

**IN THE SUPREME COURT OF KANSAS BEFORE  
THE KANSAS BOARD FOR DISCIPLINE OF ATTORNEYS**

**IN THE MATTER OF**

**Case Nos: DA10,088  
DA10,598**

**PHILL KLINE, RESPONDENT**

**MOTION TO DISQUALIFY**

COMES NOW, Respondent Phillip D. Kline, by and through Reid F. Holbrook and Mark W. Stafford of Holbrook & Osborn, P.A., and pursuant to Kansas Supreme Court Rule 60B, Kansas Code of Judicial Conduct, Rule 2.11, moves the Hearing Panel to order disqualification of Hearing Panel members who made monetary contributions to persons who opposed Respondent in a public election. In support of his motion, Respondent states as follows:

1. Attached hereto and marked as Exhibit A is an Associated Press article appearing online at the web site of Topeka Capital Journal. This article and the fact of the political activities became known to counsel on February 10, 2011.

2. The financial support of a candidate who was running for office against Respondent in a public election is a material fact that should have been disclosed by the panel members in the early stages of the proceeding. This information is a material fact that a party or the party's attorney might reasonably consider grounds for a motion for disqualification.

3. Counsel for Respondent requested the Members of the Hearing Panel to disclose grounds for disqualification. Attached hereto and marked as Exhibit B is the affidavit of Edward D. Greim, former counsel of record in this matter.

4. The record in this case does not establish that after current counsel appeared the issue of disclosures was acted upon by the Hearing Panel.

5. The Hearing Panel must, in the interest of fundamental fairness, determine whether one or more members must be disqualified from hearing this case.

### **Argument and Authority**

This proceeding was initiated by the Kansas Disciplinary Administrator before the Supreme Court of Kansas, to be heard before Members of a Hearing Panel. Information regarding the propriety of certain members' participation on the panel has recently come to light.

Counsel recognizes the lateness of the hour in bringing this matter to the Hearing Panel. This motion is not presented for the purpose of delay or to embarrass any individual person, but rather to ensure that Respondent is provided a fair and impartial hearing on a matter of such grave importance to himself, to the Courts, and to the legal profession itself. The Hearing Panel Chairperson stated her own concern many months ago that objections to the composition of the hearing panel needed to be resolved early in the proceeding and not just before the hearing, which is scheduled to commence February 21, 2011. (See, Tr. Of Hrg., August 17, 2010, p. 4-7, attached as Exhibit C.) This is consistent with Internal Operating Rule D.1., establishing a 10-day rule for objecting to the composition of the hearing panel. Respondent shares that concern, but asserts that his due process interests must not give way to procedural rules. Had each member who was aware of grounds for a potential motion to disqualify made a record of the facts as requested by Respondent's counsel, the issue might have been resolved in a more timely manner.

Supreme Court Rule 204(d) requires that members of the Board for Discipline of Attorneys refrain from participating in a proceeding in which a judge similarly situated would be required to abstain. Additionally, they are subject to the Kansas Code of Judicial Conduct, K. Ct. Rule 601B. While the rule generally prohibiting political activities, Rule 4.1(B)(3), does not apply because the members are part-time, occasional judges as described in the Application section of Rule 601B, the members continue to be subject to Rule 1.2 (promoting confidence in the judiciary when serving as a judge), Rule 2.2 (impartiality and fairness), Rule 2.3 (bias and prejudice), and Rule 2.4 (external influences on judicial conduct when serving as a judge). Comment 2 to Rule 2.11 states “[2] a judge’s obligation not to hear or decide matters in which disqualification is required applies regardless of whether a motion to disqualify is filed.” Additionally, Comment 5 states a “judge should disclose *on the record* information that the judge believes the parties or their lawyers *might reasonably* consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification” (emphasis added). The Rules clearly contemplate self-disclosure and do not place a burden on parties to discover what is already known to the Panel Members.

The allegations by the Disciplinary Administrator include the claim that the personal political beliefs of Respondent constitute a conflict of interest. The political involvement revealed in Exhibit A include the support of Panel Member Calvin J. Karlin for Mr. Paul Morrison, the political opponent of Respondent. This fact alone clearly gives rise to a the perception of bias for the following reasons:

- a. Mr. Morrison’s campaign against Respondent was largely based on a theme that Respondent’s investigation of abortion clinics was a witch hunt, a waste of taxpayer dollars, and a misplaced priority.

b. The allegations by the Disciplinary Administrator arise partially from complaints by Mr. Morrison's staff at the Office of Attorney General and counsel for the criminal defendants.

c. The issues debated in the public election in which Respondent and Mr. Morrison sought the Office of Attorney General, the allegations of misconduct by Mr. Morrison in his criticisms of Respondent, and the allegations in the Formal Complaint describe the same factual events.

d. Mr. Karlin directly provided political support for Mr. Morrison's allegations against Respondent, including his criticism of Respondent's alleged personal political interest in prosecuting the abortion clinics, through his contributions to Mr. Morrison.

