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

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

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

Shane P. Coleman
Billstein, Monson & small PLLC
1555 Campus Way, Suite 201
Billings, MT 59102
Phone: (406) 656-6551
Email: shane@bmslawmt.com

Attorneys for Respondent

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

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

INTRODUCTION

Respondent Attorney General Austin Knudsen respectfully requests that the Commission on Practice ("Commission") vacate the October 9–11 disciplinary hearing. Alternatively, Respondent asks the Commission to stay the hearing and allow Respondent to file a writ of supervisory control to the Montana Supreme Court.

Throughout these proceedings, the Adjudicatory Panel has piled on one due process violation after another. It failed to perform adequate conflicts checks on its members, failed to exercise independent judgment in its decisions, prevented Respondent from being heard on pretrial evidentiary issues, and violated its own rules.

At least two of the five members of the Panel had obvious and direct conflicts of interest that demanded disqualification, yet neither panelist recused themselves. It wasn't until Respondent moved to disqualify that one of the conflicted panelists recused. The other conflict panelist has yet to recuse. That panelist worked as the Montana Supreme Court Administrator and was employed by the Judicial Nominating Committee, and she lost her job because of the Legislature's judicial reform efforts that led to the litigation in which Respondent is alleged to have committed the various ethical violations under consideration here. Worse still, Respondent doesn't know whether either conflicted panelist participated in any pretrial matter because—a mere week before the hearing—the Commission has yet to disclose that information. Beyond the conflicts issues, the Panel twice ruled on ODC's opposed motions for relief—to permit remote testimony of a key witness and to exclude crucial expert testimony—without allowing Respondent to file a response brief. These decisions flout

the constitutional minimum for due process—an opportunity to be heard. Nor were these decisions merely technical violations; both decisions undermine Respondent's ability to mount a defense against ODC's unprecedented 41-count ethics complaint.

Given the Panel's course of conduct in these proceedings, there are serious questions over its impartiality, and its multiple due process violations taint these proceedings beyond repair. If the Commission wishes to move forward with an ethics complaint, it must do so with fair and impartial adjudicators after allowing Respondent to be heard. At a minimum, due process requires the Commission to vacate the hearing, along with all accompanying orders, and dismiss the panelists. Anything short of that remedy constitutes reversible error.

BACKGROUND

The relevant facts here bear repeating. In 2021, litigants challenged the constitutionality of SB 140, which changed the method for filling mid-term judicial vacancies in Montana. Those changes included authorizing the Governor, instead of the Judicial Nominating Commission ("JNC"), to fill judicial vacancies. Opponents of that bill filed an original action in the Montana Supreme Court seeking to declare SB140 unconstitutional. *Brown v. Gianforte*, 2021 MT 149, 404 Mont. 269, 488 P.3d 548. Due to his public lobbying against SB 140, Chief Justice McGrath recused from *Brown* and selected District Court Judge Kurt Krueger to hear the case in his stead. Under the Montana Supreme Court's, Associate Justice James Rice was appointed Acting Chief Justice for *Brown*.

Not two weeks after that original action was filed, emails became public showing that Chief Justice McGrath was not the only member of Montana's judiciary who had taken a position on SB140. In January 2021—when the Legislature was still considering SB140—Supreme Court Administrator Beth McLaughlin emailed every Montana Supreme Court Justice and every Montana district court judge using government email accounts, asking that they "review and take a position on" SB140. The email included a click-poll, to which many state judges responded. In addition, some judges' individual views became public when they chimed in on the long chain of "reply-alls." Many simply declared their opposition. Others offered more robust explanations. Still others went further, explicitly stating their view that SB140 was unconstitutional. Judge Krueger, the Chief Justice's replacement in *Brown*, specifically offered his views: "I am also adamantly oppose [sic] this bill." Learning this, the State quickly moved to disqualify Judge Krueger and any other judicial officers who took a position on SB140 before it was enacted. Judge Krueger recused within hours.

In early April 2021, the Montana Legislature issued two legislative subpoenas. The first was to Supreme Court Administrator McLaughlin, seeking all public records in her possession related to the SB140 poll. When the Legislature saw that McLaughlin's response (on an extended deadline) included only two emails—along with an apology and an explanation that she had not retained emails—Senate Judiciary Chairman Keith Regier then issued an April 8 legislative subpoena to the Director of the Department of Administration ("DOA") for McLaughlin's emails during the 2021 Legislative Session. On Friday, April 9, 2021, the Department partially complied

with the subpoena, providing a 2,450-page collection of documents, including more emails related to SB140 and other proposed legislation.

