IN THE SUPREME COURT OF KANSAS

IN THE MATTER OF	**:**	
	:	**DA10088 and DA10598**
PHILLIP D. KLINE,	**:**	
Respondent.	**:**	

MOTION OF RESPONDENT PHILLIP D. KLINE FOR REHEARING OR MODIFICATION

Pursuant to Supreme Court Rule 7.06, Respondent Phillip D. Kline hereby moves for rehearing or modification of this Court's decision ("Opinion") entered in this action on October 18, 2013.

Supreme Court Rule 7.06(a) states:

> **Motion for Rehearing or Modification**. A motion for rehearing or modification in a case decided by the Supreme Court may be served and filed not later than 21 days after the decision is filed. A copy of the Court's opinion must be attached to the motion.

Per order dated November 4, 2013, this Court granted Mr. Kline's unopposed request for an extension of time to file this motion on or before December 2, 2013.

MEMORANDUM

I. INTRODUCTION: Overview.

This disciplinary case arises from the efforts of Respondent Phillip D. Kline, while he served as Kansas Attorney General (2003-2007) and as Johnson County District Attorney (2007-2009), to enforce the laws of the State of Kansas that (i) prevent child sexual abuse, (ii) mandate reporting of child sex abuse, and (iii) ban late term abortions (with narrowly defined exceptions). Mr. Kline's investigation led a Shawnee County judge to issue subpoenas for the records from two state agencies and for medical records from two Kansas abortion clinics. The evidence Mr. Kline obtained over a five year period led four different judges to conclude that there was probable cause crimes had been committed.[1]

Throughout the process, Kansas abortion providers, their political supporters, and an anti-Kline Kansas press succeeded in misleading the public about the nature and effect of Mr. Kline's work, turning the focus from child abuse/child rape and illegal late term abortions to hysterical and unfounded claims that Mr. Kline was violating the privacy of women.[2] (Of course, not a

[1] Probable cause was found by Judge Anderson in issuing the original subpoenas, by Judge James Vano when approving charges against Comprehensive Health of Planned Parenthood and by Judge Eric Yost in approving Kline's initial criminal charges against the late Dr. George Tiller. Moreover, a second Sedgwick County District Court judge approved Mr. Morrison's criminal filing against Dr. Tiller. Neither the evidence nor these probable cause findings are challenged by the findings in this disciplinary proceeding.

[2] For example, in 2006 the Kansas City Star won Planned Parenthood's "Maggie Award" for media excellence for its series of editorials regarding the investigation. The Maggie Award is named after Planned Parenthood founder Margaret Sanger. See *PPFA Awards Maggie Award for Media Excellence,* PLANNED PARENTHOOD FEDERATION OF AMERICA (http://www.plannedparenthood.org/about-us/newsroom/politics-policy-issues/ppfa-maggie-awards-10047.htm, retrieved December 1, 2013). This media coverage, partially based on false statements by the pre-recusal Court and the abortion providers, was so deceptive and harmful

single patient identity was ever revealed and the security of medical records was never breached, but a lie can travel around the world quicker than the truth can go half way around the block.)

While Kansas abortion providers and editorial writers were weaving their public relations masterpiece of deception, the abortion providers were also having great success in the Kansas Supreme Court, delaying Mr. Kline's investigations and obtaining opinions from the Court that were peppered with misleading statements and unfair attacks on Mr. Kline and his office. See *Alpha Medical Clinic v. Anderson,* 128 P.3d 364 (Kan. 2006) and *CHPP v. Kline,* 197 P.3d 370 (Kan. 2008).[3]

The abortion clinic strategies of (i) painting Mr. Kline as a rogue extremist acting unfettered by judicial oversight, and (ii) delaying every stage of the investigation, was evident at the outset. Unfortunately, the strategy was aided by the pre-recusal court's numerous misrepresentations and consideration of unprecedented legal theories that precipitated four mandamus actions, extensive discovery and secret trials. Among other things, the pre-recusal court falsely implied that Mr. Kline had improperly retained copies of the redacted medical records when he became Johnson County District Attorney.[4] This egregious deception, which simply will not die in Kansas, even made its way into this Court's current opinion when it stated that Mr. Kline was

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that Kline and his staff testified that confidential witnesses became afraid to provide further evidence and the investigation was harmed. <u>See</u> e.g., R. 2 2101:18-21-2:14; *infra* at 27, *et seq*.

[3] Counsel is mindful that this Court and the pre-recusal Court have demonstrated the troubling tendency of interpreting any legitimate and factually based criticism of this Court's decisions or findings as evidence of malicious intent by Mr. Kline. It is not. These statements and criticisms are supported by fact and, in the opinion of counsel, necessary as part of Mr. Kline's defense in a matter so unprecedented and so full of legal novelties.

[4] Judge Arnold-Burger amplified this deception when, as editor of *The Verdict,* she published an article stating "Kline had been specifically advised that he was not to take any records of the Wichita investigation." *The Verdict*, Winter, 2009, at 5-6. That same article from *The Verdict* is discussed later in the memorandum relating to the Motion to Clarify.

not "authorized" to take WCHS (Tiller) records to Johnson County. However, it has been documented for years that Mr. Kline did not require authorization to share or take records with Johnson County, and Judge Anderson has informed this Court that such sharing was a "quintessential prosecutorial function" and was solely up to Mr. Kline. Judge Anderson specifically stated that Mr. Kline "had the authority to engage other agencies in his investigation and share the evidence" and that he "did not establish any additional requirements for management" of the records. *See* e.g., R.3, 3582.[5]

It is doubtful any criminal suspect in the history of this nation has ever so successfully used a high court to thwart legitimate investigations while persuading the judicial branch of government to put the prosecutor on trial. While the executive branch of the Kansas government ran cover for two abortion providers by (in one instance) shredding evidence of crimes and (in the other instance) conducting a sham prosecution that did everything but stipulate to the abortion provider's innocence, the judicial branch pursued a two count, multi-charge disciplinary proceeding against Mr. Kline for alleged ethics violations.[6]

Dripping with ideological warfare, the complainants against Mr. Kline included the targets of his investigation, his political adversaries, and the pre-recusal Kansas Supreme Court. The Kansas Disciplinary Administrator vigorously pursued Mr. Kline for ethics violations, contrary

[5] This is but a sample of misstatements and misrepresentations contained in opinions issued by this Court. For a more thorough review of the Court's deceptions see, e.g., Respondent's Motion to Recuse Justice Beier, R.2, 2085-2177.

[6] The Kansas Department of Health and Environment, then under the direction of former Governor Kathleen Sebelius, shredded Kansas Termination of Pregnancy Reports it knew were under criminal subpoena and hid their destruction for more than two years from the Court in the criminal prosecution of Comprehensive Health of Planned Parenthood. See, e.g., Jack Cashill, *Planned Parenthood's Shreddergate Scandal,* WORLDNET DAILY (October 26, 2011, http://www.wnd.com/2011/10/360517/, retrieved December 1, 2013).

to the findings of his own investigators and in violation of required Kansas disciplinary procedures (e.g., no written probable cause finding obtained from a Review Board prior to filing a Formal Complaint).[7] The Court then appointed a panel of three Kansas attorneys to preside over Mr. Kline's ethics trial, two of whom had contributed to Mr. Kline's political opponents during contested elections and refused to voluntarily disclose that fact.[8] With the process so utterly tainted from the outset, the biased Panel's *Final Report and Recommendation* appeared to be a foregone conclusion. Ignoring much exculpatory evidence, distorting other evidence to the detriment of Mr. Kline, and finding that Mr. Kline had violated three rules that did not even exist, the Panel recommended that Mr. Kline's law license be suspended indefinitely. Mr. Kline appealed to the same Kansas Supreme Court that had previously displayed such hostility to him in the *Alpha* and *CHPP v. Kline* opinions.

On May 15, 2013, concurrent with the filing of his appeal brief, Mr. Kline filed a motion to recuse Justice Carol Beier and four other justices who had joined her misleading *CHPP v. Kline* opinion. Three days later the Court issued a press release stating that the five justices had recused themselves for a different reason, citing Rule 2.11 of the Kansas Code of Judicial Conduct and their prior involvement with litigation involving Mr. Kline. (The actual recusal order gave no

[7] The only writing provided by the Disciplinary Administrator to the probable cause panel, the 204d report, did not reference any facts or claims relevant to the case that was eventually filed.

[8] With the exception of this footnote, Mr. Kline will not be addressing the problem of Panel bias in this motion. It is a relevant issue, however, in light of the deference given to the Panel in this Court Opinion on at least two disputed issues of fact/credibility. As Mr. Kline has previously noted, the Panel gave no weight to, or even failed to mention, some of the evidence most vindicating of Mr. Kline – including the Disciplinary Administrator's own investigation report (DeFries-Mudrick Report) finding no probable cause that Mr. Kline had committed an ethics violation. For example, this Court continues to ignore the official record of the Grand Jury in deference to the statements of one juror who provided demonstrably false testimony at hearing. *See infra* at 86-87.

reason for the recusals.) Unfortunately for Mr. Kline, the pre-recusal Court had already issued an order limiting the length of his appeal brief to 80 pages even though the Panel Report condemning him was 185 pages and Mr. Kline's exceptions to the Panel Report were 175 pages. Consequently, Mr. Kline was deprived of the opportunity to fully develop in his appeal brief his defense to the Panel Report, a defense that had to address ten complex issues of fact or law (or both) as well as the harshness of the sanction.

On October 18, 2013, this post-recusal court issued a decision finding that Mr. Kline had committed 11 violations of the Kansas Rules of Professional Conduct (KRPC) in the course of six different fact scenarios and indefinitely suspending Mr. Kline from the practice of law in Kansas. The six fact scenarios, in the order they were argued in Mr. Kline's appeal brief, are:

Appeal Issue	Description of Conduct
3	Attaching Sealed Documents to Alpha Brief
4	Misleading Statement in Motion To Clarify
7	Misleading Statements Regarding WHCS Summaries
8	Failure to Correct Response to Disciplinary Complaint
9	Misleading Advice to Grand Jury about *Aid For Women* Case
10	Filing Motion to Enforce Grand Jury Subpoena

Mr. Kline seeks rehearing and modification of the Opinion because of its multiple errors of fact and law, which include the Court's (i) rejection of broadly accepted due process/cabining requirements for the Rule 8.4 catch-all provisions (contrary to other jurisdictions), (ii) disregard of operative principles for enforcement of the KRPC and the erroneous interpretation of one specific rule, (iii) errors in the application of Kansas law with respect to materiality, (iv) multiple misrepresentations of fact on the way to its conclusions; (v) ignoring the official record of the grand jury proceedings; (vi) novel and unprecedented interpretations of law; and (vi) contrary to

the FIRST AMENDMENT, construing legitimate executive branch interests in protecting the integrity of an investigation as "selfish" and deserving of enhanced sanction.

II. This Court's Opinion Reflects a Disturbing Double Standard for the Tolerance of Misrepresentations of Fact and Law.

This Court's Opinion brings to mind an observation by Justice Scalia in *Madsen v. Women's Health Center*, 512 U.S. 753 (1994), a case wherein the Supreme Court upheld some, but not all, of the terms of an injunction that restricted the rights of anti-abortion protestors:

> The judgment in today's case has an appearance of moderation and Solomonic wisdom, upholding as it does some portions of the injunction while disallowing others. That appearance is deceptive. The entire injunction in this case departs so far from the established course of our jurisprudence that in any other context it would have been regarded as a candidate for summary reversal. But the context here is abortion….

512 U.S. at 785 (Scalia, J. dissenting).

With the Panel Report having found a total of 21 KRPC violations by Mr. Kline arising from ten different fact scenarios, this Court has now upheld only 11 violations arising under six of those fact scenarios. Hence, there is the appearance of Solomonic wisdom. However, as is demonstrated below, a higher level of scrutiny casts an entirely different light on the reasoning and even the neutrality of Court. Indeed, the Court's many factual errors and misrepresentations in the course of discussing Mr. Kline's conduct reveal a palpable double standard governing truth and error in attorney communications. Were the justices and judges on this post-recusal Court to apply to themselves the same standard of intolerance they have applied to Mr. Kline's conduct and writing, everyone on this Court would be subjected to significant disciplinary sanctions.[9]

[9] This statement can be applied five-fold or ten-fold to the Hearing Panel, the Disciplinary Administrator, the attorneys for the Kansas abortion clinics, and others who have touched this case.

A. The Court's Characterizations of Mr. Kline's Conduct.

At least six of the KRPC violations upheld by this Court are attacks on Mr. Kline's honesty. Whether they appeared as ambiguities stated while Mr. Kline and his staff were navigating conflicting and/or confidential court orders or merely as mistaken statements of his honest belief at a particular moment, Mr. Kline's accurate but less-than perfect expressions regarding matters not material to any legal outcome, whether written or spoken, were treated as deliberate lies even when there was no apparent motive for him to mislead anyone. In every instance where the Panel's findings were upheld, the novel issues and unusual circumstances that faced Mr. Kline and his subordinates, as well as any exculpatory evidence reflecting their good faith efforts and motives in navigating those circumstances, were afforded mere lip service if they were mentioned at all. And for those other KRPC violations found by the Court that did not directly implicate dishonest conduct, the Court's analysis usually turned on suggestions of dishonest and selfish motive, construing such selfish motive from Mr. Kline's efforts to protect the integrity of the investigation and despite the fact that the legitimacy of the investigation's evidence and findings are not in dispute. It is fair to say that a Court *Opinion* that began with a tone of neutrality and moderation eventually morphed into a biting criticism with a Beier-esque tone, falsely signaling to readers that Mr. Kline lied and lied again for his own selfish reasons.

B. The Court Opinion's Factual Errors and Misleading Characterizations.

Unlike most of Mr. Kline's communications that were the subject of these disciplinary proceedings, this Court had the benefit of reviewing an objective fact record, reading opposing briefs, hearing oral arguments, a full staff of law clerks, and no time constraints for producing a fair and factually accurate decision. It is therefore startling that this Court's *Opinion* so

misrepresented material facts and circumstances central to the Court's analysis in a manner so prejudicial to Mr. Kline. The Court's errors and misrepresentations, and the emerging double-standard it portrays, require review as a prelude to the arguments that follow.

1. **Misrepresenting the Evidence – Attaching Sealed Documents to *Alpha* Brief.**

   On page 47 of the Court's Opinion, the Court stated:

   > "Mr. Kline's subordinates testified that they attached sealed documents to the Attorney General's *Alpha* brief **because of their frustration with the clinics statements and the clinic's perceived ability to provide a one-sided version of events to the public.**"

(Bold and underline emphasis supplied).

This is a misleading statement that, in context, supports this Court's finding that Mr. Kline and his staff were determined to get their message out to the public, irrespective of any court orders. However, it gives a blatantly false impression about the attitude of Mr. Kline and his subordinates toward the Alpha Court and its orders, a false impression that vanishes as soon as one reads the testimony of Mr. Kline and his subordinates regarding their extensive efforts to understand and comply with the *Alpha* Court's order. After one objectively reads that testimony, only some of which is reprinted later in this memorandum, one must conclude that Mr. Kline's subordinates attached the sealed documents to the *Alpha* brief because they were satisfied that it was an acceptable and non-prejudicial approach under the conflicting orders and in order to calm confidential witnesses and sources, not because they were "frustrated" by adverse publicity. *See infra* at 26, *et seq*.

2. **Misrepresenting the Evidence – Motion to Clarify.**

   On page 53 of the Court's Opinion, the Court stated:

   > In further explanation of the statements in the second motion to clarify, Kline testified his office had subpoenaed documents from KDHE, a state agency, which Kline characterized as a "repository" of information from

> mandatory reporters. Therefore, **he reasoned the motion to clarify accurately indicated his office had subpoenaed "other mandatory reporters."**

(Bold and underline emphasis supplied).

Mr. Kline never stated or "reasoned" any such thing. Unlike members of the Alpha Court, Mr. Rucker and Mr. Kline were always careful in distinguishing between a "subpoena" for records and other forms of seeking records/evidence. By using the word "subpoenaed" but leaving it outside of the quotations marks in the Court's statement on page 53, the Court misleads the reader into believing *that Mr. Kline believed* that issuing a subpoena to a state repository was the same thing as issuing a subpoena to a mandatory reporter. And this misrepresentation goes to the very nub of the controversy that began with two justices on the Alpha Court peppering Mr. Rucker with questions which had alternative meanings. Mr. Kline's simple, but somehow controversial, motion to clarify made the careful distinction between records being "subpoenaed" and records being otherwise "sought," contrary to what the Court Opinion conveyed. *See infra* at 40, *et seq*.

3. Fabricating Evidence – Possessing WCHS Summaries.

On page 67 of the Opinion, the Court stated:

> Seven months later, in November 2007, while Kline still had those 62 summaries, he testified under oath before Judge King that he had **only** 3 summaries.

(Bold and underline emphasis supplied).

The word "only" is a fabrication by the Court which makes all the difference in the world when assessing the accuracy of Mr. Kline's testimony before Judge King. Worse yet, Mr. Kline's counsel made the specific point to the Court during the November 15, 2013 oral argument that Mr. Kline did not say "only" three, but that he had three *pertaining to Johnson County*. This use

of the word "only" is a material falsehood in the Court's Opinion, in spite of the clear distinction previously communicated to the Court. *See infra* at 51, *et seq*.

4. Misrepresenting The Evidence - Failure to Correct Response To Complaint.

On pages 91 and 94 of the Opinion, the Court stated:

> "Reed testified at Kline's disciplinary hearing that Kline angrily confronted Reed about Reed's deposition statement concerning the files being stored in his apartment, and Kline threw the transcript across the room." *Opinion* p. 91.

> "This is buttressed by Reed's testimony regarding Kline's angry confrontation with him in September 2007 after Kline learned that Reed had given a sworn statement to Morrison about storing the files in Reed's apartment. According to Reed, Kline was so angry that he threw Reed's deposition across the room." *Opinion* p. 94.

This is a twice-stated material misrepresentation of the evidence relating to Mr. Kline's failure to correct his response to the disciplinary investigation regarding off-site storage of redacted medical records. The statements relate specifically to the issue of when Mr. Kline learned about the off-site storage and suggest, in context, that Mr. Kline was upset at Mr. Reed for revealing in Reed's secret deposition that records had been stored at his apartment. As noted later in this memorandum, there is **no basis whatsoever** for linking Mr. Kline's anger to the storage of records, and all of the evidence states otherwise. *See infra* at 59, *et seq.*

5. Misrepresenting Legal Authority - Failure to Correct Response To Complaint.

On page 95 of the Opinion, the Court stated:

> See also *State Ex Rel. Okla. Bar Ass'n v. Gassaway*, 196 P.3d 495, 500 (Okla. 2008) (finding violation based on respondent's failure to correct misapprehension when respondent knew he falsified a letter **but administrator presented no other evidence regarding respondent's knowledge of disciplinary authority's misapprehension**).

(Bold and underline emphasis supplied).

This is a material misrepresentation in the Court's Opinion about case law from another jurisdiction used by this Court to justify applying KRPC 8.1(b) against Mr. Kline contrary to how Rule 8.1(b) is written. Nothing in the *Gassaway* opinion reveals how much evidence was or was not presented about "misapprehension". Moreover, as noted in the more extensive discussion of this issue below, this Court cited the *Gassaway* case to justify its reliance on Comment to Rule 8.1 to depart from the actual language of Rule 8.1, a method specifically prohibited by the KRPC. *See infra* at 62.

