MARK D. PARKER
Parker, Heitz & Cosgrove, PLLC
401 N. 31st Street, Suite 1600
P.O. Box 7212
Billings, MT 59103-7212
Phone: (406) 245-9991
markdparker@parker-law.com

TYLER GREEN
Consovoy McCarthy PLLC
222 S. Main Street, 5th Floor
Salt Lake City, UT 84101
Phone: (703) 243-9423
tyler@consovoymccarthy.com
*Pro hac vice

CHRISTIAN BRIAN CORRIGAN
Solicitor General
Office of the Attorney General
215 North Sanders
Helena, MT 59601
Phone: (404) 444-2797
Christian.Corrigan@mt.gov

SHANE P. COLEMAN
Billstein Monson & Small PLLC
1555 Campus Way, Suite 201
Billings, MT 59102
Phone: (406) 656-6551
shane@bmslawmt.com

Attorneys for Respondent

IN THE SUPREME COURT OF THE STATE OF MONTANA
PR 23-0496

IN THE MATTER OF AUSTIN MILES KNUDSEN, An Attorney at Law, Respondent.	ODC File No. 21-094 **RESPONDENT'S REPLY IN SUPPORT OF OBJECTIONS**

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INTRODUCTION[1]

The Commission on Practice and the Office of Disciplinary Counsel seek to suspend the sitting Attorney General of Montana from the practice of law for 90 days for alleged violations of the Rules of Professional Conduct while he represented the Montana Legislature. As the Attorney General explained in his objections to the Commission's Findings of Fact, Conclusions of Law, and Recommendation, ODC failed to prove a single count of misconduct by clear and convincing evidence. Nor could it, because none of the Attorney General's conduct violates the letters of the Rules in question. Furthermore, the proceedings against the Attorney General have been marked by blatant due process violations, erroneous evidentiary rulings, and separation-of-powers concerns.

Now, ODC has responded to the Attorney General's objections. But ODC's arguments doom, rather than help, its position. Among other things, ODC concedes that the Chairman of the Commission likely ruled on dispositive motions unilaterally, in violation of due process, and concedes that it has no objective way to distinguish between good-faith

[1] Due to the multitude of issues raised in his Objections, Respondent believes oral argument would be beneficial.

and bad-faith criticism of courts, so it assumes that the Attorney General subjectively "meant" his criticism to be disrespectful. At every turn, ODC defies this Court's settled practice on how to apply Montana Rules of Professional Conduct Rules 3.4(c), 8.2(a), and 8.4(d), misinterpreting this Court's precedents and attempting to bolster the Commission's inadequate findings by weaving in facts that the Commission itself never bothered to mention. ODC's response makes clear that it and the Commission wish to make an example of the Attorney General, no matter how rules or precedents are contorted along the way. This Court should refuse to countenance those efforts. It should dismiss the Complaint—or, at the very least, remand for a new hearing.

FACTUAL BACKGROUND

For sake of brevity, the Attorney General incorporates by reference the factual section from his original objections. *See* Objs. at 2-14.

ARGUMENT

I. The Commission's investigation and adjudication repeatedly violated the Attorney General's due process rights.

The Attorney General previously explained how, from the outset of this case, the proceedings against the Attorney General have been

tainted by due process violations. *First*, the Commission usurped the prosecutorial role by dismissing the first special counsel—who had formally recommended that the Attorney General should not be charged—and appointed a second special counsel with direct instructions to charge the Attorney General. *Second*, the Commission ruled on the Attorney General's dispositive motions either with the participation of biased panelists, or without a quorum—either way, a due process violation. And *third*, the Commission ruled on multiple important motions without giving the Attorney General the chance to present arguments on his own behalf. Each of these due process violations resulted in substantial prejudice and denied the Attorney General the right to fairly defend himself against baseless charges.

In an effort to hide these blatant due process violations, ODC claims that the Attorney General simply has *fewer* due process rights due to his status as an attorney. ODC asserts that the only due process the Attorney General should have received was "notice and an opportunity to be heard … *nothing more and nothing less*." ODC Resp. at 61 (emphasis added). This astonishing erasure of due process protection for attorneys directly defies the due process protections recognized by this Court. Whatever

ODC's wish to discipline the Attorney General, this Court has ruled that attorneys in disciplinary proceedings receive "the full panoply" of due process rights, "including," but not limited to, "notice of the charges against him and an opportunity to be heard to contest those charges." *In re Engel*, 2008 MT 215, ¶26, 344 Mont. 219, 226, 194 P.3d 613, 618. And in *Goldstein v. Comm'n on Practice of the Supreme Court*, 2000 MT 8, ¶40, 297 Mont. 493, 503, 995 P.2d 923, 930, this Court incorporated the due process definition from *Goldberg v. Kelly*, 397 U.S. 254 (1970), into the attorney disciplinary context. So due process—even in attorney disciplinary proceedings—includes, among other things, "the opportunity to be heard," "at a meaningful time and in a meaningful manner," and "an effective opportunity to defend … by presenting his own arguments." *Goldberg*, 397 U.S. at 268. The Commission repeatedly deprived the Attorney General of such rights. Thus, the entire proceeding is tainted, and this Court should vacate the entire disciplinary proceeding with prejudice. *See In re Best*, 2010 MT 59, ¶¶34, 36, 355 Mont. 365, 229 P.3d 1201.

A. The Commission usurped the prosecutorial role, sitting simultaneously as prosecutor and adjudicator.

This Court has repeatedly acknowledged that when "investigatory and adjudicatory functions [are] combined," the "right[] to impartial tribunals" will be denied. *Goldstein*, 2000 MT 8, ¶27. The Montana Rules of Lawyer Disciplinary Enforcement provide that the Commission's role is to "*hear and decide* complaints," RLDE 1 (emphasis added), and ODC "shall perform *all* prosecutorial functions." RLDE 5(B) (emphasis added). Here, the Commission blatantly violated this division of power.

The first ODC special counsel tasked with investigating the Attorney General's conduct recommended disposing of the matter without a formal complaint. *See* Dkt. 20A, Ex. A at 6. But the Commission rejected that recommendation and *sua sponte* "referred the matter back to ODC for further investigation," directing the second ODC special counsel that the subsequent investigation should conclude that the matter "likely warrant[ed] public discipline." Objection Ex. 1, at ODC #2962.

This isn't the first time that the Commission ignored ODC's recommendation of no prosecution and usurped prosecutorial power. In *Best*, "[t]he ODC investigated the complaint against Best and presented

it to the COP's Review Panel with the recommendation that the complaint be dismissed with a letter of caution." 2010 MT 59, ¶9. But even though "the ODC recommended no discipline," the Commission "ignored the ODC's recommendation and, instead, decided to draft its own complaint and then act on its own complaint." *Id.* ¶32. Since the Rules of Lawyer Disciplinary Enforcement require that "[p]rosecutorial and adjudicatory functions shall be separated," this Court concluded that the attorney's "right to due process was violated" by the Commission. *Id.* at ¶¶31, 34. Here the Commission technically didn't draft and file its own complaint—but it might as well have. The Commission took the apparently unprecedented step of dismissing the recommendation of no discipline and ordering the new special counsel to bring a complaint seeking discipline.

In response, ODC doesn't address this part of *Best*, pointing instead to a different part that discusses failure to provide notice and an opportunity to respond. ODC Resp. at 62. True, in *Best*, this Court found *two* due process violations: failure to provide notice *and* an improper commingling of powers. *Best*, 2010 MT 59, ¶¶28-29, 33-34. ODC cannot erase the second holding by pretending it doesn't exist. This Court ruled

that the Commission cannot exercise ODC's prosecutorial power. By ordering ODC to prosecute the Attorney General, the Commission violated due process and its obligation to be a fair and neutral tribunal.

ODC also claims that the Commission had authority under MRLDE 3B(2) to reject ODC's recommendation of no discipline and order further investigation. But ODC omits the language of Rule 3B(2), since the Rules themselves do not grant such power. Under Rule 3 of the Rules of Lawyer Disciplinary Enforcement, the Commission has the power to "[r]eview Disciplinary Counsel's request to file a Complaint," and then can either "[r]efer the grievance to Disciplinary Counsel for any further investigation, if needed, to determine whether a Complaint is appropriate," or "[a]pprove Disciplinary Counsel's request to file a Complaint." RLDE 3(B)(1)-(3). Yet nothing in Rule 3 gives the Commission the power to seek further prosecution when ODC itself has *not* requested to file a complaint.

By ignoring ODC's recommendation of no discipline and ordering ODC to file a complaint that recommended discipline, the Commission violated due process and the division of power outlined in the MRLDE. *Best* remains binding and requires dismissing this matter with prejudice.

B. The Commission either ruled on dispositive motions with the participation of biased panelists, or ruled on the motions without a quorum.

During the preliminary proceedings in this matter, the Attorney General filed a dispositive motion seeking summary judgment. The Commission denied that motion. Yet the record makes clear that this ruling necessarily violated the Attorney General's due process rights in one of two ways. Either two biased panelists participated in the dispositive ruling, or the Commission ruled on the dispositive motion without a quorum.

The Commission's own rules prohibit the participation of any attorney who "cannot participate in a fair and reasonable manner." COP Rule 6. Yet two of the initial panelists—Patricia Klanke and Louis Menzies—were seated on the panel despite disabling conflicts of interest. *See generally* Objs. at 24-26. ODC concedes that both Klanke and Menzies were properly recused. ODC Resp. at 64. ODC instead seeks to hide from this potential due process violation by accusing the Attorney General of "implying that the Commission lied" since the Commission had stated that the two biased members did not participate in any aspects of the case. *Id.*

But this misunderstands the Attorney General's point. The Attorney General implies no such thing. The Attorney General's argument follows from three uncontroverted facts. *First*, the Commission denied the Attorney General's dispositive motion on September 10, 2024. Dkt. 37. *Second*, on September 10, the Commission's panel overseeing the Attorney General's case was composed of six members, including Klanke and Menzies. Dkt. 43 at 1. And *third*, under the Rules for Lawyer Disciplinary Enforcement, "[f]ive members of an Adjudicatory Panel … shall constitute a quorum," "any act of an Adjudicatory Panel *shall require* the vote of a majority of the members present," and *only* Adjudicatory Panels have the power to "[h]ear and determine preliminary and procedural matters" or "engage in other disposition of Complaints." MRLDE 4(B)(2)-(3), 4(C) (emphasis added).

The Attorney General doesn't know exactly what happened behind closed doors on the day the Commission denied his dispositive motion. But there are only two possibilities. Either the Commission thought it had a proper quorum and followed the rules outlined in MRLDE by voting all together to deny the dispositive motion—an action that would have required participation of the biased panelists. Or the Commission acted

without a quorum, in violation of MRLDE. Either possibility constitutes a clear violation of due process.

ODC's response implicitly concedes that the Chairman of the Commission acted alone when denying the Attorney General's dispositive motion. *See* ODC Resp. at 64, n.8. ODC points to a rule that permits the Chairman to rule on motions during the hearing itself. *See* MRLDE 12(D)(2). Yet a rule that permits the Chairman to make evidentiary rulings during a hearing does not displace the requirement that "any act of an Adjudicatory Panel shall require the vote of a majority of the members present." MRLDE 4(C). Thus, ODC's concession proves fatal to its position—if the Chairman did act alone in denying the Attorney General's dispositive motion for summary judgment, he violated both the MRLDE and due process.

