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

IN THE MATTER OF AUSTEN MILES KNUDSEN, An Attorney at Law, Respondent.	Supreme Court Cause No. PR 23-0496 ODC File Nos. 21-094 **FINDINGS OF FACT CONCLUSIONS OF LAW AND RECOMMENDATION**

The Complaint filed in this matter by the Office of Disciplinary Counsel (ODC) came on for a contested hearing before an adjudicatory panel of the Commission On Practice (COP) on Wednesday, October 9, 2024. Timothy B. Strauch appeared on behalf of ODC; Christian B. Corrigan, Tyler Green, Shane P. Coleman and Mark D. Parker appeared on behalf of the Respondent. Members of the panel participating in the hearing were Randall S. Ogle, Chair, Carey Matovich, Mike Lamb, Elinor Nault and Troy McGee.

INTRODUCTION/PROCEDURAL POSTURE

Before this adjudicatory panel is the 41 count Complaint dated 9/5/2023 filed by the Office of Disciplinary Counsel (ODC), against the Respondent alleging

multiple violations of Montana Rules of Professional Conduct (MRPC) 3.4.(c), 5.1(c), 8.2(a), 8.4(a) and 8.4(d). The foundation for those charges, detailed in the Complaint Counts 1-36, are the published declarations in Pleadings filed with various courts and correspondence of the Respondent or his subordinates, and all exhibits Stipulated to and admitted into the record of these proceedings; see chronologically referenced Exhibits 11, 13, 16, 17, 19, 20, 26 and 30. In addition, Counts 37-41 of the Complaint arise from alleged violations of the mandate set forth in exhibit 24, also admitted over objection.

This matter has been pending before the COP for over a year, and was the subject of substantial Motion Practice by the parties, which continued until the hearing dates of October 9-10, 2024. At all times the parties and their counsel have conducted themselves professionally and in compliance with the Rules. At the time of the hearing the parties presented Opening Statements, presented witnesses and evidence, and made Closing Arguments. At the conclusion of the hearing the matter was taken under advisement by the adjudicatory panel pending issuance of its Findings of Fact, Conclusions of Law and Recommendations.

DISCUSSION

A. Scope of Proceedings

We start by recognizing the limited scope of the issues before the COP. The decisions of the Montana Supreme Court and the Order of the United States Supreme Court in the underlying matter are final. And while the background disputes during which the conduct at issue arose provide context for what happened, the issues presented to the COP are strictly and necessarily limited to the "conduct" of the Respondent that is the subject of the Complaint. The question presented is quite simply whether the conduct detailed in the Complaint complies with the plain meaning and spirit of the MRPC. In that regard, Respondent admits in his Amended Answer that he, along with every attorney admitted to practice law in the state of Montana, is subject to the MRPC; that his conduct is governed by those Rules; and that the Montana Supreme Court has exclusive jurisdiction over this matter. See Respondent's Amended Answer at pgs. 16-17, paragraphs 1 & 3.

B. Factual Record

Per the parties' presentations and submissions, there is 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. The COP has given due consideration to the background factual context, which was presented to the COP by the parties through

their respective witnesses and exhibits, largely unchallenged. 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.

C. Representation

As Respondent testified, when approached by the Montana Legislature, his office had a choice and considered whether to align itself with the Legislature as its counsel against other duly elected state-wide officials, i.e., the justices of the Montana Supreme Court. Of course, the Legislature had its own counsel and was free to retain any private attorney it desired. The Legislature elected to request that the state's Attorney General, the highest legal officer of Montana, advance its position, and he agreed to do so.

D. Emergency

Per the record before us, the "emergency" focused on by the Respondent's counsel as vindication for his conduct, is one contributed to or largely created by his client. As the testimony of the witnesses established, the self-described Freedom of Information Act (FOIA) requests and the follow up legislative Subpoena issued by the Legislature and advanced by the Respondent to obtain records routinely maintained by the Court Administrator, required a broad-based production of documents and almost immediate compliance. Of course, FOIA and subpoena processes for obtaining information requested or required to be produced exist at all levels of state and federal government. Those processes are attended by appropriate due process considerations related to production of documents such as 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. Every attorney is familiar with those processes for production, the necessity for notice to affected parties, the opportunity to limit production to those things appropriately the subject of a FOIA request or subpoena (via limits on requested information, privilege logs, in-camera review, etc.), i.e., due process. None of those procedural safeguards or niceties attended the situation presented.

