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IN THE SUPREME COURT OF THE STATE OF MONTANA

PR 23-0496

IN THE MATTER OF AUSTIN MILES KNUDSEN,

An Attorney at Law,

Respondent.

ODC'S RESPONSE TO RESPONDENT'S OBJECTIONS TO COMMISSION ON PRACTICE'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION

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I. INTRODUCTION

In October 2024, the Commission on Practice ("Commission" or "COP") cited evidence establishing forty-one separate instances in which Montana's chief law enforcement officer, Attorney General Austin Miles Knudsen ("AG"), violated the following provisions of the Montana Rules of Professional Conduct ("MRPC"):

1. MRPC 3.4(c), for violating his sworn oath as an officer of the Court to maintain the respect due to courts of justice and judicial officers, and to strive to uphold the honor and to maintain the dignity of the profession;

2. MRPC 3.4(c), for disobeying this Court's July 14, 2021, Order to immediately return judicial branch emails;

3. MRPC 5.1(c), as to the AG's responsibility for the misconduct of his subordinate lawyers, which he ratified or ignored;

4. MRPC 8.2(a), for reckless statements concerning the qualifications or integrity of judicial officers made in court filings by the AG and his subordinate lawyers;

5. MRPC 8.4(d), for conduct prejudicial to the administration of justice including knowing disobedience of obligations under the AG's sworn duties pursuant to his oath for admission to the bar and this Court's July 14, 2021, Order, and disrespectful statements made in court filings by him and/or his subordinate lawyers; and

6. MRPC 8.4(a), for the AG's violations of MRPC 3.4(c), 5.1(c), 8.2(a) and 8.4(d).

The AG's Objection to the carefully drafted – and restrained – determination of the Commission asks this Court to join in his assault upon the fundamental agreements that make the practice of law and process of peaceful adjudication

possible – the understandings that have preserved civility, professionalism, and respect for the rule of law throughout our country's history.

The facts central to this disciplinary proceeding are astonishing. In public court filings, the AG and his subordinates repeatedly attacked the integrity of judicial officers, elected by the people of Montana, attributed inappropriate or self-serving motives to them, and challenged their competence and honesty. The AG repeatedly, knowingly, and intentionally disobeyed his sworn oath as a Montana lawyer and his obligations under an order of this Court. Further aggravating those unrefuted facts, to this day, the AG refuses to acknowledge the wrongful nature of his conduct, opting instead to accuse ODC of "overzealous and misguided prosecution" and the ODC and Commission of "goad[ing] this Court into adopting an extreme punishment on the Attorney General that threatens to further erode the comity between the branches."

The AG does not even bother to claim that the conduct with which he was charged did not occur. Clear, convincing, ***undisputed*** evidence establishes that the AG and his subordinates disregarded, disrespected, and undermined his oath, the Rules at issue, and this Court's order. Rather, the AG brazenly asserts that he alone -- among all Montana lawyers -- is above the law.

The AG is a constitutional officer, representing a governmental agency, but first and foremost, he is an attorney. He, like every other member of the bar, is subject

to this Court's disciplinary authority under the Constitution. The Commission's decision addresses the AG's conduct. The Complaint did not assert any allegation, and the Commission did not make any finding or conclusion, that "exacerbates conflicts" or relationships between the branches of government.

Throughout the disciplinary proceedings, and in his Objection, the AG argued that the Complaint filed against him is "unprecedented." This is true, but the AG chooses to ignore this simple reality: the Complaint is the straightforward consequence of ***his unprecedented misconduct***. No lawyer in any prior disciplinary case attacked the Montana Supreme Court like the AG did here. This case represents knowing and willful conduct undermining public confidence in Montana's judicial system by the highest legal officer in the State; a repeated pattern of misconduct, involving multiple offenses; the Respondent's refusal to acknowledge the wrongful nature of his conduct; and his blatant failure to remediate or take corrective action. For this unparalleled misconduct, the Commission recommended that this Court suspend the AG from the practice of law for a period of 90 days.

We live in challenging times in which societal norms are under near constant attack. For reasons known only to himself, the AG has chosen to adopt precisely that *modus operandi*, breaching recognized behavioral boundaries applicable to his profession. He has demeaned, disparaged, and defied Montana's highest court, its judges, and its system of justice.

The picture the AG has painted is not a pretty one, but it does provide this Court with the opportunity to drive a stake deep in the ground, marking the point beyond which such attacks will not be tolerated. If the rule of law is to be preserved, respectfully, this Court must do precisely that.

This Introduction is intended to explain *why* the COP's decision was necessary and *how* so much depends upon this Court's decision. All that follows, though lengthy (not as lengthy as the Objection), is essential. It sets the record straight, demonstrates that the recommended discipline is neither "draconian" nor "disproportionate," and establishes for all to see the manifest reasons the AG's Objection should be rejected and the Commission's recommendation adopted.

II. FACTUAL BACKGROUND

A. Mr. Knudsen's oath as an officer of the Court.

Mr. Knudsen was sworn in as an attorney at law in Montana on October 7, 2008. Like every other licensed Montana lawyer, he took an oath that includes the obligations to maintain the respect due to courts of justice and judicial officers, and to strive to uphold the honor and to maintain the dignity of the profession to improve not only the law, but the administration of justice. (Ex. 40; TR122:13-124:20, 149:22-150:6).[1] The AG admitted that he ***never*** openly refused those sworn

[1] "Dkt." Refers to the COP docket number. "Ex." refers to a COP hearing exhibit number and, where noted by a dash, the internal exhibit page number. "TR" refers to the COP hearing transcript (Dkt. 85-86).

obligations to the tribunal. (TR124:21-125:7). The AG also acknowledged that lawyers have "affirmative obligations" "to always pursue the truth, *see* [MRPC] Preamble § 1, and to safeguard 'the integrity of the of the [legal] system and those who operate it as a basic necessity of the rule of law.' [MRPC] Preamble § 14." (Ex. 19-2).

B. The AG's experience, authority, and responsibilities.

Respondent was elected as AG in 2020 and continues in that position today. He is familiar with the civil and criminal rules of procedure and the evidence rules. (TR127:4-15). He does not ever recall sending a letter to a court to disagree with an order and understands the appropriate method of challenging a court order is by means of a motion or appeal. (TR129:23-130:21).

As AG, Respondent is the State's chief legal officer responsible for representing and defending Montana's legal positions and Montana's laws. (TR134:13-18). With certain exceptions (not applicable here), the AG controls and manages all litigation on behalf of the State. (TR134:19-135:11). His legal views and opinions prevail when a conflict arises between state agencies and officers whom the AG represents. (TR135:12-18).

//

C. The AG appeared in *Brown* after the Legislature obtained judicial emails.

On March 17, 2021, a Petition for Original Jurisdiction was filed in *Brown, et. al. v. Gianforte*, Montana Supreme Court Case No. OP 21-0125 (*Brown*), challenging the constitutionality of SB140.

On April 1, 2021, the AG on behalf of Governor Gianforte, filed in *Brown* a motion to disqualify Judge Krueger, who was acting Chief Justice after Chief Justice McGrath recused himself and called in Judge Krueger. (Ex. 4; TR136:18-25). In a Declaration in support of the motion, Derek Oestreicher ("Oestreicher"), in his capacity as an attorney employed by the AG, attached copies of emails between Montana Supreme Court Administrator Beth McLaughlin and Supreme Court Justices and district court judges, purportedly "consistent with [his] ethical obligations" under MRPC 8.3.[2] (Ex. 5-3; TR137:1-19). The AG had previously received the emails from the Legislature. (TR141:1-11).

Also on April 1, the AG agreed to represent the Legislature in *Brown*, and the next day, entered an appearance and requested an extension to answer the petition. (Ex. O; TR142:3-143:10).

[2] Contrary to Oestreicher's assertion, if he or any other attorney with the AG's office believed there was an ethical obligation to report alleged misconduct by a judge, including one or more Justices of the Montana Supreme Court, MRPC 8.3 required the attorney to inform the Montana Judicial Standards Commission, which is the appropriate disciplinary authority over judicial misconduct. Jud. Stds. Comm. Rule 9.

D. The Legislature sent April 7 and 8 FOIA Requests to Beth McLaughlin for Montana Judges Association Polling Emails but Then Failed to Allow Her Until April 9 to Respond as Indicated.

Upon learning of certain polling emails sent by Court Administrator Beth McLaughlin on behalf of the Montana Judges' Association ("MJA") on the Court's email system (Exs. E, F, G, H, I, and J), on April 7, 2021, Abra Belke, Chief of Staff to the Republican leadership, Montana State Senate, emailed Ms. McLaughlin requesting the breakdown of the vote and identity of the voting judges on MJA's poll regrading SB140. The email stated, "[w]hile the President is comfortable waiting until Friday to receive the bulk of the requested information, we are specifically requesting the breakdown for this 34-3 count by close of business today." Ms. McLaughlin responded attaching two emails she had located on the subject and stating that she would "make every effort to search for and get the other requested information to the President and the Speaker on Friday [April 9]." (Ex. C; TR323:8-326:20).

The next day, April 8, Ms. Belke asked further questions about the MJA poll on SB140 and requested copies of the emails and the Court email retention policy. Ms. Belke requested the documents by close of business the next day. Ms. McLaughlin responded that she did not personally retain any additional documents and that "I have not completed the search for other information but will do so and

have it delivered tomorrow. I have attached the Branch's e-mail policy." (Ex. D; TR326:21-330:8).

However, as admitted by House Speaker Wylie Galt at the formal hearing, the Legislature did not wait for Ms. McLaughlin to complete the search and produce further information on April 9. Instead, it issued a subpoena on April 8 to Misty Giles, Director of Administration of the Department of Administration ("DOA"), demanding her to produce judicial branch emails by 3:00 p.m. on April 9. (TR381:1-383:16).

E. Misty Giles produced judicial branch emails on April 9 in response to an April 8 legislative subpoena directed to her.

On April 8, 2021, the Legislature issued a subpoena to Ms. Giles signed by Sen. Keith Regier, demanding production by 3:00 p.m. on April 9 of "*[a]ll* emails and attachments sent and received by Court Administrator Beth McLaughlin between January 4, 2021 and April 8, 2021 ..." and "*[a]ny and all* recoverable deleted emails sent or received by Court Administrator Beth McLaughlin between January 4, 2021 and April 8, 2021 ..." (emphasis added). The only exception to the subpoenaed documents were those "related to decisions made by the justices in disposition of final opinion." (Ex. 6; TR143:11-144:4; 275:24-276:5).

The judicial branch email system resides on the executive branch network. However, Ms. McLaughlin understood Ms. Giles had no authority to access judicial branch emails, notwithstanding the fact that those emails resided on the executive

branch network. (TR267:11-269:20). Judicial branch records requests are normally directed to the Court Administrator, who in turn directs them to respective clerks of court or the Court's IT Department. The documents are prepared, and Ms. McLaughlin then goes through those documents to redact or withhold confidential information and indicates the same on a privilege log before providing the materials. (TR269:21-272:8).

Ms. McLaughlin was not served with, nor was the April 8 subpoena directed to her, even though it was for judicial branch emails, and should have been. She learned of it for the first time around 5:00 p.m. on Friday, April 9, when she returned to her office and found a "courtesy copy" of the document on her desk. (TR266:5-267:9). The subpoena required Ms. Giles to produce the judicial branch emails on April 9, before McLaughlin even saw it. (TR274:17-276:13). Ms. McLaughlin's immediate concerns were that the subpoenaed emails would include, in part, information about employees' medical and personal information, information about child abuse and neglect cases involving minors, and a statutorily confidential Judicial Standards Commission matter. She was concerned about potential financial, and in some cases, criminal liability, to the State for disclosure of some kinds of information. (TR276:14-280:20, 336:16-337:6). Given those concerns and not knowing whether Ms. Giles had already produced the emails, Ms. McLaughlin hired

attorney Randy Cox to represent her interests as Court Administrator. (TR280:21-281:17).

F. After informal resolution efforts failed, Ms. McLaughlin petitioned the Court on an emergency *ex parte* basis to quash the April 8 subpoena, which the Court granted.

Over the weekend of April 10-11, Mr. Cox attempted to contact Ms. Giles and lawyers for the Legislature and DOA to attempt to resolve Ms. McLaughlin's concerns and reach an agreement for the review and production of the emails. Those efforts failed. (Exs. 7 and P (attachments A, B, and D); TR25:4-35:1). In an email around noon on Sunday, April 11, Ms. Giles informed Mr. Cox for the first time that she had produced emails on Friday, April 9, and planned to produce the balance of the emails on Monday, April 12. (Ex. 7-1; TR33:15-35:1). In that email, Ms. Giles admitted that the DOA "was not well suited" to ascertain which emails fell within the concerns raised by McLaughlin. (*Id.*) Later, on April 14, the AG disclosed that on April 9, Ms. Giles had produced over **5,000** judicial branch emails in response to the Legislature's subpoena, that the AG had conducted a review of them, that some had been "publicly disclosed by members of the press," and that the AG had retained emails. (Ex. 14-2 to 3; TR50:18-51:10).

Mr. Cox then contacted Supreme Court Clerk Bowen Greenwood and Justices Rice and Sandefur to notify the Court of his filing of an emergency *ex parte* petition seeking to quash the subpoena. (Exs. JJ, KK; TR35:2-38:1, 83:17-90:25, 99:4-16).

On Ms. McLaughlin's behalf, Mr. Cox filed the petition in *Brown* on April 10 and a supplement on April 11. (Ex. 1-3; TR40:2-21).

On Sunday, April 11, the Court issued a Temporary Order quashing the Legislature's April 8 subpoena until a hearing could be held to consider the merits and parameters of the Legislature's subpoena powers and pending further order of the Court. (Ex. 10).

Following that Order, Ms. McLaughlin received an additional Legislative subpoena directing her to appear and produce documents, including those already sought in the quashed subpoena; it also asked for judicial branch phones and computers. (TR286:24-288:8).

On or about April 12, 2021, someone on behalf of the Legislature provided the AG with two USB drives containing over 5,000 emails produced by Ms. Giles. The AG processed, copied, and reviewed the files contained on the two USB drives and thereafter retained custody, possession, and control over both USB drives and the files processed and copied from them. (Ex. 8; TR293:1-294:7).

G. Disrespectful statements made in the AG's April 12 letter to the Court.

On April 12, 2021, DOJ "Lieutenant General" Kristin Hansen ("Hansen") (now deceased), wrote a letter on the AG's letterhead to Supreme Court Acting Chief Justice Jim Rice stating, among other things, the following:

> The Legislature does not recognize this Court's [April 11] Order as binding and will not abide it. The Legislature will not entertain the Court's interference in the Legislature's investigation of the serious and troubling conduct of members of the Judiciary. The subpoena is valid and will be enforced.