6. False Statement About the Evidence – Motion to Enforce Grand Jury Subpoena.

On page 110 of the Court's Opinion, the Court stated as a section heading:

> *Kline* ***disregards the grand jury's request to review pleadings***.

On page 128 of the Court's Opinion, the Court stated in the text:

> By **intentionally and purposefully failing to honor the grand jury's request** and by acting on behalf of the State without authority to do so, Kline exceeded his statutory responsibility to the grand jury in favor of his own interests.

This is another twice-stated material misrepresentation of the evidence relating to Mr. Kline's decision to file a motion to enforce the grand jury subpoena in the name of Johnson County. Like the "only 3 summaries" misrepresentation noted above, the distinction between filing a motion in the name of the grand jury and filing a motion on behalf of Johnson County was specifically mentioned by Mr. Kline's counsel during oral argument. For whatever reason, the Court is doggedly clinging to a prejudicial falsehood about Mr. Kline's conduct in the grand jury proceeding. Allowing for the Court to treat the request of a single grand juror as an official request of the grand jury (a doubtful application of the law), the unrebutted fact is that Mr. Kline did not disregard the request of the grand jury because he did not thereafter file any more motions in the name of the grand jury. Regardless how the Court views Mr. Kline's decision to

file a motion in the name of Johnson County, it is false and prejudicial for the Court to mischaracterize Mr. Kline's conduct with respect to the Grand Jury's request. *See infra* at 88, *et seq*.

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In aggregate, the factual errors, misrepresentations and/or debatable characterizations that appear in this Court's *Opinion* arguably equal or exceed the gravity of the errors/omissions that have been excerpted from seven different legal proceedings and a seven year record of Mr. Kline's life while he held public office or defended his work in public office.[10] And unlike Mr. Kline and his staff, this Court's expressions were not hamstrung by confidentiality orders or cross checked with every word its law clerks and other staff members ever wrote or uttered. The low bar set by the Panel and adopted by this Court for imposing harsh attorney discipline for less-than-perfect attorney communications will have far reaching ramifications for the legal profession in Kansas, unless it is a standard to be applied only to Mr. Kline.

III. The Court's Departures from Kansas Law, Cabining Requirements, Due Process And Other Provisions Underlying the KRPC Have Produced Novel Applications of The KRPC Unique To Mr. Kline.

Significantly, seven of the eleven violations upheld by the Court involved subsections ("catch all" provisions) of KRCP 8.4. The Court's application of the "catch all" provisions in KRPC 8.4 breaks with Kansas precedent and the weight of authority from federal courts and other states applying identical or similar rules. It does so in two ways. First, the Court uses

[10] Mr. Kline provided testimony or sworn pleadings in *Alpha, CHPP v. Kline*, *Kansas v. Tiller*, *Kansas v. Planned Parenthood*, *Kansas v. Tiller II* (charges filed by Attorney General Paul Morrison) and these ethics proceedings. Moreover, Mr. Kline filed pleadings in another mandamus action filed by the abortion clinics which was dismissed and provided sworn testimony and pleadings in the underlying inquisition. It is from these thousands of pages of testimony and pleadings that ambiguities are cherry-picked and transformed into deceptions.

KRPC 8.4 to negate core elements of existing, specific rules (such as materiality) that indicate the drafters' conscious decision to leave certain conduct undisciplined; it does not merely use KRPC 8.4 to reach egregious species of misconduct that could not have been anticipated and conveniently enumerated in specific rules.

Second, the Court for the first time announces that KRPC 8.4 will *not* "be confined by a professional norm standard." Relatedly, the Court announces the broadest possible definition of "prejudicial," which deprives the rule of any objective meaning. These breaks from the weight of authority are not only startling, they violate Mr. Kline's due process and free speech rights. Unmoored from traditional and objective criteria, the application of KRPC 8.4 becomes unpredictable. As discussed below, this vagueness and unpredictability is of heightened concern when the Court is presented with novel allegations and unprecedented circumstances such as those that confronted Mr. Kline while he held public office. In short, to avoid a violation of Mr. Kline's rights to due process and free speech, this Court should reconsider its pronouncements on the new meaning it has assigned KRPC 8.4.

A. This Court's Opinion Fails to Acknowledge that the Federal Constitutional Guarantees of Due Process and Free Speech Control KRPC 8.4, and Can Limit the Way in Which KRPC 8.4 Applies to a Given Set of Facts

As an initial matter, missing from this Court's opinion is any acknowledgment of the fact that free speech and due process protections in the First and Fifth Amendments of the United States Constitution (applicable to Kansas through the Fourteenth Amendment) could be required to cabin the application of the KRPC, and that in a given case, this Court must determine whether cabined constructions of the rules should be applied. Indeed, the Court immediately and explicitly dismisses authority applying or recommending any narrowing construction for

disciplinary rules, such as the Restatement (Third) of the Law Governing Lawyers, as "nonprecedential," *Opinion* at 23, or from outside of Kansas.

This is error. The United States Constitution applies to every state disciplinary rule, and in some cases, it can require cabining. *See, e.g., In re Snyder*, 472 U.S. 634, 644-645 (1985) (in a Due Process and First Amendment challenge to Eighth Circuit-imposed discipline for conduct "prejudicial to the administration of justice," "refusal to show continuing respect for the court," and lack of fitness to practice law, finding that before reaching constitutional challenge, the general federal misconduct rule must be "read in light of the traditional duties imposed on an attorney," including "more specific guidance [that] is provided by case law, applicable court rules, and 'the lore of the profession'"). *See also In re Ruffalo*, 390 U.S. 544, 550, 88 S. Ct. 1222, 1226, 20 L. Ed. 2d 117 (1968) (attorneys are "entitled to procedural due process, which includes fair notice"); *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1054, 111 S. Ct. 2720, 2734, 115 L. Ed. 2d 888 (1991) ("At the very least, our cases recognize that disciplinary rules governing the legal profession cannot punish activity protected by the First Amendment, and that First Amendment protection survives even when the attorney violates a disciplinary rule he swore to obey when admitted to the practice of law.").

Next, the Court relies on statements from its own prior opinions in which parts of KRPC 8.4 were found sufficiently clear, and from this alone, concludes that "every licensed attorney is responsible for observing the Rules of Professional Conduct, regardless of whether the rules recite general or specific obligations," and that "any licensed Kansas attorney reasonably observing the Rules of Professional Conduct would be on notice of a potential violation…" Opinion 23-25. Respectfully, as discussed below, this analysis fails to grapple with Mr. Kline's specific arguments regarding the failure of KRPC 8.4's "catch-all" provisions to provide fair

notice regarding the specific circumstances and conduct at issue here. It also fails to consider the possibility that KRPC 8.4, read broadly, can be used to punish conduct that is not only unworthy of censure, but that is constitutionally protected.

B. KRPC 8.4 Fails to Provide Fair Notice of the Theories of Discipline Ultimately Used by this Court

In two distinct respects, KRPC 8.4 fails to provide notice of the theories of discipline the Court ultimately adopted to indefinitely suspend Mr. Kline. First, KRPC 8.4(c), a "catch-all" rule which generally prohibits dishonesty and contains no other elements, was used in place of KRPC 3.3(a), the specific rule which applies to false statements made to tribunals. Critically, KRPC 3.3(a) requires that the statement be material, while the broader Rule 8.4(c) does not. Second, the Court failed to apply KRPC 8.4(d) and (g) according to their plain meaning and in a "cabined" manner, consistent with clear professional norms.

(1) This Court Should Not Have Applied the Catch-All KRPC 8.4(c) Where There Was No Proof of "Materiality" Under the Specific Rule Relating to Statements to Tribunals, KRPC 3.3(a)

This Court impermissibly applied KRPC 8.4(c), which punishes "conduct involving dishonesty, fraud, deceit, or misrepresentation," in place of the specific rule for statements to tribunals, KRPC 3.3(a). In contrast to KRPC 8.4(c), which contains no express limitations on its application and on its face could apply to any conduct whatsoever, KRPC 3.3(a) governs "knowing" misrepresentations made to tribunals. KRPC 3.3(a) expressly requires that the knowing representation to a tribunal have been "material," thereby protecting a wide range of conduct from discipline—including, but not limited to, knowing misstatements made in complex proceedings where side-issues and false leads will invariably proliferate. In cases such as this, using KRPC 8.4(c) in place of KRPC 3.3(a) reads the "materiality" requirement out of the rule

altogether. This procedural "switch" punishes conduct that is otherwise protected under KRPC 3.3(a).

This result is unfair, illogical, and, unless this Court remedies it upon rehearing, violates Due Process. Accordingly, Respondent believes the Court should reconsider the reasoning of its Opinion at pp. 23-29. First, although this Court dismisses the Restatement as "nonprecedential authority," *Opinion* p. 23, it fails to actually consider and respond to its reasoning, which flows directly from the Due Process Clause. Again, the Restatement reasons as follows:

> No lawyer conduct that is made permissible or discretionary under an applicable, specific lawyer-code provision constitutes a violation of a more general provision so long as the lawyer complied with the specific rule. Further, **a specific lawyer-code provision that states the elements of an offense should not, in effect, be extended beyond its stated terms through supplemental application of a general provision to conduct that is similar to but falls outside of the explicitly stated ground for a violation**. For example, a lawyer whose office books and accounts are in conformity with lawyer-code provisions specifying requirements for them should not be found in violation of a general provision proscribing "dishonesty" for failure to have even more detailed or complete records.

Restatement (Third) of Law Governing Lawyers § 5 (2000) (emphasis added).

Next, the Court argues that Respondent places too much emphasis on a case that seemed to recognize the principles of the Restatement: *In re Pyle*, 283 Kan. 807, 812, 156 P.3d 1231, 1237 *reinstatement granted*, 284 Kan. 727, 163 P.3d 267 (2007). In *Pyle*, this Court observed without disapproval that "The members of the panel also unanimously agreed that respondent did not violate KRPC 8.4(g)… in part 'because there are more specific provisions of the Kansas Rules of Professional Conduct that apply.'" The Court now tries to limit *Pyle* because the three panel members could not agree on a more specific provision of KRPC 8.4 to apply, but fails to explain why this is even relevant given that this Court itself identified an allegedly more specific rule to use in place of KRPC 8.4(g): KRPC 8.4(d), which prohibits conduct prejudicial to the administration of justice. Further, the Court even admits—tantalizingly, without ever returning to

the concept—that *Pyle* could stand for the principle that 8.4(g) (fitness to practice law) *should not be used* if a more specific rule applies. Finally, this Court's emphasis on the divergence in panelist opinions in *Pyle* is ironic; the disagreement among seasoned lawyers who specialize in applying the KRPCs is a case study in the vagueness of KRPC 8.4. Each of the three panel members (two of whom served in this case) believed Pyle's conduct violated a different part of KRPC 8.4, and this Court disagreed with two of them. Indeed, as will be discussed below, this Court decided it could not resolve (and left for another day) an important issue relating to KRPC 8.4(d)—the definition of "prejudicial"—which sits at the heart of two issues in this case.

Next, after citing two cases which arguably did not violate the general-specific canon, the Court ultimately relies on a single case to anchor its apparently categorical rejection[11] of the canon: *In re Roth*, 269 Kan. 399, 7 P.3d 241 (2000). Yet *Roth* provides no support for this position, let alone for the Court's additional implication that all such arguments are "novel and convoluted."

In *Roth*, the respondent had filed frivolous mortgages to pressure a settlement of litigation, and the panel found that this conduct was "prejudicial to the administration of justice" under KRPC 8.4(d). The respondent argued that he should have been charged, and that his conduct was permissible, under KRPC 4.4, which states that "in representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person." *Id*. at 403-404, 246. Rather than rejecting the canon that general statutes cannot be used to supply missing elements of specific statutes, the *Roth* court simply held that the respondent's conduct did not fall under KRPC 4.4; therefore, it had to be judged against KRPC 8.4(d). *Id*. The Court's reasoning was the same on Roth's theory that his false statements to the panel should have been

[11] Except, perhaps, as it applies to KRPC 8.4(g). *See* Opinion at 24.

judged against and would not have violated KRPC 1.8 (which relates only to conflicts of interest), rather than KRPC 8.4(g) (fitness to practice law). *Id*. Again, as the Court observed, Roth's conduct did not even fall under the more specific rule. Therefore, the specific and general rules "in this case [did] not conflict." *Id.*

Here, Mr. Kline is alleged to have made knowingly false statements to tribunals. KRPC 3.3(a), "Candor Toward the Tribunal," is clearly the applicable rule, and clearly requires materiality. A general rule which fails to require materiality—KRPC 8.4(c)—cannot be used to displace KRPC 3.3(a) and discipline Mr. Kline for non-material misstatements that KRPC 3.3(a) would explicitly absolve. Thus, this Court mischaracterizes Mr. Kline's argument when it suggests that he seeks mercy under KRPC 8.4(c) merely because his conduct is "governed" by another rule. *Opinion* at 25. Instead, Mr. Kline's argument is that his conduct is *both* governed *and allowed* by KRPC 3.3(a), which affirmatively provides a safe harbor for (among other things) misstatements in prolonged, complex, multifaceted proceedings by requiring a showing of "materiality." In short, nothing in *Roth*, in the KRPC, or in the Due Process Clause allows courts to read out specific required elements of the KRPC by occasionally deciding to substitute a "catch all" rule. To do so would be to negate the notice afforded by the specific elements of KRPC rules, replacing it with a vague standard enunciated in the few dozen words in KRPC 8.4. Accordingly, this Court should reconsider its application of KRPC 8.4.

(2) This Court Should Not Have Applied KRPC 8.4 Without Reference to Its Plain Language and Objective Cabining Standards

This Court's opinion departs from the mainstream of the law governing lawyer conduct—and the requirements of Due Process—in two novel ways. First, it categorically rejects even a "professional norm" constraint for KRPC 8.4, holding that the rule should never "be confined to a professional norm standard." *Compare In re Snyder*, 472 U.S. 634, 644-645 (1985) (the general

federal misconduct rule must be "read in light of the traditional duties imposed on an attorney," including "more specific guidance [that] is provided by case law, applicable court rules, and 'the lore of the profession'"). Second, while claiming that "prejudicial" is a well-known term, the Court seems for the first time to hold that it can apply "to the justice system generally," without an actual showing of harm to the judicial system.

(a) The Court Failed to Cabin the Application of KRPC 8.4

First, this Court should reconsider its failure to cabin the application of KRPC 8.4.[12] The Court failed to actually address the reasoning of the great weight of authority, beginning with the United States Supreme Court in *In re Snyder* and continuing through other state and federal courts, which "save" KRPC 8.4(d) by using a narrowing construction. *See Howell v. State Bar of Texas*, 843 F.2d 205, 208 (5th Cir. 1988) (rule proscribing conduct "prejudicial to the administration of justice" is not unconstitutionally vague because it is interpreted according to "case law, court rules and the 'lore of the profession.'"); *Comm. on Legal Ethics of W. Virginia State Bar v. Douglas*, 179 W. Va. 490, 493, 370 S.E.2d 325, 328 (1988) ("There also appears to be general agreement that the "prejudicial to the administration of justice" standard contained in

[12] In this section, Respondent addresses the Court's uniform approach to KRPC 8.4(c), (d), and (g), even though the Court paused to separately treat subsection (c). *See* Opinion at 28. In discussing subsection (c), the Court seems to suggest that its prior *In re Pyle* decision does not apply something like the "egregious" conduct cabining requirement, and does not require more than "intentional dishonesty." *Id*. Yet, surveying eleven "exemplary cases," the Court remarked that, "in the past, this rule generally has been invoked to discipline lawyers who engaged in conduct **significantly more egregious** than respondent's conduct here. Indeed, by comparison, respondent's conduct ranks as mere whining—petty, annoying, childish, but far from the **dramatic abandonment of honest practice that typifies our Rule 8.4(c) cases.**" *In re Pyle*, 283 Kan. 807, 826, 156 P.3d 1231, 1245 (2007) (emphasis added). *Pyle* shows that Kansas has, in fact, applied something like a cabining interpretation to Rule 8.4(c) when it decides to reach non-Rule 3.3(a) conduct. Consequently, this post-recusal Court appears to be diluting the accepted standard in Kansas in favor of an even less predictable standard for Mr. Kline alone.

DR 1-102(A)(5) is not unconstitutionally vague. This is because the standard is considered in light of the traditions of the legal profession and its established practices. *See Parker v. Levy,* 417 U.S. 733, 94 S.Ct. 2547, 41 L.Ed.2d 439 (1974); *In Re Ruffalo,* 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968)"); *Matter of Hinds*, 90 N.J. 604, 631-32, 449 A.2d 483, 497-98 (1982) ("And on those few occasions when the rule has served as the sole basis for discipline, it has been applied only in situations involving conduct flagrantly violative of accepted professional norms… Thus, the rule's broad language proscribing acts "prejudicial to the administration of justice" takes on sufficient definition to pass constitutional muster, given these prior judicial determinations narrowing its scope to particularly egregious conduct...").

The Court's discussion betrays a concern that a cabining approach will result in an under-inclusive catch-all rule, but this result need not obtain. *See Opinion* at 27 (failure to catch non-legal conduct); *Opinion* at 29 (failure to catch conduct outside of a proceeding). Yet neither concern is a rational reason to reject a cabining approach here, in the litigation context. First, the "lore of the profession" does not apply only to litigators or transactional lawyers; it has grown to apply to all of the specific Model Rules adopted in the KRPC, and applies even outside of the legal context in the form of federal and state rules that govern the conduct of attorneys when they are not providing legal advice. *See, e.g.*, KRPC 8.4, Comments 1-2, 4. It also applies in civil adjudications, such as fraud cases, which might apply to an attorney acting solely in a business capacity. *See, e.g.*, KRPC Preamble, Comment 3. These independent sources of objective professional standards supplement the "cabining" standards for KRPC 8.4—they do not somehow obviate them. Second, in the alternative, the Court could decide to apply cabining only

to lawyers serving in a professional legal capacity, while retaining the broad, un-cabined versions of KRPC 8.4 for non-legal acts of lawyers.[13]

(b) The Court Applied an Impermissibly Vague KRPC 8.4(d) Standard

Instead of relying on the weight of authority, the Court returned to Kansas case law, focusing on its *Nelson* and *Comfort* decisions. However, those decisions not only rest on uncertain constitutional ground,[14] they focus exclusively on the dictionary meaning of the word, "prejudicial," and therefore do not grapple with the vagueness that affects KRPC 8.4 as it applies to Mr. Kline's conduct in unique circumstances. First, in *Nelson*, this Court held that the

[13] This Court need not reach this issue here, though, as there is no reason that there must be precise uniformity between the standards as they apply to practicing attorneys and attorneys working in a non-legal setting. At any rate, the Comments to KRPC 8.4 suggest many ways in which cabining standards can be applied to limit the scope and seriousness of non-legal conduct that can become subject to the attorney discipline system.

