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

IN THE MATTER OF	)	
	)	
PHILLIP D. KLINE,	)	Case No. DA10088 and DA10598
Respondent.	)	
	)	
	)	

FINAL HEARING REPORT

Procedural History

1. Sara S. Beezley, Chairman of the Kansas Board for Discipline of Attorneys, appointed a Hearing Panel to conduct a Formal Hearing on the above-captioned cases. The Hearing Panel consisted of Jo Ann Butaud, Presiding Officer, Calvin J. Karlin, and Jeffrey A. Chubb.

2. On January 14, 2010, the Disciplinary Administrator filed a formal complaint in the above-captioned cases. (Document 1). That same day, the Disciplinary Administrator filed a notice of hearing, scheduling a formal hearing for May 26, 2010, through May 28, 2010. (Document 2).

3. The Respondent made an oral motion for an extension of time to file an answer to the formal complaint. On February 8, 2010, the Hearing Panel granted the Respondent's oral motion for an extension of time to file an answer to the formal complaint, granting the Respondent 30 days from February 8, 2010, or until March 10, 2010, to file his answer. (Document 3). On February 19, 2010, the Respondent memorialized his oral motion in written form. (Document 4).

4. On March 1, 2010, Kyle E. Krull, a Kansas attorney, filed a motion and a verified application for admission *pro hac vice* of Thomas W. Condit, an Ohio attorney. (Documents 5 and 6). On March 9, 2010, the Hearing Panel granted the Respondent's motion and admitted Mr. Condit to the practice of law in the State of Kansas for the limited purpose of representing the Respondent in the instant disciplinary case. (Document 8).

5. Also on March 1, 2010, the Respondent, through Mr. Krull and Mr. Condit, filed a motion for a more definite statement. (Document 7). On March 5, 2010, the Disciplinary Administrator filed a response to the motion for a more definite statement. (Document 9). On March 10, 2010, the Hearing Panel denied the Respondent's motion, finding that the Disciplinary Administrator had complied with the requirements of due process and more. (Document 10).

6. The Respondent failed to file an answer to the formal complaint by March 10, 2010, as required by the Hearing Panel's February 8, 2010, order.

7. On March 15, 2010, the Respondent filed a request for discovery. (Document 11). On March 19, 2010, the Disciplinary Administrator filed a response to the Respondent's request for discovery, indicating that the Disciplinary Administrator would make all evidence in the Disciplinary Administrator's possession available to the Respondent. (Document 12).

8. On March 29, 2010, the Respondent filed a motion for an extension of time to file his answer to the formal complaint. (Document 13). On April 1, 2010, the Disciplinary Administrator filed a response to the Respondent's motion to extend time to file his answer to

the formal complaint. (Document 14). On April 5, 2010, the Hearing Panel granted the Respondent's motion for an extension of time to file an answer to the formal complaint, giving the Respondent until April 12, 2010, to file an answer. (Document 15).

9. On April 8, 2010, Edward D. Greim, Todd P. Graves, and Ryan A. Kreigshauser entered their appearance on behalf of the Respondent. (Document 16). On April 16, 2010, Mr. Krull and Mr. Condit filed a notice of withdrawal of counsel. (Document 20).

10. On April 12, 2010, the Respondent filed an answer to the formal complaint. (Document 17).

11. Also on April 12, 2010, the Respondent filed a motion to continue the prehearing conference and the hearing on the formal complaint. (Document 18). On April 14, 2010, the Disciplinary Administrator filed a response to the Respondent's motion to continue. (Document 19). On April 22, 2010, the hearing panel continued the hearing to November 15, 2010, through November 19, 2010, and November 22, 2010, through November 23, 2010.[1]

12. On April 19, 2010, the Disciplinary Administrator filed a motion to file certain exhibits under seal. (Document 21). On May 3, 2010, the Respondent filed a response to Disciplinary Administrator's motion to file certain exhibits under seal. (Document 22). On May 6, 2010, the Disciplinary Administrator filed a reply to the Respondent's response to Disciplinary Administrator's motion to file certain exhibits under seal. (Document 23). On

[1]The Hearing Panel did not issue an order continuing the case. The parties were notified by electronic mail on April 22, 2010, that the hearing had been set over to the November dates.

August 16, 2010, the Hearing Panel granted the Disciplinary Administrator's motion to file certain exhibits under seal. (Document 46).

13. On May 28, 2010, the Disciplinary Administrator provided a witness list, an exhibit list, and a copy of exhibits 1 through 125 to the Hearing Panel and the Respondent. (Document 24).

14. On June 24, 2010, the Respondent filed a motion to compel discovery. (Document 25). On July 1, 2010, the Disciplinary Administrator filed a response to the Respondent's motion to compel discovery. (Document 28). On July 9, 2010, the Respondent filed a motion for leave to file a reply to the Disciplinary Administrator's response to the motion to compel discovery. (Document 32).[2] The Hearing Panel denied the Respondent's motion for leave to file a reply to the Disciplinary Administrator's response to compel discovery. (Document 33). On August 19, 2010, the Hearing Panel denied the Respondent's motion to compel discovery. (Document 48).

15. On June 29, 2010, the Respondent filed a motion for reconsideration with the Review Committee of the Kansas Board for Discipline of Attorneys. (Document 26).[3] The

[2]The Respondent filed a motion for leave to file a reply because, by that time, the Hearing Panel had issued an order to the parties that replies to responses to motions would not be accepted from either party.

[3]The Review Committee of the Kansas Board for Discipline of Attorney consists of Sara S. Beezley, Chairman, Robert I. Guenthner, Vice-Chairman, and William B. Swearer. The Review Committee reviews each docketed attorney disciplinary case to determine whether probable cause exists to believe that the responding attorney violated the Kansas Rules of Professional Conduct or other rules of the Kansas Supreme Court.

Respondent also provided a memorandum in support of the motion for reconsideration. (Document 27). In the motion, the Respondent sought reconsideration of the Review Committee's probable cause determination. On July 2, 2010, in response to the Respondent's motion for reconsideration, the Disciplinary Administrator filed a request for direction with the Review Committee. (Document 30). On July 8, 2010, the Respondent filed a response to the Disciplinary Administrator's request for direction with the Review Committee. (Document 31). On August 3, 2010, "the Review Committee concluded that probable cause exists that the Respondent violated his oath 'or the disciplinary rules of the Supreme Court.' Kan. Sup. Ct. R. 210(c)" and denied the Respondent's motion for reconsideration. (Document 40).

16. On July 1, 2010, the Hearing Panel issued a prehearing scheduling order, detailing case deadlines. (Document 29). The Hearing Panel provided the parties with a copy of the prehearing scheduling order. (Document 29).

17. On July 21, 2010, the Respondent filed a motion to enlarge the time to designate expert witnesses. (Document 34). The Disciplinary Administrator did not respond to the Respondent's motion. On August 16, 2010, the Hearing Panel granted the Respondent's motion to enlarge the time to designate expert witnesses. (Document 45). The Hearing Panel extended the time to designate expert witnesses to October 5, 2010. (Document 45).

18. On July 27, 2010, the Respondent filed a witness list. (Document 35). The Respondent listed Stanton A. Hazlett and Alexander M. Walczak as witnesses for the Respondent. (Document 35). On August 3, 2010, the Disciplinary Administrator filed a motion

to strike the names of Stanton A. Hazlett and Alexander M. Walczak from the Respondent's witness list. (Document 37). The Respondent did not file a response to the Disciplinary Administrator's motion. On January 6, 2011, the Hearing Panel granted the Disciplinary Administrator's motion to strike. (Document 77).

19. On July 27, 2010, the Respondent filed a second motion to compel discovery. (Document 36). On August 3, 2010, the Disciplinary Administrator filed a response to Respondent's second motion to compel discovery. (Document 38). On August 19, 2010, the Hearing Panel denied the Respondent's second motion to compel discovery. (Document 48).

20. On August 3, 2010, the Disciplinary Administrator filed a motion to amend the formal complaint. (Document 39). The Respondent did not respond to the Disciplinary Administrator's motion. On January 6, 2011, the Hearing Panel granted the Disciplinary Administrator's motion to amend the formal complaint. (Document 78).

21. On August 9, 2010, the Respondent filed a third motion to compel discovery. (Document 41). On August 11, 2010, the Disciplinary Administrator filed a response to the Respondent's third motion to compel discovery. (Document 42). On August 16, 2010, the Hearing Panel denied the Respondent's third motion to compel discovery. (Document 43).

22. On August 16, 2010, the Hearing Panel issued a media order. (Document 44).

23. On August 17, 2010, the Hearing Panel held a prehearing conference. (Document 47). The Respondent did not appear in person, rather, the Respondent appeared

through counsel, Mr. Greim and Mr. Kreigshauser. (Document 47). The Disciplinary Administrator appeared through Mr. Hazlett and Mr. Walczak. (Document 47).

24. On August 27, 2010, the Disciplinary Administrator notified the Respondent and the Hearing Panel of his intent to offer Exhibits 126-31. (Document 49). Additionally, the Disciplinary Administrator made corrections to Exhibits 78 and 86. (Document 49).

25. Also, on August 27, 2010, the Respondent filed a motion to continue the hearing and the case deadlines. (Document 50). That same day, Mr. Greim filed a notice of withdrawal of his firm as counsel for the Respondent. (Document 51).

26. On August 30, 2010, the Hearing Panel held a telephone conference with the parties. (Document 52). Mr. Greim, Mr. Kreigshauser, Mr. Graves, Reid F. Holbrook, Mr. Hazlett, Mr. Walczak, and the Hearing Panel appeared by telephone. (Document 52). During the telephone conference, Mr. Holbrook indicated that in order for him to enter the case, the hearing would have to be continued from November, 2010, to January or February, 2011. (Document 52). The Hearing Panel directed Mr. Greim to file a motion to withdraw as counsel for the Respondent. (Document 52).

27. On August 30, 2010, Mr. Greim filed a motion to withdraw as counsel for the Respondent. (Document 53). On August 31, 2010, the Hearing Panel granted Mr. Greim's motion to withdraw as counsel for the Respondent. (Document 54).

28. On August 31, 2010, the Hearing Panel granted the Respondent's motion to continue the hearing and ordered that the hearing on the formal complaint commence February 21, 2011. (Document 55).

29. On September 1, 2010, Mr. Holbrook and Mark W. Stafford entered their appearances on behalf of the Respondent. (Document 56).

30. On September 22, 2010, the Hearing Panel issued a second prehearing scheduling order. (Document 57). The Hearing Panel's second prehearing scheduling order set forth deadlines for the parties. (Document 57).

31. The Respondent filed a proposed witness list on October 5, 2010. (Document 58).

32. On November 19, 2010, the Respondent filed an amended answer. (Document 59).

33. On November 24, 2010, the Disciplinary Administrator filed a second motion to amend the formal complaint as well as an amended formal complaint. (Documents 60 and 61). Thereafter, on December 1, 2010, the Disciplinary Administrator filed a supplement to the second motion to amend the formal complaint and an amended formal complaint, hereinafter referred to as the "second amended formal complaint." (Documents 62 and 63). On January 6, 2011, the Hearing Panel granted the Disciplinary Administrator's second motion to amend the formal complaint. (Document 79). On January 31, 2011, the Respondent filed an answer to the second amended formal complaint. (Document 89).

34. On December 2, 2010, the Disciplinary Administrator provided notice to the Respondent and the Hearing Panel of his intent to introduce Exhibits 132 through 136. (Document 64).

35. On December 3, 2010, the Disciplinary Administrator filed a motion to take Kristafer Ailslieger's deposition, pursuant to Kan. Sup. Ct. R. 216(f). (Document 65). In response, the Respondent, on December 6, 2010, filed a motion for a protective order or, alternatively, a motion for authority to take Jared Reed's deposition. (Document 66). The Disciplinary Administrator responded on December 8, 2010. (Document 67).

36. Following a telephone conference regarding the competing motions, on December 13, 2010, the Hearing Panel granted the Disciplinary Administrator's request to take Mr. Ailslieger's deposition and the Respondent's request to take Mr. Reed's deposition. (Documents 68 and 69). Later, on December 21, 2010, the Disciplinary Administrator requested that the Hearing Panel reconsider its ruling allowing the Respondent to take Mr. Reed's deposition. (Document 70). Subsequently, the Disciplinary Administrator withdrew his motion for reconsideration. (Document 85, p. 45).

37. On December 27, 2010, the Disciplinary Administrator and the Respondent took Mr. Ailslieger's deposition. (Document 71).

38. Also on December 27, 2010, the Respondent filed a motion *in limine* regarding Disciplinary Administrator's Exhibit 72. (Document 72). Additionally, two days later, on December 29, 2010, the Respondent filed a (second) motion *in limine.* (Document 73). The

Respondent's (second) motion *in limine* was regarding the Final Hearing Report issued in the attorney disciplinary case styled *In re Eric Rucker*. On December 30, 2010, the Disciplinary Administrator responded to the Respondent's (first) motion *in limine*. (Document 74). On January 4, 2011, the Disciplinary Administrator responded to the Respondent's (second) motion *in limine*. (Document 75). Pursuant to the Hearing Panel's direction, on January 20, 2011, the Respondent filed a motion to file the motions *in limine* out of time. (Document 82). Later, the Hearing Panel denied the Respondent's (first) motion *in limine* and reserved ruling on the Respondent's (second) motion *in limine*, stating that the Disciplinary Administrator had not offered the Final Hearing Report in *In re Eric Rucker* as an exhibit in this case, thus, the objection to its admission was not ripe. (Document 87).

39. In the Hearing Panel's second prehearing scheduling order, the Hearing Panel directed the parties to notify the Hearing Panel of other matters that the parties wished to raise at the prehearing conference. (Document 57). On January 4, 2011, the Disciplinary Administrator notified the Respondent and the Hearing Panel of other matters he wished to discuss at the prehearing conference. (Document 76).

40. On January 11, 2011, the Respondent filed a notice of intent to call an expert witness. (Document 80). Three days later, on January 14, 2011, the Disciplinary Administrator filed a response to the Respondent's notice. (Document 81). On January 21, 2011, the Respondent replied to the Disciplinary Administrator's response. (Document 83). The Hearing

Panel ruled that no witness would be allowed to testify regarding ultimate issues in the case. (Document 87).

41. On January 21, 2011, the Respondent filed a motion to continue the hearing. (Document 84). The motion was later denied. (Document 85, pp. 43-44 and Document 87).

42. At some point prior to January 24, 2011, the Respondent provided an exhibit list and copies of Exhibits A-R5 to the Hearing Panel and the Disciplinary Administrator. (Document 86).

43. On January 24, 2011, the Hearing Panel held a second prehearing conference. (Document 85). On January 25, 2011, the Hearing Panel issued a prehearing conference order. (Document 87). The Hearing Panel admitted Disciplinary Administrator's Exhibits 1 through 136 and Respondent's Exhibits A through R5. (Documents 87 and 105).

44. On January 28, 2011, the Respondent requested that the Hearing Panel reconsider the Respondent's request to endorse an expert witness. (Document 88). The Disciplinary Administrator responded to the request on January 31, 2011. (Document 90). On February 8, 2011, the Hearing Panel affirmed its prior ruling. (Document 95).

45. On February 3, 2011, the Respondent filed a request for consideration of additional procedural issues. (Document 91). The next day, February 4, 2011, the Disciplinary Administrator responded to the Respondent's request. (Document 93). On February 11, 2011, the Hearing Panel ruled on the Respondent's request for consideration of additional procedural issues. (Document 100). Specifically, the Hearing Panel concluded that the parties

would be afforded sufficient time to try their case, even if that meant scheduling additional days for hearing, that trial briefs would not be permitted, that suggested findings of fact and conclusions of law would not be permitted, that the parties would be provided with sufficient time to present closing arguments addressing all legal and factual issues, and that the parties were permitted to retain the court reporter for real time or daily transcripts. (Document 100).

46. Also on February 3, 2011, the Respondent requested that the Disciplinary Administrator issue subpoenas on behalf of the Respondent. (Document 92). The following day, the Disciplinary Administrator responded to the Respondent's motion, objecting to the Respondent's request. (Document 94). On February 11, 2011, the Respondent filed a pleading in response to the Disciplinary Administrator's response. (Document 99). The Hearing Panel did not order the Disciplinary Administrator to issue subpoenas on behalf of the Respondent. (Document 100).

47. On February 8, 2011, the Respondent filed a supplemental witness list and a pleading detailing the anticipated testimony of Thomas R. Stanton, the Respondent's proposed expert witness. (Documents 96 and 97). On February 9, 2011, the Disciplinary Administrator objected to the Respondent's supplemental witness list. (Document 98). On February 11, 2011, the Respondent filed a response to the Disciplinary Administrator's objection to the Respondent's supplemental witness list. (Document 99). The Hearing Panel permitted the Respondent to endorse the witnesses listed in his supplemental witness list. (Document 100).

48. On February 11, 2011, the Respondent filed a motion to disqualify the Hearing Panel. (Document 101). Thereafter, on February 14, 2011, the Disciplinary Administrator filed a response to the Respondent's motion to disqualify the Hearing Panel. (Document 103). The Hearing Panel denied the Respondent's motion to disqualify the Hearing Panel. (Document 103).

49. Pursuant to Kan. Sup. Ct. R. 216(a), the Respondent sought and obtained subpoenas from the Clerk of the Appellate Courts, including subpoenas for the Honorable James F. Vano, the Honorable Eric Yost, Michael D. Strong, and the Honorable Richard Anderson.

50. On February 21, 2011, the Hearing Panel commenced the hearing on the formal complaint. The Hearing Panel conducted the hearing on the formal complaint from Monday, February 21, 2011, through Friday, February 25, 2011, and Monday, February 28, 2011, through Wednesday, March 2, 2011, in the hearing room of the Kansas Board for Discipline of Attorneys, 701 Southwest Jackson, First Floor, Topeka, Kansas. The Disciplinary Administrator appeared through Mr. Hazlett and Mr. Walczak. The Respondent appeared in person and through counsel, Mr. Holbrook and Mr. Stafford. The evidence as to Count I of the Disciplinary Administrator's formal complaint was presented by the Disciplinary Administrator and the Respondent during these first eight days of the hearing.

51. On February 18, 2011, M.J. Willoughby, General Counsel, Office of Judicial Administration filed an objection and motion to quash the subpoena issued to Judge Vano.

(Document 104). During the hearing, the Hearing Panel took up the matter. However, the parties were able to reach a stipulation. (Respondent's Exhibit H7). As a result, Judge Vano was not called to testify. The parties were likewise able to reach a stipulation regarding Judge Yost's testimony and, as a result, Judge Yost did not testify. (Respondent's Exhibit I7).

52. During the hearing, counsel for Michael D. Strong and the Honorable Richard Anderson filed a joint motion to quash and motion for a protective order. (Document 106). Additionally, counsel filed a Hearing Memorandum on behalf of Judge Anderson. (Document 107). The parties reached an agreement with counsel for Mr. Strong and Judge Anderson regarding matters to be addressed during Mr. Strong's and Judge Anderson's testimony. As a result, Judge Anderson and Mr. Strong testified during the hearing on the formal complaint. (Transcript, pp. 615-794, 943-971).

53. On February 28, 2011, the Hearing Panel filed a motion for release of documents with the Kansas Supreme Court seeking the release of pleadings and documents filed under seal in *Alpha Medical Clinic and Beta Medical Clinic v. the Honorable Richard Anderson, et al.*, Kansas Supreme Court case number 04-93383-S. (Document 108). The Kansas Supreme Court granted the Hearing Panel's motion and released the documents and the Hearing Panel admitted those documents into evidence. (Hearing Panel Exhibit HP-1).

54. The Disciplinary Administrator presented evidence regarding Count I of the formal complaint. At the conclusion of the presentation of the Disciplinary Administrator's case, on March 1, 2011, the Respondent filed a motion to dismiss Count I. (Document 109).

The Hearing Panel established a deadline for the Disciplinary Administrator's response. The Respondent requested and received special permission to file a reply to the Disciplinary Administrator's response. Thereafter, on April 4, 2011, the Disciplinary Administrator filed a response to the Respondent's motion to dismiss Count I. (Document 110). Then, with permission from the Hearing Panel, on April 18, 2011, the Respondent filed a reply to the Disciplinary Administrator's response to the Respondent's motion to dismiss Count I. (Document 111). The Hearing Panel advised the parties that the matter would be taken under advisement and ruled on in this report. After careful consideration, the Respondent's motion to dismiss Count I is generally denied as detailed below. *See* ¶¶ 283-307, *infra*.

55. At the conclusion of the presentation of evidence on Count I, on March 2, 2011, the Hearing Panel continued the hearing. The Hearing Panel ordered that the hearing would resume July 19, 2011. (Transcript, p. 2293-303).

56. On June 30, 2011, the Respondent provided notice to the Hearing Panel and the Disciplinary Administrator of the witnesses the Respondent intended to call during the hearing as to mitigation. (Document 112). Additionally, on July 12, 2011, the Respondent provided the Hearing Panel and the Disciplinary Administrator with an exhibit list for Count II. (Document 113). On July 14, 2011, the Disciplinary Administrator filed a response to the Respondent's exhibit list. (Document 116).

57. On July 13, 2011, the Respondent filed a motion to disqualify the Disciplinary Administrator's witnesses from testifying during the hearing based upon the grand jury

confidentiality statute, K.S.A. 22-3012. (Document 114). That same day, the Disciplinary Administrator responded to the Respondent's motion. (Document 115). The Disciplinary Administrator sought and obtained permission from the Honorable Kevin Moriarty, District Court Judge for Johnson County, Kansas, who presided over the grand jury proceeding, for the witnesses to testify pursuant to K.S.A. 22-3012. (Transcript, pp. 2314-15). After Judge Moriarty's ruling, the Respondent withdrew his motion to disqualify the Disciplinary Administrator's witnesses from testifying. (Transcript, pp. 2314-15).

58. On Tuesday, July 19, 2011, the Hearing Panel commenced the hearing on Count II of the formal complaint. The Hearing Panel conducted the hearing on Count II of the formal complaint from Tuesday, July 19, 2011, through Friday, July 22, 2011, in the hearing room of the Kansas Board for Discipline of Attorneys, 701 Southwest Jackson, First Floor, Topeka, Kansas. The appearances were the same.

59. During the hearing, counsel for the Respondent inadvertently stated the name of a medical patient of Dr. George Tiller. As a result, in an attempt to protect the identity of the woman, the Hearing Panel directed the court reporter to delete the name from the transcript and directed the court reporter and the parties to destroy copies of the transcript that were sent electronically or printed. (Document 117). The Respondent informed the Hearing Panel that he had electronically sent the transcript to Martin Wishnatsky, a law student from Liberty University, who was personally attending the hearing and who was assisting counsel for the Respondent in some capacity. Mr. Wishnatsky indicated that the

electronic mail message with the transcript had not appeared in his inbox. As a result, the Hearing Panel directed Mr. Wishnatsky to sign an affidavit acknowledging that he had not received the message and transcript by electronic mail and that if the message and transcript arrived that he would destroy the transcript. (Transcript, pp. 2944-46; Document 118).

60. At the conclusion of the presentation of the Disciplinary Administrator's case, the Respondent made an oral motion to dismiss Count II. The Hearing Panel denied the Respondent's oral motion to dismiss Count II. (Transcript, p. 2682). Thereafter, the Respondent requested additional time to file a written motion to dismiss Count II. (Transcript, p. 3145). The Hearing Panel directed the parties to file the motion and response. (Transcript, pp. 3189-91). The Respondent agreed that he would not file a reply to the Disciplinary Administrator's response. (Transcript, p. 3147).

61. On August 5, 2011, the Respondent filed a motion to dismiss Count II. (Document 119). Thereafter, on August 18, 2011, the Disciplinary Administrator filed a response to the Respondent's motion to dismiss Count II. (Document 120).

62. Thereafter, on August 22, 2011, the Respondent filed a motion to strike a portion of the Disciplinary Administrator's response to Respondent's motion to dismiss Count II. (Document 121). That same day, the Disciplinary Administrator filed a response to the Respondent's motion to strike. (Document 122). The Hearing Panel addresses Respondent's motion to dismiss Count II and the Respondent's motion to strike a portion of the Disciplinary

Administrator's response to the Respondent's motion to dismiss Count II in paragraphs 308-14, *infra*.

Exhibits

63. The Hearing Panel admitted Disciplinary Administrator's exhibits 1 through 119, 119a, 120 through 139, 141, 142, and 144 through 151 into evidence. Of those, the Hearing Panel admitted the following exhibits under seal: 5, 7, 15, 20, 21, 29, 30, 41, 42, 45, 50, 51, 53, 54, 58-71, 74, 75, 78, 82-85, 88-90, 92-119, 119a, 120-124, 126-128, 130-132, 134, 138, 139, 141, 145, and 148-150. Additionally, the Hearing Panel admitted Respondent's exhibits A-V5, X5-F6, H6-K6, M6-W6, Y6-I7, G8, I8, P8-V8, A9, and C9-E9 into evidence. Of those, the Hearing Panel admitted the following exhibits under seal: A-G, Q-Z, M2-T2, C3, G3, I3, N3-P3, R3-X3, B4-F4, O4-W4, Z4, F5, G5, U5, Z5, B6-D6, N6, U6-W6, Y6, Z6, B7, C7, G7, G8, I8, J8, P8, Q8, A9, C9, and E9. Finally, the Hearing Panel admitted its own exhibit, HP-1, under seal. Based upon the sensitive nature of the information included in the exhibits, the exhibits admitted under seal shall not be released to members of the public.

Judicial Notice

64. During the hearing on the formal complaint, the Hearing Panel took judicial notice of the following: *Aid for Women v. Foulston*, 327 F. Supp. 2d 1273 (2004) (Document 123), *Aid for Women v. Foulston*, 441 F.3d 1101 (2006) (Document 124), *Aid for Women v. Foulston*, 427 F. Supp. 2d 1093 (2006) (Document 125), *Aid for Women v. Foulston*, 2007 WL 6787808 (10th Cir. Kan. 2007) (Document 126), and the Revised Kansas Code for Care of

Children, Drafted by Juvenile Offender/Child in Need of Care Advisory Committee, Approved by Kansas Judicial Council. (Document 127).

Witnesses

65. The Disciplinary Administrator called Veronica Dersch, Phillip D. Kline, the Honorable Richard Anderson, Thomas Williams, Michael Strong, Jared Maag, Eric Rucker, Jared Reed, Dan Monnat, Stephen Maxwell, Terry Morgan, Kristafer Ailslieger (video deposition played), Stephanie Hensel, the Honorable Larry McClain, and Richard Merker, to testify under oath.

66. The Respondent called Mary Beth Mudrick, the Honorable David King, Lucky DeFries, Linda Carter, Camille Nohe, Terry Morgan, John Badger, Phillip D. Kline, Teresa Salts, Thomas Stanton, Stephen Maxwell, John Christopher Pryor, Nancy Jensen, and Marjorie Webb as witnesses to testify under oath in his case. Additionally, video statements of Irene Thompson, the Honorable Eric Melgren, and Robert Ulrich were also shown.

Findings of Fact and Conclusions of Law

67. The Hearing Panel finds the following facts, by clear and convincing evidence; and based thereupon reaches the legal conclusions set forth below:

68. Phillip D. Kline (hereinafter "the Respondent") is an attorney at law, Kansas Attorney Registration No. 13249. His last registration address with the Clerk of the Appellate Courts of Kansas is Liberty University, 1971 University Boulevard, Lynchburg, Virginia 24502,

telephone number (434) 592-5328. The Respondent was admitted to the practice of law in the State of Kansas on September 30, 1987. (Documents 1, 17, 61, 63, 59, and 89).

69. The Respondent's license to practice law in Kansas is currently suspended. At the hearing on the formal complaint, the Respondent testified that his license is suspended as a result of failing to pay his annual registration fee. Specifically, the Respondent stated that, "I didn't pay my fee. . . . I didn't want to send you money. I'm sorry. I don't believe I should be here and I didn't want to send you money." (Transcript, p. 189). The Respondent testified that it was his choice not to pay his fee. (Transcript, p. 191). The Respondent is currently a law professor at Liberty University in Virginia. The Respondent does not intend to practice law in Kansas again. The Respondent testified, "You don't need to have a law license to be a professor. Of course, I don't intend to practice in Kansas anymore. I hope to practice in Virginia." (Transcript, p. 191).

Count I

70. In November, 2002, the citizens of the State of Kansas elected the Respondent to serve as the Kansas Attorney General. (Transcript, pp. 193-94). The Respondent took office in January, 2003. (Transcript, p. 194).

71. Soon after taking office, the Respondent met with Eric Rucker, Senior Deputy Attorney General and Thomas Williams, Special Agent in Charge for the Attorney General's office to discuss an allegation that Dr. George Tiller of Women's Health Care Services (hereinafter "WHCS") "continues to perform abortions on females under 16 years of age

without filing a report to competent authority concerning 'abuse of child' as required by K.S.A. 38-1522(a)." (Disciplinary Administrator's Exhibit 11, p. 277). Dr. Tiller and WHCS were located in Wichita, Sedgwick County, Kansas. (Transcript, p. 82).

72. Physicians and medical care facilities who perform abortions are required by statute to provide information regarding each abortion to the Kansas Department of Health and Environment (hereinafter "KDHE"). (K.S.A. 65-445). The statute prohibits the physician or medical facility from revealing the name of the patient. (K.S.A. 65-445). The form which KDHE provides for disclosing information regarding each abortion requires the physician or medical facility to disclose identifying information, including age, date of abortion, city, county, and state of residence, ancestry, race, education level, and previous pregnancies. (Respondent's Exhibits C4, D4, and I6).

73. Additionally, the KDHE form does not contain a field for including the physician or medical care facility's name. (Respondent's Exhibits C4, D4, and I6). Rather, KDHE assigns each physician or medical care facility an identification code number. (Transcript, p. 265). The physician or medical care facility is required to include its corresponding identification code number on the form. (Respondent's Exhibits C4, D4, and I6).

74. K.S.A. 65-445(c) prohibits the disclosure of the physician or medical care facility's name, except under limited circumstances. The statute provides:

> Information obtained by the secretary of health and environment under this section shall be confidential and shall not be disclosed in a manner that would reveal the identity of any person licensed to practice medicine and surgery who submits a

> report to the secretary under this section or the identity of any medical care facility which submits a report to the secretary under this section, except that such information, including information identifying such persons and facilities may be disclosed to the state board of healing arts upon the request of the board for disciplinary action conducted by the board and may be disclosed to the attorney general upon a showing that a reasonable cause exists to believe that a violation of this act has occurred.

Thus, the Attorney General's office is entitled to learn the identity of the physician or medical facility that performed the abortion only "upon a showing that a reasonable cause exists to believe that" a physician or medical care facility failed to properly report abortions to the KDHE. (K.S.A. 65-445(c)).

75. The Attorney General's dissemination of the information is substantially restricted by statute. Specifically, K.S.A. 65-445(c) provides that "[a]ny information disclosed to . . . the attorney general pursuant to this subsection shall be used solely for the purposes of a disciplinary action or criminal proceeding."