(Ex. 11-2; TR44:19-46:14; 146:17-147:16).

At the Commission hearing, the AG admitted he knew of no rule of procedure -- civil, criminal, or appellate -- that allows counsel of record to send a letter to a court to challenge an order. (TR148:13-19). The AG denied that the April 12 letter was disrespectful, intemperate, contemptuous, insulting or undignified of the profession, and particularly undignified of the chief legal officer of this State, or indignant toward the Court. (TR150:7-151:8). The AG fully supported the letter both in his initial response to ODC (Ex. 39-3; TR154:22-155:10) and at the Commission hearing (TR154:9-11). He never apologized to this Court and never implemented a policy to curb the use of this kind of rhetoric in court filings. (TR155:15-24).

Notwithstanding this Court's April 11 Order, the AG advised the Legislature as to the issuance of subsequent additional legislative subpoenas for judicial branch emails and various electronic devices that might house emails. (TR157:3-10).

H. Disrespectful statements made in the AG's April 14 Motion to Dismiss in *McLaughlin.*

Also on April 12, 2021, Ms. McLaughlin filed a Petition for Original Jurisdiction and Emergency Request to Quash/Enjoin Enforcement of Legislative Subpoena in *McLaughlin v. the Montana State Legislature and the Montana*

Department of Administration, Montana Supreme Court Case No. OP 21-0173 (*McLaughlin*). (Ex. 12). As noted, by the time that petition was filed, DOA had already produced judicial branch emails to DOJ in response to the Legislature's April 8 subpoena, and some of the emails had made it to public media. (TR156:8-17).

On April 14, 2021, the AG, on behalf of the Legislature, filed in *McLaughlin* a Motion to Dismiss McLaughlin's Petition, stating, among other things, the following:

1. The April 11 Order "will not bind the Legislature and will not be followed."

2. "McLaughlin's current Petition seeks yet another Court order which will not bind the Legislature and will not be followed."

(Ex. 13-8 to 9; TR49:1-50:17, 157:11-158:6).

At the Commission hearing, the AG denied those statements were disrespectful, intemperate, contemptuous, insulting or undignified of the profession, particularly of the chief legal officer of the State, or indignant toward the Court. (TR158:7-20). The AG fully supported the language used in that motion. (TR160:16-18).

I. Disrespectful statements made in the AG's April 18 letter to the Court.

On April 16, 2021, the Court issued an order in *Brown* and *McLaughlin* staying enforcement of various Legislative subpoenas. (Ex. 15)

On April 18, 2021, Ms. Hansen wrote a letter on the AG's letterhead to all the Montana Supreme Court Justices regarding their obligations to appear and testify in response to subpoenas issued to them. Regarding the Court's April 16 Order, the letter states the following:

> The Court here lays claim to sole authority over provision of due process for all branches of government, ***which is ludicrous***. The statement implies that the Legislature is not capable of providing a forum in which due process may be had by subjects of Legislative inquiry. ***This statement is wholly outside the bounds of rational thought***, given that all branches and levels of government are bound to provide due process to citizens in every action taken, and which the Executive and Legislative branches do every day. (Emphasis added.)

(Ex. 16-1; TR53:19-55:3; 160:24-161-10).

At the Commission hearing, the AG admitted he knew of no other instance where the counsel of record had made such remarks in a letter filed in court. (TR162:4-15). Yet, he denied the letter was disrespectful, intemperate, or insulting. (TR161:14-20). The AG fully supported the letter. (TR161:11-13).

J. Disrespectful statements made in the AG's April 30 Motion to Disqualify in *McLaughlin.*

On April 30, 2021, the AG, on behalf of the Legislature, filed in *Mclaughlin* a Motion to Disqualify all Justices. Among other things, it includes the following statements:

1. "This matter has arisen because evidence of judicial misconduct has come to public light."

2. "The self-interest is so apparent, any attempt by this Court to decide the question runs afoul of state law and the MCJC."

(Ex. 17-5; TR55:4-56:20, 162:16-163:10).

At the formal hearing, the AG admitted that the rules require a complaint of judicial misconduct to be filed with the Judicial Standards Commission (TR165:4-167:1) -- not in a brief filed in court.[3] He denied the statements in the brief were disrespectful, intemperate, contemptuous, insulting, undignified of the profession, particularly of the chief legal officer of the State, or indignant toward the Court. (TR167:2-16). He denied that the statements willfully and knowingly undermined the presumed integrity and qualifications of the Justices of this Court. (TR168:11-15).

K. Disrespectful statements made in the AG's May 19 letter to the Court.

On May 12, 2021, the Court issued an Opinion and Order in *McLaughlin* denying the Legislature's Motion to Disqualify Justices, *McLaughlin v. Legislature*, 2021 MT 120, 404 Mont. 166, 489 P.3d 482. (Ex. 18; TR56:18-22, 169:15-18).

On May 19, 2021, the AG himself wrote a letter on AG letterhead to the Supreme Court Justices in response to the May 12, 2021, Order. (Ex. 19). In the letter, the AG admitted he knew of the "strong" statements of subordinates in his

[3] The Judicial Standards Commission is a constitutional body. *See* Mont. Const. Art. VII, § 11.

office in the aforesaid letters and briefs. At the hearing, he admitted he did nothing to remediate, soften, or correct those statements. (Ex. 19-1; TR170:2-14).

The AG's letter also contains the following statements, among others:

1. "Much can be said about the impropriety of the Court, the State's highest disciplinary authority, bandying such warnings under circumstances like this."

2. [Quoting Page 10 of the May 12, 2021, Order]: "That statement is inaccurate almost to a word. It assumes facts and ascribes malintent so brazenly, it betrays a self-admission that the Court's posture in this matter is adversarial-not adjudicatory. But for purposes of this letter, to the extent you are again attributing allegedly unethical behavior to my attorneys, that is incorrect and inappropriate." (Ex. 19-2, n.1).

3. "There is also some irony in accusing these fine attorneys of disrupting the administration of justice when their client's argument is that it is constitutionally, legally, and ethically improper for this Court to attempt to administer justice in this matter."

4. "All this to say, while this dispute is extraordinary and troubling, please refrain from threatening or maligning the integrity of my attorneys who are assiduously living up to their ethical obligations under unusual circumstances. If you wish to vent any further frustrations about the conduct of attorneys in my office, I invite you to contact me directly."

(Ex. 19-2; TR56:23-60:6; 170:15-171:25).

At the Commission hearing, the AG denied his letter was disrespectful, intemperate, contemptuous, insulting, undignified of the profession, or indignant toward the Court. (TR172:12-23).

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L. Disrespectful statements made in the AG's May 26 Rehearing Petition in *McLaughlin*.

On May 26, 2021, the AG, on behalf of the Legislature, filed in *McLaughlin* a Petition for Rehearing of the Court's May 12 Order. (Ex. 20). Among other things, it contains the following statements:

1. "The Court Overlooked and ***Misstated Material Facts***." (Ex. 20-4, emphasis added).

2. "Here, the Justices are institutionally and personally interested in the outcome, so their ability to be impartial is justifiably suspect. Specifically, the Court asserts that no Justice 'participate[d]' in the polls conducted by the MJA. Respectfully, ***public records tell a different tale***." (Ex. 20-6, emphasis added).

3. "[I]t is ***perverse*** to suggest that this Court will determine whether its own polling practices are misconduct." (Ex. 20-8, n. 4, emphasis added).

4. "It's not all that surprising, but ***the Court appears to suffer from the bias of Maslow's Hammer***. See Abraham Maslow, THE PSYCHOLOGY OF SCIENCE 15 (1966) ('if all you have is a hammer, everything looks like a nail')." (Ex. 20-10, emphasis added).

5. "Which begs the question: who will judge the judges? According to this Court-the judges. The judges will judge the judges. That of course ***defies common and constitutional sense***." (Ex. 20-13, emphasis added).

(TR60:7-62:7, 173:11-175:18).

At the formal hearing, the AG denied that those statements were disrespectful, intemperate, contemptuous, insulting, undignified of the profession, or indignant toward the Court. (TR177:10-178:1).

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M. The AG's disobedience of the Court's July 14, 2021, Order for immediate return of all judicial branch emails.

On June 10, 2021, the Court issued its Opinion and Order in *Brown*, 2021 MT 149, 404 Mont. 269, 488 P.3d 548, affirming the Legislature's position that SB140 was constitutional. (Ex. 21). On June 22, 2021, the Legislature withdrew its subpoenas to McLaughlin and the Justices. (Ex. 22).

On July 14, 2021, the Court issued its Opinion and Order in *McLaughlin*, 2021 MT 178, 405 Mont. 1, 493 P.3d 980. (Ex. 24). The Order states:

> d. The Montana Legislature is ORDERED to ***immediately*** return any materials produced pursuant to the subject subpoenas, or any copies or reproductions thereof, to Court Administrator Beth McLaughlin (emphasis added).

McLaughlin, 2021 MT 178, ¶ 57. (Ex. 24-36).

As of the date of that Order, the AG still had both the USB drives produced by Ms. Giles and the files processed and copied from those drives. However, the AG admitted those materials were not immediately returned as ordered. (TR179:4-7). Though Mr. Cox sent a letter requesting the emails to be returned as ordered (Ex. 25), the AG did not respond. (TR67:3-7). Nor did the AG notify this Court that the AG refused to comply with the Order. (TR65:15-67:24). The AG did not return any files to McLaughlin until at least March 22, 2022, followed by additional materials on April 15, 2022. (Exs. 8, 33, 34, 35; TR290:3-297:25).

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N. Disrespectful statements made in the AG's August 11 Rehearing Petition in *McLaughlin*.

On August 11, 2021, the AG, on behalf of the Legislature, filed in *McLaughlin* a Petition for Rehearing of the Court's July 14, 2021, Opinion and Order. Among other things, it contains the following statements:

1. "Simply ignoring why we're here doesn't change why we're here—***questionable judicial conduct***." (Ex. 26-9, emphasis added).

2. "The Opinion, on the other hand, is an ***unwarranted confiscatory decree***."[4] (Ex. 26-11, emphasis added).

3. "The Court's dismissive treatment of the Legislature's investigation into the records-retention practices of judicial officers ***blinks reality***." (Ex. 26-13, emphasis added).

4. [Referencing *McLaughlin*, ¶ 45] "That is a ***stunning, counterfactual denial***." (Ex. 26-16, emphasis added).

5. "[The Court's] ***advisory statements must be withdrawn***." (Ex. 26-18, emphasis added).

6. "Apart from that, the Opinion contains numerous ***misstatements***, ..." (Ex. 26-19, emphasis added).

(Ex. 26; TR67:25-70:6, TR182:15-23).

At the Commission hearing, the AG denied that the statements in the petition were disrespectful, intemperate, contemptuous, insulting, undignified of the profession, or indignant toward the Court. (TR182:24-183:14).

[4] At the formal hearing, the AG admitted he did not believe this was a true statement. (TR 182:8-14).

On September 7, 2021, the Court denied the Legislature's Petition for Rehearing in *McLaughlin*. (Ex. 27). Though Mr. Cox again requested the return of the emails as ordered (Ex. 28), the AG still did not return emails and did not seek an order relieving the AG of his duty to comply with the July 14 Order. (TR70:14-72:25, TR183:20-23).

O. Disrespectful statements made in the AG's December 6 certiorari petition to the U.S. Supreme Court.

On December 6, 2021, the AG, on behalf of the Legislature, filed a Petition for Writ of Certiorari of *McLaughlin* (2021 MT 178), in the U.S. Supreme Court, which was placed on the docket December 9, 2021, as No. 21-859. Among other things, the petition contains the following statements:

1. Speaking of this Court, "***[j]udicial self-dealing on this scale might be unprecedented in the Nation's history***." (Ex. 30-18, emphasis added).

2. "It [the Montana Supreme Court] reached out to facilitate a case brought by its appointee ***to conceal its misbehavior***." (Ex. 30-34, emphasis added).

3. [Referencing *McLaughlin*, 2021 MT 178, ¶¶ 9 and 11], "***In addition to being untrue, these statements-a panegyric to insincerity***—came after the nonparty Justices stayed their own subpoenas." (Ex. 30-38, n.7, emphasis added).

4. "They [the six *McLaughlin* Justices] charged ahead, ***ensuring a result that bailed themselves out of an investigation prompted by their own inappropriate behavior***." (Ex. 30-43, emphasis added).

5. "It permitted them [the Montana Supreme Court] to resolve the legal question of legislative subpoena power, and by emasculating that power, ***to conceal judicial branch misbehavior*** from the light of day." (Ex. 30-45, emphasis added).

(TR73:1-76:21, 183:24-186:8).

At the formal hearing, the AG denied that the statements in the petition were disrespectful, intemperate, contemptuous, insulting, undignified of the profession, or that they willfully and knowingly undermined the presumed integrity and qualifications of the justices of this Court. (TR186:9-187:2).

The U.S. Supreme Court denied the Petition for Writ of Certiorari on March 21, 2022. (Ex. 31).

III. PROCEDURAL BACKGROUND

On September 5, 2023, ODC filed its Complaint charging the AG with 41 counts of violations under MRPC 3.4.(c), 5.1(c), 8.2(a), 8.4(a) and 8.4(d). (Dkt. 1). The foundation for Counts 1-36 are the published declarations in pleadings and correspondence of the AG or his subordinates filed with this Court, and the exhibits admitted into the record of these proceedings, summarized above. In addition, Counts 37-41 of the Complaint arise from alleged violations of the Court's July 14 Order (Ex. 24).

The AG accepted service of the Complaint, retained additional counsel, and was granted an extension to file an Answer. Commission Chair Ward "Mick" Taleff

recused himself and appointed as successor Chair Randy Ogle on September 12, 2023.[5] (Dkt. 4.) The AG filed his Answer on November 27, 2023. (Dkt. 8.)

Commission Chair Ogle, the Commission Secretary, ODC's Investigator and Special Counsel, and counsel for Respondent Mark Parker and Deputy AG Christian Corrigan were present during the scheduling conference held December 12, 2023. At that time, the parties agreed the matter would be set for the Commission's July 2024 setting. (Dkt. 10).

The AG undertook written discovery in February 2024 and conducted depositions of Ms. McLaughlin and Mr. Cox in April 2024.

In May 2024, the AG sought to move the hearing set in July to October. Though ODC objected to moving certain pre-hearing deadlines, it agreed to continue the hearing as an accommodation to Mr. Corrigan, who was anticipating the birth of his first child in August. The parties then agreed to a stipulated order on June 3 and the hearing was reset for October 9-11, 2024. (Dkt. 18).

