a writ of mandamus ordering the district court to vacate the portion of its August 2, 2013, order directing RCR to give notice of the construction defects to Uponor.[4]

PICKERING, HARDESTY, DOUGLAS, CHERRY, and SAITTA, JJ., concur.

CITY OF NORTH LAS VEGAS, APPELLANT/CROSS-RESPONDENT, *v.* 5TH & CENTENNIAL, LLC, A NEVADA LIMITED LIABILITY COMPANY; 5TH & CENTENNIAL II, LLC, A NEVADA LIMITED LIABILITY COMPANY; 5TH & CENTENNIAL III, LLC, A NEVADA LIMITED LIABILITY COMPANY; ALL FOR ONE FAMILY TRUST; BRIAN A. LEE AND JULIE A. LEE, TRUSTEES FOR THE ALL FOR ONE FAMILY TRUST; AND BRIAN A. LEE; AND JULIE A. LEE, RESPONDENTS/CROSS-APPELLANTS.

No. 58530

CITY OF NORTH LAS VEGAS, APPELLANT/CROSS-RESPONDENT, *v.* 5TH & CENTENNIAL, LLC, A NEVADA LIMITED LIABILITY COMPANY; 5TH & CENTENNIAL II, LLC, A NEVADA LIMITED LIABILITY COMPANY; 5TH & CENTENNIAL III, LLC, A NEVADA LIMITED LIABILITY COMPANY; ALL FOR ONE FAMILY TRUST; BRIAN A. LEE; AND JULIE A. LEE, RESPONDENTS/CROSS-APPELLANTS.

No. 59162

August 7, 2014 331 P.3d 896

Petition for rehearing of this court's March 21, 2014, order affirming in part, reversing in part, and remanding to determine prejudgment interest in this eminent domain matter. Eighth Judicial District Court, Clark County; Mark R. Denton, Judge.

Landowners brought action against City for inverse condemnation and precondemnation damages. The district court found that inverse condemnation claim was not ripe but entered judgment in favor of landowners as to precondemnation damages. On cross-appeals, the supreme court entered dispositional order that affirmed in part but reversed as to calculation of prejudgment interest. City petitioned for rehearing. The supreme court, GIBBONS, C.J., issued clarifying opinion and held that: (1) date that triggered accrual of prejudgment interest recoverable by landowners in claim for precondemnation

[4]In light of this conclusion, the homeowners' alternative request for a writ of prohibition is denied.

damages was first date of compensable injury resulting from City's conduct, despite City's argument that controlling authority required calculation of prejudgment interest from date when condemnation summons was served; (2) statute providing for calculation of prejudgment interest in an eminent domain case, rather than general prejudgment interest statute, applies to calculation of prejudgment interest for a precondemnation damages claim; and (3) statute of limitations of 15 years for takings actions applied to landowners' claim for precondemnation damages, even though such claim was separate from landowners' inverse condemnation claim.

Rehearing denied.

Marquis Aurbach Coffing and *Micah S. Echols, Brian R. Hardy*, and *Jack C. Juan*, Las Vegas, for Appellant/Cross-Respondent.

John Peter Lee Ltd. and *John C. Courtney* and *John Peter Lee*, Las Vegas; *Kemp, Jones & Coulthard, LLP*, and *William L. Coulthard, Jennifer C. Dorsey*, and *Eric M. Pepperman*, Las Vegas, for Respondents/Cross-Appellants.

1. Appeal and Error.
   The supreme court may grant a petition for rehearing when it has overlooked or misapprehended a material fact or has overlooked or misapplied controlling law. NRAP 40(c)(2).
2. Eminent Domain.
   Date that triggered accrual of prejudgment interest recoverable by landowners, in claim for precondemnation damages against City, was first date of compensable injury resulting from City's conduct, despite City's argument that controlling authority required calculation of prejudgment interest from date when condemnation summons was served; state constitution allowed for interest to be calculated from date of taking, and first date of compensable injury was akin to date of taking. Const. art. 1, § 8(6); NRS 37.175(4).
3. Eminent Domain.
   Statute providing for calculation of prejudgment interest in an eminent domain case, rather than general prejudgment interest statute, applies to calculation of prejudgment interest for a precondemnation damages claim. NRS 17.130(2), 37.175(4).
4. Eminent Domain.
   Statute of limitations of 15 years for takings actions applied to landowners' claim for precondemnation damages, even though such claim was separate from landowners' inverse condemnation claim. NRS 40.090.
5. Eminent Domain.
   City could not pursue argument that it should be allowed to assert statute of limitations defense to landowner's claim for precondemnation damages, where City raised argument for first time in its petition for rehearing on appeal. NRAP 40(c)(1).

Before the Court En Banc.[1]

[1]The Honorable Ron Parraguirre, Justice, voluntarily recused himself from participation in the decision of this matter.

OPINION

By the Court, GIBBONS, C.J.:

On March 21, 2014, this court issued a dispositional order regarding this appeal from the district court's decision in an eminent domain action. In that order we addressed a number of issues, but pertinent to this opinion, we considered whether the district court erred in calculating the prejudgment interest award from the date on which the summons and complaint were served, rather than from the date on which the injury resulting from the conduct that supported precondemnation damages arose. We concluded that the district court did err in its calculation of prejudgment interest, and we held that prejudgment interest should be calculated from the date on which the resulting injury arose. Appellant/cross-respondent City of North Las Vegas seeks rehearing of that order on the prejudgment interest issue, as well as on issues concerning the statute of limitations and standing. Although rehearing is not warranted, we take this opportunity to address the issues raised by the City in order to clarify the relevant law.

FACTS AND PROCEDURAL HISTORY

Beginning in 2002, the City planned, adopted, and began construction on a seven-mile-long, eight-lane, high-speed, super-arterial roadway along North 5th Street to relieve regional traffic congestion on Interstate 15 (the Project). Over the next eight years, the City and others conducted a number of studies, developed reports, budgeted, and authorized planning documents for the Project. The City's 2004 amendment to its Master Plan of Streets and Highways (AMP-70-04) allowed for North 5th Street to be widened up to 150 feet and provided that approval of development applications must be conditioned upon landowners giving up a 75-foot right-of-way on the land fronting that street. The Project was divided into two sections: a northern half, from Owens Avenue to Cheyenne Avenue; and a southern half, from Cheyenne Avenue to Clark County 215. Between 2000 and 2005, respondents/cross-appellants 5th & Centennial, LLC; 5th & Centennial II, LLC; 5th & Centennial III, LLC; All for One Family Trust; and Brian and Julie Lee (collectively, the Landowners) acquired five vacant parcels totaling more than 20 acres on the northwest corner of North 5th Street and Centennial Parkway (the Property), in the northern half of the Project.

When the economy stalled in recent years, so did the City's progress on the northern half of the Project, which relied on federal funding. On January 1, 2010, the Landowners filed a complaint against the City for inverse condemnation and precondemnation damages, asserting that the City's delay in condemning their properties had prevented them from advantageously selling the properties. Following an eight-day bench trial, the district court concluded that the

inverse condemnation claim was not ripe but awarded the Landowners precondemnation damages. The district court further awarded the Landowners attorney fees, costs, and prejudgment interest.

On appeal, we affirmed the district court's orders, except for the prejudgment interest award, which we reversed and remanded for a new determination of when that interest began to accrue.[2] The City then filed this petition for rehearing on the prejudgment interest issue, while also arguing that it is entitled to an opportunity to raise statute of limitations and standing defenses.

DISCUSSION

The City argues that we overlooked controlling authority when deciding that the district court had improperly calculated the prejudgment interest award from the date when process was served. The City further argues that it should be given an opportunity to assert statute of limitations and standing defenses based on the date of compensable injury.

We disagree. Our conclusion in *City of Sparks v. Armstrong*, 103 Nev. 619, 748 P.2d 7 (1987), coupled with the Nevada Constitution's definition of just compensation, allows for interest to be calculated from the date of taking. Further, the Landowners' claims are not barred by the applicable statute of limitations, and additionally, the City cannot raise the statute of limitations defense for the first time on rehearing. Lastly, the City fails to demonstrate why this court should address its standing defense on rehearing.

Standard of review

[Headnote 1]

NRAP 40(c)(2) permits this court to grant a petition for rehearing when it has overlooked or misapprehended a material fact or has overlooked or misapplied controlling law. *See Bahena v. Goodyear Tire & Rubber Co.*, 126 Nev. 606, 609, 245 P.3d 1182, 1184 (2010). In petitions for rehearing, parties may not reargue matters they presented in their appellate briefs and during oral arguments, and no point may be raised for the first time. NRAP 40(c)(1).

Prejudgment interest

The City contends that prejudgment interest should commence on the date of the service of the summons and argues that in our order we overlooked our prior decision in *Manke v. Airport Authority of Washoe County*, 101 Nev. 755, 710 P.2d 80 (1985). Further, the City argues that we should not have relied on *City of Sparks v.*

[2]We also concluded that the district court abused its discretion in awarding attorney fees.

Armstrong, 103 Nev. 619, 748 P.2d 7 (1987), because *Armstrong* applied a former version of NRS 37.175. We disagree.

In *Manke*, the Airport Authority of Washoe County filed and served a summons and complaint to condemn the Mankes' property, which consisted of 4.24 acres of "vacant, unimproved, commercially zoned real property." 101 Nev. at 756-57, 710 P.2d at 81. When reviewing the district court's calculation of interest, this court agreed that the constitutionally required "just compensation" includes interest from the date of the taking and held that the district court erred in calculating interest from the date of judgment, noting that under NRS 37.120(1)-(2), condemned property is valued as of the "date of the service of summons." *Id.* at 758, 710 P.2d at 82. Because the taking occurred at the service of summons, interest was also calculated as of that date. *Id.* at 759, 710 P.2d at 82.

Two years after *Manke*, this court determined that a taking could occur before service of the summons. *Armstrong*, 103 Nev. at 621-22, 748 P.2d at 8-9. In *Armstrong*, the district court found that a regulatory taking occurred when the City of Sparks approved a tentative subdivision map, prohibiting development on Armstrong's parcels. *Id.* at 621, 748 P.2d at 8. This court agreed that a taking occurred and clarified that Armstrong was entitled to prejudgment interest from the date of the taking, which occurred prior to the service of the summons. *Id.* at 623, 748 P.2d at 9. This court again reasoned that the constitutional requirement of "just compensation" includes "interest from the date of the taking." *Id.* (citing *Manke*). Thus, this court held that Armstrong was entitled to interest from the time that the regulatory taking occurred, even though it occurred prior to the summons. *Id.*

When private property is taken from an owner for public use, he or she is entitled to just compensation for that taking. Nev. Const. art. 1, § 8(6); NRS 37.120(3). Further, the Nevada Constitution was amended effective November 2008.[3] This amendment states in part that "just compensation shall be defined as that sum of money, necessary to place the property owner back in the same position, monetarily, without any governmental offsets, as if the property had never been taken." Nev. Const. art. 1, § 22(4). "Just compensation shall include, but is not limited to, compounded interest and all reasonable costs and expenses actually incurred." *Id.* Statutorily, "[j]ust compensation for the property taken by the exercise of eminent domain must include, without limitation, interest computed pursuant to NRS 37.175." NRS 37.120(3). In order to calculate that award consistent with the constitution, NRS 37.175(4) instructs the district court to "determine, in a posttrial hearing, the award of in-

[3]The voters first approved this ballot initiative on the November 7, 2006, ballot, and then again on the November 4, 2008, ballot.

terest and award as interest the amount of money which will put the person from whom the property is taken in as good a position monetarily as if the property had not been taken.''

[Headnote 2]

With regard to our decision in this case, we relied on the Nevada Constitution and *Armstrong* in recognizing that just compensation includes interest from the date of taking. Further, we concluded that NRS 37.175(4) is more appropriate than NRS 17.130(2), the general prejudgment interest statute, for calculating precondemnation damages because NRS 37.175 is specific to eminent domain cases. We determined that NRS 37.175(4) also ''directs the district court to calculate the interest from the date of taking'' in order to provide just compensation. Thus, for precondemnation cases, we concluded that the date akin to the taking date, and thus the most appropriate to use here, is the first compensable date of injury resulting from the City's oppressive and unreasonable conduct, which in this case was prior to service of the summons and complaint.

