THE STATE OF NEVADA, DEPARTMENT OF TRANSPORTATION, Appellant, *v.* JOHN BRONDER, Respondent.

No. 79695

December 3, 2020 476 P.3d 866

Appeal from a district court order denying a petition for judicial review of a Nevada Division of Personnel Commission decision. First Judicial District Court, Carson City; James Todd Russell, Judge.

Affirmed.

Aaron D. Ford, Attorney General, and *Cameron P. Vandenberg*, Chief Deputy Attorney General, Carson City, for Appellant.

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[2]Although the district court's decision was based on the conclusion that the conviction constituted a crime against a child, the court orally expressed concern that the records could also be precluded from sealing as relating to a sexual offense. Like the description of "crime against a child," "sexual offense" is defined in a limited manner for purposes of sealing records under NRS 179.245. *See* NRS 179.245(8)(b). While records relating to convictions on *felony* open and gross lewdness charges may not be sealed under that definition, records pertaining to misdemeanor open and gross lewdness convictions are not listed as precluded and thus may be sealed. We also note that the original crime Aragon pleaded guilty to, felony sexually motivated coercion of a minor, is also not listed as a "[c]rime against a child" under NRS 179D.0357 or as a "[s]exual offense" under NRS 179.245(8)(b).

[3]We note that the State did not file an answering brief or otherwise oppose Aragon's appeal.

Dyer Lawrence, LLP, and *Thomas J. Donaldson*, Carson City, for Respondent.

Before the Supreme Court, Parraguirre, Hardesty and Cadish, JJ.

OPINION

By the Court, Parraguirre, J.:

NRS 281.641(5) provides that the Nevada Department of Administration's Personnel Commission may adopt procedural rules for whistleblower appeal hearings. NAC 281.305(1)(a), which the Personnel Commission promulgated under NRS 281.641(5), provides that a state officer or employee claiming whistleblower protection "must" file a whistleblower appeal within 10 workdays of the alleged reprisal or retaliation. In this appeal, we consider whether NAC 281.305(1)(a) is a procedural rule and thus within the rulemaking authority that NRS 281.641(5) confers upon the Personnel Commission, or instead a jurisdictional rule that exceeds the Personnel Commission's authority and thus invalid. We conclude that NAC 281.305(1)(a) is a jurisdictional rule and thus invalid.

FACTS

This dispute arose when appellant Nevada Department of Transportation (NDOT) fired respondent John Bronder. Bronder was a probationary NDOT employee at the time of his termination.[1] Approximately 8 months after NDOT fired him, Bronder filed a whistleblower appeal alleging that his termination was retaliation for his disclosure of certain information. NDOT moved to dismiss, arguing that under the 10-day rule for filing whistleblower appeals, Bronder's appeal was untimely by several months. The hearing officer concluded that the 10-day rule is invalid and ultimately ordered NDOT to reinstate Bronder's probationary employment. NDOT petitioned the district court for judicial review, but the district court denied the petition, thereby affirming the hearing officer's decision.

NDOT now appeals, arguing that the hearing officer erroneously concluded that Bronder timely filed his whistleblower appeal.[2]

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[1]A probationary employee, though hired to fill a permanent position, lacks permanent-employee status until the end of the probationary period. *See* NRS 284.290(3) (explaining that a probationary employee may eventually become a permanent employee).

[2]NDOT also argues that the hearing officer clearly erred by concluding that Bronder disclosed information, but we decline to consider the issue because NDOT raises it for the first time on appeal. *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981).

DISCUSSION

This appeal involves a statute and a related regulation. The statute, NRS 281.641(5), provides that "[t]he Personnel Commission may adopt rules of procedure for conducting" whistleblower-appeal hearings. The regulation, NAC 281.305(1)(a), provides that a state officer or employee claiming whistleblower protection must file a whistleblower appeal within 10 workdays of the alleged reprisal or retaliation. The issue before us is whether NAC 281.305(1)(a) is a procedural rule and thus within the rulemaking authority that NRS 281.641(5) confers, or instead a *jurisdictional* rule that exceeds the Personnel Commission's authority and thus invalid.

NDOT simply argues that NAC 281.305(1)(a) is valid because it "was adopted in accordance with . . . NRS 281.641," so "[t]he district court clearly erred in concluding that NAC 281.305 is invalid." Bronder answers by repeating the district court's reasoning that, because NRS 281.641(5) allows rules for conducting hearings and NAC 281.305(1)(a) is instead a rule for filing an appeal, NAC 281.305(1)(a) is invalid.

We review an "administrative decision in the same manner as the district court." *Nassiri v. Chiropractic Physicians' Bd.*, 130 Nev. 245, 248, 327 P.3d 487, 489 (2014). We may reverse an agency's decision "if substantial rights of the petitioner have been prejudiced because the final decision of the agency is . . . [a]ffected by . . . error of law." NRS 233B.135(3)(d).

This issue requires us to review an agency's interpretation of one of its governing statutes. While we ordinarily review statutory interpretation issues de novo, we will "defer to an agency's interpretation of its governing statutes or regulations if the interpretation is within the language of the statute." *Dutchess Bus. Servs., Inc. v. Nev. State Bd. of Pharmacy*, 124 Nev. 701, 709, 191 P.3d 1159, 1165 (2008).

The hearing officer's interpretation of NRS 281.641(5) was that it "appears to authorize adoption of procedural rules for hearing . . . rather than . . . jurisdictional" rules. NRS 281.641(5) authorizes the adoption of "rules of procedure for conducting a hearing," so the hearing officer's interpretation is within the statute's language, and we therefore defer to his interpretation.

Under the hearing officer's interpretation of NRS 281.641(5), NAC 281.305(1)(a) is indeed invalid. As the hearing officer explained, a rule providing a time limit for filing an administrative appeal is not procedural but *jurisdictional*. *See K-Kel, Inc. v. State, Dep't of Taxation*, 134 Nev. 78, 80-81, 412 P.3d 15, 17 (2018) (recognizing the time period for filing a petition for judicial review under NRS Chapter 233B as jurisdictional); *Washoe Cty. v. Otto*, 128 Nev. 424, 432, 282 P.3d 719, 725 (2012) ("The word 'must' generally imposes a mandatory requirement."). NAC 281.305(1)(a)'s 10-day limit is such a rule. Because a jurisdictional rule is beyond the *procedural* rulemaking authority that NRS 281.641(5) confers,

NAC 281.305(1)(a) is invalid.[3] *Felton v. Douglas County*, 134 Nev. 34, 38, 410 P.3d 991, 995 (2018) (explaining that this court "will not hesitate to declare a regulation invalid when the regulation . . . exceeds the statutory authority of the agency" (quoting *Meridian Gold Co. v. State ex rel. Dep't of Taxation*, 119 Nev. 630, 635, 81 P.3d 516, 519 (2003))). Accordingly, we affirm the district court's denial of NDOT's petition for judicial review.

Hardesty and Cadish, JJ., concur.

RAJWANT KAUR, Appellant/Cross-Respondent, *v.*
JASWINDER SINGH, Respondent/Cross-Appellant.

No. 80090

December 10, 2020 477 P.3d 358

Appeal and cross-appeal from a district court order denying a motion to set aside a divorce decree. Eighth Judicial District Court, Family Court Division, Clark County; Sandra L. Pomrenze, Judge.

Reversed and remanded.

[Rehearing denied January 13, 2021]

[En banc reconsideration denied March 18, 2021]

Kainen Law Group, PLLC, and *Racheal H. Mastel*, Las Vegas, for Appellant/Cross-Respondent.

Law Offices of F. Peter James, Esq., and *F. Peter James*, Las Vegas, for Respondent/Cross-Appellant.

Before the Supreme Court, Gibbons, Stiglich and Silver, JJ.

OPINION

By the Court, Gibbons, J.:

In *Vaile v. Eighth Judicial District Court*, 118 Nev. 262, 44 P.3d 506 (2002), we addressed the application of the judicial-estoppel doctrine in the context of divorce decrees entered without jurisdiction. There, the former wife raised a defense to judicial estoppel, arguing that she signed the divorce pleadings under duress and co-

[3]NRS 284.390(1) provides a similar 10-day limit that applies only to "an employee's dismissal, demotion or suspension pursuant to NRS 284.385." But NRS 284.385 applies only to *permanent* employees. So unless the Legislature amends NRS 284.390(1) to apply to *probationary* and *temporary* employees, or otherwise provides some applicable time limit, probationary employees will not be subject to a 10-day limit for filing a whistleblower appeal.

ercion. The district court rejected her defense because she failed to present sufficient evidence, and we affirmed.

In this appeal, we clarify that *before* considering whether a party sufficiently raised a defense to the application of the doctrine of judicial estoppel, district courts should consider whether judicial estoppel applies to the situation under the traditional judicial-estoppel factors. Misguided by our holding in *Vaile*, the district court here did not consider the traditional judicial-estoppel factors before considering appellant/cross-respondent Rajwant Kaur's defense of duress and coercion. We therefore conclude the district court erred when it applied judicial estoppel solely based on Rajwant's failure to provide evidence of duress or coercion and remand for the district court to consider the traditional judicial-estoppel factors.

FACTS

Rajwant and respondent/cross-appellant Jaswinder Singh got married in India in 1989, moved to California in 1993, and have lived together ever since. In 2004, they filed a joint petition for divorce in Las Vegas, claiming they were Nevada residents. Because the couple filed a witness's affidavit corroborating their residency, the district court entered the divorce decree without holding a hearing.

Shortly thereafter, Rajwant married Jaswinder's brother in India. Rajwant claims that Jaswinder ordered her to marry his brother for immigration purposes. About three weeks later, Rajwant and Jaswinder returned to California, *without* Jaswinder's brother, and the couple continued living together in California.[1]

In 2018, Rajwant discovered that Jaswinder married another woman in India, so she filed for divorce in California. After initially filing a response and request for dissolution of the marriage, Jaswinder filed an answer arguing the parties were already divorced, referencing the 2004 Nevada divorce decree. In January 2019, Rajwant moved the Eighth Judicial District Court to set aside the 2004 divorce decree under NRCP 60(b) on two grounds: (1) the parties never resided in Nevada, so the district court did not have jurisdiction and the divorce decree was therefore void; and (2) Jaswinder forced her to sign the divorce decree, which they had jointly submitted to the district court for approval, so it was obtained by fraud. She also contended she could not read the 2004 divorce pleadings, which were written in English, and thus did not know what she was signing.

Jaswinder answered that Rajwant's motion to set aside the 2004 divorce decree, filed in 2019, was untimely. He also argued Rajwant was judicially estopped from challenging the divorce decree under *Vaile*, 118 Nev. 262, 44 P.3d 506. Additionally, he sought attorney fees under NRS 18.010(2)(b) and EDCR 7.60.

[1]Jaswinder's brother never moved to the United States.

