CORRECTED

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 98,747

COMPREHENSIVE HEALTH OF PLANNED PARENTHOOD OF KANSAS AND MID-MISSOURI, INC.,

Petitioner,

v.

PHILL KLINE, JOHNSON COUNTY DISTRICT ATTORNEY,

Respondent,

and

STEPHEN N. SIX, KANSAS ATTORNEY GENERAL,

Intervenor.

SYLLABUS BY THE COURT

1.

Kansas Supreme Court Rule 9.01(a) (2007 Kan. Ct. R. Annot. 70), requires a petition for mandamus to state why original jurisdiction has been invoked only if relief is available in the district court. Even if district court relief is available, the Supreme Court has discretion to exercise its original jurisdiction.

2.

An abortion provider has standing in mandamus to attempt to neutralize threatened violations of its patients' constitutional privacy rights by a prosecutor's alleged unlawful performance of a public duty or unlawful exercise of public office.

3.

It is the function of the Supreme Court to determine real rather than speculative or abstract controversies. This action's challenge to a prosecutor's handling of abortion patient records qualifies as a real controversy, compelling this court to decide whether the prosecutor's behavior constituted unlawful performance of a public duty or unlawful exercise of public office and whether he engaged in contemptuous or otherwise sanctionable conduct.

4.

A county or district attorney is the representative of the State in criminal prosecutions; and he or she has broad discretion in controlling those prosecutions. The scope of this discretion extends to the power to investigate and to determine who shall be prosecuted and what crimes shall be charged. It includes the power to dismiss charges; a court cannot refuse to allow a dismissal or restrain a prosecution. Nevertheless, a prosecutor's discretion is not limitless; and the doctrine of separation of powers does not prevent court intervention in appropriate circumstances. Courts must react when a prosecutor abuses the judicial process. The Supreme Court may order relief when a prosecutor's behavior qualifies as an unlawful performance of public duties or an unlawful exercise of his or her office.

5.

Unless a respondent's legal duty is clear, a writ in mandamus should not issue.

6.

Generally, an Attorney General has lawful authority to give information arising out of an investigation to others in a position to prosecute a lawbreaker; a county or district attorney has authority to receive and act upon such information; and a prosecutor need not obtain permission from a member of the judiciary before such an information exchange.

7.

On the record of this case, the doctrine of incompatibility of offices does not apply. One individual who served first as Attorney General and then as a district attorney was empowered to authorize movement of certain materials gathered in a criminal inquisition from his first prosecutorial office to his second.

8.

On the record of this case, no binding standards for exactly how to effect an exchange of investigation information between prosecutors exist. Use of private citizens to transport or store such information is not unlawful.

9.

Mandamus is appropriate to compel a former public officer to return property belonging to the office, but not if the former public officer occupies a new public office also legally entitled to possession of the property.

10.

On the facts of this case, respondent and his subordinates used the resources of respondent's statewide office to pursue an abortion-related inquisition. Their removal of certain materials gathered and generated in that inquisition from that statewide office hampered respondent's successor's ability to fulfill his duties. Thus respondent and his subordinates must supply the materials gathered and generated in the inquisition to respondent's later successor in the statewide office.

11.

Civil contempt is the failure to do something ordered by the court for the benefit or advantage of another party to the proceeding. A proceeding in civil contempt is remedial in nature, designed to advance the private right of a litigant won by court order. Any penalty inflicted for civil contempt is intended to be coercive, and relief can be achieved only by compliance with the order. On the facts of this case, this court does not deem it advisable to institute a proceeding against respondent for indirect civil contempt under K.S.A. 20-1204a at this time.

12.

On the facts of this case, neither petitioner nor intervenor is entitled to an award of attorney fees.

13.

This court has inherent power to sanction behavior not denominated contempt and absent particular statutory authorization, as reasonably necessary for the administration of justice, provided these powers in no way contravene or are inconsistent with substantive statutory law.

14.

On the facts of this case, respondent's obstructive behavior merits the imposition of sanctions by this court, as set out in this opinion.

15.

Petitioner's motion to strike a portion of respondent's brief and its attachments is considered, and it is held that the attachments are stricken; the court has disregarded the disputed portion of the brief.

Original proceeding in mandamus. Opinion filed December 5, 2008. Petition for writ of mandamus granted in part and denied in part.

Robert V. Eye, of Irigonegaray & Associates, of Topeka, argued the cause, and *Pedro L. Irigonegaray* and *Elizabeth R. Herbert*, of the same firm, and *Douglas N. Ghertner* and *Robert A. Stopperan*, of Slagle, Bernard & Gorman, of Kansas City, Missouri, and *Roger K. Evans*, of Planned Parenthood Federation of America, of New York, New York, and *Helene T. Krasnoff*, of Planned Parenthood Federation of America, Washington, D.C., were with him on the briefs for

petitioner.