C. The Commission denied the Attorney General the ability to present arguments before ruling on an important motion.

The fundamental core of due process is the "opportunity to be heard," "at a meaningful time and in a meaningful manner," and "an effective opportunity to … presen[t] his own arguments." *Goldberg*, 397 U.S. at 267-68. This Court has spoken even more clearly: If a tribunal

denies the "opportunity to be heard on the motion made … all subsequent actions by the [] court [are] *null* and *void*." *State ex rel. Mont. St. Univ. v. District Court, Fourth Jud. Dist.*, 132 Mont. 262, 272 (1957).

Yet the Commission blatantly denied the Attorney General the right to be heard before ruling in ODC's favor on a crucial motion. Before the hearing, ODC filed a motion to exclude the Attorney General's sole expert. *See* Dkt. 54. Even though the Commission's rules gave the Attorney General fourteen days to respond to such a motion, the Commission granted ODC's motion and excluded the witness *just one day later*, before the Attorney General filed a response in opposition. The Commission thus violated the Attorney General's fundamental right to present arguments on his own behalf.

There is no excuse for this blatant deprivation of the right to be heard. ODC's only attempt at an answer is to claim that the initial violation didn't matter, because the Attorney General filed his arguments anyway. ODC Resp. at 65. But the fact that the Attorney General filed his arguments *after* the Commission had already ruled and violated his due process rights does not cure the violation. If due process means

anything, it means the opportunity to be heard *before* a ruling. That didn't happen here.

II. The Commission committed multiple evidentiary errors that prejudiced the Attorney General's defense.

A. The Commission erred by excluding the report and testimony of the Attorney General's expert witness.

The Commission excluded both the Attorney General's expert witness—Professor Thomas Lee—and the expert report that Professor Lee prepared. *See* Dkt. 59. Besides violating fundamental due process, *see supra* Part I(C), that exclusion defied this Court's precedent and ignored the Commission's prior practice of accepting expert testimony.

Rule 702 of the Montana Rules of Evidence permits experts to offer opinions that "describe recognized principles of their specialized knowledge." *State v. Santoro*, 2024 MT 136, ¶19, 417 Mont. 92, 551 P.3d 822. This Court regularly "encourage[s]" tribunals "to construe liberally the rules of evidence so as to admit all relevant expert testimony." *Beehler v. E. Radiological Assocs.*, 2012 MT 260, ¶23, 367 Mont. 21, 289 P.3d 131.

Most important, the Commission has consistently *permitted* experts to testify in attorney disciplinary proceedings about whether attorneys have violated the Montana Rules of Professional Conduct. *See In re Doud*, 2024 MT 29, ¶49, 415 Mont. 171, 543 P.3d 586 (2024) (ODC

called an expert witness to testify on best practices); *In re Olson*, 2009 MT 455, ¶17, 354 Mont. 358, 222 P.3d 632 (2009) (the Commission heard testimony from "an expert on professional responsibility"); *In re Engel*, 2007 MT 172, ¶27, 338 Mont. 179, 169 P.3d 345 (ODC called an expert witness to testify on customary attorney practices); *In re Johnson*, 2004 MT 6, ¶10, 319 Mont. 188, 84 P.3d 637 (the Commission heard expert testimony from a professor of legal professional responsibility).

The Commission stated only one reason for its exclusion of Professor Lee: "[E]xpert testimony regarding the interpretation or application of the MRPC has been *consistently* rejected." Dkt. 59 at 2-3. That assertion cannot be reconciled with *Doud*, *Olson*, *Engel*, and *Johnson*, where the Commission has consistently *accepted* all forms of expert testimony—including testimony from experts on professional responsibility and testimony on what sort of conduct violates the MRPC. Since both this Court and the Commission have historically permitted expert testimony in disciplinary proceedings, and since Rule 702 provides for liberal admission of expert testimony, the Commission abused its discretion by excluding Professor Lee under the false premise that it never permits expert testimony.

ODC has no answer to the many cases where the Commission heard from expert witnesses on the standard of care (including ODC's own expert witnesses). But *Doud*, *Olson*, *Engel*, and *Johnson* don't vanish when ODC and the Commission ignore them. Under Rule 702 and the Commission's past practice of consistently accepting expert testimony, the Attorney General should have been able to present expert testimony in his own defense. The Commission's ruling prevented the Attorney General "from presenting evidence going to the core of his defense," *Santoro*, 2024 MT 136, ¶26, thus necessitating rejecting the recommendations from the fatally flawed hearing.

B. The Commission excluded key evidence based on improper "collateral attack" and "relevance" rulings.

1. The Attorney General has explained that the Commission erroneously invoked the "collateral attack" principle to exclude significant evidence that the Attorney General tried to present. As he explained, the collateral attack doctrine arises in a wholly different context, such as when a party tries to invalidate a prior judgment. *See* Objs. at 37-39. Neither this Court nor the Montana Rules of Evidence recognize the collateral-attack doctrine to be an *evidentiary* basis for a court to ignore legal arguments or exclude evidence from the record. And

at no point did the Attorney General seek to invalidate this Court's ruling in *McLaughlin*.

Now, ODC tries to cover up the Commission's erroneous "collateral attack" ruling by claiming that the Commission's rulings were not actually based on the collateral attack doctrine, and that "the Chair did not even mention the words 'collateral attack.'" ODC Resp. at 71. But this response simply seeks to hide both ODC's own mistake and the Commission's indefensible ruling. At the hearing, ODC *repeatedly* used the language of "collateral attack" to object. *See, e.g.*, Tr. 312:1-6 ("Mr. Chairman … this is one of several exhibits that consist of copies of … lobbying emails, and this is an improper collateral attack of the decision of the Montana Supreme Court in the *McLaughlin* case."); *id.* at 313:23-314:5 ("the Montana Supreme Court has decided this entire issue … and it cannot be an issue in this case because it amounts to a collateral attack on a Montana Supreme Court decision"); *id.* at 315:5-7 ("it's an improper collateral attack on a Montana Supreme Court decision"); *id.* at 410:8-10 ("[T]he fact that these opinions, if [Senator Hertz] gives them even orally, would be an improper collateral attack."). And ODC erroneously concluded by saying that the Attorney General's evidence and cross-

examination was irrelevant *because* it was a collateral attack. *See id.* 314:25-315:6 ("[T]he Montana Supreme Court has already determined, fully determined, and a binding decision [on the issue] … So I would submit this entire line of questioning is irrelevant.").

And later, the Commission itself acknowledged that the supposed relevance ruling was actually based on "collateral attack." *See id.* at 368:11-22 (ODC: "They're now getting into an area that the Montana Supreme Court has already decided…." Chairman: "The objection is sustained again. We have previously considered and ruled on this, based upon the Supreme Court's order."); *id.* at 330:23-24 (Chairman: "So the objection is sustained. It's already been dealt with by the Supreme Court."); *see also id.* at 407:16-23 (ODC: "Your Honor, as I indicated earlier, and you sustained my objection, in the McLaughlin case the Supreme Court already ruled that the Legislature did not have … authority to investigate or make findings regarding alleged Judicial or Court Administrator misconduct, and I'll again cite for the record McLaughlin 2021 Montana 178 Paragraphs 23 to 31.").

Try as it might to reimagine the transcript, ODC cannot hide the fact that ODC made a series of legally incorrect objections or that the

Commission excluded significant portions of the Attorney General's defense on a wholly inapplicable "collateral attack" basis. This error of law substantially prejudiced the Attorney General's defense and warrants remand for a new hearing.

2. ODC's defense fares no better when considering only the "relevance" rulings. The Commission compounded its evidentiary errors by trying to convert the "collateral attack" objections into a ruling on relevance. *See* Objs. at 42-44. The Commission ruled that the evidence making up much of the Attorney General's defense—including multiple reports that formed the basis of the Attorney General's filing motions to recuse the Supreme Court Justices, which comprised some of the conduct charged in the complaint—was not "*directly related to the allegations in this Complaint* that are relevant to this proceeding." Tr. 317:18-19 (emphasis added).

In other words, the Commission excluded evidence that the Attorney General sought to present in his own defense by ruling that only evidence that is *relevant to the prosecution's theory of the case* counts as relevant. But basic due process guarantees accused litigants a right to present a defense, *see Bondarenko v. Holder*, 733 F.3d 899, 906 (9th Cir.

2013) (due process guarantees Respondent "a reasonable opportunity to present evidence on his behalf"), and the rules of evidence permit all relevant evidence—including the evidence that is relevant to the defendant's defense.

Once again, ODC has no answer to explain the Commission's ruling that evidence can be excluded when it isn't relevant to the prosecution's theory of the case. Nor is there any possible justification. ODC is thus left trying to invent other reasons that the Commission might have made a relevance ruling. *See* ODC Resp. at 71-72. But no hypothetical alternative reason for the relevance ruling can displace the *actual* relevance ruling, which was that only evidence relevant to the prosecution's case can be admitted. Tr. 317:18-19. So the Attorney General was improperly precluded from fully presenting his defense. This evidentiary ruling is indefensible and necessitates rejecting the Commission's recommendations and remanding for proper proceedings.

III. The Commission failed to submit findings of fact or conclusions of law sufficient to demonstrate that any charges were proved by clear and convincing evidence.

This Court has established that the Commission has a duty "to establish a record upon which this Court must act." *In re Wyse*, 212 Mont.

339, 346 (1984). Under the MRLDE, the Commission must make "findings of fact, conclusions of law, and a recommendation to the Supreme Court," including whether each charge was "established by clear and convincing evidence." MLRDE 12(D)(3), 22(B). This Court has never allowed the Commission to cut corners on its findings and conclusions simply because it deals with attorney discipline. *See Wyse*, 212 Mont. at 346. Without a clear record that discusses the details of each supposed violation and provides a clear basis for each decision, this Court cannot possibly "determine whether the charges have been proven by clear and convincing evidence." *Goldstein*, 2000 MT 8, ¶49.

Here, the Commission abdicated that duty. It failed to analyze the legal standards that apply to each rule the Attorney General is accused of violating. The Commission issued only general conclusory statements of guilt that are devoid of any specific factual findings—spending just five sentences, less than half a page, on its cursory finding of guilt. *See* Findings, at 25. Such nonexistent findings violate this Court's teaching that the failure to "explicitly address or discuss the [issues] individually" and "fail[ure] to even make reference to" the applicable legal standard

renders a tribunal's findings "impossible … to evaluate." *Snavely v. St. John*, 2006 MT 175, ¶¶15, 17-18, 333 Mont. 16, 140 P.3d 492.

ODC, for its part, calls the Commission's findings "carefully drafted," and claims that the Commission, since it is not a lower court, is exempt from the requirement of providing sufficiently detailed findings. ODC Resp. at 1, 74. But had the Commission's findings been "carefully drafted," ODC would not have been forced to devote its brief to bolstering those findings with facts and arguments that the Commission never discussed. More to the point, ODC is wrong as a matter of law about the Commission's duty to provide detailed findings, since this Court has incorporated the *Snavely* requirement of sufficiently detailed findings into disciplinary proceedings. *See Doud*, 2024 MT 29, ¶33.

Here the Commission apparently thought it was enough to label the Attorney General guilty without explaining how any of the forty-one separate alleged violations (and all of their many subparts) had been established by clear and convincing evidence. This Court should not condone such severe legal abdications. *State v. Golden*, 2007 MT 247N, ¶9 ("[I]t is not this Court's obligation to conduct legal research on a party's behalf or develop an argument supporting the party's position").

If this Court does not dismiss this case with prejudice, it should remand this case to develop an adequate record.

