

47. In his summary of Count I, Mr. Hazlett alleged that “the Attorney General’s office failed to correct the numbers in a timely fashion.” Hazlett letter, ¶ 3.

48. Judge Owens found that no harm occurred.

[T]he discrepancy was not discovered until after the inquisition had been opened and the subpoenas issued. The AG’s office did inform Judge Anderson later when they approached him to obtain records from KDHE None of these alleged omissions would have been sufficient to have altered the findings of Judge Anderson.

Exhibit N, at 12. The Panel Report omits this finding by Judge Owens.

49. Mr. Kline takes exception to the criticisms in ¶¶ 95-99 and 330-333. He agrees with the Panel that clear and convincing evidence does not support a violation of the KRCP in this matter.

EXCEPTIONS TO FINDING THREE¹⁴

Mr. Kline’s office did not seek the identities of adult patients.

The original subpoena to Planned Parenthood and WHCS.

50. Comparison of the SRS and KDHE data revealed that during a time when 166 abortions were performed on children, age fourteen and under, Kansas abortion clinics reported only four cases of child sexual abuse. Exhibit 20.

51. The KDHE clinic codes disclosed that the clinics performing most of these abortions on children were Comprehensive Health of Planned Parenthood in Overland Park

¹⁴ See Panel Report, at ¶¶ 334-336 (whether Respondent violated the KRPC “when he repeatedly testified that his office did not seek the identity of adult abortion patients”).

(Planned Parenthood) and Women’s Health Care Services in Wichita (WHCS). Yet, SRS records revealed Planned Parenthood and WHCS each reported only one case of child sexual abuse during the same eighteen-month time period. Exhibits OO and 20.

52. The KDHE reports also revealed that some of the children had late-term abortions. Kansas law requires for a late-term abortion that two doctors verify the child will suffer “substantial and irreversible impairment of a major bodily function” if the abortion is not performed. K.S.A. § 65-6703.

53. Mr. Kline reasoned that the necessary finding of harm for a minor’s late-term abortion necessitated an abuse report to SRS. If the sexual abuse resulted in sufficient injury to justify a late-term abortion, the abortion doctor of necessity had reason to suspect injury.

54. Judge Owens came to the same conclusion. See Exhibit N, at 8 -9 (stating that a late-term abortion, requiring a finding of medical necessity, “would certainly be stronger evidence of injury than can be inferred merely by visiting a nurse or physician”).

55. Thus, the investigation was consistent with the 1992 Stephan opinion that abortion is not a per se injury.¹⁵ Kline 323:14-325:5.

56. Judge Anderson also determined that the investigation was not premised on Mr. Kline’s Opinion, denying a KDHE motion to quash discovery despite *Aid for Women*.

¹⁵ Assistant Attorney General Camille Nohe composed the 2003 opinion based on her legal research. She testified that Mr. Kline did not direct her conclusions and only had minor input. She identifies as “pro-choice.” Mr. Kline never expressed any concerns about her beliefs regarding abortion. Nohe 1925:10-1929:14.

57. Mr. Kline and his investigators believed it was necessary to show a pattern of non-reporting to demonstrate intent not to report, and to defeat the defense of mistake.

58. The Termination of Pregnancy (TOP) reports submitted to KDHE require specific justification for a late-term abortion. K.S.A. § 65-445.

59. The reports filed by WHCS for late-term abortion of viable children simply quoted the statute without providing any specifics. Kline 200:23-203:19; 267:21-270:19. *See also* Exhibit 98, 2608:19-2612:25 (testimony of Tom Williams).

60. On August 2, 2004, Mr. Kline decided to include possible violation of the late-term abortion law. K.S.A. § 65-6703. Exhibit 26, at 322. Investigators had voluntarily-provided evidence of possible illegal late-term abortions at WHCS, but had not yet sought to subpoena information on that issue. Kline 276:25-277:12; 1708:9-17.