After holding an evidentiary hearing, the district court rejected Jaswinder's argument that Rajwant's motion was untimely, finding "the injured party is the State of Nevada," and "[u]ntil the parties bring this in front of the Court, the Court doesn't know there might be a fraud." As to the merits of Rajwant's motion, the district court found that the parties did not live in Nevada for six weeks before filing for divorce, as required by NRS 125.020, so they perpetrated a fraud on the court. Nonetheless, the district court found Rajwant failed to prove she was operating under duress or coercion when she signed the divorce decree, so she was judicially estopped from challenging the decree. In so finding, the court relied on *Vaile*, concluding that its holding compelled the court to apply judicial estoppel. Finally, the district court found that "because neither party comes to this court with clean hands, neither party shall receive an award of attorney's fees against the other." The district court therefore denied Rajwant's motion to set aside the 2004 decree and Jaswinder's motion for attorney fees. Rajwant appealed, and Jaswinder cross-appealed.

DISCUSSION

Rajwant's NRCP 60(b) motion was timely

As a threshold issue, we first address Jaswinder's argument that Rajwant's motion to set aside the divorce decree was untimely. Jaswinder challenges the district court's finding that the State of Nevada was the injured party, so that Rajwant's motion was not subject to NRCP 60(c)'s six-month limitations period. He also argues that Rajwant failed to file her motion within a reasonable time because she moved to set aside the divorce decree 14 years after it was entered.

We review an order denying an NRCP 60(b) motion to set aside a judgment for an abuse of discretion. *Rodriguez v. Fiesta Palms, LLC*, 134 Nev. 654, 656, 428 P.3d 255, 257 (2018). NRCP 60(c) requires a party to file a motion for relief from judgment "within a reasonable time." NRCP 60(c) imposes an additional time limit on motions based on fraud under NRCP 60(b)(3), which must be filed within six months of the notice of entry of the order. This time limit applies to fraud "by an opposing party" and does not apply to fraud on the court. *See* NRCP 60(b)(3) (defining fraud for purposes of an NRCP 60(b) motion to set aside); *see also NC-DSH, Inc. v. Garner*, 125 Nev. 647, 652, 218 P.3d 853, 857 (2009) (addressing an earlier version of NRCP 60(b)(3) with substantially similar language and providing that fraud by an attorney is not fraud by an adverse party).

Jaswinder failed to cogently argue on appeal that the district court incorrectly found that Rajwant's motion was *not* based on the type of fraud contemplated in NRCP 60(b)(3). Further, he seemingly ignored that Rajwant *also* based her motion on NRCP 60(b)(4), which is not subject to the six-month limitations period. The district court therefore did not abuse its discretion when it found that Raj-

want needed only to file her motion "within a reasonable time." *See* NRCP 60(c). Nor did the court abuse its discretion when it concluded that she did so. Rajwant moved to set aside the divorce decree two months after she discovered Jaswinder had married someone else. She testified that up until that point, she believed the 2004 divorce was merely a "paper divorce," as Jaswinder had told her. She also testified that she did not believe she and Jaswinder were divorced because they continued living together. Based on this testimony, which the district court found credible, we conclude the district court did not abuse its discretion when it determined that Rajwant's motion was timely.

The district court erred in its application of Vaile

We next address Rajwant's argument that the district court erred when it found that, under *Vaile*, she was judicially estopped from challenging the divorce decree. In its order, the district court found that neither Jaswinder nor Rajwant lived in Nevada, so the parties committed fraud on the court when they filed the joint petition for divorce. Nonetheless, the court determined, based solely on Rajwant's failure to provide evidence of duress or coercion, that Rajwant was judicially estopped from challenging the decree under *Vaile*. Rajwant argues *Vaile* is distinguishable, so the district court erred when it applied judicial estoppel based on this precedent. While we are not persuaded that *Vaile* is distinguishable, we agree the district court erroneously applied *Vaile* in concluding judicial estoppel precluded Rajwant's motion. *Deja Vu Showgirls of Las Vegas, LLC v. State, Dep't of Taxation*, 130 Nev. 711, 716, 334 P.3d 387, 391 (2014) (providing that whether judicial estoppel applies is a question of law that we review de novo).

In *Vaile*, we addressed whether a divorce decree entered without jurisdiction was void or voidable. We concluded that when evidence is admitted demonstrating the parties resided in Nevada for the requisite six-week period before filing for divorce, but in fact neither party ever resided in Nevada, then the district court lacked jurisdiction and the decree is voidable. *Vaile*, 118 Nev. at 271-72, 44 P.3d at 513. Having concluded that the divorce decree was voidable, we next considered whether the former wife, who admitted to Nevada residency when seeking the divorce, was judicially estopped from later challenging the divorce decree for lack of jurisdiction. *Id.* at 273, 44 P.3d at 514. We concluded that under the circumstances of the case, judicial estoppel applied, and we rejected the former wife's defense that she signed the divorce decree under duress or coercion. *Id.* at 274, 44 P.3d at 514.

The district court's determination that the 2004 divorce decree was voidable under *Vaile* was not erroneous. By presenting an affidavit of a resident witness, the parties here made a colorable case for jurisdiction at the time the district court entered the divorce decree. The divorce decree was therefore not void. However, it could still

be *voidable* if Rajwant demonstrated that the district court did not have jurisdiction at the time it entered the divorce decree. At the evidentiary hearing, Jaswinder alleged that he and Rajwant lived with a friend for six weeks before filing for divorce in Nevada, but countless discrepancies discredit his testimony. Significantly, Rajwant testified that neither she nor Jaswinder lived in Nevada, which the district court found credible. Because the district court is in a better position to assess the credibility of witnesses testifying at an evidentiary hearing, we defer to its assessment of Rajwant's testimony. *See Ybarra v. State*, 127 Nev. 47, 58, 247 P.3d 269, 276 (2011) ("Matters of credibility . . . remain . . . within the district court's discretion."). The district court therefore did not err when it found that neither party resided in Nevada for the requisite six weeks, and the divorce decree was voidable under *Vaile*.

The district court's application of judicial estoppel, however, was erroneous. Judicial estoppel prevents a party from stating a position in one proceeding that is contrary to his or her position in a previous proceeding. *Vaile*, 118 Nev. at 273, 44 P.3d at 514. Well-established caselaw sets forth a five-factor test for courts to consider when determining whether judicial estoppel applies: whether "(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake." *In re Frei Irrevocable Tr. Dated Oct. 29, 1996*, 133 Nev. 50, 56, 390 P.3d 646, 652 (2017) (internal quotation marks omitted).

In *Vaile*, we did not focus on this five-factor test.[2] Instead, we addressed the applicability of a defense to the doctrine of judicial estoppel—namely, whether the former wife provided sufficient evidence to prove that she signed the divorce pleadings under duress or coercion, thereby precluding application of the doctrine. We concluded that because the district court determined that the former wife "was not coerced or operating under duress," it correctly rejected her defense. *Vaile*, 118 Nev. at 273, 44 P.3d at 514. We therefore affirmed the district court's application of judicial estoppel. *Id.*

The district court here relied primarily on our holding regarding duress and coercion—a *defense* to judicial estoppel—to determine

[2]We nonetheless considered and addressed all five factors of the test. First, we concluded that the former wife successfully asserted that her husband was a resident of Nevada in her answer but asserted a contrary position in her motion to set aside, covering the first four factors in the test for judicial estoppel. *Vaile*, 118 Nev. at 273-74, 44 P.3d at 514. Next, we concluded that the former wife "knew that [her husband] had not resided in Nevada for six weeks when she signed the [A]nswer," recognizing that the former wife's actions were not the result of ignorance, fraud, or mistake under the fifth factor of the test for judicial estoppel. *Vaile*, 118 Nev. at 274, 44 P.3d at 514.

that judicial estoppel applied. In doing so, it failed to first consider whether the five-factor test favored application of judicial estoppel. And although a district court's decision to apply judicial estoppel is discretionary, "judicial estoppel should be applied only when a party's inconsistent position arises from *intentional* wrongdoing or an attempt to obtain an unfair advantage." *NOLM, LLC v. Cty. of Clark*, 120 Nev. 736, 743, 100 P.3d 658, 663 (2004) (internal quotation marks omitted) (emphasis added). A party seeking application of this doctrine must therefore show that "the first position was not taken as a result of ignorance, fraud, or mistake." *Id.* (internal quotation marks omitted). Significantly, the district court failed to make findings regarding whether Rajwant was operating under ignorance, fraud, or mistake when she signed the divorce decree, in light of her claims that she could not read or understand the decree. Had the district court made findings concerning this factor and determined that Rajwant *was* operating under ignorance, fraud, or mistake, it could have declined to apply the doctrine of judicial estoppel without ever reaching the issue of whether Rajwant's defense of duress and coercion was proven.

We recognize that *Vaile* did not focus on the five-factor test in applying the doctrine of judicial estoppel, which caused confusion regarding the district court's obligation to consider this test and make findings for appellate review. We therefore take this opportunity to clarify that *Vaile* did not overrule or alter the caselaw setting forth the five-factor test. After considering and making findings concerning these factors and determining that judicial estoppel applies, district courts can *then* determine whether defenses such as duress or coercion preclude application of the doctrine. Because the district court here did not make findings regarding the five-factor test in its determination of whether judicial estoppel applied, we conclude that it erred.[3]

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[3]Insofar as Rajwant raises arguments that are not specifically addressed in this opinion, we have considered the same and conclude they need not be reached. This includes numerous arguments Rajwant failed to raise before the district court and arguments that are not dispositive given our reversal of the district court's order. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) ("A point not urged in the trial court . . . is deemed to have been waived and will not be considered on appeal."); *see also First Nat'l Bank of Nev. v. Ron Rudin Realty Co.*, 97 Nev. 20, 24, 623 P.2d 558, 560 (1981) ("In that our determination of the first issue is dispositive of this case, we do not reach the second issue . . . .").

We also decline to overturn *Vaile* because Rajwant fails to demonstrate that its reasoning is clearly erroneous or otherwise flawed. *See Miller v. Burk*, 124 Nev. 579, 597, 188 P.3d 1112, 1124 (2008) ("[U]nder the doctrine of stare decisis, we will not overturn [precedent] absent compelling reasons for so doing."); *cf. Armenta-Carpio v. State*, 129 Nev. 531, 536, 306 P.3d 395, 398 (2013) (departing from precedent but explaining that the decision was "clearly erroneous" and the foundational problems were "more than a mere disagreement with that decision" (internal quotation marks omitted)).

CONCLUSION

We clarify that a district court considering whether to apply the doctrine of judicial estoppel should first consider the five-factor test set forth in *Frei Irrevocable Trust*, 133 Nev. at 56, 390 P.3d at 652, before considering whether a party sufficiently raised a defense to the application of the doctrine. Because the district court did not analyze these factors, we conclude it erred. We therefore reverse its order denying Rajwant's motion to set aside the 2004 divorce decree and remand for the district court to consider whether this test favors application of judicial estoppel.[4]

Stiglich and Silver, JJ., concur.