Judge Anderson further stated that during the timeframe at issue in this proceeding, Mr. Morrison "directed criticism toward Kline but appeared to show very little curiosity about substantive issues involved in the investigation" of the abortion clinics. (See, Additional Response to Petition for Mandamus by Respondent Richard Anderson, District Judge (October 17, 2007), *State of Kansas ex. Rel. Paul J. Morrison, Attorney General Petitioner v. Honorable Richard D. Anderson, Respondent* (attached as Exhibit D).

It is fair to conclude that financial support to Mr. Morrison might be motivated in whole or in part by a sharing of Mr. Morrison's criticisms of Respondent, whether as active opposition to Respondent personally, or at least to the enforcement efforts or political or social positions of Respondent. A reasonable person could conclude that Mr. Karlin has already endorsed the factual basis of the Disciplinary Administrator's KRPC 1.7 claim—that Respondent allowed his

political beliefs against abortion to influence his decisions in the investigation of the clinics—by parting with his own money to support a candidate who made this precise claim the centerpiece of his political campaign. While it could be argued that a panelist in this position would make an effort to cast aside previously-formed conclusions on the issues in the case, it would seem that the first step in this process would be an open acknowledgment and disclosure of the appearance of a conflict. The lack of any such disclosure is troubling. But perhaps the lack of disclosure also suggests the degree to which, for some, partiality or bias so easily and imperceptibly arise from the fundamental social/political interests that are intrinsic to this matter.

In conclusion, the political activities described in the attached, and the facts at issue in this hearing, should have led a member to believe the fact of those activities would reasonably and objectively be considered relevant to a possible motion for disqualification, even if that member subjectively believed no basis for disqualification existed. Such member had an obligation either to recuse, or at a minimum, to place the information on the record to allow resolution of any objection to that member's participation, at a meaningful time so that Respondent had a fair opportunity to consider whether objection was necessary.

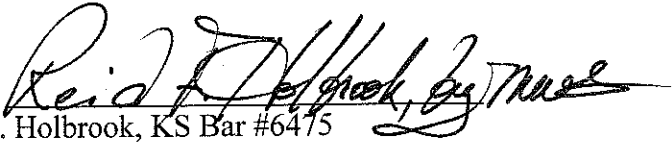
WHEREFORE, Respondent respectfully requests that Panel Member Calvin J. Karlin be recused from the panel and that a hearing be held without delay for the purpose of allowing other panel members to disclose political affiliations or activities which should form the basis for self-disclosure under the rules.

Further, Respondent respectfully requests that Chair Person Butaud recuse from the case in light of the order denying Respondent's Counsel's request for a scheduled self disclosure, and in light of not completing proceedings on that in the Second Prehearing Order.

Respectfully submitted,

HOLBROOK & OSBORN, P.A.

BY:

  
Reid F. Holbrook, KS Bar #6475

Mark Stafford, KS #13233

7400 West 110<sup>th</sup> Street, Suite 600

Overland Park, KS 66210

Telephone: (913) 342-2500

Facsimile: (913) 342-0603

ATTORNEYS FOR RESPONDENT

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the above and foregoing has been mailed this 11<sup>th</sup> day of February, 2011, to:

Ms. JoAnn Butaud  
7225 Renner Road, Suite 200  
Shawnee, KS 66217

Mr. Jeffrey A. Chubb  
P O box 747  
Independence, KS 67301

Mr. Calvin J. Karlin  
P O box 667  
Lawrence, KS 66044

Ms. Sara S. Beezley  
P O Box 352  
Girard, KS 66743

And a copy was hand-delivered to the offices of:

Stanton A. Hazlett  
Alexander M. Walczak  
Office of the Disciplinary Administrator  
701 S.W. Jackson, First floor  
Topeka, KS 66603

Gayle B. Larkin  
Research Attorney  
Kansas Board for Discipline of Attorneys  
701 Southwest Jackson, 1<sup>st</sup> Floor  
Topeka, KS 66603

By: 

THE TOPEKA CAPITAL JOURNAL  
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## Pair donated to Kline rivals

By [The Associated Press](#)

Created Jan 20 2010 - 2:24pm

Records show two on ethics panel contributed a combined \$150 to campaigns opposing Phill Kline

Two of the three attorneys reviewing an ethics complaint against former Kansas Attorney General Phill Kline made a total of \$150 in campaign contributions to candidates who ran against him, campaign finance records show.

One of the attorneys also donated \$400 to former Gov. Kathleen Sebelius, an abortion rights Democrat who appointed four of the Kansas Supreme Court's seven current justices. The court has the final word on whether Kline will be sanctioned over allegations of misconduct while investigating abortion providers.