Accordingly, we decline to grant the City's petition for rehearing on the prejudgment interest issue. While *Manke* and *Armstrong* held that different dates controlled for the calculation of prejudgment interest, the underlying rule remains consistent in both cases: prejudgment interest begins at the time a taking occurs. Here, the Landowners suffered injury to their property prior to the summons, making this factual scenario more akin to *Armstrong*, where the property owner suffered damage when Sparks approved a subdivision plan and the court concluded that a taking occurred at that time.

Further, the City's argument that *Armstrong* relied on an old version of the statute is without merit because *Armstrong* (1) did not rely on a prior version of NRS 37.175 in making its ruling that prejudgment interest begins at the date of taking,[4] (2) relied on the constitutional requirement of just compensation to determine when the prejudgment interest should begin, and (3) relied on *Manke* to conclude that prejudgment interest begins at the date of taking. Further, the ''just compensation'' definition for eminent domain cases was added to the Nevada Constitution in 2008, subsequent to the *Manke* and *Armstrong* cases. As a result, the constitutional language would supersede any inconsistency that existed between the Constitution and the *Manke* and *Armstrong* cases. *Lueck v. Teuton*,

[4]Instead, this court referred to a prior version of NRS 37.175(2) in noting that, according to *Manke*, ''if the condemned property is neither unimproved, nor vacant, nor of value to the condemnee for purposes of investment or development, the recipient of the condemnation award is only entitled to interest according to NRS 37.175(2).'' *Armstrong*, 103 Nev. at 623, 748 P.2d at 9 (citing *Manke*, 101 Nev. at 759 n.6, 710 P.2d at 82 n.6). However, since the property in *Armstrong* was ''vacant, unimproved, and held for investment purposes at the time of taking,'' the interest was not limited by the former NRS 37.175(2). *Id*.

125 Nev. 674, 684 n.2, 219 P.3d 895, 902 n.2 (2009) (noting that to the extent a statutory provision conflicts with the Nevada Constitution, the Constitution supersedes the statute). Therefore, we properly (1) concluded that just compensation includes interest from the date when the injury began, and (2) remanded this issue to the district court to determine when the first compensable date of injury was for the Landowners.[5]

[Headnote 3]

Lastly, this court properly relied on NRS 37.175(4) for calculating interest because it is specific to eminent domain actions. Since NRS 37.175(4) and NRS 37.120(3) aim to provide the property owner with just compensation, this court properly concluded that prejudgment interest for precondemnation damages begins at the date of injury. Therefore, our analysis of prejudgment interest is consistent with prior case law and properly relies on NRS 37.175(4), coupled with the constitutional definition of "just compensation."[6]

Statute of limitations

The City also argues that, on remand, it should be allowed to assert a statute of limitations defense since we instructed the district court to determine the first date of injury resulting from the City's oppressive and unreasonable conduct. We disagree.

[Headnote 4]

First, the Landowners' claims are not barred by the applicable statute of limitations. This court has concluded that a 15-year statute of limitations applies "in 'takings' actions." *White Pine Lumber Co. v. City of Reno*, 106 Nev. 778, 780, 801 P.2d 1370, 1371-72 (1990) (involving an inverse condemnation claim against the City of Reno when it conditioned approval of a project on the donation of the project parcel to the City). Although separate from inverse condemnation claims, we see no reason to apply a different limitations period to precondemnation claims, which are often brought together with an inverse condemnation claim. Under this ruling, the Land-

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[5]This court's conclusion in this case is further buttressed by the fact that the City's oppressive and unreasonable conduct benefited the City's ultimate goal while burdening the Landowners. *See Manke*, 101 Nev. at 759, 710 P.2d at 82.

[6]The City argues that *Klopping v. City of Whittier*, 500 P.2d 1345, 1349 (Cal. 1972), stands for the proposition that "just compensation" should be measured at the time of taking. We conclude that *Klopping* is distinguishable from the present case because the valuation date used in *Klopping* "is set by statute at the time the summons is issued." 500 P.2d at 1349. Additionally, *Klopping* even notes that "depending on the nature of those activities occurring prior to the issuance of summons a different date may be required in order to effectuate the constitutional requirement of just compensation." *Id.* Thus, *Klopping* actually supports the notion that a date other than the date of summons could be appropriate to provide "just compensation."

owners' claims are clearly not barred because they first purchased parcels in 2000 and filed their complaint in January 2010.

[Headnote 5]

Moreover, the City failed to assert this issue in response to the Landowners' argument that prejudgment interest should have been calculated from an earlier date. We conclude that the City cannot pursue this argument for the first time in its petition for rehearing. NRAP 40(c)(1).

Standing

Finally, the City also contends that it should be given an opportunity to assert a lack of standing defense against the Landowners as to the latter three parcels that were not acquired until January 2005, and the district court could conclude on remand that the injury occurred earlier than then. We decline to address this argument, however, because it does not set forth how this court (1) overlooked or misapprehended a material fact, or (2) overlooked or misapplied controlling law. NRAP 40(c)(2).

CONCLUSION

Our dispositional order properly concluded that prejudgment interest should be calculated from the date of taking, which in this case is the first date of compensable injury. Further, we conclude that the City cannot raise its statute of limitations argument for the first time on rehearing, and regardless, that defense is inapplicable to the facts of this case. Finally, rehearing is not warranted to clarify whether the City can assert a standing defense on remand.

PICKERING, HARDESTY, DOUGLAS, CHERRY, and SAITTA, JJ., concur.

GREENBERG TRAURIG, LLP, A LIMITED LIABILITY PARTNERSHIP; GREENBERG TRAURIG, P.A., A PROFESSIONAL ASSOCIATION; AND SCOTT D. BERTZYK, AN INDIVIDUAL, APPELLANTS, *v.* FRIAS HOLDING COMPANY, A CORPORATION; AND MARK A. JAMES, AN INDIVIDUAL, RESPONDENTS.

No. 61820

August 7, 2014 331 P.3d 901

Certified question, in accordance with NRAP 5, regarding the legal-malpractice exception to the litigation privilege. United States District Court for the District of Nevada; Gloria M. Navarro, Judge.

The supreme court, DOUGLAS, J., held that, as a matter of first impression in the state, legal-malpractice exception to the litigation privilege would be adopted.

Question answered.

Brownstein Hyatt Farber Schreck, LLP, and *Anthony J. DiRaimondo* and *Kirk B. Lenhard*, Las Vegas; *Steptoe & Johnson* and *Jon T. Neumann*, Phoenix, Arizona; *Bennett Evan Cooper, Esq.*, Paradise Valley, Arizona, for Appellants.

Carbajal & McNutt, LLP, and *Daniel R. McNutt*, Las Vegas, for Respondents.

1. TORTS.
   The "litigation privilege" immunizes from civil liability communicative acts occurring in the course of judicial proceedings, even if those acts would otherwise be tortious.
2. TORTS.
   The policy behind the litigation privilege, as it applies to attorneys participating in judicial proceedings, is to grant them as officers of the court the utmost freedom in their efforts to obtain justice for their clients.
3. TORTS.
   The litigation privilege applies as long as the statements in question are in some way pertinent to the subject of the controversy.
4. ATTORNEY AND CLIENT.
   Legal-malpractice exception to the litigation privilege would be adopted because it harmonizes with the privilege's underlying purpose; privilege applies to attorneys primarily for the clients' benefit, to ensure that attorneys have the utmost freedom to engage in zealous advocacy and are not constrained in their quest to fully pursue the interests of, and obtain justice for, their clients, and allowing attorneys to breach their professional duties to their clients with impunity and then assert the privilege against the clients' legal malpractice action would impair the attorney-client relationship, hinder the clients, and run afoul of the privilege's underlying policy.
5. ATTORNEY AND CLIENT.
   In the attorney-client context, the litigation privilege applies to attorneys primarily for the client's benefit; although the privilege provides attorneys substantial protection, that protection is contingent on the attorney's representation of his or her client because the privilege is designed to en-

sure that attorneys have the utmost freedom to engage in zealous advocacy and are not constrained in their quest to fully pursue the interests of, and obtain justice for, their clients.

6. Attorney and Client.

Attorneys must zealously pursue the interests of all of their clients, and attorneys who breach their professional responsibilities to their client are not entitled to hide behind the litigation privilege with impunity, even if the breach occurred in the course of competent advocacy on behalf of another client.

Before the Court En Banc.[1]

OPINION

By the Court, Douglas, J.:

[Headnote 1]

The United States District Court for the District of Nevada has certified a question of law to this court regarding the legal-malpractice exception to the litigation privilege. The litigation privilege immunizes from civil liability communicative acts occurring in the course of judicial proceedings, even if those acts would otherwise be tortious. Although Nevada has long recognized this common law privilege, we have not before determined whether it applies to preclude claims of legal malpractice or professional negligence based on communicative acts occurring in the course of judicial proceedings. The federal court asks "[w]hether Nevada law recognizes an exception to the common law litigation privilege for legal malpractice and professional negligence actions." We conclude that Nevada law recognizes the exception.

FACTS

In May 2005, Scott Bertzyk and Mark James were opposing counsel in a commercial real estate litigation matter. Bertzyk, an attorney at Greenberg Traurig, LLP, represented the buyer, L.A. Pacific Center, Inc. (LAP). James, an attorney at Bullivant Houser Bailey, P.C., at the time, represented the sellers, Hotels Nevada, LLC, and Inns Nevada, LLC (Hotels and Inns). LAP filed a complaint in both Nevada and California against Hotels and Inns on related claims. However, in 2006, James transitioned out of active involvement in both litigations, and became president and CEO of Frias Holding Company (FHC), a taxi and limousine service company.

In June 2008, the California suit went to arbitration, during which Bertzyk allegedly attacked James's character—asserting that James

[1]The Honorable Kristina Pickering, Justice, voluntarily recused herself from participation in the decision of this matter.

committed fraud and concealed or manipulated evidence.[2] In October 2009, the arbitration panel found in LAP's favor and awarded damages against Hotels and Inns. According to James, before the panel issued the final arbitration award, Bertzyk suggested to one of Hotel and Inns' attorneys that Hotel and Inns should explore filing a legal malpractice suit against its former attorneys, including James.

Meanwhile, in September 2008, James, in his capacity as FHC's president and CEO, retained attorney Mark Tratos of Greenberg Traurig to handle some intellectual property matters for FHC. And in July 2009, James retained attorney Michael Bonner (also of Greenberg Traurig) to personally represent him for his Nevada gaming license application. James was aware that Greenberg Traurig represented LAP in the litigation, but the firm did not inform James about the statements Bertzyk made during the arbitration. Moreover, during Greenberg Traurig's representation of James, LAP filed a lawsuit against Bullivant Houser Bailey, alleging attorney misconduct. In the misconduct matter, Bertzyk provided a declaration that reasserted the negative statements that he made about James during the arbitration.

After learning of Bertzyk's actions, James and FHC (collectively, respondents) terminated their respective relationships with Greenberg Traurig in August 2010 and filed a complaint against Bertzyk and Greenberg Traurig, LLP (collectively, appellants) in the Nevada district court, alleging that appellants committed malpractice and breached their professional and fiduciary duties by impugning James and FHC in furtherance of appellants' representation of LAP, which adversely affected their representation of James and FHC. The parties removed the case to federal district court pursuant to 28 U.S.C. §§ 1441 and 1446. Appellants filed a motion to dismiss, alleging that the litigation privilege barred respondents' claims.

The federal district court denied appellants' motion without prejudice because Nevada had not addressed the legal-malpractice exception to the litigation privilege. Then, pursuant to NRAP 5, the federal court certified the following question to this court: ''Whether Nevada law recognizes an exception to the common law litigation privilege for legal malpractice and professional negligence actions.'' We previously accepted the question and now issue this opinion in answer.

DISCUSSION

Appellants argue that the legal-malpractice exception is not applicable to this matter because respondents' claims actually allege def-

[2]This court stayed the proceedings in the Nevada litigation.

amation, which the litigation privilege clearly bars.[3] To support their assertion, appellants note that respondents do not allege that appellants provided inadequate legal representation; rather, respondents' malpractice claim is based on Bertzyk's negative comments about James. Appellants also contend that adopting the legal-malpractice exception would undermine the litigation privilege's absolute nature and that state bar disciplinary measures are the appropriate remedy for alleged lawyer misconduct during judicial proceedings, not tort liability.