IV. ODC's Complaint is barred by the Montana Constitution's separation-of-powers Clause.

The Montana Constitution's separation-of-powers clause protects the sovereign power vested in the constitutional office of the Attorney General and affords him deference in the way he chooses to carry out his duties. *See* Objs. at 53-64. ODC mistakenly reads this as an argument that an Attorney General can never be disciplined, even for severe violations of ethical obligations. But the Attorney General has never made that argument. Rather, as a constitutional officer, the Attorney General enjoys a significant degree of "constitutional independence" in executing his core duties, *see Bd. of Regents of Higher Educ. of Mont. v. State*, 2022 MT 128, ¶ 14, 409 Mont. 96, 104, 512 P.3d 748, 752, and his core duties include the duty to "prosecute or defend all causes in the supreme court in which the state or any officer of the state in the officer's official capacity is a party or in which the state has an interest," MCA § 2-15-501(a). Under this Court's separation-of-powers precedent, this means that the Attorney General receives deference in how he chooses to

carry out those duties, including how he litigates on behalf of the sovereign State of Montana.

It bears repeating: This is not an argument that the Attorney General can never be disciplined by this Court. The correct implication under this Court's separation-of-powers precedents is that the Attorney General can be disciplined *in the moment*—such as by sanction or contempt—when he is actively litigating a case before this Court and commits what this Court perceives to be a violation of the tribunal rules. But deference to the separation-of-powers clause precludes the judiciary from second-guessing the Attorney General's litigation decisions or engaging in *ex post* discipline for how he chooses to carry out that constitutional authority.

This conclusion follows both from this Court's precedents and precedents from the Supreme Court of Texas. Earlier in this proceeding, both the Commission and ODC relied heavily on two related Texas Court of Appeals decisions in *Comm'n for Law. Discipline v. Webster*, 676 S.W.3d 687, 691 (Tex. Ct. App. 2023), and *Paxton v. Comm'n for Law. Discipline*, No. 05-23-00128-CV, 2024 WL 1671953 (Tex. Ct. App. Apr. 18, 2024). *Paxton* and *Webster* both presented a question identical to the

one raised here: can a lawyer disciplinary committee discipline the Attorney General for specific statements he made during the representation of a particular case?

At the Texas Court of Appeals, the ruling was that such discipline could occur. So the Commission and ODC both relied heavily on these cases. *Compare* Dkt. 37 at 9, *with* Dkt. 25 at 8. But now, the Texas Supreme Court has reversed those cases and held, under its own separation-of-powers clause, that only the tribunal to whom the statements are made can discipline the Attorney General for his litigation statements.

ODC seeks to hide from this conclusion by raising several material inaccuracies. *First*, ODC bizarrely claims that the *Paxton* case at 2024 WL 1671953 is a Texas Supreme Court opinion. ODC Resp. at 81 ("First, according to Westlaw, *Paxton*, *supra*, which is a Texas Supreme Court decision, has not been reversed."). It is not. *See Paxton*, 2024 WL 1671953, at *1 (noting that the cited *Paxton* decision was rendered by the Texas Court of Appeals).

What's troubling about this error is that it isn't the first time ODC has misrepresented this same material fact about *Paxton* and *Webster*.

In its opposition to the Attorney General's Motion for Summary Judgment, ODC's citation format implied that *Webster* and *Paxton* were decided by the Texas Supreme Court. *See* Dkt. 25 at 7-8. The Attorney General's Reply brief pointed out ODC's mistake to the Commission. Dkt. 29 at 15 ("First, ODC's citation format implies—intentionally or not—that *Paxton* and *Webster* were decided by the Texas Supreme Court.… But they were not. Rather, both decisions come from the Texas Court of Appeals.").

ODC never corrected that misrepresentation.[2] But, understanding that citation errors are common and usually innocuous, the Attorney General let it be. Now, however, ODC has decided to double down and flagrantly misrepresent the same material fact about this cited authority to this Court. That's unacceptable. And it's particularly troubling given that ODC is responsible for enforcing violations of MRPC 3.3(a)(1) ("A lawyer shall not knowingly make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.").

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[2] *But see* Tr. 452:9-15 (ODC: "But what does a responsible attorney do? They apologize. They apologize. They correct it. They remediate it.… If you misstate something in the heat of battle, you tell the Court you did, and you apologize.") (Special Counsel's closing statement).

Second, ODC claims that *Paxton* has not been overturned. It has. *Webster* and *Paxton* raised identical issues about the protections a separation-of-powers clause affords the Attorney General when carrying out his duty. When the Texas Supreme Court reversed the lower court in *Webster*, *see Webster v. Comm'n for Law. Disc.*, 2024 WL 5249494 (Tex. Dec. 31, 2024), the Texas disciplinary commission acknowledged that the decision effectively reversed *Paxton* and consented to dismiss *Paxton* with prejudice, *see* Mot. to Dismiss, *Paxton v. Comm'n for Law. Discipline*, No. 24-0452 (Tex. Jan. 22, 2025). Once again, ODC refuses to acknowledge a basic, incontrovertible matter of fact and law.

Third, and most important, ODC focuses on the wrong portions of the Texas Supreme Court's *Webster* opinion. ODC emphasizes that "[the Attorney General's Office] claims no entitlement to violate any disciplinary rule," and that "[a]ll lawyers are bound by such rules." ODC Resp. at 81 (quoting *Webster*, 2024 WL 5249494, *18). The Attorney General agrees. But ODC fails to appropriately acknowledge the next lines:

> In the narrow circumstance before us, however, we conclude that *the separation of powers* requires that violations of the sort alleged here—*based wholly on representations in initial pleadings*—must be *addressed directly by the court to whom*

> *the pleadings are presented rather than on the commission's purely collateral review*. The substance and application of the rules remains fully intact, and so does our separation-of-powers precedent.

Webster, 2024 WL 5249494, at *18 (emphasis added). Thus, to protect both the judiciary's authority to discipline attorneys *and* the fundamental separation of powers guaranteed by the Montana Constitution, any discipline for what the Attorney General said in a discrete filing must be imposed by the court to whom the filing was addressed.

ODC's Response then pivots from *Paxton* and *Webster* to the less applicable *Messameno v. Statewide Grievance Comm.*, 663 A.2d 317 (Conn. 1995), claiming "[t]he immunity claimed by the AG in this case is much more like *Messameno* than *Webster*." ODC Resp. at 82. As an initial matter, this Court shouldn't allow ODC to retreat from its past representations about *Webster* and *Paxton*. *See* Dkt. 25 at 7 ("Most recently, *and in similar circumstances*, the Texas Commission for Lawyer Discipline's petition alleged Texas Attorney General Warren Paxton, made 'dishonest representations to the Supreme Court…. Like the Montana Attorney General, Paxton challenged the jurisdiction asserting

the Commission's suit violated the separation of powers doctrine.") (emphasis added).

Next, *Messameno* supports the Attorney General's position.[3] *Messameno* dealt solely with whether prosecutors were immune from "any and all grievance proceedings." *Id.* at 337. *Messameno* held that prosecutors were not per se immune, but that "judicial intrusion may disproportionately impact particular aspects of the prosecutorial function" and thus violate the separation of powers. *Id.* at 336. The Texas Supreme Court recognized this exact point in *Webster*:

> [T]he commission's invocation of out-of-state authority fares no better. It relies on *Messameno v. Statewide Grievance Committee*, where the Supreme Court of Connecticut rejected the state attorney's extraordinarily broad argument that he could not be disciplined because "*any and all* grievance proceedings pertaining to prosecutors" are "a violation of the separation of powers." The state supreme court unsurprisingly rejected such a broad assertion, but it nonetheless observed that "a prosecutor subject to investigation [in a grievance proceeding] may be able to allege

[3] ODC bizarrely chastises the Attorney General for "neglect[ing] to tell this Court [] that he relied on *Massameno* in seeking summary judgment, claiming that the Commission's exercise of jurisdiction over him violated the Separation of Powers Clause." ODC Resp. at 82. Below, the Attorney General simply cited *Massameno* for the proposition that the separation of powers can affect the application of attorney grievance procedures on constitutional officers. *See* Dkt. 20 at 8-9 ("Nor is it novel to assert that the Attorney General may be subject to different disciplinary standards than other attorneys…. Thus, the question for a court reviewing a disciplinary complaint against an Attorney General is whether the conduct complained of involved the exercise of constitutionally conferred discretionary authority. If the answer is yes, the court can proceed no further.") (citing *e.g.*, *Massameno,* 663 A.2d at 336).

> that, because of separation of powers principles, different substantive or procedural rules appl[ied] to him or her than to the average attorney." That is because "particular aspects of the prosecutorial function"—including weighing "the strength of the evidence"—are "generally [not] well suited for broad judicial oversight." [W]e agree that … the attorney general and his lawyers are entitled, "because of separation of powers principles," to a "different … procedural rul[e]," *id.*, in the sense that the commission may not collaterally attack initial pleadings made before a court.

Webster, 2024 WL 5249494 at *57-58 (internal citations omitted).

In this case, this Court had the opportunity to discipline the Attorney General while the relevant cases were ongoing. It chose not to, and chose instead to give the Attorney General a form of public admonition by criticizing his litigation conduct in separate opinions issued by several members of this Court. In light of the separation of powers, that is enough—the Montana Constitution does not give the judiciary further authority to second-guess in collateral review the litigation tactics of the Attorney General.

This Court should adopt the well-reasoned opinion of the Texas Supreme Court and likewise hold that the Montana separation-of-powers clause bars discipline based wholly on representations in individual pleadings by any body other than the court to whom the pleadings are addressed.

V. The Attorney General did not violate the MRPC.

A. The Attorney General did not violate any rule of the MRPC.

1. MRPC 3.4(c). The Attorney General explained how, under a proper application Rule 3.4(c), he never violated Rule 3.4(c) because he always openly asserted that no valid obligation existed while pursuing appropriate reconsideration and appellate procedures.

Rule 3.4(c) provides that an attorney shall not "knowingly disobey an obligation under the rules of a tribunal *except* for an open refusal based on an assertion that no valid obligation exists." MRPC 3.4(c) (emphasis added). The Rule thus contains a built-in exception—it "requires obedience" to a court's orders "except where open disobedience is a procedurally necessary step to mounting a good faith challenge to the validity of the rule [or order] in question." Geoffrey C. Hazard, et al., *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct* §33.09 (4th ed. 2024). As the Attorney General explained, this Court has consistently applied Rule 3.4(c) in a manner that corresponds with this approach to Rule 3.4(c), which is shared by the majority of jurisdictions. *See* Objs. at 66-74. Since the Attorney General here openly asserted that no valid obligation existed—i.e., that the judicial branch

had no jurisdiction over legislative subpoenas—up until the moment that his final avenue of appeal was exhausted, he did not violate Rule 3.4(c).

As a threshold matter, the Commission never addressed the Attorney General's invocation of Rule 3.4(c)'s exception. That alone renders its conclusions defective as a matter of law. In its response, ODC tries to invent new arguments for why Rule 3.4(c)'s exception does not apply to the Attorney General. But each of these arguments defies this Court's settled precedents and advances new, expansive interpretations of Rule 3.4(c).

First, ODC claims that Rule 3.4(c)'s language about disobeying "an obligation under the rules of a tribunal" can apply to "[v]iolations of the lawyer's oath." ODC Resp. at 39. But that assertion is unsupported, nor does ODC offer any support for it. Neither this Court nor any other has ever ruled, as a matter of law, that an attorney can be punished under Rule 3.4(c) for violations of the lawyer's oath.