On July 3, the AG filed a summary judgment motion. (Dkt. 19, 20, and 20A). The motion asserted that the Commission lacked jurisdiction to hear the matter, that as the AG, he was not a "mine-run attorney," and that the disciplinary proceedings

[5] Based on his appointment as a "presiding officer," Chair Ogle was granted "all the powers of the Chairperson in any case in which she or he has been appointed." MRLDE 2B. MRLDE 2G(8) provides that the Commission may exercise authority and perform other duties as required to carry out the provisions of the MRLDE.

hindered his ability to fulfill his constitutional duties and infringed upon the executive branch of government and violated the Separation of Powers doctrine. The AG also argued that, out of mischievous and/or political motives, ODC filed the case to further politicize the matter and suggested ODC and the Commission were merely "doing the Court's bidding." ODC responded on July 29. (Dkt. 25).

On September 10, the Commission denied the AG's motion. Among other things, the Commission noted that "[d]isciplinary proceedings are unquestionably within the Constitutional power of the Montana Supreme Court," and noted that "contrary to Respondent's (repeated) pronouncements" that the matter was political, "they [were] clearly not." (Dkt. 37).

On July 8, 2024, ODC filed a Request for Judicial Notice (Dkt. 21), to which the AG only partially objected (Dkt. 24). On July 10, the AG moved for leave to file an amended answer, ODC did not object, and the Commission granted leave on July 15. (Dkt. 23). The AG's First Amended Answer was docketed on July 17. (Dkt. 36).

On September 5, ODC filed a partially opposed motion requesting permission to call witness McLaughlin out of order, and in the event the hearing proceeded more expeditiously than anticipated, to allow her appearance and testimony by remote means. On September 11, the Commission granted ODC's motion. (Dkt. 35). The AG filed a Rule 60(a) motion, requesting relief from the September 11 Order and included the substance of its opposition to ODC's motion. (Dkt. 38 and 39). ODC

responded on September 24 (Dkt. 45), and the AG replied on September 25 (Dkt. 48). After considering the AG's arguments regarding Ms. McLaughlin's remote testimony, the Commission denied the AG's Rule 60 motion on October 1. (Dkt. 63).

On September 17, 2024, this Court appointed former Commission member attorney Carey Matovich to the Adjudicatory Panel. (Dkt. 41).

After requesting the names of the Adjudicatory Panel members from the Commission Secretary on September 12, the AG moved to disqualify Commission member and attorney Patricia Klanke on September 19. (Dkt. 42, 43, and 44). ODC responded on September 24 and agreed the matter should be addressed. (Dkt. 46). The AG filed his reply on September 30. (Dkt. 61). Prior to any ruling on the AG's motion, Ms. Klanke recused herself. This Court issued a Notice of Temporary Appointment to the Commission for former Commission member attorney Mike Lamb on September 25. (Dkt. 47).

The parties filed their respective proposed exhibits, witness lists and expert disclosures (ODC filed September 25 (Dkt. 49 and 50); the AG filed September 26 (Dkt. 51-53)). In those filings, the AG disclosed Thomas Lee as a testifying expert. Two days later, on September 27, ODC filed a motion in limine seeking to prohibit Mr. Lee's testimony at the October 9 and 10 hearing. (Dkt. 54).

On September 30, the Commission granted ODC's motion in limine. The Order specifically referenced the need to rule on the motion prior to the hearing and

given the short window before the same, the Commission entered the Order prior to the AG's response. (Dkt. 59). Also on September 30, the Commission entered an Order granting in part and denying in part ODC's Request for Judicial Notice. (Dkt. 60).

ODC then filed objections to Respondent's exhibits on October 1 and amended those objections on October 2 (Dkt. 69). That same day the AG filed a Second Motion to Disqualify Commission lay member Lois Menzies (Dkt. 65 and 66), his own motion in limine (that the Commission should prohibit admission of any excerpts or specific statements from the majority Opinion in *McLaughlin* or the concurring Opinion of Justice Jim Rice in *Brown*) (Dkt. 67), and his objections to ODC's exhibits. (Dkt. 68).

The following day the AG filed a Rule 60(a) motion asserting the Commission erred by excluding the report of Mr. Lee without first allowing the AG to file a response. His motion included the substance of his response to ODC's motion in limine. (Dkt. 70 and 71). The AG also filed a motion to vacate the formal hearing, which he argued was necessary because of alleged due process violations. (Dkt. 72 and 73).

The Commission entered four Orders on October 4: 1) Order on Respondent's Second Motion to Disqualify (denied; finding the AG's motion was moot as Ms. Menzies recused herself, despite believing there was no reason she could not be

impartial) (Dkt. 74); 2) Order on the AG's motion in limine (denied; finding that the AG did not object to the judicial notice of ODC's Exhibits 18 and 25, which he now sought to exclude, and that the documents were to establish what was said rather than to establish the truth therein) (Dkt. 75); 3) Order on the AG's second Rule 60(a) motion (denied; after considering the substance of the AG's argument in opposition to the ODC's motion to exclude Mr. Lee, the Commission saw no reason to vacate the September 30 Order excluding Mr. Lee's report) (Dkt. 76); and 4) Order on Respondent's Motion to Vacate the Hearing (denied; confirming that Commissioners Klanke and Menzies had been recused and that neither of them, nor any other remaining panel members had participated in the deliberation of any pre-trial matters) (Dkt. 77).

On October 7, 2024, the AG then filed a Petition for Writ of Supervisory Control (Dkt. 78; Cause No. OP 24-0595). This Court denied that Petition on October 8 (Dkt. 79).

On October 9 and 10, the Commission held a formal hearing. ODC and the AG made arguments, presented evidence, and cross-examined witnesses. Ms. McLaughlin testified by videoconference after the AG withdrew his objection to her remote testimony. (TR229:1-24).

After hearing and reviewing all the evidence, the Commission entered its Findings of Fact, Conclusions of Law, and Recommendation on October 23, 2024.

(Dkt. 82, "FOFCOL"). The Commission first noted the limited scope of the issues before it; "namely, whether the conduct detailed in the Complaint complies with the plain meaning and spirit of the MRPC." (*Id.* at 3). It concluded that there was "little, if any, dispute as to the factual record germane to the conduct at issue; it is detailed in the Pleadings and Exhibits before the COP." (*Id.* at 3-4). It held:

> Further, the Respondent acknowledges his supervisory responsibility for his assistants and subordinates and for the language he generated, adopted, directed, endorsed or ratified in the representation of his client, the Montana Legislature. See e.g. October 9, 2024 transcript @ pp. 154-155. Finally, at the time of the hearing, he confirmed his position that all such statements were acceptable to, and generated by himself, or by those under his supervision and/or control. See e.g. Id. Generally, the positions of the parties differ only with respect to whether the conduct at issue violates the MRPC and, if so, what penalty should attach given the context in which it arose.

(*Id.* at 4).

The Commission found that although the Legislature was free to retain private counsel, it "elected to request that the state's Attorney General, the highest legal officer of Montana, advance its position, and he agreed to do so." (*Id.*) It determined that the "'emergency' focused on by the Respondent's counsel as vindication for his conduct, is one contributed to or largely created by his client," by virtue of the means chosen by the Legislature to obtain the Court's emails, "without adequate time for a complete response, processes for removal and protection of privileged communications (due to statutory directive, privacy or other applicable privileges),

generation of privilege logs as necessary, etc.," with which attorneys are familiar. (*Id.* at 5-6). It held:

> Yet, it is argued by Respondent's counsel that the follow up disputes between the Montana Supreme Court and the Legislature, represented by the Respondent/Attorney General, through the date of the Order of the United States Supreme Court denying the Legislature's Petition for Writ of Certiorari approximately eight months later, constituted an 'emergency' justifying the conduct and published language of Respondent at issue here.

(*Id.* at 6-7).

In addition to ruling on "the unique nature of the self-described 'emergency' constitutional crisis," the Commission addressed the AG's other primary argument in his defense, that holding the AG "accountable for his conduct as a professional for the alleged violation of his ethical obligations could further inflame the issues between the entities engaged in the underlying matter." The Commission held:

> Unfortunately, we do not have that luxury. Indeed, if conduct violative of the Rules was endorsed or accepted by the COP in any circumstance, that abdication of our responsibility to the public for oversight of attorney conduct, in the name of deference or otherwise, would erode the very foundations of our justice system.
>
> ***
>
> It must be acknowledged that real or imagined disputes grounded in Constitutional separation of power issues are not unique. The dynamic tension between the three branches of government has fueled uncountable litigated cases, often with not only state, but national, and even international implications. And it surprises no one that in such matters -- in fact, in almost every legal dispute -- people become emotional, angry, and at least half of the parties (sometimes all) feel the result is unjust or unfair, would like a "do-over'; or would like a different judge or jury. That is the nature of the justice system and the

> Rule of Law that provides the foundation for our representative democracy, where the ever-evolving majority's power is limited by Constitutional guarantees, where 'might' does not make 'right,' and everyone is guaranteed a level playing field and due process.
>
> And in each of those tribunals the parties are represented by officers of the court selected by the parties themselves, sworn to uphold the applicable constitutional edicts and laws of the land, and to conduct themselves civilly, honestly and respectfully, and in Montana within the bounds of the MRPC, precisely as was done in the instant proceedings before the COP.
>
> From these requirements there are no exceptions. Neither the power of a client, the emotions of a client, the perceived opportunity presented to the client or the attorney involved, nor the sincerity of those involved, excuses a breach of the applicable Rules of Professional Conduct by its chosen counsel. Engaging in conduct violative of the Rules, attacks on integrity, attributing inappropriate or self-serving motives or challenging the competence or honesty of judicial officers elected by the people of Montana, is not only actionable here, but counterproductive of the client's purposes and the processes required by the Rules. On this fundamental principle there can be no legitimate dispute, and Respondent recognizes that no ethical rule excuses an attorney's conduct because of a client's position. See e.g. October 9, 2024 transcript @ page 176. Simply stated, as an attorney faced with ethical challenges, you cannot hide behind 'my client made me do it.' And importantly, in this case, the published language at issue is NOT that of the Legislature (via affidavit or declaration of fact), it is the admitted language generated and/or adopted, and publicly advanced, by the Respondent.

(*Id.* at 7-9).

Based on the AG's "unequivocal and undisputed" testimony, the Commission rejected his argument that the "more incendiary, disrespectful and inappropriate words and phrases detailed in the exhibits before the COP" have been used by

various judicial officers themselves, citing specific examples supporting each of the 41 Counts enumerated in the Complaint. (*Id.* at 10-13).

The Commission made 32 enumerated findings of fact supporting its conclusions. (*Id.* at 13-25). Based upon those findings, it concluded that the AG violated MRPC 3.4.(c), 5.1(c), 8.2(a), 8.4(a) and 8.4(d) as charged in each Count of the Complaint. (*Id.* at 25-29). The Commission held:

> It is not susceptible of serious dispute that the conduct at issue reflects numerous obvious and inexcusable violations of the MRPC and is arguably deserving of the most serious consequences. No attorney licensed to practice law and armed with its privileges and responsibilities, particularly the chief legal officer of our state, charged with the duty to defend any elected official and the laws of our state, can attack other elected officials of our state with impunity, in apparent total disregard for the Rule of Law and MRPC. Further, to deny that the language implemented, endorsed or ratified by Respondent is not violative of his oath, his sworn obligations as an attorney, is disingenuous in the extreme. And compellingly, disregard for the Order to 'immediately' return documents, issued by the highest Court in our state, staffed by Justices elected by the people of Montana, done without response, and without seeking a Stay or other appropriate relief, is beyond the pale. Any exception to compliance with the Court's Order would require, at a minimum, exhaustion of all appropriate avenues for seeking relief from that Order -- none of which was done in this case.

(*Id.* at 26).

As for the AG's argument that the Commission needed to consider the context of his conduct and that holding him accountable "may have further consequences," the Commission held:

> The fervor and demands of a client in any context do not proscribe the conduct of their counsel, and it isn't the conduct, desires or intentions

> of the 'client' which are at issue here; it is the language, conduct and intentions of the Respondent. Attorneys are not weapons to be wielded at the discretion of any client; attorneys are certainly charged with advancing the legitimate goals of their clients, but only within the constraints of the Law and the MRPC.
>
> The context of the conduct is largely irrelevant; this is not about the political or other intent of the Respondent's client, nor the separation of powers dispute underlying the current Complaint. The scope and due process considerations involved in the Legislature's subpoena power were susceptible of determination without any of this arising. No client's cause is advanced by violation of the applicable Rule of Law and the refusal of its counsel to abide by the professional obligations the Respondent swore to uphold. Casting about for mitigating circumstances the COP was gratified by Respondent's testimony that "if I'm being really honest, in hindsight I think a lot of things could be done—could have been done different here, and probably should have been done different here. If I had this to do over, I probably would not have allowed language like this, so sharp, to be used;" See e.g. October 9, 2024 transcript @ p. 154. Juxtaposed against that candid admission, however, is the repeated refusal to admit that any of the conduct or published language, which admittedly should not have been used to advance his client's position, is violative of Rules to which he is unqualifiedly required to adhere.

(*Id.* at 27-28).

"It is the conclusion of the COP that the conduct in issue here is repeatedly, consistently and undeniably violative of the MRPC provisions referenced in the Complaint and herein, and prejudicial to the administration of justice. (*Id.* at 29).

Based upon the foregoing, the Commission recommended the AG be suspended for a period of 90 days and bear the costs of the proceedings. (*Id.* at 29-31).

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IV. STANDARD OF REVIEW

The AG's Objections are founded on the premise that this Court is acting in the normal appeal setting and that Mont. R. Civ. P. 52(a) controls. However, that is not the case.

This Court is not acting as an appellate court here in an appeal of a civil or criminal lower court decision, but pursuant to its "original and exclusive jurisdiction and responsibility under Article VII, Section 2(3), of the 1972 Montana Constitution and the provisions of Chapter 61, Title 37, Montana Code Annotated, in addition to its inherent jurisdiction, in all matters involving admission of persons to practice law in the State of Montana, and the conduct and disciplining of such persons." MRLDE, Preamble. *In re Engel*, 2008 MT 215, ¶ 6, 344 Mont. 219, 194 P.3d 613, *cert. denied*, 555 U.S. 1031, 129 S.Ct. 619, 172 L.Ed.2d 456 (2008) (quoting *Goetz v. Harrison*, 153 Mont. 403, 404, 457 P.2d 911, 912 (1969)).

