Thomas W. Condit

Attorney At Law

P.O. Box 12700

Phone (513) 731-1230 **Cincinnati, Ohio 45212** **Fax (513) 731-7230**

November 21, 2012

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

In Re: *Phillip D. Kline*
Supreme Court No. 11-106870-S

Dear Mr. Hazlett:

You are undoubtedly aware of the recent firing of an appellate research attorney who had publicly communicated her disdain for Mr. Kline during the November 15 oral argument in this matter.

Our investigation reveals that Ms. Herr's November 15 tweets were not her first salvos aimed at Mr. Kline. When the Panel issued its Final Report on October 13, 2011, Ms. Herr linked to a *Kansas City Star* news report and tweeted: "Haha. Serves you right douche." Linking to a June 3, 2012, *Capital-Journal* story on Mr. Kline's *Suggestion for Recusal of Justice Dan Biles*, she tweeted: "Sweet Jesus dude, make up your F'ing mind. Douche."

I find it reasonable to conclude that a research attorney who freely and publicly made such impertinent remarks over an extended period of time may inhabit a culture that finds them unobjectionable.

As I have stated to Kansas media several times since this story broke, my larger concern has always been that the bold lack of inhibition displayed in Ms. Herr's remarks may reflect a culture of bias against Mr. Kline that prevails among other research attorneys and other courthouse personnel.

Because research attorneys draft legal memoranda after ascertaining facts from the record, they are in the unique position to provide judges and justices with their first impression, if not their lasting impressions of a case. Any ideological biases of staff

attorneys could shape the perceptions of the court or the panel. If the Court's trust in the analytical honesty of staff attorneys is misplaced, justice may be jeopardized.[1]

The only just way to resolve these concerns, when there is so much at stake for Mr. Kline, is to conduct a thorough vetting of the process.

The harshness of your own advocacy unfortunately indicates that the Disciplinary Administrator may have a similar bias.

Your office began to investigate this matter in November, 2006. Six years have passed. During that time a number of disturbing events have occurred that make me question the objectivity of your office.

First, you filed the ethics complaint without obtaining the Review Committee's probable cause finding as required by the Rules. When I requested written evidence of the probable cause finding, you provided me with an order of the Board Chair stating that all communications were oral. Yet Internal Operating Rule B.4 requires the Chair of the Committee to "record the individual recommendations of the Review Committee members."

Second, you brought a legally groundless charge, later dropped before trial, that Mr. Kline's pro-life views created a conflict of interest in investigating and prosecuting abortion clinics. Letter of Dec. 29, 2010.

Third, you stated in a report to the Review Committee: "Child rape seems to be a term invented by Mr. Kline. That term seems to me to be highly inflammatory . . . ." Report of Jan. 4, 2008. In stark contrast to your skepticism, a Google search for the term "child rape" yielded nearly two million results, many of them in newspaper headlines. In a recent death penalty case, justices on the United States Supreme Court used the term "child rape" seventy-nine times in the majority and dissenting opinions. *Kennedy v. Louisiana*, 554 U.S. 407 (2008). Moreover, sexual intercourse with a child 13 years of age or younger is classified as "rape" in Kansas regardless of whether the sexual interaction was "consensual." *See* K.S.A. § 21-3502(a)(C)(2) ("Rape is . . . sexual intercourse with a child who is under 14 years of age.").

Fourth, the Formal Complaint uncritically adopted Stephanie Hensel's misleading truncation of Mr. Kline's description of mandatory reporting law. *Compare* Exhibit 7, at 1 *with* Second Amended Formal Complaint, ¶ 43 (R.1, 764). Mr. Kline's actual statement

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[1] Your statement to the Court last week that my motion to recuse Justice Beier and her colleagues should be held against Mr. Kline was misdirected, but it does lead to a relevant thought now. Maybe the blame for the horrifically misleading *CHPP v. Kline* opinion lies less with Justice Beier than I originally thought (although it surely remains her ultimate responsibility). Maybe Justice Beier relied too much on research attorneys who had their own attitudes about Mr. Kline.

belies Ms. Hensel's false accusation that he instructed the Grand Jury that mandatory reporting applied without exception to fourteen and fifteen-year-olds. *See* Grand Jury transcript of Dec. 17, 2007 (R.3, 2432: Ex. 96).

Fifth, in your direct examination of Ms. Hensel before the Panel, you elicited the false testimony that subpoenas to the Departments of Labor and Revenue went out before the Grand Jury had received knowledge of the *Aid for Women* litigation. R.3, 2485-86. In fact, the Grand Jury voted to issue the subpoenas after Mr. Maxwell and Judge McClain, though not identifying the case by name, provided a thorough exposition of this litigation. R.3, 2879-94 (Ex. 100).

Sixth, you refused to abandon the argument about Mr. Kline's O'Reilly appearance even after being confronted with the obvious Panel error. You elected instead to argue inapposite case law, which I consider to be a frivolous argument of law in violation of KRPC 3.1, forcing us to devote precious time responding in our Reply brief and preparing for oral argument. You then did an about-face by conceding the Panel's "wrong rule" error at oral argument, while still arguing that two rules with manifestly different meanings actually mean the same thing. This "concede nothing" attitude is contrary to the spirit of justice and suggests that some other priority may be motivating your office.

Seventh, addressing Issue No. 10 in your appeal brief and responding to our argument that Mr. Kline had received no notice that the "public " filing of a motion was one of the ethics charges, you falsely stated that the Formal Complaint alleged the Motion to Enforce was filed publicly. Opp. Br. 70. The Formal Complaint contained no such allegation.

Finally, you ignored and buried the recommendations of your own investigator (Lucky DeFries) that Mr. Kline had committed no ethical violations.

The Panel Report also exhibited such failings, omitting any mention of the exculpatory DeFries Report and Owens Opinion, and mischaracterizing the King Report. There are seemingly infinite ironies between the many failings and omissions of your office and the Panel Report on the one hand, and the standard of absolute perfection required of all of Mr. Kline's acts and communications on the other hand.

Consequently, and in light of recent events involving Ms. Herr, I am hereby requesting that you provide me with all communications concerning this case between your office and any judicial branch research attorney, whether housed in your office or not. I also request any communications between attorneys or staff in your office and the Hearing Panel. I request that such documents include emails and Twitter accounts.

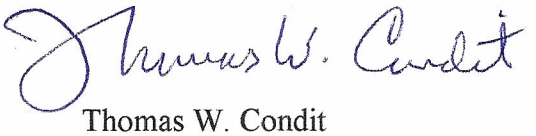
I also ask you to inform me whether any research attorney, or anyone other than the three panel members, participated in research and writing of the Final Hearing Report.

In light of your bright-line position articulated at oral argument regarding an attorney's duty of honesty and full disclosure, I trust that you will comply with this request.

I realize you are receiving this request on the day before Thanksgiving. It was not possible to sort through Ms. Herr's twitters, understand the scope of our concerns and provide this letter any earlier. Because time is of the essence, your prompt attention to this matter is requested. I understand if you cannot respond until early next week.

Thank you for your attention to this request.

Sincerely,



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TWC/kk