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

On April 12, 2021, McLaughlin filed her own lawsuit—styled *McLaughlin v. Montana State Legislature*—as an original action at the Montana Supreme Court. That original action sought to quash the Legislature's April 8 subpoena. On April 14, the Legislature not only moved to dismiss *McLaughlin* but also formed a select committee to investigate judicial document retention, judicial lobbying, and other potential judicial impropriety. On April 15, Legislative leadership issued new subpoenas—to McLaughlin and to each member of the Montana Supreme Court—ordering their appearance at an April 19 meeting of the select committee and the production of (a) McLaughlin's computer and (b) documents related to judicial branch polls on pending legislation and to judicial lobbying. On April 16, in response to another emergency motion from McLaughlin, the Montana Supreme Court issued a combined order in McLaughlin and in the SB140 merits challenge. That combined order

quashed not only the April 8 legislative subpoena to DOA but also the second legislative subpoena to McLaughlin and the legislative subpoenas issued to the Justices the day before.

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

Justice Rice's lawsuit was based entirely on the events leading up to and including *Brown* and *McLaughlin*. *See, e.g.*, Br. of Pet'r in Supp. of Petition for Dec. J., at 1 (Apr. 15, 2021), attached as Ex. D ("The Court is familiar with the facts giving rise to this dispute. Those facts are set out in the Court's Preliminary Injunction Order, May 18, 2021, and in *McLaughlin v. Montana State Legislature*, 2021 MT 120, 404 Mont. 166, 489 P.3d 482 ("*McLaughlin I*").").

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

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

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

Respondent moved for summary judgment in July 2024, *see* Mot. Summ. J., Dkt. 19 (July 3, 2024), and briefing was completed in early August 2024, *see* Opp'n Br., Dkt. 25 (July 29, 2024); Reply Br., Dkt. 29 (Aug. 7, 2024). A month later, the Commission denied Respondent's motion. Order on Mot. Summ. J., Dkt. 34 (Sept. 10, 2024). After the Commission's order, Respondent discovered that two members of the Panel had disqualifying conflicts of interest. So later that month, Respondent moved to disqualify Ms. Klanke, *see* Mot. Disqualify, Dkt. 42 (Sept. 19, 2024), which ODC opposed, *see* Opp'n Br., Dkt. 47 (Sept. 24, 2024). The Commission has yet to rule on this motion, but the Montana Supreme Court entered an order replacing Ms. Klanke

on the Panel the next day. *See* MTSC Order, Dkt. 47 (Sept. 25, 2024). Respondent moved to disqualify Ms. Menzie earlier today.

During that same time, ODC moved to allow a key witness—Beth McLaughlin—to testify remotely, *see* Mot., Dkt. 33 (Sept. 5, 2024), and to exclude the testimony of Respondent's expert witness, former Utah Supreme Court Justice Thomas Lee, *see* Mot., Dkt. 54 (Sept. 27, 2024). The Commission granted both of ODC's motions without allowing Respondent to file response briefs within the fourteen days provided for under the Montana Civil Rules. For the McLaughlin motion, the Commission ruled six days later without hearing from Respondent. Order, Dkt. 35 (Sept. 11, 2024). Respondent filed a Rule 60 motion seeking an opportunity to respond, Mot., Dkt. 38 (Sept. 13, 2024), which ODC opposed, *see* Opp'n Br., Dkt. 45 (Sept. 24, 2024). The Commission denied Respondent's motion, claiming that it wasn't a due process violation to rule before a reply brief was filed, *see* Order, Dkt. 63, at 3 (Oct. 1, 2024)—even though Respondent seeks the opportunity to file, not a reply brief (which is optional) but a response brief (which is required). For the Lee motion, the Commission ruled the next business day without hearing from Respondent. Order, Dkt. 59, at 3 (Sept. 30, 2024). Respondent filed a Rule 60 motion to respond earlier today.

