No. 11-106870-S

IN THE SUPREME COURT OF THE STATE OF KANSAS

In The Matter of

Phillip D. Kline,
Respondent-Appellant.

On Appeal from the Kansas Board for Discipline of Attorneys'
Final Hearing Report
Panel No. DA10088 and DA10598

BRIEF OF APPELLANT PHILLIP D. KLINE

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Oral Argument Request:
One Hour

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NATURE OF THE CASE

This is the appeal of Respondent Phillip D. Kline from the final hearing report (the "Report") of a panel of the Kansas Board for Discipline of Attorneys (the "Panel"). Pursuant to Disciplinary Rule 212(c), Kline has filed Exceptions to the many factual findings of the Panel which are unsupported by clear and convincing evidence. Pursuant to Rule 212(e), this brief argues points of law to accompany the Exceptions.

ISSUES TO BE DECIDED ON APPEAL

1. Whether the Panel correctly found by clear and convincing evidence that ten specific acts of Kline or his staff in investigating the failure of mandatory reporters of sexual abuse to comply with Kansas law, and in responding to questions about the investigation that were repeatedly posed by courts and disciplinary authorities over a period of several years, violated the Kansas Rules of Professional Conduct ("KRPC").

2. Whether the Panel's recommended discipline is consistent with the facts and law.

STATEMENT OF THE CASE

Respondent Phillip D. Kline was elected Kansas Attorney General in November of 2002. Each KRPC violation found by the Panel arises from Kline's investigation into failures by medical providers to report sexual abuse as required by Kansas law. The investigation began in 2003 upon credible evidence that abortion clinics were failing to file mandatory sexual abuse reports with the Department of Social and Rehabilitation Services ("SRS"). Kline 194:25-196:18; Ex. 98 at 2598:4-10. Kansas requires medical providers to file such reports if they have "reason to suspect injury"[1] to a child.

[1] K.S.A. § 38-1522 was repealed in 2006 and re-enacted as K.S.A. § 38-2223, which replaced the word "injury" with "harm."

Tom Williams, a former FBI Special Agent and ATF agent, served as Kline's lead investigator; Assistant Attorney General Stephen Maxwell was lead prosecutor. Ex. 98 at 2954:12-2956:24, 2957:7-21; Ex. 90 at ¶¶ 34-35. The first step in the investigation was to obtain Termination of Pregnancy ("TOP") records from the Kansas Department of Health and Environment ("KDHE") and sexual abuse reports from SRS. Ex. 98 at 2957:10-2602:16. Kansas requires abortion providers to file TOP reports with KDHE for each abortion performed. K.S.A. § 65-445. TOP reports contain patient ages but not patient names. *Id*; Kline 1656:22-1657:8. Mr. Williams and Mr. Maxwell believed that, by comparing TOP reports for underage children with reports of abuse filed with SRS, they could determine whether sexual abuse (*i.e*. sexual contact with children under sixteen) had not been reported to SRS. In requesting data from SRS, Mr. Williams represented that the Attorney General's office was attempting to determine if "there was a serious latent sexual abuse problem" within the state. Ex. 13.

After the initial information obtained from SRS was inconclusive, Mr. Williams requested additional data, again stating that the Attorney General's office was performing an "investigation into the circumstances surrounding the reporting/or failure to report allegations of sexual abuse in children." Ex. 16 at 288. When SRS rebuffed this request, Kline's office moved to open a criminal inquisition and to subpoena the requested records from SRS pursuant to Kansas law. Exs. 15-16. Chief Judge Richard Anderson of the Shawnee County District Court granted Kline's request and issued a subpoena to SRS and KDHE. *In re Inquisition*, Case No. 04-IQ-03.

The data obtained from KDHE and SRS revealed that 166 abortions had been performed on children age fourteen and under, including multiple late-term abortions. Ex.

20. However, only four cases of sexual abuse had been reported to SRS. A majority of the abortions performed on children occurred at two clinics, Comprehensive Health Planned Parenthood of Overland Park, Kansas ("CHPP") and Women's Health Care Services ("WHCS"). Exs. 20, OO. Accordingly, in August of 2004, inquisition subpoenas were issued to CHPP and WHCS requesting a total of 90 patient records. Ex. N3, at 2882-2886; Ex. G3 at 3625-3628. Dr. George Tiller practiced at WHCS, which was located in Sedgwick County. After Judge Anderson rejected the clinics' motion to quash, the clinics filed a mandamus action in this Court in an effort to avoid producing the records. *Alpha Medical Clinic et al. v. Anderson et al*., 128 P.3d 364 (Kan. 2006) ("*Alpha*"). Following briefing and oral argument, this Court instructed Judge Anderson to revaluate the inquisition, and if he was "satisfied" that it stood on "firm legal" ground, the subpoenas to the clinics could then be reissued so long as patient identifying information was redacted from the records prior to their production to the Attorney General's office. *Id*. at 379. It was Kline's suggestion that patient identities be redacted from the records. *See* Anderson 701:9-25; Kline 1687:11-1689:13. After review, Judge Anderson reissued the subpoenas and the redacted patient records were eventually produced to the Attorney General's office. Exs. 75, 90.

While *Alpha* was pending, Kline learned of more incriminating evidence regarding WHCS, including a request from the Texas Attorney General to assist in investigating the death of a Down's Syndrome patient at the clinic. Kline 1729:1-1730:7, 3220:16-25; Jensen 3100:10-3101:15. In addition, the Attorney General's office learned that Dr. Tiller referred his patients to a nearby LaQuinta Inn & Suites. Ex. Y3. In an effort to identify children, Kline's office requested and obtained a subpoena for

registration records from the motel (the "LaQuinta records"). Kline 799; Exs. 41-42. Investigators hoped that, by comparing the LaQuinta records to data obtained from KDHE, they could identify underage children who obtained abortions at WHCS. Williams 801:1-4. Ultimately, the effort was unsuccessful. Kline 361:11-16.

In November of 2006, Johnson County District Attorney Paul Morrison was elected to replace Kline as Attorney General. Kline, in turn, was selected to serve as District Attorney for the remainder of Mr. Morrison's term. In this new role, Kline continued his investigation into the failure of mandatory reporters to report instances of suspected sexual abuse. As Kline transitioned to his new office, Judge Anderson ordered the filing of a Status and Disposition Report identifying the location of the inquisition records. Mr. Maxwell filed this report on January 8, 2007. Ex. 78; Maxwell 1406:8-1409:3. However, Mr. Maxwell was unaware that Kline had requested that copies of the redacted records be made for transfer to his office in Johnson County. *Id*; Williams 818-40, 1086-95. Thus, the report filed by Mr. Maxwell did not identify this set of copies retained by Kline. Nonetheless, Judge Anderson believed that Kline had authority to transfer the redacted records to the District Attorney's office. *See* Ex. Z5 at 3-5; Anderson 759:16-18; Ex. 82 at 1042:6-13; Ex. 132 at 3584.

Kline also created and retained summaries of these redacted records. Kline 98-99, 536, 538. In an effort to prevent Kline from using the redacted records as evidence in his continuing investigation, CHPP filed a mandamus action. *CHPP et al. v. Kline,* 197 P.3d 370 (Kan. 2008) ("*CHPP*"). This Court appointed Judge David J. King to conduct evidentiary hearings and find facts. *See* Ex.90, Report of Judge King in *CHPP, et. al. v. Kline,* (the "King Report"). In November and December of 2007, Judge King held several

days of hearings and took testimonial and documentary evidence. *Id*. This Court ultimately concluded that Kline was entitled to retain the records. *CHPP,* 197 P.3d at 399 ("In sum, the person who holds the position of Johnson County District Attorney may lawfully possess the results of a criminal investigation begun by the Attorney General").

In December 2007, a grand jury was convened pursuant to a citizen petition to investigate seven issues relating to CHPP. Ex. 93. On December 17, 2007, Kline and his assistants appeared before the grand jury to provide background information, including relevant law. Ex. 96 at 2427-2432. Kline emphasized that abortion providers must report underage sexual relations among age-mates only if there is reason to believe that a child has been harmed. *Id*. Although he did not specifically cite a federal case which had also so interpreted Kansas law, and did not provide the citation for a former Kansas law, he accurately stated the holding of the case: "some might say I don't have reason to believe there was harm to the child. That's an issue for you all to take up." *Id*.

On January 9, 2008, Kline's assistants provided the grand jury with the citation to *Aid for Women* and the prior reporting statute. Two days earlier, the grand jury had issued a subpoena to CHPP for sixteen medical records. The subpoena could have, but did not, seek child patient names, and only sought data needed to ascertain CHPP's compliance with parental notification and 24-hour waiting period requirements. Ex. 108; Ex. 98, 2714-2730. The grand jury issued an official statement later that month, and entered into a stipulation, confirming that the purpose of its CHPP subpoena had been to investigate these two items. Ex. Q8 at 260, 104-119. The CHPP records lacked names and therefore were irrelevant for investigating failures to report. Ex. 98, 2701:23-2702:6.

In contrast, to investigate the mandatory reporting issue, the grand jury (following Kline's earlier method) subpoenaed SRS and KDHE. *See* Ex. 98, 2598:16-22, 2681:2-2682:4 (explaining basis for using SRS and KDHE records to investigate mandatory reporting). The mandatory reporting investigation continued into February, long after *Aid for Women* was discussed. In that month, the Court entered an order relating to the jury's review of SRS records (Feb. 12; *see* Ex. 114), grand jurors asked for evidence on "all" seven areas of the investigation (Feb. 20, *see* Ex. 102, 3038:23-3039:7), and the grand jury began reviewing SRS records (Feb. 25, *see* Ex. 103:3155a-3156:6).

Also in February, Kline ordered two motions filed to enforce the grand jury subpoena to CHPP. The subpoena was still pending and had not been withdrawn, and the jury had never voted to oppose Kline's motion (Merker, 2672:19-23) or demanded to first approve the motions (Ex. 103, 3160:20-3161:17). The motions were not filed in the grand jury's name (*See* Ex. 7 at 252), and the grand jury completed an agreement to receive CHPP's redacted documents before the court ruled upon either motion (Report ¶¶ 278-280). Although Kline publicly filed the motion, the matters discussed in the motion were either in the public file (Ex. P8 at 548), or were the subject of public hearings.

The Disciplinary Administrator's investigation of these matters spanned several years. A formal complaint was filed in January 2010. Kline's counsel answered and filed a motion to reconsider the Review Committee's probable cause finding after discovering that the Disciplinary Administrator ("DA") had failed to produce an earlier investigative report by Lucky DeFries and Mary Beth Mudrick finding that the initial set of allegations were without probable cause. The motion raised several issues, including the application of collateral estoppel based on prior findings by several courts that would

have disposed of contrary factual allegations made by the DA. Later, the DA used a different investigator to review a new set of allegations, and ultimately, the DA added its own allegations to the complaint. The Hearing Panel denied every motion to compel discovery filed by Kline. One member, Jeffery Chubb, failed to recuse himself based upon a letter he wrote to a national publication attacking the politics of social conservative Republicans. The Panel had finished hearing both Counts I and II by July 22, 2011. It issued its 185-page report in October 2011. Kline timely filed his 175-page exceptions, which provide substantial detail **impossible** to include within these page limits and are incorporated herein by reference.

ARGUMENT

I. KLINE DID NOT VIOLATE THE KRPC WHEN HE AND HIS STAFF INVESTIGATED THE FAILURE OF MANDATORY REPORTERS OF SEXUAL ABUSE TO COMPLY WITH KANSAS LAW, AND WHEN HE RESPONDED TO QUESTIONS ABOUT THE INVESTIGATIONS THAT WERE REPEATEDLY POSED BY COURTS AND DISCIPLINARY AUTHORITIES OVER A PERIOD OF SEVERAL YEARS

A. Standard of Review

Each of the Panel's ten findings of a disciplinary violation must have been supported by "clear and convincing" evidence. Rule 211(f). "Per direction from the United States Supreme Court, Kansas…recognizes that the clear and convincing standard of proof should apply when particularly important individual interests or rights are at stake." *In re B.D.-Y.*, 187 P.3d 594, 601-02 (Kan. 2008) (adopting new standard) (internal quotations omitted). This Court has adopted *B.D.-Y.*'s articulation of the "clear and convincing" standard in discipline cases. *In re Dennis*, 188 P.3d 1, 14 (Kan. 2008). Thus, each and every factual finding must have been based on "high quality evidence," and "*true to a high probability." In re B.D.-Y.*, 187 P.3d at 601 ("Although the introduction

of high quality evidence may well be *an important element* in meeting the intermediate standard of proof, *that alone would not suffice*.") (citation omitted).

In deciding what constitutes "high quality evidence," the Panel had to follow "the Rules of Evidence." Rule 211(d). Not all admitted evidence qualifies as "high quality evidence" for making a "clear and convincing" finding. "High quality evidence" means that "the witnesses to a fact must be found to be credible; the facts to which the witness testifies must be distinctly remembered; the details in connection with the transaction must be narrated exactly and in order; the testimony must be clear, direct and weighty; and the witnesses must be lacking in confusion as to the facts in issue." *In the Matter of Berg*, 955 P.2d 1240, 1250 (Kan. 1998).

Finally, the Panel was required to apply specific standards to certain factual findings. Thus, to conclude that Kline acted "knowingly," the Panel must have found "actual knowledge of the fact in question," and such actual knowledge could be inferred *only* with clear and convincing evidence. KRPC 1.0(g). A "belief" means that Kline must have actually believed a supposed fact to be true (KRPC 1.0(a)), inferred *only* upon clear and convincing evidence. "Reasonable" or "reasonably" adds the requirement (as with any use of the word "reasonable") that a reasonably prudent and competent lawyer (in this case, a prosecutor) could have acted or believed in a like manner. KRPC 1.0(i)-(k). As a corollary, where prior courts or factfinders determined Kline's intent, knowledge, or belief, almost overwhelming evidence was required to "infer" opposite findings.

On appeal, the question for this Court is whether a rational factfinder could have found that clear and convincing evidence exists for each factual predicate required to find a violation of a given rule. *See In re Dennis*,188 P.3d 1, 15 (Kan. 2008). Factual findings

should be rejected where the "clear weight of the evidence" shows that the quality and quantum of the evidence does not rise to the level of "clear and convincing." *See In re Lober*, 78 P.3d 442, 445 (Kan. 2003). The Panel is entitled to no deference on its conclusions of law, which are merely advisory to this Court. *Id*.

Further, this Court must consider that several tribunals with first-hand or contemporaneous knowledge of the facts have rendered findings and rulings which in many cases contradict findings made by the Panel years later. The Panel erred by not giving Judge King's and Judge Owens' prior factual findings collateral estoppel effect here, as the disciplinary complainants were litigants, factual issues were fully litigated on the merits, and those factual conclusions were necessary to support the prior judgments. *See In the Matter of the Appeal of the City of Wichita*, 86 P.3d 513, 526 (Kan. 2004). *See also* Kline's Motion to Dismiss Count I, Document 109, cited in Report at 54, 283-307.

But regardless of whether courts' prior factual findings now have collateral estoppel effect, the Panel was bound to consider whether it had received such compelling contrary evidence that prior findings or decisions were, in effect, clearly and convincingly erroneous. For example, S. Lucky DeFries and Mary Beth Mudrick made a full investigation of several issues, including the "O'Reilly Factor" allegations, and found no probable cause. *See* Ex. 142. In the Tiller criminal trial, Judge Clark Owens considered and soundly rejected several arguments raised by Dr. Tiller's counsel, who was also a complainant in this matter. *See* Ex. N1. Judge Anderson, who supervised most of the investigation at issue, never filed a disciplinary complaint and in many cases provided testimony supporting Respondent's position. Finally, Judge King prepared extensive factual findings at this Court's request which are directly relevant here, but

which are either ignored or contradicted by the Panel with the barest of evidence. *See* Ex. 90. These decisions, largely favorable to Kline, must carry weight in deciding whether contrary evidence is truly "clear and convincing" in quality and quantity.

Under these standards, as set forth below, none of the Panel's ten disciplinary violations can stand. Accordingly, this Court should find that Kline has not committed a KRPC violation and should bring this proceeding to a close.

B. None of the Ten Violations of the KRPC Found by the Hearing Panel Are Founded in Law or Supported by Clear and Convincing Evidence

Kline's conduct comported with the letter and spirit of the KRPC, and the Panel's ten findings to the contrary are unsupported by clear and convincing evidence. Each finding is addressed below and in the Kline Exceptions as follows:

Finding	**Panel Report, Paragraphs**	**Kline Exceptions, Paragraphs**	**Pages in this Brief**
1. Misleading SRS	318-329	5-40	10-26
2. Adult patient names	334-336	50-128	26-35
3. Sealed records attached to brief	337-341	129-141	35-39
4. Motion to Clarify	342-348	142-162	39-43
5. O'Reilly appearance	353-354	174-182	43-49
6. Status and Disposition Report	359-370	200-230	49-55
7. WHCS summary testimony	375-380	232-246	55-59
8. Response to complaint	381-387	247-270	60-63
9. Statements of law to grand jury	389-397	271-380	63-69
10. Motions to enforce subpoena	398-400	381-458	70-73

1. Kline Did Not Violate KRPC 8.4(c) and Engage in Deception When His Investigators Refused to Disclose the Precise Focus of Their Investigation of Child Sexual Abuse to SRS, a Witness

The Panel incorrectly found that Kline committed a dishonest act that rises to the level of a KRPC violation when investigators failed to tell a Kansas agency the precise reason his office was seeking summary statistics on the number of sexual abuse reports in Kansas. Kline's investigators need not have expounded upon the inquiry's full purpose.

a. *The Panel Ignored the Specific Rule Applicable to Kline's Conduct and Instead Applied a Vague Catch-All Rule Without the Cabining Interpretation Required by Due Process*

The DA's claim regarding SRS involved statements by Kline's investigators of allegedly material facts about Kline's investigation to a repository of information and a potential witness—SRS. The most specific rule governing this conduct is KRPC 4.1, which states that a lawyer shall not "make a false statement of material fact or law to a third person," or "fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client."

i. The Panel Should Have Tested the DA's Claim that False Statements Were Made to a Witness Against KRPC 4.1, Which Requires that False Statements of Material Fact Be Made, and Should Not Have Applied a Vague Catch-All Rule

The Panel's refusal to apply or so much as mention KRPC 4.1 is puzzling. Rather than applying the specific elements of that rule, the Panel instead relied exclusively on the murkier KRPC 8.4(c), which forbids "dishonesty, fraud, deceit, or misrepresentation." This initial mistake freed the Panel to embark upon an unguided legal and factual expedition which ultimately strayed far from the strictures of the law and facts.