76. The Respondent's investigators obtained public information from KDHE regarding abortions performed in 2001. (Disciplinary Administrator's Exhibits 11 and 12). According to the public information, in 2001, 83 abortions were performed on patients under the age of 15 years. (Disciplinary Administrator's Exhibits 11 and 12).

77. Thereafter, the Respondent again met with Mr. Rucker and Mr. Williams, on April 1, 2010, to discuss how the investigation should proceed. They concluded that they needed to (1) determine where the 83 abortions took place, (2) identify the patients by name,

age, and legal address, and (3) determine whether the Kansas Department of Social and Rehabilitation Services (hereinafter "SRS") was properly advised. (Disciplinary Administrator's Exhibit 11, p. 278).

78. On June 18, 2003, the Respondent issued Kan. Att. Gen. Op. No. 2003-17. (Respondent's Exhibit B2). The opinion includes the following:

> Kansas law clearly provides that those who fall under the scope of the reporting requirement must report any reasonable suspicion that a child has been injured as a result of sexual abuse, which would be any time a child under the age of 16 has become pregnant. As a matter of law such child has been the victim of rape or one of the other sexual abuse crimes and such crimes are inherently injurious.

(Respondent's Exhibit B2). The result of Atty. Gen. Op. No. 2003-17 was to reverse a decade old opinion from Attorney General Robert Stephan.[4]

[4]General Stephan's opinion provided, in pertinent part, as follows:

> Whether a particular minor in a particular case has been injured as a result of sexual intercourse and a resulting pregnancy must be determined on a case-by-case basis. The fact of pregnancy certainly puts one on notice that sexual abuse (as statutorily defined) has probably occurred, and requires persons listed in K.S.A. 1991 Supp. 38-1522(a) to investigate further whether the child has suffered injury, physical or emotional, as a result of such activity. If there is reason to suspect that the child has been injured, that person is then required to report such suspicions and the reasons therefore.

Kan. Att. Gen. Op. No. 1992-48 (April 6, 1992). (Respondent's Exhibit P8, p. Merker 00086).

79. On July 15, 2003, Stephen Maxwell and Mr. Williams provided the Respondent and Mr. Rucker with a "confidential memo" regarding the investigation. (Disciplinary Administrator's Exhibit 13). In the memo, Mr. Maxwell and Mr. Williams stated as follows:

> As previously discussed, there is a need to convene a Judicial Inquisition as authorized by KSA 22-3101(1) in order to compel the production of certain business, medical and governmental records required to thoroughly investigate and bring to criminal prosecution individuals who have knowingly violated KSA 38-1522 and other statutes that address rape and sexual abuse. These statutes specifically apply to victims under the age of 16.
>
> The records needed to advance this inquiry can only logically be obtained from SRS, KDHE and certain physicians and medical providers. Although KSA 38-1507 permits the Attorney General to access records maintained by SRS, a subpoena will be required to compel the production of records in the possession of KDHE, physicians and medical providers.
>
> There potentially exists a legal obstacle to initiating a Judicial Inquisition due to the absence of a definitive complainant or allegation that a medical provider knowingly failed to report a specific incident of sexual abuse as statutorily defined by KSA 21-3503(1)(a). However, it is believed a legal showing can be properly presented to justify the initiation of a Judicial Inquisition if this inquiry is conducted in a logical objective manner.
>
> Accordingly, the following investigative plan is proposed:
>
> 1. An agent of the Office of Attorney General will make a verbal request of SRS to identify by number incidences of sexual abuse involving victims under the age of 16 years that were reported to SRS within the past 18 months. **If asked to explain the nature of the inquiry, SRS will be told that the Attorney General desires to determine if there is a serious latent sexual abuse problem in Kansas.**

2. After SRS discloses the number of reports of sexual abuse, SRS will be asked to produce the files associated with each report of sexual abuse.

3. Writers will personally review each SRS client file to further identify incidences of sexual abuse involving pregnancy and abortion. A further review will be made to identify one or more situations when an abortion was performed and a corresponding report of sexual abuse was not filed by the physician/medical provider.

4. Assuming that step number 3 determines violations of KSA 38-1522, an appropriate jurist will be requested to convene a Judicial Inquisition. The proper venue shall be designated by the Attorney General.

5. Using the power of the Judicial Inquisition, a subpoena will be directed to KDHE for completed [*sic*] detailed information regarding all reported abortions involving patients under the age of 16 years within the past 18 months.

6. Writers will review and compare records obtained from SRS and KDHE to identify situations where an abortion was performed on a patient under 16 years of age and a corresponding report of sexual abuse was not submitted to SRS.

7. Subpoenas will be served on abortion providers to obtain medical and payment records of all abortion recipients under the age of 16 years.

8. Writers will review and compare the records received from SRS, KDHE and abortion providers to fully identify alleged violations of failure to report and will initiate independent investigations regarding all identified instances of sexual abuse.

This suggested plan assumes that SRS will cooperate and comply with K.S.A. 38-1507 and provide the requested materials for our review.

(Disciplinary Administrator's Exhibit 13 (emphasis added)). Thus, the Respondent knew that Mr. Williams planned to be less than forthright with SRS regarding the reason he was seeking the information. (Disciplinary Administrator's Exhibit 13).

80. Mr. Williams contacted SRS and requested that SRS provide "reporting numbers" for child sexual abuse on minor children under the age of 16 for the period beginning January 1, 2002, through June 30, 2003. (Disciplinary Administrator's Exhibit 16, p. 287).

81. On July 19, 2003, in an electronic mail message, Mr. Williams informed the Respondent, Mr. Rucker, and Mr. Maxwell that he had implemented the first step of their plan. (Respondent's Exhibit E2).

> Gentlemen: FYI, we have initiated step one in the overall plan. After first attempting to reach Susan McKenna (ph) an Asst. Director at SRS on Friday, I was referred to Betsy Thompson who offices in the SRS Secretary's section on the 6th floor of the docking [*sic*] Building. I was told that our request was being handled as a Legislative Inquiry. I met with Ms. Thompson late Friday afternoon at her office. **I advised her that I was attempting to assess the sexual abuse problem in Kansas and desired statistical information as to the number of sexual abuse reports received by SRS since January 1, 2002 involving children 15 years and younger.** I also requested that if possible that age and demographic information of the victim be provide [*sic*] regarding each report. She opined that the total number may turn out to be in the range of 900 or more. She offered that SRS usually receives about 40,000 reports of all types of abuse annually. She indicated she would begin the research immediately and that I will hear from her on Monday, 7-21-03, as to when the information will be available. **I stayed away from the underlying issue that we are interested in. She made reference to the A.G.'s recent opinion. I kept the conversation**

> **in very general terms by mentioning the recent absconder initiative that primarily focused on sex offenders and told her I was attempting to determine the nature and magnitude of the sex abuse crime problem in Kansas with children being the victims. There was nothing said to suggest that SRS will resist providing the requested information.** I'll keep you advised of all developments. Thanks, Tom

(Disciplinary Administrator's Exhibit 14; Respondent's Exhibits D2 and E2 (emphasis added)).

Mr. Williams intentionally misled SRS as to the reason he sought the information. (Disciplinary Administrator's Exhibit 14; Respondent's Exhibit D2 and E2).

82. On July 20, 2003, the Respondent acknowledged Mr. Williams' conduct by responding to the electronic mail message. (Respondent's Exhibit E2). The Respondent stated:

> Tom – thanks for keeping me informed. Please continue to update and provide timeline when possible. We need to constantly assess in order to determine possible strategic adustments [*sic*] if time becomes an issue.
> Thanks,
> Phill

(Respondent's Exhibit E2). Clearly, the Respondent knew that Mr. Williams intentionally misled SRS shortly after Mr. Williams' meeting at SRS. (Respondent's Exhibit E2). Further, the Respondent knew that Mr. Williams intentionally misled SRS prior to the time that SRS provided the requested information. (Respondent's Exhibit E2 and F2).

83. As a result of his request, Mr. Williams received a spreadsheet from SRS on July 25, 2003, which indicated that SRS received 1,042 reports of alleged sexual abuse of children 15 years of age or younger for the period of January 1, 2002, through June 30, 2003.

(Respondent's Exhibit F2). According to the SRS records, 175 reports were from Sedgwick County, Kansas. (Disciplinary Administrator's Exhibit 16, p. 287).

84. Mr. Williams continued to attempt to mislead SRS. On July 26, 2003, Mr. Williams sent a memorandum to the Respondent. In the memo, Mr. Williams stated:

> The next step as planned is to request that SRS produce each of the 1042 reports for our inspection. We could logically hasten this process by asking them to only produce the reports associated with female victims from 9 through 15 years of age; however, this would in all likelihood alert them to the focus of the inquiry and may result in legal action to resist disclosure. I recommend that we continue as planned and ask to review all the reports.

(Respondent's Exhibit F2).

85. On October 29, 2003, Mr. Williams stated in an affidavit in support of an inquisition application that he obtained from the Sedgwick County District Attorney's office information that the number of cases of alleged sexual abuse involving children under 16 years between January 1, 2002, and June 30, 2003 was 1884. (Disciplinary Administrator's Exhibit 16).

86. Mr. Williams contacted SRS again and requested SRS to review the individual files of child sexual abuse. (Disciplinary Administrator's Exhibit 16). Mr. Williams explained that the Attorney General's office sought those records "to determine whether consistency throughout Kansas in the resolution or prosecution was occurring and whether criminal acts had occurred in the reporting or failure to report sexual abuse." (Disciplinary Administrator's Exhibit 16, p. 288).

87. On July 30, 2003, John Badger, Chief Counsel to SRS, requested that the Attorney General's office make its request in writing, citing K.S.A. 38-1507, the confidentiality provision of the Kansas Code for Care of Children. (Disciplinary Administrator's Exhibit 16, p. 288).

88. On July 31, 2003, Mr. Rucker wrote to Mr. Badger and explained that the Attorney General's office sought the records in order to further "a criminal investigation into the circumstances surrounding the reporting and/or failure to report allegations of sexual abuse of children." (Respondent's Exhibit H2).

89. On August 5, 2003, Mr. Badger refused to provide the records to the Attorney General's office unless they first provided an explanation of the reason and an analysis of the law supporting the request. (Disciplinary Administrator's Exhibit 16, p. 288; Respondent's Exhibit I2).

90. On October 9, 2003, four months after the Respondent issued Kan. Att. Gen. Op. No. 2003-17, a number of medical professionals filed suit in federal court seeking to enjoin the Kansas County and District Attorneys from enforcing K.S.A. 38-1522 as it related to incidents of sexual activity between minors of certain ages. *See Aid for Women v. Foulston*, United States District Court Case No. 03-1353-JTM. The Attorney General's office represented the Kansas County and District Attorneys in the suit. (Document 123).

91. Meanwhile, rather than explain the reason for the request to Mr. Badger and SRS, on October 29, 2003, the Respondent's staff filed an application to open an inquisition in

Shawnee County, Kansas, and sought a subpoena to compel SRS to release the records to the Attorney General's office. *In re Inquisition into the Failure to Report Abuse*, Shawnee County case number 04IQ3. (Disciplinary Administrator's Exhibits 15 and 16; Transcript, pp. 616-17).

92. K.S.A. 22-3101(1) sets forth the procedure to open an inquisition. It provides:

> If the attorney general . . . is informed or has knowledge of any alleged violation of the laws of Kansas, such person may apply to a district judge to conduct an inquisition. An application for an inquisition shall be in writing, verified under oath, setting forth the alleged violation of law.

93. The Respondent designated Mr. Maxwell as the attorney responsible for the inquisition. (Transcript, p. 217). In the application, Mr. Maxwell alleged, in pertinent part, as follows:

> 2. The criminal investigation currently ongoing will seek to discover whether child abuse is not being reported properly under K.S.A. 38-1522.
>
> . . .
>
> 7. The only efficient and appropriate means to investigate whether suspected abuse is being properly reported and then investigated is to access the records of the SRS. Prior attempts to investigate without resorting to this inquisition have been made and [SRS] has not been cooperative. . . .
>
> 8. As a duly appointed prosecuting attorney defined under K.S.A. 22-2202 and based upon the affidavit of Special Agent Williams attached hereto, I have knowledge of alleged violations of K.S.A. 38-1522 and have been directed by the Attorney General to investigate the same.

(Disciplinary Administrator's Exhibit 15). Neither the application for inquisition nor the affidavit filed in support of the application contained any references that the Respondent was investigating abortion providers. (Disciplinary Administrator's Exhibits 15 and 16).

94. On October 29, 2003, Judge Anderson approved the Respondent's request that an inquisition subpoena be issued to SRS. (Disciplinary Administrator's Exhibit 26).

95. On November 6, 2003, eight days after opening the inquisition, Mr. Rucker informed Mr. Maxwell and Mr. Williams that the information previously received from SRS was inaccurate. (Disciplinary Administrator's Exhibit 18).

> Well it seems that additional numbers are being released regarding abuse. I hope the mistakes made by the chief counsel of the SRS and the earlier numbers released by that agency don't adversely effect [*sic*] our representations of last week. . . .

(Disciplinary Administrator's Exhibit 18).

96. That same day, Mr. Maxwell responded by stating:

> It shouldn't affect us one way or another. They are the ones that misrepresented the numbers. We used what they gave us. At some point, we may have to clarify with the judge if and when we go back for further inquisition subpoenas. At that point, we can tell him what happened. Tom and I are going to go thru email tomorrow to try and develop a plan of action.

(Disciplinary Administrator's Exhibit 18). After learning that the information provided by SRS was inaccurate, neither the Respondent nor his staff took any steps, for more than six months, to inform Judge Anderson that the information provided at the time the Court opened the inquisition and issued the SRS subpoena was flawed. (Transcript, pp. 258-61).

97. On November 10, 2003, Mr. Badger complied with the inquisition subpoena and provided the records to the Respondent's office. (Respondent's Exhibit L2).

98. On May 26, 2004, Mr. Williams provided Judge Anderson with an affidavit in support of a request for the issuance of a subpoena to KDHE. At that time, the Respondent's office sought the identity of the medical providers who were "under-reporting and false[ly] reporting." (Disciplinary Administrator's Exhibit 20, p. 297; Respondent's Exhibit O2).

99. In Special Agent Williams' May 26, 2004, affidavit, more than six months after learning of the inaccuracy of the information, for the first time, the Attorney General's office informed Judge Anderson that the information provided to open the inquisition and issue the SRS subpoena was inaccurate. (Disciplinary Administrator's Exhibit 20; Respondent's Exhibit O2).

100. That same day, Judge Anderson issued a subpoena to KDHE. (Respondent's Exhibit P2). In his order and subpoena duces tecum, Judge Anderson concluded the following:

> 1. . . . [KDHE] shall allow the Attorney General of Kansas or his designee access to any and all records related to the performance of abortions for the years 2001, 2002, 2003, and 2004.
>
> 2. The Attorney General of Kansas is hereby ordered not to disclose the contents of any file reviewed to any person outside the Office of the Attorney General except as necessary to further the criminal investigation or as authorized by this Court.
>
> 3. The existence of this order and subpoena and any testimony or documents produced pursuant to such are to remain confidential and not to be disclosed to any other person

> or entity except upon written approval of the Attorney General or this Court.

(Respondent's Exhibit P2).

101. On June 7, 2004, KDHE filed a motion to quash the subpoena. (Respondent's Exhibit N2). In its motion, KDHE alleged that the order and subpoena did not comply with statutory requirements and that KDHE is prohibited from disclosing certain information, including the name of the medical provider. (Respondent's Exhibit NN).

102. After the hearing on the motion to quash, Judge Anderson ordered KDHE to provide the Respondent the requested records. (Disciplinary Administrator's Exhibit 21; Respondent's Exhibit Q2). However, Judge Anderson modified the previous order and, pursuant to K.S.A. 65-445, did not require KDHE to provide the Respondent with the names of the abortion providers. (Disciplinary Administrator's Exhibit 21; Respondent's Exhibit Q2; Transcript, pp. 622-23).

103. On July 6, 2004, KDHE partially complied with the inquisition subpoena. (Respondent's Exhibit S2, p. 3791).

104. On July 26, 2004, the United States District Court for the District of Kansas issued a preliminary injunction in the *Aid for Women* case. (Document 123).

> Accordingly, the court is left with the difficult task of balancing the state's interest in preventing child abuse against the breach of informational privacy resulting from reports made to SRS. The court reaches its decision, in part, by considering the nature of the information involved. The Reporting Statute requires disclosure of highly personal information from plaintiffs' minor patients and clients. The court is convinced even a limited

> breach of confidentiality concerning such unique and intimate information could have large implications for the well-being of minors. The court is also struck by the magnitude of the change in policies outlined in the 2003 advisory opinion. It is persuasive that the parties operated under the 1992 advisory opinion for a substantial period of time without discernable problems. This mitigates against allowing a breach of minors' informational privacy rights even if such a breach is made in an investigatory context. Further, the court is hesitant to sanction such a monumental change in policy considering the new policy's imposition on the informational privacy rights of minors. Based on the aforementioned, the court finds plaintiffs are likely to succeed on their informational privacy claim. Thus, the court grants plaintiff's motion for a preliminary injunction on this basis.

Id., 327 F. Supp. 2d 1273, 1288 (2004). (Document 123, p. 1595). The Kansas County and District Attorneys appealed.

105. On July 29, 2004, Mr. Williams requested that Judge Anderson issue a subpoena, pursuant to K.S.A. 65-445, to KDHE seeking the identification of names of the medical providers who provided certain abortions. (Disciplinary Administrator's Exhibit 25; Respondent's Exhibit S2). In an affidavit in support of the request, the Attorney General disclosed that they were investigating late term abortions irrespective of the patients' age. (Disciplinary Administrator's Exhibit 25; Respondent's Exhibit S2). On August 9, 2004, Judge Anderson issued the requested subpoena. (Respondent's Exhibit G3).

106. In response to the subpoena, KDHE revealed that the identities of the two clinics were Comprehensive Health Planned Parenthood of Overland Park, Kansas, (hereinafter "CHPP") and Dr. Tiller's WHCS. (Disciplinary Administrator's Exhibit 28).

107. On August 2, 2004, the Respondent specifically directed his staff to investigate late term abortions. (Disciplinary Administrator's Exhibit 26, p. 322; Transcript, p. 263). The Respondent acknowledged that the plan to do so would necessarily include adult patients. (Transcript, p. 263).

108. In late August, 2004, the Respondent's staff applied for warrants from Judge Anderson, to search CHPP's and WHCS' offices. (Disciplinary Administrator's Exhibits 28 through 30; Transcript, pp. 625-30). At the time the Respondent's staff met with Judge Anderson in an attempt to secure search warrants, Judge Anderson discussed whether it was wise to serve search warrants rather than inquisition subpoenas. (Transcript, pp. 626-30). Judge Anderson suggested that inquisition subpoenas would be a better route to take. (Transcript, pp. 626-29). Nonetheless, Judge Anderson found probable cause and issued the warrants. (Disciplinary Administrator's Exhibits 28 through 30; Transcript, p. 634).

109. Before the service of the warrants but after Judge Anderson's suggestion that inquisition subpoenas would be a better route to take, the Respondent's staff decided to seek and obtain inquisition subpoenas rather than to serve the search warrants. (Disciplinary Administrator's Exhibits 31 and 33; Respondent's Exhibits H3 and J3; Transcript, pp. 634-36).

110. On September 21, 2004, Judge Anderson issued inquisition subpoenas to CHPP and WHCS for medical records. (Disciplinary Administrator's Exhibit 71, pp. 751, 796-804; Respondent's Exhibit G3, pp. 3625-28 and N3, pp. 36, 38-42).

111. On September 22, 2004, Special Agent Williams served inquisition subpoenas on the two clinics. (Disciplinary Administrator's Exhibit 35). The subpoena to CHPP required the production of 30 patient medical records. (Disciplinary Administrator's Exhibit 71, pp. 801-04; Respondent's Exhibit G3). The subpoena to WHCS required the production of 60 patient medical records. (Disciplinary Administrator's Exhibit 71, pp. 796-800; Respondent's Exhibit N3). Both clinics moved to quash the subpoenas. (Disciplinary Administrator's Exhibits 35 and 71, p. 751).

112. On October 5, 2004, Judge Anderson heard the motions to quash. (Disciplinary Administrator's Exhibit 35). Judge Anderson appointed a guardian *ad litem* to represent the interests of the minor patients and a special master to represent the interests of the patients who had reached the age of majority. (Disciplinary Administrator's Exhibit 35 and Exhibit 71, p. 879; Transcript, p. 630). Following the hearing, Judge Anderson denied the motions to quash and directed the clinics to deliver the medical records to the Respondent no later than October 15, 2004. (Disciplinary Administrator's Exhibit 35 and Exhibit 71, pp. 752, 878-79).

113. On October 8, 2004, each of the clinics filed motions to reconsider. (Disciplinary Administrator's Exhibit 71, p. 752). On October 21, 2004, Judge Anderson denied the motions in a six page memorandum decision. (Disciplinary Administrator's Exhibit 71, pp. 752, 891-97).

114. On October 22, 2004, the clinics filed a joint motion for a protective order. (Disciplinary Administrator's Exhibit 71, p. 753).

115. On October 26, 2004, the clinics filed a petition for writ of mandamus in the Kansas Supreme Court, seeking to avoid compliance with the inquisition subpoena, *Alpha Medical Clinic and Beta Medical Clinic v. Judge Richard Anderson and Phill Kline* (hereinafter "*Alpha*"), Kansas Supreme Court case number 04-93383-S. (Respondent's Exhibit H6).

116. On October 28, 2004, the Kansas Supreme Court ordered that compliance with the inquisition subpoenas be stayed during the pendency of the action in mandamus and that all filings by the parties would be made under seal. (Respondent's Exhibit H6).

117. On November 30, 2004, Judge Anderson filed an answer and statement regarding the joint petition for writ of mandamus and order staying production of medical records. (Disciplinary Administrator's Exhibit 138). In his answer and statement, Judge Anderson did not address the allegations or arguments made in the clinics' joint petition. Rather, Judge Anderson attached a copy of the transcript of the hearing he held on October 5, 2004, on the clinics' motions to quash the inquisition subpoenas and requested guidance from the Kansas Supreme Court on four issues. (Disciplinary Administrator's Exhibit 138). Judge Anderson's statement and answer, along with the transcript of the October 5, 2004, hearing were filed under seal consistent with the Kansas Supreme Court's order in existence at the time. (Disciplinary Administrator's Exhibit 138; Transcript, pp. 642-44). Judge Anderson's four issues were as follows:

> 1. After a motion to quash an inquisition subpoena has been filed or otherwise, does a district court have the authority or any obligation under the inquisition statute or other applicable law to grant a person or entity challenging the

subpoena any other procedural rights, such as a hearing, in addition to filing a motion to quash and, if so, what are these rights?

2. After a motion to quash an inquisition subpoena has been filed or otherwise, does a district court have the authority or any obligation under the inquisition statute or other applicable law to disclose to the subpoena recipient all or any portion of the information constituting the factual basis for the reasonable suspicion upon which the subpoena was issued, and, if so, under what circumstances and to what extent?

3. To what extent, if any, does the recipient of an inquisition subpoena have a right to confront or challenge the evidence of reasonable suspicion upon which the subpoena was issued and, if so, at what stage of the inquisition?

4. Upon motion to quash an inquisition subpoena or otherwise, is a district court authorized to conduct or supervise an in camera review of subpoenaed materials or utilize other measures it deems appropriate to protect the competing interests of the Attorney General under the inquisition statute and those of a subpoena recipient or others?

(Disciplinary Administrator's Exhibit 138).

118. Later, on January 31, 2005, the Kansas Supreme Court ordered the parties to file formal briefs. (Respondent's Exhibit H6).

119. On February 14, 2005, the Clerk of the Appellate Court clarified the Court's order stating that the briefs filed in *Alpha* would be filed as open records and not under seal, but the record itself remained under seal. (Respondent's Exhibit Y5).

120. In February, 2005, Mr. Williams learned that patients of WHCS were referred to nearby La Quinta Inn & Suites for lodging. La Quinta Inn & Suites has a national policy of

affording guests a medical discount upon request. (Disciplinary Administrator's Exhibit 40, p. 386).

121. The Respondent directed Mr. Williams to seek a subpoena compelling the production of registration records from La Quinta Inn & Suites. (Transcript, p. 799).

122. On February 11, 2005, Mr. Williams stated to Mr. Maxwell, Mr. Rucker, Jared Maag, and Jared Reed a belief that if records from La Quinta Inn & Suites were compared with records from KDHE, they would be able to identify "juvenile patients who were provided late term abortions" at WHCS. (Disciplinary Administrator's Exhibit 40, pp. 387-88). On February 14, 2005, Mr. Maxwell applied for and received an inquisition subpoena *duces tecum* from Judge Anderson requiring La Quinta Inn & Suites to provide registration records for individuals receiving a medical discount from January 1, 2003, to the date of the subpoena. (Disciplinary Administrator's Exhibits 41 and 42).

123. La Quinta Inn & Suites complied with the subpoena and provided the records to the Attorney General's office in an electronic format. (Transcript, pp. 1149, 1205). Thereafter, Mr. Williams directed Mr. Reed to compare the records from La Quinta Inn & Suites with records from KDHE. (Transcript, pp. 1141, 1150-51). Mr. Reed's charge was to review the KDHE pregnancy termination forms, which included dates of services as well as home town information and seek to match that form with a motel reservation on the same date with the same home town. (Transcript, pp. 1150-51).

124. Mr. Reed compared the records and memorialized his comparison in spreadsheets. (Disciplinary Administrator's Exhibits 50 and 51; Transcript, pp. 1150-51). Mr. Reed prepared Disciplinary Administrator's Exhibit 50 which includes two spreadsheets. The spreadsheets are titled, "2003 & 2004 KDHE Records & Potential Matches from La Quinta Inns, Inc. (Kansas Residents – 15 Years of Age or Younger)" and "2003 & 2004 KDHE Records & Potential Matches from La Quinta Inns, Inc. (Non-Kansas Residents – 15 Years of Age or Younger)." (Disciplinary Administrator's Exhibit 50, pp. 434, 437).

125. Mr. Reed also prepared Disciplinary Administrator's Exhibit 51. Exhibit 51 contains one spreadsheet titled, "2003 KDHE Records & Potential Matches from La Quinta Inns, Inc. (Kansas & Non-Kansas Residents) (16 Years of Age or Older and Gestation Period of 22 Weeks or More)." (Disciplinary Administrator's Exhibit 51, p. 537). Mr. Reed provided Disciplinary Administrator's Exhibits 50 and 51 to Mr. Williams in April, 2005. (Transcript, p. 1159).

126. In different forums, the Respondent has repeatedly testified that he and his office did not seek the identity of adult patients. Specifically, the Respondent testified before Judge Clark Owens in Dr. Tiller's criminal case, the Respondent testified before Judge David King in the CHPP's mandamus action, and the Respondent testified before the Hearing Panel in the instant disciplinary case that neither he nor his subordinates sought the names of adult patients. (Disciplinary Administrator's Exhibit 84, pp. 1141-42, Exhibit 86a, pp. 1853-59, 1863-

64; Transcript, pp. 267-68, 273-75, 310, 406, 1599, 1604, 1686-87, 1706, 1722, 2090, 2095, 2151-52).

127. At the hearing on Dr. Tiller's motion to dismiss or suppress, the Respondent testified, under oath, as follows:

> A. [By the Respondent] What I have said is that we did not need nor seek adult patient names, and we sought the identities of children because they were victims of crime.
>
> Q. [By Dan Monnat] And you have taken special pains to reassure Dr. Tiller's adult patients that you never got their identities, correct?
>
> A. I have stated that we never saw adult patient identities, and to my knowledge the only patient identity we have is a patient who voluntarily came forward and identified herself.
>
> Q. And you said that the reason that you went on to the Bill O'Reilly show was because it was incumbent upon you to indicate that neither you nor your subordinates had the identities of the patients?
>
> A. I don't know what I might have indicated in what you're reading. My recollection is that there was widespread belief that patient privacy had been violated because patient identities were in the files, and there was a misperception that women were being investigated and potentially faced prosecution, and that was never the case.
>
> . . .
>
> Q. And about those mailings do you say, And so it was I believe incumbent upon me to indicate that the women were not under investigation. They were not under any legal liability. We did not have the identities of the

patients and the nature – as it has been presented in the past, of the true nature of the investigation?

A. That is what my testimony reads.

Q. And are you then asked the question, Question: And is it for that reason that you chose then to appear on the Bill O'Reilly show? And do you answer, That's the reason that I consented to appear, the primary reason?

A. As I recall, we were constantly attempting to inform people that the adult women's identities were not sought. They were not under investigation and not under legal liability. I said that in several forms [*sic*] at several times.

Q. And you assured the local public of that in the letter to the editor of the Wichita paper that we have talked about before when you said, As Attorney General I never sought the names of the adult patients, correct?

A. That's right.

Q. Now, did you write that line, correct?

A. Yes.

Q. And by your statement as Attorney General, you meant that you had not sought the names or identities of adult patients and no one subject to your direction in the investigation had sought the names of adult female patients, correct?

A. Yes, even before the mandamus, we were contemplating that Judge Anderson would receive those names, redact them and then maintain those names in his discretion to allow us to be able to compare them to other medical records, if necessary.

. . .

Q. Actually, you originally tried to get all of the patients' identities, didn't you?

A. No.

Q. Didn't you try to get both adult and underage patients' identities?

A. No.

Q. You did seek files by the subpoenas that asked Judge Anderson to issue for both adult and underage patients, didn't you?

A. . . . So I never sought them, but the subpoena sought them for Judge Anderson to redact them.

. . .

Q. . . . [Y]ou originally intended to seize the files with a search warrant, correct?

A. No. We contemplated that, and then I decided not to.

. . .

Q. An [*sic*] the operations plan called for the clinic's files to go straight to the hands of your office, correct?

A. Yes.

. . .

Q. Your position is that during your investigation of Dr. Tiller and Planned Parenthood, neither you nor your subordinates ever tried to identify any adult women, correct?

A. We did not try to identify the adult women who were the patients of the files subpoenaed. My position was we did

not need to know their identities to prosecute the crimes that we were investigating.

(Disciplinary Administrator's Exhibit 86b, pp. 1853-59, 1863-64).

128. Before Judge King in the CHPP's mandamus action, the Respondent testified, under oath, as follows:

> Q. [By Caleb Stegall] Were you seeking the identity of women – the identities of women contained in those records?
>
> A. [By the Respondent] The – we had established a method of protecting patient privacy. And Judge Anderson has opined to this. We knew that there would be a concern simply because we were dealing with what might be considered a volatile issue, not because of any strong concern of law. I worked with Judge Anderson to establish a process where the records would be provided in total to him, not to us. But to the Court. So the Court could redact irrelevant information, as well as the identities of adult women before tendering the records to our possession. I always sought the identity of the children, because the children were victims of crimes. And it was necessary to determine whether actions to protect those children should occur.
>
> Q. Is that – is that normal for prosecutors to seek the identity of victims of crimes, such as child rape?
>
> A. Absolutely. In fact, I would say that it's normal to seek the identity of patients when seeking medical records. I just made an exception in our approach in this case as it relates to adult women. But I believed, and this is important, that it was vitally important for the Court, not the target, to do the redactions. Because I always felt that we needed some corroborating medical evidence from other sources. The clinics are not the primary care provider to these women, generally their OB/GYN is, and

> others. The clinics have a very limited interaction with these patients.
>
> And I saw the need of subpoenaing other medical records to compare what was stated in the clinic records and the judge would have to do – ensure to us that these records were of the same patient. So I sought the identity for the Court of adult women but never for our office.