Caleb Stegall, of The Stegall Law Firm, of Perry, and *Phill Kline*, respondent, argued the cause, and *Edward D. Greim* and *Todd P. Graves*, of Graves Bartle & Marcus, LLC, Kansas City, Missouri, and *Carly F. Gammill*, of American Center for Law & Justice, Washington, D.C., and *Edward L. White, III*, of American Center for Law & Justice, Ann Arbor, Michigan, were with him on the briefs for respondent.

Michael C. Leitch, deputy attorney general, argued the cause and was on the brief for intervenor Attorney General Stephen N. Six.

The opinion of the court was delivered by

BEIER, J.: This is an original action in mandamus filed by petitioner Comprehensive Health of Planned Parenthood of Kansas and Mid-Missouri, Inc. (CHPP), to challenge respondent Phill Kline's handling of patient records obtained from CHPP pursuant to an inquisition subpoena issued when Kline was Attorney General. We decide whether CHPP has met its burden to obtain relief in mandamus and whether Kline's behavior merits sanction as civil contempt or otherwise.

Factual and Procedural Background

On February 3, 2006, this court issued its opinion in *Alpha Med. Clinic v. Anderson*, 280 Kan. 903, 128 P.3d 364 (2006), which arose out of Kline's issuance of inquisition subpoenas duces tecum under K.S.A. 22-3101(1). Our decision identified three constitutional privacy interests implicated by subpoenas for patient records directed to Women's Health Care Services of Wichita, P.A. (WHCS), and CHPP, identified in the opinion as Alpha Medical Clinic and Beta Medical Clinic. Both clinics perform abortions. We balanced the patients' individual privacy interests against the societal necessity and compelling State interest in pursuing criminal investigations, outlining procedures to be followed for redaction of the records before the district court allowed them to be turned over to the Attorney General. See *Alpha*, 280 Kan. at 924-25. We did not rule upon exactly which data was to be redacted or how the records were to be handled once they were placed in Kline's hands. See *Alpha*, 280 Kan. at 924-25. During oral argument in *Alpha*, Chief Deputy Attorney General Eric Rucker, who argued the case on behalf of then Attorney General Kline, asserted that Kline was not seeking patient names.

In *Alpha*, the clinics urged us to hold Kline in contempt of court, in part because he had attached to his brief portions of a district court transcript and order, had discussed the inquisition at a press conference, and had permitted distribution of the transcript after the conference concluded, all allegedly in violation of court seal orders.

In response to the clinics' contempt argument, we first observed that those allegations over which this court had jurisdiction concerned indirect criminal contempt. Indirect contempt deals with conduct occurring outside the presence of a judge. *Alpha*, 280 Kan. at 926.

Proceedings in criminal contempt attempt to """preserve the power and vindicate the dignity of the courts and to punish for disobedience"" of court orders; criminal contempt tends to obstruct the administration of justice." *Alpha*, 280 Kan. at 927 (quoting *State v. Davis*, 266 Kan. 638, 645, 972 P.2d 1099 [1999]. We continued:

> "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 these 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.'
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> "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) [now KRPC 3.8 (2007 Kan. Ct. R. Annot. 520)]. This too is troubling.

"At oral argument before this court, Kline's [personal] 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.

"We conclude that, despite the attorney general's initial defiant tone, he should not be held in contempt at this time. No prejudice has resulted from his conduct, a distinguishing feature of the cases cited to us by petitioners. . . .

"This is . . . the first [case] 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." 220 Kan. at 928-30.

On May 23, 2006, approximately three and one-half months after this court released *Alpha*, District Judge Richard Anderson of Shawnee County, the judge overseeing the inquisition, issued what the record before us reveals as his only written post-*Alpha* protective order concerning the patient records from the clinics. The order set forth the procedure to be followed to effect the safeguards outlined in *Alpha*, appointing a Topeka lawyer to assist the judge and act as

"special counsel for adult patients and as guardian ad litem for minor patients for the purpose of making recommendations to the Court to protect the confidentiality of the identity of any patients . . . and to protect against release of sensitive, confidential, and privileged information which is not relevant to the medical procedure and/or the criminal investigation. Special Counsel shall supervise the reproduction and release of copies of all medical records. In addition, Special Counsel shall make duplicate copies of all medical records in the form released to the Attorney General and return complete copies of such copied medical records to the medical facilities."

