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

IN THE MATTER OF AUSTIN MILES KNUDSEN,	)	ODC File No. 21-094
	)	
	)	**RESPONDENT'S OBJECTIONS TO**
An Attorney at Law,	)	**THE COMMISSION ON**
	)	**PRACTICE'S OCTOBER 23, 2024**
Respondent.	)	**FINDINGS OF FACT,**
	)	**CONCLUSIONS OF LAW AND**
	)	**RECOMMENDATION**

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INTRODUCTION

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 when he represented the Montana Legislature during *Brown v. Gianforte*, 2021 MT 149, 404 Mont. 269, 488 P.3d 548, and *McLaughlin v. Montana State Legislature* ("*McLaughlin II*"), 2021 MT 178, 405 Mont. 1, 493 P.3d 980. ODC's unprecedented 41-count Complaint contains 127 unique sub-counts, mostly relating to the Attorney General's sharp criticism of the Montana Supreme Court.

This Court should reject the Commission's October 23, 2024, Findings of Fact, Conclusions of Law, and Recommendation ("Findings" or "Recommendation"). ODC failed to prove a single instance of misconduct by clear and convincing evidence. Nor could it. None of the Attorney General's actions violated the MRPC. This Court can and should clear the Attorney General. But it also need not reach the merits of ODC's overzealous and misguided prosecution. The Court has ample grounds to dismiss the Complaint or remand for a new hearing.

FACTUAL BACKGROUND

A. The story behind this disciplinary complaint begins in the Montana Legislature's 2021 session. In March 2021, the Legislature passed, and Governor Gianforte signed, Senate Bill 140—legislation that changed how mid-term judicial vacancies are filled. Before SB140, Montana's Judicial Nomination Commission vetted and recommended candidates to the Governor. But SB140 allows the Governor—with public input and Senate approval—to fill judicial vacancies.

Like most legislation, SB140 attracted some opposition. That included public opposition from then-Chief Justice Mike McGrath, who lobbied the Governor against SB140 before the Governor eventually signed it. Chief Justice McGrath's public opposition led to his recusing from an original action challenging SB140's constitutionality filed in the Montana Supreme Court the day after the Governor signed it. When Chief Justice McGrath recused, he picked District Judge Kurt Krueger to sit as his replacement.

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 SB140. In January

2021—two months before SB140 was passed or signed—Montana Supreme Court Administrator Beth McLaughlin emailed (using government email accounts) every Montana judge and justice on behalf of the Montana Judges Association. She asked them to review and take a position on SB140 and made a click-poll available for that purpose. Tr. 318:12-319:19; 323:8-326:19; Resp. Ex. C; 463:16-25 (citing ODC Ex. 5); 465:12-23 (citing Resp. Ex. D). Apart from that poll, some members of the judiciary expressed their views via "reply-all" emails. *Id.*

Judge Krueger, whom Chief Justice McGrath eventually picked to sit in his place in the original action challenging SB140, sent one of those reply-all emails. In it, he said: "I am also adamantly oppose[d] [to] this bill." Tr. 319:20-320:6 (citing Resp. Ex. I).

Upon learning of those emails, the State quickly moved to disqualify Judge Krueger (and any other judges who took a position on SB140 before it was enacted) from the original action challenging SB140's constitutionality. ODC Ex. 17. Judge Krueger recused within hours. On April 7, 2021, the six members of the Montana Supreme Court who had not recused themselves issued an order denying that any

Supreme Court Justice had participated in the poll or inappropriate correspondence. Resp. Ex. M, at 1-2.

B. What occurred in the ensuing weeks was an unprecedented dispute between two co-equal branches of Montana's tripartite government. In response to the Court's April 7 Order, the Montana Legislature contacted Administrator McLaughlin that same day requesting records related to MJA's poll on SB 140. Resp. Ex. C; Tr. 324-325; Tr. 266:5-267:12 (citing ODC Ex. 6). McLaughlin was able to locate only two emails in her records related the SB 140 and said she did not retain records of the vote by individual judges. Resp. Ex. C. She claimed "Judicial Branch policy [did] not require retention of these ministerial-type e-mails." Resp. Ex. C.

The next day (April 8), the Legislature followed up with additional questions to the Administrator about her retention of records and judicial polling. Resp. Ex. D. Administrator McLaughlin told the Legislature that she had deleted emails related to judicial polling of state district court judges. Tr. 80:25-818; Resp. Ex. D. The Administrator blamed the loss of public records on "sloppiness." Resp. Ex. D.

When the Legislature saw that Administrator McLaughlin's response included only two emails, Senate Judiciary Chairman Keith Regier issued a legislative subpoena that same day to the Department of Administration ("DOA")—which houses the servers for State email—for Administrator McLaughlin's emails during the 2021 Legislative session. Tr. 267:3-17; 274:17-275:21; 359:21-362:6; 397:22-398:6. The subpoena expressly excluded emails or attachments related to decisions made by Montana's Supreme Court Justices in disposition of final opinions. Tr. 275:13-17 (citing ODC Ex. 6). The goal was to learn whether McLaughlin's apparently deleted emails might still be retrievable from the state's email servers. Tr. 360:20-362:15; 374:7-375:5; 376:3-20.

The Legislature believed the judiciary was using state resources for lobbying purposes. Tr. 364:23-365:5; 367:6-368:4; 403:22-404:4. The Legislature also believed that the Court was not producing all responsive emails and was "trying to hide in very strong language." Tr. 365:9-12. On Friday, April 9, 2021, DOA partially complied with the subpoena, providing a 2,450-page collection of documents, including more emails related to SB140 and other proposed legislation. Tr. 288:12-289:1.

The judicial branch responded almost immediately. On Saturday April 10 and Sunday April 11, 2021, Administrator McLaughlin made emergency filings with the Montana Supreme Court to quash the April 8 subpoena to the Department of Administration. Tr. 342:1-16. The April 8 subpoena concerned at least some emails that belonged to the Justices of Montana Supreme Court. Tr. 111:11-14.

C. This weekend filing was irregular for a number of reasons. First, Administrator McLaughlin's filing didn't follow normal processes. Tr. 236:25-237:1. The Court is not open on Sundays and ordinarily does not accept motions or other filings over the weekend. Tr. 233:19-24; 234:13-235:3. The Montana Supreme Court has not, in recent history, convened on a weekend before April 11, 2021. Tr. 236:7-17. This case, involving the Supreme Court's employee, is only case on record where a litigant e-filed a document over the weekend and didn't have to wait until Monday morning. Tr. 237:4-11.

The Legislature was also concerned with how the emergency motion was put in front of the Court on a weekend. Administrator McLaughlin's attorney, Randy Cox, called Justice Sandefur on Saturday April 10, and had a roughly five-minute phone conversation with him about

McLaughlin's emergency filing. Tr. 87:1-90:20; Resp. Ex. KK. Mr. Cox called Justice Sandefur first because he knew him. Tr. 88:10-20. Mr. Cox told Justice Sandefur that he was seeking an *ex parte* order to temporarily quash the Legislature's subpoena. Resp. Ex. KK. Justice Sandefur told Mr. Cox that there was likely no legal authority for an individual justice to grant emergency relief and he would not consider such a request. *Id.* Justice Sandefur informed Mr. Cox that Justice Rice was the Acting Chief Justice in *Brown*. *Id.* Justice Sandefur also stated that he wasn't sure that McLaughlin's emergency motion could properly be filed in the *Brown* matter and would likely have to file a new case. *Id.* Justice Sandefur then directed Mr. Cox to Justice Rice. *Id.*

Later on April 10, 2021, Mr. Cox called Acting Chief Justice Rice and left him a voicemail. 35:20-36:6. Mr. Cox told Justice Rice that he would be filing an emergency motion with the Supreme Court. 35:20-36:6.

When Mr. Cox was questioned in his deposition about how he was able to file an emergency motion over the weekend, he disclosed the voicemail he left for Justice Rice. But he didn't disclose his April 10, 2021, phone conversation with Justice Sandefur. Tr. 37:9-22. When asked why he didn't originally disclose his 5-minute phone conversation with Justice

Sandefur, Mr. Cox responded: "Because I simply did not remember it, and I still do not remember it to this day." Tr. 37:21-22.

Mr. Cox testified that he believed emergency circumstances justified his *ex parte* communications over the weekend. Tr. 84:15-18. He testified in his deposition that his *ex parte* communications with the Montana Supreme Court were necessary because he received an email from DOA Director Misty Ann Giles at 11:23am on Sunday April 11, 2021, informing him that DOA was complying with the legislative subpoena, had already produced emails, and was not doing a review of documents before turning them over to the Legislature. Tr. 91:16-92:17, 94:10-95:13; ODC Ex. 7. When asked at the hearing how a Sunday April 11, 2021, email could justify *ex parte* communications that took place on Saturday April 10, 2021, Mr. Cox admitted his prior testimony was incorrect. Tr. 95:8-13.

Administrator McLaughlin never provided notice of her attorney's *ex parte* communications to the Governor, the Legislature, or the Attorney General. Tr. 84:19-24. Nor did her court filings ever disclose her counsel's *ex parte* communications with Justices Sanderfur and Rice before this Complaint. Tr. 86:10-22.

Mr. Cox admitted that he could have sought a temporary restraining order from a district court to quash the subpoena. Tr. 98:14-17. Administrator McLaughlin, however, chose to file an emergency motion with the Montana Supreme Court. Administrator McLaughlin is an employee of the judicial branch, was appointed by the Montana Supreme Court, and reports to the Chief Justice. Tr. 112:9-16; 301:6-11.

Second, McLaughlin filed her emergency motion in the pending original action challenging SB140's constitutionality, *Brown v. Gianforte*—even though she was not a party to that case, and neither were the Montana Legislature nor the Department of Administration. Tr. 97:11-22. Despite all those irregularities, later that Sunday, the Court temporarily quashed the April 8 legislative subpoena to the Department of Administration. ODC Ex. 10.

D. The next day (Monday, April 12), the Legislature retained the Attorney General's Office as counsel. Tr. 373:8-13. Later that day, the Attorney General's Office sent a letter to the Montana Supreme Court conveying the Legislature's position that the Court lacked jurisdiction to quash a duly issued subpoena when neither the issuer nor the recipient were parties to the case in which the Court entered an order to quash.

ODC Ex. 11. The Attorney General, on behalf of his client, determined that a letter was a more appropriate way (than a court filing) to convey that position to the Court, so as to not waive the Legislature's jurisdictional objections to the Court's April 11, 2021, Order. Tr: 204:10-23.

In response, later that same day (April 12), McLaughlin filed her own lawsuit—styled *McLaughlin v. Montana State Legislature*—as an original action at the Montana Supreme Court. Tr: 43:23-44:2 (citing ODC Ex. 12). That original action sought to quash the Legislature's April 8 subpoena.

On April 14, the Legislature not only moved to dismiss *McLaughlin*, Tr. 48:22-49:6 (citing ODC Ex. 13), but also formed a select committee to investigate judicial document retention, judicial lobbying, and other potential judicial impropriety. Tr. 394:5-18. On April 15, Legislative leadership issued new subpoenas—to McLaughlin and to each member of the Montana Supreme Court—ordering McLaughlin to appear at an April 19 meeting of the select committee and produce certain documents related to judicial branch polls on pending legislation and to judicial lobbying. Tr: 401:15-403:17.

But on April 16, in response to another emergency motion from Administrator McLaughlin, the Montana Supreme Court issued a combined order in *McLaughlin* and in the SB140 merits challenge. *Brown v. Gianforte*, 2021 Mont. LEXIS 356 (Apr. 16, 2021). 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. *Id.*

Even so, the select legislative committee held its meeting on April 19. The Committee wanted to fully understand the degree to which the Montana Judges Association's lobbying activities were directed by public employees and officers using public resources and whether current law was sufficient to ensure taxpayer resources were not inappropriately used for the benefit of private organizations. Tr. 364:23-365:17; 403:18-404:4.

On April 30, the Legislature filed a Motion to Disqualify the Justices in *McLaughlin*, citing due process and judicial-ethics concerns. ODC Ex. 17. The Court denied that motion on May 12. *McLaughlin v. Mont. State Legislature*, 2021 MT 120, ¶ 17, 404 Mont. 166, 489 P.3d 482.

Thereafter Legislature tried for weeks to negotiate with the Court to get information relevant to its investigation, but was unsuccessful. Tr. 156:18-157:2,160:8-12. So, in late June 2021, the Legislature withdrew its subpoenas issued to DOA, McLaughlin, and the Justices, and moved to dismiss *McLaughlin* as moot. *McLaughlin II*, ¶ 1. Though the subpoenas that were the predicate for *McLaughlin* no longer existed, the Supreme Court still denied the Legislature's motion to dismiss the case as moot. *McLaughlin II*, ¶ 56.

On July 14, 2021, the Court issued an opinion quashing the withdrawn subpoenas. *McLaughlin II*, ¶ 57. The Court later denied the Legislature's petition for rehearing. *McLaughlin v. Mont. State Legislature* ("*McLaughlin III*"), 2021 Mont. LEXIS 696 (Sept. 7, 2021).

Following the Court's July 14, 2021, decision, the Attorney General's Office told McLaughlin's counsel that the Legislature was weighing its options and that all documents would be retained until all avenues for judicial relief were exhausted. Tr. 70:14-71:22.

The Legislature then filed a petition for a writ of certiorari with the United States Supreme Court on December 6, 2021. That was denied on March 21, 2022. ODC Ex. 31. On March 22, 2022, the Department of

Justice produced all the records it received from the Legislature, which the Legislature in turn received from DOA, in accordance with the Supreme Court's July 14, 2021, Order. Tr. 291-294 (citing ODC Exhibit 33). Later, the Department of Justice received additional, possibly duplicative, documents from legislative staff and then returned the entire compilation of subsequently received records on April 15, 2022. Tr. 295:8-295.

E. In June 2021, an attorney in California filed an ethics grievance against Attorney General Knudsen. ODC's Chief Disciplinary Counsel recused from the matter, so ODC appointed Daniel McLean as outside special counsel to investigate the Complaint in August 2021. After ten months of investigation, Special Counsel McLean issued a report on May 27, 2022, recommending dismissal of the Complaint with a private letter of admonition. Dkt. 20A (Ex. A at 6, ODC# 0290). The report concluded that "a formal complaint, investigation, and hearing would exacerbate the issues between the Legislature and the Judiciary, which likely would be played out in public, and allow a political fight to undermine confidence in the judicial system." Dkt. 20A (Ex. A at 6, ODC# 0290).

The Commission's Elkhorn Review Panel rejected the Special Counsel's dismissal recommendation and referred back to ODC for further investigation. Objection Ex. 1, at ODC #2962. ODC's own documents thus confirm that the Commission essentially instructed ODC to file a formal complaint because it believed the Attorney General had committed ethics violations. *Id.* Because Special Counsel McClean was unable to try a formal hearing, ODC then appointed a second special counsel in February 2023. The second special counsel requested leave to file a 41-count Complaint against the Attorney General. On August 31, 2023, the Commission granted the second special counsel's request *in toto*. ODC filed its Complaint against the Attorney General on September 5, 2023.

STANDARD OF REVIEW

"This Court reviews de novo the Commission's findings of fact, conclusions of law, and recommendations." *In re Doud*, 2024 MT 29, ¶ 8, 415 Mont. 171, 173, 543 P.3d 586, 588. Matters of trial administration are reviewed for abuse of discretion. *Id.* "Evidentiary rulings are generally reviewed for an abuse of discretion, but when the trial court's rulings are based on an evidentiary rule, [this Court] reviews those

rulings de novo." *State v. Tyer*, 2020 MT 273N, ¶ 7, 402 Mont. 426, 474 P.3d 329.

SUMMARY OF ARGUMENT

1. The Court has ample reason to dismiss the Complaint entirely or remand for a new hearing. First, the Commission improperly combined the prosecutorial and adjudicatory functions of the disciplinary process when it rejected ODC's first special counsel's recommendation to not file a formal complaint against the Attorney General. Second, the Commission subjected the Attorney General to multiple due process violations before and during the hearing that taint the entirety of the proceedings against him. The Commission's disregard for due process and the rules of civil procedure and saw it grant opposed motions without giving the Attorney General the opportunity to respond and deny him an offer of proof at the hearing. Most egregiously, the Commission prevented the Attorney General from putting on a defense that directly related to the elements of the charges against him. These serious errors require, at a minimum, remand for a new hearing with a new panel.

2. The Commission's Findings were wholly devoid of factual or legal analysis. The Attorney General, therefore, raises a standing objection to

every conclusion of law offered by the Commission. Since no finding of fact or conclusion of law addresses or discusses any single count of alleged misconduct, the Commission has failed to provide any meaningful conclusions of law. This signals both that the Commission's unsupported and unexplained findings should receive no deference from this Court, and that insofar as these conclusions of law imply that they authoritatively resolve any specific count of alleged misconduct, they are erroneous.

3. ODC's overzealous prosecution of the Attorney General is also barred by the separation of powers. The Attorney General isn't exempted from the MRPC. In most cases, he and his subordinates can be disciplined for violations. But not all alleged violations are created equal. In this case, ODC seeks to discipline the Attorney General, a constitutional officer, for his vigorous representation of the Legislature, a coequal branch of government. Even if this Court stops short of holding that the prosecution is barred, it should exercise discretion and dismiss the Complaint on prudential grounds due to the serious separation of powers issues involved.

4. Should this Court reach the merits of the Complaint, neither the law nor the undisputed evidence supports the Commission's findings that the Attorney General's violated Rules 3.4(c), 5.1(c), 8.2(a), 8.4(a), and 8.4(d) of the Montana Rules of Professional Conduct.

The Attorney General didn't violate MRPC 3.4(c) because he openly asserted that no valid obligation existed. It doesn't matter whether his assertion was ultimately correct. What matters is that it was based on a reasonable, good-faith belief about novel and unanswered questions of state and federal law. And he didn't engage in secret, subversive disobedience to any court order.

ODC's novel theory that the Attorney General violated MRPC 3.4(c) by using strongly worded language in letters and filings fails because ODC never identified what rule of a tribunal was violated by these various statements. Instead, ODC claims the alleged intemperate, contemptuous, and disrespectful language violated the Attorney General's "oath as an officer of the Court." But in the only case that ODC could muster in support of this proposition, the court cast serious doubt on the theory. The Attorney General made good-faith criticism of legal

conclusions and employed strong language similar to that used by members of this court and other litigants.

The Attorney General didn't violate Rule 8.2(a) because his statements were neither objectively false nor made with knowing falsity or in reckless disregard for the truth. The Attorney General had an objectively reasonable factual basis for his statements. The Attorney General made assertions concerning bias, impartiality, and conflict of interest based on the fact that members of the Court would be ruling on a case involving their own employee, and members the Court would be ruling on the disclosure of their own emails. This Court determined that recusal of the justices wasn't required in *McLaughlin I*, but the Attorney General's statements of opinion are disciplinable under Rule 8.2(a) only if they are related to assertions of fact that are susceptible of being objectively verified. ODC cannot carry that burden, even on this record. The Attorney General's arguments were made in good faith based on the circumstances of the underlying litigation.