The three lawyers comprise a hearing panel for the Kansas Board for Discipline of Attorneys and will make recommendations to the Supreme Court. They are JoAnn Butaud, of Lenexa; Jeffrey Chubb, of Independence; and Calvin Karlin, of Lawrence.

Campaign finance records show Karlin contributed to Sebelius in 2002 and 2003, then donated a total of \$100 in 2005 and 2006 to Paul Morrison, a Democrat who defeated Kline when Kline sought re-election as attorney general.

Records show Chubb donated \$50 to then-state Sen. David Adkins, one of Kline's Republican primary opponents in his successful 2002 race for attorney general.

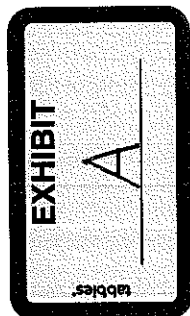
"The whole thing from the start is very political," Mary Kay Culp, executive director of the anti-abortion group Kansans for Life, said Wednesday.

Culp said the attorneys' contributions show Kline won't get a fair hearing. The Supreme Court criticized Kline in previous rulings dealing with his abortion investigations.

Kline's legal team declined to discuss its strategy Wednesday. Brian Burgess, a Washington, D.C.-based public relations executive who's often acted as Kline's spokesman, said the disciplinary board is "hopelessly compromised."

"All of them have an ideological agenda, and it's reflected in who they support politically," Burgess said, emphasizing that he was speaking for himself.

But Peter Brownlie, chief executive officer of Planned Parenthood of Kansas and Mid-Missouri, said Kline's allies are trying to divert attention from his unethical behavior.





"It's simply demeaning to those who agree to hear the evidence," Brownlie said.

Ron Keefover, a spokesman for the disciplinary board that appointed the three attorneys, said politics is playing no role. Butaud, Chubb and Karlin referred questions to him.

"I've been watching attorney discipline cases for 30 years, and I've never seen politics enter into any of the hearings, complaints being filed or recommendations to the Supreme Court," Keefover said.

The complaint against Kline accuses him of making false statements and allowing subordinates to mislead the Supreme Court and other officials while investigating the late Dr. George Tiller, of Wichita, and Planned Parenthood's Overland Park clinic.

An anti-abortion Republican, Kline served a single term as attorney general in 2003-07, then served as Johnson County district attorney in 2007-09. He is now a visiting assistant professor of law at Liberty University in Lynchburg, Va.

Tiller was acquitted of criminal charges filed by the attorney general's office after Kline left. A criminal case filed by Kline as Johnson County district attorney against the Planned Parenthood clinic is still pending.

The complaint against Kline was filed by disciplinary board officials and made public Tuesday. The three attorneys are scheduled to have a hearing May 26-28.

Allegations: Kline lied, misled

**Source URL:** [http://cjonline.com/news/local/2010-01-20/pair\\_donated\\_to\\_kline\\_rivals](http://cjonline.com/news/local/2010-01-20/pair_donated_to_kline_rivals)

**AFFIDAVIT OF EDWARD D. GREIM**

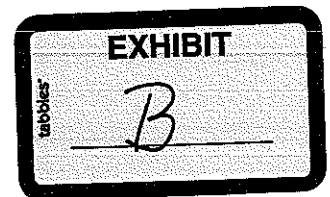
EDWARD D. GREIM, of lawful age, being duly sworn, deposes and states as follows:

1. I was an attorney of record for Respondent in the disciplinary proceeding styled as *In the Matter of Kline*, Case Nos. DA 10,088 and DA 10,598, from April 8, 2010, to approximately August 31, 2010.

2. On July 1, 2010, the three-member Hearing Panel assigned for this case issued a detailed scheduling order with various dates and deadlines. Among these was a pre-hearing conference for Tuesday, August 17, 2010, to take place at the Hearing Room of the Kansas Board for Discipline of Attorneys. The purpose of the first pre-hearing conference was to hear and resolve all discovery-related motions and other matters raised by the parties at that time.

3. At approximately noon on Monday, August 16, 2010, the Presiding Officer, Jo Ann Butaud, emailed and faxed Respondent a 3-page letter listing the topics to be covered at the hearing.

4. The letter informed Respondent for the first time that the Hearing Panel would not hear argument the next morning on certain discovery and other procedure-related motions for which I had been preparing, and that the Panel had either already reached decisions without the aid of oral argument by Respondent or had decided that hearing on the motions would be postponed until the second prehearing conference, at that time scheduled for September 28, 2010. The letter concluded that "only the first motion to compel and the second motion to compel" would be argued at the hearing the next day.



5. However, at the hearing, the Panel allowed argument on Respondent's third motion to compel and *sua sponte* raised additional topics that it had not placed on the agenda.

6. The Presiding Officer first asked the undersigned to state whether Respondent raised any objection to the subject matter jurisdiction of the Hearing Panel. The Presiding Officer also asked the undersigned to state whether Respondent objected to the composition of the Panel sitting before me.