61. In September, 2004, Mr. Maxwell and Mr. Williams approached Judge Anderson to obtain a search warrant for WHCS and Planned Parenthood records. Exhibit N3, at 2882-2886 (WHCS subpoena); Exhibit G3, at 3625-3628 (Planned Parenthood subpoena).

62. Prior to approaching Judge Anderson, Mr. Williams confirmed with SRS the accuracy and completeness of its disclosure of child sexual abuse reports. Exhibits K3, L3.

63. Judge Anderson found probable cause that clinic records contained evidence of crimes. Mr. Kline ultimately decided to proceed by subpoena rather than execute a search warrant. Anderson 629:1-4. Even though Kansas law only requires reasonable suspicion for an

inquisition subpoena, the subpoenas retained the “probable cause” language from the search warrant finding. Exhibits N3, at 2882-2886; G3 at 3625-3628.

64. Mr. Kline decided his office would not seek, through subpoena, adult patient identities. Anderson 701:9-25; Kline 1687:11-1689:13.

65. Judge Anderson instead would redact patient-identifying information from subpoenaed clinic records before releasing them to the Attorney General. Anderson 701:9-25. The Disciplinary Administrator’s own investigator stated: “Attorney General Kline’s office had previously discussed a protective order with Judge Anderson which would have contemplated that the names of the women would have been redacted prior to the records being turned over to the Attorney General’s Office” Exhibit 142, at 16 (DeFries Report).

Mr. Kline instructed his office not to seek adult patient identities.

66. Judge Anderson testified Mr. Maxwell “was very much there to alert me So if you want [to] give him credit for suggesting [redacting patient names], I’m not going to quarrel with that.” Anderson 701:23-702:2.

67. At an April 11, 2007 hearing attended by Mr. Kline and representatives of Attorney General Morrison, Judge Anderson complimented Mr. Kline on the quality of his investigation and his efforts to protect patient privacy.

You know, Mr. Kline, throughout the course of these proceedings, and particularly through the period of the election, I believe I complimented sort of the design of your investigation, the work that you had done. **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.** So I

had given you credit where credit was due in that regard. . . . Your design is well founded, well articulated.

Exhibit 82, 1011:22-1013:15 (emphasis added).

68. Typically, the fruits of a subpoena are produced directly to law enforcement. The unusual production to Judge Anderson was for the express purpose of redacting adult patient names from the files. Kline, 273:5-25. See Exhibit 142, at 16.

69. The Attorney General had a right to adult patient names upon a legal showing. “Should patient-identifying information later be required, the district judge may approve appropriate subpoenas for that information at that time.” *Alpha*, 280 Kan. at 924. But Mr. Kline did not seek this information.

70. Instead, Mr. Kline sought to protect patient privacy while forwarding the state’s interest in the investigation. Judge Anderson wrote:

The Attorney General does not contend that the statutory privilege or constitutional right of informational privacy of patients should be given insubstantial consideration. On the contrary, **the Attorney General has articulated an awareness of the need to conduct the investigation in the least intrusive manner to the privacy interests of patients**

Exhibit 71, at 894, ¶12 (emphasis added). The Disciplinary Administrator’s investigator confirms: “We believe the record supports the notion that Respondent Kline did not seek the identities of adult women.” Exhibit 142, at 16.

71. Mr. Kline’s decision to shield patient identities raised concern in his office. Deputy Attorney General Jared Maag argued that the Confrontation Clause required the patient to appear as a witness in any criminal matter. Exhibit 34, at 364-370; Maag 985:15-987:18.

72. Mr. Kline, however, was confident that *Crawford v. Washington*, 541 U.S. 36 (2004), demonstrated otherwise. In his view medical records, being non-testimonial, were not subject to the Confrontation Clause. Furthermore, medical records fell under a hearsay exception and might additionally contain physician statements against interest. Maxwell 1470:20-1472:20; 1519:7-25; Kline 1600:1-1604:9. Both Mr. Kline and his successor, Mr. Morrison, obtained probable cause findings to file charges against Dr. Tiller without any identification of adult patient names. Maxwell 1472:21-1473:11.

