

## C O U N T I

### EXCEPTIONS TO FINDING ONE<sup>3</sup>

**Mr. Kline did not violate the KRPC when his investigators first sought information from the Kansas Department of Social and Rehabilitation Services (SRS).**

#### *The Background and the Initiation of the Investigation*

5. As Attorney General, Mr. Kline initiated several efforts to strengthen and enforce Kansas law prohibiting child sexual abuse. Kline 194:25-196:18.<sup>4</sup>

6. In 2003 the Office of Attorney General received credible evidence indicating that abortion clinics in Kansas were not reporting child sexual abuse as required by K.S.A. § 38-1522. Kansas law required medical providers to report sexual abuse of children to SRS if they had “reason to suspect” injury.<sup>5</sup> The mandatory reporting statute defined “sexual abuse” as any sexual contact with a child contrary to Kansas law. Accordingly, a child fourteen or younger engaged in sexual activity was by law a victim of sexual abuse. *Id.*

7. This evidence included statements of witnesses who desired to remain anonymous. Kline 197:24-198:24; Exhibit 98, 2598:4-10.<sup>6</sup>

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<sup>3</sup> See Panel Report, at ¶¶ 318-29 (whether Respondent violated the KRPC “when a nonlawyer assistant, Mr. Williams, intentionally misled SRS”).

<sup>4</sup> Citations to the hearing transcript are in the following form: [witness name] [page: line].

<sup>5</sup> In 2006 the Kansas legislature repealed K.S.A. § 38-1522 and re-enacted it as K.S.A. § 38-2223. The word “injury” was changed to “harm,” requiring reporters to report sexual abuse if they had reason to suspect “harm,” a more encompassing standard than “injury.”

<sup>6</sup> Exhibits 96-106 are a selection of grand jury transcripts from Dec. 17, 2007 to Mar. 3, 2008.

8. Mr. Kline assigned the investigation to Mr. Tom Williams. Mr. Williams served with the FBI for more than twenty years, including six years as Special Agent in Charge of the Public Corruption Unit of the Kansas City FBI field office. He had also served as an ATF agent and in the United States Army as a commissioned officer. Mr. Williams received training from the ATF and the FBI, and also at the Kansas Law Enforcement Training Center. He was Chief Investigator for the Office of Attorney General when he began this investigation. Mr. Kline relied on Mr. Williams' expertise to develop the investigative plan. Exhibit 98, 2954:12-2956:24, 2957:7-21; Exhibit 90 (King Report), at ¶¶ 34-35.

9. Assistant Attorney General Stephen Maxwell was assigned the role of lead prosecutor. Mr. Maxwell had extensive prosecutorial experience and received numerous honors, including the Prosecutor of the Year award for 2006 from the Kansas County and District Attorneys' Association. Maxwell 1430:6-1442:21. Mr. Maxwell reported to Eric Rucker, Deputy Attorney General and Chief of Staff. At times he reported directly to Mr. Kline. During Mr. Kline's tenure as District Attorney of the Tenth Judicial District from January, 2007 through early January, 2009, Mr. Maxwell reported directly to him.

10. Mr. Maxwell and Mr. Williams developed an investigative plan to compare annual statistics published by the Kansas Department of Health and Environment (KDHE) with child sexual abuse statistics available from SRS. Exhibit 98, 2957:10-2602:16. Mr. Williams testified the office had received reports of underage abortions in Kansas that raised concern whether the abuse was being reported to SRS or local law enforcement. *Id.*, at 2958:4-10.

11. Mr. Williams' investigative plan called for comparing public information from KDHE and SRS to determine whether further investigation was warranted. *Id.*, at 2957:11.

12. Kansas law requires abortion providers to file a report for each abortion with KDHE. These Termination of Pregnancy (TOP) reports assist law enforcement in ensuring that Kansas laws are being followed, and provide the basis for an annual KDHE statistical report of abortions performed in Kansas. K.S.A. § 65-445. *See also* Exhibit 98, 2597:10-2602:2.

13. The KDHE reports provide age-cohort data, including the number of abortions performed on children fourteen years of age and younger.<sup>7</sup> *See* Exhibit K6;<sup>8</sup> Kline 1656:22-1657:8; K.S.A. § 65-445.

14. TOP reports are not medical records and do not contain patient names. The reports also do not identify the abortion clinics. The clinics are identified by a code assigned by KDHE. K.S.A. § 65-445(e); Kline 200:11-16; Exhibit 98, 2608:19-2612:25.