Instead, ODC's brief is full of platitudes about the importance of the lawyer's oath and the interplay between the lawyer's oath and not using "intemperate" language. Yet ODC provides exactly *zero* citations to courts that have ruled that Rule 3.4(c) can be violated in such a way. Nor

can it, because no such citations exist. ODC again invokes its "best case" for the proposition, *Ligon v. Stilley*, 371 S.W.3d 615 (Ark. 2010), by burying it in the middle of a string cite. *See* ODC Resp. at 40. But none of the other cases cited in that string discussed the imposition of discipline for violations of a lawyer's oath, and *Ligon* itself stopped well short of establishing the principle as a matter of law:

> We express some concern about these charges because it is unclear whether an attorney can be sanctioned for violating his 'lawyer's oath.' However, Stilley does not raise this as an argument on appeal, and we will not address issues that are not argued.

Ligon, 371 S.W.3d at 628 n.5.

ODC backed away from *Ligon* in its response. But still, the bulk of ODC's arguments against the Attorney General are built from this single point—that "intemperate" statements violate the lawyer's oath, and as such, violate a panoply of other rules in the MRPC. But there is no authority for such a precedent; ODC failed to identify a single case. This Court should not be the first in the country to plow this ground.

Second, ODC claims that the Attorney General violated a rule of a tribunal by sending letters to this Court. But no rule of this Court forbids filing letters for the Justices' review. Indeed, for each of the three letters

identified, the Attorney General had a good reason to file a letter rather than a motion. For the April 12 letter, the Attorney General represented a client who was not yet a party to the case, and thus could not file a letter in the normal course of proceedings. *See* Objs. at 83. For the April 18 letter, the Attorney General sought to communicate with members of this Court regarding a legislative subpoena issued to them, which fell outside the scope of the existing case. *Id.* at 84. And in the May 19 letter, the Attorney General explicitly acknowledged that the letter was not about the substance of the Supreme Court's orders and took full responsibility for the contents of all prior filings. *Id.*

No rule of any tribunal forbade the Attorney General from filing these letters. ODC's response cites none and offers no answer to this fact, and its arguments to the contrary should be dismissed.

Third, the Attorney General appropriately asserted his "open refusal" to this Court's order about discovery until his last avenue of appeal was exhausted, when he then promptly complied.

As the Attorney General previously explained, to invoke Rule 3.4(c)'s exception an attorney must make an "open refusal," and may do so by "challeng[ing] a court order by motion, appeal, or other legal

means." *In re Ford*, 128 P.3d 178, 181-82 (Alaska 2006). Examples from other jurisdictions make clear that an appropriate open refusal includes any recognized procedural method for challenging an order. *See* Objs. at 53-54 (listing cases where lawyers engaged in good-faith disobedience of court orders).

ODC claims that Rule 3.4(c)'s "open refusal" exception does not apply to the Attorney General, with regard to the order to return the produced discovery, because "he did *not* notify this Court in those pleadings that he refused to return the emails." ODC Resp. at 44. This is incorrect on multiple fronts. As the cases the Attorney General discussed in his initial objections illustrate, there is not just one single appropriate method of asserting an "open refusal." Here, the Attorney General asserted his open refusal in two ways: (1) he informed this Court that he could not comply with "[t]he Orders that conclude the Court's Opinion" because they "violate established laws, rules, and constitutional principles," ODC Ex. 26, and (2) he filed a petition for rehearing and a petition for certiorari which were both based on the assertion that the judicial branch lacked jurisdiction over legislative subpoenas. While the legality of judicial jurisdiction over legislative subpoenas has *now* been

settled, at the time of these events, it was an open question. Therefore, the Attorney General clearly fell within Rule 3.4(c)'s exception when he openly asserted, through procedural appeals, that this Court lacked jurisdiction over legislative subpoenas and therefore that "no valid obligation existed." MRPC 3.4(c).

2. MRPC 8.2(a). The Attorney General also didn't violate Rule 8.2(a) because his statements were not made with knowing falsity or in reckless disregard for the truth. Rule 8.2(a) states that "[a] lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge." MRPC 8.2(a). As the Attorney General previously explained, Rule 8.2(a) incorporates the *New York Times v. Sullivan* standard—whether the offending statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not"—with one small modification. In the attorney discipline context, "reckless disregard" is measured by an objective, rather than subjective, standard. *See* Objs. at 95 (citing *In re Miller*, MT PR 18-0139, at 4 (2019)). And this Court has applied Rule 8.2(a) only to punish either admitted lies or baseless *ad hominem* attacks on judges. *See id.* at 97-98.

In this case, as the Attorney General exhaustively explained, none of his statements constitutes a violation of Rule 8.2(a). The vast majority of the challenged statements involved the Attorney General's motions to disqualify and various attempts to seek recusal of the Justices. So all statements on improper "self-interest" and "actual impropriety" came from the Attorney General's good-faith motions to recuse, or appeals from those motions. *See* Objs. at 100-03. Other statements discussed what the Attorney General believed were mistakes of fact or law in the Court's initial few rulings. Yet appealing a court's order necessarily involves alleging that the original order made a mistake of either fact or law, so the Attorney General's comments alleging mistakes of fact or law fell well within the bounds of normal appellate practice. *See id.* at 103-05. And the last few statements were rhetorical flourishes that cannot be reduced to true-or-false facts, and therefore cannot be violative of Rule 8.2(a). *See id.* 105-06.

Rather than engage with the extensive caselaw and precedent surrounding the application of Rule 8.2(a), ODC falls back to two primary arguments:

First, ODC asks whether "a reasonable attorney under the circumstances" would make the same statements that the Attorney General made—including filing a brief calling a court ruling "ludicrous," filing a motion discussing "judicial misconduct" and "self-interest," or filing a motion claiming that a court order is "inaccurate" or "runs afoul of state law." ODC Resp. at 49. The answer is yes. Not only have members of this Court labeled attorneys who appeared before them (and each other) "ludicrous" without violating the professionalism of the forum, *see Objs.* at 63, n.7, but Montana attorneys have regularly filed briefs before this very Court in which they labeled a court's order "ludicrous," yet were not disciplined, *see, e.g.*, Appellant Br., *Haffner-Lynn v. Annala*, 2021 WL 4993770, at *41 (Mont. 2021) ("The district court['s] … finding is ludicrous."); Appellant Br., *Wallace v. Hayes*, 2004 WL 3101962, at *26 (Mont. 2004) ("Finding V [by the lower court] is the most ludicrous."). Since no other Montana attorney has been disciplined for using such rhetorical flourishes, the Attorney General shouldn't be disciplined either.

Reasonable lawyers also routinely file briefs discussing "judicial misconduct" and "self-interest." A fundamental component of litigation is

moving to recuse judges who have a conflict of interest. Even though a motion to recuse is "inherently offensive to the sitting judge because it requires the moving party to allege and substantiate bias and prejudice," the "fair administration of justice *requires* that lawyers challenge a judge's purported impartiality when facts arise which suggest the judge has exhibited bias and prejudice." *United States v. Cooper*, 872 F.2d 1, 4 (1st Cir. 1989) (emphasis added). So, while not enjoyable for either the jurist or the litigant, reasonable attorneys must necessarily file motions for recusal when they have a good-faith belief that there is a conflict of interest. That's exactly what the Attorney General did.[4]

ODC's position hasn't aged well. During a recent House Judiciary Committee Hearing, the lobbyist for the State Bar of Montana stated:

> [Y]ou're referring to the poll back in 2021 about Senate Bill 140, which eliminated the Judicial Nomination Commission, and the Montana Judges Association at the time would send out a poll and ask judges what their position was on the bill…. *Can I see the appearance of impropriety if there's a court case*

[4] ODC claims that "the rules require a complaint of judicial misconduct to be filed with the Judicial Standards Commission … not in a brief filed in court." ODC Resp. at 15. While a complaint of judicial misconduct is one available avenue, a motion to recuse the judge is also a proper procedural option (and one that, if successful, will have a more immediate impact on the case). It is unclear why ODC refuses to recognize that motions to recuse based on judicial misconduct are indeed an appropriate procedural mechanism in the State of Montana. But if ODC is trying to assert that litigants who believe a judge has a conflict of interest can *never* raise that argument in a motion to recuse, ODC misreads untold numbers of this Court's cases.

> *announced or filed and it gets in front of a judge that's said in a poll that he felt the bill was unconstitutional? Yes, of course, I can*. I can tell you now that the Montana Judges Association doesn't do that anymore…. *They recognized what happened in '21 was the appearance of impropriety and have taken actions to address that*.

Ex. A at 4:9-5:11 (Audio Transcription of Montana House Judiciary Hearing Minutes 9:20:46 to 9:23:08, Monday, February 3, 2025) (emphasis added).[5] So the State Bar and the Montana Judges Association both recognize that the Supreme Court Administrator's polling of judges during 2021 legislative session created at least the appearance of impropriety. Yet, somehow, ODC's maintains that the Attorney General lacked an objectively reasonable basis for making statements about "judicial misconduct," "violations of the Code of Judicial Conduct," and "judicial impropriety." *See* ODC Resp. at 52. And, once again, to exonerate the Attorney General for alleged violations of 8.2(a) this Court need not determine that there was actual judicial misconduct. Nor must the Court endorse or condone every rhetorical flourish.

[5] The audio of the hearing is publicly available at https://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20250203/-1/55362.

The same holds true for statements discussing mistakes of fact or law. Reasonable attorneys engaged in appellate practice will *always* discuss how the court order being appealed was either incorrect on the facts or incorrect on the law. This isn't not disrespectful to the court that entered the order—it is a necessary component of the appellate process. As the Attorney General explained, if ODC is correct that it can punish him for discussing what he believed to be mistakes of fact or mistakes of law, then in every case that this Court decides, the losing attorney will have made a false statement about the lower court's ruling and must be disciplined under Rule 8.2(a). This conclusion would chill vigorous appellate advocacy in Montana courts and defies the text and supporting precedent of Rule 8.2(a). The Attorney General cannot be punished for engaging in the normal appellate practice of outlining alleged mistakes of fact or law.

Second, when trying to answer what differentiates "respectful" criticism from "disrespectful" criticism, ODC gives away the game by admitting that "disrespectful" simply comes down to subjective interpretation. ODC Resp. at 50-51. In his objections, the Attorney General pointed out that reasonable attorneys—including ODC's Special

Counsel himself—regularly file briefs using statements such as "an incorrect standard," "misconstrued facts," "committed legal error," "incorrectly determined" certain facts, or "failed to employ 'conscientious judgment' in refusing to defer summary judgment." *See Objs*. at 87-88. If those statements—all of which criticize a court's findings, rulings, and judgment—are fine and reasonable, how are the Attorney General's materially *identical* statements not reasonable? ODC answers: "The difference is that the examples from the undersigned's briefs are in fact 'strong statements' or 'robust criticism' within the boundaries of ethical precepts," while the Attorney General's "statements subject to these proceedings *were meant to be* … disrespectful." ODC Resp. 50-51.

In other words, ODC asks this Court to find that critical statements made by ODC's Special Counsel are reasonable because the Special Counsel *subjectively knows* they were offered in good faith. And somehow ODC simultaneously knows with perfect certainty that, in contrast, the Attorney General *subjectively* "meant" his statements to be "disrespectful." This claim is baffling for multiple reasons. For one thing, ODC has (correctly) acknowledged that Rule 8.2(a) operates with an objective standard, "not what the [Attorney General] subjectively

believed." ODC Resp. at 72. So when ODC insists that the only way to tell that Attorney General violated Rule 8.2(a) is by how he *subjectively* "meant" his statements, it effectively concedes that *objectively* those identical statements have an identical, reasonable meaning. For another thing, only the Attorney General can testify to his subjective statement of mind. And the *undisputed* evidence from the hearing is that the Attorney General did *not* mean any of his statements to be disrespectful. *See, e.g.*, Tr. 150, 151, 158, 161, 167, 172, 175, 177. So ODC has now made a factual assertion pertaining to the Attorney General's state of mind that's devoid of support in the record. Thus that assertion *must* be rejected. If this Court decided to resolve the Rule 8.2(a) allegations based on how the Attorney General subjectively "meant" his statements, then it can only find what's shown by undisputed evidence: the Attorney General did *not* mean his statements to be disrespectful.

