Appeal No. 11-106870-S

IN THE SUPREME COURT OF KANSAS

IN THE MATTER OF	:	
	:	**DA 10088 and DA 10598**
	:	
PHILLIP D. KLINE,	:	
	:	
Respondent.	:	

MOTION OF RESPONDENT PHILLIP D. KLINE FOR THE RECUSAL OF JUDGE KAREN ARNOLD-BURGER

Respondent Phillip D. Kline, former Attorney General the State of Kansas, hereby moves for the recusal of Judge Karen Arnold-Burger from any further participation in this appeal. Per the Order of Presiding Justice Daniel Biles on June 4, 2012, Judge Arnold-Burger is one of five Kansas judges assigned to hear this appeal in the aftermath of the May 18, 2012 recusal of five sitting justices of this Court.

I. Introduction.

As editor of *The Verdict*, the official quarterly publication of the Kansas Municipal Judges Association ("KMJA"), Judge Karen Arnold-Burger was instrumental in publishing numerous false statements regarding Mr. Kline's investigation of Kansas abortion clinics. These false statements about facts at issue in this proceeding provide a reasonable basis to question Judge Arnold-Burger's impartiality, thereby requiring recusal. *See* Kansas Code of Judicial Conduct, Canon 3(E)(1) (1995).

Specifically, a synopsis of *Comprehensive Health of Planned Parenthood v. Kline*, 287 Kan. 372, 433, 197 P.3d 370 (2008) (hereinafter *CHPP v. Kline*) in the Winter 2009 edition of *The Verdict* made numerous false assertions supported neither by the *CHPP v. Kline* opinion itself nor the underlying facts.[1] Most of these gratuitous and untrue statements improperly cast Mr. Kline's conduct in a false negative light and uniformly tended to disparage him before the Kansas judiciary.

A. Example of an untruth in *The Verdict*'s *CHPP v. Kline* synopsis

The Verdict falsely stated: "Kline had been specifically advised that he was not to take [with him to Johnson County] any records of the Wichita investigation." This statement had no basis in fact and did not reflect the *CHPP v. Kline* opinion, which it purported to characterize for a statewide audience of judges.

To the contrary, Shawnee County District Judge Richard Anderson, who issued the abortion clinic subpoenas at issue in *CHPP v. Kline*, took the position with Mr. Kline "that as chief executive law enforcement officer he had the authority to engage other agencies in his investigation and share the evidence. The Court did not establish additional requirements for management of the medical records, because the records had been de-identified as required by the protective order." R.3, 3582 (Memorandum Decision of April 18, 2007. Ex. 132). Seven months after this opinion, Judge Anderson was asked under oath if he in any way restricted Mr. Kline's use of the records "in the investigation and prosecution of crimes."

[1] *The Verdict*, Winter, 2009, at 5-6. *See* Attachment A. The full issue is online at http://kmja.org/wp-content/uploads/2010/09/VerdictWinter2009.pdf.

> The answer to that is no. And I did have a very specific conversation with Kline's office about that, because they came back in and essentially told me what they intended to do in regard to some of the prosecutions and with whom they shared the information. I said that is a call that is up to you, that I believed I had redacted the records as required to identify [sic] patient information. It was now in his hands to go about his prosecution in the way he saw best.

R.4, 3523 (Transcript of Proceedings at 52:8-18, *CHPP v. Kline*, Nov. 19, 2007. Ex. B7). Judge Anderson further explained that Kline's office kept him informed to a much greater extent than prosecutors in other inquisitions. *Id*. at 3547. While serving as a Judge he had never restricted a prosecutor from sharing the fruits of an investigation or subpoena with other law enforcement agencies. *Id*. at 3545-46.

The Special Master who heard this testimony found that Judge Anderson approved Mr. Kline's request to share the fruits of the investigation with expert consultants and other prosecutors. R.3, 2013 (King Report, ¶43. Ex. 90). "Judge Anderson was aware of Kline's intention to transfer records from the investigation to the Johnson County District Attorney's office. . . . [H]e did not regard it as his role to prevent Kline from making the transfer." *Id*. at 2030-31 (King Report, ¶ 132).

On May 2, 2008, well before Judge Arnold-Burger's publication of a false statement about the records transfer, the Supreme Court publicly released the King Report and the transcript of Judge Anderson's testimony at the *CHPP v. Kline* hearing.

B. *The Verdict*'s unfounded assertion contradicts the *CHPP* opinion.

The *CHPP v. Kline* opinion does not support *The Verdict's* claim that Mr. Kline was "specifically told" he was not to take copies of Dr. Tiller's records. The Supreme Court explained:

> *Alpha*[2] was not intended to instruct and did not instruct on whom Kline should or should not involve in any other aspect of his investigation; whether referrals should be made to other prosecutors; if so, which prosecutors would be acceptable; whether confidentiality agreements should be required of potential witnesses with whom the records' contents were shared; how the records were to be stored; or how access to them was to be documented. In short, any inherent prosecutorial power to transmit information to other prosecutors that Kline possessed the day before *Alpha* was filed he still possessed the day after.

CHPP v. Kline, 287 Kan. at 414.

C. The *CHPP v. Kline* opinion: a web of deception

The *CHPP v. Kline* opinion contained many falsehoods whose effect was to assist a criminal defendant in resisting prosecution, and to impair the chief law enforcement officer in the state in the exercise of his duties. Justice Beier's opinion charged, contrary to the record, that Phill Kline and his staff "did not merely take copies of patient records and some or all of the work product they generated in the inquisition while Kline held the position of Attorney General. They took *all* copies of the patient records and certain other materials as well." *Id*. at 416. Building on this spurious theme, Justice Beier then claimed that "no coherent copies of these records or of other investigation materials were left behind. Indeed, we cannot condone his effort to stand in the way of his successor doing his job." *Id*.

To the contrary, Judge David King, this Court's Special Master, found specifically that Kline's staff left five boxes of records with Judge Anderson for safekeeping, including copies of the CHPP and WHCS redacted patient records, and the subpoenaed Kansas Department of Health and Environment ("KDHE") Termination of Pregnancy Reports. R.3, 2023 (King Report. Ex. 90, ¶ 103). Other records, including a hard copy of the full investigation file, were left with

[2] *Alpha Med. Clinic v. Anderson*, 280 Kan. 903, 128 P.3d 364 (2006) was the predecessor case to *CHPP v. Kline*.

District Attorney Robert Hecht. R.3, 2016, 2023-24 (Ex. 90, ¶¶ 65, 104). Mr. Morrison picked up these records shortly after taking office.[3]

Nonetheless, almost two years later, this Court ordered Mr. Kline not only to make a complete set of the transferred records for Steve Six, the current Attorney General, but also as a "sanction" to provide him with the complete investigative file developed solely in Johnson County. *CHPP v. Kline*, 287 Kan. at 416-17, 423. This "other alternative relief" and "sanction" then provided Justice Beier with a further platform to excoriate Mr. Kline for obstructing his successor in performing his duties. In truth, Morrison had all the records his first week in office. Based on those records he exonerated Planned Parenthood and filed a stripped-down criminal action against WHCS.[4] As a former Secretary of KDHE noted: "If there were no relevant documents left behind for Morrison, on what evidence did he base these two decisions?"[5] Why in December, 2008, would the Attorney General need a second set of documents he already possessed to "do a job" he had finished a year and a half earlier?[6]

Yet Justice Beier had the audacity to repeat the big lie: "The record before us discloses numerous instances in which Kline and/or his subordinates seriously interfered with the performance of his successors as Attorney General . . . ." *CHPP v. Kline*, 287 Kan. at 420. She

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[3] For a detailed chronology of the movement of the inquisition records to the courthouse and then to Morrison, see *Motion for the Recusal of Justice Carol A. Beier*, May 15, 2012, at 15-19. Attachment B.

[4] *See* R.4, 3369 (Letter from Paul J. Morrison to Pedro Irigonegaray, June 25, 2007. Ex. R6) (stating that Morrison had conducted a "thorough examination of the numerous documents and medical records that Mr. Kline subpoenaed").

[5] James O'Connell, *The Kansas Supreme Court's Empty Words*, KANSASLIBERTY.COM (Dec. 19, 2008), http://www.kansasliberty.com/liberty-update-archive/22dec2008/words-without-meaning.

[6] For a full account of this Court's unfounded grant of relief and sanctions against Mr. Kline for "obstructing" his successor, see the full May 15, 2012 *Motion for the Recusal of Justice Carol A. Beier* (on file in the docket of this case).

concludes with this flourish: "Furthermore, the known pattern of obstructive behavior prompting sanctions, standing alone, may be or become the subject of disciplinary or other actions . . . ." *Id.* at 425. As Chief Justice Kay McFarland stated: "It appears to me that the majority invokes our extraordinary inherent power to sanction simply to provide a platform from which it can denigrate Kline . . . ." *Id.* at 433 (McFarland, J., concurring in the result).