Respondents insist that adopting the legal-malpractice exception would not undermine the litigation privilege because the privilege was not intended to apply to an attorney-client relationship. Respondents argue that applying the legal-malpractice exception would not hinder an attorney from zealously advocating for his or her client and that an attorney should not be given protection for breaching his or her duties to a client.

Litigation privilege

[Headnote 2]

This court has recognized " 'the long-standing common law rule that communications uttered or published in the course of judicial proceedings are absolutely privileged,' " rendering those who made the communications immune from civil liability. *Fink v. Oshins*, 118 Nev. 428, 432-33, 49 P.3d 640, 643 (2002) (quoting *Circus Circus Hotels v. Witherspoon*, 99 Nev. 56, 60, 657 P.2d 101, 104 (1983)). "The policy behind the [litigation] privilege, as it applies to attorneys participating in judicial proceedings, is to grant them 'as officers of the court the utmost freedom in their efforts to obtain justice for their clients.' " *Id*. at 433, 49 P.3d at 643 (quoting *Bull v. McCuskey*, 96 Nev. 706, 712, 615 P.2d 957, 961 (1980), *abrogated on other grounds by Ace Truck & Equip. Rentals, Inc. v. Kahn*, 103 Nev. 503, 746 P.2d 132 (1987), *abrogated by Bongiovi v. Sullivan*, 122 Nev. 556, 138 P.3d 433 (2006)).

[Headnote 3]

The privilege applies as long as the statements are "in some way pertinent to the subject of the controversy." *Id.* at 433, 49 P.3d at 644 (internal quotation omitted). Although this court has stated that the privilege is absolute, in that it applies even if the communications

[3]While we acknowledge that the litigation privilege bars a defamation claim, the question presented by the United States District Court, pursuant to NRAP 5, characterizes the claim as one for legal malpractice and professional negligence. We do not resolve in this opinion how respondents' claim should be characterized.

were made with knowledge and malice, *id.* at 433, 49 P.3d at 643, we have recognized that the privilege has limitations. *See Bull*, 96 Nev. at 712, 615 P.2d at 962 (stating that litigation privilege does not shield an attorney from bar discipline stemming from the attorney's misconduct).

The legal-malpractice exception to the litigation privilege

Whether the litigation privilege applies to communicative acts that form the basis of legal-malpractice and professional negligence actions is a matter of first impression in Nevada; therefore, it is appropriate to look to outside jurisdictions for guidance. Many courts—including those in New Jersey and California—have held that the litigation privilege is inapplicable to a client's malpractice or professional negligence claim against his or her attorney. *Kolar v. Donahue, McIntosh & Hammerton*, 52 Cal. Rptr. 3d 712, 719 (Ct. App. 2006); *Buchanan v. Leonard*, 52 A.3d 1064, 1070 (N.J. Super. Ct. App. Div. 2012). In doing so, these courts have determined that applying the privilege to such claims would not further the privilege's purpose of ensuring that an attorney can zealously defend his or her client during litigation. *Kolar*, 52 Cal. Rptr. 3d at 719 (noting that if the privilege protected the attorney from suit by the client, no client could ever bring a malpractice suit against his or her attorney); *Buchanan*, 52 A.3d at 1070. However, a few courts have determined that the litigation privilege is absolute and there are no exceptions to its applicability in civil actions, even as to a former client's malpractice suit against his or her former attorney based upon the attorney's communications during litigation. *See O'Neil v. Cunningham*, 173 Cal. Rptr. 422 (Ct. App. 1981) (applying a California statute to bar a client's defamation action against his attorney); *Hugel v. Milberg, Weiss, Bershad, Hynes, & Lerach, LLP*, 175 F.3d 14, 17 (1st Cir. 1999) (applying New Hampshire Law and concluding that the litigation privilege barred ''legal malpractice claims'').

Nevada recognizes the legal-malpractice exception

[Headnotes 4, 5]

We find the rationale of the New Jersey and California courts persuasive and now adopt the legal-malpractice exception to the litigation privilege because the exception harmonizes with the privilege's underlying purpose. In the attorney-client context, the litigation privilege applies to attorneys primarily for the client's benefit. Although the privilege provides attorneys substantial protection, that protection is contingent on the attorney's representation of his or her client because the privilege is designed to ensure that attorneys have the utmost freedom to engage in zealous advocacy and are not

constrained in their quest to fully pursue the interests of, and obtain justice for, their clients. In contrast, while allowing attorneys to breach their professional duties to their clients with impunity and then assert the privilege against the clients' legal malpractice action might benefit the attorney, this impairs the attorney-client relationship, hinders the client, and runs afoul of the privilege's underlying policy assisting the attorney in pursuing the client's interests. *See Fremont Reorganizing Corp. v. Faigin*, 131 Cal. Rptr. 3d 478, 495 (Ct. App. 2011). Therefore, we conclude that it is unsound policy to allow an attorney to assert a privilege designed to ensure unimpeded advocacy for a client as a shield against the client's claim that the attorney provided inadequate legal representation.

[Headnote 6]

Finally, our rationale extends to the scenario in this case, where advocacy on one client's behalf adversely affects another client. Attorneys must zealously pursue the interests of all of their clients, and attorneys who breach their professional responsibilities to their client are not entitled to hide behind the litigation privilege with impunity, even if the breach occurred in the course of competent advocacy on behalf of another client.

Accordingly, while we make no comment on the viability or merits of the legal malpractice and professional negligence claims asserted, we answer the federal district court's question in the affirmative and conclude that, generally, an attorney cannot assert the litigation privilege as a defense to legal malpractice and professional negligence claims.

GIBBONS, C.J., and HARDESTY, PARRAGUIRRE, CHERRY, and SAITTA, JJ., concur.

BRADY, VORWERCK, RYDER & CASPINO, APPELLANT, *v.* NEW ALBERTSON'S, INC., RESPONDENT.

No. 61767

August 7, 2014 333 P.3d 229

Certified question under NRAP 5 concerning whether the statute of limitations in NRS 11.207, as revised by the Nevada Legislature in 1997, is tolled against an action for attorney malpractice, pending the outcome of the underlying suit in which the malpractice allegedly occurred.[1] United States District Court of the District of Nevada; Gloria M. Navarro, Judge.

[1]The clerk of this court shall amend the caption on this docket to conform with the caption on this opinion.

The supreme court, SAITTA, J., held that statute of limitations for attorney malpractice is tolled against an action for attorney malpractice pending the outcome of the underlying suit in which the malpractice allegedly occurred.

Question answered.

[Rehearing denied November 10, 2014]

Lemons, Grundy & Eisenberg and *Robert L. Eisenberg*, Reno; *Lipson, Neilson, Cole, Seltzer & Garin, P.C.*, and *Joseph Garin* and *Kaleb D. Anderson*, Las Vegas, for Appellant.

Prince & Keating, LLP, and *Dennis M. Prince* and *Eric N. Tran*, Las Vegas, for Respondent.

LIMITATION OF ACTIONS.

Two-year statute of limitations for attorney malpractice is tolled against an action for attorney malpractice pending the outcome of the underlying suit in which the malpractice allegedly occurred, since litigation malpractice tolling rule continued after amendments to statute; tolling rule permits the litigation to end and the damages to become certain before judicial resources are invested in entertaining the malpractice action. NRS 11.207(1).

Before the Court EN BANC.

OPINION

By the Court, SAITTA, J.:

Before it was amended in 1997, NRS 11.207(1) stated that an attorney malpractice action for damages may not "be commenced more than 4 years after the plaintiff sustains damage and discovers or through the use of reasonable diligence should have discovered the material facts which constitute the cause of action." NRS 11.207(1) (1981), *amended by* 1997 Nev. Stat., ch. 184, § 2, at 478. To the pre-1997 version of NRS 11.207(1), Nevada caselaw applied the litigation malpractice tolling rule, which delays the commencement of a malpractice claim's statute of limitations until the end of the litigation in which the malpractice occurred. *See, e.g.*, *Clark v. Robison*, 113 Nev. 949, 951, 944 P.2d 788, 789-90 (1997). Since being amended in 1997,[2] NRS 11.207(1) has imposed on attorney malpractice actions a four-year limitations period that begins "after the plaintiff sustains damage," and a two-year statute of limitations that starts "after the plaintiff discovers or through the use of reasonable diligence should have discovered the material facts which

[2]1997 Nev. Stat., ch. 184, § 2, at 478.

constitute the cause of action, whichever occurs earlier." As to NRS 11.207(1), the United States District Court for the District of Nevada has certified the following question to this court: "Whether the statute of limitations in NRS 11.207, as revised by the Nevada [L]egislature in 1997, is tolled against a cause of action for attorney malpractice pending the outcome of the underlying lawsuit in which the malpractice allegedly occurred."

With respect to the two-year statute of limitations under NRS 11.207(1), we answer this question in the affirmative.[3] After 1997, the amended statute retained the discovery rule language to which the litigation malpractice tolling rule has been applied in Nevada caselaw. *See Clark*, 113 Nev. at 951, 944 P.2d at 789-90 (applying the litigation malpractice tolling rule to the entirety of NRS 11.207, including the discovery rule language). And Nevada caselaw, while not explicitly addressing whether the tolling rule survived the statutory amendments, has continued to implicitly recognize the rule as good law under the amended statute. *See Moon v. McDonald, Carano & Wilson L.L.P.*, 129 Nev. 547, 548, 550, 306 P.3d 406, 407, 409 (2013) (indicating that the litigation malpractice tolling rule applies to the current version of NRS 11.207(1)); *Hewitt v. Allen*, 118 Nev. 216, 221, 43 P.3d 345, 347-48 (2002) (stating, albeit without citing to NRS 11.207(1), that the litigation malpractice tolling rule delays the accrual of a malpractice action "until the plaintiff knows, or should know, all the facts relevant to the foregoing elements and damage has been sustained" and that damages do not accrue "until the underlying legal action has been resolved"). Moreover, we maintain the rule because it permits the final resolution of the damages incurred during the litigation, including any changes on the appeal, thereby preventing judicial resources from being spent on a claim for damages that may be reduced or cured during litigation. *See Hewitt*, 118 Nev. at 221, 43 P.3d at 348 (providing, in the context of an appeal from the litigation in which the malpractice occurred, that the litigation malpractice tolling rule accounts for the possibility that the damages may disappear upon resolution of the appeal).

FACTS AND PROCEDURAL HISTORY

The federal court's certification order concerns purported litigation malpractice. This alleged malpractice occurred in the context of an attorney-client relationship between the appellant law firm Brady, Vorwerck, Ryder & Caspino (BVRC), its former and now

[3]We do not discuss whether NRS 11.207(1)'s four-year time limitation may be tolled, as that time limitation had not expired when the malpractice action at issue was filed and thus it need not be addressed.

deceased attorney W. Dennis Richardson, and their client Albertson's, Inc., which later became New Albertson's, Inc.[4]

The facts, underlying litigation, and malpractice

New Albertson's and Farm Road Retail, LLC, entered into an agreement concerning the maintenance of a common area that they shared between them. The agreement provided that Farm Road would "indemnify [New] Albertson's from certain negative legal outcomes resulting from any breach of the [agreement] by Farm Road."[5] A woman fell on a flight of stairs at the New Albertson's location to which the agreement applied. That woman and her husband (the claimants) filed suit against New Albertson's and Farm Road in a Nevada district court to recover the damages that she incurred when she fell. New Albertson's hired BVRC for legal representation, and it assigned its attorney, Richardson, to the case.

New Albertson's denied all liability in an answer to the complaint. It also filed a cross-claim "against Farm Road based on Farm Road's initial refusal to indemnify [New] Albertson's for the . . . [c]omplaint and refusal to accept [New] Albertson's Tender of Defense."

The claimants served New Albertson's with requests for admission. Richardson, the BVRC lawyer, "belatedly served the responses on behalf of [New] Albertson's." Considering that New Albertson's responses were "untimely and allegedly deficient," the claimants "filed a [m]otion to [c]ompel." A discovery commissioner determined that New Albertson's responses were " 'frivolous and an insult to the court.' " The district court agreed, and it ordered New Albertson's to "re-file the responses," which Richardson did.