LEGAL STANDARD

Proceedings that "adjudicate individuals' interests in life, liberty, or property [must] be free from bias and partiality." *Clements v. Airport Auth.*, 69 F.3d 321, 333 (9th Cir. 1995). Once conferred, a license to practice law may not be revoked or suspended without due process. *See, e.g.*, *Kafka v. Mont. Dep't of Fish, Wildlife & Parks*,

2008 MT 460, ¶38, 348 Mont. 80, 201 P.3d 8 ("[C]ourts have recognized that some licenses may contain property interests … protected by the due process clause."); *State v. VanDyke*, 2008 MT 439N, ¶6, 348 Mont. 372 ("[O]nce issued, a driver's license becomes a property interest that may not be suspended or revoked without the procedural due process guaranteed by the Montana and United States Constitutions."); *see also People v. Varallo*, 913 P.2d 1, 6 (Colo. 1996); *Huckaby v. Ala. State Bar*, 631 So. 2d 855, 857 (Ala. 1993) *Conway v. State Bar*, 767 P.2d 657, 660 (Cal. 1989).

Once a tribunal determines that "due process applies, the question remains what process is due." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). To avoid due process concerns, "the 'opportunity to be heard' is the constitutional minimum." *Doe v. Baum*, 903 F.3d 575, 581 (6th Cir. 2018) (quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)). To determine the process that's constitutionally due, courts balance the three *Eldridge* factors, looking to (1) "the private interest … affected by the official action"; (2) the risk of an erroneous deprivation through the procedures used and the value of any "additional or substitute procedural safeguards"; and (3) the government's interest, including any burdens imposed by more procedural safeguards. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). The notice and hearing required turn on the interests implicated in each case. *Haidak v. Univ. of Mass.-Amherst*, 933 F.3d 56, 72 (1st Cir. 2019) ("The more serious the deprivation, the more demanding the process." (citation omitted)); *State v. Pyette*, 2007 MT 119, ¶14, 337 Mont. 265, 159 P.3d 232 ("procedural safeguards … should reflect the nature of the private and governmental interests involved").

Due process requires, at a minimum, that any hearing be "before an impartial tribunal." *Clements v. Airport Auth.*, 69 F.3d 321, 333 (9th Cir. 1995). And Montana's Due Process Clause, *see* MONT. CONST. art. II, §17, similarly sets the "guiding principle of our legal system" and contemplates tenacious adherence "to the ideal that both sides of a lawsuit be guaranteed a fair trial." *Lopez v. Josephson*, 2001 MT 133, ¶35, 305 Mont. 446, 30 P.3d 326. Actual bias and the high probability of bias both trigger due process concerns. *See Withrow v. Larkin*, 421 U.S. 35, 46-53 (1975). This neutrality principle applies in administrative adjudications and quasi-judicial proceedings. *See Marshall v. Jerrico, Inc.*, 446 U.S. 238, 243 n.2 (1980); *Schweiker v. McClure*, 456 U.S. 188, 195 (1982). The proper procedure to challenge the impartiality of the decision-maker in quasi-judicial proceedings is to request the examiner to withdraw from the case. *See, e.g.*, *Ginsburg v. Richardson*, 436 F.2d 1146, 1151 (3rd Cir. 1971); *Wells v. Apfel*, 2000 U.S. App. LEXIS 26163, at *16 (6th Cir. Oct. 12, 2000); *Idegwu v. Colvin*, 2013 U.S. Dist. LEXIS 163393, at *41 (D. Del. Nov. 18, 2013).

Unless modified by order, Respondent had fourteen days to respond to the ODC's motions for relief. Rule 12(c)(3) of the Rules for Lawyer Disciplinary Enforcement provides that "hearings in disciplinary proceedings shall be conducted in accordance with the Montana Rules of Civil Procedures." And Rule 22(A) of the Rules for Lawyer Disciplinary Enforcement provides that "the Rules of Civil Procedure of the State of Montana apply in disciplinary cases." Rule 2(b), which governs motions practice, provides that "within fourteen days after service of the movant's brief, the opposing party shall file an answer brief which also may be accompanied by

appropriate supporting documents." Mont. Unif. Dist. R. 2(b). The Montana Supreme Court has vacated lower court orders issued before the time provided for a response. *Steinbeisser v. Steinbeisser*, 2024 Mont. LEXIS 61, at *3 (Mont. Jan. 23, 2024) (finding good cause to vacate a district court's order "because the court entered [the order] prematurely and without the benefit of [petitioner]'s response in opposition").