Further, the Commission is an arm of this Court that sits "in an advisory capacity to the Court," *Goldstein v. Comm'n on Prac. of Supreme Ct.*, 2000 MT 8, ¶ 48, 297 Mont. 493, 995 P.2d 923 – not a "lower court" under Mont. R. Civ. P. 52(a). *See also Matter of Keller*, 213 Mont. 196, 197, 693 P.2d 1211, 1212 (1984) ("The Commission on Practice, an arm of this Court charged with investigating and hearing ethical complaints"); *Matter of McCann*, 2018 MT 140, ¶ 9, 391 Mont. 443, 421 P.3d 265 ("[The COP is] an arm of this Court empowered to conduct a judicial

investigation under the Court's authority"); *Best*, 2020 MT 59, ¶ 31 ("The COP is an arm of this Court. Its function is to "*hear and decide complaints* and in appropriate cases ... make recommendations to the Court for discipline.' RLDE 1" (Emphasis original)). *See also* MRLDE 12D(3).

This Court reviews de novo the Commission's FOFCOL. *In re Neuhardt*, 2014 MT 88, ¶ 16, 374 Mont. 379, 321 P.3d 833 (citation omitted). The Court reviews matters of trial administration for abuse of discretion. *Blanton v. Dep't of Pub. HHS*, 2011 MT 110, ¶ 22, 360 Mont. 396, 255 P.3d 1229. Despite its duty to weigh the evidence, the Court "remain[s] reluctant to reverse the decision of the Commission when its findings rest on testimonial evidence. We recognize that the Commission stands in a better position to evaluate conflicting statements after observing the character of the witnesses and their statements." *In re Neuhardt*, ¶ 16 (quoting *In re Potts*, 2007 MT 81, ¶ 32, 336 Mont. 517, 158 P.3d 418).

V. ARGUMENT

A. Under MRPC 5.1(c), the AG is Responsible for the Misconduct of His Subordinates.

The Commission concluded that the AG committed twenty-six violations of MRPC 5.1(c) for the misconduct of his subordinates (Counts 1, 2, 3, 4, 5, 7, 8, 10, 11, 12, 13, 15, 16, 17, 23, 25, 26, 27, 29, 30, 31, 33, 34, 35, 38, and 40).

MRPC 5.1(c) provides:

> c. A lawyer within a firm shall be responsible for another lawyer in the firm's violation of the Rules of Professional Conduct if:
>
> 1. the lawyer orders or, with knowledge of the specific conduct, ratifies ***or ignores*** the conduct involved; or
>
> 2. the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, ***and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action***. (Emphasis added).

In his Objection, the AG does not dispute that Rule 5.1(c) applies to him, nor does he dispute that he bears responsibility under the Rule. He simply contends no Rules were violated, so there is no supervisory responsibility. (Dkt. 96, Objection, p. 118). There is clear and convincing evidence that the AG is responsible under Rule 5.1(c) for the conduct of his subordinates detailed in Sections II F-J and L-O above[6] and summarized as follows:

- Counts 1-5: Aware of the language at issue used by his subordinates in the April 12 letter to the Court (Ex. 11-2), the AG never recanted it and ratified it both in his initial response to ODC (Ex. 39-3; TR154:22-155:10) and at the Commission hearing (TR150:7-151:8, 154:9-11). He never apologized to the Court for it and never implemented a policy to curb the use of that kind of rhetoric in court filings. (TR155:15-24).

- Counts 7-8: Aware of the language at issue used by his subordinates in the April 14 motion to dismiss (Ex. 13-8 to 9), the AG never recanted it and at the formal hearing, the AG ratified the language. (TR158:7-20, 160:16-18).

[6] The underlying violations of Rules 3.4(c), 8.2(a), and 8.4(d) are discussed in Sections V. B-D, below.

- Counts 10-13: Aware of the language at issue used by his subordinates in the April 18 letter (Ex. 16-1), the AG never recanted it and at the formal hearing, the AG ratified the language. (TR161:11-162:15).

- Counts 15-17: Aware of the language at issue used by his subordinates in the April 30 motion to disqualify (Ex. 17-5), the AG never recanted it and at the formal hearing, the AG ratified the language. (TR167:2-16, TR168:11-15).

- Counts 25-27: Aware of the language at issue used by his subordinates in the May 26 rehearing petition (Ex. 20-4, 6, 8, n.4, 10, 13), the AG never recanted it and at the formal hearing, the AG ratified the language. (TR177:10-178:1).

- Counts 29-31: Aware of the language at issue used by his subordinates in the August 11 rehearing petition (Ex. 26-9, 11, 13, 16, 18, 19), the AG never recanted it and at the formal hearing, the AG ratified the language. (TR182:24-183:14).

- Counts 33-35: Aware of the language at issue used by his subordinates in the December 6 petition to the U.S. Supreme Court (Ex. 30-18, 34, 38, n.7, 43, 45), the AG never recanted it and at the formal hearing, the AG ratified the language. (TR186:9-187:2).

- Counts 38 and 40: The AG admitted that he and his subordinates did not immediately return to McLaughlin the emails as ordered on July 14, 2021. (TR179:4-7).

Contrary to the AG's argument, it is irrelevant whether anyone was sanctioned in *Brown* or *McLaughlin* or otherwise disciplined for the conduct at issue. Whereas here, when an attorney fails to satisfy the supervisory requirements of Rule 5.1 by actions or omissions, that supervising attorney violates the Rule and can be sanctioned separate from any sanction issued for the underlying actions or omissions of the supervised attorney. *In re Anonymous Member of South Carolina Bar*, 346 S.C. 177, 552 S.E.2d 10, 12 (2001); *In re Phillips*, 226 Ariz. 112, 244 P.3d 549, 553

(2010) (citing *In re Galbasini*, 163 Ariz. 120, 124, 786 P.2d 971, 975 (1990)); American Bar Association, *A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982-2013*, at 586 (2013).

The AG's failure to take any remedial action against his subordinates' clear violations is second only to his endorsement of their improper conduct. A true managerial lawyer sets an ethical-rule-following example to his subordinates; he does not cheerlead their deplorable conduct.

B. The AG's MRPC 3.4(c) Violations.

Of the AG's 25 supervisory violations, ten of them were for his subordinates' violations of MRPC 3.4(c), including Counts 1, 3, 7, 10, 12, 15, 25, 29, 33, and 38. The Commission concluded that the AG also individually (not based on his Rule 5.1(c) supervisory responsibility) committed three additional violations of MRPC 3.4(c) (Counts 19, 21, and 37).

MRPC 3.4(c) states that "a lawyer 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."

There are two types of violations of the rules of a tribunal here: 1) violations of the AG's oath as an officer of the Court (Ex. 40) for the disrespectful statements

contained in court filings (Counts 1, 3, 7, 10, 12, 15, 19, 21, 25, 29, and 33),[7] and 2) violations of the AG's obligations to follow this Court's July 14, 2021, Order in *McLaughlin* to immediately return judicial branch emails (Ex. 24-36) (Counts 37 and 38).

The AG claims that "ODC never identified what rule of a tribunal was violated." (Objection, p. 17). However, paragraph 2 of the Complaint clearly alleged the AG's obligations under his oath as an officer of the Court. Counts 1, 3, 7, 10, 12, 15, 19, 21, 25, 29, and 33 each clearly alleged a violation of those obligations as an officer of the court. Paragraphs 28-30 clearly alleged the AG's obligations to follow this Court's July 14, 2021, Order to immediately return judicial branch emails. Counts 37 and 38 clearly alleged the AG's violations of those obligations.

The AG argues that "only secret, subversive disobedience that sought to defy a court, deceive a court, or otherwise disrespect a court" can be punished as a Rule 3.4(c) violation. (Objection, p. 74). Nowhere in Rule 3.4(c) is there any language limiting its scope to "secret, subversive disobedience." By its plain language, Rule 3.4(c) means an attorney must either obey the rules of a tribunal or put his refusal to obey before the court through proper legal channels.

[7] Counts 1, 10, and 19 allege violations of MRPC 3.4(c) for sending the three subject letters to reargue an issue, resist the ruling, or insult the judge. Counts 3, 12, and 21 allege the language used in those letters violates Rule 3.4(c). Counts 7, 15, 25, 29, and 33 are for the disrespectful statements within briefs.

The AG contends that his conduct and that of his subordinates falls within the exception to Rule 3.4(c) "for an open refusal based on an assertion that no valid obligation exists." (Objection, p. 65). The issue this Court must decide is whether there was a valid "open refusal" as to either the AG's sworn oath or the July 14, 2021, Order in *McLaughlin*. The answer to both is "no."

Rule 3.4(c)'s "open refusal" exception requires a lawyer to seek relief in court by "motion, appeal, or other legal means." *In re Ford*, 128 P.3d 178, 181-82 (Alaska 2006). *See also Chapman v. Pac. Tel. & Tel. Co.*, 613 F.2d 193, 197 (9th Cir. 1979) ("An attorney who believes a court order is erroneous is not relieved of the duty to obey it. The proper course of action, unless and until the order is invalidated by an appellate court, is to comply and cite the order as reversible error should an adverse judgment result."); *In re Disciplinary Action Against Igbanugo*, 863 N.W.2d 751, 763 (Minn. 2015) (determining that an attorney violated Rule 3.4(c) because the attorney's failure to abide by a court order did not include an open refusal before the court and declining to give weight to the attorney's belief that the obligation imposed by the court was beyond the court's authority); *Gilbert v. Utah State Bar*, 379 P.3d 1247, 1256 (Utah 2016) ("Although Gilbert may have harbored reservations about the order's validity, he, in the district court's words, "had a duty to openly contest the order by filing a request to stay the order in court, notify the court of his receipt

of the ... checks and at least hold the monies in trust until the court ruled on the issue.").

As explained below, the record clearly demonstrates there was no "open refusal" as defined above as to either the AG's oath or the Court's July 14, 2021, Order. Thus, the AG can find no refuge in Rule 3.4(c)'s exception for his thirteen Rule 3.4(c) violations.

1. Violations of the lawyer's oath.

The lawyer's oath as an officer of the Court includes the obligation of "maintaining the respect due to the courts of justice and judicial officers" and the obligation of "striving to uphold the honor and to maintain the dignity of the profession." (Ex. 40; TR122:13-124:20, 149:22-150:6).

At the hearing, the AG admitted he ***never*** openly refused those sworn obligations to the tribunal. (TR124:21-125:7). Thus, the exception to MRPC 3.4(c) does not apply as to his violations of those obligations.

Perhaps in recognition that he has no safe harbor because he never openly refused to obey his obligations as an officer of the Court, the AG suggests that his sworn oath does not constitute a "rule of the tribunal" within the meaning of Rule 3.4(c). That position is unsupportable, nor does the AG offer any support for it.

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A lawyer's obligations as an officer of the Court are among the foundational professional responsibilities of a lawyer. MRPC Preamble ¶¶ (2), (9), (10), (13) and (14). Courts across the country often cite a lawyer's obligations as an officer of the court as a basis for disciplining disrespectful and intemperate attacks on the judiciary such as those employed by the AG and his subordinates. *See, e.g., Matter of Jordan*, 316 Kan. 501, 518 P.3d 1203, 1225 (2022) (quoting *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1074 (1991) ("Appellant as a citizen could not be denied any of the common rights of citizens. But he stood before the inquiry and before the Appellate Division in another quite different capacity, also. As a lawyer he was an "officer of the court, and, like the court itself, an instrument ... of justice ...."); *Stilley v. Supreme Court Committee on Professional Conduct*, 370 Ark. 294, 259 S.W.3d 395, 404 (2007) (Stilley's oath as an officer of the court was an additional basis for punishing disrespectful comments made in a brief directed at the trial court); *Cleveland Metro. Bar Assn. v. Donchatz*, 150 Ohio St. 3d 168, 80 N.E.3d 444, 448-449 (2017) ("Given that attorneys are officers of the court with an integral role in the judicial system, the court has concluded, narrow restrictions on attorney speech are justified when that speech is highly likely to obstruct or prejudice the administration of justice."); *In re Snyder*, 472 U.S. 634, 644-45 (1985) ("[t]he license granted by the court requires members of the bar to conduct themselves in a matter compatible with the role of courts in the administration of justice"); *In re Sawyer*, 360 U.S. 622, 646 (1959)

(Stewart, J., concurring) ("[o]bedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech").

That same body of case law undermines the AG's argument that his comments were nothing more than "strongly worded" filings that are not disciplinable, but necessary "robust criticism" of the Court protected by the First Amendment. "Membership in the bar is a privilege burdened with conditions." *Gentile v. State Bar of Nev.*, 501 U.S. at 1066. Lawyers are officers of the court and do not stand in the same shoes as ordinary citizens. *U.S. Dist. Court for E.D. of Wash v. Sandlin*, 12 F.3d 861, 865-66 (9th Cir. 1993) ("[O]nce a lawyer is admitted to the bar, although he does not surrender his freedom of expression, he must temper his criticisms in accordance with professional standards of conduct.").

Thus, while legitimate criticism of judicial officers is tolerable, "an attorney must follow the Rules of Professional Conduct when so doing." *Shortes v. Hill*, 860 So. 2d 1, 3 (Fla. Dist. Ct. App. 2003) (quoting *The Florida Bar v. Ray*, 797 So.2d 556, 558–60 (Fla. 2001)). "Although attorneys play an important role in exposing valid problems within the judicial system, statements impugning the integrity of a judge, when made with reckless disregard as to their truth or falsity, erode public confidence in the judicial system without assisting to publicize problems that legitimately deserve attention." *Id.* *See also State ex rel. Oklahoma Bar Ass'n v. Porter*, 766 P.2d 958, 969 (Okla. 1988) ("Members of the Bar possess, and are

perceived by the public as possessing, special knowledge of the workings of the judicial branch of government. Critical remarks from the Bar thus have more impact on the judgment of the citizen than similar remarks by a layman would be calculated to have.").

A lawyer is not free to "seek refuge within his own First Amendment right of free speech to fill a courtroom with a litany of speculative accusations and insults." *U.S. v. Cooper*, 872 F.2d 1, 3 (1st Cir. 1989). "The First Amendment does not preclude sanctioning a lawyer for intemperate speech during a courtroom proceeding." *In the Matter of Garaas,* 652 N.W.2d 918, 925 (N.D. 2002) (Emphasis added). Commenting on *Gentile* in a disciplinary proceeding, the Supreme Court of Missouri concluded:

> An attorney's free speech rights do not authorize unnecessary resistance to an adverse ruling.... Once a judge rules, a zealous advocate complies, then challenges the ruling on appeal; the advocate has no free-speech right to reargue the issue, resist the ruling, or insult the judge.

In re Coe, 903 S.W.2d 916, 917 (Mo. 1995).

The AG is correct that three Counts (1, 10, and 19) allege violations of MRPC 3.4(c) for the act of sending the three subject letters to reargue an issue, resist the ruling, or insult the judge. He argues there is no rule of a tribunal prohibiting sending such letters, but as he admitted at the hearing, there is no rule ***allowing*** them, either. (TR148:13-19). And to state the obvious, there ***are*** procedural rules that ***do address*** those types of requests.

