

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 FIVE²³

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,

²³ 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”).

1697:11-1706:16. Mr. Kline's office did not have original jurisdiction to investigate live births. For that reason Mr. Williams referred such cases to local prosecutors. *See* Exhibit N4. Attorney General Stephan's opinion that pregnancy of a minor is not a per se injury clouded enforcement when the pregnancy was ultimately welcome. Kline 445:23-447:11. When the pregnancy is unwanted and results in an abortion, however, suspicion of injury objectively should be greater. *See* Exhibit N, at 8-9.

Unlike termination-of-pregnancy reports (TOPs), mandatory reports of live births to KDHE include the name of the mother.

146. Hospitals are required to report live births to KDHE. Unlike reports by abortion clinics, however, reports of live births include the name of the mother and the name of the father, if known. Kline 429:13-436:3. Because TOP reports do not contain the name of the mother, an investigation of an abortion clinic's failure to report child sexual abuse requires obtaining the actual clinic abortion record. The KDHE live-birth reports, by contrast, contain all the information necessary for referral to local prosecutors. K.S.A. § 65-2409a.

147. Mr. Kline explained why prosecutors do not seek underage live-birth information directly from hospitals. Many such births are in small communities. A subpoena directly to the hospital could tip off the target or cause unnecessary distress. Kline 429:13-436:3, 443:21-445:13, 445:23-447:11.

148. Because the KDHE birth information contains the name of the mother of the child, investigators can easily check for the existence of an SRS child abuse report. Thus, ***no reason exists directly to subpoena the hospital.*** K.S.A. § 65-2409a.

The investigation of live births as contrasted with abortions also implicated particular jurisdictional and evidentiary issues.

149. Because the Office of Attorney General did not have original jurisdiction to prosecute sexual abuse underlying a live birth, Mr. Kline's office referred live-birth information probative of sexual abuse directly to local prosecutors. Kline 429:13-436:3.

150. Mr. Kline decided to clarify for the Court that his office had indeed sought live-birth information submitted by other mandatory reporters. Mr. Rucker was hindered in responding because he suddenly found himself questioned publicly about an unrelated investigation sealed by the lower court. He answered honestly but unavoidably left the impression that live-birth information was not obtained from other mandatory reporters. That information, however, had been obtained from the repository—KDHE. Kline 429:13-436:3; Kline 1697:11-1706:16. The Motion to Clarify legitimately sought to dispel the implication that the Attorney General's interest in investigating failure to report encompassed only abortion clinics.

An existing protective order in the live birth investigation prohibited Mr. Kline from informing this Court that the subpoena was issued to KDHE.

151. Both Mr. Kline and Mr. Rucker were bound by court order not to disclose the subpoena of KDHE live-birth information. The order specifically stated:

....

2. The Attorney General of Kansas is hereby ordered not to disclose further the contents of any file reviewed to any person outside the Office of the Attorney General accept as necessary to further the criminal investigation or as authorized by this Court.

3. The existence of this order and subpoena and any testimony or documents produced pursuant to such are to remain confidential and not to be disclosed to any other person or entity except upon written approval of this Court.

Exhibit 69, at 721 (emphasis added). *See also* Exhibit UUU (same); Kline 606:15-607:19.

152. The Motion to Clarify, therefore, stated, in part: “As part of this criminal investigation and/or inquisition, Mr. Kline has sought records and information from other mandatory reporters besides the petitioners in present mandamus action.” Exhibit 126. This statement is true. The hospitals are mandated to report to KDHE, from whom the Attorney General obtained the information. The subpoena was to obtain information directly provided by mandatory reporters to KDHE.

153. The Motion continued: “This effort has included subpoenas for records relating to live births involving mothers under the legal age of sexual consent.” *Id.* This statement is also true. The live-birth subpoena was to KDHE. *See* Exhibit 126; Kline 604:16-610:4.

154. The Office did subpoena live-birth information. Exhibit 126; Kline 607:5-19.

155. Kansas law requires filing of a birth certificate with KDHE within five days of every live birth. K.S.A. § 65-2409a(a)-(b)(emphasis added). The birth records maintained by KDHE are the birth certificates *from* mandatory reporters. KDHE receives these records, but does not create them. Thus, by subpoenaing KDHE, the Attorney General subpoenaed information supplied by other mandatory reporters.

Although the Attorney General did not directly subpoena the hospitals, he obtained their reports from the live-birth information repository—KDHE.