(Disciplinary Administrator's Exhibit 84, pp. 1141-42).

129. Finally, before the Hearing Panel the Respondent repeatedly testified that neither he nor any of his subordinates sought the identity of adult abortion patients. (Transcript, pp. 267-68, 273-75, 310, 406, 1599, 1604, 1686-87, 1706, 1722, 2090, 2095, 2151-52). However, additionally before the Hearing Panel, in response to questioning by Mr. Hazlett, the Respondent also testified as follows regarding Disciplinary Administrator's Exhibit 51:

> Q. [By Mr. Hazlett] And to your knowledge you yourself did not order anybody else in your office to prepare that document?
>
> A. **[By the Respondent] What I asked my staff to do was try to identify adult patients** and the adult traveling companions. How they did that was up to them.
>
> Q. But you didn't specifically you yourself order that this document be prepared?
>
> A. Well, what I'm saying is my direction could encompass them excluding adult patients to make sure to identify children, but I don't know why they did that. I mean, you'd have to ask Mr. Reed or Mr. Williams why the decision to approach the effort to identify children included that spreadsheet.

(Transcript, p. 357).

130. Furthermore, before the Kansas Supreme Court, Mr. Rucker argued that the Attorney General's office was not seeking to identify adult abortion patients. (Disciplinary Administrator's Exhibit 57; Transcript, p. 1133).

131. However, the spreadsheet found at Disciplinary Administrator's Exhibit 51, in its unredacted form, contains names of motel registrants, who received a medical discount, and who are from the same home town as a person who had an abortion at WHCS on that same date. (Disciplinary Administrator's Exhibit 51).[5]

132. Subsequently, Mr. Rucker acknowledged that the Attorney General's office attempted to identify adult abortion patients' names. (Transcript, pp. 1075-76, 1081-82). During Mr. Rucker's own attorney disciplinary proceeding, he stipulated to the following:

> [Mr. Rucker] admits that a thorough inquiry by him of personnel of the Attorney General's Office would have disclosed that an investigator named Jared Reed at the Attorney General's Office had prepared a spreadsheet to identify potential adult patients by attempting to match KDHE records with records obtained from La Quinta Inn, which attempt produced 221 potential matches.

(Transcript, pp. 1081-82). Additionally, before the Hearing Panel in the instant case, Mr. Rucker acknowledged that the Attorney General's office made "an effort to identify potential adult patient" names. (Transcript, pp. 1075-76).

[5]The Kansas Supreme Court previously found that the Respondent did seek adult patient names. (Disciplinary Administrator's Exhibit 87, p. 1923).

133. Mr. Williams directed Mr. Reed to compare the KDHE records and the La Quinta Inn & Suites records and develop a spreadsheet in an attempt to match the records and thereby identify adult patient names. (Transcript, pp. 1157-58).[6] The spreadsheet found at Disciplinary Administrator's Exhibit 51 evidences an attempt to identify patients who were 16 years of age and older. (Disciplinary Administrator's Exhibit 51).

134. On March 3, 2005, the Respondent filed a brief in *Alpha*. (Disciplinary Administrator's Exhibit 71). Mr. Rucker, Mr. Maag, Mr. Maxwell, and Mr. Ailslieger signed the brief. (Disciplinary Administrator's Exhibit 71, p. 793). The Respondent did not sign the brief. (Disciplinary Administrator's Exhibit 71, p. 793). Mr. Maag testified that it was not the custom for the Attorney General to sign appellate briefs. Specifically, Mr. Maag stated as follows when questioned by Mr. Karlin:

> Q. [By Mr. Karlin] Both counsel asked you about the signature page on the brief?
>
> A. [By Mr. Maag] Yes.
>
> Q. And I think the question by Mr. Holbrook was whether the Attorney General typically does not sign and you said typically the Attorney General would not sign. Are you

[6]The Hearing Panel heard testimony from the Respondent, Mr. Rucker, Mr. Maxwell, Mr. Williams, and Mr. Reed regarding whether the Respondent and his office sought to identify adult patients. Much of the testimony was conflicting. Based upon the demeanor of the witnesses and other compelling evidence, the Hearing Panel finds that Mr. Reed's testimony, found at pages 1147 through 1162 of the transcript of the hearing on the formal complaint, was most credible. Further, Mr. Williams did not deny directing Mr. Reed to compare the KDHE records with the La Quinta Inn & Suites records and develop a spreadsheet in an attempt to identify patients 16 years of age and older. Rather, Mr. Williams testified that he "did not recall" giving that direction to Mr. Reed. (Transcript, p. 813).

aware of any instances where the Attorney General would have signed a brief before one of the appellate courts?

A. I can tell the Attorney General's name is already on every criminal brief that goes before the court by law, that's statutory. So whoever the Attorney General is at the time their name is on it and we have to do an approval stamp with that. So the name is already on the actual brief.

This was a unique situation where this was not the typical type of brief. The Attorney General was named as a respondent and the issue obviously resolved itself by having us sign it instead of Mr. Kline.

Q. I'm asking about signatures. When you say the Attorney General's name is on there, is it a stamp showing his signature?

A. No. Usually the county attorney will have a signature block with the Attorney General's name on it already.

Q. But the Attorney General himself or herself does not physically sign the brief typically?

A. No.

Q. Are you aware of the Attorney General himself or herself ever signing a brief?

A. Not-- not before the Kansas Supreme Court, no.

Q. Or the Kansas Court of Appeals?

A. No.

(Transcript, pp. 1030-31).

135. Despite the order of the Kansas Supreme Court of February 14, 2005, directing that the parties could file their briefs publicly but that the record would remain under seal, the

Respondent directed his assistants to attach three items from the record to the brief: (1) redacted copies of the inquisition subpoenas issued to the clinics, (2) a transcript of the hearing held on October 5, 2004, in the inquisition case, before Judge Anderson on the clinics' motions to quash the subpoenas, and (3) the district court's memorandum decision and order issued October 21, 2004, denying the clinics' motions to reconsider the order denying the motions to quash subpoenas. (Disciplinary Administrator's Exhibit 71, pp. 796-897; Transcript, pp. 373-76, 991).

136. At the hearing on the Formal Complaint, the Respondent testified in detail regarding the discussions surrounding the filing of his brief and attachments in *Alpha*. (Transcript, pp. 374-87).

137. The Respondent testified that he thought the transcript was no longer a sealed document and that it was important to make it public, "[f]or people to understand the arguments, the Court and others, certainly." (Transcript, p. 375). The Respondent further testified, "I know the brief was public and it was filed publically [*sic*]." (Transcript, p. 376). Finally, the Respondent testified that, "Judge Anderson stated it did not violate his protective order." (Transcript, pp. 374, 379).

138. The Respondent acknowledged that Judge Anderson had previously provided the transcript to the Kansas Supreme Court, as an attachment to his response to the clinics' petition for writ of mandamus. (Transcript, pp. 387-89, 407-08). However, Judge Anderson's filing was under seal. (Disciplinary Administrator's Exhibit 138; Transcript, pp. 642-44).

139. On further examination, the Respondent acknowledged Judge Anderson's actual ruling which does not purport to address whether the Attorney General's actions in attaching the transcript, redacted subpoenas, or any other document to the public record in the mandamus constitutes a violation of the Kansas Supreme Court's mandate relative to sealing the appeal record. (Transcript, pp. 396-97). The Respondent asserted, however, that Judge Anderson's conclusion was that the nondisclosure order "was mooted by the clinic's filing of their brief, which was prior to our filing." (Transcript, p. 397).

140. Mr. Maag testified that it was ultimately the Respondent's decision to attach the transcript after discussions in the Attorney General's office regarding the Respondent's frustration as to getting his position out to the press. (Transcript, pp. 991, 1041).

141. After the brief was filed, the Respondent held a press conference. During the press conference, the Respondent discussed the brief, its contents, and its attachments. (Transcript, pp. 2100-02). Following the press conference, the Respondent's communications director provided an electronic copy of the October 5, 2004, transcript of the motion to quash subpoena hearing held before Judge Anderson in the inquisition case to anyone who asked. (Disciplinary Administrator's Exhibit 72, p. 916).

142. The redacted copies of the inquisition subpoenas issued to the clinics were confidential by virtue of Judge Anderson's nondisclosure order. (Disciplinary Administrator's Exhibit 71, p. 800; Transcript, pp. 644-45). Further, when the Respondent's assistants initially requested that subpoenas be issued, the subpoenas contained language which allowed the

Respondent's office to disclose information regarding the subpoena. (Transcript, p. 641). Prior to issuing the subpoenas, Judge Anderson changed that language. The nondisclosure order provided: "[t]he existence of this subpoena and any records produced pursuant to such are to remain confidential and not to be disclosed to any other person or entity." (Disciplinary Administrator's Exhibit 71, p. 800). The nondisclosure order required a court order for disclosure and applied not only to the clinics but also to the Attorney General's office. (Respondent's Exhibit T3; Transcript, p. 641).

143. Further, the transcript of the hearing held on October 5, 2004, before Judge Anderson on the clinics' motions to quash the subpoenas and the district court's memorandum opinion issued October 21, 2004, denying the clinics' motions to reconsider the order denying the motions to quash subpoenas were likewise sealed. (Transcript, p. 375).

144. By attaching the subpoenas, the transcript, and the memorandum opinion to his brief, the Respondent made public, these three items of the district court's record, in violation of the Kansas Supreme Court's order that the record remain under seal. (Disciplinary Administrator's Exhibit 71).

145. Neither the Respondent nor any of his assistants sought or obtained permission from Judge Anderson to attach confidential documents to the brief in *Alpha*. (Transcript, pp. 639-40).

146. On April 11, 2005, the clinics filed a joint motion that the Respondent be held in contempt of court for (1) attaching the transcript of the October 5, 2004, hearing to his brief,

(2) attaching the memorandum and order from October 21, 2004, to his brief, and for (3) openly discussing his brief and the attachments at a press conference. (Disciplinary Administrator's Exhibit 72, p. 915). The Kansas Supreme Court issued an order to show cause to the Respondent. (Disciplinary Administrator's Exhibit 72, p. 915).

147. The Respondent filed a response to the Kansas Supreme Court's order to show cause. (Disciplinary Administrator's Exhibit 72, p. 916). The Kansas Supreme Court later recounted the Respondent's response. (Disciplinary Administrator's Exhibit 72, p. 916).

> In his initial response to this court's Order to Show Cause, the attorney general contended that the documents attached to his brief were "but a very small fraction of the entire record before the lower court in the inquisition; we attached only what we believed necessary to support our arguments in this segment of the proceedings." As for the news conference, Kline asserted that he "stressed the privacy protections put in place by the lower court and the law to prevent public disclosure of the medical records sought. . . . I did not refer to the transcript of the lower court's hearing, nor did I provide it at the news conference. Later that day, my communications director, after our brief had been filed, provided the transcript electronically to those who requested a copy." **He argued that "it was seemingly inconsistent to keep those pleadings under seal while at the same time suggesting that oral argument was likely." Kline also argued that the press conference was "necessitated by the false impression left by the public filing of Petitioners' brief and [Petitioners'] representation of the record."**

Alpha, 280 Kan. at 928. (Disciplinary Administrator's Exhibit 72, p. 916 (emphasis added)).

148. On September 8, 2005, the Kansas Supreme Court held oral arguments in *Alpha*. (Disciplinary Administrator's Exhibit 57). Mr. Rucker and former Attorney General Robert T. Stephan appeared on behalf of the Respondent. (Disciplinary Administrator's Exhibit 72, p.

917). Mr. Rucker addressed the substantive underlying issues from the action in mandamus. Mr. Stephan's appearance was limited to representing the Respondent regarding the order to show cause why the Respondent should not be held in contempt of court. (Disciplinary Administrator's Exhibit 57, p. 635).

149. The Respondent listened to the arguments over the Internet. (Transcript, p. 429). The following exchanges between the Kansas Supreme Court and Mr. Rucker occurred during the argument.

> JUSTICE BEIER: For minors where obviously there's been sexual intercourse, just like there's been sexual intercourse in the case of an abortion, you have subpoenaed hospitals?
>
> MR. RUCKER: We have not. We have investigated, which I believed was your question, not subpoenaed –
>
> JUSTICE ALLEGRUCCI: Subpoena was next, if you investigate.
>
> MR. RUCKER: We have not subpoenaed.
>
> JUSTICE BEIER: How about teachers, how about all the mandatory reporters under the statute, have you subpoenaed any of these people or entities?
>
> MR. RUCKER: Again –
>
> JUSTICE BEIER: Have you or have you not?
>
> MR. RUCKER: The nature of our investigation –
>
> JUSTICE BEIER: Yes or no, sir?
>
> MR. RUCKER: – is secret. Okay.

JUSTICE BEIER: Sir, I asked you a yes or no question.

MR. RUCKER: I understand.

JUSTICE BEIER: Can you answer, please?

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

JUSTICE BEIER: Have you subpoenaed entities who are mandatory reporters like the abortion clinics that you have subpoenaed in this inquisition?

MR. RUCKER: At this juncture the answer is no.

JUSTICE BEIER: Thank you.

MR. RUCKER: That – but I do wish to indicate to the Court that we are investigating. This investigation is not at a conclusion and it has not been limited to abortions. It has been limited not to abortions, but other live births.

JUSTICE LUCKERT: Why is identity important to the investigation at this stage?

MR. RUCKER: As I previously indicated to the Court, the Attorney General and the State of Kansas are not pursuing the identity of any adult woman who has obtained services by either of the clinics, nor will we ask for that identity. The children, however, Justice Luckert, are far different. The children are victims of either rape, incest, or other sexual felonies. We must investigate these child crimes. We must put all of our investigative efforts into full motion to fully prosecute these cases, and without specific facts as it relates to who these children are, we would not be able to do so.

. . .

> JUSTICE ALLEGRUCCI: Let me – so I'm clear when I asked you about independent investigation, has your independent investigation seemed to want to know the names of these children, but you seem to imply –
>
> MR. RUCKER: We do want to know.
>
> JUSTICE ALLEGRUCCI: – through your investigation you already knew the names or at least you knew to the extent that your evidence pointed towards the abortion clinic of these particular individuals who had abortions is that true or not?
>
> MR. RUCKER: It is true.
>
> JUSTICE ALLEGRUCCI: So you have actual evidence, you already know who these children are?
>
> MR RUCKER: No, we do not. Let me explain.

(Disciplinary Administrator's Exhibit 57, pp. 646-48, 653).

150. After Mr. Rucker returned to the Respondent's office, the Respondent and Mr. Rucker discussed the oral argument. (Transcript, p. 1057-58). The Respondent filed two motions to clarify Mr. Rucker's argument. (Disciplinary Administrator's Exhibits 126 and 127). Mr. Rucker did not agree that his oral argument needed to be "clarified." (Transcript, pp. 1058, 1064).

151. In one of the motions to clarify, the Respondent stated that he did not need to designate the physician chosen to review the medical records and that he had no qualms with the district court appointing the physicians, but that he did not want the clinics to appoint the physicians. Additionally, the Respondent clarified that he did not oppose the redaction of all identifying information from the medical records. Finally, the Respondent indicated that he

would not oppose the implementation of a protective order by the district court. (Disciplinary Administrator's Exhibit 127).

152. The other motion, also titled motion to clarify, provided as follows:

> 1. As part of this criminal investigation and/or inquisition, respondent 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.
>
> 2. At oral argument, counsel was unable to directly and adequately respond to the questions from the bench specifically relating to this topic because of the secret nature of the criminal investigation and inquisition and the existence of a do not disclose order relating to the subpoenas of live birth records.

(Disciplinary Administrator's Exhibit 126). As the Kansas Supreme Court pointed out in its opinion, the Respondent's motion "changed" rather than "clarified" the Respondent's position. *Alpha*, 280 Kan. At 912-13. (Disciplinary Administrator's Exhibit 72, p. 905 and Exhibit 126).

153. Regarding paragraph 1 of the second motion to clarify, Mr. Rucker testified that the Respondent's reference to seeking "records and information from other mandatory reporters" and "subpoenas for records relating to live births involving mothers under the legal age of sexual consent" was a reference to subpoenas issued to KDHE. (Disciplinary Administrator's Exhibit 126; Transcript, p. 1062). KDHE was not and is not listed as a mandatory reporter in K.S.A. 38-1522 and K.S.A. 38-2223. At that time, Mr. Rucker's opinion was that KDHE was not a mandatory reporter. (Transcript, pp. 1063, 1068). Mr. Rucker

testified that the Respondent stated that it was the Respondent's legal opinion that KDHE was a mandatory reporter. (Transcript, pp. 1062-63, 1068, 1071).

154. At the hearing on this matter, the Respondent testified in great detail regarding what transpired regarding the filing of the motions to clarify.

> A. [By the Respondent] . . . And it left a general impression we had not issued subpoenas. So I – and in this motion to clarify every word of it was true. We supplemented the record consistent with the protective order informing the Court we had subpoenaed, . . .
>
> . . .
>
> Q. [By Mr. Hazlett] Yeah, the Court said that we're not sure what led Mr. Rucker to be less than forthright. That is stated in the Alpha Beta opinion, is it not?
>
> A. And that is an inference about his veracity.
>
> Q. Doesn't the Court make that statement in response to the motion to clarify that you filed?
>
> A. Yes they drew false inferences, both are true.
>
> Q. If that motion had never been filed they would not have found that Mr. Rucker – or concluded that Mr. Rucker wrongfully or rightfully had given the courts – the Court incorrect information?
>
> A. They drew a false inference and I feel terrible about that. But both are true, they drew a false inference.
>
> . . .
>
> Q. Okay. Then after the quoted portions of the motion to clarify argument that's – that's the statement that you indicated you felt terrible about that the Court found, "It

is evident that at least in the Attorney General's judgment whatever order allegedly compelled Rucker to be less than forthright in his answers to this Court's on December 8th, 2005, . . .

. . .

Q. But that's what the – that's what the Court concluded?

A. Yes, the Court inferred wrongly. If you look at what was said and what is in this –

Q. I know you take the position what you said in the motion to clarify was – was truthful?

A. Yes.

Q. But what happened was when the Court viewed that they, obviously from what they held, took it to mean that you needed to clarify something that Mr. Rucker said?

A. I needed to clarify that we had subpoenaed information relating to other mandatory reporters.

Q. And who was that, what other mandatory –

A. Kansas – okay. We needed to subpoena information relating to other mandatory reporters. It's not a subpoena of mandatory reporters. It's a subpoena of the repository of that information and that is Kansas Department of Health and Environment because they have the names. They have the birth certificates which lists what might be the victim and also lists who might be the perpetrator. The abortion records do not. At KDHE they do not. So we approached it differently. But we could not reveal that it was a KDHE subpoena. And the Court incorrectly inferred that Mr. Rucker's statement and my statement are in opposite and are not. We were trying to get the Court information and I guess it was a mistake to try to get the Court information to understand

the context. But it was not an untruthful statement. Every word in this motion to clarify is true.

Q. Do you believe KDHE was a mandatory reporter?

A. I don't believe so.

Q. Did you believe so at the time?

A. I don't believe I did at the time. . . .

Q. Well, Mr. Rucker did state that. In fact, he stated that this motion to clarify argument was filed because of your belief that KDHE was a mandatory reporter?

A. Well, I differ with him on that.

. . .

Q. Looking at your motion to clarify you say, in paragraph number one, "As part of this criminal investigation and our inquisition, respondent 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, "Respondent has sought records and other information from other mandatory reporters." And we did that by going to the repository, which is KDHE, which I could not mention in this motion to clarify because of the nondisclosure order. That's the second sentence.

Q. Second sentence, "This effort has included subpoenas for records relating to live births involving mothers under the legal age of sexual consent."

A. That is true.

Q. That's a true statement?

A. Absolutely. That's the information we gathered and distributed.

. . .

Q. [By Mr. Chubb] I just wanted to clarify on that motion to clarify, paragraph one, I think you said KDHE is not a mandatory reporter, is that your testimony?

A. [By the Respondent] I recall a discussion about whether they are.

Q. I just want to know is KDHE –

A. Right now I don't believe they are.

Q. Okay.

A. I don't remember what I believed then.

(Transcript, pp. 432-33, 436-37, 440-43, 447-49, and 451).[7]

155. Mr. Rucker did not agree with the Respondent that the motions to clarify needed to be filed because Mr. Rucker believed he accurately answered the Kansas Supreme

[7]Where there are conflicts in the testimony of Mr. Rucker and the Respondent, based upon observations of demeanor during the hearing, and other evidence, the Hearing Panel concludes that Mr. Rucker's testimony was more credible.

Court's questions. (Transcript, pp. 1058, 1072). Further, Mr. Rucker did not sign, author, or ratify the language used in the second motion to clarify. (Transcript, pp. 453, 1068, 1072).

156. The Kansas Supreme Court was left with Mr. Rucker's argument and the motion to clarify. (Disciplinary Administrator's Exhibits 57 and 126).

157. On February 3, 2006, the Kansas Supreme Court issued its opinion in *Alpha*. The Court specifically addressed the matters raised in the Respondent's second motion to clarify. The Court stated:

> After oral argument on September 8, 2005, the attorney general's office filed two Motions to Clarify statements made by Rucker earlier that day.
>
> One of the motions states that the attorney general "has no qualms with" the district court, rather than the attorney general, selecting the physician who would do the initial in camera review of the patient files. The attorney general "simply opposes said physician(s) being appointed by petitioners who are the targets of the criminal investigation." This motion also states that the attorney general does not oppose redaction of all patient-identifying information before the district court's special counsel and physician perform the in camera review, although it asserts that Judge Anderson will need to be provided with the redacted information "in order to cross-reference the files with records and evidence from other sources."
>
> The other motion, despite its caption, changes rather than clarifies certain statements made by Rucker in response to questions from members of this court during oral argument. It states in pertinent part:
>
> > "1. As part of this criminal investigation and/or inquisition, respondent 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.
>
> "2. At oral argument, counsel was unable to directly and adequately respond to the questions from the bench specifically relating to this topic because of the secret nature of the criminal investigation and inquisition and the existence of a do not disclose order relating to the subpoenas of live birth records."
>
> It is evident that, at least in the attorney general's judgment, whatever order allegedly compelled Rucker to be less than forthright in his answers to this court's questions on September 8, 2005, had either been lifted or dissipated or overcome by a competing priority by mid-October 2005, when Kline called a press conference and announced that he had obtained the birth records of 62 babies born to girls younger than 16. The mechanism by which Kline obtained these records remains somewhat unclear, as does the reason for and timing of the press conference.

Alpha, 280 Kan. at 912-13. (Disciplinary Administrator's Exhibit 72, p. 905).

158. In the Kansas Supreme Court's opinion, the Court concluded that some court order "compelled Rucker to be less than forthright in his answers to this court's questions on September 8, 2005." *Alpha*, 280 Kan. at 912. (Disciplinary Administrator's Exhibit 72, p. 905).

159. Contrary to the first paragraph of the motion to clarify, the Attorney General's office had not sought records **from** other mandatory reporters. At that time, the Attorney General's office had received records from only SRS and KDHE. (Disciplinary Administrator's Exhibits 15, 16, 20, 21, 26; Respondent's Exhibit P2). Neither SRS nor KDHE are mandatory reporters. (K.S.A. 38-1522 and K.S.A. 38-2223). The Kansas Supreme Court was not misled **by**

Mr. Rucker. Mr. Rucker's statements were accurate and he was not "less than forthright" with the Kansas Supreme Court.

160. At the hearing on the Formal Complaint, the Respondent testified that he did subpoena mandatory reporters because (1) he subpoenaed KDHE and (2) KDHE was a repository of information from mandatory reporters. (Transcript, pp. 441-42). The Respondent's argument is not well received by the Hearing Panel. While some of the information contained in the SRS and KDHE records that the Attorney General's office received from SRS and KDHE had originally been provided to SRS and KDHE by other mandatory reporters, that is not what the Respondent said to the Kansas Supreme Court in the motion to clarify.

161. Following the Court's release of the *Alpha* opinion, the Respondent never sought to correct the Court's misapprehension of Mr. Rucker's statements created by the motion to clarify. (Transcript, pp. 453-54).

162. Regarding the underlying substantive matters that were pending in the mandamus action, the Court concluded as follows:

> . . . Judge Anderson also stated that "presumed flaws" in the attorney general's interpretation of the criminal abortion or mandatory child abuse reporting statutes would not prevent production of the files called for in the subpoenas. In essence, this statement adopted senior assistant attorney general Maxwell's position that any error in the attorney general's interpretation was irrelevant. We disagree. To hold otherwise could prevent exactly the abuse of prosecutorial power the courts must be vigilant to prevent. To the extent the inquisition rests on the attorney general's ignorance, disregard, or misinterpretation

of precedent from the United States Supreme Court, subpoenas pursuant to the inquisition cannot be allowed.

For example, the United States Supreme Court has long held, and continues to hold that, in order to be constitutional, state restrictions on abortions must include exceptions to preserve both the life and health of the pregnant woman. . . . The attorney general has said he disagrees with requiring an exception to preserve the pregnant woman's mental health. Until the United States Supreme Court or the federal Constitution says otherwise, however, the mental health of the pregnant woman remains a consideration necessary to assure the constitutionality of the Kansas criminal abortion statute. Judge Anderson was not free to decide the subpoenas should issue in the first place or whether the petitioners' motion to quash should be denied without considering the soundness of any legal interpretations on which the attorney general depends. This is true of any district judge who passes on an inquisition application or associated subpoenas.

. . .

In sum, Judge Anderson must withdraw his order and first evaluate the inquisition and subpoenas in light of what the attorney general has told him regarding his interpretation of the criminal statutes at issue. If the judge requires additional information in order to perform this evaluation, he should seek it from the attorney general in the inquisition proceeding. As targets of the investigation, petitioners need not be included in any hearing or other communication to enable this evaluation.

Only if Judge Anderson is satisfied that the attorney general is on firm legal ground should he permit the inquisition to continue and some version of the subpoenas to remain in effect. Then he also must enter a protective order that sets forth at least the following safeguards: (1) Petitioners' counsel must redact patient-identifying information from the files before they are delivered to the judge under seal; (2) the documents should be reviewed initially in camera by a lawyer and a physician or physicians appointed by the court, who can then advise the court

> if further redactions should be made to eliminate information unrelated to the legitimate purposes of the inquisition. This review should also determine whether any of the files demonstrate nothing more than the existence of a reasonable medical debate about some aspect of the application of the criminal abortion and/or mandatory child abuse reporting statutes, which the attorney general's office has already acknowledged would not constitute a crime. If so, those files should be returned to petitioners; and (3) any remaining redacted files should be turned over to the attorney general.

Alpha, 280 Kan. at 923-25. (Disciplinary Administrator's Exhibit 72, pp. 913-14).

163. Regarding the Respondent's direction to attach confidential documents to his brief and discussion of his brief and the attachments at a press conference, the Kansas Supreme Court addressed the Respondent's initial response as well as his attorney's presentation at oral argument.

> Kline's initial responses were troubling. He admitted that he attached sealed court records to a brief he knew would be unsealed; that he did so knowingly because, in his sole estimation, he believed it to be necessary to further his arguments; that he held a press conference on this criminal matter merely because he determined that petitioners had painted his previous actions in an unflattering light; and that he later permitted his staff to provide electronic copies of the sealed transcript to anyone who requested them. **In essence, Kline has told this court that he did what he did simply because he believed that he knew best how he should behave, regardless of what this court had ordered, and that his priorities should trump whatever priorities this court had set.** Furthermore, although there is conflict between the parties on exactly what was said in the press conference, *i.e.* whether the actual content of the sealed documents was discussed, Kline's stated reason for holding the conference – to combat what he saw as unflattering earlier press coverage – does not appear to be among the permissible reasons for an attorney in his position to engage in

> extrajudicial statements under Kansas Rule of Professional Conduct 3.6 (2005 Kan. Ct. R. Annot. 473). This too is troubling.
>
> At oral argument before this court, Kline's lawyer, a former four-term attorney general, wisely altered the tone of Kline's response. He characterized whatever mistakes Kline may have made as honest ones and said his client was acting in good faith. He also, as Kline eventually had done for himself in his written response, 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.

Alpha, 280 Kan. at 928-29 (emphasis added). (Disciplinary Administrator's Exhibit 72, pp. 916-17).

164. Ultimately, the Court concluded 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. . . .
>
> This is a highly unusual case, the first in memory when this court has required public briefs and oral argument on a sealed record. Although we believe this directive was more challenging than confusing, and although the actions complained of here might well be characterized as criminal contempt in a different case, we are inclined to grant the attorney general the benefit of the doubt here. This is an unusually high-profile case attracting keen public interest throughout the state. **We caution all parties to resist any impulse to further publicize their respective legal positions, which may imperil the privacy of the patients and the law enforcement objectives at the heart of this proceeding.**

Alpha, 280 Kan. at 929-30 (emphasis added). (Disciplinary Administrator's Exhibit 72, p. 917).

165. Meanwhile, on January 27, 2006, the United States Court of Appeals for the 10th Circuit concluded that the medical providers had not established a substantial likelihood of success on the merits in the *Aid for Women* case. (Document 124). Additionally, the 10th Circuit Court of Appeals concluded that the District Court abused its discretion by failing to adequately analyze issues of irreparable injury, balance of harms, and public interest. *Aid for Women v. Foulston*, 441 F.3d 1101, 1120-21 (2006). (Document 124). The 10th Circuit Court of Appeals vacated the preliminary injunction and remanded the case for further proceedings. (Document 124).

166. Thereafter, the United States District Court for the District of Kansas held a bench trial in *Aid for Women v. Foulston*. (Document 125). Following trial, the Court concluded that applying the mandatory reporting statute to require reporting of all consensual underage sexual activity violated minors' limited right of informational privacy, the application of the statute in that fashion would cause irreparable harm, the threatened injury from such application outweighed harm to Kansas' interest in reporting sexual abuse, and a permanent injunction would not adversely affect public interest. (Document 125). As a result, on April 18, 2006, the Court issued a permanent injunction. *Aid for Women v. Foulston*, 427 F. Supp. 2d 1093 (2006). (Document 125). The Kansas County and District Attorneys appealed the Court's issuance of the permanent injunction to the 10th Circuit Court of Appeals. (Document 126).

167. The Kansas legislature repealed the reporting statute found at K.S.A. 38-1522, effective January 1, 2007. (Document 126).

