

127. Kline's staff was concerned about security at the Johnson County District Attorney's office.

128. District Attorney Morrison and some of his staff were extremely hostile to Attorney General Kline and his staff.

129. Morrison and his transition staff were not cooperative with Kline and his transition staff: Kline was denied a secure storage area at the Johnson County District Attorney's office; Kline was not provided with office space in the District Attorney's office.

Exhibit 90, at ¶¶ 126-129. The Panel Report omits these findings by Judge King.

199. During the transition and subsequently, Judge Anderson maintained the original set of redacted records in his possession, resisting the efforts of Attorneys General Morrison and Six to have those records returned to the criminal defendants. "The medical records held by the court," he informed this Court, are in a pristine, redacted condition which possess intrinsic evidentiary value" Exhibit U5, at 54. In light of the demonstrated hostility of Mr. Morrison to Mr. Kline and his investigation, personnel of the incoming District Attorney prudently protected their investigative work product.

EXCEPTIONS TO FINDING NINE³⁵

Mr. Kline did not violate the KRPC regarding the Status and Disposition Report. He did inform Judge Anderson that the redacted copies of the WHCS records were taken to Johnson County.

200. Mr. Kline takes exception to ¶¶ 359-370 of the Panel Report and the conclusion that he violated KRPC 3.3(a)(1) and 5.1.

³⁵ See Panel Report, at ¶¶ 359-370 (whether Respondent violated the KRPC "by failing to update the status and disposition report or otherwise inform Judge Anderson that the redacted WHCS patient medical records were taken to Johnson County").

201. The Panel Report asks whether Mr. Kline “fail[ed] to . . . inform Judge Anderson that the redacted WHCS patient medical records were taken to Johnson County.” Panel Report, p. 156.

202. Judge King found:

After Attorney General Kline obtained the CHPP and WHCS records on October 24, 2006, he asked Judge Anderson to allow him to share the fruits of the investigation with expert consultants and other law enforcement. He **specifically discussed sharing the information with prosecutors in Sedgwick, Johnson and Shawnee Counties**. Judge Anderson approved the request telling Kline he could share the records as he’d proposed.

Exhibit 90, at ¶43 (emphasis added).

203. During the evidentiary hearing in *CHPP v. Kline*, Judge Anderson testified: “Once I released . . . copies of those records to the prosecutor, I took the position that I really couldn't control much how he was going to disseminate those, because obviously he had experts he wanted to talk to and perhaps other prosecutors.” Exhibit B7, at 38. The Panel Report omits this testimony.

204. The Panel Report also omits the following testimony by Judge Anderson:

Q. [By Mr. Stegall] In your mind did the non-disclosure order restrict in any way that the Attorney General's Office could use these records in the investigation and prosecution of crimes?

A. The answer to that is no. . . . I said that is a call that is up to you, that I believe I had redacted the records as required to identify [sic] patient information. It was now in his hands to go about his prosecution in the way he saw best.

Q. Okay. So the handling of the redacted records in the investigation and prosecution was an executive function; is that correct?

A. I considered it so.

Exhibit B7, at 52.

205. In the inquisition, Attorney General Morrison asked the court to compel Mr. Kline to surrender his copies of the redacted Planned Parenthood records and other investigation materials. On April 18, 2007, Judge Anderson ruled:

Following the general election [in 2006], then Attorney General Phill Kline discussed with the Court his intention to continue with the inquisition through the remainder of his term of office. Among other things, Kline (and/or his assistants) informed the Court that he planned to enlist the help of expert witnesses and possibly district attorneys in Shawnee, Sedgwick and Johnson Counties with respect to the filing of criminal charges. Kline advised the Court that referrals to other law enforcement agencies would entail disclosing the redacted medical records. **Mr. Kline sought advice from the Court on any additional requirements for management of the medical records.**

The Court took the position with Mr. Kline that as chief executive law enforcement officer he had authority to engage other agencies in his investigation and share the evidence. The Court did not establish additional requirements for management of the medical records, because the records had been de-identified .as required by the protective order.

