Cited
As of: September 26, 2016 2:02 PM EDT

In re Brizzi

Supreme Court of Indiana

March 12, 2012, Decided; March 12, 2012, Filed

No. 49S00-0910-DI-425

Reporter
962 N.E.2d 1240; 2012 Ind. LEXIS 25

IN THE MATTER OF: CARL J. BRIZZI, Respondent.

Prior History: [**1] Attorney Discipline Action. Hearing Officer Charles D. O'Connor.

Core Terms

substantial likelihood, adjudicative process, Officer's, murder, probable cause, public record, media, materially, hearing officer, safe harbor, condemnation, prejudicing, blood, truck, heightening, cases, press release, convincing, charges, alleged statement, misconduct, convicted, comments, contents, presumed, wrap, criminal defendant, actual prejudice, caliber handgun, death penalty

Case Summary

Procedural Posture

The Indiana Supreme Court Disciplinary Commission filed a verified complaint for disciplinary action against respondent attorney, which alleged that he had engaged in public misconduct by making certain public statements as a prosecutor.

Overview

The prosecutor made public statements involving murder cases. He was later charged with violating Ind. R. Prof. Conduct 3.6(a) and Ind. R. Prof. Conduct 3.8(f). In entering a public reprimand, the supreme court determined that Ind. R. Prof. Conduct 3.6(a) and Ind. R. Prof. Conduct 3.8(f) did not require a showing that there was actual prejudice suffered by the comments. Rather, the substantial likelihood applied under both rules. The attorney here made several statements that were rebuttably presumed to have a substantial likelihood of materially prejudicing an adjudicative proceeding under Ind. R. Prof. Conduct 3.6(d). There was nothing in the record to rebut the presumption in this case. There was a safe harbor under Ind. R. Prof. Conduct 3.6(b)(2) for information contained in a public record. This referred to public government records, which could have included a probable cause affidavit. With regards to the statements made in this case, it was unclear where the content of the affidavit ended and the attorney's own assessment of the matters began. Finally, the statements were not meant to serve a law enforcement purpose under Ind. R. Prof. Conduct 3.8(f).

Outcome

A public reprimand was imposed.

LexisNexis® Headnotes

Legal Ethics > Professional Conduct > Tribunals

HN1 See Ind. R. Prof. Conduct 3.6(a).

Legal Ethics > Prosecutorial Conduct

HN2 See Ind. R. Prof. Conduct 3.8(f).

Evidence > Burdens of Proof > Clear & Convincing Proof

Legal Ethics > Sanctions > Disciplinary Proceedings > Appeals

Legal Ethics > Sanctions > Disciplinary Proceedings > Hearings

HN3 The Indiana Supreme Court Disciplinary Commission carries the burden of proof to demonstrate attorney misconduct by clear and convincing evidence. The review process in disciplinary cases involves a de novo examination of all matters presented to the court, including review not only of the hearing officer's report but also of the entire record tendered in the case. The hearing officer's findings receive emphasis due to the unique opportunity for direct observation of witnesses, but the Indiana Supreme Court reserves the right to make the ultimate determination.

Legal Ethics > Professional Conduct > Tribunals

Legal Ethics > Prosecutorial Conduct

HN4 Ind. R. Prof. Conduct 3.6 and Ind. R. Prof. Conduct 3.8 do not require a finding that an otherwise improper statement cause actual prejudice to a criminal defendant or to an adjudicative proceeding. Rather, Ind. R. Prof. Conduct 3.6(a) requires a substantial likelihood of materially prejudicing an adjudicative proceeding, and Ind. R. Prof. Conduct 3.8(f) requires a substantial likelihood of heightening public condemnation of the accused. Even if the passage of time, preventative measures by the trial court, and other factors prevent actual prejudice from occurring in a particular case, it does not necessarily mean that a prosecutor's statements did not meet the "substantial likelihood" standard when made. In considering the propriety of a prosecutor's extra-judicial statement, the court determines the likelihood that a particular statement will cause prejudice at the time made, not whether, in hindsight, it actually worked to the detriment of a defendant.

Evidence > Inferences & Presumptions > Presumptions

Legal Ethics > Professional Conduct > Tribunals

HN5 The following types of statements are rebuttably presumed to have a substantial likelihood of materially prejudicing an adjudicative proceeding under Ind. R. Prof. Conduct 3.6(d): statements concerning the character, credibility, reputation or criminal record of a suspect in a criminal investigation; statements concerning the performance or results of any examination or test or the identity or nature of physical evidence expected to be presented; any opinion as to the guilt or innocence of a defendant or suspect in a criminal case; and the fact that a defendant has been charged with a crime unless there is included a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

Legal Ethics > Professional Conduct > Tribunals

Legal Ethics > Prosecutorial Conduct

HN6 Ind. R. Prof. Conduct 3.6 applies to all attorneys, not just to prosecutors. Ind. R. Prof. Conduct 3.8(f) supplements Ind. R. Prof. Conduct 3.6. In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. A prosecutor's opinion of guilt is particularly likely to create prejudice, given that his or her words carry the authority of the government and are especially persuasive in the public's eye.

Legal Ethics > Professional Conduct > General Overview

HN7 See Ind. R. Prof. Conduct 3.6(b)(2).

Legal Ethics > Professional Conduct > Tribunals

HN8 The phrase "public record" in Ind. R. Prof. Conduct 3.6(b)(2) refers only to public government records, i.e., the records and papers on file with a government entity to which an ordinary citizen would have lawful access. "On file" does not mandate such formalities as file stamping or entry on a case docket. A more expansive concept of a public record that includes the unfiltered and untested contents of all publicly accessible media would permit the public record safe harbor to swallow the general rule of restricting prejudicial speech.

Criminal Law & Procedure > Commencement of Criminal Proceedings

Legal Ethics > Professional Conduct > Tribunals

Legal Ethics > Prosecutorial Conduct

HN9 A probable cause affidavit falls under the Attorney Grievance Committee v. Gansler definition of "public record" so long as it is on file with a government entity to which an ordinary citizen has lawful access. However, Gansler held, and the Indiana Supreme Court concurs, that to receive the protection of the public record safe harbor, a lawyer may not provide information beyond quotations from or references to the contents of the public record. Moreover, prosecutor must make clear that what is being disclosed is, in fact, the contents of the probable cause affidavit or other identified public document so the statements cannot be misunderstood to be the prosecutor's own opinion about the evidence or the suspect's guilt.

Legal Ethics > Professional Conduct > Tribunals

HN10 See Ind. R. Prof. Conduct 3.6(b)(2).

Evidence > Inferences & Presumptions > Presumptions

Legal Ethics > Prosecutorial Conduct

HN11 Ind. R. Prof. Conduct 3.8(f) permits a prosecutor

to make statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, even if they might heighten public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. The inevitable negative consequences are why the announcement of the fact that a defendant has been charged with a crime is presumptively prejudicial unless accompanied by a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty. Ind. R. Prof. Conduct 3.6(d).

Counsel: ATTORNEY FOR THE RESPONDENT: Kevin P. McGoff, Indianapolis, Indiana.

ATTORNEYS FOR THE INDIANA SUPREME COURT: DISCIPLINARY COMMISSION, G. Michael Witte, Executive Secretary, David B. Hughes, Staff Attorney, Indianapolis, Indiana.

Judges: All Justices concur.

Opinion

[*1241] Per Curiam.

We find that Respondent, Carl J. Brizzi, engaged in attorney misconduct by making public statements as a prosecutor that had a substantial likelihood of materially prejudicing adjudicative proceedings and a substantial likelihood of heightening public condemnation of the criminal defendants. For this misconduct, we find that Respondent should receive a public reprimand.

This matter is before the Court on the report of the hearing officer appointed by this Court to hear evidence on the Indiana Supreme Court Disciplinary Commission's "Verified Complaint for Disciplinary Action," and on the post-hearing briefing by the parties. Respondent's 1994 admission to this state's bar subjects him to this Court's disciplinary jurisdiction. See IND. CONST. art. 7, § 4.

[*1242] I. Background

A. The Commission's Allegations.

Respondent was the prosecuting attorney of Marion County, having been **[**2]** elected in 2002 and re-elected in 2006. During Respondent's two terms, the Prosecutor's Office filed close to 100 murder cases, including five death penalty cases. The Commission charged Respondent with the following two counts of misconduct relating to public statements concerning murder cases.

Count 1. Respondent conducted a press conference on April 10, 2008, announcing the filing of a murder charge against Bruce Mendenhall for the murder of Carmen Purpura, who was last seen at an Indianapolis truck stop. Mendenhall had murder charges pending in Alabama and Tennessee, and he had been previously convicted of murder in Tennessee. According to media reports, Respondent's statements included the following:

- DNA testing of blood taken from Purpura's parents matched blood inside the cab of Mendenhall's truck.
- "When the officer opened up the cab of the truck, you can imagine his surprise, because the cab of the truck was literally awash with blood." Purpura's blood "soaked" the seats of Mendenhall's truck.
- Enough blood matching the DNA of Purpura's parents was found inside the cab of Mendenhall's truck to determine that she could not possibly be alive.
- The "DNA analysis of [the blood] **[**3]** shows that it's not just the blood of one victim, but the blood of several victims."
- The victims were shot after their heads were wrapped in plastic wrap and duct tape.
- A .22 caliber handgun used by Mendenhall in the killings was found in his truck.
- Mendenhall had admitted to the police when arrested that Purpura had been shot in the back of the head at the Indianapolis truck stop, then left inside a vehicle parked at a nearby restaurant, but that he denied being the murderer.
- Respondent was confident that he had enough evidence to convict Mendenhall.
- Respondent was "working with the other jurisdictions to see the quickest way and the best way to punish [Mendenhall] with the ultimate punishment - a capital sentence."

Purpura's body has never been discovered. Nothing further has occurred in the Indiana prosecution because Indiana is deferring to the other states' prosecutions.

Count 2. On or about June 1, 2006, seven family members, including three children, were discovered murdered in their east side Indianapolis home. The County Prosecutor's Office issued a press release on June 6, 2006, after Desmond Turner and James Stewart were charged with the murders. The press release included **[**4]** the following:

> Brizzi said, "According to the probable cause affidavit, Desmond Turner and James Stewart thought there was a large amount of money and drugs at 560 North Hamilton Street. They weren't going to let anyone or anything get in the way of what they believed to be an easy score. There was no money in that house. There were no drugs. Seven bodies were carried out, including those of three children. I would not trade all the money and drugs in the world for the life of one person, let alone seven. Turner deserves the ultimate penalty for this crime."
>
> **[*1243]** Regarding the swiftness with which the death penalty was filed, Brizzi said "The evidence is overwhelming. There are several aggravators present, any one of which would merit the death penalty. To do otherwise would be a travesty."

The Charges. The Commission charged Respondent with violating the following Indiana Professional Conduct Rules:

> Rule 3.6(a): ***HN1*** "A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of **[**5]** materially prejudicing an adjudicative proceeding in the matter."
>
> Rule 3.8(f): ***HN2*** "The prosecutor in a criminal case shall . . . except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused . . . ."

B. The Hearing Officer's Report.

Count 1. The hearing officer concluded for several reasons that the Commission had not met its clear and convincing burden of proof that Respondent had violated the rules charged in Count 1. The following reasons are based on the hearing officer's perception of weakness in the evidence that Respondent actually made some of the statements at issue:

> • The statements that "the victims were shot after their heads were wrapped in plastic wrap and duct tape," that Respondent "was confident that he had enough evidence to convict Mendenhall," and "that a .22 caliber handgun used by Mendenhall in the killings was found in his truck" do not appear as a quotation and Respondent does not recall making these statements.
>
> • Respondent's public comments, **[**6]** while serving as prosecutor, have been misquoted in the media on a number of occasions.

Hearing Officer's Report at 4, 6. The hearing officer also posited the following bases for his conclusion that Respondent had not violated the rules charged with respect to some of the statements:

> • The statements concerning DNA analysis, plastic wrap, a .22 caliber handgun, and the large amount of blood discovered were previously documented in the media and/or the probable cause affidavit. "Thus, these statements were based on publicly available information and are protected by the safe harbor provision in Rule 3.6(b)."
>
> • Although the statements about punishing Mendenhall with the ultimate punishment may not have been necessary to inform the public of the nature and extent of Respondent's actions as prosecutor, and although Respondent knew or should have known the statements would be disseminated by means of public communication, the evidence does not meet the clear and convincing standard required to conclude that these comments had a substantial likelihood of heightening public condemnation of Mendenhall or would materially prejudice an adjudicative proceeding.

Hearing Officer's Report at 13.

Count **[**7]** 2. The Turner and Stewart cases involved Hispanic victims and African-American suspects, resulting in some racial tension in the community. Media coverage of the cases was constant and extensive, and news cameras were present for nearly all court proceedings. Eventually, **[*1244]** the presiding judge,

Judge Robert R. Altice of the Marion Superior Court, told both sides to stop commenting about the cases to the media, and the parties agreed. Judge Altice remained concerned about the potential publicity issue and maintained statistics concerning potential jurors who were questioned about pre-trial publicity and their knowledge of the cases.

While Turner's murder case was pending, additional charges of assault and battery on corrections officers were brought against Turner, which resulted in three jury trials occurring prior to Turner's murder trial. Judge Altice presided over each case, and Turner was convicted in each case. Turner ultimately waived his right to a trial by jury in the murder case in exchange for dismissal of the death penalty charge. Turner was convicted of the murder charges during a bench trial in October 2009. Stewart was convicted of murder at a jury trial in December 2009.

The **[**8]** hearing officer concluded that the Commission had not met its burden of proof concerning the charges in Count 2, reasoning:

> • Although certain statements in the press release were not necessary to inform the public about the nature and extent of the Respondent's actions as prosecutor, the evidence was not clear and convincing to prove a substantial likelihood of heightening public condemnation of Turner and Stewart or of materially prejudicing an adjudicative proceedings in the matter.
>
> • The delay between the June 6, 2006, statements and the trial dates for Turner and Stewart (mid to late 2009) indicated an extremely low likelihood, if any, that substantial prejudice occurred.
>
> • Judge Altice had no knowledge of any statements alleged in Count 2 of the verified complaint until requested to testify in this matter.
>
> • Pre-trial publicity in the Stewart and Turner jury trials did not affect the court's ability to select unbiased jurors in Turner's three jury trials for battery or in Stewart's jury trial for murder.
>
> • Turner ultimately waived his right to a trial by jury in his murder case in exchange for dismissal of the death penalty charge.

Hearing Officer's Report at 10, 14.

II. Discussion

A. **[**9]** Burden of Proof and Standard of Review.

HN3 The Commission carries the burden of proof to demonstrate attorney misconduct by clear and convincing evidence. See Ind. Admission and Discipline Rule 23(14)(h); Matter of Siegal, 708 N.E.2d 869, 870 (Ind. 1999). The review process in disciplinary cases involves a *de novo* examination of all matters presented to the Court, including review not only of the Hearing Officer's report but also of the entire record tendered in the case. The Hearing Officer's findings receive emphasis due to the unique opportunity for direct observation of witnesses, but this Court reserves the right to make the ultimate determination. *See* Matter of Kern, 555 N.E.2d 479, 480 (Ind. 1990).

B. Disputed Facts Regarding Respondent's Alleged Statements.

Count 1. In Respondent's answer to the paragraph of the Commission's verified complaint setting forth the statements alleged in Count 1, Respondent stated he was without sufficient knowledge to admit or deny the allegation. Respondent testified that he did not recall making at least some of the specific statements alleged, and the hearing officer found that Respondent's **[*1245]** public comments were misquoted in the media on a number of **[**10]** occasions. We defer to the hearing officer's conclusion that the Commission did not meet the demanding clear and convincing evidence standard that Respondent made the statements alleged in Count 1. For future guidance, however, the Court will address below the hearing officer's conclusions that the statements, if made, did not violate the rules charged.

Count 2. The underlying facts relating to this count are, for the most part, undisputed. There is no dispute regarding the contents of the official press release at issue, and Respondent accepts responsibility for the content of all communications made by his staff and attorneys acting under his direction while he was serving as prosecutor. The primary factual issue is the extent to which those statements, if improper, were substantially likely to cause prejudice to the criminal defendants and/or to an adjudicative proceeding. After examining the results of jury questionnaires and other evidence, the hearing officer found that pre-trial publicity did not actually place Stewart or Turner in grave peril and it did not actually affect the trial court's ability to select unbiased jurors. Hearing Officer's Report at 14. We accept these findings **[**11]** that **no actual prejudice** resulted from Respondent's statements. For the reasons below, however, we do not agree with his

finding that there was insufficient evidence to prove **a substantial likelihood** of heightening public condemnation of Turner and Stewart or of materially prejudicing an adjudicative proceeding.

C. Actual Prejudice vs. Substantial Likelihood of Prejudice.

In concluding that Respondent had committed no misconduct, the hearing officer considered highly relevant his finding that the Commission made no showing that any of the criminal defendants suffered actual prejudice from the statements at issue. ***HN4*** The rules at issue, however, do not require a finding that an otherwise improper statement cause **actual prejudice** to a criminal defendant or to an adjudicative proceeding. Rather, Rule 3.6(a) requires "**a substantial likelihood** of materially prejudicing an adjudicative proceeding," and Rule 3.8(f) requires "**a substantial likelihood** of heightening public condemnation of the accused." (Emphasis added.) Even if the passage of time, preventative measures by the trial court, and other factors prevent actual prejudice from occurring in a particular case, it does not necessarily mean **[**12]** that a prosecutor's statements did not meet the "substantial likelihood" standard when made. In considering the propriety of a prosecutor's extra-judicial statement, the court determines the likelihood that a particular statement will cause prejudice at the time made, not whether, in hindsight, it actually worked to the detriment of a defendant. *See* Attorney Grievance Commission v. Gansler, 377 Md. 656, 835 A.2d 548, 571 (Md. 2003).

HN5 The following types of statements are rebuttably presumed to have a substantial likelihood of materially prejudicing an adjudicative proceeding under Rule 3.6(d):

- Statements concerning the character, credibility, reputation or criminal record of a suspect in a criminal investigation.

- Statements concerning the performance or results of any examination or test or the identity or nature of physical evidence expected to be presented.

- Any opinion as to the guilt or innocence of a defendant or suspect in a criminal case.

- The fact that a defendant has been charged with a crime unless there is included a statement explaining that **[*1246]** the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

HN6 Rule 3.6 applies to all attorneys, **[**13]** not just to prosecutors. *See* Matter of Litz, 721 N.E.2d 258 (Ind. 1999) (defense attorney reprimanded for statements in letter published in newspapers). Rule 3.8(f) "supplements Rule 3.6 . . . . In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused." Prof. Cond. R. 3.8, cmt. [5]. "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence." Prof. Cond. R. 3.8, cmt. [1]. A prosecutor's opinion of guilt is particularly likely to create prejudice, given that his or her words carry the authority of the government and are especially persuasive in the public's eye. *See* Gansler, 835 A.2d at 572.

Although we defer to the hearing officer's finding the Commission did not offer clear and convincing evidence that Respondent made the statements alleged in Count 1, for future guidance we note that a large part of alleged statements are of the type rebuttably presumed to have a **[**14]** substantial likelihood of materially prejudicing an adjudicative proceeding under Rule 3.6(d). Regarding Count 2, we note that the press release did not include the required explanation that a charge is merely an accusation and that the defendant is presumed innocent until proven guilty, and much of the undisputed statements Respondent made in the press release are also of the type rebuttably presumed to have a substantial likelihood of materially prejudicing an adjudicative proceeding. We find nothing in the record to rebut this presumption in this case.

D. "Safe Harbor" for Information Contained in a "Public Record."

Professional Conduct Rule 3.6(b)(2) provides: ***HN7*** "Notwithstanding paragraph (a), a lawyer may state . . . . information contained in a public record." The hearing officer concluded that the several of Respondent's alleged statements concerning the Mendenhall case would fall within this "safe harbor," reasoning:

- "**Media reports** from other states about the Mendenhall case were accessible on the Internet. Respondent searched the Internet for news stories about Mendenhall because Respondent himself had little information about the multi-state investigation into the suspected **[**15]** slayings."

- "Mendenhall's alleged use of a .22 caliber

handgun in his murders was **publicly documented** and available as early as October 2007, six months prior to Respondent's press conference. The **probable cause affidavit** filed in the Marion County case discusses Mendenhall's suspected killings in other jurisdictions, and states that 'the evidence found in his truck including a .22 caliber weapon, all point to Mendenhall as the killer.'"

• "The statements . . . concerning DNA analysis, plastic wrap and a .22 caliber handgun refer to **information previously documented in the media. The Probable Cause Affidavit** . . . discusses the .22 caliber gun, the DNA testing and the law enforcement officials' discovery of such a large amount of blood that they were able to determine that Ms. Purpura was no longer alive. Thus, these statements were based on **publicly available information** **[*1247]** and protected by the safe harbor provision in Rule 3.6(b)."

Hearing Officer's Report at 5-7, 13 (emphasis added, record citations omitted).

Media accounts. In Gansler, a prosecutor charged with making a number of improper public statements about several murder defendants argued that some of the statements fell within **[**16]** the public record safe harbor. Because there was no settled definition of "public record," the high court of Maryland construed the phrase as broadly as possible to statements made prior to its opinion. Thus, it found the prosecutor's statements of information in media reports and in police charges to be within the Rule 3.6(b)(2) safe harbor. However, the court determined that in the future, ***HN8*** the phrase "public record" would refer only to public government records, i.e., the records and papers on file with a government entity to which an ordinary citizen would have lawful access. *See* 835 A.2d at 567-69.

We agree with the definition of "public record" set forth in Gansler, with the proviso that "on file" does not mandate such formalities as file stamping or entry on a case docket. A more expansive concept of a public record that includes the unfiltered and untested contents of all publicly accessible media would permit the public record safe harbor to swallow the general rule of restricting prejudicial speech.

Probable cause affidavit. ***HN9*** A probable cause affidavit falls under the Gansler definition of "public record" so long as it is on file with a government entity to which an ordinary **[**17]** citizen has lawful access. *Cf.* Muex v. State, 800 N.E.2d 249 (Ind. Ct. App. 2003) (no cogent argument supported assertion that prosecutor violated Prof. Cond. R. 3.6 and 3.8. by public disclosure of DNA test results contained in probable cause affidavit). However, Gansler held, and we concur, that to receive the protection of the public record safe harbor, a lawyer may not provide information beyond quotations from or references to the contents of the public record. *See* 835 A.2d at 569. Moreover, we hold that a prosecutor must make clear that what is being disclosed is, in fact, the contents of the probable cause affidavit or other identified public document so the statements cannot be misunderstood to be the prosecutor's own opinion about the evidence or the suspect's guilt.

With regard to the Mendenhall case, some of the alleged statements corresponded to the contents of the probable cause affidavit, but the alleged statements did not make clear that this information was from the probable cause affidavit as opposed to a personal assessment of the matters.

With regard to the press release about the Turner and Stewart cases, Respondent began by referencing the probable cause affidavit, **[**18]** but it is unclear where the content of the affidavit ended and Respondent's own assessment of the matters began. The transition certainly occurred by the time Respondent stated: "I would not trade all the money and drugs in the world for the life of one person, let alone seven."

E. Other "Safe Harbors" and Permitted Statements.

Professional Conduct Rule 3.6(b)(2)'s list of "safe harbors" reads in full:

> ***HN10*** Notwithstanding paragraph (a), a lawyer may state:
>
> (1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;
>
> (2) information contained in a public record;
>
> (3) that an investigation of a matter is in progress;
>
> **[*1248]** (4) the scheduling or result of any step in litigation;
>
> (5) a request for assistance in obtaining evidence and information necessary thereto;
>
> (6) a warning of danger concerning the behavior of a person involved, when there is

reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case, in addition to subparagraphs (1) through (6):

(i) the identity, residence, occupation and family status of the accused;

(ii) if the accused has not been apprehended, information **[**19]** necessary to aid in apprehension of that person;

(iii) the fact, time and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

In addition, ***HN11*** Rule 3.8(f) permits a prosecutor to make "statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose," even if they might heighten public condemnation of the accused. "Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused." Prof. Cond. R. 3.8, cmt. [5]. The inevitable negative consequences are why the announcement of the fact that a defendant has been charged with a crime is presumptively prejudicial unless accompanied by a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty. *See* Prof. Cond. R. 3.6(d).

We do not fault Respondent or any prosecutor for wanting to share **[**20]** with the public information on the prosecution of serious crimes of great interest in the community.

> It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved. . . . On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

Prof. Cond. R. 3.6, cmt. [1]. In the cases at issue, there is no evidence that any of Respondent's statements were meant to serve such law enforcement purposes as protecting potential victims or apprehending suspected perpetrators **[**21]** still at large. Some of the information Respondent provided could have been properly communicated if framed within any of the "safe harbors" listed in Rule 3.6(b). We conclude that in performing his important responsibility of apprising the public of the activities of his office, Respondent stepped beyond the bounds permitted by Rules 3.6 and 3.8.

[*1249] F. Violations and Discipline.

We accept the hearing officer's finding that the Commission failed to present clear and convincing evidence that Respondent actually made the statements alleged in Count 1. Although we have addressed the contents these alleged statements for guidance in future cases, we find in favor of Respondent on the charges of Count 1.

With respect to Count 2, to the extent that Respondent was repeating information in media accounts and the probable cause affidavit, we give him the benefit of a broad interpretation of the public record safe harbor, although the narrower interpretation set forth above will be applied to future statements. Some of Respondent's statements, however, fall well outside even these parameters, including the statements that Respondent would not trade all the money and drugs in the world for the life **[**22]** of one person, let alone seven, that Turner deserved the ultimate penalty for this crime, that the evidence was overwhelming, and that it would be a travesty not to seek the death penalty. We conclude that when these statements were made, Respondent knew or reasonably should have known that they would have a substantial likelihood of (a) materially prejudicing an adjudicative proceeding in the matter and (b) heightening public condemnation of the accused, and thus violated Professional Conduct Rules 3.6(a) and 3.8(f).

Respondent has no disciplinary history. At the time he

made the statements at issue, there was little precedent in Indiana or elsewhere defining the limits of Rules 3.6(a) and 3.8(f). We conclude that a public reprimand is appropriate for Respondent's violation of these rules.