168. Following the repeal of K.S.A. 38-1522, the medical providers filed a motion to dismiss the appeal pending before the 10th Circuit Court of Appeals. (Document 126). The 10th Circuit Court of Appeals granted the medical providers' motion to dismiss, declaring that the matter was rendered moot by the repeal of K.S.A. 38-1522. (Document 126). The 10th Circuit Court of Appeals vacated the permanent injunction and remanded the case to the District Court with instructions to dismiss the case without prejudice. *Aid for Women v. Foulston*, 2007 WL 6787808 (10th Cir. Kan. 2007). (Document 126).

169. After the Kansas Supreme Court handed down the decision in *Alpha*, on March 28, 2006, Mr. Maxwell and Mr. Williams appeared before Judge Anderson to establish that the Attorney General's office was on "firm legal ground." (Disciplinary Administrator's Exhibit 74, pp. 982-83). During that hearing, Mr. Maxwell questioned Mr. Williams regarding the investigation. Specifically, Mr. Williams testified as follows:

> A. [By Mr. Williams] We tried to get it down to a workable number and look at the most – what I would consider the most egregious situations that would clearly fall into those categories.
>
> Q. [By Mr. Maxwell] Such as I believe there was an example of a ten-year-old getting a late-term abortion. She was ten at the time of the abortion, which she either [*sic*] early ten or nine years old at the time of the pregnancy?
>
> A. She was from California. She was late term. I can – that record, I think, is included among this 90. But I think it was a late-term like 28 or 30 weeks, also.
>
> Q. Okay. And then you took the – what you determined was the most obvious examples of what you were looking at

> and then asked the Court for specific numbers of patient files based on the reports to KDHE using an identification number?
>
> A. That is correct.
>
> . . .
>
> THE COURT: I believe you could ascertain and did represent to the Court that with respect to the instance of the ten-year-old, you found no report that appeared to match at all?
>
> THE WITNESS: I couldn't find anything that matched, Your Honor.

(Disciplinary Administrator's Exhibit 74, pp. 937, 942).

170. However, on March 9, 2005, a year previous, Mr. Williams contacted the authorities in Sacramento County, California, and learned that the abuse had been reported in California and that the perpetrator of the sexual abuse had been successfully prosecuted. (Disciplinary Administrator's Exhibit 47).

171. On March 28, 2006, neither Mr. Maxwell nor Mr. Williams informed Judge Anderson that the abuse had been reported in California or that the perpetrator of the sexual abuse had been successfully prosecuted. (Transcript, pp. 650-53).

172. On May 23, 2006, Judge Anderson entered an amended protective order, setting out in detail the protective steps he deemed necessary to comply with the *Alpha* mandate. (Disciplinary Administrator's Exhibit 75 and Exhibit 90, p. 2006).

173. CHPP and WHCS redacted patient-identifying information and produced the records required by the subpoenas. (Disciplinary Administrator's Exhibit 90, p. 2006). An

attorney and two physicians appointed by Judge Anderson reviewed the records *in camera* to be sure that the records had been properly redacted. (Disciplinary Administrator's Exhibit 90, p. 2006).

174. On October 24, 2006, Judge Anderson provided the Respondent's office with the redacted patient medical records from CHPP and WHCS. (Disciplinary Administrator's Exhibit 90, pp. 2007, 2009).

175. The Respondent sought re-election to the post of Kansas Attorney General in 2006. (Transcript, p. 498).

176. *The O'Reilly Factor* is a national cable news show, hosted by Bill O'Reilly, and is aired on the Fox News Channel. On November 3, 2006, just four days before the election, the Respondent appeared on *The O'Reilly Factor*. The following are excerpts from that show.

> MR. O'REILLY: Hi, I'm Bill O'Reilly reporting tonight from Boston. Thank you for watching us. Killing babies in America. That's the subject of this evening's Talking Points Memo. For more than a year, the Factor has been investigating Dr. George Tiller of Kansas. For $5,000, Tiller, the Baby Killer, as some call him, will perform a late-term abortion for just about any reason. In Kansas, the law says that abortions are legal after 22 weeks, when a baby in the womb becomes viable only if there is a quote "irreversible impairment of a major bodily function of the pregnant woman" unquote. Now, that's a pretty high bar, but there is the mental health exception and that is where Dr. Tiller lives. The Factor has learned that a mental health exception can be just about anything. However, we needed to prove that. So, we tried to get Tiller's records. We could not. He cited patient confidentiality. And month after month we were frustrated. But now the Factor has evidence that indicates Tiller killed late-term fetuses by citing temporary depression on the part of the mother. That was the reason Tiller performed scores, perhaps thousands,

of late-term abortions. Temporary depression could mean anything. So what we have here in Kansas is a doctor who will terminate a pregnancy at any time for a reason that is vague and undefined. . . .

. . .

MR. O'REILLY: Now, in addition to Tiller's late-term abortion mill, the Factor has obtained information that his clinic and another in Kansas are violating the law. Dozens of abortions have been performed in that state on girls ages 10 to 15, some of them by Tiller. Ten to fifteen. And those abortions were not reported to authorities as required by law. . . .

. . .

MR. O'REILLY: Continuing now with our lead story, late-term abortions and child rape going unreported in Kansas. Joining us from Topeka, Kansas Attorney General Phill Kline who's locked in a pretty tight election here next Tuesday. Ms. Richards, and again, we respect her coming in. We couldn't disagree with her more, but she did come in. She doesn't believe what I just said. All right. And you're the Attorney General of the state. Should she believe me?

MR. KLINE: Well, absolutely. One of the first steps of a rapist, when they have a child victim, and the child is pregnant, is to eradicate evidence of the rape. And that means stopping in at an abortion clinic. And I think it's an absurdity to argue that the privacy of the child, which has already been violated by a rapist, prohibits law enforcement, after they present evidence to a judge, which is what happened in all of these cases and the judge found probable cause to believe the crimes had been committed and subpoenas records, somehow that they cannot reveal that information –

MR. O'REILLY: Okay.

MR. KLINE: – and the child rapist is able to go free.

MR. O'REILLY: Now, on the other hand we have Tiller, who is - - our information shows aborting late-term unborn babies, because the mother is depressed. Should Ms. Richards believe me when I say that?

MR. KLINE: Well, what I can confirm as it relates to our investigation, Bill, is that we have received the medical records in question. First of all, it's important for your listeners to know that women were never under investigation. Their identity never sought. There will be no invasion of privacy. But 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. We have obtained those records. In every single instance there was not a late-term abortion performed on a viable child to save the life of the mother. And in every single instance, there was not an abortion performed for a physical reason. So, from that you can infer, as I guess that you have, regarding the reason for the late-term abortion.

MR. O'REILLY: Yeah. Our information says that on almost every medical sheet, and obviously we have a source inside here, it says depression.

MR. KLINE: Well, let me tell you what - -

MR. O'REILLY: So I don't know whether you have that information or not, I don't know, but that's what it says. So what we have here –

MR. KLINE: Well, –

MR. O'REILLY: – is a horrendous, horrendous situation. I [*sic*] the state of Kansas. Now, *The Kansas City Star* and the *Wichita Eagle* oppose you, have attacked you, are asking for you to be defeated. And I am stunned because you want to stop these two situations. And I guess these newspapers are like Ms. Richards, they're fine with it.

MR. KLINE: It is rather shocking, especially when you consider the tragedies that have been visited upon the city of Wichita. . . .

MR. O'REILLY: Let me ask you one more question. . . . Is this just far left stuff gone insane? Is that the way you see it?

MR. KLINE: Yeah. There's a deception being perpetrated in Kansas and on America. And that is, that we cannot recognize any value at any time in an unborn child. And, therefore, we have to cover up that deception by not admitting at any time that there ought to be any scrutiny fro what is happening inside abortion clinics. And as a result, they can be safe havens for child rapists.

MR. O'REILLY: All right.

MR. KLINE: As a result, illegal late-term abortions can be performed and nobody has the right to look inside the clinic. That is wrong.

MR. O'REILLY: All right.

MR. KLINE: My job is to enforce the law. That's what I'll do.

MR. O'REILLY: Good luck on Tuesday. Mr. Kline, thank you.

(Respondent's Exhibit V5).

177. The Respondent's statements on *The O'Reilly Factor* followed the Kansas Supreme Court's admonition in *Alpha*:

> . . . We caution all parties to resist any impulse to further publicize their respective legal positions, which may imperil the privacy of the patients and the law enforcement objectives at the heart of this proceeding.

Alpha, 280 Kan. at 930. (Disciplinary Administrator's Exhibit 72, p. 917).

178. On November 5, 2006, the redacted patient medical records were left in the Respondent's locked office overnight. The next day, when that was discovered, the redacted patient medical records were returned to a locked storage area. (Disciplinary Administrator's Exhibit 90, p. 2040).

179. The Respondent lost the November 7, 2006, election to Paul Morrison. (Transcript, p. 498). At the time Mr. Morrison ran for the Kansas Attorney General, he was serving as the Johnson County District Attorney. (Transcript, pp. 160, 170-71).

180. On November 10, 2006, Dan Monnat filed a complaint with the Disciplinary Administrator's office regarding the Respondent's conduct. (Disciplinary Administrator's Exhibit 1). Thereafter, the Disciplinary Administrator received additional complaints regarding the Respondent's conduct. (Disciplinary Administrator's Exhibits 2-4).

181. Following the Respondent's defeat, the Respondent contacted the Johnson County Republican Central Committee and indicated his interest in completing Mr. Morrison's term as the Johnson County District Attorney. (Transcript, pp. 499, 665-66, 756). Later, on December 11, 2006, the Johnson County Republican Central Committee selected the Respondent to complete Mr. Morrison's term as the Johnson County District Attorney. (Disciplinary Administrator's Exhibit 90, p. 2019; Transcript, pp. 170-71).

182. On January 5, 2007, Judge Anderson and Mr. Maxwell discussed the inquisition record. Judge Anderson directed Mr. Maxwell to provide an accounting of distribution and

current location of all copies of the redacted patient medical records. (Disciplinary Administrator's Exhibit 80, p. 998, Exhibit 82).

183. That same day, Mr. Williams and Mr. Maxwell boxed up the inquisition records. Mr. Maxwell took the records to his home and stored the records in his garage. (Transcript, pp. 506, 517, 910-12, 1169). During that weekend, Mr. Maxwell organized and sorted the inquisition records. (Transcript, pp. 1093, 1168-69).

184. In order to inform Judge Anderson regarding the distribution of the inquisition records, Mr. Maxwell prepared a status and disposition report. (Disciplinary Administrator's Exhibit 78; Respondent's Exhibit G5; Transcript, pp. 818-40, 1170).

185. At some previous time, Mr. Maxwell told Judge Anderson that they would be taking records relating to their investigation of CHPP with them to the Johnson County District Attorneys Office. (Transcript, p. 663). Judge Anderson told Mr. Maxwell to make sure that the transfer to Johnson County was orderly and regular. (Transcript, p. 664). Neither the Respondent nor Mr. Maxwell told Judge Anderson that they would be taking the redacted WHCS patient medical records to the Johnson County District Attorney's office.[8] (Transcript, pp. 500-01, 663, 670, and 674).

[8]At the hearing on this matter, the Respondent testified that "he believed" he told Judge Anderson that he planned to take the redacted WHCS patient medical records with him to the Johnson County District Attorney's Office. (Transcript, pp. 500-01). Judge Anderson's testimony and the Respondent's testimony were in direct conflict. (Transcript, pp. 663-68). Based upon the demeanor of the witnesses, their testimony before the Hearing Panel, and other evidence, the Hearing Panel concludes that Judge Anderson's testimony is credible and the Respondent's testimony is not credible in this regard.

186. On January 8, 2007, the Respondent left office as the Kansas Attorney General and took office as the Johnson County District Attorney. (Transcript, p. 1168).

187. Mr. Maxwell provided the records and the status and disposition report to Mr. Williams for distribution. Mr. Williams met Mr. Reed in front of the Shawnee County Courthouse in the morning hours of January 8, 2007. (Transcript, pp. 818-40, 1086-95, 1168-81, 1495).

188. While Judge Anderson was being sworn in for his next term of office, Mr. Williams and Mr. Reed delivered some records to Judge Anderson's chambers. Mr. Williams left the status and disposition report for Judge Anderson. (Transcript, pp. 663-68, 1168-81).

189. The status and disposition report provides as follows:

> COMES NOW the State of Kansas by and through Stephen D. Maxwell, Senior Assistant Attorney General, and reports to the Court of the status and disposition of files and certain evidence. The State shows the Court:
>
> 1) Since Special Agent in Charge Tom Williams and Special Agent Jared Reed will not be employed by the Attorney General after noon on January 8, 2007, and due to [*sic*] sensitive nature of the evidence and files, and in light of this Court's protective orders, the following evidence is hereby returned to [*sic*] custody of the Court for safekeeping:
>
> a) Copies of medical files #s: 34, 35, 36, 42, 45, 46, 47, 48, 49, 50, 51, 52, 54, 56, 57, 60, 61, 62.
>
> b) Copies 2003, 2004, and Jan. 2005 KDHE reports for induced termination of pregnancy
>
> c) 2 floppy disks containing KDHE electronic files

2) Certain medical files, KDHE documents along with inquisition testimony and affidavits have been filed with the Sedgwick County Clerk of the District Court and remain there as the confidential supporting documents to show probable cause in the criminal case entitled *State of Kansas v. George Tiller*, 06-CR-2961. A copy of the complaint and summons filed, which lists the files and evidence, is attached to this pleading. These files and evidence are readily accessible by the Sedgwick County District Attorney should she wish to view such evidence. The medical files are #: 30, 31, 32, 59, 33, 37, 38, 39, 40, 41, 55, 43, 44, 58, and 53. The files, evidence and documents constitute the evidence supporting said charges and upon which Judge Eric Yost found probable cause to believe the defendant had committed the crimes charged. These documents are not accessible to the public.

3) Copies of the following documents have been submitted to Robert Hecht, Shawnee County District Attorney, for his review and contemplation of criminal charges. DA Hecht has been fully advised of this Court's protective orders. Those files are:

b) Copies of medical files #s: 1-62[9]

c) Copies of the Inquisition testimony of Dr. Kristin Neuhaus

d) Copies of KDHE forms corresponding to the above medical files

e) Affidavit of Dr. Paul McHugh and notes

f) Affidavits of SAC Williams

g) Copies of the official investigative case file and reports of SAC Williams and others

[9]No subsection (a) was included in section 3 of the status and disposition report.

4) Donald McKinney, the special prosecutor appointed by Attorney General Kline, was given temporary access to the pleadings, correspondence, and other documents (no medical files were given to him) gathered during the inquisition and criminal investigation in order for him to perform the duties of his appointment. When it was announced and became apparent that the incoming Attorney General was going to terminate the appointment, the files were retrieved from the special prosecutor, although it is unknown what, if any, files were copied by the special prosecutor. The special prosecutor was fully advised of this Court's protective orders.

5) Dr. Paul McHugh, a psychiatrist at Johns Hopkins Medical Center, was given copies of medical files 1-62. Dr. McHugh has returned 30-62, but still is reviewing 1-29. Dr. McHugh was directed by this office to return the files directly to the Court.

6) The subpoenaed records of SRS for 2002 and 2003 will be returned to SRS as these files are no longer necessary.

7) Due to recent court decisions on the legal authority for the original prosecution of crimes by the Attorney General and by direction of Attorney General Kline, the 29 medical files from Planned Parenthood in Johnson County along with copies of testimony, other documents and pleadings have been referred to the District Attorney for the 10th Judicial District for his determination on whether criminal charges should be considered.[10]

8) The case file, containing pleadings, orders, correspondence, and documents gathered during this inquisition and criminal investigation have been secured in the Office of the Attorney General for review by the

[10]Although Mr. Maxwell did not identify him as such, in this paragraph Mr. Maxwell is stating that the Respondent, as the Kansas Attorney General, referred medical files, testimony, documents, and pleadings obtained during the investigation of Planned Parenthood, to himself, as the new Johnson County District Attorney.

> incoming Attorney General and/or administration. Copies of all protective orders issued by this Court are contained in those files.
>
> WHEREFORE, the State submits this status and disposition report to the Court.

(Disciplinary Administrator's Exhibit 78; Respondent's Exhibit G5). Judge Anderson relied on the status and disposition report to inform him of the location of all copies of the redacted medical files. (Disciplinary Administrator's Exhibits 82, p. 1052 and 90, p. 2034).

190. The records from Mr. McKinney were found in the Attorney General's office. The items described in paragraph eight of the status and disposition report were not found in the Attorney General's office. (Disciplinary Administrator's Exhibit 90, p. 2070).

191. While the record distribution was occurring, the Respondent called Mr. Rucker. During the telephone conversation the Respondent asked Mr. Rucker whether a copy of the redacted WHCS patient medical records had been prepared to take to the Johnson County District Attorney's office. Mr. Rucker told the Respondent that the records had not been copied. The Respondent instructed Mr. Rucker to have the redacted WHCS patient medical records copied and sent to Johnson County. The Respondent told Mr. Rucker that Judge Anderson had given permission to copy the redacted WHCS patient medical records and take the records to the Johnson County District Attorney's office. Mr. Rucker was unaware of any plan to take the redacted WHCS patient medical records to Johnson County prior to the telephone call from the Respondent. (Disciplinary Administrator's Exhibit 90, p. 2024).

192. Mr. Williams and Mr. Reed delivered some inquisition records to the Shawnee County District Attorney's office. After delivering the records to Judge Anderson's chambers and to the Shawnee County District Attorney's office, Mr. Williams received a telephone call from Mr. Rucker. Mr. Rucker asked Mr. Williams whether he had a copy of the redacted WHCS patient medical records to take to the Johnson County District Attorney's office. (Transcript, pp. 818-40, 1086-95, 1168-81).

193. Mr. Williams informed Mr. Rucker that he did not have a copy of the redacted WHCS patient medical records to take to the Johnson County District Attorney's office and that the redacted WHCS patient medical records had already been delivered to the Shawnee County District Attorney's office. Mr. Rucker instructed Mr. Williams to retrieve the redacted WHCS patient medical records, take them to Kinkos, make a copy, and take the copy to the Johnson County District Attorney's office. (Transcript, pp. 818-40, 1086-95, 1168-81).

194. Mr. Williams became frustrated as taking a copy of the redacted WHCS patient medical records had not been part of the transition plan. (Disciplinary Administrator's Exhibit 90, p. 2025; Transcript, p. 1088). Additionally, Mr. Williams had little time to copy the redacted WHCS patient medical records given the transitions that were occurring that day. (Transcript, pp. 822-24). Finally, Mr. Williams questioned the authority to copy the records at that time. (Transcript, pp. 823-25). Mr. Rucker assured Mr. Williams that copying the records had been authorized by the Respondent, the Kansas Attorney General and that the Attorney General

indicated that he notified Judge Anderson. (Disciplinary Administrator's Exhibit 90, pp. 2024-25; Transcript, pp. 818-40, 1086-95, and 1168-81).

195. Mr. Williams and Mr. Reed returned to the Shawnee County District Attorney's office and retrieved the redacted WHCS patient medical records. (Transcript, pp. 823, 1174). Mr. Williams and Mr. Reed proceeded to Kinkos to make a complete copy of the redacted WHCS patient medical records. (Transcript, pp. 818-40, 1168-81).

196. After the copying was completed, Mr. Williams and Mr. Reed returned the initial set of redacted WHCS patient medical records to the Shawnee County District Attorney's office. Mr. Williams directed Mr. Reed to retain the new copy of the redacted WHCS patient medical records because Mr. Williams was without a vehicle, as he had turned in his state issued vehicle, because Mr. Williams was not going to the Johnson County District Attorney's office that day, and because the Johnson County District Attorney's office was not a secure location. (Disciplinary Administrator's Exhibit 90, p. 2026; Transcript, pp. 818-40, 1168-81).

197. Later that day, at 3:43 p.m., Mr. Rucker sent an electronic mail message, using Mr. Maxwell's mobile telephone, to Mr. Williams. Mr. Rucker stated:

> Per the direction of AG Kline, I am directing you to copy all medical files and AG Kline is directing the copies be deliver [*sic*] District Attorney for the 10th Judicial District before noon K. Rucker Chief Deputy Attorney General (sent at 9:30 am)

(Disciplinary Administrator's Exhibit 79).

198. Mr. Williams instructed Mr. Reed to retain the redacted WHCS patient medical records in Mr. Reed's Topeka apartment until instructed to deliver the records to the Johnson

County District Attorney's office. Mr. Reed maintained the redacted WHCS patient medical records in a Rubbermaid tub in the dining room of his Topeka apartment until mid-February, 2007. (Transcript, pp. 818-40, 1168-81).

199. The status and disposition report did not disclose that the Respondent had the redacted WHCS patient medical records copied for the use by the Respondent as the Johnson County District Attorney. (Disciplinary Administrator's Exhibits 78 and 90, p. 2035).

200. Within a week or two of January 8, 2007, Mr. Maxwell knew that the Respondent had directed his staff to make a copy of the redacted WHCS patient medical records for his use as the Johnson County District Attorney. (Transcript, pp. 505-06, 1408-11). Neither the Respondent nor Mr. Maxwell ever corrected or updated the status and disposition report to disclose the distribution of the additional copy of the redacted WHCS patient medical records. (Transcript, pp. 513, 675-76, 1408-11).

201. On January 9, 2007, Judge Anderson wrote to Attorney General Paul Morrison, enclosing a copy of the status and disposition report. (Disciplinary Administrator's Exhibit 80). Additionally, Judge Anderson informed Mr. Morrison that Mr. Williams and Mr. Reed delivered five boxes containing evidence to Judge Anderson's chambers. (Disciplinary Administrator's Exhibit 80, p. 998). Judge Anderson requested that Mr. Morrison retrieve the five boxes of evidence from Judge Anderson's chambers. (Disciplinary Administrator's Exhibit 80, p. 999).

202. After receiving the letter from Judge Anderson, Rick Guinn, Mr. Morrison's assistant, reviewed the status and disposition report. On January 9, 2007, Mr. Guinn wrote to the Respondent. Mr. Guinn's letter provided:

> On January 9, 2007, special Assistant Attorney General Don McKinney was informed both by phone and by fax that he was terminated effective immediately as special Assistant Attorney General by this office. McKinney acknowledged receipt of the written termination letter. McKinney was also directed to turn over any and all documentation that had been forwarded by you, and/or your subordinates, in your previous capacity as Attorney General. McKinney informed me that on Friday, 01/05/07, he turned over three boxes of documentation to "one of Kline's people". He indicated he did not recall the name of the individual to whom he had turned the documents over to.
>
> I am hereby requesting that you turn over the three boxes you and/or your subordinates received from McKinney last Friday relating to his role as a special Assistant Attorney General. Furthermore, we hereby direct that any and all documentation received and/or generated by the Kline administration Attorney General's office be turned over immediately. Please contact me . . . or Terri Issa . . . to make arrangement for turning over these documents.

(Disciplinary Administrator's Exhibit 135).

203. On January 10, 2007, KBI Special Agent R.E. Blecha retrieved the five boxes of evidence from Judge Anderson's chambers and provided the evidence to the Attorney General's office. (Disciplinary Administrator's Exhibit 115, p, 3483).

204. On January 12, 2007, the Respondent wrote to Mr. Guinn. The Respondent's letter provides as follows:

> I am writing in response to your letter dated January 9, 2007 regarding the above matter. Former Assistant Attorney General and now Senior Deputy District Attorney Steve Maxwell was responsible for handling the documents relating to Special Assistant Don McKinney.
>
> I have been informed by Mr. Maxwell that he related to you the location of all of the case file documents and that they are currently in your possession. **All 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 regarding this issue.

(Disciplinary Administrator's Exhibit 81).

205. Veronica Dersch, Mr. Morrison's assistant, learned that the Respondent had records copied the day of the swearing-in ceremony from Mr. Hecht and his assistant. (Transcript, p. 77). Ms. Dersch believed that, based on the bill from Kinkos and the number of copies made, the Respondent had copied the redacted WHCS patient medical records. (Transcript, p. 77). Ms. Dersch communicated her suspicion to Judge Anderson. Judge Anderson doubted Ms. Dersch's conclusion. (Disciplinary Administrator's Exhibit 82, pp. 1051-52; Transcript, pp. 154-55).

206. In mid-February, 2007, approximately five weeks later, Mr. Williams instructed Mr. Reed to transfer the redacted WHCS patient medical records from Mr. Reed's apartment to the Johnson County District Attorney's office. Mr. Reed brought the records to Johnson County and provided them to Mr. Williams.

207. During the disciplinary investigation, on September 19, 2007, the Respondent provided a written response to the complaint. (Disciplinary Administrator's Exhibit 5). In his written response to the complaint, the Respondent made the following statements regarding the storage of the redacted patient medical records:

> The documents have been kept under lock and key the entire time since they have been produced and during which my office(s) have had authority to maintain possession of the records.
>
> I did not have direct access to the records while I was Attorney General. To gain access it was necessary that I make a request to my investigative division. The only time I reviewed the documents, others where [*sic*] in the room and the documents were immediately returned to the locked closet by an investigator.
>
> During my tenure as District Attorney the records were kept either in a closet in my locked office or a locked filing cabinet in the work area of my Administrative Assistant Megan Harmon. During that time, I have had access to the records but at no time have allowed access to others not directly tied to the investigation. The records have never been provided to any media outlet.

(Disciplinary Administrator's Exhibit 5, pp. 121-22).

208. If the Respondent had not already been informed that the redacted WHCS patient medical records had been stored at Mr. Reed's house for a period of five weeks at the time he provided his written response to the complaint, he certainly was on notice of that fact a week after submitting his response to the complaint. On September 25, 2007, Attorney

General Morrison filed a memorandum in support of CHPP's petition for writ of mandamus. (Disciplinary Administrator's Exhibit 88). That document contained the following statements:

> 7. At or about 11:40 a.m. on the morning of Monday, January 8, 2007 (after Paul Morrison was sworn in as Attorney General), an investigator working at Kline's direction was told to take copies of Comprehensive Health's records – and those produced by Dr. George Tiller of WHCS – to his apartment in Shawnee County "until we were established over in the Johnson County D.A.'s office." The investigator kept the records there in his dining room until mid-February, 2007. *See* A.G.App. 133.
>
> 8. Among the records being stored at the investigator's apartment were copies of the WHCS records that were made at Kinko's, in Topeka, on the morning of January 8, 2007, after Paul Morrison had already been sworn into office. A.G.App. 133.

(Disciplinary Administrator's Exhibit 88, p. 1966). The Respondent's name and address are listed in the certificate of service. (Disciplinary Administrator's Exhibit 88, p. 1981). Additionally, the Respondent responded to that document on October 19, 2007. (Disciplinary Administrator's Exhibit 89).

209. The Respondent did not correct his September 19, 2007, written response to the initial complaint filed with the Disciplinary Administrator. (Transcript, pp. 524-26).

210. After taking office as the Johnson County District Attorney, the Respondent continued his investigation into CHPP and WHCS. On April 9, 2007, the Respondent contacted Judge Anderson to request that Judge Anderson issue a subpoena in the inquisition to allow the Respondent to obtain additional records. During the meeting, the Respondent showed

Judge Anderson a redacted WHCS patient medical record. Judge Anderson described the exchange as follows:

> A. [By Judge Anderson] . . . And that led to the meeting in April when he came in and he then indeed had at least had a draft of a document, I believe it was a request for some subpoenas perhaps, that he said that he would want to file but he wanted to talk to me about it ahead of time. And in that regard he had some files from Doctor Tiller's office and he just kind of showed me one and - not the file but like a document from the file that he wanted to pursue. There was a connection, in his view, between Planned Parenthood and Doctor Tiller on three cases that were referred for late term abortions. And he just showed me one of these records and I said, "where did you" – "where'd you get that?" And he said, "well, we took these records, we have these records, thought you knew," or something of that nature. He was very matter of fact about it. I then – we closed out that meeting after talking about it and then I went in to review the status and disposition report, because I was pretty sure that I had not been informed Tiller records were going to Kansas City, and, indeed, there was nothing in the status and disposition report that suggested that.
>
> It's not that if he would have told me ahead of time that these records need to go and here's why these records need to go, there's a connection and so forth, I may have said go ahead and do it under the status and disposition report, but he hadn't said that. I didn't believe the records should be there because I hadn't been told that, so I called Maxwell the next morning, I said, "Steve, Phill Kline was in yesterday and he showed me some records from Tiller and that's not what you said you were taking in the status and disposition report." And then Steve – we broke the conversation, he called me back later in the morning and – because I told him I was going to order those records back.

(Transcript, pp. 669-70). Judge Anderson did not authorize the Respondent to take the redacted WHCS patient medical records to the Johnson County District Attorney's office nor does he recall any discussion with the Respondent about the redacted WHCS patient medical records being copied and taken to the Johnson County District Attorney's office. (Respondent's Exhibit B7, pp. 35-36). On April 10, 2007, Judge Anderson ordered that the Respondent return the redacted WHCS patient medical records. (Disciplinary Administrator's Exhibits 82, p. 1080 and 132, p. 3583; Transcript, pp. 524, 670-71).

211. After Judge Anderson ordered the Respondent to return the redacted WHCS patient medical records, the Respondent directed his staff to make summaries of each of the redacted WHCS patient medical records. (Transcript, pp. 98-99, 536, 538). Ms. Dersch, who reviewed both the summaries and the redacted WHCS patient medical records, stated the following regarding the information contained in the summaries:

> Q. [By Mr. Hazlett] . . . could you explain to us whether or not there is anything in the Tiller medical records themselves which do not appear on those summaries?
>
> A. [By Ms. Dersch] Almost everything is here. They've got what the D tree diagnosis said. It starts with the information from KDHE, then it starts with the file, the doctor, whether there was a referral by Doctor Neuhaus. The diagnoses that Doctor Tiller wrote down on the file, things that she was suffering at the time or the reasons for it. Medical history stuff. Medications. The age. It doesn't have the billing information from the medical records in it and I don't see – there's no, like, forms for mental health counseling, but all the substantive information is here.

(Transcript, p. 99). Two examples of the summaries may be found at Disciplinary Administrator's Exhibits 130 and 131.

212. On April 11, 2007, Judge Anderson held a hearing in the inquisition case. At that time, the Respondent, Mr. Maxwell, Mr. Rucker, Jesse Paine, Mr. Williams, Mr. Reed, Mr. Guinn, Ms. Dersch, and Mike Leitch all appeared. (Disciplinary Administrator's Exhibit 82, pp. 1002, 1004). During the hearing, the following exchange occurred:

> THE COURT . . . The Court was unaware that the Tiller records had been delivered to the Johnson County District Attorney's Office. The Court has been provided a status report – it was provided a status report January 8, 2007. I note that is the day that the administrations changed here for the Attorney General and in Johnson County. In the status report at paragraph number seven, it was reported that the Planned Parenthood records had been delivered to Johnson County and it was not clear that the Tiller records had been delivered to Johnson County.
>
> . . .
>
> It is not my belief, and it is not my purpose today, to determine whether the Court was or was not informed, whether I have forgotten information that I was informed or what the issue is. What is at issue is where these records are now and what's going to happen to the records in the future. And that's the focus that I want to make.
>
> Mr. Kline called me late yesterday afternoon and asserted a protest or an objection to redelivering these records, challenging the Court's authority to order him to bring records back, so I'm going to, with that predicate for the purpose of this meeting, allow Mr. Kline or Mr. Maxwell, whomever, to address the Court as to what concerns or issues that you want to raise.