Rule 8.2(a) cannot simply mean, as ODC argues, that the rubric for deciding which statements violate Rule 8.2(a) is simply whatever ODC's Special Counsel deems the speaker's *subjective intention* to have been. Two identical statements criticizing a court's order for "misconstrued facts" or "legal error" cannot be sorted in "respectful" and "disrespectful"

buckets based on the prosecutor's subjective belief about the speaker's subjective belief about which statement was made in good faith. Rule 8.2(a), this Court, and Montana's rule of law demand more than such a standardless approach.

ODC's (insufficient) explanation notwithstanding, the Attorney General must point out the obvious: ODC's real argument is that using such language is acceptable when the Special Counsel does it. The hearing transcript and ODC's briefing are filled with righteous indignation at the Attorney General for criticizing the judicial branch. *See, e.g.*, Tr. 456:18-21 (ODC: "[I] can't relate to this. It is so antithetical to what I understand it is to be a lawyer that I am speechless.") (Special Counsel's closing statement). Under different circumstances those (misguided) sentiments could be attributed to good faith concerns about the rule of law and the integrity of the judiciary. But not here. ODC's brazen hypocrisy on these statements taints its entire Complaint and demonstrates that its overzealous prosecution of the Attorney General is, and always has been, political. The mask is off.

In this case, the Attorney General filed motions to recuse—as any reasonable attorney would do. And he filed petitions for rehearing and

for certiorari, alleging his belief that there were mistakes of law and fact—as any reasonable attorney would do. And, from time to time, he chose to use rhetorical hyperbole—as many reasonable attorneys and members of this Court have done. None of those statements violated Rule 8.2(a).

3. MRPC 8.4(d). The Attorney General never violated Rule 8.4(d) because his conduct and comments didn't disrupt or interrupt ongoing court proceedings. Rule 8.4(d) states that a lawyer shall not "engage in conduct that is prejudicial to the administration of justice." MRPC 8.4(d). Because Rule 8.4(d) runs perilously close to being unconstitutionally vague, this Court has adopted a narrowing interpretation: "In order to establish a violation of [Rule 8.4(d)] … ODC must demonstrate some *nexus* between [the attorney's] conduct and *an adverse effect* upon the administration of justice." *In re Olson*, 2009 MT 455, ¶22, 354 Mont. 358, 222 P.3d 632 (emphasis added). As a practical matter, this Court has therefore only disciplined attorneys under Rule 8.4(d) for attempting to perpetrate fraud on a court or directly disrupting ongoing proceedings. *See* Objs. at 112-14.

ODC acknowledges that this Court implemented *Olson*'s "nexus/adverse effect" test. But since that leaves ODC without a textual or precedential basis to argue that the Attorney General violated Rule 8.4(d), ODC pivots to the sweeping assertion that Rule 8.4(d) does not "require proof of some identifiable harm in" actual proceedings, and that the Court can punish lawyers "though [they] did not disrupt any ongoing underlying cases." ODC Resp. at 54.

Unfortunately for ODC, it cites *no* case supporting such a sweeping departure from how this Court has traditionally applied Rule 8.4(d). ODC refers to "the situation in the *Miller* and *Meyers* proceedings," but chose not to supply any citations for such cases. The Attorney General has been unable to find *any* Montana disciplinary case called "*Meyers*," much less one that embraces such a novel departure from customary Rule 8.4(d) application.[6] And while ODC had previously cited a "*Miller*" case, that

[6] If ODC meant to refer to *In re Myers*, its contention that the attorney there was punished despite "not disrupt[ing] any ongoing underlying cases" misreads that case. In *Myers*, this Court dismissed an appeal after the attorney failed to file an opening brief. ODC File No. 15-133, ¶4 (2017). The Court later affirmed discipline under Rule 8.4(d) since the attorney's conduct "*squandered* [his client's] *right of appeal* by failing to timely file an opening brief." *Id.* ¶14. Thus, even if ODC meant *Myers* rather than *Meyers*, that case involved circumstances where an attorney's dereliction of duty caused a severe disruption of ongoing litigation.

Miller case did *not* involve Rule 8.4(d). *See Miller*, PR 18-0139, at 2 (violations of Rule 3.1(a) and Rule 8.2(a)).

This Court should thus disregard this unsupported, incorrect assertion of law. The Attorney General has explained, in detail, how Montana and a majority of other jurisdictions find Rule 8.4(d) violations only when attorneys try to defraud a court or materially disrupt ongoing proceedings. *See* Objs. at 109-14. This Court should not set aside all these years of settled law based on one unsupported ODC legal claim.

ODC then argues that the Attorney General violated Rule 8.4(d) for his (allegedly) disrespectful statements and his (allegedly) unexcused disobedience of this Court's order to return the emails produced in discovery. Each of these arguments—when taken on their own merits under Rule 3.4(c) and Rule 8.2(a)—fail on both law and fact for the reasons the Attorney General has already explained. They have no place in Rule 8.4(d), and at no point does ODC even try to demonstrate a "nexus" between that conduct and some non-hypothetical "adverse effect" in the real world. So under the black-letter law application of this Court's decision in *Olson*, the Attorney General didn't violate Rule 8.4(d).

4. MRPC 5.1(c), 8.4(a). The Attorney General explained how he did not violate either Rule 5.1(c) or Rule 8.4(a), since each of those rules requires some other underlying independent violation of a separate disciplinary provision. For sake of brevity, the Attorney General incorporates by reference his full arguments regarding these alleged violations from the initial objections. *See* Objs. at 117-18.

B. If this Court reinterprets the MRPC in a new, expansive way, the MRPC will violate the First and Fourteenth Amendments to the U.S. Constitution.

The Attorney General has explained, both in his objections and in this brief, how ODC's proposed interpretation and application of the various rules of the MRPC defy this Court's settled precedent and would represent a new, expansive interpretation of the MRPC. If the Court departs from its settled holdings on Rules 3.4(c), 8.2(a), and 8.4(d) and interprets those rules as ODC requests to cover the Attorney General's conduct here, each of those three rules will become unconstitutionally vague. *See* Objs. at 122-27. And an expansive new interpretation of Rule 8.2(a) will render it unconstitutionally overbroad. *See id.* at 128-31.

ODC has no answer to this constitutional infirmity that its reinterpretation of the Rules of Professional Conduct will create. ODC

merely asserts that its reinterpretation of the Rules is not "new or expansive." Yet juxtaposing ODC's attempt to sweep up all his reasonable litigation conduct against the text, interpretation, and precedent from this Court and the majority of other jurisdictions shows how each of ODC's claims about how Rules 3.4(c), 8.2(a), and 8.4(d) should apply represents a massive departure from settled practice.

ODC also claims that it addressed the First Amendment implications for all three relevant rules elsewhere in its brief, but actually discussed the First Amendment only in relation to Rule 3.4(c). *See* ODC Resp. at 42. ODC points to *United States v. Cooper* for the notion that an attorney may not "seek refuge within his own First Amendment right of speech to fill a courtroom with a litany of speculative accusations and insults." 872 F.2d at 3. The Attorney General has no quarrel with that principle, which matches this Court's use of Rule 8.2(a) to discipline attorneys who launch baseless *ad hominem* attacks at judges. Yet ODC chose to omit the *holding* of *Cooper*, where—as the Attorney General previously noted—the First Circuit *reversed* the attorney discipline because the attorney had made his statements in good faith and in a motion to recuse, so "*not only was it ethical and proper* for [the attorney]

to file the motion, but more importantly that it was necessary for him to do so." *Id.* at 5.

In short, even the claims ODC makes about the First Amendment are misplaced. The First Amendment does not cloak an attorney with absolute immunity, but it does protect his reasonable statements made in pursuit of a legitimate litigation objective. That is what occurred in the underlying facts of this case. Additionally, none of ODC's general references to the First Amendment solves the unconstitutional vagueness and unconstitutional overbreadth problems that will arise if the Court adopts ODC's proffered unprecedented new interpretations of the MRPC to punish the Attorney General's reasonable litigation statements.

VI. The Commission's recommended discipline is draconian and disproportionate.

The Commission's recommended discipline in this case is far more severe than in any comparable case. This Court regularly punishes far worse conduct much more leniently. The Montana Rules for Lawyer Disciplinary Enforcement list a series of criteria that should be taken into account when determining appropriate disciplinary. These include: "[t]he lawyer's mental state," the "injury caused by the lawye[r]," the existence

of "mitigating factors," and the existence of "prior offenses." MRLDE 9(B)(2)-(5)

1. Even if this Court were to accept all of ODC's mistaken assertions of factions and law, those factors demonstrate that the Commission's recommended punishment for the Attorney General is far too severe even for the conduct with which he is charged. As the undisputed record evidence confirms, the Attorney General's "mental state" was that he did not intend to disrespect this Court or the rule of law. *See, e.g.*, Tr. 150, 151, 158, 161, 167, 172, 175, 177. Neither the Commission nor ODC has shown any material "injury" from the Attorney General's conduct—no proceedings were delayed or disrupted, and no evidence was leaked to the public. *See* Objs. at 133.

There are also significant "mitigating factors." The underlying cases here involved two separate constitutional branches of government struggling over a previously undefined area of power. Before this Court's decision in *McLaughlin* became final, no Montana precedent existed on whether a court could exercise jurisdiction over a legislative subpoena. Given that unknown, the Legislature naturally wished to assert the broadest reach possible for its legislative subpoena power—and the

Attorney General, as a constitutional officer, was tasked with representing that position in the unprecedented separation-of-powers dispute. This unusual posture and context demonstrate that this is no run-of-the-mill case. That mitigates against disciplining the Attorney General harshly.

Most important, in this Court's eyes and past practice, the Attorney General has *no* history of prior (or later) MRPC offenses. As the Attorney General noted in the initial objections, this Court has set a practice of reversing recommendations for harsher penalties and opting for public admonition where the attorney has no history of prior violations. *See* Objs. at 131-32.

2. For these reasons, should this Court find that the Attorney General violated the MRPC, it should reject the discipline of suspension that was recommended by the Commission. Suspension is unnecessary where "a public censure will alert the public that the Court will not tolerate such misconduct from a lawyer." *In re Potts*, 2007 MT 81, ¶80, 336 Mont. 517, 158 P.3d 418.

3. The Attorney General again respectfully requests that if this Court orders a penalty of suspension, the Court also stay the suspension

while the Attorney General seeks relief from the U.S. Supreme Court on Due Process and First Amendment grounds.

CONCLUSION

Despite the Commission's and ODC's desire to minimize this case's political background, this case cannot be separated from the context in which it arose—a separation-of-powers dispute between two branches of government, with each branch zealously striving to defend what it saw as the proper extent of its power. Equally important to that context is the result—the Judicial branch won. And after pursuing appropriate methods of procedural appeal, the Legislature and the Attorney General accepted that result. Not everyone was pleased with the way the dispute was conducted. Indeed, several members of this Court wrote separate opinions chastising the Legislature and the Attorney General. But the matter should have ended there.

Instead, many years later, the Attorney General has been forced to defend himself for the strongly worded statements he made while filing the various motions for recusal and petitions for rehearing that are necessary to any appellate procedure. And the Attorney General has been subjected to a process marked by repeated due process violations, clearly

erroneous evidentiary rulings, and expansive reshaping of this Court's settled precedent on the application of the MRPC.