[14] In *Nelson*, the Court apparently assumed that any First Amendment-based vagueness challenge would lack merit, stating that "the right to free speech may not be invoked to protect an attorney against discipline for unethical conduct." *Id*. at 640 (citing *In re Sawyer*, 360 U.S. 622, 79 S.Ct. 1376, 3 L.Ed.2d 1473 (1959)). This is no longer the law. Two decades after *Nelson*, the United States Supreme Court distinguished *Sawyer* and held as follows:

> At the very least, our cases recognize that disciplinary rules governing the legal profession cannot punish activity protected by the First Amendment, **and that First Amendment protection survives even when the attorney violates a disciplinary rule he swore to obey when admitted to the practice of law**. See, *e.g., In re Primus*, 436 U.S. 412, 98 S.Ct. 1893, 56 L.Ed.2d 417 (1978); *Bates v. State Bar of Arizona, supra*. We have not in recent years accepted our colleagues' apparent theory that the practice of law brings with it comprehensive restrictions, or that we will defer to professional bodies when those restrictions impinge upon First Amendment freedoms. And none of the justifications put forward by respondent suffice to sanction abandonment of our normal First Amendment principles in the case of speech by an attorney regarding pending cases.

Gentile v. State Bar of Nevada, 501 U.S. 1030, 1054, 111 S. Ct. 2720, 2734, 115 L. Ed. 2d 888 (1991) (emphasis added).

dictionary definition of "prejudicial" ("hurtful, injurious, disadvantageous") should be used, and that it sufficiently defined "the degree of conduct which is expected of an attorney." *State v. Nelson*, 210 Kan. 637, 639-640, 504 P.2d 211, 214 (1972). Yet in applying this standard, the Court held that an attorney's bitter attack on the disciplinary system in a newspaper interview, while unfortunate, did not actually hurt, cause injury to, or disadvantage the legal system. And in *Comfort*, this Court held that there was ample evidence of actual harm: the respondent interfered with and caused another party to drop its open records requests, and caused another attorney to lose clients. *In re Comfort*, 284 Kan. 183, 198, 159 P.3d 1011, 1023 (2007). Because this sort of actual injury was encompassed by the dictionary definition of "prejudice" in *Nelson*, the *Comfort* court denied a vagueness challenge. *Id*.

Finally, in *Pyle* (yet another case where an attorney bitterly complained about the disciplinary process, this time by writing stinging letters to 281 addressees) this Court extended KRPC 8.4(d) to injuries to the system of justice—but again, limited its holding to "actual harm." *In re Pyle*, 283 Kan. 807, 831, 156 P.3d 1231, 1248 (2007). In *Pyle*, there was evidence that several recipients were "persuaded" that the recipient "could not get a fair hearing" and that "insurance company interests" had systematically corrupted the Kansas courts. *Id*. [15]

[15] The only other case cited by the Court also indicates that there was proof in the record of actual harm in the context of a judicial proceeding. *See In re Johanning*, 292 Kan. 477, 487-488, 254 P.3d 545, 553-554 (2011). There, an attorney's failure to forward a client's criminal restitution payment caused actual prejudice to several parties. First, his client was placed in noncompliance with court order, and had to defend himself just as he was beginning probation. Second, the judge had to deal with the report of noncompliance. And third, the victim was deprived of use of his funds. These were concrete harms that resulted directly from the attorney's failure to forward funds—not second-order or psychological effects that occurred only because another party was angered by the comment or decided to file a disciplinary complaint.

Here, this Court has moved beyond all of its prior authority, from *Nelson* through *Pyle*. In so doing, it introduces a brand new kind of vagueness: if objective, quantifiable harm need not actually result (even if outside the four corners of a specific proceeding), then what sort of abstract negativity is "prejudicial to the administration of justice?" This question calls for just the sort of unpredictable and easily-manipulated inquiry that the great weight of federal and state courts have tried to avoid by employing standards-based cabining.

Unmoored from any requirement that actual harm be matched to a violation of some professional norm, this Court and future courts would be invited to apply KRPC 8.4(d) based solely on individual judges' speculation—not based on any factual showing by clear and convincing evidence—that a respondent's conduct had implicitly "prejudiced" the judicial system as a whole. *See* Opinion, 29. At this high level of abstraction, the results are unpredictable. Courts will no longer consider what actually happened in a judicial proceeding, or, as in *Johanning*, what concrete results around the edges of the judicial system proximately flowed from the action. Instead, courts will consider only what they believe the public at large would think about the judicial system if it learned of Respondent's conduct, reached the same level of disappointment as individual members of the court, and then imputed Respondent's conduct to the system as a whole. This layers subjective judgment upon subjective judgment.

The Court's approach is a far cry from an objective standard that locates (a) an actual professional norm arising from case law, rule, or lore of the profession; and (b) an egregious violation of that rule. Additionally, it provides no protection or breathing space for First Amendment freedoms. Where (as in at least two instances here) a respondent's speech is at issue, there must be a real likelihood of prejudice—not a speculative reputational harm to the justice

system. *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1047, 111 S. Ct. 2720, 2730, 115 L. Ed. 2d 888 (1991).

In conclusion, by failing to apply any sort of cabining construction to KRPC 8.4, the Court violates Respondent's due process right to fair notice and, in the context of Respondent's attempts to speak to the public about his conduct, violates his First Amendment rights. Specific discussions about how the Court's departures in these areas are prejudicial to Mr. Kline appear in the individual subsections below.

C. By Harshly Judging the Conduct and Decisions of Mr. Kline in the Context of Unusual and Even Unprecedented Facts and Circumstances, This Court Has Departed from the Spirit and Scope of the KRPC.

Closely related to the Cabining and Due Process Issues discussed above are the principles enunciated in the KRPC Preamble and Scope sections. The Court invoked two such excerpts in its Opinion, both relating to the responsibilities of attorneys. One of those references was to a single sentence from KRCP Scope ¶19. *Opinion* p. 25. But the Court stopped too soon in its reference to KRPC Scope ¶19, and repeatedly errs in its applications of the KRPC to Mr. Kline's conduct because of its apparent disregard of these equally important provisions intended to govern those who enforce attorney discipline:

> The Rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation. Moreover, the Rules presuppose that whether or not discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors and whether there have been previous violations.

There is a reason why Mr. Kline's counsel read a portion of Scope ¶19 during oral argument: it is manifestly designed to insulate from discipline the conduct of attorneys who are

faced with tough decisions in unusual circumstances, particularly when there is no clear legal precedent to guide the decision making. In effect, the presence of unique circumstances and legal novelties are a defense (within reasonable limits) to charges of attorney misconduct, or at a minimum should mitigate how harshly a "wrong" decision will be judged.

Such a spirit is completely absent from this Court's reasoning and the harshness of the sanction imposed. Most, if not all, of the circumstances underlying the violations attributed to Mr. Kline had no factual or legal precedent at the time of his conduct. Ironically, some of those circumstances arose via court orders that created procedural confusion or forced Mr. Kline and his staff to be guarded in their communications. Were the Court in any way deferential to the spirit of Scope ¶19 that the Court declined to mention in its Opinion, most of the alleged violation could be vacated on that ground alone.

Specific applications to Mr. Kline's conduct of Cabining/Due Process Requirements and of the deference required by the principles underlying Scope ¶19 are discussed below in connection with the violations found.

IV. Arguments In Support of Rehearing or Modification On Count One.

The prejudicial briefing limitation imposed for this case greatly impeded Mr. Kline's ability to develop the facts favorable to him at the briefing stage. Meanwhile, those holding Mr. Kline's oral and written communications to a standard of perfection (i.e., the Panel and the Disciplinary Administrator) were selective in what evidence they were willing to discuss as they pursued Mr. Kline's law license. It is disturbing that the Court has been likewise selective, and even inaccurate, in developing the factual record for public consumption. Because the facts matter, both for a just resolution of this case and for public confidence in the judicial system, Mr. Kline develops the facts below in more detail than was ever possible in an 80 page appeal brief.

A. Appeal Issue #3: Attaching Sealed Documents to Alpha Brief.

The Court found that by authorizing his staff attorneys to attached sealed documents to the publicly filed brief in the *Alpha* case, Mr. Kline violated Rule 8.4(d) (prejudicial to the administration of justice), Rule 8.4(g) (reflects adversely on his fitness to practice law) and Rule 5.1(c) (failure to mitigate or avoid consequences of subordinates' conduct).

1. The Facts and Circumstances Surrounding the Decision to Attach Sealed Documents to the Alpha Brief.

This controversy arose from two conflicting orders issued by the Kansas Supreme Court in the *Alpha* Mandamus case. The first order placed the record under seal. The second order directed that the parties' briefs would be public filings and that oral argument would be open to the public. The Petitioner abortion clinics filed a brief that was misleading in several respects and held a contemporaneous press conference that misled the public about Mr. Kline's investigation and Judge Anderson's handling of the inquisition. The deceptive brief and publicity created a firestorm as the public was led to believe that Mr. Kline's investigation was a threat to the privacy of women and their medical records. [16] These facts are undisputed.

Mr. Kline's office struggled for the best way to counter the clinics' deceptions in order to protect the integrity of the investigation, to assist the Court and to inform the public. Mr. Kline's staff attorneys, to whom he had delegated the responsibilities for the *Alpha* case, contacted the

[16] The truth was that Judge Anderson subpoenaed the records after finding probable cause to believe the records contained evidence of criminal activity, and Kline had already arranged for Judge Anderson to redact the identities of adult women prior to the files being provided to the Office of Attorney General. *See, e.g.*, R. 3, at 3721 (Recommendations and Findings of Lucky DeFries and Marybeth Mudrick, investigators hired by the Disciplinary Administrator). Ironically, in the end the truth had little effect. The first line of the *Alpha* Opinion mirrored the opening line of the clinics' *Alpha* briefs, lending credence to their false claim that the mandamus action arose out of "Attorney General Phill Kline['s] subpoena [of] the entire, unredacted patient files…." *Id.*

Appellate Court Clerk for guidance on what was permissible under the conflicting Supreme Court orders. They also contacted Judge Anderson and his attorney to discuss the problem. Mr. Kline's staff could obtain no guidance from the Appellate Clerk, and ended up concluding that the purpose of the order would not be violated and that no one would be prejudiced if Kline's office attached redacted record documents to the *Alpha* brief. The attorneys reasoned that such attachments, bearing no private or sensitive information, would be acceptable and consistent with Supreme Court Rule 6.02 and the Court's order allowing public briefs and arguments. The goal was to better inform the Court and the public about the truth surrounding Judge Anderson's handling of the inquisition and thereby forward the legitimate interests of the investigation.

Mr. Kline and his staff attached copies of the following documents to the Attorney General's *Alpha* brief:

(i) Two (redacted) subpoenae issued by Judge Anderson for clinic records to document that (contrary to the clinic deceptions) it was Judge Anderson, and not Mr. Kline, who had issued the subpoenae;

(ii) The (redacted) transcript from a hearing held by Judge Anderson on the clinics' objections to the subpoenae and their motion to quash to document that (contrary to the clinic deceptions) patient privacy was being protected**,** and

(iii) The (redacted) Order that had been issued by Judge Anderson in response to the motions to quash/objections of the Abortion clinics, discussing not only his conclusions about the legitimacy of Mr. Kline's investigation but also the concessions made by the abortion clinic's lawyers regarding the Attorney General's right to pursue the investigation and medical records.

Like the abortion clinics and their attorneys, Mr. Kline's office held a press conference after filing the Attorney General's brief, distributing to the press some of the same information that was publicly filed.

When the filing of their *Alpha* brief became the subject of a contempt motion and later attorney discipline, Mr. Kline and his staff repeatedly testified regarding their confusion in

dealing with the *Alpha* Court's conflicting orders, their reasoning to conclude that it would be acceptable to attach redacted documents to the brief, and their motives for doing so.

> Q. Mr. Kline, leading up to the filing of the Alpha Beta brief by your office were representatives, lawyers of the clinics making statements about the case that you disagreed with in the public domain?
>
> Mr. Kline: A firestorm erupted. I think it erupted after the clinics filed their brief. And, yes, there were-- the general thrust of things-- and I don't know who all was making the statements, Mr. Hazlett. It hit national news in no time at all. And the statements were Phill Kline is demanding the personal, intimate, medical files, sexual histories, psychological profiles, a whole list of things, of 90 women and children and hysteria started. People were calling our office fearful that we were going to get their medical records. There were claims that medical records would be posted out in public view. There were claims that I had issued the subpoena, which is what actually the Supreme Court said, which is not true. Judge Anderson had issued the subpoena. Those claims all were characterized as a right wing religious right zealot prying into the personal, intimate information without any basis at law or fact and it was an assault upon the investigation in our office and it continued.

R. 2, 376:18-25 (Kline). Elsewhere:

> Q. Did you feel a need to call a press conference in order to alleviate the public's fear that had been generated by some of these statements and advertisements?
>
> Mr. Kline: I felt the need for several reasons. One, the arguments were open and the brief was open and so therefore certainly the Court had placed within the public context the legal arguments at issue and I needed to articulate our clear legal position. I have a duty as Attorney General. I am an elected official. That's what elections are about, people taking responsibility for their actions. I took responsibility for my actions. I stood up and stated the legal arguments that the Court made public.
>
> Q. When you attached the documents to your brief in the Alpha Beta case, were those attached as a means to offend the Court, was that your purpose?
>
> Mr. Kline: My purpose has never been to offend, it's to speak to the truth and the law.

R. 2, 2102:15 – 2103:11 (Kline).

Mr. Maxwell testified that the court's order, combined with the clinic's deceptive brief, created confusion and concern for all of the attorneys working on the appeal. Mr. Kline's staff attorneys devoted much effort to the issue, aside from Mr. Kline's involvement

> Q. [By Mr. Walczak] And did that (the Court's order) cause you some – to have some issues?
>
> A. Yeah. I mean, this was a little confusing. We didn't' know – we had a lot of debates on what that really meant to the extent that we called – I think Jared Maag and I called Carol Green. We discussed with – I discussed it with Judge Anderson. I discussed it with his counsel. I – we discussed it internally in the office, all that attorneys that were involved in the preparation of the brief, and I think there was like six or seven….
>
> Q. And did you discuss it with Mr. Kline?
>
> A. Probably. I don't specifically recall it. I do recall a meeting with all the attorneys who were working on it. He wasn't at that meeting, but we all debated it.

R. 2, 1082:17-1083:16 (Maxwell).

Mr. Maxwell described his discussions with Judge Anderson and his attorney (Michael Strong) regarding the abortion clinics' deceptions about the inquisition before Judge Anderson:

> Mr. Maxwell: The gist was is was that they thought that-- well, Judge Anderson and Mr. Strong thought that the petitioners were trying to unfairly characterize what Judge Anderson had said and done in the district court and that's—
>
> Q. And were any-- or was any part of the Attorney General's responsive brief to petitioners' brief devoted to trying to rectify or clarify the inaccuracies that Judge Anderson thought were present?
>
> Mr. Maxwell: Oh, absolutely.
>
> Q. And that was-- was that at least one of the subjects that you had with-- discussions you had with Mr. Strong?
>
> Mr. Maxwell: Yeah, absolutely. That was the gist of the whole thing, right.
>
> Q. Do you recall any specific?

> Mr. Maxwell: I mean, other than we talked about, you know, the allegations that were made in the petition didn't even have any relation to what actually Judge Anderson had really done and said. And so we talked about that-- that conflict, the inconsistency between what actually happened that the Supreme Court didn't have versus what Judge Anderson-- versus what the petitioners said in the petition. So, I mean, that was the gist of the conversations. So we were trying to figure out how to rectify that or put forth what actually happened.

R. 2, 1491:1 – 1492:5 (Maxwell).

Attorney Strong, with discernibly guarded testimony, confirmed that the *Alpha* Petitioners had taken liberties with the record:

> Q. Okay. You've indicated in your direct examination that Mr. Maxwell was concerned about and the Attorney General's Office was concerned about what they understood to be misleading statements about the various positions in the case; is that accurate?
>
> Mr. Strong: Yes.
>
> Q. And after you having reviewed the materials did you concur with Mr. Maxwell on that?
>
> Mr. Strong: 'Um, I believe that I-- that I think certain statements that were Mr. Maxwell's focus were probably-- I think that the petitioners may have taken some liberties with some of the statements, yes.

R. 2, 963:2-15 (Strong).

Jared Maag, an appellate attorney on Mr. Kline's staff, described the quandary created by the conflicting orders of the *Alpha* court. Maag was originally scheduled to provide oral argument and was concerned about what statements he could make at argument and how he might respond to the court's questions.

> (BY MR. HAZLETT) [D]id you contact Carol Green?
>
> A. I did.
>
> Q. And the purpose of that contact was for what?

> A. The-- the order from the court to me was confusing. We knew that we had filed the matter under seal. The court was then asking to us file open record briefs and also indicating that the oral argument would be in open court. That was confusing to me because the issues that were going to arise in the briefings and during oral argument would properly surround the issue of some of the hearings in front of Judge Anderson. Indicating in this that the record itself was sealed we were attempting to get some sort of an understanding of what it was that they wanted us to talk about, whether or not we could talk about issues related to some of the record because that's what the oral argument would turn into. And we were simply trying to seek some order or clarification from the court that gave us direction of what we could talk about and-- and what we-- what might have to remain under seal.

R. 2, 996:3-25 (Maag).

> Q. And it essentially says, again, I guess what confused you is that the briefs are open, but the record remains sealed?
>
> A. Right. We had some concern because we fully believed that if you're going to open the record and open the briefing we were going to have to talk about matters that were obviously part of the record. It would be very difficult to have an oral argument about matters that were part of the record when you can't talk about the record. And we just simply needed some guidance as to what we could do.

R. 2, 1039:11-22 (Maag).

Attorney Steve Maxwell elaborated on the efforts of Mr. Kline's staff, with references to affidavits that he and Attorney Maag completed in defense of the *Alpha* contempt motion:

> Well, I think we talked about it indirect, and, you know, it came up and it was strange. I mean, we had never-- you know, I'd been doing it for quite a while at that point and I'd never seen a case where-- first off, mandamuses are extraordinary rare. Second is I think I'd only even seen one before in my life and that was dismissed pretty quickly by the court. So, I mean-- so that was pretty strange, but then the issue of what was sealed of the record versus the open public briefs versus open public arguments became a real question among the lawyers in the office, which engendered a significant amount of debate between the lawyers in the

> office like Jared Maag, myself, Kris Ailslieger, Eric Rucker, Julien Miller, Camille Noe, all the people that were involved in the drafting of the brief, we started debating the issue. Ultimately we made the decision that we attached what we did, then it turns out they filed an order-- the clinics filed and order to show cause and the Supreme Court wanted us to brief the issue. And what we tried to do in some of those affidavits . . . the question was whether or not there was contempt for filing this, you know, and so we tried to explain why we made this decision. For example, in Jared Maag's affidavit in the second page he says-- on the second page, first full paragraph he says "as result of that explanation from the clerk I concluded that attaching the exhibits complained of by petitioners was appropriate as none would materially prejudice either of the petitioners and each was important to support respondent's position and further assist this court in its understanding of the issues." So Jared Maag-- and I concluded the same thing….
>
> Now, the court ultimately said, well, we shouldn't have probably done that but nothing was prejudiced because-- as a result of it. I think that's the language they used in the opinion. Because we had redacted the names this was all this transcript was was basically arguments between lawyers so there was no in the end prejudice. And I guess that's why we made the decision we did, I mean.