MR. KLINE: Yes, Your Honor. All the records that you have requested be returned are present, consistent with your order. And just consistent with our discussion yesterday – and we believe that the Court was informed and has forgotten as it relates to the provision of the records, the Court granted authority for the delivery of the Tiller records to Mr. Hecht pursuant to the authority of the Office of Attorney General. And the Court was informed and did inform us that we had the authority to transfer the records to any law enforcement agency, of which the Johnson County District Attorney's office is one. And conversations consistent with that were held between the Court, myself, and additionally with the Court, Mr. Maxwell, over the phone.

I certainly understand the potential for forgetfulness as relates to the scope of that, considering the circumstances which we were under at that time. I would also say that Kansas inquisitional statute allows a District Attorney to open an inquisition with a Court when they have reason to believe – or of any violation – alleged violation, of Kansas law anywhere within the State of Kansas. The executive branch maintains the authority to continue that investigation with any evidence that it obtains lawfully, pursuant to a court order or a finding of reasonable suspicion of probable cause.

It is that basis in which I was concerned about the provision of the records and return to the Court, but pursuant to the Court's request, when I met with the Court – today is Wednesday – on Monday, we'll make further application for these records and provide a record at that time consistent with our inquisition with you indicating the reason and basis we should have those records for further investigation. But the records are here.

THE COURT: Okay. And those would constitute all of the records, including all of the copies that you had in your custody in Johnson County.

MR. KLINE: Yes, Your Honor. I directed the office, after our phone conversation yesterday afternoon, to obtain all copies

> of these particular records. And I believe we have had sufficient time to remove work product notes and tabs from the record, although I'm not particularly concerned about the Court having that. But, I may be back with you in case there is some work product that is contained within those files.

(Disciplinary Administrator's Exhibit 82, pp. 1005-09).

213. Judge Anderson determined that the investigation was then owned by Attorney General Paul Morrison's office. (Disciplinary Administrator's Exhibit 82, pp. 1014, 1036). The Respondent returned the redacted WHCS patient medical records to Judge Anderson and Judge Anderson provided the records to the Attorney General's office. (Disciplinary Administrator's Exhibit 82, p. 1080).

214. On June 6, 2007, CHPP filed a petition for writ of mandamus with the Kansas Supreme Court. (Disciplinary Administrator's Exhibit 83). In the petition, CHPP sought an order in mandamus:

> that compels Respondent Phill Kline to comply with this Court's directives in *Alpha Med. Clinic v. Anderson*, 280 Kan. 903, 128 P.3d 364 (Kan. 2006) and return any copies of Petitioner's medical records to Attorney General Paul Morrison and provide an accounting for those records. Petitioner also moves this Court for an order to show cause why Phill Kline should not be held in contempt of this Court's order in *Alpha*.

(Disciplinary Administrator's Exhibit 83, p. 1090).

215. On September 25, 2007, Attorney General Morrison filed a memorandum in support of CHPP's petition for writ of mandamus. (Disciplinary Administrator's Exhibit 88).

216. On October 19, 2007, the Respondent filed a response to CHPP's petition for writ of mandamus. (Disciplinary Administrator's Exhibit 89).

217. On October 24, 2007, the Kansas Supreme Court issued an order, in the CHPP's mandamus action, appointing the Honorable David King to conduct an evidentiary hearing and an order for the Respondent and Attorney General Morrison to answer 17 questions. (Disciplinary Administrator's Exhibit 90, p. 2003).

218. On November 2, 2007, Judge King conducted a case management conference in CHPP's action in mandamus. (Respondent's Exhibit A).

219. On November 9, 2007, Mr. Morrison filed his written responses to the 17 questions propounded by the Kansas Supreme Court. (Disciplinary Administrator's Exhibit 90, p. 2065; Respondent's Exhibit W6).

220. On November 13, 2007, the Respondent filed his written responses to the 17 questions propounded by the Kansas Supreme Court. (Disciplinary Administrator's Exhibit 90, p. 2047; Respondent's Exhibit G).

221. On November 15, 2007, Judge King conducted a hearing in the CHPP's mandamus case regarding the protective orders. (Respondent's Exhibit B).

222. Beginning November 19, 2007, and continuing on November 20, 2007, November 21, 2007, December 3, 2007, and December 4, 2007, Judge King conducted an evidentiary hearing in CHPP's mandamus action. (Disciplinary Administrator's Exhibits 84 and 90, p. 2003; Respondent's Exhibits C, D, E, and B7).

223. On November 20, 2007, the Respondent testified before Judge King. During his testimony, the following exchange occurred:

> Q. [By Mr. Irigonegaray] Are there any summaries of Doctor Tiller's records left in Johnson County?
>
> A. [By the Respondent] I have a summary of three records that pertain to a theory of criminal liability that would have jurisdiction in Johnson County against Doctor Tiller. I have mentioned that to the Office of the Attorney General through correspondence to the Attorney General's Office requesting copies of the actual records relating to those three abortions. The Attorney General has refused to provide those records.

(Disciplinary Administrator's Exhibit 84, pp. 1231-32).

224. On November 30, 2007, the Respondent supplemented his response to the 17 questions propounded by the Kansas Supreme Court. (Disciplinary Administrator's Exhibit 90, p. 2074; Respondent's Exhibit G).

225. On January 10, 2008, Judge King issued a report of his findings. (Disciplinary Administrator's Exhibit 90; Respondent's Exhibit F).

226. On June 12, 2008, the Respondent appeared before the Kansas Supreme Court for oral argument in the CHPP's mandamus action. (Disciplinary Administrator's Exhibit 85; Respondent's Exhibit P). During that argument the following exchanges occurred:

> JUSTICE BEIER: I have one more question, Chief.
>
> The record makes reference to the summaries that were retained by your office – well actually recreated and then retained by your office, Mr. Kline, have you ever told, or any of

> your subordinates, told Judge Anderson that those summaries were retained?
>
> MR. KLINE: I'm not familiar as to what you're referencing, Justice Beier.
>
> JUSTICE BEIER: I'm referring to summaries that you swore to in your responses?
>
> MR. KLINE: Again, Justice Beier, I have not seen those responses for several months.
>
> JUSTICE: So you don't know whether you have summaries of certain records from the Wichita Clinic?
>
> MR. KLINE: I don't believe that I do. I have sought the records from the Office of Attorney General and been refused.

(Disciplinary Administrator's Exhibit 85, pp. 1511-12). At that time, the Respondent continued to retain the 62 summaries. (Transcript, p. 565).

227. On December 5, 2008, the Kansas Supreme Court issued its opinion in CHPP's mandamus action. *CHPP v. Kline*, 287 Kan. 372, 197 P.3d 370 (2008). The Court ordered the Respondent to turn over

> . . . a full, complete, and understandable set of the patient records and any and all other materials gathered or generated by Kline and/or his subordinates in their abortion-related inquisition while Kline was Attorney General. Neither Kline nor any of his subordinates or lawyers may make any exceptions whatsoever for an reason or on any rationale to the foregoing order. "Full, complete, and understandable" means exactly what it says. This set of materials shall be organized and labeled exactly as organized and labeled in the files or repositories maintained by and/or for Kline and his subordinates in the discharge of their duties on behalf of the Johnson County District Attorney's office. The cost of the production and delivery of the set of materials

described in this paragraph shall be borne by the Johnson County District Attorney's office.

CHPP v. Kline, 287 Kan. at 416-17. (Disciplinary Administrator's Exhibit 87, p. 69). Additionally, the Court concluded as follows:

> We are also deeply disappointed by Kline's casual treatment of the WHCS patient records. First, he moved them to the Johnson County District Attorney's office, despite the clinic's location in Sedgwick County. Second, he and Maxwell failed to correct the Status and Disposition Report given to Judge Anderson on this point. Even accepting, as we do, Judge King's factual finding that no initial deception or misrepresentation was intended, the same cannot be said about Maxwell's, and thus Kline's, subsequent failure to set the record straight. Once Judge Anderson discovered that Kline had possession of the WHCS records, he demanded that the records be returned and questioned whether copies had been kept. He was told no. Yet Kline's sworn responses to the 17 fact questions reveal that Kline and his subordinates failed to disclose to Anderson that certain summaries of the WHCS records had been created and maintained. By the time Kline appeared before this court for oral argument, he again expressed uncertainty as to whether the summaries existed or were in the possession or use of his office.
>
> Kline has demonstrated similarly disingenuous and possibly orchestrated confusion on his status vis a vis McHugh. After Kline was defeated in the Attorney General's race but before he decamped to Johnson County, he embraced McHugh long enough to ensure that McHugh obtained redacted copies of patient records and other items that could enable patient identification. Kline later disavowed any ability to control McHugh's behavior when McHugh discussed the contents of the records in an interview sponsored by an anti-abortion advocacy group. Kline's behavior told a different story. He met with McHugh shortly before McHugh's interview and listened to the interview as it was being conducted, both ostensibly because he was concerned about patient privacy. Still later, Kline personally typed an overinclusive affidavit for McHugh at the request of

Judge Anderson. Although Kline did not, as Judge King found, personally pass that affidavit on to a legislative committee, he contributed without reason to the detail ultimately revealed by McHugh and others.

An obvious and sorry pattern emerges from the foregoing examples and from Kline's performance at oral argument before us. Kline exhibits little, if any, respect for the authority of this court or for his responsibility to it and to the rule of law it husbands. His attitude and behavior are inexcusable, particularly for someone who purports to be a professional prosecutor. It is plain that he is interested in the pursuit of justice only as he chooses to define it. As already noted in Alpha, he has consistently disregarded the clear import of this court's directions, instead doing what he chose because "he knew best how he should behave, regardless of what this court had ordered, and [believed] that his priorities should trump whatever priorities this court had set." Alpha, 280 Kan. at 929, 128 P.3d 364.

We note that Kline has persisted in his attitude and behavior despite the fact that Alpha made clear that he had already narrowly escaped a contempt citation. He has repeatedly maximized jeopardy to Alpha's delicate balance between abortion patients' constitutional privacy rights and law enforcement interests. We therefore conclude that sanction is necessary to remediate the substantial actual costs the Attorney General's office and this court have incurred as a result, to discourage Kline from continuing as he has, and to deter his subordinates and successors from following his example.

In light of all of the foregoing and because Kline and his subordinates have, during their time in Johnson County, capitalized on what they learned while Kline was Attorney General, we hereby order the following sanction:

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

sworn in as Johnson County District Attorney. Neither Kline nor any of his subordinates or lawyers may make any exceptions whatsoever for any reason or on any rationale to the foregoing order. “Full, complete, and understandable” means exactly what it says. This set of materials shall be organized and labeled exactly as organized and labeled in the files or repositories maintained by and/or for Kline and his subordinates in the discharge of their duties on behalf of the Johnson County District Attorney's office. The cost of the production and delivery of the set of materials described in this paragraph shall be borne by the Johnson County District Attorney's office.

We also hereby order as an additional sanction that Kline, Rucker, Maxwell, Williams, Reed and any other employee of the Johnson County District Attorney's office requested by the Attorney General shall meet with the Attorney General and/or his designee(s) on whatever date(s) and at whatever time(s) designated by the Attorney General up to and including noon on January 10, 2009, and at whatever place(s) designated by the Attorney General for the purpose of explaining all of the materials turned over by 5 p.m. on December 12, 2008, pursuant to the relief and sanction orders contained in this decision by this court.

Motion to Strike

Kline and his counsel's principal explanation for why Kline's final brief in this mandamus action discussed his allegations in the Johnson County criminal case against CHPP and why he decided to attach redacted copies of confidential KDHE records is unfortunately reminiscent of Kline's initial troubling response to the contempt allegation in Alpha. Essentially, to Kline, the ends justify the means. The explanation is also entirely unconvincing.

In our view, neither Kline nor his counsel can seriously believe that without the disputed portion of their brief or the attachments, we would have been unaware of the chronology or context of events underlying this case or of the potential of any relief we grant to affect the Johnson County criminal case.

Litigation among these parties has been ongoing for years. Accordingly, we must conclude that this explanation is yet another post hoc rationalization for conduct designed to poison the well of public and judicial opinion about CHPP. Kline's adoption of this tactic is not new but it is transparent. Again, Kline attempts to invoke his (irrelevant) opinion about the strength of his criminal case to defeat any criticisms of his choices in how to pursue it.

We also agree with CHPP that Kline's and his counsel's attachment of the KDHE records may have run afoul of K.S.A. 65–445(c). As with certain other issues, we leave resolution of that issue to another case on another day.

Finally, we also reject assertions by Kline and his counsel that the previous statements or actions of this court justified the content of or attachments to the brief. This court engaged in an enormously costly and careful redaction of the public files in this action and in State ex rel. Six v. Anderson. We were explicit in announcing that the parties should be guided by our redactions. As in Alpha, Kline simply believed he knew better than this court and the legislature what he should and should not include.

In view of the above, we grant CHPP's motion to strike as to the attachments to Kline's brief. This court has disregarded the portion of the brief to which CHPP objects.

Because Kline's actions also seriously interfered with this court's efforts to determine the facts and arrive at resolution, we also regard reimbursement of this court for the costs of this action in the amount of $50,000— i.e., the minimum personnel expense associated with filings, hearings, and conferences that could have been avoided if Kline's conduct had been otherwise—to be an appropriate additional sanction. However, were we to impose this sanction, it would be borne by Johnson County rather than Kline personally. We are unwilling to make those taxpayers foot any further bill for the conduct of a district attorney they did not elect in the first place and have now shown the door.

CHPP v. Kline, 287 Kan. at 421-25. (Disciplinary Administrator's Exhibit 87, pp. 76-81).

228. On January 6, 2009, while testifying in a hearing in a criminal case brought against Dr. Tiller, the Respondent testified about the summaries that he directed his staff to create in April, 2007. Specifically, the Respondent admitted that his testimony before Judge King that he had three summaries was false. (Disciplinary Administrator's Exhibit 86b, pp. 1830-31).

229. On March 13, 2009, Judge Anderson wrote to Terry Morgan, Special Investigator with the Disciplinary Administrator's office. Judge Anderson wrote:

> On November 10, 2008 I returned a telephone call to Phill Kline. Phill Kline told me that he had discovered that he had some summaries of Dr. Tiller's medical records in his possession. He asked if I had ordered the summaries be returned to me during the April 2007 hearing. I told him I did not remember what he had said when he delivered records to the Attorney General at the close of the hearing. I told him he was not required to return any summaries to me but he may wish to discuss the subject with the Attorney General.

(Disciplinary Administrator's Exhibit 136).

230. The Respondent testified that the Judge Anderson was aware that they made summaries of the redacted WHCS patient medical records. (Transcript, pp. 538, 540). In so arguing, the Respondent is relying on a statement he made during the April 11, 2007, hearing. "Additionally, these copies were made as a working copy in which we were reviewing, analyzing and summarizing the contents of those records." (Disciplinary Administrator's Exhibit 82, p. 1074). The Respondent's statement above was not sufficient to put Judge Anderson on

notice that after Judge Anderson ordered the return of the records, the Respondent directed his staff to "summarize" the records by hand copying much of the information from each medical record. Thus, the Hearing Panel concludes that Judge Anderson did not know that the summaries existed until the Respondent called him in November, 2008. (Transcript, pp. 669, 686-87).

Count II

231. While the Respondent was the Johnson County District Attorney, on October 26, 2007, an "original citizen petition" was filed and a grand jury was summoned to investigate CHPP. (Disciplinary Administrator's Exhibit 7, p. 188 and Exhibit 93). The original citizen petition provided as follows:

Petition to the District Court of Johnson County

> The undersigned qualified electors of the **County of Johnson and State of Kansas** hereby request that the **10th District Court of Kansas also known as the District Court of Johnson County**, within 60 days after the filing of this petition, cause a grand jury to be summoned in the county to investigate alleged violations of law and to perform such other duties as may be authorized by law. While not limiting other authority of the grand jury, the grand jury shall investigate **Planned Parenthood of Kansas and Mid-Missouri Inc., commonly known as Planned Parenthood of Overland Park**, and all affiliated entities and persons for allegedly:
>
> **(1.) Performing, allowing to be performed, or colluding to perform illegal late term abortions,**
>
> **(2.) Failing to report suspected child abuse, and suspected child sexual abuse,**

(3.) Failing to follow the standard of care in providing medical advice or failure to conduct medical procedures as required by Kansas statute,

(4.) Providing false information in order to induce government action or inaction,

(5.) Harvesting and/or illegal trafficking in fetal tissue,

(6.) Failing to comply with parental consent requirements,

(7.) Failing to enforce the required 24 hour waiting period and other violations of Kansas Statutes:

Furthermore, it is the request of signers that the grand jury issue a report regarding same, as allowed by law and without identifying any patient, or the nature of the evidence reviewed by the 10th District Court of Kansas. The specification provided in this petition shall not be construed to limit the common law, statutory or case law authority of the grand jury in any fashion.

(Disciplinary Administrator's Exhibit 93). The grand jury petition was organized by "Life Is For Everyone Coalition" which was supported by Concerned Women for America, Operation Rescue, and Women Influencing the Nation. (Disciplinary Administrator's Exhibit 93).

232. On December 10, 2007, the grand jury was initially convened. The Respondent appeared before the grand jury at that time. (Transcript, p. 2333). Judge Moriarty selected grand juror 9 as the presiding juror. (Transcript, pp. 2336, 2341, 2407).

233. On December 17, 2007, the Respondent and his assistants appeared before the grand jury and provided general information. During that session, the Respondent and his assistants provided the grand jury with a copy of K.S.A. 38-2223, which is the mandatory

reporting of child abuse statute in effect at that time. (Disciplinary Administrator's Exhibit 96, p. 2428; Transcript, p. 2333).

234. K.S.A. 38-2223 did not go into effect until January 1, 2007. Prior to January 1, 2007, the reporting statute was K.S.A. 38-1522. In 2006, the legislature repealed K.S.A. 38-1522, and enacted K.S.A. 38-2223, effective January 1, 2007.

235. With respect to grand juries, a prosecutor is charged with ensuring that the grand jury understands relevant laws and facilitating the presentation of evidence before the grand jury. (Transcript, p. 2686).

236. The Respondent informed the grand jury that they would be looking at cases dating back five years. At the outset, the Respondent failed to inform the grand jury that K.S.A. 38-2223 became effective January 1, 2007, and that K.S.A. 38-1522 was in effect for events prior to January 1, 2007, and that Kansas prosecutors had been enjoined from enforcing K.S.A. 38-1522 as interpreted by Atty. Gen. Op. No. 2003-17 in *Aid for Women*. (Disciplinary Administrator's Exhibit 94; Respondent's Exhibit P8, p. 86; Transcript, pp. 2333, 2337, 2345, 2371-75).

237. During his appearance before the grand jury on December 17, 2007, the Respondent explained the statute of limitations to the grand jury:

> MR. KLINE: Five years from the act of the crime. So, for example, this is December 17th, 2007. Am I right? Okay. If there was an abortion on December 16, 2002, the statute of limitations – actually the statute of limitations – it gets a little technical. It is gone for any crime that occurs prior to July 1st, 2005, because

> that's when the extension took place. July 1st, 2005, unless there's concealment.

(Disciplinary Administrator's Exhibit 96, pp. 2489-90).

238. The Respondent provided the following information regarding mandatory reporting:

> MR. KLINE: . . .
>
> If you turn to the next page, which is page 8, 38-2223. This is a requirement to report sexual abuse. If you look at (a)(1), you will see the statutory definition when certain persons must report neglect or abuse of minors. "When any of the following persons" – and this includes physicians and nurses and teachers and counselors and so forth. And here is the operable language – "has reason to suspect that a child has been harmed as a result of physical, mental, or emotional abuse or neglect, or sexual abuse."
>
> A child, by Kansas statute – and I can get you a copy of the specific statute. Roger has done that. And then I will define sexual abuse. A child is under 18. But our sex crimes, which are inherently defined as sexual abuse – when a crime is being committed against a minor, it's defined as sexual abuse – only kick in if the child is under 16, unless it's forcible or deceptive.
>
> Okay. So, in other words, the age of consent for sexual interaction in Kansas is sixteen. You might have heard the term "statutory rape." The age of consent in Kansas is sixteen.
>
> Now, there are different crimes, depending upon the age of the child and the age of the perpetrator, in Kansas that apply. If the child is 13 years of age or younger, this is called rape. No matter what the age of the person engaged in that sexual interaction with that child, this child at this age is deemed to be unable to consent. So even if they say, "I want to have sexual intercourse," it's still a crime, and it's called rape.

And by definition of the statute, if you have a 13-year-old that is pregnant, you have a child that has been raped and you have a mandatory report because it is sexual abuse. 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, but that is how Kansas law works in this area.

Now, if the child is 14 or 15, there's still a crime – and I have got to remember to talk to you about the Child Rape Protection Act.

Fourteen or 15, it's still a crime, but it's a lesser crime. If the perpetrator or partner is within four years of age and it's truly a conduct that they agree to and there's not coercion or force or deception, it's called involuntary sexual relations. We call that the Romeo and Juliet law. If they are within four years of age and it's two teens, it's – it's voluntary sexual relations.

I'm sorry. Thank you, Roger.

It's voluntary sexual relations.

And if it's two teens in the backseat of the Toyota, that's still a crime. Does it get prosecuted? Some county attorneys decide to prosecute it, and some do not. If there's not coercion, force, or deception, or fear, I generally do not prosecute two teens making a mistake. That's my policy. That is if they are within four years of age.

Any questions on that?

That is still deemed to be sexual abuse by law.

Now, if the age range is greater, you have a more serious crime, which is indecent liberties.

Is it not Roger?

MR. NORDEEN: Aggravated indecent liberty.

> MR. KLINE: Ag is thirteen and under. It's ag. Fourteen to fifteen. Ag indecent liberties. Still a crime under Kansas law. It is a little more serious of a crime. Involuntary sexual relations is less. Thirteen years and younger, it's rape.
>
> Now, in 2005 the legislature passed –
>
> JUROR NO. 14: There is still mandated reporting for a 14- and 15-year-old; correct?
>
> MR. KLINE: 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.

(Disciplinary Administrator's Exhibit 96, pp. 2427-32).

239. After reviewing the statutes which govern grand jury proceedings, the grand jury learned that with the district court's approval, the grand jury may employ special counsel. *See* K.S.A. 22-3006(3). (Transcript, pp. 2338-39). The grand jury requested that the Court appoint special counsel. (Transcript, p. 2339). The Court appointed Rick Merker, an active attorney, and the Honorable Larry McClain, a retired District Court Judge, to serve as special counsel to the grand jury.[11] (Disciplinary Administrator's Exhibit 107).

240. On December 19, 2007, Mr. Merker met the grand jury and explained his role and Judge McClain's role with the grand jury. (Disciplinary Administrator's Exhibit 97). Later that same day, Mr. Maxwell appeared before the grand jury. During that session, the grand

[11]The typewritten date on the order appointing special counsel is December 16, 2007. However, the hand-written date on the order is December 19, 2007, and the file-stamped date on the order is December 19, 2007. (Disciplinary Administrator's Exhibit 107).

jury asked Mr. Maxwell to provide them with legal research, including law review articles regarding abuse reporting. (Transcript, pp. 2343–44).

241. On January 2, 2008, Mr. Maxwell provided the grand jury with a notebook of legal research. (Transcript, pp. 2344-45). The notebook contained K.S.A. 38-2223, Atty. Gen. Op. No. 2003-17, information from Dr. McHugh regarding viability, and a published case from an insurance company. (Transcript, pp. 2345-46). The notebook did not contain any law review articles regarding the definition of harm or injury in the sexual abuse context, K.S.A. 38-1522 or the *Aid for Women* cases. (Transcript, pp. 2345-46).

242. Neither Mr. Maxwell nor the Respondent informed the grand jury of the *Aid for Women* cases – that Atty. Gen. Op. No. 2003-17 had been the subject of federal litigation, resulting in an injunction of the enforcement of K.S.A. 38-1522 pursuant to the interpretation expressed in Atty. Gen. Op. No. 2003-17.[12] (Transcript, pp. 2823-24). Subsequently, the presiding juror of the grand jury and Judge McClain discovered this information. (Transcript, pp. 2371-75).

243. At some point, the grand jury requested and received records from SRS. (Transcript, p. 2475).

244. On January 3, 2008, the grand jury issued a subpoena to KDHE seeking reports of induced termination of pregnancy involving patients 16 years of age or younger and reports of

[12]Atty. Gen. Op. No. 2003-17 contains references to K.S.A. 38-1522. However, neither the Respondent nor Mr. Maxwell explained to the grand jury that K.S.A. 38-1522 was the mandatory reporting statute in effect for acts prior to January 1, 2007.

induced termination of pregnancy involving fetuses 22 weeks or older, from 2003. (Disciplinary Administrator's Exhibit 113; Transcript, p. 2347).

245. On January 7, 2008, the grand jury issued a subpoena to CHPP, commanding it to produce 16 patient medical records. (Disciplinary Administrator's Exhibits 7, pp. 247-51 and Exhibit 108; Transcript, pp. 2347, 2357-58). At the time the grand jury issued the subpoena to CHPP, the grand jury sought records to further its investigation of all seven items detailed in the original citizen petition. (Disciplinary Administrator's Exhibit 94; Transcript, pp. 2367-70, 2375).[13]

246. On January 9, 2008, for the first time, and only after the grand jury issued a subpoena to CHPP, Mr. Maxwell explained to the grand jury that K.S.A. 38-2223 went into effect in 2007.

> MR. MAXWELL: You have [*sic*] provided 38-2223, and I can't quote that statute. I don't deal with it enough to be able to quote it. But I have read it, and it defines pretty much what has to be reported. Okay. There's been multiple opinions from the

[13]During their testimony at the hearing on the formal complaint, Mr. Maxwell and the Respondent stated that the grand jury's subpoena to CHPP was only for purposes of two of the original seven issues: whether CHPP was complying with the parental notification provision and whether CHPP was complying with the 24 hour waiting period; and that therefore, K.S.A. 38-1522 and the *Aid for Women* cases were irrelevant to the investigation. (Transcript, pp. 2824-25, 2898-99). The statements of Mr. Maxwell and the Respondent are misleading. The evidence establishes that originally the grand jury sought information through the subpoena to CHPP on all seven issues. However, after the grand jury learned of K.S.A. 38-1522 and that the Respondent and other prosecutors had been enjoined from enforcing K.S.A. 38-1522 as interpreted by the Respondent's attorney general opinion in *Aid for Women*, the grand jury discontinued their investigation of five of the seven issues. (Transcript, pp. 2597, 2612). The existence of K.S.A. 38-1522 and the *Aid for Women* cases are what caused the grand jury to discontinue their investigation of the other issues.

Attorney General and at various prior – the Attorney General before Mr. Kline, the one before that. There's been multiple court decisions.

The statute got changed, I think – and if I'm not mistaken it was '07. July 1st, '07.

Was that right, Judge?

MR. McCLAIN: Yes.

MR. MAXWELL: Was it amended? It used to be 38-1522. Now it's 38-2223. There was a lot of court decisions on that. . . .

. . .

The issue of harm has been debated, litigated – it has been – the statute used to be. I don't remember the exact wording of the prior statute.

Judge do you recall?

MR. McCLAIN: I think it was pretty similar, though. I think it's very similar.

MR. MAXWELL: Is it? I don't remember the exact wording. That statute had a different reporting. This statute was changed to make it pretty clear.

. . .

You help me out, Judge, because this has been litigated and discussed.

MR. McCLAIN: You have two Attorney Generals' opinions. One from Bob Stephan, who was a prior Attorney General. His opinion focused on pregnancy.

MR. MAXWELL: Right.

MR. McCLAIN: And that opinion concluded that pregnancy is not necessarily evidence of injury. And so there's no mandatory reporting unless there's other evidence of injury.

And then Attorney General Kline –

MR. MAXWELL: There's one from Carla Stovall.

MR. McCLAIN: I didn't look at that. I assume it was very similar to Stephans [*sic*].

MR. MAXWELL: I don't remember the distinction. There was one from Stephan and one from Stovall, and then there was Attorney General Kline who said in his opinion – I don't remember. I can't quote his opinion either because it was years ago, but it basically said that if you have got a child who is underage, can't lawfully have sex, and that is a felony offense in the State of Kansas, then that's basically evidence of per se harm because it is a felony, and it's emotional. I mean children are emotionally hurt as a result of that. So, in his opinion, that was a mandatory report.

Then the statute was rewritten in the '07 legislature to what's currently in front of you. So you have got it.

JUROR NO. 9: I'm sorry. Then if the statute has changed, then we are looking at two different standards because if the statute changed in February or in '07, then the dates between '03 and '07 fall under a different statute than after that. I think we have to know the difference then.

MR. MAXWELL: Correct.

. . .

MR. McCLAIN: We are going to have to take a look at the prior statute. It's probably going to be controlling.

. . .

MR. MAXWELL: I can go up and pull the statute, the previous statute in effect. I believe it was, in effect, until January 1st, 2007. So anything prior to that would be applied to the statute. It's not that much different.

Judge, do you have it there? Do you want to read it? The first paragraph basically.

MR. McCLAIN: The first paragraph is as follows:

"When any of the following persons has reason to suspect that a child has been injured as a result of physical, mental or emotional abuse or neglect, or sexual abuse, the person shall report."

JUROR NO. 9: They changed "injured" to "harm."

MR. MAXWELL: "Injured to harm."

JUROR NO. 9: Do you know why?

MR. MAXWELL: I don't know why. I don't. I wasn't in the legislature. I didn't have anything to do with it. I was generally aware they had done some modification to the wording, but I don't know that I analyzed it or looked at it one way or the other.

I would have to pull the legislative history. I can do that if you wish me to, and I can have you – we have a research expert up in the DA's Office and he can pull up – it would be legislative notes and history on that statute. We could find out what, at least, is public on why they changed it.

MR. McCLAIN: Could you have your person do a research memo on the definition of "injured" and "harmed" as used in these statutes?

MR. MAXWELL: Okay. Sure. I think we can.

MR. McCLAIN: Is that really what you are interested in?

JUROR NO. 9: You alluded to there's been lots of litigation.

MR. MAXWELL: Well, there has been litigation on this.

There's some annotations behind that, isn't there, Judge?

MR. McCLAIN: There's one case that looks like maybe we ought to take a look at, which it is a federal case.

"Preliminary injunction granted on claim that the statute requiring plaintiffs to report underage patient's sexual activities violated privacy rights."

MR. MAXWELL: I am aware of that case. I can tell you about that case. That was a case out of Wichita, and the federal judge down there believed and wrote an opinion that two 14-year-olds having sex was not a governmental interest necessarily. That consensual sex between – what he called in this opinion – age mates, okay, was not a reportable event. Okay.

MR. McCLAIN: He also called it the Romeo and Juliet.

JUROR NO. 14: Wasn't reportable or chargeable?

MR. MAXWELL: It wasn't reportable. Which the Romeo and Juliet statute, that involves the sex crime statute.