THOMAS WILLIAM RANDOLPH, Appellant, *v.*
THE STATE OF NEVADA, Respondent.

No. 73825

December 10, 2020 477 P.3d 342

Appeal from a judgment of conviction, pursuant to a jury verdict, of conspiracy to commit murder and two counts of first-degree murder with the use of deadly weapon. Eighth Judicial District Court, Clark County; Stefany Miley, Judge.

Reversed and remanded.

Sandra L. Stewart, Mesquite, for Appellant.

Aaron D. Ford, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, and *David L. Stanton* and *Charles W. Thoman*, Chief Deputy District Attorneys, Clark County, for Respondent.

Before the Supreme Court, En Banc.

OPINION

By the Court, Silver, J.:

A jury convicted appellant Thomas Randolph of conspiring with a hitman to have his sixth wife murdered during a staged burglary and then murdering the hitman. In this appeal, we consider whether the events surrounding the death of Randolph's second wife were

[4]Because we reverse the district court's order denying Rajwant's motion to set aside, we need not reach Jaswinder's argument that the district court abused its discretion when it denied his motion for attorney fees under NRS 18.010(2)(b) and EDCR 7.60.

admissible under NRS 48.045(2), which provides that evidence of other bad acts is inadmissible unless offered to prove something other than the defendant's criminal propensity. Because the danger of unfair prejudice substantially outweighed any probative value, we hold that the district court abused its discretion in admitting the prior-bad-act evidence. And, because the State did not meet its burden of proving the error was harmless, we reverse the judgment of conviction and remand for a new trial.

FACTS AND PROCEDURAL HISTORY

On the evening of May 8, 2008, Randolph called 9-1-1 to report that an intruder shot his wife and that he shot and killed the intruder. Law enforcement responded and discovered the bodies of Sharon Randolph and Michael Miller. Sharon died of a single gunshot wound to the head. Miller sustained five gunshot wounds, two of them to the head.

According to Randolph, when he and Sharon returned home from a night out, Sharon exited the vehicle and entered the house while he pulled their vehicle into the garage. After lingering in the garage, he then entered the house to find Sharon lying face down in the hallway. Startled by unexpected movement, Randolph grabbed one of his handguns from a nearby room and encountered a masked intruder. Randolph scuffled with the intruder in the hallway before shooting him multiple times. The intruder collapsed in the garage, where Randolph fired two more shots into the intruder's head. Randolph recognized the intruder as Miller, a person whom he had befriended a few months before and with whom he had looked at jet skis mere hours before the home invasion.

The scene of the killings raised a number of questions about Randolph's version of events, and detectives began to suspect that Randolph was involved in Sharon's murder based on inconsistencies between his story and the physical evidence. Further stoking suspicions about Randolph's involvement, law enforcement uncovered evidence that Randolph took out multiple life insurance policies on Sharon before the killings and had an extensive, secretive relationship with Miller. For example, the two men often spoke in private and exchanged hundreds of phone calls in the months before the alleged burglary. Additionally, prosecutors learned that Randolph's second wife, Becky, died in Utah in 1986 from a single gunshot wound to the head. Although Becky's death was initially considered a suicide, Utah authorities ultimately charged Randolph with Becky's murder based largely on information obtained from Randolph's former friend Eric Tarantino. According to Tarantino, he and Randolph met while working together. They became friends, and Tarantino worked odd jobs for Randolph after he was laid off. The friendship changed when Randolph began asking generally whether Tarantino could hurt someone. Their discussions eventually focused

on killing Randolph's then-wife Becky during different scenarios, such as a staged burglary of Randolph's home. Randolph indicated to Tarantino that he wanted Becky killed so he could collect the money from her life insurance policies.

During the Utah criminal proceedings, Randolph solicited an undercover police officer to "whack" Tarantino before Tarantino could testify against him at trial. To achieve that end, Randolph dispatched his then-girlfriend Wendy Moore to deliver payment to the purported hitman. After the exchange, Utah authorities charged Randolph for the incident, and he pleaded guilty to felony witness tampering. In 1989, a Utah jury acquitted Randolph on the murder charge. Randolph subsequently had all the records related to his prosecution for murder and conviction for witness tampering expunged in Utah.

In this case, the State charged Randolph with conspiracy to commit murder and two counts of murder with the use of a deadly weapon, also filing a notice of intent to seek the death penalty for both murders.[1] The State theorized that Randolph enlisted Miller to kill Sharon during a staged burglary in order to collect the proceeds from her life insurance policies, and after Miller shot and killed Sharon, Randolph shot and killed Miller. Before trial, the State filed a pretrial motion seeking to admit the Utah evidence to prove motive, intent, preparation, plan, knowledge, and identity. The district court held a *Petrocelli*[2] hearing where the State called a single witness—William McGuire, the prosecutor at Randolph's murder trial in Utah—to provide an offer of proof. Over Randolph's objection, the district court found the Utah evidence admissible in the Nevada trial. At trial, the State presented extensive testimony of the Utah events from McGuire, as well as from Utah Detective Scott Conley, Tarantino, and Moore. After deliberations, the jury convicted Randolph on all counts and sentenced him to death. This appeal followed.

DISCUSSION

The primary question on appeal is whether the district court abused its discretion in admitting prior-bad-act evidence of the Utah events at trial. Evidence of other crimes, wrongs, or acts is prohibited to prove a person's character or propensity to act in conformity with a character trait. NRS 48.045(2). However, such evidence may "be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Id*. The proponent of prior-bad-act evidence "must request a hearing and establish that: (1) the prior bad act is

[1]The State also charged Randolph with burglary while in possession of a deadly weapon but later dismissed that charge.

[2]*Petrocelli v. State*, 101 Nev. 46, 692 P.2d 503 (1985), *superseded in part by statute as stated in Thomas v. State*, 120 Nev. 37, 83 P.3d 818 (2004).

relevant to the crime charged and for a purpose other than proving the defendant's propensity, (2) the act is proven by clear and convincing evidence, and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice." *Bigpond v. State*, 128 Nev. 108, 117, 270 P.3d 1244, 1250 (2012). We review the admission of prior-bad-act evidence for an abuse of discretion. *Newman v. State*, 129 Nev. 222, 231, 298 P.3d 1171, 1178 (2013).

The State's pretrial offer of proof

We first consider the State's method of proving the prior bad acts by making an offer of proof. Generally, "[a]n offer of proof provides an evidentiary basis for a district court's decision." *Santiago v. State*, 644 N.W.2d 425, 442 (Minn. 2002). The district court must be satisfied that the offer will lead to the introduction of legally admissible evidence. "[A]n adequate offer of proof can be made without producing all the witnesses if the offer is sufficiently specific and there is nothing in the record to indicate the proponent's bad faith or inability to produce the proof." Robert P. Mosteller, ed., *McCormick on Evidence* § 51 (8th ed. 2020) (internal footnote omitted). NRS 47.080 contemplates "offers of proof in narrative or question and answer form." Thus, when the State seeks to admit prior-bad-act evidence, it can apprise the court of what the prior-bad-act evidence will be or present the evidence through witness testimony.

In this case, the State chose the latter method by calling McGuire to testify. Among Randolph's objections to McGuire's testimony, he argued that McGuire did not witness any of his alleged misconduct and could only offer hearsay. The State contended that offers of proof were necessarily based on hearsay. Over Randolph's objections, the district court allowed McGuire to testify.

We conclude that the district court erred in finding the State proved the prior bad acts by clear and convincing evidence based on McGuire's testimony alone. The record shows that while McGuire testified about investigating Becky's death and Randolph's attempts to have Tarantino killed, he had no firsthand knowledge about Randolph's attempts to recruit Tarantino to kill Becky or Randolph's ultimate conviction for witness tampering because he did not prosecute that case. The majority of McGuire's testimony consisted of explaining what Tarantino and other Utah authorities told him. His lack of firsthand knowledge about the actual bad acts the State sought to admit is problematic. *See Lane v. Second Judicial Dist. Court*, 104 Nev. 427, 446, 760 P.2d 1245, 1257 (1988) ("[T]o be competent to testify, a witness must have personal knowledge of the subject of his testimony."); *see also* Robert P. Mosteller, ed., *supra*, § 10 ("[A] person who has no knowledge of a fact except what another has told her does not satisfy the requirement of knowledge

from observation for that fact."). Accordingly, the State's offer of proof proved very little.

Further, the jury in Becky's murder trial acquitted Randolph. This casts additional doubt on the district court's finding that the State proved the Utah acts by clear and convincing evidence. While "an acquittal in a criminal case does not preclude the Government from relitigating an issue when it is presented in a subsequent action governed by a lower standard of proof," *Dowling v. United States*, 493 U.S. 342, 349 (1990), Randolph's acquittal certainly should have raised concerns for the district court about the quality of Tarantino's proposed testimony as relayed by McGuire. Because the State's only offer of proof was made through a witness with limited first-hand knowledge, we conclude the district court abused its discretion in finding that the prior bad acts were proven by clear and convincing evidence based on the State's offer of proof made by this witness.[3] *Cf. Salgado v. State*, 114 Nev. 1039, 1043, 968 P.2d 324, 327 (1998) (providing that, after an offer of proof, clear and convincing evidence can only be established when "combined with the quality of the evidence actually presented to the jury").

Relevance for a permissible purpose

We next address the district court's finding that the Utah evidence was relevant for a proper purpose. To be relevant, evidence need only have "any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable." NRS 48.015. We conclude the district court improperly allowed the State's witnesses to testify to irrelevant and prejudicial facts related to the Utah events.

The district court found the Utah evidence relevant to Randolph's motive, intent, preparation, plan, knowledge, and identity. Some of the prior-bad-act evidence was relevant for a nonpropensity purpose. For example, regarding the relevance of Randolph's attempts to convince Tarantino to kill Becky for a portion of her life insurance benefits and soliciting Tarantino's murder after he cooperated with Utah authorities, we agree with the district court that these acts may have had relevance for a proper nonpropensity purpose under NRS 48.045(2). Randolph claimed that he justly killed an intruder and only realized after the shooting that it was Miller, a person he knew and had a relationship with. Thus, evidence that Randolph previously attempted to recruit Tarantino to kill his then-wife Becky during a staged burglary for her life insurance payout may have been relevant to Randolph's involvement with Miller or his intent to enter into the

[3]We note that this error is not dispositive because other witnesses with first-hand knowledge testified at trial. *See Qualls v. State*, 114 Nev. 900, 903, 961 P.2d 765, 767 (1998) (providing that "a rule of automatic reversal for failure to conduct a proper *Petrocelli* hearing, regardless of a lack of prejudicial effect caused by the admission of the evidence, cannot be justified").

conspiracy.[4] *See United States v. Adams*, 401 F.3d 886, 898-99 (8th Cir. 2005) (finding evidence related to the defendant's involvement in an earlier drug conspiracy and his falling out with members of that conspiracy was relevant to show his intent to enter into a new conspiracy under NRS 48.045(2)'s federal analog).