D. *The Verdict*: putting the CHPP falsehoods into overdrive

Judge Arnold-Burger's mere parroting of the *CHPP v. Kline* falsehoods in her publication could possibly be explained as not evidencing bias, but merely an expression of misplaced trust in the integrity of this Court. Magnifying those falsehoods by publishing claims contradicted by the *CHPP* opinion and having no other basis in fact, however, cannot be excused as innocent error. As detailed below, taking a cue from Justice Beier's vitriolic and fallacious attack on Mr. Kline, she added her own independent misrepresentations to the mix. The *CHPP* opinion sent a message to the state judiciary that Mr. Kline was the bull in this bullfight, and that slashing him to death with malicious attacks would win the approval of their superiors in the judicial hierarchy. Judge Arnold-Burger responded with enthusiasm to the implied invitation to join in the bloodletting. The synopsis of the *CHPP* opinion printed in *The Verdict* in many instances imaginatively enlarged on Justice Beier's falsehoods. For *The Verdict's* additional misrepresentations, Judge Arnold-Burger bears full responsibility.

II. Detailed Analysis of *CHPP v. Kline* Synopsis in Winter, 2009 Issue of *The Verdict*

A. Misleading Headline

The very headline of the case brief—*Writ of Mandamus Issued Against Phill Kline*—is misleading. Planned Parenthood sought to compel Mr. Kline to return all copies of redacted medical records from the Planned Parenthood investigation to his

successor as Attorney General, Paul Morrison. *Id*. at 386.[7] The Attorney General, intervening, sought even broader relief—that Mr. Kline return all evidence developed in the investigation. *Id*. at 404.

Finding that Mr. Kline as Johnson County District Attorney had a right to retain evidence for legitimate prosecutorial purposes, this Court refused to grant the writ on the grounds requested. *Id*. at 416. Although denying "primary relief," the Court did grant, though unrequested, "other alternative relief," namely that Mr. Kline supply copies of investigation records he had transferred to Johnson County. *Id*. at 416-17. Neither the headline nor any other part of the synopsis indicated this fact—that Mr. Kline won the case on the merits. He did not have to give up the records he had and thus destroy his pending prosecution against Planned Parenthood.[8] Further, *The Verdict* misstated the relief granted: "He was ordered to return the materials he gathered in relation to the investigation to Attorney General Six." That statement is completely false. He was ordered only to make copies.

B. The Twelve Statements

The synopsis begins with twelve assertions:

1. Planned Parenthood filed a writ of mandamus against Phil Kline regarding the handling of medical records and also seeking a finding of contempt of court.

2. Before his successor took office Kline and/or his staff boxed up all the records that he had obtained as part of an inquisition he conducted as Attorney General to take with him to Johnson County, even though some involved a clinic in Wichita.

[7] By the time the case was decided, Steve Six had succeeded Morrison as Attorney General.

[8] Mr. Kline filed a 109-count criminal complaint against Planned Parenthood on October 17, 2007. *See CHPP v. Kline*, 287 Kan. at 388 ("more than 100 criminal counts").

3. He failed to document when and to whom he provided copies, although certainly copies were made.

4. He knowingly attached copies of sealed records to unsealed briefs he filed in Shawnee County.

5. He held press conferences about the records and appeared on the O'Reilly Factor (where Bill O'Reilly suggested that he had been made privy to the contents of the records).

6. He gave access to the information to several "expert witnesses" who later gave interviews about the contents to the media in his presence and he discussed the records in front of a state legislative committee.

7. All of his actions were in direct conflict with the orders of confidentiality personally relayed to him by the Supreme Court and Shawnee District Judge Richard Anderson.

8. In removing the files from the Attorney General's office, they took a tortured path to Johnson County including unsecure storage at attorney Steve Maxwell's private residence, put in the trunk of a state vehicle that sat in a parking lot for several days, and to the dining room of one of his staff investigators, Jared Reed.

9. Some files were left with Shawnee District Attorney Robert Hecht and some were left with Judge Anderson later to be retrieved by Kline's staff.

10. The Status and Disposition Reports that had been filed with Judge Anderson were clearly erroneous.

11. Kline had been specifically advised that he was not to take any records of the Wichita investigation. He only had a right to the records of the clinic in Johnson County.

12. When Judge Anderson discovered that Kline and his staff had taken the Wichita records he ordered them returned and questioned whether copies had been kept. He was told that no copies had been made, which was patently false.

Let us examine each statement in turn for accuracy.

1. Planned Parenthood filed a writ of mandamus against Phil Kline regarding the handling of medical records and also seeking a finding of contempt of court.

To be accurate, Planned Parenthood filed a "petition for a writ of mandamus." Only the Court can issue the writ. Otherwise, the statement is correct.

2. Before his successor took office Kline and/or his staff boxed up all the records that he had obtained as part of an inquisition he conducted as Attorney General to take with him to Johnson County, even though some involved a clinic in Wichita.

This statement implies that Kline left no records behind for the incoming Attorney General, and further implies that he had no authority to take copies of the subpoenaed and redacted abortion patient records from Women's Health Care Services (WHCS) in Wichita. Both these statements are false. In *CHPP*, this Court stated that "Kline's subordinate had placed at least three boxes of materials connected to the inquisition at the Attorney General's office before they left it . . . ." 287 Kan. at 384. More important, Mr. Kline left a full set of records for his successor with Judge Richard Anderson, who oversaw the abortion clinic inquisition, and District Attorney Robert Hecht.[9] Their offices in the Shawnee County courthouse were less than a mile from the offices of Paul Morrison, the new Attorney General. Morrison was informed the very next day that the records were available for him to pick up. *Id.* (Judge Anderson "offered to permit Morrison to pick up the inquisition evidence that had been left at the judge's chambers by

[9] Judge Anderson testified that he received five big banker's boxes of documents R.2, 749. The King Report found that they included "copies of the CHPP and WHCS redacted patient records, KDHE Termination of Pregnancy Reports and the Status and Disposition Report." R.3, 2023.

Williams and Reed the day before."). For a discussion of the WHCS records, see ¶¶ 11 and 12 below.

3. He failed to document when and to whom he provided copies, although certainly copies were made.

The Status and Disposition Report prepared for Judge Anderson, R.3, 994-96 (Ex. 78), sets out the location of all the records, including copies, except for one set of WHCS files made after the report was written and delivered. The *CHPP* opinion states that Judge Anderson requested "a full and accurate written report on where all copies of the patient records were as of the time of the transition between Kline and Morrison at the Attorney General's office. 287 Kan. at 381-82. Senior Assistant Attorney General Stephen D. Maxwell prepared "a Status and Disposition Report, the written report Judge Anderson requested." *Id*. at 382. On Monday, January 8, 2007, the day Morrison and Kline formally switched offices,[10] Maxwell left a copy of the Status and Disposition Report at Judge Anderson's chambers along with five boxes of investigation materials. *Id*. at 383. Except for the set of WHCS records copied at the last minute, the Status and Disposition Report documented "when and to whom" copies were provided.

4. He knowingly attached copies of sealed records to unsealed briefs he filed in Shawnee County.

a. *Alpha* mandamus.

In *Alpha Med. Clinic v. Anderson*, 280 Kan. 903, 929, 128 P.3d 364 (2006), this Court found that the attachment of redacted inquisition records to an appellate brief

[10] Morrison, then Johnson County District Attorney, defeated Kline for Attorney General in November, 2006. The following month precinct committee members in Johnson County selected Mr. Kline to complete his term. *CHPP v. Kline*, 287 Kan. at 380-81.

caused "no prejudice" to the proceeding. The Court also acknowledged that *Alpha* was "a highly unusual case, the first in memory when this court has required public briefs and oral argument on a sealed record." *Id*. Prior to the filing, Mr. Kline and his subordinates had sought guidance on the matter from the Clerk of the Appellate Courts, but none was given. R.2, 1037:24-1038:20. Judge Anderson noted that Mr. Kline's staff "have always recognized the privacy of the patient is to be respected and that only information necessary to evaluating the legal issues should be produced." R.4, 2806 (Letter Decision, May 25, 2005. Ex. T3). The Court found that "curative measures" were unnecessary. "The transcript," wrote Judge Anderson, "contains legal arguments and no specific references to patient identities or any medical facts concerning any identified patient." *Id*. *See also* R.2, 956:13-957:9.

b. *CHPP* mandamus.

Mr. Kline attached to his *CHPP* brief a KDHE abortion report and a companion copy from Planned Parenthood files. Both were completely redacted of patient-specific information except for a two-digit gestational age. He reasonably believed that these documents—in different handwriting—would assist the Court in understanding the validity of the Planned Parenthood prosecution in regard to falsification of records. The attachments only contained the number "23" relating to the gestational age of the fetus in one abortion. KDHE publishes gestational age in its annual abortion report. Although this Court gave Mr. Kline a tongue-lashing for attaching the reports, no patient privacy or other confidential information was implicated. 287 Kan. at 401-03, 424.

5. He held press conferences about the records and appeared on the O'Reilly Factor (where Bill O'Reilly suggested that he had been made privy to the contents of the records).

Mr. Kline was the chief executive law enforcement officer of the State of Kansas. In a hotly-contested re-election campaign his opponent, Paul Morrison, accused him of compromising patient privacy in his investigation of the abortion clinics. Mr. Kline had a right to provide information to the public to refute this charge, and to demonstrate the validity of his investigation. Candidates for public office have a robust First Amendment right to inform the public of their positions, and certainly cannot be silenced from answering sharp attacks. *Cf. Repub. Party of Minn. v. White*, 536 U.S. 765 (2002) (judicial elections). None of the disclosures implicated patient privacy. The Disciplinary Administrator's own investigators stated: "[W]e do not believe that any statements made on the O'Reilly factor 'imperiled the privacy of patients' or jeopardized the 'law enforcement objectives at the heart of the proceedings.'" R.3, 3724 (DeFries Report, Ex. 142 at 20).