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[4]In reviewing the facts and procedure, we rely on the federal district court's articulation of that information in its certified question, but we do so with one exception. *See In re Fontainebleau Las Vegas Holdings, L.L.C.*, 127 Nev. 941, 956, 267 P.3d 786, 795 (2011) (providing that the answering court in a certified-question proceeding "is bound by the facts . . . in the certification order"). The certification order does not explain why respondent New Albertson's, Inc., and not Albertson's, is a party to the proceeding. For the limited purpose of providing context to the issues that we address in responding to the certified question, we look to the appendix that New Albertson's submitted to this court. *See id.* (providing that an appendix that is submitted in a certified-question proceeding may help give context for the issues but should not be relied on "to contradict the certification order"). In the appendix, New Albertson's complaint before the federal district court explains that New Albertson's acquired Albertson's rights and liabilities. This fact is of no consequence to our analysis, nor is it contested before this court, and we do not discuss it further. But for the purpose of clarity, we use the name "New Albertson's" in reference to both Albertson's and New Albertson's.

[5]This and all other quotes within our review of the facts and procedural history come from the federal district court's certification order.

After New Albertson's ''re-file[d] the responses,'' the claimants filed a motion for partial summary judgment ''on the issue of liability, alleging that the . . . [re-filed] [r]esponses filed by Richardson knowingly violated the [district] court's order.'' The district court granted the motion, the result of which ''established [New] Albertson's liability for the [claimants'] damages.'' It appears that the district court deemed New Albertson's responses to the requests for admission as admitted because of BVRC and Richardson's discovery violations.

Subsequently, the claimants and New Albertson's entered into a settlement agreement on January 5, 2008. Following that settlement agreement, New Albertson's cross-claim against Farm Road remained. The district court granted summary judgment in favor of Farm Road with respect to that cross-claim. In so doing, the district court concluded in part that New Albertson's claims against Farm Road, including an indemnification claim, were '' 'not viable . . . because [New] Albertson[']s settlement was the direct result of discovery abuses committed by [New] Albertson['s].' ''

New Albertson's appealed the district court's summary judgment determination to this court. But before this court could reach the appeal's merits, New Albertson's and Farm Road entered into a settlement agreement during a mandatory settlement conference in April 2009. As a result, this court issued an order that dismissed New Albertson's appeal in May 2009.

The attorney malpractice action before the federal district court

On January 22, 2010—over two years after New Albertson's settlement with the claimants, but less than two years after New Albertson's settlement with Farm Road and the dismissal of New Albertson's appeal—New Albertson's filed an attorney malpractice suit against BVRC and Richardson in a Nevada district court. At some point, the suit was removed to the United States District Court for the District of Nevada.

After answering the complaint, BVRC filed a motion for summary judgment, wherein it argued that the malpractice action was untimely filed after the expiration of NRS 11.207(1)'s two-year statute of limitations for attorney malpractice actions. BVRC asserted that, at the latest, NRS 11.207's two-year limitation period commenced on January 5, 2008, the date of New Albertson's settlement with the claimants. Accordingly, it contended that New Albertson's attorney malpractice action was untimely because it was filed over two years after that settlement.

The federal district court denied BVRC's motion upon concluding that NRS 11.207(1)'s two-year time limitation did not begin until May 27, 2009, the date that this court dismissed New Albertson's appeal that concerned its cross-claim. It concluded that New Albertson's action against BVRC was therefore timely.

Subsequently, BVRC filed a motion to certify a question to this court regarding NRS 11.207(1). BVRC argued that although this court stated in the past that NRS 11.207(1)'s limitations period does not commence for a malpractice action until the conclusion of the litigation in which the malpractice occurred, this tolling rule, often called the litigation malpractice tolling rule, existed before the 1997 amendments to NRS 11.207(1). BVRC maintained that the 1997 amendments rendered the litigation malpractice tolling rule obsolete. The federal district court granted the motion and issued an order that certified the question that we now answer.

DISCUSSION

BVRC contends that the litigation malpractice tolling rule no longer applies to NRS 11.207(1). It suggests that the rule was developed before the Legislature amended NRS 11.207(1) in 1997 and, thus, has no application to the current version of the statute. According to BVRC, the two-year statute of limitations in NRS 11.207(1) begins to run when a claimant has knowledge of any amount of damages and the remaining material facts for an attorney malpractice action, which may occur before the completion of the litigation during which the malpractice occurred. Based on our de novo review of the statutory language and the relevant caselaw, we disagree with BVRC's contentions. *See In re Fontainebleau Las Vegas Holdings, L.L.C.*, 127 Nev. at 955-56, 267 P.3d at 794-95 (2011) (providing that when responding to a certified question, we only answer the legal questions and leave the federal court to apply the clarified law to the facts before it); *City of Reno v. Reno Gazette-Journal*, 119 Nev. 55, 58, 63 P.3d 1147, 1148 (2003) (stating that issues of statutory interpretation are reviewed de novo); *Banegas v. State Indus. Ins. Sys.*, 117 Nev. 222, 224, 19 P.3d 245, 247 (2001) (providing that "[q]uestions of law are reviewed de novo"); *Meguerditchian v. Smith*, 284 P.3d 658, 661 (Utah Ct. App. 2012) (noting that the interpretation of caselaw is a question of law).

NRS 11.207(1)'s codification of the discovery rule

Generally, jurisdictions place time limitations on attorney malpractice actions in the form of statutes of limitation and statutes of repose. *See* 3 Ronald E. Mallen et al., *Legal Malpractice* § 23:1, at 320 (2013). As to a statute of limitations, various tolling theories may delay the start of the time set forth in the statute. They include, but are not limited to: (1) the occurrence rule, which starts the statute of limitations when the lawyer commits the act of malpractice; (2) the continuous representation rule, which starts the statute of limitations when the attorney-client relationship ends; (3) the damage rule, which starts the statute of limitations when the actionable damages occur, although some jurisdictions disagree on how much dam-

age must occur to trigger the statute of limitations; (4) the discovery rule, which starts the statute of limitations when the claimant discovers, or reasonably should have discovered, the material facts for the action, including the damages; and (5) the litigation malpractice tolling rule, which provides that the damages for a malpractice claim do not accrue until the underlying litigation is complete and, thus, a malpractice claim does not accrue and its statute of limitations does not begin to run during a pending appeal of an adverse ruling from the underlying litigation. *See Moon v. McDonald, Carano & Wilson L.L.P.*, 129 Nev. 547, 548, 550, 306 P.3d 406, 407, 409 (2013) (discussing the discovery rule that NRS 11.207(1) codifies and the litigation malpractice tolling rule); 3 Mallen et al., *supra*, § 23:9, at 394-96, § 23:11, at 425, 428-35 (explaining the damage rule, the occurrence rule, and the continuous representation rule). Of these multiple rules, two are at issue in this matter: (1) the discovery rule that is codified in NRS 11.207(1), and (2) the litigation malpractice tolling rule that appears in Nevada caselaw.[6]

In 1981, the Legislature codified the discovery rule. 1981 Nev. Stat., ch. 501, § 1, at 1023. It appeared in NRS 11.207(1), which stated:

> No action against any . . . attorney . . . to recover damages for malpractice . . . may be commenced more than 4 years after the plaintiff sustains damage and *discovers or through the use of reasonable diligence should have discovered the material facts which constitute the cause of action*.

NRS 11.207(1) (1981) (emphasis added) (amended in 1997). In addition, the Legislature provided that the time limitation for a malpractice action is tolled when the attorney conceals his actionable conduct:

> This time limitation is tolled for any period during which the . . . attorney . . . conceals any act, error or omission upon which the action is founded and which is known or through the use of reasonable diligence should have been known to him.

NRS 11.207(2) (1981) (hereinafter "the concealment tolling rule") (amended in 1997). This version of NRS 11.207 required a claimant to sustain damages in order for the four-year time limitation to start. NRS 11.207(1). But it delayed the start of the four-year limit until the discovery of the necessary facts for an attorney malpractice claim. NRS 11.207(1) (1981) (amended in 1997).

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[6]While we acknowledge that the continuous representation rule *may* be applicable to this matter, we do not address that theory or its place in Nevada caselaw. We limit our discussion to what is asked within the federal court's certification order, which narrowly concerns whether the litigation malpractice tolling rule still applies to the statute of limitations in NRS 11.207(1).

In 1997, the Legislature amended NRS 11.207(1). 1997 Nev. Stat., ch. 184, § 2, at 478. As a result, the statute places four-year and two-year time limitations on an attorney malpractice claim:

> An action against an attorney . . . to recover damages for malpractice, whether based on a breach of duty or contract, must be commenced *within 4 years after* the plaintiff sustains damage *or within 2 years after* the plaintiff discovers or through the use of reasonable diligence should have discovered the material facts which constitute the cause of action, *whichever occurs earlier*.

NRS 11.207(1) (emphases added). The first time limitation to expire governs the timeliness of the malpractice action. NRS 11.207(1).

The discovery rule, the litigation malpractice tolling rule, and the application of the latter to the former in Nevada before NRS 11.207(1) was amended in 1997

With respect to the discovery rule, the presence of damages partially informs when the statute of limitations begins to run. Various jurisdictions maintain that the accumulation of some, but not necessarily all, damages triggers an attorney malpractice claim's statute of limitations. *See, e.g.*, *Laird v. Blacker*, 828 P.2d 691, 693-96 (Cal. 1992) (identifying that the discovery of any ''appreciable'' harm, or the fact of a damage, has been held to trigger a malpractice claim's statute of limitations and resolution of an appeal is unnecessary to the determination); *Riemers v. Omdahl*, 687 N.W.2d 445, 449 (N.D. 2004) (noting that some, but not all, incurred damage is necessary for the statute of limitations to start under the discovery rule); *Fritzeen v. Gravel*, 830 A.2d 49, 52, 54 (Vt. 2003) (providing that the discovery of an injury triggers the statute of limitations, even though the extent of the damages is unsettled). Some of these jurisdictions provide that ongoing litigation, including a pending appeal from the litigation in which the malpractice occurred, does not delay the accrual of the attorney malpractice claim. *See, e.g.*, *Laird*, 828 P.2d at 693-96 (providing that the ''focus'' of its statute that codifies the discovery rule for a malpractice action ''is on discovery of the malpractice and actual injury, not success on appeal or proof of the total amount of monetary damages suffered by the former client'' (emphasis omitted)); *Fritzeen*, 830 A.2d at 52, 54 (rejecting the argument that a statute of limitations is not triggered until the damages are finalized after the exhaustion of an appeal).

In contrast, other jurisdictions focus on the end of the litigation during which the malpractice occurred and the finality of the damages for the commencement of the statute of limitations. *See, e.g.*, *Amfac Distribution Corp. v. Miller*, 673 P.2d 795, 796 (Ariz. Ct. App. 1983) (''Where there has been no final adjudication of the cli-

ent's case in which the malpractice allegedly occurred, the element of injury or damage remains speculative and remote, thereby making premature the cause of action for professional negligence."), *approved as supplemented by* 673 P.2d 792 (Ariz. 1983); *Silvestrone v. Edell*, 721 So. 2d 1173, 1175 & n.2 (Fla. 1998) (concluding that, with respect to the discovery rule, damages must not be speculative but must be final for an attorney malpractice claim's statute of limitations to start, and that finality exists when the time for an appeal has passed or when a pending appeal has been resolved). In such jurisdictions, the end of the litigation in which the malpractice took place, which may include the loss or exhaustion of an appeal, triggers the statute of limitations, because at that point the damages are solidified and can be ascertained. *See, e.g.*, *Amfac Distribution Corp.*, 673 P.2d at 796; *Silvestrone*, 721 So. 2d at 1175 & n.2.

Nevada caselaw that predates the 1997 amendments to NRS 11.207(1) applied the litigation malpractice tolling rule to the discovery rule for attorney malpractice actions. *See, e.g.*, *Clark v. Robison*, 113 Nev. 949, 951, 944 P.2d 788, 789-90 (1997) (providing, with respect to the entirety of the older version of NRS 11.207(1), that the time limitation for an attorney malpractice action does not start until the "underlying litigation is concluded," which includes the post-conviction appellate process for a criminal defendant). Thus, Nevada was akin to those jurisdictions that focus on the end of the litigation—including the appeal—and the final accumulation of damages to trigger commencement of the statute of limitations for an attorney malpractice claim.