. . .

JUROR NO. 14: It there any federal case or statute regarding mandated reporting?

MR. MAXWELL: Not that I am aware of.

. . .

JUROR NO. 9: I have a question. Is there a Part II or a sequel to the preliminary injunction that is dated 2004?

MR. McCLAIN: It's annotated in the statute.

JUROR NO. 9: Can I have 2007?

MR. MAXWELL: That statute will be deleted in 2007.

JUROR NO. 9: Not this particular statute but whatever the following one then is to 2223.

MR. MAXWELL: You have got a copy of that.

JUROR NO. 9: I'm looking for the annotations.

MR. MAXWELL: The annotations. Sure. I will get that. I will go get that. Sure, I can get that.

Okay. I don't know what annotations are behind that statute. I can't recall.

MR. McCLAIN: And I haven't done the research on it, and I will talk to you about the research in a minute. But if there's a permanent injunction issued in this federal case, that's an injunction that apparently recognized some privacy rights for patients on a preliminary basis. I mean if there's a federal court decision that addresses the privacy issue, that could have an impact on how –

MR. MAXWELL: Yeah.

MR. McCLAIN: – how these activities are perceived by this group.

MR. MAXWELL: I agree. And what I understand about that federal court – I don't know that I could quote it. But I understand that it had to do with age mates, consensual sex, age mates, and the reporting of little Johnnie and little Susie having sex, whether or not that necessarily had to be reported absent any other circumstances.

I will pull that decision and give you a copy of that decision. Okay. I will make sure you get a copy of that decision.

> If I'm not mistaken, the case was ultimately dismissed either at the district court level – it was out of Wichita or at the Tenth Circuit level, but I'm not sure about that. I don't know where that stands. I don't believe there was ever a final – there may have been a preliminary –
>
> MR. McCLAIN: The preliminary injunction was issued.
>
> MR. MAXWELL: Right. That was for the enforcement of that particular issue. Right.
>
> . . .

(Disciplinary Administrator's Exhibit 100, pp. 2872-79, 2887-90).

247. On January 9, 2007, the grand jury sent a letter to CHPP requesting that a management representative appear before the grand jury. The letter provided:

> This letter is written on behalf of the Grand Jury now sitting and empaneled in Johnson County District Court.
>
> As you are aware, the Grand Jury is now considering evidence in accordance with the petition calling us into existence. As a result, we invite a management representative from your office to appear before the Grand Jury and to give any or all evidence you may believe we should be aware of while considering our mandate. If you agree to accept our invitation, the person or persons should be a management employee of Planned Parenthood and be prepared to give evidence under oath and have the ability to answer our questions.
>
> You should be aware that K.S.A. 22-3008 states that "No witness before a grand jury shall be required to incriminate the witness' self." The person or persons may also have counsel present during their testimony before the grand jury. This is a voluntary request on our part. If you desire to accept this invitation, please communicate with our Special Counsel to coordinate the appearance. . . .

(Disciplinary Administrator's Exhibit 150). Mr. Maxwell forwarded the letter to CHPP on behalf of the grand jury. (Disciplinary Administrator's Exhibit 149). CHPP did not accept the grand jury's invitation to have a management representative appear before the grand jury. (Transcript, pp. 2366-67). However, counsel for CHPP and special counsel to the grand jury had discussions regarding records to be provided to the grand jury. (Transcript, p. 2367).

248. After the grand jury session on January 9, 2008, and after learning that K.S.A. 38-1522 applied to matters prior to January 1, 2007, the presiding juror and Judge McClain went to the Johnson County law library to conduct research. During their research, the presiding juror located *Aid for Women*, 327 F. Supp. 2d 1273 (2004). (Disciplinary Administrator's Exhibits 10 and 119). The presiding juror and Judge McClain read the case for the first time. (Transcript, pp. 2372-76).

249. After reading the *Aid for Women* case which resulted in a preliminary injunction, Judge McClain located Mr. Maxwell and confronted him. (Transcript, pp. 2513-14). At the hearing on the formal complaint, Judge McClain described the exchange between himself and Mr. Maxwell, as follows:

> Q. [By Mr. Walczak] Did you have occasion to visit with Mr. Maxwell regarding this?
>
> A. [By Judge McClain] Yes.
>
> Q. Could you tell us about that, please?
>
> A. Well, I don't recall. I think Ms. Hensel went with me, but I went up to the DA's office, found Mr. Maxwell and

knowing me I probably said, "Why in the hell didn't you tell us about this case?"

Q. Do you recall what, if anything, Mr. Maxwell said or what was his reply, if any?

A. It was basically I didn't know about it.

Q. He did not know about Aid for Women?

A. Yes.

Q. And did you have any response to that?

A. I didn't believe him.

Q. I'm sorry?

A. I said I didn't believe him. He was in the A.G.'s Office when that case was litigated, he was involved in this issue and continued to be involved in it and it was just incredulous to me that he would suggest that he wasn't aware of the case.

Q. Did you tell Mr. Maxwell anything along the lines of you couldn't trust him anymore?

A. Yes, I did.

Q. Do you recall your exact words or –

A. Just pretty much that I said, look, I just can't trust you anymore.

. . .

A. Well, I told him that we'd found this case, gave him the case cite.

Q. Is the case Aid for Women?

> A. Yes. Gave him the cite and told him I thought it was a very enlightening case as far as the work the grand jury was doing, asked him to make copies of it to – at his office because he was going to be at the next meeting of the grand jury, because I thought all the juror members should have the benefit of that information. And told him that I'd lost certainly a lot of faith and confidence in the District Attorney's Office to be candid with us on certainly the law.

(Transcript, pp. 2513-14, 2518).[14]

250. Judge McClain contacted Mr. Merker and informed him of the import of the *Aid for Women* case. (Transcript, pp. 2591-92). Mr. Merker reviewed the *Aid for Women* cases and directed an associate in his firm to complete some research for the grand jury. (Disciplinary Administrator's Exhibit 120; Transcript, pp. 2592-93).

251. The grand jury next met on January 14, 2008. (Disciplinary Administrator's Exhibit G8). On that day, Mr. Merker provided a copy of the *Aid for Women* cases to each member of the grand jury. (Disciplinary Administrator's Exhibit 10; Transcript, p. 2376). After having the opportunity to review the *Aid for Women* cases and K.S.A. 38-1522, the presiding grand juror believed that the grand jury had been purposely misled. (Transcript, pp. 2380-81). The grand jury was unhappy that they had not previously been provided with a copy of the *Aid for Women* cases. (Transcript, p. 2605).

[14]Mr. Maxwell's testimony and Judge McClain's testimony on this subject was conflicting. Based upon the demeanor of the witnesses and other evidence, the Hearing Panel finds Judge McClain's testimony to be more credible than Mr. Maxwell's testimony.

252. The grand jury requested records from SRS, subpoenaed records from KDHE, and issued a subpoena to CHPP based on misrepresentations of the law. (Transcript, p. 2475).

253. After becoming familiar with the import of K.S.A. 38-1522 and the *Aid for Women* cases, the grand jury discontinued investigating five of the seven items detailed in the original citizen petition. (Transcript, pp. 2597, 2612). The grand jury continued to investigate whether CHPP complied with the 24 hour waiting period and the parental notification provision. (Transcript, p. 2382).

254. On January 16, 2008, CHPP filed a motion to quash, objection to the production of records, and a memorandum in support of the objection. (Disciplinary Administrator's Exhibits 109-112).

255. On February 19, 2008, the Respondent filed a supplemental response to CHPP's motion to quash the grand jury subpoena. (Disciplinary Administrator's Exhibit 115). The Respondent attached the status and disposition report from the inquisition, the Kansas Supreme Court's opinion in *Alpha*, Judge Anderson's response to the petition for mandamus, a transcript of a press conference held by Paul Morrison, Investigation Reports by KBI Special Agent R.E. Blecha, Paul R. McHugh's affidavit of August 29, 2007, CHPP's HIPAA policy, an inquisition subpoena issued to CHPP, and a page from the original citizen's petition to summon the grand jury. (Disciplinary Administrator's Exhibit 115).

256. At some point in February, 2008, Judge McClain called CHPP in an effort to come to an agreement whereby CHPP would produce the requested medical records. (Transcript, pp. 2526-27, 2606-09).

257. As a result of those discussions, two agreements were drawn up. The agreements limited the grand jury's use of the records and provided for civil liability for "authorized personnel" if the records were used for a purpose other than the purpose stated in the agreement. The agreements were accepted by the Court. (Disciplinary Administrator's Exhibit 124; Respondent's Exhibit P8; Transcript, pp. 2608-09).

258. However, prior to the acceptance of the records pursuant to the agreement, the Respondent and Mr. Maxwell appeared before the grand jury. Without having read the agreement, the Respondent cautioned that the result of the agreement could be to severely impede the criminal case pending against CHPP at that time. A heated discussion between the grand jurors, the Respondent, Mr. Maxwell, and Mr. Merker ensued. (Disciplinary Administrator's Exhibit 102, pp. 3062-78).

259. Eventually, based upon the Respondent's protestations, Mr. Merker stated that the grand jury would not accept the records pursuant to the agreement. (Disciplinary Administrator's Exhibit 102, pp. 3071-72).

260. Also, on February 20, 2008, the grand jury directly asked the Respondent whether he could produce evidence of a crime within the week.

JUROR NO. 2: . . . You had made a statement that you have specific evidence towards each of these counts. Yet this has not been presented to us.

MR. KLINE: Yes.

JUROR NO. 2: . . . So if this is evidence you would like to present to us, I would say you have got till the 7th to get it presented, and I don't know that that's evidence that can be presented by others in your office.

MR. KLINE: No. These involve out-of-state witnesses and documents and so forth, and so we couldn't.

. . .

MR. KLINE: . . . There's just no way we can present this to you by March 4th.

. . .

But to get all this to you, it's going to take us – Steve and are [*sic*] going to have to finish our trial. We just can't put it together before that.

(Disciplinary Administrator's Exhibit 102, pp. 3109-3112).

261. Following the grand jury proceedings on February 20, 2008, the Respondent, Mr. Maxwell, and John Christopher Pryor, one of the Respondent's assistants in the Johnson County District Attorney's office, discussed the investigation. At the hearing on the formal complaint, Mr. Pryor recalled that exchange as follows:

A. [By Mr. Pryor] . . . [i]t was around the February 20th meeting with the grand jury, just before or just after. And Steve Maxwell came into the office – into Phill's office and I was there and maybe one other person, I don't remember. And – and said, look Phill, you're losing this

> grand jury. He said I'm looking – Steve says I'm looking at their body language. Some of them are looking at you, listening to you. Others are – are not making eye contact. You're losing them. Then after that – and then Phill was – was bothered by the fact that he was losing them and wanted to keep trying to convince them. And then Steve left and I was sitting right in front of him and I said – I said, Phill, why do you even care, you've got – what the grand jury does. It came through a citizen petition, you didn't bring them in here. They're an independent body. You've got 107 counts. Why do you have all this angst over losing – quote - unquote, losing the grand jury. And then he became very angry, his body was stiff and he slammed the table and he said if I lose this grand jury it will destroy me.

(Transcript, pp. 2795-96).

262. The grand jury reconvened on February 25, 2008. During those proceedings, the presiding juror made the following request:

> JUROR NO. 9: . . . 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 COURT: Say it one more time now.
>
> JUROR NO. 9: The Grand Jury would like to review any documents that are provided to the Court in our name. For example, if there are to be 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.
>
> . . .
>
> MR. PRYOR: In all candor from our office's standpoint, I don't have the authority to accept or reject, but I will pass that on. . . .

JUROR NO. 9: Okay. That's fine. We would just want to review anything before anything is submitted on our behalf.

(Disciplinary Administrator's Exhibit 103, pp. 3161-62).

263. Mr. Pryor informed the Respondent and Mr. Maxwell that the grand jury requested that they be provided a copy of any pleadings filed to enforce the subpoena prior to the filing. (Transcript, pp. 2790-91).

264. Despite the grand jury's request, and the fact that the grand jury is authorized to direct the course of its investigation, on February 26, 2008, at 4:26 p.m., the Respondent filed a motion to enforce the grand jury's subpoena and original citizen petition. (Disciplinary Administrator's Exhibit 7, p. 252, Exhibit 105, p. 3341, and Exhibit 116; Transcript, p. 2688). The Respondent filed the motion to enforce the grand jury's subpoena and original citizen petition publicly rather than confidentially. (Transcript, pp. 2631, 2786).

265. The Respondent directed Mr. Pryor to draft the motion to enforce the grand jury subpoena. Mr. Pryor drafted it and together, the Respondent and Mr. Pryor edited the document. The Respondent and Mr. Pryor signed the motion. The Respondent directed Mr. Pryor to file the motion. (Disciplinary Administrator's Exhibit 116; Transcript, pp. 2786-87).

266. Neither the Respondent nor any of his assistants notified the grand jury that a motion to enforce the grand jury's subpoena would be filed nor did they provide the grand jury, or its special counsel, the opportunity to review the pleading before it was filed. The grand jury did not provide its permission or authority for filing the motion to enforce the grand jury's subpoena. (Transcript, pp. 2393, 2787).

267. At the hearing on the formal complaint, Mr. Pryor testified about the motion, in pertinent part, as follows:

> Q. [By Mr. Hazlett] Did Mr. Kline request you at any point in time to attach any document to this motion before it was filed?
>
> A. [By Mr. Pryor] Yes, he wanted me – on several occasions he told me – he stressed the need to attach the sealed agreement to this document. The sealed agreement between the grand jury that we just discussed earlier that was put under seal.
>
> Q. The stipulated confidential order, is that what you're talking about?
>
> A. 'Um, yeah, the first – and there were a couple of agreements, but I'm talking about the one that was in the original examination that we just spoke about that – that Mr. Merker presented to the grand jury and they had the argument on. I believe it's the 20th. That's the one that I'm discussing.
>
> Q. Okay. Did you – ultimately you didn't attach that document to this motion, did you?
>
> A. That's correct, I did not.
>
> Q. How come?
>
> A. Because it was clearly forbidden by the seal of the judge. And the pressure – Phill's pressure was – I objected to it strenuously and refused to attach it.
>
> Q. Did he explain to you why he wanted to attach that document to this motion?
>
> A. Yeah, he argued that we needed to get the truth out.

(Transcript, pp. 2787-88).

268. The Respondent's motion to enforce the grand jury's subpoena was posted on Operation Rescue's website by February 27, 2008, at 11:08 a.m. (Respondent's Exhibit Q8, p. 30).

269. The Respondent failed to provide Judge Moriarty with a chambers copy of the pleading. The Respondent also failed to serve the grand jury's special counsel with a copy of the pleading. Judge McClain first learned of the pleading when a reporter from *The Kansas City Star*, who had a copy of the pleading, called him and asked him about it. (Transcript, pp. 2523-24, 2626).

270. At the time the Respondent filed the motion, the grand jury, through its special counsel and counsel for CHPP continued to negotiate the production of the requested records.

271. In the motion to enforce the grand jury subpoena, the Respondent stated that:

> 10. This Grand Jury was convened on December 10, 2007 and was commissioned to investigate Planned Parenthood for 90 days per K.S.A. 22-3013.
>
> 11. The Grand Jury's 90 day period of time for investigation is set to expire on March 9, 2008.
>
> 12. If the Grand Jury had met for investigation on every business day between December 10, 2007 and March 9, 2008 they would have worked a mere 66 days investigating.
>
> 13. This Grand Jury has convened no more than two business days each week, did not meet at all over Christmas Holiday period, and recessed for another 21 days while

waiting for compliance with the only subpoena issued thus far to Planned Parenthood.

14. According to Johnson County Sheriff's records, the Grand Jury has only convened 11 days as of this filing.

. . .

26. On February 25, 2007 [*sic*], Assistant District Attorney John Christopher Pryor objected to the Court that the counsel for the Grand Jury, Larry McClain, had engaged in a conversation, via telephone, with an attorney for Planned Parenthood. Pryor informed the Court that this had occurred during the time the Grand Jury was in session. Pryor objected that McClain's conversation concerned the investigation of the Grand Jury. K.S.A. 22-3012 calls for absolute secrecy concerning the investigation of the Grand Jury. Pryor also objected, that by Planned Parenthood providing responses through counsel McClain, McClain was in effect acting as a witness by providing Planned Parenthood's testimony while neither he nor Planned Parenthood were under oath. As counsel he was not statutorily permitted to provide testimony to the Grand Jury pursuant to K.S.A. 22-3008 and K.S.A. 22-3010.

27. Assistant District Attorney Pryor objected that it was absurd to alert Planned Parenthood of the Grand Jury's investigative focus through McClain's direct phone call to Planned Parenthood. Such actions by the special counsel are outrageous and undermine the duty of the Grand Jury to conduct an independent investigation. Judge Moriarty ordered that should any further need to contact Planned Parenthood arise, the District Attorney's Office and the Court should be consulted.

. . .

29. Kansas law does not provide counsel for the Grand Jury to telephone the subject of the investigation to discuss the

> investigation. On the contrary, such behavior under K.S.A. 22-3012 is strictly forbidden.
>
> 30. The issue of grand jury secrecy pursuant to K.S.A. 22-3012 continues to be a matter of concern for the Grand Jury as evidenced by its questions to the Court on the afternoon of February 25, 2008. It should be noted that the proceedings and investigations of the Grand Jury continue to be covered by this statute concerning confidentiality even after the end of the Grand Jury's term, whether or not an indictment is issued. . . .
>
> 31. K.S.A. 22-3012 leaves no room for doubt. Attorneys are not permitted to "chit chat" with the subjects of investigation during proceedings concerning those proceedings, and the jurors are not permitted to appear on "Oprah" or otherwise discuss grand jury proceedings with the media or public.

(Disciplinary Administrator's Exhibit 116, pp. 3503-04, 3507-08). Despite the Respondent's complaint that Judge McClain had improperly publicized the work of the grand jury contained in the motion to enforce the subpoena, at the Respondent's direction, Mr. Pryor filed the motion publicly. (Transcript, pp. 2631, 2786).

272. According to the presiding juror of the grand jury, the motion "contains misstatements, exaggerations, and outright lies." (Disciplinary Administrator's Exhibit 7, p. 185).

273. On February 27, 2008, the Court convened proceedings with the grand jury. Mr. Merker, Judge McClain, Mr. Pryor, and Mr. Rucker were also present. Judge Moriarty contacted attorneys for CHPP and assisted Mr. Merker and Judge McClain in proposing an agreement for CHPP to provide certain information to the grand jury. The attorneys for CHPP

agreed to discuss the proposal with his clients and reconvene the following day. (Disciplinary Administrator's Exhibit 104).

274. During the proceedings on February 27, 2008, Judge McClain repeated his request that the District Attorney's office refrain from filing any motions or briefs to enforce their subpoena unless the pleading has been reviewed by and approved by the grand jury. (Disciplinary Administrator's Exhibit 104, p. 3259 – but marked p. 3059).

275. On February 28, 2008, Mr. Merker sent an electronic mail message to Mr. Pryor which provided as follows:

> Mr. Pryor: I will be at the hearing today at noon as counsel for the Grand Jury. I understand through reading the Kansas City Star that you have apparently filed a motion which suggests, directly or indirectly, impropriety on the part of Judge McClain and/or me. We had repeatedly requested that we be served with copies of pleadings as we are entitled to under State statutes and local court rules. Why does your office refuse to serve us? I intend to raise this issue today with the Court. Please bring a copy of whatever you have recently filed so that we may discuss it privately with our clients and respond if necessary. Please direct your staff to serve us with all pleadings filed in the future. Thank you for your attention to this oversight.

(Disciplinary Administrator's Exhibit 122; Transcript, pp. 2627-28).

276. On February 28, 2008, the Court reconvened proceedings regarding the grand jury's request for records from CHPP. (Disciplinary Administrator's Exhibit 105). A reporter from *The Kansas City Star* appeared at that hearing. (Disciplinary Administrator's Exhibit 105, pp. 3317-19).

277. On March 3, 2008, at 11:39 a.m. Mr. Pryor filed another pleading to enforce the grand jury's subpoena. Like the earlier motion, the Respondent filed the state's fourth request to enforce the grand jury subpoena publicly. (Disciplinary Administrator's Exhibit 117; Transcript, pp. 2398, 2792). Again, neither the Respondent, Mr. Pryor, nor any of the Respondent's other assistants sought or obtained permission from the grand jury to file the fourth request to enforce the grand jury subpoena. Neither the Respondent, Mr. Pryor, nor any of the Respondent's other assistants provided the grand jury with a copy of the fourth request to enforce the subpoena prior to its submission to the court. (Transcript, pp. 2398, 2792-93).

278. The state's fourth request to enforce the grand jury subpoena was filed much like the motion to enforce the grand jury subpoena. The Respondent directed Mr. Pryor to draft it and they edited the pleading together. However, the Respondent did not sign the state's fourth request to enforce the grand jury subpoena. Mr. Pryor testified about the filing of the state's fourth request to enforce the grand jury subpoena as follows:

> A. [By Mr. Pryor] . . . I presented it to him to sign like the last time and he asked me to remove his name because there was abortion controversy and he didn't want to have another thing to make it appear like he was just the abortion attorney. So he asked me to remove his signature block.

(Transcript, p. 2792).

279. That same day, the Court brokered an agreement between the grand jury and CHPP. CHPP agreed to provide certain records to the Court for an *in camera* review. The grand

jury received records from CHPP. (Disciplinary Administrator's Exhibits 124; Transcript, pp. 2386, 2390-91). The grand jury compared the records received from SRS with the records received from KDHE. (Transcript, p. 2399). The grand jury found that "generally the records matched." (Transcript, p. 2399).

280. On March 4, 2008, the grand jury unanimously withdrew its subpoena to CHPP. (Disciplinary Administrator's Exhibit 118).

281. Thereafter, in early March, 2008, the grand jury's 90 day period concluded. The Court did not extend the service of the grand jury.

282. On July 8, 2008, the presiding grand juror filed a disciplinary complaint against the Respondent. On July 22, 2008, Judge Moriarty authorized the presiding grand juror to provide detailed supplemental information regarding her complaint. On July 31, 2008, the presiding grand juror supplemented her complaint. (Disciplinary Administrator's Exhibit 7).

Motion to Dismiss Count I

283. On March 1, 2011, at the conclusion of the presentation of Disciplinary Administrator's evidence, the Respondent filed a written motion to dismiss Count I, pursuant to K.S.A. 60-252(c) and Kan. Sup. Ct. R. 211(f). (Document 109). Thereafter on April 4, 2011, the Disciplinary Administrator filed his response to the Respondent's motion to dismiss Count I. (Document 110). The Hearing Panel specifically allowed the Respondent to file a reply to the April 18, 2011. (Document 111).

284. Before considering the issues raised in the Respondent's motion, we must first consider whether the motion is properly before the Hearing Panel. The Respondent brings this motion pursuant to K.S.A. 2010 Supp. 60-252(c). That subsection provides:

> *Judgment on partial findings*. If a party has been fully heard on an issue during a nonjury trial and the court finds against the party on that issue, the court may enter judgment against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue. The court may, however, decline to render any judgment until after the close of the evidence. A judgment on partial findings must be supported by findings of fact and conclusions of law as required by subsection (a).

Generally, the Rules of Civil Procedure apply to attorney disciplinary cases. Kan. Sup. Ct. R. 224(b). However, the application of the Rules of Civil Procedure has specifically been limited to exclude motions for summary judgment. *See In re Bryan*, 275 Kan. 202, 69 P.3d 641 (2003). In *Bryan*, the Hearing Panel stated:

> In addition, however, the Hearing Panel finds that Summary Judgment as contemplated by K.S.A. 60-256(b) and Kan. Sup. Ct. R. 141, is so inconsistent with the procedures established in the Kansas Supreme Court Rules Relating to Discipline of Attorneys that they cannot apply to these proceedings.
>
> The Respondent cites K.S.A. 60-256(b), Kan. Sup. Ct. R. 141, and Internal Operating Rules §§ D.1 and D.2 as procedural authority for the motion.
>
> The Hearing Panel is mindful of Kan. Sup. Ct. R. 224(b) which states: "Except as otherwise provided, the Rules of Civil Procedure apply in disciplinary cases." Clearly, K.S.A. 60-256(b) is part of the Rules of Civil Procedure. However, in the opinion of the Hearing Panel, summary judgment conflicts so dramatically

> with concepts underlying the Rules Relating to Discipline of Attorneys that the two procedures cannot coexist.

Bryan, 275 Kan. at 230. The Court held that:

> The propriety of a motion for summary judgment in disciplinary proceedings appears to be an issue of first impression. . . .
>
> . . . The filing of a motion for summary judgment is inconsistent with the procedure establish by this court for the discipline of attorneys. Thus, K.S.A. 2001 Supp. 60-256(a) is not applicable to disciplinary proceedings.

Bryan, 275 Kan. at 231.

285. The Respondent's motion to dismiss is not similar to a motion for summary judgment. First, a motion for summary judgment is filed and ruled upon prior to trial because if it is granted, then the matter does not proceed to trial. In this case, the hearing is completed. Second, in a motion for summary judgment, the parties argue that, for purposes of the motion, there is no genuine issue of material fact. In this case, many, many facts were contested. Further, conflicting testimony was presented on a variety of facts. Thus, because of the significant differences between motions for summary judgment and the Respondent's motion to dismiss filed in this case, the Hearing Panel concludes that the holding in *Bryan* is not controlling in this case.

286. However, whether the Respondent's motion is consistent with disciplinary proceedings does not turn on whether it is a motion for summary judgment. Attorney disciplinary proceedings are not regular civil cases. They are administrative proceedings to

determine whether an attorney should retain his or her license and concomitant privilege to practice law. While the Rules of Civil Procedure generally apply, they are not strictly construed.

287. The Respondent's motion to dismiss Count I is partially a legal argument and partially a closing argument. In the Respondent's motion, he set out three issues. The Respondent's first issue, whether the Disciplinary Administrator's claims comprising Count I lack merit and must be dismissed because they are barred by collateral estoppel, is a purely legal argument.

288. The Respondent's second issue, whether the Disciplinary Administrator's claims comprising Count I lack merit and must be dismissed because to rule otherwise would violate the United States Constitution or the Kansas Constitution, is likewise a legal argument.

289. The Respondent's third issue, whether the Disciplinary Administrator's claims comprising Count I lack merit and must be dismissed because the Disciplinary Administrator failed to establish each of the elements of the claims by clear and convincing evidence, turns on the factual findings made in this case and whether the facts as found amount to violations of the Kansas Rules of Professional Conduct. The Respondent's third argument is akin to a closing argument, in that the Respondent is arguing that the Disciplinary Administrator failed to meet his burden of proof regarding the various issues before the Hearing Panel.

290. Regardless of the arguments advanced by the Respondent, the Respondent's motion to dismiss Count I was filed out of time. In the first and second prehearing scheduling orders, the Hearing Panel set forth deadlines for filing various pleadings, including motions.

According to the second prehearing scheduling order, all motions were to be filed by December 21, 2010.

291. The legal arguments made by the Respondent in his first two issues of his motion to dismiss Count I, were based upon knowledge and information to which the Respondent and his counsel had access long before the motion deadline. Neither the Respondent nor his counsel asked for additional time to file a motion. As such, the Hearing Panel denies the Respondent's motion to dismiss as untimely.

292. Notwithstanding the denial of the Respondent's motion to dismiss Count I, in order to assist the Kansas Supreme Court in its review, the Hearing Panel offers the following analysis of the merits of the Respondent's first two issues in his motion to dismiss Count I.

Collateral Estoppel

293. The Respondent argues that collateral estoppel bars various claims made by the Disciplinary Administrator. In order to prevail on a claim of collateral estoppel, as the Court recently restated, the Respondent would have to establish the following three conditions:

> (1) a prior judgment on the merits which determined the rights and liabilities of the parties on the issue based upon ultimate facts as disclosed by the pleadings and judgment; (2) the parties must be the same or in privity; and (3) the issue litigated must have been determined and necessary to support the judgment.

Venters v. Sellers, ___ Kan. ___, ___ P.3d ___, 2011 WL 3873808, p. 9 (September 2, 2011) *citations omitted*.

Prior Final Judgment

294. As set forth in the Respondent's memorandum in support of his motion to dismiss Count I, the judgment must be a final judgment. "A judgment is 'final' if it 'ends litigation on merits and leaves nothing for the court to do but execute judgment.'" (Document 109 *citations omitted*). The Respondent relies on Judge King's report to the Kansas Supreme Court in the mandamus action and Judge Owens' order denying Dr. Tiller's motion to dismiss or suppress in the criminal action brought against Dr. Tiller.

295. Judge King's report to the Kansas Supreme Court was not a final judgment. It was a report to the Court. In the mandamus action, the final judgment was rendered by the Kansas Supreme Court in the form of its opinion, *CHPP v. Kline*, 287 Kan. 372, 197 P.3d 370 (2008).

296. Further, the order denying Dr. Tiller's motion to dismiss or suppress was likewise not a final judgment. Following the denial of Dr. Tiller's motion to dismiss or suppress, the matter proceeded to trial. The order denying the motion to dismiss or suppress was simply a preliminary order issued in a criminal case.

297. The Hearing Panel concludes that the two judgments are not valid final judgments as required.

Privity

298. The second condition of collateral estoppel is privity. Privity is a difficult term to define. The Kansas Court of Appeals, in *St. Paul Fire & Marine Ins. Co. v. Tyler*, restated a number of definitions of privity previously relied on in deciding collateral estoppel cases.

> We have read a number of cases attempting to define privity and can only conclude that the definition of privity is one of the more difficult to state and is perhaps one that has never been satisfactorily set forth.
>
> Despite that difficulty, there are a number of definitions of privity:
>
> "There is no generally prevailing definition of 'privity' which can be automatically applied to all cases. A determination of the question as to who are privies requires careful examination into the circumstances of each case as it arises." Goetz v. Board of Trustees, 203 Kan. 340, 350–51, 454 P.2d 481 (1969).
>
> "A privy is: '[O]ne who, after rendition of the judgment, has acquired an interest in the subject matter affected by the judgment through or under one of the parties, as by inheritance, succession or purchase.' " Wells v. Davis, 226 Kan. 586, 589, 603 P.2d 180 (1979) (quoting Bernhard v. Bank of America, 19 Cal.2d 807, 811, 122 P.2d 892 [1942]).
>
> In 47 Am.Jur.2d, Judgments § 663, we find:
>
> "Privity is not established however, from the mere fact that persons happen to be interested in the same question or in proving or disproving the same state of facts, or because the question litigated was one which might affect such other person's liability as a judicial precedent in a subsequent action. . . .
>
> "It has been declared that if the interests of two groups of persons were in conflict at the time of the first action, they are not privies for the purposes of res judicata or collateral estoppel.

> There can be no such privity between persons unless the result can be defended on principles of fundamental fairness in the due process sense."
>
> The fact is, Tyler was not a party in the malpractice suit and was not represented in the malpractice suit. To hold that she is bound by the judgment of the malpractice action seems to us to deny her fundamental due process and fairness. The definition of privity in the context with which we deal is very difficult if not impossible to state. However, privity is an equitable concept and equitable principles should apply. We conclude there can be no privity between persons unless the result can be defended on principles of fundamental fairness in a due process sense. That element cannot be satisfied in this case.