6. He gave access to the information to several "expert witnesses" who later gave interviews about the contents to the media in his presence and he discussed the records in front of a state legislative committee.

The use of quotation marks around "expert witnesses" implies that they were a sham. This accusation could not be further from the truth. Mr. Kline discovered in his investigation through a subpoena to KDHE for abortion reports that WHCS, contrary to state law, provided a boilerplate explanation for late-term abortions. To prove that this evasion of the law represented abortions that did not meet the statutory standard of a "substantial and irreversible impairment of a major bodily function," K.S.A. § 65-6703,

Mr. Kline required the testimony of credentialed psychiatrists. In almost all cases, the WHCS records alleged a mental health impairment. He successfully enlisted as an expert witness Dr. Paul R. McHugh, the Chairman of the Psychiatry Department at Johns Hopkins, and a giant in his field.[11] *The Verdict's* disparagement of Dr. McHugh's credentials is shameful and ignorant. Recently, Mr. Kline's prosecution of Dr. Tiller for illegal late-term abortions has been more than vindicated in the revocation of the medical license of Dr. Kristin Neuhaus, who for a flat fee created for WHCS subpar mental diagnoses with an easy-to-use program called "PsychManager Lite"[12]

The statement that Mr. Kline "discussed the records in front of a state legislative committee" is a pure lie, finding no support in the *CHPP* opinion or anywhere else. Mr. Kline never appeared before a legislative committee on this topic.

7. All of his actions were in direct conflict with the orders of confidentiality personally relayed to him by the Supreme Court and Shawnee District Judge Richard Anderson.

The abortion records were fully redacted of patient identities before Mr. Kline received them. At the order of this Court, the abortion clinics redacted them before delivery to Judge Anderson, who went through a further detailed redaction protocol. *See Alpha*, 280 Kan. at 924-25. When Mr. Kline asked if he needed further permission from the court to share the records with expert witnesses and other district attorneys, Judge

[11] In 1999, Johns Hopkins named a Chair in Psychiatry for Dr. McHugh "endowed with $1.76 million in contributions from admiring colleagues, friends and former patients." Jim Duffy, *Straight-Shooting Shrink*, HOPKINS MEDICAL NEWS, Winter 1999, *available at* http://www.hopkinsmedicine.org/hmn/w99/profile.html.

[12] *See Final Order Revoking Licensure to Practice Medicine and Surgery and Assessing Costs*, Kan. State Bd. of Healing Arts, No. 10-HA00129 (July 5, 2012), http://www.ksbha.org/boardactions/Documents/Neuhaus_12.pdf.

Anderson added no further requirements "because the records had been de-identified as required by the protective order." R.3, 3582 (Memorandum Decision of April 18, 2007, at 2. Ex. 132). The Supreme Court concurred: ""[R]eferrals of information gathered in criminal investigations are neither uncommon nor inappropriate. . . . [S]uch referrals do not generally require law enforcement or prosecutors to obtain permission from a member of the judiciary." *CHPP v. Kline*, 287 Kan. at 410. Judge David King, Special Master for this Court in *CHPP*, stated:

> The evidence presented in this matter supports a conclusion that the redacted patient medical records Kline received on October 24, 2006 complied with the *Alpha* mandate, the Orders of Judge Anderson, and had patient identifying information removed to a degree that they complied with the federal Health Insurance Portability and Accountability Act of 1996, 42 U.S.C § 1320d. (HIPAA).

R.3, 2007 (Ex. 90, ¶ 11).

Because the records had been fully redacted, as Judge Anderson stated, Mr. Kline did not violate any confidentiality order of the district court. Even the red-hot anti-Kline *CHPP* opinion grudgingly conceded this point. 287 Kan. at 419. Judge King's Report found that "Judge Anderson declined to find Kline in contempt in relation to the transfer of either the CHPP or WHCS records to Johnson County." R.3, 2038 (Ex. 90, ¶ 176). In fact, Judge Anderson complimented Mr. Kline on his concern for patient privacy and acknowledged the unfair criticism he had received during his re-election campaign. "You faced a lot of undue criticism and unwarranted criticism during the campaign, which was occasioned by critics maybe not being fully familiar with what you had done, what you were attempting to do, or protections that you had put in place." R.3, 1012:1-6

(Transcript of Inquisition hearing, April 11, 2007, at 12).

8. In removing the files from the Attorney General's office, they took a tortured path to Johnson County including unsecure storage at attorney Steve Maxwell's private residence, put in the trunk of a state vehicle that sat in a parking lot for several days, and to the dining room of one of his staff investigators, Jared Reed.

This rendition of the movement of the files from Topeka to Olathe completely overlooks the bristling hostility of Paul Morrison to the abortion investigation and to Mr. Kline personally. What was Mr. Kline to do to transmit the investigative files and evidence to Johnson County? Transmit them by courier while Mr. Morrison was still occupying the District Attorney office in the Johnson County courthouse? Would he have ever seen them again? Wait til Mr. Morrison took office as Attorney General and politely ask him to forward them? When Mr. Kline after the transition asked Mr. Morrison to provide him with three of the Tiller files, he flatly refused. *See* R.4, 3366-67 (Letter from Phill Kline to Paul Morrison, May 25, 2007. Ex. P6); R.4, 3232 (Letter from Veronica Dersch to Phill Kline, June 1, 2007. Ex. T5). Linda Carter, Mr. Morrison's administrative director, testified that he "had an extreme hatred for Phill Kline." R.2, 1829.

To effectuate the transfer and sidestep Mr. Morrison's inevitable obstructionism,[13] Mr. Kline had to move the files before Mr. Morrison arrived in Topeka and after he had left Johnson County. He operated in this narrow window out of necessity. Thus Steve

[13] Mr. Morrison intervened in *CHPP v. Kline* to align himself with Planned Parenthood's effort to strip the files from Mr. Kline. *See CHPP*, 287 Kan. at 388. He filed his own mandamus action against Judge Anderson to force the court to give up the original set of redacted records in its custody. *Morrison v. Anderson*, No. 99,505 (2007). Recruited by Governor Kathleen Sebelius to run against Mr. Kline, Morrison was a Planned Parenthood bird dog with a nose for all evidence that might inculpate the abortion giant.

Maxwell and investigator Tom Williams moved the files to Mr. Maxwell's house on their last Friday in office. Over the weekend, storing the files safely, Mr. Maxwell prepared the Status and Disposition Report. On Monday morning, the day of the swearing in, Mr. Williams and his aide, Mr. Reed, delivered the files for the Attorney General's office to Judge Anderson and District Attorney Hecht for safekeeping and to maintain an official chain of custody. Because during the transition no secure storage location existed in the Johnson County courthouse, the files destined for Johnson County were of necessity stored in Mr. Reed's apartment. Mr. Williams, a veteran federal law enforcement officer, exercised his prudent judgment in this matter, waiting to move the records to Johnson County until he could guarantee their safety. *See CHPP*, 287 Kan. at 385 (noting that Williams moved the materials from Reed's apartment after he "had reassured himself about secure storage at the Johnson County District Attorney's office").

The "tortured path" was the result of Mr. Morrison's hostility. As this Court stated: "[H]e didn't want to compromise the investigation or have to start over once he reached Johnson County." *Id*. at 398. Justice Beier portrayed Mr. Kline as a threat to patient privacy because his office creatively sought to protect its set of records from Morrison's menacing antagonism. *Id*. at 411 (terming storage in Jared Reed's dining room "grossly incompetent"). Only in passing and without comment did she acknowledge the corroborating findings of this Court's own Special Master:

> Judge King also found that Morrison made public statements that were hostile to the merit of Kline's inquisition. In addition, "Morrison and his transition staff were not cooperative with Kline and his transition staff: Kline was denied a secure storage area at the Johnson County District Attorney's office; Kline was not provided with office space...."

Id. at 399. *See also id*. at 411 (noting "the unique exchange of prosecutorial offices by Kline and Morrison and the intense political acrimony that surrounded it"). For a fuller account of Morrison's enmity, see R.3, 2030 (Ex. 90, ¶¶ 126-30).

9. Some files were left with Shawnee District Attorney Robert Hecht and some were left with Judge Anderson later to be retrieved by Kline's staff.

As stated above, leaving the redacted medical records and the investigation files with trustworthy officers of the court system ensured their preservation, while making them readily available to the new Attorney General. Mr. Kline had briefed Mr. Hecht on continuing the Tiller prosecution and left him with the records necessary to that effort. The suitability of leaving inquisition materials with Judge Anderson requires no further comment. The implication that this decision was somehow improper is baseless.

The statement that these files were "later to be retrieved by Kline's staff" is completely false. Mr. Kline took the records he needed to Johnson County. Those left behind were for the benefit of other prosecutors. They were not a secret cache for Mr. Kline to retrieve at a later time.