ARGUMENT

During these proceedings, the Panel has committed one due process violation after another. First, it failed to perform adequate conflicts checks on its members, and the presence of two conflicted panelists—Ms. Menzies and Ms. Klanke—taint these proceedings. And second, its failure to provide Respondent an opportunity to be heard on two pre-hearing evidentiary issues severely impaired Respondent's ability to mount a defense.

I. Ms. Menzies' participation taints the proceedings and requires reversal of all decisions she participated in.

The facts and legal issues in ODC's Complaint against the Attorney General are inextricably intertwined with the Legislature's passage of SB140, which disbanded Ms. Menzies's place of employment—the JNC. Ms. Menzies also worked alongside Beth McLaughlin—an essential witness in this proceeding. Ms. Menzies did not notify any party of these self-evident conflicts and presumably participated in the proceedings to date. If Ms. Menzies participated in any part of the proceedings against Respondent, her participation violates the demands of due process. That's because Ms. Menzies's previous employment gives her direct, personal knowledge of

disputed facts in this proceeding—including the credibility of Beth McLaughlin and judicial policies surrounding the retention of public documents.

These conflicts offend due process, the Code of Judicial Conduct, and the Montana Rules of Professional Conduct ("MRPC").

Ms. Menzies must be disqualified. That legal conclusion is not subject to reasonable dispute. *See United States v. Washington*, 157 F.3d 630, 660 (9th Cir. 1998) (quoting *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) ("The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases.")); *see also Bullman v. State*, 2014 MT 78, ¶ 17, 374 Mont. 323, ¶ 17, 321 P.3d 121, ¶ 17 (holding "personal knowledge of facts that are in dispute" require disqualification).

But Ms. Menzies's disqualification doesn't cure any prejudice from her involvement. If she already participated in this matter in any capacity or shared her personal knowledge of disputed facts with other panelists, Respondent's due process rights have already been violated. The Commission must then vacate the hearing and any rulings Ms. Menzies participated in. *See Mach v. Stewart*, 137 F.3d 630, 633 (9th Cir. 1998) (sharing personal knowledge related to child testimony "infected the process from the very beginning" and required conviction reversal); *United States v. Gonzalez*, 214 F.3d 1109, 1113 (9th Cir. 2000) (sharing personal knowledge related to cocaine tainted jury in cocaine trial).

The Commission must vacate the hearing, rescind prior orders, and dismiss the panelists to cure prejudice from Ms. Menzies's participation.

II. Ms. Klanke's participation requires the Commission to vacate the hearing and dismiss the panelists.

On September 19, 2024, Respondent moved to disqualify Adjudicatory Panelist Patricia Klanke ("Ms. Klanke") due to her representation of Montana Supreme Court Justice James Rice in *Rice v. Montana State Legislature*, BDV-2021-451, Mont. First Judicial Dist., Lewis & Clark County (2021). Respondent also sought clarification on Ms. Klanke's involvement in the proceedings and on what remedial action the Commission has taken to cure prejudice stemming from that participation, and to vacate any decision Ms. Klanke participated in.

Ms. Klanke recused herself from the Panel, apparently agreeing with Respondent that she cannot participate in this proceeding. But on the eve of the hearing, the Commission has still not disclosed the extent of Ms. Klanke's involvement in these proceedings or what it has done to cure the taint of her involvement. The unavoidable conclusion is that Ms. Klanke participated in deliberations and Commission rulings before she recused. That raises a constitutional concern for several reasons.

First, as Respondent previously explained, one biased member of a tribunal is sufficient to taint the entire panel and deprive a plaintiff of procedural due process. *Stivers*, 71 F.3d at 748 ("Whether actual or apparent, bias on the part of a single member of a tribunal taints the proceedings."); *see Williams*, 579 U.S. at 15 ("[I]t does not matter whether the disqualified judge's vote was necessary to the disposition of the case. The fact that the interested judge's vote was not dispositive may mean only that the judge was successful in persuading most members of the court to accept his or her position. That outcome does not lessen the unfairness to the affected party.");