St. Paul Fire & Marine Ins. Co. v. Tyler, 26 Kan. App. 2d 9, 18-19, 974 P.2d 611 (1999).

299. CHPP brought the mandamus action against the Respondent and Judge Anderson. While the Respondent was a party in the mandamus action and is the Respondent in this action, CHPP is not involved in the attorney disciplinary proceeding and the Disciplinary Administrator was not involved in the mandamus action. Further, CHPP and the Disciplinary Administrator are not in privity.

300. In the criminal case, the parties were the State of Kansas and Dr. George Tiller. Neither the Respondent nor the Disciplinary Administrator were parties or are in privity with the parties in Dr. Tiller's criminal case.

301. The Hearing Panel concludes that the parties are not the same nor are they in privity with the parties in the underlying cases. As such, the Hearing Panel concludes that the Respondent failed to establish the second condition required for collateral estoppel.

Issues Litigated

302. The issues litigated must have been determined and must be necessary to support the judgment, meaning the issues in the prior cases must be the same as the issues in the instant case.

303. In the mandamus action, CHPP sought the return of medical records. In the criminal case, the State of Kansas charged Dr. Tiller with a number of criminal violations. In the attorney disciplinary case, the Disciplinary Administrator alleged that the Respondent violated the Kansas Rules of Professional Conduct. Whether an attorney has violated the Kansas Rules of Professional Conduct is matter that rests solely with the Kansas Supreme Court. Thus, the Hearing Panel concludes that the issues involved in the underlying cases are not the same as the issues involved in the attorney disciplinary proceeding brought against the Respondent. Similarly, the third condition necessary for collateral estoppel to apply is not present in this case.

304. Therefore, had the Respondent's motion been timely filed, the Hearing Panel would have denied the Respondent's claim of collateral estoppel in his motion to dismiss Count I.

United States Constitution and Kansas Constitution

305. The Respondent's second legal argument in his motion to dismiss initially appears to be an argument that his constitutional rights have been violated and therefore the formal complaint must be dismissed. However, upon closer inspection, the Respondent's

argument in this section of his motion and memorandum in support of his motion is a prospective argument. Without stipulating to another violation, the Respondent argues that KRPC 8.4(c) and KRPC 8.4(d) should only be found when other violations are not present and should only be found in certain circumstances. In this regard, the Respondent's motion appears to be a trial brief on the application of KRPC 8.4(c) and KRPC 8.4(d). The Hearing Panel specifically denied the Respondent's previous request to file a trial brief in this case.

306. Whether to find a violation of KRPC 8.4(c), KRPC 8.4(d), or any other provision of the Kansas Rules of Professional Conduct turns on the particular facts presented to the Hearing Panel. The Respondent's attempt to narrow the meaning of two provisions of the rules which have clear meaning is not a matter that is properly before the Hearing Panel. The Respondent's argument in this regard lacks merit and had his motion been timely, the Hearing Panel would also deny this portion of the motion.

Sufficient Evidence

307. The Respondent's third section of his motion to dismiss Count I turns on whether sufficient evidence was presented to establish particular violations. The Respondent's motion in this regard is basically a closing argument. The Hearing Panel has thoroughly considered the facts and the law of this case. The Hearing Panel's conclusions and analysis are set forth fully below by issue.

Motion to Dismiss Count II

308. On August 5, 2011, the Respondent filed a motion to dismiss Count II of the formal complaint. (Document 119). The Disciplinary Administrator filed a response to the motion on August 18, 2011. (Document 120). Thereafter, on August 22, 2011, the Respondent filed a motion to strike a portion of the Disciplinary Administrator's response to Respondent's motion to dismiss Count II. (Document 121). That same day, the Disciplinary Administrator filed a response to the Respondent's motion to strike. (Document 122).

309. In his motion to strike Count II, the Respondent asserts that the Disciplinary Administrator "alleges a violation of the KRPC that goes beyond the scope of the facts alleged in the Amended Formal Complaint." (Document 121). The Respondent argues that he did not have an opportunity to address the issue and consideration of that issue would result in a due process violation. (Document 121).

310. Beginning in 1970, with *State v. Nelson*, 206 Kan. 154, 476 P.2d 240 (1970), the court made clear what notice is due in disciplinary cases. The Disciplinary Administrator is required to include facts sufficient to put the Respondent on notice as to what violations may arise. *Id*. at 157.

311. Since *Nelson*, the court has been called upon to determine whether Respondents were afforded sufficient notice in the formal complaint. *See In re Alvey*, 215 Kan. 460, 466, 524 P.2d 747 (1974) ("It is not incumbent on the board to notify the respondent of charges of specific acts of misconduct as long as proper notice is given of the basic factual

situation out of which charges might result.") and *In re Turner*, 217 Kan. 574, 580, 538 P.2d 966 (1975) ("We believe the language of count III was sufficient to apprise the respondent of the incidents out of which the alleged misconduct arose.")

312. The most exhaustive review of the notice requirement in disciplinary cases came in 1984 with *In re Caenen*. There, the Court engaged in a thorough discussion of notice in disciplinary cases.

> The respondent argues he was deprived of due process because he was not properly notified solicitation was to be a charge against him.
>
> Supreme Court Rule 211(b) (232 Kan. clxvi), requires the formal complaint in a disciplinary proceeding to be sufficiently clear and specific to inform the respondent of the alleged misconduct.
>
> The seminal decision regarding the applicability of the due process clause to lawyer disciplinary proceedings is found in *In re Ruffalo,* 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed.2d 117, *reh. denied* 391 U.S. 961, 88 S.Ct. 1833, 20 L.Ed.2d 874 (1968). There the United States Supreme Court held that a lawyer charged with misconduct in lawyer disciplinary proceedings is entitled to procedural due process, and that due process includes fair notice of the charges sufficient to inform and provide a meaningful opportunity for explanation and defense.
>
> Decisions subsequent to *Ruffalo* have refined the concept of due process as it applies to lawyer disciplinary hearings, and suggest that the notice to be provided be more in the nature of that provided in civil cases. The weight of authority appears to be that, unlike due process provided in criminal actions, there are no stringent or technical requirements in setting forth allegations or descriptions of alleged offenses. . . . Due process requires only that the charges must be sufficiently clear and specific to inform the attorney of the misconduct charged, but the state is not

> required to plead specific rules, since it is the factual allegations against which the attorney must defend. . . . However, if specific rules are pled, the state is thereafter limited to such specific offenses. . . .
>
> Subsequent to the *Ruffalo* decision, the due process requirements in lawyer disciplinary proceedings have been given exhaustive treatment by this court. In *State v. Turner,* 217 Kan. 574, 538 P.2d 966 (1975), 87 A.L.R.3d 337, the court summarized prior Kansas and federal precedent on the question, including *Ruffalo,* and held in accordance with established precedent that the state need not set forth in its complaint the specific disciplinary rules allegedly violated . . ., nor is it required to plead specific allegations of misconduct. . . . What is required was simply stated therein:
>
> "'We must conclude that where the facts in connection with the charge are clearly set out in the complaint a respondent is put on notice as to what ethical violations may arise therefrom. . . .
>
> . . .
>
> "'It is not incumbent on the board to notify the respondent of charges of specific acts of misconduct as long as proper notice is given of the basic factual situation out of which the charges might result.'"

Caenen, 235 Kan. 451, 458-59, 681 P. 2d 639 (1984) (*citations omitted)*. Thus, pursuant to *Caenen* and the line of cases that preceded *Caenen*, the Disciplinary Administrator was required to provide the Respondent with the basic factual situation out of which the rule violations might arise.

313. The Disciplinary Administrator has provided the Respondent with what is required and more. As such, the Hearing Panel denies the Respondent's motion to strike the Disciplinary Administrator's response to the Respondent's motion to dismiss Count II.

314. The Respondent's motion to dismiss Count II takes a similar approach to the third section of the Respondent's motion to dismiss Count I – whether the Disciplinary Administrator presented sufficient evidence to establish specific violations. Again, the Respondent's motion in this regard is basically a closing argument. The Hearing Panel has thoroughly considered the facts and the law of this case. The Hearing Panel's conclusions and analysis are set forth fully below by issue.

315. Because the Hearing Panel denied the Respondent's motions to dismiss the formal complaint, it is proper to determine whether the facts, as found by the Hearing Panel constitute violations of the Kansas Rules of Professional Conduct.

316. Based upon the findings of fact, the Hearing Panel concludes as a matter of law that the Respondent violated KRPC 3.3, KRPC 3.8, KRPC 5.1, KRPC 5.3, KRPC 8.1, and KRPC 8.4, in Count I, as detailed below.

317. "Attorney misconduct must be established by clear and convincing evidence." *In re Patterson*, 289 Kan. 131, 133–34, 209 P.3d 692 (2009). "Clear and convincing evidence is 'evidence that causes the fact finder to believe that the truth of the facts asserted is highly probable.'" *Id*. (*quoting In re Dennis*, 286 Kan. 708, 725, 188 P.3d 1 (2008)). Thus, in order for the Hearing Panel to conclude that the Respondent violated the Kansas Rules of Professional

Conduct, the Hearing Panel must conclude that the truth of the facts asserted to support the violations is highly probable.

Analysis of the Kansas Rules of Professional Conduct

Count I

Whether the Respondent violated the Kansas Rules of Professional Conduct when a nonlawyer assistant, Mr. Williams, intentionally misled SRS.

318. Mr. Williams intentionally misled SRS in order to obtain certain information. The Respondent knew that Mr. Williams planned to intentionally mislead SRS prior to the time when Mr. Williams met with SRS. Mr. Williams detailed his plan to mislead SRS in a memo to the Respondent and Mr. Rucker, on July 15, 2001. (Disciplinary Administrator's Exhibit 13). Further, the Respondent knew that Mr. Williams had, in fact, intentionally misled SRS prior to the time when SRS provided the records. (Disciplinary Administrator's Exhibit 14). Thus, the Respondent could have taken remedial measures, but did not.

319. In his motion to dismiss, citing *State v. Ackward*, 281 Kan. 2, 128 P.3d 382, 388 (2006), the Respondent argued, that the "Kansas Supreme Court has instructed that law enforcement may use deception even when obtaining a confession from a criminal defendant, let alone when interviewing non-target witnesses." (Document 109, p. 1275).

320. First, in *Ackward*, the Court does not specifically sanction law enforcement use of deception during interrogation of a suspect; the holding was to use a totality of the circumstances evaluation in determining the voluntariness of confessions. Second, the Court

makes no mention of "interviewing non-target witnesses." Finally, *Ackward* and other cases regarding whether a criminal defendant's confession is deemed involuntary based upon the potentially coercive tactic of providing false or misleading information to the suspect are inapposite to this case.

321. In his closing argument, the Respondent referred to a federal District Court decision from New York, *United States v. Parker*, 165 F. Supp. 2d 431 (W.D. N.Y. 2001). In that case, a criminal defendant moved to suppress evidence gained as the result of alleged deceptive investigative techniques. *Id*. at 476. The Court denied the relief sought but stated, "opinions of state and local bar associations hold DR 1-102(A)(4) does not apply to prosecuting attorneys who provide supervision and advice to undercover investigations." *Id*. Oddly, the two ethics opinions cited do not pertain to undercover investigations – but rather secret recordings.

322. The holding in *Parker* is neither controlling nor persuasive. First, the facts in *Parker* are distinguishable from the facts in this case. In *Parker*, the person on the receiving end of the deception was a suspect, not a fellow state agency. Additionally, the Court was considering whether to suppress evidence not whether to find a violation of the ethics rules. Next, the law is also distinct. The rule under consideration in *Parker* was not Rule of Professional Conduct 8.4(c), but rather, DR 1-102(A)(4), a disciplinary rule from the Code of Professional Responsibility. Finally, the Court issuing *Parker* is a federal District Court in New

York and its decision has no effect on a disciplinary proceeding in Kansas. Accordingly, the Hearing Panel concludes that *Parker* offers no guidance in this regard.

323. It appears that this issue is a matter of first impression in Kansas. But, the matter is a simple one. Lawyers cannot lie nor can they allow their subordinates to lie on their behalf.

324. Two rules of the Kansas Rules of Professional Conduct are implicated. Specifically, KRPC 5.3 and KRPC 8.4 are applicable to this situation.

325. Under the rules, attorneys are responsible for the actions of nonlawyers if the lawyer has supervisory responsibility for the nonlawyer. KRPC 5.3 provides the authority in this regard. Specifically, KRPC 5.3(b) provides that "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." In his testimony before the Hearing Panel, the Respondent acknowledged that under KRPC 5.3, he is responsible for the conduct of his non-lawyer subordinates, including Mr. Williams. (Transcript, p. 220).

326. Further, KRPC 5.3(c) provides, in pertinent part, as follows:

> 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:
>
> . . .
>
> (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.

327. Finally, KRPC 8.4(c) prohibits attorneys from engaging in "conduct involving dishonesty, fraud, deceit or misrepresentation."

328. Neither the Kansas Rules of Professional Conduct nor other law establish exceptions to KRPC 5.3 or KRPC 8.4(c) for lawyers who choose to supervise criminal investigations. Thus, while law enforcement officers have been allowed to intentionally mislead others, lawyers are not. Further, attorneys, in a supervisory role over non-lawyers, must insure that those non-lawyers also comply with the Kansas Rules of Professional Conduct. KRPC 5.3(b) and KRPC 5.3(c).

329. Accordingly, the Hearing Panel concludes that the Respondent violated KRPC 5.3(b) by failing to make reasonable efforts to ensure that Mr. Williams' conduct complied with the professional obligations of the lawyer. Further, the Hearing Panel concludes that the Respondent violated KRPC 8.4(c) by virtue of KRPC 5.3(c)(2) because (1) Mr. Williams intentionally misled SRS, (2) the Respondent knew that Mr. Williams planned to intentionally mislead SRS prior to its occurrence, (3) the Respondent knew that Mr. Williams carried out his plan at a time when its consequences could have been avoided or mitigated, but (4) the Respondent failed to take reasonable remedial action.

Whether the Respondent violated the Kansas Rules of Professional Conduct when he failed to timely inform Judge Anderson that the initial information received from SRS was inaccurate.

330. In the fall of 2003, in response to Mr. Williams' request for information, SRS provided the Respondent with certain information. Specifically, SRS provided the Respondent with the number of reported cases of underage sexual abuse for the period January 1, 2002, through June 30, 2003.

331. The number of cases of underage sexual abuse reported to SRS, in Sedgwick County, Kansas, alone, was vastly different than the cases recorded by Sedgwick County District Attorney's Exploited and Missing Children Unit. Based upon the difference in the numbers, the Respondent sought and opened an inquisition in Shawnee County, Kansas, before Judge Richard Anderson.

332. Shortly thereafter, the Respondent learned that the information provided by SRS was faulty. Neither the Respondent nor any of his assistants took any steps to inform Judge Anderson of the faulty information for a period of more than six months.

333. The Hearing Panel has thoroughly considered these allegations and concludes that there is not "clear and convincing evidence" that the Respondent violated the Kansas Rules of Professional Conduct by failing to inform Judge Anderson of the faulty information for a period of more than six months.

Whether the Respondent violated the Kansas Rules of Professional Conduct when he repeatedly testified that his office did not seek the identity of adult abortion patients.

334. The Respondent repeatedly testified, under oath, that his office did not seek to identify the names of adult abortion patients. However, the Respondent directed Mr. Williams to subpoena records from La Quinta Inn & Suites. Mr. Maxwell obtained a subpoena from Judge Anderson. Mr. Williams directed Mr. Reed to compare the KDHE records with the La Quinta Inn & Suites records, in an attempt to identify the names of adult abortion patients, and in April, 2005, Mr. Reed provided Mr. Williams with a copy of Disciplinary Administrator's Exhibit 51 which contained a summary of 2003 KDHE records and potential matches from records of La Quinta Inns., Inc., including Kansas and non-Kansas residents, 16 years of age or older and a gestation period of 22 weeks or more. In April, 2005, the Respondent knew or should have known that his office attempted to identify adult abortion patient names.

335. Thus, the statements made by the Respondent, under oath, that his office never sought to identify the names of adult abortion patients are false. To date, the Respondent has never attempted to correct the false statements made under oath.

336. KRPC 3.3(a)(1) prohibits lawyers from making "a false statement of fact or law to a tribunal." That subsection also prohibits lawyers from failing to "correct a false statement of material fact or law previously made to the tribunal by the lawyer." Because the Respondent made false statements under oath to Judge King and Judge Owens and because the

Respondent never corrected the false statements, the Hearing Panel concludes that the Respondent violated KRPC 3.3(a)(1).

Whether the Respondent violated the Kansas Rules of Professional Conduct when he attached confidential documents to a public brief.

337. On March 3, 2005, the Respondent's staff filed a brief in *Alpha*. The Respondent directed his assistants to attach three documents to the brief – the inquisition subpoenas issued to the clinics, a transcript of an inquisition hearing, and a memorandum opinion issued in the inquisition case. The three items attached were part of the inquisition record of the district court which was to remain under seal by order of the Kansas Supreme Court. Further, the Respondent held a press conference following the filing of the brief. Following the filing of the brief and the press conference, the Respondent's communications director provided an electronic copy of the transcript of the inquisition hearing to anyone who asked.

338. KRPC 8.4(d) defines professional misconduct to include conduct that is prejudicial to the administration of justice. Attaching confidential documents to a public pleading is misconduct that is prejudicial to the administration of justice, in violation of KRPC 8.4(d).

339. "It is professional misconduct for a lawyer to . . . engage in any other conduct that adversely reflects on the lawyer's fitness to practice law." KRPC 8.4(g). The Court's purpose in sealing court records is to protect confidential information from being publicly released. Attaching confidential documents to a public pleading is also misconduct that

adversely reflects on the Respondent's fitness to practice law as it defeated the Court's purpose in sealing the record. Accordingly, the Hearing Panel concludes that the Respondent violated KRPC 8.4(g) in this regard.

340. When a supervising lawyer directs a subordinate lawyer to engage in misconduct, the supervising lawyer is responsible for the other lawyer's violation of the rules if:

> . . . 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.

KRPC 5.1(c).

341. The Respondent directed his subordinates to attach confidential documents to a public brief. As a result, the Respondent's assistants violated KRPC 8.4(d) and KRPC 8.4(g). Because the Respondent had managerial authority over his assistants, because the Respondent knew of the conduct at a time when the consequences of the conduct could have been avoided, and because the Respondent failed to take reasonable remedial action, the Hearing Panel concludes that the Respondent violated KRPC 5.1(c), KRPC 8.4(d), and KRPC 8.4(g).

Whether the Respondent violated the Kansas Rules of Professional Conduct when he stated that he had sought records and information from other mandatory reporters and this effort included subpoenas for records, in the second motion to clarify.

342. Following oral arguments in *Alpha*, the Respondent filed two motions to clarify Mr. Rucker's oral arguments. The second motion to clarify changed, rather than clarified, Mr.

Rucker's oral arguments. Specifically, the second motion to clarify provided, in pertinent part, as follows:

> 1. As part of this criminal investigation and/or inquisition, respondent 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.

(Disciplinary Administrator's Exhibit 126).

343. The language used in the motion to clarify stated that the Respondent "sought records and information from other mandatory reporters." The Respondent never sought information from other mandatory reporters. The Respondent sought information from SRS, KDHE, and the petitioners in the mandamus action. The information, that SRS and KDHE had, came from others, including mandatory reporters.

344. The Respondent argues that the words used in the motion to clarify are clear and honest. The Hearing Panel disagrees, however. If the words of the motion are given the meaning that the Respondent suggests, then the motion is misleading.

345. However, the Hearing Panel believes that, rather than misleading, the words of the motion are simply false. The motion states that the Respondent sought information from other mandatory reporters. The Respondent and his assistants sought information from SRS, KDHE, and the petitioners. The Respondent did not seek any information from other mandatory reporters.

346. KRPC 3.3(a)(1) provides:

> A lawyer shall not knowingly . . . 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.

The Respondent violated KRPC 3.3(a)(1) when he filed the second motion to clarify with the Kansas Supreme Court. In the second motion to clarify, the Respondent made a false statement of fact. Accordingly, the Hearing Panel concludes that the Respondent violated KRPC 3.3(a)(1).

347. Including false statements in a motion filed with the Kansas Supreme Court amounts to misconduct involving "dishonesty, fraud, deceit or misrepresentation" in violation of KRPC 8.4(c). Thus, the Hearing Panel concludes that the Respondent violated KRPC 8.4(c).

348. The Respondent's misconduct in this regard is particularly troubling to the Hearing Panel as the Respondent's false statements caused the Kansas Supreme Court to conclude, in a published opinion, that Mr. Rucker was "less than forthright in his answers to this court's questions on September 8, 2005." *Alpha*, 280 Kan. at 912-13. (Disciplinary Administrator's Exhibit 72, p. 905). The Hearing Panel concludes that Mr. Rucker's comments to the Kansas Supreme Court were made to appear to be misleading as a result of the Respondent's statements made in his motion to clarify. However, the Hearing Panel has determined that the Respondent's statements made in his motion to clarify were false.

Whether the Respondent violated the Kansas Rules of Professional Conduct when Mr. Maxwell and Mr. Williams failed to inform Judge Anderson that the abuse of the 10 year old had been reported in another state.

349. During the inquisition proceedings before Judge Anderson, the Respondent's assistants referred to a specific patient who was 10 years old at the time of her abortion. Mr. Maxwell and Mr. Williams used that particular abortion as a specific example when seeking and obtaining a subpoena.

350. After the Kansas Supreme Court issued the decision in *Alpha*, on March 28, 2006, Mr. Maxwell and Mr. Williams appeared before Judge Anderson to establish that they were on "firm legal ground." During that hearing, the case of the 10 year old was again mentioned. Judge Anderson asked Mr. Williams if they found any evidence that the abuse of the 10 year old had been reported. Mr. Williams informed Judge Anderson that they had not found any evidence that the abuse of the 10 year old had been reported. The Attorney General's office did not find any information that the abuse of the 10 year old had been reported to SRS. However, the 10 year old was from California. The child abuse had been reported in Sacramento County, California, and the perpetrator had been successfully criminally prosecuted. (Transcript, p. 651).

351. However, while Mr. Williams' statements to Judge Anderson were apparently true – the abuse of the 10 year had apparently not been reported to SRS in Kansas – just as Judge Anderson testified at the hearing on this matter, Mr. Williams and Mr. Maxwell should

have given him "a full and candid outline" of what they knew at the time. (Transcript, pp. 651-52).

352. The Hearing Panel concludes that there is not clear and convincing evidence that the Respondent knew that Mr. Maxwell and Mr. Williams failed to inform Judge Anderson that the abuse of the 10 year old had been reported to California. Thus, the Hearing Panel does not find a violation by the Respondent.

Whether the Respondent violated the Kansas Rules of Professional Conduct by the statements that he made while appearing on The O'Reilly Factor.

353. On November 3, 2006, the Respondent appeared on *The O'Reilly Factor*. During his appearance, the Respondent made statements regarding matters that had been discovered in the investigation. Specifically, the Respondent made the following statements:

> MR. KLINE: Well, absolutely. One of the first steps of a rapist, when they have a child victim, and the child is pregnant, is to eradicate evidence of the rape. And that means stopping in at an abortion clinic. And I think it's an absurdity to argue that the privacy of the child, which has already been violated by a rapist, prohibits law enforcement, after they present evidence to a judge, which is what happened in all of these cases and the judge found probable cause to believe the crimes had been committed and subpoenas records, somehow that they cannot reveal that information . . . and the child rapist is able to go free.
>
> . . .
>
> MR. KLINE: Well, what I can confirm as it relates to our investigation, Bill, is that we have received the medical records in question. First of all, it's important for your listeners to know

> that women were never under investigation. Their identity never sought. There will be no invasion of privacy. But 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. We have obtained those records. In every single instance, there was not a late-term abortion performed on a viable child to save the life of the mother. And in every single instance, there was not an abortion performed for a physical reason. So, from that you can infer, as I guess that you have regarding, the reason for the late-term abortion.

(Respondent's Exhibit V5).

354. Prosecutors have additional limitations on making extrajudicial statements.

KRPC 3.8(f) provides those additional restrictions:

> The prosecutor in a criminal case shall . . . 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 . . . .

The statements made by the Respondent on *The O'Reilly Factor* were not necessary to inform the public of the nature and extent of the prosecutor's action. The statements made by the Respondent on *The O'Reilly Factor* did not serve a legitimate law enforcement purpose. Finally, the statements made by the Respondent on *The O'Reilly Factor* had a substantial likelihood of heightening public condemnation of Dr. Tiller. Accordingly, the Hearing Panel concludes that the Respondent violated KRPC 3.8(f) by making the statements on *The O'Reilly Factor*.

Whether the Respondent violated the Kansas Rules of Professional Conduct in the handling, copying, and storage of the redacted WHCS patient medical records.

355. On January 8, 2007, shortly before the Respondent left office as the Kansas Attorney General and took office as the Johnson County District Attorney and after Mr. Williams filed the status and disposition report with Judge Anderson, the Respondent directed Mr. Rucker to make sure that a copy of the redacted WHCS patient medical records were taken to the Johnson County District Attorney's office. As a result, Mr. Williams and Mr. Reed made an additional copy of the redacted WHCS patient medical records.

356. However, the new copy of the redacted WHCS patient medical records was not taken to the Johnson County District Attorney's office. Rather, the new copy of the redacted WHCS patient medical records was taken to Mr. Reed's apartment in Topeka, Kansas. Mr. Reed maintained the records in a Rubbermaid container in the dining room of his Topeka apartment for approximately five weeks.

357. While the Respondent directed that the copy of the records be made, he did not direct nor did he know, initially, that the records were being stored in Mr. Reed's apartment. Additionally, it appears that throughout the time the redacted WHCS patient medical records were stored in Mr. Reed's apartment, they were not disturbed.

358. The Hearing Panel concludes that storing the redacted WHCS patient medical records in Mr. Reed's Topeka apartment for five weeks does not constitute a violation of the Kansas Rules of Professional Conduct by the Respondent.

Whether the Respondent violated the Kansas Rules of Professional Conduct by failing to update the status and disposition report or otherwise inform Judge Anderson that the redacted WHCS patient medical records were taken to Johnson County.

359. On January 5, 2007, Judge Anderson directed Mr. Maxwell to prepare an accounting of the location of the copies of the redacted patient medical records. On Saturday, January 6, 2007, at his personal residence, Mr. Maxwell prepared a status and disposition report. Mr. Williams and Mr. Reed assisted in organizing the files and reviewed the status and disposition report.

360. On January 8, 2007, the Respondent directed Mr. Rucker to ensure that a copy of the redacted WHCS patient medical records were taken to Johnson County for their use during the Respondent's tenure as Johnson County District Attorney. The Respondent informed Mr. Rucker that Judge Anderson had authorized him to take the redacted WHCS patient medical records to Johnson County. (However, the Respondent had not asked Judge Anderson's permission to take the redacted WHCS patient medical records to Johnson County.) Mr. Rucker relayed the direction to Mr. Williams and the records were copied.

361. However, the status and disposition report did not contain information about this new set of redacted WHCS patient medical records. The status and disposition report contained no reference to the fact that the redacted WHCS patient medical records were copied for use by the Respondent as Johnson County District Attorney.

362. Within four days of its issuance, the Respondent was familiar with the status and disposition report, as he referred Mr. Guinn to it in written correspondence. (Disciplinary Administrator's Exhibit 81).[15]

363. Judge Anderson relied on the status and disposition report for information on the location of all copies of the redacted patient medical records.

364. At no time did the Respondent, Mr. Maxwell, or anyone else correct or update the status and disposition report. As a result, Judge Anderson was left with a misapprehension of the facts. It was not until April 9, 2011, when the Respondent showed Judge Anderson a redacted WHCS patient medical record that the Judge Anderson learned that the Respondent had made an additional copy of the redacted WHCS patient medical records and had taken that copy to the Johnson County District Attorney's office.

365. In order to avoid leaving Judge Anderson with a misapprehension of fact, the status and disposition report should have been corrected or updated.

---

[15]Judge King, in his report, stated:

> 159. Kline was not familiar with the content of the Status and Disposition Report. He was not even aware that Judge Anderson had requested an accounting for the location of the files. There is no indication that Maxwell advised Kline of the existence or content of the Status and Disposition Report.

(Disciplinary Administrator's Exhibit 90, p. 2035). However, Judge King knew of the Respondent's January 12, 2008, letter to Mr. Guinn. (Disciplinary Administrator's Exhibit 90, p. 2028). Judge King must not have realized the significance of the Respondent's statement that "a report was filed with the Court." (Disciplinary Administrator's Exhibit 90, p. 2028).

366. The responsibility for correcting or updating the status and disposition report falls to both Mr. Maxwell and the Respondent. First, according to the Respondent, Mr. Maxwell was aware that an additional copy of the redacted WHCS patient medical records was made within a week or two of January 8, 2007. Second, while the Respondent did not draft or review the status and disposition report, he relied on it within four days of its issuance. Thus, both Mr. Maxwell and the Respondent had an obligation to correct or update the status and disposition report with Judge Anderson.

367. By failing to correct the status and disposition report, Mr. Maxwell violated KRPC 3.3(a)(1).

368. KRPC 3.3(a)(1) provides:

> A lawyer shall not knowingly . . . 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.

The status and disposition report did not include information about the copy of the redacted WHCS patient medical records made for the Respondent's use as the Johnson County District Attorney. The security and location of the redacted WHCS patient medical records are material facts. Once the redacted WHCS patient medical records were copied for the Respondent's use as the Johnson County District Attorney, the status and disposition report was no longer accurate. And, when he failed to correct the status and disposition report previously provided to Judge Anderson, Mr. Maxwell failed "to correct a false statement of material fact . . . previously made" to Judge Anderson, in violation of KRPC 3.3(a)(1).

369. KRPC 5.1 provides, in pertinent part, as follows:

> (b) A lawyer having direct supervisory authority over another layer 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:
>
> . . .
>
> (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.

The Respondent was Mr. Maxwell's supervisor, the Respondent knew of the conduct within four days, and the Respondent failed to take remedial action. Thus, the Hearing Panel concludes that the Respondent is likewise responsible for Mr. Maxwell's violation of KRPC 3.3(a)(1), pursuant to KRPC 5.1.

370. Further, because of his own personal knowledge, the Respondent was also responsible for correcting or updating the status and disposition report. The Hearing Panel concludes that the Respondent's failure to correct or update the status and disposition report also amounts to a violation of KRPC 3.3(a)(1).

Whether the Respondent violated the Kansas Rules of Professional Conduct when he failed to return the summaries of the redacted WHCS patient medical records.

371. On April 9, 2007, Judge Anderson learned for the first time that the Respondent had his staff make an additional copy of the redacted WHCS patient medical records for his use as the Johnson County District Attorney. Judge Anderson ordered the Respondent to return the copy of the redacted WHCS patient medical records.