When an attorney's conduct is covered by a specific KRPC such as KRPC 4.1, the conduct should be judged against the standards of the specific rule. More general "catch-all" rules, such as Rule 8.4(c), should not apply in place of a more specific provision:

> 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). *See also In re Pyle*, 283 Kan. 807, 812, 156 P.3d 1231, 1237 *reinstatement granted*, 284 Kan. 727, 163 P.3d 267 (2007) (observing 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.'").

This practice must apply to KRPC 8.4(c), both as a matter of statutory construction and as a matter of procedural due process and fair notice:

> Modern lawyer codes contain one or more provisions (sometimes referred to as "catch-all" provisions) stating general grounds for discipline, such as engaging "in conduct involving dishonesty, fraud, deceit or misrepresentation" (ABA Model Rules of Professional Conduct, Rule 8.4(c) (1983)) or "in conduct that is prejudicial to the administration of justice" (id. Rule 8.4(d)). Such provisions are written broadly both to cover a wide array of offensive lawyer conduct and to prevent attempted technical manipulation of a rule stated more narrowly. On the other hand, **the breadth of such provisions creates the risk that** a charge using only such language would fail to give fair warning of the nature of the charges to a lawyer respondent (see Comment *h*) and that **subjective and idiosyncratic considerations could influence a hearing panel or reviewing court in resolving a charge based only on it… Tribunals accordingly should be circumspect in avoiding overbroad readings or resorting to standards other than those fairly encompassed within an applicable lawyer code.**

Restatement (Third) of Law Governing Lawyers § 5 (2000) (emphasis added). *See also Matter of Discipline of Two Attorneys*, 660 N.E.2d 1093 (Mass. 1996) ("The better course, where possible, is to deal with alleged professional misconduct under specific rules, such as those that we have already discussed, rather than to invoke the general language of [Model Rule 8.4(d)]"). Courts express concern when catch-all provisions are used to sanction conduct that falls within the ambit of a narrower rule:

> We note that, in light of the plaintiff's violation of rules 3.1 and 3.3, the trial court also could have found a violation of subsection (1) of rule 8.4. Rule 8.4 provides: "It is professional misconduct for a lawyer to: (1) Violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another...." In the court's imposition of sanctions, however, the court specifically relied on its finding of a rule 8.4(4) violation. **Academic commentators have identified a serious problem in the open textured provisions of rule 8.4(4). "[Subsection 4] raises the specter of a disciplinary authority creating new offenses by common law, and perhaps harassing an unpopular lawyer through selective enforcement...."** 2 G. Hazard & W. Hodes, supra, § at 65.6.

O'Brien v. Superior Court, 939 A.2d 1223, 1242 (Conn. App. 2008) (although attorney committed Rule 3.3 violation, it was error to find a separate violation for conduct prejudicial to the administration of justice) (emphasis added).

Indeed, the weight of authority has long recognized the potential for abuse when catch-all rules are used in place of more specific rules. Imprecise rules not only fail to provide notice of what behavior is prohibited, but "may invite state bar associations, or factions thereof, to weed out attorneys who are unorthodox or politically unpopular by current standards." Martha Johnston, Comment, *ABA Code of Prof. Responsibility: Void for Vagueness?* 57 N.C. L. REV. 671, 684 (1979). *Compare Konigsberg v. State Bar*, 353 U.S. 252, 262-63 (1957) ("a vague qualification, which is easily adapted to fit personal views and predilections, can be a dangerous instrument for arbitrary and discriminatory denial of the right to practice law"); *Hirschkop v. Virginia State Bar*, 421 F. Supp. 1137, 1140 (E.D. Va. 1976) (noting Virginia Bar's concession that complaints against attorney "appeared to have had arisen in cases where complainants may have disagreed with the causes supported and espoused by plaintiff"); Leonard E. Gross, *The Public Hates Lawyers: Why Should We Care?*, 29 Seton Hall L. Rev. 1405, 1455 (1999) (vague

standards encourage discriminatory enforcement "based on political considerations wholly unrelated to considerations of deterrence or protection of the public").

Although some Kansas decisions appear to treat violations of rules like KRPC 8.4 as *per se* add-ons to violations of more specific rules, this Court has clarified that specific rules apply independently of, not as predicates to, catch-all rules like KRPC 8.4. *See In re Comfort*, 159 P.3d 1011 ("our prior cases have required no predicate violation of another rule to support a violation of KRPC 8.1 through 8.4"). Thus, just as an attorney cannot avoid a stand-alone KRPC 8.4 violation because he did not violate specific rules covering other types of conduct, a disciplinary authority cannot use KRPC 8.4 to punish a respondent for conduct that falls under or is made permissible under a more specific rule. Due process and sound construction require that each rule have its own force. Only to the extent that Kline's specific conduct is not addressed or made permissible by a more specific rule such as KRPC 4.1 can the conduct fairly be evaluated to see whether it constitutes an un-enumerated offense under "catch-all" rules such as KRPC 8.4(c) or (d).

ii. In Cases Where Catch-All Rules Are Applied, They Must Be Cabined By Clear, Objective, and Predictable Standards

Where catch-all rules are applied in place of a specific rule like KRPC 4.1, clear, objective and predictable standards must apply. As discussed below, to violate either KRPC 8.4(c) (dishonesty and fraud), KRPC 8.4(d) (conduct prejudicial to the administration of justice), or KRPC 8.4(g) (catch-all), the conduct must:

- Be egregious and flagrantly violative of accepted professional norms that would be recognized by a reasonable attorney practicing in the same situation; and
- In the case of Rule 8.4(c), involve dishonesty, fraud, deceit, or misrepresentation with malevolent intent that rises above mistake; or

- In the case of Rule 8.4(d), cause injury, harm, or disadvantage to the relevant proceeding or, with conduct outside of formal proceedings, to the judicial process.

These standards must be applied because the literal wording of KRPC 8.4(c), (d), and (g), without any external point of reference, is vague and subject to uneven and unpredictable application. Thus, in almost every instance where KRPC 8.4(c), (d) and (g) have been attacked as unconstitutional, courts have read the rules as being subject to objective guidelines and definitions that "cabin" their application and thereby give fair notice to reasonable lawyers practicing in a specific area. *In re Snyder*, 472 U.S. 634, 645 (1985) (evaluating and dismissing charge that lawyer's conduct was "prejudicial to the administration of justice," examining the broad standard and holding that "[m]ore specific guidance is provided by case law,[2] applicable court rules, and 'the lore of the profession,' as embodied in codes of professional conduct."); *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.'"). Indeed,

> There also appears to be general agreement that the "prejudicial to the administration of justice" standard contained in 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).

[2] *See, e.g., Melnick v. Statewide Grievance Comm.*, 1995 WL 387579 (Conn. Super. Ct. June 26, 1995) (recognizing that Model Rule 8.4(d) has been criticized as "insufficient to give fair notice to lawyers… and as leaving open the possibility that lawyers will be disciplined [as here] because of unorthodox or politically unpopular conduct or views," and holding that "Even in those jurisdictions which have found misconduct under a broader interpretation of Rule 8.4(d), no case has been cited to or found by the court in which a violation was upheld based on facts even remotely analogous to those here...").

Comm. on Legal Ethics of W. Virginia State Bar v. Douglas, 370 S.E.2d 325, 328 (W. Va. 1988) (on other grounds, superseded by adoption of Model Rules).

Gathering authority (including from Kansas), the New Jersey Supreme Court in a frequently-cited decision has articulated the constitutional basis for "cabining" Rule 8.4:

> [Model Rule 8.4] is framed in broad language and gives the appearance of an aspirational standard, rather than a disciplinary rule. Courts have held that a broad disciplinary rule may acquire constitutional certitude **when examined in light of traditions in the profession and established patterns of application**. 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); *In re Bithoney*, 486 *F.*2d 319 (1 Cir. 1973) (dictum).
>
> Attorney disciplinary rules have long been framed in general, rather sweeping language. The legal profession's cardinal ethical edict-"to avoid even the appearance of impropriety"-suggests that a lawyer should refrain from acting if there is any basis for suggesting that his conduct might be questioned. See Canon 9 of the Code of Professional Responsibility. As one court explained in affirming the constitutionality of [Model Rule 8.4]: "[T]he rule was written by and for lawyers. The language of a rule setting guidelines for members of the bar need not meet the precise standards of clarity that might be required of rules of conduct for laymen." *In re Keiler*, 380 *A.*2d 119, 126 (D.C.1977). See *State v. Martindale*, 215 *Kan.* 667, 527 *P.*2d 703 (1979).
>
> Moreover, unlike *DR* 7-107, which has rarely been applied, [Model Rule 8.4] has regularly been invoked in disciplinary actions. The New Jersey cases disclose a pattern of applying [Model Rule 8.4] in conjunction with other more specific disciplinary rules to sanction attorney misconduct. See, *e.g., In re Clark*, 83 *N.J.* 458, 416 *A.*2d 851 (1980) (also violating *DR* 6-101, 9-102); *Wilson*, 81 *N.J.* 451, 409 *A.*2d 1153 (also violating *DR* 9-102). **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.** See, *e.g., In re Schleimer*, 78 *N.J.* 317, 394 *A.*2d 359 (1978) (false swearing). **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.** See *Committee on Professional Ethics v. Durham*, 279 *N.W.*2d 280 (Iowa 1979).

Matter of Hinds, 449 A.2d 483, 497-98 (N.J. 1982) (emphasis added). Recent authority further supports this view:

> Although broad standards are not unconstitutional in the context of lawyer disciplinary proceedings, we must be careful to adequately define a threshold to give lawyers some warning of what kind of conduct can give rise to sanctions. As reflected in *McCarty*, "[u]nnecessary breadth is to be regretted in professional rules that can be used to deprive a person of his or her means of livelihood through sanctions that are universally regarded as stigmatizing." C. Wolfram, Modern Legal Ethics § 3.3.1, at 87; see also Restatement (Third) of the Law Governing Lawyers § 5 cmt. c. (2000) (the breadth of provisions like DR 1-102(A)(7) "creates the risk that a charge using only such language would fail to give fair warning of the nature of the charges to a lawyer respondent ... and that subjective and idiosyncratic considerations could influence a hearing panel or reviewing court in resolving a charge based only on it"). We find appropriate statements in the decisions of the highest courts of other states. For example, the New York Court of Appeals has held that the standard "**must be whether a reasonable attorney, familiar with the Code and its ethical strictures, would have notice of what conduct is proscribed**." *In re Holtzman*, 78 N.Y.2d 184, 573 N.Y.S.2d 39, 577 N.E.2d 30, 33 (1991). The Massachusetts and New Jersey courts have held that violation of a general rule is shown only by "**conduct flagrantly violative of accepted professional norms**." *In re Discipline of Two Attorneys*, 421 Mass. 619, 660 N.E.2d 1093, 1099 (1996); *In re Hinds*, 90 N.J. 604, 449 A.2d 483, 498 (1982). We believe that the Massachusetts and New Jersey standard captures the essence of the line we attempted to draw in *McCarty* and explains our application of DR 1-102(A)(7) in the cases in which we have employed it.

In re Gadbois, 786 A.2d 393, 400 (Vt. 2001). *See also State ex rel. Oklahoma Bar Ass'n v. Minter*, 37 P.3d 763, 783 (Okla. 2001) (Rule 8.4(d) applies only to cases of "**severe interference** with judicial proceedings and to conduct of such a serious nature that it harms our system of justice as a whole," and is "intended to proscribe behavior already disapproved by case law, statute, or court rules as well as the **'lore of the profession'**"); *In re Discipline of Attorney*, 815 N.E.2d 1072, 1079 (Mass. 2004) ("…conduct that does not violate any other disciplinary rule cannot violate DR 1-102(A)(5) unless it is so '**egregious**' and '**flagrantly violative of accepted professional norms**" as to

"undermine the legitimacy of the judicial process.'") (emphasis added);[3] *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Templeton*, 784 N.W.2d 761, 768 (Iowa 2010) (adopting "violations of well-understood norms and conventions of practice" limit on Rule 8.4(d)).

That the weight of authority has settled on this point is not surprising, because "[t]he debate leading to adoption of Rule 8.4(d) by the ABA House of Delegates made clear that it was intended to address violations of well-understood norms and conventions of practice only." 2 Geoffrey C. Hazard, Jr. et al., *The Law of Lawyering* § 65.6, at 65-16 (3d ed. 2009 Supp.) This majority rule is consistent with Kansas law and precedent, despite slight variation in the precise wording of courts' "cabining" interpretations.

The commentary to KRPC 8.4 itself makes clear that only "serious" prejudice to the administration of justice can be subject to discipline through use of a catch-all rule. Comment 2, attempting to harmonize portions of the rule, instructs that even with respect to criminal offenses (KRPC 8.4(b)), only those crimes that involve "**serious** interference with the administration of justice" can provide grounds for discipline. Of course, no less of a standard can apply to conduct that is not even criminal under KRPC 8.4(c) or KRPC 8.4(d). Second, Comment 1 to KRPC 3.8, "Special Responsibilities of a Prosecutor," suggests that the un-enumerated offense of "abuse of prosecutorial discretion" could fall under KRPC 8.4(d), but even then, the prosecutor's use of discretion must not merely be questionable or even "faulty" with respect to a certain defendant, but rather, a "systematic abuse." Further, even with respect to prosecutorial obligations un-enumerated in the

[3] "There is no Kansas case which discusses when the application of DR 1-102(A)(5) is appropriate." *Matter of Johnson*, 729 P.2d 1175, 1182 (Kan. 1986) (citing *Hinds*).

disciplinary rules but actually imposed by black-letter law, the prosecutor's conduct must rise to the level of "knowing disregard" of the applicable law. *Id*.

This Court has employed this heightened standard in applying KRPC 8.4(c) and (d). In *In re Comfort*, the court publicly censured an attorney who wrote a vitriolic letter to another lawyer threatening bar complaints because the lawyer made public records (KORA) requests on behalf of a client; the violation of KRPC 8.4(d) occurred when he forwarded the vitriolic letter to various members of the community, causing the lawyer to drop his client's effort to legally access public records, lose the client, and lose other clients who heard of the letters after they were published. 159 P.3d 1011, 1022-1023 (Kan. 2007). The Court made clear that free-standing KRPC 8.4(d) violations[4] must rest upon conduct that is actually harmful and egregious:

> The Deputy Disciplinary Administrator met the correct burden of proof to show "prejudice to the administration of justice" when she introduced uncontested evidence that respondent's letters **interfered with Blosser's open records request** and that respondent's **threat of disciplinary action and widespread accusations of Swenson forced him to drop his request and his representation of Blosser. In fact, the Deputy Disciplinary Administrator showed actual harm to Swenson**, putting on evidence that he lost clients after the content of the letters became known.

Id. at 1023. This Court also made clear that "prejudicial" means nothing less than its dictionary definition: "hurtful," "injurious," or "disadvantageous." *Id*. at 1024.

Another opinion, *In re Pyle*, 156 P.3d 1231 (Kan. 2007), examined the conduct of an attorney who sent a blistering letter to his clients, friends, and family attacking the findings of his hearing panel, accusing it of bias because of outside influence from insurance companies, making a "wholesale indictment of the Kansas disciplinary

[4] Notably, this Court analyzed respondent's initial sending of the letter to its intended recipient separately under KRPC 4.4("Respect for Rights of Third Persons").

process," stating that it issued him a mere "slap on the wrist," and eliciting favorable responses from the letter's recipients. *Id*. at 1245.

First, addressing KRPC 8.4(c), the Court disagreed with one member of the panel and found that the attorney's false statements about the prior disciplinary findings did not demonstrate "malevolence." *Id*. at 1245. After surveying the relatively few Kansas cases that have applied KRPC 8.4(c),[5] the Court explained that

> The exemplary cases cited above demonstrate 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, and childish, but far from the **dramatic abandonment of honest practice** that typifies our Rule 8.4(c) cases.

Id. (emphasis added).

Second, this Court addressed KRPC 8.4(d), citing *In re Snyder* with approval, surveying prior decisions and clarifying for the first time that harm to the system of justice as a whole is within the ambit of the rule in cases where the conduct occurs outside of the context of an ongoing proceeding. *Id*. at 1248 (finding that attorney's letter had impugned the "integrity of all involved" in the disciplinary system to "hundreds of readers" and convinced some recipients that the attorney had been unable to "get a fair hearing" because of a systematic pro-insurance company bias in the system). Further, the Court found that the attorney had not stated that he sought to advance any broader goal than his own self-interest, and had "belittled the court's public censure" by calling it a slap on the wrist. *Id*. For all of this conduct, this Court imposed a 3-month suspension. *Id*.

[5] Representative are *In re Singleton*, 111 P.3d 630, 634-35 (Kan. 2005) (attorney presented order of dismissal to judge after representing that opposing counsel agreed and obtained dismissal, when there was no agreement) and *In re Islas*, 112 P.3d 210, 213 (Kan. 2005) (attorney obtained driver's license by lying about his recent health status).

Again, this Court interpreted KRPC 8.4(d) to require a degree of conduct which was not merely questionable, but flagrantly violative of accepted norms for reasonable attorneys in Kline's position (i.e., the "lore of the profession"). *See In re Snyder*, 472 U.S. 634, 645 (1985) (Rule 8.4(d) must be interpreted in view of the lore of the profession).