The ongoing relevance and applicability of the litigation malpractice tolling rule to NRS 11.207(1)

Although the Legislature amended NRS 11.207(1) in 1997, the discovery rule language to which the litigation malpractice rule has been applied in Nevada caselaw remains. Before it was amended in 1997, NRS 11.207(1) contained language that codified the discovery rule. NRS 11.207(1) (1981) (amended 1997). The *Clark* court applied the litigation malpractice tolling rule to the discovery rule language and the remaining language within the original version of NRS 11.207(1) in determining that an attorney malpractice claim does not accrue until the end of litigation in which the malpractice occurred. 113 Nev. at 951, 944 P.2d at 789-90. That discovery rule, to which the litigation malpractice rule was applied, is still codified in the current version of NRS 11.207(1).

Following the 1997 amendments to NRS 11.207(1), Nevada caselaw has minimally addressed the relationship between the litigation malpractice tolling rule and NRS 11.207(1)'s statute of limitations. Nevertheless, the caselaw that postdates the 1997 amendment indicates the rule's continued relevance and purpose.

In 2002, the court in *Hewitt v. Allen* indicated the litigation malpractice tolling rule's ongoing presence and applicability in Nevada caselaw when it established an exception to the rule. 118 Nev. 216, 43 P.3d 345 (2002). Although the *Hewitt* court did not cite to NRS 11.207(1) in discussing when the cause of action for an attorney malpractice claim accrues, it referenced the discovery rule, which is codified in NRS 11.207(1), when stating that generally such an action "does not accrue until the plaintiff knows, or should know, all the facts relevant to the foregoing elements and damage has been sustained." Id. at 221, 43 P.3d at 347-48. The *Hewitt* court discussed the litigation malpractice tolling rule's application to that rule and its rationale that a malpractice action does not accrue until the end of the litigation, including any appeal, because the damages sought by the action may be cured during the litigation's progression. *Id.* at 221, 43 P.3d at 348. The *Hewitt* court, however, crafted "a narrow exception" to the rule, providing that a plaintiff does not give up his right to file an attorney malpractice action when voluntarily dismissing a *futile* appeal from the underlying litigation in which the malpractice occurred. Id. at 221-25, 43 P.3d at 348-50. While *Hewitt* did not explicitly address NRS 11.207(1), its recognition of an exception to the litigation malpractice tolling rule and discussion of the rule's basis indicate the enduring presence and approval of the rule.

In 2013, we acknowledged in *Moon* that the litigation malpractice tolling rule may delay the commencement of the two-year statute of limitations in NRS 11.207(1) until the end of the litigation in which the malpractice occurred. *Moon*, 129 Nev. at 548, 306 P.3d at 407. But we concluded that the non-adversarial portions of a bankruptcy proceeding were not litigation for the purpose of the litigation malpractice tolling rule, and therefore they did not toll the two-year statute of limitations under NRS 11.207(1). *Id.* at 550-51, 306 P.3d at 409-10. As a result, we did not have a procedural posture that permitted us to expressly explain how and why the litigation malpractice tolling rule was still applicable to NRS 11.207(1) in its current composition. *See id.*

In response to the federal district court's certified question, we affirm the ongoing validity and application of the litigation malpractice tolling rule to the two-year statute of limitations in NRS 11.207(1). Although NRS 11.207(1) was amended in 1997, those amendments have not negated the applicability and purpose of the litigation malpractice rule. As NRS 11.207(1) currently exists, the two-year statute of limitations starts when "the plaintiff discovers or through the use of reasonable diligence should have discovered the material facts which constitute the cause of action . . . ." The material facts for an attorney malpractice action include those facts that pertain to the presence and causation of damages on which the

action is premised. *See Semenza v. Nev. Med. Liab. Ins. Co.*, 104 Nev. 666, 667-68, 765 P.2d 184, 185 (1988) (stating that an attorney malpractice claim is premised on an ''attorney-client relationship, a duty owed to the client by the attorney, breach of that duty, and the breach as proximate cause of the client's damages''). When the litigation in which the malpractice occurred continues to progress, the material facts that pertain to the damages still evolve as the acts of the offending attorney may increase, decrease, or eliminate the damages that the malpractice caused. *See id*. at 668, 765 P.2d at 185-86. Hence, the need for the litigation malpractice tolling rule remains, as it permits the litigation to end and the damages to become certain before judicial resources are invested in entertaining the malpractice action. *See id.*; *see also Silvestrone*, 721 So. 2d at 1175 & n.2.

Accordingly, we uphold the applicability of the litigation malpractice rule to the two-year statute of limitations in NRS 11.207(1). So long as the litigation in which the malpractice occurred continues, the damages on which the attorney malpractice action is based remain uncertain.

CONCLUSION

Therefore, we answer the federal district court's certified question in the affirmative. The two-year statute of limitations in NRS 11.207, as revised by the Nevada Legislature in 1997, is tolled against a cause of action for attorney malpractice, pending the outcome of the underlying lawsuit in which the malpractice allegedly occurred.[7] Having answered this question, we leave the federal district court to apply the law that we have articulated to the facts before it. *See In re Fontainebleau Las Vegas Holdings, L.L.C.*, 127 Nev. 955-56, 267 P.3d 786, 794-95 (2011) (providing that the certifying federal court decides the facts, and to those facts it applies the law that this court states in its answer).

Gibbons, C.J., and Pickering, Hardesty, Parraguirre, Douglas, and Cherry, JJ., concur.

[7]We have considered the appellant's remaining contentions and conclude that they lack merit.

LAS VEGAS SANDS CORP., A NEVADA CORPORATION; AND SANDS CHINA LTD., A CAYMAN ISLANDS CORPORATION, PETITIONERS, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE ELIZABETH GOFF GONZALEZ, DISTRICT JUDGE, RESPONDENTS, AND STEVEN C. JACOBS, REAL PARTY IN INTEREST.

No. 63444

August 7, 2014 331 P.3d 905

Original petition for a writ of prohibition or mandamus challenging a district court order authorizing the use of purportedly privileged documents.

Former chief executive officer (CEO) of corporation brought action against corporation alleging breach of employment agreement. Corporation filed motion for protective order regarding documents possessed by CEO. The district court entered order authorizing the use of purportedly privileged documents. Corporation petitioned for writ of mandamus or writ of prohibition. The supreme court, GIBBONS, C.J., held that: (1) failure to appeal injunction in separate action did not preclude writ petition, and (2) corporation's current management was sole holder of its attorney-client privilege.

Petition granted in part.

Morris Law Group and *Steve L. Morris* and *Rosa Solis-Rainey*, Las Vegas; *Kemp, Jones & Coulthard, LLP*, and *J. Randall Jones* and *Mark M. Jones*, Las Vegas; *Holland & Hart LLP* and *J. Stephen Peek* and *Robert J. Cassity*, Las Vegas, for Petitioners.

Pisanelli Bice, PLLC, and *Todd L. Bice, James J. Pisanelli, Debra L. Spinelli*, and *Eric T. Aldrian*, Las Vegas, for Real Party in Interest.

1. PROHIBITION.

   Corporation's failure to appeal the district court's grant of injunctive relief in second action by corporation seeking to prevent former chief executive officer's (CEO) use of purportedly privileged documents in instant litigation by CEO alleging breach of employment agreement did not preclude corporation's writ petition in instant action seeking to prevent CEO from using documents, where injunction was granted in favor of corporation in second action, the district court did not rule on the merits of the issue of whether CEO was legally entitled to use documents, and the district court had not consolidated second action and instant action.

2. PROHIBITION.

   A writ of prohibition may issue to arrest the proceedings of a district court exercising its judicial functions when such proceedings are in excess of the jurisdiction of the district court.

3. Prohibition.
   The supreme court will generally decline to review issues involving discovery disputes through a petition for writ of prohibition.
4. Appeal and Error; Pretrial Procedure.
   Discovery issues are generally within the district court's sound discretion, and the supreme court will not disturb a district court's ruling regarding discovery unless the district court has clearly abused its discretion.
5. Appeal and Error; Prohibition.
   Statutory interpretation is a question of law subject to the supreme court's de novo review, even when arising in a writ proceeding.
6. Privileged Communications and Confidentiality.
   Corporation's current management was the sole holder of its attorney-client privilege, and thus, attorney-client privilege statute did not allow for a judicially created "class of persons" exception to attorney-client privilege, and therefore, former chief executive officer of corporation, who was suing corporation for breach of employment agreement, was not permitted to use corporation's privileged documents for use in litigation; allowing a former fiduciary of a corporation to access and use privileged information after he or she became adverse to the corporation solely based on his or her former fiduciary role was entirely inconsistent with the purpose of the attorney-client privilege, and such a situation would have had a perverse chilling effect on candid communications between corporate managers and counsel. NRS 49.095.
7. Statutes.
   When a statute's language is plain and its meaning clear, the courts will apply that plain language.
8. Statutes.
   When a statute is susceptible to more than one reasonable interpretation, it is ambiguous, and the supreme court must resolve that ambiguity by looking to legislative history and construing the statute in a manner that conforms to reason and public policy.

Before the Court En Banc.[1]

OPINION

By the Court, Gibbons, C.J.:

In this opinion, we consider whether a former chief executive officer of a corporation, who is now suing his former employer, is within a "class of persons" entitled to access the corporation's privileged documents for use in the litigation. We conclude that a corporation's current management is the sole holder of its attorney-client privilege, and thus, Nevada law does not allow for a judicially created class of persons exception to attorney-client privilege. Accordingly, we grant petitioners' request for a writ of prohibition in part to prevent real party in interest from using the purportedly privileged documents in the underlying litigation.

[1]The Honorable Kristina Pickering and The Honorable Ron Parraguirre, Justices, voluntarily recused themselves from participation in the decision of this matter.

FACTS AND PROCEDURAL HISTORY

This matter arises out of real party in interest Steven C. Jacobs's termination as president and chief executive officer of Sands China Ltd. On or near the same day he was terminated, Jacobs gathered approximately 40 gigabytes of documents in the form of e-mails and other communications (the documents), which Jacobs continues to possess.

Approximately three months after his termination, Jacobs filed a complaint against petitioners Las Vegas Sands Corp. (LVSC) and Sands China Ltd., as well as nonparty to this writ petition, Sheldon Adelson, the chief executive officer of LVSC (collectively, Sands). In the complaint, Jacobs alleged that Sands breached his employment contract by refusing to award him promised stock options, among other things.

Almost nine months after filing his complaint, Jacobs disclosed, as an update on the status of document production, that he possessed the documents at issue in this writ petition. Shortly thereafter, the parties met and conferred regarding the documents, and Sands asserted that the material may be subject to Sands's attorney-client privilege and demanded that Jacobs return the documents. Jacobs, however, refused to return the documents.

LVSC files a motion for a protective order and for return of the documents

Approximately one month after Jacobs disclosed that he possessed the documents, LVSC filed a motion for a protective order and for return of the documents.[2] Among LVSC's several arguments was that, after he was terminated, Jacobs had no right to possess documents that were subject to LVSC's attorney-client privilege.

The district court expressed concern that it could not consider LVSC's motion in light of the stay that this court had imposed on the underlying litigation in connection with a previous writ petition that Sands China filed in this court.[3] LVSC communicated to the district court that if the district court believed that entertaining the motion would violate the stay, then LVSC would withdraw the motion and

[2]Sands China did not join in the motion in order to avoid seeking affirmative relief from the district court and thereby subject itself to the court's jurisdiction.

[3]On August 26, 2011, this court granted Sands China's petition for a writ of mandamus, which challenged the district court's order denying Sands China's motion to dismiss it from the underlying action for lack of personal jurisdiction. *See Sands China Ltd. v. Eighth Judicial Dist. Court*, Docket No. 58294 (Order Granting Petition for Writ of Mandamus, August 26, 2011). As a result, this court directed the district court to stay the underlying action until the district court held an evidentiary hearing on whether Sands China is subject to personal jurisdiction in Nevada. The underlying action is still stayed because the parties have not yet concluded jurisdictional discovery in preparation for the ordered evidentiary hearing.

instead file a second action challenging Jacobs's possession and use of the documents.