R. 2, 1476:4 – 1478:5 (Maxwell).[17]

Mr. Kline summarized his view of the dilemma and how he reasoned that attaching redacted (sealed) documents to the public brief would be consistent with the *Alpha* Court's conflicting orders:

> Here's the issue that I faced, and I made the decision, this was my decision to attach that transcript. Mr. Rucker faced a real challenge in oral argument. Judge Anderson's previous filing under seal could not be referenced in oral argument because it was filed under seal. Judge Anderson attaching the unredacted transcript of the motion to quash could not be referenced during oral argument because it was under seal. The motion to quash dealt with the legal issues before

[17] The affidavits of Mr. Maag and Mr. Maxwell, Exhibits E6 and F6 (R. IV 3323 and R. IV 3327), also document in detail their individual struggles to best advance Attorney General Kline's position within the confines of the Supreme Court's conflicting orders. Somehow, the affidavits were not even mentioned by the Panel in its Final Hearing Report.

the court because we fully anticipated the court would say did Judge Anderson consider this issue? Was this issue raised? What was the nature of this argument? Judge Anderson did not file a brief in the case so he gave no guidance to the court as to the ~~of the~~ motion to quash. He only asked questions.

So I was perplexed in that how did Mr. Rucker respond to the court's legitimate questions legitimate arguments of law which were portrayed and raised and argued in the October 4th hearing, unless our brief extensively quoted from that, and if we extensively quoted from that, are we revealing something that the court claimed was sealed. I made the decision based upon a lack of guidance from the court, a confusing order from the court, a record which we didn't-- weren't sure what it meant, that the court had decided the legal argument surrounding this motion to quash were to be articulated in public, that any protective order of course was not aimed at the existence of the inquisition because the Supreme Court made that public. The protective order was aimed at protecting patient identities or information that might be sensitive to the patients. Judge Anderson later confirmed that. Then Mr. Rucker could not argue without having reference to the legal arguments that were the very foundation of the mandamus action. I still do not see anything else that we could have done to try to get the full argument, the legal argument and the positions that we took before that court. I have no idea how we could have argued that case without referring to Judge Anderson's rulings and the basis of his rulings on the motion to quash. And I still hold that today.

Q. Did something occur in the case that, so to speak, mooted the-- some of the concern you had about whether or not you could attach something to your brief?

A. Did something occur in the case that mooted?

Q. Yeah. Mainly I'm talking about the clinics going public and identifying themselves?

A. Well, when the clinics filed their briefs it became public who the clinics were. It was still styled Alpha Beta, but it was obvious who the clinics were. And there was a pretty mammoth campaign trying-- well, for the next three years, in my opinion, mischaracterizing the nature of the investigation and its purposes.

R. 2, 1693-1695 (Kline).[18]

[18] Ironically, as Mr. Kline's counsel noted during the *Alpha* oral argument, the attorneys for the clinics revealed the identities of their clients during their press conference, information previously under seal. Those same attorneys later filed a contempt motion against Mr. Kline because his office had attached to their public briefs documents that revealed no confidential information. One can only surmise why the abortion clinics' lawyers feel free to operate under such a bold double standard.

There was no shortage or professional effort and professional reasoning among multiple attorneys in Mr. Kline's office in arriving at the decision the approach they took was justified by that the extraordinary circumstances, the redaction of documents for the protection of privacy, and the lack of prejudice to any party, and the value of getting the truth out to the public.

2. Cabining Requirements, Due Process Principles of Fair Notice, and The Principles Underlying KRPC Scope ¶19 Requirements All Combine to Prohibit Findings that Mr. Kline Violated KRPC Rule 8.4(d) and Rule 8.4(g).

(a) The Unusual Circumstances.

"This is a highly unusual case, the first in memory when this Court has required public briefs and oral argument on a sealed record." *Alpha* at 381. So stated the *Alpha* Court that issued contradictory orders and refused to provide guidance to Mr. Kline's office on how to navigate them. It is insufficient merely to characterize Mr. Kline's dilemma as an unusual circumstance with no factual or legal precedent. In effect, the Court's second order "broke the seal" of its first order but left the parties on their own to discern an acceptable approach to a confounding contradiction. Every attorney confronted by the *Alpha* orders found them confusing and contradictory.

Mr. Kline's staff attorneys were diligent in pursuing an acceptable (but ultimately unknowable) approach, they were careful to redact any truly confidential information, and the approach they adopted prejudiced no one. They also confirmed with District Judge Anderson that their conduct would not violate his protective orders. Objectively, the efforts reflect good faith effort and professionalism.

But the Maxwell affidavit, Exhibit E6, R. IV 3323, reveals another complicating factor: the rights of a party under Supreme Court Rule 6.02(f) to append record materials to a brief. The

operation of Rule 6.02(f) gave rise to a natural question: if a party can reprint verbatim the text of a sealed document in the text of its brief, how can there be harm in just attaching the same text at the back of the brief? Maxwell reasonable concluded from the text of Rule 6.02, particularly when nothing in the Court's orders nullified its application for the Alpha briefing, that he would be permitted to attach to the brief any document he was quoting from.

While Mr. Kline and his staff (with at least six of his subordinate attorneys involved in the discussion) have been condemned for their prudential judgment on how to proceed, neither the Disciplinary Administrator, the ethics Panel, nor this Court has offered a coherent reason why (i) a reprint of text was permissible, but (ii) a photocopy of that same text was unethical and prejudicial to the justice system.

The Cabining Principles, Due Process (fair notice and a discernible standard of what conduct is prohibited), and KRPC Scope ¶19 all require vindication of Mr. Kline in this highly unusual situation.

(b) Unjustified Court Criticism of Good Faith Exercise of Professional Judgment.

The Court's *Opinion* seized upon two issues to impute to Mr. Kline dishonesty and improper motives for his decision to attach sealed documents to the *Alpha* Brief. Neither criticism is justified because there is an innocent and legally justified reason for both.

First, the Court was skeptical of Mr. Kline explanation (articulated by his counsel during oral argument in *Alpha*) that he had approved attaching sealed documents to assist the Court in better understanding his arguments. The Court reasoned that because those documents were already in the Court record from Judge Anderson, Mr. Kline's attachments added nothing for the Court. But that portrays a disregard of the Court's own internal processes. A case in this Court is typically assigned to a single judge before oral argument. Sup. Ct. Internal Op. Proc. (Written

Opinions) As in most appellate courts, the assigned judge (and law clerks) takes responsibility for the record and drafting the opinion. Consequently, most of the other judges, while having access to the record, are less likely to spend time with it.

Supreme Court Rule 6.02(b) (Optional Appendix) mitigates that problem by allowing an appellant to add "limited extracts from the record . . . which the [he] considers to be of critical importance to the issues to be decided." The Appendix is "for the Court's convenience" and as a practical matter insures that the designated material is at the fingertips of every judge holding the brief. In this case, the redacted documents helped to demonstrate the "liberties" that the *Alpha* petitioners took with the record and, in Mr. Kline's mind, would be helpful to the understanding of the Court. There is nothing nefarious or dishonest about Mr. Kline's motives, and it is disturbing that this Court is holding against Mr. Kline his decision to take advantage of a court rule that is available to every other litigant and attorney. It continually appears that a different set of rules apply to Phillip D. Kline.

Second, the Court sees ill will in Mr. Kline's trial testimony that he wanted the public and anyone else who read the brief to better understand the issues as well. The Court apparently saw that motive only as self-serving contempt. But it was perfectly legitimate for Mr. Kline to have been motivated as the Kansas Attorney General to inform the public about the merits of his position (and indeed about the truth of the inquisition before Judge Anderson) and to dispel the disinformation promulgated by the abortion clinics. As an Executive branch statewide constitutional officeholder (Kansas Const., Article 1, Section 1) and the highest law enforcement official in the state, Mr. Kline operated with the perfectly legitimate and *unselfish* motive of restoring public confidence in his office and in his investigation. The loss of confidence harmed developing sources of information and needlessly frightened witnesses. In the light of the

"firestorm" created by the *Alpha* Petitioners' misleading brief and other public attacks on Mr. Kline's investigation, he *rightfully* sought to defend his office and the interest of his client (the State of Kansas) in enforcing the law and protecting the investigation's integrity.

> False light is what we were concerned about…[t]he clinics stated that I personally demanded the full sexual history. Sexual history in this case is the name of the potential abuser. It's the partner of the child…And so there were lots of concerns that flooded our office from women saying we're under investigation, do you have the right to call my doctor and get my medical records…I can't talk to your office anymore. That flood happened as soon as this Court made it public….

R. 2, 2101:18-2102:12 (Kline).

Moreover, Mr. Kline's decision to hold a press conference and to distribute material to the press was merely consistent with his belief that his redacted filing was an acceptable means of complying with the conflicting orders. Yet, this Court treats Kline's desire to reassure the public and to correct scandalously false misinformation as carrying some forbidden, sneaky motive, prophesized by Justice Beier in *CHPP v. Kline, Opinion* p. 48, and triumphantly flushed out during the disciplinary hearing. It should trouble this Court that the attorney who was trying to advance the truth in a difficult situation *created by the Alpha Court* is being disciplined as unfit to practice law, while the attorneys who publicly promoted a lie (a more accurate phrase than "taking liberties") to mislead the public unrest are walking around unscathed.

Contrary to the tone of this Court's Opinion, there is no evidence or history to support the idea that Mr. Kline violates court orders or is otherwise disrespectful to courts or the justice system. If this Court can impose discipline under Rule 8.4(g), on the substantial testimony cited above, and still characterize Mr. Kline's filing decision as "intentional disregard of the [*Alpha* Court's] directive," *Opinion* p. 48, and still believe that the filing was done "because of their frustration," *Opinion* p. 47, then the Kansas definition of "fitness to practice law" requires serious review.

(c) The Death of "Prejudice" as a Disciplinary Standard.

The Court went to great lengths to sustain the Hearing Panel's finding that Mr. Kline acted in a manner "prejudicial to the administration of justice" by attaching the sealed documents to the *Alpha* brief. The Court devoted significant discussion to establish that, when the violation of a court order is at issue, an ethics violation can be found in the absence of a previous contempt finding. Mr. Kline does not oppose that reasoning on a certain level, but it was never the primary thrust of his argument here. Rather, Mr. Kline opposes, as a matter of fair notice and professional standards, a concept of "prejudice" that is so flexible that it becomes meaningless. It is not a question of "contempt vs. ethics" but a question of "prejudice vs. prejudice." The comparative work of the Alpha Court and this post-recusal Court on what constitutes "prejudice" reduces Rule 8.4(d) to an ethical trapdoor subject to the standardless discretion of a court or hearing panel, with violations possible on such abstract levels that they are neither foreseeable in advance or defendable after the fact.

To uphold three ethics violations on these facts (two "catch-all" violations and one for a supervisory role) is ethics by ambush and "Exhibit 1" for why the Rule 8.4 catch-all provisions must be cabined consistent with the authority Mr. Kline has cited in this motion and in his appeal brief.[19] It is also a reason why KRPC Scope ¶19 Requirements must receive particular attention in tough cases.

[19] Without a predicate violation of Rules 8.4(d) or (g), there can be no violation of Rule 5.1(c).

B. Appeal Issue #4: Filing of Motion To Clarify.

This Court upheld the Panel's finding that by filing the Motion To Clarify in *Alpha*, Mr. Kline violated KRPC 3.3(a)(1) (knowingly making a false statement of material fact to a tribunal) and Rule 8.4(c) (dishonesty, fraud, deceit or misrepresentation). The Court's decision errs on the issue of materiality, in its failure to apply the KRCP in accordance with Scope ¶19**,** and in its failure to cabin the effect of *Rule 8.4(c) in* the absence of materiality.

In addressing these violations, the Court characterizes Mr. Kline's arguments as "a game of semantics" and "nuance." *Opinion*, p. 54, 55. It also falsely states that "Kline asks us to consider the clarification's statements in a vacuum, with no context or clues as to their motivation." *Opinion*, p. 55. Mr. Kline asked no such thing. Mr. Kline's every spoken and written word over a seven-plus year period has been nit-picked to death by his political adversaries, the Hearing Panel and the Court, yet only Mr. Kline's position is considered by the Court to be "semantics" and "nuance." Such commentary reflects a loss of neutrality by the Court.

If *anyone* has been the victim or "nuance" and "semantics," if *anyone* seeks to have his words and conduct judged "in context," it is Mr. Kline. Unfortunately, the pre-recusal Court's enforcement of an 80 page limit for Mr. Kline's appeal brief guaranteed that full context could never be provided by Mr. Kline to expose this wasteful and unnecessary war over the meanings of the words "from" and "of." Mr. Kline provides it below.[20]

[20] Ironically, the ambiguity present in Mr. Rucker's answers at oral argument are partially due to the fact the Court was asking public questions about a sealed record. This same concern was present with Mr. Maag as he attempted to understand the novel court order to have public argument on a sealed record. In that instance and in this, Mr. Kline's office provided truthful information that did not violate the lower court's orders in order to assist the Court.

1. The Facts in Context: Two Dialogues During Oral Argument About "Other Mandatory Reporters" Not Otherwise At Issue In Alpha Case.

There were two segments of dialogue about "other mandatory reporters" during the *Alpha* oral argument. The first one was initiated by something that "bother[ed]" Judge Allegrucci:

> *Justice Allegrucci: Let me ask you another question, it is something that bothers me. If you have this evidence; do you have evidence on other situations like this and which do not involve abortions, but involve a child coming to –- being term and being born in a hospital, do you go around to hospitals and attempt to get these records?*
>
> *Mr. Rucker: Have we gone to hospitals?*
>
> *Justice Allegrucci: Yes. I mean, is your evidence only concerning those who have abortions?*
>
> *Mr. Rucker: No.*
>
> *Justice Allegrucci: You have evidence of those who come to full term, are you pursuing those as well?*
>
> *Mr. Rucker: Yes, sir.*
>
> *Justice Allegrucci: Pursuing the records of the hospitals?*
>
> *Justice Beier: You subpoenaed hospitals –-*
>
> *Mr. Rucker: No*
>
> *Justice Beier: - on full term births for minors?*
>
> *Mr. Rucker: On full term births –-*
>
> *Justice Beier: For minors where obviously there's been sexual intercourse, just like there's been sexual intercourse in the case of an abortion, you have subpoenaed hospitals?*
>
> *Mr. Rucker: We have not. We have investigated, which I believe was your question, not subpoenaed --*

Justice Allegrucci: Subpoenaed was next - - if you investigate.

Mr. Rucker: We have not subpoenaed.

Justice Beier: How about teachers, how about all of the other mandatory reporters under the statute, have you subpoenaed any of these people or entities?

Mr. Rucker: Again –

Justice Beier: Have you or have you not?

Mr. Rucker: The nature of our investigation –-

Justice Beier: Yes or no, sir?

Mr. Rucker: - - is secret. Okay.

Justice Beier: Sir, I asked you a yes or no question.

Mr. Rucker: I understand.
Justice Beier: Can you answer, please?

Mr. Rucker: Within the body of this current inquisition I can indicate to the Court, without reservation, that we have looked into live births. That's what I believe within the realm of the inquisition I can reveal to this Court.

Justice Beier: Have you subpoenaed entities who are mandatory reporters like the - -abortion clinics that you have subpoenaed in this inquisition?

Mr. Rucker: At this juncture, the answer is no.

Justice Beier: Thank you.

Mr. Rucker: That - - But I do wish to indicate to the court that we are investigating. This investigation is not at a conclusion and it has not been limited to abortions. It has been limited not to abortion, but other live births.

R. 3, Part C, 645:9 -648:3 (Ex. 57).

The second (very brief) dialogue was initiated by Justice Beier a few minutes later:

Justice Beier: So again we go back to the question that Justice Allegrucci was trying to get to, but you're not seeking similar kinds of records on children who have given birth in the State?

Mr. Rucker: Yes, we are

Justice Beier: You have not subpoenaed any records of any of these other mandatory reporters regarding those children?

Mr. Rucker: That would be accurate at this stage of the proceedings, ma'am.

R. 3, Part C, 652:16 – 653:1 (Ex. 57).

Setting aside disagreements about the context and accuracy of Mr. Rucker's responses and of Mr. Kline's Motion to Clarify, they become a moot point because they were all immaterial to the *Alpha* case.

2. Materiality: Efforts Regarding Records From Other Mandatory Reporters Had No Bearing on the Relief Sought or the Issues Decided in Alpha.

A material fact is one on which the controversy may be determined. *Bartal v. Brower*, 268 Kan. 195, 198, 993 P.2d 629 (1999) (quoting *Ebert v. Mussett*, 214 Kan. 62, 65, 519 P.2d 687 (1974)). Thus, a fact is material when it can have a legal effect on the outcome. "[T]he substantive law will determine which facts are material." *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986).

For purposes of discussing materiality, Mr. Kline accepts the Court's definition that a fact "is not material unless it has a legitimate and effective bearing on the decision of the ultimate facts in issue." *Opinion*, p. 56 (citing *State v. Goodson*, 281 Kan. 913, 922, 135 P.3d 1116 (2006)). Notably, after citing that principle, the Court then literally ran from it ("We need not linger long on materiality"), largely relying on Mr. Kline's decision to file the motion as *per se* evidence of its materiality. That position was unaccompanied by any supporting legal authority and is specifically contradicted by Mr. Kline's unrebutted testimony at the ethics trial.

a. The Alpha Issues and the Remedies Sought: *Alpha* Pleadings and Decision Establish that, as a Matter of Law, Efforts to Obtain Records From Other Mandatory Reporters Was Not a Material Issue.

The *Alpha* pleadings and Decision establish objectively that efforts to obtain records from other mandatory reporters, and live birth investigations in particular, were not material to any issue raised or decided in *Alpha*. The Petition and supporting memorandum filed by the clinics do not raise the issue, nor was it mentioned a single time during any of the following portions of the *Alpha* Opinion:

1. *Alpha's* 14 point syllabus, 128 P.3d at 368-69;
2. *Alpha's* 6 point statement of the issues raised by the parties' pleadings and briefs, 128 P.3d at 369;
3. *Alpha's* review of the Petitioners' main argument and three alternative arguments, 128 P.3d at 371;
4. *Alpha's* review of four positions raised by Mr. Kline's office, 128 P.3d at 371-72;
5. *Alpha's* statement of the four questions for which Judge Anderson sought guidance, 128 P.3d at 372;
6. *Alpha's* discussion of Mr. Kline's issues opposing the writ, 128 P.3d at 375-76;
7. Alpha's discussion of the constitutional right to privacy and the State's countervailing interest in pursuing criminal investigations,128 P.3d at 376-78;
8. *Alpha's* discussion of Judge Anderson's three specific errors, 128 P.3d at 376-79;
9. *Alpha's* discussion of the three safeguards that were required in Judge Anderson's protective order 128 P.3d at 379;
10. *Alpha's* discussion of physician-patient privilege, 128 P.3d at 379-80;
11. *Alpha's* discussion of further disclosures sought by Petitioners, 128 P.3d at 380;
12. *Alpha's* discussion of the contempt proceedings, 128 P.3d at 380-82;

In addition, the *Alpha* opinion twice acknowledged the limited goals of the Petitioners.

> "Petitioners do not seek to stop the entire investigation. Rather, at this stage of the proceeding, they appear to insist **only** that their patients' privacy rights must be balanced with the State's compelling need for information relevant to the criminal investigation."

Alpha 128 P.3d at 375 (Bold emphasis supplied).

> "At least by the time of oral argument before this court, [Petitioners] acknowledged the State's legitimate law enforcement interest and sought **only** to have their patients' rights weighed appropriately against it."

Id. (Bold emphasis supplied).