Next, rhetorical hyperbole and loose, figurative language cannot trigger discipline under Rule 8.2(a). Likewise, ODC's radical position that the Attorney General's arguments that various court orders contained

mistakes of fact or law constitute violations of 8.2(a) has no support in Rule 8.2(a)'s text or history and would chill vigorous appellate advocacy in Montana courts.

The Attorney General didn't violate Rule 8.4(d) because he didn't engage in conduct prejudicial to the administration of justice. ODC cannot show some nexus between the Attorney General's conduct and an adverse effect upon the administration of justice. Nothing he did directly delayed and altered court proceedings. And ODC introduced no evidence to show violations of Rule 8.4(d), as it was required to do.

Finally, if the Court construes Rules 3.4(c), 8.2(a), and 8.4(d) apply to the Attorney General's conduct, they are unconstitutional. Were this Court to abandon the traditional interpretations of the rules and adopt ODC's new, expansive interpretations, they would be unconstitutionally vague in violation of the First Amendment to the U.S. Constitution. Additionally, if this Court adopts ODC's new, expansive interpretation of MRPC 8.2(a) that prohibits criticism supported by a reasonable factual basis and statements of opinion, it would be overbroad in violation of the First Amendment to the U.S. Constitution.

5. On this record, the Court can determine that ODC has neither alleged a violation of the MRPC nor proved one by clear and convincing evidence. It cannot, however, find a violation. At most, the Court must remand for a new hearing and new findings. Given the multitude of serious due process violations from the Commission, the Court must appoint new panelists to sit on remand.

If the Court determines that the Attorney General violated one or more rules of professional conduct, it should take into account the highly unusual circumstances of this case. Suspending the sitting Attorney General from the practice of law for any period is an extreme and disproportionate sanction. It will not serve the ends of justice. It will not heal the fault lines in our political system. It will not increase public confidence in our institutions. It will, however, exacerbate the conflict between the branches of government.

ARGUMENT

I. The Commission's investigation and adjudication is invalid for repeatedly violating the Attorney General's due process rights.

"[D]ue process requires a fair and impartial tribunal, and a fair hearing." *Doud*, ¶ 29. From the outset, the proceedings against the

Attorney General have been tainted by one due process violation after another, resulting in substantial prejudice and depriving the Attorney General of fundamental rights. The Commission's failure to acknowledge these blatant due process violations casts serious doubt on its ability to exercise independent judgment and adequately safeguard a fair and impartial process for the Attorney General. Such due process violations alone invalidate the Commission's Recommendation and warrant remand for a new hearing.

A. The Commission violated due process when it usurped ODC's prosecutorial role.

Due process requires a separation between the Commission's role as adjudicator and ODC's role as prosecutor. This Court has long warned about the danger of combing the two functions. *See In re Best*, 2010 MT 59, ¶ 31, 355 Mont. 365, 229 P.3d 1201 ("Nothing in the [rules] permits the [Commission] to act as a complainant in disciplinary proceedings.") Thus, it is necessary that "[p]rosecutorial and adjudicatory functions" remain "separated and managed to secure responsiveness, efficiency and fairness," because when the "investigatory and adjudicatory functions are combined," that compromises an attorney's right to a fair tribunal. *Id.* ¶¶ 31, 33.

Here, the Commission functionally usurped the prosecutorial role by dismissing the first special prosecutor's recommendation not to file charges and instructing the second to bring formal charges. ODC's first appointed special prosecutor recommended disposing of this matter without a formal complaint in May 2022. *See* Dkt. 20A, Ex. A at 6. But "in July 2022 the [Commission's] Review Panel" rejected that recommendation and *sua sponte* "referred the matter back to ODC for further investigation, citing the conduct as outlined likely warranting public discipline." Objection Ex. 1, at ODC #2962. The Commission's directive could not have been clearer: the Commission would not accept the results of the investigation, so ODC was to ignore that investigation, file a formal complaint, and prepare for trial. ODC then hired a second special prosecutor, who filed the unprecedented 41-count Complaint.

This Court confronted similar usurpation and co-mingling of the prosecutorial and adjudicatory roles in *In re Best*, ¶ 31. There, ODC likewise recommended no discipline, but the Commission ignored ODC's recommendation and decided to draft and prosecute its own complaint. *Id*. This Court held that because the Commission had combined the investigatory and adjudicatory functions, "the risk of unfairness from the

combination of those functions" was intolerably high. *Id.* ¶ 33; *see also Withrow v. Larkin*, 421 U.S. 35, 58 (1975). Furthermore, it determined that by "ignor[ing] the ODC's recommendation" and instigating its own prosecution, the Commission violated the Rules of Lawyer Disciplinary Enforcement, which provides that the ODC (not the Commission) "shall perform *all prosecutorial* functions." RLDE 5(B) (emphasis added). *In re Best*, ¶¶ 31-33; *see also In re Engel*, 2008 MT 215, ¶¶ 19-21, 344 Mont. 219, 194 P.3d 613 (a disciplinary tribunal "appoint[ing] a special counsel to prosecute disciplinary cases" after the "investigative attorney panel has not recommended … formal disciplinary proceedings" would be "usurpation of the prosecutorial function").

Here, the Commission didn't draft and file its own complaint, but it might as well have. ODC's own documents confirm that both special counsels understood the directive: The first special counsel resigned because he didn't want to partake in the inevitable disciplinary hearing and the second special counsel knew his assignment was to file a formal complaint. Objection Ex. 1, at ODC #2962. There's no functional difference between the Commission filing its own complaint and what it did here.

Because the Commission's instruction to ODC violated procedural due process, this Court should dismiss the Complaint.

B. The Commission included members who were biased against the Attorney General.

Next, the Commission's rulings on dispositive motions are tainted by the presence of biased members. The Commission's rules prohibit participation by 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. Klanke represented Justice James Rice in *Rice v. Montana State Legislature*, BDV-2021-451, Mont. First Judicial Dist., Lewis & Clark County (2021)—and thus should have been barred from the panel as a "lawyer in connection with any events relating to the matter or proceeding." Rule 6(d). And Menzies worked at the Judicial Nominating Commission (which was eliminated by the legislation challenged in the underlying case *Brown v. Gianforte*) and alongside Beth McLaughlin (a key witness in this proceeding)—and thus should have been barred from the panel due to "personal knowledge of disputed evidentiary facts" and having "a direct financial interest in any events relating to the matter or proceeding." Rule 6(b), (e).

As a threshold matter, the mere presence of even one conflicted panelist tainted the entire panel and deprived the Attorney General of procedural due process. *See Stivers v. Pierce*, 71 F.3d 732, 748 (9th Cir. 1995) ("Whether actual or apparent, bias on the part of a single member of a tribunal taints the proceedings[.]"); *see also Williams v. Pennsylvania*, 579 U.S. 1, 15 (2016) (failure to show biased member influenced other members' decisions "does not lessen the unfairness to the affected party"). Disqualification was the appropriate remedy for both Klanke and Menzies. *See Bullman v. State*, 2014 MT 78, ¶ 14, 374 Mont. 323, 321 P.3d 121 ("personal knowledge of facts that are in dispute" requires disqualification). But it did not cure the prejudice from their involvement in these proceedings. *Mach v. Stewart*, 137 F.3d 630, 633 (9th Cir. 1998) (sharing personal knowledge "infected the process from the very beginning" and required reversal of conviction); *United States v. Gonzalez*, 214 F.3d 1109, 1113 (9th Cir. 2000) (sharing personal knowledge related to cocaine tainted jury in cocaine trial).

But beyond mere presence, it appears likely that both Klanke and Menzies irrevocably tainted the entire process by participating in the deliberations taken by the Commission on certain dispositive motions—

irrevocably tainting the entire proceeding with bias. To be sure, 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." *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 833 (1986) (Brennan, J., concurring). But here, the Commission denied the Attorney General's summary judgment motion on September 10, 2024, and Klanke and Menzies did not recuse until weeks later. *See* Dkt. 74; Dkt. 77.

The Commission asserted that neither Menzies nor Klanke, nor any other conflicted panelist, participated in the proceedings. Dkt. 77, at 1. But if that's true, it raises further serious due process concerns. First, it suggests that the Chair resolved each of the Attorney General's many requests for substantive relief on his own. Second, it suggests that the Chair also ruled on the Attorney General's summary judgment motion on his own—a dispositive motion that requires a quorum to resolve.[1] *See Wilson v. Comm'r of Soc. Sec.*, 378 F.3d 541, 546-47 (6th Cir. 2004) (courts must overturn when an agency does not observe its own regulations and thereby prejudices or deprives the claimant of substantial rights.).

[1] *See* Rule 4.C of the Rules for Lawyer Disciplinary Enforcement ("Five members of an adjudicatory panel, *at least three of whom are lawyers*, shall constitute a quorum.").

Thus, there is no scenario where the Commission did not violate the Attorney General's due process rights in one way or another. Did conflicted panelists participate in these proceedings or did the Commission violate its own rules and act without a quorum? Either way, due process requires a reversal.

C. The Commission undermined the Attorney General's defense by foreclosing relevant expert testimony without an opportunity to be heard.

"The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Tai Tam, L.L.C. v. Missoula Cnty.*, 2022 Mont. 229, ¶ 25, 410 Mont. 465, 520 P.3d 312 (quoting *Smith v. Bd. of Horse Racing*, 1998 MT 91 ¶ 11, 288 Mont. 249, 956 P.2d 752); *see also Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). This "opportunity to be heard" is "tailored" to the specific "circumstances" of the proceeding. *Goldberg v. Kelly*, 397 U.S. 254, 268-69 (1970). For motions seeking various types of relief, the "party interested in resisting the relief sought by a motion has a right to notice and an opportunity to be heard." *State ex rel. McVay v. District Court of Fourth Jud. Dist.*, 126 Mont. 382, 393, 251 P.2d 840, 846 (1952). 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, 317 P.2d 309, 314 (1957).

The Commission's actions fall well short of that constitutional minimum. Before the hearing, ODC filed a motion to exclude the Attorney General's sole expert. Dkt. 54. That Motion noted the Attorney General opposed the requested relief. *Id.* at 2. Despite that opposition, the Commission ruled in favor of ODC's motion *one business day* after it was filed, despite Montana Rule 2(b)'s allowance for fourteen days to file a response brief. The Commission claimed it needed to rule on the motion before hearing from Petitioner because of "the short time remaining before the hearing." Dkt. 59, at 1.[2] Yet it critically failed to order an expedited response—or give any notice of an expedited ruling—even though it could have. As a result, the Attorney General was precluded

[2] To justify its (two-time) failure to allow Respondent to file a response brief, the Commission apparently confused the difference between a response brief and a reply brief: "Although Uniform District Court Rule 2 does envision a reply brief, the Montana Supreme Court has held that where the court ruled before the reply brief was in but the part had the opportunity to present all of his contentions to the District Court, and the District Court considered them, it was not a due process violation to rule before the reply brief was filed." Dkt. 63 at 3 (citing Patrick v. State, 2011 MT 169, ¶ 29, 3161 Mont. 204, 213, 257 P.3d. 365, 372). The Commission ruled on Respondent's motions without waiting for a response. Respondent thus never "had the opportunity to present all of his contentions to the [Commission]." Patrick, ¶ 29.

from presenting evidence from his expert witness.

Denying a party the opportunity to be heard on an issue is error in any jurisdiction, but this Court has specifically ruled that such due process violates constitutes reversible error. In *Fennessy v. Dorrington*, 306 Mont. 307, 309-10 (2001), the trial court granted a motion to dismiss before the time to respond had elapsed—even though the other party had indicated it opposed the motion. *See id.* at 308. This Court ruled that the court there "abused its discretion by failing to follow" the rules about time to respond and granting a motion even though "Fennessy's time for responding had not yet expired[.]" *Id.* at 310; *see also Aizmendi-Medina v. Garland*, 69 F.4th 1043, 1052 (9th Cir. 2023) (tribunal "deprived [party] of a full and fair opportunity to be heard" by setting an *ambiguous* deadline, which the petitioner subsequently missed, resulting in prejudice).

The Commission's actions here were egregious. It ruled against the Attorney General without notice and without any reasonable opportunity to be heard in a single business day. That ruling resulted in prejudice by excluding a witness who would have testified to the scope of the Attorney General's ethical obligations in a novel, complex separation-of-powers

dispute.[3] Under this Court's own precedent, such expert testimony was necessary to establish the scope of the Attorney General's ethical obligations. *See infra*, Part II.A. Prematurely excluding expert testimony on that issue directly undermined the Attorney General's ability to mount a defense and deprived him of the fundamental guarantee of due process—"the opportunity to be heard at a meaningful time and in a meaningful manner." *See Tai Tam*, ¶ 25. That violation demands reversal and remand to a different panel. *State ex rel. Mont. State Univ. v. Dist. Court*, 132 Mont. at 272, 317 P.2d at 314 (instructing "a judge of another district to proceed with the cause" on remand).

II. The Commission committed multiple evidentiary errors.

The Montana Rules of Evidence govern the resolution of evidentiary disputes in disciplinary hearings before the Commission on Practice. *See In re Potts*, 2007 MT 81, ¶ 65, 336 Mont. 517, 158 P.3d 418. "The

[3] This crucial testimony is not even part of the record before this Court, because the Commission refused to allow the Attorney General to make an offer of proof about how the expert witness would have testified, had he been called. *See* Tr. 418:14-16 ("That issue has been determined by the order on the motion in limine, Mr. Coleman, so [the offer of proof is] not going to be allowed in."). While the contents of the expert report are in the record, the substance of his testimony is not. The Commission cannot, therefore, find safe harbor in a harmless-error analysis after preventing this Court from reviewing the prejudice that resulted from its error.

application of state evidentiary rules must be consistent with the right to due process." *Trillo v. Biter*, 769 F.3d 995, 1003 (9th Cir. 2014).

Although matters of trial administration are reviewed for abuse of discretion, the Commission's evidentiary errors are reviewed de novo because they were based on mistakes of law. *Doud*, ¶ 8. The Commission also abused its discretion by acting arbitrarily and failing to employ conscientious judgment. *Meine v. Hren Ranches, Inc.*, 2020 MT 284, ¶ 13, 402 Mont. 92, 101, 475 P.3d 748, 754 ("An abuse of discretion occurs if a lower court exercises granted discretion based on a[n] … erroneous conclusion or application of law, or otherwise arbitrarily, or in excess of the bounds of reason, resulting in substantial injustice.").

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

Before the hearing, the Commission excluded the Attorney General's expert witness—Professor Thomas Lee—and the expert report that Professor Lee prepared. *See* Dkt. 59 Order on Motion *in Limine*, *In re Knudsen*, MT PR 23-0496 (2024). That order not only violated fundamental due process, *see supra*, Part I.C, but also defied this Court's precedent and ignored the Commission's prior practice on accepting expert testimony.

1. Under Rule 702 of the Montana Rules of Evidence, experts with specialized "knowledge, skill, experience, training, or education" can help the trier of fact comprehend nuanced factual disputes by offering opinions that "describe recognized principles of their specialized knowledge." *State v. Santoro*, 2024 MT 136, ¶ 19, 417 Mont. 92, 551 P.3d 822. Expert testimony may take "the form of an opinion or inference" that "embraces an ultimate issue to be decided by the trier of fact," M.R. Evid. 704, so long as it does not opine on an ultimate issue of law.

In practice, Rule 702 permits the liberal admission of expert testimony on matters such as reasonable professional behavior and best practices in professional conduct. This Court often "encourage[s]" courts "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. It is best to "admit all relevant expert testimony" and open the matter to "vigorous cross-examination" and "presentation of contrary evidence." *Santoro*, ¶ 23 (citations omitted).

Expert witnesses may not, however, explicitly express opinions on the ultimate question of law. *See In re Potts*, (excluding an expert who testified that an attorney didn't "violate the Rules of Professional

Conduct"). But expert witnesses *can* testify about both "the standards of industry practice which he believed should be followed" and "whether [the party] violated any of the industry standards he had identified." *Peterson v. St. Paul Fire & Marine Ins.*, 2010 MT 187, ¶ 67, 357 Mont. 293, 239 P.3d 904. Such testimony is proper, even though the applicable "law may be different than these [industry] standards," since the expert opines only on whether a party "comported with those standards." *Id.*

Applying this Court's "liberal" expert-testimony standard, the Commission itself has allowed expert witnesses to establish professional standards of care for attorneys in disciplinary proceedings. *See, e.g.*, *In re Doud*; *In re Olson*, 2009 MT 455, 354 Mont. 358, 222 P.3d 632; *In re Engel*; *In re Johnson*, 2004 MT 6, 319 Mont. 188, 84 P.3d 637. In fact, in *Doud*, ODC itself called an expert witness who opined on the "proper" best practices for attorneys' recordkeeping. *Doud*, ¶¶ 33-36. In *Olson*, the Commission heard testimony from "*an expert on professional responsibility*" who testified that the accused attorney "was not required by law" to take or not take certain actions. ¶ 17 (emphasis added). In *Engel*, ODC recruited an expert witness who testified about "customary" attorney fee practices. ¶ 27. And in *Johnson*, the Commission heard

expert testimony on the meaning and application of legal terms "full disclosure" and "after consultation." ¶ 10.

2. By excluding the report and testimony of Professor Lee, the Commission erred as a matter of law and excluded indispensable standard-of-care testimony.

First, Professor Lee's expert testimony spoke only of accepted professional legal standards, reasonable attorney behavior, and how specific behavior interacts with those standards. Such opinions do not usurp the Commission's ultimate role or impermissibly speak to the ultimate legal issue at hand.

Second, the Commission defied this Court's precedents. As mentioned, tribunals should "construe liberally the rules of evidence so as to admit all relevant expert testimony," *Beehler*, ¶ 23, and to "admit all relevant expert testimony" and open the matter to "vigorous cross-examination" and "presentation of contrary evidence," *Santoro*, ¶ 23. This Court also said expert testimony is *required* when considering whether an attorney breached an ethical standard of care. In *Carlson v. Morton*, the Court stated that while "the Model Rules of Professional Conduct … establish the bounds of ethical conduct by lawyers," expert testimony on

existing professional standards of conduct is necessary to understand and apply the disciplinary codes. 229 Mont. 234, 237, 745 P.2d 1133, 1135 (1987). Thus, when the "issue is whether the applicable ethical rules create a duty," "an expert witness *must* testify so as to acquaint the [factfinders] with the attorney's duty of care." *Id.* (emphasis added); *see also Schuff v. A.T. Klemens & Son*, 2000 MT 357, 303 Mont. 274, 16 P.3d 1002.

Third, the Commission ignored its own precedent. It provided only one reason for excluding Professor Lee: That it is "the exclusive province of the Commission … to interpret [established] facts under the [MRPC]," so "expert testimony regarding the interpretation or application of the MRPC has been *consistently* rejected." Dkt. 59, at 2-3. Yet the Commission has *not* consistently rejected expert testimony—it has consistently *accepted* expert testimony. *E.g., Doud,* ¶ 45; *Olson*, ¶ 17; *Engel*, ¶ 27; *Johnson*, ¶ 10.[4] The Commission did not explain this conflict with all past practice—which this Court itself has ratified.