Judge Anderson would later testify that, aside from this order and earlier nondisclosure provisions contained in the subpoenas directed to the clinics, he relied on a

series of conversations with Kline and his subordinates, what he called an oral "working agreement," to control dissemination of information generated in the inquisition, including the redacted patient records. Judge Anderson also would testify that, although he thought the guidelines of *Alpha* had been adhered to, he believed a parent of a patient described in the redacted records would be able to identify his or her daughter. Judge Anderson trusted Kline to behave ethically and professionally.

> "My expectation, as in any case, I have to trust the prosecutor that comes in to open inquisitions not to do things with information that would harm the legal proceeding. So I did not expect anything that would be ascertained as evidence or accumulated as evidence would be shared with the public . . . .
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> "But all of my focus would be on . . . legitimate law enforcement objectives. I don't believe the public at that stage of the proceeding, the press, or the Legislature for that matter, needs to get involved in the prosecutor's business of prosecuting the crimes or the defendant–affecting the defendant's right to defend the crimes. I feel very strongly about that."

Judge Anderson thus left any restrictions on potential witnesses who were given access to the redacted patient records from the clinics entirely up to Kline and his subordinates.

The redacted records were given to Kline's subordinates on October 24, 2006. They took approximately 2 weeks to make two copies and then return the originals of the

redacted records to Judge Anderson.

Shortly after the records were given to Kline, he and two of his subordinates, lawyers Rucker and Stephen Maxwell, presented Judge Anderson with a summary of the records that Kline wanted to disclose publicly. Kline was in the final days of a highly contentious political race to retain his position; his opponent was then Johnson County District Attorney Paul Morrison. According to Judge Anderson, Kline – who had argued unsuccessfully to Judge Anderson while *Alpha* was pending before this court that the judge should not subject Kline to the nondisclosure provision in the subpoenas directed to the clinics – took an "aggressive" position on the summary and his potential use of it. In Judge Anderson's view, Kline appeared "somewhat desperate" to counter charges advanced by Morrison in the campaign. Kline also told Judge Anderson that he did not believe the judge could control what an attorney general disclosed to the public. Regardless of the merit or lack of merit of that view, Judge Anderson warned Kline that he would have trouble persuading Judge Anderson to rule in his favor on any future inquisition issues if he publicly disclosed information from the patient records. At no point in this discussion with Judge Anderson did Kline, Rucker, or Maxwell divulge any plans for television or other public appearances concerning the inquisition or its results.

On November 3, 2006, the Friday before election day and before Kline's subordinates returned the originals of the redacted records to Judge Anderson, Kline was a guest on a nationally televised program, "The O'Reilly Factor." During the broadcast,

host Bill O'Reilly suggested that O'Reilly had been made privy to the contents of the redacted records. Kline later testified that he "certainly" considered his appearance on O'Reilly's show to be appropriate despite this court's cautionary language about publicity in *Alpha* and apparently despite Judge Anderson's insistence that Kline and his subordinates were bound by the subpoenas' nondisclosure provision. Kline testified that he had decided to appear on the O'Reilly program because his office had been inundated with calls about his intentions, and he wanted to alleviate fears that his office was seeking identities of patients.

Kline's appearance on "The O'Reilly Factor" prompted the clinics to press Judge Anderson to hold Kline in contempt before election day. They also filed a sealed action for writ of mandamus and a motion with this court on the day before election day, November 6, 2006, seeking a stay of the inquisition, sealing of the records from Kline's office, and deposit of the records with a special prosecutor or master appointed to investigate any leak of information from, or other mishandling of, the records.

Morrison defeated Kline in the attorney general's race. Approximately 2 weeks after the election, Judge Anderson declined to launch contempt proceedings against Kline in connection with the O'Reilly show. Although Judge Anderson would later testify that he was "very upset" with Kline for putting himself in a position allowing O'Reilly to claim he had seen the redacted patient records, Judge Anderson had concluded after questioning Kline, Maxwell, and Kline investigator Tom Williams under oath that Kline

had not given the records to O'Reilly, if, in fact, O'Reilly had seen them at all. We denied the clinic's November 6 petition for writ of mandamus on November 30, 2006.

During the 2 weeks after the elections, Kline, Rucker, Maxwell, and Williams shared information from the redacted patient records and other inquisition results with at least three potential medical experts, including Dr. Richard Gilmartin, a pediatric neurologist from Wichita, and Dr. Paul McHugh, a psychiatrist from Baltimore, Maryland. Rucker had obtained Gilmartin's name from a representative of Kansans for Life; he would later testify that he may have told the representative about the nature of the records. Kline had obtained McHugh's name from a representative of Women Influencing the Nation. Both Kansans for Life and Women Influencing the Nation are anti-abortion advocacy organizations.