LVSC files a second action in district court in an attempt to obtain a ruling on Jacobs's possession of the purportedly privileged documents

Subsequently, LVSC filed a complaint (the second action) against Jacobs in the district court claiming theft/conversion of the documents and seeking preliminary and permanent injunctive relief. LVSC simultaneously filed a motion in the second action for a temporary restraining order and preliminary injunction or, in the alternative, for a protective order, again arguing that Jacobs took company documents containing attorney-client privileged communications without the authority to do so. The district court granted injunctive relief, prohibiting Jacobs from disseminating the documents to third parties for 14 days, in order to allow Sands to return to the original action and file an emergency writ petition with this court requesting a "carve out" from the underlying stay.[4] Neither party challenged this decision before this court.

Six days after the hearing in the second action, LVSC filed an emergency writ petition with this court requesting a limited lift of the stay in order to pursue a protective order barring the use of the privileged documents and requiring their return. This court denied LVSC's emergency writ petition.

At a subsequent hearing in the second action, the district court made the determination that the subject matter was purely a jurisdictional discovery dispute that could be resolved in this case. Therefore, the district court dismissed the second action without prejudice,[5] indicating that Sands must pursue its discovery claims in this case. Thereafter, LVSC stopped pursuing its complaint in the second action, and that action has been statistically closed.

The district court subsequently ordered the parties to establish an electronically stored information (ESI) protocol in the instant action that (1) directed Jacobs to turn over copies of the documents to an independent ESI vendor,[6] (2) allowed Jacobs and Sands to review the documents and assert any privilege, and (3) provided that the district court would then conduct an in-camera review to resolve any privilege disputes.

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[4]The district court labeled its order an "Interim Order," prohibiting Jacobs from disseminating the documents to any third party for 14 days.

[5]The district court did not enter a written order dismissing the second action.

[6]An ESI vendor is a neutral third party who stores potentially discoverable electronic information such that the parties can search, collect, and produce relevant documents and withhold privileged documents. *See* Jason Fliegel & Robert Entwisle, *Electronic Discovery in Large Organizations*, 15 Rich. J.L. & Tech. 7, 2009, at 25-27.

After providing the documents to a court-ordered ESI vendor pursuant to an ESI protocol, Jacobs files a motion to return the documents

After extensive motion practice, the district court entered a formal ESI protocol in which it appointed an independent ESI vendor, and ordered Jacobs to provide the ESI vendor a full mirror image of the documents. Pursuant to the ESI protocol, Sands received the documents from the independent ESI vendor, reviewed the documents for privileges, and completed a privilege log. Shortly after receiving Sands's privilege log, Jacobs filed a motion for the return of the documents from the independent ESI vendor. Jacobs argued that Sands's privilege log was deficient and asserted several improper privileges. Additionally, Jacobs argued that the "collective corporate client" approach to the attorney-client privilege applied, such that Sands could not "deprive Jacobs of access to the proof, particularly when he was a participant in its creation." Essentially, Jacobs argued that he was "the client" when he was directly involved in running Sands China, and therefore had a right to access and use any privileged documents that had been created while he was CEO of Sands China.

In opposition, Sands argued that pursuant to NRS 49.045 and 49.095, Sands was the sole holder of the attorney-client privilege, and it had not waived that privilege.

The district court grants Jacobs's motion, ruling that Jacobs is among the "class of persons" legally entitled to view and use privileged documents that pertain to his tenure at Sands China

The district court granted Jacobs's motion to return the documents from the independent ESI vendor based on the legal conclusion that Jacobs was within a class of persons legally allowed to view and use the purportedly privileged documents. The district court order stated that it did not need to address "whether any of the particular documents identified by [Sands] are subject to some privilege . . . , whether Jacobs has the power to assert or waive any particular privileges that may belong to [Sands] . . . or whether [Sands] waived the privilege." Rather, the district court ruled:

> the question presently before this [c]ourt is whether Jacobs, as a former executive who is currently in possession, custody and control of the documents and was before his termination, is among the class of persons legally allowed to view those documents and use them in the prosecution of his claims and to rebut [Sands's] affirmative defenses and counterclaim, as these were documents that the former executive authored, received and/or possessed, both during and after his tenure.

Based on this "class of persons" exception, the district court granted Jacobs's motion to return the remaining documents from the in-

dependent ESI vendor. Two days later, Sands filed this original petition for writ of prohibition or mandamus, asking that this court direct the district court to vacate its order permitting Jacobs to use the documents in the underlying litigation.[7]

DISCUSSION

[Headnote 1]

As a preliminary matter, Jacobs argues that writ relief is unavailable because Sands failed to appeal the district court's ruling in the second action. Jacobs argues that a district court's refusal to grant an injunction is immediately appealable and that "writ relief is not available to correct an untimely notice of appeal." *Pan v. Eighth Judicial Dist. Court*, 120 Nev. 222, 224-25, 88 P.3d 840, 841 (2004); *see also Bradford v. Eighth Judicial Dist. Court*, 129 Nev. 584, 588, 308 P.3d 122, 123 (2013).

While this is generally a correct statement, in this case, the district court's interim order actually *granted* relief by prohibiting Jacobs from disseminating the documents to third parties for 14 days. This afforded Sands the time to use the ESI protocol in the underlying action to review the documents and assert any applicable privileges. In addition, the district court's ruling in the second action did not reach the merits of the "class of persons" exception to the corporate attorney-client privilege issue raised in this writ petition; it instead ruled that Sands needed to pursue its privileges in this case. Thus, any appeal of the district court's ruling in the second action would not preclude this current writ petition. As a result, we are not persuaded by Jacobs's argument that Sands should be estopped from filing this writ petition.

Additionally, even if we were to construe the district court's order as adverse to Sands, the district court had not consolidated the motion for a temporary restraining order and preliminary injunction with the trial on the merits pursuant to NRCP 65(a)(2), and when it dismissed the second action, it did so without prejudice.[8] Under these circumstances, LVSC could still obtain the permanent injunction requested in its complaint in the second action. NRCP 65; *cf. Cal. State Univ., Hayward v. NCAA*, 121 Cal. Rptr. 85, 92 (Ct. App. 1975); *Art Movers, Inc. v. Ni W., Inc.*, 4 Cal. Rptr. 2d 689, 696 (Ct. App. 1992). In our view, Sands made a strategic decision to assert its privileges in this case—a decision that coincided with the direc-

[7]This court previously granted Sands's emergency motion to stay the district court order under NRAP 8(c) pending resolution of this petition.

[8]The district court stated that it was dismissing the complaint "for [Sands] to pursue it as a discovery dispute related to the jurisdictional evidentiary hearing issue" in the instant case.

tions of the district court.[9] Therefore, we conclude that Sands's writ petition is proper in this instance.

We exercise our discretion to consider Sands's petition for a writ of prohibition

[Headnotes 2, 3]

"A writ of prohibition may issue to arrest the proceedings of a district court exercising its judicial functions when such proceedings are in excess of the jurisdiction of the district court." *Club Vista Fin. Servs., L.L.C. v. Eighth Judicial Dist. Court*, 128 Nev. 224, 228 & n.6, 276 P.3d 246, 249 & n.6 (2012) (explaining that discovery excesses are more appropriately remedied by a writ of prohibition than mandamus). Although this court will generally decline to review issues involving discovery disputes, this court has elected to intervene in discovery matters when (1) the trial court issues a blanket discovery order without regard to relevance, or (2) a discovery order requires disclosure of privileged information. *Valley Health Sys., L.L.C. v. Eighth Judicial Dist. Court*, 127 Nev. 167, 171, 252 P.3d 676, 679 (2011).

Although Jacobs already possesses the purportedly privileged documents, this case nevertheless presents a situation where, if Jacobs were improperly permitted to use the documents in litigation, "the assertedly privileged information would irretrievably lose its confidential and privileged quality and petitioners would have no effective remedy, even by a later appeal." *Wardleigh v. Second Judicial Dist. Court*, 111 Nev. 345, 350-51, 891 P.2d 1180, 1183-84 (1995). Thus, we choose to exercise our discretion to consider this writ petition because the district court order at issue permits adverse use of purportedly privileged information. *See Valley Health*, 127 Nev. at 171-72, 252 P.3d at 679; *see also Aspen Fin. Servs., Inc. v. Eighth Judicial Dist. Court*, 128 Nev. 635, 639-40, 289 P.3d 201, 204 (2012) ("[W]rit relief may be available when it is necessary to prevent discovery that would cause privileged information to irretrievably lose its confidential nature and thereby render a lat-

[9]Although Jacobs argues that Sands's failure to timely object to his possession of the documents should constitute a waiver of any privilege that Sands may be able to assert, the district court did not rule on this issue and made no findings of fact to this effect. The record before this court is unclear regarding the steps taken by Sands to preserve any privileges. We therefore decline to consider Jacobs's waiver-related arguments in opposition to this writ petition. *See Ryan's Express Transp. Servs., Inc. v. Amador Stage Lines, Inc.*, 128 Nev. 289, 299, 279 P.3d 166, 172 (2012) ("An appellate court is not particularly well-suited to make factual determinations in the first instance."). To the extent necessary to address Jacobs's waiver-related arguments, we direct the district court to make findings of fact and resolve whether Sands waived any privileges.

er appeal ineffective."). Accordingly, we now turn to the merits of Sands's petition.

Standard of review

[Headnotes 4, 5]

Generally, discovery issues "are within the district court's sound discretion, and [this court] will not disturb a district court's ruling regarding discovery unless the court has clearly abused its discretion." *Club Vista*, 128 Nev. at 228, 276 P.3d at 249. But here, the parties dispute the proper scope of the attorney-client privilege, which, in Nevada, is governed primarily by statute. *See* NRS 49.035-.115. Statutory interpretation is a question of law subject to our de novo review, even when arising in a writ proceeding. *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 198, 179 P.3d 556, 559 (2008); *see also United States v. Richey*, 632 F.3d 559, 563 (9th Cir. 2011) ("We review de novo the district court's rulings on the scope of the attorney-client privilege."). Therefore, our analysis surrounding the proper scope of the attorney-client privilege is subject to de novo review.

The district court erred when it ruled that Jacobs may use Sands's assertedly privileged documents in litigation on the grounds that Jacobs was within a class of persons entitled to review Sands's privileged information

Nevada privilege law grants the attorney-client privilege to the client corporation's current management

[Headnotes 6-8]

"Generally, when a statute's language is plain and its meaning clear, the courts will apply that plain language." *Leven v. Frey*, 123 Nev. 399, 403, 168 P.3d 712, 715 (2007). But when a statute is susceptible to more than one reasonable interpretation, it is ambiguous, and this court must resolve that ambiguity by looking to legislative history and "construing the statute in a manner that conforms to reason and public policy." *Great Basin Water Network v. Taylor*, 126 Nev. 187, 196, 234 P.3d 912, 918 (2010).

Here, Sands argues that the plain language of NRS 49.095 unambiguously guarantees a client the right "to prevent any other person from disclosing" privileged communications. Thus, Sands argues that given the broad language used in the statute, Nevada law does not allow for a "class of persons," other than the client itself, to use or disclose privileged documents over a client's assertion of privilege. While we agree that NRS 49.095 unambiguously guarantees a client the right "to prevent any other person from disclosing" privileged communications, we note that this right belongs to the client—a term defined by NRS 49.045.

NRS 49.045 defines "client" as "a person, including a public officer, *corporation*, association or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from the lawyer." (Emphasis added.) In a corporate context, a client corporation is not a living entity that can make decisions independently—people have to make decisions on its behalf. Thus, the issue we are faced with is the appropriate scope of persons who have the authority to assert a corporation's privilege and whether an exception should exist when a corporation's current management attempts to assert the attorney-client privilege against a former officer or director. Other courts have addressed this issue, with varying results.

We decline to adopt an exception to the attorney-client privilege based on a litigant's status as a former officer or director of a corporation

Sands argues that the district court erred because the attorney-client privilege belongs exclusively to the client corporation's current management, and thus Jacobs's status as former CEO alone does not entitle him to access and use Sands's privileged communications in litigation. *See Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 348-49 (1985); *Montgomery v. eTreppid Techs., L.L.C.*, 548 F. Supp. 2d 1175, 1187 (D. Nev. 2008). Sands contends that the district court's order is inconsistent with the purpose of attorney-client privilege because allowing former employees to use the company's privileged documents against it in litigation would chill officers' and directors' willingness to communicate candidly with counsel. *See Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981); *Dexia Credit Local v. Rogan*, 231 F.R.D. 268, 277 (N.D. Ill. 2004) ("To rule otherwise would defeat that expectation, and could chill the willingness of control group members to speak candidly on paper (or, these days, in electronic media) about privileged matters, knowing that some day one of their number may leave the control group and become adverse (whether through litigation or business activity) to the corporation.").