In conclusion, it is clear that Kansas follows the majority approach that when the "catch-all" ethics provisions are used to support stand-alone violations (here, KRPC 8.4(c), (d) and (g)) because no specific rule covers or explicitly allows the relevant conduct, discipline can only be imposed if the conduct is both a flagrant rule violation and violates already-accepted norms for reasonable attorneys in Kline's position. Further, 8.4(c) applies to false statements only for malevolence, and 8.4(d) only applies if a proceeding (or, in the case of conduct outside of a proceeding, the justice system as a whole) is harmed, injured, or disadvantaged. To the extent it applied a catch-all rule, the Panel should have explicitly applied these standards to give KRPC 8.4 independent meaning and to avoid any unconstitutional vagueness or overbreadth.

In this case, the Panel swept aside Kline's request to apply the specific elements of KRPC 4.1, which governs false statements to third parties, to allegations that Kline had engaged in this very conduct. Further, the Panel ignored Kline's request to at least adopt a cabining interpretation of KRPC 8.4(c) so that not every representation that allegedly is "dishonest" can constitute a KRPC violation. The Panel's decision to jettison the inconveniently stringent requirements of KRPC 4.1 and replace them with the vague, catch-all KRPC 8.4(c) freed it to create a brand new ethical duty in Kansas: the duty of prosecutors to ensure that police and investigators use no "dishonesty" when they communicate with witnesses about the investigation of a crime. As discussed in section

(b) below, there is no precedent for such a rule in Kansas, and it seems highly unlikely that it will now be applied to all other prosecutors and law enforcement officers. By failing to require that a "false" statement of "material" fact to have been made, and by failing to apply a cabining interpretation of KRPC 8.4(c), the Panel erred.

b. *The Panel Created and Applied a New Rule that Prohibits Prosecutors from Allowing Investigators and Police to Use Deception in Gathering Evidence from Witnesses, and Such a Rule Has no Basis in the Law*

The Panel's conclusion can only be correct if prosecutors are unable to allow law enforcement officers to use deception in gathering evidence from witnesses. That is not the rule in Kansas or anywhere else. The United States Supreme Court has found that deceptive tactics by law enforcement can be necessary in investigations. *See, e.g., U.S. v. Russell*, 411 U.S. 423, 431-32, 36 (1973) ("for there are circumstances when the use of deceit is the only practicable law enforcement technique available"). Similarly, this Court has recognized law enforcement's occasional need for deception during a criminal investigation. *See, e.g., State v. Bagemehl*, 515 P.2d 1104, 1108 (Kan. 1973).

Responding to academics' arguments that prosecutors must stamp out investigative deception, many states have expressly confirmed that prosecutors may oversee otherwise lawful undercover activity that uses deception.[6] Indeed, the former chair of the ABA Standing Committee on Ethics and Professional Responsibility

[6] *See* Utah Bar Ethics Adv. Op. 02-05, 2002 WL 459018 (2002); Iowa R. Prof. Conduct 32:8.4 cmt 6 (2005); Ohio R. Prof. Conduct 8.4 cmt. 2A (2007); Or. R. Prof. Conduct 8.4(b) (2009); Alaska R. Prof. Conduct 8.4 cmt. 4 (2009); Fla. R. Prof. Conduct 4-8.4(c) (2010); Wis. R. Prof. Conduct 20:4.1(b) (2010).

promoted express allowance of deceptive representations during law enforcement investigations, setting the stage for the recent amendments adopted by various states.[7]

Oregon presents an interesting case study. Its supreme court rejected an argument to extend an investigation deception exception in the Oregon Code of Professional Responsibility to private attorneys participating in deceptive investigation measures. *See In re Conduct of Gatti*, 8 P.3d 966 (Or. 2000). In response to a public outcry against the decision, the Oregon Supreme Court reversed course by amending its rules. *See* Or. Code Prof'l Responsibility DR 1-102(D) (2002); Or. R. Prof. Conduct R. 8.4(b) (2009).

Even before these developments, the weight of authority anticipated that prosecutors could oversee investigators utilizing deception and misrepresentation. *See, e.g., Gitadex, S.r.L. v. Campaniello, Ltd.*, 82 F. Supp. 2d 119, 122 (S.D.N.Y. 1999) ("hiring investigators to pose as consumers is an accepted investigative technique, not a misrepresentation"). Indeed, disciplinary authorities have allowed prosecutors to supervise and direct investigations involving deceit in similar contexts. *See, e.g., United States v. Parker*, 165 F. Supp. 2d 431, 476 (W.D.N.Y. 2001); *see also In re Conduct of Gotti*, 8 P.3d 966, 976 (Or. 2000) (it is an established custom that lawyers rely on those investigating violations of the law by using deception or misrepresentation). Prosecutorial misconduct is found only where the prosecutor actively deceived a criminal defendant or lied or induced others to lie under oath. *See In re Pautler*, 47 P.3d 1175 (Colo. 2002)

[7] *See* David B. Isbell & Lucantonio N. Salvi, *Ethical Responsibility of Lawyers for Deception by Undercover Investigators and Discrimination Testers: An Analysis of the Provisions Prohibiting Misrepresentation under the Model Rules of Professional Conduct*, 8 Geo. J. Legal Ethics 791 (1995) (promoting an implied investigation deception exception in the ABA Model Rules of Professional Conduct which authorizes attorneys to direct non-attorney investigators to use deceptive techniques).

(prosecutor masqueraded as a public defender to a criminal suspect in order to convince suspect to turn himself in); *see also People v. Reichman*, 819 P.2d 1035 (Colo. 1991) (prosecutor filed false criminal complaint against undercover officer to preserve officer's true identity); *see also In re Friedman*, 392 N.E.2d 1333 (Ill. 1979) (prosecutor instructed police officer to lie on the stand in order to expose bribery attempt).

While the Panel recognized that this is a "matter of first impression in Kansas," it errantly decided that the rule that "lawyers cannot allow their subordinates to lie on their behalf" applies to prosecutors and investigators who are trying to obtain information from potential witnesses. The Panel's casual adoption of such a sweeping rule was in error.

c. *The Panel Incorrectly Assumed that SRS Had a Legal Right to Withhold, or Would Have Withheld, Summary "Numbers" Data Because it Disapproved of the Attorney General's Decision to Investigate the Reporting of Sexual Abuse*

By applying KRPC 8.4(c) instead of KRPC 4.1, the Panel allowed itself to skip over the critical determination of whether Mr. Williams made a "material" misstatement of fact to SRS. Importantly, the evidence shows that any misstatement or vagueness in his conversation with SRS was immaterial.

On only one occasion did Mr. Williams make an alleged misstatement of fact that caused SRS to act: in July 2003 he asked for summary data regarding the numbers of sexual abuse reports for children under the age of sixteen. Report ¶¶ 80-82. SRS merely processed this as a "legislative request." Report ¶ 81. Although Mr. Williams stated that the data would be used to investigate "the nature and magnitude of the sex abuse crime problem in Kansas," rather than the specific aspect of that problem relating to the failure of mandatory reporters to report the crimes, there is no allegation suggesting that SRS would or could have withheld this data merely had it known the specific focus of Kline's

investigation. Indeed, SRS's General Counsel believed that the information provided to Mr. Williams was "public information." Badger 2065:11-14. He further testified that "I don't recall what the specific reason was [that Mr. Williams said he needed the information], but I don't think it would have probably mattered because, like I said, I think numbers themselves would probably be public information." *Id*. Mr. Badger was counsel for SRS for two decades. *Id*. at 2061:9-10. Another SRS employee testified that SRS "freely exchanged" such data, requiring no subpoenas, with law enforcement agencies such as the Attorney General and District Attorneys. Ex. 100, 2838:4-2840:14.

The next step of the investigation was to review individual files underlying the summary data. This prompted SRS to object and ask for an explanation. Mr. Rucker responded (just thirteen days after Mr. Williams' initial request) by stating that Kline was investigating the failure to report child sexual abuse. *See* Ex. H2. SRS' data was ultimately obtained by subpoena, not by its own cooperation. Accordingly, the only data SRS willingly provided to Kline was public information and there was no basis for withholding it in the first place. Whatever Mr. Williams' vague statement meant, SRS did not rely (and could not have relied) on it and it was not material.

Finally, the Panel completely ignored a prior judicial finding which rejected the very same allegation. Judge Clark Owens of the Sedgwick County District Court held:

> The defendant complains that when Investigator Williams requested records from SRS, he failed to tell them the real reason that he wanted them. This was probably more of an omission than a false statement. He just failed to give them a detailed explanation. During an investigation a law enforcement officer is allowed to make false statements to a suspect as an interrogation technique. *State v. Ackward*, 281 Kan. 2 (2006). It would certainly not be necessary for an investigator to give a detailed explanation to a state agency as to the direction of his investigation in order to request access to records. Revealing the object of the inquiry could jeopardize the investigation.

Owens Opinion, Ex. N1 at 15. Not only does collateral estoppel apply to such a decision, it is striking that the Panel would completely disregard it.

In conclusion, the Panel's finding of an SRS "deception" fails on multiple levels. The Panel applied a vague catch-all rule and sidestepped the requirements of the specific rule, KRPC 4.1. It then adopted a brand-new Kansas rule that prosecutors cannot allow investigators to use deception with witnesses. Next, it failed to consider materiality, not recognizing that Mr. Williams' statement to SRS was not material and admittedly was not relied upon by SRS in providing strictly public data. Finally, it ignored Judge Owens' decision on the same point. The Panel's decision falls far short on the facts and the law.

2. The Panel Incorrectly Concluded That Kline's Statements Regarding Identifying Adult Patients Violated Rule 3.3

The Panel incorrectly concluded that Kline made false statements of fact to tribunals regarding investigatory efforts to determine the identities of adult abortion patients. The Panel found that Kline violated KRPC 3.3 by stating under oath to Judge King (in the *CHPP* mandamus action) and Judge Owens (in the *Tiller* criminal action) that "his office did not seek to identify the names of adult abortion patients." Report ¶¶ 126, 334, 336. The Panel also determined that Kline "never correct[ed] the false statements made under oath." Report ¶ 335.

KRPC 3.3(a)(1) provides that a lawyer "shall not *knowingly* (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of *material* fact or law previously made to the tribunal by the lawyer." KRPC 3.3(a)(1) (emphasis added). As described below, there is no clear and convincing evidence that Kline "knowingly" made a false statement of fact to Judges King or Owens. To the contrary, the evidence

reveals that Kline (a) did not instruct his staff to identify the names of adult patients, (b) was unaware that a low-level member of his staff tried to match KDHE reports involving adult patient abortions with hotel records, and (c) first learned of such efforts at the hearing in this disciplinary action. In addition, not only was Kline unaware that his statements were inaccurate, his statements were *immaterial* to the proceedings in which they were made.[8] Thus, there is no "clear and convincing" evidence satisfying the factual predicates for a Rule 3.3 violation: Kline did not "knowingly" make a false statement of fact and did not "knowingly" fail to correct a false statement of "material" fact.

b. *The Purpose of the LaQuinta Subpoena and Records*

In February of 2005, after learning that Dr. Tiller referred patients to a LaQuinta Inn near his clinic, Mr. Maxwell applied for and obtained a subpoena *duces tecum* for registration records from the motel. As both Judge Owens and Judge King determined, Kline had decided not to seek adult patient identities, and Kline's staff decided to obtain the LaQuinta records to identify *minor patients* so that those names could be cross-referenced with records obtained from KDHE in order to determine whether Dr. Tiller's clinic had failed to report victims of abuse:

> The investigators attempted to match the KDHE records with the records from the motel . . . to obtain the identity of the adult traveling companions of the minor patients . . . an effort to identify the patients under the age of 16 that had obtained abortions to see if the defendant had filed the SRS report.

Ex. N1, Judge Owens Opinion, 16.

[8] Importantly, nothing in the record or Report suggests that it was unlawful for Kline to obtain the identity of adult patients. Accordingly, the violation found by the Panel does not relate to the underlying conduct (*i.e.* obtaining the identities of adult patients), but instead, Kline's representations about that conduct.

> His purpose was to attempt to use the registration records to obtain the identity of WHCS patient's who were minor's . . . as such patients were potential crime victims.

Ex. 90, King Report, 4.

Kline testified at length that the purpose of the LaQuinta subpoena was to identify children who had abortions at Dr. Tiller's clinic. Kline 344:16-347:7. As Kline's lead investigator, Tom Williams, explained:

> Q. Okay. And what were your-- what were your directions to do with that La Quinta registration?
> A. The objective was to see if we could identify underage females who had received abortions and had, you know, been a guest at the La Quinta Inn.
> Q. And how were you going to use the La Quinta records to accomplish that?
> A. Well, it wasn't to going to be a direct task, and I didn't know if it was going to be that productive, but we were going to take records from the Kansas Department of Health and Environment because those termination of pregnancy records would have a city of residence and a date, as I recall, the procedure was performed. We were going to do a crosscheck looking for same time period and same geographic location between the two sets of records. And I'm not the computer guru, but I think in layman terms that was the way the process was to be accomplished.

Williams 800:23- 801:19.

Because the LaQuinta records would contain only adult names, it would be necessary to compare geographic and other information contained in the KDHE records to the LaQuinta records in order to determine contact information for minor patients. *Id*. As Mr. Williams noted, "children underage are not going to be able to rent a motel room." Williams 814:3-8. Thus, the identity of the children's' adult *travel companions*

was relevant to the investigatory analysis. The identity of adult *patients*, however, was *irrelevant*: "It was like wheat and chaff. Any criminal investigation there's wheat and chaff. We separate the wheat from the chaff. You really—you sometimes pull in all kinds of stuff in a criminal investigation and what you have to do is sort it out. What's important to you, and what's not important to you." Maxwell 1466:4-11.

c. *Exhibit 51 – Spreadsheet Prepared by Mr. Reed*

The Panel's finding that Kline made false statements to Judge Owens and Judge King is predicated on a single piece of evidence: Exhibit 51, a spreadsheet prepared by Jared Reed analyzing data obtained from the LaQuinta records. Mr. Reed was a newly-hired, lower-level investigator who reported to Mr. Williams. Mr. Reed testified that Mr. Williams instructed him to review the LaQuinta records and to compare the records with those received from KDHE in order to identify patients under the age of fifteen:

> 1 Q. Okay. What were you asked to do with the La
> 2 Quinta information by Mr. Williams?
> 3 A. In this report it discusses reviewing all of the
> 4 2003 and 2004 KDHE reports and comparing them to
> 5 the La Quinta records. **And basically I was**
> **6 attempting to identify where the patient resided**
> **7 in Kansas and was 15 years of age or younger**.

Reed 1150:1-7 (emphasis added).

Accordingly, Mr. Reed prepared spreadsheets which attempted to identify abortion patients who were fifteen years old or younger. In addition, however, Mr. Reed prepared a separate spreadsheet listing only the names of potential patients *over* the age of sixteen. Report ¶ 125. The Panel found that Mr. Williams "directed" Mr. Reed to prepare the spreadsheet identifying adult patients. Report ¶ 133. However, Mr. Williams was surprised at its very existence when the DA first asked him about it in early 2010:

Q. And in there we did discuss this-- or asked you some questions about this 16 and over spreadsheet, did we not?
A. Yes.
Q. And your reaction that day on January 10th of 2010, when we talked about to you was what?
A. Well, I think I expressed to you that-- that I was surprised when it was first presented to me and this issue came up during the hearings in Wichita, I think that would have been in late 2008, when I was cross-examined by Mr. Monnat. And, you know, my recollection was at that point in time after I-- that we had never done anything or had any need to seek names of adult women. **In my opinion from the very get go the names were not important except for the children where we wanted to find out if there was sexual abuse and the reporting there.**

I was really surprised about the existence of this at all. And I went on to explain to you that at that point in time Mr. Reed didn't work for me every day, he worked on one floor and I worked on another and I was not his direct supervisor during 2005. And that I think Mr. Reed is very conscientious. He had not been to the law enforcement training academy at that time, and I also told you that may be I had done a poor job in explaining to him what I had wanted, because we've-- we've seen documents here today where this process started in February of '05 and he had prepared a report on the children, and whether he had a misunderstanding and worked this up at some point or-- I can't explain.

I think he was a conscientious employee and may be he thought, anticipated that this was something that I was going to need or want but--

Q. In there in the portion of the statement that you gave to us, and I'm not attempting to put words in your mouth, it seems to me that you acknowledge that you may have seen it but that you didn't think it was relevant because you hadn't ordered it?
A. Well, I thought that was another situation that maybe he had shown this to me and I said, hey,

why are you doing this, and may be I had discarded it. I said that was a possibility. **Because the format is not completed and it's my understanding that there was never a final report of this put into file that I had ever initialed off on. I have no recollection of ever ordering him, there was no logical reason for me to do it.** I can just suggest that if he did it it was a misunderstanding. And maybe I was a poor supervisor and didn't clearly explain to him.

Williams 852:1- 853:8 (emphasis added). Further suggesting that he had not previously reviewed Exhibit 51, Mr. Williams testified that the spreadsheet lacked the typical formalities of an approved investigative document. Williams 810:18-817:14 (Exhibit 51 does not contain his initials, lacks a cover report, and was not saved to the investigation file). Mr. Reed confirmed that the spreadsheet was never finalized or approved by Mr. Williams. Reed 1210:25-1213:9.