73. On September 21, 2004 Judge Anderson subpoenaed sixty records from WHCS and thirty from Planned Parenthood. Exhibit G3; Exhibit N3, at 38-42.

74. After Judge Anderson denied a motion to quash, Exhibit 35, the clinics filed a mandamus action naming Judge Anderson and Mr. Kline as defendants. Sup. Ct. No. 93,383.

Mr. Kline's office receives evidence of possible maltreatment of vulnerable patients by WHCS and separately of sexual abuse of group home residents while SRS looks the other way, thereby underscoring his duty to protect children from harm.

75. On October 26, 2004 this Court stayed Judge Anderson's subpoena of clinic records. The Office of Attorney General, however, continued to receive evidence from other sources and continued its investigation. See Kline 1729:1-1730:7; 3220:16-25; Nancy Jensen (former Kaufman House resident) 3100:10-3101:15; Transcript of Kaufman House video 3103:5-15; *id.* at 3103:2-3 ("Phill Kline saved our lives.").¹⁶

¹⁶ To view the video the Panel saw, see <http://www.youtube.com/watch?v=kLhPeeWn1rQ>; <http://www.youtube.com/watch?v=mD1pa8Y9R6I>.

76. In February, 2005, Mr. Kline received a request to assist the Texas Attorney General in investigating the death of a mentally-handicapped Down Syndrome patient at Dr. Tiller's clinic. The Texas Attorney General was pursuing possible rape charges. Mr. Kline complied with the request. Kline 1729:1-1730:7.

77. The death of the patient at WHCS generated significant media attention. An open records request produced the chilling audio recording of the 911 call from the clinic. "No lights, no sirens." This audio has been in the public domain for years. *Id.*; Transcript of Closing Argument 3221:1-16.

78. Mr. Kline and his staff listened to this recording and developed concern that the most vulnerable patients at WHCS were not receiving proper care. The Hearing Panel found that Mr. Kline's closing mention of this 911 call violated the KRPC. Panel Report, ¶ 409. During the February hearing, the Panel sustained an objection to admission of the 911 call. Mr. Kline made a proffer that the audio—a public document—was probative of the reasons he sought to identify child patients through a subpoena of the records of a hotel used by WHCS. When he briefly summarized the call five months later in closing argument, the Panel, citing him for "bad faith" and "obstruction," requested this Court to consider his reference to the dying moments of a Down Syndrome young woman as an aggravating factor. Mr. Kline takes exception to this finding and recommendation of the Panel. These facts, though unflattering to WHCS, demonstrate that he was seeking to protect the vulnerable, not to acquire names of adult patients. The dead woman stayed at the hotel.

79. In the same time period, Mr. Kline received videotape evidence depicting routine sexual abuse of patients at a mental health group home in Newton, Kansas. Though the videotape had been in the possession of SRS for more than a decade, the agency failed to act. The tape prompted Mr. Kline to launch an investigation that eventually led to the felony conviction of the operators of the home. Kline 3220:16-25; Nancy Jensen, 3100:10-3101:15; 3103:5-14; Judge Eric Melgren, 3127:19-3130:5.

80. These two revelations reinforced existing concerns about the use of abortion clinics to cover up child sexual abuse, and the disturbing absence of reports to SRS. The Kaufman House situation separately indicated that SRS had been systematically unresponsive to allegations of sexual abuse of vulnerable mental health patients. The death of the young disabled woman prompted Mr. Kline to explore how his office could further act to protect those least able to protect themselves from sexual exploitation.

The Attorney General seeks hotel records in an effort to identify child patients.