The *Alpha* opinion did mention Mr. Kline's *Motion to Clarify* as a post-argument filing, *Alpha* at 373, but only in a short narrative detailing other procedural events. The *Motion to Clarify* was never otherwise unmentioned in *Alpha* and had no bearing on any issue asserted or decided. By no stretch of Kansas law can the Court reasonably conclude that the oral argument detour about "other mandatory reporters" and/or Mr. Kline's motion responding to it was a material issue in *Alpha*.

b. The Court's Primary Factual Premise To Support Materiality – That Mr. Kline Believed His *Motion to Clarify* was a Material Issue – is False.

Absent any authority or analysis to support the conclusion that materiality can be created by the subjective belief of a litigant, the Court cited Mr. Kline's filing of the *Motion to Clarify* as proof of its materiality:

> "Clearly, Kline believed Rucker's responses – and their 'clarification' – were material or he would not have insisted on filing the motion over Rucker's objection."

Opinion, p. 56. However, the Court's reasoning and assumption about what Mr. Kline believed is conclusively contradicted by Mr. Kline's testimony:

> Q. You had taken a position that this-- this exchange here between Mr. Rucker and the court was **unrelated** to the issues before the Court?

A. **It was unrelated to the investigations before the Court. It was unrelated to the parties before the Court.** And I guess they were pursuing questions about a-- a targeted investigation, maybe some type of selective investigation theme, but there's no such animal. There's selected prosecution, I believe. **So I was puzzled by why suddenly.** Now, it was a public debate. It was in-- the clinics were claiming that we weren't doing any investigation, but **I was puzzled by the Court's questions about it** and Mr. Rucker was between a rock and a hard place because he tried to answer without violating a protective order sealing live birth information for the very reason we were before the Court and that is privacy. It involved real people. Subpoenas that were sealed by the district court judge, do not disclose orders, **and suddenly the Supreme Court-- when none of this is in the record before the Court, none of it is raised by the clinics before the Court that I know of, I don't know if they claim selective investigation, and he's stuck with these questions and he's trying to answer them the best he can. And it's a tough spot. So what I remember is why are they asking this.**

Q. Okay.

A. What-- I don't understand.

Q. Fair enough. If they're asking other than the clinics have you sought—

A. Well, it's kind of like your investigation of the clinics is not legitimate unless you are investigating other people, that's-- I suppose you can never that [sic], **but I don't see how that is relevant in law and I was confused by it.**

R. 2, 430:13-432:1 (Kline) (bold emphasis supplied).

Manifestly, Mr. Kline's efforts to seek records from other mandatory reporters was not material to *Alpha* and the Court has erred as a matter of law by concluding, in effect, that the curiosity of one or more justices about an immaterial issue can convert it into a material issue. Moreover, even if the issuance of subpoenas to obtain other records in an unrelated investigation was material to the *Alpha* issues, whether those subpoenas were issued directly to the mandatory reporter or to a repository of records would be immaterial to that issue.

3. The Elastic Scope of the *Alpha* Court's Questions to Mr. Rucker Justified Mr. Kline's Good Faith Belief That Clarification Was Necessary.

Even if the Court adheres to its erroneous conclusion about materiality, the Court is wrong about the context and substance of Mr. Kline's motion, and also wrong about Mr. Kline's intentions. The transcript from the *Alpha* oral argument provides objective evidence that Mr. Kline had a sound basis for suspecting that confusion could have resulted from Mr. Rucker's dialogue with the justices

The question that Justice Beier compelled Mr. Rucker to answer ("Yes or No") after she took control of the discussion was much different than the question posed by Justice Allegrucci to open the discussion.[21] Specifically, whether "you have evidence" (Allegrucci) implicates a much broader horizon than whether you have "subpoenaed…people or entities " (Beier). In a dialogue where two justices had asked two different things, Justice Beier ultimately channeled Mr. Rucker into answering only her narrow question, in spite of Rucker's obvious attempt to navigate (and convey) his duty not to disclose certain information about the inquisition.

Interrupted repeatedly as he attempted to answer a series of changing questions, Rucker responded accurately to the narrowest of the questions after Justice Beier demanded a response. "At this juncture, the answer is no." The truth of Rucker's response is beyond dispute, and Justice Beier's later suggestion that Rucker had been "less than forthright" reflected (in context)

[21] The discussion on page 55 of this Court's Opinion does not address this reality, but it does misrepresent Mr. Kline's position again. "Yet, he now seeks to persuade us that his statements were far more general responding to a question never asked – i.e., whether the Attorney General had sought information from entities that were merely repositories of information from mandatory reporters." Mr. Kline has never argued that he was answering a question about "repositories" because no justice had asked about repositories. But that is not the same thing as saying that Mr. Kline's guarded attempt to clarify what records he had obtained was untrue merely because he was unable to disclose that the subpoena had been issued to the repository.

at least an understanding that Rucker was restricted by a court order. It is not clear, however, that Justices Beier and Allegrucci perceived the distinction that Rucker was navigating.

Meanwhile, Mr. Kline was listening and feared a misunderstanding. Bound by the same confidentiality order as Rucker, Mr. Kline filed the motion to clarify in an attempt to inform the Court that his office had obtained records "from" other mandatory reporters, while withholding the recipient of the subpoena. Had Mr. Kline informed the *Alpha* Court that his office had obtained the records via subpoena to KDHE, he would have violated Judge Anderson's confidentiality order.

> Q. As I understand what you're saying your understanding—that your belief was at the time that since hospitals and other mandatory reporters had to report to KDHE that you were subpoenaing that information, therefore you were subpoenaing information from mandatory reporters?
>
> A. It doesn't say I was subpoenaed information from other mandatory reporters.
>
> Q. You sought.
>
> A. It says, "Respondent has sought records and information from other mandatory reporters." And we did that by going to the repository, which is KDHE, **which I could not mention in this motion to clarify because of the nondisclosure order**. That's the second sentence.
>
> Q. Second sentence, "This effort has included subpoenas for records relating to live births involving mothers under the legal age of sexual consent."
>
> A. That is true.
>
> Q. That's a true statement?
>
> A. Absolutely. . . .

R. 2, 448: 3-25 (Kline) (bold emphasis supplied).

More testimony from Mr. Kline:

> Q. You say this effort, that's referring back to the previous sentence where you talk about you sought records and information from other mandatory reporters?
>
> A. Absolutely. KDHE is the repository. We're seeking information that was provided by other mandatory reporters with the repository by subpoenaing that repository **whom I can't mention**. And I think I mentioned the do not disclose order in the next paragraph.

R. 2, 450: 14-23 (Kline) (bold emphasis supplied).

In effect, Mr. Kline's motion gave a more accurate response to the question posed by Justice Allegrucci without changing Rucker's accurate response to Justice Beier's narrower question. Consequently, The observation by Justice Beier in her *Alpha* opinion, as repeated in this Court's Opinion, that Mr. Kline "changed rather than clarified" Mr. Rucker's response during the *Alpha* argument is simply wrong, or certainly subject to good faith disagreement.

4. Neither the Hearing Panel nor This Court Have Made Findings to Support a <u>Knowing</u> Deception by Mr. Kline or Identified a Motive to Mislead.

Significantly, neither the Hearing Panel nor this Court found or even addressed the Rule 3.3(a) requirement that Mr. Kline <u>knowingly</u> misled the *Alpha* Court, nor has either body attributed any reason or motive for Mr. Kline to mislead the *Alpha* Court. This is good and just, because Mr. Kline had no motive to mislead and no evidence was presented for such a motive. Consequently, a required element for a Rule 3.3(a) violation ("knowingly), which is also implicitly required for an 8.4(c) violation (dishonesty, fraud, deceit or misrepresentation), has never been found by clear and convincing evidence.[22]

[22] The KRPC Scope ¶19 factor is also present here. When such a minimal correction (substituting "of" for "from") would have eliminated this entire controversy, the presence of a protective order and the vacillating scope of the Justices' questions to Rucker should be written off as human error, not deliberate deception.

Mr. Kline simply used a common term to reference how records are often subpoenaed by law enforcement from third party sources. The financial documents of a target, for example, are routinely subpoenaed from a bank without knowledge of the target. It would not be uncommon or a meaningful distinction to state than an investigator obtained financial records of, or from, a target when the records were actually obtained from the target financial institution via subpoena. The failure of proof in this case as to lack of "knowing" deception and the lack of "motive" is a reflection of the fact that the Disciplinary Administrator and the Hearing Panel made far too much of the use of a common phrase.

5. Seeking Equal Protection For the Flaw of a "Poorly Constructed Sentence."

On August 10, 2012, the *Motion of Respondent Phillip D. Kline for the Recusal of Judge Karen Arnold Burger* was filed. The factual basis for the motion was Judge Arnold Burger's role as Editor of *The Verdict*, the (quarterly) Official Publication of the Kansas Municipal Judges Association. The *Winter 2009* edition of *The Verdict* had reviewed and commented upon the then-recently published decision in *CHPP v. Kline*, 287 Kan. 372 (2008).

As referenced earlier in this motion, The *Verdict* made a number of false or misleading statements in its report on *CHPP v. Kline*, some more damaging than others to Mr. Kline's reputation in an already hostile press environment. Possibly the most damaging misstatement was that "Kline had been specifically advised that he was not to take with him to Johnson County any records of the Wichita investigation." It is impossible to quantify how much damage *The Verdict's* work did to the truth in such a high profile case, but maybe it explains why one Kansas appellate clerk could later tweet to the world during oral argument in this case that Mr. Kline "stole" medical records.

In any event, without specifically knowing Judge Arnold Burger's animus toward him or the specific role she played in the *Winter 2009* edition of *The Verdict,* Mr. Kline believed it reasonable that she not serve on this post-recusal Court that was certain to brush against some of the very issues discussed in *The Verdict.* At a minimum, there was an appearance of impropriety that should have been avoided in such a politically divisive case.

Significant to this motion is the reasoning used to dismiss concerns over one of the inaccuracies in *The Verdict*. Acknowledging that the statement was inaccurate, Judge Arnold Burger explained the error as merely a "poorly constructed sentence." Without questioning Judge Arnold Burger's sincerity or integrity in refusing to recuse herself, Mr. Kline respectfully submits that he (and any attorney) should be entitled to the same consideration for a "poorly constructed sentence" or (in this case) maybe just less-than-perfect word selection. When one considers the "clear and convincing evidence" standard and how innocently one can produce a "poorly constructed sentence," it is hard to justify findings that Mr. Kline violated two of the KRPC merely because he used "from" instead of "of" in his motion to clarify.

C. Appeal Issue #7: Testimony about WCHS (Tiller) Summaries.

The Court upheld the findings by the Hearing Panel that Mr. Kline's testimony about his possession of the WCHS (Tiller) summaries in the proceeding before Judge King violated Rule 3.3(a)(3) (failing to correct false testimony) and that his statement during oral argument in *CHPP v. Kline* was untruthful and violated Rule 8.4(c) (dishonesty, fraud, deceit or misrepresentation).

The Court's decision errs on the issue of materiality, in its misrepresentation of the fact record, in its failure to apply the KRCP in accordance with Scope ¶19**,** and in its failure to cabin the effect of *Rule 8.4(c) in* the absence of materiality.

1. The Court Erroneously Found the WCHS (Tiller) Summaries to be Material to CHPP v. Kline When They Were Irrelevant to the Parties and Had No Effect on the Outcome of any Issue.

Just as close scrutiny of the *Alpha* Opinion establishes that Mr. Kline's Motion to Clarify was not material to the *Alpha* case, close scrutiny of the *CHPP v. Kline* Opinion reveals that Mr. Kline's testimony about the Tiller summaries was not material to *CHPP v. Kline,* a case whose many aberrations included the evolution of issues as the case drew to a conclusion.

Neither the original Petition in Mandamus filed by CHPP nor the subsequent supporting memorandum/pleadings filed by the new Attorney General mentioned anything about the Tiller summaries. The *CHPP v. Kline* opinion introduced the case as follows:

> [28] This is an original action in mandamus filed by petitioner Comprehensive Health of Planned Parenthood of Kansas and Mid-Missouri, Inc. (CHPP), **to challenge respondent Phill Kline's handling of patient records obtained from CHPP** pursuant to an inquisition subpoena issued when Kline was Attorney General. We decide whether CHPP has met its burden to obtain relief in mandamus and whether Kline's behavior merits sanction as civil contempt or otherwise.[23]

Shortly thereafter it framed the claims asserted by CHPP:

> [68] CHPP filed this mandamus action on June 6, 2007, asking this court to: (1) compel Kline to "comply with [the court's] directives" in Alpha; (2) compel Kline to "return any copies of Petitioner's medical records" to the Attorney General's Office; (3) direct Kline to provide an accounting for those records; (4) issue an order to show cause why Kline should not be held in contempt of the mandate in Alpha; and (5) grant any other appropriate relief, including attorney fees. CHPP also filed a motion to proceed under seal, which was granted.

As it proceeded to review the factual history of the case, it noted that Mr. Kline's staff had created the summaries, *CHPP Opinion* ¶64, a fact originally disclosed by Mr. Kline in his responses to the sweeping discovery demand that Mr. Kline was required to answer. The

[23] In this and all of the other block quotes reprinted from the *CHPP v. Kline* Opinion, the bold lettered emphasis is supplied.

existence of the Tiller summaries was revealed by Mr. Kline in a lengthy response to Question #9, a response that expressed his reservations about the sweep of the question. As stated in the *CHPP v. Kline* opinion:

> [138] "9. Exactly what Inquisition records and/or documents, other than WHCS and/or CHPP records, **were transferred** by Respondent Kline in his position as Attorney General to Respondent Kline in his position as Johnson County District Attorney?
>
> [139] "RESPONSE"
>
> [140] "This question asks about 'inquisition records and/or documents.' **It is my understanding that the only items at issue in this case are the medical records of Petitioner or any documents containing information from those medical records. However, the question is not so limited, and without waiving any objection as to the relevance or scope of this question, my response will construe this phrase as broadly as common sense allows.**
>
> [141] "There are roughly four categories of documents that could fall under the phrase 'inquisition records and/or documents.' First, there is the small amount of records actually obtained from Petitioner in this case. I understand this category has been excluded from this question by the phrase 'other than WHCS and/or CHPP records.' Second, there is the large mass of evidence produced pursuant to the many subpoenas obtained by my staff during the course of the inquisition over several years. Third, there are pleadings and other papers filed with the Court in which the inquisition was opened. Fourth, there are draft pleadings, attorney notes, **and summaries compiled by attorneys and investigators working on the inquisition**. Of course, there are also investigative files separate and apart from the inquisition, into which I do not understand this question to have inquired.
>
> [142] "With this clarification, I have no knowledge of any 'inquisition records and/or documents' **that have been transferred** by me in my position as Attorney General to myself in my position as District Attorney. I do have information and belief that electronic copies and drafts of pleadings and legal research compiled by Assistant Attorney General Stephen Maxwell (category 4, above) were transferred by Mr. Maxwell to his new office at the Johnson County District Attorney during transition. However, it is my information and belief that these did not include attorney notes and summaries, as **I am not aware of any summaries of the files, etc. that were transferred and as District Attorney have had to ask staff to recreate such summaries**. I have made requests to Attorney General Morrison for assistance in this regard, however, such assistance has been not forthcoming.

In spite of the revelation that Mr. Kline, "as District Attorney . . . had to ask staff to recreate such summaries," Attorney General Six did *not* expand his own request in *CHPP v. Kline* to include evidence that Mr. Kline and his staff *created* in Johnson County:

> [239] The Attorney General, now Six, characterizes the situation as one in which state property was unlawfully taken on Kline's exit from the office of the Attorney General. Before filing his most recent brief, the Attorney General had not attempted to use this case as a vehicle to obtain return of items other than patient medical records. **He now seeks "each and every copy of those records that [Kline] has made and any and all other evidence Kline developed and obtained while he was acting as Attorney General that he took with him to Johnson County." These items include, as asserted at oral argument, any summaries Kline or his subordinates have created of WHCS patient records.**
> **. . .**

Still later the issues evolved to include how Mr. Kline's office had handled the records, and there was a reference to the creation and use of Tiller summaries:

> [248] . . . This action does not deal with the content of the records. **We are now focused on Kline's handling of the records** since Alpha. This handling includes, among other things, Kline's and his subordinates' comparison of the records to **other materials to obtain adult patient names**--a goal Rucker specifically denied when questioned during the oral argument in Alpha. And it includes the last-minute removal of the records from the Attorney General's office and the high, long lob through various automobiles and Reed's dining room that Kline and his subordinates used to ensure that the records would not arrive in the Johnson County District Attorney's office before Kline and certain of his subordinates arrived. It also includes Kline's dissemination as Attorney General and Johnson County District Attorney of the records to various experts, and his inconsistent assertions of control and lack of control over the later dissemination of patient information by one of those experts. It includes Kline's and his subordinates' failure to correct the Status and Disposition Report and **their creation and use of summaries of WHCS records that Judge Anderson ordered returned**.

The CHPP Court ultimately fashioned an order that required Mr. Kline to deliver a set of documents to the Attorney General:

> [284] Kline shall produce and hand deliver to the Attorney General's office no later than 5 p.m. on December 12, 2008, a full, complete, and understandable set of the patient records and **any and all other materials gathered or generated by Kline and/or his subordinates in their abortion-related inquisition while**

> **Kline was Attorney General.** Neither Kline nor any of his subordinates or lawyers may make any exceptions whatsoever for any reason or on any rationale to the foregoing order. . . .

The Court subsequently ordered additional "relief," as a sanction, that *included* production of a set of "any and all materials gathered or generated" while Kline served as Johnson County District Attorney, but the order never mentioned Tiller summaries:

> [308] Kline shall produce and hand deliver to the Attorney General's office no later than 5 p.m. on December 12, 2008, a full and complete and understandable set of **any and all materials gathered or generated by Kline and/or his subordinates in their abortion-related investigation and/or prosecution since Kline was sworn in as Johnson County District Attorney.**

For the first time, and well after Mr. Kline testified before Judge King and spoke at oral argument, the Tiller summaries has a brush with "materiality" but only because they fall within the broad definition of "any and all materials gathered or generated. . .since Mr. Kline was sworn in as Johnson County District Attorney. On the other hand, the summaries themselves were never material to any issue decided and there is no evidence that the Court's "sanction" would been different regardless whether the summaries existed or had been destroyed.

The materiality problem with the Tiller summaries mirrors the materiality problem with the *Motion to Clarify* in the Alpha case – it had nothing to do with the issues in the case but a lot to do with the curiosities of the Court.

(a) Materiality During the Secret Trial Before Judge King

For all the high octane attention the Tiller summaries have received throughout this disciplinary proceeding, the summaries were so *insignificant* to Judge King that, as this Court noted, "Judge King's written report to the Court contained no mention of any summaries." *Opinion* p.72. And this is true even though Mr. Kline voluntarily revealed them in his discovery responses to the Court's 17 questions (while expressing his concern that the relevance of the summaries was outside the scope of the case). The grant of executive privilege limiting Mr.

Kline's testimony may have affected Judge King's failure to mention them, but the executive privilege was properly granted by Judge King and Mr. Kline properly invoked it in light of the open investigation at the time. Certainly at that stage of the *CHPP v. Kline* proceeding, there was no reason for Mr. Kline or Judge King to believe that Mr. Kline's work product (Tiller summaries) was a material issue in a case involving only the possession and handling of CHPP's patient medical records.

(b) Materiality By the Time of the CHPP v. Kline Oral Argument.