10. The Status and Disposition Reports that had been filed with Judge Anderson were clearly erroneous.

This statement does not bear scrutiny. Only one Status and Disposition Report existed. Use of the plural is incorrect. The Report was completely accurate except for omission of the WHCS records. See analysis of Statement 3 above. The *CHPP* opinion quotes Judge King as follows: "It is reasonable to conclude that the initial failure to disclose in the Status and Disposition Report that WHCS records were being taken to

Johnson County was not a deliberate attempt to deceive, or make misrepresentations to, Judge Anderson." 287 Kan. at 400. When Mr. Maxwell composed the report, he was not aware that WHCS records would be sent to Johnson County. *Id*. at 382-83. A detailed three-page report with a single omission, and that unintentional, is not fairly described as "clearly erroneous."

11. Kline had been specifically advised that he was not to take any records of the Wichita investigation. He only had a right to the records of the clinic in Johnson County.

This statement is false. Mr. Kline may not have specifically been given permission to retain a set of the WHCS records, but he was never "specifically advised" that he could not have them. As the prosecutor who had developed the file, and knowing of Morrison's hostility to the investigation, upon which he had run for office, Mr. Kline prudently sought to retain a set of WHCS records for use in Johnson County. He sought to protect them from loss, deliberate or otherwise,[14] and to have them available for examining the legality of late-term pregnancy referrals from Planned Parenthood to WHCS. Morrison's offensive to wrench the records from Kline's hands and from Judge Anderson confirmed the wisdom of this cautionary approach to preserving evidence.

Judge Anderson acknowledged the validity of Mr. Kline possessing the Tiller records:

[14] Hindsight amply reveals that fear of destruction of evidence at the hands of abortion-friendly officials was not a chimera. Under the administration of Governor Sebelius, KDHE destroyed abortion reports essential to the prosecution of Planned Parenthood. Her appointee, Attorney General Steve Six, did the same. *See* Tim Carpenter, *Kline: "Shreddergate" Exposes Abortion Corruption*, TOPEKA CAPITAL JOURNAL, Nov. 11, 2011.

> The Tiller records. . . . Mr. Kline has probably some pretty sound theories as to why some of that evidence should be in his possession . . . because there appears to be some link between Planned Parenthood that they have discovered and the Women's Clinic in Wichita about referrals of patients that were 24 weeks.

Morrison v. Anderson case file, at 210 (Attachment C) (Transcript of Inquisition hearing, April 10, 2007, at 8).[15] *See also id*. at 202 (letter from Judge Anderson to Morrison, July 13, 2007) ("Three [WHCS] files may be relevant to the Planned Parenthood investigation being conducted by the Johnson County District Attorney.").

As this Court stated in *CHPP v. Kline*, the Attorney General has "lawful authority to give information arising out of an investigation to others in a position to prosecute a lawbreaker." 287 Kan. at 410. Furthermore, a district attorney may "receive and act upon such information." *Id*. Thus, permission from Judge Anderson was "irrelevant" to Kline's authority to refer the patient records "from the Attorney General's office to the Johnson County District Attorney's office." *Id*. This Court found specifically that Kansas law permitted the transfer as part of the Attorney General's duty to provide aid, consultation, and advice to county attorneys. *See* K.S.A. 75-704. "Kline's movements of the patient records and other inquisition materials from one office to another appear to constitute aid, consultation, or advice to the Johnson County District Attorney . . . ." *CHPP v. Kline*,

[15] The Supreme Court released this case file to the public on May 2, 2008. *CHPP v. Kline*, 287 Kan. at 401. This Court may take judicial notice of its own records. *See State v. Shelton*, 252 Kan. 319, 323, 845 P.2d 23 (1993) (noting that a district court "took judicial notice of its own records"); K.S.A. 60-409(b)(4). *See also Van Woudenberg ex rel. Foor v. Gibson*, 211 F.3d 560, 568 (10th Cir. 2000) ("[T]he court is permitted to take judicial notice of its own files and records."); *St. Louis Baptist Temple, Inc. v. Fed. Deposit Ins. Corp*., 605 F.2d 1169, 1172 (10th Cir. 1979) ("Judicial notice is particularly applicable to the court's own records of prior litigation closely related to the case before it.").

287 Kan. at 413. Because Mr. Kline legitimately held both offices in succession, he was authorized as a matter of law to make the transfer. *See id*. at 415 ("the former public officeholder is also a current officeholder with authority to possess the materials at issue"). "In sum, the person who holds the position of Johnson County District Attorney may lawfully possess the results of a criminal investigation begun by the Attorney General." *Id*.

The *Alpha* case did not require a different result. "[A]ny inherent prosecutorial power to transmit information to other prosecutors that Kline possessed the day before *Alpha* was filed he still possessed the day after." *Id*. at 414. This Court thus concluded that "Kline was not prevented by law from moving the patient records to the Johnson County District Attorney's office." *Id*. at 416. Because *CHPP* itself completely refutes the statement in *The Verdict* that Kline "only had a right to the records of the clinic in Johnson County," one may infer that Arnold-Burger's own bias and prejudice against Kline inspired the misrepresentation. In a judicial setting, findings by a trial judge "unsupported by the record are evidence that the judge has relied on extrajudicial sources in making such determinations indicating personal bias and prejudice." *Peacock Records, Inc. v. Checker Records, Inc*., 430 F.2d 85, 89 (7th Cir. 1970).

12. When Judge Anderson discovered that Kline and his staff had taken the Wichita records he ordered them returned and questioned whether copies had been kept. He was told that no copies had been made, which was patently false.

This statement conveys less than the whole story, and thus misleads readers. Judge Anderson primarily ordered the Tiller records returned to protect against a legislative

subpoena for them. Explaining why he had given the new Attorney General very brief notice of a hearing on return of the records, Judge Anderson stated:

> I did not want these records to get away and be delivered to anybody under a subpoena or anything like that. I believed that the only way to make sure that those records would be retained within the jurisdiction of the Court was to make my order orally and require them to redeliver the records today.

R.3, 1033 (Transcript of Inquisition hearing, April 11, 2007. Ex. 82, at 33).[16] Judge Anderson was concerned that he had not been given notice in the Status and Disposition report that the Tiller records went to Johnson County, but he "brought those back into the custody of the Court, so there's no risk that they could be subpoenaed by anyone else." R.3, 1079-80. Indeed, he expressed apprehension that taking the records from Mr. Kline might unfairly hinder his investigation. Speaking to Morrison's chief counsel, he said: "[T[here might be evidence in the Tiller records that has some connection to the Planned Parenthood records. And I recognize today that I have ordered that that be taken from Mr. Kline, delivered to your custody and I am somewhat uneasy about that." R.3, 1080-81.

Mr. Kline assured the Court that all copies had been returned. "We have not retained any copies as it pertains to any of these files and we're now tendering back to the Court, or to the Court, consistent with its order." R.3, 1075. His staff also assured him, in response to his inquiry, that no WHCS records had been scanned. R.3, 1076-77.

Mr. Kline's statement that no copies had been made was correct. His office did make a handwritten compilation of data from the files for use in further investigation, but

[16] During a hearing recess, the Panel located in the Inquisition transcript Judge Anderson's detailed explanation of why he did not want the records to be at risk of a legislative subpoena. Chair Jo Ann Butaud confirmed that the transcript "supported Mr. Kline's testimony about the legislative subpoena issue. It is exactly as he testified." R.2, 1919-1920, *citing* R.3, 1010-1011.

retained no copies of the actual records. The Hearing Panel found that Mr. Kline did not violate any conduct rule in making these summaries. R.1, 2030-31 (Panel Report at 160-61, ¶¶ 371-74). This information later permitted Mr. Kline to request particular relevant files from Morrison, as detailed above in the analysis of statements 8 and 11. Had he retained the actual files, he would have had no reason to request them from Morrison.

Justice Beier in the *CHPP* opinion drew the distinction between the actual redacted abortion files and the summaries of information from them. 287 Kan. at 385, 422. Judge Arnold-Burger, ignoring this distinction, falsely charged Mr. Kline with lying to Judge Anderson when he returned the files on April 11, 2007.

C. Going Beyond *CHPP v. Kline*

The Verdict in many instances went beyond the baseline of *CHPP* to pin imaginary wrongdoing on Mr. Kline that even this Court eschewed. *CHPP* does not claim that Mr. Kline "failed to document when and to whom he provided copies." *The Verdict* does. *CHPP* does not demean the credentials of Mr. Kline's expert witnesses. *The Verdict* does. CHPP does not claim that Mr. Kline "discussed the records in front of a state legislative committee." *The Verdict* does. *CHPP* does not claim that all of Mr. Kline's actions "were in direct conflict with the orders of confidentiality personally relayed to him" from Judge Anderson and this Court. *The Verdict* does.

CHPP does not allege that the records left with Judge Anderson and District Attorney Hecht were "later to be retrieved by Kline's staff." *The Verdict* does. *CHPP*, though critical of the omission of the WHCS records from the Status and Disposition Report, does not condemn the whole report as "clearly erroneous." *The Verdict* does.

CHPP does not state that "Kline had been specifically advised that he was not to take any records of the Wichita investigation." *The Verdict* does. *CHPP* does not accuse Mr. Kline of a "patently false" answer to Judge Anderson about return of the WHCS records. *The Verdict* does. Although *The Verdict* spoke of Mr. Kline's "careless handling of abortion clinic patient files," his careful handling of the records under the circumstances more than favorably compared with the lack of even slight respect for the truth shown by the official publication of the Kansas Municipal Judges Association.