The record before us reflects that Gilmartin took no notes and that no patient records were left with him. Maxwell and Williams evidently left copies of patient records and other inquisition documents with McHugh. These other documents included pregnancy termination information obtained from the Kansas Department of Health and Environment (KDHE) which, when cross-referenced to patient records and/or other sources mined by Kline and his subordinates during the inquisition, enabled Kline to identify patients by name. The record reflects that the time period when Kline and his subordinates were seeking the cross-reference data was before or during the pendency of *Alpha*. The record is unclear on exactly when McHugh returned the records left with him

or whether he first made copies before returning the set he had been given. Judge Anderson had not required Kline or his subordinates to obtain confidentiality agreements from any persons to whom the records themselves or information within them was disseminated; and Kline and his subordinates did not take this step on their own.

On December 11, 2006, Republican precinct committee members in Johnson County selected Kline to complete Morrison's term as Johnson County District Attorney, once Morrison was sworn in as Attorney General on January 8, 2007.

It was in this time frame that Kline and Maxwell conversed with Judge Anderson about Kline's desire to send the patient records produced by the clinics in the inquisition to other prosecutors, specifically mentioning Shawnee, Sedgwick, and Johnson Counties. According to Judge Anderson, Kline and Maxwell did not tell him how this would be accomplished; they did not tell him that the records would not be received in Johnson County until Kline had taken office there; they did not tell him that they also would send the records from WHCS, a clinic in Sedgwick County, to Johnson County. Kline did tell Judge Anderson that the transformation of his Attorney General inquisition into a Johnson County District Attorney investigation would be "seamless." Judge Anderson would eventually testify that, during one of his conversations with Maxwell about the movement of patient records to Johnson County, he told Maxwell, "Just be sure that you do that in a very orderly and regular sort of way."

Shortly before leaving the Attorney General's office, on December 20, 2006, Kline filed charges in Sedgwick County against Dr. George Tiller of WHCS. Kline supported the charges with an affidavit from McHugh, an affidavit from Williams, and information from the redacted patient records. The following day, District Judge Paul Clark dismissed the Sedgwick County charges at the request of Sedgwick County District Attorney Nola Foulston.

On December 27 or 28, 2006, Kline announced that, as Attorney General, he would appoint Wichita lawyer and anti-abortion activist Donald McKinney as a special prosecutor. The clinics filed a joint motion for a protective order with Judge Anderson, seeking to ensure that the patient records produced in the inquisition would remain with Judge Anderson and in the Attorney General's office on Kline's exit from that office. The record reflects that Judge Anderson received this motion on Wednesday, January 3, 2007, but he did not rule on it immediately. Judge Anderson did, however, tell Maxwell that he wanted 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.

Although Kline later testified that he directed Rucker to transport the records from the Attorney General's office to Johnson County in mid-December 2006, the actual physical movement of the records did not begin until the Friday before Morrison was sworn in as Attorney General, January 5, 2007, and did not end until Kline had been in

office as the Johnson County District Attorney for several weeks. In the intervening time, the patient records were stored in more than one automobile; in Maxwell's residence; and, from January 8, 2007, until mid-February 2007, in the dining room of an apartment of another investigator, Jared Reed. The several weeks that the records sat in Reed's dining room included the day that elapsed between the point when Reed's employment with Kline's Attorney General's office ended and the point when his employment by Kline's Johnson County District Attorney's office began.

On Friday, January 5, 2007, the same day that Rucker signed a 6-month contract with McKinney, McKinney's fees to be funded by up to $25,000, apparently from the budget of the Attorney General's office, Williams removed all of the patient records obtained through the inquisition from the Attorney General's office, along with additional investigation materials and records obtained from other agencies, and placed them in a state-owned vehicle. This Friday was to be Maxwell's last day of work for the Attorney General's office. The following day, Saturday, January 6, Williams delivered the records and other materials to Maxwell's residence.

At Maxwell's residence that day, Maxwell and Williams sorted the records for distribution to various places. At some point that day, Williams contacted Reed, who came to Maxwell's residence and witnessed this process. Maxwell also was preparing a Status and Disposition Report, the written report Judge Anderson requested. 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.

Shortly after 8 a.m. on Monday, January 8, 2007, the day Morrison was to be sworn in as Attorney General and Kline sworn in as Johnson County District Attorney, Williams and Reed met at the Shawnee County courthouse. They left five boxes of investigation materials at Judge Anderson's chambers, as well as a copy of the Status and Disposition Report. Williams and Reed also left several boxes of materials, including patient records, at Shawnee County District Attorney Robert D. Hecht's office.