The "collective corporate client" or "joint client" exception to corporate attorney-client privilege

The collective corporate client exception to corporate attorney-client privilege is based on the idea that there is one collective corporate client that includes the corporation itself as well as each individual member of the board of directors, rather than just the corporation alone. *See Lane v. Sharp Packaging Sys., Inc.*, 640 N.W.2d 788, 815-16 (Wis. 2002) (Abrahamson, C.J., dissenting); *Montgom-*

ery, 548 F. Supp. 2d at 1183, 1185. The theory is that "directors are collectively responsible for the management of a corporation and a corporation is an inanimate entity that cannot act without humans"; therefore "it is consistent with a director's role and duties that the director be treated as a 'joint client.'" *Montgomery*, 548 F. Supp. 2d at 1183. Thus, similar to the way in which parties with a common interest who retain a single attorney may not assert the attorney-client privilege against each other if they later become adverse, *Livingston v. Wagner*, 23 Nev. 53, 58, 42 P. 290, 292 (1895), the collective corporate client approach creates an exception to a corporation's attorney-client privilege by precluding a corporation from asserting its attorney-client privilege against a former director or officer. *See Gottlieb v. Wiles*, 143 F.R.D. 241, 247 (D. Colo. 1992).

Jacobs argues that the district court's decision is amply supported by caselaw adopting the collective corporate client exception to corporate attorney-client privilege. Jacobs primarily relies on *People v. Greenberg*, 851 N.Y.S. 2d 196, 200-02 (App. Div. 2008). In *Greenberg*, the New York Attorney General's office filed a complaint against AIG and its former CEO and CFO for their involvement in alleged sham insurance transactions. The former CEO and CFO served document requests on AIG seeking documents created during their tenure as officers and directors of AIG for use in their defense. *Id.* at 197-98. In evaluating the issue, the court separated attorney-client communications into "two categories: general business matters and the four transactions at the heart of this action." *Id.* at 200. The court found that while the corporation's current board of directors controlled the attorney-client privilege regarding "general business matters," a former director may inspect records that are "necessary to protect their personal responsibility interests." *Id.* at 201. Thus, the court found that former executives were "within the circle of persons entitled to view privileged materials without causing a waiver of the attorney-client privilege" because they were "privy to, and on many occasions actively participated in, legal consultations regarding the four subject transactions . . . ."[10] *Id.* at

[10]While the district court did not directly cite to *Greenberg* in its order, it appears that its order is primarily based on the analysis in *Greenberg*. In *Greenberg*, the court held that former corporate officers had a "qualified right" to access privileged corporate documents because those documents were needed by the officers to defend themselves against allegations of malfeasance. *Id.* at 201-02 (emphasis omitted). Here, the only issue upon which discovery is being conducted is whether Sands China is subject to personal jurisdiction. In light of this fact, it is unclear how the *Greenberg* court's analysis led to the district court's conclusion that Jacobs is entitled to use any documents that he "authored, received and/or possessed, both during and after his tenure," in establishing personal jurisdiction over Sands China. To the extent that Sands may have placed any documents "at-issue," this court's analysis of at-issue waiver in *Wardleigh v. Second Judicial District Court*, 111 Nev. 345, 891 P.2d 1180 (1995), provides

201-02; *see also Kirby v. Kirby*, 1987 WL 14862, at *7 (Del. Ch. July 29, 1987) (holding that the directors of a closely held corporation, collectively, were the client and that joint clients may not assert the attorney-client privilege against one another);[11] *Gottlieb*, 143 F.R.D. at 247 (concluding that because the plaintiff was a chairman of the board and CEO when the documents were created, he was "squarely within the class of persons who could receive communications" from the corporation's counsel "without adversely impacting the privileged or confidential nature of such material").

"The entity is the client" approach

Sands primarily cites two cases for its proposition that the corporation's current management is the sole holder of the attorney-client privilege: *Weintraub*, 471 U.S. 343, and *Montgomery*, 548 F. Supp. 2d 1175. In *Weintraub*, the Supreme Court considered whether managers of a bankrupt corporation could assert the attorney-client privilege on behalf of the corporation or if, instead, the right to assert and waive the privilege passed to the bankruptcy trustee. 471 U.S. at 349. The Court framed the issue before it as "which corporate actors are empowered to waive the corporation's privilege."[12] *Id.* at 348. The Court explained that for solvent corporations, the power to waive attorney-client privilege rests with the corporation's officers and directors.[13] *Id.* "The managers, of course, must exercise the privilege in a manner consistent with their fiduciary duty to act in the best interests of the corporation and not of themselves as individuals." *Id.* at 348-49. The Court reasoned that "when control of a

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the appropriate framework for resolving those issues. But at this point, it would be inappropriate for this court to address such a fact-intensive issue that would hinge on the content of individual documents, and whether Sands placed such a document at issue. *See Ryan's Express Transp. Servs., Inc. v. Amador Stage Lines, Inc.*, 128 Nev. 289, 299, 279 P.3d 166, 172 (2012).

[11]While this is an unpublished disposition, many courts across the country have cited to this case. *See, e.g.*, *Milroy v. Hanson*, 875 F. Supp. 646, 648 (D. Neb. 1995).

[12]*Weintraub* specifically addressed which party has the power to control attorney-client privilege during the pendency of a bankruptcy. 471 U.S. at 349. However, its analysis of corporate attorney-client privilege has been cited outside the context of bankruptcy. *See Montgomery*, 548 F. Supp. 2d at 1183; *Milroy*, 875 F. Supp. at 649-50 (citing *Weintraub* for the proposition that "[a] dissident director is by definition not 'management' and, accordingly, has no authority to pierce or otherwise frustrate the attorney-client privilege when such action conflicts with the will of [current] 'management'").

[13]More accurately, the Court noted that the parties agreed that the power to waive attorney-client privilege rests with the corporation's officers and directors. *See Weintraub*, 471 U.S. at 348-49. But it appears that the Court implicitly supported these conclusions because it cited to additional legal authority to support them. *Id.*

corporation passes to new management, the authority to assert and waive the corporation's attorney-client privilege passes as well." *Id.* at 349. Thus, the Court concluded that "[d]isplaced managers may not assert the privilege over the wishes of current managers, even as to statements that the [displaced managers] might have made to counsel concerning matters within the scope of their corporate duties." *Id.* As a result, a former officer and director "who is now neither an officer nor a director . . . retains no control over the corporation's privilege." *Id.* at 349 n.5.

Similarly, in *Montgomery*, the federal district court for the district of Nevada found that a former officer may not access his former employer's privileged communications for use in his lawsuit against his former employer. 548 F. Supp. 2d at 1187. Dennis Montgomery, the plaintiff, who was a member[14] and former manager for eTreppid, requested discovery, in response to which eTreppid asserted the attorney-client privilege. *Id.* at 1177. Montgomery claimed that as a member and former manager, he was a "joint client," and as such, eTreppid could not assert the attorney-client privilege against him with respect to privileged communications created during his tenure as a manager. *Id.* The *Montgomery* court analyzed a number of cases on each side of the issue, and concluded that

> [T]he *Milroy*[15] [and *Weintraub*] line of cases are more persuasive. It makes sense that the corporation is the sole client. While the corporation can only communicate with its attorneys through human representatives, those representatives are communicating on behalf of the corporation, not on behalf of themselves as corporate managers or directors. Moreover, the court finds very convincing the language in *Weintraub*,

[14]The respondent in that case, eTreppid, is an LLC, not a corporation. 548 F. Supp. 2d at 1177. However, the court determined that eTreppid's structure was most similar to that of a corporate structure, and therefore treated it as a corporation for the purposes of its privilege analysis. *Id.* at 1183.

[15]In *Milroy*, the plaintiff Michael Milroy, an active member of the board of directors and minority stockholder of a corporation, sued several other directors and majority stockholders based on claims related to alleged violations of their fiduciary duty. 875 F. Supp. at 647. Milroy requested discovery, which the corporation—via a majority vote of the other directors—refused based on attorney-client privilege. *Id.* Milroy asked the federal court to adopt the collective corporate client exception to corporate attorney-client privilege because he was an active director and thus belonged to the entity that controls the corporation. *Id.* at 648. The court found that no exception should apply to the normal rule that "since the majority decision of the board of directors of a Nebraska corporation 'controls' the corporation . . . an individual director is bound by the majority decision and cannot unilaterally waive or otherwise frustrate the corporation's attorney-client privilege if such an action conflicts with the majority decision of the board of directors." *Id.* Thus, "[a] dissident director is by definition not 'management' and, accordingly, has no authority to pierce or otherwise frustrate the attorney-client privilege when such action conflicts with the will of 'management.'" *Id.* at 649-50.

> which states that the privilege belongs to the corporation, can be asserted or waived only by management, and that this power transfers when control of the corporation is transferred to new management.
>
> Also important to the court's decision is the fact that Montgomery, like the former director in *Milroy*, is not suing on behalf of eTreppid or in his capacity as a former manager or officer. Rather, Montgomery is suing to benefit himself individually—a perfectly acceptable position, but not one which should entitle him to eTreppid's attorney-client privileged communications. Like the "dissident" director in *Milroy*, Montgomery is now adverse to eTreppid and may not obtain privileged documents over the objection of current management. Moreover, even though Montgomery would have had access to such documents during his time at eTreppid, he still would have been duty-bound to keep such information confidential.

Id. at 1187.

> *We decline to adopt an exception to the attorney-client privilege based on a litigant's status as a former officer or director of a corporation*

It appears that the modern trend in caselaw follows the *Weintraub*, *Milroy*, and *Montgomery* line of cases. *See Montgomery*, 548 F. Supp. 2d at 1186 (noting that "many more courts have rejected the reasoning in *Gottlieb* than in *Milroy*"); *Nunan v. Midwest, Inc.*, No. 2004/00280, 2006 WL 344550, at *7 (N.Y. Sup. Ct. January 10, 2006) ("Although there is discredited authority to the contrary . . . most of the more recent cases embrace the view that, when a former officer or director is suing the company for his or her own personal gain, the privilege belongs to the corporation and if asserted is effective to prevent disclosure to the former officer or director." (internal citations omitted)).

More importantly, we are persuaded by the policy behind the *Weintraub*, *Milroy*, and *Montgomery* line of cases and conclude that it is consistent with Nevada privilege law. Allowing a former fiduciary of a corporation to access and use privileged information after he or she becomes adverse to the corporation solely based on his or her former fiduciary role is entirely inconsistent with the purpose of the attorney-client privilege.[16] We believe such a situation would

[16]Other courts have expressed similar concerns. *See, e.g.*, *Montgomery*, 548 F. Supp. 2d at 1187; *Davis v. PMA Cos., Inc.*, No. CIV-11-359-C, 2012 WL 3922967, at *6 (W.D. Okla. Sept. 7, 2012) ("It seems paradoxical to allow a party to access information previously available to that individual only because of his or her role as a fiduciary once that party is adverse to the corporation and no longer required to act in the corporation's best interests.").

have a perverse chilling effect on candid communications between corporate managers and counsel. *Cf. Whitehead v. Nev. Comm'n on Judicial Discipline*, 110 Nev. 380, 410, 873 P.2d 946, 965 (1994) (recognizing that the attorney-client privilege's purpose "is to protect confidential communications between attorney and client"). We therefore decline to recognize the collective corporate client exception to a corporation's attorney-client privilege and conclude that Jacobs may not use Sands's privileged documents in litigation over Sands's current management's assertion of the attorney-client privilege.