While the district court's pretrial decision seemingly admitted two discrete bad acts (Randolph attempted to convince Tarantino to kill Becky for a portion of her life insurance proceeds and solicited Tarantino's murder after he cooperated with Utah authorities), the actual presentation of the Utah events is problematic. Specifically, at trial, the State presented many additional bad acts related to the Utah events that far exceeded the scope of its offer of proof upon which the district court determined the evidence was admissible.

Tarantino, Moore, and Conley all gave irrelevant and prejudicial testimony at trial. First, in addition to recounting Randolph's attempts to convince him to kill Becky for a portion of her life insurance proceeds, Tarantino testified that Randolph beat him so severely that he suffered an injured spleen and torn back muscles, among other injuries. Randolph loaded Tarantino into his car, drove him to his wife's workplace, continued to beat him, and dumped him in the parking lot. Randolph then entered Tarantino's wife's workplace and put the bloody gloves he had been wearing on the counter. The jury also heard that Tarantino needed to be hospitalized to treat his wounds and that, within hours of his release from the hospital, Randolph showed up at Tarantino's home, inflicted another beating, and stole Tarantino's medications. Randolph threatened to kill him if he told anyone about the assaults. These bad acts had no relevance to prove that Randolph solicited Miller to kill Sharon for her life insurance proceeds and then murdered Miller during the staged burglary. Additionally, Moore testified that she dated Randolph while he awaited trial for Becky's murder. During that time, he directed Moore to deliver a car title to another individual. Believing this individual would aid Randolph's legal defense, Moore agreed to deliver the document, bringing her eight-year-old son along. After she handed over the document, Utah law enforcement put a gun to Moore's head and arrested her. While possibly having some relevance to the State's theory that Randolph killed Miller to silence him as a potential witness, the evidence was needlessly cumulative, *see* NRS 48.035(2), because McGuire and Conley had already testified that Randolph had been charged with conspiring to murder Tarantino and that he pleaded guilty to felony tampering with a witness. Finally, in addition to explaining that Randolph had been charged for his efforts to solicit Tarantino's murder, Detective Conley suggest-

[4]Because we have determined that the acts discussed above were relevant for a nonpropensity purpose, we need not address whether they were relevant for all the purposes identified by the district court.

ed that Randolph ran in a "circle" of people associated with other criminal acts, which had no relevance to the charged crimes. These additional bad acts only served to show Randolph's bad character or his predisposition to commit violent crimes. *See Longoria v. State*, 99 Nev. 754, 756, 670 P.2d 939, 940 (1983) (holding the prosecutor improperly questioned the defendant about a prior, unrelated incident because the evidence principally demonstrated the defendant's bad character). This evidence therefore was not admissible under NRS 48.045(2).

Balancing the probative value and the danger of unfair prejudice

Finally, we consider the district court's finding that the probative value of the Utah evidence was not substantially outweighed by the danger of unfair prejudice, and we conclude the district court erred. While relevant evidence is generally admissible, *see* NRS 48.025, "[a] presumption of inadmissibility attaches to all prior bad act evidence." *Rosky v. State*, 121 Nev. 184, 195, 111 P.3d 690, 697 (2005). The presumption of inadmissibility guards against unfair prejudice that may undermine an accused's right to a fair trial by enticing jurors to resolve a case based on emotion, sympathy, or another improper reason disconnected from an impartial evaluation of the evidence. *See State v. Eighth Judicial Dist. Court (Armstrong)*, 127 Nev. 927, 933-34, 267 P.3d 777, 781 (2011) (discussing different forms of unfair prejudice); *see also Old Chief v. United States*, 519 U.S. 172, 180 (1997) (" '[U]nfair prejudice,' as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged."). "In assessing 'unfair prejudice,'" we look to the basis for the admission of prior-bad-act evidence and "the use to which the evidence was actually put." *Fields v. State*, 125 Nev. 785, 790, 220 P.3d 709, 713 (2009). When balancing probative value against the danger of unfair prejudice, courts consider a variety of factors,

> including the strength of the evidence as to the commission of the other crime, the similarities between the crimes, the interval of time that has elapsed between the crimes, the need for the evidence, the efficacy of alternative proof, and the degree to which the evidence probably will rouse the jury to overmastering hostility.

State v. Castro, 756 P.2d 1033, 1041 (Haw. 1988) (quoting E.W. Cleary, *McCormick on Evidence* § 190 (3d ed. 1984)); *see also Franks v. State*, 135 Nev. 1, 6, 432 P.3d 752, 756 (2019) (applying similar factors to the admission of prior sexual offenses to show propensity under NRS 48.045(3) (citing *United States v. LeMay*, 260 F.3d 1018, 1028 (9th Cir. 2001))).

Randolph's attempts to enlist Tarantino to kill Becky and later soliciting his murder have some similarities to the present case—Randolph purportedly wanted to have both Becky and Sharon killed for their life insurance benefits, sought a friend to aid him in each plot, and then pursued a means to silence those friends in an attempt to insulate himself from criminal liability. Randolph, however, was acquitted of the murder charge in Utah, which goes to the strength of Tarantino's testimony, as the jury in Utah heard the same evidence and entered a verdict of not guilty. *See* 2 Edward J. Imwinkelried, *Uncharged Misconduct Evidence* § 8:25 (2020) (discussing that "the lack of a conviction reduces the probative value of the uncharged misconduct evidence"). And the Utah events occurred more than 20 years before the Nevada killings. In those intervening decades, Randolph had three other marriages before marrying Sharon. Finally, while the Utah evidence bolstered the State's case, the State had other evidence from which the jury could infer the criminal conspiracy and that Randolph was not an innocent bystander or victim. *See Old Chief*, 519 U.S. at 184 (" '[P]robative value' . . . may be calculated by comparing evidentiary alternatives."). The State presented evidence that Randolph took out life insurance policies for Sharon and that he was overly concerned about the money from Sharon's estate, providing a motive. The State also presented circumstantial evidence of the conspiracy between Randolph and Miller that detailed their extensive, secretive relationship. *See Gaitor v. State*, 106 Nev. 785, 790 n.1, 801 P.2d 1372, 1376 n.1 (1990) (providing that the agreement to conspire is rarely shown by direct evidence and is instead usually inferred by circumstantial evidence and the conduct of the parties), *overruled on other grounds by Barone v. State*, 109 Nev. 1168, 866 P.2d 291 (1993). For example, in the months before the incident, the two men exchanged almost 300 phone calls, most of them initiated by Randolph. They often had lengthy private conversations outside Miller's residence and in a back room at Randolph's residence. And Miller told his aunt and uncle shortly before his death that he was planning on moving away from Nevada and that he and Randolph were coming into a large sum of money.

But ultimately, the State lured the jury into finding Randolph guilty based on myriad other bad acts that were not even marginally relevant for a nonpropensity purpose, rather than constraining the testimony to evidence relevant to the charged offenses.[5] Notably, Tarantino's testimony about Randolph inflicting multiple beatings, stealing his medication, and threatening him only served to show Randolph's bad character or his predisposition to commit violent crimes. Moore's testimony unfairly prejudiced Randolph by indi-

[5]As discussed above, the record reflects that, at trial, the State presented extensive testimony regarding bad acts that went far beyond the offer of proof elicited from the testimony of the one witness from the *Petrocelli* hearing.

cating that he had the propensity to use and endanger his romantic partners for his own ends. Put another way, Randolph lied to Moore about the nature of delivering the car title, placed her and her eight-year-old child in mortal danger, and exposed her to grave criminal liability. And Conley's testimony implied Randolph associated with other criminals. Moreover, the State and the Utah witnesses repeatedly referred to Becky's death in the context of Randolph being arrested and tried for her murder. Despite the State's representations that Becky's death was not at issue and the district court's order to refer to her death as "the Utah case," the extensive discussion of the murder prosecution strongly implied that Randolph was wrongfully acquitted in the Utah case.[6] The danger inherent in admitting prior-bad-act evidence "is particularly great where . . . the extrinsic activity was not the subject of a conviction; the jury may feel that the defendant should be punished for that activity even if he is not guilty of the offense charged." *United States v. Beechum*, 582 F.2d 898, 914 (5th Cir. 1978); *see also* Edward J. Imwinkelried, *supra*, § 8:25 ("[T]he lack of a conviction creates the probative danger that the jury will conclude that the defendant unjustly escaped conviction for the uncharged crime.").

In sum, this evidence only served to show the jury that Randolph is a deceitful and violent man. Given the negligible relevance to the Nevada charges, it is clear that these myriad bad acts functioned only to prove propensity, i.e., that Randolph is a bad person, prone to committing, or attempting to commit, brutal crimes, so he must have committed the charged crimes. *See Propensity, Black's Law Dictionary* (11th ed. 2019) ("A natural tendency to behave in a particular way; esp., the fact that a person is prone to a specific type of bad behavior."). Because the district court did not sufficiently limit the State's presentation of the Utah evidence, the jury was inundated with evidence of Randolph's bad character. *See Harris v. State*, 134 Nev. 877, 880, 432 P.3d 207, 211 (2018) ("NRS 48.035 requires the district court to act as a gatekeeper by assessing the need for the evidence on a case-by-case basis and excluding it when the benefit it adds is substantially outweighed by the unfair harm it might cause."); *see also People v. Denson*, 902 N.W.2d 306, 316 (Mich. 2017) ("It is incumbent on a trial court to vigilantly weed out character evidence that is disguised as something else." (internal quotation marks omitted)). Given the deluge of bad character evidence, the danger that the Utah evidence would be used for the forbidden

[6]Both at oral argument and below, the State argued that the Utah evidence was not a relitigation of Becky's death and conceded that her death had little relevance to the Nevada case. In fact, in its decision to admit the prior-bad-act evidence, the district court noted that the State "is not seeking to introduce the Utah case to show that [Randolph] actually murdered Becky Randolph." Accordingly, the repeated references during trial to her death in the context of murder was overly prejudicial.

purpose of convicting Randolph simply because he is a bad person drastically increased. Consequently, the jury could believe that, because Randolph did it before, he must have done it again—or as the State put it: "It's the conspiracy, it just came back into fruition 20 years later . . . . The only thing he did was change up the players and change up the outcome." This strengthens the impression that "the evidence was presented or argued at trial for its forbidden tendency to prove propensity." *Fields*, 125 Nev. at 790, 220 P.3d at 713. Therefore, considering these factors, we conclude the danger of unfair prejudice substantially outweighed any probative value of the Utah evidence, and the district court abused its discretion by allowing its admission.[7]

Harmless error

Having concluded that the district court abused its discretion by admitting the prior-bad-act evidence, we must determine whether the error was harmless. *See Rosky*, 121 Nev. at 198, 111 P.3d at 699 ("Errors in the admission of evidence under NRS 48.045(2) are subject to a harmless error review."). Such an error is harmless only "if it did not have a substantial and injurious effect or influence in determining the jury's verdict," *Hubbard v. State*, 134 Nev. 450, 459, 422 P.3d 1260, 1267 (2018), and "[t]he State bears the burden of proving that the error was harmless." *Belcher v. State*, 136 Nev. 261, 267, 464 P.3d 1013, 1023 (2020).