After these two distributions had been accomplished, Williams received a telephone call from Rucker, who had spoken to Kline that morning before Kline was sworn in as Johnson County District Attorney. Kline had called Rucker to make sure that the patient records would be available in Johnson County and told Rucker for the first time that the materials going there needed to include records from WHCS as well as from CHPP. Kline indicated to Rucker that Judge Anderson had given permission for this to occur. Rucker, in turn, told Williams that the records headed for Johnson County needed to include the records from WHCS as well as CHPP. Williams expressed surprise and displeasure with what he apparently viewed as a last-minute change in his instructions and because the Status and Disposition Report produced and signed by Maxwell and left

earlier that morning with Judge Anderson did not state that the WHCS records would go to the Johnson County District Attorney's office. According to Williams, Rucker told him that Kline had nevertheless ordered this action and that Kline had spoken to Judge Anderson about it. Williams asked for written confirmation of this order.

After the call from Rucker, Williams and Reed had to retrieve the patient records that had already been left at Hecht's office. On Rucker's instruction, they then took the records to a downtown Topeka photocopy store. Although Reed's and Williams' recollections vary slightly, apparently Reed began making copies of the WHCS records for use by Kline as Johnson County District Attorney (at the expense of the Attorney General's office) while Williams returned the state automobile they had been using. After the copying was completed, Williams and Reed returned the set meant for Hecht to his office. All of the material intended for the Johnson County District Attorney's office was then transported in Reed's personal automobile and delivered to Reed's apartment, where it was placed in his dining room.

According to the record, at 3:43 that afternoon, several hours after all of the distribution steps were completed and Morrison had been sworn in as Attorney General, in apparent compliance with Williams' request for written confirmation of the earlier order, Rucker sent an electronic mail to Williams. It stated "Per the direction of AG Kline, I am directing you to copy all medical files and AG Kline is directing the copies be delivered . . . to the District Attorney for the 10th Judicial District before noon . . . K.

Rucker Chief Deputy Attorney General (sent at 9:30 am)[.]"

Although Kline's subordinates had placed at least three boxes of materials connected to the inquisition at the Attorney General's office before they left it, the precise content of these boxes cannot be determined at this stage because no specific inventory of them was created at the time. We understand, however, as mentioned above, that the boxes contained no copies of the patient records obtained from CHPP or WHCS. On January 9, 2007, Judge Anderson sent a letter to Morrison, directing Morrison to determine whether McKinney possessed any materials in his role as special prosecutor and to supplement the Status and Disposition Report accordingly. He also directed Morrison to communicate with potential expert witness McHugh directly regarding return of the records left with him in Baltimore and offered to permit Morrison to pick up the inquisition evidence that had been left at the judge's chambers by Williams and Reed the day before. The sufficiency of access to inquisition material granted Morrison and, eventually, his replacement as Attorney General, Stephen N. Six, remains under consideration in another original action pending before this court, *State ex rel. Six v. Anderson*, Case No. 99,050.

Three days later, on January 12, 2007, in response to a letter from Morrison's chief counsel at the Attorney General's office, Kline sent a letter representing, among other things, that a report had been filed with Judge Anderson reflecting Kline's handling of inquisition documents. The Status and Disposition Report, produced and signed by

Maxwell and delivered to Judge Anderson, had not been corrected and was never corrected by Kline or by Maxwell or by any other Kline subordinate.

According to Reed, he asked Williams repeatedly whether he could bring the materials sitting in his dining room to the Johnson County District Attorney's office. He testified that his mother and apartment maintenance personnel may have been in his apartment during the time the records were stored in his dining room. Reed finally received permission from Williams to move the materials in mid-February 2007, after Williams had reassured himself about secure storage at the Johnson County District Attorney's office.

On April 9, 2007, Judge Anderson learned for the first time that Kline had taken the WHCS patient records as well as the CHPP patient records to Johnson County. Kline inadvertently disclosed this fact to Judge Anderson, and this disclosure prompted another heated discussion about the extent of the judge's authority. Judge Anderson declined to require Kline to return CHPP records; however, he ordered Kline to return the WHCS records. Had Kline refused, Judge Anderson later testified, an order citing Kline in contempt had been prepared and would have been filed. When the WHCS records were returned to Judge Anderson at a hearing on April 11, 2007, Judge Anderson asked Kline if Kline's office had kept any copies; Kline told Judge Anderson that no copies were kept. The record reflects that Kline has admitted more than once–although not in response to direct questioning by this court at oral argument in this case on June 12, 2008–that his

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.

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.

Conclusion

We believe the limited relief granted and the sanctions imposed above strike a moderate and reasonable balance among the interests of the parties to this action, as well as those of the patients whose privacy rights are at stake, and the citizens of this state who have a right to expect lawful, ethical, and professional behavior from their elected and appointed public servants. We appreciate the delicacy of the intersection between this action and others now pending or to be brought in the future. We are saddened but satisfied that the combination of relief and sanctions selected will ameliorate the most grievous harms still amenable to such treatment, and remove all incentive for further inappropriate behavior that this court is capable of removing.