Per the testimony provided to the COP, in this case the Legislature issued a subpoena for judicial records to the state's administrative website custodian, provided no advance Notice to the Court Administrator, required production the following day, and only then provided an after-the-fact "courtesy" notice to the Court Administrator, late in the day on a Friday afternoon, near or after the close of business. Then, when the Court was importuned to address what it was advised was an "emergency," exception was taken to the fact it acted immediately, "extraordinarily" over a weekend, to attempt to claw-back, review and appropriately limit production of those items. When the Supreme Court Administrator received the "courtesy" copy of the subpoena for judicial records, she retained Randy J. Cox, Esq. to represent her in responding to the subpoena. Mr. Cox testified at length regarding his efforts to arrange for informal corrective action, and an opportunity to appropriately respond to the Legislature's request and that he received no substantive response. Further, at the time of hearing, it was admitted that the documents already had been received by the Legislature with some apparently distributed to the media, and possibly otherwise distributed before the Court Administrator ever had chance to react, i.e., as the parties described it, after the horses were already out of the barn. 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.

E. Attorneys' Responsibilities/Oath of Office

We are urged by Respondent's counsel to excuse the referenced conduct, or at a minimum to exercise leniency in favor of the Respondent, on two bases: the unique nature of the self-described "emergency" constitutional crisis described by the Respondent during which the alleged violations arose, and the argument, that holding the Respondent 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. 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.

As in all aspects of life and litigation, the parties are free to think what they will---but their attorneys, regardless of whom they represent, are required to live by the word and spirit of the Rules of Professional Conduct, to act as "officers of the court," and to never engage in "conduct that is prejudicial to the administration of Justice." MRPC 8.4(d). The principles set forth by the Supreme Court of the United States in *Marbury v. Madison*, 5 U.S. 137 (1803) have been the law of the land in our representative democracy since its infancy. That reality has preserved and advanced our Constitutional government, our way of life, and provides the foundation for the justice system upon which all citizens depend. No lawyer is unaware of that fact. And regardless of what our clients may desire or demand in any context, all attorneys are required, at all times, to abide by the Law of that Land and the applicable Rules of Professional Conduct.

The duty to refrain from inappropriate conduct and language, which evidences a highly visible disregard for our justice system—by someone sworn to enforce and abide by it —is in the first instance the responsibility of each individual attorney, and failing that, the COP. Admittedly, the failure to require adherence to these principles is nothing short of an invitation to anarchy. If there is no place where individuals and entities can expect to receive justice—if the courts cannot preserve their integrity—we are all lost. Therefore, unavoidably, conduct in derogation of those obligations must be addressed.

F. Respondent's Conduct

In a nutshell, reduced to its most fundamental and unavoidable reality, the Respondent in his role as an attorney sworn to abide by the MRPC has been charged with repeatedly engaging in conduct that publicly accuses judicial officers with misconduct, i.e., corruption, self-dealing, misstating facts, nondisclosure, failure to fulfill their sworn duties, etc. Those declarations are contained in Pleadings and correspondence admitted into the record in these proceedings, and referenced above. In closing arguments, Respondent's counsel argues that some of the "strong language" used by the Respondent here has found its way into other judicial opinions cited to the COP, such as the words "ludicrous", "perverse" and

"defies common sense." The COP notes that in making such arguments counsel disregards completely the context, and more importantly, stopped short of referencing the more incendiary, disrespectful and inappropriate words and phrases detailed in the exhibits before the COP. Compellingly, the testimony of the Respondent is unequivocal and undisputed:

1) he denies that his office's declaration that his client will not abide by the Montana Supreme Court's Order, and will in fact enforce the Legislature's contrary directive in the face of that Order, is violative of the MRPC (Ex. 11) (see Counts 1-6);
2) he denies that the Pleading filed by his office restating its position that neither the Court's April 11, 2021 Order or an Order granting the pending Petition in the *McLaughlin* case will bind his client or be abided by (Ex. 13) (See Counts 7-9);
3) he denies that accusing the Court of being irrational and ludicrous is violative of the MRPC (Ex. 16) (See Counts 10-14);
4) he denies that accusing the Court of judicial misconduct, of serving its own self-interest in violation of the law and Montana Code of Judicial Conduct, and of "actual impropriety" in publicly filed pleadings, is violative of the MRPC (Ex. 17) (See Counts 15-18);