Importantly, Kline was unaware that Mr. Reed had created Exhibit 51. In fact, the first time Kline had even seen it was at the disciplinary hearing. Kline 354:22-356:5. Kline testified he had never ordered anyone to prepare the document. Kline 357:11-358:8. Likewise, no one on his staff told him about the preparation of Exhibit 51, but instead, simply informed him that the "effort to identify the children and their adult traveling partners did not work." Kline 361:7-16. Kline speculated that it "could" make sense for his staff to identify adult patients as a way to exclude them from the list of adults, leaving only the adult *traveling companions* of children, but he stated he had not asked for this to be done and "did not know" if that was Mr. Reed's purpose in creating

Exhibit 51. Kline 357:17- 358:8; 360:11-361:6.[9] Notably, Mr. Reed's testimony about the La Quinta records mentions Kline *not once*. Reed 1140-62. Given this, it is unsurprising that there was no evidence of anyone in Kline's office ever using or following up on Exhibit 51 in the investigation. It would be surprising if they had, since, while Kline's office had every right to learn adult identities, there was no need to do so in such fashion.

d. *Requirements of Rule 3.3(a) Are Not Satisfied*

The Panel's conclusion that Kline violated Rule 3.3(a)(1) by stating that his office did not seek to identify adult patients is wrong as a matter of fact and law. Rule 3.3(a)(1) requires a lawyer to act "knowingly." "Knowing denotes *actual knowledge* of the fact in question." KRPC 1.0(g) (emphasis added). As the comments to KRPC 3.3 make clear, the rule is designed to prevent statements "that the lawyer knows to be false." KRPC 3.3 (Comment 2). Thus, the Panel was required to find "clear and convincing" evidence that Kline *knew* his statements to Judge King and Judge Owens were false.

There is simply no evidence that, in April of 2005, Kline "knew or should have known" his statements were inaccurate. Report ¶ 334. Exhibit 51 is the <u>only</u> evidence relied upon by the Panel to support its finding that Kline's statements were false. And as explained above, at the time he made his statements, Kline was unaware that Exhibit 51 had been created. Not only was Kline unaware of this document, but so too were his assistants Mr. Maxwell and Mr. Rucker. Rucker 1076:8-13; Maxwell 1465:14- 1467:16. Indeed, the very existence of Exhibit 51 was inconsistent with Kline's purpose in

[9] The Panel rips a portion of Kline's testimony from its context to imply that Kline admitted seeking the identities of adult patients. Report ¶ 129. However, a review of his complete testimony reveals he was merely offering a potential explanation for Mr. Reed's creation of Exhibit 51. Kline 357:11-361:16.

obtaining the LaQuinta records and with his instructions to his staff on how to analyze the information contained in those records.

Despite Mr. Williams' testimony that he had no "recollection" of Exhibit 51, and despite both Mr. Williams' and Mr. Reed's testimony that Exhibit 51 was not approved for inclusion in the investigation file, the Panel concluded that Mr. Williams "directed" Mr. Reed to prepare the document. Report ¶ 334. Even assuming this dubious conclusion was correct, it does not support the Panel's conclusion that Kline "knew" that Mr. Reed had tried to identify adult patients at the time he made his statements to Judges King and Owens. *Id*. Instead, it merely suggests that *Mr. Williams* was aware of such efforts. There is simply no evidence (and the Panel pointed to none) showing that Kline *knew* his statements to be false, let alone "clear and convincing evidence."

Second, in addition to lacking any evidentiary support, the Panel also incorrectly applied Rule 3.3(a). The Panel found that "Kline knew or *should have known* that his office attempted to identify adult abortion patient records." Report ¶ 334. But nothing in Rule 3.3(a)—and its attendant "knowingly" element—charges lawyers with constructive knowledge of the truth or falsity of statements. The rule is clear: a lawyer must "know" his statement is false. KRPC 3.3(a). It is true that "actual knowledge" can be inferred from facts, KRPC 1.0(g), though, as noted above, there is no evidence from which "actual knowledge" could be inferred on the part of Kline. But the Panel moved far beyond "inferring" *actual* knowledge and instead created a new *constructive* knowledge element to the rule, *i.e*. Kline "should have known" that his statements were false. The Panel completely disregards the scope and text of KRPC 3.3. "Actual knowledge" of falsity is required under the rule. KRPC 3.3(a); KRPC 1.0(g).

Notably, the newly-created "constructive knowledge" element employed by the Panel would deter lawyers from correcting previous, unknowingly false statements to tribunals, as any such correction would open an inquiry as to whether the lawyer "should have known" of the falsity at the time the statement was made. But putting this policy rationale aside, the Panel's application of KRPC 3.3 is simply incompatible with the plain language of the rule, which requires that Kline must have possessed "actual knowledge" that his statements were false at the time he made them. Thus, even if there was evidence that Kline "should have known" of Mr. Reed's efforts (which, as described above, there is not), such evidence would be wholly insufficient to find a violation of Rule 3.3(a).[10]

Third, the Panel found that "Kline has never attempted to correct the false statements made under oath." Report ¶ 335. Under KRPC 3.3(a), lawyers shall not "fail to correct a false statement of *material* fact or law previously made." (emphasis added). Here, Kline's alleged false statements—that he did not seek the identities of adult abortion patients during the investigation—were immaterial to the "conclusive issues" in the underlying proceeding. *Shamberg, Johnson & Bergman, Chtd. v. Oliver*, 289 Kan. 891, 900, 220 P.3d 333, 339 (2009). Neither the *Tiller* nor *CHPP* case turned on whether Kline's investigation encompassed the identities of adult patients. It is undisputed that Kline had a legal right to obtain the names of adult patients from the LaQuinta records. Moreover, even if Kline's representations were material, by the time he became aware

[10] Notably, not even KRPC 5.1 contains a broad "constructive knowledge" element like that applied by the Panel in regard to KRPC 3.3. As discussed *infra*, in limited circumstances, KRPC 5.1 makes supervisory attorneys responsible for the actions of their subordinates. But revealingly, under that rule, a supervisory attorney is only responsible for a violation by his subordinate if the lawyer "orders," "ratifies," or has actual "knowledge" of the violation. *See* Rule 5.1(c)(1)-(2).

they were inaccurate, the *Tiller* and *CHPP* cases had long since concluded. Thus, there was no avenue for Kline to have "corrected" his previous statements.

The record also shows that Kline took great pains to prevent disclosure of the identities of adult patients because they were not relevant to his investigation. *See* Kline 1687:11-1689:13; Kline 273:5-25; Ex. 142 at 16. For example, in *Alpha*, Kline proposed a procedure for redacting all patient identities from records requested from CHPP.

In summary, the Panel's conclusion that Kline violated KRPC 3.3 is not supported by "clear and convincing" evidence. There is simply no evidence that Kline was aware that Mr. Reed had engaged in efforts to determine the identities of adult abortion patients. The great weight of evidence reveals that Mr. Reed prepared Exhibit 51 on his own, with *at most* the knowledge of Mr. Williams. In addition, the Panel erred as a matter of law by inventing and applying a constructive knowledge element to KRPC 3.3. The Panel's determination should be reversed.

3. The Panel Incorrectly Determined That Kline Violated KRPC By Attaching Sealed Documents To His Brief in *Alpha*

The Panel incorrectly concluded that Kline violated Rules 8.4(d), 8.4(g), and 5.1(c) by attaching sealed documents to the appellate brief his office filed in *Alpha*. The Panel found that Kline instructed his subordinates to attach three documents from the district court record to the appellate brief filed with this Court: (1) redacted subpoenas Judge Anderson issued to the clinics; (2) redacted portions of the October 5, 2004 transcript of a hearing before Judge Anderson on the clinics' motions to quash the subpoena; and (3) Judge Anderson's October 21, 2004 Memorandum and Order. *Alpha*,

128 P.3d at 380; *See also* Maag 1003:12-24.[11] Pursuant to a February 15, 2005 order, this Court had sealed the district court record for purposes of the appeal in *Alpha*, but ordered that the briefs and oral argument would remain public.

Rule 8.4(d) provides that lawyers should not "engage in conduct that is prejudicial to the administration of justice," Rule 8.4(g) forbids "conduct that adversely reflects on the lawyer's fitness to practice law," and Rule 5.1(c) makes a lawyer with "supervisory authority" responsible for the conduct of subordinate lawyers if the supervisor "orders" or "ratifies" the conduct, or "knows of the conduct at a time when its consequences can be avoided or mitigated, but fails to take reasonable remedial action." The Panel determined that, by attaching the documents to the brief in *Alpha*, Kline engaged in "misconduct that is prejudicial to the administration of justice," Report ¶ 338, and that Kline's conduct "adversely reflects on Kline's fitness to practice law as it defeated the Court's purpose in sealing the record." Report ¶¶ 339. The Panel also found that Kline had "managerial authority" over the attorneys filing the brief and failed to take remedial action, in violation of KRPC 5.1(c). Report ¶ 341.

The record reveals, however, that although the attachment of documents to the brief was a technical violation of this Court's order, it did not cause prejudice to any party and does not rise to the level of a violation of the KRPC. Importantly, the three

[11] In light of the "highly unusual" order from this Court, Kline and his attorneys, including Assistant Attorney General Maxwell, carefully considered whether to file these documents. *See* Maag 1037:24-1038:20; Maxwell 1082:17-1083:16. They unsuccessfully sought direction from the Clerk of the Appellate Courts, Carol Green, and they later filed a Motion for Clarification with Judge Anderson, who found that his own nondisclosure order had not been violated by attaching the documents because the clinics had already made that order's application moot, and because the unredacted parts of the attachments that could be viewed by the public did not contain any patient-related information or other information that could harm the investigation. Strong 956:13- 857:9.

documents from the record attached to the brief contained only legal arguments and conclusions and *did not contain confidential information about the investigation, medical records, or abortion patients*. This Court, in *Alpha*, has already addressed Kline's conduct in the context of the motion for contempt filed against Kline in that case. While this Court was clearly unhappy with Kline's "defiant tone," it rejected the clinics' claim that Kline should be held in contempt or had prejudiced the proceeding:

> [Kline has] made a classic "no harm, no foul" argument: Any disclosure of sealed material did nothing to impair the orderly nature of this proceeding or the soundness of its eventual result; the attorney general and his staff did not release information harmful to personal privacy, prejudicial to the administration of justice, or detrimental to this court's performance of its duties.
>
> We conclude that, despite the attorney general's initial defiant tone, he should not be held in contempt at this time. **No prejudice has resulted from his conduct**, a distinguishing feature of the cases cited to us by petitioners.

Alpha, 128 P.3d at 381-82 (emphasis added).

Despite this Court's explicit finding that "no prejudice" resulted from Kline's conduct, the Panel found a Rule 8.4(d) violation because "[a]ttaching confidential documents to a public pleading is misconduct that is prejudicial to the administration of justice…." Report ¶ 338. However, as noted above, the documents were "confidential" only in the sense they were subject to this Court's order sealing the entire district court record. The documents themselves did not contain "confidential" (*i.e.* non-public) information. Indeed, the documents contained the same type of information—legal issues and arguments—addressed in the parties' public briefing and oral argument. Thus, to the extent Kline's conduct can be questioned, it is only because it contravened this Court's

order sealing the district court record. And, as noted above, this Court expressly declined to hold Kline in contempt of its order because no prejudice resulted from his conduct.

Similarly, as to Rule 8.4(g), the Panel found that this "Court's purpose in sealing court records is to protect confidential information from being publicly released," and that Kline's conduct "defeated the Court's purpose in sealing the record." Report ¶ 339. But Kline's conduct did *not* defeat the purpose of this Court's order, because Kline "did not release information harmful to personal privacy, prejudicial to the administration of justice, or detrimental to this court's performance of its duties." *Alpha*, 128 P.3d at 381-82 (emphasis added). As this Court has already found, "[n]o prejudice has resulted from his conduct." *Id*. If an alleged violation is predicated on the violation of a court order, and the court issuing that order determines that the conduct was not prejudicial and does not constitute contempt, how can that conduct establish an independent violation of the Rules of Professional Responsibility?

Indeed, the Panel's application of Rule 8.4 in this instance admits of virtually no limits. For example, it is commonplace in civil litigation for courts to enter protective orders protecting a party's personal or proprietary information from public disclosure. In the event such a protective order is violated, the court may sanction a party or hold the party in contempt. The issuing court is plainly in the best position to judge the parties' conduct and weigh any resulting prejudice. However, if a lawyer's mere disclosure of "confidential" information in a brief constitutes a *per se* violation of Rule 8.4—even where the issuing court found no prejudice resulted from the conduct—this Court will soon be flooded with countless new cases of attorney misconduct. Simply put, if Kline's conduct was in any way sanctionable, this Court was best positioned to issue such a

sanction in *Alpha*. This Court, however, expressly declined to hold Kline in contempt and found that no prejudice resulted from his conduct. The Panel's freewheeling application of Rule 8.4 was an error, and there is no "clear and convincing" evidence of egregious conduct violating Rule 8.4.[12]

4. The Panel Incorrectly Found that Kline Violated Rule 3.3 Through His Representations to this Court in *Alpha*

The Panel incorrectly concluded that Kline violated Rule 3.3(a)(1) when he filed a motion to clarify following oral argument in *Alpha*. Mr. Rucker argued on Kline's behalf in *Alpha*. Two justices of this Court questioned Mr. Rucker regarding investigations into "live births," which did not involve abortion clinics and therefore were not at issue. Specifically, the justices asked whether Kline's office had investigated or issued subpoenas regarding "failure to report" violations by other mandatory reporters such as hospitals.[13] In response, Mr. Rucker initially invoked the need for investigative secrecy, as the "live births" investigation was not before the Court and, because KDHE records contained all information necessary to investigate non-reporting by live birth providers, which would be prosecuted solely by local prosecutors, was at any rate entirely separate from the investigation regarding abortion clinics. Kline 429:13-436:3. Nonetheless, Mr. Rucker finally acceded and answered that Kline had not subpoenaed information from other mandatory reporters, such as hospitals. Report ¶ 149. After the argument, Kline had a motion to clarify filed. It stated:

[12] Without a predicate violation of Rules 8.4(d) or (g), there is no violation of Rule 5.1(c).
[13] Although inapposite in *Alpha*, a "selective prosecution" theory was later rejected by Judge Owens in the Tiller trial. Judge Owens held that it would make sense to start with abortion clinics when investigating mandatory reporters' failure to report, since minors receiving an abortion would by definition have "suffered an injury through an unwanted pregnancy." The statute is triggered by the presence of an "injury." Ex. N1 at 9-10.

> As part of this criminal investigation and/or inquisition, Kline has sought records and information from other mandatory reporters besides the petitioners in the present mandamus action. This effort has included subpoenas for records relating to live births involving mothers under the legal age of sexual consent.

Alpha, 128 P.3d at 373.

The Panel "believe[d]" the motion to clarify contained false information because "[t]he respondent did not seek any information from other mandatory reporters." Report ¶ 345. However, the Panel's factual findings provide no basis for this "belief." The Panel's conclusion that Kline violated Rule 3.3(a)(1) rests upon the language in the motion to clarify stating that Kline "has sought records from other mandatory reporters besides the petitioners in the present mandamus action." Report ¶ 342. The Panel deems this statement to be false because "[t]he respondent and his assistants [only] sought information from SRS, KDHE, and the petitioners," and the information obtained from SRS and KDHE "came from others, including mandatory reporters." Report ¶ 343. In other words, the Panel concluded that Kline's motion to clarify was false because Kline had not, in fact, sought information *directly* from other mandatory reporters. *See* Report ¶¶ 343-345.

However, nothing in Kline's motion states that he sought records *directly* from other mandatory reporters. Instead, the motion simply states that Kline has "sought records and information from other mandatory reporters." This is a true statement, as the Panel's Report implicitly concedes, because the information "sought" from SRS and KDHE included information provided to those agencies by other mandatory reporters. *See* Report ¶ 343. The motion to clarify was true and accurate:

> 23 Q. Looking at your motion to clarify you say, in
> 24 paragraph number one, "As part of this criminal
> 25 investigation and our inquisition Kline has

sought records and information from other mandatory reporters besides the petitioners in the present mandamus action." 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, "Kline 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.**

Kline 448:23- 449:6 (emphasis added).

Q. I mean, we're all attorneys here we kind of know what's going on. But the phrase "other mandatory reporters" was just a reference to KDHE?
A. **No, it's a reference to those who reported to KDHE. The reason we went to KDHE was to get information from other mandatory reporters that were given to KDHE.**

Kline 452:16-23 (emphasis added).

Q. And it is your testimony that-- today that paragraph number one of the motion to clarify argument was truthful and would not have misled the Kansas Supreme Court?
A. **It is truthful. It is factually truthful. It wasn't intended to mislead. The inferences the Court might have drawn, but it wasn't intended that way. It is factually truthful**.

Kline 484:5-12.

The Panel found that Mr. Rucker "did not agree" that the motion to clarify was necessary and that he did not "sign, author, or ratify the language" contained in the

motion. Report ¶ 155. Mr. Rucker recalled conversations with Kline in which the two (and others) debated whether the motion to clarify should be filed. Mr. Rucker stated that, at the time, he believed that Kline thought that KDHE was itself a mandatory reporter, and that he therefore resisted filing the motion because he disagreed. Rucker 1063:6-15. Mr. Rucker then testified that he was "confused" by the relevant paragraph:

> 6 Q. Yes, this effort paragraph--in the second
> 7 sentence of paragraph number one states that the
> 8 Attorney General's office sought records and
> 9 information from other mandatory reporters and
> 10 this effort includes subpoenas for records.
> 11 A. I am-- I am confused by the paragraph.

Rucker 1070:6-11. Kline, however, testified that he did *not* believe KDHE to be a mandatory reporter at the time of filing the motion. Report ¶ 154. Tellingly, after reviewing the language of the motion again at the hearing, Mr. Rucker refused to agree to a leading question asserting that the motion was not accurate, and stated that "I understand General Kline's argument." Rucker 1129:14-1130:2. Mr. Rucker also stated that he believes that Kline is an honest person. Rucker 1127:8-12.

The Panel remarked that Kline's conduct was "particularly troubling" because this Court relied upon the motion to clarify in *Alpha* when it stated that Mr. Rucker was "less than forthright in his answers" to the Court's inquiry at oral argument. Report ¶ 348. But nothing in the motion to clarify contradicted Mr. Rucker's testimony. In response to questions as to whether the Attorney General's office had subpoenaed specific mandatory reporters, Mr. Rucker responded "no." Report ¶ 149. This was a true statement. Likewise, in the motion to clarify, Kline stated that the Attorney General's office had "sought" information from other mandatory reporters. Report ¶ 342. This was also a true statement, as Kline had in fact "sought" such information from SRS and KDHE—the "repositories"

of information from mandatory reporters. Thus, Mr. Rucker's statement at oral argument was consistent with, and clarified by, Kline's statement in the motion to clarify.