81. Mr. Williams learned that Dr. Tiller referred out-of-area abortion patients to a hotel chain that had “a national policy of affording guests a medical discount upon request.” Exhibit Y3. The KDHE TOP reports provided investigators with the age and ethnicity of the patient, the date of the abortion, and the city or town of residence. K.S.A. § 65-445. Investigators decided to seek a subpoena of hotel records, hoping to match them with KDHE records to identify potential child victims. Mr. Williams believed that the hotel records “when compared with records obtained and to be obtained from KDHE **will lead to the identification**

of juvenile patients who were provided late term abortions at Women’s Health Care Services, Inc. in violation of Kansas statutes.” Exhibit Y3 (Memorandum of Feb. 11, 2005) (emphasis added).

82. Mr. Williams sought to identify child victims, not adult patients. “The objective was to see if we could identify underage females who had received abortions” Williams 801:1-4. He ultimately doubted the effectiveness of the effort since “children under age are not going to be able to rent a motel room.” Williams 814:3-8.¹⁷ To identify child victims, he had to find the names of their adult traveling companions in the hotel records by matching dates and home towns with KDHE records of underage abortions.

83. The effort to match up the data was unsuccessful. Kline 361:11-16. *See also* Exhibit 90, at ¶ 6. No evidence indicates that investigators ever contacted any registrant. Nor did any witness testify that the purpose of the hotel subpoena was to identify adult patients.

84. The Panel concludes that Mr. Kline “knew or should have known that his office attempted to identify the names of adult abortion patients.” ¶ 334.

85. The Panel provides no evidence that Mr. Kline knew of the creation of Exhibit 51, the only document that supports its finding.¹⁸

Q. [By Mr. Hazlett] Well, as I understand your testimony, nobody on your staff said anything to you about the preparation of this document Exhibit 51, the unredacted version of 51?

¹⁷ The transcript reads that Mr. Williams said the effort was not “protective.” The word he used was “productive.”

¹⁸ For an explanation of Exhibit 51, *see infra* ¶¶ 99-121.

- A. What my staff told me, that I recall, is that the effort to identify the children and their adult traveling partners did not work and I was concerned about that because I felt we had a duty to try to act as it relates to those children.

Kline 361:7-16.

86. Mr. Kline speculated that in creating Exhibit 51, Mr. Reed may have been trying to exclude the possible adult patients in an effort to identify the children. Kline 360:13-361:6. By omitting the full testimony, the Panel improperly claims that Mr. Kline admitted the subpoena of hotel records was for the purpose of identifying adult patients and excluding child patients. See Panel Report, ¶ 129. Mr. Kline's testimony becomes clear, however, when the omitted portion is considered.

- Q. [By Mr. Hazlett] So, as I understand it, one explanation might be that the preparation of that document is that you're comparing the KDHE records and the [hotel] information in an attempt to exclude that person as somebody involved with a minor patient? I just want to make sure I understand your testimony correctly. The preparation of that document might have been an attempt by your staff to exclude certain adults who registered at [the hotel] as being involved with minor patients?

A. No.

- A. I think the question was misphrased. I don't think you meant it. You said was the effort to exclude the adult traveling partners, no. We wanted the identity of the adult traveling partners with the children. The effort would be potentially, and there may have been other reasons that they did this I do not know, you'd have to ask them. But is to exclude adult patients so that they're not part of the adult traveling partners because children will not register under their own name.

Kline 358:9-361:16.

87. The Panel implies that Mr. Kline testified twelve separate times during the hearing that the purpose of the hotel subpoena was solely to identify children. ¶ 129. An examination of these twelve citations, however, indicates that Mr. Kline was talking about his initiative for Judge Anderson to redact adult identities from abortion clinic records before delivering them to the Attorney General. In those instances, Mr. Kline's office neither sought nor saw adult identities. See Panel Report, ¶ 129 (and citations therein). The Panel Report improperly infers that Mr. Kline's testimony about the original subpoena indicates he was lying and denying the existence of Exhibit 51.

88. The Panel infers that Mr. Kline suddenly admitted that the true purpose was to identify adults. *Id.* Mr. Kline takes exception to this characterization of his testimony.