Clearly, the Tiller summaries had nothing to do with the original issues as asserted in the CHPP mandamus petition or the relief sought. One can argue that the summaries had a brush with materiality by the end of the case if only because they were encompassed with the scope of the "sanction" requiring Mr. Kline to turn over to the Attorney General a set of everything "generated" while he was in Johnson County. But even that scant brush with materiality came so late that Mr. Kline had already testified before Judge King and had already stated his (erroneous) belief at the CHPP oral argument.

Mr. Kline cannot be held to a standard of material falsehood when the first semblance of "materiality" did not surface until after he testified. This had a very practical consequence in this case. One value to the materiality of an issue is that a party is on notice of its importance. In this case, even the duty to correct would have dissipated once Mr. Kline received the *CHPP* opinion to learn that he was not required to purge himself of whatever summaries he may have had.

As this Court noted from the record regarding the secret trial before Judge King: "Kline further explained that he was "stunned" to be asked about the WCHS records because he believed Judge King's hearing concerned only CHPP records." *Opinion* p. 72. Likewise, the Court notes with some skepticism Mr. Kline's claim that he was unprepared to talk about

summaries at the CHPP oral argument. *Opinion* p. 86 (citing *CHPP v. Kline*, 287 Kan. at 402.) The Panel and the Court may be dissatisfied with Mr. Kline's memory and/or preparation, but neither defect establishes violations of KRPC 3.3(a)(3) or 8.4(c).

2. The Court Relied on an Objectively False Distortion of the Record To Find That Mr. Kline Had Knowingly Misled Judge King and Then Failed to Correct the Error.

Even if this Court holds ~~its~~ to its position that the WCHS summaries were material to *CHPP v. Kline*, the Rule 3.3(a)(3) violation must be vacated because Mr. Kline's limited testimony before Judge King was true.[24]

The Court's conclusion that Mr. Kline knowingly gave false testimony to Judge King rests on the Court's own misrepresentation of the record. Specifically, Mr. Kline did not testify that he had only three summaries, a point made explicitly by counsel during the November 15, 2012 oral argument, and he was not asked how many summaries he had. Rather, in response to whether "[there are] any summaries of Dr. Tiller's records left in Johnson County", Mr. Kline stated: "I have a summary of the three records that pertain to a theory of criminal liability that would have jurisdiction in Johnson County against Dr. Tiller." The line of questioning was then terminated due to a grant of executive privilege.

Framed as it was, with the three summaries *qualified* as relating to Johnson County, Mr. Kline's testimony was true in spite of the uncertainly of what he may or may not have recalled about *other* summaries had the questioning been allowed to continue. In effect, this Court has *misrepresented* Mr. Kline's true statement and then concluded that it was a false statement merely because there may have been more to say on the subject had the testimony not been

[24] Likewise, the 3.3(a)(1) and (a)(3) violations found by the Panel but which this Court did not consider, *Opinion* p. 85, are meritless because Kline's testimony was true.

terminated. This cannot be a serious application of the KRPC – a true statement cut short by the Court becomes a lie that requires correction later. Giving so little deference to the circumstances surrounding Mr. Kline's testimony before Judge King is just another violation of letter and the spirit of KRPC Scope ¶19.

3. The Court Misrepresented Mr. Kline's Response During Oral Argument in CHPP v. Kline and Has Disciplined Him For Mistaken Recall and Belief.

The Court's Opinion misrepresented the accuracy of Mr. Kline's statement to the *CHPP* Court after Justice Beier asked Mr. Kline whether he still had any patient summaries. Both in the heading section, *Opinion* p. 67 and in the text of the discussion that followed, *Opinion* p. 68, this court states that Mr. Kline "advised" the Court that he no longer possessed summaries of patient files. Mr. Kline did no such thing. He simply said: "I don't believe that I do."

"Advising" a court connotes far more certainty about a statement than the expression of a doubtful belief about it. If the Court is going to impose discipline upon Mr. Kline it should at least be candid about the facts underlying the discipline. The facts are that Mr. Kline stated a belief, later proven to be wrong, about whether he possessed medical summaries that had long ago ceased to be relevant to his work as Johnson County District Attorney.

Such conduct again deserves the protection of cabining under Rule 8.4(c) and under KRPC Scope ¶19. This is particularly true when, as here, there is no evidence or finding that Mr. Kline had any motive to mislead anyone, never did anything with summaries, and reported the existence of the summaries immediately to Judge Anderson[25] when his staff discovered them while responding to the subpoena in *State v. Tiller* about the summaries.

[25] The record is clear that Judge Anderson did not require Kline to return the summaries to him after Kline's staff discovered them, R.2, 687: 11-13, and that Judge Anderson has never required a prosecutor to turn over work product either to him or to the target of an investigation. R. 2, 698: 1-8.

Appeal Issue #8: Response to Disciplinary Investigation: Failure to Correct Statement About Records Kept Under "Lock and Key."

After vacating two Panel findings that Mr. Kline had violated KRPC 8.1(a) with false statements in response to the Disciplinary Administrator's investigation, this Court upheld a finding that Mr. Kline violated KRPC 8.1(b) by "fail[ing] to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter…" In doing so, the Court *abandoned* the explicit text of Rule 8.1(b) and improperly relied upon a Comment to Rule 8.1 to justify an analysis of evidence outside the scope of a true Rule 8.1(b) violation. Finally, the Court's evidentiary analysis (i) failed to recognize that Mr. Kline's statement was substantially true, and (ii) seriously *misrepresented* the fact record to portray Mr. Kline and his motivations in a false light.

1. The Court's Misapplication of Rule 8.1(b) is Inconsistent With the Operation of the KRPC and Must Be Vacated.

a. The Relevant Evidence.

The core facts surrounding the Rule 8.1(b) allegation involve Mr. Kline's statement, in response to the disciplinary investigation, that certain (redacted) medical records were always kept "under lock and key" while under the control of his office. Having later learned that the records were kept for more than a month in the apartment of investigator Jared Reed, Mr. Kline never corrected the "lock and key" statement to the Disciplinary Administrator.

Reed had been instructed by lead investigator Tom Williams to store the redacted records in his own apartment until a secure location could be established in the Johnson County District Attorney's Office.[26] Reed kept all of the records in an unlocked container in his dining room.

[26] The need to store the redacted records off-site was necessitated exclusively by the deplorably uncooperative behavior of outgoing District Attorney Paul Morrison. Judge King expressly found Morrison was uncooperative and that there was not a secure storage location in Johnson

R.2, 1178:16-21 (Reed). However, there is no evidence that Reed's apartment was ever unsecured or that the records were ever exposed to unauthorized access. Reed lived alone and had no reason to believe that the records were ever compromised. R.2, 1176:15-16, 1179:25 – 1180:3 (Reed).

It is undisputed that Mr. Kline had delegated record storage to his staff and that he was not told by Williams or Reed that Reed was keeping the records. There is no evidence that the Disciplinary Administrator was under any misapprehension about the records storage by the time Mr. Kline first knew about it, and there is no evidence that Mr. Kline knew that the Disciplinary Administrator was under any misapprehension about the records storage after Mr. Kline learned about it.

b. The Operation of KRPC Does Not Allow Official Comments to a Rule to Override the Text of a Rule.

As previously noted, KRPC 8.1(b) is violated if during a disciplinary investigation the accused "fail(s) to disclose a fact necessary to correct a misapprehension known by that person to have arisen in the matter." In plain English, not only must there be an actual misapprehension, but the offending attorney must know of it. This is the rule and there is no ambiguity in it. Yet, absent any evidence of a misapprehension by the Disciplinary Administrator or knowledge on the part of Mr. Kline, this Court has somehow found a violation of Rule 8.1(b) by clear and convincing evidence.

County. R. 3, 2030, at ¶138; R. 3, 2029, at ¶¶ 126-139 (Judge King Report). Mr. Morrison's Director of Administration, Judge Anderson and Steve Maxwell together testified that Morrison denied a secure storage room, demonstrated hostility and accosted Mr. Kline's staff with obscenity. *See e.g.*, R. 2, 1816:17-1817:14; 1818:8-1829:23; 1826:11, 16-18 (Carter); R. 2, 1501:5-1502:17 (Maxwell); R. 2, 752:18-753:7 (Anderson).

Disregarding the plain text of the rule, this Court relied instead on the Comment 1 to Rule 8.1 to conclude that a misapprehension on the part of the Disciplinary Administrator need not be proven for a Rule 8.1(b) violation. *Opinion* p. 95. After observing that Mr. Kline "cites no authority to support [his] suggestion" that a known misapprehension is required for a violation, the Court relies on Comment 1:

> "Paragraph (b) of this Rule also requires correction of any prior misstatement in the matter that the . . . lawyer may have made *and* affirmative clarification of any misunderstanding on the part of the admissions or disciplinary authority of which the person involved becomes aware." (Emphasis added.) KRPC 8.l(b), Comment I (2012) Kan. Ct. R. Anno~~l~~. 634).

Opinion p. 95. The Court then cites to *State Ex Rel. Okla. Bar Ass'n v. Gassaway,* 196 P.3d 495, 500 (Okla. 2008) to support its reliance on Comment 1.

There are three distinct problems with the Court's analysis. First, Mr. Kline does not and should not need case law to establish that a rule means what it unambiguously says. Mr. Kline's "authority" is the text of the rule upon which he is entitled to rely.

Second, the KRPC specifically disapproves of the use of a Comment to override the authoritative text of a Rule:

> The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule. The Preamble and this note on Scope provide general orientation. The comments are intended as guides to interpretation, **but the text of each Rule is Authoritative.**

KRCP Scope, Para. ¶21 (bold emphasis supplied).

Beyond doubt, the text of the rule governs, not the comment. This Court's finding that Mr. Kline violated Rule 8.1(b) is therefore itself a violation of the letter and the spirit of the KRPC and must be vacated on that ground alone.

Third, the Court improperly cited *State Ex Rel. Okla. Bar Ass'n v. Gassaway*, 196 P.3d 495, 500 (Okla. 2008) to support its rewrite of Rule 8.1(b), even though *Gassaway* is inapposite to this case and says nothing to support this Court's reliance on it. In *Gassaway*, the Respondent attorney had forged a letter on some old letterhead of his own attorney (Adams) to challenge a disciplinary investigation by the Oklahoma Bar Association (OBA). The truth was eventually discovered:

> "An OBA investigator testified that the language and tone of the letter was not consistent with previous letters received by the OBA from Adams during his prior representation of attorneys in involved in bar proceedings. This suspicion led the OBA to further scrutinize the letterhead and signature of Adams. It was discovered that the letterhead did not match other letters…."

Gassaway at 499. Attorney Adams later testified that he neither drafted, signed nor authorized the letter. *Id.*

Clearly, *Gassaway* involved deliberate deception intended by Gassaway to deceive the OBA, and a "misapprehension" occurred until the OBA investigation uncovered the truth. There is nothing in the opinion that suggests that Gassaway ever admitted the deception. *Gassaway* listed, but did not discuss, the elements of a Rule 8.1(b) violation and it certainly did not hold, or even state, that the rule could be violated in the absence of a misapprehension and knowledge of it. More disturbing is that contrary to this Court's discussion of *Gassaway*, nothing supports this Court's statement that in *Gassaway* the "administrator presented no other evidence regarding respondent's knowledge of disciplinary authority's misapprehension." *Opinion* at 95. Nothing in *Gassaway* allows a reader to draw such a conclusion about the record in *Gassaway*, all of which further undercuts this Court's reliance on it.

Finally, at least one state has amended its Rule 8.1(b) to eliminate the "misapprehension clause altogether because of the difficulty in its application. Ohio Rule 8.1(b) now states that a lawyer shall not:

> (b) in response to a demand for information from an admissions or disciplinary authority, fail to disclose a material fact or *knowingly* fail to respond, except that this rule does not require disclosure of information otherwise protected by Rule 1.6.

Of interest for this case, however, is the reason for the amendment as expressed in a Comment accompanying the new Rule 8.1(b):

> Rule 8.1(b) is modified for clarity. The clause, "fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter," is **too unwieldy and creates a standard too difficult for explanation and comprehension**. The elimination of that clause does not lessen the standard of candor expected of a lawyer in bar admission or disciplinary matters.

(Bold Emphasis supplied). The "unwieldiness" of the rule is certainly exposed in this case.

c. Even if the Court Adheres to Its Creative Application of Rule 8.1(b), Mr. Kline did Not Violate the Rule Because His Statement Was Substantially True.

Lost in the multipronged attack that was launched against Mr. Kline for his "lock and key" reference is that his statement was substantially true. The Panel found that

> [T]he redacted patient medical records were not kept "under lock and key"…. For five weeks, the redacted patient medical records were kept in a Rubbermaid container in Mr. Reed's apartment.

Final Panel Report, para. 382. This assumption, accepted by everyone in this process except Mr. Kline, is driven by emotion rather than fact. References to a "Rubbermaid" container are effective at portraying a cavalier approach to record storage. But the only relevant question is whether they were secure from unauthorized access. As Mr. Kline previously argued, "even when [the records] were kept by an investigator at his own residence for five weeks during Kline's transition in office due to security concerns at the Johnson County Courthouse," they

were at all times under lock and key, and the DA cites no evidence to the contrary. *Reply Brief of Appellant Phillip D. Kline*, p. 21. The phrase "lock and key" does not appear in the KRPC and, to Mr. Kline's knowledge, has no fixed legal meaning. However, Mr. Kline gladly accepts this Court's characterization that something is under "lock and key" if it is "in a secure location with access only by authorized individuals…" *Opinion* at p. 94. The Court's definition is consonant with Mr. Kline's view of the matter:

> My concern would be whether anybody had access who didn't have the authority to have access and the answer is no. My concern would be whether one patient was ever identified, the answer is no. My concern would be whether anyone had an unauthorized access to these records and the answer is no. That's my concern.

R. 2, 2021:2-10 (Kline).

Mr. Reed's locked apartment falls within that definition, as he lived alone and the security of the records was never breached. This location was in fact more secure than the Johnson County courthouse which was "wide open" and contained rooms that allowed custodial staff and others to gain access. Whether the records were in a Rubbermaid container in the dining room or an unlocked file cabinet in a bedroom closet, the question is the same for purposes of discipline: whether the records were under "lock and key" while in Reed's locked apartment? With the issue so framed, one cannot find a Rule 8.1(b) violation by clear and convincing evidence.

d. The Duty to Correct the Erroneous Statement Was Not Proven By Clear and Convincing Evidence Because There is Too Much Conflicting Evidence of When Mr. Kline Learned About the Record Storage.

For a Rule 8.1(b) violation, Mr. Kline had to know about the erroneous statement before a duty to correct it was triggered. There are various theories about when Mr. Kline first knew it, complicated by the fact that Mr. Kline would have found the fact of off-site storage to be an insignificant fact and therefore paid it little attention.

Notably, this Court placed great weight on the conclusion that Mr. Kline first learned about the record storage as the result of a deposition given by investigator Jared Reed to Attorney General Morrison in April 2007 pursuant to an immunity deal. *Opinion* p. 91. Reed disclosed various facts about his experiences working for Mr. Kline while Mr. Kline served as Attorney General and Johnson County District Attorney. After Mr. Kline learned about Reed's deposition, he called Reed to a meeting in his Office. According to this Court:

> Reed testified at Kline's disciplinary hearing that Kline angrily confronted Reed about Reed's deposition statement **concerning the files being stored in his apartment,** and Kline threw the transcript across the room. Although Kline claimed he did not recall when that meeting with Reed occurred, Kline admitted he probably read the information regarding the storage of WHCS patient files if that information was contained in Reed's statement.

Opinion at 91 (Bold emphasis supplied). Later, while making its case that the Reed meeting "alerted Kline to the falsity of his statement," *Opinion* at 94, the Court stated:

> This is buttressed by Reed's testimony regarding Kline's angry confrontation with him in September 2007 after Kline learned that Reed had given a sworn statement to Morrison **about storing the files in Reed's apartment.** According to Reed, Kline was so angry that he threw Reed's deposition across the room.

Opinion at 91 (Bold emphasis supplied).

These **two** statements by the Court are terrible distortions of the record and cannot be excused as "poorly constructed sentences." Here is Reed's actual testimony about his meeting in Mr. Kline's office:

> A. Mr. Kline had a copy of the deposition in his
> 23 hand and he had questioned me just as far as if
> 24 I-- if-- basically if the things that I told in
> 25 here if I truly believed them.
>
> Q. Did you respond to that question?
> 2 A. Yes.
> 3 Q. And what did you say?
> 4 A. I told him I wasn't comfortable discussing the
> 5 matter with him.

6 Q. And what happened after that?
7 A. He had taken the deposition and he had thrown it
8 across the room.
9 Q. In your presence?
10 A. Yes.
11 Q. Any more discussion that you recall?
12 A. No.

R. 2, 1189:22 - 1190:12 (Reed).

In short, the Court's linking of Mr. Kline's anger with Reed's storage of the redacted records is a fabrication and establishes nothing about when Mr. Kline knew about the storage issue.[27] Making the Court's fabricated link more disturbing is that other testimony by Reed and Mr. Kline at the ethics trial laid out quite clearly what Mr. Kline found so disturbing about Reed's deposition.

Q. (MR. STAFFORD) Mr. Reed, after you gave your
10 deposition to Mr. Guinn at the Attorney
11 General's Office, Attorney General Morrison's
12 Office, did he ever ask you whether Mr. Kline or
13 Mr. Rucker or Mr. Maxwell or Mr. Williams had
14 engaged in any unlawful activities or other
15 misconduct?
16 A. Not-- not that I can recall.
17 Q. Okay.
18 A. I recall I had given a personal opinion.
19 Q. And your personal opinion was?
20 A. The personal opinion was that I believed that
21 Mr. Kline would-- would contemplate going above
22 and beyond by breaking the law to further the
23 investigation.
24 Q. And why do you believe-- or why did you conclude
25 that?

[27] The Disciplinary Administrator vaguely suggested this non-existent link in the *Brief of Petitioner* (p. 66) filed with this Court on or about August 13, 2013, but nowhere near the extent to which it was done in this Court's Opinion.

A. That was purely an opinion.
2 Q. Did you have any basis for that opinion?
3 A. Just from-- just observations. I understood he
4 was passionate about abortion, but as far as
5 factual content goes, no.
6 Q. Okay. So it was just something you thought as a
7 possibility, but you never saw any misconduct,
8 you never saw any unlawful activity on his part?
9 A. Again, it was an opinion.
10 Q. Okay.
11 MR. HOLBROOK: He didn't answer the
12 question.
13 A. No, I didn't see anything.

R. 2, 1243:11 – 1244:13 (Reed)

In light of the widespread (and false) attacks to which Mr. Kline was subjected while running for office and while serving in office, his anger at such a baseless conjecture is understandable. Kline confirmed that it was this aspect of Reed's testimony that upset him:

> A. What I remember about the [Reed] statement…is his statement that he believed we would [sic] beyond the law based upon Mr. Rucker's statement. That's what leapt out to me in that statement and that's what I was concerned about.