Thus, we conclude that the district court erred when it applied the collective corporate client approach to find that Jacobs was within a class of persons legally allowed to use Sands's purportedly privileged documents in the prosecution of his claims. We therefore grant Sands's petition for a writ of prohibition in part and direct the district court to vacate its June 19, 2013, order granting the return of the documents from the independent ESI vendor. We note that the district court has yet to make a determination as to whether Sands's assertions of privilege are proper. As it previously indicated that it would do, the district court should resolve any disputes regarding Sands's privilege log by conducting an in-camera review of the purportedly privileged documents to determine which documents are actually protected by a privilege.[17]

CONCLUSION

We conclude that a corporation's current management controls the privilege "to refuse to disclose, and to prevent any other person from disclosing, confidential communications." This precludes a finding that there is a class of persons outside the corporation's current officers and directors who are entitled to access the client's confidential or privileged information over the client's objection for use in litigation. Therefore, we conclude that the district court erred when it employed the collective corporate client exception to corporate attorney-client privilege in ruling that Jacobs, solely based on his former executive position with Sands China, was legally allowed

[17]Because the district court resolved the underlying motion without addressing Jacobs's objections to various assertions of privilege, the district court should evaluate each of Jacobs's objections and determine the factual and legal validity of Sands's assertions of privilege. We note that documents that were not sent to legal counsel for the purpose of rendering legal advice, such as instances in which legal counsel was merely copied, are not protected by the attorney-client privilege. *See Lindley v. Life Investors Ins. Co. of Am.*, 267 F.R.D. 382, 390 (N.D. Okla. 2010); *ABB Kent-Taylor, Inc. v. Stallings & Co., Inc.*, 172 F.R.D. 53, 57 (W.D.N.Y. 1996). Similarly, as noted above, to the extent that Sands may have placed any documents "at-issue," this court's analysis of at-issue waiver in *Wardleigh v. Second Judicial District Court*, 111 Nev. 345, 891 P.2d 1180 (1995), provides the appropriate framework for resolving those issues.

to use the purportedly privileged documents over Sands's claim of privilege.

We therefore grant Sands's writ petition in part and direct the clerk of this court to issue a writ of prohibition ordering the district court to halt the return to Jacobs of the purportedly privileged documents.[18]

HARDESTY, DOUGLAS, CHERRY, and SAITTA, JJ., concur.

LARRY EDWARD MAJOR, APPELLANT, *v.*
THE STATE OF NEVADA, RESPONDENT.

No. 62819

August 28, 2014 333 P.3d 235

Appeal from a judgment of conviction, pursuant to a guilty plea, of child abuse. Second Judicial District Court, Washoe County; Connie J. Steinheimer, Judge.

Father was convicted in the district court after pleading guilty to abusing daughter. The district court required father to pay restitution to Social Services offset by $700 support obligation imposed by the family court. Father appealed. The supreme court, PARRAGUIRRE, J., held that: (1) as a matter of first impression, the district court had jurisdiction to order restitution; and (2) evidence supported amount of restitution.

Affirmed.

Jeremy T. Bosler, Public Defender, and *John Reese Petty*, Chief Deputy Public Defender, Washoe County, for Appellant.

Catherine Cortez Masto, Attorney General, Carson City; *Richard A. Gammick*, District Attorney, and *Jennifer P. Noble*, Deputy District Attorney, Washoe County, for Respondent.

1. SENTENCING AND PUNISHMENT.

The district court's order requiring father to pay restitution to Social Services for cost to care for abused daughter was not a review or modification of family court order requiring father to pay monthly support of $100, and, thus, the district court had jurisdiction to order restitution following conviction for child abuse, despite overlap between the family court's authority to impose a support obligation and a district court's authority to impose restitution as part of a criminal sentence; the family court lacked the power to grant restitution, and the district court offset the restitution

[18]Sands's alterative request for a writ of mandamus is denied. In light of our resolution of this writ petition, we vacate the stay imposed by our October 1, 2013, order.

by amount of the support obligation. NRS 3.223(1), 125B.070, 125B.080, 176.033(1)(c).

2. Courts.
   Family courts have original, exclusive jurisdiction over matters affecting the familial unit, including child support. NRS 3.223(1).
3. Child Support.
   The purpose of child support is to prevent the child from experiencing the effects of poverty and becoming a charge of the state. NRS 125B.070, 125B.080.
4. Sentencing and Punishment.
   The purpose of restitution in the context of a criminal case is to compensate a victim for costs arising from a defendant's criminal act.
5. Sentencing and Punishment.
   Evidence presented by Social Services for cost to care for child abused by her father was sufficient to support the district court's order requiring father to pay $19,662.07 in restitution following conviction for child abuse, even though federal government provided reimbursement of up to 56 percent of the cost of care for certain eligible children; the district court required Social Services to notify the district court if it did receive such a reimbursement. NRS 176.033(1)(c).
6. Sentencing and Punishment.
   Social Services can be a "victim" entitled to restitution for cost to care for abused child. NRS 176.033(1)(c).
7. Sentencing and Punishment.
   Defendant is not entitled to a full evidentiary hearing at sentencing.
8. Criminal Law.
   So long as the record does not demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence, the supreme court will refrain from interfering with the sentence imposed.

Before Pickering, Parraguirre and Saitta, JJ.

OPINION

By the Court, Parraguirre, J.:

In this appeal, we consider whether a district court has jurisdiction to impose restitution to the State for the cost of child care in a child abuse case where a family court has already imposed an obligation on the defendant for the costs of supporting the child. We conclude that the district court has jurisdiction to impose such restitution but that the district court must offset the restitution amount by the amount of the support obligation imposed by the family court.

FACTS

The State placed appellant Larry Major's daughter in the custody of Washoe County Social Services (Social Services) following his 2012 arrest for child abuse. A family court hearing master ordered Major to pay child support in the amount of $100 per month directly

to Social Services. A family court district judge affirmed that order. The child was in the care of Social Services for approximately seven months.

Major entered a guilty plea to one felony count of child abuse. Social Services sought restitution in the amount of $20,362.07. Ida Peeks, a fiscal compliance officer for Social Services, testified that Social Services based this amount on the amount it charges other agencies for the cost of care provided to children placed in Kids Kottage, where Social Services housed Major's daughter. Social Services bases this rate on the costs of running Kids Kottage, including overhead and salaries. Peeks also testified that Social Services may receive reimbursement for the cost of care from the federal government for children who meet certain eligibility requirements. Peeks did not know whether Major's daughter met these requirements or if Social Services received any reimbursement for her care.

Major objected to the amount sought by Social Services on the basis that the family court had already entered a cost-of-care order. Following oral argument on the issue, the district court concluded that the family court's order, which was based on Major's ability to pay, did not affect the jurisdiction of the district court as to its criminal restitution order. Accordingly, the district court ordered Major to pay restitution to Social Services in the amount of $19,662.07. This amount reflected an offset of $700 for the amount Major incurred from the support obligation imposed by the family court. Major now brings this appeal.

DISCUSSION

On appeal, Major argues that: (1) the district court lacked jurisdiction to order him to pay restitution for the total cost of his daughter's care because the family court previously ordered him to pay $100 per month for the cost of care; and (2) if the district court had jurisdiction, there was insufficient evidence to support the amount of the restitution award.

The district court had jurisdiction to order Major to pay restitution

[Headnote 1]

Major argues that the district court lacked jurisdiction to order him to pay $19,662.07 in restitution to Social Services for the cost of his daughter's care because the family court had already ordered him to pay child support to Social Services in the amount of $100 per month. This is an issue of first impression in Nevada.

[Headnote 2]

According to Major, the district court was improperly modifying or reviewing the family court's support order when it imposed restitution. We disagree with that characterization. Family courts have

original, exclusive jurisdiction over matters affecting the familial unit, including child support. NRS 3.223(1); *Landreth v. Malik*, 127 Nev. 175, 184, 251 P.3d 163, 169 (2011). We have held that family court judges "are district court judges with authority to preside over matters outside the family court division's jurisdiction." *Landreth*, 127 Nev. at 177, 251 P.3d at 164.

Although district courts lack jurisdiction to review or modify actions of other district courts, *Rohlfing v. Second Judicial Dist. Court*, 106 Nev. 902, 906, 803 P.2d 659, 662 (1990), we conclude that the district court's order imposing restitution did not constitute a review or modification of the family court's support obligation.

In this case, the family court lacked the power to grant restitution to compensate for the costs of child care imposed on the State by Major's criminal acts, as the power to grant restitution to crime victims is statutory, not inherent to a district court. *Martinez v. State*, 115 Nev. 9, 10, 974 P.2d 133, 134 (1999) (quoting *State v. Davison*, 809 P.2d 1374, 1375 (Wash. 1991)). NRS 176.033(1)(c) provides that a sentencing court may award restitution to the victims of a crime upon a criminal conviction. Thus, although a family court judge has the same authority as a district court judge, NRS 176.033(1)(c) limits the power of a district court judge to award restitution to victims of crimes to the sentencing phase of a criminal proceeding.

[Headnote 3]

Statutes also circumscribe a family court's authority to award child support. NRS 125B.070 and NRS 125B.080 provide that the amount of a parent's support obligation is calculated based on the gross monthly income of the parent or a minimum payment of $100. This amount is presumed to be sufficient to meet the basic needs of the child. NRS 125B.080(5). The purpose of child support is to prevent the child from experiencing the effects of poverty and becoming a charge of the State, *Rodriguez v. Eighth Judicial Dist. Court*, 120 Nev. 798, 812, 102 P.3d 41, 50 (2004), and there is no statutory authority for increasing the amount where the parent's support obligation arose from a criminal act.

[Headnote 4]

The purpose of restitution in the context of a criminal case, however, is to compensate a victim for costs arising from a defendant's criminal act. *Martinez v. State*, 120 Nev. 200, 202-03, 88 P.3d 825, 827 (2004). Although we have recognized that there are limited circumstances wherein the State may be considered the victim of a crime for purposes of restitution, *see Igbinovia v. State*, 111 Nev. 699, 706-07, 895 P.2d 1304, 1308-09 (1995) (concluding that a police department was not entitled to restitution as a victim for the cost of setting up a drug transaction), we have held that the State was a victim for purposes of awarding restitution in a case where the de-

fendant was convicted of abusing his children and the State incurred expenses for the medical and foster care of the children. *Roe v. State*, 112 Nev. 733, 735, 917 P.2d 959, 960 (1996).

Accordingly, only the district court during the sentencing phase of the criminal trial had the power to grant restitution to the State for the total cost imposed on it by Major's criminal act. Nevertheless, this created an overlap between the family court's authority to impose a support obligation and a district court's authority to impose restitution as part of a criminal sentence. *See Rohlfing*, 106 Nev. at 906, 803 P.2d at 662. Such an overlap need not undermine the jurisdiction of either the family court or the sentencing court. In the current case, where the support obligation and the restitution arose from the same occurrence and compensate for overlapping expenditures, we note with approval that the district court offset the restitution amount by the amount of the support obligation.

Accordingly, we conclude that the district court had jurisdiction to award restitution to the State for the cost of care for the victim of Major's crime to the extent that the district court's order did not overlap with the existing support obligation imposed by the family court.

Sufficient evidence supports the restitution award

[Headnote 5]

Major next argues in the alternative that we should remand for a hearing to establish the actual cost of care for his daughter. We conclude that this contention lacks merit.

[Headnotes 6-8]

NRS 176.033(1)(c) provides that a district court may impose restitution at sentencing for the victims of crimes. Social Services can be a "victim" for purposes of restitution. *Roe*, 112 Nev. at 735-36, 917 P.2d at 960. Although we have cautioned sentencing courts to "rely on reliable and accurate evidence in setting restitution," a defendant is not entitled to a full evidentiary hearing at sentencing. *Martinez v. State*, 115 Nev. 9, 13, 974 P.2d 133, 135 (1999). Thus, "[s]o long as the record does not demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence, this court will refrain from interfering with the sentence imposed." *Silks v. State*, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976).

At sentencing, Peeks testified that Social Services based the cost-of-care rate on the total cost of running Kids Kottage. Peeks also testified that the federal government provides reimbursement of up to 56 percent of the cost of care for certain eligible children. She did not know, however, whether Social Services received such a reimbursement for Major's daughter's care. The district court re-

quired Social Services to notify the district court if it did receive such a reimbursement in order to allow the district court to amend the restitution order to reflect the reimbursement. Major did not present any evidence that Social Services actually received such a reimbursement.

We conclude that the evidence presented by Social Services for the cost of care is sufficient to support the district court's order. Although the question remains whether Social Services received a reimbursement, Major makes no showing there actually was such a reimbursement, and the district court appears to have imposed on Social Services a continuing obligation to notify the district court if there was a reimbursement to allow the court to revise the restitution order. Given these circumstances, we affirm the judgment of conviction.

PICKERING and SAITTA, JJ., concur.