89. Mr. Kline was not involved in the preparation of Exhibit 51. He did not know it existed at the time. Nor did Mr. Rucker. Rucker 1076:2-3.

Judge King and Judge Owens both concluded that Mr. Kline subpoenaed hotel records to identify child victims, not adults who had abortions.

90. Judge Owens tried this issue during a pre-trial motion at the Tiller criminal trial. He heard the same witnesses that appeared before the panel: Jared Reed, Mr. Williams, Mr. Rucker, Mr. Maxwell and Mr. Kline. He admitted Exhibit 51 as Exhibit L7. Judge Owens writes:

The investigators attempted to match the KDHE records with the records from the motel. Jared Reed testified **that his assignment was to obtain the identity of the adult travelling companions of the minor patients.** This was done in an effort to identify the patients under the age of 16 that had obtained abortions to see if the defendant had filed the SRS report.

Exhibit N, at 16 (emphasis added). The Panel omits Judge Owens' factual finding.

91. Judge King heard testimony on this issue as special master in *CHPP v. Kline*, Sup. Ct. No. 98,747. He found that Mr. Kline’s purpose was to attempt to use the registration records **“to obtain the identity of WHCS patients who were minor’s . . . as such patients were potential crime victims.”** Exhibit 90, at ¶6 (emphasis added). The Panel report also omits Judge King’s findings.

92. Mr. Kline testified: “[W]hat I asked them to do is match up the KDHE information, which does not have identities, with the registration and the date . . . the hometown . . . to try to identify the children. That’s what I asked them to do. To try to find the children.” Kline 346:18-25.

93. Mr. Hazlett asked: “[Y]ou knew that you would potentially be receiving the names of some adult patients as well, did you not?” Mr. Kline answered: “Yes, if adult patients stayed there. But that wasn’t the purpose for the subpoena.” Kline 347:3-7.

All the testimony indicates that Mr. Kline’s purpose in seeking hotel records was to identify child patients. The effort was unsuccessful.

94. The subpoena was for the names of all hotel registrants receiving the medical discount. The effort was to identify the children and it was not successful. Kline 1709:5-1710:12.

95. Mr. Maxwell testified:

Q. [By Mr. Holbrook] When you issued the subpoena were you expecting to see . . . a number of adult names?

A. Sure.

Q. And it was your estimate that if contacts would be made with the adults then the identity of the children could be learned and further evidence could be developed for the case?

A. Yes.

Q. Okay. What if the adult was getting the discount, the female, and she had had an abortion, was that the goal and purpose of this subpoena at all?

A. Not at all.

Q. What were you going to do with that information?

A. It was like wheat and chaff. Any criminal investigation there's wheat and chaff. We separate the wheat from chaff **I know the argument here is they were trying to seek adult names because Jared Reed did the spreadsheet, but that's just not the reason that we had any interest in it.** He did it, I think, because he's a thorough guy and he had all the information in front of him and he could obviously do both. But that wasn't the interest of anybody, it certainly wasn't my interest. It certainly wasn't Mr. William's as far as I know.

Q. What about Mr. Kline's interest?

A. I don't think he would have cared one way or the other because it wasn't something we were focused on. **We didn't need the adult women's identities.** The whole thing started as a failure to report child abuse [A]ctually I thought failure to report child abuse would be the easiest case, initially going in, to actually see if it was true or not. It turned out to be the most difficult. And because we could never identify the minor patients by name that's the reason. So in the end it looked the easiest, it turned out to be the hardest.

Q. Did – has anyone ever told you that it was unethical to issue a subpoena like this and secure adult women's name even though you might not have that as your goal or purpose?

A. No. I mean, I guess that's the – that's the thing I don't quite get, is everybody has asked me about that question, and, you know, we could

have if we had wanted to. There was nothing prohibiting us from looking into or trying to obtain adult women's names . . . it wasn't something that was relevant to us at the time.