We also note, as referenced above, 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. We rule today only on the appropriateness of sanctions in this case because of the currently known components of obstructive behavior regarding this matter. We do not address other issues or potential issues in other actions.

Petition for writ of mandamus is granted in part and denied in part, and sanctions are imposed as more fully set out in the foregoing opinion.

IT IS SO ORDERED.

DAVIS, J., concurring: I concur in the result and agree with the majority opinion that the issue before us is District Attorney Phill Kline's handling of the records since our decision in *Alpha Med. Clinic v. Anderson*, 280 Kan. 903, 128 P.3d 364 (2006). Our concern in this case has been and is the "constitutional privacy rights that Kline's behavior threatens." Slip op. at 48. I disagree with the majority's analysis on two specific points: (1) the majority's implicit finding that Kline's actions constituted the unlawful performance of a public duty or unlawful exercise of public office; and (2) the majority's characterization of the relief granted against Kline as sanctions rather than an order of mandamus.

First, I disagree with the portion of the majority opinion that concludes in the context of its "ripeness and mootness" discussion that "[w]e must decide whether that handling [of the records] constituted unlawful performance of a public duty or unlawful exercise of public office." Slip op. at 50. The majority uses the phrases "unlawful performance" and "unlawful exercise" numerous times throughout its opinion to describe Kline's conduct at issue in this case.

The majority acknowledges that Judge David King, who was appointed by this court as a special master to conduct an evidentiary hearing and make factual findings on the handling of the record, reported that the handling of the records was not done in an "ordinary manner" and that "'the exchange of records in this case was handled differently than any other such information exchange described by any other witnesses.'" Slip op. at 38-39. Despite these observations, Judge King concluded and the majority concurred that there were "no written protocols or procedures for exactly how prosecutors are to go about sending investigation materials from one office to another." Slip op. at 38.

Because there is no statutory definition of "unlawful performance of a public duty or unlawful exercise of public office," and given that we have determined that the handling of the records "was not illegal," slip op. at 59, as there are no laws, protocols, or procedures for how prosecutors should transfer investigation materials to other prosecutors' offices, I do not think we are in a position to make a determination as to whether Kline or his employees engaged in the "unlawful performance of a public duty or

unlawful exercise of public office." We are only in a position to determine whether his handling of the records as outlined in the majority opinion violated the constitutional privacy rights of patients.

Second, I would not classify the relief granted against Kline and his employees as sanctions. Rather, this court is in a position in a mandamus action to require a public official to perform his or her duty. See K.S.A. 60-801 ("Mandamus is a proceeding to compel some inferior court, tribunal, board, or some corporation or person to perform a specified duty, which duty results from the office, trust, or official station of the party to whom the order is directed, or from operation of law."). When Kline removed records from the Attorney General's office leaving no copy for the incoming Attorney General, he made it difficult if not impossible for the incoming Attorney General to determine his course of action regarding the information within those records. Thus, the relief granted by the majority opinion is appropriate in that the relief directs a public official to perform his duty and restore to the present Attorney General what is rightfully his. Accordingly, I would hold that it is proper, through mandamus, to compel Kline to perform that duty. *Cf.*, *State, ex rel. v. Thompson*, 135 Kan. 193, 9 P.2d 628 (1932) (mandamus appropriate to compel delivery of property of county treasurer's office); *State v. Lawrence*, 76 Kan. 940, 92 Pac. 1131 (1907) (mandamus appropriate to compel delivery of property of county treasurer's office); *Huffman v. Mills*, 39 Kan. 577, 18 Pac. 516 (1888) (property belonging to sheriff's office ordered delivered in mandamus action).

The majority opinion's imposition of sanctions against Kline for his actions before this court presents a problem. While I recognize that this court possesses inherent power to impose sanctions in cases falling short of civil or criminal contempt, our exercise of that power must nevertheless be measured by objective standards. The fundamental problem with the majority's decision to impose sanctions in this case is that there is no objective test—statutory or otherwise—by which the court can measure Kline's conduct and by which attorneys can avoid such penalties in the future.