5) he denies that his language accusing the Court of: impropriety, that declaring that language in its Order is "inaccurate almost to a word," that the Court has taken an adversarial position in the proceedings, that the Court is engaging in incorrect and inappropriate conduct, and then directing the Court as to its responsibilities, is violative of the MRPC (Ex. 19) (See Counts 19-24);

6) he denies that language accusing the Court of bias of serving its own institutional and personal interests, of procedural irregularities, and of misrepresenting the Justice's participation in polls conducted by the Montana Judges Association, all within publicly filed pleadings, is violative of the MRPC (Ex. 20) (See Counts 25-28); [1]

7) he denies that accusing the Court of self-interest, misconduct, of inappropriate confiscation, and numerous misstatements of the facts, is violative of the MRPC (Ex. 26) (See Counts 29-32);

8) he denies---in the face of the United States Supreme Court's Order denying his Petition for Writ of Certiorari---that language accusing the Court of "judicial self-dealing" perhaps "unprecedented in the Nation's history," of "concealing judicial branch misbehavior,"

[1] While asserting that the language used here, and elsewhere in the referenced exhibits, does not constitute an allegation of dishonesty, Respondent readily acknowledges that calling Judges liars would be "horribly inappropriate", "disrespectful" and something he "would never" do. See e.g. October 9, 2024 transcript at pp. 171-173.

misrepresentation/lying, "ensuring a result that bailed themselves out," is violative of the MRPC (Ex. 30) (See Counts 33-36);

9) he denies that failing to comply with the Court's July 14, 2021 Order requiring immediate return of inappropriately disclosed documents, without explanation or seeking a Stay or other relief from that Order, is a violation of the MRPC (Ex. 24) (See Counts 37-41).

The Respondent testified repeatedly that he considers none of the above conduct to be contemptuous, undignified, discourteous and /or disrespectful of a tribunal, nor to constitute unjustified knowing disobedience of the Rules applicable to his conduct. Further, he testified that such conduct does not constitute a failure to uphold the dignity of the court, and was not prejudicial to the administration of justice.

We turn now to a determination of whether his conduct evidences violation of the applicable Rules by "clear and convincing" evidence. And, if so, what consequence should attend.

FINDINGS OF FACT

1. Mr. Knudsen was sworn as an attorney of law in the State of Montana on October 7, 2008 and took an oath that includes the obligations to maintain the respect due to courts of justice and judicial offices, 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). He assumed office as the Montana Attorney General ("AG") on January 4, 2021, and continues to serve as AG through the filing of this Complaint.

2. Among other things, it is Mr. Knudsen's duty as AG to prosecute or defend all causes in the Montana Supreme Court in which the State or any officer of the State in the officer's official capacity is a party or in which the State has an interest.

3. 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 SB 140. The AG appeared as counsel of record in *Brown* on behalf of the Respondent, Governor Gianforte.

4. 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 had recused himself and called in Judge Krueger. 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 ("McLaughlin") and the Supreme Court Justices and district court judges, purportedly "consistent with [his] ethical obligations" under MRPC 8.3. (Ex. 5)

5. Contrary to Oestreicher's assertion, if he or any other attorney with the AG 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.

6. On April 8, 2021, the Legislature issued a subpoena signed by Sen. Keith Regier, to Misty Giles, Director of Administration of the Department of Administration, demanding the production 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 e-mails 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)

7. Court Administrator McLaughlin testified that her 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.

8. In response to the April 8 subpoena, sometime after receiving the subpoena on April 8 and by April 9, Giles produced to a person or persons on behalf of the Legislature over 5,000 responsive emails in electronic format on two USB drives.

9. On April 11, 2021, the Supreme Court issued a Temporary Order in *Brown* 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)

10. On or about April 12, 2021, a person or persons on behalf of the Legislature provided the AG with two USB drives containing over 5,000 emails produced by Giles.

The AG processed, copied, and reviewed the files contained on the two USB drives and thereafter retained custody, possession, and control over both the two USB drives and the files processed and copied from those drives.