The cases described above discussing Rule 3.4(c)'s exception for an "open refusal" all require lawyers to use appropriate legal means to challenge a ruling such as a motion to stay, a Rule 60 motion, or an appeal. Such mechanisms "allow 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. By comparison, a letter to the court provides no such opportunity. Not one of the cases the AG cites permits an attorney to simply send a letter refusing to obey an order to invoke the "open refusal" exception.

2. Disobedience of this Court's July 14, 2021, Order.

On July 14, 2021, this Court ordered the "immediate" return of any materials produced pursuant to the subject subpoenas, or any copies or reproductions thereof, to Court Administrator McLaughlin. *McLaughlin v. Mont. State Legislature*, 2021 MT 178, ¶ 57 (Ex. 24-36). The AG admitted he and his office did not immediately return those materials to McLaughlin as ordered. (TR179:4-7). Instead, the AG did not return any files to McLaughlin until at least March 22, 2022, followed by additional materials on April 15, 2022. (Exs. 33-35; TR291:5-297:25).

Counts 37 and 38 (supervisory responsibility) of the Complaint charged the AG with violating Rule 3.4(c) by disobeying that Order. The Commission determined that the AG committed those violations by clear and convincing evidence. (FOFCOL at 26).

The AG does not dispute that this Court's Order constitutes a rule of a tribunal within the meaning of MRPC 3.4(c). His only defense is Rule 3.4(c)'s "open refusal" exception. He contends that because he filed a petition for rehearing in *McLaughlin* and then a petition to the U.S. Supreme Court for a writ of certiorari that he was excused from the mandate to "immediately" return the emails. (Objection, pp. 87-88). But he ignores the fact that he did ***not*** notify this Court in those pleadings that he refused to return the emails until those petitions were decided and he ***never*** filed a motion to stay the Order. Instead, he simply ignored the Order without pursuing the required procedural mechanisms to relieve him of his obligations to obey it.

As noted in the "open refusal" case law discussed above, a lawyer is not entitled to unilaterally decide whether to comply with an order like the AG did here. *See, e.g., Chapman v. Pac. Tel. & Tel. Co.*, *supra* ("An attorney who believes a court order is erroneous is not relieved of the duty to obey it. The proper course of action, unless and until the order is invalidated by an appellate court, is to comply and cite the order as reversible error should an adverse judgment result."); *In re Gilbert*, *supra* ("Although Gilbert may have harbored reservations about the order's validity, he, in the district court's words, "had a duty to openly contest the order by filing a request to stay the order in court, notify the court of his receipt of the ... checks and at least hold the monies in trust until the court ruled on the issue.").

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Here, the AG should have immediately returned the emails and then pursued his petition, or he should have moved to stay the Order and explained why he would not return the emails. Instead, he simply chose to disobey the Order.

None of the cases the AG relies upon support his unilateral flouting of this Court's mandate to immediately return all judicial emails. Rather, unlike the AG here, in those cases, the lawyers directly advised the court that they would not obey its order. *Cf. Olson v. Superior Court*, 157 Cal. App. 3d 780, 204 Cal. Rptr. 217 (1984) (defense attorney was held in contempt for refusing to answer a question in open court from the trial court concerning conversations between herself and a certain defense witness); *Florida Bar v. Gersten*, 707 So. 2d 711 (Fla. 1998) (defense attorney was held in contempt for refusing to answer questions in open court posed by the state attorney and ordered answered by the court). In *People v. Brown*, 461 P.3d 683, 696 (Colo. 2019), the court held that "Respondent had an obligation to review the BAP decision and to comply with it—particularly given that he alone controlled the trust funds subject to the BAP's decision." In both *Gersten* and *Brown*, the lawyers were disciplined (Gersten was suspended for one year, Brown was disbarred). Olson's contempt was reversed because "[t]here was insufficient time in which to seek relief by way of an extraordinary writ." *Olson*, 204 Cal. Rptr. at 226. Unlike the respondent in *Olson*, the AG here does not even suggest he had insufficient time to seek a stay of this Court's Order – nor, given 8 months, could he.

C. The AG's MRPC 8.2(a) Violations.

Of the AG's 26 supervisory violations, five of them were for his subordinates' violations of MRPC 8.2(a), including Counts 4, 16, 26, 30, and 34. The Commission concluded the AG also individually (not based on his supervisory responsibility) committed one additional violation of MRPC 8.2(a) (Count 22). This Court should reach the same conclusion.

MRPC 8.2(a) provides 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, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

As the AG admitted at the hearing (TR168:2-8), one purpose of the Rule is to preserve public confidence in the fairness and impartiality of our system of justice. *See, e.g., Kentucky Bar Ass'n v. Waller*, 929 S.W.2d 181, 183 (Ky. 1996) (disrespectful language directed at judge is not sanctioned because "the judge is of such delicate sensibilities as to be unable to withstand the comment, but rather that such language promotes disrespect for the law and for the judicial system"), cert. denied, 519 U.S. 1111 (1997); *The Florida Bar v. Ray*, *supra*; *Mississippi Bar v. Lumumba*, 912 So. 2d 871 (Miss. 2005).

Counts 4, 16, 22, 26, 30, and 34 did ***not*** charge the AG with any knowingly false statements, but reckless ones. Thus, the AG's discussion of ABA commentary

and case law regarding knowingly false statements (Objection, pp. 91-95) is misplaced.

As detailed in Section II above, there is clear and convincing evidence that the AG recklessly accused this Court of judicial misconduct, dishonesty, and defying reality and common sense. The AG did not just assert that there were errors in court findings or conclusions; the AG repeatedly, willfully, and knowingly undermined the presumed integrity and qualifications of the Justices. This Court has never tolerated such conduct and should not condone it here.

In re Miller, PR 18-0139 (Nov. 20, 2019), this Court concluded that Miller violated Rule 8.2(a) by asserting one time in one brief that Judge Lovell altered testimony and created affirmative defenses. Miller received a public admonition.

In re Myers, PR 16-0245 (Dec. 28, 2017), this Court concluded that Myers violated Rule 8.2(a) and 8.4(d) by using highly inflammatory language to make baseless accusations of conspiracy, fraud, bias, unethical behavior, and illegal acts against numerous people, including Judge Langton. Myers was suspended for seven months.

In re Epperson, PR 15-129 (April 19, 2016), after Judge Simonton notified the parties he would not accept Epperson's client's plea agreement, Epperson sent an email to Judge Simonton's judicial assistant, to the Clerk of Court, and to Howe that stated in part: "One more thing: Neither Cooper nor I will show up if the judge

refuses to vacate the trial set for July 8, and he can throw my ass in jail for contempt if he chooses." Epperson received a public admonition. However, he, unlike the AG here, admitted his violation of the MRPC, it was a single infraction, and he truly acknowledged the inappropriateness of his conduct.

In re McCann, PR16-0635 (Mont. June 5, 2018), the lawyer filed three pleadings accusing Judge Manley of bias, impartiality, and unethical conduct, and impropriety due to the Court violating the law. McCann was disbarred.

The AG here attacked this Court and its Justices much more explicitly and repeatedly than any of those Montana lawyers. Still, he seeks refuge in his "good faith" belief "based on the circumstances of the underlying litigation." (Objection, p. 18). Implicit in that argument is that his alleged subjectively reasonable factual basis for making the statements exculpates him. But that ***subjective*** standard (announced in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)) does not apply to this proceeding. This was explained by this Court in *Miller*, *supra*:

> As explained in *United States District Court v. Sandlin*, 12 F.3d 861, 867 (9th Cir. 1993), the standard to be applied regarding Rule 8.2(a) is not the subjective standard of *New York Times*, ***but is rather an objective standard: what a reasonable attorney, considered in light of all his professional functions, would do in the same or similar circumstances***. *See also In re Terry*, 394 N.E.2d 94, 95 (Ind. 1979) ("Defamation is a wrong directed against an individual . . . . Professional misconduct . . . is not punished for the benefit of the affected person; the wrong is against society as a whole, the preservation of a fair, impartial judicial system, and the system of justice as it has evolved for generations." (Emphasis added)

Miller, *supra*.

Thus, the AG's focus on what he subjectively believed to be a "good faith" basis to make the statements at issue is misplaced. That is *not* the issue the Court must decide here. Under *Miller*, the issue is: what a reasonable attorney, considering all his professional functions, would objectively do in the same or similar circumstances.

Here, would a reasonable attorney under the circumstances:

- File a brief calling the Montana Supreme Court's ruling "ludicrous" and outside the bounds of rational thought? (Ex. 16-1).

- File a brief stating: "This matter has arisen because evidence of judicial misconduct has come to public light" and "[t]he self-interest is so apparent, any attempt by this Court to decide the question runs afoul of state law and the [Montana Code of Judicial Conduct]"? (Ex. 17-5).

- Write a letter to the Court and admonish it not to make comments about his subordinates? And further, "[i]f you wish to vent any further frustrations about the conduct of attorneys in my office" to direct them to me? (Ex. 19-2).

- Or, in the same letter state that the Court's "statement is inaccurate almost to a word"? (Ex. 19-2, n.1). Or, in the same letter state the Court's orders were invalid and accuse the court of "impropriety'? (Ex. 19-2).

- File a petition suggesting the Court lied about its participation in the Montana Judges Association polling, calling the Court's ruling "perverse," accuse it of the "bias of Maslow's Hammer," and its rationale of "defying common and constitutional sense"? (Ex. 20-6, 20-8, n.4; 20-13).

- File another petition stating: "we're here" because of "questionable judicial conduct"; the Court's ruling "blinks reality" or is a "stunning, counterfactual denial"; admonishing the Court that its "advisory statements must be

withdrawn"; or again accusing it of "misstatements"? (Ex. 26-9, 26-13, 26-16, 26-18, 26-19).

- File a U.S. Supreme Court petition accusing this Court of "[j]udicial self-dealing on this scale [that] might be unprecedented in the Nation's history," "conceal[ing] its misbehavior," making "untrue" statements, "charging ahead, ensuring a result that bailed themselves out of an investigation prompted by their own inappropriate behavior," and "conceal[ing] judicial branch misbehavior from the light of day"? (Ex. 30-18, 30-34, 30-38, n.7, 30-43, 30-45).

The answer to those questions must be a resounding "no." When this Court reviews the record in this matter, it will see nothing that transpired in the underlying cases that objectively justifies such outrageously false accusations.

The AG argues that he "simply made statements identical to those made by every litigator who appeals to this Court" and that disciplining him for the language he used would mean that "every appeal will have at least one attorney who should be disciplined for violating Rule 8.2(a)." (Objection, pp. 104-105). As support for his argument, the AG cites the Special Counsel's appellate briefing in other cases asserting that a district judge used "an incorrect standard," "misconstrued facts," "committed legal error," "incorrectly determined" certain facts, or "failed to employ 'conscientious judgment' in refusing to defer summary judgment."

The difference is that the examples from the undersigned's briefs are in fact "strong statements" or "robust criticism" within the boundaries of ethical precepts, using the legal standards necessary to argue for the reversal of an order. By contrast, the AG's statements subject to these proceedings were meant to be, and are,

insulting, disrespectful, and impugn the integrity of the Court. If the AG cannot perceive that difference, certainly a reasonable attorney, considering all his professional functions, would.

The AG also argues that his repeated accusations of judicial misconduct and impropriety are nothing more than an opinion, not capable of being proved true or false, and thus outside the scope of Rule 8.2(a). However, Rule 8.2(a) ***does*** apply to a lawyer's opinions if they are based, explicitly or implicitly, upon false assertions of fact. *See, e.g., Pilli v. Virginia State Bar*, 269 Va. 391, 611 S.E.2d 389 (2005) (accusing judge of "lying, of 'skewing' the facts, and of various acts of incompetence" "were assertions of fact that were plainly within the scope of remarks proscribed by Rule 8.2" rather than opinion), cert denied, 546 U.S. 977 (2005); *Idaho State Bar v. Topp*, 129 Idaho 414, 925 P.2d 1113, 1115 (1996) (statement that judge's decision could have been politically motivated "went beyond the realm of pure opinion"); *Iowa Supreme Court Att'y Disciplinary Bd. v. Weaver*, 750 N.W.2d 71, 86 (Iowa 2008) (lawyer's statement that "I can't speculate about the reasons why [the judge] did this, ... but he's not being honest about the reasons why he committed me to the Department of Corrections' was not opinion but was "a specific statement about specific wrongdoing, by the judge, capable of being proved true or false"; his disclaimer about speculation "simply left the reader at liberty to assume that Weaver knew more than he was saying"); *In re Nathan*, 671 N.W.2d 578, 584 (Minn. 2003)

(lawyer called judge a "bad judge" who "substituted his personal view for the law" and "won election to the office of judge by appealing to racism;" "merely cloaking an assertion of fact as an opinion does not give that assertion constitutional protection").

The AG's accusations of "judicial misconduct," "violations of the Code of Judicial Conduct," "judicial impropriety," lying about the Justices' non-participation in the judicial polling, "questionable judicial conduct," "judicial self-dealing," making "untrue" statements, "ensuring a result that bailed themselves out of an investigation prompted by their own inappropriate behavior," and "concealing judicial branch misbehavior from the light of day," among others, are within the scope of Rule 8.2(a) because they imply a false assertion of ***fact***.

Unlike the cases relied upon by the AG, his statements are not the sort of "loose, figurative, or hyperbolic language" that would negate the impression that the AG was seriously maintaining the Court was dishonest or had engaged in judicial misconduct. *Cf. Standing Comm. on Discipline v. Yagman*, 55 F.3d 1430, 1440 (9th Cir. 1995) (discipline reversed, concluding that when considered in context, Yagman's statement "cannot reasonably be interpreted as accusing Judge Keller of criminal misconduct" but instead were "rhetorical hyperbole, incapable of being proved true or false.").

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For these reasons, the Court should conclude that the AG has Rule 5.1(c) responsibility for his subordinates' violations of MRPC 8.2(a) as charged in Counts 4, 16, 26, 30, and 34. It should also conclude that the AG committed one non-supervisory violation of MRPC 8.2(a) as charged in Count 22.

D. The AG's MRPC 8.4(d) Violations.

Of the AG's 26 supervisory violations, eleven of them were for his subordinates' violations of MRPC 8.4(d), including Counts 2, 5, 8, 11, 13, 17, 23, 27, 31, 35, and 40. The Commission concluded that the AG also individually (not based on his supervisory responsibility) committed two additional violations of MRPC 8.4(d) (Counts 20 and 39). This Court should reach the same conclusion.

MRPC 8.4(d) states that it is professional misconduct for a lawyer to "engage in conduct that is prejudicial to the administration of justice."