This Court still has many avenues to correct the Commission's mistakes. In light of the arguments the Attorney General has presented in his objections and here, the Court should dismiss the Complaint against the Attorney General with prejudice.

DATED this 7th day of February 2025.

Respectfully submitted,

/s/ Christian B. Corrigan
CHRISTIAN B. CORRIGAN
Solicitor General
MONTANA DEPARTMENT
OF JUSTICE
P.O. Box 201401
Helena, MT 59620-1401
Phone: (406) 444-2026
christian.corrigan@mt.gov

MARK D. PARKER
PARKER, HEITZ & COSGROVE, PLLC
401 N. 31st Street, Suite 1600
P.O. Box 7212
Billings, MT 59103-7212
Phone: (406) 245-9991
Email: markdparker@parker-law.com

TYLER GREEN*
CONSOVOY MCCARTHY PLLC
222 S. Main Street, 5th Floor

Salt Lake City, UT 84101
Phone: (703) 243-9423
tyler@consovoymccarthy.com
**Pro hac vice*

SHANE P. COLEMAN
BILLSTEIN, MONSON & SMALL PLLC
1555 Campus Way, Suite 201
Billings, MT 59102
Phone: (406) 656-6551
shane@bmslawmt.com

Attorneys for Respondent

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 10,442 words, excluding certificate of service and certificate of compliance.

/s/ Christian B. Corrigan
CHRISTIAN B. CORRIGAN
Solicitor General

MARK D. PARKER
Parker, Heitz & Cosgrove, PLLC
401 N. 31st Street, Suite 1600
P.O. Box 7212
Billings, MT 59103-7212
Phone: (406) 245-9991
markdparker@parker-law.com

TYLER GREEN
Consovoy McCarthy PLLC
222 S. Main Street, 5th Floor
Salt Lake City, UT 84101
Phone: (703) 243-9423
tyler@consovoymccarthy.com
*Pro hac vice

CHRISTIAN BRIAN CORRIGAN
Solicitor General
Office of the Attorney General
215 North Sanders
Helena, MT 59601
Phone: (404) 444-2797
Christian.Corrigan@mt.gov

SHANE P. COLEMAN
Billstein Monson & Small PLLC
1555 Campus Way, Suite 201
Billings, MT 59102
Phone: (406) 656-6551
shane@bmslawmt.com

Attorneys for Respondent

IN THE SUPREME COURT OF THE STATE OF MONTANA
PR 23-0496

IN THE MATTER OF AUSTIN MILES KNUDSEN, An Attorney at Law, Respondent.	ODC File No. 21-094 **INDEX OF EXHIBITS**

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Exhibit A

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AUDIO TRANSCRIPTION

OF

Montana House Judiciary Hearing

Minutes 9:20:46 to 9:23:08

****

Monday, February 3, 2025

Transcribed by Melissa K. Gum, RDR, CRR, CRC, Jeffries Court Reporting, Inc., 1015 Mount Avenue, Suite B, Missoula, Montana 59801, (406) 721-1143, Freelance Court Reporter and Notary Public for the State of Montana, Residing in Corvallis, Montana, jcrcourt@montana.com

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The assurance we can provide is that we will endeavor to provide the most thorough and complete transcript that is possible.

(Whereupon, the following transcript was transcribed from an audio link. The reporter was not present to verify any spellings or speaker identifications.)

MR. SPENCER: Madam Chair, Vice Chair Deming.

VICE CHAIR DEMING: Madam Chair. Good to see you today, Mr. Spencer.

MR. SPENCER: Nice to be seen.

VICE CHAIR DEMING: So were you the one -- were you the witness that talked about judges shouldn't be doing any ex parte communication?

MR. SPENCER: Madam Chair, Vice Chair Deming, yes, I did say that.

VICE CHAIR DEMING: Follow up?

CHAIRWOMAN REGIER: Go ahead.

VICE CHAIR DEMING: Thank you, Madam Chair.

So is it fair to say that that is -- those types of communications would give the appearance of impropriety?

MR. SPENCER: Madam Chair, Vice Chair Deming, if not actual impropriety, yes.

CHAIRWOMAN REGIER: Go ahead, follow-up.

VICE CHAIR DEMING: Thank you, Madam Chair.

Okay. So do you think taking -- judges taking a poll of the other judges on upcoming legislation -- in your opinion, do you think that that is -- qualifies as at least the appearance of impropriety if not outright impropriety?

MR. SPENCER: So, Madam Chair, Vice Chair Deming, you're referring to the poll back in 2021 about Senate Bill 140, which eliminated the Judicial Nomination Commission, and the Montana Judges Association at the time would send out a poll and ask judges what their position was on the bill.

And judges, as they are wont to do -- and I know Judge Sherlock is behind me -- some of them were reluctant just to say yes or no or "I don't like it," and they wanted to explain themselves. So some of the judges opined they felt the bill was unconstitutional.

Can I see the appearance of impropriety if there's a court case announced or filed and it gets in front of a judge that's said in a poll that he felt the bill was unconstitutional? Yes, of course, I can.

I can tell you now that the Montana Judges Association doesn't do that anymore. There's an executive committee. The executive committee makes decisions on bills. Those judges all know that if a case ever came before them about that bill they would have to recuse themselves, and it doesn't go out to the general judge populous for decisions on the bills. They recognized what happened in '21 was the appearance of impropriety and have taken actions to address that.

VICE CHAIR DEMING: Thank you, Madam Chair.

(End of requested audio.)

* * *

C E R T I F I C A T E

STATE OF MONTANA)
: ss.
County of Ravalli)

I, Melissa K. Gum, RDR, CRR, CRC, Freelance Court Reporter and Notary Public for the State of Montana, residing in Corvallis, Montana, do hereby certify:

That I was authorized to and did transcribe the testimony and evidence in this cause to the best of my ability from the audio file I received.

That the foregoing pages of this transcript represent my best effort to transcribe an audio file of a proceeding where I was not in attendance.

I further certify that I am not an attorney nor counsel of any of the parties; nor a relative or employee of any attorney or counsel connected with the action, nor financially interested in the action.

IN WITNESS WHEREOF, I have hereunto set my hand and seal on this the 5th day of February, 2025.

Melissa K. Gum

Melissa K. Gum, RDR, CRR, CRC
Freelance Court Reporter
Notary Public, State of Montana
Residing in Corvallis, Montana
My Commission expires: 8/29/2028

Exhibit B

Mark D. Parker
PARKER, HEITZ & COSGROVE, PLLC
401 N. 31st Street, Suite 1600
P.O. Box 7212
Billings, MT 59103-7212
Phone: (406) 245-9991
Email: markdparker@parker-law.com

Christian Brian Corrigan
Solicitor General
OFFICE OF THE ATTORNEY GENERAL
215 North Sanders
Helena, MT 59601
Phone: (404) 444-2797
Email: Christian.Corrigan@mt.gov

Tyler Green
CONSOVOY MCCARTHY PLLC
222 S. Main Street, 5th Floor
Salt Lake City, UT 84101
Phone: (703) 243-9423
Email: tyler@consovoymccarthy.com

Attorneys for Respondent

BEFORE THE COMMISSION ON PRACTICE OF THE SUPREME COURT OF THE STATE OF MONTANA

IN THE MATTER OF AUSTIN MILES KNUDSEN,	)	Supreme Court Cause No. PR 23-0496
An Attorney at Law,	)	ODC File No. 21-094
Respondent.	)	**RESPONDENT'S BRIEF IN SUPPORT OF MOTION TO DISQUALIFY**

* *

INTRODUCTION

Respondent Attorney General Austin Knudsen respectfully requests that the Commission on Practice ("Commission") disqualify Adjudicatory Panelist Patricia Klanke ("Ms. Klanke") due to her representation of Montana Supreme Court Justice James Rice in *Rice v. Montana State Legislature*, BDV-2021-451, Mont. First Judicial Dist., Lewis and Clark County, (2021). Ms. Klanke's involvement runs afoul of the Due Process Clause of the Fourteenth Amendment to the United States Constitution, Article II, Section 17 of the Montana Constitution, the Montana Rules of Professional Conduct, and the Montana Code of Judicial Conduct.

On September 12, 2024, Respondent requested disclosure of the members of the upcoming Adjudicatory Panel for this matter. The Commission obliged and disclosed that the Adjudicatory Panel would consist of: "Randy Ogle (Chair), Patricia Klanke (attorney member), Substitute attorney member (TBA), Troy McGee (lay member), Lois Menzies (lay member), and Elinor Nault (lay member)."[1] See COP Email, dated September 12, 2024, attached as Ex. A.

The Commission appointed Ms. Klanke as the Attorney Member to the Commission on Practice for Area F on June 18, 2024, following the resignation of Andres

[1] The Commission also informed Respondent that: "Per Rule 4(C) of the Montana Rules for Lawyer Disciplinary Enforcement, a substitute attorney member is required to constitute a quorum and will be appointed by the Montana Supreme Court from the attorney member area either in Area C, Area D, or Area E, as these are the areas of the three recused attorney members of the Adjudicatory Panel. The Supreme Court appoints attorney members per Rule 2(A) of the Montana Rules for Lawyer Disciplinary Enforcement." Ex. A. On September 17, 2024, the Supreme Court appointed Carey Matovich to sit by designation as the third attorney member.

Haladay. Mr. Haladay previously worked as an employee of the Montana Department of Justice and sued the Department in 2022[2] alleging unfair discrimination when passed over for promotion due to his political beliefs.[3]

The Commission must disqualify Ms. Klanke from the Adjudicatory Panel and cure all prejudice resulting from her involvement. Ms. Klanke represented Justice Rice in his district court lawsuit to quash the Montana Legislature's April 15, 2021, subpoena issued to him (as well as every other member of the Montana Supreme Court and Supreme Court Administrator Beth McLaughlin). See Petitioner's Response in Opposition to Motion to Dismiss, filed July 1, 2021, attached as Ex. B. She's already taken a position on the propriety of that subpoena, which is adverse to Respondent's representation in that controversy. This is the same subpoena, controversy, and underlying facts that were at issue in *Brown v. Gianforte* and *McLaughlin v. Legislature*. In other words, the exact same subpoena, controversy, and underlying facts that constitute the entire basis for the 41 counts against Attorney General Knudsen.

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[2] John Riley, *Montana Human Rights Bureau says state DOJ discriminated in hiring process based on political beliefs*, KTHV (Sept. 29, 2022), https://www.ktvh.com/news/montana-human-rights-bureau-says-state-doj-discriminated-in-hiring-process-based-on-political-beliefs.

[3] Respondent asked ODC in discovery whether Mr. Haladay had participated in these proceedings in any way. ODC answered: "[T]o the best of ODC's knowledge, COP member Haladay has not participated in any review, discussion, or deliberation of this matter." If ODC's answer is inaccurate, Respondent respectfully requests that the Commission immediately disclose the extent of Mr. Haladay's participation and order additional briefing.

Ms. Klanke's conflict of interest isn't hypothetical, attenuated, or imputed. It's real. It's obvious. And it shocks the conscience.

The Commission must, at minimum, disqualify Ms. Klanke from the hearing panel. *See United States v. Washington*, 157 F.3d 630, 660 (9th Cir. 1998) (quoting *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) ("The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases.")); *see also Bullman v. State*, 2014 MT 78, ¶ 17, 374 Mont. 323, ¶ 17, 321 P.3d 121, ¶ 17 (holding that "the plain language of Rule 2.12 clearly requires recusal when the judge has personal knowledge of disputed facts stemming from his previous representation of a client in a separate and related matter.").