III. Conclusion

The Court concludes that Respondent violated Indiana Professional Conduct Rules 3.6(a) and 3.8(f) by making public statements as a prosecutor that had a substantial likelihood of materially prejudicing an adjudicative proceeding and a substantial likelihood of heightening public condemnation of the criminal defendants. For Respondent's professional misconduct, the Court imposes a public **[**23]** reprimand.

The costs of this proceeding are assessed against Respondent. The hearing officer appointed in this case is discharged.

The Clerk of this Court is directed to give notice of this opinion to the hearing officer, to the parties or their respective attorneys, and to all other entities entitled to notice under Admission and Discipline Rule 23(3)(d). The Clerk is further directed to post this opinion to the Court's website, and Thomson Reuters is directed to publish a copy of this opinion in the bound volumes of this Court's decisions.

All Justices concur.

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Cited
As of: September 26, 2016 12:43 PM EDT

Commonwealth v. Fogel

Common Pleas Court of Philadelphia County, Pennsylvania

October 24, 1989

No. 2343

Reporter
20 Phila. 107; 1989 Phila. Cty. Rptr. LEXIS 71; 1989 WL 817165

Commonwealth v. Herbert Fogel

Core Terms

mistrial, defense counsel, prosecutorial misconduct, continuance, Inquirer, retrial, defense motion, postponed, cases, double jeopardy, open case, aforementioned, presenting evidence

Case Summary

Procedural Posture

Defendant moved to quash transcripts based on claims of double jeopardy as a result of prosecutorial misconduct following a mistrial in the Municipal Court of Philadelphia (Pennsylvania) on charges of driving under the influence and/or a controlled substance in violation of 75 Pa. Cons. Stat. Ann. § 3731.1989. A rule to show cause was vacated by the court, and the matter was ordered transferred to the municipal court.

Overview

Multiple continuances had been granted in defendant's trial in the municipal court, and on one such occasion, the prosecutor spoke to a newspaper reporter about defendant's case and his discontent with the course of the trial. The newspaper published a story about the trial, and the municipal court granted defendant a mistrial pursuant to Pa. R. Crim. P. 1118(b). The municipal court judge concluded that the prosecutor's conduct violated Pa. R. Prof. Conduct 3.6, 3.8. Following the issuance of the order to transfer the case from the court back to the municipal court, defendant filed his motions with the court to quash transcripts and to bar his retrial on grounds of double jeopardy. The court denied defendant's motions. Double jeopardy did not attach and did not bar defendant's retrial because it was not shown that the prosecutor intended for his misconduct to cause a mistrial in the municipal court. The court agreed with the municipal court that the prosecutor's comments to a known newspaper reporter constituted misconduct, but under the facts, the prosecutor had not intended to cause a mistrial.

Outcome

The court denied defendant's motion to quash transcripts and denied his motion to bar his retrial on charges of driving under the influence of alcohol and/or a controlled substance on grounds of double jeopardy as a result of prosecutorial misconduct.

LexisNexis® Headnotes

Criminal Law & Procedure > Commencement of Criminal Proceedings > Double Jeopardy > Attachment Jeopardy

Legal Ethics > Prosecutorial Conduct

HN1 Double jeopardy will attach to preclude retrial after the grant of a mistrial due to prosecutorial misconduct only where the misconduct was intentional and undertaken with a specific intent to precipitate a mistrial.

Criminal Law & Procedure > Commencement of Criminal Proceedings > Double Jeopardy > Attachment Jeopardy

Legal Ethics > Prosecutorial Conduct

HN2 The mere existence of prosecutorial misconduct which subsequently leads to a mistrial, in and of itself, does not automatically bar retrial on double jeopardy grounds. It is only when the prosecutorial misconduct is intended to cause the mistrial that double jeopardy will attach and prevent the retrial.

Criminal Law & Procedure > ... > Double Jeopardy > Double Jeopardy Protection > Tests for Double Jeopardy Protection

Criminal Law & Procedure > Trials > Motions for Mistrial

HN3 The standard considered with a motion for a mistrial is significantly different than the standard to be applied to a motion seeking to bar retrial after a mistrial

on double jeopardy grounds.

Headnotes/Syllabus

Headnotes

[1]** Criminal Procedure -- Mistrial Due to Prosecutorial Misconduct -- Retrial -- Motion To Quash Transcripts on Double Jeopardy Grounds -- Lack of Specific Intent To Cause Mistrial

Syllabus

(1) Double jeopardy will attach to preclude retrial after the grant of a mistrial due to prosecutorial misconduct only where the misconduct was intentional and undertaken with specific intent to precipitate a mistrial

(2) The mere existence of prosecutorial misconduct which subsequently leads to a mistrial, in and of itself, does not automatically bar retrial on double jeopardy grounds

(3) It is only when the prosecutorial misconduct was intended to cause the mistrial that double jeopardy will attach and prevent retrial

(4) Absent evidence that prosecutorial misconduct which precipitated a mistrial was in fact intended to do so, a motion to quash transcripts on double jeopardy grounds must be denied.

Counsel: *Martin Durkin,* Assistant District Attorney, and *Karen Grigsby,* Assistant District Attorney, for the Commonwealth

Mark Mungello, Esquire, for the Defendant.

Judges: PRESENZA, *J.*

Opinion by: PRESENZA

Opinion

[*107] OPINION

On March 28, 1989, the above-captioned matter was listed for trial before the Honorable J. EARL **[**2]** SIMMONS, JR., of the Municipal Court of Philadelphia. The defendant was **[*108]** to be tried on the charge of Driving Under the Influence of Alcohol and/or a Controlled Substance, 75 Pa. C.S.A. § 3731.

Following the commencement of trial on that date, the Commonwealth presented its case-in-chief against the defendant. (N. T. 3/28/89, pp. 3-41.) Thereafter, defense counsel, Nino V. Tinari, Esquire, demurred to the Commonwealth's evidence contending that insufficient evidence was presented by the Commonwealth to establish that "alcohol" was emanating from the defendant's person. (N. T. 3/28/89, p. 42.) In response, the Court stated, "I understand your point", but did not issue any ruling on the demurrer. (N. T. 3/28/89, p. 42.)

The defendant then took the stand in his own behalf and was in fact the only defense witness. (N. T. 3/28/89, p. 42.) Prior to the presentation of the defendant's testimony, however, defense counsel informed the Court that he was required, at that time, to return immediately to the Federal Courthouse for an unspecified matter. (N. T. 3/28/89, p. 43.) In turn, the Assistant District Attorney, Gavin Lentz, Esquire, In turn, the Assistant District Attorney, **[**3]** Gavin Lentz, Esquire, requested the Court to personally contact the Federal Courthouse in order to obtain additional time for defense counsel so that the trial could proceed, (N. T. 3/28/89, p. 44.) Judge SIMMONS responded to the Assistant District Attorney's request by stating, "Those guys [at the Federal Courthouse] won't pay any attention to [a] Municipal Court Judge. I'll recess it." (N. T. 3/28/89, p. 44.) Accordingly, over the objection of the Commonwealth, the matter was continued until the earliest possible date, May 2, 1989. (N. T. 3/28/89, pp. 44-45.)

Then, outside the courtroom, Assistant District Attorney Lentz was approached in the hallway by Susan Caba, who had previously identified herself to him as a reporter for The Inquirer. (N. T. 8/3/89, pp. 18-19.) According to Mr. Lentz, he had initially met Ms. Caba approximately ten minutes prior to the start of the aforementioned trial. (N. T. 8/3/89, p. 19.) That particular meeting was initiated by Mr. Lentz when he inquired as to whether Ms. Caba was a **[*109]** defense witness (N. T. 8/3/89, p. 19.) It was at that time that Ms. Caba indicated that she was an *Inquirer* reporter. (N. T. 8/3/89, p. 19.)

It was in **[**4]** the hallway, after the aforementioned trial had been recessed, that Ms. Caba proceeded to ask Mr. Lentz a number of questions related to the above-captioned matter as well as other open cases involving the defendant. (N. T. 8/3/89, p. 21.) Although Mr. Lentz declined to answer some of those questions, he did provide the reporter with information relating to the

number of continuances which had been granted in the defendant's other open cases. (N. T. 8/3/89, pp. 21-22.) Mr. Lentz, in addition to providing this information, also stated to Ms. Caba that the defendant's record of appearance in those open cases was "embarrassing" and that the number of continuances granted in those cases was also "appalling". (N. T. 8/3/89, pp. 22, 31-32.) Thereafter, when Mr. Lentz declined further comment, the interview in question was terminated. (N. T. 8/3/89, pp. 22-23.)

According to Mr. Lentz, the above-described situation represented the only in person meeting he had with Ms. Caba. However, he did indicate that on one prior occasion he spoke to her on the telephone concerning one of Mr. Fogel's other cases. (N. T. 8/3/89, p. 22.) On November 25, 1988, Ms. Caba contacted Mr. Lentz with respect **[**5]** to a trial involving the defendant which was heard on or about that date by the Honorable ERIC LILLIAN of the Municipal Court of Philadelphia. (N. T. 8/3/89, p. 22.) The defendant was convicted following that trial. Mr. Lentz, during the telephone conversation, related to Ms. Caba the evidence presented by the Commonwealth at trial in that case. The information provided on November 25, 1988 by Mr. Lentz shortly thereafter appeared in an article in *The Inquirer* which was written by Ms. Caba. (Commonwealth Exhibit "C-2".)

On March 29, 1989, the day following the commencement of trial in the above-captioned matter, an article written **[*110]** by Ms. Caba appeared in *The Inquirer.* (Commonwealth Exhibit "C-3".)

In summary, the article provided the following information which specifically cited Mr. Lentz as the source:

Assistant District Attorney Gavin Lentz later said Fogel has had numerous postponements in other pending drunken-driving cases . . . After the truncated court session, Lentz said, "The number of court continuances is appalling, and the defendant's record of attendance is embarrassing". . . Lentz said Fogel has had several court appearances postponed. Consulting **[**6]** his files, he said that the trial in one of the pending incidents has been postponed 11 times and the other case has been delayed 14 times. "The Commonwealth has been ready every time," Lentz added . . .

In addition to the information for which Ms. Caba cited Mr. Lentz as the source, the article in question also contained additional information, without citing the source thereof, relating to the following:

(1) The defense request for a continuance on March 28, 1989;

(2) The Commonwealth's objection to the continuance;

(3) The Court's decision to permit the continuance;

(4) The testimony of Officer Joseph DelGrippo on March 28, 1989;

(5) The fact that the defendant had not testified on March 28, 1989 and that the defendant refused to comment thereafter on the case at bar or other matters pending;

(6) The nature of testimony given by the defendant in past court proceedings;

(7) Defendant's previous conviction for Driving Under the Influence and the scheduled date for sentencing for that conviction; and

[*111] (8) Similar charges faced by the defendant in two open cases and the scheduled listing dates for those trials.

Following the publication of the aforementioned article, **[**7]** Judge SIMMONS, on that same date, March 29, 1989, sent a letter to both Mr. Lentz and Mr. Tinari. (Exhibit "B", Defendant's Memorandum of Law in Support of Defendant's Motion to Quash Transcripts Based on Double Jeopardy as a Result of Prosecutorial Misconduct, dated June 22, 1989.)

With this letter, Judge SIMMONS enclosed a photostatic copy of the article written by Ms. Caba which appeared in *The Inquirer* on March 29, 1989. Based upon his reading of this article, Judge SIMMONS concluded that Mr. Lentz violated the Rules of Professional Conduct, specifically Rule 3.6(a), Rule 3.6(b)(1, 4-6) and Rule 3.8(e), as a result of his disclosures to Ms. Caba following the continuance of the trial on March 28, 1989. Judge SIMMONS noted that by reading this article he was exposed to evidence which would be otherwise inadmissible at the defendant's trial, i.e., that the defendant has other pending cases and that he has one conviction for the same offense. He concluded that this information had been provided to the reporter by Mr. Lentz. According to Judge SIMMONS, Mr. Lentz's conduct amounted to prosecutorial misconduct. Given the requisites of the Code of Judicial Conduct, Judge SIMMONS, **[**8]** therefore, was informing counsel, through this letter, of the existence of what he perceived to be a prejudicial event occurring during the course of trial and, as a result thereof, of the defendant's right to

proceed with a motion for a mistrial under Pa. Crim. R. Pro., Rule 1118, if so inclined.

Subsequent thereto, pursuant to Rule 1118(b), defense counsel filed a Rule to Show Cause Why a Mistrial Should Not be Granted. Judge SIMMONS signed the Rule and made it returnable on the next scheduled listing date, May 2, 1989.

On May 1, 1989, the Commonwealth delivered its response to the defendant's motion for a mistrial to Judge **[*112]** SIMMONS. An affidavit of Assistant District Attorney Gavin Lentz was contained in the Commonwealth's response.

On May 2, 1989, following argument by counsel, Judge SIMMONS granted the defendant's motion for a mistrial. (N.T. 5/2/89, pp. 24-25.) In supporting his decision, Judge SIMMONS found that the Assistant District Attorney, Mr. Lentz, in disclosing certain information to the *Inquirer* reporter on March 28, 1989, intentionally attempted to "belittle Mr. Fogel, so as to create an impression in the press that were any verdict rendered other **[**9]** than guilty it would have been a miscarriage of justice". (N. T. 5/2/89, p. 24.) Given the existence of this prosecutorial misconduct, and the resulting prejudicial effect, Judge SIMMONS, based upon the Code of Judicial Conduct as well as existing case law, concluded that he had no choice but to grant the defendant's motion. (N. T. 5/2/89, pp. 22-25.)

Following this decision, the matter was relisted for retrial on June 27, 1989.

On or about June 23, 1989 defense counsel filed a Rule to Show Cause which in effect was a Motion to Quash Transcripts Based on Double Jeopardy as a Result of Prosecutorial Misconduct. The Honorable EDWARD E. RUSSELL of the Court of Common Pleas signed the defendant's Rule and made it returnable on September 19, 1989.

On July 13, 1989, Judge RUSSELL subsequently vacated the Rule forthwith and transferred the matter for retrial in Municipal Court with a trial date of August 3, 1989 in Courtroom 275 City Hall.

On August 3, 1989, the defendant, through his attorney, Mark Mungello, Esquire, moved before the undersigned to quash transcripts based on double jeopardy as a result of prosecutorial misconduct. In support of his motion, defense counsel introduced **[**10]** into evidence the notes of testimony from May 2, 1989. (Defense Exhibit "D-1".)

In response, the Commonwealth presented evidence in the form of testimony from Gavin Lentz. In addition to Mr. Lentz's testimony, the Commonwealth also introduced into **[*113]** evidence the notes of testimony from March 28, 1989 (Commonwealth Exhibit "C-1") as well as two *Inquirer* articles written by Ms. Caba. (Commonwealth Exhibits "C-2" and "C-3", respectively.) The notes of testimony from May 2, 1989 were also introduced by the Commonwealth, and cross-marked "C-4".

Following the presentation of the aforementioned evidence, the Court entertained argument by counsel. The matter was then held under advisement and relisted for October 24, 1989. The Court, while acknowledging possession of memoranda of law from counsel at that time, did nevertheless provide counsel with an opportunity to supply the Court with supplemental memoranda if they so desired.

It should be noted that neither party elected to file additional memoranda with the Court.

Having set forth in detail the factual and procedural background of this case, this Court will now consider the motion at hand.

In *Com. v. Simons,* 514 Pa. 10, 522 A.2d 537 (1987), **[**11]** the Pennsylvania Supreme Court held that ***HN1*** double jeopardy will attach to preclude retrial after the grant of a mistrial due to prosecutorial misconduct *only* where the misconduct was *intentional* and undertaken with a specific intent to precipitate a mistrial. (Emphasis Added.)

Both defense counsel and the Commonwealth concede that the standard set forth in *Simons, supra,* is the appropriate standard to be applied in the case at bar.

Initially, it should be noted that under *Simons* ***HN2*** the mere existence of prosecutorial misconduct which subsequently leads to a mistrial, in and of itself, does not automatically bar retrial on double jeopardy grounds. It is *only* when the prosecutorial misconduct was *intended* to cause the mistrial that double jeopardy will attach and prevent the retrial. Thus, in the case at bar, the issue becomes a factual one, i.e., whether the evidence presented to this Court establishes that the Assistant District Attorney, Gavin Lentz, **[*114]** through his conduct on March 28, 1989, intended to cause the mistrial which subsequently resulted.

Defense counsel asserts that Mr. Lentz, on March 28, 1989, **[**12]** during the course of the trial realized that

the prosecution's case "was in trouble . . . because [of] the way Judge SIMMONS was dealing with the case and the signals that were being sent off." (N. T. 8/3/89, p. 36.) According to defense counsel, in an attempt to "short circuit" the proceeding and avoid a favorable defense ruling, Mr. Lentz, by disseminating certain information to the press, intended to cause a mistrial in order to "move the case along somewhere else". (N. T. 8/3/89, pp. 37-38.)

In support of his assertion that Mr. Lentz knew, on March 28, 1989, that the Commonwealth's case was in "trouble", defense counsel directed this Court's attention to the findings of fact made by Judge SIMMONS on May 2, 1989. (N. T. 5/2/89, pp. 14-15.) More specifically, defense counsel noted the fact that Judge SIMMONS stated on the record on May 2, 1989 that it was his opinion that the Commonwealth had a "weak" case against the defendant following the presentation of the Commonwealth's case-in-chief on March 28, 1989. (N. T. 5/2/89, p. 14.)

Contrary to the position taken by defense counsel, the Commonwealth contended that its case against the defendant, as presented on March 28, 1989, **[**13]** was "quite a strong case". (N. T. 8/3/89, pp. 39-40.) According to the Commonwealth, given the strength of its case against the defendant, Mr. Lentz had no motive to act in such a manner as to cause Mr. Lentz had no mo,ive to act in such a manner as to cause a mistrial. (N. T. 8/3/89, p. 41.) In reality, he simply wanted the trial to be completed on March 28, 1989, and not prolonged any further.

In considering the arguments set forth above, this Court wants the record to reflect that while this Court has the utmost and deepest respect for his fellow colleague, Judge SIMMONS, and the decision he rendered on May 2, 1989, this Court is in no way bound by the findings made by Judge SIMMONS in deciding the motion at hand. Simply stated, the **[*115]** motion before this Court is completely different from the one considered by Judge SIMMONS. On May 2, 1989, Judge SIMMONS considered a defense motion for a mistrial. ***HN3*** The standard considered with a motion for a mistrial is significantly different than the standard to be applied to a motion seeking to bar retrial after a mistrial on double jeopardy grounds. In fact, Judge SIMMONS noted this on May 2, 1989. (*See* 5/2/89, p. 26.) Accordingly, **[**14]** while this Court will certainly consider the findings of fact and conclusions of law made by Judge SIMMONS in granting the defense motion for a mistrial, this Court is, nevertheless, not bound by those findings and conclusions in considering the completely different motion at hand.

Thus, this Court must now apply the law as set forth in *Simons, supra,* to the evidence presented on August 3, 1989.

Initially, it should be noted that this Court is in complete agreement with Judge SIMMONS' conclusion of May 2, 1989 that the conduct of Assistant District Attorney Lentz following the postponement of the trial on March 28, 1989 amounted to prosecutorial misconduct. Plain and simple, the issuing of statements by a prosecutor during the course of a trial to a known member of the press, who, in turn, disseminates that information by means of public communication, represents totally unacceptable behavior, and is contrary to the Rules of Professional Conduct when the said statements would otherwise be inadmissible as evidence at trial.

The question which next follows under *Simons* is whether the aforementioned prosecutorial misconduct was **[**15]** *intended* to cause the mistrial. This is clearly the more difficult question.

For the reasons which follow, it is this Court's conclusion that while the conduct of Mr. Lentz on March 28, 1989 did in fact amount to prosecutorial misconduct, it, nevertheless, was not his specific intent to cause a mistrial, therefore, retrial is not barred on double jeopardy grounds.

[*116] Defense counsel, on August 3, 1989, asserted that the Assistant District Attorney knew he had a "weak" case at the time the trial was postponed on March 28, 1989. In support, defense noted Judge SIMMONS' finding of fact on May 2, 1989 that it was his opinion that the Commonwealth had a "weak" case.

The aforementioned position of defense counsel is problematic in that Judge SIMMONS' state of mind regarding the strength of the Commonwealth's case on March 28, 1989 is not conclusive as to what Mr. Lentz perceived at that time. It is Mr. Lentz's state of mind with which this Court is concerned. In fact, in reviewing the notes of testimony from March 28, 1989, it is clear from the record that Judge SIMMONS, like the excellent jurist that he is, gave no inkling either way as to the strength of the Commonwealth's **[**16]** case. Thus, it would be ludicrous for this Court to assume that Mr. Lentz possessed such telepathic powers that he was able to read Judge SIMMONS' mind. Moreover, as was previously stated, at the conclusion on the Commonwealth's case-in-chief, defense counsel, Mr.

Tinari, demurred to the evidence. The Court did not make a specific ruling on the defense motion and the defendant then took the witness stand. As a result of the sequence of events, this Court can conclude that Judge SIMMONS in effect denied the demurrer.

For the record, this Court did read the notes of testimony from March 28, 1989 in order to review the evidence presented by the Commonwealth. Notwithstanding this Court's inability to observe the demeanor of the witnesses firsthand as Judge SIMMONS did, this much is clear: This Court has seen stronger cases than the one presented by the Commonwealth on March 28, 1989. Likewise, this Court has also seen weaker ones. However, based upon this Court's review of the evidence presented on March 28, 1989, it is nonetheless clear that the Commonwealth's case was "not so weak" per se, as defense counsel contends, that a defense verdict was a certainty.

[*117] Given **[**17]** these findings, this Court, in making its decision, focused instead primarily upon Mr. Lentz's statements to the *Inquirer* reporter in determining his intentions.

It is clear that following the continuation of the trial by Judge SIMMONS on March 28, 1989, Mr. Lentz was, indeed, quite upset. Shortly thereafter, he was approached by Ms. Caba, a person he knew to be a member of the press. Upon her request, he then provided the reporter with information relating to the defendant's other open cases. This information was, for the most part, focused on the number of postponements granted in those cases. He also added some personal commentary as to his own feelings about the defendant's record of appearance in his open cases as well as about the Court's handling of the continuances in those cases. He certainly knew or should have known that this information could be published.

Did Mr. Lentz intend to create a mistrial by providing this information? This Court believes not. Rather, it is apparent that Mr. Lentz improperly and inappropriately sought to vent his frustration over the postponement by issuing statements to a known member of the press corps. Additionally, this Court **[**18]** concluded that everything he said to Ms. Caba was related to postponements and delays.

However, it must be stated quite clearly that this Court's conclusion must in no way be interpreted as an approval of the conduct of Mr. Lentz. Given his obvious discontent for delays, it simply does not follow that Mr. Lentz would cause further delay by intentionally attempting to secure a mistrial. To the contrary, this Court, while acknowledging the frustration of Mr. Lentz, will not condone or excuse such behavior. Obviously, if Mr. Lentz exhibited a little more professionalism and restraint, the defense would have no basis whatever to litigate a Motion to Bar Retrial based on Double Jeopardy.

Accordingly, since this Court has found a lack of specific intent on the part of the prosecutor to cause the mistrial which occurred, the defendant's motion to bar retrial on double jeopardy grounds must be denied.

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As of: September 26, 2016 9:16 AM EDT

Atty. Griev. Comm'n v. Gansler

Court of Appeals of Maryland

November 12, 2003, Filed

No. 81, September Term, 2002

Reporter
377 Md. 656; 835 A.2d 548; 2003 Md. LEXIS 744

ATTORNEY GRIEVANCE COMMISSION OF MARYLAND v. DOUGLAS F. GANSLER

Subsequent History: **[***1]** As Corrected December 1, 2003.

Related proceeding at In re Gansler, 889 A.2d 285, 2005 D.C. App. LEXIS 732 (D.C., Dec. 15, 2005)

Prior History: Julie R. Stevenson JUDGE.

Disposition: Respondent reprimanded. Judgment entered.

Core Terms

public record, extra judicial statement, comments, confession, prosecute, fair trial, substantial likelihood, attorneys, murder, lawyers, safe harbor, charges, press conference, prejudicing, juveniles, guilt, prejudicial, materially, media, information contained, bomb threat, extrajudicial, disciplinary, elaboration, innocence, adjudicative process, circumstances, arrest, cases, criminal record

Case Summary

Procedural Posture

Petitioner Attorney Grievance Commission of Maryland, by Bar Counsel, filed a petition for disciplinary action, alleging that respondent prosecutor committed violations of the Maryland Rules of Professional Conduct. The petition was referred to a judge of the Circuit Court for Frederick County (Maryland) for an evidentiary hearing. The judge found the prosecutor committed one violation. Both Bar Counsel and the prosecutor filed exceptions.

Overview

The prosecutor made extrajudicial statements in connection with the prosecution of various well-publicized crimes. The hearing judge found the prosecutor violated Md. R. Prof. Conduct 3.6 by making extrajudicial statements about a decision to offer a plea agreement in one case. Bar Counsel maintained the prosecutor violated Rule 3.6 on numerous occasions. In addition, Bar Counsel argued the prosecutor intended to prosecute without probable cause, in violation of Maryland R. Prof. Conduct 3.1, 3.8, and 8.4(d). The prosecutor argued that his comments regarding the plea offer did not violate Md. R. Prof. Conduct 3.6. The appellate court found a number of the prosecutor's extrajudicial statements did not warrant discipline. The prosecutor's reference to one defendant's convictions qualified for the protection of the public record safe harbor. However, the prosecutor violated Rule 3.6 by commenting on one defendant's confession, by discussing the plea offer, and by providing his opinion as to the guilt of two defendants. The prosecutor did not commit a violation of Rules 3.1, 3.8(a), or 8.4(d), by commenting on future prosecutions of juveniles who phoned bomb threats.

Outcome

The prosecutor's exception concerning the plea bargain was overruled, Bar Counsel's exceptions were sustained as to the prosecutor's extrajudicial statements in which he discussed one defendant's confession and his opinion of two defendant's guilt, and Bar Counsel's exception was overruled as to the prosecutor's comments about the future prosecution of juveniles. The prosecutor was reprimanded.

LexisNexis® Headnotes

Legal Ethics > Sanctions > Disciplinary Proceedings > Hearings

HN1 See Md. R. 16-751(a).

