

**Mr. Kline did not violate the KRPC when in *Alpha* his Office attached the redacted transcript of the hearing before Judge Anderson on the clinics' motion to quash.**

129. Mr. Kline takes exception to ¶¶ 337-341 of the Panel Report and the Panel's finding that he violated the KRPC when his office attached to the *Alpha* brief a redacted copy of the legal arguments presented to Judge Anderson in the clinics Motion to Quash.

130. The *Alpha* decision balanced patient privacy rights and the State's compelling interest in investigating criminal activity.

131. Mr. Kline's investigation was private and not known to the public until order of this Court made the briefs of Petitioners (Planned Parenthood and WHCS) public at the moment of their filing on February 25, 2005.

132. Mr. Kline's office, one week later, filed its brief and by order of the Court that brief was also a public document. Exhibit 71.

133. Initially this Court sealed the Mandamus action, but on February 14, 2005 ordered that the record would be sealed but the briefs and oral argument would be public. Exhibit Y5. The information under seal presumably was not available for public argument.

134. Mr. Kline's office became concerned about the scope of the public oral argument. Much of the argument and briefing would be based on the manner in which the Office of Attorney General and Judge Anderson addressed the legal issues about handling of the records. In their mandamus, the clinics challenged the manner in which Judge Anderson addressed these issues. The transcript of the hearing on the clinics Motion to Quash reflected

these legal arguments and Judge Anderson's reasoning for his decisions. Also, the public brief would draw largely on the arguments made in the hearing. To address these concerns, Deputy Attorney General Jared Maag, one of the authors of the brief, sought guidance from this Court.

Mr. Maag testified at the hearing:

- Q. [By Mr. Hazlett] In part your decision to attach the-- to make the attachments to the brief was based on your conversation with Carol Green?
- A. Yes.
- Q. Did that--
- A. Yes. It was based in part on that conversation with Carl [Carol] and what we believed, yes.
- Q. Okay. Would you explain what went on in that conversation?
- A. When I called Ms. Green to inquire again about why this was going public, why briefing was necessary. **And if oral argument was going to happen there were obviously some concerns about what we could and could not say. We got – I got absolutely no guidance with my questions and quite frankly left the conversation very frustrated because we were trying to clarify what it is we could and couldn't do.** And it was simply-- we were simply directed back to the order that it would be open and-- the briefs would be open and that oral argument would be open.

Maag 1037:24-1038:20 (emphasis added).

135. Judge Anderson filed under seal a response to the Mandamus Petition but did not argue the issues or brief the matter. He simply asked for answers to four questions at a time when this Court had the action still under seal. Exhibit 138 (filed Nov. 30, 2004).

136. Mr. Maxwell also testified to confusion over the order that argument and briefing would be public, but the record sealed. He testified:

Q. [By Mr. Walczak] And did that (the Court's order) cause you some – to have some issues?

A. Yeah. I mean, this was a little confusing. We didn't know – we had a lot of debates on what that really meant to the extent that we called – I think Jared Maag and I called Carol Green. We discussed with – I discussed it with Judge Anderson. I discussed it with his counsel. I – we discussed it internally in the office, all the attorneys that were involved in the preparation of the brief, and I think there was like six or seven. So it was – it was an issue that was discussed.

Q. You said you discussed it with Judge Anderson?

A. Yes.

Q. And he was the court for the inquisition?

A. Correct.

Q. And did you discuss it with Mr. Kline?

A. Probably. I don't specifically recall it. I do recall a meeting with all the attorneys who were working on it. He wasn't at that meeting, but we all debated it.

Maxwell 1082:17-1083:16.

137. Mr. Maxwell also expressed concern to Judge Anderson and his counsel, Michael Strong, about misrepresentations in the abortion clinics' brief. Mr. Strong testified:

Q. [By Mr. Holbrook] You've indicated in your direct examination that Mr. Maxwell was concerned about and the Attorney General's Office was concerned about what they understood to be misleading statements about various positions in the case; is that accurate?

A. Yes.

Q. And after you having reviewed the materials did you concur with Mr. Maxwell on that?

A. 'Um, I believe that I – that I think certain statements that were Mr. Maxwell's focus were probably – I think that the petitioners (Planned Parenthood and WHCS) may have taken some liberties with some of the statements, yes.

Strong 963:2-15.

138. Mr. Maxwell unsuccessfully sought guidance from Mr. Strong regarding Judge Anderson's position about the Supreme Court's order. *Id.* After the filing of the Attorney General's brief, Judge Anderson concluded that the order making the briefs and argument public mooted his sealing of the inquisition record.

139. The clinics filed a motion before Judge Anderson to hold Mr. Kline in contempt of court for his attachments to the *Alpha* brief. Judge Anderson denied the motion. He testified:

[W]hat I said is that the fact that-- of the inquisition had been disclosed so that was no longer a secret. That I had filed the record. That the purpose of the nondisclosure order had become moot and that I wouldn't require any curative measures. And I also comment that the transcript [attached to Mr. Kline's brief] contained legal arguments and not specific references to patients. So I didn't think there was any need for the district court to attempt to take any curative measures based on orders that I had entered. The fact of the inquisition was now open to the public . . . .

Anderson 645:15-646:1.

140. Although this Court in *Alpha* was critical of Mr. Kline for the attachment, the Court found that "No prejudice has resulted from his conduct . . . ." *Alpha*, 280 Kan. at 929.

141. This Court also acknowledged recognized that its order for public briefing and argument on a sealed record was challenging: “highly unusual . . . the first in memory.” *Id.* Accordingly, Mr. Kline takes exception to ¶¶ 135-146 and 337-341.

#### EXCEPTIONS TO FINDING FIVE<sup>23</sup>

**The Motion to Clarify, filed in *Alpha*, was factually correct and respected the lower court’s seal order.**

142. Mr. Kline takes exception to ¶¶342-348 of the Panel Report and the Panel’s finding that the Motion to Clarify is evidence of Mr. Kline knowingly deceiving this Court.

143. During the public oral argument in *Alpha*, members of this Court inquired about investigations unrelated to the *Alpha* Petitioners. Panel Report, ¶¶148-149; Kline 1697:11-1701:16. The questions related to live-birth investigations conducted by Mr. Kline’s office. Exhibit 57, at 646-53.

144. Mr. Rucker attempted to state that the record on the unrelated investigations was sealed. Justice Beier interrupted, insisting that he answer questions regarding the live-birth investigations.

145. Discussing the oral argument afterwards, Mr. Kline’s staff were puzzled why the Court would ask questions regarding unrelated investigations. The petitioning clinics provided abortion, not maternity, services. Additionally, a failure-to-report investigation of a hospital is different from one of an abortion clinic. Kline 429:13-436:3, 443:21-445:13, 445:23-447:11,

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<sup>23</sup> See Panel Report, at ¶¶ 342-348 (whether Respondent violated the KRPC “when he stated that he had sought records and information from other mandatory reporters and this effort included subpoenas for records in the second motion to clarify”).