Exhibit 132, at 3582 (emphasis added).

206. Judge Anderson further stated:

[T]he Court was informed of Attorney General Kline's intention to refer evidence to local prosecutors. In response to such announcement, **this Court told Kline that such prosecutorial decisions on how to investigate and prosecute claims, including what experts and law enforcement officials would be engaged, were not considered to be within the scope of this Court's responsibility. This Court told Kline the Court would not join in such discussion or provide advice.**

Id. at 3584 (emphasis added).

207. Judge Anderson has consistently stated that Mr. Kline had the inherent authority to refer or share the redacted records to forward the investigation. “I didn’t think it was the judge’s role to decide some of these prosecutorial judgments” Anderson 759:16-18.

208. Judge King’s findings are of a similar tenor.

On December 8, 2006, during a meeting in connection with the investigation, Kline told Judge Anderson for the first time of his intent to transfer records to the Johnson County District Attorney. During this meeting, Judge Anderson asked Kline about taking the Johnson County District Attorney’s position when he left the Attorney General’s office and how that would affect the investigation. Kline said “it would be seamless.” This was the last discussion Judge Anderson had with Kline until January 2007.

Exhibit 90, at ¶76.

209. During a hearing on April 11, 2007, Judge Anderson commented on Mr. Kline’s intention to refer redacted records to Johnson County. “[T]he Court indicated how the case was going to be prosecuted would be determined by the executive branch engaging whatever law enforcement officials needed to be engaged or brought into the investigation.” Exhibit 82, at 1024:6-13.

210. Sometime after Judge Anderson ordered the return of Mr. Kline’s copies of the redacted Tiller records, he informed the Disciplinary Administrator’s investigator that he ordered the return to prevent production of the documents pursuant to a potential legislative subpoena. Exhibit G9, at 8-9.³⁶ Judge Anderson never testified that Mr. Kline did not have

³⁶ The Hearing Panel denied admission of investigator Morgan’s report on relevancy and hearsay grounds. See 1856:20-1863:25, 3152:24-3157:25. Mr. Kline maintains this decision is in error.

authority to possess copies of the redacted Tiller records, much less summaries. Rather, Judge Anderson consistently testified that Mr. Kline had that inherent right, had a legitimate basis for possession of the documents, and refused to require return of the summaries.

211. Nonetheless, Mr. Kline and his office kept the Court informed of his plans and communicated with the court much more than in a normal inquisition. Anderson 764:10-17.

212. In a pleading before this Court, Judge Anderson stated:

[A] prosecutor who obtains information during an inquisition that could be useful in the prosecution of crime is generally left to pursue the prosecution in the manner the prosecutor deems most appropriate, including sharing the information with other prosecutors to assist in the prosecution. Because of the separation of powers doctrine and the executive nature of the prosecution of crime, it is not up to the District Court to determine with whom the prosecutor should share information.

Exhibit Z5, at 3-4. He explained that “the critical question is not whether Kline as Attorney General had authority to refer medical records and other investigation information to other prosecutors, because surely he did – that is a quintessential function as a prosecutor” *Id.* at 5.³⁷

³⁷ Despite this evidence, Mr. Hazlett alleged that Mr. Kline violated the KRPC by failing to obtain Judge Anderson’s permission to transfer the redacted copies of the WHCS records. See Hazlett letter of Dec. 29, 2010 (Allegation 11: “Taking the Tiller files without court approval”). The Panel did not address this claim, thus discarding it. The Panel instead focused on the alleged failure of Mr. Kline to update the status and disposition report, of which he was unaware. Mr. Kline also directly informed Judge Anderson on April 9, 2007, that he possessed redacted working copies of the WHCS records.

213. Mr. Kline agreed with Judge Anderson that prosecutors have inherent authority to share the fruits of a subpoena to further the prosecution of crime. He requested Judge Anderson's guidance out of an abundance of caution.