[4] ODC cited two cases to support its conclusion that expert testimony is "consistently" rejected. *See In re Cushman*, MT PR 17-0665 (Aug. 20, 2019); *In re Morin*, MT PR 17-0448 (Oct. 17, 2018). Neither case supports that conclusion. In *Cushman*, the Commission "order[ed]" the exclusion of an expert "as *sanctions* after Cushman resisted discovery attempts." *Cushman*, at 14-15. And in *Morin*, the Commission

3. The exclusion of Professor Lee's expert report and testimony was severely prejudicial. The exclusion prevented the Attorney General "from presenting evidence going to the core of his defense," *Santoro*, ¶ 26, and discussing of the proper scope and application of the Montana Rules of Professional Conduct, *see infra*, Part V. Where "preclusion of … admissible testimony was not harmless," it "necessitates remanding to the district court for a new trial." *Santoro*, ¶ 41.

B. The Commission erroneously excluded key evidence based on a misunderstanding of "collateral attack" and "relevance."

Throughout the hearing, the Commission excluded evidence based on the notion that the proffered evidence constituted a "collateral attack" on this Court's opinions in *McLaughlin I and McLaughlin II*. These evidentiary rulings severely prejudiced the Attorney General's defense by preventing the effective cross-examination of ODC's key witness and by excluding evidence relevant to the Attorney General's good-faith representation.

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excluded an expert witness's testimony as irrelevant since it was the attorney's "*role*, not her performance, that is in dispute." *Morin*, at 7.

1. The Commission invoked the phrase "collateral attack" as an absolute bar to the Attorney General's developing an evidentiary record in his defense. But "collateral attack" is *not* an evidentiary doctrine, gatekeeping or otherwise. It does not appear in the Montana Rules of Evidence. As such, it is not a basis to exclude (or admit) evidence.

Instead, this Court has defined "collateral attack" to mean "every proceeding in which the integrity of a judgment is challenged, except those made in the action wherein the judgment is rendered or by appeal." *State ex rel. Delmoe v. Dist. Ct. of Fifth Jud. Dist.*, 100 Mont. 131, 136, 46 P.2d 39, 42 (1935); *see also Blair v. Blair*, 140 Mont. 278, 287, 370 P.2d 873, 878 (1962) ("A 'collateral attack' on a judgment or judicial proceeding is an attempt to avoid, defeat, or evade it, or to deny its force and effect in some manner."). So properly understood, a "collateral attack" is not an evidentiary objection, but a litigation strategy to challenge a *judgment* alleged to be void—such as where an attorney was held in contempt of court for not obeying a writ of attachment, but "the property [was] not properly attached," so "the writ of attachment [was] a nullity." *Phillips v. Loberg*, 186 Mont. 331, 337, 607 P.2d 561, 565 (1980). The collateral attack in *Phillips* was proper because the attorney explicitly "attack[ed]

the content and validity of the writs … and the validity of the contempt order." *Id.* at 334, 607 P.2d at 563.

Contrast *Phillips with Grigg v. Cuffe*, 2022 MT 79N, 409 Mont. 553, 507 P.3d 570 (table), where a litigant filed a "Petition to Overturn Unlawful Eviction Judgment" challenging the validity of a court order entered in separate divorce proceedings. *Id.* ¶ 3. This Court rejected that collateral attack on the divorce-proceedings order because the litigant "failed to provide any argument or evidence that the Order was void." *Id.* ¶ 7. Or consider *Lindquist v. Harris*, 2022 Mont. LEXIS 672 (July 19, 2022), where this Court rejected the notion that an attorney was collaterally attacking a settled contempt order. *Id.* at *3. The Court determined that the litigant "makes no collateral attack" simply because he "did not challenge" that contempt "determination," and was instead challenging the validity of a separate order. *Id.*

In short, a collateral attack occurs when a party tries to *invalidate a prior judgment*. If party's argument is a proper collateral attack, the court hears the argument and rules on its merits. Or, if the party is not actually seeking to invalidate a judgment, the tribunal need make no collateral-attack ruling. But *no* Montana precedent deems the collateral-

attack doctrine to be an *evidentiary* basis for a court to ignore legal arguments or exclude evidence from the record.

2. Here, the Commission erred both by misinterpreting the Attorney General's discussion of witnesses' mental states at the time of the charged conduct as a "collateral attack," and by mistakenly using the collateral attack doctrine as an evidentiary bar.

First, the Attorney General is *not* collaterally attacking this Court's judgment in *McLaughlin*. *See* Tr. 315:11-13 ("[W]e're not actually collaterally attacking the Montana Supreme Court's holding."). *McLaughlin* addressed the validity of a legislative subpoena. The Attorney General acknowledges that this Court's judgment in *McLaughlin* is final and constitutes the law of the land. Nothing in these disciplinary proceedings casts any doubt on the validity of *McLaughlin*'s conclusion about legislative subpoenas. At no point did the Attorney General's defense below seek to "void," "defeat," "evade," or "deny" those conclusions.

Instead, here the Attorney General is defending himself against charges that he behaved unethically while representing the Legislature in that case. And just because some of facts that gave rise to *McLaughlin*

must be discussed to place the Attorney General's challenged conduct in context does not mean that the Attorney General is seeking to void *McLaughlin*'s judgment. The Commission didn't explain how merely discussing the shared underlying facts could constitute an effort to invalidate this Court's judgment. That's because under this Court's precedent, it can't.

Rather than seeking to invalidate *McLaughlin*, the excluded evidence sought to establish the basis for Attorney General's good-faith litigation decisions. One of ODC's main charges against the Attorney General is that he made "statement[s] that the lawyer knows to be false or with reckless disregard as to its truth or falsity." MRPC 8.2(a). The first half of this Rule places the attorney's mental state directly at issue. For the second half, Montana has adopted the "objective" approach, *see In re Miller*, No. PR 18-0139, 2019 Mont. LEXIS 937, at *6 (Nov. 20, 2019), which requires only that the lawyer make the statements in "good faith" with "supporting facts" "based on the circumstances of the underlying litigation," *see infra*, Part V.A.2.

Since both parts of the rule look to whether an attorney was acting in good faith and with knowledge, presenting evidence on the attorney's

state of mind and the underlying circumstances is *necessary* to defend against Rule 8.2(a) charges. As discussed further in Section V, it does not matter, for purposes of Rule 8.2(a), if a court ultimately denies the motion for recusal that prompted the charge. *See infra*, at Part V.A.2. What matters is whether the attorney made the statements in that motion in good faith and with at least some supporting evidence in the record. *See id.*

Here, the Attorney General's attempts to cross-examine the ODC's key witness, *see* Tr. 315-18, and attempts to introduce the Montana State Legislature's investigative reports, *see id.* at 410-14, were efforts to offer evidence showing why the Attorney General was *not* recklessly leveling unsupported accusations at the Montana judiciary. Discussing this evidence—known to the Attorney General when he took the actions charged—does not cast doubt on the validity of this Court's *McLaughlin* judgment on legislative subpoenas. It provides the evidentiary basis for the Attorney General's defense that he did not violate any ethical duty when he filed a motion for recusal as his clients directed.

Second, the Commission erred by treating the "collateral attack" doctrine as an evidentiary bar. This Court never has recognized the

collateral-attack doctrine to be an evidentiary rule. Thus, even if a lower tribunal believed that a litigant was raising an improper collateral attack, the correct procedure would be to allow the litigant to present the evidence and fully preserve the issue for this Court's review. Rather than doing so, the Commission denied the Attorney General the ability to present his defense—even though introducing the relevant facts did not constitute a collateral attack—and simultaneously denied this Court a full record to review.

3. When the Commission tried to place its ruling on firmer evidentiary ground, it compounded its error. During the hearing, the Commission tried to convert "collateral attack" objections into a ruling on relevance. *See* Tr. 317:15-19 ("[T]estimony about the Attorney General's comments and comments from his office aren't directly related to the allegations in this Complaint that are relevant to this proceeding.").

Montana Rule of Evidence 402 provides that "[a]ll relevant evidence is admissible." M.R. Evid. 402. Rule 401 defines relevant evidence as all "evidence having any tendency to make … any fact that is of consequence to the determination of the action more probable or less probable." M.R.

Evid. 401. This "basic standard of relevance is a 'liberal' one." *State v. Murphy*, 2021 MT 268, ¶ 9, 406 Mont. 42, 497 P.3d 263.

Here, by converting its "collateral attack" ruling into a relevance ruling, the Commission backed itself into a logical corner. ODC's charges force the Attorney General to defend why he made certain statements. Yet the Commission decided that evidence about *why* the Attorney General made those statements is irrelevant.[5] In other words, by excluding this evidence, the Commission created a one-sided world: ODC can accuse an attorney of making false or reckless statements, but that attorney cannot then introduce evidence to explain why he made those statements or to show that they were not false or reckless.

The Commission further compounded its error when it explicitly stated that it would exclude evidence it believed wasn't "directly related to the allegations in this Complaint." Tr. 414. In simpler words, the Commission decided that to be "relevant," evidence must be "directly related" to the *prosecution's* theory of the case. *Id.* Yet basic due process

[5] To preserve the issue with clarity, counsel for the Attorney General asked: "Just to make sure I understand, Mr. Chairman, the Complaint is alleging intemperate statements and related issues, and this evidence we're offering to explain *why* those statements were made, and the ruling is that [such evidence] is irrelevant to those statements?" Tr. 317-18 (emphasis added). The Commission answered affirmatively. *Id.* at 318.

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.

4. "[A] fair trial in a fair tribunal is a basic requirement of due process." *Withrow*, 421 U.S. at 46 (cleaned up). "A vital hallmark of a full and fair hearing is the opportunity to present evidence and testimony on one's behalf." *Oshodi v. Holder*, 729 F.3d 883, 889 (9th Cir. 2013). A respondent's due process rights are implicated when the tribunal excludes evidence that is "relevant and material, and … vital to the defense." *See Washington v. Texas*, 388 U.S. 14, 16 (1967); *see also United States v. Hayat*, 710 F.3d 875, 898 (9th Cir. 2013) (decision by a trial court to exclude evidence violates the Constitution if the evidence is "sufficiently reliable and crucial to the defense").

Here, the evidence sought in the excluded line of questioning during Beth McLaughlin's cross-examination and the excluded legislative reports and testimony all had a "tendency" to show that the Attorney General did not move for recusal with reckless disregard. The

Commission's erroneous exclusion orders severely prejudiced the Attorney General's defense by depriving him a chance to present necessary evidence and a meaningful opportunity to cross-examine a key witness. *See Santoro*, ¶ 41; *see also United States v. Scheffer*, 523 U.S. 303, 315 (1998) (explaining that the exclusion of evidence pursuant to a state evidentiary rule is unconstitutional where it "significantly undermined fundamental elements of the accused's defense"). Given the charges against him, the excluded evidence was relevant, material, and vital to the Attorney General's defense. *See Washington*, 388 U.S. at 16.

The serious errors committed by the Commission during the hearing aggravated the Commission's pre-hearing constitutional violations discussed in Part I, *supra*. Standing alone and together, they warrant a sharp rebuke from this Court. As discussed in Part V, *infra*, this Court cannot adopt the Commission's Recommendation on this record. To satisfy the Montana Rules of Evidence and the Due Process Clause, this Court must remand for a new hearing so that the Attorney General can present a proper defense.

III. The Commission failed to submit conclusions of law sufficient to impose discipline on the Attorney General.

The Commission on Practice must supply this Court with an adequate record to review. *See In re Wyse*, 212 Mont. 339, 346, 688 P.2d 758, 762 (1984). It has failed to do so. The Commission's Recommendation amounts to little more than a cursory conclusion that the Attorney General broke the rules of professional conduct and should be punished. Absent a 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 v. Comm'n on Practice of the Supreme Court*, 2000 MT 8, ¶ 49, 297 Mont. 493, 995 P.2d 923.

The Attorney General, therefore, raises a standing objection to every conclusion of law offered by the Commission.

A. The Commission on Practice must provide an adequate record on which this Court may act.

Because this Court is "a court of final review and not first view," *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001), it needs an adequate record to review. To that end, Montana Rule of Civil Procedure 52(a) requires lower courts to set forth sufficient "findings and

conclusions" for review on appeal. Mont. R. Civ. P. 52(a). This Rule is modeled after its federal analogue, and this Court has looked to federal caselaw when interpreting it. *Schmidt v. Colonial Terrace Assocs.*, 215 Mont. 62, 66, 694 P.2d 1340, 1343 (1985).

Rule 52(a) exists to provide litigants and reviewing courts with a clear basis to appeal, overturn, or affirm a judgment. Thus, a tribunal's findings and conclusions must amount to more than threadbare findings of guilt. *Feeley v. United States*, 337 F.2d 924, 935 (3d Cir. 1964). Any decisionmaker must "set forth the reasoning behind its decisions in a way that allows for meaningful review." *Brown-Hunter v. Colvin*, 806 F.3d 487, 492 (9th Cir. 2015). This "imposes on the trial court an obligation to ensure that its ratio decidendi is set forth with enough clarity to enable a reviewing court reliably to perform its function." *Sierra Fria Corp. v. Donald J. Evans, P.C.*, 127 F.3d 175, 180 (1st Cir. 1997) (quoting *Touch v. Master Unit Die Prods., Inc*, 43 F.3d 754, 759 (1st Cir. 1995)). At bottom, a fact-finding tribunal must explain "in a readily intelligible

manner the conclusions that it draws by applying the controlling law to the facts as found[.]" *Id.*[6] The Commission failed to satisfy this standard.

While this Court has never explicitly cited Rule 52 when reviewing Commission recommendations, it has applied an equally demanding standard. It is "substantial error" if the Commission does not "set[] forth reasoning, based upon its findings and conclusions, in a manner sufficient to allow informed appellate review." *In re Doud* ¶ 33. This Court is not a court of first impression and has no "obligation to conduct legal research on a party's behalf or develop an argument supporting the party's position." *State v. Golden*, 2007 MT 247N, ¶ 9. So this Court normally vacates and remands decisions supported by an insufficient record. *See, e.g.*, *Peterson-Weilacher v. Weilacher*, 2024 MT 195N, ¶ 13, 418 Mont. 548, 555 P.3d 748 (remanding a domestic violence case for insufficient findings of fact).

This Court must continue to hold the Commission to the same standard. Failing to do so would upend the Commission's very purpose of creating a record on which this Court may act. *See In re Potts*, ¶ 31 ("We

[6] Courts routinely apply Rule 52 to administrative and quais-judicial bodies. *See, e.g.*, *Hert v. J.J. Newberry Co.*, 178 Mont. 355, 359, 584 P.2d 656, 659 (1978) (applying Rule 52 to a Workers' Compensation Court); *see also Brown-Hunter*, 806 F.3d at 492 (applying Rule 52 to an Administrative Law Judge's analysis).

created the Commission in 1965 to act under the aegis of this Court for the purpose of receiving, investigating, and reporting on allegations of misconduct of lawyers in the State of Montana."). If this Court cannot "discern the [Commission's] path to [its] conclusion" as Rule 52 requires, the Commission's very purpose is defeated. *Nelson v. Comm'r of Soc. Sec.*, 2024 U.S. Dist. LEXIS 50732, at *20 (W.D. Wash. Mar. 21, 2024) (cleaned up).

B. The Commission's recommendations are devoid of any legal analysis and should be rejected.

This Court should wholly reject the Commission's Recommendations because it failed to adequately support its legal conclusions. The Commission committed three major errors when it failed to analyze the legal standards that apply to the MRPC, when it offered only conclusory statements devoid of accompanying facts, and when it affirmatively prevented the development of a detailed record for this Court's review.

First, the Commission didn't attempt to analyze the legal standards that apply to the facts here. *See generally* Part V, *infra*. This Court routinely reverses lower courts for applying an incorrect legal standard—much less any legal standard at all. *See State v. Sommers*, 2014 MT 315,

¶ 39, 377 Mont. 203, 339 P.3d 65; *Konesky v. Keller*, 2021 MT 214N, ¶ 2, 405 Mont. 538, 493 P.3d 361. Reversal is likewise necessary when a lower tribunal fails to explain whether a litigant has established a prima facie case for a violation. *See Zivkovic v. S. Cal. Edison Co.*, 302 F.3d 1080, 1090 (9th Cir. 2002); *Norris v. San Francisco*, 900 F.2d 1326, 1329 (9th Cir. 1990).

The Commission's Recommendation violates both principles. As discussed further in Part V, *infra*, the MRPC are not an inkblot for each individual to peer at and decide for himself how they apply. The Rules are law. And as such, each Rule has an established legal standard of application, accompanied by precedent demonstrating how those legal standards apply in various scenarios. But the Commission never acknowledged—much less applied—legal standards, depriving the Attorney General and this Court of clear markers by which to judge the Commission's (non)application of those legal standards.

Second, the Commission provided only general conclusory statements of guilt that are devoid of any specific factual findings. After spending thirty-one pages on prose and repeating undisputed background facts, the Commission dedicates less than half a page to its

cursory finding of guilt. Findings, at 25. Rather than give detailed findings or explanations of how the Attorney General violated each Rule, the Commission clumped the forty-one separate alleged violations together and resolved them in clusters. The resulting five identical sentences say nothing more than that the Attorney General's "conduct constitutes a violation of" the applicable rule.

These meager findings are so deficient that they deprive the Attorney General of any meaningful ability to challenge them on review. For practical purposes, the "findings" are nonexistent, as neither the Attorney General nor this Court can reasonably determine from these conclusory statements how the Attorney General supposedly violated the Rules or what specifics facts the Commission relied on in reaching that decision. Indeed, this Court's seminal case on sufficiency of factual findings determined that 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; *see also Nelson*, at *20 ("The [tribunal's] conclusory, two-

sentence discussion in this case does not suffice. Again, the Court must be able to discern the [tribunal's] path to [its] conclusion.").

Third, the Commission's behavior in depriving this Court of a clear record to review severely prejudiced the Attorney General's case and necessitates vacatur. When trial courts fail to develop an adequate record for review, the normal remedy is vacatur and remand for further proceedings. *See C.L. v. Del Amo Hosp., Inc.*, 2023 U.S. App. LEXIS 7976, at *3 (9th Cir. Apr. 4, 2023). That's especially true where, as here, the Commission's failure to develop a record resulted in substantial prejudice to the Attorney General. *In re Potts*, ¶ 70. And that general rule should have stronger effect in a disciplinary proceeding where this Court applies different standards of review depending on the basis for the Commission's decision. *See In re Potts*, ¶ 32 (distinguishing between findings that rest on "testimonial evidence" from other findings of fact).

At the hearing, the Attorney General even requested that the parties be permitted to submit post-hearing briefing given the sheer number of counts and legal issues involved. Tr. 244-245. The Attorney General submitted a point brief in support of this request. Tr. 245. ODC opposed it. Tr. 251-255. The Commission denied the request. Tr. 420-421.