Hicks v. Watonga, 942 F.2d 737, 748 (10th Cir. 1991) ("Litigants are entitled to an impartial tribunal whether it consists of one man or twenty and there is no way which we know of whereby the influence of one upon the others can be quantitatively measured."); *Antoniu v. SEC*, 877 F.2d 721, 726 (8th Cir. 1989) (vacating commission decision and remanding for de novo reconsideration, even though biased commissioner belatedly recused himself and did not vote on final decision); *Cinderella Career & Finishing Schs., Inc. v. Fed. Trade Comm'n*, 138 425 F.2d 583, 592 (D.C. Cir. 1970) (vacating and remanding agency decision "despite the fact that former Chairman Dixon's vote was not necessary for a majority"); *Am. Cyanamid Co. v. FTC*, 363 F.2d 757, 767–98 (6th Cir. 1966) (agency decision must be vacated and remanded for de novo review; result "is not altered by the fact that [the biased panel member's] vote was not necessary for a majority"); *Berkshire Emps. Ass'n of Berkshire Knitting Mills v. N.L.R.B.*, 121 F.2d 235, 239 (3rd Cir. 1941) ("Litigants are entitled to an impartial tribunal whether it consists of one man or twenty and there is no way which we know of whereby the influence of one upon the others can be quantitatively measured.").

Worse still, Ms. Klanke's previous involvement in Panel rulings likely tainted the participation of her fellow panelists. As a starting point, "voluminous" literature has found that "judges' views are quite often influenced by the composition of the courts on which judges sit." Pamela S. Karlan, *Electing Judges, Judging Elections, and the Lessons of* Caperton, 123 Harv. L. Rev. 80, 102 n.121 (2009) (collecting citations). Adding to the risk, the private nature of court deliberations makes it

impossible for the public to determine "the actual effect a biased judge had on the outcome of a particular case." *Lavoie*, 475 U.S. at 833 (Blackmun, J., concurring).

Whatever effect biased judges usually have on their unbiased colleagues, that effect is compounded here with the presence of laypersons on the Panel. This proceeding, unlike normal disciplinary proceedings, involves a novel application of the MRPC to Respondent's representation of the Legislature during an interbranch conflict. Understandably, Respondent moved to dismiss the 41-count complaint, arguing in part that ODC failed to allege a violation of the MRPC. That motion turned on the legal sufficiency of ODC's complaint. Of the five panelists who considered that motion, three were laypeople and two were lawyers. Of the two three lawyers, only Ms. Klanke—the lawyer who should have never been seated on the Panel—had experience as a litigator.[1] Natural intuition and common sense both counsel that the only member of the Panel trained in the legal nuances of litigation pleading requirements likely carried undue weight in deliberations. That Ms. Klanke carried that undue weight while having a clear conflict of interest against Respondent demands reversal of the Order on Summary Judgment and dismissal of all panelists who took part in that decision.[2]

---

[1] It appears the Commission did not have had a quorum when it denied Respondent's motion for summary judgment on September 10, 2024. *See* Order, Mot. Summ. J., Dkt. 35 (Sept. 10, 2024). As of September 12, 2024, there were two lawyers on the panel, Randy Ogle and Patricia Klanke, there were three lay panelists, and there was a vacant seat that another attorney panelist would fill. *See* COP Email, dated Sept. 12, 2024, attached as Ex. A. Five days later, the Montana Supreme Court appointed Carey Matovich to that vacant seat as the third attorney member. *See* MTSC Order, Dkt. 41 (Sept. 17, 2024). Under Rule 4.C of the Rules for Disciplinary Enforcement, "[f]ive members of an adjudicatory panel, *at least three of whom are lawyers*, shall constitute a quorum." Yet another reason to vacate the upcoming disciplinary hearing.

[2] The Panel's omission of a single, unbiased litigator raises more issues. For one, the Panel applied an erroneous legal standard to Respondent's Summary Judgment Motion. *See* Order Denying Sum.

If Ms. Klanke did not participate in deliberations, two questions demand answers: Why didn't Ms. Klanke participate? And why won't the Commission clarify that point on the eve of trial? The self-evident answer demands that the Commission cure the prejudice from her involvement by vacating the hearing, retracting the Order on Summary Judgment, and dismissing the panelists.

III. The Commission failed to allow Respondent to respond to ODC's motions to allow the remote testimony of a key witness and to exclude Respondent's expert testimony, so it must vacate the hearing.