Legal Ethics > Professional Conduct > Frivolous Claims &

Conduct

HN2 See Md. R. Prof. Conduct 3.1.

Legal Ethics > Professional Conduct > General Overview

HN3 See Md. R. Prof. Conduct 3.6.

Legal Ethics > Prosecutorial Conduct

HN4 See Md. R. Prof. Conduct 3.8.

Legal Ethics > Professional Conduct > Tribunals

HN5 See Md. R. Prof. Conduct 8.2(a).

Legal Ethics > Professional Conduct > General Overview

HN6 See Md. R. Prof. Conduct 8.4(a).

Legal Ethics > Professional Conduct > General Overview

HN7 See Md. R. Prof. Conduct 8.4(d).

Legal Ethics > Sanctions > Disciplinary Proceedings > Hearings

HN8 See Md. R. 16-752(a).

Legal Ethics > Sanctions > Disciplinary Proceedings > Hearings

HN9 See Md. R. 16-757(c).

Governments > Courts > Judges

Legal Ethics > Sanctions > Disciplinary Proceedings > Appeals

HN10 Where Maryland Bar Counsel failed to take exceptions to a hearing judge's factual findings in a disciplinary proceeding, the Court of Appeals of Maryland will consider only those statements discussed by the hearing judge to be at issue. Md. R. 16-759(2)(B).

Criminal Law & Procedure > ... > Entry of Pleas > Guilty Pleas > General Overview

Legal Ethics > Professional Conduct > General Overview

HN11 Md. R. Prof. Conduct 3.6(c) provides that certain types of statements are permissible even though, under Md. R. Prof. Conduct 3.6(a), those statements might have a substantial likelihood of materially prejudicing an adjudicative proceeding.

Constitutional Law > ... > Fundamental Freedoms > Judicial & Legislative Restraints > General Overview

Legal Ethics > Professional Conduct > General Overview

HN12 Md. R. Prof. Conduct 3.6(c)(2) allows a lawyer to state, without elaboration, information contained in a public record notwithstanding the strictures of Md. R. Prof. Conduct 3.6(a) or Md. R. Prof. Conduct 3.6(b).

Civil Procedure > Appeals > Standards of Review > De Novo Review

Legal Ethics > Sanctions > Disciplinary Proceedings > Appeals

Legal Ethics > Sanctions > Disciplinary Proceedings > Hearings

HN13 The Court of Appeals of Maryland exercises original and complete jurisdiction for attorney disciplinary proceedings in Maryland, and conducts an independent review of the record.

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

Legal Ethics > Sanctions > Disciplinary Proceedings > Appeals

Legal Ethics > Sanctions > Disciplinary Proceedings > Hearings

HN14 In conducting a review of attorney disciplinary proceedings in Maryland, the Court of Appeals of Maryland will accept the hearing judge's findings of fact as prima facie correct unless shown to be clearly erroneous, and give due regard to the hearing judge's opportunity to assess the credibility of witnesses.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Legal Ethics > Sanctions > Disciplinary Proceedings > Appeals

Legal Ethics > Sanctions > Disciplinary Proceedings > Hearings

HN15 As to a hearing judge's conclusions of law in an attorney disciplinary proceeding in Maryland, the Court of Appeals of Maryland's consideration on review is essentially de novo.

Legal Ethics > Professional Conduct > General Overview

HN16 Md. R. Prof. Conduct 3.6 is the rule of professional responsibility governing trial publicity.

Constitutional Law > Bill of Rights > State Application

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Fair Trial

HN17 Criminal justice must be carried out in the courtroom. The theory of the system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print. The constitutional underpinnings for this concept reside in the Sixth Amendment's right to a fair trial, made applicable to the states through the Fourteenth Amendment.

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Fair Trial

HN18 Md. Const. Decl. Rights art. 21 guarantees the right to a fair trial in all criminal prosecutions.

Constitutional Law > ... > Fundamental Rights > Criminal Process > General Overview

Constitutional Law > ... > Fundamental Rights > Criminal Process > Right to Jury Trial

Constitutional Law > ... > Fundamental Rights > Criminal Process > Speedy Trial

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Public Trial

HN19 See U.S. Const. Amend. VI.

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Fair Trial

HN20 See Md. Const. Decl. Rights art. 21.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Right to Jury Trial

HN21 The text of the Sixth Amendment makes clear that a fair trial consists of numerous components, including, but certainly not limited to, the rights of an accused to a public trial and impartial jury. These components alone, of course, do not necessarily ensure a fair trial.

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Fair Trial

HN22 The fundamental conception of a fair trial includes many of the specific provisions of the Sixth Amendment. But it also is agreed that neither the Sixth nor the Fourteenth Amendment is to be read formalistically, for the clear intent of the amendments is that these specific rights be enjoyed at a constitutional trial. Even though every form be preserved, the forms may amount to no more than an empty shell when considered in the context or setting in which they were actually applied.

Civil Procedure > Preliminary Considerations > Venue > General Overview

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Fair Trial

HN23 Even where a court has observed all of the Sixth Amendment formalities, it is possible for a defendant to be deprived of a fair trial if circumstances occurring outside the courtroom taint the proceedings.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Right to Jury Trial

HN24 One outside circumstance that may affect a defendant's right to a fair trial and, specifically, his right to an impartial jury, occurs when an attorney makes a publicized, out- of-court statement about the defendant's case. This is particularly true because attorneys occupy a special role as participants in the criminal justice system, and, as a result, the public may view their speech as authoritative and reliable. Attorneys involved in a particular case have greater access to information through discovery, the ability to converse privately with knowledgeable witnesses, and an enhanced understanding of the circumstances and issues. Their unique role and extensive access to information lends a degree of credibility to their speech that an ordinary citizen's speech may not usually possess. Comments by prosecuting attorneys, in particular, have the inherent authority of the government and are more likely to influence the public. When such seemingly credible information reaches the ears or eyes of the public, the jury pool may become contaminated, greatly diminishing the court's ability to assemble an impartial jury. The defendant's right to a fair trial, thus, may be compromised.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > General Overview

Constitutional Law > ... > Freedom of Speech > Free Press > Pretrial Publicity

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Scope

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Fair Trial

HN25 Limiting extrajudicial attorney speech to preserve a fair trial can be accomplished only in a way that is consistent with the fundamental right to free expression under the First Amendment. In general, the First Amendment applies equally to an ordinary citizen and an attorney, as long as the attorney plays no lawyerly role in the matter under comment. On the other hand, when the attorney has some professional relationship to a matter, the attorney's freedom to speak about it is not as broad. For instance, inside the courtroom, the rules of evidence and principles of relevance place rigid restrictions upon what an attorney may say, and when and how he or she may speak. Even outside the courtroom, the speech of a lawyer may be curtailed to an extent greater than an ordinary citizen's. In the arena of attorney advertising, the U.S. Supreme Court upholds a state's 30-day waiting period for solicitation letters by plaintiffs' personal injury lawyers, and a state's ban on in-person attorney solicitations.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Right to Jury Trial

HN26 Due process requires that an accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused. Where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, a judge should continue until the threat abates, or transfer it to another county not so permeated with publicity.

Criminal Law & Procedure > Jurisdiction & Venue > Pretrial Publicity

HN27 Repeatedly reversing convictions will not suffice as a long-term remedy for the harm of trial publicity.

Criminal Law & Procedure > Jurisdiction & Venue > Pretrial Publicity

HN28 Reversals are but palliatives; the cure lies in those remedial measures that will prevent a prejudice at its inception. The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function.

Criminal Law & Procedure > Jurisdiction & Venue > Pretrial Publicity

HN29 Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but it is highly censurable and worthy of disciplinary measures.

Criminal Law & Procedure > Jurisdiction & Venue > Pretrial Publicity

Legal Ethics > Professional Conduct > General Overview

HN30 Md. R. Prof. Conduct 3.6(a) announces a general prohibition against lawyers making extrajudicial statements that the lawyer knows or reasonably should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding. This prohibition applies, however, only to those statements that a reasonable person would expect to be disseminated by means of public communication.

Criminal Law & Procedure > ... > Entry of Pleas > Guilty Pleas > General Overview

Criminal Law & Procedure > Jurisdiction & Venue > Pretrial Publicity

Legal Ethics > Professional Conduct > General Overview

HN31 Md. R. Prof. Conduct 3.6(b) provides examples of the types of extrajudicial statements that would have a substantial likelihood of materially prejudicing an adjudicative proceeding. Under Md. R. Prof. Conduct 3.6(b), statements are prohibited that ordinarily are likely to include references to criminal matters that relate to, among other things, the criminal record of a party, the possibility of a plea of guilty, the existence or contents of any confession, admission, or statement by a defendant, or any opinion as to the guilt or innocence of a defendant.

Criminal Law & Procedure > Jurisdiction & Venue > Pretrial Publicity

Legal Ethics > Professional Conduct > General Overview

HN32 Md. R. Prof. Conduct 3.6(c) states that circumstances exist where an attorney, without risking discipline, may make extrajudicial statements that fall under Rule 3.6(a), (b). The provisions under Rule 3.6(c) are known as safe harbors. For example, an attorney may disclose, through extrajudicial statements and without elaboration, the scheduling or result of any step in litigation, even if that information, in some way, would have a substantial likelihood of materially prejudicing an adjudicative proceeding. Md. R. Prof. Conduct 3.6(c)(4).

Another such safe harbor permits attorneys to comment outside the courtroom and without elaboration on information contained in a public record. Md. R. Prof. Conduct 3.6(c)(2).

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > General Overview

Constitutional Law > ... > Freedom of Speech > Free Press > Pretrial Publicity

HN33 The First Amendment permits the states to regulate attorney speech more stringently than the speech of an ordinary citizen.

Constitutional Law > ... > Freedom of Speech > Free Press > Pretrial Publicity

Criminal Law & Procedure > Criminal Offenses > Obstruction of Administration of Justice > General Overview

Governments > Courts > Court Personnel

Governments > Fiduciaries

Legal Ethics > Professional Conduct > General Overview

HN34 Lawyers representing clients in pending cases are key participants in the criminal justice system, and a state may demand some adherence to the precepts of that system in regulating their speech as well as their conduct. As officers of the court, court personnel and attorneys have a fiduciary responsibility not to engage in public debate that will redound to the detriment of the accused or that will obstruct the fair administration of justice. Because lawyers have special access to information through discovery and client communications, their extrajudicial statements pose a threat to the fairness of a pending proceeding since lawyers' statements are likely to be received as especially authoritative.

Constitutional Law > Bill of Rights > Fundamental Freedoms > General Overview

Constitutional Law > ... > Freedom of Speech > Free Press > Pretrial Publicity

Criminal Law & Procedure > Counsel > Right to Counsel > General Overview

Criminal Law & Procedure > Jurisdiction & Venue > Pretrial Publicity

Legal Ethics > Professional Conduct > General Overview

HN35 The substantial likelihood of material prejudice standard constitutes a constitutionally permissible balance between the First Amendment rights of attorneys in pending cases and the state's interest in fair trials.

Constitutional Law > ... > Freedom of Speech > Free Press > Pretrial Publicity

Criminal Law & Procedure > ... > Challenges to Jury Venire > Pretrial Publicity > Change of Venue Requests

Criminal Law & Procedure > Jurisdiction & Venue > General Overview

Criminal Law & Procedure > Jurisdiction & Venue > Venue

Criminal Law & Procedure > Jurisdiction & Venue > Pretrial Publicity

Governments > Courts > Court Personnel

HN36 The substantial likelihood of material prejudice test is constitutional, for it is designed to protect the integrity and fairness of a state's judicial system, and it imposes only narrow and necessary limitations on lawyers' speech. The limitations are aimed at two principal evils: (1) comments that are likely to influence the actual outcome of the trial, and (2) comments that are likely to prejudice the jury venire, even if an untainted panel can ultimately be found. Few, if any, interests under the Constitution are more fundamental than the right to a fair trial by impartial jurors, and an outcome affected by extrajudicial statements would violate that fundamental right. Even if a fair trial can ultimately be ensured through voir dire, change of venue, or some other device, these measures entail serious costs to the system. Extensive voir dire may not be able to filter out all of the effects of pretrial publicity, and with increasingly widespread coverage of criminal trials, a change of venue may not suffice to undo the effects of statements. The state has a substantial interest in preventing officers of the court, such as lawyers, form imposing such costs on the judicial system and on the litigants.

Constitutional Law > ... > Freedom of Speech > Free Press > Pretrial Publicity

Legal Ethics > Professional Conduct > General Overview

HN37 The substantial likelihood of material prejudice standard is narrowly tailored to protect the state interests. This is so because the restraint on attorney speech is limited - it applies only to speech that is substantially likely to have a materially prejudicial effect; it is neutral as to points of view, applying equally to all attorneys participating in a pending case; and it merely postpones the attorneys' comments until after trial.

Criminal Law & Procedure > Jurisdiction & Venue > Pretrial Publicity

Legal Ethics > Professional Conduct > General Overview

HN38 The text of Md. R. Prof. Conduct 3.6(c)(2) provides that an attorney may make extrajudicial statements without elaboration concerning information contained in a public record.

Governments > Legislation > General Overview

HN39 See Md. Code Ann., State Gov't § 10-611(g)(1) (1999).

Governments > Courts > Court Records

HN40 See Md. Code Ann., Crim. § 8-606(a)(3).

Administrative Law > Governmental Information > General Overview

Evidence > ... > Exceptions > Public Records > General Overview

Governments > Courts > Rule Application & Interpretation

HN41 Md. R. 5-803(b)(8)(A) defines "public records and reports" for purposes of the public records exception to the hearsay rule, as including a memorandum, report, record, statement, or data compilation made by a public agency setting forth (1) the activities of the agency; (2) masters observed pursuant to a duty imposed by law, as to which matters there was a duty to report; or (3) in civil actions and when offered against the state in criminal actions, factual finding resulting from an investigation made pursuant to authority granted by law.

Governments > Courts > Court Records

HN42 "Public record" is defined as a record that a governmental unit is required by law to keep, such as land deeds kept at a county courthouse.

Criminal Law & Procedure > Jurisdiction & Venue > Pretrial Publicity

Governments > Courts > Court Records

Legal Ethics > Professional Conduct > General Overview

HN43 U.S. Dist. Ct., Md. R. 204 prohibits an attorney from making certain extrajudicial statements after the arrest of an accused, except that the lawyer may quote from or refer to without comment to public court records in a case.

Criminal Law & Procedure > Jurisdiction & Venue > Pretrial Publicity

Governments > Courts > Court Records

Legal Ethics > Professional Conduct > General Overview

HN44 Md. R. Prof. Conduct 3.6(c)(2) does not provide adequate guidance for determining which extrajudicial statements would qualify under the safe harbor.

Criminal Law & Procedure > Jurisdiction & Venue > Pretrial Publicity

Legal Ethics > Professional Conduct > General Overview

HN45 Md. R. Prof. Conduct 3.6(b)(1) informs lawyers that extrajudicial statements relating to the criminal record of a party are ordinarily likely to be intolerably prejudicial.

Criminal Law & Procedure > ... > Accusatory Instruments > Informations > General Overview

Criminal Law & Procedure > ... > Adjustments & Enhancements > Criminal History > General Overview

Governments > Courts > Court Records

HN46 Not all criminal record information would qualify as information in a public record, even if the term is defined broadly. Some information relating to an individual's criminal history, such as that collected by the Criminal Justice Information System (CJIS), may not appear in a case file or docket sheet or otherwise have reached the public domain. The CJIS Central Repository compiles and maintains data of an individual's history of arrests, convictions, and other adverse criminal actions, but CJIS strictly limits access to its data. Md. Code Ann., Crim. Proc. § 10-213 (2001); Md. Regs. Code tit. 12, §§ 15.01.08-15.01.13 (2003). An ordinary citizen may not obtain criminal history information from CJIS without demonstrating convincingly that the purpose of requesting the data meets one of CJIS's narrow exceptions (e.g., an employer who is seeking background information on a prospective employee whose job could jeopardize the life and safety of individuals). Md. Regs. Code tit. 12, § 15.01.13. As a result, the CJIS report is not public.

Criminal Law & Procedure > ... > Accusatory Instruments > Informations > General Overview

Criminal Law & Procedure > Jurisdiction & Venue > Pretrial Publicity

Governments > Courts > Court Records

Legal Ethics > Professional Conduct > General Overview

HN47 The non-public criminal history information collected by the Criminal Justice Information System (CJIS) may overlap with information contained in publicly accessible case files and docket entries. If that should occur, the overlapping criminal record information would be considered part of the public government records, and statements referring to that particular information would receive protection under the public record safe harbor. The converse is also true; if an extrajudicial statement refers to criminal history information obtainable only from a non- public source like CJIS, the public record safe harbor would not apply.

Constitutional Law > ... > Freedom of Speech > Free Press > Pretrial Publicity

Criminal Law & Procedure > Jurisdiction & Venue > Pretrial Publicity

HN48 To best protect the right to a fair trial and safeguard the right of free expression, the phrase "information in a public record" should refer only to public government records - the records and papers on file with a government entity to which an ordinary citizen would have lawful access.

Criminal Law & Procedure > Jurisdiction & Venue > Pretrial Publicity

Legal Ethics > Professional Conduct > General Overview

HN49 To receive the protection of the public record safe harbor, a lawyer must not provide information beyond quotations from or references to public government records.

Criminal Law & Procedure > Jurisdiction & Venue > Pretrial Publicity

Legal Ethics > Professional Conduct > General Overview

HN50 Md. R. Prof. Conduct 3.6(b)(2) provides that a statement relating to the existence or contents of any confession, admission, or statement given by a defendant is ordinarily likely to have a substantial likelihood of materially prejudicing an adjudicative proceeding.

Constitutional Law > ... > Fundamental Freedoms > Judicial & Legislative Restraints > Overbreadth & Vagueness of Legislation

Criminal Law & Procedure > Jurisdiction & Venue > Pretrial Publicity

Legal Ethics > Professional Conduct > General Overview

HN51 The public record safe harbor, whether construed narrowly or broadly, can not apply possibly to any statement that introduced information to the public for the first time.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Right to Jury Trial

Criminal Law & Procedure > Jurisdiction & Venue > Pretrial Publicity

HN52 The outcome of a criminal trial is to be decided by impartial jurors, who know as little as possible of the case, based on material admitted into evidence before them in a court proceeding. Extrajudicial comments on, or discussion of, evidence which might never be admitted at trial and ex parte statements by counsel giving their version of the facts obviously threaten to undermine this basic tenet.

Criminal Law & Procedure > ... > Entry of Pleas > Guilty Pleas > General Overview

Criminal Law & Procedure > Jurisdiction & Venue > Pretrial Publicity

Legal Ethics > Professional Conduct > General Overview

HN53 Md. R. Prof. Conduct 3.6(b)(2) states that a statement is ordinarily likely to have a substantial likelihood of materially prejudicing an adjudicative proceeding if the statement relates to the possibility of a plea of guilty to the offense.

Criminal Law & Procedure > Preliminary Proceedings > Entry of Pleas > General Overview

Criminal Law & Procedure > ... > Entry of Pleas > Guilty Pleas > General Overview

Criminal Law & Procedure > ... > Entry of Pleas > Guilty Pleas > Knowing & Intelligent Requirement

Criminal Law & Procedure > Jurisdiction & Venue > Pretrial Publicity

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > Knowledge

Legal Ethics > Professional Conduct > General Overview

HN54 The decision to offer a plea bargain does not qualify as information contained in a public record, even under the broadest meaning of that phrase.

Criminal Law & Procedure > Jurisdiction & Venue > Pretrial Publicity

Legal Ethics > Professional Conduct > General Overview

HN55 Md. R. Prof. Conduct 3.6(b)(4) specifically addresses attorney comments discussing any opinion as to the guilt or innocence of a defendant.

Criminal Law & Procedure > Jurisdiction & Venue > Pretrial Publicity

Legal Ethics > Professional Conduct > General Overview

HN56 In considering the propriety of a statement under Md. R. Prof. Conduct 3.6, the Court of Appeals of Maryland will determine the likelihood that a particular statement will cause prejudice at the time the statement was made, not whether that statement, in hindsight, actually worked to the detriment of a defendant.

Criminal Law & Procedure > Jurisdiction & Venue > Pretrial Publicity

HN57 The timing of an extrajudicial statement may affect its prejudicial effect.

Governments > Courts > Judges

Legal Ethics > Prosecutorial Conduct

HN58 Prosecutors are held to even higher standards of conduct than other attorneys due to their unique role as both advocate and minister of justice. The special duty of the prosecutor to seek justice is said to exist because the State's Attorney has broad discretion in determining whether to initiate criminal proceedings. The office of prosecutor is therefore not purely ministerial, but involves the exercise of learning and discretion, and he or she must exercise a sound discretion to distinguish between the guilty and the innocent. The responsibilities of the prosecutor encompass more than advocacy. The prosecutor's duty is not merely to convict, but to seek justice. His obligation is to protect not only the public interest but the innocent as well and to safeguard the rights guaranteed to all persons, including those who may be guilty.

Legal Ethics > Prosecutorial Conduct

HN59 In addition to their special role as ministers of justice, prosecutors have limitations not experienced by criminal defense attorneys in that defense attorneys have the benefit of their client's presumption of innocence. In other words, a criminal defense attorney may announce an opinion that his or her client is innocent with a lesser risk of causing prejudice because the law, itself, presumes the defendant's innocence.

Legal Ethics > Prosecutorial Conduct

HN60 Prosecutors, as public employees, may not speak publicly with the same broad freedom that ordinary citizens enjoy. This is so because, in the context of an employer and employee relationship, the state has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Public Employees

HN61 Maryland cases acknowledge that public employees may be subjected to greater speech limitations by the state as a result of the state's interests as an employer.

Legal Ethics > Professional Conduct > General Overview

HN62 Md. R. Prof. Conduct 8.4(a) finds professional misconduct where a lawyer violates or attempts to violate the Maryland Rules of Professional Conduct.

Business & Corporate Compliance > ... > Legal Ethics > Client Relations > Client Funds

Legal Ethics > Professional Conduct > General Overview

HN63 Violations of a Md. R. Prof. Conduct 1.15, 1.4(a) necessarily result in a violation of Md. R. Prof. Conduct 8.4(a) as well.

Legal Ethics > Professional Conduct > Frivolous Claims & Conduct

HN64 Md. R. Prof. Conduct 3.1 prohibits attorneys from bringing frivolous suits.

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > Knowledge

Legal Ethics > Prosecutorial Conduct

HN65 Md. R. Prof. Conduct 3.8(a) prohibits prosecutors from knowingly prosecuting a charge that is not supported by probable cause.

Legal Ethics > Sanctions > General Overview

HN66 In sanctioning an attorney, the Court of Appeals of Maryland seeks to protect the public, to deter other lawyers from engaging in violations of the Maryland Rules of Professional Conduct, and to maintain the integrity of the legal profession. To protect the public adequately, courts impose a sanction that is

commensurate with the nature and gravity of the violations and the intent with which they were committed. A sanction, therefore, depends upon the facts and circumstances of each particular case, including consideration of any mitigating factors.

Legal Ethics > Sanctions > General Overview

Legal Ethics > Sanctions > Reprimands

HN67 The appropriate sanction in a case is one which demonstrates to members of the legal profession the type of conduct that will not be tolerated and which maintains the integrity of the Bar by preventing an attorney's transgressions from bringing its image into disrepute.

Headnotes/Syllabus

Headnotes

In an attorney disciplinary proceeding against prosecutor, the Court of Appeals referred petition for hearing. The Circuit Court, Frederick County, Julie R. Stevenson, J., found a single violation of rule applicable, to extra judicial comments. Bar Counsel and prosecutor filed exceptions. The Court of Appeals, Battaglia, J., held as a matter of first impression that: (1) comments about a defendant's confession, decision to offer plea bargain, and apprehension of perpetrators of two, murders violated disciplinary rule applicable, to extra judicial statements; (2) some comments were within safe harbor of disciplinary rule allowing attorney to make extra judicial statement about information contained in a public record since a broad definition of "public record" applied to case against prosecutor; (3) for future cases the "public record" is limited to public government records; and (4) public reprimand was warranted.

Counsel: Melvin Hirshman, Bar Counsel and John C. Broderick, Assistant Bar Counsel for the Attorney Grievance Commission of Maryland, for Petitioner.

Carmen M. Shepard, Washington, DC, for respondent.

Judges: Argued before Bell, C.J., Eldridge, Wilner, Cathell, Harrell, Battaglia, Robert L. Karwacki (retired, specially assigned), JJ.

Opinion by: BATTAGLIA

Opinion

[*663] **[**552]** BATTAGLIA, Judge.

Respondent Douglas F. Gansler was admitted to the Bar of this Court on December 18, 1989. On November 7, 2002, the Attorney Grievance Commission of Maryland, by Bar Counsel, acting pursuant to Maryland Rule 16-751(a),[1] filed a petition for disciplinary action, alleging that Gansler violated the following Maryland Rules of Professional Conduct (hereinafter "MRPC"): MRPC 3.1 (Meritorious Claims and Contentions),[2] **[*664]** MRPC 3.6 (Trial Publicity),[3] **[***3]** MRPC 3.8

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[1] Maryland Rule 16-751(a) provides:

> ***HN1*** (a) **Commencement of disciplinary or remedial action.** Upon approval of the [Attorney Grievance] Commission, Bar Counsel shall file a Petition for Disciplinary or Remedial Action in the Court of Appeals.

[2] MRPC 3.1 states:

> ***HN2*** A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer may nevertheless so defend the proceeding as to require that every element of the moving party's case be established.

[3] MRPC 3.6 states:

> ***HN3*** (a) A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.
>
> (b) A statement referred to in paragraph (a) ordinarily is likely to have such an effect when it refers to a civil matter. triable to a jury, a criminal matter, or any other proceeding that could result in incarceration, and the statement relates to:
>
> (1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;
>
> (2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;
>
> (3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(Special Responsibilities **[*665]** **[**553]** of a Prosecutor), [4] MRPC 8.2(a) (Judicial and Legal Officials), [5] **[***4]** and MRPC 8.4(a) & (d) (Misconduct). [6]

[*666] The charges arose from numerous extrajudicial statements made by Gansler, who has served as the State's Attorney for Montgomery County since January of 1999. By order dated November 13, 2002 and pursuant to Maryland Rules 16-752(a) and 16-757(c), [7]

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(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

(5) information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would if disclosed create a substantial risk of prejudicing an impartial trial; or

(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

(c) Notwithstanding paragraph (a) and (b)(l-5), a lawyer involved in the investigation or litigation of a matter may state without elaboration:

(1) the general nature of the claim or defense;

(2) the information contained in a public record;

(3) that an investigation of the matter is in progress, including the general scope of the investigation, the offense or claim or defense involved and, except when prohibited by law, the identity of the persons involved;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case:

(i) the identity, residence, occupation and family status of the accused; (ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the fact, time and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

[4] MRPC 3.8 states:

HN4 The prosecutor in a criminal case shall:

(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends, to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the, tribunal; and

(e) exercise reasonable care to prevent an employee or other person under the control of the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6.