11. 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)

12. Also on April 12, 2021, 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*"). The AG entered an appearance on behalf of the Legislature in *McLaughlin*. (Ex. 12)

13. 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:

A. "Original jurisdiction here, if accepted, creates a conflict of interest for the Court in that the Court's employee, though attempting to skirt this fact by styling the suit solely in her personal capacity, is acting in her representative capacity for the Court, and is the Plaintiff. This inherent bias requires recusal of, at minimum, the entire panel of Justices."

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

C. "McLaughlin's current Petition seeks yet another Court order which will not bind the Legislature and will not be followed." (Ex. 13)

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

15. On April 18, 2021, 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. (Ex. 16)

16. On April 30, 2021, the AG, on behalf of the Legislature, filed in *Mclaughlin* a Motion to Disqualify all Justices, alleging the Justices had a clear conflict of interest in hearing a case involving the Court's Administrator and staff. Among other things, it includes the following statements:

A. "A quick recitation of the facts demonstrates the bewilderingly obvious conflict of interest this Court faces with the parties and subject matter at issue here. This conflict justifies and requires summary disqualification of each member of this Court."

B. "That weekend transaction, which necessarily included ex parte communications that have neither been acknowledged nor disavowed, resulted in the Court stifling the production of its own public records held by McLaughlin."

C. "Members of this Court have an obligation to promote confidence in the independence, integrity, or impartiality of the judiciary, see MCJC 1.2, but these actions do precisely the opposite."

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

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

F. "We are well beyond the point where the Court's impartiality and independence 'might reasonably be questioned.' This is not merely the appearance of impropriety. This is actual impropriety." (Ex. 17)

17. Also on April 30, 2021, the AG, on behalf of the Legislature, filed in *McLaughlin* a Response to the Petition, challenging the Montana Supreme Court's jurisdiction. Among other things, the Response stated McLaughlin "prefer[ed] instead the sanctuary of her bosses' conflict of interest."

18. On May 12, 2021, the Supreme Court issued an Opinion and Order in *McLaughlin* denying the Legislature's Motion to Recuse Justices, *McLaughlin v. Legislature*, 2021 MT 120, 404 Mont. 166, 489 P.3d 482. (Ex. 18)

19. On May 19, 2021, Knudsen wrote a letter on AG letterhead to the Supreme Court in response to its May 12, 2021, Order, "to object to some of the Court's statements, which appear to me nothing more than thinly veiled threats and attacks on the professional integrity of attorneys in my office." A copy of that letter is filed in the Court's docket in *Mclaughlin*. (Ex. 19)

20. In his May 19, 2021, letter to the Justices, Mr. Knudsen acknowledged that attorneys in his office "delivered strong statements from the Legislature regarding the Court's lack of jurisdiction, the invalidity of resultant orders, and the

impropriety of this Court presuming to 'settle' its dispute with a coordinate branch of government." (Ex. 19)

21. In his May 19, 2021, letter to the Justices, Mr. Knudsen 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)

22. Mr. Knudsen's May 19, 2021, letter to the Justices contains the following statements, among others:

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

B. [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."

C. "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."

D. "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)

23. 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. Among other things, it contains the following statements:

A. "The Court Overlooked and Misstated Material Facts."

B. "And if those [emails] are anything like some of the other intemperate emails already publicly available, the Court and its members have an obvious interest in providing a specific answer to that dusty old legal question about the scope of legislative subpoena power."

C. "The Legislature has repeatedly stated that the Court's failure to disclose and produce ex parte communications between the justices and the Court Administrator demonstrates actual bias."

D. "And the Chief Justice's emails betray a disdain for the Legislature that amounts to actual bias."

E. "...the Court's multiple procedural irregularities (granting unnoticed weekend relief to nonparties for nonparties, refusing to disclose ex parte communications, etc.)"

F. "Here, the Justices are institutionally and personally interested in the outcome, so their ability to be impartial is justifiably suspect."

G. "Specifically, the Court asserts that no Justice 'participate[d]' in the polls conducted by the MJA. Respectfully, public records tell a different tale."