15. Mr. Williams planned to approach SRS to obtain statewide statistics of child sexual abuse reporting. He hoped to identify in that data statistics on sexual abuse reports from counties where abortion clinics are located. Finally, he would compare the county data to KDHE's annual reports on the number of underage children receiving abortions in Kansas.

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<sup>7</sup> See Abortions in Kansas, Kan. Dep't of Health & Env't, available at <http://www.kdheks.gov/hci/absumm.html>. Online reports cover 1999 to the present.

<sup>8</sup> Respondent's Exhibits were marked with letters, those of the Disciplinary Administrator with numbers.

16. Mr. Williams had to approach SRS to request the needed information. Exhibit 98, 2607:7-10. Investigators ordinarily seek to obtain information without revealing the full nature of the investigation to third parties. Since SRS and KDHE are repositories of the required reports, agency employees are potential authenticating witnesses in any subsequent criminal proceeding. Kline 224:13-226:15. Additionally, failure to file a sexual abuse report with SRS or failure to file a TOP report with KDHE are crimes. K.S.A. § 65-6703 and K.S.A. § 38-1522 (current version at K.S.A. § 38-2223). For these reasons, Mr. Williams did not want to reveal specifics of the investigation to persons outside the Attorney General's office.

*Mr. Kline did not violate the KRPC when Mr. Williams refused to reveal details of the investigation to an outside agency.*

17. When Mr. Williams approached SRS he only revealed that the Attorney General was trying to determine if “there was a serious latent sexual abuse problem” in Kansas. Exhibit 13.

18. A memorandum prepared by Williams and Maxwell on July 15, 2003, informed Mr. Kline of the investigative plan. *Id.*

19. The Panel Report describes the investigative plan, and Mr. Kline's awareness of it, as “conduct involving dishonesty, fraud, deceit or misrepresentation” in violation of KRPC 8.4 and 5.3. Panel Report, ¶ 327. Mr. Kline takes exception to this finding, as well as the other legal determinations in ¶¶318-29. Mr. Kline also takes exception to ¶¶ 79, 81, 82, 84, and 91 of the Panel Report. Mr. Kline provides the following portions of the record in explanation of these exceptions and reserves his right to brief this issue.

20. Revealing the full nature of the investigation to third parties could endanger privacy, harm the investigation, generate damaging rumors, potentially impair reputational interests, cause the destruction of evidence, and harm witnesses and victims. Mr. Williams testified:

Q. [By Mr. Stafford] Exhibit 13. And look at your-- your plan, your investigative plan, paragraph one.

A. Yes. It says, "an agent of the Office of the Attorney General will make a verbal request to SRS to identify by number incidents of sexual abuse involving victims under the age of 16 years that were reported to SRS within the past months." And it continues, "if asked to explain the nature of the inquiry SRS will be told that the Attorney General desires to determine if there is a serious latent sexual abuse problem in Kansas."

Q. Was that unlawful to do it that way?

A. No, I think that was my idea.

Q. Was it proper to do it that way? I probably ought to rephrase that question. And don't answer that one because it's not a fair question.

A. Okay.

Q. It may take a very long answer to get around to it. There's been criticism that the Office of the Attorney General was going to mislead a state agency, did you believe that it was improper to describe the investigative purpose as a serious latent sexual abuse problem in Kansas?

A. I thought that-- no, I didn't. I didn't think it was improper at all.

Q. Did you feel like it was false?

A. No. It just wasn't giving them the specifics. I don't think it's necessary when you conduct an investigation when you're seeking information. For example, if you went to a courthouse or a county government office or a city office to request documents about bidding contracts. If you properly

identify yourself and-- I wouldn't tell them exactly why I need them, I would just say I'd like those records for review. I don't feel that there's an obligation to tell someone what the nature of the investigation is. That was a very-- that was in very broad terms. The courts have held over the years that law enforcement officers can actually lie to people to obtain information and there's nothing inappropriate about that. Now that wasn't the case here, I just made a very broad statement because I didn't know exactly where it was going. This was probably the first overt investigative step that was taken.

Williams 871:13-873:12.

21. Mr. Kline also understood the strong policy and prudential reasons for not revealing the purpose of an investigation. He testified to the legitimacy of these concerns.