This Court should not condone such severe legal abdications. *Golden*, ¶ 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 the Court finds that ODC's Complaint alleged a violation of the Rules of Professional Conduct, 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.

A. ODC's Complaint and the Commission's Recommendation inappropriately interfere with the Attorney General's constitutional authority. While the Attorney General and his subordinates are generally subject to the rules governing the practice of law, those rules cannot interfere with the Attorney General's core duties to prosecute cases at the Supreme Court. Yet that's exactly what the Commission recommends: that the Attorney General be suspended from the practice of law because he vigorously represented the Legislature in an unprecedent separation-of-powers dispute with the judiciary.

Disagreement or criticism of this Court, however, doesn't grant the Commission authority to hamstring a coequal branch of government. On the contrary, federal courts across the country consistently hold that

executive officials are afforded great discretion in how they choose to carry out their duties. This Court has immunized *its own members* from discipline for the same "intemperate" statements allegedly made by the Attorney General. *See State ex rel. Shea v. Judicial Standards Comm'n*, 198 Mont. 15, 39, 643 P.2d 210, 223 (1982) But the Commission ask this Court to deny the Attorney General, a constitutional officer for the State of Montana, the same protection and subject him to punishment and suspension when any single lawyer complains about his actions. This cannot be. The Commission's recommended punishment raises nonjusticiable issues and must be rejected. And even if this Court has concerns about the conduct alleged in the Complaint, there are strong prudential and practical reasons to avoid discipline.

B. The Montana Constitution divides government into legislative, executive, and judicial departments. Article III, Section 1 then demands that "[n]o person or persons charged with the exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted." MONT. CONST. art. III, § 1. That separation is "designed to act as a check on an overly ambitious branch of government.'" *MEA-MFT v.*

McCulloch, 2012 MT 211, ¶ 26, 366 Mont. 266, 291 P.3d 1075 (quoting Montana Constitutional Convention, Committee Reports, February 19, 1972, p. 818).

The Montana Constitution establishes the Attorney General as an independent executive office. MONT. CONST. art. 6, §§ 1(1), 2(1), 4(4). As the "legal officer of the state," the Attorney General has "the duties and powers provided by law." *Id.* § 4(4). Chief among these is 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). The Attorney General's representation of the Legislature in the proceedings giving rise to the Complaint falls squarely within those core constitutional and statutory duties.

The Attorney General, therefore, enjoys a significant degree of "constitutional independence" in executing that core duty. *See Bd. of Regents of Higher Educ. of Mont. v. State*, 2022 MT 128, ¶ 14, 409 Mont. 96, 512 P.3d 748. And the courts may not interfere in his discharge of that duty without violating the separation of powers. *See Elendil v. Mont. Eighth Jud. Dist. Court*, 2023 Mont. LEXIS 698, at *8 (2023) ("By

intruding on the prosecutor's discretion, the court violated the separation of powers between the executive and judicial branches of government."); *see also State ex rel. Fletcher v. Dist. Court*, 260 Mont. 410, 418, 859 P.2d 992, 997 (1993); *Sheehy v. Comm'r of Pol. Practices for Mont.*, 2020 MT 37, ¶ 29, 399 Mont. 26, 458 P.3d 309; *Trump v. United States*, 603 U.S. 593, 636 (2024).

C. The Commission's Recommendation would interfere with the Attorney General's constitutionally vested authority to prosecute cases in the Supreme Court. *Regents*, ¶ 23. The Attorney General was "doing [his] duty" as an independent executive official "pursuant to the Constitution and statute." *Sheehy*, ¶ 30. The Commission mistakes this argument as an argument that the Attorney General may be disciplined only for committing a crime. Dkt. #25, at 10. Not so.

If the Attorney General behaves inappropriately during a case, the tribunal can impose sanctions *for that case.* For larger transgressions, the Legislature can impeach the Attorney General. But the courts may neither interfere with the Attorney General's ability to discharge his duties (by suspending him) nor impose standing restrictions on the manner in which he carries out his duties (by punishing him for taking

unsuccessful litigation positions or using language that some found uncomfortable).

That's not a novel argument. It flows logically from this Court's treatment of other constitutional branches. *See, e.g.*, *Sheehy*, ¶ 35 (McKinnon, J., concurring) (collecting cases on the Board of Regent's "need for reasonable constitutional autonomy"). Consider this Court's ruling in *Shea*. The Court explained that censuring, suspending, or removing Justice Shea from office for his intemperate language was less important than "preserv[ing] an independent judiciary in this State." 198 Mont. at 39, 643 P.2d at 223. In fact, the Court went even further and made the very point the Attorney General advances here: "The judicial power of a district judge is sovereign" and "[d]isciplinary proceedings should not apply to the decisional process of a judge." *Id.* In other words, constitutional officers get deference in how they carry out their official duties. Were these decisions subject to disciplinary review, these officers "would be as concerned with what is proper in the eyes of the Commission as with what is justice in the cause." *Id.*

Taken together, this Court's holdings on the independence afforded to the Board of Regents and the state judiciary—when exercising their

constitutional powers—maps closely with federal courts' application of that same principle to executive functions. In its separation-of-powers caselaw, the United States Supreme Court has confirmed that an executive official must be allowed to "execute the duties of his office fearlessly and fairly." *Trump*, 603 U.S. at 595. And that same Court explained in *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), that the threat of civil liability for official acts chills the Attorney General from taking the "bold and unhesitating action" required of an independent executive. *Id.* at 745. The Supreme Court's "'dominant concern' [in *Fitzgerald*] was to avoid 'diversion of the President's attention during the decision-making process caused by needless worry as to the possibility of damages actions stemming from any particular official decision.'" *Trump*, 603 U.S. at 594 (quoting *Clinton v. Jones*, 520 U.S. 681, 694, n.19 (1997)). And the *Fitzgerald* Court tied its Presidential immunity ruling to the same rights afforded to "prosecutors and judges" who must concern themselves with matters likely to "arouse the most intense feelings." 457 U.S. at 751-52 (citing *Pierson v. Ray*, 386 U.S. 547, 554 (1967)).

But the Commission's Recommendation does exactly that. It purports to discipline the Attorney General after the case has ended for

the exercise of his constitutional authority and threatens his ability to fulfill that constitutional role. After all, the Commission recommends revoking the Attorney General's law license. *See Fitzgerald*, 457 U.S. at 753 ("Cognizance of this personal vulnerability frequently could distract a President from his public duties to the detriment of not only the President and his office but also the Nation that the Presidency was designed to serve."). The people of Montana expect and demand that their Attorney General represent their interests. That includes zealously defending the Legislature's enactments, subpoenas, and—when in his view necessary—standing up to perceived judicial overreach. And while it "may not have been pleasant" for the Court to receive that criticism, the exercise of constitutional rights and duties cannot yield to hurt feelings. *Shea*, 198 Mont. at 38-39, 643 P.2d at 223 ("Yet it seems nearly every day newspaper editors say something equally derogatory about [Court] decisions.").

ODC's Complaint effectively kneecaps the Attorney General's ability to represent two branches of government and favors the judiciary in any future dispute between the branches. Public interest demands parity between the branches so that the Attorney General can fulfil his

oath of office. *See Trump*, 603 U.S. at 613; *Shea*, 198 Mont. at 39, 643 P.2d at 223.

D. The Commission erroneously rejected the Attorney General's separation-of-powers challenge to its disciplinary authority. Dkt. 39. The Commission (as well as ODC, Dkt. 25 at 7-8) 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), with both quoting the same passage from *Webster*. *Compare* Dkt. 37 at 9 *with* Dkt. 25 at 8.

But the Texas Supreme Court recently reversed both of those cases and held that the Texas Commission on Lawyer Discipline's prosecution of Attorney General Paxton and his First Assistant was barred by Texas's separation-of-powers provision. *Webster v. Comm'n for Law. Discipline*, No. 23-0694, 2024 Tex. LEXIS 1175, at *3 (Dec. 31, 2024).

Paxton and *Webster* stem from the 2020 election when Texas filed an original action in the U.S. Supreme Court against Pennsylvania. *See Texas v. Pennsylvania*, 141 S. Ct. 1230 (2020). As here, those disciplinary cases began when attorneys who did not participate in that litigation filed

politically motivated ethics grievances against the Texas Attorney General and his First Assistant. The grievances alleged that Texas filed a frivolous lawsuit and made misrepresentations to the tribunal. Like the Complaint against Attorney General Knudsen, the *Paxton* and *Webster* complaints reflected nothing more than disagreements with the Attorney General's legal position and assessment of the facts at the time. In another eerily similar coincidence, the Texas Chief Disciplinary Counsel initially declined to the pursue the case but was overruled by the Board of Disciplinary Appeals. *Webster*, 2024 Tex. LEXIS 1175, at *3.

The Texas Supreme Court concluded that formal discipline would be inappropriate when the tribunal to whom the statements were made didn't issue discipline. Courts are capable of disciplining attorneys who appear before them:

> *Direct* scrutiny within the judicial process accommodates the inherent authority and responsibility of the judicial branch. A court that perceives or is alerted to a professional violation may address it, always sensitive to a coordinate branch's authority, its entitlement to respect, and the presumptions of good faith and regularity that it is owed.

Webster, 2024 Tex. LEXIS 1175, at *28. Contrary to the Commission's prediction here, dismissing the Complaint against Attorney General Knudsen would not be an "invitation to anarchy." Findings, at 10. The

Brown and *McLaughlin* courts had the opportunity to institute discipline or sanctions against the Attorney General but chose not to.

Nor does it save ODC's prosecution that the Commission claims the Attorney General is being disciplined for his "conduct." Findings, at 28-29. As the *Webster* court explained:

> [I]t is insignificant that the commission relabeled the assessments and determinations that informed and populated the initial pleadings as "misrepresentations." Whatever the label, the challenged statements are part and parcel of the attorney general's (and first assistant's) "investigation of the case, and [his] determination" that "the evidence necessary to a successful prosecution of the suit can be procured."

Webster, 2024 Tex. LEXIS 1175, at *39.

From the outset, the Attorney General has agreed with ODC and the Commission that the factual scenarios from *Webster* and *Paxton* are directly on point. *See* Dkt. 29 at 17 ("*Webster* and *Paxton* are outliers that present the same threat to the separation of powers as this Complaint. Little wonder the Texas Supreme Court granted review."). Now that the Texas Supreme Court has vindicated Attorney General Knudsen's separation-of-powers argument, this Court should hold the Commission and ODC to their reliance on *Webster* and *Paxton* and dismiss.

E. Even if this Court isn't compelled to dismiss the Complaint, there are prudential considerations that support dismissal. The Texas Supreme Court cautioned against courts inserting themselves into politically charged disputes:

> Collaterally disciplining an official like the first assistant for statements made in initial pleadings—particularly when a filing involves a politically sensitive lawsuit—creates a serious risk that the judicial branch will venture into, or be dragged into, the contentious arena of political disputes. This Court has time and again refused to do so.

Webster, 2024 Tex. LEXIS 1175, at *37.

The Commission's proposed suspension would permit any Montana attorney to weaponize this State's attorney discipline proceedings against an Attorney General for his public filings. Such a state of affairs violates the will of the electorate, chills the Attorney General's actions, and thwarts the proper function of government provided for in Montana's Constitution. *See Webster*, 2024 Tex. LEXIS 1175, at *4 ("Were we to hold otherwise and instead allow collateral attacks like the commission's lawsuit, we would improperly invade the executive branch's prerogatives and risk the politicization and thus the independence of the judiciary."). That's why the first Special Prosecutor in these proceedings

recommended disposing of this matter with a private admonition. Dkt. 20A (Ex. A at 6, ODC# 0290).

The Attorney General, the justices of the Montana Supreme Court, and the members of the Montana Legislature are elected by and accountable to the people of Montana. The allegations in the Complaint and the Commission's Recommendation were widely publicized by the media and well-known to the voters of Montana on November 5, 2024. And the voters have spoken: 60% of Montanans wanted Austin Knudsen to continue serving as Attorney General. *See Webster*, 2024 Tex. LEXIS 1175, at *63-64 ("[V]arious political mechanisms serve as additional checks on the attorney general's (and by extension, the first assistant's) conduct. The Attorney General's client is ultimately the People of the State, who are empowered to renew his engagement, or not, every four years.").

V. The Commission erred in concluding that the Attorney General violated the MRPC.

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

Neither the law nor the undisputed evidence supports the Commission's findings that the Attorney General's conduct violates Rules

3.4(c), 5.1(c), 8.2(a), 8.4(a), and 8.4(d) of the Montana Rules of Professional Conduct.

1. The Attorney General did not violate MRPC 3.4(c) because he openly asserted that no valid obligation existed.

The Commission concluded that the Attorney General violated Rule 3.4(c) without specifying the evidence supporting that conclusion or which specific counts ODC had proven. *See* Findings, at 25. The Court should reject this conclusion.

a. MRPC 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." (emphasis added). This rule is copied verbatim from the American Bar Association's Model Rules of Professional Conduct. *See* ABA Model R. Prof'l Conduct 3.4(c).

Rule 3.4(c) contains a prohibition—and 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). This exception allows Rule 3.4(c) to work in tandem with Rule 1.2(d), which provides that an attorney should "assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law." MRPC 1.2(d).

Rule 3.4(c) thus distinguishes between *permissible* open challenges to a court's authority or jurisdiction and *impermissible* hidden or subversive disobedience. "Under Rule 3.4(c), when a lawyer openly resists compliance with a judicial order or court rule, claiming the order or rule is invalid, responsibility for enforcing the judicial obligation has been moved away from the *professional disciplinary process* … and returned back to the *tribunal*, whose order or rule has been placed in question and which has the power to impose sanctions for violation of a court order or rule or even to hold the disobedient lawyer in contempt." 16 Iowa Prac. §7:4(d) (emphasis added). So "[c]ontempt may sometimes be an appropriate remedy" for a lawyer's refusal to comply with a court rule or ruling, but later "disciplinary action" should not imposed "as long as the lawyer acted openly and in good faith." *Law on Lawyering*, §33.09.

To qualify for Rule 3.4(c)'s exception, a lawyer first must make an "open refusal." "While rule 3.4(c) does not define the term 'open refusal'

nor describe how an attorney should openly refuse … courts and commentators have determined that at a minimum, this rule requires an attorney to put a court on notice that the attorney will not comply with the court-imposed obligation." *Gilbert v. Utah State Bar (In re Gilbert)*, 379 P.3d 1247, 1255 (Utah 2016); *see also Law of Lawyering*, §33.12. So to effectuate the "open refusal," "[a]n attorney may challenge a court order by motion, appeal, or other legal means." *In re Ford*, 128 P.3d 178, 181-82 (Alaska 2006). A lawyer can comply with Rule 3.4(c) even by simply "informing the superior court that he could not comply with the order," but he "may not simply disregard it." *Id.* at 181-82. Thus, "rule 3.4(c)" means "that an attorney must either obey a court order or alert the court that he or she intends to not comply with the order." *Gilbert*, 379 P.3d at 1256. This "open refusal" requirement confirms why attorneys should be disciplined under Rule 3.4(c) only for secret, unannounced disobedience. "An open refusal permits the … court to assess the attorney's argument and allows opposing counsel to take action to protect her client from the opposing attorney's noncompliance." *Gilbert*, 379 P.3d at 1257.

Second, the attorney must also make an "assertion" challenging the validity of the order. Rule 3.4(c) does not require that the attorney's "assertion that no valid obligation" be proven correct before the exception applies. Since challenges to the validity of a court's authority often involve complex questions of jurisdiction or statutory authority, the assertion need only have "merit" to receive the protection of Rule 3.4(c)'s exception. *Law of Lawyering*, §33.12; *see also Olson v. Superior Court*, 204 Cal. Rptr. 217, 227 (Ct. App. 1984) (attorney's disobedience was legally incorrect but "was a good faith attempt to test the constitutionality of" the order, so the attorney "should not be penalized for her efforts").

Third, Rule 3.4(c)'s exception applies when the "refusal is based upon a reasonable good-faith belief that no valid obligation exists because, for example, the law is unconstitutional, conflicts with other legal or professional obligations, or is otherwise invalid." Simon's NY Rules of Prof. Conduct §8.4:11. Thus, an attorney may openly refuse and challenge an order on grounds that the order is unconstitutional. *See, e.g.*, *Chapman v. Pacific Tel. & Tel. Co.*, 613 F.2d 193, 197 & n.2 (9th Cir. 1979); *Olson*, 204 Cal. Rptr. at 227. Or beyond a court's jurisdiction. *See,*

e.g., *In re Conduct of Tamblyn*, 695 P.2d 902, 906 (Or. 1985) (en banc) ("[A]n order is void because made without jurisdiction …. when a party refuses to obey a void order he has in reality not been guilty of refusing to obey an order of the court[.]"); *In re Igbanugo*, 863 N.W.2d 751, 759, 763 (Minn. 2015) (court's lack of jurisdiction not raised in a timely "open refusal"). Or outside statutory authority. *See Tamblyn*, 695 P.2d at 905-06 (reversing discipline where attorney refused to obey a temporary restraining order that was entered without the statutorily required bond). Thus, an attorney's assertion that "no valid obligation exists" must do more than assert simple error; it must assert that "the court had no authority" to enter the order. *Tamblyn*, 695 P.2d at 906.

Finally, Rule 3.4(c)'s exception is carefully cabined: It applies only when "the lawyer has a reasonable and good faith basis to assert that no valid obligation exists under the court order," and then takes "*appropriate steps* in good faith to test the validity of the ruling." Chris Mullmann, *Who Decides? The Lawyer, the Client or the Court?*, Or. St. B. Bull., Dec. 2006, at 25 (quoting *In re Rhodes*, 13 P.3d 512, 514 (Or. 2000) (en banc))). What constitutes "appropriate steps" includes any recognized procedural method for challenging an order. *See, e.g.*, *People v. Brown*,

461 P.3d 683, 695 & n.67 (Colo. O.P.D.J. 2019) (when facing an adverse order, an attorney must enter an "open refusal" and "seek further review in the U.S. Supreme Court *or* … comply" (emphasis added)); *Fla. Bar v. Gersten*, 707 So. 2d 711, 712 (Fla. 1998) (Rule 3.4(c)'s exception applies when "the attorney [is] (1) acting in good faith and (2) *seeking redress in an appellate court*." (emphasis added)); *Att'y Grievance Comm'n of Md. v. Levin*, 69 A.3d 451, 463-64 (Md. 2013) (an attorney could have openly challenged a trial court's writ of garnishment by refusing the order and filing "objections" to "assert that no valid obligation existed" in compliance with Rule 3.4(c)); *In re Jones*, 338 P.3d 842, 853 (Wash. 2014) (en banc) (Rule 3.4(c)'s exception did not apply to attorney who gave unresponsive answers to discovery requests rather than telling the court that he would "openly refuse [to respond] based on lack of a valid obligation to produce the requested documents").