By ruling on two ODC motions before Respondent could file briefs in opposition, the Commission failed to meet even the "constitutional minimum" for due process—an "opportunity to be heard." *See Baum*, 903 F.3d at 581 (quoting *Grannis*, 234 U.S. at 394). Montana Rule 2(b) provides fourteen days to file a response brief, and the Commission has not issued an order to modify that deadline for any pending motion. Even though Respondent noted his opposition to both motions, the Commission ruled on ODC's motion for leave to allow Beth McLaughlin to testify remotely six days after it was filed, *see* Mot. for Leave, Dkt. 33 (Sept. 5, 2024); Order, Dkt. 35 (Sept. 11, 2024), and it ruled on ODC's motion to exclude Thomas Lee's expert testimony one business day after it was filed,[3] *see* Mot., Dkt. 54 (Sept. 27, 2024); Order,

---

Judg., Dkt. [], at 9 (describing Respondent's failure-to-state-a-claim arguments as "evidentiary issues inappropriate for consideration"). The Panel also repeatedly failed to exercise independent judgment by copying ODC's briefing verbatim—erroneous citations and all. *See, e.g.*, *id.* (adopting ODC's representation of *Webster* as a Texas Supreme Court decision, rather than an appellate case); *see also In re Marriage of Tahija*, 253 Mont. 505, 508, 833 P.2d 1095, 1096 (1992) (explaining error occurs where a judge adopts one party's representations whole cloth without "proper consideration" of countervailing arguments). Whether biased members or unfamiliarity with the demands of litigation are to blame, it shouldn't be too much to ask for the Panel to apply correct legal standard and read cases before adopting ODC's briefing verbatim.

[3] The Commission claims it was necessary to rule on the motion before hearing from Respondent because of "the short time remaining before the hearing." Dkt. 59, at 1 (Sept. 30, 2024). Yet the

Dkt. 59 (Sept. 30, 2024). Beyond the Commission's due process violations, its rulings undermine Respondent's ability to mount a complete defense.

A. The Commission's failure to require McLaughlin testify in person prejudices Respondent's defense.

In a case that turns on credibility, in-person testimony—and cross-examination, specifically—is essential to due process because it helps the factfinder make credibility determinations. *See Fam. Rehab., Inc. v. Becerra*, 16 F.4th 1202, 1204 (5th Cir. 2021) ("[A]n in-person hearing … allows the decisionmaker to make credibility determinations through the consideration of testimony and cross examination."); *Doe v. Univ. of Cincinnati*, 872 F.3d 393, 402 (6th Cir. 2017) ("Cross-examination is … essential to due process … because it guarantees that the trier of fact [evaluates credibility] on both sides." (quotation marks omitted)). Cross-examination is the "greatest legal engine ever invented for the discovery of truth." *California v. Green*, 399 U.S. 149, 158 (1970) (quoting John H. Wigmore, 5 Evidence §1367, at 29 (3d ed., Little, Brown & Co. 1940)). And it enables "the accused to identify inconsistencies in the other side's story," *see Baum*, 903 F.3d at 581, test the witness's perception and memory, *see Davis v. Alaska*, 415 U.S. 308, 316 (1974), expose other infirmities in the witness's testimony like forgetfulness, confusion, or evasion, *see Cincinnati*, 872 F.3d at 402, and reveal possible biases or prejudices, *see id.*

Commission could have ordered an expedited response, it just elected not to. Even so, Respondent's due process rights are not subject to such practical expediencies. If a tribunal denies the "opportunity to be heard on the motion made … *all* subsequent actions by the [] court [are] *null and void*." *State ex rel. Mont. St. Univ. v. District Court, Fourth Jud. Dist.*, 132 Mont. 262, 272 (1957) (emphases added).

As outlined in Respondent's Rule 60(a) brief, *see* Dkt. 39, at 8-10 (Sept. 13, 2024), the "need to cross-examine McLaughlin is clear," *id.* at 8. McLaughlin facilitated the events in the underlying litigation that form the basis for most of Respondent's alleged ethics violations, *id.* at 8-9 (detailing McLaughlin's conduct during the Legislature's consideration of SB140 in 2021), and several other alleged violations concern alleged misstatements or misstated material facts that involve McLaughlin, *see id.* Given these considerations, the need for McLaughlin's in-person testimony—and cross-examination—is "essential to due process." *Cincinnati*, 872 F.3d at 402.

