

## EXCEPTIONS TO FINDING SEVEN<sup>29</sup>

**Mr. Kline's statements on the O'Reilly Factor did not violate the KRPC. He responded to a question about a significant national issue, and summarized the status of the investigation.**

174. The Panel concludes that Mr. Kline on November 3, 2006, made two statements on the O'Reilly Factor that violated the KRPC. Panel Report, ¶¶353-354. Mr. Kline takes exception to these conclusions.

175. At the time of Mr. Kline's appearance on the O'Reilly Factor the nation was engaged in a significant policy debate about the propriety of requiring abortion clinics to report child sexual abuse and the scope of any such mandatory reporting requirements. Opponents of child abuse reporting argued that mandated reporting invaded the privacy of the child. DeFries Report, Exhibit 142, at 13.

176. Mr. Kline, at that time, as Attorney General of Kansas was engaged in a re-election campaign in which this debate was an issue. Mr. DeFries and Ms. Mudrick write:

This Complaint arises from strenuous legal battles between opposing counsel and was complicated by a very hotly-contested political race. Certainly, it appears that attorneys on all sides took strong stances and used the media, at times, to explain and/or support their positions. However, investigators find no probable cause to believe that Phill Kline's actions violated any rule of ethics.

*Id.* at 13.

177. Mr. DeFries and Ms. Mudrick read the same O'Reilly transcript as the Panel and found no probable cause. Mr. DeFries has served as Chair of the Kansas Bar Association

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<sup>29</sup> See Panel Report, at ¶¶ 353-354 (whether Respondent violated the KRPC "by the statements he made while appearing on the O'Reilly Factor").

committee that investigates ethics complaints against attorneys for longer than he can remember. DeFries 1769:21-1770:10.<sup>30</sup>

178. Just before questioning Mr. Kline, Mr. O'Reilly discussed the mandatory reporting issue on the air with Amy Richards, co-founder of the Third Wave Foundation, a feminist group. Ms. Richards stated that privacy and confidentiality are very important for a ten-to-fifteen-year-old when seeking an abortion. Mr. O'Reilly asked Mr. Kline to respond to the argument that privacy trumps the reporting of child sexual abuse and whether Mr. Kline agrees with him that this position is unfounded.<sup>31</sup>

Well, absolutely. One of the first steps of a rapist, when they have a child victim, and the child is pregnant, is to eradicate evidence of the rape. And that means stopping in at an abortion clinic. And I think it's an absurdity to argue that the privacy of the child, which has already been violated by a rapist, prohibits law enforcement, after they present evidence to a judge, which is what happened in all of these cases and the judge found probable cause to believe the crimes had been committed and subpoenaed the records, somehow that they cannot reveal information . . . and the child rapist is able to go free.

Panel Report, ¶353.

179. Mr. Kline replied to a question about a significant issue of public policy. At the time, no charges had been filed against the abortion clinics. A failure to report case was never

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<sup>30</sup> Mr. DeFries and Ms. Mudrick conducted an extensive investigation and did not find probable cause to proceed on any of the alleged ethical violations. Mr. Hazlett nonetheless formally charged most of the abortion lawyers' allegations.

<sup>31</sup> Since his appearance on O'Reilly, Mr. Kline has learned that Justice Beier identifies with "Third-Wave" feminism. See generally, Carol A. Beier & Larkin E. Walsh, *Is What We Want What We Need, and Can We Get It in Writing? The Third-Wave of Feminism Hits the Beach of Modern Parentage Presumptions*, 39 U. BALT. L.F. 26 (2008).

filed against them. The existence of the subpoenas and the investigation had been public since February, 2005 pursuant to an order of this Court.

180. Mr. O'Reilly then asked about the investigation in Kansas. Mr. Kline answers:

Well, what I can confirm as it relates to our investigation, Bill, is that we have received the medical records in question. First of all, it's important for your listeners to know that women were never under investigation. Their identity never sought. There will be no invasion of privacy. But you cannot enforce prohibitions against late-term abortion without seeing the doctor's notation regarding the evidence or the abortion that was performed, the procedure. We have obtained those records. In every single instance, there was not a late-term abortion performed on a viable child to save the life of the mother. And in every single instance, there was not an abortion performed for a physical reason. So, from that you can infer, as I guess that you have regarding, the reason for the late-term abortion.

Panel Report, ¶353; Exhibit V5.

181. Soon after Planned Parenthood filed its complaint against Mr. Kline in 2006, Mr. Hazlett appointed Lucky DeFries and Beth Mudrick to investigate. The complaint included the claim that Mr. Kline's comments on O'Reilly were unethical. In May, 2008, Mr. DeFries and Ms. Mudrick filed their report with Mr. Hazlett. *See* Exhibit 142.<sup>32</sup> The Panel omits their findings on this issue:

[W]e do not believe that any statements made on the O'Reilly factor "imperiled the privacy of patients" or jeopardized the "law enforcement objectives at the

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<sup>32</sup> The DeFries Report was issued on the eve of the 2008 Republican Primary in which Mr. Kline was a candidate for Johnson County District Attorney. The Report states that Mr. Kline fully cooperated with the investigation and finds no probable cause to believe Mr. Kline violated any provision of the KRPC. Claims of unethical conduct by Mr. Kline were issues in the election. The Disciplinary Administrator did not reveal the existence of the report to Mr. Kline. Its existence of the report was not revealed until mandatory discovery of more than 20,000 pages of documents in the Rucker ethics case in 2010.

heart of the proceedings.” . . . We do not believe that any statements made on the O’Reilly Factor rise to the level of establishing the probable cause necessary to find that any of disciplinary rules have been violated.

Exhibit 142, at 20-21.

182. Judge King also reviewed the O’Reilly issue during the *CHPP v. Kline* hearing held in November and December of 2007. He filed his findings of fact on January 10, 2008. This Court, despite a request, did not provide Mr. Kline with a copy until June. Judge King found that “Judge Anderson concluded that Kline did not say anything in the O’Reilly interview that violated Judge Anderson’s Protective Order.” Exhibit 90, at ¶193.<sup>33</sup> The Panel Report does not reference Judge King’s findings on this issue.

#### EXCEPTIONS TO FINDING EIGHT<sup>34</sup>

**Mr. Kline agrees with the Panel’s conclusion that the handling and storage of the redacted copies of WHCS medical records did not constitute a violation of the KRPC.**

183. The Panel Report properly finds that the handling of the copies of the redacted WHCS records did not constitute a violation of the KRPC. Panel Report, ¶358.

184. In 2007, this Court ordered a sealed hearing in *CHPP v. Kline*, directing Judge David King to make findings of fact on the transfer of the Planned Parenthood records to the Johnson County District Attorney’s Office. Judge King filed written findings (“King Report”) on January 10, 2008.

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<sup>33</sup> Judge King did not find that Mr. Kline violated any ethics rules, nor did he file an ethics complaint against him.

<sup>34</sup> See Panel Report, at ¶¶ 355-358 (whether Respondent violated the KRPC “in the handling, copying, and storage of the redacted WHCS patient medical records”).