This does not mean that attorneys who openly refuse a court's order are insulated from potential discipline. For one thing, the court can impose appropriate sanctions if it determines that the open refusal is in bad faith. For another, Rule 3.4(c)'s exception does not protect attorneys who continue to disobey the court's orders after exhausting all avenues

for appeal. So attorneys can raise "meritorious claims that may be pursued," but they also "ha[ve] the duty, once such claims have been pursued to the fullest extent allowed by law and defeated, to refrain from continuing to assert" those claims. *Fla. Bar v. Klein*, 774 So. 2d 685, 691 (Fla. 2000) (applying Rule 3.4(c) where the attorney in question "failed to accept defeat when he had exhausted all legal remedies").

b. It does not appear that the State of Montana has yet applied Rule 3.4(c)'s "open refusal" exception. *See generally* Office of Disciplinary Counsel for the State of Montana, *Public Discipline Under the Montana Rules of Professional Conduct – Annotated* (2022) (listing cases applying Rule 3.4(c)). Yet in all cases where this Court has disciplined attorneys under Rule 3.4(c), it has applied the rule as interpreted above.

In every case discussed in the *Montana Rules of Professional Conduct – Annotated*, the attorneys punished for violating Rule 3.4(c) engaged in willful deception of a court or intentional defiance of a court's orders that was only discovered later. For example, in *In re Morin*, MT PR 17-0254 (2018), this Court found that an attorney violated Rule 3.4(c) when she filed a brief on behalf of herself as a party even though the trial court specifically ordered that she could not personally appear for her

firm and must use retained counsel to file. *Morin*, MT PR 17-0254, at 2. Morin not openly challenged the validity of that order, but she attempted to deceive the court into thinking she complied by filing under her retained counsel's name and falsifying his signature. *See In re Morin*, ODC File No. 16-210, ¶¶ 14-15 (2018). This constitutes the type of secret, subversive disobedience that Rule 3.4(c) properly punishes and its exception does not protect.

Similar willful deception occurred in *In re Alback*, MT PR 09-0222 (2009). There, a court directed the parties to file briefs regarding a lease, but one attorney never filed the ordered brief. *See In re Alback*, ODC File No. 08-102, ¶¶ 4-6 (2009). After the court ruled against this attorney's client, the client asked for a copy of the brief that should have been filed. *See id.* ¶ 7. Rather than admit his error, the attorney sent a brief that included a falsified certificate of service indicating that it had been timely submitted. *Id.* This Court disciplined the attorney for violating multiple rules, including Rule 3.4(c). *Alback*, MT PR 09-0222, at 3; *see also In re Moses*, MT PR 06-0702 (2007) (applying Rule 3.4(c) where an attorney disobeyed, without explanation, two orders to file a brief on behalf of his client).

This Court also finds Rule 3.4(c) violations when attorneys disobey standing court orders in ways that are only discovered later. For example, in *In re Kammerer*, MT PR 11-0317 (2012), this Court placed an attorney's license on inactive status for continuing legal education noncompliance and notified the attorney that he was prohibited from practicing law. *See In re Kammerer*, ODC File No. 10-243, ¶¶ 4-11 (2012). Despite acknowledging his inactive status, the attorney represented several parties and filed multiple documents for clients while prohibited from practicing law. *Id.* Once this illegal practice in defiance of the Court's standing order was discovered, this Court found a clear violation of Rule 3.4(c). *Kammerer*, MT PR 11-0317, at 1; *see also In re Nelson*, MT PR 10-0172 (2011) (same facts). A similar violation occurred in *In re Begley*, MT PR 19-0023 (2020), where this Court disciplined an attorney under Rule 3.4(c) for failing to pay restitution or submit periodic reports, as required by the terms of his disciplinary probation. *See Begley*, PR 19-0223, at 2-3; *In re Begley*, ODC File No. 18-162, ¶ 8 (2020); *see also In re Caughron*, MT PR 09-0488 (2010) (same facts).

The closest scenario to an "open refusal" reviewed by this Court appears to be *In re Epperson*, MT PR 16-0025 (2016), where an attorney

told a court that "[n]either [the client] nor I will show up if the judge refuses to vacate the trial set for July 8" and challenged the court to "throw my ass in jail." *In re Epperson*, ODC File No. 15-129, ¶ 8 (2016). But there, the attorney's statement lacked any "assertion" that "no valid obligation existed," so this outburst fell outside Rule 3.4(c)'s exception. *See id.* Nor did Epperson argue that the exception applied. *See id.*

In short, no public record indicates that the Commission or this Court has ever applied Rule 3.4(c) to discipline an attorney who engaged in an "open refusal" of a court's order "based on an assertion that no valid obligation exists." MRPC 3.4(c). As far as public records indicate, this Court has disciplined only secret, subversive disobedience that sought to defy a court, deceive a court, or otherwise disrespect a court—but never good-faith noncompliance seeking to challenge and receive final rulings on the order's legitimacy.

c. Here, the Attorney General did not violate Rule 3.4(c) because the evidence did not show he engaged in secret, subversive disobedience to any court order. Instead, the Attorney General made an "open refusal based on an assertion that no valid obligation exists" while consistently arguing the then-as-yet-undecided issue that this Court lacked

jurisdiction over legislative subpoenas. And once the Attorney General exhausted all recognized procedures for rehearing or appeal to the U.S. Supreme Court, he immediately complied with this Court's order. This conduct falls squarely under Rule 3.4(c)'s exception—it shows no disrespect for the law or for this tribunal, but a good-faith desire to promptly challenge and receive final rulings on important and sensitive questions about the scope of this Court's jurisdiction and constitutional authority. *See Law of Lawyering*, §33.12; *Gilbert*, 379 P.3d at 1255-57; *Brown*, 461 P.3d at 695-96. ODC's complaint charged that the Attorney General violated Rule 3.4(c) by statements in letters to this Court (Counts 1, 3, 10, 12, 19, 21); statements in motions, responses, and petitions before this Court (Counts 7, 15, 25, 29); statements in a petition to the U.S. Supreme Court (Count 33); and by retaining possession of discovery documents until the U.S. Supreme Court denied certiorari (Count 37).[7] Despite these twelve charges—involving a vast array of factual contexts—the Commission's findings of fact and conclusions of

[7] The Complaint also lists a violation of Rule 3.4(c) under Count 38, but this count concerns the Attorney General's supervisory control over other attorneys related to the alleged violation described in Count 37. Count 38 does not allege another independent violation of Rule 3.4(c).

law say nothing more than "Respondent's conduct constitutes a violation of Rule 3.4(c) MRPC." Findings, at 25. The Commission did not cite evidence establishing how ODC proved a violation of any single count, much less all twelve counts.

First—Consider the charges that the Attorney General violated Rule 3.4(c) by using strongly worded language in some letters and filings to this Court and the U.S. Supreme Court (Counts 3, 7, 12, 21, 25, 29, 33). These Counts may be considered together, since ODC alleges that these various statements constitute "knowing disobedience of an obligation under the rules of a tribunal" because these various statements are "contemptuous, undignified, discourteous, and[] disrespectful." Compl., at 13-31. The Attorney General maintains that each statement constituted vigorous representation of his client's legal position and was not offered to be disrespectful to this Court. On this point, the Attorney General's testimony at the hearing is uncontroverted. *See* Tr. 150-83. But starting with Rule 3.4(c)'s text, nowhere in the Complaint itself did ODC identify what "rule[] of a tribunal" was violated by these various statements.

Then at the Commission hearing, ODC claimed that this "intemperate, contemptuous, and disrespectful" language violated the Attorney General's "oath as an officer of the Court." Tr. 428-29. But ODC's only authority for the proposition that the use of disrespectful language can violate Rule 3.4(c) was *Ligon v. Stilley*, 371 S.W.3d 615 (Ark. 2010), where an attorney was charged with using "intemperate, contemptuous, and disrespectful" language in violation of his "oath of office as an attorney-at-law." *Id.* at 628. ODC called *Ligon* "the most compelling case" for its legal position and an "uncanny" "parallel" to this case. Tr. 429. But ODC did not tell the Commission that the Arkansas Supreme Court itself doubted those alleged Rule 3.4(c) violations were sustainable:

> 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.

In other words, ODC's *only* authority—indeed, the "most compelling" support—for its charge that the Attorney General violated his oath as an attorney by filing litigation documents sharply criticizing

legal conclusions comes from a case where the charge went uncontested and the ruling court itself noted that the charges were likely invalid and would not withstand a proper adversarial response. Nor did the Commission cite any authority to support its conclusion that an attorney violates his oath by submitting strongly worded filings. *See generally* Findings, at 25.

In contrast, courts around the nation recognize that attorneys have a duty to strongly, albeit respectfully, criticize court rulings when vigorously representing their clients' interests. "[A]ttorneys need wide latitude in engaging robust and effective advocacy on behalf of their clients—particularly on issues … that *require* criticism of a judge or a judge's ruling." *In re Dixon*, 994 N.E.2d 1129, 1138 (Ind. 2013). "Attorneys should be free to challenge, in appropriate legal proceedings, a court's perceived partiality without the court misconstruing such a challenge as an assault on the integrity of the court." *United States v. Brown*, 72 F.3d 25, 29 (5th Cir. 1995). Such robust criticism, appropriately raised in legal proceedings, does not violate an attorney's oath. Rather, it is a necessary part of the adversarial process that protects clients and their interests. *In re Snyder*, 472 U.S. 634, 645-47

(1985); *cf. Shea*, 198 Mont. at 38, 643 P.2d at 223 ("It is characterized by the [Judicial Standards] Commission as 'intemperate' but the language quoted is not profane or vulgar").

Indeed, ODC's and the Commission's view that language such as "ludicrous" (Count 12), "perverse" (Count 25), and "defies common sense" (Count 25) impugns this Court's integrity breaks from the majority consensus. Courts have long distinguished good-faith criticism of legal conclusions from *ad hominem* attacks on individuals. The former is often required of an attorney. These statements in the Complaint fall in that category and do not violate the "rules of a tribunal." In fact, they do not even represent a departure from the normal practice of *this tribunal*. Members of this Court and the U.S. Supreme Court have used identical

language in published opinions to describe other court members' conclusions and litigants' arguments.[8]

This Court overturned the Judicial Standards Commission's ("JSC") attempted discipline of Justice Daniel Shea for using alleged "intemperate" language in a dissent. *Shea*, 198 Mont. at 39, 643 P.2d at 223. Justice Shea's dissent harshly criticized a majority opinion. *See, e.g.*, *id.* at 20, 643 P.2d at 213 ("The dishonesty of the majority opinion is manifest."); ("And this is not the only manner in which the opinion is rather slippery with the facts."); ("It is intellectual dishonesty for the majority not to recognize that the combination thereof is a radical

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[8] *See Mont. Democratic Party v. Jacobsen*, 2024 MT 66, ¶ 162, 416 Mont. 44, 545 P.3d 1074 (Sandefur, J., concurring in part and dissenting in part) (calling the majority's legal conclusion "ludicrous"); *Montanans Opposed to I-166 v. Bullock*, 2012 MT 168, ¶ 36, 365 Mont. 520, 285 P.3d 435 (Nelson, J., dissenting) (calling Attorney General Bullock's legal assertion "ludicrous"); *Musselshell Ranch Co. v. Seidel-Joukova*, 2011 MT 217, ¶ 84, 362 Mont. 1, 261 P.3d 570 (Nelson, J., concurring in the result and dissenting from the reasoning) (calling the majority opinion a "perverse result"); *State v. Hinman*, 2023 MT 116, ¶ 18, 412 Mont. 434, 530 P.3d 1271 (McKinnon, J., for the Court) (one possible interpretation of a statute "defies common sense"); *Ammondson v. Nw. Corp.*, 2009 MT 331, ¶ 36, 353 Mont. 28, 220 P.3d 1 (Cotter, J., for the Court) (one party's arguments "defy common sense and logic"); *see also, e.g.*, *Johnson v. Vandergriff*, 143 S. Ct. 2551, 2556 (2023) (Jackson, J., dissenting) ("To nevertheless maintain that Johnson should be denied a COA … defies common sense."); *Carson v. Makin*, 596 U.S. 767, 809 (2022) (Sotomayor, J., dissenting) (["T]he Court's decision is especially perverse."); *NFIB v. DOL, OSHA*, 595 U.S. 109, 135 (2022) (Breyer, J., dissenting) ("It is perverse to read the Act's grant of emergency powers in the way the majority does."); *Maracich v. Spears*, 570 U.S. 48, 93 (2013) (Ginsburg, J., dissenting) ("It would be ludicrous to treat the fact that the project did not fit within one exception…."); *Massachusetts v. EPA*, 549 U.S. 497, 558 n.2 (2007) (Scalia, J., dissenting) ("This reading of the statute defies common sense.").

departure from existing interpretations of constitutional law in this state."). The JSC alleged that these statements were "prejudicial to the administration of justice" and constituted "misconduct in office." *Id.* at 18, 23, 643 P.2d at 213-14. This Court disagreed. It explained: "As long as a justice, or a judge, in writing opinions, does not resort to profane, vulgar or insulting language that offends good morals, it may hardly be considered 'misconduct in office." *Id.* at 39, 643 P.2d at 223.

To be sure, attorneys aren't judges. But the right to fiercely criticize the Courts for their decisions has a long history. The first president of the Montana Bar Association, Wilbur Fisk Sanders, said during the State Bar's 1904 meeting: "No civilization could progress unless every decision of its courts can be subjected to the fullest examination and criticism in the light of what is right, and this could not be contempt."[9] Sanders noted that "[i]f the decisions of high tribunals command the respect of intellectual persons it is because they have permitted the fullest discussion of their actions."[10] The Secretary for the State Bar paraphrased further remarks from President Sanders: "[T]he courts and

[9] Proceedings of the Montana Bar Association, Jan. 13, 1903 to Feb. 3, 1914, 7 (Vere L. McCarthy ed.) (hereinafter "Proceedings")
[10] *Id.*

the bar were confused as to the rights of criticism and as a result justice was becoming perverted."[11] *Cf. Shea*, 198 Mont. at 38, 643 P.2d at 223 ("It may not have been pleasant for the majority in *McKenzie* to have been called 'intellectually dishonest' or to have been told that they were 'slippery with the facts.' Yet it seems nearly every day newspaper editors say something equally derogatory about our decisions.").

Attorneys' ethical duty to vigorously represent their clients' position sometimes requires criticizing—in a strong but respectful tone—legal conclusions. Statements criticizing a legal *conclusion* (rather than *ad hominem* attacks on an individual) using language that this Court itself uses does not violate Rule 3.4(c). The Attorney General's conduct described in Counts 3, 7, 12, 21, 25, 29, 33—strongly worded language—does not violate Rule 3.4(c) because it is not disobedience of any "rule[] of a tribunal," MRPC 3.4(c), and it does not depart from the long tradition of strongly worded advocacy before this Court. The Commission's conclusion to the contrary is erroneous.

<u>*Second*</u>—consider the allegations that the Attorney General violated Rule 3.4(c) by sending letters to this Court (Counts 1, 10, 19).

[11] *Id.*

Those three courts do not allege that the Attorney General violated Rule 3.4(c) due to what those letters *said*, but that he violated Rule 3.4(c) by the mere *act* of sending letters. *See* Compl., at 13, 16, 21. But neither ODC nor the Commission has identified which "rule[] of a tribunal" is violated by sending a letter to this Court. *Id.*

Neither the Montana Rules of Civil Procedure nor the Montana Rules of Appellate Procedure forbid sending letters to timely inform this Court of matters that fall outside the normal processes of litigation. And each letter the Attorney General sent to this Court had a legitimate purpose that placed it outside normal litigation procedures. For the April 12 letter, the uncontroverted evidence confirmed that when the Attorney General sent that letter, he represented a client (the Legislature) who was bound by an order of the Court and yet was not a party to any case. *See* Tr. 86:2-6, 97:11-22. When a lawyer's client is named in an order in a case where the client is not a party (and thus unable to directly file in the case docket), neither ODC nor the Commission identified any more appropriate procedure by which the Attorney General could have informed this Court of his client's position. More to the point, the Legislature's position on April 12 was that this Court lacked jurisdiction

over the enforcement of a legislative subpoena (as opposed to a judicial subpoena). Given his client's position, the Attorney General deemed it more prudent to submit a letter rather than move to intervene, since intervention might have waived any objection to jurisdiction. *See* Tr. 204:5-204:23.

The April 18 letter, in turn, discussed a *separate* legislative subpoena, issued by the Legislature to the members of this Court. ODC Ex. 16. Since none of the members of this Court were parties to any judicial proceeding at that time, and since none of the members of this Court had indicated they were "represented by counsel," the Attorney General had no other means to communicate with the members of this Court about next steps for this separate, new subpoena. *Id.* at 2. And the May 19 letter explicitly stated that it did not concern "the substance of [this Court's] Order," called on all sides to lower the temperature given the sensitive nature of the proceedings, and said the Attorney General took direct responsibility for the contents of all prior filings. ODC Ex. 19.

It bears repeating that Counts 1, 10, and 19 do not concern the substance of these three letters. The complaint addresses the letters' substance in other counts in the Complaint (mostly dealing with the

"disrespectful" language already discussed). Instead, Counts 1, 10, and 19 allege that the Attorney General violated Rule 3.4(c) by the mere *act* of sending letters to this Court. But neither ODC nor the Commission has attempted to describe what "rule[] of a tribunal" forbids the Attorney General to send letters to promptly communicate issues that fall outside the normal procedures of appellate litigation. The Attorney General's conduct described in Counts 1, 10, and 19 does not violate Rule 3.4(c) because it does not constitute disobedience of any "rule[] of a tribunal." MRPC 3.4(c). The Commission's conclusion to the contrary is erroneous and must be rejected.

Third—the remaining Rule 3.4(c) charges (in Counts 3, 37) are the only ones that allege the knowing disobedience of a court order. Yet, for both those counts, the Attorney General's conduct falls within Rule 3.4(c)'s exception for an "open refusal based on an assertion that no valid obligation exists." MRPC 3.4(c).

Count 3 alleges that the Attorney General violated Rule 3.4(c) by the three of the statements within that April 12 letter. Compl., at 13. To

the extent ODC hasn't forfeited Count 3,[12] only two of those April 12 statements come close to "knowingly disobey[ing]" an order. *Id.* Those are: (1) "The Legislature does not recognize this Court's [April 11] Order as binding and will not abide it," and (2) "The subpoena is valid and will be enforced." ODC Exhibit 11. But neither ODC nor the Commission acknowledge the Attorney General's two other arguments in that April 12 letter: (1) That the Court's order was "not" "properly filed" since the Legislature was not a party, meaning the Court lacked jurisdiction to enter a binding order; and (2) that the Court's order violated the Montana Constitution and exceeded its subject matter jurisdiction by treating a legislative subpoena as a judicial subpoena. *See id.* at 1-2. This Court has since resolved those two issues, but at the time of the April 12 letter, both questions were novel and unanswered. *See McLaughlin I*, ¶ 10 ("In this case, the Court is called upon to assess, for the first time, the appropriate scope of the legislative subpoena power in Montana….").

[12] During closing argument, ODC said that "[t]he rules of the Tribunal that [the Attorney General] is being charged with violating are … his obligations to follow one order, and one order only … the July 14th, 2021 order." Tr. 428. It's logically impossible for statements made in April 2021 to have violated an order not entered until July 2021. The natural conclusion of ODC's argument is thus that it has forfeited Count 3.