H. "[I]t is perverse to suggest that this Court will determine whether its own polling practices are misconduct."

I. "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')."

J. "Here, however, the disqualifying interest is not hypothetical. It is evident in the petitioning party (the Court's Administrator), her objectives (to prevent

disclosure of more embarrassing and ethically dubious judicial emails; to use judicial power to curtail legislative power in a dispute between the judiciary and the Legislature), and the Court's multiple procedural irregularities (granting unnoticed weekend relief to nonparties for nonparties, refusing to disclose ex parte communications, etc.) that disqualifying interests are clear and present."

K. "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)

24. On June 10, 2021, the Court issued its Opinion and Order in *Brown*, *Brown v. Gianforte*, 2021 MT 149, 404 Mont. 269, 488 P.3d 548. (Ex. 21)

25. On June 22, 2021, the Legislature withdrew its subpoenas to McLaughlin and the Justices. (Ex. 22)

26. On July 14, 2021, the Supreme Court issued its Opinion and Order in *McLaughlin*, *McLaughlin v. Mont. State Legislature*, 2021 MT 178, 405 Mont. 1, 493 P.3d 980. (Ex. 24)

27. Among other things, the Supreme Court ordered the following:

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c. The Montana Legislature and its counsel are permanently ENJOINED from disseminating, publishing, re-producing, or disclosing in any manner, internally or otherwise, any documents produced pursuant to the subject subpoenas; and

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 v. Mont. State Legislature, 2021 MT 178, ¶ 57. (Ex. 24)

28. As of the date of the Supreme Court's July 14, 2021 Order, the AG still had custody, possession, and control over both the USB drives produced by Giles and the files processed and copied from those drives. However, the AG did not immediately return to McLaughlin those materials as ordered. The AG did not return any files to McLaughlin until at least March 22, 2022, followed by additional materials on April 15, 2022.

29. 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:

A. "*Mazars* can't support the circumstances here, where the Montana Supreme Court is hearing a case in which it is an interested party...."

B. "Simply ignoring why we're here doesn't change why we're here—questionable judicial conduct."

C. "The Court lacks prudential standing, violates due process, and worsens an already disqualifying conflict of interest."

D. "The Opinion, on the other hand, is an unwarranted confiscatory decree."

E. "The Court's dismissive treatment of the Legislature's investigation into the records-retention practices of judicial officers blinks reality."

F. [Referencing *McLaughlin*, ¶ 45] "That is a stunning, counterfactual denial."

G. "The Court's newfound power furthers the mistaken notion that the judiciary is immune to independent inquiry. These advisory statements must be withdrawn."

H. "This controversy began with an unnoticed weekend order in a case the present defendant was not party to, facilitated by ex parte communications."

I. "The Legislature therefore incorporates its prior arguments and encourages the Court to take this last chance to defuse the constitutional tinder box it has kindled."

J. "Apart from that, the Opinion contains numerous misstatements, ..." (Ex. 26)

30. On September 7, 2021, the Court denied the Legislature's Petition for Rehearing in *McLaughlin*. (Ex. 27)

31. 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, and placed on the docket December 9, 2021, as No. 21-859.

Among other things, the Petition contains the following statements:

A. "Judicial self-dealing on this scale might be unprecedented in the Nation's history."

B. "It [the Montana Supreme Court] reached out to facilitate a case brought by its appointee to conceal its misbehavior."

C. "Manifold conflicts arose at every step of litigation, and the court ignored them all."

D. [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."

E. "Look how the *McLaughlin* case started—with an unnoticed, weekend motion and court order, facilitated by still undisclosed *ex parte* communications, in a case to which neither McLaughlin nor the Legislature were parties."

F. "From the first, the six *McLaughlin* Justices determined to pilot this dispute to their desired outcome."

G. "The Chief Justice's communications showed that the fix was in."

H. "The Justices below harbored direct interests in the outcome of *McLaughlin*."

I. "They [the six *McLaughlin* Justices] charged ahead, ensuring a result that bailed themselves out of an investigation prompted by their own inappropriate behavior."

J. "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."

K. "It bears repeating: the Montana Supreme Court's own actions—not the Legislature's—created and deepened the Justices' disqualifying interests." (Ex. 30)

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

CONCLUSIONS OF LAW

Based on the foregoing discussion and Findings of Fact, the Commission reaches the following legal Conclusions:

1. Respondent's conduct constitutes a violation of Rule 3.4(c) MRPC.

2. Respondent's conduct constitutes a violation of Rule 5.1(c) MRPC.

3. Respondent's conduct constitutes a violation of Rule 8.2(a) MRPC.

4. Respondent's conduct constitutes a violation of Rule 8.4(a) MRPC.

5. Respondent's conduct constitutes a violation of Rule 8.4(d), MRPC.

CONCLUSION

The COP is placed firmly on the horns of a dilemma. 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.