156. Mr. Kline believed his office was limited in its investigation of a hospital's failure to report sexual abuse by the Stephan Opinion which concluded that the pregnancy of a child does not per se require a mandatory report. Mr. Kline followed the Stephan Opinion in regard to required reporting of births to minors as child sexual abuse. Kline 445:23-447:11. But abortion was different. The clinics were finding "substantial and irreversible" impairment of a major bodily function of the child-mother as a justification for late-term abortion. Additionally, the child was suffering a physically invasive, and otherwise unwanted, medical procedure to end the pregnancy caused by the sexual abuse. Mr. Kline explained: "So the only question was did the mandatory reporter have reason to suspect harm. Where the abortion occurs, he had knowledge of harm. With a pregnancy that's carried to term the argument is there is no harm. It's an entirely different investigation and prosecution." Kline 446:23-447:4.

157. Judge Owens relied on this same distinction in ruling on Dr. Tiller's Motion to Dismiss. He received testimony from Mr. Kline and others on the investigation of the clinics. The Panel Report omits the following from Judge Owens' ruling.²⁴

The defendant also complains that the mandatory reporters that attended live births were not initially investigated. Only late in the investigation did Kline begin to gather information. This, the defense alleges, was an effort to cover their motives of investigating only abortion providers. At least in the case of **live births** there is a record that the child abuse victim visited the mandatory reporter. However, in this case **there is weak, if any evidence that the child was injured by the abuse. In this case, an inference could be made that the pregnancy was not unwanted since the mother chose to give birth rather than seeking an abortion.** The argument would have to be made that the pregnancy

²⁴ Judge Owens resolved the same motion that initiated this proceeding, and heard testimony from many of the same witnesses. The Panel never once quotes from his opinion.

itself was the injury, which would be a much weaker argument for a prosecutor than an unwanted pregnancy.

While there can certainly be suspicion that Kline's opposition to abortions was a motivating factor in investigating Dr. Tiller and Planned Parenthood as possible violators of the mandatory reporting law, it does not rise to the level of clear and convincing evidence. Looking at the decision objectively, a prosecutor could easily make the same choice for the target of his investigation on account of the relative ease in establishing the elements of the crime. A prosecutor would have a legitimate objective in first enforcing the law against the violators that were the "low hanging fruit." **It would be much easier to prove a case against a mandatory reporter that is known to have provided a service to children that have been sexually abused and suffered an injury through an unwanted pregnancy.**

Exhibit N, at 9-10 (emphasis added).²⁵

158. Judge Owens reasons that a case against a hospital mandatory reporter in a live birth situation is "weaker" than a case against an abortion clinic because the "unwanted pregnancy" is evidence of injury. *Id.*

159. Mr. Kline and his office were confused by the Court's live-birth questions. He was aware of the potential for a selective prosecution defense if charges were filed, but was not familiar with any similar theory that could justify limiting investigative activity. *See* Kline 429:13-436:3, 1697:11-1706:16.

160. That subpoena contained a nondisclosure order that was in effect at the time of the *Alpha* oral argument and the filing of the Motion to Clarify. Exhibit 69, at 721.

²⁵ Judge Anderson considered the temporary injunction in *Aid for Women* to be irrelevant to the subpoenas issued to Planned Parenthood and WHCS for much the same reason. This issue also arises in Count II, where, once again, the claim was made that *Aid for Women* is somehow relevant to the subpoena of clinic records for investigative purposes.

161. Even if Mr. Kline's good-faith effort to dispel the confusion about subpoenas for live-birth information was subject to misinterpretation, he did his best to inform the Court, while also taking care to observe the nondisclosure order. In any event, the Motion to Clarify did not result in prejudice to a judicial proceeding because it addressed an investigation wholly unrelated to the proceedings before the Court.

162. Mr. Kline takes exception to the Panel's finding that clear and convincing evidence was presented to support a violation of the KRPC. Panel Report, ¶¶342-348. Mr. Kline also takes exception to the underlying factual findings, including the use of Mr. Rucker's testimony from a proceeding to which Mr. Kline was not a party, and the Panel's failure to find that seeking live-birth records from KDHE is preferable for both investigative and prudential reasons to seeking them directly from the birthing facility. Panel Report, ¶¶ 148-161.

EXCEPTIONS TO FINDING SIX²⁶

Mr. Kline agrees that the evidence does not support a KRPC violation relating to testimony from Mr. Williams about a ten-year-old abortion patient at WHCS.

163. The Panel Report correctly concludes that Mr. Kline was not aware of Mr. Williams' testimony on March 28, 2006 before Judge Anderson. Panel Report, ¶352. Mr. Kline takes exception, however, to the Panel's presentation of Mr. Williams testimony out of context and the implication that Mr. Maxwell and Mr. Williams acted improperly.

²⁶ See Panel Report, at ¶¶ 349-352 (whether Respondent violated the KRPC "when Mr. Maxwell and Mr. Williams failed to inform Judge Anderson that the abuse of the 10 year old had been reported in another state").