- Q. [By Mr. Hazlett] I'm asking you if you asked someone about the Tiller records being in Johnson County, because you had to realize that that was going to be a controversial decision – or transfer, did you not?
- A. No. Law enforcement – in fact, this file is full of sharing of information in law enforcement gained from this inquisition. We call county attorneys in other counties. We do that all the time. Mr. Morrison and I were switching offices. And, in fact, Mr. Morrison's position he took after he assumed office was only a district attorney had the jurisdiction to file charges. I was leaving [a] set for him, I would have a set, we'd continue the investigation. We had legitimate theories and Mr. Anderson – Judge Anderson speaks to that in the record somewhere. I can't tell you right now. I think he tells Ms. Dersch that this showed a cooperation and a collaborative approach to these things between Planned Parenthood of potential conspiracy. And I eventually informed the Judge of that and I took the Tiller records to him to show him. I then at this time – this is April, I believe.

Kline 509:1-510:1.

214. Judge Anderson also informed this Court that compliance with Attorney General Morrison's request to return evidence to the clinics "would unacceptably increase the risk that evidence could be lost, destroyed or compromised while active investigations and prosecutions are ongoing. It is difficult to understand how this could benefit the citizens of Kansas." Exhibit U5, at 2.³⁸

³⁸ Judge Anderson criticized Attorney General Morrison's "erroneous" suggestion that the Court had compromised privacy. Morrison, he stated, "obfuscates the nature of the documents held

215. Judge Anderson later indicated he ordered Mr. Kline to return the redacted working copies of the WHCS records to avoid the possibility of a legislative subpoena. Kline 1853:21-1854:8.

216. In anticipation of the switching of offices, Judge Anderson requested Mr. Maxwell to prepare a report identifying the location of the inquisition records. The Status and Disposition Report that Mr. Maxwell on January 8, 2007, was prepared prior to the copying of the redacted WHCS records for transfer to Johnson County. Exhibit 78; Maxwell 1406:8-1409:3. As a result, the Report did not disclose that copies of the redacted WHCS records were also being transferred to Johnson County. *Id.*

217. Mr. Kline was not aware of the **content** of the Status and Disposition Report. Judge King states:

Kline was not familiar with the content of the Status and Disposition Report. He was not even aware that Judge Anderson had requested an accounting for the location of the files. There is no indication that Maxwell advised Kline of the existence or content of the Status and Disposition Report.

Exhibit 90, at ¶159.

218. “It is reasonable to conclude,” Judge King wrote, “that the initial failure to disclose in the Status and Disposition Report that WHCS records were being taken to Johnson County was not a deliberate attempt to deceive, or make misrepresentations to, Judge Anderson.”

by the Court,” and “misunderstands or is misrepresenting the true nature of the records”. Exhibit Z5, at 2.

Exhibit 90, at ¶158. The Panel quotes ¶159 of the King Report in ¶ 362 n.15 of its own report, but omits the finding by Judge King from ¶158.

219. The Panel takes issue with Judge King's finding in ¶159 that Mr. Kline was not familiar with the Status and Disposition Report. Panel Report, ¶ 362 n.15. The Panel Report cites a letter Mr. Kline wrote to Rick Guinn on January 12, 2007, surmising that Judge King, though aware of Mr. Kline's letter, "must not have realized [its] significance" *Id.*

220. Judge King, however, references the entire letter in his report prior to making the finding of fact in ¶159. Mr. Kline testified at hearing regarding this letter:

- Q. [By Mr. Hazlett] Were you aware at this point in time in early December – or during December of 2006 that Judge Anderson and Steve Maxwell had a conversation about having some sort of document which ended up being the status and disposition report, but some sort of document that indicated what records were going to be where and where they were going to be?
- A. The first – as I recall, Mr. Hazlett, and again this is awhile back. The first reference to some kind of report I recall is soon after I took office I think I had received a letter. I don't know if it was from Mr. Morrison or Ms. Dersch, maybe it was a phone call, I can't recall, and it was something along the lines of where are the records. And so I asked Mr. Maxwell and he said a report has been filed with Judge Anderson. And I wrote a letter back saying that a report had been filed with Judge Anderson. And I think I said the medical records, because what I've later learned is staff didn't want to leave copies of the medical records in the AG's office and so the information to Mr. Morrison was you can go to Judge Anderson and get a copy. And Judge Anderson notified him of that on January 9th, I believe, or the 10th that he could get a copy from the Court.