Meanwhile, Count 37 alleges that the Attorney General violated Rule 3.4(c) by not "immediately return[ing] … all the materials within his possession, custody, or control that were produced pursuant to the [legislative] subpoenas at issue," as set forth in this Court's July 14, 2021, Order. Compl., at 33. This count became the focus of the ODC's prosecution and the Commission's ultimate recommendation. *See* Order, at 26 (failure to "return documents" was "beyond the pale").

But the Commission's conclusion on Count 37 ignores what happened immediately after this Court's July 14, 2021, order. Within ten days, the Attorney General notified this Court that he intended to file a petition for rehearing—a well-established procedural mechanism for challenging a court's ruling. *See McLaughlin II,* Mot. for Ext., July 22, 2021. The Attorney General then filed his petition for rehearing, arguing that this Court's order was invalid on jurisdictional and constitutional grounds.[13] ODC Ex. 26, at 7-10, 12-16, 18-20. And after this Court declined to reverse the July 12 Order, the Attorney General filed a petition for a writ of certiorari in the U.S. Supreme Court, where he

[13] The petition for rehearing specifically stated that the Attorney General 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, at 20.

continued to argue that the Order was invalid due to jurisdictional and constitutional defects. ODC Ex. 30, at 1-2, 18-27. Once the U.S. Supreme Court denied certiorari, "exhaust[ing] all legal remedies," *Klein*, 774 So. 2d at 691, the Attorney General immediately complied with the July 11 Order and returned the subpoenaed materials. Tr. 211-12.

This undisputed evidentiary record confirms that the Attorney General's conduct satisfied Rule 3.4(c)'s exception for an "open refusal based on an assertion that no valid obligation exists." Both times, the Attorney General promptly informed this Court that he intended to engage in open noncompliance to challenge the validity of the respective orders. *Cf.* Tr. 436-37 (ODC: "[Y]ou have to inform the Court…. you have to tell the Court, 'I can't comply with it.' Then … [t]he Court has an opportunity to do something about it." (citing *In re Ford*, 128 P.3d at 178)).

The Attorney General even informed McLaughlin's attorney of the refusal, Tr. 107:23-108:9, who could have moved to enforce the Court's Order. But Mr. Cox never did. Tr. 103:2-19; Tr. 107:5-13; *cf. Webster*, 2024 Tex. LEXIS 1175, at *61 ("[T]he normal adversarial system provides a powerful safeguard against executive-branch authorities who may

violate the … Rules of Professional Conduct over the course of litigation. Once a case has been filed, the opposing party has every incentive—and indeed obligation—to identify any problems, ethical or otherwise, with the government's case or its filings.").

The Attorney General's open refusal further preserved the status quo, given that the emails had already been released to the public from unknown third sources before the Legislature ever came into possession of them. Tr: 114:2-4 ("[T]he horse was already out of the barn."). And there's no evidence that any additional emails were released following the Court's April order quashing the subpoenas. Tr. 117:4-8. Notably, the status quo after the Court's July 14, 2021, Order whereby the Attorney General kept the emails in safekeeping was also apparently satisfactory for McLaughlin, demonstrated by her negotiation of an extension of time to file her response to the Legislation Petition for Writ of Certiorari, which delayed resolution of the case. Tr. 113:16-114:1.

Each of these two open refusals also contained a good faith "assertion" that "no valid obligation existed." MRPC 3.4(c); *see also Law of Lawyering*, §33.12. As the Attorney General's unconverted testimony established, *see* Tr. 202-05, his decisions were motivated by "a good faith

attempt to test the constitutionality of" this Court's then-unprecedented orders. *Olson*, 204 Cal. Rptr. at 227. Finally, the Attorney General maintained his open noncompliance only while he first sought "redress in an appellate court" by petitioning this Court for rehearing, *Gersten*, 707 So. 2d at 712, and later sought "further review in the U.S. Supreme Court," *Brown*, 461 P.3d at 695 & n.67. After pursuing his claims "to the fullest extent allowed by law," he "accept[ed] defeat when he had exhausted all legal remedies" and immediately obeyed this Court's order. *Klein*, 774 So. 2d at 691.

In its findings of fact and conclusions of law, the Commission refused even to acknowledge Rule 3.4(c)'s exception. Plainly contradicting Rule 3.4(c)'s explicit text, the Commission claimed that "[f]rom these requirements there are no exceptions." *See* Findings, at 8. By itself, this failure to engage with Rule 3.4(c)'s text should be fatal to the Commission's conclusions on Counts 3 and 37. That those conclusions contravene prior Rule 3.4(c) holdings from this Court and other courts only confirms the point. The undisputed evidence confirms that Attorney General's conduct falls squarely within Rule 3.4(c)'s exception. The Commission's contrary conclusion is erroneous and must be set aside.

2. The Attorney General did not violate MRPC 8.2(a) because his statements were neither objectively false nor made with knowing falsity or in reckless disregard for the truth.

The Commission concluded that the Attorney General violated Rule 8.2(a) without specifying the evidence supporting that conclusion or which specific counts ODC had proven. *See* Findings, at 25; *see generally* Part III, *infra*. The Commission's conclusion should be set aside.

a. Montana Rule of Professional Conduct 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). Montana copied this text verbatim from the American Bar Association's Model Rules. *See* ABA Model Rule of Professional Conduct 8.2(a). And in *In re Miller*, 2019 Mont. LEXIS 937, this Court acknowledged the propriety of following the American Bar Association's official commentary on Model Rule 8.2(a). *Id.* at 4; *see also Ann. Mod. Rules of Prof. Cond.*, §8.2.

The First Amendment protects an attorney from civil and criminal liability for derogatory statements about judges unless the attorney speaks "with 'actual malice'—that is, with knowledge that [the statement] was false or with reckless disregard of whether it was false or

not." *Garrison v. La.*, 379 U.S. 64, 65-67 (1964) (applying the *New York Times v. Sullivan* standard to attorneys' comments about judges). "Rule 8.2(a) adopt[ed] the same standard for professional responsibility purposes." *Ann. Mod. Rules of Prof. Cond.*, §8.2; *see also Law of Lawyering*, §67.03 ("Model Rule 8.2(a) incorporates the First Amendment standard for false criticism of public officials, as articulated by the United States Supreme Court in *New York Times v. Sullivan* and its progeny."). But unlike in defamation cases, in Rule 8.2(a) cases the lawyer's mental state—*i.e.*, whether the lawyer knew the statement was false or recklessly disregarded its falsity—is assessed under "an objective standard: what a reasonable attorney, considered in light of all his professional functions, would do in the same or similar circumstances." *In re Miller*, 2019 Mont. LEXIS 937, at *6. As a result, Rule 8.2(a) does not prohibit all—or even most—criticism of judges. It prohibits only the statements that ODC can prove an attorney "*knows* to be false" and statements ODC can prove an attorney made "with *reckless disregard* as to its truth or falsity." MRPC 8.2(a).

Rule 8.2(a) thus threads a delicate balance between two competing interests. On one hand, states have an interest in preventing lawyers

from engaging in baseless inflammatory attacks that would undermine "public confidence" in the judiciary. *Ky. Bar Ass'n v. Blum*, 404 S.W.3d 841, 855 (Ky. 2013). On the other, "attorneys need wide latitude in engaging robust and effective advocacy on behalf of their clients—particularly on issues … that *require* criticism of a judge or a judge's ruling." *In re Dixon*, 994 N.E.2d at 1138. So Rule 8.2(a) distinguishes between baseless criticism (for which an attorney can be disciplined) and good-faith criticism and statements of opinion (for which he cannot).

In application, Rule 8.2(a)'s standard divides criticism of judges into three categories. First, Rule 8.2(a) clearly prohibits "[f]alse statements made with knowledge of their falsity," *Ann. Mod. Rules of Prof. Cond.*, §8.2, and *ad hominem* attacks that constitute nothing more than "a personal attack on [the judge] as a human being," *Mont. Rules of Prof. Cond. – Ann.*, at 380 (discussing *In re Douglas*, MT PR 05-029 (2008)). The first prohibited type requires evidence that attorneys know their statements are false—a standard usually met when the attorney later confesses and acknowledges that the criticisms were inaccurate. *See, e.g.*, *Miller*, MT PR 18-0139; *In re Drew*, MT PR 04-417 (2004). The second prohibited type encompasses criticisms unrelated to any legitimate

function of litigation—such as a motion to recuse or an appeal of an incorrect order—and therefore constitute only personal attacks on a judge. Rule 8.2(a) has been employed to discipline attorneys for *ad hominem* attacks such as saying the judge was "not intelligent enough to understand the arguments made at trial," *Schiermeier v. State*, 521 P.3d 699, 711 (Idaho 2022), calling judges "essentially con men perpetrating a con," *Matter of Jordan*, 217 A.D.3d 21, 24 (N.Y. Sup. Ct. 2023), accusing a judge of engaging in a "racist misanalysis of federal law," *Conklin v. Warrington Twp.*, 2006 U.S. Dist. LEXIS 48643, at *8, fn.9 (M.D. Pa. June 30, 2006), cursing at a judge, *In re Larvadain*, 664 So. 2d 395, 395 (La., Dec. 8, 1995), and calling a judge a "lying incompetent ass-hole," *Ky. Bar Ass'n v. Waller*, 929 S.W.2d 181, 181 (Ky. 1996).

Second, Rule 8.2(a) clearly does *not* prohibit an attorney's "statements of opinion." *Standing Comm. on Discipline of U.S. Dist. Ct. v. Yagman*, 55 F.3d 1430, 1438 (9th Cir. 1995). This is because "statements impugning the integrity of a judge may not be punished unless they are capable of being proved true or false." *Id.*; *see also Ann. Mod. Rule of Prof. Cond.*, §8.2 ("Rule 8.2(a) does not apply to opinions that are not susceptible of being objectively verified."); *Law on*

Lawyering, §67.03 ("[B]oth Rule 8.2(a) and the parallel Restatement of the Law Governing Lawyers §114 are limited to matters of fact that can be proven false."). To the same end, an attorney's statements cannot be punished under Rule 8.2(a) if they are mere "rhetorical hyperbole," *Yagman*, 55 F.3d at 1438; *In re Oladiran*, 2010 U.S. Dist. LEXIS, at *8 (D. Ariz. Sep. 21, 2010), use terms in a "loose, figurative sense," *Yagman*, 55 F.3d at 1438; *cf. In re Green*, 11 P.3d 1078, 1084 (Colo. 2000), or are "mere hasty and unguarded expression[s] of passion," *In re Pyle*, 156 P.3d 1231, 1244 (Kan. 2007).

The third category contains speech lying between what Rule 8.2(a) clearly prohibits and what it does not—criticisms made "with reckless disregard as to its truth or falsity." MRPC 8.2(a). In attorney-discipline cases, most jurisdictions—including Montana—have adopted an objective standard for determining what constitutes reckless disregard. *See Miller*, MT PR 18-0139, at 4. The test is whether the attorney had an "objectively reasonable factual basis for statements impugning the judge's fairness, integrity, [or] veracity." *Ann. Mod. Rules of Prof. Conduct*, §8.2.

When analyzing whether an attorney had an "objectively reasonable factual basis" for purposes of Rule 8.2(a), "the burden [is] on the disciplinary committee to prove that [the statement] was false, not on [the attorney] to prove that it was true." *Law on Lawyering*, §67.03; *see also Yagman*, 55 F.3d at 1438. In the context of a motion for recusal, the mere fact that the motion is later denied does not mean that the attorney had no reasonable factual basis for filing it. *Law on Lawyering*, §67.03. And when an attorney challenges a judge's ruling or impartiality and submits "supporting facts" or has "at least some support in the record," the objective-reasonable-basis standard is satisfied. *In re Dixon*, 994 N.E.2d at 1139; *Att'y Griev. Comm'n v. Dyer*, 162 A.3d 970, 1023 (Md. 2017) (Rule 8.2(a) not violated when attorney made a "good faith" challenge to impartiality "based on the circumstances of the underlying litigation," even though that argument was rejected); *Brown*, 72 F.3d at 28-29 (reversing discipline under Rule 8.2(a) where the attorney sought to overturn trial order based on facts about the judge's gestures and expressions during trial). So when an "attorney indeed had reason to complain about … events which had occurred in the case and matters specifically known to the" attorney and "confined his comments along

these lines, there [can] be no finding of 'reckless disregard'" under Rule 8.2(a). *In re Dixon*, 994 N.E.2d at 1135.

b. Each time this Court has disciplined attorneys for violating Rule 8.2(a), it has applied that rule consistent with the preceding discussion.

Most of this Court's cases involving Rule 8.2(a) involve clearly prohibited criticisms—knowingly false statements or *ad hominem* personal attacks. Take *In re Miller*, where the attorney filed a motion to recuse asserting that the judge "altered [a witness's] deposition testimony" and "create[d] and assert[ed] a defense of bad faith" against the attorney's client. *In re Miller*, ODC File No. 16-0717, ¶ 19 (2019). But almost immediately, the attorney reversed course and admitted that these factual assertions were not accurate, thus conceding he made the factual statements while knowing they were false. *See id.* ¶ 21. Similarly, in *In re Drew*, MT PR 04-417 (2004), an attorney accused a judge of "[giving] false testimony under oath." *Mont. Rules of Prof. Cond. – Ann.*, at 380 (discussing *Drew*). Here too, the attorney later reversed positions, admitted that her accusation was false, and apologized. *Id.*

The remaining publicly reported violations of Rule 8.2(a) are primarily *ad hominem* attacks against an individual judge. This Court

established that standard in *In re Douglas*, MT PR 05-029 (2008), where the attorney violated Rule 8.2(a) by engaging in lengthy character attacks over alleged illegal actions and dishonesty, which "constituted nothing more than a personal attack … on [the judge] as a human being." *Mont. Rules of Prof. Cond. – Ann.*, at 380 (discussing *Douglas*). Similarly, in *In re Myers*, MT PR 16-0245 (2017), this Court disciplined an attorney who accused a judge of committing "illegal acts" while using "highly inflammatory language [that] far exceeded the exercise of mere hyperbole or excited overstatement." *In re Myers*, ODC File No. 15-133, ¶¶ 16-17 (2017). And in *In re Vanio*, MT PR 99-559 (2000), this Court punished an attorney who called a judge "an 'asshole' who 'sucks the government tit.'" *Mont. Rules of Prof. Cond. – Ann.*, at 380 (discussing *Vanio*).

The closest this Court appears to have come to addressing Rule 8.2(a)'s "reckless disregard" component occurred in *Miller*, when this Court sided with the majority of other jurisdictions and adopted the "objective" approach to reckless disregard. *Miller*, MT PR 18-0139, at 4. This Court also clarified there that other rulings—such as a denial of a motion for reclosure—do not prove rule violations since these other rulings "incorporate a lesser burden of proof." *Id.* at 5. But since the

attorney had already admitted that his factual allegations were false and did not challenge the Commission's factual findings, *see id.*, this Court concluded there was clear and convincing evidence of a Rule 8.2(a) violation.

c. Here, the Attorney General did not violate Rule 8.2(a) because he did not make any statements that were knowingly false or made with reckless disregard to falsity. Nor did he level *ad hominem* attacks against any individual.

An extensive factual record is necessary to evaluate each statement involved in ODC's six charges that the Attorney General violated Rule 8.2(a) by various statements in motions for recusal and later filings that discussed those motions for recusal. (Counts 4, 16, 22, 26, 30, 34). But the Commission's findings of fact and conclusions of law said nothing more than: "Respondent's conduct constitutes a violation of Rule 8.2(a) MRPC." Findings, at 25. As discussed in Part III, *supra*, the Commission did not explain how any single count, much less all six counts, violated Rule 8.2(a). Nor could it, because the Commission ignored Rule 8.2(a)'s language and refused to explain how any of the identified statements

were either "false" or made with "reckless disregard." *See generally*, Findings, at 10-30.

The statements identified in these six counts can be sorted into three categories: statements directly alleging improper bias (Count 16(c)-(d); Count 26(c), (e); Count 34(c)-(d)), statements that certain orders contain mistakes of fact or law, (Count 22(b)-(c); Count 26(a); Count 30(b), (c); Count 34(c)), and statements generally describing the ongoing proceedings (Count 4; Count 16(a)-(b); Count 22(a); Count 26(b), (d); Count 30(a); Count 34(a)-(b), (e)-(f)).

First—Consider the statements where the Attorney General argued that this Court should recuse due to personal interest or bias. (Count 16(c)-(d); Count 26(c), (e); Count 34(c)-(d)). The first statements occurred in the Attorney General's April 30, 2021, motion seeking to recuse all jurists whose personal emails were the subject of the underlying case. ODC Ex. 17, at 1-2. In that motion, the Attorney General stated his belief that there would be improper "self-interest" and "actual impropriety" if jurists whose emails were at issue remained on the case and decide whether the disclosure was proper. ODC Ex. 17, at 4-6. The Attorney General continued this line of argument on appeal during his petition for

rehearing on the motion for recusal, *see* ODC Ex. 20, at 6 ("Here, the Justices are institutionally and personally interested in the outcome, so their ability to be impartial is justifiably suspect."), and the eventual petition for a writ of certiorari, *see* ODC Ex. 30, at 39 n.7 (the "Justices stayed their own subpoenas"); *id.* at 40 (the "Justices determined to pilot this dispute to their desired outcome").

These are the only statements ODC identified that directly address underlying factual situations. And statements concerning bias, impartiality, and conflict of interest are disciplinable under Rule 8.2(a) only if they are related to assertions of fact that are "susceptible of being objectively verified," *Ann. Mod. Rule of Prof. Cond.*, §8.2, or "capable of being proved true or false," *Yagman*, 55 F.3d at 1438. Here, the statements identified by ODC and the Commission are statements of opinion based on two factual assertions: (1) members of the Court would be ruling on a case involving their own employee, and (2) members the Court would be ruling on the disclosure of their own emails. While this Court has since determined that neither fact created a conflict of interest, neither one was inaccurate. Indeed, in *McLaughlin I*, this Court actually agreed with the Legislature that the justices possessed a disqualifying

interest in the litigation. The issue, according to the Court, was that *every judge* in Montana possessed that same disqualifying interest, so it invoked the rule of necessity. *McLaughlin I*, ¶ 15 ("Here, the Legislature's investigation into alleged misconduct of the Judicial Branch and the polling practices of the MJA is an investigation of every judge of this State. Because of the expansive and overarching nature of the Legislature's investigation into the Judicial Branch of government, no Montana judge is free of a disqualifying interest and, thus, this Court is required to invoke the Rule of Necessity."); *see also* 1 Judicial Conduct and Ethics § 4.04 ("The rule of necessity operates as an exception to the requirement of impartiality, justified as a matter of pragmatic need."). In other words, even this Court agreed with the Attorney General there was a conflict of interest. It simply disagreed over the remedy.