The Panel "determined" that the motion was false based upon its own reading of the words used in the motion. Report ¶ 348. At a bare minimum, however, Kline's interpretation of his own motion is equally plausible. The existence of conflicting, plausible interpretations of a written statement cannot form the basis of a knowingly false statement under KRPC 3.3. There is simply no "clear and convincing" evidence that the statement in the motion is false or that Kline had "actual knowledge" of its falsity.[14]

Finally, there was no evidence that the question of whether KDHE is a mandatory reporter of information gleaned from live births, or merely maintained data of mandatory reporters who delivered live births, was material to any issue before this Court in *Alpha*. The live birth investigation was not at issue, and at any rate, the live birth subpoenas were themselves subject to a nondisclosure order. Ex. 69 at 721. In short, because Kline's statements were neither false nor material, they cannot form the basis for discipline.

5. The Panel Incorrectly Determined that Kline's Statements on the O'Reilly Factor Violate the KRPC

The Panel incorrectly concluded that Kline violated Rule 3.8(f) by making public statements during an appearance on the nationally televised "O'Reilly Factor" in November of 2006. Rule 3.8(f) provides that a

[14] In addition to finding a violation of Rule 3.3(a)(1), the Panel also found that Kline's argument violated Rule 8.4(c), which prohibits lawyers from engaging in "dishonesty, fraud, deceit or misrepresentation." As discussed supra, §1, where a specific ethics rule addresses a course of conduct (such as Rule 3.3 in regard to false statements to tribunals), that rule must be applied in place of a catch-all rule such as Rule 8.4. Thus, although the Panel's finding in regard to Rule 8.4 fails for the same reason as it does for Rule 3.3, it was a legal error for the Panel to have applied Rule 8.4.

> prosecutor in a criminal case shall…(f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, *refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused* and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

KRPC 3.8(f) (emphasis added).

During his appearance on the O'Reilly Factor, Kline described the general nature of medical records obtained during his investigation, noting that "in every single instance [of a late-term abortion], there was not an abortion performed for a physical reason." Report ¶ 353. In describing why such records were necessary for the investigation, Kline noted that you "cannot enforce prohibitions against late-term abortion without seeing the doctor's notation regarding the evidence or the abortion that was performed in the procedure." Report ¶ 353.

The Panel determined that Kline's statements violated Rule 3.8(f) because they "were not necessary to inform the public of the nature and extent of the prosecutor's action," did not "serve a legitimate law enforcement purpose," and had a "substantial likelihood of heightening public condemnation of Dr. Tiller." Report ¶ 354. The Panel's finding is an error of law and of fact.

a. *Rule 3.8(f) Does Not Apply Retroactively*

The Panel's application of KRPC 3.8(f) to Kline's conduct violates his due process rights under the Fourteenth Amendment of the United States Constitution. Importantly, section (f) of KRPC 3.8 was not yet enacted at the time Kline made his

statements on the O'Reilly Factor in 2006. Instead, KRPC 3.8 was amended to add section (f) on July 1, 2007, almost nine months *after* Kline's appearance on the O'Reilly Factor. This amendment to the rule significantly broadened the scope of the KRPC 3.8 to encompass a wide-range of statements previously beyond the pale of both KRPC 3.6 and KRPC 3.8. The Panel erred in retroactively applying the new KRPC 3.8(f) to Kline.

Noting the "quasi-criminal" nature of attorney disciplinary proceedings, the United States Supreme Court has held that the targets of such proceedings are "entitled to procedural due process." *In re Ruffalo*, 390 U.S. 544, 550 (1968); *see also In re Tolen*, 293 Kan. 607, 610, 265 P.3d 546, 549 (2011) (same). The right to notice inherent in due process requires that a law give '"fair warning of the conduct it makes a crime."' *Rogers v. Tennessee*, 532 U.S. 451, 457, 459-460 (2001) (citations omitted) (collecting cases). Accordingly, although the constitutional prohibition on *ex post facto* laws applies only to legislative acts, due process rights place a similar limitation on acts of the judicial branch. *Id*. 456-460 (stating that it is "undoubtedly correct" that the "Due Process and *Ex Post Facto* Clauses safeguard common interests—*in particular, the interest in fundamental fairness (through notice and fair warning)* and the prevention of arbitrary and vindictive use of the laws") (emphasis added). In the context of the *ex post facto* laws, this Court has held that the constitution "forbids legislative enactment of any law which imposes a punishment for an *act which was not punishable at the time the act was committed* or which imposes punishment additional to what was prescribed." *Anderson v. Bruce*, 50 P.3d 1, 5 (Kan. 2002) (emphasis added).

Here, Kline's conduct was not punishable at the time the act was committed. As noted above, KRPC 3.8(f) was not enacted until long after Kline appeared on the

O'Reilly Factor. The new section (f) did not merely amend an existing section of the rule, but rather, added a new substantive provision requiring that prosecutors "refrain" from *any* statements that "have a substantial likelihood of heightening public condemnation of the accused," unless such statements are "necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose…." KRPC 3.8(f). The comment explaining this new section explains that it is intended to "supplement" KRPC 3.6—which applies to statements "that have a substantial likelihood of prejudicing an adjudicator proceeding"—by addressing the "additional problem" of extrajudicial statements that "increase[] public condemnation of the accused." KRPC 3.8(f) (comment 5). Thus, the purpose of KRPC 3.8(f) was to restrict extrajudicial statements not encompassed by the former KPRC 3.6 or 3.8.

The Panel made no finding that Kline's conduct would have violated the versions of KRPC 3.6 or 3.8 in effect in November of 2006. Notably, Kline testified that he reviewed both rules prior to appearing on the O'Reilly Factor. Kline 285:20-288:1. Not only was section (f) completely absent from the former version of KRPC 3.8, but application of former KRPC 3.6 was limited to statements creating a "substantial likelihood of materially prejudicing an adjudicative proceeding." *See* Rule 3.6 (pre-2007 version) and Rule 3.8 (pre-2007 version). The Panel made no finding that Kline's statements materially prejudiced an adjudicative proceeding. To the contrary, the Panel relied solely on the new, broad rule encompassed in Rule 3.8(f) in finding a violation.

The Panel incorrectly and unconstitutionally applied the new KRPC 3.8(f) to Kline's statements made prior to the enactment of that rule. The Panel's retroactive

application of Rule 3.8(f) violates Kline's due process right to notice and the Panel's findings must be reversed on this ground alone.

b. *Safe Harbors Apply*

Kline's statements also fall within two safe harbors set out in KRPC 3.6. Thus, even if the new KRPC 3.8 could be retroactively applied to Kline's statements, the statements do not violate that rule. KRPC 3.8 incorporates the safe harbor provisions contained in KRPC 3.6. Specifically, comment 5 states that KRPC 3.8 is not "intended to restrict the statements which a prosecutor may make which comply with Rule 3.6(b) or 3.6(c)." KRPC 3.8 (comment 5). KRPC 3.6(b), in relevant part, provides that

> a lawyer may state :
>
> (1) the *claim or defense involved* and, except when prohibited by law, the identity of the persons involved;
> (2) information *contained in a public record*.

KRPC 3.6(b) (emphasis added).[15]

Both of these safe harbors apply to Kline's statements. First, Kline's statements related to a "claim or defense" at issue. On December 21, 2006, just weeks after making his statements on the O'Reilly Factor, Kline filed a public Complaint against Dr. Tiller in Case Number 06-CR-2961. The Complaint contained the same information Kline provided on the O'Reilly Factor. Thus, Kline's statements related to the claims in the

[15] Like KRPC 3.8, KRPC 3.6 was amended effective July 1, 2007. Because the Panel applied the amended version of KRPC 3.8, for purposes of his analysis here, Kline also applies the amended version of KRPC 3.6, which is referenced in the comments of KRPC 3.8. However, as set out above, the Panel erred by retroactively applying this new rule. Notably, the United States Supreme Court struck down Nevada's counterpart to the pre-2007 version of KRPC 3.6. *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991). The Court found the rule's safe harbor for statements on the "general nature" of a claim or defense to be impermissibly vague because a "lawyer has no principle for determining when his remarks pass from the safe harbor of the general to the forbidden sea of the elaborated." *Id*. at 1050. It was this former version of KRPC 3.6 that Kline reviewed and relied upon prior to making his appearance on the O'Reilly Factor.

case. Second, and relatedly, because the information was contained in the Complaint against Tiller, it was "contained in a public record." Importantly, the "public record" safe harbor must be construed as broadly as possible, because "[g]iven [the Rule's] grammatical structure, and absent any clarifying interpretation by the state court, the Rule fails to provide "fair notice to those to whom [it] is directed."' *See Attorney Grievance Com'n of Maryland v. Gansler***,** 835 A.2d 548, 567 (Md. 2003), *quoting Gentile*, 501 U.S. at 1048-49. As the Maryland Court of Appeals has held:

> Because there is no settled definition of "information contained in a public record" we agree with Gansler that MRPC 3.6(c)(2) does not provide adequate guidance for determining which extrajudicial statements would qualify under the safe harbor. For this reason, we construe the phrase in its broadest form as applied to Gansler in this case and to any other extrajudicial statements made prior to the filing of this Opinion. In this case, we consider "information in a public record" *to include anything in the public domain, including public court documents, media reports, and comments made by police officers.*

Gansler, 835 A.2d at 567. In sum, even if the new KRPC 3.8(f) could be constitutionally applied to Kline (which it cannot), his statements fall within the safe harbors of that rule.

c. *Kline's Statements Have Been Previously Considered and Dismissed*

Finally, there is no "clear and convincing" evidence that Kline's statements caused any prejudice or heightened "public condemnation" of Dr. Tiller. Over the course of four years, several judges and the DA's own investigator have repeatedly reviewed Kline's statements on the O'Reilly Factor. Their opinions and findings establish that Kline's comments violated no ethical duty. Indeed, The DA's investigator, S. Lucky DeFries, determined that Kline's conduct did not even rise to the level of probable cause; much less "clear and convincing" evidence that Kline violated the KRPC. DeFries found: "[W]e do not believe that any statements made on the O'Reilly Factor 'imperiled the

privacy of the patients' or jeopardized the 'law enforcement objectives at the heart of the proceedings.'" Ex. 142 at 20. Further, he found that "[w]e do not believe that any statements made on the O'Reilly Factor rise to the level of establishing the probable cause necessary to find that any of the disciplinary rules have been violated." *Id.* at 21.

In January of 2008, Judge David King found that "[i]nformation . . . that Dr. Tiller used a diagnosis of depression to support post-viability abortions . . . was available in the public domain before the O'Reilly program." Ex. 90, *King Report*, 39. Judge King also observed that "Judge Anderson concluded that Kline did not say anything in the O'Reilly interview that violated Judge Anderson's Protective Order." *Id.* at 40.

In short, there is no evidence to support the Panel's finding that Kline's statements "had a substantial likelihood of heightening public condemnation of Dr. Tiller." Report ¶ 354. Kline's statements were consistent with the public complaint against Dr. Tiller filed shortly thereafter and such allegations were in the "public domain" before Kline's appearance on the O'Reilly Factor. The Panel incorrectly found that Kline's statements violated Rule 3.8(f).

6. The Panel Incorrectly Determined That Kline Violated KRPC By Failing To Update Status Report

The Panel incorrectly concluded that Kline violated KRPC 3.3(a)(1) and 5.1 by failing to update a Status and Disposition Report filed with Judge Anderson. The Panel concluded that the report filed with Judge Anderson contained an inaccuracy and that Kline failed to correct the report. As explained below, however, the Panel's conclusion is not supported by "clear and convincing" evidence. In fact, the evidence reveals that (a) Kline was unaware of the inaccuracy contained in the Status and Deposition Report and (b) the inaccuracy was not material to any decision made by Judge Anderson. As a result,

Kline did not violate KRPC 3.3(a)(1), nor can he be held liable under KRPC 5.1 for any violation committed by his subordinates.

a. *Kline Did Not Have Actual Knowledge of False Statement*

Before Kline left office as Attorney General, Judge Anderson asked Mr. Maxwell to provide the court with a "Status and Disposition Report" of the current location of inquisition records, including the redacted WHCS medical records. Mr. Maxwell prepared the report for filing. However, subsequent to Mr. Maxwell preparing the report, but prior to its filing, Mr. Williams and Mr. Reed were instructed by Mr. Rucker to make copies of the redacted medical records for use by Kline in his new role as District Attorney for Johnson County. Ex. 78; Maxwell 1406:8-1409:3. Thus, when the report was filed on January 8, 2007, the report was accurate in every detail but one: the report failed to mention that copies of the WHCS redacted records were retained by Kline's staff. The Panel found that, "[w]ithin a week or two" of the report being filed, Mr. Maxwell became aware of the copies retained by Kline, but that Mr. Maxwell never "corrected or updated the status and disposition report" to reflect the existence of these copies. Report ¶ 200.

The Panel found that Kline violated KRPC 3.3(a)(1) and 5.1 by failing to "correct or update" the Status and Disposition Report filed with Judge Anderson. Report ¶¶ 366-370. Specifically, the Panel concluded that Kline "knew of [Mr. Maxwell's] conduct" within four days of the report being filed and "failed to take remedial action." Report ¶ 369. The Panel also concluded that Kline had "personal knowledge" of the inaccuracy in the report and failed to "correct or update" the report. Report ¶ 370.

The "conduct" Kline became aware of within four days was Mr. Maxwell's filing of a report with Judge Anderson. Absent from the Panel's Report, however, is any evidence suggesting that Kline was aware of the *contents* of the report prepared and filed by Mr. Maxwell. To the contrary, the overwhelming evidence reveals that Kline was not aware of the inaccuracy contained in the Report until he mentioned the records to Judge Anderson (on his own initiative) in April of 2007. It was not until this meeting with Judge Anderson that Kline became aware that the Status and Disposition Report had failed to note the copies retained by his office. Accordingly, Kline cannot be found to have "knowingly" failed to correct the inaccuracy contained in the report.

The entire weight of the Panel's finding of a violation rests upon a January 12, 2007 letter sent by Kline to Mr. Morrison's assistant, Mr. Guinn. Report ¶ 204. The letter was sent in response to a letter Kline received from Mr. Guinn requesting that all records from his investigation be provided to the Attorney General's office. Report ¶ 202. Kline testified that, prior to responding to Mr. Guinn, he inquired of Mr. Maxwell as to the location of the records. Kline 504:14-17. Mr. Maxwell informed Kline that "a report had been filed with Judge Anderson" that contained the location and disposition of the records. Kline 501:13-502:15. Accordingly, Kline informed Mr. Guinn that:

> [a]ll of the documents were accounted for during my tenure as Attorney General and a chain of custody maintained. *A report was filed with the Court reflecting the same*. Please contact Mr. Maxwell if you have any further questions.

Report ¶ 204.

Based upon this single reference to the mere *existence* of the report, the Panel concludes that Kline "relied" upon the letter and "knew of" the inaccuracy contained in the letter. Report ¶¶ 366, 369. But there is nothing contained in Kline's letter to Mr.

Guinn that suggests Kline was aware of the specific *contents* of the letter. To the extent he "relied" on the letter, he relied on the mere *existence* of the letter based upon Mr. Maxwell's representations that a Status and Disposition Report had been filed with Judge Anderson. And though Kline "knew of [Mr. Maxwell's] conduct" within "four days" (*i.e.* the filing of a report with Judge Anderson), Report ¶ 369, there is absolutely no evidence that Kline reviewed the report or was aware of the inaccuracy contained in the report. The mere mention of the report (based upon Mr. Maxwell's representations) in the letter does not support the Panel's finding that Kline had "actual knowledge" of the inaccuracy contained in the report. Evidence that Kline was aware of the existence of the report is insufficient to find a violation of KRPC 3.3.

Notably, Kline never hid his possession of the records from Judge Anderson and was "very matter of fact" in approaching Judge Anderson to show him the records as evidence of a criminal conspiracy on April 9, 2007. Anderson 668:4-669:24. When Judge Anderson asked him how he possessed the records, Kline openly stated he had transferred copies to Johnson County and stated "thought you knew." *Id*. There is simply no "clear and convincing" evidence that Kline was aware of the inaccuracy contained in the report. As such, there is no "clear and convincing" evidence that Kline knowingly failed to correct the inaccuracy, or failed to take remedial action upon learning of the inaccuracy.

b. *Inaccurate Statement Was Not Material*

Additionally, Kline's conduct cannot constitute a violation of KRPC 3.3(a)(1) because the inaccuracy contained in the report was immaterial. KRPC 3.3(a)(1) only applies to a "false statement of *material* fact." KRPC 3.3(a)(1) (emphasis added). Thus, in order to find a violation of KRPC 3.3, the Panel was required to have found that

Kline's possession of copies of the redacted records was material to a proceeding. The Panel concludes that "[t]he security and location of the redacted WHCS patient medical records are material facts," Report ¶ 367, but points to no evidence supporting this finding. The evidence reveals that including the copies in the Status and Disposition Report would have made no practical difference.

First, the incoming Attorney General, Paul Morrison, knew by the second day in office that Kline (by then, Johnson County District Attorney) possessed the redacted working copies of the Tiller records. The Panel heard testimony from Veronica Dersch, the assistant attorney general assigned by Mr. Morrison to review Kline's investigative file to build a case for disciplinary charges against Kline. Ms. Dersch testified that she had access to her own set of the copies, and immediately was able to deduce that the working redacted copies of the records had been transferred to Johnson County. Dersch 77:1-78:15. Although the Attorney General's office claimed to know this was true, it took no action to supplement the report itself. Dersch 156:19-157:2 ("I did not update Mr. Maxwell's report, no. I told [Judge Anderson] what I thought was wrong with it.").

Second, Judge Anderson retained an original set of redacted copies of the records. Kline 528:14-21. Thus, Mr. Maxwell's failure to supplement the report after he learned of the copies harmed no one, as Judge Anderson maintained the original set and Morrison's staff was aware that Kline possessed copies.