[5] MRPC 8.2(a) states:

HN5 (a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

[6] MRPC 8.4 states in relevant part:

HN6 It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

HN7 (d) engage in conduct that is prejudicial to the administration of justice. . . .

[7] Maryland Rule 16-752(a) states:

HN8 (a) **Order.** Upon the filing of a Petition for Disciplinary or Remedial Action, the Court of Appeals may enter an order designating a judge of any circuit court to hear the action and the clerk responsible for maintaining the record. The order of designation shall require the judge, after consultation with Bar Counsel and the attorney, to enter a scheduling order defining the extent of discovery and setting dates for the completion of discovery, filing of motions, and hearing. Maryland Rule 16-757(c) states in pertinent part:

we referred the petition to Judge Julie R. Stevenson of the Circuit Court for Frederick County for an evidentiary hearing and to make findings of fact and conclusions of law. During that hearing, which took place on March 10, 2003, Bar Counsel offered into evidence three videotapes of Gansler's extrajudicial statements and the report of his expert in the case, Professor Abraham Dash. Professor Dash and Professor Lisa Lerman, Gansler's expert,, testified at the hearing. ; Gansler also offered his own testimony as well as that of **[***5]** two Deputy State's Attorneys for Montgomery. County.

Judge Stevenson filed a Report and Recommendations on April 29, 2003, in **[**554]** which she presented findings of fact and conclusions of law. Judge Stevenson concluded **[***6]** that Bar Counsel had presented clear and convincing evidence that Gansler, in one instance, had violated MRPC 3.6(a); however, in Judge Stevenson's judgment, the evidence insufficiently supported Bar Counsel's charges that Gansler had violated MRPC 3.6(a) in other instances and had violated other MRPC provisions. Both Bar Counsel and Gansler filed exceptions to Judge Stevenson's findings and conclusions. We, overrule Gansler's exception and conclude, further, that he violated **[*667]** MRPC 3.6(a) on more than a single occasion. Accordingly, as to Gansler's extrajudicial statements in which' he discussed Cook's confession and his opinion of Cook's and Lucas's guilt, we sustain Bar Counsel's exceptions.

I. Facts

The undisputed facts in this case have been proven by clear and convincing evidence as required by Maryland Rule 16-757(b). Those facts demonstrate that, between 2000 and 2001, Gansler made several extrajudicial statements in connection with his office's prosecution of various well-publicized crimes. A discussion of the circumstances of each of the extrajudicial statements follows. [8]

[*7] A. The Cook Case**

In late January of 2001, Sue Wen Stottsmeister was found beaten and unconscious. She had been accosted while jogging along a recreational path located in the Aspen Hill area of Montgomery County. Ms. Stottsmeister ultimately died from the injuries she suffered during that attack.

Nearly six-months later, on June 4, 2001, Albert W. Cook, Jr. allegedly attacked a woman near his home. Witnesses of that attack chased and kept visual contact with Cook until police arrived and arrested him for that incident. While. the police were investigating the June 4, 2001 attack, they began to focus their attention on Cook as a suspect in the murder of Stottsmeister. In the afternoon of June 5, 2001, police officials convened the media for a press conference. Before the press conference began, a Washington D.C. television station broadcasted a report that large sneaker footprints had been found at the scene of the murder and that Cook had large feet that might fit sneakers of that size. The press conference then commenced, and the police announced that Cook would be charged with the Stottsmeister murder.

[*668] Gansler attended that press conference and made several statements **[***8]** to, the media regarding the anticipated prosecution of Cook. He described Cook's confession and the circumstances surrounding his custodial statements to police:

> The police were able to obtain a confession completely consistent with [Cook's] constitutional rights, he confessed within just a few hours with incredible details that only the murderer would have known. He was then provided the opportunity to rest and . . . he slept, and where he had said was one of the best nights of sleep he had gotten in a long time.
>
> This morning at dawn, he was taken up to the crime scene, video taped by police, and went over in detail by detail every step of what he did to Ms. Stottsmeister this past January.
>
> Gansler further stated that investigators had "boot print matches and that type of thing, or actually in this case the sneaker matches, but we're very confident, obviously **[**555]** more than confident that we have apprehended the right person. . . ."

After the press conference, police charged Cook with the murder of Stottsmeister. [9] The statement of charges,

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HN9 (c) Findings and conclusions. The judge shall prepare and file or dictate into the record a statement of the judge's findings of fact, including findings as to any evidence regarding remedial action, and conclusions of law. . . .

[8] The facts we present in this section are based on the findings of fact and evidentiary items relied upon by the hearing judge in her Report and Recommendations.

[9] Judge Stevenson noted, specifically, that the statement of charges in Cook's case had not been filed at the time of the

which was filed in the District Court of Maryland, Montgomery County, stated: "Cook provided a full and detailed account of the assault [***9] and murder of Stottsmeister. . . . Cook provided details about the murder that would only be known by the perpetrator of the crime."

B. The Lucas Case

While asleep during the middle of the night, Monsignor Thomas Martin Wells, a revered member of the Montgomery County community, was beaten and killed in the rectory at his parish. On June 17, 2000, the Montgomery County police arrested Robert P. Lucas and charged him with the murder of [*669] Monsignor Wells. The statement of charges stated that the police had observed Lucas "wearing shoes having a shoe print consistent with the ones found on the crime scene" and that after Lucas was arrested, he "admitted breaking into the church rectory and responsibility for Well's murder."

The police held a press conference on June 18, 2000 to announce the arrest of Lucas and the charges against him. Gansler spoke at [***10] the press conference:

> The Montgomery County Police . . . were able to determine definitively that indeed it was Mr. Lucas who had committed the crime. They were able to do so by following him. They conducted surveillance for over 24 hours. And then when they actually found him, he was wearing a very unique shoe, a very unique boot, and the print of that boot matched the print that was found at the scene of the crime, and then further questioning revealed, in fact, he was the person that has done it.
>
> He offered several remarks about the evidence against Lucas, which he described as "a confession from the perpetrator as well as scientific and forensic evidence to corroborate that confession. . . ." Gansler then expressed his opinion that "we have found the person who committed the crime at this point" and that the case against Lucas "will be a strong case."

Additionally, Gansler commented at the press conference that "it was a violent murder" and that Lucas "has a criminal record which includes residential burglaries and that will be obviously something that will come out later on as well." In fact, Lucas's criminal record came out again later, when Deputy State's Attorney, Katherine [***11] Winfree discussed it at Lucas's bond hearing on the Monday after the press conference

C. The Perry Case

James Edward Perry was convicted in the Circuit Court for Montgomery County of first-degree murder and sentenced to death for his role in the 1993 killings of an 8 year-old quadriplegic boy, the boy's mother, and a nurse. Although [*670] upheld on direct appeal, in post-conviction proceedings, Perry's conviction was reversed by this Court on December 10, 1999.

On January 4, 2000, the *Washington Post* ran an article describing Gansler's discussions with family members of the victims of the 1993 murders. The article explained that Gansler had asked the family members whether Perry should be retried or offered a plea agreement. Quoted in the article was Perry's attorney, William Jordan Temple, who commented that he "certainly would look forward" to a plea [**556] offer because "anyone faced with the possibility of a death penalty considers an offer of life."

While preparing for Perry's retrial, Gansler made extrajudicial statements that the *Gazette Community News* published on April 5, 2000. According to the *Gazette's* report, Gansler had announced that "he has decided to [***12] offer [Perry] a plea bargain" and that, "when the offer is formally presented, Perry would have six weeks to make a decision." The article also recounted the events of a hearing in the Perry case, held the day before, at which the court appointed new defense counsel. At that hearing, according to the *Gazette,* the prosecutor "did not mention the plea bargain offer" and Perry's lawyers "declined to discuss a plea offer or any details about the case."

On or about July 6, 2000, Gansler again appeared in front of television cameras. Responding to questions from the media, Gansler remarked that "the Court of Appeals' decision to reverse the original conviction of Mr. Perry was a completely result oriented opinion." Gansler expressed his view that the "four to three" opinion "was clearly an effort to overturn the death penalty in the Perry case."

D. The Bomb Threat Case

On February 8, 2000, the *Montgomery County Journal* published an article reporting the dismissal of charges against two Montgomery County teenagers who had been accused of calling bomb threats to Wheaton High

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June 5, 2001 press conference.

School. At the juveniles' **[*671]** trial, the State presented evidence of two telephone calls that purportedly **[***13]** were the bomb threats. One of the calls, the article stated, could not be linked to either juvenile, and the other had been made three days prior to the alleged bomb threat. The article quoted the presiding judge, who in dismissing the charges, said, "I have no idea who did this" and "I have no evidence." The *Journal* account relayed Gansler's comments that "his office will continue to prosecute youths suspected of making bomb threats, even if the case is not strong enough to warrant a conviction." Gansler was quoted as saying, "We try hard cases. . . . Juveniles who phone in bomb threats will be prosecuted. It's more important to prosecute someone and have them acquitted [sic] than let them commit crimes with impunity." [10]

[*14] II. The Hearing Judge's Conclusions of Law**

The hearing judge concluded that Gansler committed a single violation of MRPC 3.6 by making extrajudicial statements about his decision to offer a plea agreement in the Perry case: The judge determined that those statements clearly violated the general proscriptions of MRPC 3.6(a) as well as the specific provisions of MRPC 3.6(b)(2) limiting extrajudicial references to plea agreements. Furthermore, in the hearing judge's estimation, Gansler's plea agreement remarks found no safe harbor under ***HN11*** MRPC 3.6(c), which provides that certain types of statements are *permissible* even though, under MRPC 3.6(a), those statements might have a "substantial **[**557]** likelihood of materially prejudicing an adjudicative proceeding."

[*672] The hearing judge found no violations with respect to Gansler's other extrajudicial statements. The judge concluded that Gansler's references to the physical evidence against Cook and Lucas fell under the safe harbor provision of ***HN12*** MRPC 3.6(c)(2), which allows a lawyer to state, "without elaboration," "information contained in a public record" notwithstanding the strictures of MRPC 3.6(a) or MRPC 3.6(b). In the hearing judge's **[***15]** view, the "public record" safe harbor suffered, from First Amendment vagueness concerns because it was susceptible of multiple and widely varying interpretations. Lacking a precise definition, the judge indicated that the terms "without elaboration" and "public record" fail to provide lawyers with adequate guidelines for determining when "remarks pass from protected to prohibited."

The hearing judge, however, conveyed concern over Gansler's comments regarding the Cook and Lucas confessions, which, she stated, "clearly do no fall under [the safe harbor provision of MRPC] (c)(2)," violated "the spirit of [MRPC] 3.6" and "could create a substantial likelihood of materially prejudicing an adjudicative proceeding." Nevertheless, the judge found no violations of MRPC 3.6 in these comments because she determined that, due to their timing, no material prejudice actually flowed from them. [11]

[*16]** The judge examined Gansler's extrajudicial criticism of this Court's reversal of Perry's conviction in light of MRPC 8.2. The judge agreed with Bar Counsel's expert, who considered Gansler's comments "a lawful and appropriate expression of opinion protected under the First Amendment of the United States Constitution." Consequently, the hearing judge determined that Gansler had not violated MRPC 8.2.

Finally, the hearing judge concluded that Bar Counsel had not demonstrated that Gansler violated MRPC 3.1 or MRPC 3.8(a) by making comments regarding his intended prosecution of youths suspected of making bomb threats. The judge **[*673]** was persuaded by Gansler's hearing testimony that "his intent was not to prosecute in bad faith" but, rather, to stress that "the State often must try cases difficult to prove." Specifically finding Gansler's testimony credible, the hearing judge concluded that Bar Counsel had not presented clear and convincing evidence that Gansler intended to prosecute without probable cause in violation of MRPC 3.1 and MRPC 3.8(a).

As we noted earlier, both parties filed exceptions to the hearing judge's conclusions. Bar Counsel maintained that the hearing judge's finding **[***17]** of a single violation was in error and that the evidence clearly and

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[10] In the proceedings before the hearing judge, Bar Counsel presented evidence of numerous other extrajudicial statements by Gansler that Bar Counsel considered objectionable. The hearing judge's Report and Recommendations do not refer to those other statements, and Bar Counsel has not raised any exceptions based on those statements. ***HN10*** Because Bar Counsel failed to take exceptions to the hearing judge's factual findings, we consider only those statements discussed by Judge Stevenson to be at issue. *See* Maryland Rule 16-759(b)(2)(B) ("The [Court of Appeals] may confine its review to the findings of fact challenged by [a party's] exceptions.").

[11] The hearing judge stated that she reached this conclusion "with reluctance" and that she was "troubled by such statements made by an elected State's Attorney prior to trial."

convincingly supported a conclusion that Gansler violated MRPC 3.6 on numerous occasions. In addition, Bar Counsel argued that Gansler intended to prosecute without probable cause, in violation of MRPC 3.1, MRPC 3.8, and MRPC 8.4(d). Bar Counsel, however, took no exception from the hearing judge's conclusion that Gansler did not violate MRPC 8.2. Gansler found no fault with most of the hearing judge's findings and conclusions, except, however, for her determination that his comments regarding the plea offer to Perry had violated MRPC 3.6.

III. Standard of Review

Our recent opinion in *Attorney Grievance Comm'n v. Zdravkovich*, 375 Md. 110, 126, 825 A.2d 418, 427 (2003), iterated **[**558]** our well established and frequently recognized standard of review in attorney disciplinary matters:

> ***HN13*** This Court exercises "'original and complete jurisdiction for attorney disciplinary proceedings in Maryland,' and conducts 'an independent review of the record." *Attorney Grievance Comm'n v. Blum*, 373 Md. 275, 293, 818 A.2d 219, 230 (2003) (quoting *Attorney Grievance Comm'n v. McLaughlin*, 372 Md. 467, 492, 813 A.2d 1145, 1160 (2002) **[***18]** (citations omitted)). ***HN14*** "In conducting that review, we accept the hearing judge's findings of fact as *prima facie* correct unless shown to be `clearly erroneous,' and we give due regard to the hearing judge's opportunity to assess the credibility of witnesses. *Attorney Grievance Comm'n v. Wallace*, 368 Md. 277, 288, 793 A.2d 535, 542 (2002)(citation **[*674]** omitted). ***HN15*** "As to the hearing judge's conclusions of law," however, "'our consideration is essentially *de novo.' " Attorney Grievance Comm'n v. Dunietz*, 368 Md. 419, 428, 795 A.2d 706, 711 (2002) (quoting *Attorney Grievance Comm'n v. Thompson*, 367 Md. 315, 322, 786 A.2d 763, 768 (2001) (quoting *Attorney Grievance Comm'n v. Briscoe*, 357 Md. 554, 562, 745 A.2d 1037, 1041 (2000))).

IV. Discussion

A. MRPC 3.6

This case serves as this Court's first opportunity to consider the application of ***HN16*** MRPC 3.6, the rule of professional responsibility governing trial publicity. More significant than, the case's novelty, however, are the balance and interplay of the numerous interests, rights, and responsibilities involved. To provide the proper context for understanding **[***19]** the important issues presented, we begin with a historical discussion of the regulation of trial publicity. We then proceed to dissect Maryland's present rule and apply it to the extrajudicial statements in controversy.

1. Origins of the MRPC 3.6

HN17 Criminal justice must be carried out in the courtroom. [12] As Justice Holmes declared in *Patterson v. Colorado*, 205 U.S. 454, 462, 27 S. Ct. 556, 558, 51 L. Ed. 879, 881 (1907), "[t]he theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print." The constitutional underpinnings for this concept reside in the Sixth Amendment's right to a fair trial, made applicable to our State through the Fourteenth Amendment. [13] **[*675]** *Ristaino v. Ross*, 424 U.S. 589, 595 n.6, 96 S. Ct. 1017, 1020 n.6, 47 L. Ed. 2d 258, 263 n.6 (1976) ("A criminal defendant in a state court is guaranteed an "impartial jury" by the Sixth Amendment as applicable to the States through the Fourteenth Amendment.") (citing *Duncan v. Louisiana*, 391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968)); **[***20]** *see* **[**559]** *Estes v. Texas*, 381 U.S. 532, 540, 85 S. Ct. 1628, 1632, 14 L. Ed. 2d 543, 549 (1965) (describing the right to a fair trial as "the most fundamental of all freedoms"). ***HN18*** Article 21 of the Maryland Declaration of Rights also guarantees the right to a fair trial in all criminal prosecutions. [14]

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[12] For extended discussions of the origin and historical development of the modern rules governing trial publicity, see Charles W. Wolfram, MODERN LEGAL ETHICS at 633-34 (1986); Alberto Bernabe-Riefkohl, *Silence* is *Golden: The New Illinois Rules on Attorney Extrajudicial Speech,* 33 LOY. U. CHI. L. J. 323 (2002).

[13] U.S. CONST. amend. VI provides:

> ***HN19*** In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

[14] Article 21 of the Maryland Declaration of Rights provides:

> ***HN20*** That in all criminal prosecutions, every man hath a

HN21 The text of the Sixth Amendment makes clear that a fair trial consists of numerous components, including, but certainly not limited to, the rights of an accused to a public trial and impartial jury. These components alone, of course, do not necessarily ensure a fair trial, as Chief Justice Warren explained:

> It has been held . . . that ***HN22*** the fundamental conception of a fair trial includes many of the specific provisions of the Sixth Amendment . . . . But it also has been agreed that neither the Sixth nor the Fourteenth Amendment is to be read formalistically, for the **[***22]** clear intent of the amendments is that these specific rights be enjoyed at a constitutional trial. In the words of Justice Holmes, even though "every **[*676]** form [be] preserved," the forms may amount to no "more than an empty shell" when considered in the context or setting in which they were actually' applied. *Id.* at 560, 85 S. Ct. at 1641, 14 L. Ed. 2d at 560
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> (Warren C.J., concurring). Thus, ***HN23*** even where a court has observed all of the Sixth Amendment formalities, it, is possible for, a defendant to be deprived of a fair trial if circumstances occurring outside the courtroom taint the proceedings. *See Rideau v. Louisiana*, 373 U.S. 723, 83 S. Ct. 1417, 10 L. Ed. 2d 663 (1963) (holding that a defendant's fundamental due process rights had been violated because a local television station had broadcasted his confession, and he' was denied a change of venue).

HN24 One outside circumstance that may affect a defendant's right to a fair trial and, specifically, his right to an impartial jury, occurs when an attorney makes a publicized, out-of-court statement about the defendant's case. This is particularly true because attorneys occupy a special role as participants in the criminal **[***23]** justice, system, and, as a result, the public may view their speech as authoritative and reliable. Attorneys involved in a particular case have greater access to information through discovery, the ability to converse privately with knowledgeable witnesses, and an enhanced understanding of the circumstances and issues. Their unique role and extensive access to information lends a degree of credibility to their speech that an ordinary citizen's speech may not usually possess. Comments by prosecuting attorneys, in particular, have the inherent authority of the government and are more likely to influence the public. When such seemingly credible information reaches the ears or eyes of the public, the jury pool may become contaminated, greatly diminishing the court's ability to assemble an impartial jury. The defendant's right to a fair trial, thus, may be compromised. See Joan C. Bohl, *Extrajudicial Attorney Speech and Pending Criminal Prosecutions: The Investigatory Commission Meets A.B.A. Model Rule 3.6*, 44 KAN. L. REV. 951, 973-74 (1996) (discussing how attorney speech differs from the speech of other individuals).

HN25 **[**560]** **[*677]** Limiting extrajudicial attorney speech to preserve **[***24]** a fair trial, however, can be accomplished only in a way that is consistent with the fundamental right to free expression under the First Amendment. In general, the First Amendment applies equally to an ordinary citizen and an attorney, as long as the attorney "plays no lawyerly role in the matter under comment." *See* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS at 632 (1986). On the other hand, when the attorney has some professional relationship to a matter, the attorney's freedom to speak about it is not as broad. For instance, inside the courtroom, the rules of evidence and principles of relevance place rigid restrictions upon what an attorney may say, and when and how he or she may speak. Even outside the courtroom, the speech of a lawyer may be curtailed to an extent greater than an ordinary citizen's. In the arena of attorney advertising, the Supreme Court has upheld a state's thirty-day waiting period for solicitation letters by plaintiffs' personal injury lawyers, *see Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 115 S. Ct. 2371, 132 L. Ed. 2d 541 (1995), and a state's ban on in-person attorney solicitations, *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 98 S. Ct. 1912, 56 L. Ed. 2d 444 (1978). **[***25]**

In 1908, the American Bar Association first attempted to control the ill effects of attorney-generated trial publicity through the development of professional standards entitled "Canons of Professional Ethics" (hereinafter the "ABA Canons"). Many states adopted the ABA Canons, including Canon 20, which "[g]enerally . . . condemned" newspaper publications "by a lawyer" regarding a pending case because such publications "may interfere with a fair trial in the Courts and otherwise prejudice the

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right to be informed of the accusation against him; to have a copy of the Indictment, or charge, in due time (if required) to prepare for his defence; to be allowed counsel; to be confronted with the witnesses against him; to have process for his witnesses; to examine the witnesses for, and against him on oath; and to a speedy trial by an impartial jury, without whose unanimous consent he ought not to be found guilty.

due administration of justice." [15] **[*678]** *See Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1066, 111 S. Ct. 2720, 2740, 115 L. Ed. 2d 888, 918 (1991); Alberto Bernabe-Riefkohl, *Silence is Golden: The New Illinois Rules on Attorney Extrajudicial Speech,* 33 LOY. U. CHI. L. J. 323, 331 (2002) (hereinafter Bernabe-Riefkohl). The Maryland State Bar Association formally adopted the ABA Cannons in 1922. *Canons of Ethics, Adopted by the Maryland State Bar Association, Annual Session 1922* at 1.

[*26]** Despite the widespread adoption of the ABA Canons, trial publicity continued to affect defendants' Sixth Amendment rights and, consequently, gained the attention of the Supreme Court during the 1950s and 1960s. The Court dealt with the detriments of excessive media involvement in cases by reversing a number of criminal convictions on the ground that excessive trial publicity deprived the defendants of due process. *Estes v. Texas*, 381 U.S. 532, 85 S. Ct. 1628, 14 L. Ed. 2d 543 (1965) (holding that a defendant had been denied due process because a pre-trial hearing had been televised live and then rebroadcast, and because the, court proceedings had been disrupted by the presence of the media); *Rideau v. Louisiana*, 373 U.S. 723, 83 S. Ct. 1417, 10 L. Ed. 2d 663 (1963) (reversing a conviction after the defendant had been denied a change of venue even though a local television station had broadcast his recorded confession three times, **[**561]** and 106,000 of the estimated 150,000-person community viewed the broadcast); *Irvin v. Dowd*, 366 U.S. 717, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961) (reversing a conviction where pre-trial publicity distributed **[***27]** in the vicinity of the trial included, *inter alia,* media accounts of the defendant's juvenile record, the confessions to several murders, and previous court-martial proceedings); *Marshall v. United States*, 360 U.S. 310, 79 S. Ct. 1171, 3 L. Ed. 2d 1250 (1959) (reversing a conviction because seven of twelve jurors had been exposed to news accounts of evidence that was not admitted at trial).

[*679] The leading case during this era, which identified the need for trial publicity reform and shaped the American Bar Association's (hereinafter "ABA") remedial measures, was *Sheppard v. Maxwell*, 384 U.S. 333, 86 S. Ct. 1507, 16 L. Ed. 2d 600 (1966). There, the Court, on due process grounds, reversed the murder conviction of Sam Sheppard, whose high-profile trial had been preceded and pervaded by a media frenzy. *Id* at 363, 86 S. Ct. at 1522-23, 16 L. Ed. 2d at 621. Newspapers had documented Sheppard's alleged refusal to cooperate with investigating officials and had published articles discussing incriminating evidence that was never admitted at trial. *Id*. at 338-41, 86 S. Ct. at 1509-11, 16 L. Ed. 2d at 606-08. During trial, **[***28]** members of the media frequently moved in and out of the courtroom, causing so much noise and confusion that it became difficult to hear lawyers and witnesses. *Id*. at 344, 86 S. Ct. at 1513, 16 L. Ed. 2d at 610. Furthermore, reporters had crowded the defense table at trial, making it very difficult for Sheppard to have private discussions with his counsel. *Id.* Despite the chaotic conditions, the trial judge refused to allow a change of venue and failed to take steps to control the adverse effects of the publicity. *Id*. at 354 n.9, 358-59, 86 S. Ct. at 1518 n.9, 1520, 16 L. Ed. at 615 n.9, 618.

The Supreme Court admonished the trial court in *Sheppard* for its failure to control the extrajudicial publicity:

> The fact that many of the prejudicial news items can be traced to the prosecution, as well as the defense, aggravates the judge's failure to take any action. Effective control of these sources-concededly within the court's power might well have prevented the divulgence of inaccurate information, rumors, and accusations that made up much of the inflammatory publicity *Id*. at 361, 86 S. Ct. at 1521, 16 L. Ed. 2d at 619.

[*29]** The Court suggested how the trial judge could have minimized the prejudicial publicity, including, proscribing extrajudicial statements by lawyers and other trial, participants; requesting local officials to implement regulations with respect to the dissemination of trial information, and warning news media about the impropriety of publicizing material not introduced at the proceeding. **[*680]** *Id*. at 361-62, 86 S. Ct. at 1521-22, 16 L. Ed. 2d at 619-20. Emphasizing the prejudicial effect of news media on fair trials, the

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[15] The full text of Canon 20 stated:

> Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the Courts and otherwise prejudice the due administration of justice. Generally they are to be condemned. If the extreme circumstances of a particular case justify a statement to the public, it is unprofessional to make it anonymously. An *ex parte* reference to the facts should not go beyond quotation form the records and papers on file in the court; but even in extreme cases it is better to avoid any *ex parte* statement.