A. Typically you do not approach witnesses telling them the full scope of any investigation. It could alter their responses. It could bias their responses. It could cause the potential destruction of evidence, the revelation of private information, the facts of the investigation can get out beyond investigators. It can harm reputational interests. Typically you don't go around saying we are investigating this, we want to talk to you about this. You go around gathering what information you can before you go further and-- and possibly actually seek subpoenas and affect constitutional rights. You just don't want to spread rumors.

Q. [By Mr. Hazlett] Was it your fear that SRS was going to destroy documents that you wanted?

A. No. I mean, I don't know. But there is a fear about rumors, Mr. Hazlett. If going to SRS and gathering evidence would involve several people, I mean, we're asking about child sexual abuse reports that are maintained by several different persons, so we don't go to one file cabinet and grab it with only one person knowing, SRS then has to ask several people to collect the data and you really don't want knowledge of a potential child rape investigation and failure to report child rape going across the state. That is reasonable. It is normal conduct and it is appropriate.

Kline 235:14-236:18.

22. Governor Kathleen Sebelius had close ties to the targets of the investigation and took a public position adverse to it. Investigators were legitimately concerned that she would instruct SRS not to provide information. Kline 234:17-235:12.

23. On July 18, 2003, Mr. Williams contacted SRS and requested “the number of sexual abuse reports received by SRS since January 1, 2002 involving children 15 years of age and younger. Exhibit EE. *See also* Exhibit 16, at 287. Mr. Williams was directed to the “SRS Secretary’s section” to speak with Ms. Betsy Thompson who “made reference to the AG’s recent opinion” regarding the mandatory reporting law. *Id.*

24. Mr. Williams “kept the conversation in very general terms . . . staying away from the underlying issue.” Ms. Thompson told Mr. Williams’ his request would be handled as “a Legislative Inquiry.” Exhibit E2.

25. On July 25, SRS emailed Mr. Williams that the agency statewide received 1042 reports of alleged sexual abuse of children fifteen years of age and younger from January 1, 2002 through June 30, 2003. Exhibit FF.

26. John Badger, SRS General Counsel, testified that the information provided to Mr. Williams was “public information.” Badger, 2065:11-14. “I don’t recall what the specific reason [Mr. Williams said he needed the information] was, but I don’t think it would have probably mattered because, like I said, I think numbers themselves would probably be **public information.**” *Id.* (emphasis added). Mr. Badger was General Counsel for SRS for two decades. *Id.*, at 2061:9-11. Mr. Kline, therefore, takes exception to the Panel Report’s finding that Mr.

Williams' representations to SRS were material or prejudicial. The Panel Report omits Mr. Badger's testimony. Further, neither the Panel Report nor the record contain evidence or testimony contradicting Mr. Badger's testimony.

27. Mr. Williams also obtained information from the Sedgwick County District Attorney's Office. Comparing that information to the SRS data, he noted that Sedgwick County had more reports of child sexual abuse in that same time frame than SRS received for the entire state. Exhibit 20, at 294-5. *See also* Exhibit 16, at 287.

28. Moreover, while SRS reported 175 incidents of child sexual abuse on victims fifteen and under from Sedgwick County, the County itself generated 1884 reports on the same cohort during the same time period. Exhibit 16, at 287. Further investigation was required to understand these numbers.

29. Mr. Williams asked SRS for more information saying he was working "to determine whether consistency throughout Kansas in the resolution of prosecution was occurring **and whether criminal acts had occurred in the reporting or failure to report sexual abuse.**" *Id.* at 288 (emphasis added). SRS refused to comply, and instead asked for the request in writing. *Id.* *See also* Exhibit 20, at 294-295; Exhibit 16, at 288.

30. On July 31, 2003, Mr. Rucker wrote Mr. Badger requesting SRS cooperation:

For your information, our office, is conducting a criminal **investigation into the circumstances surrounding the reporting/or failure to report allegations of sexual abuse of children**, 15 years of age and younger. We seek your assistance in this investigation as your agency is the repository for this reporting information pursuant to K.S.A. 38-1522.

Exhibit H2 (emphasis added).

31. Thus, within thirteen days of the initial request, both Mr. Williams and Mr. Rucker had informed SRS that Mr. Kline’s office was investigating failure to report child sexual abuse. During that time, SRS only provided to the Attorney General information that was available to the public. *See supra* ¶¶ 25-26.