Nonetheless, Respondent requests, via his counsel, in Closing, that we "consider the context" in which the violations arose, and further suggests that holding the Respondent accountable for his conduct may have further consequences. Again,

the COP doesn't enjoy the luxury of considering concerns over such matters: our singular focus, the ONLY issue, is the conduct of the Respondent measured against the admittedly applicable Rules. Considering the "context," as the Preamble to the MRPC directs the COP, changes none of the applicable analysis. It is the failure to hold attorneys accountable for their conduct, regardless of the circumstances, wherein lies the true terror for our justice system. As detailed above, the argument is that the conduct that is the subject of the Complaint here arose out of an "emergency" or "constitutional crisis," and that these circumstances somehow license an attorney to set aside the Rule of Law and his professional obligations and responsibilities. The COP concludes that precisely the opposite is true, and that fact, stripped to it relevant essentials, is the overriding, compelling "context." 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.

The honor of serving as an attorney at law in Montana, as well as Montana's Attorney General is attended by unique and important responsibilities. But again, foundationally, the Respondent's underlying responsibility is to adhere to and advance the Rule of Law, which is the foundation of our free society, for the benefit of all Montanans. In exchange for the privilege of practicing law, representing our fellow citizens, every attorney is charged with the responsibility of advancing each client's goals: but only by conduct in compliance with the

obligations that attend. Coming full circle, per the record before the COP, with limited exception, the charges arise not so much from "what" was done by the Respondent, but "how" he carried out his duties. 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.

RECOMMENDATION

In addressing the recommended consequences for the Respondent's conduct at issue here, we are guided not only by his oath as an attorney, but also by the duties of the office and responsibilities which he has undertaken as Montana's Attorney General, his acknowledgement that in "hindsight" less inflammatory language "should" have been implemented during the course of his representation, and his consistent denial that any of the conduct complained of is violative of his oath as an attorney or the applicable Rules. Further, we fully appreciate, as the Respondent testified, that he was under pressure from the Legislature, a situation verified by Respondent's witnesses, who directed him to press the dispute with the Court to its ultimate conclusion. See e.g. October 9, 2024 transcript @ p. 153.

Having undertaken that representation, however, his arguments serve only to justify and explain the steps taken to advance his client's position, not "how" those directives were carried out. The "how" remained within the control of the Respondent who, in turn, was governed by the Rules and oath pursuant to which his privileged status as an attorney was granted. There is nothing within the Rules of Professional Responsibility that limits or curtails the Respondent's ability to effectively and completely advance his client's position or address its concerns. Such matters were all susceptible of being advanced professionally and consistent with the Rule of Law and the MRPC. Attorneys are not engaged in trial by combat, and are constrained to "color inside the lines." To require the minimum of common professional courtesy required by the Rules costs the parties nothing of substance, and preserves the integrity of the justice system which is the foundation for the Rule of Law that serves everyone.

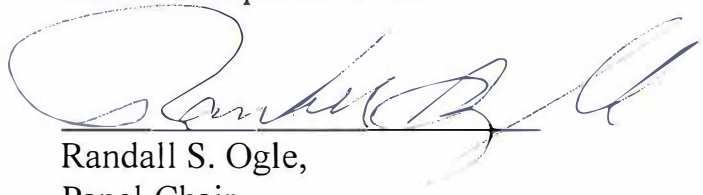
Accordingly, it is the Recommendations of the Commission On Practice that the Respondent, Austin Miles Knudsen, be suspended from the practice of law for a period of ninety (90) days.

In addition, the Respondent shall pay the costs of the proceedings before the Commission On Practice.

The decision of the Adjudication Panel of the Commission on Practice was unanimous.

DATED this 23rd day of October, 2024.

COMMISSION of PRACTICE of the
Montana Supreme Court



Randall S. Ogle,
Panel Chair

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of October, 2024, I served a copy of the foregoing *FINDING OF FACTS, CONCLUSIONS OF LAW, AND RECOMMENDATION* via electronic service to the following:

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