Court iterated:

> ***HN26*** Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused. . . . [W]here there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue until the threat abates, or transfer it to another county not so permeated with publicity. *Id.* at 362-63, 86 S. Ct. at 1522, 16 L. Ed. at 620.
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> Moreover, **[***30]** the Court recognized that ***HN27*** repeatedly reversing convictions **[**562]** would not suffice as a long-term remedy for the harm of trial publicity. The Court recommended an alternative, solution:
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> But we must remember that ***HN28*** reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception. The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function. ***HN29*** Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but it is highly censurable and worthy of disciplinary measures. *Id.* at 363, 86 S. Ct. at 1522, 16 L. Ed. 2d at 620.

In response to *Sheppard* and as a culmination of four years of meetings by a committee appointed by the ABA to develop standards to regulate the criminal justice system, the ABA in 1968 introduced Standards Relating to Fair Trial and Fair Press (hereinafter the "ABA **[***31]** Standards"). ABA STANDARDS FOR CRIMINAL JUSTICE FAIR TRIAL AND FREE PRESS ix (3rd ed. 1991). ABA Standard 1-1, which merely set aspirational **[*681]** goals for lawyers, stated that it was a "duty" of a lawyer to prevent the "release" of information for "dissemination" that is reasonably likely to interfere with a fair trial. [16] In addition, the ABA included a disciplinary rule related to trial publicity in its newly proposed Model Code of Professional Responsibility of 1969 (hereinafter "ABA Model Code of 1969"). Bernabe-Riefkohl at 337. Disciplinary Rule 7-107 of the ABA Model Code of 1969 established a detailed set of mandatory guidelines to be used by lawyers considering the propriety of extrajudicial statements. *Id.* The guidance of Rule 7-107 differed depending on the stage of the case and the nature of the proceeding, but it generally banned all extrajudicial statements that had a "reasonable likelihood" of interfering with a trial or prejudicing the administration of justice. In 1970, Maryland adopted the ABA Model Code of 1969 verbatim and in its entirety.

[*32]** In 1983, the ABA again proposed a new model code in an effort to address concerns that the "reasonable likelihood" standard of ABA Standard 1-1 and Disciplinary Rule 7-107 might not meet the requirements of the First Amendment. *See Chi. Council of Lawyers v. Bauer*, 522 F.2d 242 (7th Cir. 1975), *cert. denied sub nom., Cunningham v. Chi. Council of Lawyers*, 427 U.S. 912, 96 S. Ct. 3201, 49 L. Ed. 2d 1204 (1976) (holding that a local criminal rule nearly identical to ABA Standard 1-1 and similar to Disciplinary Rule 7-107 violated the First Amendment as a vague and overbroad restriction on speech). Rule 3.6 of the Model Rules of Professional Conduct (hereinafter the "ABA Model Rules") attempted to regulate trial publicity in a way that constitutionally balanced the lawyers' right to free expression and an accused's **[*682]** right to a fair **[**563]** trial. [17] MRPC 3.6, which first appeared in

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[16] ABA Standard 1-1 provided:

> It is the duty of the lawyer not to release or authorize the release of information or opinion for dissemination by any means of public ' communication in connection with pending or imminent criminal litigation with which he is associated, if there is a reasonable likelihood that such dissemination will interfere with a fair trial or otherwise prejudice the due administration of justice.
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> ABA Advisory Comm. of Fair Trial and Free Press, Standards Relating to Fair Trial and Free Press, Standard 1-1 (1969).

[17] The first paragraph of the Comment to ABA Rule 3.6 describes that delicate balancing act:

> It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly

the Maryland Rules in 1986 and presently governs trial publicity in Maryland, is identical to this initial version of ABA Model Rule 3.6.

[*33] 2. The Structure and Operation of MRPC 3.6**

MRPC 3.6 has three subsections, which all operate together to give the rule its full meaning.***HN30*** Subsection (a) announces a general prohibition against lawyers making extrajudicial statements that "the lawyer knows or reasonably should know . . . will have a substantial likelihood of materially prejudicing an adjudicative proceeding." This prohibition applies, however, only to those statements that a reasonable person "would expect to be disseminated by means of public communication."

HN31 Subsection (b) provides examples of the types of extrajudicial statements that would have "a substantial likelihood of materially prejudicing an adjudicative proceeding." Under subsection (b), statements are prohibited that "ordinarily [are] likely" to include references to criminal matters that relate to, among other things, the criminal record of a party, the possibility of a plea of guilty, the existence or contents of any confession, admission, or statement by a defendant, or any opinion as to the guilt or innocence of a defendant.

[*683] ***HN32*** Subsection (c) states, however, that circumstances exist where an attorney, without risking discipline, may make **[***34]** extrajudicial statements that fall under subsections (a) and (b). The provisions under subsection (c) are known as "safe harbors." *See Gentile*, 501 U.S. at 1033, 111 S. Ct. at 2723, 115 L. Ed. 2d at 897 (describing the provisions of Nevada Supreme Court Rule 177(3), which are substantively identical to MRPC 3.6(c), as "safe harbors"). For example, an attorney may disclose, through extrajudicial statements and "without elaboration," "the scheduling or result of any step in litigation," even if that information, in some way, would have a "substantial likelihood of materially prejudicing an adjudicative proceeding." MRPC 3.6 (c)(4). Another such "safe harbor" permits attorneys, to comment outside the courtroom and without elaboration on "information contained in a public record." MRPC 3.6(c)(2).

3. Gansler's Extrajudicial Statements Applied to MRPC 3.6

In the case before us, Bar Counsel argues that Gansler violated MRPC 3.6 by making extrajudicial statements related to the Cook, Lucas, and Perry cases. Gansler asserts, however, that his statements in these cases fall under the "public record" exception, under the safe harbor provisions of MRPC 3.6(c). In addition, **[***35]** Gansler claims that the safe harbor provisions **[**564]** do not provide sufficient guidance as to what information is contained in the "public record," so he was incapable of determining which statements actually would constitute violations.

The issues in this case are similar to those discussed by the Supreme Court in *Gentile.* In a fractured, opinion, the Court held that Nevada Supreme Court Rule 177, a rule substantively identical to MRPC 3.6, had been unconstitutionally applied to discipline a defense lawyer for making extrajudicial statements that professed his client's innocence in a criminal case. *Id.* at 1033, 111 S. Ct. at 2723, 115 L. Ed. at 897. Chief Justice Rehnquist authored the portion of the majority opinion analyzing the "substantial likelihood of material prejudice" **[*684]** standard of Rule 177, and Justice Kennedy represented the majority of the Court in striking down Nevada's application of Rule 177 as unconstitutionally vague.

Nevada's rule, like Maryland's, prohibited an attorney from making extrajudicial statements that have a "substantial likelihood of materially prejudicing an adjudicative proceeding." Gentile, the Nevada attorney challenging the rule, **[***36]** argued that this standard infringed upon an attorney's right to free speech as guaranteed by the First Amendment to the United States Constitution. The 'State 'Bar of Nevada, arguing in favor of the standard, emphasized the State's interest in maintaining fair trials that are decided in the courtroom and not through the use of "the meeting-hall, the radio, and the newspaper." *Id.* at 1070, 111 S. Ct. at 2742, 115 L. Ed. 2d at 920 (quoting *Bridges v. California*, 314 U.S. 252, 271, 62 S. Ct. 190, 197, 86 L. Ed. 192, 208 (1941)).

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where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

In analyzing the parties' arguments, the Court acknowledged that ***HN33*** the First Amendment permitted States to regulate attorney speech more stringently than the speech of an ordinary citizen. *Id.* at 1071, 111 S. Ct. at 2743, 115 L. Ed. 2d at 921. The Chief Justice explained the State's particular interest in restricting speech of a lawyer involved in a pending case:

> ***HN34*** Lawyers representing clients in pending cases are key participants in the criminal justice system, and the State may demand some adherence to the precepts of that system in regulating their speech as well as their conduct. As noted by Justice Brennan in his concurring **[***37]** opinion in *Nebraska Press,* which was joined by Justices Stewart and Marshall, "as officers of the court, court personnel and attorneys have a fiduciary responsibility not to engage in public debate that will redound to the detriment of the accused or that will obstruct the fair administration of justice." Because lawyers have special access to information through discovery and client communications, their extrajudicial statements pose a threat to the fairness of a pending proceeding since lawyers' statements are likely to be received as especially authoritative. **[*685]** *Id.* at 1074, 111 S. Ct. at 2744-45, 115 L. Ed. 2d at 923 (citation omitted). The Court concluded that ***HN35*** the "substantial likelihood of material prejudice standard constitutes a constitutionally permissible balance between the First Amendment rights of attorneys in pending cases and the State's interest in fair trials." *Id.* at 1075, 111 S. Ct. at 2745, 115 L. Ed. 2d at 923 (internal. quotations omitted).

The Court also subjected the "substantial likelihood" standard under Rule 177 to traditional First Amendment scrutiny, requiring that content-based speech regulation be necessary to achieve a legitimate state **[***38]** interest. *Id.* The Court stated:

> ***HN36*** The "substantial likelihood" test embodied in Rule 177 is constitutional under this analysis, for it is designed to protect **[**565]** the integrity and fairness of a State's judicial system, and it imposes only narrow and necessary limitations on lawyers' speech. The limitations are aimed at two principal evils: (1) comments that are likely to influence the actual outcome of the trial, and (2) comments that are likely to prejudice the jury venire, even if an untainted panel can ultimately be found. Few, if any, interests under the Constitution are more fundamental than the right to a fair trial by "impartial" jurors, and an outcome affected by extrajudicial statements would violate that fundamental right. Even if a fair trial can ultimately be ensured through *voir dire,* change of venue, or some other device, these measures entail serious costs to the system. Extensive *voir dire* may not be able to filter out all of the effects of pretrial publicity, and with increasingly widespread coverage of criminal trials, a change of venue may not suffice to undo the effects of statements such as those made by [Gentile]. The State has a substantial interest **[***39]** in preventing officers of the court, such as lawyers, form imposing such costs on the judicial system and on the litigants.
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> *Id.* at 1075, 111 S. Ct. at 2745, 115 L. Ed. 2d at 923-24 (citations omitted). The Court concluded that ***HN37*** the "substantial likelihood" standard was narrowly tailored to protect these State interests. *Id.* at 1076, 111 S. Ct. at 2745, 115 L. Ed. 2d at 924. This was so because the restraint on attorney speech was **[*686]** limited--"it applies only to speech that is substantially likely to have a materially prejudicial: effect; it is neutral as to points of view, applying equally to all attorneys participating in a pending case; and it postpones the attorneys' comments until after. trial." *Id*

In addition to upholding the "substantial likelihood" standard on its face, the *Gentile* Court also considered. the constitutionality of Nevada's application of Rule 177. The Nevada Supreme Court had imposed a sanction against Gentile for making extrajudicial statements labeling the alleged victims in the criminal case as "drug dealers" and "money launderers," blaming the alleged crime on the police, calling into question the police's motives for levying the criminal **[***40]** charges against his client, and proclaiming the innocence of his client. *Id.* at 1078-79, 111 S. Ct. at 2747, 115 L. Ed. at 925-26. Gentile had testified at his, disciplinary hearing that he believed his statements were protected by Rule 177(3)(a), one of Rule 177's "safe harbors," which allowed an attorney to, comment outside of the courtroom and "without elaboration" on the "general nature of the . . . defense, even if the lawyer "knows or reasonably should know, that [the statement] will have a substantial likelihood of materially prejudicing an adjudicative proceeding." *Id.* at 1048-49, 111 S. Ct. at 2731, 114 L. Ed. 2d at 907.

A majority of the Justices, led by Justice Kennedy, decided that, "[a]s interpreted by the Nevada Supreme

Court, [Rule 177] is void for vagueness . . . for its safe harbor provision, Rule 177(3), misled [Gentile] into thinking that he could give his press conference without fear of discipline." The Court described its reasoning:

> Given [the Rule's] grammatical structure, and absent any clarifying interpretation by the state court, the Rule fails to provide "fair notice to those to whom [it] is directed." *Grayned v. City of Rockford*, 408 U.S. 104, 112, 92 S. Ct. 2294, 2301, 33 L. Ed. 2d 222, 230 (1972). **[***41]** A lawyer seeking to avail himself of Rule 177(3)'s protection must guess at its contours. The right to explain the "general" nature of the defense without "elaboration" provides insufficient guidance **[*687]** because "general" and "elaboration" are both classic terms of degree. In the context before, us, these terms **[**566]** have no settled usage or tradition of interpretation in law. The lawyer has no principle for determining when his remarks pass from the safe harbor of the general into the forbidden sea of the elaborated.
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> *Id*. at 1048-49, 111 S. Ct. at 2731, 114 L. Ed. 2d at 906-07. The Court further declared that, without providing sufficiently precise guidance, Rule 177 "creates a trap" even for the lawyers who study the rule and make a conscious effort to comply with it. *Id*. at 1051, 111 S. Ct. at 2732, 114 L. Ed. 2d at 908. Finally, Rule 177(3)(a) was "so imprecise" that, in the Court's view, it created an "impermissible risk of discriminatory enforcement."

The case before us involves the application of a different safe harbor, MRPC 3.6(c)(2), which refers to "information contained' in a public record." This provision suffers from constitutional infirmities similar to those **[***42]** of Nevada's Rule 177(3)(a). [18] ***HN38*** The text of MRPC 3.6(c)(2) provides that, an attorney may make extrajudicial statements "without elaboration" concerning "information contained in a public record." These protections lack a clarifying interpretation by this Court, and the term "elaboration, a classic term of degree, has no settled usage or tradition of interpretation in law.

The phrase "information contained in a public record" also does not provide sufficient guidance for determining which statements were protected under MRPC 3.6(c)(2). **[***43]** As evidenced by the widely disparate meanings for "public record" that the parties' experts in this case have advanced, the term, standing alone, can be subject to multiple interpretations even **[*688]** by lawyers well educated on this specific principle of professional responsibility. Gansler and Professor Lerman define "information in a public record" broadly as "anything that has been filed in court . . . and anything that has been otherwise made public." Bar Counsel and Professor Dash offer a narrower interpretation, suggesting that "the public record exception applies to that formal information in the public domain that exists *prior to, or separate from,* the investigation and prosecution of the subject criminal matter." (emphasis added). Bar Counsel, however, has provided no authority to support its interpretation and, in fact, concedes that the term "does not appear to have been the subject of judicial scrutiny and little guidance is afforded. . . ."

"Public record" has been defined in other contexts, as the hearing judge recognized in her report, but those definitions also fail to provide uniform guidance. Maryland Code, § 10-611(g)(1) of the State Government Article **[***44]** (1984, 1999 Repl. Vol.), sets forth one definition for purposes of the Public Information Act:

> ***HN39*** *(g) Public Record.*--(1)"Public record" means the original or any copy of any documentary material that:
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> (i) is made by a unit or instrumentality of the State government or of a political subdivision or received by the unit or instrumentality in connection with the transaction of public business; and
>
> (ii) is in any form, including:
>
> 1. a card;
>
> 2. a computerized record;
>
> 3. correspondence;
>
> **[**567]** 4. a drawing;
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> 5. film or microfilm;
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> 6. a form;

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[18] Following the Supreme Court's decision in *Gentile,* the American Bar Association amended ABA Rule 3.6. The amendments deleted "without elaboration" and "general" from the text of 'the Rule to address the Court's concern over those terms. *See A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982-1998*, at 196 (1999); *Annotated Model Rules of Professional Conduct,* at 357 (1999). MRPC 3.6, however, has not changed since its first promulgation in 1986.

7. a map;

8. a photograph or photostat;

9. a recording; or

10. a tape.

[*689] The Maryland Code provides a different definition of "public record" in Section 8-606(a)(3) of the Criminal Law Article. That section states:

> ***HN40*** (3) "Public Record" includes an official book, paper, or record, kept on a manual or automated basis, that is created, received, or used by a unit of:
>
> (i) the State;
>
> (ii) a political subdivision of the State; or
>
> (iii) a multicounty agency.
>
> The Maryland Rules describe "public record" in still a different way. ***HN41*** Maryland Rule 5-803(b)(8)(A) defines "public records and reports" **[***45]** for purposes of the "public records" exception to the hearsay rule, as including:
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> a memorandum, report, record, statement, or data compilation made by a public agency setting forth (i) the activities of the agency; (ii) masters observed pursuant to a duty imposed by law, as to which matters there was a duty to report; or (iii) in civil actions and when offered against the State in criminal actions, factual finding resulting from an investigation made pursuant to authority granted by law.
>
> Another source, Black's Law Dictionary, ***HN42*** defines "public record" as "[a] record that a governmental unit is required by law to keep, such as land deeds kept at a county courthouse." BLACK'S LAW DICTIONARY 1279 (7th ed.1999). These characterizations of "public record" contemplate only information that has been created or distributed by a government entity.

Not all sources, however, consider "public record" to be a reference to materials produced by any government entity. Although Canon 20 of the 1908 ABA Canons of Ethics did not use the phrase "information contained in a public record," its terms do furnish some instruction as to the meaning of the phrase. Canon 20 prohibited *"ex parte* **[***46]** reference" to the facts of a case "beyond, quotation from the *records and papers on file in the court."* (emphasis added). Similarly, ***HN43*** Local Rule 204 of the United States District Court for the District of Maryland prohibits an attorney from making certain extrajudicial statements after the arrest of an accused, except that the **[*690]** lawyer may quote from or refer to without comment to "public Court records" in the case. Thus, according to some sources, "public records" are limited to the exact information contained in documents on file with the court.

Because there is no settled definition of "information contained in a public record" we agree with Gansler that ***HN44*** MRPC 3.6(c)(2) does not provide adequate guidance for determining which extrajudicial statements would qualify under the safe harbor. For this reason, we construe the phrase in its broadest form as applied to Gansler in this case and to any other extrajudicial statements made prior to the filing of this Opinion. In this case, we consider "information in a public record" to include anything in the public domain, including public court documents, media reports, and comments made by police officers.

Under this broad interpretation, **[***47]** it is clear that a number of Gansler's extrajudicial statements do not warrant discipline, as the hearing judge determined. Gansler did not violate MRPC 3.6 by commenting on the sneaker print matches in Cook's case because, shortly before Gansler's extrajudicial **[**568]** comments, a television reporter had broadcast an account of that evidence nearly mirroring Gansler's version. Additionally, in the Lucas case, Gansler made statements to the media about a shoe print at the crime scene that matched shoes Lucas had been observed wearing. This information was already public as recorded in the statement of charges filed by the police the day before. Also contained in the statement of charges was an account of Lucas's admission to police that he broke into the church rectory and murdered Monsignor Wells. Therefore, the next day, when Gansler relayed information about the admission to the media, he revealed "information contained in a public record." We overrule Bar Counsel exceptions as they relate to Gansler's extrajudicial statements about physical evidence in the Cook and Lucas cases as well as the confession in the Lucas case.

Gansler argues that the "public record" safe harbor also should **[***48]** protect his reference to Lucas's history of convictions. **[*691]** ***HN45*** MRPC 3.6(b)(1) informs lawyers that extrajudicial statements relating to the "criminal record of a party" are ordinarily likely to be intolerably prejudicial. Nevertheless, during the June 18,

2003 press conference announcing the arrest of Lucas, Gansler mentioned that Lucas "has a criminal record which includes residential burglaries." To support his assertion that this statement should be protected by the "public record" safe harbor, Gansler points to Deputy State's Attorney Winfree's testimony, characterizing Lucas's prior arrest and conviction record as "part of the public record."

Based on this testimony, we hold that Gansler's reference to Lucas's criminal record falls under our broad definition of "information in a public record." We reach this result because we have inferred from Deputy State's Attorney Winfree's testimony that she was referring to publicly accessible court records in Maryland, either case files or docket sheets, which indicate that an individual has been convicted of a crime. Maryland law does not bar an ordinary citizen from combing these court documents to learn information about someone's criminal **[***49]** history. For this reason, Lucas's history of convictions could have existed in the public domain before Gansler spoke of it. Under the circumstances of this case, the extrajudicial reference to Lucas's convictions qualifies for the protection of the "public record" safe harbor, as we have broadly defined it for this Opinion. Because of the strong prejudicial impact of the public disclosure of criminal record information, future respondents will have the burden of establishing that such information was contained in a bona fide public court record accessible to the general public. [19]

[*50] [**569] [*692]** Additionally, lawyers who make extrajudicial statements in the future will not find shelter in the broad definition of MRPC 3.6(c)(2) that we apply here. Public policy mandates a more limited definition of "information in a public record." We believe that, ***HN48*** to best "protect[] the right to a fair trial and safeguard[] the right of free expression," the phrase "information in a public record" should refer only to public government records--the records and papers on file with a government entity to which an ordinary citizen would have lawful access.

HN49 To receive the protection of the "public record" safe harbor, the lawyer must not provide information beyond quotations from or references to public government records. The definition we establish in this case prevents attorneys from side-stepping the rule by directing or encouraging individuals not bound by the MRPC to publicize information so that attorneys can speak freely about it. Furthermore, by strictly limiting what is considered a public record, this definition enables all of the components of MRPC 3.6 to filter objectionable publicity, preventing the "public record" exception from swallowing the general rule of restricting prejudicial **[***51]** speech.

In any event, no matter whether one defines "information in a public record" broadly to include everything in the public domain or narrowly, Gansler violated the MRPC 3.6 by making 'several extrajudicial statements at issue in this case. Initially, we must point out that Gansler has not challenged **[*693]** that his comments qualify, under MRPC 3.6(a), as statements that "a reasonable person would expect to be disseminated by means of public communication." The only contested issues in this case concern whether Gansler knew or should have known that his statements would have a substantial likelihood of materially prejudicing an adjudicative proceeding and whether the statements are protected under the safe harbor provisions of MRPC 3.6(c). As we discuss in detail below, Gansler did violate MRPC 3.6 by commenting on Cook's confession, by discussing the plea offer to Perry, and by providing his opinion as to the guilt of Cook and Lucas.

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[19] ***HN46*** Not all criminal record information would qualify as "information in a public record," even if the term is defined broadly. Some information relating to an individual's criminal history, such as that collected by the Criminal Justice Information System (hereinafter "CJIS"), may not appear in a case file or docket sheet or otherwise have reached the public domain. The CJIS Central Repository compiles and maintains data of an individual's history. of arrests, convictions, and other adverse criminal actions, but CJIS strictly limits access to its data. *See.* Maryland Code, § 10-213 of the Criminal Procedure Article (2001); COMAR 12.15.01.08 - 12.15.01.13 (2003). An ordinary citizen may not obtain criminal history information from CJIS without demonstrating convincingly that the purpose of requesting the data meets one of CJIS's narrow exceptions (e.g., an employer who is seeking background information on a prospective employee whose job could "jeopardize the life and safety of individuals"). COMAR 12.15.01.13. As a result, the CJIS report is not public.

HN47 This non-public criminal history information collected by CJIS, of course, may overlap with information contained in publicly accessible case files and docket entries. If that should occur, the overlapping criminal record information would be considered part of the public government records, and statements referring to that particular information would receive protection under the "public record" safe harbor. The converse is also true; if an extrajudicial statement refers to criminal history information obtainable only from a non-public source like CJIS, the "public record" safe harbor would not apply.

First, Gansler violated MRPC 3.6 by discussing Cook's confession to the Stottsmeister murder. ***HN50*** MRPC 3.6(b)(2) provides that a statement relating to the "existence or contents of any confession, admission, or statement given by a defendant" is "ordinarily **[***52]** likely" to have a "substantial likelihood of materially prejudicing an adjudicative proceeding." Notwithstanding the cautionary language of the rule and prior to the filing of murder charges, Gansler publicly stated that police were able to obtain a confession from Cook. Apparently seeking shelter again under the "public record" safe harbor, Gansler points out that his reference to "incredible details" mirrored the information and even the language of the charging document. This observation fails to acknowledge that officials did not file the statement of charges against Cook until *after* the press conference. ***HN51*** The "public record" safe, harbor, whether construed narrowly or broadly, could not apply possibly to any statement that introduced information **[**570]** to the public for the first time. Gansler should have known that these statements, by themselves, would prejudice Cook in the public's eye.

Not only did Gansler announce 'the existence' of Cook's confession, but he also furnished specific information of the surrounding circumstances, including that Cook provided "incredible details that only the murderer would have known." Gansler magnified the prejudicial effect of his statements by **[***53]** bolstering the believability of the confession. He stated that, **[*694]** before Cook traveled to the crime scene and "went over in detail by detail every step of" the murder, the police had provided him with a restful night's sleep. If we found no fault with such public disclosures, we would be allowing attorneys, in effect, to evade the operation of the exclusionary rule by taking advantage of the probative value of the confession without regard to its constitutionality or admissibility as evidence. That is, Gansler made Cook's confession public even though its contents might never reach the jury as a result of a constitutional challenge. His actions, in this regard, run afoul of our principles of criminal justice, as Chief Justice Rehnquist illustrated:

> ***HN52*** The outcome of a criminal trial is to be decided by impartial jurors, who know as little as possible of the case, based on material admitted into evidence before them in a court proceeding. Extrajudicial comments on, or discussion of, evidence which' might never be admitted at trial and *ex parte* statements by counsel giving their version of the facts obviously threaten to undermine this basic tenet. *Gentile*, 501 U.S. at 1070, 111 S. Ct. at 2742, 115 L. Ed. 2d at 920.
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> **[***54]** Accordingly, with respect to Gansler's remarks on the Cook confession, we sustain Bar Counsel's exception because Gansler knew or should have known that his announcement would have a substantial likelihood of causing material prejudice. [20]

Gansler also committed a violation of MRPC 3.6, as Judge Stevenson concluded, by commenting extrajudicially on the matter of Perry's plea bargain. ***HN53*** MRPC 3.6(b)(2) states that a statement is "ordinarily likely" to have a substantial likelihood of materially prejudicing **[***55]** an adjudicative proceeding **[*695]** if the statement relates to "the possibility of a plea of guilty to the offense." Gansler's reported statement in April of 2000 disclosed, for the first time, his decision "to offer [Perry] a plea bargain."