Even though the Attorney General's argument for recusal did not succeed, his supporting statements were made in "good faith" and "based on the circumstances of the underlying litigation," *Dyer*, 162 A.3d at 1023, and satisfy the objectively reasonable standard since these statements had "at least some support in the record," *In re Dixon*, 994 N.E.2d at 1139. Motions to recuse are "require[d]" to ensure the "fair

administration of justice," even if they sometimes fail. *United States v. Cooper*, 872 F.2d 1, 3-4 (1st Cir. 1989). And the threshold test is whether the factual statements underlying the motion were made with knowing falsity or with reckless disregard. *Id.* The Attorney General's were not. ODC did not carry its burden of proving otherwise. The Commission's contrary conclusion is erroneous.

Second—other charges arise from the Attorney General's arguments that various court orders contained mistakes of fact or law. (Count 22(b)-(c); Count 26(a); Count 30(b), (c); Count 34(c)). Those counts challenge statements such as "[t]he Court … [m]isstated [m]aterial [f]acts," "the Opinion contains numerous misstatements," and "[i]n addition to being untrue, these statements…." Compl., at 25, 28, 31. Neither ODC nor the Commission has explained how these statements were knowingly false or made with reckless disregard as to their falsity. *See* MRPC 8.2(a). Indeed, neither ODC nor the Commission explains how these statements fall outside normal litigation before this Court.

Appealing a court's order inherently involves alleging that the original order made a mistake of either fact or law. Every case that this Court accepts as part of its appellate jurisdiction will have at least one

party who asserts that the lower court made a serious error. *See, e.g.*, Appellants' Br. 1, *Draggin' Y Cattle Co. v. Junkermier, Clark, Campanella, Stevens, P.C.*, 2019 MT 97, 395 Mont. 316, 439 P.3d 935 (asserting that the district judge's "reasonableness determination and resulting judgment are legally and factually incorrect and most be reversed," since the judge used "an incorrect standard" and "misconstrued" facts); Appellants' Br. 22, 24, *Mont. Interventional & Diagnostic Radiology Specialists, PLLC v. St. Peter's Hosp.*, 2015 MT 258, ¶ 14, 381 Mont. 25, 355 P.3d 777 (asserting that the district judge "committed legal error" and "incorrectly determined" certain facts about accrual); Appellants' Br. 28, *H & H Dev., LLC v. Ramlow*, 2012 MT 51, 364 Mont. 283, 272 P.3d 657 (asserting that the district judge "committed legal error" and "failed to employ 'conscientious judgment' … result[ing] in substantial injustice").[14] Asserting that the challenged order or opinion is incorrect is an indispensable component of appellate litigation, and the Attorney General simply made statements identical to those made by every other litigator who appeals to this Court."

[14] All these briefs were filed by the special prosecutor in this case, Timothy B. Strauch, Esq.

Carried to its logical conclusion, the Commission's view means *every appeal* will have at least one attorney who should be disciplined for violating Rule 8.2(a). Each time a court's order is appealed (or petitioned for rehearing), one side's attorney argues that the challenged order contains mistakes of fact or law, and the other side's attorney argues that it does not. One of those two arguments will eventually fail. Under the Commission's view, each losing attorney will now have made a false statement about the district judge's ruling, and thus must be disciplined under Rule 8.2(a). Such a conclusion finds no support in Rule 8.2(a)'s text or history and would chill vigorous appellate advocacy in Montana courts.

Third—All remaining statements identified in the Complaint are statements that generally describe the ongoing proceedings (Count 4; Count 16(a)-(b); Count 22(a); Count 26(b), (d); Count 30(a); Count 34(a)-(b), (e)-(f)). These statements—including comments such as "serious and troubling conduct of the members of the Judiciary," "impropriety of the Court," "the bias of Maslow's Hammer," and "judicial misbehavior"—are statements of opinion and rhetorical hyperbole that fall outside Rule 8.2(a)'s scope.

Neither ODC nor the Commission has explained how those statements were made with knowing falsity or in reckless disregard of their truth. They can't make that showing; none of those statements can be reduced to objectively verifiable facts capable of being proven true or false. *See Yagman*, 55 F.3d at 1438; *Ann. Mod. Rule of Prof. Cond.*, §8.2; *Law on Lawyering*, §67.03; *see also In re Green*, 11 P.3d at 1084 ("[I]f an attorney criticizes a judge's ruling by saying it was 'incoherent,'" which is "a statement of opinion," "he may not be sanctioned."); *cf. State v. 1993 Chevrolet Pickup*, 2005 MT 180, ¶ 39, 328 Mont. 10, 21, 116 P.3d 800, 807 (Leaphart, J., dissenting) ("I find the Court's analysis both internally incoherent and inconsistent"). Imprecise, general descriptions such as "troubling conduct," "impropriety," and "misbehavior," are not "specific statement[s] about specific wrongdoing" and thus are not "capable of being proved true or false." *Ann. Mod. Rules of Prof. Conduct*, §8.2 (cleaned up).

And even if the Attorney General's statements go beyond normal statements of opinion, that merely moves them into "rhetorical hyperbole" and "loose, figurative" language—neither of which can be disciplined under Rule 8.2(a). Courts recognize that this type of

impassioned language falls well within the normal scope of an attorney's representation since "in every case where a judge decides *for* one party, he decides *against* another … [t]he disappointment therefore is great" and "judge[s] therefore ought to be patient, and tolerant of everything which appears but the momentary outbreak of disappointment." *In re Pyle*, 156 P.3d at 1244 (cleaned up).

3. The Attorney General did not violate MRPC 8.4(d) because his conduct and comments did not disrupt or interrupt ongoing court proceedings.

The Commission concluded that the Attorney General violated Rule 8.4(d) without specifying the evidence supporting that conclusion or which specific counts ODC had proven. *See* Findings, at 25. The Court should reject the Commission's conclusions.

a. Montana Rule of Professional Conduct 8.4(d) provides that a lawyer shall not "engage in conduct that is prejudicial to the administration of justice." MRPC 8.4(d). Montana here copied this language verbatim from the American Bar Association's Model Rules. ABA Model Rules of Professional Conduct 8.4(d).

Yet from the moment the ABA adopted it, Rule 8.4(d) has faced implementational difficulties. For one thing, given Rule 8.4(d)'s sweeping

language, it "is substantially—if not entirely—redundant." *Law of Lawyering*, §69.08. For another, its "open-ended" nature could permit "harassing an unpopular lawyer through selective enforcement." *Id.* To that point, Rule 8.4(d)'s broadly sweep means that "conduct that is explicitly permitted under one rule might be found to be sanctionable under [the] more general [Rule 8.4(d)]," leaving attorneys in a hopeless quagmire where even compliance with the explicit provisions of a specific rule did not protect them from punishment under the general rule. *Id.* §65.02. Given those concerns, the Restatement (Third) of the Law Governing Lawyers warns that courts "should be circumspect in avoiding overbroad readings or resorting to standards other than those fairly encompassed within an applicable lawyer code" and that when the code includes a specific rule that also addresses the situation at hand, no conduct should "constitute[] a violation of a more general provision so long as the lawyer complied with the specific rule." Restatement (Third) of the Law Governing Lawyers §5, comment (c), *general provisions of lawyer codes* (2000).

As a result, most tribunals have chosen to "construe [Rule 8.4(d)] at least somewhat more narrowly than its language might suggest."[15] *Law of Lawyering*, §65.02. In fact, this Court has adopted a narrowing interpretation for Rule 8.4(d). In *In re Olson*, this Court held that "[i]n order to establish a violation of [Rule 8.4(d), the … ODC must demonstrate some *nexus* between [the attorney's] conduct and *an adverse effect* upon the administration of justice." ¶ 32 (emphasis added). This Court cited *People v. Jaramillo*, 35 P.3d 723 (Colo. O.P.D.J. 2001), in support of this "nexus/adverse effect" test. *Jaramillo* explained that an attorney who "directly delayed and altered the course of court proceedings" violated Rule 8.4(d) under the nexus/adverse effect test. *Id.* at 731. By contrast, an attorney who did not "refund the unearned portion of [an] advance payment of fee" might have violated other ethical provisions, but did not violate Rule 8.4(d), because there was no adverse effect on pending proceedings. *Id.*

[15] The Supreme Court held that a Nevada rule without a narrowing interpretation was void for vagueness under the U.S. Constitution. *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991). The Nevada rule prohibited attorney speech where the attorney "knows or reasonably should know that it will have a substantial likelihood of materially *prejudicing an adjudicative proceeding*." *Id.* at 1033 (emphasis added). The Court held that "[g]iven this grammatical structure, and absent any clarifying interpretation by the state court," "the Rule is void for vagueness." *Id.* at 1048.

Montana is far from alone in interpreting Rule 8.4(d) to include a nexus/adverse effect test. In Alaska, the analogous provision prohibits "conduct which impedes or subverts the process of resolving disputes." *In re Friedman*, 23 P.3d 620, 629 (Alaska 2001) (mishandling a client's money may have been an ethical violation, but "did not adversely affect litigation proceedings" and so "did not prejudice 'the administration of justice'"). In the District of Columbia, a Rule 8.4(d) violation requires more than simple "improper" conduct—the conduct must also "bear directly upon the judicial process" and "taint the judicial process in more than a *de minimis* way." *In re Hopkins*, 677 A.2d 55, 60-61 (D.C. 1996). In Iowa, Rule 8.4(d) requires an inquiry into whether the attorney's conduct "hampered the efficient and proper operation of the courts," such as whether it caused "delayed proceedings" or necessitated "additional court proceedings." *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Kingery*, 871 N.W.2d 109, 121 (Iowa 2015). The Pennsylvania Supreme Court recently clarified that Rule 8.4(d) does not apply to things that simply "inconvenienc[e] a court," and that Rule 8.4(d) prohibits more tangible effects such as "interfer[ing] with the administration of justice through misrepresentation … actually undermin[ing] proceedings through

deception, or … otherwise obstruct[ing] the court's functions." *Off. of Disciplinary Couns. v. Pisanchyn*, 2024 WL 4557857, at *9 (Pa. Oct. 24, 2024).

Further examples abound. The Indiana Supreme Court held that an attorney violated Rule 8.4(d) when he blocked a student victim "from cooperating with law enforcement" because that act directly interfered with ongoing proceedings. *In re Blickman*, 164 N.E.3d 708, 713 (Ind. 2020) (holding, in contrast and for the same attorney on a separate charge, it did not violate Rule 8.4(d) to simply "guess[] incorrectly about an unsettled legal matter" of professional ethics "upon which reasonable minds can differ"). The Arizona Supreme Court held that an attorney violated its analogous rule by initiating an "ex parte communication to a judge" in "the hope of" influencing the outcome of a pending proceeding. *In re Riley*, 691 P.2d 695, 701 (Ariz. 1984). The Oklahoma Supreme Court applied its analogous rule to discipline a prosecutor who willfully "elicit[ed] false testimony from" a witness "and us[ed] that false testimony," thus directly undermining pending proceedings. *State ex rel. Oklahoma Bar Ass'n v. Miller*, 309 P.3d 108, 116 (Okla. 2013).

b. Since *Olson*, this Court has publicly imposed discipline under Rule 8.4(d) only against attorneys who attempted to perpetrate fraud on a court or directly disrupted ongoing proceedings. A few examples from this Court's recent rulings illustrate how Rule 8.4(d) is now reserved for truly egregious attempts to deceive and manipulate court proceedings.

In *In re Cushman*, MT PR 17-0665 (2019), an attorney colluded with his client to falsify a contract at issue in ongoing litigation. *Id.* at 6-7. The attorney created a fake contract that lacked several key terms, backdated it before litigation began, and filed it with the court. *Id.* This Court found that the attorney violated Rule 8.4(d) by attempting to fraudulently disrupt or influence the outcome of ongoing proceedings. *Id.* at 16-18.

In *In re Morin*, MT PR 17-0448 (2019), a court ended an attorney's guardianship over an incapacitated person, J.A.L. *Id.* at 1. The attorney (Morin) then began representing J.A.L.'s husband to challenge the court's order. *Id.* During that challenge, Morin simply "proceeded to exclude [J.A.L.'s new court-appointed attorney] from service in her filings." *Id.* at 2. Morin next hired a surrogate attorney, who—at Morin's direction—entered into a pro bono representation agreement with J.A.L. while also agreeing to help Morin and J.A.L.'s husband win their challenge to

J.A.L.'s current guardianship arrangement. *Id.* 2-3. This Court found that Morin ignored the court's orders, used "subterfuge and manipulation" to covertly represent two adverse parties, and sought to deceptively influence the administration of justice. *Id.* at 6-7. This provided the clear "nexus between her conduct and an adverse effect on the administration of justice" for discipline under Rule 8.4(d). *Id.* at 7.

In *In re Myers*, MT PR 16-0245 (2017), an attorney was retained specifically to represent a client in an appeal of a domestic case. *In re Myers*, ODC File No. 15-133, ¶ 4 (2017). This Court ultimately dismissed the appeal after the attorney failed to file an opening brief. *Id.* at ¶ 5. The attorney then returned to the district court and filed an untimely motion for reconsideration. *Id.* at ¶ 6. The attorney also filed a subpoena to depose the presiding judge for information about the pending motion for reconsideration. *Id.* at ¶ 9. This Court ultimately 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" and later filings had been to "harass[] … the Court" and "caus[e] unnecessary delay and … expenditure of judicial resources." *Id.* ¶¶ 14, 17; *see Myers*, MT PR 16-

0245, at 1; *see also In re Kohn*, MT PR 14-0468 (2015) (similarly squandered client's rights by failing to file a petition).

In *In re Schuster*, MT PR 15-0264 (2016), an attorney sued an energy company for damage to a house the attorney claimed he owned. *Id.* at 1. During litigation, the attorney admitted that his original filings were false and that he did not own the home. *In re Schuster*, ODC File No. 14-149, ¶ 11 (2016). Later, it emerged that the attorney also lied about supposedly destroyed possessions. *Id.* ¶¶ 18-20. Later still, when the attorney appealed to this Court, he lied about whether hearings had been conducted in the case to avoid producing transcripts. *Id.* ¶ 26. This Court found that the attorney's deception and fraud directly impacted ongoing litigation and properly triggered discipline under Rule 8.4(d). *Schuster*, MT PR 15-0264, at 2.

And in *In re McLean*, MT PR 14-0737 (2015), an attorney "settled [multiple] clients' cases without their knowledge or consent" and also "failed to communicate the settlement offer[s] to the client[s]." *Mont. Rules of Prof. Cond. – Ann.*, at 435 (describing *McLean*). This Court held that settling cases without legitimate authorization by the client directly disrupted the administration of justice and violated Rule 8.4(d).

c. Here, ODC's complaint raises the very problems with Rule 8.4(d) discussed above—it uses the rule as a duplicative add-on through which it can charge the Attorney General with additional counts for the same conduct already discussed in the previous two sections. (Counts 2, 5, 8, 11, 13, 17, 20, 23, 27, 31, 35, 39, 40). But ODC introduced no evidence showing violations of Rule 8.4(d) as narrowed by *In re Olson*. As a result, in support of those thirteen separate charges, the Commission's findings of fact and conclusions of law said nothing more than: "Respondent's conduct constitutes a violation of Rule 8.4(d) MRPC." Findings, at 25. The Commission did not attempt to explain how the Attorney General's conduct in any single count, much less all thirteen counts, had a "nexus" to a tangible "adverse effect" on ongoing proceedings. Thus the Commission's conclusion fails as a matter of law and must be set aside.

In any event, the Commission could not identify any true "adverse effect" caused by the Attorney General's conduct because there was none. The conduct that ODC claims violates Rule 8.4(d) is the same conduct already discussed in the previous two sections: sending letters to this Court, unsuccessfully moving for recusal, using strong language while defending the Legislature's position, and unsuccessfully challenging this

Court's jurisdiction and authority (then immediately complying with this Court's order).

None of those actions "directly delayed and altered" court proceedings, *Jaramillo*, 35 P.3d at 731, or "taint[ed] the judicial process in more than a *de minimis* way," *In re Hopkins*, 677 A.2d at 61. None of them "interfer[ed] with the administration of justice through misrepresentation," "undermin[ed] proceedings through deception," or "otherwise obstruct[ed] the court's functions." *Pisanchyn*, 2024 WL 4557857, at *9. They do not involve, for example, an "ex parte communication to a judge" in "the hope of" influencing a proceeding, *In re Riley*, 691 P.2d at 701, blocking victims "from cooperating with law enforcement," *In re Blickman*, 164 N.E.3d at 713, or willfully "elicit[ing] false testimony from" a witness, *Miller*, 309 P.3d at 116. Nor did the Attorney General manipulate evidence in ongoing proceedings, *Cushman*, MT PR 17-0665 at 16-18, engage in "subterfuge and manipulation" to undermine a court's order, *Morin*, MT PR 17-0448, at 6-7, harass the Court to cause unnecessary delay and judicial waste, *Myers*, MT PR 16-0245, at 1, or deceptively manipulate settlements in pending cases, *McLean*, MT PR 14-0737, at 1.

In short, because the Commission's findings do not identify any true "adverse effect" that interrupted or delayed the normal procedure of the underlying litigation in this case, its conclusion that the Attorney General violated Rule 8.4(d) ignores this Court's precedent, lacks factual foundation, and must be set aside.

4. The Attorney General did not violate MRPC 5.1(c) or MRPC 8.4(a), since neither rule operates without independent underlying violations.

Lastly, the Commission concluded that the Attorney General committed twenty-five violations of Rule 5.1(c) (Counts 1, 2, 3, 4, 5, 7, 8, 10, 11, 12, 13, 15, 16, 17, 25, 26, 27, 29, 30, 31, 33, 34, 35, 38, 40), and nine violations of Rule 8.4(a) (Counts 6, 9, 14, 18, 24, 28, 32, 36, 41). Rule 5.1(c) provides that "[a] lawyer shall be responsible for another lawyer's violation of the Rules" if "the lawyer orders" or "ratifies the conduct involved," or "has direct supervisory authority over the other lawyer." MRPC 5.1(c). Rule 8.4(a), in turn, provides that a lawyer may not "violate or attempt to violate the Rules of Professional Conduct." MRPC 8.4(a).[16]

[16] Rule 8.4(a) also provides that an attorney cannot "knowingly assist or induce another to [violate the Rules], or do so through the acts of another," but ODC's complaint does not invoke this portion of the rule.

Rule 5.1(c) holds attorneys in supervisory positions accountable for the ethical behavior of their subordinates. Here, it appears that ODC charged Rule 5.1(c) violations to hold the Attorney General accountable for all conduct previously discussed even though most of that conduct involved documents written and signed by his subordinates. But Rule 5.1(c) does not apply without an underlying violation of a separate disciplinary provision. Since ODC's evidence did not establish violations of Rules 3.4(c), 8.2(a), or 8.4(d), *see supra*, Part IV(1)-(3), neither the Attorney General nor his subordinates committed any underlying disciplinary violations. The Attorney General therefore cannot be disciplined under Rule 5.1(c). The Commission's contrary conclusion is erroneous and must be set aside.