And ODC has no comparable interest in having McLaughlin testify remotely other than for her convenience or to excuse its own neglect in failing to notify Respondent about McLaughlin's availability issues for 76 days. But even setting these issues aside, McLaughlin is a key witness in an unprecedented 41-count ethics complaint filed against the sitting Attorney General. If McLaughlin cannot testify in person for some or all of the hearing, the answer is not to permit remote testimony but to continue the hearing to a time when she can testify in person. *See Family Rehab.*, 16 F.4th at 1204 ("[I]n-person hearing[s] … allow the decisionmaker to make credibility determinations through the consideration of testimony and cross examination."); *Solis v. Schweiker*, 719 F.2d 301, 302 (9th Cir. 1983) ("[b]ias is better elicited through rigorous in-court scrutiny").

B. The Commission's refusal to admit Lee's expert testimony impairs Respondent's defense.

As outlined in Respondent's Second Rule 60(a) motion, Lee's expert testimony meets all the requirements for admission under Mont. R. Evid. 702. *See* Second Rule

60 Mot., at 8-9 (Oct. 2, 2024) (expert testimony must be relevant, assist the trier of fact in understanding the evidence or determining a fact in issue, and not opine on an ultimate issue of law). Montana's liberal-admission policy strongly favors admitting Lee's expert testimony and letting ODC pursue "vigorous cross-examination" and present "contrary evidence" to determine the weight the Commission should give Lee's testimony. *State v. Santoro*, 2024 MT 136, ¶23, 417 Mont. 92, 551 P.3d 822. And that approach, unlike the Commission's approach, has the benefit of ensuring that Respondent can "establish a record upon which [the Montana Supreme] Court must act." *Goldstein v. Comm'n on Prac. of the Mont. Sup. Ct.*, 2000 MT 8, ¶21, 297 Mont. 493, 995 P.3d 923.

Montana courts often admit expert testimony offered to establish professional standards of care—including in matters before this Commission regarding alleged violations of the Montana Rules of Professional Conduct. *See* Second Rule 60 Mot., at 10 (Oct. 2, 2024) (collecting cases). And while experts may not opine on ultimate legal conclusions, the accused *must* offer expert testimony when the "issue is whether applicable ethical rules create and legal duty" and the factfinder must determine whether the accused breached that duty. *See id.* (quoting *Carlson v. Morton*, 229 Mont. 234, 237 (1987)); *see also id.* (quoting *Carlson*, 229 Mont at 240) ("[p]roof of … a breach *requires* expert testimony")). Because expert testimony is necessary to establish the scope of Respondent's ethical obligations, prematurely excluding Lee's expert testimony directly undermines Respondent's ability to mount a defense and deprives him of the fundamental guarantee of due process—"the opportunity to be

heard at a meaningful time and in a meaningful manner." *Tai Tam, LLC v. Missoula Cnty.*, 2022 MT 229, ¶25, 410 Mont. 465, 520 P.3d 312 (quotation marks omitted).

CONCLUSION

Considered together, the presence on the panel of two members with disqualifying conflicts, the failure to run conflict checks on all panel members after learning of the presence of a conflicted panelist, the failure to inform Respondent of any measures taken to cure the effects of the conflicts, and the failure to allow Respondent to file response briefs to ODC motions seeking relief that undermines Respondent's ability to mount a defense, severely impair Respondent's due process rights. Not only that, but this pattern of conduct casts doubt on the Commission's impartiality. For these reasons, the Commission should replace all members on the existing panel and vacate the hearing set for October 9-11, 2024. If the Commission is unwilling to do that, it should stay the hearing to provide Respondent time to seek immediate relief from the Montana Supreme Court. Alternatively, the Commission should continue the hearing to a date that will allow McLaughlin to testify in person.

DATED this 2nd day of October, 2024.

Respectfully submitted,

/s/ *Christian B. Corrigan*
Christian B. Corrigan
Solicitor General
Office of the Attorney General
215 North Sanders
Helena, MT 59601
Phone: (404) 444-2797
Email: Christian.Corrigan@mt.gov

Attorney for Respondent

CERTIFICATE OF SERVICE

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

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

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

DATED this 2nd day of October, 2024.

/s/ Buffy L. Ekola
BUFFY L. EKOLA