There are two types of violations of Rule 8.4(d) here: 1) the disrespectful statements contained in court filings (Counts 2, 5, 8, 11, 13, 17, 20, 23, 27, 31, and 35), and 2) the AG's disobedience of this Court's July 14, 2021, Order in *McLaughlin* to immediately return judicial branch emails (Ex. 24) (Counts 39 and 40).

The AG contends he did not violate MRPC 8.4(d) "because his conduct and comments did not disrupt or interrupt ongoing court proceedings." (Objection, p. 107). While it is true that there must be some nexus between the AG's conduct and an adverse effect upon the administration of justice to prove a Rule 8.4(d) violation,

see In re Olson, 2009 MT 455, ¶ 32, 354 Mont. 358, 222 P.3d 632 (2009), that does ***not*** (contrary to the AG's position) require proof of some identifiable harm in either the *Brown* or *McLaughlin* litigation. The "nexus" required is not only identifiable harm to the proceeding in which it occurs (although that would satisfy the requirement), but such a nexus can also be established by conduct that injures or harms the justice system more generally.

That was precisely the situation in the *Miller* and *Meyers* proceedings in which this Court punished the lawyers though it did not disrupt any ongoing underlying cases. *See also In re Kline*, 298 Kan. 96, 311 P.3d 321, 349 (2013) ("[A]n attorney's conduct can violate [Rule] 8.4(d) even if it does not result in identifiable harm to an actual proceeding. Rather, conduct is prejudicial to the administration of justice when it tends to injure or harm the justice system more generally"); *In re McClellan*, 754 N.E.2d 500 (Ind. 2001) (the attorney's filing of a petition for rehearing in the Court of Appeals stating the ramifications of the Court's decision read like a "bad lawyer joke;" "The respondent violated [Rule 8.4(d)] by engaging in conduct that demeaned the judiciary and the legal profession.").

1. Disrespectful statements in court filings.

With respect to the AG's disrespectful statements in the *Brown* and *McLaughlin* proceedings, there are important differences between Rule 8.4(d) and Rule 8.2(a). First, unlike Rule 8.2(a), Rule 8.4(d) does ***not*** require proof of falsity.

The reason why is aptly explained in *Kentucky Bar Association v. Waller*, 929 S.W.2d 181, 183 (Ky. 1996):

> Respondent appears to believe that truth or some concept akin to truth, such as accuracy or correctness, is a defense to the charge against him. In this respect he has totally missed the point. There can never be a justification for a lawyer to use such scurrilous language with respect to a judge in pleadings or in open court. The reason is not that the judge is of such delicate sensibilities as to be unable to withstand the comment, but rather that such language promotes disrespect for the law and for the judicial system. Officers of the court are obligated to uphold the dignity of the Court of Justice and, at a minimum, this requires them to refrain from conduct of the type at issue here.

929 S.W.2d at 183.

"These narrow restrictions are justified by the integral role that attorneys play in the judicial system, which requires them to refrain from speech or conduct that may obstruct the fair administration of justice." *Off. of Disciplinary Couns. v. Gardner*, 99 Ohio St.3d 416, 793 N.E.2d 425, 428-29 (2003). But, based on the AG's objections, it seems dignity and professionalism do not enter into his rationale for his lashing out at judges he perceives to be enemies, or who simply disagree with his position.

Second, and contrary to the AG's argument, unlike Rule 8.2(a), Rule 8.4(d) also does ***not*** require proof of fraud, knowledge of falsity, or reckless disregard for the truth. The United States Supreme Court has held that conduct prejudicial to the administration of justice is synonymous with "'conduct unbecoming a member of the bar' [or] conduct contrary to professional standards that shows an unfitness to

discharge continuing obligations to clients or the courts." *In re Snyder*, 472 U.S. at 645. Similarly, the Fifth Circuit, in holding that Rule 8.4(d) was neither overly broad nor vague, found that the Rule's application was consistent with the "[s]tate's primary concern ... the obligation of lawyers in their quasi-official capacity as assistants to the court." *Howell v. State Bar of Texas*, 843 F.2d 205, 207 (5th Cir. 1988).

The AG suggests that Rule 8.4(d) has faced "implemental difficulties" from the "moment the ABA adopted it." (Objection, p. 107). However, the Rule (and its predecessor Model Code counterpart, DR 1-102(A)(5)) has long withstood challenges such as the AG's. The court in *Howell*, *supra* explained:

> It [DR 1-102(A)(5)] was part of the American Bar Association's Code of Professional Responsibility promulgated in 1969 and subsequently adopted by almost every State in the Union. There was nothing startlingly innovative in DR 1–102(A)(5)'s contents. Since the early days of English common law, it has been widely recognized that courts possess the inherent power to regulate the conduct of attorneys who practice before them and to discipline or disbar such of those attorneys as are guilty of unprofessional conduct. *In re Snyder*, 472 U.S. 634, 643, 105 S.Ct. 2874, 2880, 86 L.Ed.2d 504 (1985); *Ex parte Wall*, 107 U.S. (17 Otto) 265, 273, 2 S.Ct. 569, 575, 27 L.Ed. 552 (1883); *Koden v. United States Department of Justice*, 564 F.2d 228, 233 (7th Cir.1977); *Mattice v. Meyer*, 353 F.2d 316, 319 (8th Cir. 1965); *In re Claiborne*, 119 F.2d 647, 650 (1st Cir. 1941); *Graham v. State Bar Ass'n*, 86 Wash.2d 624, 631, 548 P.2d 310 (1976) (en banc).

Howell v. State Bar of Texas, 843 F.2d at 207. *See also Comm. on Legal Ethics v. Douglas*, 370 S.E.2d 325, 328-329 (W. Va. 1988), superseded on other grounds in *Law. Disciplinary Bd. v. Neely*, 207 W. Va. 21, 528 S.E.2d 468 (1998) (general

consensus that rule not unconstitutionally vague "because the standard is considered in light of the traditions of the legal profession and its established practices") (citing *Parker v. Levy*, 417 U.S. 733 (1974); *In Re Ruffalo*, 390 U.S. 544 (1968)).

The court in *Matter of Keiler*, 380 A.2d 119, 126 (D.C.App. 1977), *overruled on other grounds*, 534 A.2d 919 (D.C.App. 1987), in upholding Rule 8.4(d) against a vagueness claim, stated, "[t]he rule was written by and for lawyers. The language of a rule setting guidelines for members of the bar need not meet the precise standards of clarity that might be required of rules of conduct for laymen." *See also Howell v. State Bar*, *supra* (denying vagueness challenge, in part because lawyers are professionals and "have the benefit of guidance provided by case law, court rules and the lore of the profession"); *State v. Nelson*, 210 Kan. 637, 504 P.2d 211, 214 (1972) (rule not unconstitutionally vague; "[i]t cannot be seriously contended that 'prejudicial' does not sufficiently define the degree of conduct which is expected of an attorney").

The AG argues that using Rule 8.4(d) based on the same disrespectful statements found to be in violation of Rules 3.4(c) and 8.2(a) is an unnecessary "duplicative add-on." (Objection, p. 115). But the finding of a violation of more than one Rule based on the same conduct is not double punishment and does not run afoul of the purpose of attorney discipline. *See, e.g., Att'y Grievance Comm'n v. Lanocha*, 392 Md. 234, 896 A.2d 996, 1001 (2006) (additional finding of misconduct under

Rule 8.4(d) based upon violation of Rule l.8(c) is not double punishment and does not amount to "piling on").

In *In re Snyder*, *supra*, former Chief Justice Burger described the lawyer's role in the administration of justice in the following language:

> As an officer of the court, a member of the bar enjoys singular powers that others do not possess; by virtue of admission, members of the bar share a kind of monopoly granted only to lawyers. Admission creates a license not only to advise and counsel clients but also to appear in court and try cases; as an officer of the court, a lawyer can cause persons to drop their private affairs and be called as witnesses in court, and for depositions and other pretrial processes that, while subject to the ultimate control of the court, may be conducted outside courtrooms. The license granted by the court requires members of the bar to conduct themselves in a manner compatible with the role of courts in the administration of justice.

472 U.S. at 644-45.

The AG does not even try to pretend that he and his subordinates did not make the disrespectful and intemperate attacks on the judiciary in the *Brown* and *McLaughlin* matters and proven by clear and convincing evidence in these proceedings. The AG's position that his "impassioned language falls well within the normal scope of an attorney's representation" (Objection, p. 107) runs contrary to the overwhelming body of law that says otherwise.

As the chief legal officer in this State, the AG's own behavior has the capacity to bolster or damage public esteem for the judicial system. When he and his subordinates repeatedly attack the integrity of the Court rather than uphold the

dignity of the system as required, the wrong is against society, the preservation of a fair, impartial judicial system, the system of justice and the rule of law. For the disrespectful and demeaning statements that are the subject of Counts 2, 5, 8, 11, 13, 17, 20, 23, 27, 31, and 35, the Court should conclude that the AG violated Rule 8.4(d).

2. Disobedience of the July 14, 2021, Order.

The AG's failure to comply with the Court's July 14, 2021, Order mandating the immediate return of all emails as alleged in Counts 39 and 40 is also a violation of Rule 8.4(d). The AG never requested or obtained a stay of the Order. The AG did not immediately return all copies of the emails to the Court as ordered but took eight or nine months to return the emails. (TR179:4-23).

An attorney's violation of a court order is prejudicial to the administration of justice. *See, e.g.*, *In re Kline*, *supra* (attorney general directed staff to attach sealed documents to brief in violation of a court order); *In re Roose*, 69 P.3d 43 (Colo. 2003) (attorney's action of leaving courtroom during trial in dependency and neglect proceeding after court ordered attorney to remain in courtroom constituted violation of Rules 1.1, 3.4(c), and 8.4(d)); *In re Johnson*, 450 Mass. 165, 877 N.E.2d 249 (2007) (attorney who posted on her web site impounded material from a care and protection action involving alleged sexual abuse, and was subsequently ordered to return impounded material to court and remove it from web site, was not free to

ignore order); *Disciplinary Counsel v. Rohrer*, 124 Ohio St. 3d 65, 919 N.E.2d 180 (2009) (attorney told staff to deliver a copy of his motion to compel to the local newspaper, in defiance of the court's order prohibiting communications with the media).

As to the AG's disobedience of the Order here, he does not even attempt to argue there is an insufficient nexus between his failure to return the emails as ordered and prejudice to the administration of justice. Nor could he. When those tasked with the job of enforcing the law break it instead, the public rightfully questions whether the system itself is worthy of respect. For the AG's disobedience of the Court's Order that is the subject of Counts 39 and 40, the Court should conclude that the AG violated Rule 8.4(d).

E. The AG's MRPC 8.4(a) Violations.

The Commission concluded that the AG committed nine violations of MRPC 8.4(a) (Counts 6, 9, 14, 18, 24, 28, 32, 36, 41).

In pertinent part, MRPC 8.4(a) states that it is professional misconduct for a lawyer to "violate or attempt to violate the Rules of Professional Conduct…."

The AG correctly concedes this Rule provides a "separate and independent violation" for any violation of the MRPC. (Objection, p. 118). His only objection to the Commission's conclusion that he violated Rule 8.4(a) is that he did not violate any other Rule. (*Id.*, pp. 118-119).

For the reasons stated in Sections V, A-D above, the AG violated MRPC 3.4(c), 5.1(c), 8.2(a), and 8.4(d). Thus, the Court should conclude that the AG committed nine violations of MRPC 8.4(a) (Counts 6, 9, 14, 18, 24, 28, 32, 36, 41).

F. The AG Received Due Process.

The AG argues for dismissal of this case for violating his due process rights on three grounds: 1) the Commission "usurped the prosecutorial role" by rejecting ODC's initial recommendation of a private admonition, 2) either two "conflicted panelists" participated in deciding prehearing motions or the Commission did not have a quorum in deciding those motions, and 3) the Commission granted ODC's motion to exclude the AG's expert without allowing him the opportunity to be heard.

This Court has repeatedly held for more than 100 years that the "practice of law is a privilege not an inherent right," *In re Bailey*, 50 Mont. 365, 146 P. 1101, 1103 (1915), "burdened with conditions" including "protection of the public from unethical practitioners." *Application of President of Montana Bar Ass'n*, 163 Mont. 523, 527, 518 P.2d 32, 33 (1974); *Petition of Morris*, 175 Mont. 456, 458, 575 P.2d 37, 38 (1978); *Montana Supreme Ct. Comm'n on Unauthorized Prac. of L. v. O'Neil*, 2006 MT 284, ¶ 73, 334 Mont. 311, 147 P.3d 200. Due process in a lawyer disciplinary proceeding entitles the AG to notice and an opportunity to be heard, *In re Engel*, 2008 MT 215, ¶ 26 -- nothing more and nothing less.

Under that Due Process standard, each of the AG's arguments must fail. The AG "enjoyed the full panoply of rights afforded to lawyers facing disciplinary proceedings, including notice of the charges against him and an opportunity to be heard to contest those charges." *Engel*, *supra*.

1. The Commission did not "usurp" ODC's prosecutorial authority or confuse the prosecutorial or adjudicative functions.

The Commission's Review Panel rejected ODC's initial recommendation for a private admonition and instructed ODC to conduct further investigation. That is expressly stated as one of the Panel's authorized actions under MRLDE 3B(2): "Refer the grievance to Disciplinary Counsel for further investigation, if needed, to determine whether a formal complaint is appropriate."

Contrary to the AG's argument, this instance is nothing like *In re Best*, 2010 MT 59, 355 Mont. 365, 229 P.3d 1201. In that case, ODC recommended the matter should be dismissed with a letter of caution for certain conduct. The Commission, however, determined the lawyer had violated Rule 4.2 and ordered her to appear for private discipline. However, neither the Commission nor ODC notified the respondent of any charges under MRPC 4.2, nor had they given her an opportunity to be heard on any such charges, before requiring her to appear for a private admonition. *Id.* ¶ 27. Accordingly, the Court held the Commission violated her due process rights. *Id.* ¶ 28.

Here, unlike *Best*, the Commission itself did not conduct an investigation, nor did it conclude a separate set of violations had occurred, nor did it order discipline without providing notice or an opportunity to be heard. It merely exercised its express authority under MRLDE 3B(2) to reject ODC's recommendation and instructed ODC to further investigate, to determine whether a formal complaint would be appropriate.

The AG's reliance upon *Engel*, *supra*, undermines his position. Distinguishing *Matter of Thalheim*, 853 F.2d 383 (5th Cir. 1988) (which the AG partially quotes at page 23 of his Objection), this Court in *Engel* noted that it directed ODC to file its objections to the adjudicatory panel's recommendation of dismissal. Even still, the Court held "Engel enjoyed the full panoply of rights afforded to lawyers facing disciplinary proceedings, including notice of the charges against him and an opportunity to be heard to contest those charges." *Id.*, ¶ 26.