Gansler argues, though, that his comments to the *Gazette* about the plea offer should be covered by the "public record" safe harbor because the public already knew of his conversations with the victims' family members, in which they were consulted about whether to retry Perry or plea bargain. The public's general knowledge about plea bargains and how they normally play a part in every prosecution does not equate, however, to the public having actual knowledge that a plea bargain would be offered in this particular case. ***HN54*** The decision to offer a plea bargain does not qualify as "information contained in a public record," even under the broadest meaning of that phrase.

[571]** Besides announcing the plea offer, Gansler also discussed the impending deadline for Perry to accept that offer, all during a very public and controversial prosecution of a multiple murder suspect. Public comments such as these place greater pressure on the defendant to accept the plea **[***56]** offer. More importantly, the comments likely influenced potential jurors in Perry's case by communicating that the lead prosecutor believed the defendant was guilty. See JOHN WESLEY HALL, JR., PROFESSIONAL RESPONSIBILITY OF THE CRIMINAL LAWYER §

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[20] We observe that, prior to Gansler's comments at the Cook press conference, a television reporter noted that Cook had confessed and Captain Bernie Forsythe mentioned in his comments to the press that investigators had obtained a confession from Cook. The reporter and Captain Forsythe limited their comments to the existence of the confession and offered no additional information about it. Gansler's statements, however, as we noted above, provided a great deal of specific information that had not been disclosed.

12.16 (2nd ed. 1996) ("Any . . . statement [regarding the possibility of a plea of guilty] is, of course,. a direct reference to an opinion of the speaker as to guilt of the accused or as to the belief of the accused as to his own guilt It is tantamount to publication of an opinion as to guilt"). We, therefore, overrule Gansler's exception to Judge Stevenson's conclusion that the comments related to Perry's plea offer violated MRPC 3.6.

HN55 MRPC 3.6(b)(4) specifically addresses attorney comments discussing "any opinion as to the guilt or innocence of a defendant" Although several of Gansler's extrajudicial statements, fall under this category of' restricted speech and were **[*696]** not covered by any safe harbor, the hearing judge determined that the evidence did not show that any "material prejudicial effect" stemmed from them. Gansler's statements, indicating that "they" had apprehended the person who committed the crimes in the Cook and Lucas **[***57]** cases, came soon after the defendants had been arrested and well before the eve of trial. This; coupled with the fact that neither Lucas's nor Cook's attorneys claimed that Gansler's statements caused prejudice, persuaded the hearing judge to conclude that Bar Counsel had, not shown a substantial liielihood of material prejudice.

We disagree with the hearing judge's conclusion that the evidence failed to show that Gansler knew or should have known that his statements of opinion would have a substantial likelihood of material prejudice. ***HN56*** In considering the propriety of a statement under MRPC 3.6, we determine the likelihood that a particular statement will cause prejudice at the time the statement was made, not whether that statement, in hindsight, actually worked to the detriment of a defendant. Whether Cook or Lucas claimed at their trials to be prejudiced by Gansler's statements, therefore, does, not weigh in our analysis. Rather, we concentrate on the point in time when Gansler offered his public comments to determine the probability of prejudice.

According to the hearing judge, the point in time when Gansler made the extrajudicial statements minimized whatever prejudicial effect **[***58]** flowed from his remarks. As support for this conclusion, the hearing judge cited Part II of Justice Kennedy's minority opinion in *Gentile.* Justice Kennedy suggested that statements made well before a defendant's trial have less prejudicial impact than statements made closer to the empaneling of a jury. *Gentile*, 501 U.S. at 1044, 111 S. Ct. at 2729, 115 L. Ed. 2d at 904 (Kennedy, J., dissenting). Gentile had made his controversial statements six months prior to voir dire, enough time, according to Justice Kennedy, for the content of the message to fade from the public's memory. *Id* The timing of Gentile's statement, however, was not the only factor that Justice Kennedy considered in determining that no **[*697]** prejudice had occurred in that case. He also analyzed the contents of Gentile's message, which, Justice Kennedy stated, "lack any of the more obvious bases for a finding of prejudice." *Id.* at 1046, 111 S. Ct. at 2730, 115 L. Ed. 2d at 905.

[572]** We agree with Gansler's theory that ***HN57*** the timing of an extrajudicial statement may affect its prejudicial effect, but we do not believe that the timing element in this case neutralizes statements of the obvious prejudicial **[***59]** content of Gansler's statements of opinion. Like in *Gentile,* the timing of Gansler's statements came well before the beginnings of Cook's and Lucas's trials; however, Gansler's proclamation that "they" had apprehended the persons who committed the crimes in the Cook and Lucas cases directly contravened the provisions of MRPC 3.6(b)(4) (opinion on guilt of innocence). The comments blatantly expressed Gansler's opinion of the guilt of the defendants. In contrast to the lawyer in *Gentile* who refused to comment on confessions and evidence from searches, *see Gentile*, 501 U.S. at 1046, 111 S. Ct. at 2730, 115 L. Ed. 2d at 905 (Kennedy J., dissenting), Gansler supported his opinions of guilt by pointing to specific circumstances, such as confessions and physical evidence, to make his views more reliable.

Gentile differs from the case before us for yet another reason: Gansler is a prosecutor, not a defense lawyer. Prosecutors play a unique role in our system of criminal justice. We recognized this recently in *Walker v. State*, 373 Md. 360, 394-95, 818 A.2d 1078, 1098 (2003), where Judge Harrell for the Court stated:

> ***HN58*** Prosecutors are held to even **[***60]** higher standards of conduct than other attorneys due to their unique role as both advocate and minister of justice. The special duty of the prosecutor to seek justice is said to exist because the State's Attorney has broad discretion in determining whether to initiate criminal proceedings. *Brack v. Wells*, 184 Md. 86, 90, 40 A.2d 319, 321 (1944). The office of prosecutor is therefore "not purely ministerial, but involves the exercise of learning and discretion," and he or she "must exercise a sound discretion to distinguish between the guilty and the **[*698]** innocent." *Id.* The responsibilities of the prosecutor encompass more than advocacy. The prosecutor's

duty is not merely to convict, but to seek justice. "His obligation is to protect not only the public interest but the innocent as well and to safeguard the rights guaranteed to all persons, including those who may be guilty." *Sinclair v. State*, 27 Md. App. 207, 222-23, 340 A.2d 359, 369 (1975).

HN59 In addition to their special role as ministers of justice, prosecutors have limitations not experienced by criminal defense attorneys in that defense attorneys have the benefit of their client's presumption **[***61]** of innocence. In other words, a criminal defense attorney may announce an opinion that his or her client is innocent with a lesser risk of causing prejudice because the law, itself, presumes the defendant's innocence.

On the other hand, a prosecutor's opinion of guilt is much more likely to create prejudice, given that his or her words carry the authority of the government and are especially persuasive in the public's eye. See Scott M. Matheson, Jr., *The Prosecutor, The Press, and Free Speech,* 58 FORDHAM L. REV. 865, 886 (1990) ("When the prosecutor speaks publicly about a pending case, he cannot separate his representational role from his speech, and he thereby involves the state in the extrajudicial comment."). As lawyers, prosecutors are so distinct that some commentators have argued 'that the rules against extrajudicial statements should apply only to them. *See, e.g.,* Freedman & Starwood, *Prior Restraints on Freedom of Expression by Defendants and Defense Attorneys* 29 STAN. L. REV. 607 (1977). Although we do not embrace this position, it nonetheless reinforces the notion that **[**573]** prosecutors, in particular, should be even more cautious to **[***62]** avoid making potentially prejudicial extrajudicial statements. [21] **[***63]** Because we hold that **[*699]** Gansler knew or should have known that his public opinions of Cook's and Lucas's guilt would have a substantial likelihood of material prejudice, we sustain Bar Counsel's exception with respect to those statements. [22]

B. MRPC 3.1, 3.8(a), and 8.4(d)

Bar Counsel excepted to the hearing judge's conclusion that Gansler did not violate MRPC 3.1, 3.8, and 8.4(d). The charges under these rules arose from two events: (1) Gansler's unsuccessful prosecution in District Court of two juveniles based on charges that they called bomb threats to a Montgomery County High School, and (2) Gansler's statements regarding his intention to prosecute " [j]uveniles who phone in bomb threats" even if "the case is not strong enough to warrant a conviction." Bar Counsel argues that by prosecuting the **[***64]** two juveniles with minimal evidence, Gansler brought a frivolous claim in violation of MRPC 3.1 and prosecuted a charge not supported by probable cause in violation of MRPC 3.8(a). Furthermore, in Bar Counsel's view, Gansler's violated MRPC 8.4(d) because the statements about future bomb-threat prosecutions communicated to the public that "someone acquitted of a crime was guilty nonetheless and warranted to be prosecuted. . . ." Gansler responds that he **[*700]** prosecuted the juveniles because he believed that they had committed a crime beyond a reasonable doubt. He contends that the judge's decision to acquit the juveniles represented only that she disagreed with his evaluation of the evidence, not that the prosecution lacked probable cause.

HN64 MRPC 3.1 prohibits attorneys from bringing frivolous suits, and ***HN65*** MRPC 3.8(a) prohibits prosecutors from knowingly prosecuting, a charge that is not supported by probable cause. Expressly

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[21] We also observe that ***HN60*** prosecutors, as public employees, may not speak publicly with the same broad freedom that ordinary citizens enjoy. *See Pickering v. Board of Education*, 391 U.S. 563, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968); *DiGrazia v. County Exec. of Montgomery County*, 288 Md. 437, 418 A.2d 1191 (1980). This is so because, in the context of an employer and employee relationship, "the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." *Pickering*, 391 U.S. at 568, 88 S. Ct. at 1734, 20 L. Ed. 2d at 817. ***HN61*** Our cases have acknowledged that public employees may be subjected to greater speech limitations by the State as a result of the State's interests as an employer. *Hawkins v. Dep't. of Public Safety & Corr. Servs.*, 325 Md. 621, 602 A.2d 712 (1992); *O'Leary v. Shipley*, 313 Md. 189, 199, 545 A.2d 17, 22 (1988); *De Bleecker v. Montgomery County*, 292 Md. 498, 507, 438 A.2d 1348, 1353 (1982); *DiGrazio*, 288 Md. at 449, 418 A.2d at 1198.

[22] The hearing judge did not address the application of ***HN62*** MRPC 8.4(a), which finds professional misconduct where a lawyer "violates or attempts to violate the Rules of Professional Conduct." We have held that a ***HN63*** violations of a MRPC 1.15 and MRPC 1.4(a) "necessarily" result in a violation of MRPC 8.4(a) as well. *Attorney Grievance Comm'n v. Gallagher*, 371 Md. 673, 710-11, 810 A.2d 996, 1018 (2002). Likewise, we conclude in this case that Gansler's violation of MRPC 3.6 also constituted a violation of MRPC 8.4(a).

addressing only the comments Gansler made; the hearing judge concluded that Bar Counsel had not presented clear and convincing evidence that Gansler "intended to prosecute in violation of [MRPC] 3.1 and [MRPC] 3.8(a)." Although she did not specifically address the **[***65]** issue in her Report and Recommendations, the hearing judge by finding no violation under MRPC 3.1 and MRPC 3.8(a), determined implicitly that insufficient evidence supported Bar Counsel's charge concerning the actual **[**574]** prosecution of the juveniles. Likewise, the hearing judge also implicitly concluded that the evidence did not support a violation of MRPC 8.4(d).

We agree with Judge Stevenson that, based on the evidence presented, Gansler did not commit a violation of MRPC 3.1, MRPC 3.8(a), or MRPC 8.4(d), when he commented on future prosecutions of juveniles who phone bomb threats. Gansler testified and responded to Request for Admissions that he never intended to prosecute any charges in bad faith. Rather, according to Gansler's testimony, by making the comments about prosecuting bomb threats, he intended to communicate that his office must try "hard cases." The hearing judge found this testimony credible, a determination that we readily accept.

Gansler's actual prosecution of the youths also did not amount to a violation of MRPC 3.1, as Bar Counsel contends. Evidence before the hearing judge related to this charge came solely from a newspaper article covering the juveniles' case. **[***66]** The article reported that the District Court judge acquitted the juveniles, stating, "I have no idea who did this" and "I have no evidence." As further reported by the article, the **[*701]** State's evidence of telephone calls could not link the juveniles to the bomb threat. Without more, the news article does not demonstrate by clear and convincing evidence that Gansler violated MRPC 3.1. Consequently, we overrule Bar Counsel's exceptions to Judge Stevenson's ruling that Gansler's prosecution of the juveniles as well as his reported comments about future prosecutions do not violate MRPC 3.1, MRPC 3.8, or MRPC 8.4(d).

IV. Sanction

We must determine the appropriate sanction for Gansler's violations of MRPC 3.6 and MRPC 8.4(a). This case marks the first time in Maryland that we have disciplined an attorney for a violation of MRPC 3.6. We remain guided, however, by the well established principles determining the sanction for an attorney who failed to meet our State's standards of professionalism. ***HN66*** In sanctioning an attorney, we seek "to protect the public, to deter other lawyers from engaging in violations of the Maryland Rules of Professional Conduct, and to maintain the integrity of **[***67]** the legal profession." *Attorney Grievance Comm'n v. Awuah*, 374 Md. 505, 526, 823 A.2d 651, 663 (2003) (quoting *Attorney Grievance Comm'n v. Webster*, 348 Md. 662, 678, 705 A.2d 1135, 1143 (1998)). To protect the public adequately, we impose a sanction that is "commensurate with the nature and gravity of the violations and the intent with which they were committed." *Id.* (quoting *Attorney Grievance Comm'n v. Awuah*, 346 Md. 420, 435, 697 A.2d 446, 454 (1997)). Our sanction, therefore, "depends upon the facts and circumstances of each particular case, including consideration of any mitigating factors." *Id* (citing *Attorney Grievance Comm'n v. Atkinson*, 357 Md. 646, 656, 745 A.2d 1086, 1092 (2000); *Attorney Grievance Comm'n v. Gavin*, 350 Md. 176, 197-98, 711 A.2d 193, 204 (1998)).

Bar Counsel recommends that we issue a reprimand. On numerous occasions, Gansler spoke outside of court about matters that had a substantial likelihood of depriving several criminal defendants of fair trials. Gansler presented no evidence of mitigating circumstances. ***HN67*** The appropriate sanction **[*702]** in this case is one "which **[***68]** demonstrates to members of this legal profession the type of conduct that will not be tolerated" and which maintains the integrity of the 'Bar by preventing Gansler's transgressions "from bringing its image into disrepute." *Attorney Grievance* **[**575]** *Comm'n v. Culver*, 371 Md. 265, 277, 808 A.2d 1251, 1258 (2002) (quoting *Attorney Grievance Comm'n v. Garfield*, 369 Md. 85, 98, 797 A.2d 757, 764 (2002)). A reported reprimand satisfactorily communicates to Gansler and other members of the Bar that improper extrajudicial statements dangerously jeopardize the foundational principles of our system of criminal justice. Accordingly, Gansler is hereby reprimanded.

IT IS SO ORDERED; RESPONDENT SHALL PAY ALL COSTS AS TAXED BY THE CLERK OF THIS COURT, INCLUDING THE COSTS OF ALL TRANSCRIPTS, PURSUANT TO ***MARYLAND RULE 16-715(C)****, FOR WHICH SUM JUDGMENT IS ENTERED IN FAVOR OF THE ATTORNEY GRIEVANCE COMMISSION AGAINST DOUGLAS F. GANSLER.*

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Neutral
As of: September 26, 2016 11:52 AM EDT

State v. Grossberg

Superior Court of Delaware, New Castle

September 15, 1997, Submitted ; September 19, 1997, Decided

IN96-12-0127, IN96-12-0128

Reporter
1997 Del. Super. LEXIS 375; 1997 WL 719360

STATE OF DELAWARE v. AMY S. GROSSBERG, Defendant. ID No. 9611007818

Notice: [*1] THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

Disposition: Defendant Grossberg's Motion for Rule to Show Cause and her Motion for Hearing are DENIED.

Core Terms

baby, quotations, substantial likelihood, co-defendant, prejudicing, appearance, attributed, materially, attorneys, coverage, daughter, exhibits, poignant, newborn, duPont, birth, media

Case Summary

Procedural Posture

Defendant was charged with capital murder in the first degree, Del. Code Ann. tit. 11, § 636(1), and murder by abuse or neglect in the first degree, Del. Code Ann. tit. 11, § 634, in relation to the death of her newborn son. Defendant filed a motion for rule to show cause and a motion for a hearing concerning quotes made to a newspaper by a prosecutor.

Overview

The trial court entered an order limiting pretrial publicity, which among other things, precluded counsel for the State and counsel for Defendants from public comment about this case except in accordance with Del. Law. R. Prof. Conduct 3.6. The rule required that a lawyer not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knew or reasonably should have known that it would have a substantial likelihood of materially prejudicing an adjudicative proceeding. A newspaper published a story in which a prosecutor was quoted as acknowledging that his own baby at home has heightened his sense of the vulnerability of a child. Defendant sought to have the prosecutor found in contempt and disqualified from further participation in the case. The court found no basis to conclude that the prosecutor made any statement to the reporter which he knew or reasonably should have known would have a substantial likelihood of materially prejudicing the trial in this case. The court found that an evidentiary hearing on the issue was unnecessary.

Outcome

Defendant's motion for rule to show cause and her motion for a hearing were denied.

LexisNexis® Headnotes

Criminal Law & Procedure > Jurisdiction & Venue > Pretrial Publicity

Legal Ethics > Professional Conduct > General Overview

HN1 Del. Law. R. Prof. Conduct 3.6 requires that a lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.

Counsel: Paul R. Wallace, Esq., Thomas E. Brown, Esq. and Peter N. Letang, Esq., Deputy Attorneys General, Department of Justice, Wilmington, Delaware, for the State of Delaware.

John S. Malik, Esq., Wilmington, Delaware, Robert K. Tanenbaum, Esq., Beverly Hills, California, and Jack L. Gruenstein, Esq., Philadelphia, Pennsylvania, for defendant Amy S. Grossberg.

Judges: Henry duPont Ridgely, President Judge.

Opinion by: Henry duPont Ridgely

Opinion

Upon Defendant Amy S. Grossberg's Motion for Rule to Show Cause

Upon Defendant Amy S. Grossberg's Motion for Hearing

RIDGELY, President Judge

ORDER

This 19th day of September, 1997 upon consideration of defendant Amy S. Grossberg's Motion for Rule to Show Cause and her Motion for Hearing, the memoranda and exhibits submitted, and the record in this case, it appears that:

(1) Defendant Amy S. Grossberg and her co-defendant Brian C. Peterson, Jr. are charged with Capital Murder in the First Degree, 11 *Del. C. § 636(1)* and Murder by Abuse **[*2]** or Neglect in the First Degree, 11 *Del. C. §* 634 of their newborn son. From the outset there has been extensive national and local media coverage of this case.

(2) On November 21, 1996 this Court entered an order limiting pretrial publicity, which among other things, precluded counsel for the State and counsel for Defendants from public comment about this case except in accordance with Rule 3.6 of the Delaware Lawyers' Rules of Professional Conduct. ***HN1*** The rule requires that "[a] lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.

(3) On July 22, 1997 an article entitled "A very poignant perspective" appeared on the front page of the *Bergen County Record,* a newspaper published in New Jersey where defendant Grossberg resides. The article subtitled "Teens' prosecutor has baby daughter" profiled the State's lead prosecutor in this case, Peter N. Letang, Esq. Within this article reference is made to Mr. Letang's experience, education, family, and background, **[*3]** including the birth of his own child ten days before the discovery by police of the alleged victim in this case. Letang is quoted as acknowledging that his own baby at home has heightened his sense of the "vulnerability of a child." Further quotations attributed to him are:

> "I don't think it's affected my attitude on the case, but it's certainly poignant."
>
> ***
>
> "You try to keep your own perspective out of it."
>
> ***
>
> "Whenever you're dealing with a baby, it's not just another case."
>
> "It's macabre [referring to the execution of Steven Pennell which he witnessed]. I'm in favor of the death penalty, but don't think it should be universally applied."
>
> ***
>
> "Even that case [Pennell] didn't have national media coverage like this one."
>
> ***
>
> "Some of the letters were critical that we let them [defendants Grossberg and Peterson] out on bail. I did not think then, and do not think now, that they were a risk to flee."
>
> ***
>
> "[Most people] don't have $ 300,000 and those kind of resources available to them."

There was one further quotation of Mr. Letang which was within a description of his initial involvement in the case. The article **[*4]** describes a telephone call to Mr. Letang and his appearance at the Medical Examiner's Office as follows:

> University of Delaware campus police told him [Letang] they had a girl at the hospital who doctors said had recently given birth, but whose baby was nowhere to be found. Four hours later, in a trash bin behind the Comfort Inn in Newark, Del., a police dog discovered the body of a newborn boy, just seconds before a garbage truck was going to pick up the dumpster.
>
> "It was coming around the corner, they had to stop it," Letang said.
>
> By 7 a.m., Letang was at the Medical Examiner's Office staring at a 6-pound, 2-ounce body no bigger than his daughter. He would not discuss the physical condition of the body, saying that the court

records outline why charges were brought.
The article also includes quotations about Mr. Letang from one of defendant's former attorneys, one of co-defendant Peterson's attorneys, and Mr. Letang's wife.

(4) Defendant Grossberg has moved for a Rule to Show Cause to issue to Mr. Letang, that he be found in contempt, that he be disqualified from further participation in this case, and further that her former counsel Robert Gottleib, Esq. **[*5]** be reinstated *pro hac vice.* She has also moved for a hearing, contending that there is a factual issue as to the source and accuracy of the quotes attributed to Letang in the article. In the State's response and defendant Grossberg's replies, counsels' arguments have devolved into an exchange of summaries of expected forensic testimony and unimpressive *ad hominem* arguments

(5) Based upon my careful review of the *Bergen Record* article and other exhibits, I find no basis to conclude that Mr. Letang made any statement to the reporter which he knew or reasonably should have known would have a substantial likelihood of materially prejudicing the trial in this case. Since I have reached this conclusion based upon defendant's proffer of the timing and circumstances of Mr. Letang's statements to the *Bergen Record,* an evidentiary hearing on the motion is plainly unnecessary. Counsel should return their attention to trial preparations in this case with the civility expected of lawyers who practice before this Court.

NOW, THEREFORE, IT IS ORDERED that defendant Grossberg's Motion for Rule to Show Cause and her Motion for Hearing are *DENIED.*

Henry duPont Ridgely

President **[*6]** Judge

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Caution
As of: September 26, 2016 12:49 PM EDT

Gulley v. State

Court of Appeals of Mississippi

January 9, 2001, Decided

NO. 1999-KA-01047-COA

Reporter
779 So. 2d 1140; 2001 Miss. App. LEXIS 6

C. DOUGLAS GULLEY A/K/A C. DOUGLAS GULLEY, JR., APPELLANT v. STATE OF MISSISSIPPI, APPELLEE

Subsequent History: Post-conviction relief dismissed at Gulley v. State, 2004 Miss. LEXIS 218 (Miss., Feb. 26, 2004)

Prior History: [**1] DATE OF JUDGMENT: 06/03/1999. COURT FROM WHICH APPEALED: JACKSON COUNTY CIRCUIT COURT. TRIAL JUDGE: HON. JAMES W. BACKSTROM. TRIAL COURT DISPOSITION: 06/03/1999: SEVEN COUNTS OF EMBEZZLEMENT - SENTENCED TO 10 YEARS CUSTODY IN MDOC ON EACH COUNTS 1-6 TO RUN CONCURRENTLY WITH EACH OTHER, AND TO SERVE 10 YEARS IN MDOC ON COUNT 7, CONSECUTIVE TO THE SENTENCES IN COUNTS 1-6, WITH THE SENTENCE IN COUNT 7 SUSPENDED, AND DEFENDANT TO BE PLACE ON 10 YEARS POST RELEASE SUPERVISION AND A FINE OF $ 1,000 FOR EACH COUNT FOR A TOTAL OF $ 7,000.

Disposition: AFFIRMED.

Core Terms

charts, trial court, jurors, investors, fair trial, indictment, funds, checking account, Associates, pooled, voir dire, trust account, embezzled, contends, fair and impartial, change of venue, deposited, invested, expenses, guilt, venue, continuance, newspaper, comments, argues, checks, impartial jury, ten years, authorization, attorney's

Case Summary

Procedural Posture

Appellant sought review of the judgment of the Jackson County Circuit Court (Mississippi) that convicted him of seven counts of embezzlement.

Overview

Appellant, an insurance agent, deposited investors' checks into an account bearing his insurance company's name, but to which only he and his spouse had access. He used these funds to pay his business and personal expenses, and was charged and convicted of seven counts of embezzlement. Appellant sought review; the court affirmed. The court did not err in denying a change of venue; the State rebutted the presumption of prejudice raised by appellant's affidavits, and those jurors who served showed no bias in their voir dire answers. The prosecutor's pretrial statements to the media about the case violated ethics rules, but appellant showed no prejudice resulting from them. Admission of summary charts under Miss. R. Evid. 1006 was no abuse of discretion; appellant failed to specify what underlying documents contained hearsay, thus waiving that objection. Appellant's agreement to a two-hour continuance to review these documents was a waiver of objections to untimely discovery. The indictment was not fatally flawed because it did not list the insurance company as a victim, because those of appellant's clients whose checks were deposited into this account were listed and were victims.

Outcome

Judgment affirmed. The trial court did not err in denying appellant's motion for a change of venue, as there was no indication that empanelled jurors were biased due to pre-trial publicity, in admitting a summary of voluminous documents which was no abuse of discretion, or in not dismissing the indictment, which was not defective.

LexisNexis® Headnotes

Legal Ethics > Prosecutorial Conduct

HN1 Miss. R. Prof. Conduct 3.6(a) prohibits a lawyer from making extrajudicial statements that a reasonable

person would expect to be disseminated and will have a substantial likelihood of materially prejudicing an adjudicative proceeding.

Legal Ethics > Prosecutorial Conduct

HN2 See Miss. Unif. Cir. and County Ct. Prac. R. 9.01.

Criminal Law & Procedure > Jurisdiction & Venue > Venue

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Fair Trial

HN3 One of the fundamental hallmarks of our legal system is an accused's right to a fair trial before an impartial jury. The trial court is required to guard against even the appearance of unfairness when impaneling a jury.