A court exercising its inherent powers to sanction "must comply with the mandates of due process." *Chambers v. NASCO*, 501 U.S. 32, 50, 115 L. Ed. 2d 27, 111 S. Ct. 2123 (1991). It is a fundamental principle of due process that "'[a]ll are entitled to be informed as to what the State commands or forbids.'" *Chambers*, 501 U.S. at 68 (Kennedy, J., dissenting) (quoting *Lanzetta v. New Jersey*, 306 U.S. 451, 453, 83 L. Ed. 888, 59 S. Ct. 618 [1939]). The due process concept of notice requires that a law "convey[] a sufficiently definite warning of the proscribed conduct" so that those subject to it have the opportunity to conform their conduct accordingly. *In re Comfort*, 284 Kan. 183, 199, 159 P.3d 1011 (2007) (vagueness challenge to Kansas Rule of Professional Conduct). See also *Grayned v. City of Rockford*, 408 U.S. 104, 108, 33 L. Ed. 2d 222, 92 S. Ct. 2294 (1972) (laws must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly" and "provide explicit standards for those who apply them" so as to avoid arbitrary and discriminatory application.). Thus, due process requires that a court-imposed standard of conduct be sufficiently clear so that attorneys

have the opportunity to comply with the standard and the court may uniformly apply the standard. Once it is determined that counsel's action has fallen below this standard the imposition of sanctions is discretionary.

The majority relies upon *Wilson v. American Fidelity Ins. Co.*, 229 Kan. 416, 421, 625 P.2d 1117 (1981), and *Knutson Mortgage Corp. v. Coleman*, 24 Kan. App. 2d 650, Syl. ¶ 1, 951 P.2d 548 (1997), as support for its exercise of our inherent powers in this case. In both of these cases, however, the court's inherent powers were used to sanction conduct that ran afoul of *specific statutory provisions*. See *Wilson*, 229 Kan. at 418; *Knutson Mortgage Corp.*, 24 Kan. App. 2d at 653. In each of these two previous cases, the court used its inherent powers "as a means of enforcing obedience to a law which the court is called on to administer." *Wilson*, 229 Kan. at 421. The circumstances giving rise to those cases are in sharp contrast to the case presently before us, where the majority is not measuring counsel's action against any statute, rule, or other established standard, except to say that counsel Kline has not treated this action or this court with the respect demanded in such a proceeding.

It seems to me that the standard imposed by the court in this case is a standard the court exacts. Under such circumstances a respondent has no standard or rule by which he or she may gauge his or her action. As the United States Supreme Court has cautioned, courts "must be on guard against confusing offenses to their sensibilities with obstruction to the administration of justice." *Brown v. United States*, 356 U.S. 148, 153, 2 L. Ed. 2d

589, 78 S. Ct. 622 (1958) (criminal contempt case).

I am not unmindful of what the facts in this record demonstrate, but I believe the same result may be reached in granting relief without the resort to sanctions. Because of their very potency, inherent powers must be exercised with restraint and discretion. *Chambers*, 501 U.S. at 44. In that light, we should refrain from imposing sanctions under our inherent powers to punish for bad faith conduct where that conduct can be adequately sanctioned under other rules or procedures. See 501 U.S. at 50.

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. Otherwise, I agree with the disposition of this case.

MCFARLAND, C.J., concurring in the result: I join Justice Davis' opinion which also concurs in the result.

I agree with Justice Davis that the relief granted in this case is appropriate. As Justice Davis explained, Kline's failure to leave a complete set of records and investigative

materials for the incoming Attorney General hampered his successor's ability to determine his course of action with regard to the investigation. Accordingly, requiring Kline and his employees to provide the Attorney General with a full and complete set of all of the records and investigative materials gathered or generated by Kline and his employees in the abortion-related investigation while he was the Attorney General and during his tenure as the Johnson County District Attorney is warranted. However, I strongly disagree with characterizing this relief as a sanction imposed under our inherent power to sanction bad faith conduct.

First, as Justice Davis explains, the order directing Kline–a public official–to perform his duty and restore to the present Attorney General copies of the records to which he is rightfully entitled is wholly consistent with the type of relief available in mandamus. Moreover, as the majority even notes, it is the very relief requested by the Attorney General. Lastly, as noted above, it is decidedly warranted under the facts of this case.

We must be mindful that our inherent power to sanction is to be exercised with restraint and caution. *Knutson Mortgage Corp. v. Coleman*, 24 Kan. App. 2d 650, 652, 951 P.2d 548 (1997). "Because inherent powers are shielded from direct democratic controls, they must be exercised with restraint and discretion." *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764-65, 65 L. Ed. 2d 488, 100 S. Ct. 2455 (1980); see *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44, 115 L. Ed. 2d 27, 111 S. Ct. 2123 (1991) ("Because of their very potency, inherent powers must be exercised with restraint and discretion."). See also

United States v. McCall, 235 F.3d 1211, 1216 (10th Cir. 2000) (the bad faith exception to the rule prohibiting assessment of attorney fees in the absence of a statute "is drawn very narrowly and may be resorted to 'only in exceptional cases and for dominating reasons of justice.'"); *Dubois v. United States Dept. of Agriculture*, 270 F.3d 77, 80 (1st Cir. 2001) ("[T]he power to sanction must be used with great circumspection and restraint, employed only in compelling situations.").