372. After being ordered to return the copy of the redacted WHCS patient medical records, the Respondent directed his staff to make "summaries" of the records. The summaries were hand-written and contained much of the same information listed on the record. However, the summaries did not contain all the information found on the redacted WHCS patient medical records.

373. On April 11, 2007, the Respondent returned the copy of the redacted WHCS patient medical records to Judge Anderson. According to the Respondent, he informed Judge Anderson that he retained his work product including summaries of the redacted WHCS patient medical records. The Respondent's statement on April 11, 2007, was not sufficient to inform Judge Anderson that the Respondent directed his staff to make hand written copies of much of the information contained in the redacted WHCS patient medical records. Thus, Judge Anderson was not aware that the Respondent retained "summaries."

374. While the Respondent did not describe what information could be found in the summaries and while the Respondent certainly did not inform Judge Anderson that the

summaries were made as a result of the order to return the redacted WHCS patient medical records to the Court, the Hearing Panel concludes that retention of the summaries does not appear to be in violation of the Kansas Rules of Professional Conduct.

Whether the Respondent violated the Kansas Rules of Professional Conduct when he testified before Judge King that he had three summaries of redacted WHCS patient medical records when he actually had 62 summaries of redacted WHCS patient medical records and when he stated to the Kansas Supreme Court that he did not have any summaries of redacted WHCS patient medical records.

375. On November 20, 2007, the Respondent testified before Judge King in the CHPP's mandamus action, as follows:

> Q. [By Mr. Irigonegaray] Are there any summaries of Doctor Tiller's records left in Johnson County?
>
> A. [By the Respondent] I have a summary of three records that pertain to a theory of criminal liability that would have jurisdiction in Johnson County against Doctor Tiller. I have mentioned that to the Office of the Attorney General through correspondence to the Attorney General's office requesting copies of the actual records relating to those three abortions. The Attorney General has refused to provide those records.

(Disciplinary Administrator's Exhibit 84, pp. 1231-32).

376. Despite his testimony before Judge King, at that time, the Respondent had summaries of 62 redacted WHCS patient medical records, not three. (Transcript, p. 565). The Respondent never supplemented or corrected his testimony. (Transcript, p. 566). The

Respondent's testimony was false. At the time the Respondent testified, he knew he had more than three summaries of redacted WHCS patient medical records.

377. On June 12, 2008, the Respondent appeared before the Kansas Supreme Court for oral argument in the CHPP's mandamus action. (Disciplinary Administrator's Exhibit 85; Respondent's Exhibit P). During that argument the following exchanges occurred:

> JUSTICE BEIER: I have one more question, Chief.
>
> The record makes reference to the summaries that were retained by your office – well actually recreated and then retained by your office, Mr. Kline, have you ever told, or any of your subordinates, told Judge Anderson that those summaries were retained?
>
> MR. KLINE: I'm not familiar as to what you're referencing, Justice Beier.
>
> JUSTICE BEIER: I'm referring to summaries that you swore to in your responses?
>
> MR. KLINE: Again, Justice Beier, I have not seen those responses for several months.
>
> JUSTICE: So you don't know whether you have summaries of certain records from the Wichita Clinic?
>
> MR. KLINE: I don't believe that I do. I have sought the records from the Office of Attorney General and been refused.

(Disciplinary Administrator's Exhibit 85, pp. 1511-12). At that time, the Respondent continued to retain the 62 summaries. (Transcript, p. 565).

378. KRPC 3.3(a)(1) provides:

> A lawyer shall not knowingly . . . 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.

What materials the Respondent continued to maintain in the Johnson County District Attorney's office is a material fact. By testifying falsely before Judge King regarding the number of summaries that he maintained, the Respondent made false statements of material fact to the Courts, in violation of KRPC 3.3(a)(1).

379. KRPC 3.3(a)(3) provides:

> A lawyer shall not knowingly . . . 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.

By testifying falsely before Judge King, the Respondent offered false material evidence. The Respondent knew that the evidence was false and the Respondent never corrected or supplemented his testimony. Accordingly, the Hearing Panel concludes that the Respondent violated KRPC 3.3(a)(3).

380. "It is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation." KRPC 8.4(c). The Respondent engaged in conduct that involved dishonesty when he made false statements in his oral argument before the Kansas Supreme Court on June 12, 2008, regarding his possession of summaries of

redacted WHCS patient medical records. As such, the Hearing Panel concludes that the Respondent violated KRPC 8.4(c).

***Whether the Respondent violated the Kansas Rules of Professional Conduct when he provided false information in his response to the complaint*.**

381. During the disciplinary investigation, on September 19, 2007, the Respondent provided a written response to the complaint. (Disciplinary Administrator's Exhibit 5). In his written response to the complaint, the Respondent made the following statements regarding the storage of the redacted patient medical records:

> . . .
>
> The records were maintained in the same fashion as previous records in the case. **They were kept under lock and key only accessible by investigators in the office. I did not have access and only reviewed the records when others were present and after they were obtained by an investigator. The records were then returned to the locked room.**
>
> . . .
>
> **The documents have been kept under lock and key the entire time** since they have been produced and during which my office(s) have had authority to maintain possession of the records.
>
> **I did not have direct access to the records while I was Attorney General.** To gain access it was necessary that I make a request to my investigative division. The only time I reviewed the documents, others where [*sic*] in the room and **the documents were immediately returned to the locked closet by an investigator.**

> During my tenure as District Attorney **the records were kept either in a closet in my locked office or a locked filing cabinet** in the work area of my Administrative Assistant Megan Harmon. During that time, I have had access to the records but at no time have allowed access to others not directly tied to the investigation. The records have never been provided to any media outlet.

(Disciplinary Administrator's Exhibit 5, pp. 117, 121-22).

382. The redacted patient medical records were not kept "under lock and key." (Disciplinary Administrator's Exhibit 5, pp. 121-22). The statement made to the Disciplinary Administrator is not a true statement. For five weeks, the redacted patient medical records were kept in a Rubbermaid container in Mr. Reed's apartment.

383. Additionally, the Respondent had direct access to the records while he was Attorney General and the records, on at least one occasion, were not immediately returned to the locked closet by the investigator. Specifically, on November 5, 2006, the records were left in the Respondent's locked office overnight. (Disciplinary Administrator's Exhibit 90, p. 2040).

384. The Respondent's access to or possession of records, even sensitive medical records, is not a violation of the rules. However, the Respondent's false statements regarding his access to or possession of records is a violation. Thus, the Respondent's statements that he did not have direct access to the records and the Respondent's statements that the records were immediately returned to the locked closet or locked cabinet is false.

385. KRPC 8.1(a) prohibits lawyers, in connection with a disciplinary matter, from making "a false statement of material fact" or failing "to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter."

386. Regarding the storage of the records at Mr. Reed's apartment, at the time the Respondent made that statement, he may or may not have known that the statement he made to the Disciplinary Administrator was false. However, within a week or two, the Respondent knew that the statement he made about the records being "kept under lock and key" to be false. *See* ¶¶ 207-09, *supra*. The location and security of the redacted patient medical records are material facts. Thus, the Respondent either made a false statement or failed to correct the misapprehension. Accordingly, the Hearing Panel concludes that the Respondent violated KRPC 8.1(a).

387. Further, at the time the Respondent provided his written response to the complaint and stated that he "did not have direct access to the records" and that "the documents were immediately returned to the locked closet by an investigator," the Respondent knew that the statements were false. Again, the location and security of the redacted medical records are material facts. As such, the Hearing Panel concludes that the Respondent made a false statement in a disciplinary investigation, in violation of KRPC 8.1(a).

Count II

388. Based upon the findings of fact, the Hearing Panel concludes as a matter of law that the Respondent violated KRPC 8.4(c), KRPC 8.4(d), and KRPC 8.4(g), in Count II, as detailed below.

Whether the Respondent violated the Kansas Rules of Professional Conduct when he failed to advise the grand jury of K.S.A. 38-1522 and the* Aid for Women *cases.

389. On December 17, 2007, the Respondent and his assistants met with the grand jury. During that meeting, the Respondent provided the grand jury with a copy of K.S.A. 38-2223. The Respondent explained that the grand jury could investigate CHPP for the previous five years. The Respondent failed to inform the grand jury that K.S.A. 38-2223 became effective January 1, 2007, the Respondent failed to inform the grand jury that prior to January 1, 2007, K.S.A. 38-1522 was the applicable reporting statute, and the Respondent failed to inform the grand jury that a federal court issued an injunction prohibiting the enforcement of K.S.A. 38-1522 as interpreted by the Respondent's attorney general opinion.

390. On December 19, 2007, Mr. Maxwell appeared before the grand jury. During that session, the grand jury asked Mr. Maxwell to provide it with additional legal research.

391. A prosecutor's role with the grand jury is to make certain that the grand jury understands the law relevant to their inquiry. In this case, that required the Respondent and his assistants to apprise the grand jury of K.S.A. 38-1522 and the *Aid for Women* cases. K.S.A.

38-1522 and the *Aid for Women* cases were necessary for the grand jury to consider prior to issuing any subpoenas. The Respondent and his assistants failed to provide the grand jury with relevant law.

392. Because the *Aid for Women* cases dealt with K.S.A. 38-1522, an annotation regarding *Aid for Women* does not follow K.S.A. 38-2223. *Aid for Women* does appear in an annotation following K.S.A. 38-1522. By providing the grand jury with K.S.A. 38-2223 and not K.S.A. 38-1522, the Respondent and his assistants effectively kept the grand jury from knowing of the existence of the *Aid for Women* cases.

393. KRPC 8.4 provides, in pertinent part, as follows: "It is professional misconduct for a lawyer to: . . . (c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation; (d) engage in conduct that is prejudicial to the administration of justice."

394. The Respondent provided the grand jury with K.S.A. 38-2223. Then, the Respondent delegated the job of informing the grand jury of other relevant law to Mr. Maxwell. However, as the District Attorney for Johnson County, Kansas, the Respondent remained responsible to ensure that the grand jury was properly advised. The Respondent's failure to properly inform the grand jury of the relevant law is a violation of the Kansas Rules of Professional Conduct. Specifically, the Respondent's conduct is violative of KRPC 8.4(c) and KRPC 8.4(d). Mr. Maxwell's failure to properly inform the grand jury of the relevant law is also a violation of KRPC 8.4(c) and KRPC 8.4(d). The Respondent is responsible for Mr. Maxwell's violations by virtue of KRPC 5.1(c)(2), which states:

> A lawyer shall be responsible for another lawyer's violation of the rules of professional conduct if . . . the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or had 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.

395. It was false and misleading, by omission, for the Respondent and Mr. Maxwell to provide the grand jury with only K.S.A. 38-2223 and Atty. Gen. Op. No. 2003-17 and not timely provide the grand jury with K.S.A. 38-1522 and the *Aid for Women* cases. Accordingly, the Hearing Panel concludes that the Respondent's failure and Mr. Maxwell's failure to properly and timely advise the Hearing Panel of K.S.A. 38-1522 and the *Aid for Women* cases was false and misleading by omission and in violation of KRPC 8.4(c).

396. The Respondent's failure and Mr. Maxwell's failure to properly advise the grand jury of relevant law prejudiced the grand jury. The presiding juror of the grand jury testified that once the grand jury knew about K.S.A. 38-1522 and the federal court judgment limiting prosecutors from enforcing K.S.A. 38-1522 according to the Respondent's attorney general opinion, the grand jury abandoned five of the seven issues they were investigating. The presiding juror testified that she felt intentionally misled. The presiding juror testified that records were requested and subpoenas were issued based on a misunderstanding of the law caused by the Respondent's and his assistant's failure to properly advise the grand jury. The testimony of the presiding juror established that justice was prejudiced by the Respondent's

and Mr. Maxwell's actions. The Hearing Panel concludes that the Respondent's and Mr. Maxwell's failure to properly advise the grand jury amounted to a violation of KRPC 8.4(d).

397. The Respondent knew that he had not properly advised the grand jury. The Respondent knew or should have known that Mr. Maxwell had failed to properly advise the grand jury. The Respondent had direct supervisory authority over Mr. Maxwell and could have mitigated the misconduct by properly advising the grand jury of K.S.A. 38-1522 and the *Aid for Women* cases. Thus, because the Respondent could have remedied Mr. Maxwell's violations of KRPC 8.4(c) and KRPC 8.4(d) by timely providing the grand jury with K.S.A. 38-1522 and the *Aid for Women* cases, the Hearing Panel concludes that the Respondent is also responsible for Mr. Maxwell's violations of KRPC 8.4(c) and KRPC 8.4(d).

Whether the Respondent violated the Kansas Rules of Professional Conduct by filing the state's motion to enforce the grand jury's subpoena and original citizen petition and the state's fourth request to enforce subpoena.

398. On February 25, 2008, the grand jury admonished the Respondent *via* Mr. Pryor that it wished to review and approve and pleadings filed on behalf of the grand jury. The Respondent intentionally ignored the grand jury's direction and filed two pleadings without allowing the grand jury to review and without first obtaining permission from the grand jury. The Respondent argued that he was not required to seek or obtain permission from the grand jury to file pleadings to enforce the grand jury's subpoena.

399. The Respondent has established that the grand jury was in charge of the investigation. (Transcript, p. 3014). At the time the Respondent directed his assistant to draft and file the two unauthorized pleadings, special counsel to the grand jury was in negotiations with CHPP. Special counsel to the grand jury was attempting to obtain certain records which would allow the grand jury to make a determination on the remaining two items under investigation. The Respondent's intentional failure to comply with the request of the grand jury adversely reflects on the Respondent's fitness to practice law. Accordingly, the Hearing Panel concludes that the Respondent violated KRPC 8.4(g) by directing his assistant to file the motion to enforce the grand jury subpoena and the state's fourth request to enforce the grand jury subpoena without seeking and obtaining the grand jury's permission.

400. Additionally, the Respondent directed that his assistant file the two pleadings publicly. The two pleadings were filed in an attempt to enforce the grand jury subpoena. The grand jury subpoena was subject to the confidentiality provision of K.S.A. 22-3012, which provides:

> Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the prosecuting attorney for use in the performance of his duties. Otherwise a juror, attorney, interpreter, reporter or any typist who transcribes recorded testimony may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule. The court may direct

> that an indictment shall be kept secret until the defendant is in custody or has given bail, and in that event the clerk shall seal the indictment and no person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons.

It is inexplicable to the Hearing Panel why the Respondent directed Mr. Pryor to file the two pleadings publicly rather than under seal or confidentially. Ironically, in the Respondent's motion to enforce the grand jury subpoena, filed publicly, the Respondent alleged that Judge McClain's conduct violated the secrecy provision of K.S.A. 22-3012. The Respondent's direction that Mr. Pryor file the two pleadings publicly also adversely reflects on the Respondent's fitness to practice law in Kansas. As such, the Hearing Panel concludes that the Respondent, again, violated KRPC 8.4(g).

AMERICAN BAR ASSOCIATION
STANDARDS FOR IMPOSING LAWYER SANCTIONS

401. In making this recommendation for discipline, the Hearing Panel considered the factors outlined by the American Bar Association in its Standards for Imposing Lawyer Sanctions (hereinafter "Standards"). Pursuant to Standard 3, the factors to be considered are the duty violated, the lawyer's mental state, the potential or actual injury caused by the lawyer's misconduct, and the existence of aggravating or mitigating factors.

402. *Duty Violated*. The Respondent violated his duties to the legal system, the legal profession, and the public to maintain his personal integrity.

403. *Mental State*. The Respondent knowingly violated his duties.

404. *Injury*. As a result of the Respondent's misconduct, the Respondent caused actual injury to the legal system and the legal profession. Further, the Respondent caused potential injury to the public.

405. *Aggravating or Mitigating Factors*. Aggravating circumstances are any considerations or factors that may justify an increase in the degree of discipline to be imposed. In reaching its recommendation for discipline, the Hearing Panel, in this case, found the following aggravating factors present:

406. *Dishonest or Selfish Motive*. Much of the Respondent's misconduct was motivated by dishonesty and selfishness. The Respondent provided false information to courts and counsel. As a result, the Hearing Panel concluded that the Respondent repeatedly violated KRPC 3.3 and KRPC 8.4(c). Because much of the Respondent's misconduct involved engaging in conduct that involves dishonesty, the Hearing Panel concludes that the Respondent's misconduct was motivated by dishonesty and selfishness. The Respondent's dishonest and selfish motives aggravate the misconduct in this case.

407. *A Pattern of Misconduct*. The Respondent engaged in a pattern of misconduct. The Respondent repeatedly attached confidential or sealed documents to public pleadings. The Respondent repeatedly provided false or deceptive information to courts and counsel. As such, the Hearing Panel concludes that the Respondent engaged in a pattern of misconduct. Repeatedly committing the same rule violations is an aggravating factor.

408. *Multiple Offenses*. The Respondent committed multiple offenses of the Kansas Rules of Professional Conduct. Specifically, the Respondent violated KRPC 3.3, KRPC 3.8, KRPC 5.1, KRPC 5.3, KRPC 8.1, and KRPC 8.4. Accordingly, the Hearing Panel concludes that the Respondent committed multiple offenses and that fact is an aggravating factor considered by the Hearing Panel in recommending discipline.

409. *Bad Faith Obstruction of the Disciplinary Proceeding by Intentionally Failing to Comply with Rules or Orders of the Disciplinary Process*. Twice during the proceeding, counsel for the Respondent unsuccessfully attempted to introduce an audio recording of an emergency call. (Transcript, pp. 1451-56, 1730-32). The Hearing Panel sustained objections to the introduction of the evidence. (Transcript, pp. 1454, 1732). The Respondent personally presented the closing argument in this case. (Transcript, pp. 3193-273). During his closing argument, the Respondent relayed the contents of the emergency call despite the exclusion of the evidence during the hearing. (Transcript, p. 3221). By stating the contents of excluded evidence, the Respondent violated a ruling of the Hearing Panel made during the hearing. The Respondent's conduct in this regard is prejudicial to the administration of justice, as prohibited by KRPC 8.4(d). The Respondent's rendition of the emergency call during his closing argument is another example of his passion causing him to exceed ethical bounds. The Respondent's statement in this regard 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.

410. *Submission of False Evidence, False Statements, or Other Deceptive Practices During the Disciplinary Process*. On April 12, 2010, the Respondent filed his answer to the formal complaint. Paragraph 33 of the Respondent's answer provides as follows:

> 33. Respondent admits that the staff of the new Attorney General, Paul Morrison, demanded the return of all redacted working copies of the medical records even though they had access to the same redacted working copies of the records through Judge Anderson. Respondent admits that in early 2007 he informed the Attorney General's Office that the redacted working copies of the records were, among other places, with Judge Anderson and that a Status and Disposition report had been filed identifying the locations of the redacted working copies of the records. Further answering, Respondent states that on or about April 9, 2007, Respondent on his own initiative and without compulsion informed Judge Anderson that working copies of the redacted WHCS records were in Johnson County. Respondent admits that Judge Anderson then ordered Respondent's office to send Respondent's working copies of the redacted WHCS records to Judge Anderson's court, and that the working copies of the redacted WHCS records were sent to and received by Judge Anderson promptly on April 11, 2007. Respondent admits that Judge Anderson asked if any copies of the working copies of the redacted WHCS records were in Johnson County and that Respondent answered in the negative. Respondent admits that he did not state to Judge Anderson that the office of the Johnson County District Attorney had prepared work product in the form of summaries of certain information culled from the redacted working copies of the records. Further answering, Respondent states that he was unaware that such work product had been prepared at the time of his answer and that in any event, the work product of his office was not "copies" of the redacted records. Further answering, Respondent specifically denies having prepared or reviewed the Status and Disposition report and specifically denies that he directly or indirectly supervised its preparation or filing. Respondent denies any and all additional or inconsistent allegations, suggestions, legal conclusions, or innuendo in Paragraph 33.

(Document 17, pp. 112-13).

411. On November 19, 2010, the Respondent, with new counsel, amended his answer. The Respondent amended his answer to paragraph 33 of the formal complaint, as follows:

> 4. Answering Paragraph 33, Respondent admits that Attorney General Paul Morrison sought the return of redacted working copies of WHCS patient records, that he informed that office WHCS records were with Judge Anderson, and that he informed that office of the Status and Disposition Report. Furthering answering, Respondent states that on or about April 9, 2007, Respondent on his own initiative and without compulsion informed Judge Anderson that working copies of the redacted WHCS records were in Johnson County. Respondent admits that Judge Anderson convened a hearing and ordered Respondent to bring Respondent's copies of the redacted WCHS [*sic*] records to the Court, and that Respondent delivered those records promptly on April 11, 2007. Respondent admits that Judge Anderson asked if any copies of the working copies were retained and Respondent answered in the negative. Respondent denies that he failed to state to Judge Anderson that the office of the Johnson County District Attorney had summarized the records, and affirmatively states that he described to Judge Anderson the records he returned to the Court, that there were copies made within the office, his office kept an original, and that the copies were made as "working" copies in which they "were reviewing, analyzing and summarizing the contents of those records." (In Re Inquisition, Sh Co. D. Ct. Case No: 04-IQ-3, Tr. of Proceedings, April 11, 2007 at p. 74, lines 3 - 22. Emphasis added.). Further answering, Respondent states that at the April 11, 2007 hearing, Judge Anderson did not order Respondent to disgorge work product, either to the Court or to the Office of Attorney General. Further answering, Respondent specifically denies having prepared or reviewed the Status and Disposition Report and specifically denies that he directly or indirectly supervised its preparation or filing. Respondent denies any and all additional or inconsistent

allegations, suggestions, legal conclusions or innuendo in Paragraph 33.

(Document 59).

412. During the hearing on the formal complaint, the following exchange occurred:

Q. [By Mr. Hazlett]: . . . Respondent admits that he did not state to Judge Anderson that the Office of the Johnson County District Attorney had prepared work product in the form of summaries of certain information culled from the redacted working copies of the records. Further answering respondent states that he was unaware that such work product had been prepared at the time of his answer and that in any event the work product of his office was not copies, it was the unredacted records.

A. [By the Respondent] That's incorrect.

Q. You were aware?

A. Yes. My – my recollection as I sit here now is that when Judge Anderson ordered the records – the redacted working copies back to him, this is my recollection that I said, let's get summaries. . . .

. . .

Q. Well, I guess what's your explanation for what shows up in this answer?

A. It's incorrect.

Q. Attorney error or bad information to them?

A. I don't know. 'Um, I can't explain it. There was an effort through all of this to try to get you what you need and this was incorrect. So I guess this is the amended answer. I – unless I'm not understanding you correctly. I think I'm reading it as you are.

(Transcript, pp. 544-45, 547-48). From April 12, 2010, until November 19, 2010, the Hearing Panel and the Disciplinary Administrator were lead by the Respondent to believe that the Respondent was not aware of the summaries and that the Respondent did not order his staff to prepare the summaries. The Hearing Panel concludes that the Respondent engaged in deceptive practices during the disciplinary process.

413. During the hearing on the formal complaint, counsel for the Respondent, through cross-examination of Mr. Maxwell, made it appear as though the Respondent and his assistants had requested to have the entire inquisition record forwarded to the Kansas Supreme Court in *Alpha*. Specifically, the following exchange occurred between Mr. Holbrook and Mr. Maxwell:

> Q. [By Mr. Holbrook] Well, you filed a motion, but did you file a motion with the Supreme Court requesting that they order the entire Judge Anderson record be made a part of the record in the case?
>
> A. [By Mr. Maxwell] I think we did.
>
> Q. Okay.
>
> A. And--
>
> Q. What happened to that?
>
> A. I think they denied the motion.
>
> Q. Okay.
>
> A. And what happened is we were trying various ways to figure out how to do this, and I didn't file the motion, okay, somebody, as I recall, it may have been Jared--

> probably was Jared Maag filed I think, you'll have to look on the court docket sheet, if I recall correctly, but I think somebody filed a motion to have the entire district court record forwarded to the Supreme Court like a standard appeal would be, and I think they denied that motion.

(Transcript, pp. 1478-79).

414. In an attempt to determine whether the Respondent had requested that the entire District Court inquisition record be sent to the Kansas Supreme Court in *Alpha*, the Hearing Panel requested that the Kansas Supreme Court release certain sealed documents regarding motions made for additions to the record in *Alpha*. The Kansas Supreme Court granted the Hearing Panel's motion and provided the Hearing Panel with certain documents.

415. From a review of those records, it appears that on August 30, 2005, Mr. Ailslieger filed a motion in *Alpha* to add to the record. Specifically, Mr. Ailslieger requested that "privacy notices obtained from the respective web sites of Alpha and Beta medical clinics be added to the record." (Hearing Panel Exhibit HP-1). The Kansas Supreme Court granted Mr. Ailslieger's request on August 31, 2005. (Hearing Panel Exhibit HP-1).

416. Again, on September 2, 2005, Mr. Ailslieger filed a motion in *Alpha* to add to the record. This time, Mr. Ailslieger requested that an additional privacy notice of Alpha Medical Clinic obtained from the clinic's web site also be added to the record. (Hearing Panel Exhibit HP-1). Again, the Court granted Mr. Ailslieger's request. (Hearing Panel Exhibit HP-1).

417. Later, on September 23, 2005, the clinics filed a motion to have the entire record of the inquisition before the District Court forwarded to the Kansas Supreme Court.

(Hearing Panel Exhibit HP-1). For the Respondent, Mr. Rucker responded to the clinics' request to have the entire record forwarded to the Kansas Supreme Court. Mr. Rucker argued that it was not necessary for the Court to have the full record to decide the case and that forwarding the entire record would only serve to delay the investigation. The Kansas Supreme Court agreed with Mr. Rucker and denied the clinics' request. (Hearing Panel Exhibit HP-1).

418. After the Hearing Panel obtained copies of motions to add to the record from the Kansas Supreme Court and provided the records to the parties, the Respondent testified in response to questions by his counsel as follows:

> Q. [By Mr. Stafford] And do you know whether or not there was a record of the Court below as an appeal that was forwarded to the Court?
>
> A. [By the Respondent] No. We made a motion for that to occur, but the Court denied the motion.
>
> Q. And actually I think wasn't it the clinics that-- the Alpha clinic or the Beta clinic that had requested that the entire record be forwarded to the Court?
>
> A. Well, I believe that's the testimony, but I'm reading the Court's opinion and I thought that they refer to both parties doing that. So I-- I defer to--
>
> Q. To the record?
>
> A. -- whatever happened. I'm not sure if the Supreme Court-- if my remembrance of the Supreme Court representation is correct, if their representation is correct, or if we actually did seek to move the whole record up. I can't remember.

> MR. CHUBB: Counsel, the exhibit that we asked for and received, Exhibit HP1, just to clarify, was a motion filed by the clinics after oral argument September 23 of '05 requesting that the entire record be forwarded and the Attorney General's Office opposed that motion.
>
> A. [By the Respondent] Thank you. I couldn't remember.

(Transcript, pp. 2086-87). The Hearing Panel concludes that the Respondent's intent was to deceive the Hearing Panel. It appears that in defense of the allegation that the Respondent attached confidential documents to a public brief, thereby making the confidential documents public, the Respondent intended to mislead the Hearing Panel into believing that the Respondent had attempted to have the entire inquisition record forwarded to the Kansas Supreme Court and that because his request was denied, he did not have an alternative method of getting the items before the Kansas Supreme Court.

419. The Hearing Panel concludes that had it not obtained the documents from the Kansas Supreme Court, the Respondent's deception would have gone unchecked. Thus, the Hearing Panel concludes that the Respondent made false statements during the disciplinary process. The making of false statements before the Hearing Panel further aggravates the Respondent's misconduct in this case.

420. *Refusal to Acknowledge Wrongful Nature of Conduct*. The Respondent failed to acknowledge the wrongfulness of his conduct. Certainly, a responding attorney may defend an attorney disciplinary case and may deny wrongdoing. However, in this case, the misconduct is clear. The Respondent failed to take any responsibility for his misconduct. The Respondent's

refusal to acknowledge his wrongdoing is an aggravating factor considered by the Hearing Panel.

421. *Substantial Experience in the Practice of Law*. The Kansas Supreme Court admitted the Respondent to the practice of law in the State of Kansas in 1987. From the time when the Respondent was first licensed until the time the misconduct began, at least 16 years passed. Accordingly, the Hearing Panel concludes that the Respondent had substantial experience in the practice of law.

422. Mitigating circumstances are any considerations or factors that may justify a reduction in the degree of discipline to be imposed. In reaching its recommendation for discipline, the Hearing Panel, in this case, found the following mitigating circumstances present:

423. *Absence of a Prior Disciplinary Record*. The Respondent has not previously been disciplined. Accordingly, the Respondent's absence of a prior disciplinary record is a mitigating factor in this case.

424. *Previous Good Character and Reputation in the Community Including Any Letters from Clients, Friends and Lawyers in Support of the Character and General Reputation of the Attorney*. Several friends and associates of the Respondent testified regarding the Respondent's good character.

425. *The Present and Past Attitude of the Attorney as Shown by His or Her Cooperation.* During the disciplinary investigation, the Respondent fully cooperated with Lucky DeFries and Mary Beth Mudrick. (Transcript, pp. 1420, 1776).

426. In addition to the above-cited factors, the Hearing Panel has thoroughly examined and considered the following Standards:

> 6.12 Suspension is generally appropriate when a lawyer knows that false statements or documents are being submitted to the court or that material information is improperly being withheld, and takes no remedial action, and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding.
>
> 6.22 Suspension is appropriate when a lawyer knowingly violates a court order or rule, and there is injury or potential injury to a client or a party, or interference or potential interference with a legal proceeding.

RECOMMENDATION

427. The Disciplinary Administrator recommended that the Respondent be disbarred. The Respondent argued that he committed no violations of the Kansas Rules of Professional Conduct and, as a result, no discipline should be imposed.

428. The Hearing Panel concluded that the Respondent has repeatedly violated many of the Kansas Rules of Professional Conduct, including the most serious of the rules, the rules that prohibit engaging in false or dishonest conduct.

429. Part of an attorney's oath in Kansas is:

> You do solemnly swear or affirm that you will support and bear true allegiance to the Constitution of the United States and the Constitution of the State of Kansas; . . . that you will neither do, nor consent to the doing of any falsehood in court; and that you will discharge your duties as an attorney and counselor of the Supreme Court and all other courts of the State of Kansas with fidelity both to the Court and to your cause, and to the best of your knowledge and ability. So help you God.

(Kan. Sup. Ct. R. 720). In addition to the rule violations, as mentioned by the Review Committee in ruling on the Respondent's motion for reconsideration, it also appears that the Respondent violated the oath of attorneys by consenting to the commission of numerous falsehoods. *See* ¶ 15 *supra*.

430. Based upon the findings of fact, conclusions of law, and the Standards listed above, the Hearing Panel unanimously recommends that the Respondent be suspended from the practice of law for an indefinite period of time.

431. Costs are assessed against the Respondent in an amount to be certified by the Office of the Disciplinary Administrator.

Dated this _____ day of October, 2011.

_____
Jo Ann Butaud, Presiding Officer

_____
Calvin J. Karlin

_____
Jeffrey A. Chubb