Civil Procedure > Judicial Officers > Judges > General Overview

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Criminal Law & Procedure > Trials > Judicial Discretion

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > General Overview

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > Venue

Governments > Courts > Judges

HN4 When a defendant maintains that he cannot obtain an impartial jury without a change of venue, the decision to deny such a motion is within the trial judge's sound discretion. The appellate court will not disturb the ruling of the lower court where the sound discretion of the trial judge in denying change of venue was not abused. In determining if a judge has abused that discretion, the appellate court looks to the completed trial to ascertain whether the accused was prejudiced.

Criminal Law & Procedure > Jurisdiction & Venue > Venue

HN5 See Miss. Code Ann. § 99-15-35 (Rev. 2000).

Civil Procedure > Preliminary Considerations > Venue > General Overview

Criminal Law & Procedure > ... > Challenges to Jury Venire > Pretrial Publicity > Change of Venue Requests

Criminal Law & Procedure > Jurisdiction & Venue > Venue

Criminal Law & Procedure > Jurisdiction & Venue > Pretrial Publicity

HN6 Once a defendant presents to the trial court an application for a change of venue with two affidavits affirming the defendant's inability to receive a fair trial in a particular location, a presumption rests in his favor that it is impossible for a fair trial to be had in that particular location.

Criminal Law & Procedure > Juries & Jurors > Voir Dire > Individual Voir Dire

Criminal Law & Procedure > Appeals > Prosecutorial Misconduct > General Overview

HN7 Although a district attorney may be subject to ethical sanctions for violating ethical rules prohibiting extrajudicial statements about the guilt or innocence of a defendant, that does not per se have any effect on the fairness of the trial. The trial judge has to consider all the issues but not act as an attorney discipline panel in a criminal case against the indicted defendant.

Evidence > Types of Evidence > Documentary Evidence > Summaries

HN8 See Miss. R. Evid. 1006.

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > General Overview

HN9 The relevancy and admissibility of evidence are largely within the discretion of the trial court and reversal may be had only where that discretion has been abused. Unless the trial judge's discretion is so abused as to be prejudicial to a party, this court will not reverse his ruling.

Evidence > Types of Evidence > Documentary Evidence > Summaries

HN10 Summaries of voluminous evidence are admissible under Miss. R. Evid. 1006, according to the trial court's discretion.

Criminal Law & Procedure > ... > Reviewability > Preservation for Review > General Overview

Evidence > ... > Hearsay > Exceptions > Family Records & Statements

Evidence > ... > Hearsay > Rule Components > Nonverbal

Conduct

HN11 Failure to lodge a protest to hearsay evidence at the trial level prevents the appellate court from considering the matter on appeal as it will not hold a court in error on a matter that was not presented for its review.

Criminal Law & Procedure > ... > Theft & Related Offenses > Embezzlement > General Overview

Criminal Law & Procedure > ... > Accusatory Instruments > Dismissal > Appellate Review

Criminal Law & Procedure > ... > Accusatory Instruments > Indictments > General Overview

Criminal Law & Procedure > ... > Accusatory Instruments > Indictments > Appellate Review

HN12 The question of whether an indictment is fatally defective is an issue of law and deserves a relatively broad standard of review by the appellate court. In embezzlement cases, it is essential that it be stated from whom the property was embezzled.

Criminal Law & Procedure > Appeals > Reversible Error > General Overview

Criminal Law & Procedure > Appeals > Reversible Error > Cumulative Errors

Criminal Law & Procedure > ... > Standards of Review > Harmless & Invited Error > Harmless Error

HN13 When the combination of specific errors, while harmless in each instance, accrues to such an extent that a defendant is denied a fair trial, the appellate court will reverse for cumulative error. However, where there is no reversible error in any part, there is no reversible error to the whole.

Counsel: ATTORNEY FOR APPELLANT: JOHN M. COLETTE.

ATTORNEY FOR APPELLEE: OFFICE OF THE ATTORNEY GENERAL, BY: JEAN SMITH VAUGHAN. DISTRICT ATTORNEY: ROBERT KEITH MILLER.

Judges: PAYNE, J., McMILLIN, C.J., KING AND SOUTHWICK, P.JJ., BRIDGES, IRVING, LEE, AND THOMAS, JJ., CONCUR. CHANDLER AND MYERS, JJ., NOT PARTICIPATING.

Opinion by: PAYNE

Opinion

[*1142] NATURE OF THE CASE: CRIMINAL - FELONY

BEFORE McMILLIN, C.J., LEE, AND PAYNE, JJ.

PAYNE, J., FOR THE COURT:

P1. C. Doug Gulley appeals his conviction of seven counts of embezzlement from a jury's verdict in the Circuit Court of Jackson County. He was sentenced to serve ten years on each of six counts **[**2]** of embezzlement, to run concurrently, ten years on the seventh count, to be served consecutively, with the sentence in the seventh count suspended, to ten years of post-release supervision, and a fine of $ 7,000. Contending that the trial court committed reversible error in refusing to change venue, in admitting evidence that was misleading and confusing, in denying his motion to dismiss for a faulty indictment and because of the cumulation of trial court errors, Gulley appeals to this Court. Finding no reversible error, we affirm his conviction.

[*1143] FACTS

P2. Appellant Doug Gulley was arrested and charged with thirty-five counts of embezzlement of clients's funds. Gulley was a general agent for Minnesota Mutual Insurance Company and was in the business of selling insurance and other investment products on behalf of Minnesota Mutual in his business, Gulley & Associates. The State proceeded at trial on only seven counts of the thirty-five count indictment.

P3. On behalf of the State, Kim Erikson of the Secretary of State's office testified. Erikson, the lead investigator on the matter, testified that after spending a number of days in Gulley's offices conducting an audit, **[**3]** a search warrant was issued and all of Gulley's business and personal records were seized. Erikson and members of her staff culled through the documents and compiled the information which, she testified, showed that Gulley embezzled clients' funds.

P4. Seven of Gulley's former clients testified at trial. In sum, they testified that at the time they invested money with Gulley, they believed that they were investing in Minnesota Mutual products. Several did indicate that they needed their funds invested in a manner which allowed them to liquidate and get their hands on the cash if they needed it. Furthermore, the evidence showed that each had made checks payable, ranging in amounts from $ 3,000 to $ 100,000, to Minnesota Mutual, Ascend or Eaton Vance, all Minnesota Mutual

companies. Each investor testified that Gulley instructed them to whom they were to make their checks payable.

P5. Gulley deposited the monies from the seven investors in a Magnolia Federal Bank checking account, account number 470004980200. Gulley referred to the Magnolia Federal account as a "pooled trust account." The signature cards for the Magnolia Federal account reflected that Gulley and his wife had **[**4]** signatory authority and that the account was styled "C. Douglas Gulley or Elizabeth A. Gulley JTROS D/B/A Gulley and Associates."

P6. Several of the account summaries prepared by Gulley for some of the seven investors showed that the money was in a "pooled trust account." According to Gulley, the pooled trust account offered his clients a higher rate of return on their investment and allowed them the ability to liquidate their investment more rapidly and without the harsh penalties imposed by other Minnesota Mutual financial products. Out of this account, Gulley paid the expenses of Gulley Financial Group or placed the money in other Gulley & Associates accounts so that those particular funds might not be available from the pooled trust account when the investor needed them.

P7. Representatives of Minnesota Mutual testified that in January of 1998 they were informed by one of Gulley's former associates of the possibility that Gulley had misappropriated client funds. Thereafter, Minnesota Mutual began its own investigation. On March 24, 1998, the Magnolia Federal checking account was closed by Gulley and Minnesota Mutual accepted the balance of the account in the amount of **[**5]** $ 16,127.54 from Gulley. In a letter dated March 24, 1998, Gulley resigned as a general agent for Minnesota Mutual. On March 25, 1998, Gulley issued a letter to Union Planters Bank [1] authorizing Union Planters to provide to Minnesota Mutual any information requested by the company regarding Gulley & Associates account number 470004980200. Minnesota Mutual representative, Kevin Jacobson, testified that Gulley's letter of authorization was required because Minnesota Mutual did not have access to the Magnolia Federal checking account.

P8. Gulley, testifying on his own behalf, emphatically denied stealing or embezzling **[*1144]** client funds. Gulley believed that his clients were aware that they were investing in a pooled trust account which yielded a higher return than the long-term investment options offered **[**6]** by Minnesota Mutual. Gulley stated that, as a general agent for Minnesota Mutual, he was permitted by the company to offer financial products which Minnesota Mutual did not provide or offer which included the Gulley Financial Group pooled trust account. According to Gulley, the pooled trust account was an investment in the business of Gulley & Associates. Consequently, Gulley admitted that he accepted the money from these seven clients and that he placed the funds in an account which was used for "the investment in Gulley & Associates." Out of this account, Gulley paid the expenses of Gulley & Associates which were both business and personal expenses.

P9. Gulley deposited into the pooled trust account one of the checks written by the seven investors in question. The evidence shows that prior to a deposit of an investor's funds there was a low balance in the pooled trust account. Checks were then written by Gulley on the funds in the pooled trust/Magnolia Federal account and was then deposited into other Gulley & Associates checking accounts at other banks. Thereafter, from the various checking accounts, Gulley paid the expenses of his business and personal expenses. He paid loan **[**7]** notes on vehicles, lease payments, credit card bills, utility bills, employee salaries and others.

P10. At trial, Gulley emphasized that his clients were investing in his business and receiving the agreed upon interest rates for their investments. Gulley withdrew funds as requested by a particular investor which was subtracted from their pooled trust account investment.

P11. After the jury found Gulley guilty and after sentencing, he filed post-trial motions for a judgment of acquittal or alternatively for a new trial. From the denial of his post-trial motions, he appeals.

ANALYSIS

I. Change of Venue

P12. Gulley argues that the extensive pretrial publicity in his case demanded a change of venue and that he did not receive a fair trial because of the trial court's refusal to grant his motion to change venue. Gulley presented a motion to change venue prior to trial on which a pretrial hearing was held. The trial court delayed ruling on the matter until *voir dire*. A venire of sixty-two persons was

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[1] The record reflects that Union Planters Bank bought out Magnolia Federal. However, for consistency we will continue to refer to the primary account in question here as the Magnolia Federal checking account.

empaneled. After determining that forty-six members of the venire had heard of Gulley's case, individual *voir dire* of those forty-six persons ensued. Five **[**8]** members of the venire were struck for cause on the basis that each had indicated that they could not be fair and impartial having already determined for themselves Gulley's guilt. Following the sessions of individual *voir dire*, nineteen members were struck for cause and the circuit court denied four of Gulley's challenges for cause. Gulley maintains that ultimately the jury contained four jurors who had heard or read about Gulley's case.

P13. In support of his motion for change of venue, Gulley attached copies of twenty-eight news articles involving his case that were printed and published in the Jackson County area between March 20, 1998 and September 7, 1998. At trial which began on May 24, 1999, Gulley provided two more news articles and transcripts of television reports broadcasted in the Jackson County area between March 19, 1998 and April 8, 1999. Gulley had also provided the affidavits of two citizens and live testimony from one citizen in the Jackson County area stating that Gulley could not receive a fair trial in Jackson County because extensive media publication of the case caused the jury pool to be tainted.

P14. In particular, Gulley points to comments made **[**9]** by the district attorney to a local newspaper which was published the day before the jury was selected. Gulley **[*1145]** contends that the following statements by the district attorney which appeared in the local newspaper were improper:

Bradley [the district attorney] said the case put together by Secretary of State Eric Clark's investigators is strong and will prove Gulley took money from potential investors and converted it for his own personal use. "They did a great investigation," Bradley said. "It was a huge investigation and the facts are there. . . . I don't think there's been enough publicity in this case to bias a juror. I think we can get a fair jury to hear this case."

Gulley challenges that the district attorney's statements were in violation of ***HN1*** the Mississippi Rules of Professional Conduct Rule 3.6(a) which prohibits a lawyer from making "extrajudicial statements that a reasonable person would expect to be disseminated . . . . [and] will have a substantial likelihood of materially prejudicing an adjudicative proceeding." Gulley also relies on ***HN2*** Uniform Circuit and County Court Rule 9.01 which states:

Prior to conclusion of the trial, no . . . prosecuting attorney, . . . **[**10]** may release or authorize release of any statement for dissemination by any means of public communication on any matter concerning: . . . . The defendant's guilt or innocence, or other matters relating to the merits of the case, or the evidence in the case.

Gulley contends that his right to a fair trial was inhibited in part by the district attorney's public comments on the eve of trial and that he should have been granted a change of venue because her public comments were read by several jury members.

P15. "***HN3*** One of the fundamental hallmarks of our legal system is an accused's right to a fair trial before an impartial jury." *Hickson v. State*, 707 So. 2d 536, 541 (Miss. 1997). The trial court is required to "guard against even the appearance of unfairness" when impaneling a jury. *Mhoon v. State,* 464 So. 2d 77, 81 (Miss. 1985). ***HN4*** When the defendant maintains that he cannot obtain an impartial jury without a change of venue, the decision to deny such a motion is within the trial judge's sound discretion. *Porter v. State*, 616 So. 2d 899, 905 (Miss. 1993). "This Court will not disturb the ruling of the lower court where the sound **[**11]** discretion of the trial judge in denying change of venue was not abused." *Harris v. State*, 537 So. 2d 1325, 1328 (Miss. 1989). In determining if a judge has abused that discretion, we look to the completed trial to ascertain whether the accused was prejudiced. *Winters v. State*, 473 So. 2d 452, 457 (Miss. 1985); *see also Fisher v. State*, 481 So. 2d 203, 220 (Miss. 1985) (holding that motion for change of venue should be granted where "under the totality of the circumstances it appears reasonably likely that, in the absence of such relief, the accused's right to a fair trial may be lost").

P16. ***HN5*** Section 99-15-35 of the Mississippi Code provides:

On satisfactory showing, in writing, sworn to by the prisoner, made to the court, or to the judge thereof in vacation, supported by the affidavits of two or more credible persons, that, by reason of prejudgment of the case, or grudge or ill will to the defendant in the public mind, he cannot have a fair and impartial trial in the county where the offense is charged to have been committed, the circuit court, or the judge thereof in vacation, may change the venue in any criminal case to a **[**12]** convenient county, upon such terms, as to the costs in the case, as may be proper.

Miss. Code Ann. § 99-15-35 (Rev. 2000). ***HN6*** Once a

defendant presents to the trial court an application for a change of venue with two affidavits affirming the defendant's inability to receive a fair trial in a particular location, a presumption rests in his favor that it is impossible for a fair trial to be had in that particular location. *Hickson,* 707 So. 2d at 541.

P17. Gulley attached two affidavits to his motion for change of venue in **[*1146]** which the affiants believed that Gulley could not get a fair trial in Jackson County because of pretrial publicity. In addition, Gulley produced a witness at the hearing on the matter who testified that in his opinion there had been a large amount of publicity such that Gulley would not likely get a fair and impartial jury in that county. Accordingly, Gulley successfully raised a rebuttable presumption under our statutory law to demonstrate that an impartial jury could not be impaneled. Thus, the prosecution was charged with rebutting the presumption that Gulley could not obtain an impartial jury panel in Jackson County. *See Johnson v. State*, 476 So. 2d 1195, 1211 (Miss. 1985). **[**13]**

P18. The prosecution called several witnesses to rebut Gulley's position on the venue issue. First, the prosecution called Jackson County Circuit Clerk Joe Martin, Jr., who testified that he came into regular contact with the citizens of Jackson County and that Gulley's case was not a topic of general conversation. Also testifying for the State was Nancy Hayes, an employee with the tax assessor's office in Jackson County, who indicated that in her opinion Gulley's case had not been a hot topic of conversation among Jackson County citizens. She stated that she thought Gulley would be able to get a fair trial in the county. John Lansford also testified at the hearing stating that he believed Gulley could get a fair trial in Jackson county. After listening to all of the testimony at the hearing, the trial judge ruled that he would reserve ruling on the issue until after *voir dire*. After *voir dire* and the individual *voir dire* sessions of those who indicated they had previously "heard" of Gulley's case, the trial court denied Gulley's motion to change venue on the basis that the crimes involved were not so heinous that the passions of the community and jurors were aroused **[**14]** and that the majority of the prospective jurors did not follow the media attention given to the case and as a result knew very little about Gulley's case. The trial court stated:

So, true, there were five that have already been struck for cause because they said they could not be fair. There are others who will be struck for cause, because they left me with the impression that they had secured a lot of information about this case, a lot of which would not be admissible. And the Court is going to certainly not allow those jurors, when they have indicated some indication that they felt he was guilty, to serve on a criminal jury.

But when we take all of those away, I think we're still going to find that we have a great majority of the number of jurors here who, number one, said they knew very little about the case; number two, had no great interest in the case from a factual standpoint; and number three, said they could be fair and impartial.

I've heard their testimony. I've looked them in the eye. I believe them when they tell me that they will be -- those that said they would be fair and impartial will be fair and impartial. . . .

But on the pre-trial publicity issue, there was **[**15]** a good amount of publicity, I will admit that. Fortunately, a great majority of the jurors didn't pay any attention to it, in my opinion. The ones that did and the ones that have reservations about serving or have expressed some reservations won't be allowed to serve. But I do think that, I do think that the jury will be fair and impartial, and if I didn't think that, I would change the venue, as I said before. But I just respectfully disagree with counsel for the defendant on that issue. And so I'm going to deny the motion, you know, at this time.

P19. Twelve jurors were selected along with two alternates. During the trial, two jurors were excused and the two alternate jurors were utilized. Of the twelve jurors who convicted Gulley, seven of them had stated in *voir dire* that they had heard of Gulley's case. Juror number two indicated in *voir dire* that she had first heard of the **[*1147]** case the day before trial and did not recall the defendant's name. She stated that she could be fair and impartial and base her decision on the evidence presented. Juror number seven recalled seeing an article in the paper over a year prior to trial but had no recollection of what the case was **[**16]** about. Juror number eight stated that she had read a couple of articles about the case but on the day of trial could not recall then what the case was about. She stated she had just glanced at the newspaper article she had seen. Also, she recalled that the morning of trial a news report on the radio indicated that Gulley's trial was beginning jury selection that day. Jurors number seven and eight both stated that they could be fair and impartial if selected for jury duty.

P20. Juror eighteen indicated that she had skimmed two

or three articles about Gulley's case but only remembered his name and not the details of the case. She informed the court that she could be fair and impartial and judge Gulley's guilt or innocence on the evidence presented. Juror nineteen could not recall how he had heard about the case but that it had been from media reports. He stated that he knew it was an embezzlement case but that he did not believe much of anything that he read in the newspaper.

P21. Juror thirty-eight stated that he had heard about Gulley's case from the newspapers and television but did not recall what the case was about. He stated that he had not read anything recently about **[**17]** the case. Juror thirty-eight indicated that he had heard of the case by skimming the headlines in the newspaper, though he stated he rarely ever read the newspaper. He stated that he remembers seeing the headlines over the last year and as recently as a few days before trial. He denied seeing anything concerning the case on television or on the radio. He knew it was an embezzlement case, but that was all he knew. He stated he had not formed an opinion about Gulley's guilt or innocence and that he felt as though he would be a fair and impartial juror.

P22. Having reviewed the individual *voir dire* sessions, we are unable to conclude that the trial court erred in denying Gulley's motion for a change of venue. While a number of juror's had "heard" of the case and of those who served on the jury, none of the responses to the *voir dire* questions showed any bias or prejudice to Gulley's innocence or guilt. In addition, nothing in the record evinces any passion or outrage toward Gulley. Accordingly, we determine today that the State successfully rebutted the presumption of prejudice and that the actual persons serving on the jury panel in this case were fair and impartial. *Harris*, 537 So. 2d at 1328-29. **[**18]**

P23. As to the district attorney's comments the day prior to trial, we first note that an ethical violation by the prosecutor does nothing to negate the guilt of an indicted defendant. Notwithstanding that fact, we find that in this case the district attorney's comments were improper and in violation of Rule 3.6 (b)(4) of the Rules of Professional Conduct and Uniform Rules of Circuit and County Court Practice 9.01 prohibiting extrajudicial statements about the guilt or innocence of a defendant. Her statement that the evidence would show that Gulley embezzled money was in fact a comment on his guilt. The better practice would have been to refuse to make any comments on the case until trial concluded. ***HN7*** Although the district attorney may be subject to ethical sanctions for such a violation, that does not *per se* have any effect on the fairness of the trial. The trial judge had to consider all the issues but not act as an attorney discipline panel in a criminal case against the indicted defendant. Despite the improper pretrial statements made by the district attorney, there is no evidence in the record suggesting that Gulley was denied his right to a fair trial by an impartial jury. **[**19]** *Voir dire* of the individual jury members showed that Gulley did not suffer any prejudice **[*1148]** by such comments, and therefore his rights to a fair trial were not abrogated.

2. Summary Charts.

P24. Kim Erikson with the Secretary of State's office produced a number of "summary charts" which she used at trial to demonstrate to the jury the flow of money in the "pooled trust account." As to each of the seven counts of embezzlement, Erikson used the charts to show that after Gulley deposited a sum reflecting the amount given to him by the investor, checks were drawn on the same account for personal and business expenses and/or placed in other Gulley & Associates accounts. Additionally, the charts reflect a low balance in the Magnolia Federal account prior to the deposit of each of the investor's checks. In most cases, an immediate withdrawal was made by Gulley in excess of the prior balance and the charts reflected such. Erikson explained to the jury that the charts did not reflect every transaction in the accounts for time periods depicted. To do so, Erikson testified, would have resulted in producing too many charts to be helpful to the jury. She stated that she sought to **[**20]** streamline the proceedings by producing the summary charts.

P25. Gulley objected prior to trial and during trial to the use and admission of the charts on the basis that they were inaccurate reports of the transactions of the checking account in question. Primarily Gulley argues that because the charts did not reflect every transaction which would have included other deposits as well as additional expenditures, they were misleading and confusing to the jury. Gulley further contends that the trial court erred in determining that the charts were admissible and that Gulley's objections were matters for cross-examination. Gulley asserts that the charts left the jury with the erroneous impression that Gulley used his clients's money to pay his personal expenses.

P26. Interestingly, Gulley does not object that the charts do reflect some of the transactions, deposits and withdrawals of the checking accounts in question. In

fact, Gulley testified at trial that the monies of the seven investors were in fact deposited into the Magnolia Federal checking account in issue.

P27. Gulley also charges in his appellate brief a discovery violation by the State. Gulley claims that the bank **[**21]** records used to produce the charts were not provided to him in a timely fashion. This matter was addressed by the trial court. Erikson and her staff entered all the bank statements of the Gulley's accounts into a computerized spreadsheet. According to the State and Erikson, the spreadsheets contained every transaction of the accounts in question from the beginning date the account was opened until it was closed. Gulley was provided copies of the charts and the spreadsheets from which the charts were made three months prior to trial. In addition, the State asserted that the documents were available for Gulley to inspect at the district attorney's office.

P28. Gulley, however, complains that he did not get to see and check for accuracy the *actual* bank statements from which the spreadsheets and subsequently the charts were made. The documents make up several legal sized boxes and consist of many records. Defense counsel requested and the trial court granted a two hour continuance of trial for defense counsel to examine the records. When asked whether or not a two hour continuance would be sufficient, counsel for Gulley stated:

There's never enough time, but I mean, under the **[**22]** circumstances -- I don't want to delay this trial or aggravate this jury any longer than possible, but I have to ensure that Mr. Gulley does get a fair trial if there's something there. I think that [the two hour continuance] would be sufficient under the circumstances, Judge.

[*1149] After the continuance, the trial court asked counsel for Gulley if he was able to review the documents in question. Counsel responded:

Your Honor, we have reviewed them some, again late. There are a lot of volumes to them. We haven't completed the review, but I understand the Court's earlier ruling. And I guess, basically at this point, if they call the witness, I may be able to ascertain as to whether or not the other review is critically required.

Given counsel's acquiescence to the trial court's decision to grant the continuance and his statement that he would essentially speak up if he believed a further continuance of trial was required, we see no discovery violation which has prejudiced Gulley's case such that he did not receive a fair trial. P29. Next, Gulley contends that the summary charts contained inadmissible hearsay which was prejudicial to and adversely affected "his rights," presumably **[**23]** to a fair trial. In addition, Gulley challenges that reversible error occurred in the trial court's failure to perform a Mississippi Rules of Evidence Rule 403 "balancing test."

P30. The State argues that the trial court properly allowed the charts into evidence and that the trial court did not abuse its discretion in admitting the charts. In support of its position, the State contends that in fact the records of the bank accounts reflected on the charts were so voluminous that the charts were required to better serve the jury in deciding the case. The State asserts that the summary charts assisted the jury in understanding the flow of money through the Magnolia Federal checking account.

P31. ***HN8*** Mississippi Rule of Evidence 1006 provides:

The content of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates shall be made available for examination or copying, or both, by other parties at a reasonable time and place. The court may order that they be produced in court.

Under Mississippi Rule of Evidence 1006, "a summary of the voluminous material **[**24]** is sufficient as admissible evidence." M.R.E. 1006 cmt. The standard by which the Mississippi Supreme Court reviews a trial judge's decision to admit evidence was reiterated in *Stewart v. Stewart*, 645 So. 2d 1319, 1320 (Miss. 1994):

HN9 The relevancy and admissibility of evidence are largely within the discretion of the trial court and reversal may be had only where that discretion has been abused. . . . Unless the trial judge's discretion is so abused as to be prejudicial to a party, this court will not reverse his ruling.

P32. ***HN10*** "Summaries of voluminous evidence are admissible under M.R.E. 1006, according to the trial court's discretion." *Farris v. State*, 764 So. 2d 411 (P82) (Miss. 2000). "Reversal of a trial court's evidentiary findings may only occur when there is a demonstrable abuse of the trial court's discretion." *Id.* (citing *Johnston v. State*, 567 So. 2d 237, 238 (Miss. 1990)).

P33. Following our examination of the record and the charts, we are unable to say that the trial court abused its discretion in admitting the summary charts. The

charts do reflect some of the transactions from the accounts provided. The maker **[**25]** of the charts explained each chart in her testimony indicating that the charts reflected only some of the transactions from the accounts and not every transaction in the accounts was depicted. Even further, the jury was provided the bank statements and checks that were reflected in the charts.