In this case, the relief denominated as sanctions is the relief requested, warranted, and available in this mandamus action. Under these circumstances, there is no compelling need, nor are there any dominating reasons of justice, to invoke our extraordinary inherent power to sanction. *Cf., Chambers v. NASCO, Inc.*, 501 U.S. at 50 (where bad faith conduct can be adequately sanctioned under other rules, the court ordinarily should rely on the rules rather than its inherent power to sanction). That being so, it is not appropriate to invoke our inherent power to order this relief.

Second, even if there were an extraordinary and compelling need to invoke our inherent power to sanction, doing so would have to be conditioned upon a finding that Kline acted in bad faith. In this case, however, the majority invokes our inherent power without making any finding that Kline engaged in bad faith conduct. It is well settled that a specific finding of bad faith is a prerequisite to the imposition of sanctions under the court's inherent power. *Roadway Express, Inc.*, 447 U.S. at 767 (a specific finding that the conduct at issue constituted bad faith must precede any sanction under the court's inherent

powers). See also *Chambers v. NASCO, Inc.*, 501 U.S. at 49 (recognizing that the court held in *Roadway Express* that a finding of bad faith is a prerequisite to invocation of the court's inherent power to sanction); *Knutson Mortgage Corp.*, 24 Kan. App. 2d at 654 (quoting *Roadway Express, Inc.*, 447 U.S. at 767) ("The Supreme Court made clear in *Roadway* that a specific finding as to whether counsel's conduct constituted bad faith 'would have to precede any sanction under the court's inherent powers.'").

There is no finding that the conduct that the majority sanctions was committed in bad faith. Absent a specific finding of bad faith conduct, the court cannot impose sanctions under our inherent power.

Third, even if there was a finding of bad faith conduct, the sanction imposed bears no relationship to the majority of the conduct the court cites as the basis for the sanction. A sanction imposed under a court's inherent power is punitive in nature and, thus, must necessarily be connected to and remediate the results of the bad faith conduct. As the United States Supreme Court has stated, "[a] primary aspect" of the requirement that inherent powers be exercised with restraint and discretion, "is the ability to fashion an appropriate sanction for conduct which abuses the judicial process." *Chambers v. NASCO, Inc.*, 501 U.S. at 44-45.

While the sanction imposed by the majority requires Kline to provide copies of records and investigative materials to the Attorney General, the laundry list of Kline's

conduct cited by the court as justification for imposing the sanction bears virtually no relationship to Kline's failure to leave the incoming Attorney General a full and complete set of the records and investigative materials. Instead, the majority's grievances with Kline's conduct focus on the perception that Kline and his subordinates have shown a lack of respect for the court and the rule of law, disregarded "the clear import of the court's directions," (slip op. at 75), persisted in the attitude and behavior previously identified as problematic in *Alpha Med. Clinic v. Anderson*, 280 Kan. 903, 128 P.3d 364 (2006), and maximized jeopardy to the balance between the patients' privacy rights and law enforcement interests. Specifically, the conduct the majority identifies as justification for sanctions includes the following: evasive, ignorant and incomplete answers in the fact-finding process and during oral argument; deflecting responsibility and accountability for the actions of his subordinates; and orchestrated confusion concerning the extent of his control over Dr. McHugh.

In comparison, the only conduct mentioned by the majority that relates to the failure to leave a set of records for the incoming Attorney General is Kline's taking of the Women's Health Care Services of Wichita, P.A. (WHCS) records to Johnson County, the failure of Kline or Stephen Maxwell to correct the Status and Disposition Report to show the WHCS records were taken to Johnson County, and the failure to reveal that he had created summaries of the records. It must also be noted that the majority specifically declines to impose sanctions on Kline for the conduct of which CHPP complains–Kline's handling of the records during the transfer from the Attorney General's office to the

Johnson County District Attorney office and on access and dissemination of the records and their content once they were in Kline's hands. Slip op. at 66.

This disconnect between the sanction imposed and the conduct that serves as the majority's justification for sanction, coupled with the fact that the sanction the majority fashions could simply be ordered as relief in this mandamus action, reveals that the majority is more interested in reprimanding Kline for his attitude and behavior in the course of this litigation than in remediating the failure to leave a complete set of the investigation records for the incoming Attorney General. 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 for actions that it cannot find to have been in violation of any law and to heap scorn upon him for his attitude and behavior that does not rise to the level of contempt. This is the very antithesis of "restraint and discretion" and is not an appropriate exercise of our inherent power.

Lastly, 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. Slip op. at 74. 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.