In this case, the State argues that any error in the admission of the prior-bad-act evidence was harmless because the State needed only to show the evidence was relevant for one permissible purpose under NRS 48.045(2) and because the evidence of guilt was overwhelming. The first argument is inconsequential. Having concluded that the danger of unfair prejudice substantially outweighed any probative value of the Utah evidence, the State cannot salvage its case by identifying a permissible, nonpropensity reason to admit the evidence. The State's second argument is insufficient to carry its burden. That argument amounts to a brief generalized statement that *any error* in the case is harmless based on "extensive and compel-

[7]Given the glut of bad-act evidence, we are unconvinced the district court's terse limiting instruction effectively addressed or allayed the substantial prejudice in this case. *See Chavez v. State*, 125 Nev. 328, 345, 213 P.3d 476, 488 (2009) (providing that the district court must "issue a limiting instruction to the jury about the limited use of bad act evidence"). Here, the district court's instruction only referred to "the Utah matters" without specifying what specific evidence or acts the jury could consider, and, by simply listing nearly every exception under NRS 48.045(2), the jury had little guidance on the purpose of the evidence or how the exceptions applied. *See United States v. McGill*, 815 F.3d 846, 889 (D.C. Cir. 2016) (providing that a proper limiting instruction "should identify the evidence at issue and the particular purpose for which a jury could permissibly use it, rather than providing an incomplete description of the evidence at issue and an undifferentiated laundry list of evidentiary uses that may confuse more than it instructs").

ling evidence" of Randolph's guilt. But the State then references a section of its answering brief that discusses both the evidence that Randolph conspired with Miller and the prior-bad-act evidence. We cannot look to the prior-bad-act evidence to conclude that the error in admitting that evidence was harmless. The State offers no other meaningful assessment of the evidence against Randolph aside from the prior-bad-act evidence or whether the erroneously admitted prior-bad-act evidence influenced the verdict. *See Kotteakos v. United States*, 328 U.S. 750, 765 (1946) ("The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence."). Thus, although the State did argue harmlessness, its failure to provide any substantive analysis leaves this court in the same position as if the State had not argued harmlessness at all—we are left with the question of whether to dive into the depths of that review sua sponte. *Cf. Belcher*, 136 Nev. at 268, 464 P.3d at 1024; *see also Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (providing that a party must "present relevant authority and cogent argument; issues not so presented need not be addressed by this court"). We will do that only in extraordinary cases. *Belcher*, 136 Nev. at 268, 464 P.3d at 1023.

When deciding whether to review harmlessness sua sponte, we consider "(1) the length and complexity of the record, (2) whether the harmlessness of an error is certain or debatable, and (3) the futility and costliness of reversal and further litigation." *Id*. at 268, 464 P.3d at 1024 (quoting *United States v. Rodriguez*, 880 F.3d 1151, 1164 (9th Cir. 2018)). Here, these factors weigh against sua sponte review. This case presents a complex and lengthy 41-volume record spanning over eight years of proceedings. At oral argument the State equivocated about its ability to secure a conviction absent the prior-bad-act evidence, signaling the harmlessness of the error is surely debatable here. And concerns over the cost or futility of further litigation do not justify making the State's argument for it. Therefore, absent an adequate presentation by the State, we decline to sua sponte evaluate whether the error at issue in this death penalty case is harmless. Accordingly, we reverse the judgment of conviction and remand this matter for a new trial.[8]

Pickering, C.J., and Gibbons, Hardesty, Parraguirre, Stiglich, and Cadish, JJ., concur.

[8]Randolph also argues that his right to a speedy trial was violated, the State presented insufficient evidence to support his conviction for conspiracy to commit murder, and the death penalty is unconstitutional. We have considered these claims and conclude they lack merit. And, given our disposition in this matter, we need not address Randolph's other claims of error.

MICHAEL PATRICK LATHIGEE, Appellant, *v.* BRITISH COLUMBIA SECURITIES COMMISSION, Respondent.

No. 78833

December 10, 2020 477 P.3d 352

Appeal from a final district court order recognizing and enforcing a Canadian judgment. Eighth Judicial District Court, Clark County; Adriana Escobar, Judge.

Affirmed.

[Rehearing denied March 18, 2021]

Adkisson PLLC and *Jay D. Adkisson*, Las Vegas; *Claggett & Sykes Law Firm* and *Micah S. Echols*, Las Vegas, for Appellant.

Naylor & Brasterand John M. Naylor and *Jennifer L. Braster*, Las Vegas; *Alverson Taylor & Sanders* and *Kurt R. Bonds* and *Matthew Pruitt*, Las Vegas, for Respondent.

Before the Supreme Court, En Banc.

OPINION

By the Court, Pickering, C.J.:

This is an appeal from a district court decision to recognize and enforce in Nevada the disgorgement portion of a securities-fraud judgment from British Columbia. Appellant Michael Lathigee objects that the disgorgement judgment is in the nature of a fine or penalty, so it should not be enforced outside Canada. We disagree and affirm.

I.

Respondent British Columbia Securities Commission (BCSC) initiated proceedings against Lathigee under the British Columbia Securities Act (BC Securities Act). After a six-day hearing, in which Lathigee participated with counsel, the BCSC found that Lathigee had perpetrated a fraud, violating section 57(b) of the BC Securities Act, when he raised $21.7 million (CAD) from 698 Canadian investors without disclosing the failed financial condition of the entities he and his associate controlled. As sanctions, the BCSC imposed a disgorgement order on Lathigee under section 161(1)(g) of the BC Securities Act. The disgorgement order directs Lathigee to pay the ill-gotten $21.7 million (CAD) to the BCSC. Section 15.1 of the BC Securities Act and its associated regulations provide a notice-and-claim procedure by which the BCSC notifies the public and attempts to return any disgorged funds it recovers to the defrauded investors.

The BCSC also imposed a $15 million (CAD) administrative penalty on Lathigee.

The BCSC registered its decision with the British Columbia Supreme Court—roughly, the equivalent of a Nevada district court. Upon registry, the decision became an enforceable judgment by operation of section 163(2) of the BC Securities Act. Lathigee sought and obtained leave to appeal to British Columbia's highest court, its Court of Appeal, which rejected Lathigee's appeal on the merits. *Poonian v. BCSC*, 2017 BCCA 207 (CanLII). With this, the judgment became final and enforceable under British Columbia law.

Lathigee left Canada and relocated to Nevada without paying the judgment. The BCSC then filed the two-count complaint underlying this appeal in Nevada district court. In its complaint, the BCSC asked the district court to recognize and enforce the $21.7 million (CAD) disgorgement portion of its judgment against Lathigee: (1) under NRS 17.750(1), which directs recognition and enforcement of foreign-country money judgments except, as relevant here, "to the extent that the judgment is . . . [a] fine or other penalty," NRS 17.740(1), (2)(b); and/or (2) as a matter of comity. The complaint did not seek to enforce the $15 million (CAD) administrative penalty the judgment imposed. Despite this, Lathigee objected that the disgorgement portion of the BCSC judgment also constitutes a fine or penalty, so neither NRS 17.750(1) nor comity supports its recognition and enforcement in Nevada.

The case came before the district court on cross-motions for summary judgment. Ruling for the BCSC, the district court recognized the disgorgement judgment as enforceable under NRS 17.750(1). It held that the judgment did not constitute a penalty but, rather, an award designed to afford eventual restitution to the defrauded investors under the notice-and-claim mechanism provided by section 15.1 of the BC Securities Act. In addition, citing the close ties between Canada and the United States and the fact that Canadian courts have recognized and enforced United States Securities Exchange Commission (SEC) disgorgement judgments, the district court recognized the judgment based on comity. Lathigee timely appealed.

II.

Nevada has adopted the Uniform Foreign-Country Money Judgments Recognition Act (2005), 13 pt. II U.L.A. 18-43 (Supp. 2020) (Uniform Act), in NRS 17.700 through NRS 17.820. The Act applies to foreign-country judgments that grant or deny monetary recovery and are "final, conclusive, and enforceable" under the law of the jurisdiction where rendered. NRS 17.740(1). A Nevada court "*shall* recognize a foreign-country judgment to which NRS 17.700 to 17.820, inclusive, apply," NRS 17.750(1) (emphasis added), un-

less one of the grounds for non-recognition stated in NRS 17.750(2) or (3) is proved or one of the categorical exceptions stated in NRS 17.740(2)(a), (b), or (c) applies.[1]

By its terms, the Act does not apply "to the extent that the judgment is . . . [a] fine or other penalty." NRS 17.740(2)(b). But the Act contains a "savings clause," *see* NRS 17.820, under which "courts remain free to consider" whether a judgment that falls outside the Act "should be recognized and enforced under comity or other principles." Uniform Act § 3, cmt. 4, *supra*, 13 pt. II U.L.A. at 26. Essentially, the Act sets base-line standards, not outer limits. It "delineates a minimum of foreign-country judgments that must be recognized by the courts of adopting states, leaving those courts free to recognize other foreign-country judgments not covered by the Act under principles of comity or otherwise." Uniform Act prefatory note, 13 pt. II U.L.A. at 19.

Statutory interpretation presents a question of law to which de novo review applies. *See Friedman v. Eighth Judicial Dist. Court*, 127 Nev. 842, 847, 264 P.3d 1161, 1165 (2011). "In applying and construing the Uniform Foreign-Country Money Judgments Recognition Act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it." NRS 17.810. To this end, we accept as persuasive authority the official comments to the Uniform Act and the decisions of courts elsewhere interpreting it. *See Friedman*, 127 Nev. at 847, 264 P.3d at 1165.

A.

Lathigee admits that the disgorgement judgment grants monetary recovery; that it is final, conclusive, and enforceable under British Columbia law; and that neither the grounds for non-recognition specified in NRS 17.750(2) and (3) nor the categorical exceptions stated in NRS 17.740(2)(a) and (c) apply. NRS 17.750(1) thus mandates recognition of the BCSC's disgorgement judgment except "to the extent" that it is a "fine or other penalty." NRS 17.740(2)(b). That is, in this case, the $21.7 million (CAD) question.