Maxwell 1465:14-1468:5

95. Mr. Reed's role in the investigation was to handle and organize electronic data. Mr. Williams delegated this task to Mr. Reed because of Mr. Williams' lack of computer acumen. Williams 806:25, 814:13-817:14; Reed 1140:23-1141:4.

96. Mr. Reed began generating data analysis reports early in the investigation. See *e.g.*, Exhibit R5; Exhibit 23; Reed 1143:16-1144:1; Kline 1704:1-1708:1.

97. From the 11,000 KDHE reports for 2003, Mr. Williams instructed Mr. Reed to select records "having a patient 15 years or younger or the doctor identifying the gestation period at 22 weeks or more." Exhibit R5, at 1. This selection matched the investigative goals of identifying abortions on minors to cross-reference with sexual abuse and late-term abortion reporting. These criteria narrowed the population of relevant records to 659 from over 11,000. *Id.* at 2.

The Discovery of Exhibit 51

98. Exhibit 51 is a spreadsheet purportedly created in April, 2005 that compares KDHE records of patients sixteen years of age and older to the adult registrants at the hotel where Dr. Tiller's patients stayed. Exhibit 45, comparing KDHE records of patients fifteen years of age and younger to the hotel records, has initialed investigative reports attached to spreadsheets.

99. Mr. Williams' testified that Exhibit 45 is the official form for an investigative report. The report production procedure begins with a hard copy review by Mr. Williams, adding his written corrections. Mr. Reed would update the document with the corrections. Mr. Williams then conducted a final review, initialing each page. Upon his approval, the hard copy would be scanned and saved in the investigation file. This process was always followed. Williams 810:18-817:14. Exhibit 51 lacks these formalities and has no investigative cover report.

100. Exhibit 45 has these formalities and states that the spreadsheet and investigative report resulted in "potential matches of the minor patients or their adult travelling companions."

101. Exhibit 51, however, lacking an accompanying initialed investigative report, is only an unfinalized spreadsheet.

102. Mr. Reed corroborated Mr. Williams' testimony that Exhibit 51 is not in final form. He explained how reports were finalized for placement in the hardcopy investigative file. Reed 1210:25-1211:24. Mr. Reed stated that Exhibit 51 contains an obvious error that would have been corrected prior to placing it in final form. *Id.* at 1212:15-1213:9. This error indicates that a final review had not occurred.

103. Both exhibits identify adult registrants at the hotel and potential matches to KDHE records. Because the attempt to identify the minor patients failed, no further effort to verify the hotel data took place. Williams 814:3-8.

104. Mr. Reed testified that the office had access to other sources to assist in identifying persons but he does not remember any effort to use those sources to verify the identities of any adult patients. Reed 1208:20-1209:11.

105. Mr. Reed testified that no one ever told him why the information was being gathered. Reed 1204:17-22.

106. The Panel's conclusion that Mr. Kline gave false testimony when he said his office did not *seek* adult patient identities and or that the subpoena of hotel records was *for the purpose* of identifying child victims arises from the existence of Exhibit 51. See Panel Report, ¶ 334.

107. Dan Monnat, Dr. Tiller's lawyer, testified that someone left a computer disc on defense counsel's table on November 20, 2008, during the *State v. Tiller* criminal case. He instructed his associate, Laura Shaneyfelt, to "explore" its contents. Monnat 1276:1-23.

108. Mr. Monnat's learned that the disc contained internal documents of the Office of Attorney General, including documents of investigations unrelated to Dr. Tiller. Monnat 1294:6; 1303:24-1311:15. See also Exhibits C6 & D6 (file structure of CD).

109. To locate Exhibit 51 on the CD it was necessary to explore the folders on the disc. Ms. Shaneyfelt likely opened several files—containing sensitive and private information of people she did not represent—prior to finding Exhibit 51. Monnat 1311:20-24. Rather than return the Attorney General's property, Mr. Monnat retained the disc and pored through it.