The Winter, 2009 issue of *The Verdict* seemed to be far more interested in castigating Mr. Kline than in offering a true account of even the biased *CHPP* case to its readers. *CHPP*'s declaration of open season on Mr. Kline found a ready reception in the pages of *The Verdict*. In this sport, truth was no impediment. Predictably, the numerous departures from truth all worked to Mr. Kline's detriment, making him appear even worse than the *CHPP* case did—a considerable accomplishment. Justice Beier may have been staggering under the weight of imbibed anti-Kline intoxicants. *The Verdict* fell over backwards.

IV. The Necessity for Recusal

A. *The Verdict*: Judge Karen Arnold-Burger, Editor

In 1996, after five years as a judge in Overland Park Municipal Court, Karen Arnold-Burger was appointed Presiding Judge.[17] A year later, the Kansas Municipal Judges Association began publishing a quarterly newsletter entitled *The Verdict*. Judge

[17] *Spotlight on Judges Karen Arnold-Burger, Ryan Dixon & Scott Miller, The Verdict*, Spring, 2011, at 1-2.

Arnold-Burger was editor of *The Verdict* from its inception in 1997 until Governor Mark Parkinson appointed her to a seat on the Kansas Court of Appeals in January, 2011.[18] From the issues on the KMJA website, one may infer that *The Verdict* ceased publication after Arnold-Burger was no longer the editor. She was sworn in as an appellate judge on March 4, 2011. The last issue on the KMJA website is for Spring, 2011.

Each issue of *The Verdict* on the KMJA website has a section entitled "Court Watch" that offers synopses of recent cases "of interest to municipal judges." Almost all the cases in the "Court Watch" section are about criminal law or procedure. The Winter, 2009 issue of *The Verdict* is true to form, providing summaries of fourteen criminal law and procedure cases, but with one oddity. In the midst of cases about Fourth Amendment, evidentiary, and speedy trial issues is the unusual and incongruous headline: "Writ of Mandamus Issued against Phill Kline." In what possible way might this case "relate to issues that arise in municipal court"? Does municipal court typically address how to handle the redacted records of abortion patients in a district court inquisition?

Because *The Verdict* appears to be Arnold-Burger's creation and not to have survived her departure, one may reasonably identify the publication and its contents with her editorial hand.[19] The unusual, incongruous, and heavily slanted synopsis of the *CHPP*

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[18] *See* Karen Arnold-Burger, *Municipal Court Mediation: Reducing the Barking Dog Docket*, 35 Court Rev. 50, 54 (1998) (stating that Arnold-Burger "currently serves as editor of the KMJA newsletter, The Verdict"). *See* also KMJA, *Newsletter*, http://www.kmja.org/newsletter (last visited August 3, 2012) (linking to all issues from Winter, 2007 through Spring, 2011. Arnold-Burger was editor for all except the Spring, 2011 issue.).

[19] A newsletter of the Kansas Department of Transportation described Judge Arnold-Burger as editor *and author* of *The Verdict*. *See* 1 STREET LEGAL (July 2008), available at: http://www.ksdot.org/burtrafficsaf/lel/pdf/TSRPnwsltr708.pdf

case could not have been printed and distributed to the state judiciary without her express approval. By so doing, she went on record with her views of Kline's actions as a prosecutor of abortion clinics. The opening twelve statements read like a pro-abortion editorial, and are famously inaccurate. By placing this skewed synopsis in an official judicial publication known for its thoroughness and reliability, she gave an imprimatur of credibility to a scandalous misrepresentation.

The twelve statements implicate findings of the Hearing Panel that are before this Court for review. Judge Arnold-Burger has already announced her views on these matters in a way to impugn Mr. Kline before the state judiciary. Many of the misrepresentations have no basis in the *CHPP* opinion. Having already announced her view of the merits of this case, Judge Arnold-Burger is disqualified from hearing this appeal, and must recuse. Two specific canons are implicated.

B. Canon 3(B)(9): Public Comment about Impending Proceedings

When she published statements as a municipal judge in 2009 about Mr. Kline's conduct of the abortion clinic investigation, Judge Arnold-Burger certainly could not have imagined that she would one day be sitting in judgment of him on the same matters. Nonetheless, then Canon 3(B)(9) stated: "A judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect the outcome or impair its fairness . . . ."[20] In the winter of 2009, the

[20] The Code of Judicial Conduct, effective June 1, 1995, was superseded on March 1, 2009. Mr. Kline assumes that the Winter, 2009 issue of *The Verdict* was published before March 1, 2009. The old canon and the comparable new rule are similar in substance though phrased differently. *See* Kan. Code of Judicial Conduct R. 2.10(A) (2009).

prospect of disciplinary proceedings against Mr. Kline in the wake of *CHPP* was more likely than not. The opinion itself bristled with disciplinary threatenings. In a passage *The Verdict* quoted verbatim, the Court said that Kline's conduct "may merit civil or criminal contempt, discipline up to and including disbarment, or other sanctions. Furthermore, the known pattern of obstructive behavior prompting sanctions, standing alone, may be or become the subject of disciplinary or other actions; a copy of this opinion will be forwarded to the disciplinary administrator." *CHPP v. Kline*, 287 Kan. at 425. One year later, as could be anticipated, the Disciplinary Administrator filed a formal complaint. R.1, 1-36. Judge Arnold-Burger knew when she published the synopsis that this disciplinary proceeding was "impending," namely "to be about to occur."[21]

In those circumstances, Judge Arnold-Burger should not have disseminated *The Verdict's* biased commentary. Canon 3(B)(9) applied to a proceeding impending in *any* court, not merely one that might come before the judge making the comment.[22] Harshly negative characterizations of Mr. Kline printed in a publication targeted at a statewide judicial audience certainly qualified as "public comment that might reasonably be expected to affect the outcome or impair its fairness." Restrictions upon the First Amendment rights of judges are stricter than those that apply to lawyers.

Because judges are both highly visible members of government and neutral

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[21] Merriam-Webster Online Dictionary. http://www.merriam-webster.com/dictionary/impend. The 2009 revision of the Code of Judicial Conduct defines "impending matter" as "a matter that is imminent or expected to occur in the near future."

[22] *See In re Inquiry of Broadbelt*, 683 A.2d 543, 548 (N.J. 1996) ("We find the Canon to be clear and unambiguous: a judge should not comment on pending cases in any jurisdiction.").

> decision makers in all court proceedings, their public comments will be received by the public as more authoritative than those of lawyers. And because judges have this greater influence over public opinion, inappropriate public comment by judges poses a much greater threat to the fairness of judicial proceedings than improper public comment by lawyers.

Broadman v. Comm'n, 959 P. 2d 715, 727 (Cal. 1998) (internal quotation marks omitted).

C. Canon 3(E)(1): Objective Appearance of a Lack of Impartiality

"A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned . . . ." Canon 3(E)(1) (1995)[23] This rule is mandatory[24] and applies to the Supreme Court.[25] Because the impartiality language in Canon 3(E)(1) is the same as that in federal law, "federal cases offer guidance in their interpretation of 28 U.S.C. § 455(a) (1982), which also requires disqualification if the judge's impartiality might reasonably be questioned." *State v. Logan*, 236 Kan. 79, 86, 689 P.2d 778 (1984). The standard is an objective one, not dependent upon the judge's subjective perception. *State v. Robinson*, 270 P.3d 1183, 1204 (Kan. 2012). "The standard which federal courts use is whether the charge of lack of impartiality is grounded on facts that would create reasonable doubt concerning the judge's impartiality . . . in the mind of a reasonable person with knowledge of all the circumstances." *Logan*, 236 Kan. at 86. The Tenth Circuit explained:

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[23] The current rule, identical in wording, is Kan. Code of Judicial Conduct R. 2.11(A) (2009).

[24] "When the text uses 'shall' or 'shall not,' it is intended to impose binding obligations the violation of which can result in disciplinary action." Preamble, Code of Judicial Conduct (Rule 601A) (1995).

[25] "The text of the Canons and Sections is intended to govern conduct of judges and to be binding upon them." Preamble, Code of Judicial Conduct (1995). The term "judge" includes Kansas Supreme Court Justices. Application of the Code of Judicial Conduct (A) (1995).

> [T]he judge's actual state of mind, purity of heart, incorruptibility, or lack of partiality are not the issue. . . . The standard is purely objective. The inquiry is limited to outward manifestations and reasonable inferences drawn therefrom. In applying the test, the initial inquiry is whether a reasonable *factual* basis exists for calling the judge's impartiality into question.

United States v. Cooley, 1 F.3d 985, 993 (10th Cir. 1993) (citations omitted).

In January, 2003, Justice Antonin Scalia, speaking at a religious freedom event, expressed his disagreement with a recent Ninth Circuit decision excising "under God" from the Pledge of Allegiance.[26] On February 28, the Ninth Circuit denied en banc review.[27] In April, the losing school district petitioned for Supreme Court review. In September, Respondent Michael Newdow filed for Justice Scalia's recusal on the ground that he had apparently already reached a conclusion on the case, thus creating an appearance of partiality. The Court granted cert on October 14. The docket entry noted: "Justice Scalia took no part in the consideration or decision of this petition."[28] Justice Scalia took no part in the appeal thereafter. See *Elk Grove Unified Sch. Dist. v. Newdow*, 542 US 1, 3 (2004) ("SCALIA, J., took no part in the consideration or decision of the case.").