7. I was surprised by both questions and by the Panel's apparent attempt to elicit Respondent's positions immediately. Neither topic was set forth in the Panel's Scheduling Order or in the Panel's letter of the previous day. Further, those types of objections—jurisdiction and composition of the Panel—were not required to be raised at the first prehearing conference. Nonetheless, particularly because the Panel had posed these questions before addressing or making known its rulings on certain other pending motions, I felt some pressure to immediately respond.

8. On the Panel's first inquiry, I decided that I was prepared to respond because Respondent was a member of the Kansas Bar and the Formal Complaint referenced disciplinary rules. In my view, these were adequate to at least invoke the jurisdiction of the Hearing Panel, notwithstanding what appeared to be failures in the pleading or legal theories of the Disciplinary Administrator.

9. In response to the second inquiry, however, I had not come prepared to present a challenge to the qualifications or even-handedness of any member of the Panel. Instead, I suggested that the three members of the Hearing Panel make disclosures of any legal or political involvement which could be relevant to a challenge by Respondent. My

belief was that the individual panel members would be in a better position to know of conflicts or potential bias than Respondent, and should therefore self-disclose. The Panel did not deliberate, and the Presiding Officer denied my request for self-disclosures on the spot.

10. The Panel then ruled that the issue would be addressed at the second pre-hearing conference on September 28, 2010, with Respondent's objections to the composition of the Panel to be made by September 7, 2010 without the benefit of self-disclosure by Panel members. However, my firm withdrew from representation of Respondent on or about August 31, 2010, and pursuant to an order issued by the Panel on August 31, 2010, all case deadlines were continued and the September 28, 2010 prehearing conference was not held. Between the time of the first prehearing conference and our withdrawal, the Panel made no effort to self-disclose conflicts.


FURTHER AFFIANT SAYETH NAUGHT.



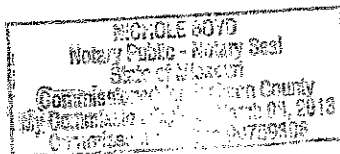
Edward D. Greim

STATE OF MISSOURI     )  
  ) ss.  
COUNTY OF JACKSON    )

The foregoing was subscribed and sworn to before me on this 11<sup>th</sup> day of February, 2011.

  
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Notary Public

My commission expires:  
3/8/2013



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IN THE SUPREME COURT OF KANSAS  
BEFORE  
THE KANSAS BOARD FOR DISCIPLINE OF ATTORNEYS

IN THE MATTER OF )  
 ) Nos., DA10,088  
 ) and DA10,598  
 PHILIP D. KLINE, )  
 ----- Respondent. )

T R A N S C R I P T

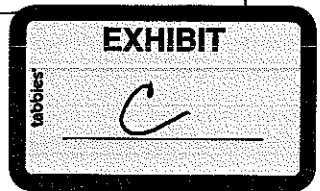
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Proceedings held in the Office of  
the Disciplinary Administrator Courtroom in the  
City of Topeka, County of Shawnee, State of  
Kansas, on the 17th day of August, 2010,  
beginning at 9:30 a.m. before a Panel appointed  
by the Chairman of the Kansas Board for  
Discipline of Attorneys consisting of, Ms. Jo  
Ann Butaud, Chairman; Jeffrey Chubb, member; and  
Calvin Karlin, member.

A P P E A R A N C E S

The Respondent appeared in person and by  
his counsel, Graves, Bartie, Marcus, & Garrett,  
LLC, 1100 Main Street, Suite 2700, Kansas City  
Missouri 64105, by Mr. Edward D. Greim and Mr.  
Ryan A. Kriegshauser.

The Complainant appeared by Mr. Stanton  
A. Hazlett, Disciplinary Administrator, and Mr.  
Alexander M. Walczak, Deputy Disciplinary  
Administrator, Office of Disciplinary  
Administrator, 701 Southwest Jackson, 1st Floor,  
Topeka, Kansas, 66603-3729.



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I N D E X

Certificate ----- 50

W I T N E S S E S

WITNESSES ON BEHALF OF THE COMPLAINANT: PAGE

WITNESSES ON BEHALF OF RESPONDENT:

E X H I B I T S

COMPLAINANT'S: OFFERED RECEIVED

1 29 41

RESPONDENT'S:

1                   CHAIRPERSON BUTAUD: All right.  
2                   We'll be on the record today In the Matter of  
3                   Philip D. Kline, DA10,088 and DA10,598. The  
4                   hearing today is a prehearing conference and the  
5                   purpose of it is to handle motions that are  
6                   stemming from discovery and a couple of other  
7                   preliminary matters that we're going to discuss.