After finding and printing Exhibit 51, he set up a meeting with Mr. Reed on December 26, 2008. Monnat 1276:1-23, 1278:16-22, 1279:18-1280:10.

110. Exhibit 51 entered the record as a copy printed by Mr. Monnat from the anonymously-provided CD of records of the Office of Attorney General. Mr. Monnat retained the CD for two years before turning it over to the Disciplinary Administrator in response to a subpoena. Exhibit 134; Monnat 1277:1-1278:11.

111. The Office of Disciplinary Administrator used the purloined information as part of its case in chief. Mr. Monnat has not been charged with a violation of the safekeeping rule, KRPC 1.15, “unwarranted intrusion into privileged relationships.” KRPC 4.4, cmt. 1, or conversion.

112. Mr. Monnat was unable to identify who left CD. Monnat 1313:22-1314:7. Terry Morgan, an investigator for the Disciplinary Administrator, did not know how the Exhibit 51 CD found its way to Mr. Monnat’s desk.¹⁹ Morgan 1545:18-1548:20.

113. The record contains no evidence that Mr. Kline knew Exhibit 51 existed before 2009. Mr. Reed’s testimony never connects Mr. Kline to Exhibit 51. He received direction only from Mr. Williams. Reed 1264:8-18.

Prior to the subpoena of hotel records, Mr. Kline’s office separately filtered KDHE records on two criteria: fifteen years and younger, and twenty-two weeks or more gestation. Mr. Reed employed the same methodology with the hotel records.

¹⁹ Mr. Hazlett, who directed Mr. Morgan on whom to interview, never requested him to ask Mr. Monnat or Ms. Shaneyfelt about the CD. Morgan 1545:18-1548:20. *See id.* at 1548:10-12 (“Mr. Hazlett and Mr. Walczak were telling us what interviews to conduct and that was not one of the directives.”).

114. In the late summer of 2004, based on analysis of late-term abortion reporting to KDHE, Mr. Kline expanded the investigation to include criminal late-term abortion. Mr. Reed thus analyzed late-term KDHE abortion reports in addition to his original analysis of abortions on minors. Exhibit R5; Kline 1704:1-1708:1. Failure-to-report was at issue for the children, and violation of the late-term abortion statute for all patients.

115. Mr. Kline did not need adult patient names for the late-term investigation. Kline 1678:11-1689:13.²⁰

116. By the time Mr. Reed received the hotel records for analysis, he had already prepared these two different types of spreadsheets: one for minors; the other for all late-term abortions. These spreadsheets did not contain any names, and were used by investigators to determine which records to subpoena in September, 2004.

117. Mr. Reed may have prepared the two distinct spreadsheets from the hotel data to parallel the existing methodology. Kline 1704:1-17-8:1.

118. Exhibit 51 does not contain any evidence of review by Mr. Williams, who testified that he possibly did not see the exhibit and that it was not deemed to be of any significance in the investigation. Williams 812:14-814:8.

119. Mr. Williams' March 2, 2005 Investigative Report contains his instructions to Mr. Reed on using the hotel information:

²⁰ The Disciplinary Administrator and the Panel seem to consider the possibility that some adults may be identified during an investigation as evidence that Mr. Kline lied when he said the office did not seek adult identities.

Review all 2003 and 2004 Kansas Department of Health and Environment “Report of Termination of Pregnancy” Reports **where the patient** resided in Kansas and **was 15 years of age or younger**. In addition, SA Reed was to review the spreadsheet provided by [the hotel] to determine if any of the guests could potentially be the patients and/or guardians of the patients that received an abortion at WHCS.

Exhibit 45, at 1 (emphasis added). Matching the hotel data to the under-15 KDHE patient reports produced six potential matches for 2003 and four for 2004. *Id.* This official initialed investigative report contains only under-16 data.