Kline 501:13-502:15.

221. The January 12 letter neither attaches the Status and Disposition Report, nor mentions it by name, referencing only a generic “report” filed with the Court. Exhibit 81. Mr. Kline, therefore, takes exception to the Panel’s unsupported statement in ¶362 that Mr. Kline was “familiar” with the Status and Disposition Report. Mr. Kline also takes exception to the Panel’s finding that the letter to Mr. Guinn clearly and convincingly demonstrates that Judge King’s finding was incorrect. The Panel does not offer any additional evidence other than what was considered by Judge King. *See* Panel Report, ¶¶ 359-370.

222. Mr. Kline asked Mr. Maxwell about the location of the records. He replied that a report was filed with Judge Anderson. Kline 504:14-17. Based on this conversation, Mr. Kline informed Mr. Guinn that “a report” was available from Judge Anderson. Exhibit 81. The letter does not demonstrate particular knowledge about the Status and Disposition Report, only that a “report” exists. *Id.* Judge Anderson later asked Mr. Morrison to update the report about any documents retained by a special prosecutor who had reviewed pleadings.

Q. [By Mr. Holbrook] Did you ever ask Mr. Morrison to either personally update or have one of his staff update the status and disposition report that had been earlier prepared and submitted to you by Mr. Maxwell?

A. [Judge Anderson] . . . I asked Mr. Morrison to update.

Q. Did he?

A. No.

Anderson 762:17-763:3. *See* Exhibit 80, at 1; Dersch 156:19-157:2.

223. In April, 2007, Mr. Kline on his own initiative informed Judge Anderson that his office possessed redacted copies of the WHCS records. Judge Anderson testified that “he just showed me one of these records and I said, ‘where did you – where’d you get that?’ And he said, ‘well, we took those records, we have those records, thought you knew,’ or something of that nature. He was very matter of fact about it.” Anderson 669:19-24.

224. Investigator Terry Morgan quotes Judge Anderson: “If Phill Kline had informed him of the [late-term abortion] conspiracy theory for the need of the records, he would have granted Kline’s request. There would have been probable cause on three of the records.”

Exhibit G9, at 7. The Morgan Report continues:

The following question was asked of Judge Anderson: If you did not have a problem with Phill Kline making copies of the abortion records, why did you order him to return the Wichita abortion records from Dr. Tiller’s office? Judge Anderson related the following information: In his (Judge Anderson’s) conversation with Phill Kline [on April 9, 2007], Phill Kline related that the legislative House and State of Affairs committee was going to subpoena the Wichita records. Judge Anderson said that “there would have been too many cooks looking at the records.” He did not want the records being subpoenaed by the House and State of Affairs committee. Phill Kline approached him reference the aforementioned advising that Kline was aware that the records were under a protection order and that further redaction may be required before the records were released to the legislative House and State of Affairs committee. At the time Judge Anderson informed Phill Kline that he was not going to release the records to the committee and that the records were to be returned to him. . . . **He (Judge Anderson) did not have a problem with copies being made for prosecution purposes, but he did have a problem with the copies of the records being given to the legislative committee under subpoena.**

Exhibit G9 at 8 (emphasis added). The Supreme Court noted Judge Anderson’s concern about a legislative subpoena. “Judge Anderson would later testify that Kline mentioned to him in this

time period that Kline expected to be subpoenaed to testify by a legislative committee. In response, Judge Anderson told Kline ‘those records are not to go anywhere.’” *CHPP v. Kline*, 287 Kan. 372, 385 197 P.3d 370 (Kan. 2008).

225. Mr. Morgan relates that Judge Anderson did not object to copying of the redacted records. “He stated several times he had no problem if the Attorney General made extra copies of the records after they had been redacted. **The Attorney General did not have to have his permission or advise him before making extra copies of the records.**” *Id.* at 6 (emphasis added).