Having expressed himself publicly on the merits of a case that later came before the Court, Justice Scalia felt obligated to recuse. Similarly, in early 2009, *The Verdict* expressed strong negative views about Phill Kline's conduct of the abortion clinic

[26] *Newdow v. United States Cong*., 292 F.3d 597 (9th Cir. 2002). *See Scalia Attacks Church-State Court Rulings*, N.Y. TIMES, Jan. 13, 2003.

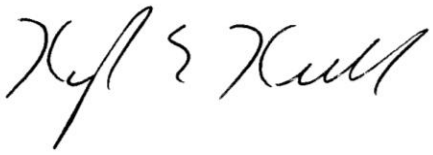
[27] 321 F.3d 772 (9th Cir. 2003).

[28] http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/02-1624.htm

investigations, an opinion that an objective observer would attribute to its editor. That editor, now appointed to sit in judgment upon Mr. Kline's handling of those investigations, is also obligated to recuse. The strange incongruity of this anomalous article appearing in the midst of synopses about criminal law and procedure, and its manifest lack of objectivity, indicate that it could not have been chosen for publication or written in such a strongly biased manner without the express approval of the editor. Judge Arnold-Burger managed *The Verdict* editorially from its founding in the late nineties until its cessation of publication upon her elevation to the Court of Appeals. Peculiarly a personal reflection of her abilities and editorial skill, the content carries her imprimatur. Thus, her impartiality "might reasonably be questioned." Canon 3(E)(1).

WHEREFORE, based on Canons 3(B)(9) and 3(E)(1) of the Code of Judicial Conduct (1995), Respondent Phillip D. Kline moves that Judge Karen Arnold-Burger be recused from hearing this appeal.

Respectfully submitted,



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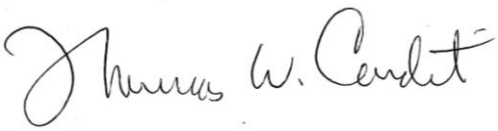

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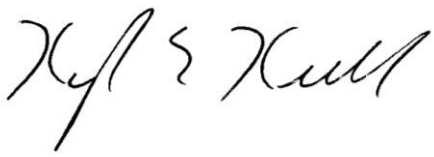
CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of August, 2012, a copy of

MOTION OF RESPONDENT PHILLIP D. KLINE FOR THE RECUSAL OF JUDGE KAREN ARNOLD-BURGER

was served by personal service upon:

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



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Attachment A

The Verdict

Winter, 2009

(excerpt)

The Verdict

The Official Publication of the Kansas Municipal Judges Association

Issue 46 Winter 2009

If you would like to submit an article or would like to see a topic addressed, please send it to Judge Arnold-Burger.

A Step back in time

Since the dawn of time, young men have felt the need for speed. Today it may mean drag racing your Mustang down an open stretch of highway, but in 1875 it meant drag racing with a different type of mustang.

In February 1875, H.M. Mayberry was driving his horse and buggy in Fort Scott. He was heading home, which was about 4 miles outside of town, when he came across his neighbor, A. Sivey walking home. He invited Sivey to ride home with him. Sivey accepted and jumped in the buggy.

About ½ mile outside of town Mayberry came upon Clark. Clark was driving a span of horses and a wagon. Mayberry challenged Clark to a race and "whipped up his horse to pass Clark." Clark then "whipped up his team to prevent" Mayberry from passing him. The race was on. Sivey "seeing a race imminent, and being in great fear of bodily injury, begged and insisted" that Mayberry stop and let him out. Mayberry refused. Sivey made repeated requests, none of which were honored. He told Sivey, "*Never mind, old man, old Bill* [meaning his horse] *will bring us through all right; if he don't, old Mayberry will pay the damages.*" While driving his horse at full speed, the buggy struck a stone fence, overturned the buggy, and threw Sivey violently to the ground. He suffered a dislocated shoulder and a bruised arm. This resulted in permanent paralysis of the muscles of the hand.

Sivey sued Mayberry for negligence. The jury found for

(Continued on page 13)

Court Watch

The following are cases that have been decided since our last issue that may be of interest to municipal judges. Only the portion of the case that may relate to issues that arise in municipal court are discussed. Members are encouraged to read the whole opinion.

EVIDENCE OBTAINED IN VIOLATION OF HIPAA DOES NOT REQUIRE SUPPRESSION

A warrant was issued for Terri Yenzer's arrest. Police were alerted by the legal assistant in her attorney's office that Terri would be at a dental appointment the next day. The next day, police went to the dental office. The officer walked up to where one would check-in and saw Yenzer's name listed on the appointment book, which was visible on the receptionist's desk. He inquired of the receptionist, who advised him that Yenzer had cancelled her appointment for that day. She gave him the date of the rescheduled appointment. The officer returned on that date. He confronted Yenzer and asked for

(Continued on page 3)

SPOTLIGHT ON: MICHAEL WILSON

Bentley judge Michael Wilson was born and raised in Kansas City, Missouri. His father, a World War II veteran, worked for Southwestern Bell. His mother was a homemaker. He has one younger sister. After graduating from Raytown High School, he went to work at Western Electric in Lee's Summit, Missouri as a junior pipefitter and electrician while he went to school. He received a bachelor's degree from Washburn University in psychology and sociology.

After college, he began a career in law enforcement, working for the Garnett and Lenexa police departments, the University of Kansas Medical Center campus police and the Wyandotte County Sheriff's Department before being named chief of police in Lake Quivira. But the legal profession kept calling him. He attended Washburn University Law School and graduated in 1988.

After a short stint in private practice in Johnson County, Mike joined the public defender's office in Clay County,

(Continued on page 2)

Court Watch

(Continued from page 4)

CAN'T CROSS-EXAMINE OFFICER ABOUT THE NHTSA MANUAL UNLESS DEFENSE COUNSEL PRODUCES AND REFERENCES THE MANUAL

In a DUI trial, defense counsel asked the arresting trooper about specific NHTSA requirements regarding the walk-and-turn test. The State objected, arguing that defense counsel should be required to produce and specifically reference the NHTSA manual before questioning the trooper about its asserted contents. The Court sustained the objection and explained *"[Y]ou have to make sure that [the prosecutor] can be satisfied that it's actually in the manual before you ask the question. That's the whole point of having the manual."* Instead defense counsel was relying on documents he received from CLE training. The Court went on to state, *"If you don't have the manual, I'm not going to accept you as an expert to correct him of anything he doesn't know the answer."*

The Court of Appeals agreed with the district court in *State v. Garcia*, ___Kan.App.2d___(November 26, 2008) and found that the rules of evidence provide that except under certain circumstances, not applicable to this case, *"[a]s tending to prove the content of a writing, no evidence other than the writing itself is admissible."* K.S.A. §60-467(a). Therefore, the *"trial court did not err in ruling Garcia could not ask the trooper about specific contents of the NHTSA manual without first producing the manual."*

The Court of Appeals further upheld the district court's ruling that the following questions by defense counsel were irrelevant and therefore not allowed:

"Are there certain instances where somebody cannot complete the test, in your experience?"

"But you wouldn't normally, in say a speeding case, have somebody get out and take [a filed sobriety test] without other clues present or other indicators present for alcohol?"

WRIT OF MANDAMUS ISSUED AGAINST PHIL KLINE

Planned Parenthood filed a writ of mandamus against Phil Kline regarding the handling of medical records and also seeking a finding of contempt of court.

Before his successor took office Kline and/or his staff boxed up all the records that he had obtained as part of an inquisition he conducted as Attorney General to take with him to Johnson County, even though some involved a clinic in Wichita. He failed to document when and to whom he provided copies, although certainly copies were made. He knowingly attached copies of sealed records to unsealed briefs he filed in Shawnee County. He held press conferences about the records and appeared on the O'Reilly Factor (where Bill O'Reilly suggested that he had been made privy to the contents of the records). He gave access to the information to several "expert witnesses" who later gave interviews about the contents to the media in his presence and he discussed the records in front of a state legislative committee. All of his actions were in direct conflict with the orders of confidentiality personally relayed to him by the Supreme Court and Shawnee District Judge Richard Anderson. In removing the files from the Attorney General's office, they took a tortured path to Johnson County including unsecure storage at attorney Steve Maxwell's private residence, put in the trunk of a state vehicle that sat in a parking lot for several days, and to the dining room of one of his staff investigators, Jared Reed. Some files were left with Shawnee District Attorney Robert Hecht and some were left with Judge Anderson later to be retrieved by Kline's staff. The Status and Disposition Reports that had been filed with Judge Anderson were clearly erroneous. Kline had been specifically advised that he was not to take any records of the Wichita investigation. He only had a right to the records of the clinic in Johnson County. When Judge Anderson discovered that Kline and his staff had taken the Wichita records he ordered them returned and questioned whether copies had been kept. He was told that no copies had been made, which was patently false.