The Uniform Act does not define what constitutes a judgment for a "fine" or "penalty." Its fine-or-penalty exception codifies the common law rule against one sovereign enforcing the criminal laws and penal judgments of another. *Chase Manhattan Bank, N.A. v. Hoffman*, 665 F. Supp. 73, 75 (D. Mass. 1987) (cited in Uniform Act § 3, cmt. 4, 13 pt. II U.L.A. at 26); *see The Antelope*, 23 U.S. 66, 123 (1825) ("The Courts of no country execute the penal laws

[1]"A party resisting recognition of a foreign-country judgment has the burden of establishing that a ground for nonrecognition stated in [NRS 17.750] subsection 2 or 3 exists." NRS 17.750(4). Conversely, "A party seeking recognition of a foreign-country judgment has the burden of establishing that NRS 17.700 to 17.820, inclusive, apply to the foreign-country judgment." NRS 17.740(3).

of another . . . ."). The Supreme Court's decision in *Huntington v. Attrill*, 146 U.S. 657 (1892), stands as the seminal authority on the common law rule against enforcing foreign penal judgments. *Chase Manhattan Bank*, 665 F. Supp. at 75; *see City of Oakland v. Desert Outdoor Advert., Inc.*, 127 Nev. 533, 538, 267 P.3d 48, 51 (2011). As *Huntington* recognizes, 146 U.S. at 666, the word "penal" has "different shades of meaning," depending on context. "The question whether a statute of one state, which in some aspects may be called penal, is a penal law, in the international sense, so that it cannot be enforced in the courts of another state, depends upon . . . whether its purpose is to punish an offense against the public justice of the state, or to afford a private remedy to a person injured by the wrongful act." *Id.* at 673-74.

Consistent with *Huntington*, "the test for whether a judgment is a fine or penalty"—and so outside the Uniform Act's (and NRS 17.750(1)'s) recognition mandate—"is determined by whether its purpose is remedial in nature with its benefits accruing to private individuals, or it is penal in nature, punishing an offense against public justice." Uniform Act § 3, cmt. 4, 13 pt. II U.L.A. at 26. The test is more nuanced than its binary phrasing suggests. A single judgment can include both an unenforceable penalty and an enforceable remedial award. *See* Restatement (Fourth) of the Foreign Relations Law of the United States § 489 cmt. d (Am. Law Inst. 2018). And a money judgment, particularly one that runs in favor of a governmental entity, can serve both remedial and public or penal purposes. Under the Uniform Act, "a judgment that awards compensation or restitution for the benefit of private individuals should not automatically be considered penal in nature and therefore outside the scope of the Act simply because the action is on behalf of the private individuals by a government entity." *Id.* § 3, cmt. 4, 13 pt. II U.L.A. at 26. On the contrary, when a foreign "government agency obtains a civil monetary judgment for purpose[s] of providing restitution to consumers, investors, or customers who suffered economic harm due to fraud, [the] judgment generally should not be denied recognition and enforcement on [the] ground[s] that it is penal . . . in nature, or based on . . . foreign public law." *Id.*; *see* Restatement (Third) of the Foreign Relations Law of the United States § 483 cmt. b (Am. Law Inst. 1987) (defining an unenforceable foreign "penal judgment" as "a judgment in favor of a foreign state or one of its subdivisions" that is "*primarily* punitive rather than compensatory in character") (emphasis added).

Applying these principles to the disgorgement portion of the BCSC judgment, we reject the contention that it constitutes an unenforceable penalty. The BCSC recovered its disgorgement award under section 161(1)(g) of the BC Securities Act. This statute authorizes the BCSC to recover "any amount obtained[,] directly or indirectly, as a result of" the Securities Act violation. Standing alone,

section 161(1)(g)'s purpose is "neither punitive nor compensatory." *Poonian*, 2017 BCCA 207, at 23, ¶ 70. But, unlike the $15 million (CAD) penalty portion of the judgment, which was calculated according to the $1 million (CAD) per violation schedule set by section 162 of the BC Securities Act, the $21.7 million (CAD) disgorgement award represents the exact amount of money Lathigee and his associate obtained from the 698 investors they defrauded. Such disgorgement serves "to eliminate profit from wrongdoing while avoiding, so far as possible, the imposition of a penalty." Restatement (Third) of Restitution and Unjust Enrichment § 51(4) (Am. Law Inst. 2011) (noting that "Restitution remedies that pursue this object are often called 'disgorgement' or 'accounting'"); *see id.* cmt. e ("The object of the disgorgement remedy—to eliminate the possibility of profit from conscious wrongdoing—is one of the cornerstones of the law of restitution and unjust enrichment.").[2] The fact that section 161(1)(g) calculates the disgorgement award by the amount of money the wrongdoer "obtained," not by reference to a schedule of fines or penalties, weighs in favor of treating the BCSC's disgorgement award as remedial, not punitive.

The judgment subjects any recovery the BCSC makes on its section 161(1)(g) disgorgement award to section 15.1 of the BC Securities Act. Section 15.1 and its related regulations provide a notice-and-claim procedure for the BCSC to return any money it collects on the disgorgement award to the investors the Securities Act violation harmed. The award does not represent a fine or penalty that, once collected, the BCSC can keep without obligation to the victims of the fraud. *Cf. City of Oakland*, 127 Nev. at 542, 267 P.3d at 54 (deeming a fine imposed and kept by the City of Oakland for violating its zoning ordinances penal and not compensatory). This, too, weighs in favor of treating the disgorgement award as more remedial than punitive.

Disgorgement in securities enforcement actions can take various forms, not all of them restitutionary. *See* Jennifer L. Schulp, *Liu v. SEC: Limited Disgorgement, But by How Much?*, 2019-2020 Cato Sup. Ct. Rev. 203, 207-10 (2020). But the disgorgement award in this case deprives Lathigee and his associate of the money they obtained from the investors they defrauded. *See Poonian*, 2017 BCCA 207, at 20, 23, ¶¶ 61, 70. And, under section 15.1 and its related regulations, any recovery is designed to "provid[e] restitution

[2]We recognize that the BCSC disgorgement judgment imposes joint and several liability on Lathigee and his associate and the entities they controlled. It did so based on findings that established that Lathigee and his associate and their corporate entities were "effectively one person." *Poonian*, 2017 BCCA 207, at 42-43, 49-51, ¶¶ 133, 154-162. The equally culpable, concerted wrongdoing in which the BCSC found Lathigee and his associate engaged supports the imposition of collective liability without transmuting the award from restitutionary to punitive. *See Liu v. SEC*, 140 S. Ct. 1936, 1949 (2020).

to . . . investors . . . who suffered economic harm due to fraud," not to enrich the BCSC. Uniform Act § 3, cmt. 4, 13 pt. II U.L.A. at 26. We therefore conclude that, for purposes of NRS 17.750(1), the primary purpose of the disgorgement award "is remedial in nature with its benefits accruing to private individuals," not penal, "punishing an offense against public justice." Uniform Act § 3, cmt. 4, 13 pt. II U.L.A. at 26. *See* Restatement (Fourth) of the Foreign Relations Law of the United States § 489 note 4 ("Although courts in the United States applying these rules frequently look to foreign practice, . . . the character of a foreign judgment as [penal] is a question of U.S. law.").

Lathigee acknowledges the statutes and authorities just cited but insists that *Kokesh v. SEC*, 581 U.S. 455 (2017), compels a different conclusion. We cannot agree. *Kokesh* did not concern recognition of a foreign-country disgorgement judgment. "The sole question" in *Kokesh* was "whether disgorgement, as applied in SEC enforcement actions, is subject to [the five-year] limitations period," *id.* at 461 n.3, that 28 U.S.C. § 2462 establishes for an "action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture."

In *Kokesh*, both the district court and the Tenth Circuit Court of Appeals held that § 2462 did not apply to SEC disgorgement claims, which left them with "no limitations period" at all. *Kokesh*, 581 U.S. at 460. The Supreme Court reversed. It held that "[d]isgorgement, as it is applied in SEC enforcement proceedings, operates as a penalty under § 2462." *Id.* at 467. En route to this holding, the Court acknowledged that "disgorgement serves compensatory goals in some cases." *Id.* at 466. But SEC disgorgement actions are not limited to recovery of funds the wrongdoer obtained. *Id.* (noting that "[i]ndividuals who illegally provide confidential trading information have been forced to disgorge profits gained by individuals who received and traded based on that information—even though they never received any profits"). And, unlike a BCSC disgorgement judgment, where any funds recovered are subject to the notice-and-claim procedure BC Securities Act section 15.1 provides victimized investors, no "statutory command" charges the SEC with remitting the disgorged funds it recovers to victims. *Id.* at 465.

In *Liu v. SEC*, 140 S. Ct. 1936 (2020), the Supreme Court returned to *Kokesh*. It confirmed that the sole question *Kokesh* decided was whether 28 U.S.C. § 2462's limitations period applies to SEC disgorgement claims. *Liu*, 140 S. Ct. at 1941. What *Kokesh* did not decide was "whether a § 2462 penalty can nevertheless qualify as 'equitable relief' under [15 U.S.C.] § 78u(d)(5), given that equity never 'lends its aid to enforce a forfeiture or penalty.'" *Id.* at 1941 (quoting *Marshall*

v. Vicksburg, 82 U.S. 146, 149 (1873)); *see id.* at 1946 (brushing aside the claim that the Court "effectively decided in *Kokesh* that disgorgement is necessarily a penalty, and thus not the kind of relief available at equity" with a blunt, "Not so."). Citing the Restatement (Third) of Restitution and Unjust Enrichment § 51, *Liu* recognizes that to the extent a disgorgement award redresses unjust enrichment and achieves restitution, it is situated "squarely within the heartland of equity," 140 S. Ct. at 1943, and does not constitute an impermissible penalty. *See id.* at 1944. Unlike *Kokesh*, which adopted a bright-line rule appropriate to its statute-of-limitations context, *Liu* counsels a case-by-case assessment of whether a disgorgement claim seeks restitution, consistent with equitable principles, or a penalty, which equity does not allow. *See id.* at 1947-50.

B.