R. 2, 2025:9-14 (Kline).

Mr. Kline's testimony meshes perfectly with Reed's recall that Mr. Kline asked him if he "truly believed" what he said in the deposition. It would make no sense for Mr. Kline to ask Reed if he "truly believed" he had stored the records in his apartment, a fact that did not bother Mr. Kline and which Reed knew to be true. It made perfect sense, however, for Mr. Kline to ask Reed if he truly believed that Mr. Kline was willing to act unlawfully in his investigation, especially when (as Reed admitted) there was no factual basis for such an "opinion." The record is disturbingly clear: not only did Reed never suggest that a disclosure about his record storage was the basis for Mr. Kline's anger, but Mr. Kline explained what he found so upsetting *consistent with* Reed's testimony on a *wholly unrelated topic*. This Court's "proof" about when

Mr. Kline had to know about Reed's record storage is contradicted by Reed's testimony, has no basis in the record, and therefore is not supported by clear and convincing evidence.

For Mr. Kline's part, he testified repeatedly that he is not sure when he learned about Reed's storage arrangement, but that it was not a relevant fact to him such that he would have taken note of it upon learning it. In that regard, the Court should be clear that Mr. Kline is not denying that he may have learned about it by the time of his meeting with Reed; it is simply that the insignificance of the issue would have led him to take little notice of it.

In summary, in finding that Mr. Kline violated Rule 8.1(b) in this case, the Court violated the intended operation of the KRCP by adopting a dubious comment over the clear text of Rule 8.1(b), the Court distorted the facts of the inapposite *Gassaway* case to fabricate support for its novel reading of Rule 8(b), and the Court distorted the testimony of Jared Reed to muddy Mr. Kline with forbidden motives and intentions that he never exhibited.

V. Arguments In Support of Rehearing or Modification On Count Two.

E. Appeal Issue #9: Advising Grand Jury on *Aid For Women* Case.

This Court upheld the Panel's finding that by improperly instructing the Grand Jury on the *Aid for Women* case, Mr. Kline violated KRPC Rule 8.4(c) (dishonesty, fraud, deceit or misrepresentation) and Rule 8.4(d) (Prejudicial to the administration of justice).

Although Mr. Kline properly instructed the grand jury that an abortion provider need not report child sexual abuse unless he has "reason to suspect harm caused thereby," this Court finds Mr. Kline failed to ensure the grand jury "understood" the law. R. 2, 2429:1-5; *Opinion,* at 115.

The Court reaches this conclusion by i) combining two logical fallacies in a misstatement of the record; ii) adding an additional logical fallacy regarding a finding of harm while overlooking the opinions of two sitting District Court judges who disagree with this Court's interpretation of *Aid for Women*; iii) ignoring the official record of the Grand Jury in preference to the perjured testimony of a single grand juror; and iv) failing to consider the applicable law to grand jury subpoenas and ignoring the fact that *Aid for Women* was not material to the Grand Jury's conduct.

The Court also based Mr. Kline's alleged violations on legal theories he has never had a chance to defend.

1. This Court Uses a Logical Fallacy to Claim Mr. Kline Impliedly Informed the Grand Jury that Charges Should Issue if the Reports of Child Sexual Abuse do not Match Kansas Termination of Pregnancy Reports. This Statement was Never Made or Implied.

Medical providers such as abortion doctors must report to SRS when they have reason to believe a child has been harmed by sexual abuse. K.S.A. 38-1522. The abortion providers are also required to report to KDHE information relating to each abortion performed. K.S.A. 65-

445. The Kansas Termination of Pregnancy Reports ("KTOP") do not contain patient identities, but do contain the date of birth of the abortion patient and the gestational age of the fetus. Accordingly, by reviewing the KTOP reports and comparing the gestational age of the fetus with the mother's birth date an investigator can determine the date of the aborted child's conception and the age of the mother on that date.

Moreover, investigators are able to request from SRS de-identified reports of child sexual abuse. These de-identified reports can be listed by reporting person or entity. Accordingly, obtaining KTOP reports and these SRS reports allows an investigator to identify whether the number of abuse reports issuing from an abortion provider and their employees match the number of reports relating to child abortions. One need simply compare the provider's name, location and their identified employees with the sexual abuse reports emanating from that physical location in order to determine a ratio of child abuse reports to underage abortions provided. This method of investigation represents the least intrusive manner to proceed because it does not require, at its initial stages, abortion records or patient identities.

If the mandatory reports match the KDHE reports it is fairly clear evidence that abortion providers ***are*** following the mandatory reporting statute and the investigation can cease. This does not, however, mean that if the reports do not match that the abortion providers are violating the law and that charges should issue.

Mr. Kline advocating that the Grand Jury use this matching of SRS and KTOP reports as the beginning point of the mandatory reporting investigation does not mean Mr. Kline advocated that the Grand Jury charge Planned Parenthood with crimes if the reports do not match.

Such is the Court's logical fallacy, committed by denying the antecedent and represents an inverse error in logic. This Court ignores the "if" of the conditional premise. For example,

"if A, then B" does not mean "not A, therefore not B." Because matching reports likely means that clinics are following the law does not necessarily mean that the reports that do not match are proof of violation – it simply means more investigation is required. Mr. Kline suggested that the Grand Jury use such a comparison as "a beginning point" in the investigation. He never suggested or said "by implication" that if the documents failed to match that "the grand jury would have sound evidence the clinic failed to report sexual abuse" as this Court states. *Opinion, at.* 119. Nowhere does Mr. Kline make such a statement and he never sought a true bill. This mendacious judicial interpretation is dependent on the logical fallacy of inverse error, thereby removing the statement from its correct context and ignoring Mr. Kline's actual instruction to the Grand Jury.

Mr. Kline had already conducted just such an investigation while he served as Attorney General. His staff, pursuant to subpoenas issued by Judge Anderson, obtained KTOP reports from KDHE and reports of child sexual abuse from SRS. A comparison of those reports completed in May of 2004 found that during a time in which 166 abortions were performed on children 14 years of age and younger that Planned Parenthood and their employees had only issued one report of child sexual abuse. *See e.g.*, R.3, at 294. Moreover, Mr. Kline had statements from a Planned Parenthood security guard that he was told to ignore the law by his employer and statements by investigators with the Kansas City, Kansas police department that Planned Parenthood was difficult to work with in child sexual abuse investigations.

Yet, even then, Mr. Kline did not file charges. Rather, he sought to investigate further by eventually requesting a subpoena of Planned Parenthood's abortion records relating to children. The request was made in the fall of 2004 and approved by Judge Anderson in September 2004, after he found probable cause to believe that the records contained evidence of criminal activity.

It was this subpoena and Judge Anderson's denial of Planned Parenthood's efforts to quash the subpoena the led to the *Alpha* mandamus filing. Mr. Kline did not receive the redacted abortion clinic records until October 24, 2006. Accordingly, Mr. Kline's conduct in his own investigation clearly reveals that he did not think that the failure of the records to match necessitated the filing of charges.

Mr. Kline properly suggested to the Grand Jury that they follow this least intrusive method of investigating compliance with the mandatory reporting statute. Conducting a record comparison was discussed as a "beginning point" of the investigation which would later be supplemented with expert and witness testimony as the investigation, if necessary, proceeded. See, e.g., R. 3, 2450:9-2452:20 (Grand Jury transcript, December 17, 2007).

Such instruction is well founded, truthful and helpful and it was the method followed by the Grand Jury. Such a finding is mandated if Mr. Kline's comments to the Grand Jury are reviewed in their entirety rather than cherry picked and mischaracterized.

After its logical fallacy the Court compounded its error by directly assigning a statement to Mr. Kline which he did not make. The Court writes "[b]y failing to explain the grand jury's investigation could not end with a record comparison, Kline left the grand jury with the mistaken impression that if the records did not match, a per se violation of the reporting law occurred." *Opinion*, at 119. Mr. Kline never stated that the investigation "could not end" with a records comparison. He merely stated that it could end if the records matched. Stating "if A, then B may occur," is not the same as stating "if A, then C must occur." The Court's statement is wholly without support.

The Court then concluded that the statement wrongly attributed to Mr. Kline "reinforced the grand jury's misapprehension…" that they would have to charge the clinics with a crime if the records did not match. *Id.*

This Court further amplified its error when it misrepresented Mr. Kline's testimony about the legislature's purpose in passing the Child Rape Protection Act. Mr. Kline served as Attorney General when the act passed, was involved in drafting the law, and his office testified in support of the law. Governor Sebelius signed the act into law.

Unlike the mandatory reporting law, the Child Rape Protection Act requires an abortion provider to report all instances of abortion on children 13 years of age or younger. These reports must issue whether or not there is specific evidence of harm to the child. K.S.A. 65-6709a.

> "The description of the law is very, very clear, every time we spoke of it the central tenet, except for the Child Rape Protection Act which doesn't require suspicion of harm. You see, the Child Rape Protection Act isn't under *Aid for Women*. It wasn't an issue under *Aid for Women*. That statute is entirely different. There is no discretion under the Child Rape Protection Act. If the child is 13 you report it to the KBI if there's an abortion. That's never been challenged constitutionally. There's no case law that says it's not a valid law. But under the mandatory reporting statute on the first day I tell them the issue of harm is the central issue."

R. 2, 2887:1-15 (Kline).

On the grand jury's first full day Mr. Kline explained the Child Rape Protection Act after he explained the mandatory reporting law.

> "Any questions as it relates to that area of the statute? Okay. So there's the general requirement of reporting sexual abuse, and then there's a specific requirement called the Child Rape Protection Act. Now the theory behind this, as it relates to abortion providers, is that law enforcement has better tools to determine the truth as relates to who is the father of the child that an abortion clinic just engaging in an intake application form. In other words, oftentimes when reports of child sexual abuse do not occur to the police and a pregnancy results, someone with authority or control over the child is the perpetrator of the sexual abuse. Parents report when their children are raped unless somebody in that environment is engaged in the sexual abuse that caused the pregnancy or it truly was an issue of consenting teens making a mistake. In either event, law enforcement has better tools to determine the truth so the legislative thinking behind the

> statute is you don't just let the rapist walk in with the child and say, 'It was her boyfriend,' because that gives them the magic words to get away with a crime…[t]hat's the theory behind it, and that's why the Child Rape Protection Act passed."

R. 3, 2433:6-2434:10 (Grand Jury Transcript).

Unlike the mandatory reporting law, the Child Rape Protection Act only applies to abortion providers. Also unlike the mandatory reporting law, the Child Rape Protection Act only applies to children 13 years of age or younger who have an abortion and requires reports in all instances of abortion whether or not the doctor had reason to suspect injury. The Act has never been challenged. Mr. Kline accurately described the differences in the two laws and the legislative reasoning in passing the act.

This Court misrepresents Mr. Kline's statements by removing them from their context and inferring the statements were made about the mandatory reporting law. "Kline further misled the grand jury with his statement that 'law enforcement' is better equipped than a statutory reporter to determine if a child has been 'harmed'…[t]hus, Kline advocated to the grand jury that even if a minor patient reports that her pregnancy resulted from consensual sex with an age-mate boyfriend, a statutory reporter was not entitled to an explanation." *Opinion, at* 120.

The Court's statement is false in several respects. First, it applies Mr. Kline's statement about the Child Rape Protection Act to the mandatory reporting law in order to claim that Mr. Kline "advocated" something he never even stated. Second, the artifice is forwarded by displacing Mr. Kline's reference to "abortion providers" with the term "statutory reporter." The mandatory reporting law refers to numerous "statutory reporters" while the Child Rape Protection Act only applies to "abortion providers."

Mr. Kline's proper explanation of the Child Rape Protection Act, as well as the legislative intent behind that act, is not proof that he "advocated" that all "statutory reporters" must report "consensual sex with an age-mate." Indeed, he never made any such a statement nor advocated such a position.

2. This Court Errs by Rewriting K.S.A. 38-2223 To Remove the Need for an Objective Determination of Harm and Disregards the Previous Contrary Opinions of Two Lower Courts.

The Kansas mandatory reporting statute requires medical providers to report child sexual abuse if that provider "has reason to suspect that a child has been harmed as a result of physical, mental, or emotional abuse or neglect, or sexual abuse." K.S.A. 38-2223. Mr. Kline quoted this statute in its entirety to the Grand Jury on the first day it met. R. 3, 2429. A grand juror asked Mr. Kline whether a report must issue if two 14-year old children are engaged in sexual activity and Mr. Kline correctly responded that the factual issue to consider is whether "there is reason to believe there is harm caused thereby." R. 3, 2432:6-10.

This Court rejects this correct statement of law, and the statute's objective standard, by claiming that the determination of "harm" rests solely within the discretion of the abortion provider. *Aid for Women* does not stand for that proposition, which would effectively give doctors immunity from prosecution even if they deliberately ignored obvious harm to a child. If the legislature intended to give doctors such unfettered (subjective) discretion the law would merely require mandatory reporting when a doctor "suspects" harm. Because the statute imposes an objection standard ("reason to suspect harm"), a charging authority must review evidence to determine if the provider was reasonable in his determination of whether harm was present. To investigate compliance with the law, a grand jury would necessarily be required to review evidence to determine if the doctor "had reason to suspect harm" caused by the sexual abuse.

This is exactly what Mr. Kline said, three separate times on the Grand Jury's first full day. R. 3, 2429:4-8; R. 3, 2430:8-15; and R. 3, 2431: 4-10.

This Court illogically concludes that *Aid for Women* stands for the proposition that a grand jury cannot consider any evidence that the doctor had reason to suspect harmed beyond the doctor's own statement:

> Further, Kline's suggestion to the grand jury that the issue of "harm" was for the jury to take up was blatantly incorrect. As Kline was acutely aware…the meaning of the term…harmed…was not an open question, nor was it an issue for the grand jury to decide. Rather, under K.S.A. 38-1522, 'health care providers,' not law enforcement or other charging bodies had 'discretion to determine when there is 'reason to suspect a child had been injured.

Opinion, at 117 (quoting *Aid for Women II*, 427 F. Supp. 2d, at 1116).

This is not the *Aid for Women* holding, which is very limited: "[T]his case is not about whether adult sexual predators escape detection… [but only addresses] mandatory reporting of consensual activity of minors." *Aid for Women*, at 1106, 1116. Judge Marten limited his holding to "clear cases of consensual, same-age sexual relations." *Id*. at 114.

"The core of the reporting statute-providing for the detection and protection of children suffering from incest or abusive sexual activity – ***is unaffected by that holding***. Such acts were and will remain subject to mandatory reporting. But the statue was not intended to cover ***consensual activity between age-mates that does not result in injury***. The injunctive relief barring the Attorney General from implementing a per se rule that all illegal sexual activity involving a minor is injurious…." ***Id.***, at 1113 (emphasis added).

The injunction only limits the duty to report consensual, non-injurious, sexual activity between age-mates. It doesn't, as this Court suggests, prevent an investigation to determine if the sexual activity was not between age-mates, or whether the illegal sexual activity resulted in injury to the victim which the provider had reason to know was present.

Judge Marten held that there was not a "per se" reporting rule of underage child sexual activity and that reporting was only required if injury resulted. It is for this reason Judge Marten stated that even age-mate sexual activity involving "incest or abusive sexual activity" was unaffected by his injunction.

> "The legislature acknowledged that all illegal sexual activity involving a minor necessarily results in 'injury;' thus, not all unlawful sexual activity warrants reporting. The language of the statute recognizes that some illegal sexual conduct, such as consensual, voluntary sexual activity with an age-mate falls outside the scope of the statute, ***as it may not cause injury***….[T]he court finds that the legislature's inclusion of the phrase 'reason to suspect that a child has been injured' ***requires reporters to determine if there is a reason to suspect injury*** resulting from the sexual abuse."

Id., at 1102-1103 (bold emphasis supplied). "This opinion does not change in any respect the law or policy as it has been applied in Kansas since 1982; indeed, it upholds both. In every case in which a reporter has a reasonable suspicion of injury caused by abuse of any kind, the report must continue to notify SRS. *Id*., at 1116.

Accordingly, this Court applied a logical fallacy to Judge Marten's reasoning in *Aid for Women* while ignoring Judge Marten's clear statement that *Aid for Women* still required reporting of illegal sexual conduct which could reasonably lead one to believe that injury resulted. Judge Marten simply rejected a "per se" rule. By holding that mandatory reporters are not required to report child abuse when evidence of injury does not exist, Judge Martin did not hold that mandatory reporters can evade reporting even when evidence of injury is obvious.

This Court's finding is contrary to Judge Marten's holding, contrary to logic and contrary to the clear language of the statutory language.

This Court "can hardly be said to have 'precisely stated the holding' of *Aid for Women II*" as the burden of proof in this matter would require.

This Court's interpretation of *Aid for Women* also clearly conflicts with the opinion issued by Sedgwick County District Judge Clark Owens in *Kansas v. Tiller* filed by former Attorney General Paul Morrison. Judge Owens reasoned that Mr. Kline's investigatory approach was well reasoned and consistent with law.

> The mandatory reporting statute is actually a very difficult law to enforce. A prosecutor not only has to prove that the defendant is a member of the mandatory reporters and that they have reason to believe that a child has been sexually abused. The prosecutor would have to also prove that the mandatory reporter was aware that the child had been injured by the abuse. This additional requirement applies not only to sexual abuse, but also physical, mental and emotional abuse and neglect. How is a prosecutor going to obtain the information that an individual nurse, psychologist or physician has counseled with a child that has been sexually abused and also has the added factor of having been injured by the abuse?
>
> **In the instance of an abortion provider, any child that has received services by definition is pregnant. In the instance of a late-term pregnancy, the abortion provider has obviously reached the conclusion that the procedure is medically necessary for the health of the mother. That would certainly be stronger evidence of injury than can be inferred merely by visiting a nurse or physician. Even in the event of an early term pregnancy, the fact that the minor is obtaining an abortion shows that it is an unwanted pregnancy.**

R. 4, at 1663-1664 (bold emphasis added).

Judge Owen's Opinion was issued in 2009, well after the injunction in *Aid for Women*.

Furthermore, in 2004, Mr. Kline's office obtained subpoenas from Judge Anderson to investigate failure to report child sexual abuse. Judge Anderson was aware of *Aid for Women* when he approved subpoenas to KDHE, and later Planned Parenthood and WHCS. Both KDHE and the abortion clinics filed motions to stay or quash the subpoenas based on the preliminary injunction in *Aid for Women*. R. 4, 2660-2663 and 2949-2955. Denying the clinics' motion, Judge Anderson wrote:

> The medical facilities have informed the Court that an injunction has been entered in the United States District Court for the District of Kansas prohibiting the enforcement of mandatory reporting requirements of **sexual activity between**

> **minors of similar age and injury is not reasonably suspected**. *Aid for Women v. Foulston*, 327 F. Supp. 2d 1273, 1275 (D. Kan. 2004). The facilities indicate that the Attorney General has (or will) be joined as a party defendant. Prior to the issuance of the subpoena, the Attorney General provided this Court with a copy of the decision in the federal case. **The Court considered Judge Marten's order in finding that subpoenas for records in this investigation should be issued. This inquisition is not focused on mandatory reporting of sexual activity between similar age minors when injury is not reasonably suspected**.

R. 4, at 2953 (emphasis added)(page 5 of Exhibit V4).

At their first meeting Mr. Kline suggested to the Grand Jury that they look at late-term abortions involving children to determine whether Planned Parenthood was complying with the mandatory reporting law.

> I would suggest – and we can provide you testimony from one of our investigators which will help provide a foundation for this. But I would suggest that you only deal with those involving children and those – or determinations of gestational age of 22 weeks or more because one of the things you are asked to look at is reporting of sexual abuse of minors….[t]here will be the Kansas Department of Health and Environment's Induced Termination of Pregnancy Reports that you can review, and the only relevant one's will fall into that category. What we could do, if you seek that, it can be provided electronically, and we can have an investigator review that and provide you a summary, as well as look at those records. That is a good starting point.