By rejecting ODC's initial recommendation, the COP did not "usurp" any prosecutorial functions. It merely exercised its express authority under MRLDE 3B(2).

2. No "Biased" Commission members participated in the proceedings against the AG.

The AG contends that the Commission's denial of his summary judgment motion was "tainted by the presence of biased members;" namely, Ms. Klanke and Ms. Menzies. (Objection, p. 24). The record does not support his argument.

As this Court noted in its October 8, 2024, Order (OP 24-0595) denying the AG's petition for writ of supervisory control, "the two Adjudicatory Panel members to whom Knudsen objected have both been substituted from the panel."

The COP's October 4 Order denied the AG's motion to disqualify Ms. Menzies as moot because, though she disputed having any bias, she had recused herself. (Dkt. 74). The Commission noted that "Ms. Menzies has not participated in any capacity to date." In another order that same day, the Commission denied the AG's motion to vacate the hearing, and stated: "***Neither Ms. Klanke or Ms. Menzies has participated in any manner in this matter to date."*** (Dkt. 77, p. 1, emphasis added).[8]

Despite the Commission's unequivocal clarification, the AG tells this Court: "***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…." including the September denial of his summary judgment motion. (Objection, p. 25, emphasis added). The AG cannot possibly make that statement without implying that the Commission lied when it said those two members had ***not*** "participated in any manner in this matter to date." This echoes the AG's comments in the underlying proceedings where this Court stated that no Justice

[8] As for the Commission's compliance with the Rules, MRLDE 12D(2) states that "[i]n the conduct of a hearing, the Chairperson of an Adjudicatory Panel shall have authority to rule on all motions, objections, and other matters presented in connection with the hearing."

participated in the polls conducted by the MJA, to which the AG said, "[r]espectfully, public records tell a different tale." (Ex. 20-6).

3. The Commission considered the AG's argument regarding his "standard-of-care" expert before excluding his testimony at trial.

The AG argues that the Commission precluded his standard-of-care expert's testimony "without an opportunity to be heard." (Objection, p. 27). The record does not support his position.

While it is true that the Commission initially granted ODC's motion to preclude the expert before the AG responded (Dkt. 59), what the AG fails to mention is that he filed a Rule 60(a) motion addressing this very issue and included the substance of his response to ODC's motion in limine in the same. (Dkt. 70 and 71). After considering that response, the Commission issued a second order affirming the preclusion of Mr. Lee's testimony. (Dkt. 76).

The AG ***was*** heard before his expert's testimony was finally barred and the balance of his due process argument on this issue can be disregarded. The AG's challenge to that ruling is addressed in Section V.G.1., below.

G. The Commission Did Not Abuse its Discretion in Matters of Trial Administration.

1. Exclusion of the AG's "standard-of-care" expert.

On September 25, 2024, the AG submitted the Expert Witness Disclosure of Thomas Lee and his report (Dkt. 53).

Mr. Lee's report states he was not "asked to offer an interpretation of the governing rules of professional conduct or to opine on whether Mr. Knudsen has violated those rules" (*Id.* ¶15). But the balance of Mr. Lee's report effectively offers his opinions regarding: 1) the alleged violations of the Rules at issue (*Id.* ¶16); and 2) his legal interpretation of the Rules at issue and his opinion as to whether the AG engaged in any unethical conduct, nearly Count-by-Count -- as opposed to what he feels are "accepted norms or means of rhetoric, advocacy, or practice" or "standard, best practices" (*Id.* ¶¶17-53).

As noted in Section V.F.3, above, after considering the AG's position regarding the necessity for Mr. Lee's testimony, the Commission precluded his testimony. The AG argues the COP "erred as a matter of law and excluded indispensable standard-of-care testimony." However, the AG applies the wrong standard of review and the wrong standard at issue in this matter.

A ruling on a motion in limine is an evidentiary ruling that this Court reviews for abuse of discretion. *State v. Edwards*, 2011 MT 210, ¶ 12, 361 Mont. 478, 260 P.3d 396. An abuse of discretion occurs when a court acts "arbitrarily, without conscientious judgment, or exceeds the bounds of reason." *State v. Hudon*, 2019 MT 31, ¶ 16, 394 Mont. 226, 434 P.3d 273. Thus, contrary to the AG's assertion, the issue is ***not*** whether the Commission "erred as a matter of law" but whether it acted

arbitrarily, without conscientious judgment, or exceeding the bounds of reason in granting ODC's motion in limine; the answer is "no."

The Commission ruled that Mr. Lee's testimony invaded the exclusive province of the Commission and this Court to determine whether the AG violated the MRPC. This is because the Rules ***are*** the standard to be considered rather than what Mr. Lee believes are "accepted norms or means of rhetoric, advocacy, or practice" or "standard, best practices." (Dkt. 59, p. 2). Accordingly, the Commission did not "need Mr. Lee's assistance in understanding the evidence or determining a fact that is in issue" as required by M.R.E. 702. (*Id.*, p. 3)

That ruling was not an abuse of discretion. There is no Montana law to support drawing a distinction in a disciplinary proceeding between whether a lawyer's conduct violates a Rule as opposed to whether it is considered an "accepted norm or means of rhetoric, advocacy, or practice" or "standard, best practice." The "accepted norms or means of rhetoric, advocacy, or practice" or "standard, best practices" are the Rules of Professional Conduct. And if the title is not self-evident, this Court has held that the "Model Rules of Professional Conduct … ***establish the bounds of ethical conduct by lawyers and are employed for disciplinary purposes***." *Carlson v. Morton*, 229 Mont. 234, 237, 745 P.2d 1133, 1135 (1987) (emphasis added).

As the AG notes, Mr. Lee was a "standard-of-care" expert (Objection, p. 34) and this is precisely why the Commission properly excluded him. The standard of

conduct -- not the standard of ***care*** -- is the issue in a lawyer disciplinary action. *Carlson* makes that distinction clear, explaining that it is the reason that the MRPC (which establish standards of conduct) are used exclusively in disciplinary proceedings but not in legal malpractice cases (where the duty of care is at issue). *Carlson*, *supra*.

Thus, the AG's focus on the requirement for expert testimony in a legal malpractice action misses the mark entirely. Unlike a legal malpractice case where expert testimony on the attorney's standard of ***care*** is generally required (*Carlson*, 229 Mont. at 240-41, 745 P.2d at 1137-38), no case has ever held that expert testimony is required or even favored in lawyer disciplinary actions where the MRPC "establish the bounds of ethical conduct by lawyers and are employed for disciplinary purposes" (*Carlson*, *supra*).

Unlike a legal malpractice action, a lawyer disciplinary case presents the ultimate environment where questions of law are presented involving the Court's own Rules (*i.e.*, MRPC). No expert witness is qualified to tell the Commission or the Court what its own Rules mean or how they should be interpreted, or whether a lawyer's conduct is "acceptable" for disciplinary purposes. While the Commission has occasionally allowed expert testimony to assist in determining a fact in issue (*e.g.*, whether a lawyer represented a client, or the reasonableness of a legal fee), it does not allow an expert to provide conclusions of law or opinions as to whether a

lawyer's conduct is acceptable for disciplinary purposes. *See, e.g., In the Matter of Tina L. Morin*, Order on Pending Motions at 7-8, Supreme Court No. PR 17-0448 (Oct. 17, 2018) (excluding expert testimony as to the performance of an attorney and what the law is and how to rule).

In attorney disciplinary proceedings in other states as well, it is the majority rule that expert testimony is properly excluded as to whether a respondent attorney acted ethically, appropriately, or within norms or standards of conduct. *See, e.g., In re Crossen*, 450 Mass. 533, 880 N.E.2d 352, 380 (2008) (excluding the testimony of renowned ethics expert Professor Wolfram which addressed "whether Crossen's conduct was within contemporaneous ethical norms") (citing *Matter of Tobin*, 417 Mass. 81, 86, 628 N.E.2d 1268 (1994) and *Matter of Buckley*, 2 Mass. Att'y Discipline Rep. 24, 25 (1980)). "Indeed, generally, '[e]xpert testimony concerning the fact of an ethical violation is not appropriate' in bar disciplinary proceedings because the fact finder does not need assistance understanding and applying the ethical rules." *Id. See also Matter of Perrello*, 270 Ind. 390, 386 N.E.2d 174, 179 (1979) ("The testimony of these witnesses was excluded by the Court on the ground that it invaded the province of the Court. It is the province of this Court to determine what the practice of law is, and the opinions of experts on the subject are not proper evidence."); *Matter of Saab*, 406 Mass. 315, 547 N.E.2d 919, 927 (1989) ("Expert testimony concerning the fact of an ethical violation is not appropriate...."); *Matter*

of Keller, 792 N.E.2d 865, 867 (Ind. 2003) ("The testimony of expert witnesses on the subject of the practice of law is not proper evidence, as it is the province of this Court to determine what the practice of law is"); *In re Masters*, 91 Ill. 2d 413, 438 N.E.2d 187, 192 (1982) (excluding expert testimony regarding the meaning of the disciplinary rules and the ultimate conclusion that there were no ethical violations); and *Disciplinary Bd. v. McKechnie*, 2003 ND 22, ¶ 15, 656 N.W.2d 661 ("Expert testimony about whether or not a rule of professional conduct has been violated is inappropriate in disciplinary proceedings"); *In re Disciplinary Action Against Boulger*, 2001 ND 210, ¶ 13, 637 N.W.2d 710 (*ibid*.).

For these reasons, the Court should reject the AG's objection to the Commission's preclusion of his expert's testimony.

2. Sustaining relevance objections to certain testimony regarding MJA polling emails and certain legislative reports.

The AG argues that the Commission "erred" in excluding "key evidence" allegedly based on the "collateral attack" doctrine, which "warrant[s] a sharp rebuke from this Court." (Objection, p. 45). The AG employs the wrong standard of review (legal error versus abuse of discretion) and mischaracterizes the basis for the Commission's rulings (which were based on relevance, not collateral attack).

Though buried in the AG's analysis, at page 45 of the Objection, the so-called "key evidence" includes: 1) the Commission's sustaining of ODC's relevance objections to questions of Ms. McLaughlin regarding the use of the Court's email

system for MJA lobbying emails (TR312:1-318:6) (CHAIR OGLE: "The questioning and testimony with regard to the use of government computers by the Court Administrator's office is ***irrelevant***, and the objection is sustained (emphasis added)" (TR318:3-6)); and 2) the Commission's sustaining of ODC's relevance objections to admission of the reports of the Special Joint Select Committee on Judicial Accountability and Transparency (the "Select Committee") (TR405:25-414:20) (CHAIR OGLE: "Number one, Mr. Hertz's mindset as to what the Legislature's thoughts were is in the record already, and I can't really see any ***relevance*** of this particular report to any of the issues before this panel and this proceeding, so the objection is sustained (emphasis added)." (TR414:4-9).

The AG focuses his objection on arguing that the "collateral attack" doctrine is not an evidentiary doctrine. However, as the record reflects, though counsel for both parties discussed the "collateral attack" doctrine, the Commission's rulings were based on relevance, ***not*** the "collateral attack" doctrine. Indeed, at the hearing, the Chair did not even mention the words "collateral attack." Thus, the AG's argument is a strawman, and his entire discussion regarding the collateral attack doctrine can be disregarded.

The Commission did not abuse its discretion in excluding as irrelevant the Select Committee reports or Ms. McLaughlin's testimony about the use of government computers for MJA lobbying emails. The AG submits that the evidence

was relevant to the AG's mental state for purposes of MRPC 8.2(a). (Objection, p. 40). However, as noted in Section V.C., above, the question the Court must decide is objectively what a reasonable attorney, considering all his professional functions, would do in the same or similar circumstances -- ***not*** what the AG subjectively believed. The Commission correctly focused on that issue.

Contrary to the AG's suggestion, the Commission did not exclude any evidence of the AG's mindset in terms of why he used the "strong language" he used or the circumstances in which the statements were made. Indeed, as detailed in Section II above, the polling emails were admitted, the circumstances of the Legislature's FOIA request, the subpoena, Ms. McLaughlin's response, the circumstances of this Court's *ex parte* Sunday order, and the context and circumstances in which the AG made the statements at issue, comprised much of the evidence introduced by both parties at the hearing.

The Commission did not bar any of the AG's testimony about his mindset, and he testified extensively about his mindset on direct and cross. Based upon that evidence, the Commission rejected the reasons asserted by the AG as exculpating him under the Rules, including the purported "unique nature of the self-described 'emergency' constitutional crisis," the fact that his client felt strongly that there was judicial misconduct and that he was zealously advocating that position, and that

litigants and judicial officers frequently use "strong language." (FOCOL, pp. 3-13, 26-29). As the Commission noted:

> it isn't the conduct, desires or intentions of the 'client' which are at issue here; it is the language, conduct and intentions of the Respondent. Attorneys are not weapons to be wielded at the discretion of any client; attorneys are certainly charged with advancing the legitimate goals of their clients, but only within the constraints of the Law and the MRPC.

(FOFCOL, pp. 27-28).

At the hearing, the AG himself conceded that he knew of no rule of professional conduct that excuses his behavior because he was advocating his client's position. (TR176:2-6). No such Rule exists. For these reasons, the Court should reject the AG's objection to the Commission's exclusion of certain testimony about MJA lobbying emails and exclusion of the Select Committee reports.

H. The Commission's Conclusions of Law Meet the Requirements of MRLDE 12D(3).

The AG argues that the Commission failed "to supply this Court with an adequate record to review" and that its FOFCOL "amounts to little more than a cursory conclusion that the Attorney General broke the rules of professional conduct and should be punished." (Objection, p. 46). However, the record here consists of 97 plus, docket filings, nearly 500 pages of formal hearing transcript, 36 ODC exhibits, 27 Respondent exhibits, and the 31-page FOFCOL; that is a more than an adequate record for review.

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The AG's argument is founded on the premise that this Court is acting in the normal appeal setting and that Mont. R. Civ. P. 52(a) controls. However, as set forth in Section IV above, that is not the case. This Court is not acting as an appellate court here in an appeal of a civil or criminal lower court decision, but pursuant to its original and exclusive jurisdiction and responsibility under Article VII, Section 2(3), of the 1972 Montana Constitution and the provisions of Chapter 61, Title 37, Montana Code Annotated, in addition to its inherent jurisdiction. The Commission is not a lower court but an arm of this Court that sits in an advisory capacity to the same. Thus, Mont. R. Civ. P. 52(a) and the case law interpreting that Rule, and the body of case law upon which the AG relies as setting the standard for sufficient conclusions of law by a lower court on appeal, do not control here.