8                   I am Jo Ann Butaud, I'm from Shawnee,  
9                   Kansas, and I'm the Chair of this hearing, and  
10                  apparently the Chair for the rest of the  
11                  hearings. On my left is Jeffrey Chubb from  
12                  Independence, Kansas, and he is the attorney at  
13                  large. On my right is Calvin Karlin, he's a  
14                  Board member from Lawrence, Kansas. I would ask  
15                  that you state your appearances, please.

16                  MR. HAZLETT: Disciplinary  
17                  Administrator's Office appears through Al  
18                  Walczak and Stan Hazlett.

19                  MR. GREIM: Respondent Kline appears  
20                  through Edward Greim and Ryan Kriegshauser of  
21                  Graves, Bartie, Marcus and Garrett in Kansas  
22                  City.

23                  CHAIRPERSON BUTAUD: Thank you. The  
24                  Panel previously entered a prehearing scheduling  
25                  order that basically set forth deadlines for

1 filing discovery motions and responses, witness  
2 and exhibit lists and objections and responses  
3 thereto and other procedural issues. Several  
4 motions were filed after that, as well as their  
5 responses, and the Panel has entered orders  
6 regarding some of those motions and you were all  
7 given copies of those orders this morning.

8 Yesterday I e-mailed and faxed a letter to  
9 everyone explaining what motions would be argued  
10 today. Today there are only two motions, as I  
11 understand it, that are left for argument. Both  
12 of those motions are Respondent's motions to  
13 compel discovery. There were motions and the  
14 responses to those motions were also filed.

15 There are two other motions that are  
16 outstanding that were filed after the July 27th  
17 deadline. Those are the Disciplinary  
18 Administrator's Motion to Strike and the  
19 Disciplinary Administrator's Motion to Amend the  
20 Formal Complaint, and we'll talk about those  
21 shortly.

22 Before we have arguments from both sides  
23 on the Respondent's motions, there's a couple of  
24 matters that I would like to discuss. One of  
25 them is the issue of whether or not the



1 Respondent has any objections to jurisdiction of  
2 this case and to the composition of the Panel,  
3 because there's been some discussion of that in  
4 your motions and we normally ask that question  
5 at the time of the hearing, it seems to me that  
6 we want to know that now. So one of the things  
7 that I'm going to ask you, Mr. Greim, is whether  
8 or not you have any objections to jurisdiction  
9 or to the composition of this Panel?

10 MR. GREIM: And just to respond, on--  
11 on jurisdiction we understand that to mean  
12 basically subject matter jurisdiction. We  
13 don't-- we don't really have any objection.  
14 We-- you know, we believe this is a disciplinary  
15 matter. This is obviously a hearing Panel  
16 appointed from the Board of Discipline for  
17 Attorneys and so we don't think there are any  
18 jurisdictional problems, as I understand in that  
19 sense.

20 To move on to the composition of the  
21 Panel, I just want to make it clear, we may have  
22 issues with that. We are actually looking at--  
23 I'll just tell you some requirements for judges  
24 in Kansas that we think may argue-- may apply to  
25 the three of you. However, we're not prepared

1 to either make or drop those objections today.  
2 We actually weren't aware that that was going to  
3 be raised until just a moment ago and I'm just  
4 not prepared, unfortunately, to commit either  
5 way.

6 If you'd like to set a deadline for to us  
7 respond to that, we'll be happy to do so.

8 CHAIRPERSON BUTAUD: And you can see  
9 why I would raise that as a concern because we  
10 don't want to wait until right before the  
11 hearing and-- and have some question about  
12 whether or not we have to remove one of the  
13 Panel members. So I would suggest that you do  
14 address that and that if we have to have  
15 argument on it we have it at the next hearing,  
16 which is I think September the 28th, so that we  
17 can get that issue out of the way.

18 MR. GREIM: One thing I would  
19 suggest, and I just raise this today, not-- not  
20 having thought through it before, is that we  
21 maybe adopt a procedure of sort of similar to  
22 what you will do in federal court sometimes at  
23 the Court of Appeals where, you know, there  
24 you'll list affiliates of your client and then  
25 you'll go through with the judge, if that would

1 cause the judge to believe he has a conflict,  
2 then they can address that early on in the  
3 appellate proceedings.

4 And I wonder if in this case the Panel  
5 members wouldn't consider listing or identifying  
6 the types of issues or conduct that if you were  
7 a judge and you were sitting in a courtroom  
8 would disqualify a member from serving. I just  
9 throw that out there.

10 CHAIRPERSON BUTAUD: Actually I think  
11 I would prefer that you put something in writing  
12 as to why you might have an objection to one of  
13 the Panel members, or all of the Panel members,  
14 and give the Disciplinary Administrator an  
15 opportunity to respond to that.