32. On August 5, 2003, SRS refused further cooperation. Mr. Badger informed Mr. Rucker that SRS would not provide additional information unless investigators provided a “thorough and specific explanation of the factual information” involved in the investigation. Exhibit I2.<sup>9</sup>

33. Mr. Williams, Mr. Maxwell, and Mr. Rucker refused the SRS demand. Instead they applied to Judge Richard Anderson to open a criminal inquisition and subpoena the needed records. The Panel Report finds this decision to be a refusal to “explain” the reason for the investigation. Panel Report, at ¶91.<sup>10</sup> On October 29, 2003 Judge Anderson made the requisite finding and issued a subpoena to SRS. *See* Exhibit 26. *See also* Exhibit 20, at 295.

34. In 2008, Attorney General Paul Morrison criminally charged Dr. George Tiller. Dr. Tiller moved to dismiss, arguing that the “deception” of SRS by Mr. Williams constituted “outrageous conduct” by Mr. Kline. Mr. Hazlett lifted passages verbatim from Dr. Tiller’s Motion

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<sup>9</sup> This citation is to Exhibit II, not to Exhibit 12.

<sup>10</sup> In January, 2008, before the Johnson County Grand Jury, SRS testified that it would “freely exchange” such information with law enforcement agencies, including District Attorneys and the Attorney General. Exhibit 100, at 2838:4-2840:13.

to Dismiss, inserting them without attribution into the Formal Complaint.<sup>11</sup> Judge Clark Owens heard testimony on the motion over several days from the same witnesses called at the hearing in this matter. Judge Owens denied the motion, finding that Mr. Williams did not deceive SRS, and that withholding “a detailed explanation” from SRS was justified.

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

Exhibit N (Owens Opinion), at 15 (emphasis added).

35. Prosecutor Thomas Stanton testified as an expert witness at the disciplinary hearing. Mr. Stanton is a law enforcement instructor and teaches prosecutors. “[I]t’s very important **not to share** information about the investigation with anyone else,” he stated. Stanton 2223:18-20. (emphasis added).<sup>12</sup>

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<sup>11</sup> Compare, for instance, the Tiller Motion to Dismiss, at 5-8 (Exhibit O) with the Formal Complaint, ¶ 6 (Document 1).

<sup>12</sup> Though recognizing Mr. Stanton as an expert witness, Panel Report, ¶ 47, the Panel ruled that he would not be allowed to testify “regarding ultimate issues in the case.” *Id.*, ¶ 40. By contrast, the Disciplinary Administrator solicited opinion testimony on the ultimate issue from other witnesses in this case, and has done so in other cases. Kansas law expressly states that an expert witness may not be prohibited from testifying to the ultimate question. K.S.A. § 60-456(d). Respondent takes exception to this Panel ruling as improper and prejudicial, a denial of due process, and cause for setting aside the Panel’s ruling. Respondent will address this issue in his appeal brief.

36. Mr. Stanton explained that revealing the nature of an investigation can spread counterproductive rumors and tip off targets. Stanton 2224:1-15.

37. Mr. Stanton also testified that he teaches investigators to be evasive and elusive when responding to questions about investigations. Stanton 2224:16-22.

38. The Panel Report omits Mr. Stanton's testimony entirely. Neither the record nor the Panel Report contains any evidence contradicting Mr. Stanton's testimony.

39. The Panel's legal argument (¶¶ 318-329) omits this Court's statement in *Alpha Med. Clinic v. Anderson*, denying the clinics' demand for "additional information about the basis for the inquisition." 280 Kan. 903, 925, 128 P.3d 364 (2006). The Panel Report cites no case law in support of its position.

40. Mr. Kline takes exception to ¶¶ 79, 81, 82, 84, 91 and 318-329, reserving his right fully to brief this issue. Mr. Kline disagrees with the Panel's finding that the initiation of a reasonable and customary law enforcement investigation of unreported child sexual abuse violated KRPC 5.3 and 8.4(c).

#### **EXCEPTIONS TO FINDING TWO<sup>13</sup>**

##### **Mr. Kline did not violate the KRPC in informing Judge Anderson of SRS's flawed data.**

41. SRS initially indicated that statewide it had received 1042 reports of child sexual abuse. *See supra* ¶ 25. After receiving the subpoena, however, SRS produced more than 20,000 reports—twenty times the number previously provided. Thorough analysis identified

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<sup>13</sup> See Panel Report, at ¶¶ 330-333 (whether Respondent violated the KRPC "when he failed to timely inform Judge Anderson that the initial information received from SRS was inaccurate").