But there's more. If Ms. Klanke has already participated in this matter in any capacity, the Commission must take immediate remedial action. First, the Commission must vacate any order or decision in which she participated. *Stivers v. Pierce*, 71 F.3d 732, 748 (9th Cir. 1995) ("[W]here one member of a tribunal is actually biased, or where circumstances create the appearance that one member is biased, the proceedings violate due process."). That includes the Order denying Respondent's Motion for Summary Judgment. Second, Ms. Klanke's involvement (formal or informal) taints the participation of any of member of the Commission that participated with her in prior orders, discussions, or conferences. As a result, the Commission must disqualify those members as well.

For these reasons, Respondent respectfully request that the Commission disqualify Ms. Klanke, disclose the extent of her prior participation in these proceedings, and take all appropriate remedial action required by the Due Process Clause.

BACKGROUND

The relevant facts of this case bear repeating under these circumstances. In 2021, litigants challenged the constitutionality of SB 140, which changed the method for filling mid-term judicial vacancies in Montana. Challengers filed suit directly in the Montana Supreme Court to declare it unconstitutional. *Brown v. Gianforte*, 2021 MT 149, 404 Mont. 269, 488 P.3d 548. Due to his public lobbying against SB 140, Chief Justice McGrath recused from *Brown* and selected District Court Judge Kurt Krueger to hear the case in his stead. Per court rules, Associate Justice James Rice was appointed Acting Chief Justice for *Brown*.

Not two weeks after that original action was filed, emails became public showing that Chief Justice McGrath was not the only member of Montana's judiciary who had taken a position on SB 140. In January 2021—when the Legislature was still considering SB 140—Supreme Court Administrator Beth McLaughlin emailed every Montana Supreme Court Justice and every Montana district court judge using government email accounts, asking that they "review and take a position on" SB 140. The email included a click-poll, to which many state judges responded. Even so, some judges' individual views became public when they chimed in on the long chain of "reply-alls." Many simply declared their opposition. Others offered more fulsome explanations. Still others went further, explicitly stating their view that SB 140 was

unconstitutional. Judge Krueger, the Chief Justice's replacement in *Brown*, specifically offered his views: "I am also adamantly oppose [sic] this bill." Learning this, the State quickly moved to disqualify Judge Krueger and any other judicial officers who took a position on SB 140 before it was enacted. Judge Krueger recused within hours.

In early April 2021, the Montana Legislature issued two legislative subpoenas. The first was to Supreme Court Administrator McLaughlin, seeking all public records in her possession related to the SB 140 poll. When the Legislature saw that McLaughlin's response (on an extended deadline) included only two emails—along with an apology and an explanation that she had not retained emails—Senate Judiciary Chairman Keith Regier then issued an April 8 legislative subpoena to the Director of the Department of Administration ("DOA") for McLaughlin's emails during the 2021 Legislative Session. On Friday, April 9, 2021, the Department partially complied with the subpoena, providing a 2,450-page collection of documents, including more emails related to SB 140 and other proposed legislation.

Two days later, on Sunday, April 11, 2021, Supreme Court Administrator McLaughlin filed an emergency motion with the Montana Supreme Court to quash the April 8 subpoena to DOA. That Sunday morning, the Clerk of the Montana Supreme Court, Bowen Greenwood, received a message from Justice Jim Rice. Justice Rice was the Acting Chief Justice in *Brown* because Chief Justice McGrath had recused. Justice Rice informed Mr. Greenwood that he had received a message from attorney Randy Cox, whom McLaughlin had retained to represent her. Later that Sunday, the Court temporarily quashed the April 8 legislative subpoena to DOA.

On April 12, 2021, McLaughlin filed her own lawsuit—styled *McLaughlin v. Montana State Legislature*—as an original action at the Montana Supreme Court. That original action sought to quash the Legislature's April 8 subpoena. On April 14, the Legislature not only moved to dismiss *McLaughlin* but also formed a select committee to investigate judicial document retention, judicial lobbying, and other potential judicial impropriety. On April 15, Legislative leadership issued new subpoenas—to McLaughlin and to each member of the Montana Supreme Court—ordering their appearance at an April 19 meeting of the select committee and the production of (a) McLaughlin's computer and (b) documents related to judicial branch polls on pending legislation and to judicial lobbying. On April 16, in response to another emergency motion from McLaughlin, the Montana Supreme Court issued a combined order in McLaughlin and in the SB 140 merits challenge. That combined order quashed not only the April 8 legislative subpoena to DOA but also the second legislative subpoena to McLaughlin and the legislative subpoenas issued to the Justices the previous day.

Justice Rice recused himself from all proceedings in *McLaughlin*. Instead, Justice Rice chose to challenge the validity of the Legislature's April 15 subpoena in Lewis & Clark County district court, *Rice v. Montana State Legislature*, No. BDV-2021-451. See Petition dated April 19, 2021, attached as Ex. C.

Justice Rice's lawsuit was based entirely on the events leading up to and including *Brown* and *McLaughlin*. *See, e.g.*, page 1 of Brief of Petitioner in Support of Petition for Declaratory Judgment, dated April 15, 2021, attached as Ex. D ~~at 1~~ ("The Court is familiar with the facts giving rise to this dispute. Those facts are set out in

the Court's Preliminary Injunction Order, May 18, 2021, and in *McLaughlin v. Montana State Legislature*, 2021 MT 120, 404 Mont. 166, 489 P.3d 482 ("*McLaughlin I*").").

Justice Rice's Petition alleged that he had reviewed the communications sought by the Legislature and believed that "not a single communication subject to the Subpoena is or would be the basis for judicial discipline [or] claims of bias." Ex. C at 7. Justice Rice further alleged that he "ha[d] nothing to hide" but did "have something to fear, that being a potentially inappropriate intrusion into the communications of the Judiciary and into a justice's private affairs, what Petitioner believes is a recent disturbing pattern of overreaching by the Department of Justice, sometimes in concert with Respondent State Legislature … which has led inexorably to Respondent's issuance of subpoenas to the Justices." *Id.* Justice Rice sought judicial review of the subpoena "[b]ecause of threatened harm and injury, both personally and judicially." *Id.*

Justice Rice took issue with the way the Legislature and Department of Justice characterized *Brown* and *McLaughlin*. *See id.* at 5 ("Respondent State Legislature stated therein it would pursue this course even if the subpoenaed materials would 'tend to 'disgrace' the Judicial Branch or render it 'infamous,' citing § 5-5-105(2), MCA. What was being insinuated by the comment in Respondent's briefing concerning a potential 'disgrace' to the Judiciary is unknown to Petitioner."); *id.* at n.3 ("The Department of Justice has made similar recent out-of-court statements attacking the Supreme Court.").

Justice Rice initially filed his Complaint *pro se*. Ex. C. But he eventually retained Curt Drake and Patricia Klanke of the Drake Law Firm as counsel. Ex. B at 1. The Department of Justice represented the Legislature throughout the litigation. *See, e.g.*, *id.* at 7.

LEGAL STANDARD

"[T]he requirement that proceedings which adjudicate individuals' interests in life, liberty, or property be free from bias and partiality has been 'jealously guarded.'" *Clements v. Airport Auth.*, 69 F.3d 321, 333 (9th Cir. 1995) (quoting *Marshall v. Jerrico*, 446 U.S. 238 (1980)). As such, a license to practice law may not be revoked or suspended without due process. *See, e.g.*, *Kafka v. Mont. Dep't of Fish, Wildlife & Parks*, 2008 MT 460, ¶ 38, 348 Mont. 80, 201 P.3d 8 ("[C]ourts have recognized that some licenses may contain property interests … protected by the due process clause."); *People v. Varallo*, 913 P.2d 1, 6 (Colo. 1996) *Huckaby v. Ala. State Bar*, 631 So. 2d 855, 857 (Ala. 1993) *Conway v. State Bar*, 767 P.2d 657, 660 (Cal. 1989); *cf. State v. VanDyke*, 2008 MT 439N, ¶ 6, 348 Mont. 372 ("[O]nce issued, a driver's license becomes a property interest that may not be suspended or revoked without the procedural due process guaranteed by the Montana and United States Constitutions.").

"At a minimum, Due Process requires a hearing before an impartial tribunal." *Clements v. Airport Auth.*, 69 F.3d 321, 333 (9th Cir. 1995). Montana's Due Process Clause, *see* MONT. CONST. art. II, § 17, similarly sets the "guiding principle of our legal system" and contemplates tenacious adherence "to the ideal that both sides of a lawsuit be guaranteed a fair trial." *Lopez v. Josephson*, 2001 MT 133, ¶ 35, 305 Mont.

446, 30 P.3d 326. Both actual bias and a high probability of bias trigger due process concerns. *See Withrow v. Larkin*, 421 U.S. 35, 46–53 (1975). This neutrality principle applies in administrative adjudications and quasi-judicial proceedings. *See Marshall v. Jerrico, Inc.*, 446 U.S. 238, 243 n.2 (1980); *Schweiker v. McClure*, 456 U.S. 188, 195 (1982).

Courts have held that the proper procedure to challenge the impartiality of the decision-maker in quasi-judicial proceedings is to request the examiner to withdraw from the case. *See, e.g.*, *Ginsburg v. Richardson*, 436 F.2d 1146, 1151 (3rd Cir. 1971); *Wells v. Apfel*, 2000 U.S. App. LEXIS 26163, at *16 (6th Cir. Oct. 12, 2000); *Idegwu v. Colvin*, 2013 U.S. Dist. LEXIS 163393, at *41 (D. Del. Nov. 18, 2013).

ARGUMENT

I. The Commission must disqualify Ms. Klanke because of her previous, direct involvement in this matter.

The facts and legal issues in ODC's Complaint against the Attorney General are inextricably intertwined with *Rice v. Montana Legislature*, where Ms. Klanke represented Justice Rice. That self-evident conflict offends due process, the Code of Judicial Conduct, and the Montana Rules of Professional Conduct ("MRPC").

Start with due process. Courts begin with a rebuttable presumption that adjudicators are honest and impartial. *Hess v. Bd. of Trs. of S. Ill. Univ.*, 839 F.3d 668, 675 (7th Cir. 2016). To overcome that presumption, "the party claiming bias must lay a specific foundation of prejudice or prejudgment, such that the probability of actual bias is too high to be constitutionally tolerable." *Id.* Alleged prejudice must be evident from the record and cannot be based on speculation or inference. *McClure*,

456 U.S. at 196. "[V]arious situations have been identified in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Withrow*, 421 U.S. 47. "A tribunal is not impartial if it is biased with respect to the factual issues to be decided at the hearing." *Tonkovich v. Kan. Bd. of Regents*, 159 F.3d 504, 518 (10th Cir. 1998) (quotations omitted).

For example, in *Staton v. Mayes*, 552 F.2d 908 (10th Cir.) (as amended), *cert. denied*, 434 U.S. 907 (1977), a school superintendent was dismissed by a majority vote of the school board. The members comprising the majority had made statements about the superintendent, both in public and in private, prior to any hearing on the matter. The court held that although such statements in an election campaign or between members weren't improper, "a due process principle is bent too far when such persons are then called on to sit as fact finders and to make a decision affecting the property interests and liberty interests of one's reputation and standing in his profession." *Id.* at 915. Ms. Klanke has even more direct involvement with the facts of this case than simply making public statements about it.