In fact, the evidence reveals that Judge Anderson believed that Kline had a right to retain the records and, absent the flare-up that occurred in April 2007, would not have ordered the records to be returned. In his report, Judge King found that Kline told Judge

Anderson in December 2006 that the records would be referred to Sedgwick, Johnson, and Shawnee Counties:

> Q. Would you agree with me that the King report [Exhibit 90, page 43]
> says after Attorney General Kline obtained the CHPP and the WHCS records on October 20, 2006, he asked Judge Anderson to allow him to share the fruits of the investigation with expert consultants and other law enforcement?
> A. I agree that's what it says, yes.
> Q. **He specifically discussed sharing the information with prosecutors in Sedgwick, Johnson and Shawnee Counties. Is that correct?**
> A. **That's what it says.**
> Q. **Okay. Judge Anderson approved the request by telling Kline he could share the records as he'd proposed?**
> A. **That is what it says that Judge King found.**

Dersch 158:11-159:8 (emphasis added).

Along the same lines, Judge Anderson's own orders recognize that he could not order Kline to transfer or withhold the records from any jurisdiction:

> Q. (BY MR. HOLBROOK) Beginning with the with respect to the Attorney General Morrison's request for an order. Would you read that, please and would you read it into the record?
> A. "With respect to Attorney General Morrison's request for an order requiring Kline to return copies of redacted medical records of Planned Parenthood the court declines to enter such order for the following reasons. First, the court was informed of Attorney General Kline's intention to refer evidence to local prosecutors. In response to such announcement this court told Kline that such prosecutorial decisions on how to investigate and prosecute claims, including what experts and law enforcement officials would be engaged, were not considered to be within the scope of the court's responsibility. This court told Kline the court would not join in such discussion or provide

6 advice. In this respect the court told Kline
7 the patient records had been protected, could be
8 used in such form in his anticipated
9 prosecutions. This these decisions were made
10 and communicated while Attorney General Kline
11 had authority over the inquisition."
12 Q. Can. And the next-- first sentence second
13 paragraph, second lower paragraph.
14 A. "Second Kline has jurisdiction to investigation
15 crimes and file charges in Overland Park, Kansas
16 where Planned Parenthood was-- is located."

Maag 1018:12-1019:16 (Resp. Ex. BBBBBB).

Thus, while Judge Anderson testified that he "relied on" the report to know where the records were between January and April 2007 (Anderson 668:1-3), this had no practical effect: Mr. Maxwell's failure to mention the records in his report did not keep Judge Anderson in the dark to the extent that he could and would have ordered remedial action had he learned of the transfer before April 9, 2007. Thus, the inaccuracy contained in the report was not "material" and KRPC 3.3 is inapplicable.

7. Kline's Testimony Regarding the Retention of "Summaries" of Records Was Consistent with the KRPC

Kline twice testified regarding "summaries" his office created of information contained in redacted records produced by the Tiller clinic (the "Tiller Summaries"). Kline had previously informed Judge Anderson about the creation of the summaries, and on neither occasion of his testimony did Kline purport (or have a chance) to give his full and complete recollection. That is not surprising, because in neither case was Kline's retention of the summaries a material fact.

The first question is whether Kline's retention of the summaries—or the number of summaries he retained—was a "material" issue of fact during the two proceedings in which Kline testified about them. The answer is no.

A "material" fact is a fact that is "material to the conclusive issues in the case." *Shamberg, Johnson & Bergman, Chtd. v. Oliver*, 289 Kan. 891, 900, 220 P.3d 333, 339 (2009). In the disciplinary context, this Court has found a misrepresentation to a tribunal to be material where the fact would have been outcome-determinative. *See In re Arabia*,156 P.3d 652, 657 (Kan. 2007) (where applicant for name change had to and did aver that the change "will not…defeat other legal obligations," it was a material misstatement not to inform a Kansas court that the applicant was subject to an outstanding fugitive warrant from Colorado, and as a result, the Kansas court granted the change, impacting Colorado authorities' search for the fugitive); *In re Wonder*, 179 P.3d 451, 455 (Kan. 2008) (application for letters contained false information, holding out an "executor" who was not named in the will, and this caused court to issue letters to the unauthorized executor instead of the executors named in the will); *In re Dennis*, 188 P.3d 1, 20 (Kan. 2008) (on motion to compel discovery responses, attorney misrepresented to the court that no compulsion was necessary because he had already served them); *In re Gershater*, 17 P.3d 929, 933 (Kan. 2001) (lawyer filed lawsuit alleging damage from not being able to practice law, but knew at the time that she "had not been reinstated to practice law and had not been damaged"); *Matter of Black*, 941 P.2d 1380, 1384 (Kan. 1997) (attorney "participated in an *ex parte* proceeding without informing the judge that [opponent] had not been notified of the hearing, had not reviewed the proposed orders, and had not reviewed the child support calculations," and obtained an order inflating child support because it was based on a knowingly false number of children.); *In re Nathanson*, 112 P.2d 162, 168 (Kan. 2005) (attorney filed counterclaim alleging rape that did not occur); *In re Jordan*, 91 P.3d 1168, 1173 (Kan. 2004) (where court was deciding

whether prosecutor had improperly "set up" arrest of witness for defense just before his testimony, attorney told the court that the arrest warrant had "nothing to do" with her own office, when in fact, she had just arranged it).

Here, Kline's possession of the summaries was not a "material" fact in any proceeding. First, no principle in the law or the KRPC prohibited Kline from possessing the summaries, just as no principle in the law or KRPC prohibited Kline from possessing the underlying records. The Panel correctly concluded that Kline did not violate the KRPC merely by having the summaries. Report ¶ 374. Kline had made the summaries after taking office as Johnson County District Attorney. Kline 536:10-22. Kline had them made because he was investigating a conspiracy between the Tiller clinic and Planned Parenthood in Johnson County, and needed the information in the summaries in order to re-seek copies of the records from Attorney General Morrison. Kline 568:9-569:14; 536:10-537:6. In fact, this is what Kline did. Ex. P6.

Kline's right to have one, two, or all of the summaries has never been in question. Nor has there been any serious contention that Kline was not entitled to see or use for law enforcement purposes the data—derived from records redacted by the order of this Court—within the summaries. Indeed, this Court had no difficulty refusing the request of the Attorney General to force Kline to disgorge his only copies of the records themselves.

The Panel suggests that the number of summaries in Kline's possession—or his possession of them—was material because the more general question of "what materials Kline continued to maintain in the Johnson County District Attorney's office is a material fact." Report ¶ 378. But this general question was raised not by the Tiller Clinic, but by Kline's successor as Attorney General in an effort to disgorge them. Because Kline had a

right to maintain all of the materials in the office—including the records from which the summaries were derived—he was not required to "disgorge" them. *CHPP*, 197 P.3d. at 399. It did not matter whether Kline had good or bad summaries of the records, or whether he had three, thirty, or three hundred. None of these facts could have been decisive given the Court's order. Further, none of these facts were decisive to Judge Anderson, who declined to order that Kline tender his summaries into the Court. Report ¶ 242.

The Panel's reasoning simply cannot be correct. Taken to its logical extreme, *any* detail or fact about "what materials Kline continued to maintain" is material. Kline could therefore be charged with misconduct for any misstatement at all about "materials" relating to his investigation, even if the supervising judge and this Court believed and ruled that he had a right to have them, and even if those materials no longer contained the sort of confidential information that originally spurred judicial intervention in Kline's investigation in the first place. The Panel's premise is simply incorrect. Because the fact of Kline's possession of the summaries was known in both proceedings and could not have changed the outcome of either proceeding, and this Court clearly did not act on any misunderstanding of the facts, it is not material.

The Panel also erred by finding that Kline made knowing misrepresentations of fact. Before Judge King, Kline was not asked how many summaries he had, he was only asked whether he had them. Kline replied that he had a summary "of three records that pertain to a theory of criminal liability that would have jurisdiction in Johnson County against Doctor Tiller…" Ex. 84 at 1231. Before Kline could testify any further, he considered that the questioner was Dr. Tiller's counsel and invoked the executive

privilege. The Court sustained his claim. Ex. 84 at 1232. While Kline did not have the chance to add that he had other summaries, the number of summaries was immaterial.

Before this Court at oral argument in 2008, Kline was asked whether he had told Judge Anderson that summaries were retained in Johnson County. Report ¶ 377. By this late date, as Justice Beier's question to Kline made clear, the record disclosed to the Court that Kline did have summaries; Kline himself had already sworn as much under oath during the discovery phase of the litigation, at a time in when he had access to the record and could carefully review it before making a response. Report ¶ 377. Indeed, the Court's opinion assumes that Kline had the summaries. *CHPP* 197 P.3d. at 402-404. Kline did not expect to have to testify again, and so months later, without the record before him in open court, he was unable to confirm the premise in Justice Beier's question, stating simply that he "didn't believe" that he had "summaries of the records." Even then, it is unclear whether he understood that the question was about summaries and not the underlying "records," as Kline stated, "I don't believe that I do. I have sought the records from the Office of the Attorney General and been refused." Report ¶ 377. This uncertain exchange is far from a knowing "false statement of fact," especially when Kline did provide correct information under oath and the Court's opinion showed it was obviously under no misapprehension.

In conclusion, Kline's statements were not knowingly false statements, were not material, and did not affect the outcome of any proceeding. If Kansas law on materiality and KRPC 3.3(a) provides any guidance in Kline's case, as a matter of law, Kline cannot be found to have made or failed to correct a knowing misrepresentation of material fact.

8. Kline's Amendments of His Response to the DA's Complaint Long Before the Hearing Does Not Make His Original Incorrect Statement a Violation of the KRPC

The Panel incorrectly found that Kline violated KRPC 8.1 by falsely stating a fact in the disciplinary proceeding. There is simply no evidence that Kline "knowingly" misstated material facts regarding the location of records maintained by his office. The Panel's contrary conclusion rests on multiple legal and factual errors.

First, the Panel again simply assumed that *any* detail relating to redacted records' location was "material"—even a detail pertaining to a *single* night, and even where there is no evidence that the records were handled in an unlawful way or in violation of the KRPC. As discussed *supra*, Kansas courts have never applied such a broad definition of materiality, either in disciplinary cases or elsewhere. Second, there is not clear and convincing evidence that any mistaken statements were "knowing" or that it was "necessary to correct a misapprehension" that Kline "knew" the DA had formed.

Three specific alleged "misstatements" were contained in a twenty-page letter from Kline's attorney to the DA dated September 19, 2007, during a time when Kline was just beginning to investigate and answer specific, probing questions about the precise location of the redacted records in a parallel mandamus proceeding before Judge King. During that proceeding, Kline learned many facts for the first time. Those facts were found by Judge King in his January 10, 2008 report to this Court *and were all made known to the DA's investigators* no later than June 2008. Kline and the DA came to learn the full facts years before the DA filed his formal complaint and years before the hearing. Thus, even if the facts were material, the DA presented no evidence to establish that his office was laboring under any misapprehension, that Kline knew about the

misapprehension, or that it was "necessary" for Kline to come forward to "correct" any initial misstatements or ambiguities that had long since been superseded by more specific findings that had been made available to the DA.

a. *Whether Redacted Records Were Kept "Under Lock and Key" While Kline Was District Attorney*

The Panel recognizes that this statement (above) was not knowingly false when made in September 2007, but concludes that Kline should have corrected it after he learned that the previous February the redacted records had been kept undisturbed in the locked apartment of an investigator. Notably, as the Panel concluded elsewhere, the fact that the redacted records were kept undisturbed for a short time in the locked apartment of an investigator, rather than in the prosecutor's office, does not implicate the KRPC. Nor has any court held that this temporary arrangement had any legal effect on the merits or evidentiary issues in a proceeding. Accordingly, Kline's failure to formally "correct" his initial, general statement regarding "lock and key" does not implicate a material fact.

Furthermore, at a very early stage in the DA's investigation, Judge King specifically found facts relating to the temporary location of the redacted records. The DA's own investigators had access to Judge King's report by June 2008. All of this occurred long before a formal complaint was filed, and almost three years before the hearing was held. Therefore, Kline could not possibly have "known" that the DA was laboring under any "misapprehension" as to a material fact, and could not rationally have believed that it was somehow necessary for him to "redisclose" disclosures and findings that had already been made on this precise point by Judge King.

b. *Whether Kline Had "Direct," Rather than "Indirect," Access to the Records as Attorney General, Because There Was One Occasion When "[Kline] reviewed the documents" and the "documents were [not] immediately returned to the locked closet by the investigator."*

The Panel stretches far beyond the "clear and convincing" evidence to find that Kline had "direct" access to the records as Attorney General, and that he knowingly misstated this fact to the DA in September 2007. The Panel's finding is based solely on the circumstances of one evening, November 6, 2006, in which the redacted records were left in Kline's locked office overnight. Report ¶ 383. The Panel simply assumes that this solitary event means *Kline* actually had direct "access" to them on that evening, and that after *Kline* reviewed them, the investigator failed to return them to "the locked closet." *Id*. But there was no evidence whatsoever—and certainly no clear and convincing evidence—to establish that Kline actually "accessed" or "viewed" them that night or the next morning. Instead, Mr. Williams testified that he took the records down to Kline's office "when [Kline] was not there" to work on them, stayed late, and left one box in Kline's office. Williams 846:11-847:16. All of the other evidence established that only Lorna Jansen (Williams' secretary) and Jared Reed (Williams' assistant) had keys to the locked evidence room where the records were actually kept. Williams 841:17-842:12; Ex. 90 (King Report). In short, there is no record from which to cobble together a conclusion that Kline had "direct access" to the redacted records or actually accessed them in his office late on the single night they were left there. Kline's representation to the DA could not have been false, let alone knowingly false.

Further, given the conclusion of the Panel itself and of every court to have addressed this issue, which have found that Kline would have had the right to review or "access" the records even if he kept his own key or was alone in his office (and there is

no evidence, again, to establish this), it is hard to understand how Kline's "direct" access on a given night would have been "material" as that term has previously been applied under Kansas law. Again, the Panel seems to have labeled every single detail about the disposition of the redacted records as "material," exposing every person who uttered a solitary fact about the records to the harshest penalties for failing to correctly distinguish between "direct" and "indirect" access on a given night. In short, the Panel's conclusion is legally and factually unsupportable.

9. Kline's Assistants' Statements of the Law to the Grand Jury Were Materially Accurate and Complete

The Panel made its most serious departure from the facts on issue 9. It ignored official, contemporaneous grand jury transcripts, records, and filings which soundly impeached the faulty memory of the single grand jury witness it allowed to testify. Only by doing so could the Panel conclude that Kline violated KRPC 8.4(c) and (d) through his representations to the grand jury. The Panel found that (1) Kline (or subordinate lawyers) falsely stated the law to the grand jury; (2) that misunderstanding of the law caused by Kline led the grand jury to issue subpoenas to investigate the mandatory reporting issue; and (3) that the grand jury abandoned the mandatory reporting issue after it supposedly learned of the "correct law." Report ¶¶ 389-97. The Panel's findings fall far below the preponderance of evidence threshold, let alone "clear and convincing."

a. *Kline Correctly Stated the Law to the Grand Jury*

The Panel's decision assumes that by not citing the old Kansas mandatory reporting statute and stating by name a federal case that limited its application, Kline imparted a false version of the law to the grand jury. But the Panel ignores the fact that Kline correctly summarized the actual state of the law, using the precise requirement that

"harm" be found before it is assumed that sex between age-mates under 16 is "sexual abuse" and must be reported. While it is true that Kline (and his subordinates, who handled grand jury communications after the first day) did not name the case or statute on December 17 and 19, 2007, they did cite the case shortly thereafter on January 9, 2008. So long as the grand jury was actually informed of what the law required, it is irrelevant whether they were provided with a specific case or statutory citation.

Two different statutes applied to mandatory reporting. The first statute, KSA 38-2223, applied after January 1, 2007; the earlier statute, KSA 38-1522, applied before that date. The statutes differ only slightly. The later statute requires reporting when there is reason to suspect "harm" caused by sexual abuse; the earlier statute requires "injury." *Id*. *See also* Ex. P8 (memo prepared by law firm for grand jury's private counsel which determined there was little practical difference in the statutes).

Every statement made by Kline to the grand jury on December 17, 2007, acknowledged that the issue for the grand jury was *not* merely whether age-mates had had sex followed by an abortion, it was whether there was "reason to suspect that a child has been harmed as a result of sexual abuse." Ex. 96, 2430:8-15 ("Some might say I don't have reason to believe there was harm to the child. **That's an issue for you all to take up**."). When a juror asked whether there "is still mandated reporting for a 14 year-old and 15 year-old," Kline clearly identified the key issue for the jury in a way that was inconsistent with his prior Attorney General Opinion but consistent with recent case law:

> Yes. Under the statute, **reason to suspect harm caused by sexual abuse**. All of this is defined as sexual abuse. **The only issue you are dealing with is reason to believe there's harm caused by.**

Ex. 96, 2432:4-10 (emphasis added). *See also* 2429:1-8 (Kline says "operable language" is "has reason to suspect that a child has been harmed as a result of…sexual abuse."). Tellingly, in her complaint to the DA which initiated Count II, the sole grand juror witness falsely quoted to the DA Kline's response to this important question by truncating his answer at the word, "Yes." Ex. 7, at 1. On cross-examination at the hearing, the witness conceded that "there's more words" in Mr. Kline's answer than she wrote in her complaint, but denied making an error. Hensel 2460:18-24; 2461:15-20. Nonetheless, the Panel relied upon this witness' testimony regarding official proceedings in place of official transcripts and records which frequently impeached her recollection.

Contrary to the witness' false testimony, Kline precisely stated the holding of the federal case (though he did not cite it by name) during the grand jury's first few meetings. *See Aid for Women v. Foulston*, 427 F.Supp.2d 1093 (D. Kan. 2006) (finding that Attorney General's opinion that pregnancies resulting from sex by minor age-mates established per se "injury" under old statute was incorrect, that the statute was "not intended to cover consensual activity between age-mates that does not result in injury," and that there is only a duty to report certain categories of sexual activity involving age-mate minors if there is reason to suspect injury), *vacated*, 06-3187, 2007 WL 6787808 (10th Cir. Sept. 20, 2007). The court specifically recognized that its holding addressed only a narrow corner of the reporting statute with respect to abortion providers:

> The core of the reporting statute—providing for the detection and protection of children suffering from incest or abusive sexual activity—is unaffected by this opinion. Such acts were and will remain subject to mandatory reporting. But the statute was not intended to cover consensual sexual activity between age-mates that do not result in injury.