In *Comprehensive Health of Planned Parenthood v. Kline*, ___Kan. ___(December 5, 2008), the Supreme Court was not able to find that Phil Kline violated any laws in his careless handling of abortion clinic patient files that he took with him from the Attorney General's Office to the Johnson County District Attorney's Office. However, the Court did find that his behavior was obstructive and that his actions hampered his successor's ability to fulfill his duties. He was ordered to return the materials he gathered in relation to the investigation to Attorney General Six. He was given one week from the date of the decision to deliver:

"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, Maxell, Williams, Reed and any other employee of

(Continued on page 6)

Court Watch

(Continued from page 5)

the Johnson County District Attorney's office requested by the Attorney General shall meet the with 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 5:00 p.m. on December 12, 2008… "

The Court was obviously distressed by the actions of Kline and his staff and the lack of controls he put on the storage and copying of these highly personal medical records which had already been the subject of strict orders regarding confidentiality in *Alpha Medical Clinic v. Anderson*, 280 Kan. 903 (2006). Here are just a few examples from Justice Beier's opinion.

"*Kline was demonstrably ignorant, evasive, and incomplete in his sworn written responses to Judge King, this court's appointed agent in the fact-finding process. Kline's responses were far from full and forthright; they showed consistent disregard for Kline's role as a leader in state law enforcement; and they delayed and disrupted this court's inquiry. Among other things, he failed to consult with his subordinates as appropriate to give responses, treating questions posed to him as a public servant whose conduct was under scrutiny in a mandamus action as though they were questions posed to him as an uncooperative and too-clever-by-half private litigant. He was thorough only when digressing from the point…"*

"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 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..."

"…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."
"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 personal 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."

"We also note…that further instances of Kline's improper conduct or the improper conduct of subordinates for whom he bears responsibility may yet come to light. Such actions, standing alone or when considered alongside Kline's or others' conduct in Alpha and/or in this case may merit civil or criminal contempt, discipline up to and including disbarment, or other sanctions. Furthermore, the known pattern of obstructive behavior prompting sanctions, standing alone, may be or become the subject of disciplinary or other actions; a copy of this opinion will be forwarded to the disciplinary administrator."

The opinion was unanimous. However, Justices Davis and McFarland did file concurring opinions. They both objected to the majority's framing of the relief as "sanctions." They stated that that the court simply granted the writ of mandamus and ordered him to perform his duties. Imposition of "sanctions" requires a different and objective standard. Justice Davis opined, "*The facts—without any inferences—speak for themselves concerning the performance of Kline and his employees. I would not attempt to characterize those actions in handling these records and responding to the investigation of this court, as the record speaks loud and clear. I would therefore leave the matter in the hands of the Disciplinary Administrator for an independent judgment as to whether ethical violations have occurred during the course of these proceedings."*

The Chief Justice was a bit more direct. *"I strongly disagree with the last paragraph of the majority opinion. In that paragraph, the majority notes that "further instances of Kline's improper conduct…may yet come to light," and warns that, if it does, such conduct may merit contempt, discipline up to and including disbarment, or other sanctions… This vague statement seems to anticipate and encompass the discovery of additional past or future misconduct. What is the point of this paragraph? Upon compliance with the simple requirements of the "sanction" imposed, the case is over, done, finished. I believe it is inappropriate to set forth, as if to threaten the respondent with, the various penalties that could be imposed if some past or future hypothetical misconduct should "come to light" at a later date."*

(Continued on page 7)

The Verdict

Winter 2009 Issue 46

C/O Overland Park Municipal Court
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All KMJA dues should be sent to:

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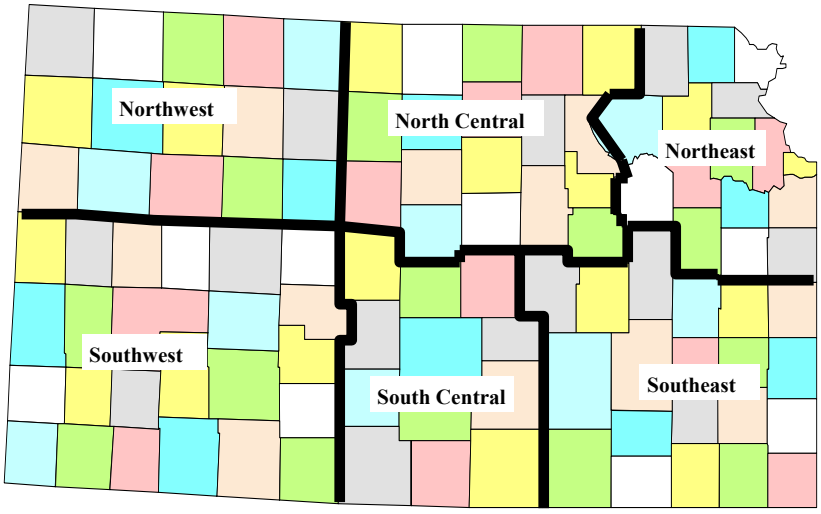

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THE VERDICT

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Attachment B

Motion for the Recusal
of Justice Carol A. Beier

May 15, 2012

(excerpt)

Appeal No. 11-106870-S

IN THE SUPREME COURT OF KANSAS

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

MOTION OF RESPONDENT PHILLIP D. KLINE FOR THE RECUSAL OF JUSTICE CAROL A. BEIER AND OF CHIEF JUSTICE LAWTON NUSS WITH REQUEST FOR ORAL ARGUMENT

Respondent Phillip D. Kline, former Attorney General the State of Kansas, hereby moves for the recusal of Justice Carol A. Beier and of Chief Justice Lawton Nuss from any further participation in this case. Specifically, Mr. Kline moves for:

(1) The recusal of Justice Carol A. Beier for her deep-seated antagonism against Mr. Kline, most notably displayed in her caustic and deceptive opinion in *Comprehensive Health of Planned Parenthood v. Kline*, 287 Kan. 372, 197 P.3d 370 (2008) (hereinafter cited as *CHPP v. Kline*); and

(2) The recusal of Chief Justice Nuss because of Mr. Kline's role in reporting conduct that led to a disciplinary sanction for the Chief Justice in 2006.

Attached to this motion and incorporated herein by reference is the *Affidavit of Phillip D. Kline in Support of Motion for Recusal*. Mr. Kline's Affidavit provides a concise summary of relevant facts, many of which are already in the record, and some of which are not. Mr. Kline requests oral argument on this motion.

16, 1829:6-7. By contrast, Ms. Carter, who continued as Director of Administration under Mr. Kline, recalled: "[I]n the time that I worked for Phill Kline I never heard him utter one bad word about Morrison. And as a matter of fact, he was always very professional in . . . any discussions about Morrison." Carter 1829:14-18.

Because the political offices would be in transition on January 8, with movers, the public and unknown others being present in both offices, Mr. Kline's staff made the prudent decision to leave the investigative files and redacted patient records a half-mile away at the Shawnee County courthouse in the custody of Judge Anderson.[25]

VI. Records in Transition

On Friday, January 5, 2007, Mr. Kline's chief investigator, Tom Williams, removed all of the physical abortion investigation files, including the redacted patient records, from the Attorney General's office and loaded them into his state vehicle.[26] The next day, Williams and Maxwell organized files and records for a Monday delivery to Judge Anderson (five boxes) and to the Shawnee County District Attorney (three boxes).[27] On Saturday night they deposited three other boxes of records in the Attorney

[25] That Mr. Morrison was never investigated or sanctioned by this Court's Disciplinary Office for a whole host of questionable and bad behavior speaks volumes about political and judicial favor in this state.

[26] "I took investigative files, all the records pertaining to this case, put them in the state automobile . . . . nonelectronic files . . . the paper copies." Tom Williams 905:25-906:3. *See also* Tr. of Proceeding at 607:25-608:2, *CHPP v. Kline*, No. 98747 (Nov. 20, 2007) ("I had taken everything out of the office, had it in the car[.]").

[27] *See* Exhibit 90, Report of the Appointed District Judge [King Report] ¶¶ 91-97 (Jan. 10, 2008). "[W]e were verifying each record and where everything was going." Tr. of Proceeding at 609:24-25, *CHPP v. Kline*, No. 98747 (Nov. 20, 2007) (Tom Williams).

General's office that Morrison was about to assume. This Court described how Williams secured the records over the weekend.

> The patient records and other materials were then locked in the trunk of a state-owned vehicle Williams was driving. Williams returned a set of materials to the Attorney General's office, not including any CHPP or WHCS patient records, and left the rest of the materials sorted earlier at Maxwell's house in the vehicle. The vehicle spent the rest of that weekend parked in a secure state parking lot.[28]

Mr. Maxwell prepared a court-requested Status and Disposition Report, detailing the location of the inquisition records. The Report noted that copies of the medical files and the Kansas Department of Health and Environment ("KDHE") abortion reports (both paper and electronic) would be left with Judge Anderson for safekeeping.[29] A large cache of records, including Mr. Williams' investigative file, the sixty-two redacted Tiller files and corresponding KDHE reports, and related affidavits and transcripts were slated for delivery to Shawnee County District Attorney Robert Hecht.[30]

On Monday morning, January 8, Mr. Williams and another investigator, Jared Reed, distributed the records as planned.[31] Judge Anderson describes the delivery of the five boxes of records to his office:

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[28] *CHPP v. Kline,* 287 Kan. at 382-83. *See also* King Report ¶ 98.

[29] Exhibit 78, at ¶ 1.

[30] *Id.*, at ¶ 3.