Ms. Klanke's attorney–client relationship with Justice Rice gives her direct personal involvement in this dispute. The Washington Supreme Court explained that although "[t]he presumption of fairness for judges likewise applies to hearing officers in attorney disciplinary proceedings," *In re Disciplinary Proceeding Against King*, 168 Wash. 2d 888, 904, 232 P.3d 1095, 1102 (2010), "because hearing officers often

are also practicing attorneys, conflicts of interest and other factors that can imperil the appearance of fairness may have a higher probability of occurring." *Id.* n.7.

Justice Rice was the Acting Chief Justice during *Brown v. Gianforte*. Justice Rice received the *ex parte* communication from McLaughlin's attorney and called the Supreme Court in on a Sunday to temporarily quash the first subpoena issued by the Legislature. The Office of Disciplinary Counsel ("ODC") has also listed Justice Rice as a potential witness in this case.

As recognized by the Washington Supreme Court in *King*, Ms. Klanke does not shed her professional obligations as an attorney by serving on the Commission. To the contrary, this proceeding takes place at the behest of ODC and before the Commission on Practice—both charged by the Supreme Court with enforcing the MRPC. Those rules, therefore, loom large in the due process analysis.

In her capacity as an attorney, Ms. Klanke couldn't represent the Attorney General or ODC in this matter due to her representation of Justice Rice. *See* MRPC R. 1.7(a)(2) ("a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer."); *id.* R. 1.9(a) ("(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives

informed consent, confirmed in writing."). In other words, if the MRPC prevent Ms. Klanke from participating in this case as an attorney due to her representation of Justice Rice, she certainly cannot serve as an impartial decisionmaker.

Finally, although this is a quasi-judicial proceeding the Montana Code of Judicial Conduct is instructive. *See Draggin' Y Cattle Co. v. Junkermier*, 2017 MT 125, ¶ 36, 387 Mont. 430, 442, 395 P.3d 497, 505 ("Because disqualification proceedings are premised upon a litigant's constitutional right to a fair and impartial tribunal, we are unpersuaded by Peters's contention that a violation of the Code cannot be the basis for vacating a judge's decision."). First, "Rule 2.12 requires that a judge disqualify [her]self 'in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances: (1) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding.' A judge shall also disqualify [her]self if the judge 'served as a lawyer in the matter in controversy.'" *Bullman v. State*, 2014 MT 78, ¶ 14, 374 Mont. 323, 327, 321 P.3d 121, 124 (quoting Mont. Code of Jud. Conduct 2.12(A)(5)(a)); *see also Williams v. Pennsylvania*, 579 U.S. 1, 8 (2016) ("[U]nder the Due Process Clause there is an impermissible risk of actual bias when a judge earlier had significant, personal involvement as a prosecutor in a critical decision regarding the defendant's case."). Rule 2.12(A)(5)(a) applies because Ms. Klanke served as an attorney for Justice Rice in the underlying controversy. *See Williams*, 579 U.S. at 9–10 ("the judge's 'own personal knowledge and impression' of the case, acquired through his or her role in the prosecution, may carry far more

weight with the judge than the parties' arguments to the court."). Justice Rice is also a prospective witness in this matter.

Second, "the plain language of Rule 2.12 clearly requires recusal when the judge has personal knowledge of disputed facts stemming from his previous representation of a client in a separate and related matter." *Bullman*, ¶ 17. Justice Rice's lawsuit directly challenged legislative subpoenas issued to the justices in an investigation of potential misconduct by the judiciary. *In re B.W.S.*, 2014 MT 198, ¶ 17, 376 Mont. 43, 46, 330 P.3d 467, 470 (ruling judge was required to recuse as a matter of law because he presided over the permanency plan and termination hearings after having actively represented the Guardian ad Litem in several hearings as counsel in the same case). ODC's Complaint attempts to discipline the Attorney General for statements made by the Department of Justice concerning the same alleged judicial bias and misconduct. Ms. Klanke has knowledge of the disputed facts regarding legislative subpoenas and the conduct of the Department of Justice. Ms. Klanke's representation of Justice Rice, moreover, gives her knowledge of confidential information in this case. She cannot participate.

II. If Ms. Klanke participated in adjudicating Respondent's Motion for Summary Judgment, the Commission must vacate the Order.

Respondent respectfully requests that the Commission disclose the extent of Ms. Klanke's involvement, if any, in this matter. If Ms. Klanke has had no involvement with this matter to date, her disqualification suffices. But if she had any other involvement, the Commission must cure the prejudice from it.

First, if Ms. Klanke participated in adjudicating Respondent's Motion for Summary Judgment, the Commission must vacate that Order. One biased member of a tribunal is sufficient to taint the entire panel and deprive a plaintiff of procedural due process. *See Stivers*, 71 F.3d at 748 ("Whether actual or apparent, bias on the part of a single member of a tribunal taints the proceedings."); *see also Williams*, 579 U.S. at 15 ("[I]t does not matter whether the disqualified judge's vote was necessary to the disposition of the case. The fact that the interested judge's vote was not dispositive may mean only that the judge was successful in persuading most members of the court to accept his or her position. That outcome does not lessen the unfairness to the affected party."); *Hicks v. Watonga*, 942 F.2d 737, 748 (10th Cir. 1991) ("Litigants are entitled to an impartial tribunal whether it consists of one man or twenty and there is no way which we know of whereby the influence of one upon the others can be quantitatively measured."); *Antoniu v. SEC*, 877 F.2d 721, 726 (8th Cir. 1989) (vacating commission decision and remanding for de novo reconsideration, even though biased commissioner belatedly recused himself and did not vote on final decision); *Cinderella Career & Finishing Schs., Inc. v. Fed. Trade Comm'n*, 138 425 F.2d 583, 592 (D.C. Cir. 1970) (vacating and remanding agency decision "despite the fact

that former Chairman Dixon's vote was not necessary for a majority"); *Am. Cyanamid Co. v. FTC*, 363 F.2d 757, 767–98 (6th Cir. 1966) (agency decision must be vacated and remanded for de novo review; result "is not altered by the fact that [the biased panel member's] vote was not necessary for a majority"); *Berkshire Employees Ass'n of Berkshire Knitting Mills v. N.L.R.B.*, 121 F.2d 235, 239 (3rd Cir. 1941) ("Litigants are entitled to an impartial tribunal whether it consists of one man or twenty and there is no way which we know of whereby the influence of one upon the others can be quantitatively measured.').

Second, Ms. Klanke's involvement in any aspect of this case taints the participation of every co-panelist. The Commission must prospectively disqualify any panelist who has participated in this matter with Ms. Klanke. That's due to Ms. Klanke's attorney-client relationship with Justice Rice and the unique nature of the Commission's structure.

The U.S. Supreme Court's decision in *Williams* provides guidance. There, the Pennsylvania Supreme Court vacated a lower court decision granting postconviction relief to a prisoner. 579 U.S. at 4. One of the justices on the Pennsylvania Supreme Court had been the district attorney who gave his official approval to seek the death penalty in the prisoner's case. *Id.* The justice in question denied the prisoner's motion for recusal and participated in the decision to deny relief, which violated the Due Process Clause. *Id.* Although the Court remanded back for rehearing without the disqualified justice, it recognized that it may not be able to provide complete constitutional relief "because judges who were exposed to a disqualified judge may still be

influenced by their colleague's views when they rehear the case." *Id.* at 16; *see also Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 831 (1986) (Blackmun, J., concurring) ("mere participation in the shared enterprise of appellate decisionmaking—whether or not [the improperly seated judge] ultimately wrote, or even joined, the [tribunal's] opinion—pose[s] an unacceptable danger of subtly distorting the decisionmaking process.").

That's because "voluminous" literature has found that "judges' views are quite often influenced by the composition of the courts on which judges sit." Pamela S. Karlan, *Electing Judges, Judging Elections, and the Lessons of* Caperton, 123 HARV. L. REV. 80, 102 n.121 (2009) (collecting citations). Adding to the risk, the private nature of court deliberations makes it impossible for the public to determine "the actual effect a biased judge had on the outcome of a particular case." *Lavoie*, 475 U.S. at 833 (Blackmun, J., concurring).

The current circumstances produce a particularly high risk of lingering bias following Ms. Klanke's disqualification. First, as discussed above, her knowledge of this case as counsel for Justice Rice makes it nearly impossible to purge the taint of her past participation. The disqualified justice in *Williams* was merely adversarial to the defendant and had no such information.

Second, the Commission's structure makes it uniquely susceptible to lingering bias because the Adjudicatory Panel is made up of three non-attorney members. The U.S. Supreme Court has recognized that even judges are at risk of bias when reconsidering their past decisions. *See Williams*, 579 U.S. at 9 ("There is, furthermore, a

risk that the judge 'would be so psychologically wedded' to his or her previous position as a prosecutor that the judge 'would consciously or unconsciously avoid the appearance of having erred or changed position.'") (quoting *Withrow*, 421 U. S. at 57).

But unlike judges who, on remand, may be able to reconsider their prior ruling), attorneys and laypersons in particular may not be able to approach decision-making with a blank slate. *Cf. United States v. Flores*, 901 F.3d 1150, 1165 (9th Cir. 2018) ("*Daubert* is meant to protect juries from being swayed by dubious scientific testimony. When the district court sits as the finder of fact, there is less need for the gatekeeper to keep the gate when the gatekeeper is keeping the gate only for himself."). For example, the U.S. Supreme Court generally finds limiting instruction inadequate where a jury of laypersons would be unlikely to disregard prejudicial evidence. The touchpoint of that analysis centers on two issues. First, that the inadmissible evidence is highly probative of a fact issue a jury must decide. Second, that the information may not be considered due to some overarching policy concern related to the rules of evidence. That distinction is best illuminated by *Jackson v. Denno*, 378 U.S. 368 (1964), and *Bruton v. United* States, 391 U.S. 123 (1968). In *Jackson*, the Court found that a limiting instruction was insufficient to cure prejudice to the jury through the introduction of an involuntary confession. In that case, the Court described a limiting instruction as an "unmitigated fiction." *Id.* at 388 n.15. In *Bruton*, the Court considered a joint trial where one codefendant's confession implicated another. The Court ruled that "because of the substantial risk that the jury, despite instructions to the contrary, looked to the incriminating extrajudicial statements in

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that a copy of the foregoing document was served upon the persons named below, addressed as follows:

Timothy B. Strauch
c/o Office of Disciplinary Counsel
P.O. Box 1099
Helena, MT 59624-1099
tstrauch@montanaodc.org

Shelly Smith
Commission on Practice
P.O. Box 203005
Helena, MT 59620-3005
shellysmith@mt.gov

DATED this 19th day of September, 2024.

/s/ Christian B. Corrigan
CHRISTIAN B. CORRIGAN

CERTIFICATE OF SERVICE

I, Christian Brian Corrigan, hereby certify that I have served true and accurate copies of the foregoing Brief - Other to the following on 02-07-2025:

Timothy B. Strauch (Govt Attorney)
257 West Front St.
Ste. A
Missoula MT 59802
Representing: Office of Disciplinary Counsel
Service Method: eService

Mark D. Parker (Attorney)
401 N. 31st St., Ste. 1600
P.O. Box 7212
BILLINGS MT 59101
Representing: Austin Miles Knudsen
Service Method: eService

Shelly Smith (Court Reporter)
Office Administrator
Commission on Practice
PO Box 203005
Helena MT 59620-3005
Service Method: E-mail Delivery

Tyler R Green (Attorney)
222 S Main Street, 5th Floor
Salt Lake City UT 84101
Representing: Austin Miles Knudsen
Service Method: E-mail Delivery

Electronically signed by Lauren Kaplan on behalf of Christian Brian Corrigan
Dated: 02-07-2025