The Commission fully discharged its obligations under MRLDE 12D(3) here as an arm of this Court. To claim that the FOFCOL is "devoid of any legal analysis" (Objection, p. 49), and that the Commission's "findings are non-existent" (Objection, p. 51) would require ignoring the entirety of the 31-page FOFCOL.

The AG (Objection, p. 48) cites *Matter of Doud*, 2024 MT 29, ¶ 32, 415 Mont. 171, 543 P.3d 586, in arguing that the Court requires the Commission to "meet an equally demanding standard" as Mont. R. Civ. P. 52(a). That is not what this Court ruled in *Doud*. The Court held that the "Commission's inclusion of an introductory passage does not render its findings, conclusions, or recommendation infirm." *Id.*

Nowhere in that case, nor in any case ODC could locate, has this Court required the Commission to meet Rule 52(a) standards.

Lastly, this Court conducts a de novo review. A de novo review accords no deference as to conclusions of law. *See, e.g., In re Marriage of Szafryk*, 2010 MT 90, 356 Mont. 141, 232 P.3d 361. Thus, even if the Commission's conclusions are lacking in sufficiency (which the ODC disputes as explained above), this Court must reach its own conclusions on de novo review. For these reasons, the Court should reject the AG's objection to the sufficiency of the Commission's FOFCOL.

I. The Complaint is Not Barred by the Separation of Powers Clause.

The AG's position is that a court may sanction him in a particular case, or "for larger transgressions, the Legislature can impeach the Attorney General," but this Court "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)." (Objection, pp. 56-57). In other words, of all Montana lawyers, the Respondent and only the Respondent, is above this Court's constitutional disciplinary authority; the same disciplinary authority to which the AG swore allegiance when he took the lawyer's oath (Ex. 40).

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Respondent's suggestion that the exercise of disciplinary authority over the AG would violate the Separation of Powers doctrine ignores and offends the core constitutional qualifications ***required to be the AG***. Article VI, §3(2) of the Montana Constitution, governing the Executive Branch, specifies the fundamental prerequisite for holding the Office of the Attorney General:

> Any person with the foregoing qualifications is eligible to the office of attorney general if an attorney ***in good standing*** admitted to practice law in Montana. (Emphasis added).

Article VII of the Montana Constitution, governing the judicial branch, correspondingly grants this Court authority to "make rules governing . . . admission to the bar and the conduct of its members." Art. VII, §2(3).

In short, Montana's Constitution unequivocally requires that only an attorney "in good standing" may serve as AG and that only this Court may determine whether an attorney is "in good standing." The Court has exercised this authority through the adoption of the MRPC and establishment of the Commission, which predates the 1972 Constitution. This plain language reflects the legal reality that the Court's exercise of disciplinary jurisdiction over the AG is, in fact, ***required*** to maintain the balance between the branches of government. The AG is expected to fully exercise the authority of the office, but the Constitution requires those duties and authorities are exercised in accordance with the MRPC. The AG was aware of these obligations, both through his admission to the practice of law in Montana, and the numerous

times he swore to "support, protect and defend . . . the constitution of the state of Montana" and "discharge the duties of [his] office with fidelity." Art. III, §3.

The notion that an attorney general is outside the jurisdictional reach of the disciplinary authority of the judicial branch has been roundly rejected. *In re Rokita*, 219 N.E.3d 733 (Ind. 2023), the Indiana Attorney General was disciplined for extrajudicial statements which violated Rules 3.4 and 4.4. and were made in relation to his pursuit of a case. Rokita appeared on a national television program to discuss an Indiana physician who had performed an abortion on a ten-year-old rape victim from Ohio. During that appearance, Rokita described the physician as an "abortion activist acting as a doctor—with a history of failing to report." Rokita was publicly reprimanded.

There are other disciplinary cases against other state's attorney generals as well. *See e.g., Lawyer Disciplinary Bd. v. McGraw*, 194 W. Va. 788, 461 S.E.2d 850 (1995) (public reprimand was warranted for West Virginia's Attorney General's violation of ethics rule requiring strict client confidentiality when he disclosed his client's change in position on an environmental issue to a third party); *Disciplinary Counsel v. Dann*, 134 Ohio St. 3d 68, 979 N.E.2d 1263 (2012) (former Ohio Attorney General was disciplined after entering an *Alford* plea to the charge of soliciting improper compensation and pled guilty to filing false financial disclosures); *In re Kline*, 311 P.3d at 393 and 399 (2013) (suspending former Kansas Attorney General

from practicing law in state for professional misconduct); *Matter of Hill*, 144 N.E.3d 184 (Ind. 2020) (suspending the Ohio Attorney General); *Matter of Foster*, 492 Mass. 724, 215 N.E.3d 394 (2023) (Disbarment was an appropriate sanction for failures by assistant attorney general, who was lead prosecutor, to disclose potentially exculpatory evidence).

The cases the AG cites do ***not*** support the broad immunity against any discipline or disciplinary proceedings he asserts here, but only the very narrow restrictions courts have recognized for disciplining prosecutors for exercising prosecutorial discretion.

The first case the AG cites *Elendil v. Mont. Eighth Jud. Dist. Court*, 535 P.3d 1128 (OP 23-0322, July 6, 2023), is an unpublished decision granting a writ of supervisory control reversing the district court's order denying the State's motion to dismiss a revocation petition, pursuant to a plea agreement (Elendil pled guilty in one case in exchange for the dismissal of a revocation in another). At the revocation hearing, the prosecutor told the district court that the State would not call any witnesses and advised the court of his obligation to dismiss the petition considering the plea agreement. This Court *sua sponte* took judicial notice of Elendil's guilty plea in the other matter and thereby found that the first count of the revocation petition was supported by a preponderance of the evidence. The Court held:

> In this instance, the court was not merely taking judicial notice but actively assumed a prosecutorial role because it was dissatisfied with

> the prosecution's efforts. By intruding on the prosecutor's discretion, the court violated the separation of powers between the executive and judicial branches of government.

Id. at 5.

Another case relied upon by the AG is *State ex rel. Fletcher v. Dist. Ct. of Nineteenth Jud. Dist. of State of Mont. In & For Cnty. of Lincoln*, 260 Mont. 410, 859 P.2d 992 (1993). There, the AG concluded there was insufficient, untainted evidence on which to continue prosecution of certain criminal cases and directed the County Attorney to file motions to dismiss the charges. The district court refused to dismiss the charges. This Court held the district court intruded on the prosecutorial discretion of the Attorney General and the Lincoln County Attorney and, in so doing, violated the separation of powers between the executive and judicial branches of government. *Fletcher*, 260 Mont. at 417, 859 P.2d at 996.

Unlike *Elendil* and *Fletcher*, no charges against the AG here relate to the exercise of his prosecutorial discretion.

Both *State ex rel. Shea v. Jud. Standards Comm'n*, 198 Mont. 15, 643 P.2d 210 (1982) and *Sheehy v. Comm'r of Pol. Practices for Mont.*, 2020 MT 37, 399 Mont. 26, 458 P.3d 309, likewise are distinguishable. *Shea* held that "disciplinary proceedings should not apply to the decisional process of a judge. Otherwise, judges would be as concerned with what is proper in the eyes of the [Judicial Standards] Commission as with what is justice in the cause." 198 Mont. at 39. Here, the

Attorney General is not a judge, and there are no claims against him involving the decisional process of a judge.

Sheehy held that a Regent's statements about a mill levy did not violate the state's code of ethics because they were "inherently part of her constitutional and statutory duties as a Board of Regents member." 2020 MT 37, ¶ 29. Unlike *Sheehy*, this action does not involve a Regent or the state's ethics code, but a lawyer who violated the MRPC.

The AG's reliance on the *Trump* and *Nixon* cases is likewise misplaced. *See Trump v. United States*, 603 U.S. 593 (2024); *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), which address presidential immunity against criminal and civil liability. Obviously, this action does not involve the President of the United States or any charges of criminal or civil liability.

The AG criticizes the Commission in denying his summary judgment motion for having cited cases concerning Texas Attorney General Paxton and his First Assistant Webster, *Paxton v. Commission for Lawyer Discipline*, 2024 WL 1671953 (Tex. 2024), and *Commission for Lawyer Discipline v. Webster*, 676 S.W.3d 687, 699 (Tex. Ct. App. 2023). Respondent claims the Texas Supreme Court "recently reversed both of those cases" (Objection, p. 60), and has "vindicated" his separation-of-powers argument (Id., p. 62). Neither assertion is correct.

First, according to Westlaw, *Paxton*, *supra*, which is a Texas Supreme Court decision, has not been reversed.

Second, in a decision on December 31, 2024, after the Commission here issued its FOFCOL, the Texas Supreme Court did reverse the Texas Court of Appeals' decision in *Webster*. In doing so, it did ***not*** confer the broad immunity to disciplinary authority that the Respondent claims here. It noted that:

> ***First—and to reiterate yet again—[Webster] claims no entitlement to violate any disciplinary rule. We authorize no such entitlement, either. All lawyers are bound by the rules. The judiciary remains fully capable of vindicating breaches in any context.*** In the narrow circumstance before us, however, we conclude that the separation of powers requires that violations of the sort alleged here—based wholly on representations in initial pleadings—must be addressed directly by the court to whom the pleadings are presented rather than on the commission's purely collateral review. The substance and application of the rules remains fully intact, and so does our separation-of-powers precedent. (Emphasis added).

Webster v. Comm'n for Law. Discipline, No. 23-0694, 2024 WL 5249494, *18 (Tex. Dec. 31, 2024). In so holding, the Texas Supreme Court distinguished *Massameno v. Statewide Grievance Comm.*, 234 Conn. 539, 663 A.2d 317, 337 (1995), "where the Supreme Court of Connecticut rejected the state attorney's extraordinarily broad argument that he could not be disciplined because "*any and all* grievance proceedings pertaining to prosecutors" are "a violation of the separation of powers." *Webster*, *supra*.

The immunity claimed by the AG in this case is much more like *Massameno* than *Webster*. What the AG neglects to tell this Court is that he relied on *Massameno* in seeking summary judgment, claiming that the Commission's exercise of jurisdiction over him violated the Separation of Powers Clause. And because he still makes the same claim, *Massameno* is still instructive.

In Connecticut (as in Montana), the state's highest court has jurisdiction to regulate and discipline members of the bar and "a comprehensive disciplinary scheme has been established to safeguard the administration of justice and designed to preserve public confidence in the system and to protect the public and the court from unfit practitioners." *Massameno*, 663 A.2d at 326. In that case, the following is also undeniably true here:

> All parties recognize that unlike other constitutional officers, prosecutors must perform their constitutional function nearly exclusively in the forum of another branch of government, the judiciary. ***They must also be licensed to practice law by that other branch of government, and in effect, they must depend upon that other branch for proper recognition of their role.*** As we stated previously, it has long been recognized that prosecutors maintain their positions as officers of the court like all other attorneys when they are performing their role as prosecutors . . . and that they must act within recognized principles of law and standards of justice. . .. ***Therefore, the authority underlying a prosecutor's powers merges with his or her complimentary obligations to the judicial process.*** (Citations omitted, emphasis added.)

Id. at 330.

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In Connecticut, as in Montana, the following is also true:

> The judiciary is ultimately responsible for the enforcement of the court rules and must use its inherent power over the administration of justice to prevent action that undermines the integrity of the system. . .. Because the functions of a prosecutor clearly are an integral part of the judicial process, and because the judicial branch has an overlapping interest in the administration of justice, the judicial branch must be able to exercise its own power of supervision over the judicial process and the attorney who must be accountable to the court. (Citations omitted).

Id. at 332.

In rejecting Massameno's separation of powers argument, similar to the AG's here, the Court held:

> They argue that such power lies exclusively within the executive branch of government and, furthermore, that any attempt by the judicial branch to regulate the ethical conduct of prosecutors is an unconstitutional interference with the essential functions of another branch of government. We reject their unconditional attack and conclude that the separation of powers doctrine does not obliterate the obligation and authority of the judicial branch to investigate and discipline prosecutors.

Id. at 337.

The *Massameno* Court concluded that the Separation of Powers doctrine does ***not*** alter the obligation and right of judicial branch to investigate and discipline prosecutors for professional misconduct. The same conclusion is warranted here.

Lastly, citing no Montana authority, the AG suggests that since he is an elected official, the Court should not adjudicate this matter under prudential considerations. However, this proceeding is not a political question; it is a

disciplinary case against a member of the State Bar of Montana, charged with violating the MRPC. While the AG may wish to make it a political matter, wishing it does not make it so.

J. Application of the MRPC to the AG's Misconduct Does Not Violate the First Amendment.

The AG contends that, "[w]ere 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." (Objection, p. 19).

As noted in Sections V.B-D, above, there is nothing "new or expansive" about applying MRPC 3.4(c), 8.2(a), or 8.4(d) to the AG's misconduct here. Rather, as explained in detail above, the grounds for disciplining the AG's misconduct under each of those Rules are firmly established by the plain language of the Rules and an extensive body of case law supporting their application to this case. Likewise, the First Amendment considerations under each of those Rules are addressed in Sections V.B-D, above. So, they will not be repeated here.

K. The Recommended Discipline is Appropriate.

As noted in the Introduction to this brief, the AG's unprecedented conduct has necessitated these proceedings. Sadly, his knowing, willful, and repeated offenses of undermining public confidence in the judicial system have been aggravated by his refusal to acknowledge the wrongful nature of his conduct.

After hearing all the evidence, weighing the credibility of the various witnesses, and taking all the facts and circumstances into consideration, the Commission recommended that the egregiousness of the AG's Rules violations warrant a 90-day suspension. That is not "goading" this Court to do anything. That is the Commission's job.

VI. CONCLUSION

Contrary to the AG's position, this case is not about the Legislature "losing" or the Judicial Branch "winning." The AG is a constitutional officer, representing a governmental agency, but first and foremost, he is an attorney. And he, like any every other member of the bar, is subject to Court's disciplinary authority under the Constitution. There are no charges in the Complaint against a branch of government, nor any that would "exacerbate" perceived "conflicts" or tensions between the branches of government. The only party who has been steadfast in making this attorney disciplinary matter a governmental branch dispute is the AG himself. Attorneys must advance the desires of the client, but within the confines of the MRPC. That is what this matter has always been about.

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ODC respectfully asks the Court to deny the AG's objections and accept and adopt the Commission's recommendation for discipline.

DATED this 24th day of January 2025.

OFFICE OF DISCIPLINARY COUNSEL

/s/ Timothy B. Strauch

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CERTIFICATE OF COMPLIANCE

I certify that this principal brief is printed with a proportionately spaced Times New Roman 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 21,226 words, excluding the Tables, Certificate of Service and Certificate of Compliance.

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