[31] *CHPP v. Kline*, 287 Kan. at 383. *See also* King Report ¶¶ 103-04 (detailing delivery of records to Judge Anderson and District Attorney Hecht). Mr. Maxwell returned the SRS [Social and Rehabilitation Services] records as "no longer necessary." Exhibit 78, ¶ 6. *See also* King Report ¶ 109 (Williams and Reed "returned all previously obtained SRS records to SRS, completing the distribution of records.").

> I was getting ready to go to our swearing in, that would have been about 15 minutes until nine. Tom Williams and Jared Reed come in, each of them lugging a big banker's box and I say, "What is that?" And they say, "Well, these are the records we're supposed to deliver." I said, "Well, I didn't ask for the records, where is your report?" And I think they forgot it down in the car is what they said. I said, "Well, I've got to go to our swearing in." When I come back then five boxes of records are there and the status and disposition report is laying in my chair at my desk because they came and delivered it while I was out.[32]

The Supreme Court's special master, appointed for *CHPP v. Kline*, found that the five boxes of records left with Judge Anderson "included copies of the CHPP and WHCS redacted patient records, KDHE Termination of Pregnancy Reports and the Status and Disposition Report."[33]

The following day, Tuesday, January 9, Judge Anderson wrote to Mr. Morrison and offered him the opportunity "to pick up the inquisition evidence that had been left at the judge's chambers by Williams and Reed the day before."[34] Veronica Dersch and Richard Guinn of Morrison's office visited Judge Anderson Wednesday morning, January 10. Ms. Dersch recalls: "We met with him and he said there are some things here in my closet, locked closet that you need to take with you, some materials that were left with me on Friday . . . and this status and disposition report tells you where

[32] Anderson 749:9-23. Judge Anderson initialed receiving the Report at 9:20 AM. Maxwell 1495:1-19.

[33] King Report ¶ 103.

[34] *CHPP v. Kline*, 287 Kan. at 384; *See also* Letter of Hon. Richard D. Anderson to Att'y Gen. Paul J. Morrison, at 2 (Jan. 9, 2007) ("You may retrieve the evidence returned to the Court which has been identified in the Status and Disposition Report."), Exhibit 7, Redacted Materials released in *CHPP v. Kline* (May 2, 2008).

everything else is."[35] At their instruction, Bob Blecha of the Kansas Bureau of Investigation retrieved the five boxes of subpoenaed records.[36] Judge Anderson memorialized the retrieval by Morrison's people in a court opinion:

> On the morning of the day Mr. Kline left office, his agents delivered five large file boxes of records to the Court with the Status and Disposition Report. On January 9, 2007, the Court notified newly elected Attorney General Paul J. Morrison that the materials had been delivered and could be retrieved. Mr. Morrison's agents promptly retrieved the materials.[37]

He testified similarly in a Supreme Court evidentiary hearing:

> When Kline left office on the day that everyone was sworn in, including judges in our district court, five boxes of records were delivered to me, long banker's box records were delivered by the Attorney General's office to me. **I had Morrison's officers come over a couple of days later, they retrieved those records**.[38]

Attorney General Morrison's office also retrieved the files that were left at the courthouse with Shawnee County District Attorney, Robert Hecht. "[T]here was a whole bunch at Bob Hecht's office." recalled Veronica Dersch. "The entire investigative file

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[35] Dersch 67:20-68:2.

[36] "On January 10, 2007, Morrison's agents picked up the boxes of records which had been delivered to the court by Kline." Additional Response to Petition for Mandamus at 3, *Morrison v. Anderson*, No. 99,050 (Oct. 19, 2007), Exhibit Z5. *See also* Anderson 753:8-20 (KBI agent Bob Blecha "was the person I believe that actually physically carted the records out" that day or the next morning.); Dersch 68:6-13 (Feb. 21, 2011) (explaining the choice of a KBI agent to retrieve the boxes "because we felt like we needed a chain of custody").

[37] Mem. Decision at 3 (Apr. 18, 2007), Exhibit B6. *See also id*. at 5 ("Five file boxes were delivered to the Court and retrieved by Attorney General Morrison's officers.").

[38] Tr. of Proceeding at 84, *CHPP v. Kline*, No. 98747 (Nov. 19, 2007), Exhibit B7 (emphasis added).

was there. . . . We sent Mr. Blecha to get them[.]"[39] The Supreme Court's Special Master wrote in his report: "On January 18, 2007 all files left behind with District Attorney Hecht's office were turned over to KBI Deputy Director Robert E. Blecka [sic]."[40]

Three months later Judge Anderson stated to Dersch: "There is evidence of crimes in those [CHPP] records that need to be evaluated." She replied: "Right. And we have been evaluating that since you gave us a third copy of those records a week ago."[41] As Mr. Kline explained: "He had access to the case file in paper documents and five boxes with Judge Anderson. He had access to the medical records that were maintained by Judge Anderson. He had access to the entire electronic file[.]"[42] Ms. Dersch confirms that Bob Blecha was sent out to retrieve the records "right away" after identifying the locations from the Status and Disposition Report. "The first thing he went to was Judge Anderson and Robert Hecht's office."[43]

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[39] Dersch 68:17-22. "I had what I called an investigative file, which was in some black folders, and there were multiple volumes." Tr. of Proceeding at 606, CHPP v. Kline, No. 98747 (Nov. 20, 2007) (Tom Williams). *See also* King Report ¶ 104 ("Williams' investigative records consisted of multiple black folders that contained investigative reports, memos, and subpoenas from the inquisition.").

[40] King Report 66. *See also* Investigation Report of Special Agent R.E. Blecha (Jan. 18, 2007) (stating that he picked up "62 files" [redacted Tiller records] from District Attorney Hecht and two other boxes of inquisition "medical files," and turned them over to Veronica Dersch "for safekeeping"), Exhibit A5, at DA 4265.

[41] Tr. of Hr'g at 10:25-11:4, Shawnee County 3rd Dist. Ct., No. 04-IQ-03 (Apr. 10, 2007).

[42] Kline 2080:25-2081:4.

[43] Dersch 140:23-141.

Attachment C

Morrison v. Anderson
case file

(excerpts)

MSL-07-010566

THIRD JUDICIAL DISTRICT
COURT OF KANSAS

Richard D. Anderson
District Judge

Shawnee County Courthouse
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Topeka, Kansas 66603-3922
(785) 233-8200 ext. 4350
Fax (785) 291-4917

Shawn R. Hoff, C.S.R.
Official Court Reporter
(785) 233-8200 ext 4392
Shery Smith
Administrative Assistant

July 13, 2007

Paul J. Morrison
Kansas Attorney General
120 SW 10th Street
Memorial Building
Topeka, Kansas 66612

Re: Inquisition Case No. 04IQ3 – Request to Return WHCS Medical Records

Dear General Morrison:

On July 10, 2007 you notified the Court that the Attorney General's Office had closed the above-captioned inquisition. A separate letter from the Court addresses the records of Planned Parenthood. With respect to the return of files from Women's Health Care Services, P.A., the Court will preserve the record as it exists until further order for these reasons.

- Claims have been made that records may have been altered by the former Attorney General.
- There are investigations pending by the Disciplinary Administrator.
- Three files may be relevant to the Planned Parenthood investigation being conducted by the Johnson County District Attorney. The District Attorney has claimed your office has refused to cooperate and has asserted this Court improperly disgorged him of relevant evidence and interfered with his investigation by ordering the return of all of Dr. Tiller's records which had been taken to Johnson County.

During the pendency of these investigations the Court believes its duty is to maintain the integrity of the files as delivered. Once these proceedings and investigations have been concluded, the records will be returned to your office. Because you have filed charges in Sedgwick County some of these records may be at issue while others may not be relevant. Once the evidence is returned to you, the Court will leave to your discretion which records should be returned to the accused before conclusion of the Sedgwick County proceedings.

Very truly yours,

Richard D. Anderson

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Richard D. Anderson
District Judge

000026

RDA/ee

ORIGINAL

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
DIVISION TWO
STATE OF KANSAS

IN RE: INQUISITION CASE NO. 04-IQ-3

Pursuant to K.S.A. Chapter 22

TRANSCRIPT

OF

Proceedings had before the HONORABLE RICHARD D. ANDERSON, JUDGE, SECOND DIVISION, at Topeka, Kansas, on the 10th day of April, 2007.

APPEARANCES

For the Attorney General:
Ms. Veronica Dersch
Assistant Attorney General
Office of Kansas Attorney General Paul Morrison
Criminal Division
120 SW 10th Avenue
Topeka, KS 66612

disclosure says "29 Planned Parenthood records were released to the Johnson County District Attorney," and that was consistent with what I believed was going to happen.

MS. DERSCH: Right. And those were the Johnson County records and not in any way the Tiller records?

THE COURT: The Tiller records.

But my immediate concern is now that I'm aware that records have been released to Johnson County-- and frankly, Mr. Kline has probably some pretty sound theories as to why some of that evidence should be in his possession or in-- at least in theory-- in possession of a prosecutor who could bring claims against Dr. Tiller, because there appears to be some link between Planned Parenthood that they have discovered and the Women's Clinic in Wichita about referrals of patients that were 24 weeks. So he is questioning some validities of those referrals on the same theory of legal late-term abortions, that sort of thing.

So whether those records are pertinent to an investigation ultimately isn't what I'm trying to address today. What I'm trying to address today is whether these records should remain in the Johnson