16 MR. GREIM: Okay.

17 CHAIRPERSON BUTAUD: What's our next  
18 deadline for motions, besides the hearing,  
19 before that, what-- what --

20 MR. CHUBB: September 7.

21 CHAIRPERSON BUTAUD: Okay. Can you  
22 do that by September 7?

23 MR. GREIM: If we could, if we could  
24 have until-- yeah, I think we can do it by  
25 September 7th.

IN THE SUPREME COURT OF KANSAS

FILED

2007 OCT 19 A 11:20

STATE OF KANSAS, EX REL.,  
PAUL J. MORRISON, ATTORNEY  
GENERAL OF THE STATE OF KANSAS,

PETITIONER

vs.

THE HONORABLE RICHARD D. ANDERSON,  
JUDGE OF THE THIRD JUDICIAL DISTRICT,  
SHAWNEE COUNTY, KANSAS,

RESPONDENT.

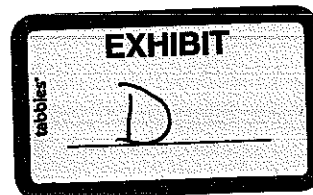
CAROL G. GREEN  
CLERK APPELLATE COURTS

Original Action  
No. 07-99050-S

UNDER SEAL

**ADDITIONAL RESPONSE TO PETITION FOR MANDAMUS  
BY RESPONDENT RICHARD ANDERSON, DISTRICT JUDGE**

Petitioner Attorney General Paul J. Morrison has presented inconsistent positions regarding how to manage the sets of original redacted medical records which were filed with the District Court by Comprehensive Health of Planned Parenthood of Kansas and Mid-Missouri, Inc. (CHPP) and Women's Health Care Services, P.A. (WHCS) as part of a criminal investigation began by former Attorney General Phill Kline. Morrison originally asked the District Court to return the evidence to one of the clinics who he has charged with crimes in Sedgwick County District Court and to another target of an active criminal investigation in Johnson County, Kansas. Morrison now suggests other alternatives for preservation of the evidence. Unfortunately, he has never presented these alternatives to the District Court. Instead, he seeks a Writ of Mandamus from the Kansas Supreme Court.



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The Shawnee County District Court has retained the "as filed redacted medical records" believing that the Court has a duty to protect the integrity of the evidence, which it believes will be at issue in legal proceedings. The Court believes that returning evidence to CHPP and WHCS at this point in time would unacceptably increase the risk that the evidence could be lost, destroyed or compromised while active investigations and prosecutions are on-going. It is difficult to understand how this would benefit the citizens of the State of Kansas.

**1. The Privacy of Patients Has Been Protected**

It is important to recognize that before any medical records were delivered to then Attorney General Kline on October 24, 2006, the Court, with the help of Special Counsel and two experienced physicians independently appointed by the Court, determined that no patient could be identified from the review of any medical file. The Court resubmits its Response to Petition for Mandamus in Original Action No. 06-97554-S. (Respondent Exhibit 1). The resubmission of these materials is offered to controvert erroneous assertions made by Attorney General Morrison in his letter of June 25, 2007 and again in a legal pleading that the Court has "original unredacted medical records" and to dispute Morrison's suggestion that the privacy of patients has been compromised. (See Petitioner Appendix, pp. 18 and 20 for assertions about "original unredacted medical records")

**2. November 2006 - January 8, 2007: Kline's Lame Duck Period**

After the election, Attorney General Kline (and his agents) placed the Shawnee County District Court on notice that he would continue the investigation until his term in office was completed. Kline planned to subpoena additional witnesses and documents, engage expert

witnesses, and seek assistance of prosecutors in Sedgwick, Johnson and Shawnee Counties. Kline told the Court he planned to provide copies of the redacted medical records to expert witnesses and various prosecutors, in which additional investigations and/or prosecutions may be conducted.

The District Court informed Kline that since the records had been de-identified (by redacting individually identifiable health information) as required, the redacted records could be used by him in investigations and prosecutions. The Court informed Kline he could engage appropriate assistance as necessary in his law enforcement efforts. Before Kline left office, he was directed (through Steve Maxwell) to provide a report to the Court concerning the distribution of the medical records.

**3. January 8, 2007: Status and Disposition Report**

On January 8, 2007, Kline agents delivered a Status and Disposition Report to the Court (Petitioner Appendix, pp. 3-5). In addition, five large file boxes of records were deposited with the Court. The Court notified Attorney General Morrison on January 9, 2007 that the materials could be retrieved (Petitioner Appendix, pp. 1-2)

**4. January 10, 2007: Meeting with Veronica Dersch and Richard Guinn**

On January 10, 2007, Morrison's agents picked up the boxes of records which had been delivered to the Court by Kline. The Court provided Morrison's agents with some background information on the investigation, offered to answer questions and offered to provide the response made by the Court under seal to the Kansas Supreme Court in Original Action No. 06-97554-S. At this first meeting, Morrison's agents directed criticism toward Kline but appeared to show

very little curiosity about substantive issues involved in the investigation. The Court did indeed tell Morrison's agents that the political chaos which existed between Morrison and Kline belonged to the executive branch and that it would not become involved in the political dispute between the current and former Attorney General. Frankly, the Court believed two seasoned prosecutors ought to be able to interact civilly and professionally, regardless of any political differences they may have.