Alternatively, even crediting Lathigee's argument that NRS 17.740(2)(b) takes the disgorgement judgment outside NRS 17.750(1)'s mandatory recognition provisions, the district court properly recognized it as a matter of comity. The comity doctrine is "a principle of courtesy by which 'the courts of one jurisdiction may give effect to the laws and judicial decisions of another jurisdiction out of deference and respect.'" *Gonzales-Alpizar v. Griffith*, 130 Nev. 10, 18, 317 P.3d 820, 826 (2014) (quoting *Mianecki v. Second Judicial Dist. Court*, 99 Nev. 93, 98, 658 P.2d 422, 424-25 (1983)); *see Hilton v. Guyot*, 159 U.S. 113, 165 (1895) (stating that comity "contributes so largely to promote justice between individuals, and to produce a friendly intercourse between the sovereignties to which they belong, that courts of justice have continually acted upon it as a part of the voluntary law of nations") (internal quotation marks omitted). Under comity, Nevada courts will not "recognize a judgment or order of a sister state if there is 'a showing of fraud, lack of due process, or lack of jurisdiction in the rendering state.'" *Gonzales-Alpizar*, 130 Nev. at 19-20, 317 P.3d at 826 (quoting *Rosenstein v. Steele*, 103 Nev. 571, 573, 747 P.2d 230, 231 (1987), and adopting the limits on comity stated in the Restatement (Third) of the Foreign Relations Law of the United States § 482 (Am. Law Inst. 1987)). But otherwise, comity may be "appropriately invoked according to the sound discretion of the court acting without obligation." *Mianecki*, 99 Nev. at 98, 658 P.2d at 425; *see In re Stephanie M.*, 867 P.2d 706, 716 (Cal. 1994) (reviewing grant of comity for abuse of discretion).

Lathigee does not raise any of the defenses to comity recognized in *Gonzales-Alpizar* or the Restatement (Third) of Foreign Relations Law § 482. Instead, citing the Restatement (Third) of Foreign Relations Law § 483, he argues that Nevada need not and, under *Kokesh*,

should not grant comity to a foreign-country disgorgement judgment, because such a judgment constitutes a penalty. But neither the Restatement (Third) § 483 nor its comments speak to comity; section 483 simply restates the rule that "[c]ourts in the United States are not required to recognize or enforce judgments for the collection of [fines] or penalties" that NRS 17.740(2)(b) already provides. And, as discussed, *supra*, § II.A, *Kokesh* does not establish the profound policy against recognizing and enforcing foreign-country disgorgement judgments that Lathigee says it does.

The policy of promoting cooperation among nations has special strength as between Canada and the United States. The United States shares a long border with Canada. As the district court found, the SEC and the securities commissions of each of the provinces, including the BCSC, often work together, since the proximity and relations of the two countries make it easy for fraud to move between them. In fact, the United States and Canada have signed a Memorandum of Understanding, which provides that the "Authorities will provide the fullest mutual assistance" "to facilitate the performance of securities market oversight functions and the conduct of investigations, litigation or prosecution." And Canadian courts have upheld SEC disgorgement judgments repeatedly. *United States (SEC) v. Cosby*, 2000 BCSC 338, at 3, 15, ¶¶ 4, 26 (CanLII) (enforcing the disgorgement portion of an SEC judgment against an individual who engaged in fraudulent schemes to raise capital for a Nevada corporation and rejecting the argument that the U.S. disgorgement judgment was "unenforceable" in British Columbia "because it is a foreign penal judgment"); *id*. at 3, 14, ¶¶ 5, 24 (discussing the Canadian decision in *Huntington v. Attrill*, [1893] A.C. 150 (P.C.)); *see United States (SEC) v. Peever*, 2013 BCSC 1090, at 6, ¶ 18 (CanLII) (to similar effect; citing *Cosby*); *United States (SEC) v. Shull*, [1999] B.C.J. No. 1823 (S.C.) (same).

"[I]nternational law is founded upon mutuality and reciprocity . . . ." *Hilton*, 159 U.S. at 228. Recognizing these principles, "Canadian judgments have long been viewed as cognizable in courts of the United States." *Alberta Sec. Comm'n v. Ryckman*, 30 P.3d 121, 126 (Ariz. Ct. App. 2001). The district court properly recognized the BCSC disgorgement judgment under principles of comity.

We therefore affirm.

Gibbons, Hardesty, Parraguirre, Stiglich, Cadish, and Silver, JJ., concur.

JOHN S. WALKER; AND RALPH ORTEGA, PETITIONERS, *v*. THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF WASHOE; AND THE HONORABLE BARRY L. BRESLOW, DISTRICT JUDGE, RESPONDENTS, AND SHEILA MICHAELS; AND KATHERYN FRITTER, REAL PARTIES IN INTEREST.

No. 80358

December 10, 2020 476 P.3d 1194

Original petition for a writ of mandamus challenging a district court order denying two motions to strike trial de novo demands.

Petition denied.

William R. Kendall, Reno, for Petitioners.

Lemons, Grundy & Eisenberg and *Robert L. Eisenberg*, Reno; *Law Office of S. Denise McCurry* and *Adam P. McMillen*, Reno, for Real Parties in Interest.

Before the Supreme Court, PICKERING, C.J., HARDESTY and STIGLICH, JJ.

OPINION

By the Court, PICKERING, C.J.:

"Extraordinary relief should be extraordinary": real parties in interest, Sheila Michaels and Katheryn Fritter, state the principle aptly. And while the facts of the dual arbitrations underlying this petition are unfortunate, there is nothing in the resulting interlocutory district court decision challenged here which clears that "extraordinary" bar. To the contrary, the petition raises a factual question limited to the practice of one particular attorney of the insurer for both Michaels and Fritter, which will be appealable by the petitioners, John S. Walker and Ralph Ortega, at the conclusion of their respective matters. Accordingly, we deny the instant petition.

I.

Two personal injury disputes join cause in the petition we reject here. One of those underlying matters stems from injuries Walker sustained when Michaels made a right-hand turn in her vehicle and collided with Walker while he rode his bike in the bike lane. The other entirely separate matter centers on the extent of Ortega's damages after Fritter rear-ended his vehicle at an intersection. Both accidents allegedly resulted in injuries, and so Walker sued Michaels, and Ortega sued Fritter. The cases both proceeded to this

state's mandatory court-annexed arbitration program. And pursuant to the Nevada Arbitration Rules (NAR), Michaels and Fritter each served offers of judgment in their individual cases, which Walker and Ortega, respectively, rejected. Ultimately, the arbitrators in both Walker's and Ortega's cases found in their favor, awarding damages that substantially exceeded the amount that Michaels and Fritter had each previously offered.

Because Farmers Insurance insured both Michaels and Fritter, the same attorney, Adam McMillen, separately represented the interests of both defendants. Following the arbitrators' respective decisions, and in light of the hefty differences between the offers of judgment and ultimate awards, McMillen sought trials de novo in both cases. Relying on statistical information purporting to demonstrate the undue frequency of McMillen's requests for trials de novo as a general practice, Walker and Ortega alleged that McMillen had arbitrated in bad faith by using the requests to obstruct and delay. Accordingly, under the representation of the same attorney, Walker and Ortega filed nearly identical motions to strike McMillen's requests for trials de novo in their cases, based on NAR 22 (stating that "the failure of a party or an attorney to either prosecute or defend a case in good faith during the arbitration proceedings shall constitute a waiver of the right to a trial de novo").

The district court consolidated the separate motions to strike and held an evidentiary hearing on the question of McMillen's motivations and the applicability of NAR 22. Ultimately, the court found that the statistical evidence Walker and Ortega had presented was not sufficient to establish that McMillen had arbitrated in bad faith, rejecting their motions to strike. Walker and Ortega subsequently filed this petition, demanding that we reverse the district court's finding and compel it to strike McMillen's requests for trial de novo in each of their cases.

II.

Article 6, Section 4 of the Nevada Constitution grants this court authority "to issue writs of *mandamus, certiorari,* prohibition, *quo warranto* and *habeas corpus* and also all writs necessary or proper to the complete exercise of [its] jurisdiction." The traditional writ of mandamus is a remedy distinguishable from all others listed therein, to the extent "it recognizes legal duty, and compels its performance where there is either no remedy at law or no adequate remedy." Thomas Carl Spelling, *A Treatise on Injunctions and Other Extraordinary Remedies* 1173 (2d ed. 1901). And while our original jurisdiction to issue this unique remedy resounds in our constitutional powers, the Legislature has also provided guidance for its appropriate administration. *See* NRS 34.160 (stating that the writ of mandamus may issue "to compel the performance of an act which the law

especially enjoins as a duty resulting from an office, trust or station; or to compel the admission of a party to the use and enjoyment of a right or office to which the party is entitled and from which the party is unlawfully precluded by such inferior tribunal"). This language is consistent with well-established common law rules governing traditional mandamus jurisdiction, and we therefore "presume that . . . in prescribing mandamus as a statutory remedy, [the Legislature] had in view the nature and extent of the remedy, as known at the common law." Spelling, *supra*, at 1170.

Accordingly, under our constitutional authority, as directed and refined by statute and its corresponding common law,

> [t]he chief requisites of a petition to warrant the issuance of a [traditional] writ of mandamus are: (1) The petitioner must show a legal right to have the act done which is sought by the writ; (2) it must appear that the act which is to be enforced by the mandate is that which it is the plain legal duty of the respondent to perform, without discretion on his part either to do or refuse; (3) that the writ will be availing as a remedy, and that the petitioner has no other plain, speedy, and adequate remedy.

Id. at 1173; *see* NRS 34.160; *Segovia v. Eighth Judicial Dist. Court*, 133 Nev. 910, 911-12, 407 P.3d 783, 785 (2017) (holding that a writ of mandamus is available "to compel the performance of an act which the law requires as a duty resulting from an office"). Particularly where, as here, this court is asked to direct its traditional powers of mandamus at a lower court or judicial officer, there is significant overlap between the first and second requirements. That is, the question of whether a petitioner has a legal right to any particular action by the lower court turns, in part, on whether the action at issue is one typically entrusted to that court's discretion, and whether that court has exercised its discretion appropriately. *See Martinez Guzman v. Second Judicial Dist. Court*, 136 Nev. 103, 106-07, 460 P.3d 443, 446 (2020); *see also* Spelling, *supra*, at 1230 (noting that "[i]n order to entitle a party to mandamus to compel action by the judge of an inferior court . . . it is incumbent upon him to show that it is clearly the duty of such judge to do the act sought to be coerced").

Where a district court *is* entrusted with discretion on an issue, the petitioner's burden to demonstrate a clear legal right to a particular course of action by that court is substantial; we can issue traditional mandamus only where the lower court has *manifestly* abused that discretion or acted arbitrarily or capriciously. *See Martinez Guzman*, 136 Nev. at 105, 460 P.3d at 446 (quoting *Redeker v. Eighth Judicial Dist. Court*, 122 Nev. 164, 167, 127 P.3d 520, 522 (2006)). That is, traditional mandamus relief does not lie where a discretionary lower court decision "result[s] from a mere error in judgment"; instead, mandamus is available only where "the law is overridden or misap-

plied, or when the judgment exercised is manifestly unreasonable or the result of partiality, prejudice, bias or ill will." *State v. Eighth Judicial Dist. Court (Armstrong)*, 127 Nev. 927, 932, 267 P.3d 777, 780 (2011) (quoting *Blair v. Zoning Hearing Bd. of Twp. of Pike*, 676 A.2d 760, 761 (Pa. Commw. Ct. 1996)); *see also Segovia*, 133 Nev. at 912, 407 P.3d at 785 (holding that a writ of mandamus is available "to control a manifest abuse or an arbitrary or capricious exercise of discretion"). Were we to issue traditional mandamus to "correct" any and every lower court decision, we would substitute our judgment for the district court's, subverting its "right to decide according to its own view of the facts and law of a case which is still pending before it" and ignoring that there would almost always be "an adequate remedy for any wrongs which may be done or errors which may be committed, by appeal or writ of error." Spelling, *supra*, at 1202.