Similarly, Rule 8.4(a) provides "a separate and independent violation … for any violation of the Rules of Professional Conduct." Tr. 423; *but cf. Att'y Grievance Comm'n of Maryland v. Yates*, 225 A.3d 1, 8 (2020) (Rule 8.4(a) "is simply an echo of the other violation [and] has no independent effect on the sanction we impose"). But when there is no other violation of any other rule of professional conduct, there is no violation of Rule 8.4(a). Since none of the conduct alleged in the complaint

violates Rules 3.4(c), 8.2(a), or 8.4(d), the Attorney General has not violated Rule 8.4(a). The Commission's contrary conclusion is erroneous and must be set aside.

5. This Court declined to issue any discipline against the Attorney General during the *McLaughlin* saga

The Commission mistakenly believes it is the only entity capable of enforcing the rules of decorum against the Attorney General. *See* Findings, at 10 ("The duty to refrain from inappropriate conduct and language … is in the first instance the responsibility of each individual attorney, and failing that, the COP."). The Commission, moreover, believes this case stands as the only bulwark against ethical anarchy in the justice system. *See id.* ("[T]he failure to require adherence to these principles is nothing short of an invitation to anarchy."). That hyperbole is belied by the facts of the case.

All the conduct at issue occurred in plain sight in front of the Montana Supreme Court and the public. The Montana Supreme Court didn't issue any discipline any against the Attorney General or lawyers in his office during the events related to *McLaughlin* or *Brown*. *See Webster*, 2024 Tex. LEXIS 1175, at *2 ("Generally, scrutiny of statements

made directly to a court within litigation is by the court to whom those statements are made."). Nor did any judge, justice, or attorney in those cases notify ODC of any potential ethical violation—as each was ethically obligated to do, had they learned of facts warranting it.[17] Instead, this highly irregular disciplinary complaint is based on a grievance filed by a lawyer in California, with no connection to this matter, nearly two years before ODC filed the Complaint.

Courts have long possessed inherent power to discipline attorney behavior. *See Ex parte Terry*, 128 U.S. 289, 307 (1888). Many other states recognize the inherent power of trial and appellate courts to discipline attorneys for misconduct before them.[18] In *Webster*, the Texas Supreme

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[17] *See* Mont. Code J. Conduct 2.16(B) ("A judge having knowledge that a lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question regarding the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects shall inform the appropriate authority."); *Id.* at 2.16(D) ("A judge who receives information indicating a substantial likelihood that a lawyer has committed a violation of the Rules of Professional Conduct shall take appropriate action."); Mont. R. Prof. Conduct 8.3(a) ("A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.").

[18] *See, e.g.*, *Frank v. Henkenius (In re Stratbucker)*, No. A-20-430, 2021; Neb. App. LEXIS 57, at *21 (Ct. App. Feb. 23, 2021); *In re Botros*, 265 N.C. App. 422, 437, 828; S.E.2d 696, 707 (2019); *In re Bennett*, 960 S.W.2d 35, 40 (Tex. 1997); *State ex rel. N.M. State*; *Highway & Transp. Dep't v. Baca*, 1995-NMSC-033, ¶ 11, 120 N.M. 1, 4, 896 P.2d 1148, 1151; *Winters v. City of Okla. City*, 1987 OK 63, ¶ 8, 740 P.2d 724, 726; *In re Weissman*, 203 Conn. 380, 384, 524 A.2d 1141, 1143 (1987); *Bi-Rite Package v. Dist. Court of Ninth Judicial Dist.*, 735 P.2d 709, 716 (Wyo. 1987); *Shelley v. District Court of Appeal*, 350 So. 2d 471, 472 (Fla. 1977).

Court found compelling that the U.S. Supreme Court could have imposed discipline against the Texas Attorney General, but it didn't. 2024 Tex. LEXIS 1175, at *3 ("The U.S. Supreme Court neither imposed discipline on the first assistant nor referred him (or anyone else) to the commission (or any disciplinary body). Rather, the commission's lawsuit arose from outside the litigation in which the challenged statements were made.").

At any point during this saga, this Court could have instituted disciplinary proceedings against the Attorney General or held him in contempt. But it didn't. Attorneys involved in the case as opposing counsel could have moved for sanctions, moved to enforce the Court's Order, or filed disciplinary complaints against the Attorney General. *See Webster*, 2024 Tex. LEXIS 1175, at *46. But they didn't.

Judges, too, can police misbehavior. The fact that they did *not* here speaks volumes.

B. If this Court interprets the MRPC to apply to the Attorney General's conduct, the MRPC will violate the First Amendment to the U.S. Constitution.

1. If MRPC 3.4(c), 8.2(a), and 8.4(d) apply to the Attorney General's conduct, they are unconstitutionally vague.

At the Commission hearing, ODC urged abandoning the traditional interpretations of Rules 3.4(c), 8.2(a), and 8.4(d), and adopting expansive new interpretations that would prohibit the Attorney General's conduct. Were this Court to do so, Rules 3.4(c), 8.2(a), and 8.4(d) would be void for vagueness and violate the First Amendment to the U.S. Constitution.

"It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Laws must therefore have enough specificity that they (1) give "the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly," and (2) prevent "arbitrary and discriminatory enforcement" by "provid[ing] explicit standards for those who apply them." *Id.* These two tests operate disjunctively—a regulation that fails either inquiry is unconstitutional.

The vagueness doctrine "appl[ies] fully to attorney disciplinary proceedings." *Zauderer v. Office of Disciplinary Counsel of Supreme Ct. of Ohio*, 471 U.S. 626, 666 (1985) (Brennan, J., concurring in part, concurring in the judgment in part, and dissenting in part); *see also Gentile*, 501 U.S. at 1048; *United States v. Wunsch*, 84 F.3d 1110, 1119-20 (9th Cir. 1996). And "[w]hen speech is involved, rigorous adherence to th[e] requirements [of vagueness doctrine] is necessary to ensure that ambiguity does not chill protected speech." *FCC v. Fox TV Stations, Inc.*, 567 U.S. 239, 253-54 (2012).

a. If this Court reverses its existing interpretations of Rules 3.4(c), 8.2(a), and 8.4(d), each of those provisions will become unconstitutionally vague. Take Rule 3.4(c); whose plain text prohibits an attorney from "knowingly disobey[ing] 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). As discussed, the uncontroverted evidence before the Commission proved that the Attorney General (1) filed his "open refusal" directly to this Court, (2) provided a good faith "assertion" in support of his actions, and (3) argued why "no valid obligation exist[ed]" due to jurisdictional and constitutional defects. *See*

Part V.A.1. While this Court later disagreed with his arguments, the uncontested evidence shows that the Attorney General complied with Rule 3.4(c)'s exception and this Court's prior application of that rule.

Any new, expansive interpretation of Rule 3.4(c) that disciplines the Attorney General even though his conduct was "an open refusal based on an assertion that no valid obligation exists" will make Rule 3.4(c) unconstitutionally vague. Any reading of Rule 3.4(c) that encompasses the Attorney General's conduct renders the exception meaningless. A rule that claims to protect "open refusal based on an assertion that no valid obligation exists" but actually punishes that exact conduct is the opposite of a "clearly defined" "prohibition." *Grayned*, 408 U.S. at 108. In such a world, "people of common intelligence must necessarily guess at" Rule 3.4(c)'s exact "meaning and differ as to its application." *Citizens United v. FEC*, 558 U.S. 310, 324 (2010). An attorney who reads Rule 3.4(c)'s text will have no concept of "what is prohibited" by the rule, and if he reasonably attempts to rely on the plain text, he could be punished under the new interpretation. *Grayned*, 408 U.S. at 108; *cf. Webster*, 2024 Tex. LEXIS 1175, at *51 ("[A] minimally narrow rather than a maximally

broad reading of Rule 8.04(a)(3) is necessary to avoid undue constitutional friction.").

b. The same problems await if this Court adopts a new, expansive interpretation of Rule 8.2(a). That rule's plain text prohibits only speech that an attorney "knows to be false" or offers "with reckless disregard as to its truth or falsity." MRPC 8.2(a). As discussed, the uncontroverted evidence proves that the Attorney General's speech consists only of reasonable litigation statements of opinion, some of which are rhetorical hyperbole and some of which find objective factual support in the record. *See supra*, Part V.A.2. Nor do the Commission's findings and conclusions identify even one fact showing that the Attorney General's speech is false, known to be false, or made with reckless disregard as to its falsity.

Under existing Rule 8.2(a) precedent, this lack of evidence should prove fatal to ODC's allegations. *See supra*, Part V.A.2. Were this Court to reverse course and adopt a new, expansive interpretation of Rule 8.2(a) to punish the Attorney General for this conduct, it would render Rule 8.2(a) unconstitutionally vague. A rule whose text prohibits only speech that an attorney "knows to be false" or offers "with reckless disregard as to its truth or falsity" cannot be a clearly defined prohibition if that rule

now also punishes the use of analogies (Count 26(d)) or the necessary appellate drafting technique of stating "the court misstated material facts" (Count 26(a)). Attorneys of common intelligence cannot reasonably read Rule 8.2(a)'s text to bar such assertions, rendering any expanded version of Rule 8.2(a) void for vagueness. *Grayned*, 408 U.S. at 108; *Citizens United*, 558 U.S. at 324.

c. Constitutional vagueness problems also loom if this Court rejects its current narrowing interpretation of Rule 8.4(d). As discussed, the vagueness inherent in Rule 8.4(d)'s text already makes the rule susceptible to arbitrary and discriminatory enforcement—the very reason this Court and others already adopted narrowing constructions. Beyond that, the U.S. Supreme Court has already once held a nearly identical rule to be unconstitutionally vague. *See Gentile*, 501 U.S. at 1049. The Nevada rule in *Gentile* prohibited attorney speech where the attorney "knows or reasonably should know that it will have a substantial likelihood of materially *prejudicing an adjudicative proceeding*." *Id.* at 1033 (emphasis added). Even though Nevada provided a "safe harbor" to explain what the rule prohibited, the Court concluded that "[g]iven this grammatical structure, and absent any clarifying

interpretation by the state court," "the Rule is void for vagueness." *Id.* at 1082; *see also Wunsch*, 84 F.3d at 1119-20 (a rule requiring attorneys to "abstain from all offensive personality" was void for vagueness); *Webster*, 2024 Tex. LEXIS 1175, at *50 ("Accusations like a 'lack of straightforwardness' or 'integrity in principle' as bases for subjecting an executive-branch attorney's initial pleadings to collateral review under Rule 8.04(a)(3) are therefore doubly problematic. Such accusations are comparatively vague compared to other disciplinary rules.").

This Court currently reads Rule 8.4(d) to forbid only conduct with a nexus to an actual adverse effect that disrupts or interferes with some ongoing proceeding. If the Court abandons that approach, attorneys will lack clarifying guidance on how Rule 8.4(d) applies. Every attorney who reads the rule will be forced to guess at what conduct "is prejudicial to the administration of justice." Without the Court's current narrowing construction, Rule 8.4(d) cannot inform attorneys what conduct is prohibited or provide clear standards to avert arbitrary enforcement, making it void for vagueness. *Grayned*, 408 U.S. at 108.

2. If MRPC 8.2(a) prohibits criticism supported by a reasonable factual basis and statements of opinion, it is overbroad.

Expanding Rule 8.2(a)'s reach will also make that rule unconstitutionally overbroad. The overbreadth doctrine provides that "a law may be invalidated as overbroad if 'a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.'" *United States v. Stevens*, 559 U.S. 460, 473 (2010) (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 n.6 (2008)). The doctrine is justified "on the ground that it provides breathing room for free expression," since "[o]verbroad laws 'may deter or "chill" constitutionally protected speech,'" *United States v. Hansen*, 599 U.S. 762, 769-70 (2023) (quoting *Virginia v. Hicks*, 539 U.S. 113, 119 (2003)).

The First Amendment protects the type of attorney speech that Rule 8.2(a) regulates. "[A]ttorney speech about what is pending or occurring in a court is political speech," and "[a]ny speech about a judge or a judge's rulings ... is central to the First Amendment." Erwin Chemerinsky, *Silence Is Not Golden: Protecting Lawyer Speech Under the First Amendment*, 47 Emory L. J. 859, 863 (1998). Indeed, the "fair

administration of justice *requires* that lawyers challenge a judge's purported impartiality when facts arise which suggest the judge has exhibited bias or prejudice." *Cooper*, 872 F.2d at 4 (emphasis added); *see also In re Dixon*, 994 N.E.2d at 1138 ("[A]ttorneys need wide latitude in engaging robust and effective advocacy on behalf of their clients—particularly on issues … that *require* criticism of a judge or a judge's ruling.").

The test for whether a regulation is unconstitutionally overbroad begins by "first determin[ing] what [the regulation] covers." *Hansen*, 599 U.S. at 770. Here, Rule 8.2(a)'s plain text prohibits lawyers from making 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). By its plain terms, that rule does not prohibit attorney speech that is based on some actual evidence or circumstances from the litigation. Applied in this manner, Rule 8.2(a) is constitutional: its "legitimate sweep" prohibits things like "false" or "reckless" criticism that is not protected by the First Amendment but does not inhibit truthful speech protected by the First Amendment. *See Ann. Mod. Rules of Prof. Cond.*, §8.2 ("Rule 8.2(a) adopt[ed] the [*New York Times v.*

Sullivan] standard for professional responsibility purposes."); *Law of Lawyering*, §67.03 ("Model Rule 8.2(a) incorporates the First Amendment standard for false criticism of public officials."); *see also U.S. Dist. Ct. for E. Dist. of Wash. v. Sandlin*, 12 F.3d 861, 867 (9th Cir. 1993) (concluding that the text of Washington's Rule 8.2(a) was "consistent with ... constitutional limitations").

But if this Court rejects the traditional interpretation of Rule 8.2(a) by holding that it prohibits the Attorney General's statements at issue here—statements of opinion and statements supported by reasonable factual basis—Rule 8.2(a) becomes unconstitutionally overbroad. "[A]ll true statements reflecting adversely on the reputation or character of federal judges" are protected by the First Amendment. *Yagman*, 55 F.3d at 1437. Attorneys thus "may freely voice criticisms supported by a reasonable factual basis" against judges without fear of discipline even if the criticism ultimately "turn[s] out to be mistaken." *Id.* at 1438.

Reinterpreting Rule 8.2(a) to prohibit the Attorney General's good-faith criticisms supported by an objectively reasonable factual basis will render the rule "overbroad" because the rule will then prohibit and "punish a great deal of constitutionally protected speech." *Id.* at 1436-37.

The uncontroverted evidence shows that the Attorney General's criticisms consist of reasonable statements of opinion, some of which are rhetorical hyperbole and some of which are supported by the circumstances. *See supra*, Part V.A.2. If Rule 8.2(a) forbids the Attorney General's speech, it can be enforced against any attorney who attempts to raise a legitimate concern about judicial misconduct or bias. That would result in "a substantial number of [Rule 8.2(a)'s] applications" being "unconstitutional," making the rule unconstitutionally overbroad. *Stevens*, 559 U.S. at 473.

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

A. This Court regularly punishes far more egregious conduct much more leniently. And it does so by considering one mitigating factor above others: a history of good conduct before the violation supporting the disciplinary proceeding. *See* Rule 9(B)(5), MRLDE ("The existence of prior offenses."). Consider *In re Potts*, ¶ 30. There, this Court found by clear and convincing evidence that an attorney had committed multiple ethical violations including 1) perpetuating fraud on behalf of his clients, 2) improperly accepting money outside of a settlement agreement, and 3) "violat[ing] his duty of candor toward [a] tribunal[.]" *Id.* ¶ 30. The

Commission recommended that the Court suspend the attorney from the practice of law for only thirty days. *Id.* But this Court found that punishment too extreme, instead opting to subject the attorney to only a public admonition. *Id.* ¶ 80. In reaching that decision, the Court relied heavily on the attorney's history of compliance with the rules. *Id.*

So too in *In re Braukmann*, PR 17-0269 (2017). There, an attorney admitted to engaging in felony child endangerment while drunk driving with children in her vehicle. *Id.* ¶ 3. Even for this egregious violation, which involved a criminal offense and the endangerment of children, the Commission merely recommended a public admonition. *Id.* ¶ 12. In suggesting that penalty, and declining to impose a suspension, the Commission relied heavily on the attorney's lack of prior violations and the publicity that her actions received. *Id.*

On the flip side, this Court does impose ninety-day suspensions in the face of repeated violations that harm clients. *See, e.g.*, *In re Neuhardt*, 2014 MT 88, 374 Mont. 379, 321 P.3d 833. There, an attorney represented two criminal defendants with interests adverse to one another. *Id.* ¶¶ 24, 34. But in imposing a severe penalty, this Court relied on more than the attorney's violation of a fundamental duty to clients—that a lawyer

cannot simultaneously represent two clients with adverse interests. The Court also highlighted the attorney's frequent disciplinary violations in the years before and his total lack of remorse for his actions, which he called "trifling." *Id.*

But unlike these cases, the Attorney General is not alleged to have harmed clients, engaged in fraud, or broken the law but—at bottom—is alleged to have acted "discourteously" in representing the Legislature in a clash between coequal branches of government. In doing so, the Attorney General finds himself before the Commission for the first time in his career. His alleged offense caused no harm to any client, was done in good faith in service of a legal position and resulted in no sanctions during the underlying dispute.

No party was harmed by the Attorney General's conduct. *See, e.g.*, Tr. 278:8-16. This Court didn't sanction him for his filings, didn't hold him in contempt of its July 14, 2021, Order, and no party moved to enforce it. ODC presented no evidence that a single email containing personal information was ever disclosed to the public. In fact, ODC presented no evidence that *any* email was disclosed after entering custody of the Attorney General.

B. Should this Court find that the Attorney General violated the MRPC, it should still avoid suspension. As it has explained before, 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*, ¶ 80. The Court shouldn't go any further.

C. If this Court issues a suspension the Attorney General respectfully requests that the Court stay the suspension while the Attorney General seeks relief from the U.S. Supreme Court on Due Process and First Amendment grounds. This would eliminate the need for emergency briefing and ensure an orderly resolution to this saga—one way or the other.

CONCLUSION

The Legislature and the Attorney General will likely never agree with judicial branch on the merits of the *McLaughlin* dispute. And that's to be expected, since the legal fight centered on the balance of power between coequal branches of government. What matters is that the Legislature backed down at the end of the *McLaughlin* litigation. The judicial branch won. *McLaughlin* is the law of the land. Although the

branches continue to have conflicts, that tumultuous chapter in the State's history ended in March 2022.

At least it should have. ODC and the Commission refuse to move on. They now goad this Court into adopting an extreme punishment on the Attorney General that threatens to further erode the comity between the branches.

This Court has many avenues to correct the Commission's mistakes. Considering all the facts and circumstances, it should leave things as they were in 2021 and dismiss the Complaint against the Attorney General.

DATED this 6th day of January 2025.

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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 27,359 words, excluding certificate of service and certificate of compliance.

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

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

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CERTIFICATE OF SERVICE

I, Christian Brian Corrigan, hereby certify that I have served true and accurate copies of the foregoing Response/Objection - Other to the following on 01-06-2025:

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