5. **April 9, 2007: Meeting with Phill Kline**

Johnson County District Attorney Kline met with the Court on April 9, 2007. Kline discussed his investigation in Johnson County and a possible legislative subpoena. Regarding his investigation, Kline pointed out that CHPP had over-redacted entries on the medical records such as dates and times of visits to the clinic, dates and times of medical procedures, dates and times of required legal notifications, patient identification numbers matching the KDHE forms and notary public stamps, seals and signatures required by law. Kline referred the Court to one file as an example of whether the clinic failed to enforce the legally required 24-hour waiting period prior to performing an abortion. Kline conceded some of the redacted information could prove to be exculpatory while in other instances it appeared redacted information may prove violations of KSA 65-6703 and/or KSA 65-6709.

Kline also showed the Court a record from Dr. Tiller's clinic. The Court interrupted Kline and asked where he had obtained the Tiller record. Kline explained that he had referred the WHCS files to the Johnson County District Attorney shortly before he left office as Attorney General. After some discussion about the Court's directions to Steve Maxwell, Kline finished his presentation which focused on an alleged connection between CHPP and WHCS involving

three patient files. At this meeting, Kline also notified the Court that he had been contacted by the Kansas House Federal and State Affairs Committee about a possible subpoena for WHCS medical records. Kline said he wanted to make sure that any production of records pursuant to a legislative subpoena would be done in compliance with the Court's protective order.

When Kline finished with his comments, the Court told him that while he clearly could articulate the relevance and merit of his requests concerning CHPP and WHCS, the Court would not be inclined to provide relief for several reasons, including the fact that Morrison was now in command of the investigation. The Court told Kline that any petition for relief would have to be made in writing. As to the possible legislative subpoena, the Court told Kline no authorization for release of any records would be given and he could be subject to contempt proceedings if the records were produced.

6. **April 10, 2007: Communications with Steve Maxwell, Veronica Dersch and Phill Kline**

On April 10, 2007, the Court contacted Steve Maxwell about the WHCS records being in the possession of the Johnson County District Attorney's Office. No disclosure had been made in the Status and Disposition Report regarding the WHCS records being sent to Johnson County. Moreover, the Court recalled no discussion or request about WHCS records being used in Johnson County. The Court informed Maxwell that the copies of WHCS records were to be returned to the Court. The Court then notified Veronica Dersch of contacts with Kline and Maxwell (Petitioner Appendix, pp. 27-41). Although Maxwell notified the Court that WHCS records would be delivered as ordered without the need for further written order, Kline later objected to the Court's order, challenging the Court's authority to order a prosecutor to disgorge



evidence of crimes and expressing a concern that Morrison may cover up the evidence. The Court ordered Kline to appear the next day and informed him that, if necessary, the order would be put in writing and the Court would have it served on him. The Court advised Kline he would be given an opportunity to make his record of objections.

**7. April 11, 2007: Hearing on Return of WHCS Records**

The purpose of this hearing was to retrieve the WHCS medical records from District Attorney Kline. The Court addressed other matters and allowed both Kline and Morrison's agents opportunity to express their positions on several points. At the close of the hearing, Kline returned the WHCS records. (Petitioner Appendix, pp. 27-129)

**8. May, 2007: The Suspected False Writings**

In late May, 2007, Kline showed the Court CHPP records which he believed were not authentic. These records had been submitted in response to subpoena. (Respondent Exhibit 2, Phill Kline Affidavit, September 20, 2007) The Court asked Kline whether he had notified Morrison about this discovery. He responded he had not but promised to do so. On June 12, 2007, during the same meeting in which Morrison's agents discussed Dr. McHugh with the Court, Ms. Dersch confirmed that she was aware of the suspect record. Because the Johnson County District Attorney, who had CHPP within his territorial jurisdiction, knew about the possible false writing, and because the Attorney General, who had an open investigation, had the same information, the Court believed no further action was required. Samples of the questioned writings have been attached as Respondent Exhibit 3.

On or about June 25, 2007, Morrison closed his investigation of CHPP announcing no charges would be filed and asserting that he found no evidence of any criminal wrongdoing. On July 9, 2007, Morrison moved the Court to return the "original, unredacted patient files" to CHPP. (Petitioner Appendix, pp 19-21) The Court ruled on July 13, 2007. (Petitioner Appendix, pp. 23-25) Morrison has since filed this Petition for Mandamus and has apparently joined CHPP in its effort to disgorge Kline of CHPP medical records in another action.