This leads to the third, related requirement for traditional mandamus relief—namely, the absence of any alternative legal remedy. *See Pan v. Eighth Judicial Dist. Court*, 120 Nev. 222, 224, 88 P.3d 840, 841 (2004). Because mandamus is an extraordinary remedy, this court does not typically employ it where ordinary means, already afforded by law, permit the correction of alleged errors. *See Rawson v. Ninth Judicial Dist. Court*, 133 Nev. 309, 316, 396 P.3d 842, 847 (2017). And by limiting our interference with ordinary district court decisions, we thereby circumvent the "inconvenience and confusion which would result from allowing litigants to resort to the appellate courts for correction of errors in advance of opportunity on the part of the lower court to correct its errors before final judgment and upon motion for new trial." Spelling, *supra*, at 1203. Moreover, to the extent that appellate relief is available at the conclusion of a matter, it would typically be preferable to an extraordinary writ proceeding because we can issue a decision after "review[ing] the entire record in the regular way, when [we] can enjoy the advantage of having the whole case before us." *Id.* at 1203-04. In light of these considerations, "[t]his court has previously pointed out, on several occasions, that the right to appeal is generally an adequate legal remedy that precludes [mandamus] relief." *Pan*, 120 Nev. at 224, 88 P.3d at 841.

Petitioners fail to demonstrate any of the prerequisites for traditional writ relief to the circumstances at hand. With regard to the first requirement—that is, that petitioners "show that it is clearly the duty of [the district court judge] to do the act sought to be coerced," Spelling, *supra*, at 1203—petitioners rely extensively on *Gittings v. Hartz*, 116 Nev. 386, 996 P.2d 898 (2000), for the proposition that the frequency of McMillen's requests for trials de novo plainly establishes his bad-faith participation in arbitration here, as a matter of law. But this ignores that, far from establishing a clear legal right to the relief that petitioners demand, in *Gittings* this court actually

rejected on the facts the argument petitioners raise. 116 Nev. at 394, 996 P.2d at 903. And, while *Gittings* observed that "statistical information that demonstrates that an insurance company has routinely filed trial de novo requests without regard to the facts and circumstances of each individual case *may be used to support* a claim of bad faith," it did not obligate a district court to credit statistical evidence it determined was incomplete and insufficient to establish bad faith. *Id.* (emphasis added). Indeed, and entirely contrary to petitioners' position, if the district court had stricken McMillen's requests for trials de novo in the absence of a clearly established factual and legal basis to do so, real parties in interest may have had a more supportable claim of legal right than petitioners, given that, in the absence of bad-faith arbitration practices under NAR 22, they would enjoy a constitutionally established right to the jury trials requested. Nev. Const. art. 1, § 3.

As to the second consideration, petitioners fail to analyze it under the proper standard, arguing that the district court merely "abused its discretion by substituting its own misunderstanding of statistics for the uncontested expert opinion of a Doctor of Economics." But the question of counsel's bad faith is one of fact, left to the district court's discretion, s*ee Williams v. Williams*, 120 Nev. 559, 565, 97 P.3d 1124, 1128 (2004) (determining that the good faith of a party was a question of fact); *NOLM, LLC v. County of Clark*, 120 Nev. 736, 739, 100 P.3d 658, 660 (2004) (stating that this court leaves findings of facts to the discretion of the district court), and as indicated, our mandamus relief is not available to correct a mere abuse of that discretion. *See Martinez Guzman*, 136 Nev. at 105, 460 P.3d at 446 (holding that mandamus is available only where a district court *manifestly* abused its discretion); *Armstrong*, 127 Nev. at 932, 267 P.3d at 780 (quoting *Blair*, 676 A.2d at 761) (noting that mandamus is available to correct decisions based entirely on improper reasons). Moreover, nothing in the record supports that the district court's refusal to grant their motions to strike amounted to the sort of overtly erroneous conduct that would make our traditional extraordinary relief available, particularly because *Gittings*, the case upon which petitioners hang their demands, does not clearly require the relief requested in the first instance.

Put in terms of the standards recited above, petitioners have neither identified their legal right to have the requests for trials de novo stricken, nor demonstrated that it was the district court's plain legal duty to have done so. Instead, the petition demands that this court review a discretionary "order or judgment of the court below, adjudge it to be erroneous [and] set it aside," *State v. Wright*, 4 Nev. 119, 123 (1868), based on a post-hoc expansion of our precedent. But this would "simply . . . convert the writ of mandamus into a writ of error," *id.*, which it is not.

The request for our interlocutory review here likewise fails under the third requirement for traditional mandamus relief because, as petitioners themselves acknowledge, there is an obviously adequate, sufficiently speedy remedy available at law—that is, petitioners may appeal when their cases resolve. *See Pan*, 120 Nev. at 224, 88 P.3d at 841 (noting that "[t]his court has previously pointed out, on several occasions, that the right to appeal is generally an adequate legal remedy that precludes writ relief"). It may be that, as petitioners emphasize, our grant of mandamus would "give an easier or more expeditious remedy" than that particular course of action, but this is not the standard. *Washoe County v. City of Reno*, 77 Nev. 152, 156, 360 P.2d 602, 603 (1961) (citing *Steves v. Robie*, 31 A.2d 797 (Me. 1943)). "A remedy does not fail to be speedy and adequate, because, by pursuing it through the ordinary course of law, more time probably would be consumed than in a mandamus proceeding." *Washoe County*, 77 Nev. at 156, 360 P.2d at 603; *see also Pan*, 120 Nev. at 225, 88 P.3d at 841 (stating that "even if an appeal is not immediately available because the challenged order is interlocutory in nature, the fact that the order may ultimately be challenged on appeal from the final judgment generally precludes writ relief").

Petitioners hypothesize that appellate relief might be unavailing should "each injured Plaintiff's judgment after trial de novo [be] equal to or greater than the arbitration awards." But this argument—that the outcome of their trials de novo might leave them in a *better* position—only emphasizes the absence of any impending irreparable harm that might otherwise weigh in favor of our granting traditional mandamus. *See NAD, Inc. v. Eighth Judicial Dist. Court*, 115 Nev. 71, 78, 976 P.2d 994, 998 (1999). In any case, "our concern is with the existence of a remedy and not whether it will be unproductive in [any] particular case." *Washoe County*, 77 Nev. at 156, 360 P.2d at 604. Petitioners have failed to demonstrate a basis for us to grant a traditional writ of mandamus.

III.

This court has alternatively granted mandamus relief where a petitioner presented "legal issues of statewide importance requiring clarification, and our decision . . . promote[d] judicial economy and administration by assisting other jurists, parties, and lawyers." *MDC Rests., LLC v. Eighth Judicial Dist. Court*, 134 Nev. 315, 319, 419 P.3d 148, 152 (2018); *see also Archon Corp. v. Eighth Judicial Dist. Court*, 133 Nev. 816, 820, 407 P.3d 702, 706 (2017). This is an expansion of the common law doctrine and statutory procedural authorization discussed above, and we therefore take seriously the judicial limitations placed upon this so-called "advisory" mandamus—to do otherwise would be "virtually to nullify the final decision rule and to allow interlocutory review by mandamus freely in [our] own discre-

tion." Harvard Law Review Association, *Supervisory and Advisory Mandamus Under the All Writs Act*, 86 Harv. L. Rev. 595, 596, 608 (1973) (collecting cases and discussing expansion); *see Archon*, 133 Nev. at 820, 407 P.3d at 707 (noting that advisory mandamus "risks being misused in ways that subvert the final judgment rule"). Petitioners do not acknowledge the strict limits on "advisory" mandamus—not referring to it except to state in their reply that "this writ presents an important procedural question of statewide importance to all practitioners and litigants."

This matter does not qualify for advisory mandamus. The dispute in district court was factual, not legal, and sufficient evidence supports the district court's factual finding of no bad faith. *See Williams*, 120 Nev. at 565, 97 P.3d at 1128. But even crediting for the sake of argument the petitioners' position that the district judge should have found otherwise, this disagreement does not present a serious issue of substantial public policy or involve important precedential questions of statewide interest as required for advisory mandamus. *See Poulos v. Eighth Judicial Dist. Court*, 98 Nev. 453, 455, 652 P.2d 1177, 1178 (1982).

Nor are we persuaded that our review of the factual question in this case would promote judicial economy. *See MDC Rests.*, 134 Nev. at 319, 419 P.3d at 152. To the contrary, the orderly administration of justice by the lower courts of this state requires that we allow them the province of their authority. Indeed, "if the duty of superintending and reviewing the action and proceedings of inferior courts were thrown upon appellate courts otherwise than by the regular course of appeal or writ of error," it would destroy the possibility of such administration—hindering fact-finding by the judicial body best poised to do so and unnecessarily limiting the records for this court's appellate review. Spelling, *supra*, at 1202. We are particularly inclined to leave the fact-based decision underlying this petition to the ordinary course of case administration, since the arbitration program it involves is specifically intended to be "a simplified, informal procedure to resolve certain types of civil cases." *Gittings*, 116 Nev. at 393, 996 P.2d at 902; *see also* NAR 2(A) and (D). Routinely accepting interlocutory challenges to factual determinations in these actions would only add a new layer to that intentionally streamlined program, potentially encouraging its use by prospective parties as the very method of delay and obstruction petitioners decry here. *Gittings*, 116 Nev. at 394, 996 P.2d at 903 (noting accusation that insurer was using the arbitration process to delay).

Finally, "advisory" mandamus is appropriate only where it will clarify a "substantial issue of public policy or precedential value." *Poulos*, 98 Nev. at 455-56, 652 P.2d at 1178. And petitioners have not cogently argued for the broader importance of the seemingly singular, fact-based issue they ask us to resolve. Indeed, save a summary reference to the goals of the state's alternative dispute resolu-

tion program, petitioners do not offer context for their petition supporting or suggesting that it would resolve any issue beyond their individual disagreements with the district court's findings as to this particular legal practitioner. And, as noted, in our view the goals of the program are better served by our denial of writ relief in this case. Accordingly, because petitioners have not offered any cogent, compelling reason for this court to issue an "advisory" mandamus, we deny their petition for a writ of mandamus and lift the stays imposed on the underlying proceedings in district court.

HARDESTY and STIGLICH, JJ., concur.