Id., 427 F. Supp. 2d at 1113. *See also id*. at 1105 ("The narrow constitutional issue before this court is whether minor patients have a right to informational privacy concerning

consensual sexual activity with an age-mate where there is no evidence of force, coercion, or power differential."); *id*. at 1112 ("This injunction action is limited in its scope to a determination of whether consensual sexual activity of underage minors is reportable based on a number of constitutional challenges").

Assuming that Kline was under a duty not to incorrectly state the law to the grand jury, he was certainly under no duty to provide legal citations to support correct statements of the law. Curiously, the Panel did not find that the statements of law Kline made were incorrect or inconsistent with the substance of *Aid for Women* or the new statute. Instead, the Panel seems to suggest that the actual citations must have been immediately provided to the grand jury. But there is no basis in the law for requiring the utterance of such citations. The Panel's findings are simply incorrect as a matter of law, because on day one, the grand jury heard what it needed to know on the issue of mandatory reporting with respect to sexual relations between age-mate minors: that it would still need to find that "harm" occurred.

b. *Kline's Staff's Provision of a Citation to Aid for Women and KSA 38-1522 on January 9, 2008, and Not on December 19, 2007, Did Not Prejudice the Administration of Justice Because It Had No Effect on the Issuance of Subpoenas or the Grand Jury's Focus*

As might be expected based on Kline's correct explanation of the law on day one of the grand jury proceedings, the citation of *Aid for Women* and KSA 38-1522 on January 9, 2008, had no effect on the course of the grand jury's actions. To reach the opposite conclusion, the Panel relies exclusively on the hearing testimony of the presiding grand juror. This witness claimed that she and her colleagues voted to issue January 3, 2008 subpoenas to obtain documents that were relevant to seven separate areas of inquiry, but that she and her colleagues would never have investigated five of those

areas had they known of *Aid for Women*'s narrow holding that sexual abuse reporting involving minor age-mates is only required if there is reason to believe the minor was injured. This is implausible on its face. The actual record of proceedings in the grand jury confirmed that the presiding juror's recent opinions about her co-jurors' motivations were simply not based in fact. The Panel seriously erred by disregarding the official record of the proceedings and relying instead on the baseless opinions of the presiding juror.

First, *Aid for Women*, which held that underage age-mate sexual relations is not automatically reportable because there must also be "injury", covers a narrow portion of what the grand jury was investigating. It relates only to a subset of the cases covered by the mandatory reporting law, itself only one of seven distinct issues being investigated.

Second, there was no evidence that Kline or the grand jury ever intended to tread within the narrow area foreclosed by *Aid for Women*. The grand jury's chosen method (comparing KDHE to SRS records) was similar to Kline's and, just like Kline's request to Judge Anderson, did not violate *Aid for Women* or depend on patient records from the clinics themselves. *See* Anderson 714:18-21. The grand jury's methods were entirely consistent with staying out of the *Aid for Women* zone, entirely consistent with the law, and entirely consistent with what Kline told them on December 19.

Third, in issuing the January 7 subpoenas, the grand jury was investigating only the 24-hour waiting period and parental notification. We know this because in January 2008, the grand jury stated that it

> would like to make a formal statement in regards to the subpoena issued to [CHPP]. The purpose of the subpoena dates on January 7th 2008 to [CHPP] was for the purpose of determining whether [CHPP] complies with the following:
> - **Parental consent requirement**
> - **Compliance with the 24-hour requirement**

> The purpose of the subpoena is not to revisit complaints filed by the District Attorney of Johnson County on October 15, 2007…

Ex. Q8 at 260 (emphasis added). While the grand jury was still in session, its representatives (and CHPP's counsel) repeatedly confirmed that these were the only purposes of the subpoena. *See* Ex. 101, 2916:19-2917:7 (statement of grand jury counsel, Judge McClain, at February 25 hearing); Ex. Q8, 106 (statement in stipulated protective order between CHPP counsel and grand jury counsel).

Indeed, the subpoena itself requested records that had already been produced to Kline, but despite the fact that it could have asked to disclose identities (which would have aided a mandatory reporting inquiry), *only asked to disclose information relevant to two issues, parental notification and waiting periods*: "dates and/or ties of any required notification and/or compliance with any required waiting period." Ex. 108. The grand jury's transcripts make clear that by January 2, 2008, it wanted to investigate these items precisely because Kline had not yet investigated them. See Ex. 98, 2714:24-2715:18 (identifying consent and 24-hour requirements as issues that had not been investigated because the redaction of dates in CHPP's production made this impossible) 2730:6-7 (juror no. 2 stating, "I think that's [the areas not investigated by Kline] where we, as a group, need to take our investigation."). Given all of this, it should not be surprising that only three of the sixteen subpoenaed records related to children. Ex. 99, 2762:1-99.

Fourth, the grand jury was still investigating mandatory reporting—using sources other than the CHPP records, as it had planned all along—weeks after it received the citation to *Aid for Women*. Indeed, immediately after receiving the *Aid for Women* citation, the grand jury voted to issue a subpoena to the Department of Revenue for names of CHPP employees. Ex. 100, 2893:7-2894:2. Grand Juror Hensel admitted that

this was to aid the mandatory reporting investigation (Hensel 2348:16-2349:5), but falsely testified that this happened before *Aid for Women* was cited, when in fact, it happened afterwards. Ex. 100, 2893:7-2894:2. The mandatory reporting investigation continued into February. In that month, the Court entered a protective order relating to what SRS records could be reviewed (Feb. 12; *see* Ex. 114), grand jurors asked for evidence on "all" seven areas of the investigation (Feb. 20, *see* Ex. 102, 3038:23-3039:7), and the grand jury began reviewing SRS records (Feb. 25, *see* Ex. 103:3155a-3156:6).

In conclusion, the Panel relied on testimony from a single person several years after the fact about what the grand jury intended to do, instead of transcripts and other contemporaneous and unchallenged official records of the grand jury (along with other evidence from a variety of contemporaneous sources) which frequently impeached the witness. The Panel's finding was not supported by "quality" evidence, nor was it supported by even a preponderance of the evidence. Troublingly, the Panel's report does not even mention the vast bulk of the record, let alone disclose how it grappled with it and managed to allow a single witness' testimony to completely override it. In short, it simply cannot be true that the failure to explicitly name and cite *Aid for Women*, which applies to a mere corner of one of seven issues being investigated, "caused" the issuance of entire subpoenas and misled the grand jury to a degree that it precipitously dropped five-sevenths of its inquiry. The Panel's adoption of this incredible finding was seriously errant and should be rejected.

10. Kline's Attempt to Enforce the Grand Jury's Subpoena Was Consistent with the KRPC

Relying on the broadest catch-all disciplinary rule of all, 8.4(g) ("any other conduct that adversely reflects on the lawyer's fitness to practice law"), the Panel faulted

Kline for his decision to file a motion to enforce the grand jury's subpoena, when, weeks after its issuance, the judge refused to either enforce it or rule on a motion to quash. As discussed in Section 1.a.ii, above, due process requires that Kline's conduct have been clearly egregious and flagrantly violative of accepted professional norms that would be recognized by a reasonable attorney practicing in the same situation. Kline's filing of the motion was actually necessary to the administration of justice rather than "flagrantly violative" of an accepted prosecutorial norm.

First, Kline was under no obligation to obtain the grand jury's permission to enforce the only subpoena it had issued to CHPP. On February 25, 2008, the presiding juror stated:

> Juror: Second is a **request**, and **while we understand that we don't have the authority to issue this**, we are asking the DA's office **and anyone else** that might submit any documents to the Court in our name, that the Grand Jury **be advised of those** prior to the filing. The Grand Jury would like to **review** any documents that are provided to the Court **in our name**. For example, if there are any more briefs related to the subpoena, we would like to **see** that information since it's being submitted in our name prior to that.
>
> Court: Okay.
>
> Juror: **It's a request**.
>
> Pryor: In all candor from our office's standpoint, I don't have the authority to accept or reject, but I will pass it on. I just wanted to---
>
> Juror: We understand that.
>
> Pryor: **Unless you order it**.
>
> Juror: **That's just a general request**.

Ex. 103, 3160:20-3161:17 (emphasis added). While the presiding juror requested to "see" and "review" filings, as she represented, she had "no authority" to do so.[16] Nor did

[16] The grand jury's counsel did not "repeat" a request that the grand jury "approve" any filings to enforce the subpoena. *See* Report ¶ 274. Counsel simply referred to the prior

the presiding juror ever demand or obtain a court order requiring that the grand jury approve all filings made to enforce the subpoena. That is simply not in the record.

Additionally, the District Attorney's two filings to enforce the subpoena were made solely in the name of the State and signed by his office,[17]--in stark contrast to other documents which the grand jury did purport to issue or request be filed in its own name.[18] *See* Ex. 7 at 252. Indeed, the motions to enforce did not bear the introduction attached to filings by Kline that did come at the grand jury's request (and, essentially, were in its name). See Ex. Q8 at 299 (Kline's opposition to motion to quash subpoena, filed at grand jury's request, which stated, "COMES NOW THE STATE **at the request of the grand jury**…") (emphasis added).

Finally, Kline's motions to enforce had no discernible effect on the investigation. At the time he filed the motions, the grand jury had not decided to withdraw its subpoena and in fact, had never told its actual counsel, Mr. Merker, that it did not want the

---

record and mistakenly stated that there was an agreement to secure the grand jury's approval. As discussed above, there was no demand or agreement for grand jury "approval" of all filings made with respect to the subpoenas. *See* Ex. 104 at 3259.

[17] Under K.S.A. 22-3008(1), the clerk of the court issues subpoenas and other process "whenever required by a grand jury, its presiding juror or the prosecuting attorney."

[18] The grand juror's "request" of Kline "and anyone else" more likely related to a recent, disturbing incident. Without notifying the other jurors, the grand jury's counsel and presiding juror entered into an agreement in the grand jury's name with CHPP which purported to bind the grand jury to a stipulation of confidentiality, including waiving the jurors' civil immunity. Judge Moriarty so-ordered it. It was withdrawn after, in open court, the rest of the grand jurors discovered they had neither learned nor approved of it. *See* Ex. 102, 3066:25-3067:25 (juror no. 15 discloses that he has not seen agreement between grand jury and CHPP); *Id*. at 3140 (jury votes to withdraw the secret agreement); Ex. P8 (the agreement); Ex. 102, 3118 (presiding juror tells Judge Moriarty on Feb. 20 she had not seen the agreement); Ex. P8 (grand jury's counsel's time entry for Feb. 18 states that he emailed proposed agreement to presiding juror for approval).

subpoena enforced. Merker, 2672:19-23. And as the Panel recognized, negotiations between the grand jury and CHPP continued, CHPP did enter into an agreement to produce the records to the grand jury, the court never had to rule on the motion to enforce, and as a result, the subpoena was withdrawn. Report ¶¶ 278-280. Accordingly, Kline was within his right to file a motion to enforce the subpoena on behalf of the State, that motion violated no order, law, rule, or agreement, and the filing had no cognizable effect on the investigation itself. There is no clear and convincing evidence to show that the filing was "flagrantly violative" of any pre-existing, widely-accepted prosecutorial norm.

The Panel also found that the filing violated the grand jury confidentiality statute, K.S.A. 22-3012, and thereby violated the catch-all provision of KRPC 8.4(g). But the Panel failed to provide Kline notice that it would try this alleged violation, and no facts regarding the "public" filings were alleged before the hearing. *See* Formal Complaint at 49-50 (failing to allege that filings were public or that this would be considered a violation). Kline was prohibited from establishing that the February 15, 2008, hearing on the motion to quash, which covered the same subject matter as the motions to enforce, was open to the public.[19] Even though Kline had no opportunity to anticipate and provide evidence on this point (by calling Judge Moriarty or other grand jurors), other evidence showed that the secret agreement between CHPP and the grand jury's counsel, which was later withdrawn, was filed publicly. See Ex. P8, 548 (grand jury's counsel McClain says

[19] For example, the Panel would have been presented with items such as an Olathe Daily News article, *Judge Asks for Compromise in Planned Parenthood Case*, by Jack Weinstein (Feb. 15, 2008), which quotes from the hearing and demonstrates it was open to the public. This Court can take judicial notice of the article.

he has decided not to give Kline a copy of the secret agreement because "it is filed and public record."). Finally, the Panel made no finding of prejudice as a result of the filing.

For all of these reasons, there was no clear and convincing evidence that Kline's filing meets the high standard of egregiousness required to apply a catch-all rule.

II. THE HEARING PANEL'S RECOMMENDATION OF DISCIPLINE IS INCONSISTENT WITH THE FACTS AND LAW

Finally, bootstrapping on its incorrect findings that Kline violated the KRPC, the Panel's recommendation of punishment is inconsistent with the facts of this case and the ABA Standards for Imposing Lawyer Sanctions. The Panel recommends that Kline be "suspended for the practice of law for an indefinite period of time." Report ¶ 430. The Panel arrives at this errant recommendation by relying on factual findings contradicted by the record and incorrectly applying the ABA standards.

The ABA Standards provide a basic methodology for assessing punishment in disciplinary proceedings. This methodology is based upon four questions: (1) the ethical duty violated; (2) the mental state of the lawyer; (3) the resulting actual or potential injury; and (4) the existence of aggravating or mitigating circumstances. Standards, p. 9. The Panel made little effort to actually apply these questions to the facts of the case, but instead merely announced unsupported, conclusory answers to each question.

A. **Duty Violated and Mental State**

The ABA Standards emphasize that the "most important ethical duties are those obligations which a lawyer owes to clients." Standards, p. 9. The Panel made no findings that Kline violated any duties owed to a client. Instead, the Panel concludes that Kline "knowingly" violated his duties to the "legal system, the legal profession, and the public to maintain his personal integrity." Report ¶¶ 402-03. In this context, the "knowingly"

mental state is met where "the lawyer acts with conscious awareness of the nature or attendant circumstances of his or her conduct both without the conscious objective or purpose to accomplish a particular result." Standards, p. 10.

As addressed above in respect to each of the KRPC violations found by the Panel, there is no evidence that Kline acted with knowledge of his purported wrongful conduct. Not only does this lack of mental state fatally undermine the Panel's findings of KRPC violations, but it also undermines the Panel's recommended punishment.

B. **No Actual or Potential Injury**

The Panel concludes that Kline's conduct "caused actual injury to the legal system and the legal profession" and "potential injury to the public." Report ¶ 404. However, the Panel cannot (and does not) recite a single shred of evidence supporting its conclusion. The Standards make clear that the existence of an injury may not be inferred from a violation of the KRPC. To the contrary, the Panel was required to "go further" to examine the "extent of the injuries caused by the lawyers' actions." Standards, p. 11. The Panel engaged in so such inquiry. As set out *supra* in Section I(B)(1)-(10), there is no evidence that any of the violations found by the Panel caused prejudice to any party or legal proceeding. Nor is there any showing of potential injury resulting from Kline's conduct. The false statements allegedly made by Kline were immaterial to the relevant legal proceedings and had no practical effect or impact on those proceedings; Kline's statements on the O'Reilly Factor were consistent with public allegations in the criminal case against Dr. Tiller and other publicly available information; and Kline's statements to the grand jury had no actual or potential effect on the issuance of subpoenas or the focus of the grand jury.

The Panel's conclusion that Kline's conduct resulted in "actual" and "potential" injury is not supported by the record or by the Panel's own—materially flawed—factual findings. In the absence of actual or potential injury, the Panel's recommendation of an indefinite suspension is inappropriate under the ABA Standards the Panel purported to rely upon. *See* Standards §§ 6.12, 7.2.

C. **Aggravating and Mitigating Factors**

The Panel also failed to properly consider evidence (or the lack thereof) regarding the existence of aggravating and mitigating factors.

1. Dishonest and Selfish Motive

The Panel concludes that "[m]uch of Kline's conduct was motivated by dishonesty and selfishness." Report ¶ 406. The Panel arrived at this conclusion "[b]ecause much of Kline's misconduct involved engaging in conduct that involves dishonesty . . . ." Report ¶ 406. Stated differently, according to the Panel, because Kline's conduct involved "dishonesty," he was therefore motivated by "dishonest" and "selfish" purposes. This strange, circular, and conclusory reasoning finds no basis in the ABA Standards. A finding that Kline violated the KRPC by making a false statement of fact does not allow the Panel to infer the existence of a "dishonest" and "selfish" motive as an aggravating factor. Such reasoning is counter to the very existence of aggravating factors, which are intended to be considered separate and apart from the finding of a rule violation.

The Panel cites no evidence supporting its conclusion that Kline was motivated by "dishonest" or "selfish" purposes. Indeed, in light of Kline's role as a public servant and the nature of the investigation and legal proceeding, it is difficult to even conceive of

what "selfish" motive could have motivated Kline's conduct. Regardless, even if a "selfish" motive was conceivable, there is no evidence of such a motive here.

2. Obstruction of Disciplinary Process

Kline did not obstruct the disciplinary process. The Panel found that, in closing argument, Kline "relayed the contents" of a 911 call after the audio had been excluded from evidence. Report ¶ 408. The Panel concludes that Kline's conduct was "an effort to get the Hearing Panel and the public to hear something that was not in the record and the details of which are not relevant to this proceeding. Report ¶ 409. Notably, the Panel's decision to exclude the 911 call as irrelevant was in error. Both Kline and Mr. Maxwell testified that the call's contents, which relate to treatment of a minor at a clinic, was the "tripwire" that led to the LaQuinta subpoena. Kline 1730:15-23; Maxwell 1450:15-1451:24. As discussed above, Kline's purpose in obtaining the LaQuinta records relates directly to the Panel's erroneous finding that Kline lied when he stated that his office did not adult patients' identities from the LaQuinta records. Finally, the 911 call itself was and is in the public domain; it is not confidential material that had to be protected.