After being notified of the Mandamus action, the Court spoke with Special Counsel. The Court informed Special Counsel that a question had been raised about the authenticity of KDHE reports that had been presented with the medical records for review.<sup>1</sup> In response, the Special Counsel has provided his affidavit. (Respondent Exhibit 4, Affidavit of Stephen W. Cavanaugh, 9/10/07)

9. **June 12, 2007: Dr. Paul McHugh**

During the Spring Judicial Conference, the Court was summoned to meet with Morrison agents, Veronica Dersch and Jared Maag. The Court was handed Section 1B of the Wichita Eagle Beacon, which Morrison apparently believes should have been sufficient showing for issuance of a restraining order against Dr. Paul McHugh. (Respondent Exhibit 5., Newspaper Article 6/12/07) Morrison was concerned his expert witness planned to speak at a forum.

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<sup>1</sup>It appears that the KDHE reports, which are required by law to be filed and maintained for five years, do not match copies obtained from KDHE. Someone has redacted the patient number from page "A" of the purported copy of the KDHE report, has manufactured page "B", and has placed the Bates stamp number to match the patient file. The KDHE report was submitted for the physician review of CHPP medical records.

Dr. McHugh had been employed by the Attorney General as an expert witness. McHugh had been provided WHCS medical files for review. Dr. McHugh's affidavit is attached. (Respondent Exhibit 6, Affidavit of Paul R. McHugh, M.D. 8/31/07). In this Court's letter to Morrison on January 9, 2007, the Court noted "[s]ince Dr. McHugh has been employed as an expert by the Office of the Attorney General, any communication, including return of any files, should be made to your office." (Petitioner Appendix, pp. 1-2).

In any event, the Court asked Morrison's agents if they had talked to their expert witness and asked him not to speak about his opinions. They responded they had not. As an aside, the Court asked counsel whether they thought any judge would enter a restraining order on the strength of their [newspaper] showing, to which they conceded they did not believe so. The Court reminded counsel they were responsible for making sure their expert complied with orders and the Code of Professional Responsibility so they should discuss the matter with Dr. McHugh. The Court mentioned that Dr. McHugh had been represented to be well respected in his profession, to which counsel responded Dr. McHugh did indeed have impressive credentials. The Court suggested that if Dr. McHugh did not comply with their instructions perhaps they should make formal demands on him. The Court further suggested that once contact was made with Dr. McHugh, if counsel wanted the Court to join in a telephone conference, the Court would be available. After returning to Topeka, the Court was informed by Mr. Maag that contact had been made with Dr. McHugh and he would not be speaking at the forum.

#### 10. Disciplinary Investigations

The Court has been interviewed by several investigators who are conducting investigations of ethics complaints: Terry Morgan, Gary Pettijohn, Lucky DeFries and Mary

Mudrick. The Court has produced records in response to subpoenas. No subpoena has requested redacted medical records and none have been produced. Phill Kline, Steve Maxwell and Veronica Dersch have all mentioned to the Court that allegations have been made respecting some alleged misconduct by Kline in the filing of charges against WHCS which were filed and dismissed in December 2006. These accusations relate to claims that Kline altered records in his prosecution or perpetrated some type of fraud on the Court.

#### 11. The Third Judicial District Has "No Dog In This Fight"

During Kline's lame duck period, the Court obviously could not tell Kline he could not be Attorney General for the remainder of his term in office nor interfere with his prosecutorial functions. While the manner of transfer of the CHPP files by Kline was unorthodox, Kline had informed the Court he intended to enlist others, including the Johnson County District Attorney in his investigation. This fact, combined with the reality that Kline knew he had evidence which raises substantial factual and legal issues about CHPP compliance with the law, weighed heavily in the Court's decision to allow him to retain CHPP evidence. The recent disclosures of possible false writings, which in context could mean that somebody may have committed a felony in an attempt to cover up a misdemeanor, convinces the District Court that no hasty decision should be made about management of the files which would risk loss or destruction of the as filed redacted medical files of CHPP. Different considerations apply to the prospective management and return of WHCS files.

This is the third mandamus action involving the District Court arising out of a criminal investigation. Ordinarily mandamus is considered an extraordinary remedy. Aside from the controversial subject of abortion and the political sideshow, the matter before the District Court is

straightforward. The Court has issued subpoenas and assured that patient privacy interests have been protected. As a result of the investigation, Morrison has filed charges against WHCS. Kline has filed charges against CHPP. The evidence as originally prepared by the clinics was filed with the Court as required (unlike most inquisitions). The Court has considered Supreme Court Rule 108 and recognizes active legal proceedings exist which place the "as filed redacted medical records" squarely in issue. While this District Court has no desire to be the permanent custodian of these records, the Court believes that until the reasons for retention of the records no longer exist, the records should remain subject to judicial control and oversight. The only request presented by Morrison to this District Court has been to return redacted medical records to putative defendants while active investigations and prosecutions are pending. That request was denied by the District Court and should be denied by the Kansas Supreme Court.

Respectfully submitted,

*Richard D. Anderson*

Richard D. Anderson     10/18/07  
District Judge