120. Mr. Kline has never denied the existence of the spreadsheet, once it was shown to him, and continues to state his office was not seeking adult patient names. Kline 1687:11-1689:13.²¹

The record contains no evidence that Mr. Kline’s office sought to verify whether the adult hotel registrants were patients, or ever contacted anyone listed on the exhibit.

121. The record contain no evidence of any effort to verify the hotel registrants in Exhibit 51 as adult patients or to contact anyone in the spreadsheet.

122. The record contains no testimony that Mr. Kline gave any other instruction to his staff than to try to identify children. The record **does** reflect that Mr. Kline’s policy was not to seek to identify adult patients.

²¹ No evidence of record indicates that any person saw Exhibit 51 before the deposit of the mystery disc on Mr. Monnat’s counsel table in November, 2008, except for Mr. Reed and perhaps Mr. Williams. They disagree on whether Mr. Williams saw the document, but agree that if he did, he would have corrected the obvious errors in the spreadsheet. *See supra* ¶¶ 100-103.

123. To date, three separate legal actions have heard testimony on the purpose of the hotel subpoena: the secret trial in *CHPP v. Kline*, the motion to dismiss hearing in *State v. Tiller*, and this case. The same witnesses appeared each time. None of them stated that the purpose of the subpoena was to identify adult abortion patients. The Panel Report cites no such testimony. See Panel Report, ¶¶ 129-133, 334-336.

124. Judge King, Judge Owens, and Mr. Hazlett’s own investigators concluded that Mr. Kline did not seek adult patient identities. Exhibits 90, 142, and N. During the five years of investigation and in the thousands of pages of documents assembled, including the investigation files provided by Mr. Morrison’s office, not a single statement exists that the purpose of the hotel subpoena was to identify adult abortion patients. The dog has not barked. See Arthur Conan Doyle, *Silver Blaze*, in *The Memoirs of Sherlock Holmes* (1894) (“the curious incident of the dog in the night-time”).

125. Mr. Williams Investigative Report on the hotel records identifies the purpose of the subpoena as “the identification of juvenile patients who were provided late term abortions . . . in violation of Kansas statutes.” Exhibit Y3, at 2-3. That document, authored on February 11, 2005, well before any ethics complaints against Mr. Kline, states the purpose of that subpoena.

126. The Panel states Mr. Rucker acknowledged that the Attorney General’s Office made “an effort to identify potential adult patient” names. Panel Report, ¶ 132. The quoted passage, however, contains the words, not of Mr. Rucker, but of Disciplinary Counsel AI

Walczak. Mr. Rucker, responding to Mr. Walczak's question, stated merely that he learned of the existence of Exhibit 51 two years after leaving office. Rucker 1076:1-3.

That's the first time that I ever knew of such a thing. And I got to thinking about the discovery of that and how odd that was because I didn't know about it, I don't believe Mr. Maxwell knew about it. I don't believe that General Kline knew about it.

Id. at 1076:8-13. Asked earlier about the matching of KDHE with hotel records, Mr. Rucker replied as follows: "Again, at some point in time, sir, I became aware of the [hotel] subpoenas and, 'um, that they were going to be used **for the purposes of identifying underage children.**"

Id. at 1075:15-18 (emphasis added). By leaving out of its report Mr. Rucker's statements and instead adorning him with Mr. Walczak's phraseology, the Panel creates a misimpression of his testimony.

127. Mr. Kline could have sought adult names at the beginning of the investigation and did not. He could have directly subpoenaed adult names at a later point, but did not.

128. The mere existence of Exhibit 51, which was never used in the investigation, has dubious origins, and can easily be explained, does not of itself suffice to demonstrate clearly and convincingly that Mr. Kline lied when he said he was not seeking adult patient identities. Mr. Kline, therefore, takes exception to ¶¶ 129-133, 334-336, and other statements contained in the Panel Report inconsistent with the above citations to the record.

EXCEPTIONS TO FINDING FOUR²²

²² See Panel Report, at ¶¶ 337-341 (whether Respondent violated the KRPC "when he attached confidential documents to a public brief").