Regardless, however, Kline's brief mention of the call during closing argument did not violate the Panel's ruling that the *audio recording* not be admitted into evidence. The Panel had already admitted testimony regarding the nature of the 911 call and its corresponding impact on Kline's investigation. Kline's mention of the call during closing was consistent with this testimony and "obstructed" nothing in the disciplinary process.

3. Deceptive Practices

Kline engaged in no deceptive practice during the disciplinary proceeding. Inexplicably, the Panel found that Kline submitted false evidence by *amending* his

answer to the formal complaint in order to *correct* an inaccuracy contained in his original answer. Report ¶¶ 410-411. Stranger still, the Panel then cited Kline's testimony at the hearing, which confirmed that the original answer contained an inaccuracy, as further support for its finding that Kline engaged in deceptive conduct. *Id*., ¶ 412. Correcting a previous misstatement cannot constitute a "deceptive practice," particularly where the correction was made over three months before the hearing.

Kline's original answer to the formal complaint stated that, in April of 2007, when appearing before Judge Anderson, Kline was unaware that his office had created summaries of certain records obtained during the investigation. Report ¶ 410. Notably, this disciplinary proceeding encompasses conduct spanning six years, and Kline's original answer was filed three years after the relevant hearing. Subsequently, after reviewing additional documents, Kline determined that he had been aware of the summaries in April of 2007. Exceptions ¶ 442. Accordingly, upon discovering this inaccuracy, an amended answer was promptly filed that accurately stated that Kline was aware of the summaries prepared by his office. Report ¶ 411; Document 59 at 33.

By correcting this inaccuracy, however, the Panel deems Kline to have engaged in "deceptive practices." The Panel's finding is entirely inconsistent with the KRPC, which *required* Kline to take remedial action to correct the inaccuracy. There is no evidence that Kline had knowledge that the statement was inaccurate at the time of filing the original answer. If anything, Kline's amendment of his answer serves as evidence of Kline's cooperation with the disciplinary process—mitigating any violations of the KRPC.

Likewise, Kline's testimony related to the *Alpha* case was not deceptive. The Panel went to great lengths in a futile attempt to establish that Kline gave false testimony

at the hearing. On its own initiative, the Panel acquired portions of the *Alpha* record from this Court in order to determine whether Kline's office had requested that the district court record be forwarded to this Court in *Alpha*. Report ¶¶ 414-418. The documents obtained by the Panel revealed that Kline's office had not made such a request. Apparently, the Panel anticipated that Kline "intended" to rely on the existence of this non-existent request to defend his attaching of sealed documents from the record to his appellate brief in *Alpha*. Report ¶ 418.

However, Kline's testimony did not contradict the documents obtained by the Panel. Instead, Kline testified that "I can't remember" which party in *Alpha* asked to have the record forwarded. Panel ¶ 418. Thus, it is much ado about nothing, and there was no deception to have gone "unchecked." Report ¶ 419. At best, the evidence establishes that Kline cannot remember whether his office filed a specific motion six years ago. No evidence supports the conclusion that "Kline's intent was to deceive the Hearing Panel" or that he made "false statements." Report ¶ 418.

4. Mitigating Factors

Finally, the Panel failed to adequately consider the extensive evidence mitigating any violations of the KRPC. Victims and colleagues alike testified as to Kline's character and accomplishments as Attorney General. Jensen 3101:22-3103:4; Thompson 3121:5-3124:22. Notably, United States District Judge Eric Melgren testified that Kline was "very professional in the pursuit of his prosecutorial responsibilities and duties" and that he never had any indication of inappropriate or unethical behavior. Melgren 3136:10-3137:17. Despite this significant testimony, the Panel merely noted that "[s]everal friends and associates of Kline testified regarding Kline's good character." Report ¶ 424.

CONCLUSION

The years-long investigation into Kline's attempt to enforce Kansas law is probably the single largest undertaking every mounted by the Office of the DA. Throughout this process, Kline was forced to testify under oath multiple times over a space of several years regarding a complicated investigation that itself journeyed from court to court as targets and witnesses mounted a prolonged effort to avoid providing evidence. Over that span, no human being could possibly testify precisely the same each and every time on the same matter. That is especially true where the Panel ventures beyond the KRPC to hold Kline responsible for statements and actions of subordinates of which he was unaware, and only "should have" known.

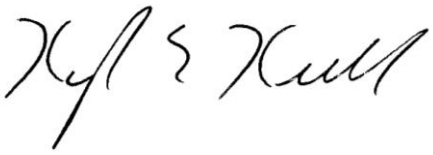
At least as disturbing are the Panel's findings relating to the grand jury, *supra*, at 63-69, where the provably false testimony of a lone grand juror contradicted—but was given more credibility than—the official grand jury record and transcripts. The official record so completely contradicts the Panel's findings with respect to the grand jury issue that it fairly calls into question the panel's neutrality and the legitimacy of every other finding that it made.

In short, the DA's investigation eventually became *about* the DA's investigation, not about the underlying handling of records and prosecutorial decisions that initially led some, including Kline's political opponents, to begin working with the DA's investigators. Most of those claims have finally fallen under the weight of successive judicial opinions and findings that vindicated Kline's conduct as a prosecutor, including the DeFries Report commissioned by the DA, Judge King's findings of fact, Judge

Anderson's decisions and testimony, and Judge Owens' opinion. All of these judges and investigators had a duty to report suspected ethical violations. Not a single one did.

Ultimately, there is no evidence that Kline did anything other than to enforce the law to the best of his ability, without making knowing misrepresentations and without "selfish" motive. To have found otherwise, the Panel was required to make new law in a variety of areas, setting precedents that could not possibly be enforced against other prosecutors and lawyers. This Court should reject the Panel's findings that Kline violated the Kansas Rules of Professional Conduct, and should reject its recommendation of discipline.

Respectfully submitted this 15th day of May, 2012.



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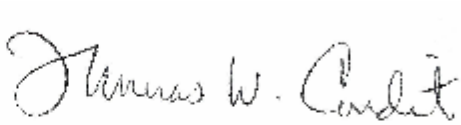

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of May 2012 a copy of this motion was served by personal delivery upon:

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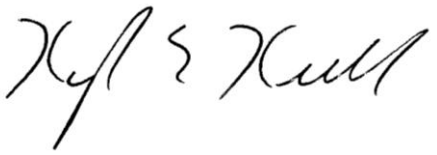

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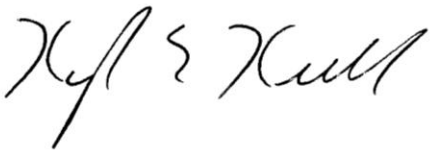

APPENDIX

Selected Rules from the Kansas Rules of Professional Conduct with Comments

Rules Adopted by the Supreme Court
Rules Relating to Discipline of Attorneys

Rule 226
Kansas Rules of Professional Conduct

1.0 Terminology

(a) "Belief" or "Believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

. . . .

(g) "Knowingly," "Known," or "Knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

. . . .

(i) "Reasonable" or "Reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.
(j) "Reasonable belief" or "Reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.
(k) "Reasonably should know" when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

3.3 Advocate: Candor Toward the Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct

related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Comment

[1] This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See Rule 1.0(n) for the definition of "tribunal." It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.

[2] This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.

Representations by a Lawyer

[3] An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(d), see the Comment to that Rule. See also the Comment to Rule 8.4(b).

Legal Argument

[4] Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(3), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction which has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

Offering Evidence

[5] Paragraph (a)(3) requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes. This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.

[6] If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness' testimony will be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false.

[7] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. In some jurisdictions, however, courts have required counsel to present the accused as a witness or to give a narrative statement if the accused so desires, even if counsel knows that the testimony or statement will be false. The obligation of the advocate under the Rules of Professional Conduct is subordinate to such requirements. See also Comment [9].

[8] The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See Rule 1.0(e). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

[9] Although paragraph (a)(3) only prohibits a lawyer from offering evidence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes is false. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. Because of the special protections historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that

the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify. See also Comment [7].

Remedial Measures

[10] Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client, or another witness called by the lawyer, offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. In such situations, the advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6. It is for the tribunal then to determine what should be done--making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing.

[11] The disclosure of a client's false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus, the client could in effect coerce the lawyer into being a party to fraud on the court.

Preserving Integrity of Adjudicative Process

[12] Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.

Duration of Obligation

[13] A practical time limit on the obligation to rectify false evidence or false statements of law and fact has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation. A proceeding has concluded within the meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed.

Ex Parte Proceedings

[14] Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in an ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

Withdrawal

[15] Normally, a lawyer's compliance with the duty of candor imposed by this Rule does not require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer's disclosure. The lawyer may, however, be required by Rule 1.16(a) to seek permission of the tribunal to withdraw if the lawyer's compliance with this Rule's duty of candor results in such an extreme deterioration of the client-lawyer relationship that the lawyer can no longer competently represent the client. Also see Rule 1.16(b) for the circumstances in which a lawyer will be permitted to seek a tribunal's permission to withdraw. In connection with a request for permission to withdraw that is premised on a client's misconduct, a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this Rule or as otherwise permitted by Rule 1.6.

[History: Am. effective July 1, 2007.]

3.6 Advocate: Trial Publicity

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) Notwithstanding paragraph (a) a lawyer may state:

(1) the claim or defense involved and, except when prohibited by law, the identity of the persons involved;

(2) information contained in a public record;

(3) that an investigation of the matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case, in addition to subparagraphs (1) through (6):

(i) the identity, residence, occupation and family status of the accused;
(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;
(iii) the fact, time and place of arrest; and
(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

Comment

[1] It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

[2] Special rules of confidentiality may validly govern proceedings in juvenile, domestic relations and mental disability proceedings, and perhaps other types of litigation. Rule 3.4(c) requires compliance with such Rules.

[3] The Rule sets forth a basic general prohibition against a lawyer's making statements that the lawyer knows or should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding. Recognizing that the public value of informed commentary is great and the likelihood of prejudice to a proceeding by the commentary of a lawyer who is not involved in the proceeding is small, the rule applies only to lawyers who are, or who have been, involved in the investigation or litigation of a case, and their associates.

[4] Paragraph (b) identifies specific matters about which a lawyer's statements would not ordinarily be considered to present a substantial likelihood of material prejudice and should not in any event be considered prohibited by the general prohibition of paragraph (a). Paragraph (b) is not intended to be an exhaustive listing of the subjects upon which a lawyer may make a statement, but statements on other matters may be subject to paragraph (a).

[5] There are, on the other hand, certain subjects that are more likely than not to have a material prejudicial effect on a proceeding, particularly when they refer to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration. These subjects relate to:
(1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;
(2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;
(3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;
(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;
(5) information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial; or
(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

[6] Another relevant factor in determining prejudice is the nature of the proceeding involved. Criminal jury trials will be most sensitive to extrajudicial speech. Civil trials may be less sensitive. Nonjury hearings and arbitration proceedings may be even less

affected. The Rule will still place limitations on prejudicial comments in these cases, but the likelihood of prejudice may be different depending on the type of proceeding.

[7] Finally, extrajudicial statements that might otherwise raise a question under this Rule may be permissible when they are made in response to statements made publicly by another party, another party's lawyer, or third persons, where a reasonable lawyer would believe a public response is required in order to avoid prejudice to the lawyer's client. When prejudicial statements have been publicly made by others, responsive statements may have the salutary effect of lessening any resulting adverse impact on the adjudicative proceeding. Such responsive statements should be limited to contain only such information as is necessary to mitigate undue prejudice created by the statements made by others.

[8] See Rule 3.8(f) for additional duties of prosecutors in connection with extrajudicial statements about criminal proceedings.

[History: Am. effective July 1, 2007.]

3.8 Advocate: Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; and

(e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:

(1) the information sought is not protected from disclosure by any applicable privilege;

(2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and

(3) there is no other feasible alternative to obtain the information;

(f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

Comment

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. Precisely how far the prosecutor is required to go in this direction is a matter of debate and varies in different jurisdictions. Many jurisdictions have adopted the ABA Standards of Criminal Justice Relating to Prosecution Function, which in turn are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.

[2] In some jurisdictions, a defendant may waive a preliminary hearing and thereby lose a valuable opportunity to challenge probable cause. Accordingly, prosecutors should not seek to obtain waivers of preliminary hearings or other important pretrial rights from unrepresented accused persons. Paragraph (c) does not apply, however, to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of an uncharged suspect who has knowingly waived the rights to counsel and silence.

[3] The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

[4] Paragraph (e) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relationship.

[5] Paragraph (f) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused.

Nothing in this Comment is intended to restrict the statements which a prosecutor may make which comply with Rule 3.6(b) or 3.6(c).

[6] Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer's office. Paragraph (f) reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. In addition, paragraph (f) requires a prosecutor to exercise reasonable care to prevent persons assisting or associated with the prosecutor from making improper extrajudicial statements, even when such persons are not under the direct supervision of the prosecutor. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law-enforcement personnel and other relevant individuals.

[History: Am. (e) and (f) effective July 1, 2007.]

4.1 Transactions with Persons other than Clients: Truthfulness in Statements to Others

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by or made discretionary under Rule 1.6.

Comment

Misrepresentation

[1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing person of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by failure to act.

Statements of Fact

[2] This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud.

Fraud by Client

[3] Paragraph (b) recognizes that substantive law may require a lawyer to disclose certain information to avoid being deemed to have assisted the client's crime or fraud. The requirement of disclosure created by this paragraph is, however, subject to the obligations created by Rule 1.6.

4.4 Transactions with Persons other than Clients: Respect for Rights of Third Persons

(a) 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, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.

Comment

[1] Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalog all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusion into privileged relationships, such as the client-lawyer relationship.

[2] Paragraph (b) recognizes that lawyers sometimes receive documents that were mistakenly sent or produced by opposing parties or their lawyers. If a lawyer knows or reasonably should know that such a document was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the original document, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person. For purposes of this Rule, "document" includes e-mail or other electronic modes of transmission subject to being read or put into readable form.

[3] Some lawyers may choose to return a document unread, for example, when the lawyer learns before receiving the document that it was inadvertently sent to the wrong address. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.

[History: Am. (b) effective July 1, 2007.]

5.1 Law Firms and Associations: Responsibilities of Partners, Managers and Supervisory Lawyers

(a) A partner in a law firm and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the rules of professional conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the rules of professional conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the rules of professional conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Comment

[1] Paragraph (a) applies to lawyers who have managerial authority over the professional work of a firm. See Rule 1.0(d). This includes members of a partnership, the shareholders in a law firm organized as a professional corporation, and members of other associations authorized to practice law; lawyers having comparable managerial authority in a legal services organization or a law department of an enterprise or government agency; and lawyers who have intermediate managerial responsibilities in a firm. Paragraph (b) applies to lawyers who have supervisory authority over the work of other lawyers in a firm.

[2] Paragraph (a) requires lawyers with managerial authority within a firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm will conform to the Rules of Professional Conduct. Such policies and procedures include those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced lawyers are properly supervised.

[3] Other measures that may be required to fulfill the responsibility prescribed in paragraph (a) can depend on the firm's structure and the nature of its practice. In a small firm of experienced lawyers, informal supervision and periodic review of compliance

with the required systems ordinarily will suffice. In a large firm, or in practice situations in which difficult ethical problems frequently arise, more elaborate measures may be necessary. Some firms, for example, have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior partner or special committee. See Rule 5.2. Firms, whether large or small, may also rely on continuing legal education in professional ethics. In any event, the ethical atmosphere of a firm can influence the conduct of all its members and the partners may not assume that all lawyers associated with the firm will inevitably conform to the Rules.

[4] Paragraph (c) expresses a general principle of personal responsibility for acts of another. See also Rule 8.4(a).

[5] Paragraph (c)(2) defines the duty of a partner or other lawyer having comparable managerial authority in a law firm, as well as a lawyer who has direct supervisory authority over performance of specific legal work by another lawyer. Whether a lawyer has such supervisory authority in particular circumstances is a question of fact. Partners and lawyers with comparable authority have at least indirect responsibility for all work being done by the firm, while a partner or manager in charge of a particular matter ordinarily also has supervisory responsibility for the work of other firm lawyers engaged in the matter. Appropriate remedial action by a partner or managing lawyer would depend on the immediacy of involvement and the seriousness of the misconduct. A supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension.

[6] Professional misconduct by a lawyer under supervision could reveal a violation of paragraph (b) on the part of the supervisory lawyer even though it does not entail a violation of paragraph (c) because there was no direction, ratification or knowledge of the violation.

[7] Apart from this Rule and Rule 8.4(a), a lawyer does not have disciplinary liability for the conduct of a partner, associate or subordinate. Whether a lawyer may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these Rules.

[8] The duties imposed by this Rule on managing and supervising lawyers do not alter the personal duty of each lawyer in a firm to abide by the Rules of Professional Conduct. See Rule 5.2(a).

[History: Am. effective July 1, 2007.]

5.3 Law Firms and Associations: Responsibilities Regarding Nonlawyer Assistants

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the rules of professional conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Comment

[1] Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer should give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

[2] Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that nonlawyers in the firm will act in a way compatible with the Rules of Professional Conduct. See Comment [1] to Rule 5.1. Paragraph (b) applies to lawyers who have supervisory authority over the work of a nonlawyer. Paragraph (c) specifies the circumstances in which a lawyer is responsible for conduct of a nonlawyer that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.

[History: Am. effective July 1, 2007.]

8.4 Maintaining the Integrity of the Profession: Misconduct

It is professional misconduct for a lawyer to:

(a) Violate or attempt to violate the rules of professional conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official;

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or

(g) engage in any other conduct that adversely reflects on the lawyer's fitness to practice law.

Comment

[1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

[2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offense carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, or breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

[3] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

[4] Lawyers holding public office assume legal responsibilities going beyond those of

other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of attorney. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.