226. Mr. Hazlett objected to the admission of the Morgan Report on relevancy and hearsay grounds. *See* Kline 1845:10-1864:5. Mr. Morgan relied on the report during his testimony, confirming the contents without objection, and also his participation in its preparation. Morgan 1939:15-1945:3. This official investigative report qualifies as a business or public record exception to hearsay. Relevance is not an issue. Mr. Kline takes exception to the Panel ruling denying admission of the Morgan Report.³⁹

227. Confirming the Morgan Report interview with Judge Anderson, Mr. Kline stated:

Judge Anderson did not provide advice, did not see it within his authority to provide advice, did not restrict the dissemination and allowed us to have whatever copies we wanted of this evidence to pursue what we deemed fit, which is well within the right of the executive branch. He has never taken a position contrary to that and this confirms it.

³⁹ The Morgan Report is in the record as Exhibit I to Mr. Kline’s Memorandum in Support of Motion for Reconsideration (June 29, 2010). *See* Panel Report, ¶ 15 (Document 27).

Kline: 1947:1-9.

228. Mr. Kline disagreed with Judge Anderson's order to return copies of redacted WHCS records. He believed that law enforcement had discretion to share the fruits of a subpoena. He understood Judge Anderson's concern about a possible legislative subpoena, but disliked giving up records that would end a conspiracy investigation. Mr. Morrison was unlikely to make available the copies in his possession. Kline 1853:7-1854:16. Because Planned Parenthood, one of the co-conspirators, was located in Johnson County, Mr. Kline had jurisdiction to file charges there. Despite his disappointment, he complied with the order to return his copies of the redacted records. Judge Anderson stated that "he was sure it was hard for Mr. Kline to give up the abortion records that he had fought so long and hard to obtain." Exhibit G9, at 8.

229. Mr. Kline did retain work product that included detailed summaries of the records in order to have the necessary information to seek assistance from Attorney General Morrison. Kline 568:9-569:14.

230. On May 25, 2007, Mr. Kline wrote to Mr. Morrison requesting copies of three specific WHCS redacted files relevant to the investigation of conspiracy to commit illegal late-term abortions.⁴⁰ The request was specific and detailed, demonstrating that Mr. Kline

⁴⁰ Judge Anderson later informed Mr. Morgan that this evidence provided "probable cause" for Mr. Kline to have the WHCS records as District Attorney of Johnson County. See Exhibit G9, at 7.

maintained summaries of the records. On June 1, 2007, Assistant Attorney General Veronica Dersch responded refusing cooperation. *See also* Exhibit S5.

EXCEPTIONS TO FINDING TEN⁴¹

231. Mr. Kline concurs with the Panel's conclusion that retaining the summaries did not violate the KRPC. Panel Report, at ¶374.

EXCEPTIONS TO FINDING ELEVEN⁴²

Mr. Kline did not deceptively answer questions about the WHCS summaries. The questions were asked in three separate proceedings spanning more than one year and related to a three-year period of time. Once he knew, Mr. Kline consistently revealed that his office maintained such summaries.

232. The Panel finds that Mr. Kline knowingly provided false material evidence, KRPC 3.3(a), and engaged in dishonest and deceitful misrepresentation. KRPC 8.4(c). *See* Panel Report, ¶¶379-380.

233. On November 20, 2007, during the sealed hearing in *CHPP v. Kline*, counsel for Planned Parenthood questioned Mr. Kline:

Q. [by Mr. Irigonegaray] Are there any summaries of Doctor Tiller's records left in Johnson County?

⁴¹ *See* Panel Report, at ¶¶ 371-374 (whether Respondent violated the KRPC “when he failed to return the summaries of the redacted WHCS patient medical records”).

⁴² *See* Panel Report, at ¶¶ 375-380 (whether Respondent violated the KRPC “when he testified before Judge King that he had three summaries of redacted WHCS patient medical records when he actually had 62 summaries of redacted WHCS patient medical records and when he stated to the Kansas Supreme Court that he did not have any summaries of redacted WHCS patient medical records”).