R. 2, at 2451:5-20 (Grand Jury transcript quoting Kline).

Kansas law required an abortion provider to find that the mother would "suffer severe and irreversible injury" prior to performing an abortion on a viable fetus of 22 or more weeks of age. This finding of injury resulting from the sexual abuse would, as Judge Owens reasoned, require a report of sexual abuse since the abortion provider had reason to know of the injury. This does not in any fashion conflict with Judge Marten's opinion or Kansas law.

Mr. Kline repeatedly testified that his opinion issued in 2003 was irrelevant to his investigation. Judge Anderson and Judge Owens came to the same conclusion. Moreover, this Court improperly imposes the *Aid for Women* decision as a bar to investigation, rather than

merely a prohibition of convicting a mandatory reporter of failing to comply with the law in circumstances where evidence of injury is not reasonably known to the abortion provider.

A Kansas grand jury may issue a subpoena for any "relevant" records and the burden to prove a lack of relevancy is on the opponent of the subpoena. *Tiller v. Corrigan*, 286 Kan. 30, 182 P.3d 719 (Kan. 2008).[28] Before issuing a subpoena to Planned Parenthood the Grand Jury would, therefore, need to find that the requested records were ***relevant*** to the mandatory reporting investigation. The *Aid for Women* case does not in any fashion impinge on this authority as clearly explained by Judge Owens and as found by Judge Anderson.

The Grand Jury must be able to review relevant information to determine if the abortion provider had "reason to suspect harm" caused by the sexual abuse. As admitted by this Court, sexual intercourse with a child under 16 is "sexual abuse" as defined by the mandatory reporting statute. The next question is whether the medical provider had reason to suspect that sexual abuse caused harm to the child. This evidence is obtained on a case by case basis and for the investigation to result in charges it will be necessary to review the abortion files to determine what information was available and known by the abortion provider. Mr. Kline merely gave the Grand Jury a manner to proceed which could indicate compliance with the law prior to proceeding with a subpoena for the abortion records – if the KDHE records and KTOP records match compliance is highly likely. If not, then the investigation continues.

[28] Judge Moriarity appointed Mr. Merker as special counsel for the Grand Jury. Mr. Merker testified at hearing that despite his responsibility as counsel to the Grand Jury that he "didn't have a clue" regarding the applicable law for grand jury subpoenas. R. 2, 2663:3-7.

This explanation is appropriate, consistent with the law, reasonable and consistent with *Aid for Women*.[29]

3. This Court's Interpretation of *Aid for Women* is Novel and First Presented in Its Opinion. Accordingly, Mr. Kline's Due Process Rights are Violated by this Finding and the Lack of Notice for a Theory Which he was Denied an Opportunity to Defend.

Throughout these proceedings the Disciplinary Administrator and the complaining party, Ms. Hensel, have maintained that Mr. Kline failed to inform the Grand Jury that a doctor is not required to report child sexual abuse unless the doctor has reason to suspect the child was harmed by that abuse.

On July 12, 2009, Ms. Hensel wrote Mr. Hazlett stating that Mr. Kline's office told "the Grand Jury all underage pregnancies were evidence of a crime and were required to be reported." R. 3, at 275. In her formal complaint filed with Mr. Hazlett on July 31, 2008, Ms. Hensel writes: [w]hen asked by a Grand Jury member of (sic) this mandatory report applied to 14-15 year-olds, Mr. Kline states, 'Yes.'" R. 3, at 180 (Hensel complaint letter, at page 1). Ms. Hensel omitted the remainder of Mr. Kline's statement that "the only issue that you are dealing with is reason to believe there's harmed caused thereby." R. 3, at 2431:4-10.

Ms. Hensel continued this misrepresentation of Mr. Kline's testimony at hearing claiming that Mr. Kline advised the grand jury that "the law was any girl 16 or under by law had to be reported to SRS by the fact that she was pregnant, because that, I believe the word per se…was per se harmed and so that was a mandatory reporting event." R. 3, at 2349:6-12-2350:1. This

[29] This Court goes to great length to justify its finding that Mr. Kline intended to deceive even when accurately stating the law. In doing so, the Court ignored Mr. Kline's advice that provided the Grand Jury with exculpatory evidence indicating that the clinics were complying with law. Mr. Kline's staff provided the Grand Jury with a copy of Mr. Morrison's "clearance letter" issued after Morrison completed his investigation of Planned Parenthood. R. 3, 2717:19-23.

testimony is not supported by the grand jury transcript and Mr. Kline never used the term "per se" when explaining the mandatory reporting law.

Creation of new Duty

Throughout these proceedings, Mr. Kline defended claims that he failed to inform the Grand Jury that applicable Kansas law only required reports of child sexual abuse if the reporter had reason to suspect the child was harmed by that abuse. When it became clear that Mr. Kline did accurately inform the Grand Jury of the law, the panel morphed Mr. Kline's accurate statement of the law into an ethics violation by claiming he had the duty to ensure the Grand Jury "understood" his explanation of the law. "A prosecutor's role with the grand jury is to make certain that the grand jury *understands* the law relevant to the inquiry." R. 1, at 1938 (Final Hearing Report, at 167, ¶391. The Panel's finding is so novel that even the Disciplinary Administrator abandoned it at oral argument in response to a question from Justice Biles.

> Justice Biles: In paragraph 391 of the Panel's findings they state that a prosecutor's role with the grand jury is to make certain that the grand jury understands the law relevant to the inquiry. That can't be right, can it? The district attorney or the prosecuting attorney doesn't have any duty toward comprehension. I mean, they have a duty to accurately and fairly represent the law, possibly, but the comprehension of the grand jury is not the responsibility of the prosecuting attorney, is it?
>
> Mr. Walczak: No, I would agree it is not.

Oral Argument, November 15, 2012.

Yet, this Court has now concluded that that a prosecutor does have such a duty and that Mr. Kline violated it. The Court lifts this duty from Mr. Maxwell's testimony, again without citation or quotation, stating "Maxwell testified…that a prosecutor is a 'legal advisor' to the grand jury and should ensure that the jury understands the criminal law. Maxwell's description is consistent with the statutory provisions of a prosecutor's role." *Opinion*, at 114-115.

Mr. Kline did not have the opportunity to defend this claim at hearing and is not aware of any case law or prior claims which allege that a prosecutor has a duty to "ensure" every grand jury member comprehends the law. Mr. Kline accurately described the law.

The Court compounds its error by introducing its new interpretation of *Aid for Women*. No one, until this Court, has argued that *Aid for Women* does not allow an investigation to proceed nor has any court stated that *Aid for Women* stands for the proposition that a doctor may refuse to report child sexual abuse even when a reasonable person would "suspect that harm was caused" by the abuse. Mr. Kline was not afforded an opportunity to defend this claim.

Finally, the *Aid for Women* cite was not annotated in the copy of the relevant reporting statute because that statute had been amended prior to the Grand Jury being seated. Mr. Kline's staff provided the grand jury with the current copy of the Kansas Statutes Annotated, which did not have the case cite, as a part of a notebook given to the grand jury at the beginning of the investigation. The grand jury's lack of this citation did not affect its decisions or conduct and was not material to their deliberations.

4. This Court Overlooks the Official Record of the Grand Jury and Instead Relies on the False and Contradictory Testimony of a Single Grand Juror.

Even had Mr. Kline misrepresented the law to the grand jury, this Court would still need to find by clear and convincing evidence that the Grand Jury relied on this falsehood – that there was some prejudice – to find a Rule 8.4(d) violation. This Court solely relies on the testimony of Ms. Hensel to make such a finding, without citation to the record and without quotation. *Opinion* at 120. Ms. Hensel, however, is not the spokesperson for the Grand Jury and her testimony is directly contradicted by the Grand Jury record.

Relying solely on Ms. Hensel's testimony, the Disciplinary Administrator asserted that the Grand Jury issued its subpoena to Planned Parenthood to forward the mandatory reporting

investigation and that its decision would have been different had the Grand Jury known about *Aid for Women*. Yet the official record of the Grand Jury clearly demonstrates that the Grand Jury issued the subpoena to investigate Planned Parenthood's compliance with the 24 hour waiting period and parental consent law.

> "The Grand Jury would like to make a formal statement in regards to the subpoena issued to Planned Parenthood of Overland Park. The purpose of the subpoena dated on January 7, 2008 to Comprehensive Health of Kansas and Mid-Missouri, Inc., was for the purpose of determining whether Planned Parenthood complies with the following, parental consent requirement and compliance with the 24 hour waiting period."

R.4, at 4953 (Exhibit Q8, at 260).

Planned Parenthood's counsel, Douglas Ghertner wrote to the Grand Jury's special counsel on February 20, 2008 stating that the agreed protective order "states that the purpose of the January 7th subpoena is to determine whether Planned Parenthood complies with "Parent [notice] consent (sic) requirement – Compliance with 24 hour waiting requirement." *Id*., at 4799 (Exhibit Q8, at 106). Later that same day, Mr. Ghertner reiterates the purpose for the subpoena in a letter to Mr. Merker. Id., at 5007 (Exhibit Q8, at 314). Special counsel McClain confirmed the purpose of the subpoena in a statement to the court on February 25, 2008. R. 3, at 2916:19-2917:7.

Moreover, the information sought by the subpoena proves the subpoena was not issued to forward the mandatory reporting investigation. The subpoena did not seek patient names. The Grand Jury sought to subpoena the very same records obtained in the *Alpha* investigation which only included three abortions involving children. R. 3, 2762:1-19. Those records were already in the possession of the District Attorney's office but they were over-redacted and did not include date and time information necessary to investigate compliance with the 24-hour waiting period and parental notification laws. R. 3, at 2715:11-2716:18.

Furthermore, the records did not support the investigation of failure to report child sexual abuse because they did not have the names of the child patients. *See, e.g.*, R. 3, 2702:1-6. Accordingly, no reason existed to subpoena records already in the possession of the District Attorney's office for the mandatory reporting investigation unless the subpoena sought the relevant evidence missing from the documents originally produced under *Alpha* – **the child names**.

The same holds true regarding an investigation of compliance with parental notification and the 24-hour waiting period. The Grand Jury would need to see the dates and times of meetings— redacted in the *Alpha*-produced records— and the parental notification form. The only evidence not in the possession of the Office of District Attorney at the time of the Grand Jury subpoena to Planned Parenthood relevant to the mandatory reporting investigation of the three subpoenaed child patient records was the identity of the minor patients. The Grand Jury did not seek this information, but did seek dates and times—further evidence that the purpose of the subpoena was for the two issues identified and not to investigate mandatory reporting failures. The subpoena orders Planned Parenthood to remove patient-identifying information and requires inclusion of dates and times of procedures. *See* Exhibit 108.

In a memorandum in support of its Motion to Quash, Planned Parenthood identifies the information sought by the Grand Jury that was <u>not</u> in the records originally produced to Judge Anderson. The information includes:

1. Any dates or times contained in any record
2. Dates of birth
3. Any dates relating to the last menstrual period
4. Dates and/or times of medical procedures and consultations

5. Dates and/or times of any required notification and/or compliance with any required waiting period

6. Any information contained in KDHE reports of induced termination of pregnancy forms

7. Names of insurance companies

8. Names of physicians or personnel working for Comprehensive Health

9. Patient ID codes as used in the KDHE forms

10. Any other information that cannot logically be used independently to identify a patient from the files.

The records and information sought would not have added in any fashion to an investigation of compliance with the mandatory reporting law.

This Court relies on Ms. Hensel's testimony to find harm. "The presiding juror specifically testified the discovery of the opinion impacted the investigation as the grand jury felt it no longer had reasonable suspicion to request records from CHPP on the reporting issue."[30] *Opinion*, at 122. This testimony, however, is fallacious and contradicted by the Grand Jury's actions.

On January 9, 2008, the Grand Jury, with Mr. McClain and Mr. Maxwell, had a full and complete factual discussion regarding *Aid for Women*. The Grand Jury decided to proceed as suggested by Mr. Kline and first seek SRS records and compare those records with KTOP reports. First, the Grand Jury subpoenaed Kansas Department of Revenue reports to determine the names of Planned Parenthood employees. This was necessary because some reports of child abuse may be filed under the name of employee and not the business. This subpoena was issued immediately after the discussion of *Aid for Women* on January 9, 2008. Ms. Hensel testified that this subpoena was issued to forward the

[30] The Court also cites Mr. Merker's testimony that the Grand Jury was "unhappy" by the discovery of the opinion.

"mandatory reporting" investigation. R. 2, at 2348:16-2349:5 (Hensel). "And so we came to believe they weren't reporting as required by law and so our thought process when we issued this [subpoena to the Kansas Department of Revenue] was to allow us to get names of people who worked for Planned Parenthood." *Id.*

The Grand Jury also subpoenaed the KTOP reports from KDHE in order to compare those reports to the SRS records. *See e.g.,* R. 3, 2758:5-19; 2780:1-2782:19; and 2823:1-2824:20.

On February 12, Judge Moriarity entered a protective order relating to the SRS records subpoenaed. R. 3, at 3419-3421.

On February 20, 2008, 42 days after *Aid for Women* was discussed, Judge Moriarity informs the Grand Jury that he was reviewing SRS's response to the Grand Jury subpoena of records relating to their mandatory reporting investigation. R. 3, at 3118.

Four days later, 46 days after *Aid for Women* was discussed and only seven days before the Grand Jury statutorily disbanded, the Grand Jury began reviewing the SRS records in their mandatory reporting investigation. On that date, Mr. McClain indicated that after photocopying he would have the SRS records ready for review. R. 3, 3155a-3156:6.

The *Aid for Women* discussion did not impact the Grand Jury's investigation plan. The subpoena to Planned Parenthood was issued to forward an investigation of Planned Parenthood's compliance with Kansas child consent and the 24 hour waiting period laws. The Grand Jury decided to compare SRS records to the KDHE KTOP reports. To accomplish this the Grand Jury first subpoenaed the Kansas Department of Revenue to identify Planned Parenthood employees and then subpoenaed SRS and KDHE records.

These subpoenas and records continued to be issued and reviewed well after the discussion of *Aid for Women*.

The official transcript and Grand Jury statements are the best evidence of the Grand Jury's intent and thought processes. Ms. Hensel does not speak for the Grand Jury and her service as presiding juror does not afford her that right. The Grand Jury speaks by its votes and its official record and transcript.[31]

At most, this Court may disagree with Mr. Kline's opinion regarding the import of the *Aid for Women* holding, but such does not rise to the level of clear and convincing evidence of an intentional deception or conduct prejudicial to the administration of justice.

F. Appeal Issue #10 Motion To Enforce Grand Jury Subpoena

This panel concluded that Mr. Kline violated KRPC 8.4 (g) by disregarding the Grand Jury request that it be advised in advance of any document to be submitted to the Court "in our name." Mr. Kline proceeded to file, in the name of Johnson County, a motion to enforce a languishing Grand Jury subpoena directed to CHPP.

There are two different tracks to this Court's findings: (1) Mr. Kline's disregard of a Grand Jury request; and (2) Mr. Kline's taking action beyond his statutory authority as an adviser to the Grand Jury.

As noted early in this memorandum, the Court has flatly misrepresented the record every time it has stated that Mr. Kline disregarded the Grand Jury request. The Court describes this as

[31] Ms. Hensel was successfully impeached in several statements and committed perjury. Her false statements are detailed in the Exceptions filed by Mr. Kline in December of 2011. Exceptions, at 121-143, ¶¶ 332-380. These manipulations including lying about knowledge of a secret agreement that harmed the Grand Jury's interests to relying on incorrect and confusing legal interpretations by sources outside the Grand Jury and Mr. Kline's office.

a "misguided trajectory," *Opinion* at 126, but it is not. Having been criticized and disciplined for ambiguities and less-than-perfect word selection, Mr. Kline will cling to the principle that *unambiguous* words must be given their plain meaning. In plain English, the grand juror request related only to documents to be filed in the Grand Jury's name. The only way that Mr. Kline could have violated that request would have been for him to file a document with the court, in the name of the Grand Jury, *without* first allowing the Grand Jury to review it. Because Mr. Kline never again filed anything in the name of the Grand Jury, the Court's characterization on that point is simply false and it cannot be the basis for attorney discipline.

The Court's displeasure with Mr. Kline, and the only legitimate basis for discipline relative to the motion he filed, falls to the Court's concern that Mr. Kline exceeded his statutory authority in doing so. But this exposes both a misguided application of the KRPC and another double standard at play in this case.

Here, Mr. Kline submits, is the entire issue:

> Not surprisingly, Kline points to no legal authority supporting his suggestion that a prosecutor occupies dual roles in a citizens' grand jury proceeding and that when those roles diverge, the prosecutor may elect to act on the State's behalf rather than the grand jury's behalf. Simply stated - this was *not* an inquisition brought by the prosecutor on behalf of the State in which the prosecutor assumes a more independent role. This was a statutorily defined citizens' grand jury proceeding in which Kline played a limited and specific role--a role explicitly set out by statute. He was not free to assume a different role once he no longer approved of the grand jury's direction.

Opinion, at 126.

With that one paragraph, the Court has turned legal ethics on its head -- placing the burden on the attorney to prove that what he did was not unlawful. It is not Mr. Kline's burden to prove anything. It is the burden of the Disciplinary Administrator to prove by clear and convincing evidence that he violated the KRPC. Neither the Disciplinary Administrator, the

Hearing Panel, nor this Court has cited a single statute or other legal authority that prohibits a prosecutor from acting with a certain level of independence before a citizen's grand jury.

The Court's analysis loses sight that this Grand Jury was not a self-creating body. Indeed, this Grand Jury was only convened because the citizens of Johnson County filed a lawful petition to create it. Consequently, Mr. Kline submits that he was wearing two hats, and properly so, during the entire course of the grand jury proceedings. At no time did he stop serving as Johnson County District Attorney, nor did K.S.A. 38-1522 or any other statute relevant to a citizen-requested grand jury relieve Mr. Kline of his duty to act on behalf of the citizens of Johnson County to enforce the laws of Kansas. When this fractured Grand Jury was effectively prepared to let the clock run out, and when Juror Hensel and her special counsel were on the verge of striking an agreement with CHPP that was not in the interest of the grand jurors (e.g., waiving juror immunity), Mr. Kline's desire to serve the interests of the people of Johnson County does not reflect adversely on his "fitness" to practice law." This is even more true in this unique situation where the Grand Jury had its own special counsel.

This free-wheeling and punitive application of Rule 8.4 (g) exemplifies again why the cabining and due process requirements, as well as the principles of KRPC Scope ¶19 must apply for the standardless catch-all provisions that have dominated these proceedings.

For all of the foregoi ehearing or modification of the decision in this case.

Respectfully submitte

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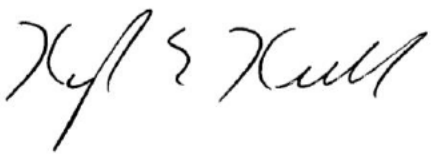
CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of December, 2013, a copy of this motion was served by courier (Fedex) hand-delivery upon:

Mr. Stanton A. Hazlett
Disciplinary Administrator
Mr. Alexander M. Walczak
Deputy Disciplinary Administrator
701 S.W. Jackson, 1st Floor
Topeka, Kansas 66603



Kyle E. Krull, Attorney