P34. Regarding the allegation of a discovery violation, we find that the trial court did not err in refusing to grant a mistrial. Having discussed the matter with counsel out of the presence of the **[*1150]** jury, the trial court granted a two hour continuance of trial to give defense counsel the opportunity to review the documents.

P35. As to Gulley's complaint that the trial court did not conduct a Mississippi Rule of Evidence 403 balancing test, the record does not reflect that Gulley interposed an objection as to the relevancy of the evidence. Gulley objected to the admission of the charts based on inaccuracies he believed the charts contained. The trial court permitted counsel for Gulley to *voir dire* Erikson about her preparation of the charts. After hearing argument from counsel, the trial court overruled Gulley's objection to the admission of the chart stating that the problems Gulley **[**26]** had with the charts were matters for cross-examination.

P36. Regarding Gulley's allegation that the charts contained inadmissible hearsay, the record fails to show a point at which Gulley lodged an objection to the charts on the grounds that they contained inadmissible hearsay. In addition, Gulley failed on appeal to point us to specific references in the charts where any such "hearsay" is found. ***HN11*** Failure to lodge a protest to hearsay evidence at the trial level prevents us from considering the matter on appeal as we will not hold a court in error on a matter that was not presented for its review. *Hall v. State*, 691 So. 2d 415, 420 (Miss. 1997); *see also Read v. State*, 430 So. 2d 832, 838 (Miss. 1983) ("Before an issue may be assigned and argued here, it must first have been presented to the trial court. Where the issue has not been timely presented below, it is deemed waived. The point is thus said to be procedurally barred when urged here.").

3. Motion to dismiss indictment.

P37. Gulley argues here that the trial court erred in denying his motions to dismiss the indictment because it contained a fatal flaw. Gulley contends that **[**27]** the indictment was defective because the proof at trial did not support the actual charges listed in the indictment. The seven counts of the indictment stated that Gulley allegedly embezzled and converted for his own use specific amounts of money of each investor. Gulley contends that the evidence showed that the checks of the listed investors were written out to Minnesota Mutual and not Doug Gulley. Accordingly, Gulley argues that the seven investors were not the so-called victims here, but rather that if anyone is, it is Minnesota Mutual. Minnesota Mutual assumed the business of Gulley & Associates pursuant to an agreement with Gulley. Subsequent to their assumption of the business, Minnesota Mutual repaid the investors the amounts of money they invested, with interest. Thus, Gulley asserts that based on Minnesota Mutual's restitution to his clients, any dispute as to amounts owed are between him and Minnesota Mutual and not the investors individually. Consequently, Gulley argues to this Court that the indictment which did not list Minnesota Mutual as the party injured by any of his actions was defective and the refusal of the trial court to dismiss his case was error.

P38. **[**28]** "***HN12*** The question of whether an indictment is fatally defective is an issue of law and deserves a relatively broad standard of review by this Court." *Nguyen v. State*, 761 So. 2d 873 (P3) (Miss. 2000) (citing *Peterson v. State*, 671 So. 2d 647 (Miss. 1996)). In embezzlement cases, it is essential that it be stated from whom the property was embezzled. *See Meyer(s) v. State*, 193 So. 2d 728 (Miss. 1967); *Voss v. State*, 208 Miss. 303, 305, 44 So. 2d 402 (Miss. 1950).

P39. With the standard of review in mind, we are unpersuaded by Gulley's argument. The evidence showed that Gulley instructed his clients to make their checks payable to Minnesota Mutual. Gulley claims that he did so because that is the way the account was styled. However, looking at the signature card for the account into which Gulley placed the funds **[*1151]** (account number 470004980200) of these seven clients, we note that the card provides that the account is in the name of "C. Douglas Gulley or Elizabeth A. Gulley with JTROS D/B/A Gulley and Associates." Thereafter, Gulley, in most cases, immediately wrote checks on account number 470004980200 in large sums transferring **[**29]** money to other checking accounts including Gulley & Associates accounts held at South Trust Bank, Union Planters Bank, and Hancock Bank.

P40. Other evidence submitted at trial does not support Gulley's assertion that the only victim in this case is Minnesota Mutual. Gulley presented at trial two letters from Minnesota Mutual. One was a 1985 letter to First City Federal Savings and Loan and the other was a

1991 letter to the Bank of Mississippi. Both letters gave Gulley authority to open a premium account/checking account on behalf of Minnesota Mutual on which Gulley would have signatory authority. Gulley testified that in 1991 he was approached by the Bank of Mississippi about doing business with the bank. According to Gulley, he moved the Minnesota Mutual premium account pursuant to Minnesota Mutual letter of authorization to the Bank of Mississippi. Gulley testified that the First City Federal Savings and Loan account is what is now referred to the Magnolia Federal account. Gulley indicated that the savings and loan bank went into bankruptcy and Magnolia Federal took over the account. Gulley claims that Minnesota Mutual was the only party who could authorize the closure of the **[**30]** Magnolia Federal account and that it was aware that the Magnolia Federal account was still in existence even after he had transferred the Minnesota Mutual premium account to the Bank of Mississippi. Gulley said that he requested that Minnesota Mutual allow him to maintain the Magnolia Federal account to use as a money management account. Gulley testified that he therefore kept the account active but did not use it as a Minnesota Mutual premium account.

P41. Testimony at trial from Minnesota Mutual indicated that the company did not "own" the Magnolia Federal account and had no rights to access the account. Even more telling on the issue of whether Minnesota Mutual is the only "victim" here is the fact that Gulley drafted a letter to the bank giving it authorization to release to Minnesota Mutual any and all documents it requested pertaining to the Magnolia Federal account. If Gulley's claim that Minnesota Mutual actually owned the account in question were true, there would have been no need for a written authorization from Gulley for Minnesota Mutual to obtain information relating to the account. Further, whether or not Minnesota Mutual was the checking account owner is not relevant **[**31]** as the evidence shows that Gulley accepted the investors' monies, commingled it in an account from which he paid personal and business expenses and therefore, converted the money for his own use. Even if Gulley himself had paid the investors the money they had previously invested, such an action does not vitiate Gulley's conduct in wrongfully converting the funds for his own use.

P42. Minnesota Mutual may be a "victim" in this case. However, the indictment does not list any losses of Minnesota Mutual and specifically refers to the clients and the amount of money Gulley was accused of embezzling from each.

P43. Alternatively, Gulley contends that, at a minimum, counts one and seven should be dismissed on the basis that the proof at trial regarding the amounts invested were not consistent with the amounts provided in the indictment. As to count one, the indictment charged that Gulley accepted and embezzled $ 10,350 from Mr. James H. Bains. Gulley asserts that because Bains testified that he received $ 5,500 from Gulley before charges were filed against him, the indictment is factually defective making it fatally defective. As to count seven, the grand jury charged Gulley with **[**32]** receiving and embezzling $ 75,000 from William Hammack and **[*1152]** Janice Parmelee. Gulley charges, however, that $ 16,000 had been returned to the client therefore making the indictment defective because the $ 75,000 investment was not reduced by the pay out of $ 16,000.

P44. Again, we are not convinced. The fact that Gulley had previously refunded or returned portions of the investors' money is not relevant in this criminal case. The return of the funds does not negate Gulley's actions of illegally commingling and converting the funds for his own use.

P45. We therefore rule that the trial court did not abuse its discretion in refusing to dismiss any part of the indictment against Gulley.

4. Motions for mistrial and cumulative effect of errors.

P46. In his last assignment of error, Gulley advances that the trial court erred in refusing to grant his motions for a mistrial and alternatively that the cumulative effect of errors made throughout his trial denied him a fair trial. Consequently he contends that reversal of his case is required. Gulley points to trial court errors in allowing inadmissible testimony over defense objections. Gulley argues that the seven investors **[**33]** were "'tainted' by the statements, letters, and comments" of Minnesota Mutual, the Secretary of State's office, and the district attorney's office. Even further, Gulley asserts that these jurors "'presumably' read the prejudicial, inaccurate and inflammatory articles in the paper and/or saw reports on T.V."

P47. In response, the State contends that because there is no merit in any of Gulley's assignments of error, there is no cumulative error.

P48. "***HN13*** When the combination of specific errors, while harmless in each instance, accrued to such an extent that a defendant was denied a fair trial, this Court will reverse for cumulative error." *Hughes v. State*, 735

So. 2d 238 (P199) (Miss. 1999). However, where "there was no reversible error in any part, so there is no reversible error to the whole." *McFee v. State*, 511 So. 2d 130, 136 (Miss. 1987).

P49. In this case we have concluded that there was no error in any part. Accordingly, this assignment of error lacks merit.

P50. THE JUDGMENT OF THE CIRCUIT COURT OF JACKSON COUNTY OF CONVICTION OF SEVEN COUNTS OF EMBEZZLEMENT AND SENTENCE OF TEN YEARS EACH ON COUNTS ONE THROUGH SIX, TO BE [34] SERVED CONCURRENTLY, AND TEN YEARS ON COUNT SEVEN TO BE SERVED CONSECUTIVELY TO THE SENTENCES IMPOSED IN COUNTS ONE THROUGH SIX, WITH THE SENTENCE IN COUNT SEVEN SUSPENDED, AND TEN YEARS OF POST-RELEASE SUPERVISION, ALL IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS AND A FINE OF $ 7,000 IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.**

McMILLIN, C.J., KING AND SOUTHWICK, P.JJ., BRIDGES, IRVING, LEE, AND THOMAS, JJ., CONCUR. CHANDLER AND MYERS, JJ., NOT PARTICIPATING.

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As of: September 26, 2016 9:25 AM EDT

In re Kline

Supreme Court of Kansas

October 18, 2013, Opinion Filed

No. 106,870

Reporter
298 Kan. 96; 311 P.3d 321; 2013 Kan. LEXIS 1144; 2013 WL 5663197

In the Matter of PHILLIP DEAN KLINE, Respondent.

Subsequent History: US Supreme Court certiorari denied by, Motion granted by Kline v. Kan. Disciplinary Adm'r, 2014 U.S. LEXIS 2982 (U.S., Apr. 28, 2014)

Prior History: Alpha Med. Clinic v. Anderson, 280 Kan. 903, 128 P.3d 364, 2006 Kan. LEXIS 18 (2006)

Disposition: **[***1]** Indefinite suspension.

Core Terms

grand jury, summaries, records, Disciplinary, subpoena, patient, clear and convincing evidence, attorney general, files, documents, jury's, mandatory, abortion, staff, sexual abuse, questions, sealed, violations, patient files, adult patient, reporting, clarify, clinics, misconduct, copies, motions, oral argument, district attorney, attorney's, knowingly

Case Summary

Overview
HOLDINGS: [1]-Because there was clear and convincing evidence that the attorney, the former State Attorney General and county district attorney, committed 11 violations of Kan. R. Prof. Conduct 3.3(a)(1), (a)(3), 5.1(c), 8.1(b), 8.4(c), (d), (g), and given the facts and circumstances of each violation; the ethical duties violated by the attorney to the public, the legal system, and the legal profession; the knowing nature of his misconduct; the injury that resulted from the misconduct; the existence of aggravating and mitigating factors; and the applicable advisory American Bar Association Standards for imposing discipline, the attorney was suspended indefinitely from the practice of law.

Outcome
Attorney indefinitely suspended.

LexisNexis® Headnotes

Legal Ethics > Sanctions > Disciplinary Proceedings > Appeals

HN1 In reviewing a disciplinary panel's report, the court considers the evidence, disciplinary hearing panel's findings, and the parties' arguments to determine whether an attorney violated the Kansas Rules of Professional Conduct and, if so, the appropriate discipline to impose. The Disciplinary Administrator must establish misconduct by clear and convincing evidence. Clear and convincing requires that the factfinder believes that the truth of the facts asserted is highly probable. In assessing whether sufficient evidence exists, the court refrain from weighing conflicting evidence, assessing witness credibility, or redetermining questions of fact.

Legal Ethics > Professional Conduct > General Overview

HN2 Kan. R. Prof. Conduct 8.4 makes it professional misconduct for an attorney to engage in conduct involving dishonesty, fraud, deceit or misrepresentation; engage in conduct that is prejudicial to the administration of justice; or engage in any other conduct that adversely reflects on the lawyer's fitness to practice law.

Legal Ethics > Professional Conduct > General Overview

Legal Ethics > Sanctions > General Overview

HN3 Every licensed attorney is responsible for observing the Rules of Professional Conduct, regardless of whether the rules recite general or specific obligations. Kan. R. Prof. Conduct Preamble 12 provides that every lawyer is responsible for observance of the Rules of Professional Conduct. Kan. R. Prof. Conduct Scope 19 provides that failure to comply with

an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process. Any licensed Kansas attorney reasonably observing the Rules of Professional Conduct would be on notice of a potential for violation of the rules alleged to have been violated under the facts as alleged.

Legal Ethics > Professional Conduct > General Overview

HN4 Kan. R. Prof. Conduct 8.4(c) prohibits engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation.

Legal Ethics > Professional Conduct > Tribunals

HN5 Kan. R. Prof. Conduct 8.4(d) prohibits engaging in conduct prejudicial to the administration of justice.

Legal Ethics > Professional Conduct > Illegal Conduct

HN6 Kan. R. Prof. Conduct 8.4(g) prohibits engaging in conduct adversely reflecting on the lawyer's fitness to practice.

Legal Ethics > Professional Conduct > Tribunals

HN7 The word "prejudice" as used in the context of Kan. R. Prof. Conduct 8.4(d) sufficiently defines the standard and restricts a lawyer's conduct. The word "prejudicial" is universally found throughout the legal and judicial system.

Legal Ethics > Professional Conduct > General Overview

Legal Ethics > Professional Conduct > Tribunals

HN8 The Preamble to the Kansas Rules of Professional Conduct notes that some rules apply to lawyers not actively practicing or to practicing lawyers not acting in a professional capacity. Similarly, lawyers can be disciplined for conduct outside the profession if the conduct functionally relates to the practice of law. Holding attorneys to a professional norm standard might hinder the court's ability to punish conduct that is not prohibited by professional norms but may still impact a licensed lawyer's fitness to hold that license.

Legal Ethics > Professional Conduct > Tribunals

HN9 An attorney's conduct need not prejudice the proceeding itself in order to constitute a Kan. R. Prof. Conduct 8.4(d) violation.

Legal Ethics > Professional Conduct > Tribunals

HN10 The administration of justice Kan. R. Prof. Conduct 8.4(d) seeks to protect from prejudice is much broader than the administration of justice to be effected in any single trial or adjudicatory proceeding. All lawyers, by virtue of their licenses, enjoy the status of officers of the court. That status brings with it the responsibility to refrain from conduct unbecoming such officers.

Legal Ethics > Professional Conduct > Tribunals

HN11 Kan. R. Prof. Conduct 8.4(d) encompasses conduct that injures, harms, or disadvantages the justice system generally, regardless of the context in which that conduct occurs or whether it prejudiced a particular proceeding.

Legal Ethics > Professional Conduct > General Overview

HN12 Kan. R. Prof. Conduct 8.4(c) prohibits engaging in conduct involving dishonesty, fraud, deceit or misrepresentation.

Legal Ethics > Professional Conduct > Nonlawyers

HN13 Kan. R. Prof. Conduct 5.3(c)(2) makes a lawyer responsible for the conduct of a supervised nonlawyer if the lawyer has direct supervisory authority, knows of the conduct, and fails to avoid or mitigate the conduct.

Legal Ethics > Professional Conduct > Tribunals

HN14 Kan. R. Prof. Conduct 3.3(a)(1) prohibits a lawyer from knowingly making a false statement of fact or law to a tribunal.

Legal Ethics > Professional Conduct > Tribunals

HN15 Kan. R. Prof. Conduct 3.3(a)(1) requires that a lawyer knowingly make a false statement of fact or law.

Legal Ethics > Professional Conduct > Tribunals

HN16 Kan. R. Prof. Conduct 3.3 Comment 13 discusses that there must be a practical time limit on an attorney's obligation to correct false evidence and statements and the conclusion of the proceeding is a reasonably definite point for the termination of the obligation.

Legal Ethics > Professional Conduct > General Overview

HN17 Kan. R. Prof. Conduct 5.1(c)(2) places responsibility on a lawyer with direct supervisory authority over another lawyer for the other lawyer's

misconduct if the supervising lawyer knows of the misconduct and fails to take remedial actions when the misconduct's consequences could be avoided.

Legal Ethics > Professional Conduct > Tribunals

HN18 Kan. R. Prof. Conduct 8.4(d) prohibits conduct that is prejudicial to the administration of justice.

Civil Procedure > Sanctions > Contempt > Criminal Contempt

HN19 Conduct rises to the level of criminal contempt when it is directed against the dignity and authority of the court, or a judge acting judicially; it is an act obstructing the administration of justice which tends to bring the court into disrepute or disrespect. A finding of criminal contempt requires the court to determine that the person acted with the requisite intent, and such a finding depends not only on the nature of the act, but also upon intent, good faith, and the surrounding circumstances.

Legal Ethics > Professional Conduct > Tribunals

HN20 An attorney's conduct can violate Kan. R. Prof. Conduct 8.4(d) even if it does not result in identifiable harm to an actual proceeding. Rather, conduct is prejudicial to the administration of justice when it tends to injure or harm the justice system more generally.

Legal Ethics > Professional Conduct > Illegal Conduct

HN21 Kan. R. Prof. Conduct 8.4(g) prohibits a lawyer from engaging in any other conduct that adversely reflects on the lawyer's fitness to practice law.

Legal Ethics > Professional Conduct > Tribunals

HN22 Kan. R. Prof. Conduct 3.3 requires candor towards tribunals.

Legal Ethics > Professional Conduct > Tribunals

HN23 Kan. R. Prof. Conduct 8.2 prohibits a lawyer from making a false statement regarding the integrity or qualifications of a judge.

Legal Ethics > Professional Conduct > General Overview

HN24 Kan. R. Prof. Conduct 5.1(c)(2) places responsibility on a lawyer with direct supervisory authority over another lawyer for the other lawyer's misconduct if the supervising lawyer knows of the misconduct and fails to take remedial action when the misconduct's consequences could be avoided.

Legal Ethics > Professional Conduct > Tribunals

HN25 Kan. R. Prof. Conduct 3.3(1)(a) provides that a lawyer shall not knowingly make a false statement of material fact or law to a tribunal.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Legal Ethics > Professional Conduct > Tribunals

HN26 Under Kan. R. Prof. Conduct 3.3, a lawyer shall not knowingly make a false statement of material fact or law to a tribunal. Where disciplinary hearing panel has made no finding regarding materiality, the court can do so since materiality is a question of law. The court reviews materiality de novo.

Legal Ethics > Professional Conduct > Tribunals

HN27 Evidence is found to be material when it is significant under the substantive law of the case and properly at issue. Similarly, a fact is not material unless it has a legitimate and effective bearing on the decision of the ultimate facts in issue. Thus, an attorney's statement is material if it has bearing on an ultimate issue in a case.

Legal Ethics > Professional Conduct > General Overview

HN28 Kan. R. Prof. Conduct 8.4(c) prohibits engaging in conduct involving dishonesty, fraud, deceit or misrepresentation.

Legal Ethics > Professional Conduct > General Overview

HN29 Kan. R. Prof. Conduct 3.8(f) provides that the prosecutor in a criminal case shall except for statements that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused.

Legal Ethics > Professional Conduct > Tribunals

HN30 A lawyer shall not make an extrajudicial statement if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding. Kan. R. Prof. Conduct 3.6(a).

Legal Ethics > Professional Conduct > Tribunals

HN31 The two safe harbors to Kan. R. Prof. Conduct 3.6 that permit a lawyer to state without elaboration are: (1) the general nature of the claim or defense; or (2) the information contained in a public record. Rule 3.6(c).

Legal Ethics > Professional Conduct > Tribunals

HN32 Kan. R. Prof. Conduct 3.3(a)(1) prohibits failing to correct a false statement of material fact or law previously made to the tribunal.

Legal Ethics > Professional Conduct > Tribunals

HN33 Kan. R. Prof. Conduct 3.3(a)(1) governs candor toward the tribunal.

Legal Ethics > Professional Conduct > General Overview

HN34 Kan. R. Prof. Conduct 5.1(c)(2) holds a supervising lawyer responsible for another lawyer's conduct only if the lawyer knows of the conduct at a time when its consequences can be avoided.

Legal Ethics > Professional Conduct > Tribunals

HN35 Kan. R. Prof. Conduct 3.3(a)(3) prohibits offering false evidence and failing to take remedial measures if a lawyer comes to know false material evidence was presented.

Legal Ethics > Professional Conduct > Tribunals

HN36 Kan. R. Prof. Conduct 3.3(a)(1) prohibits, in part, making false statements.

Legal Ethics > Professional Conduct > Tribunals

HN37 Kan. R. Prof. Conduct 3.3(a)(1) provides that a lawyer shall not knowingly make a false statement of fact or law.

Legal Ethics > Professional Conduct > Tribunals

HN38 Kan. R. Prof. Conduct 3.3(a)(3) restricts a lawyer from, knowingly offering evidence that the lawyer knows to be false.

Legal Ethics > Professional Conduct > Tribunals

HN39 Kan. R. Prof. Conduct 3.3(a)(3) provides that if a lawyer offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures.

Legal Ethics > Professional Conduct > Tribunals

HN40 Kan. R. Prof. Conduct 3.3(a)(3) does not require that an attorney make a knowingly false statement. Instead, it requires that an attorney take remedial measures if he offers material evidence and comes to know of its falsity.

Legal Ethics > Professional Conduct > Tribunals

HN41 Kan. R. Prof. Conduct 3.3(a)(3) prohibits a lawyer from offering material evidence and failing to correct it if the lawyer comes to know of its falsity.

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > General Overview

Civil Procedure > Appeals > Standards of Review > General Overview

HN42 Appellate courts do not reassess credibility determinations.

Legal Ethics > Professional Conduct > General Overview

HN43 Knowledge may be inferred from circumstances. Kan. R. Prof. Conduct 1.0(g).

Legal Ethics > Professional Conduct > Tribunals

HN44 Kan. R. Prof. Conduct 8.1 prohibits a lawyer, in connection with a disciplinary matter, from (a) knowingly making a false statement of material fact; or (b) failing to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter.

Legal Ethics > Professional Conduct > Tribunals

HN45 Kan. R. Prof. Conduct 8.1(b) requires correction of any prior misstatement in the matter that the lawyer may have made and affirmative clarification of any misunderstanding on the part of the admissions or disciplinary authority of which the person involved becomes aware. Rule 8.1(b), cmt. 1.

Legal Ethics > Professional Conduct > Tribunals

HN46 Kan. R. Prof. Conduct 8.1(b) requires correction of misstatements made by the lawyer as well as clarification of any misunderstanding on the part of the disciplinary authority of which the lawyer becomes aware.

Criminal Law & Procedure > ... > Grand Juries > Investigative Authority > Authority of Prosecutors

HN47 A district attorney has a statutory role to fulfill with

a grand jury as its legal advisor.

Criminal Law & Procedure > ... > Grand Juries > Investigative Authority > Authority of Prosecutors

HN48 Kan. Stat. Ann. § 19-713 provides that whenever required by the grand jury it shall be the duty of the county attorney to give the grand jury advice in any legal matter.

Governments > Local Governments > Employees & Officials

HN49 Kan. Stat. Ann. § 22a-107 construes the term "county attorney" to include district attorneys.

Criminal Law & Procedure > ... > Grand Juries > Investigative Authority > Authority of Prosecutors

HN50 Kan. Stat. Ann. § 22-3007 provides that the prosecuting attorney can advise the grand jury on any legal matter or examine witnesses, but only at the grand jury's request.

Family Law > Family Protection & Welfare > Children > Abuse, Endangerment & Neglect

HN51 The Kansas Code for Care of Children requires individuals engaged in certain professions, including those licensed under the Board of Healing Arts, to report suspected child abuse to state authorities.

Family Law > Family Protection & Welfare > Children > Abuse, Endangerment & Neglect

HN52 Kan. Stat. Ann. § 38-1522, the reporting statute in effect until January 1, 2007, provided: When any of the following persons has reason to suspect that a child has been injured as a result of physical, mental or emotional abuse or neglect or sexual abuse, the person shall report the matter promptly.

Family Law > Family Protection & Welfare > Children > Abuse, Endangerment & Neglect

HN53 As defined in the Code for Care of Children, the term "sexual abuse" encompassed all sexual activity with someone under the age of 16 regardless of the age of the other participant and regardless of whether the activity was voluntary. Kan. Stat. Ann. § 38-1502(c). The term sexual abuse encompassed all sexual activity with someone under the age of 16 regardless of the other participant's age; thus voluntary sexual contact between two people under the age of 16 fell within the definition of sexual abuse.

Family Law > Family Protection & Welfare > Children > Abuse, Endangerment & Neglect

HN54 The pregnancy of a minor puts one on notice that sexual abuse (as statutorily defined) has probably occurred but the determination whether sexual abuse has caused an injury should be made on a case-by-case basis. In short, the reporter is left to determine if there was reason to suspect the child had suffered an injury requiring reporting.

Family Law > Family Protection & Welfare > Children > Abuse, Endangerment & Neglect

HN55 Mandatory reporters are not required to report consensual sexual activity between minors under the age of 16 and of a similar age when the reporter does not suspect injury. Further, Kan. Stat. Ann. § 38-1522's plain meaning could not be interpreted to include a per se reporting requirement when a reporter suspected consensual sexual activity between age-mates.

Family Law > Family Protection & Welfare > Children > Abuse, Endangerment & Neglect

HN56 Effective January 1, 2007, the mandatory reporting law provides: When any of the following persons has reason to suspect that a child has been harmed as a result of physical, mental or emotional abuse or neglect or sexual abuse, the person shall report the matter promptly. Kan. Stat. Ann. § 38-2223.

Family Law > Family Protection & Welfare > Children > Abuse, Endangerment & Neglect

HN57 Under the new version of the mandatory reporting law, "sexual abuse" is defined as any contact or interaction with a child in which the child is being used for the sexual stimulation of the perpetrator, the child or another person. Kan. Stat. Ann. § 38-2202(dd). The new statute substitutes the word "harmed" for the word "injured" and defines "harm" as physical or psychological injury or damage. Kan. Stat. Ann. § 38-2202(l).

Criminal Law & Procedure > ... > Grand Juries > Investigative Authority > Authority of Prosecutors

Criminal Law & Procedure > ... > Procedures > Impaneling Grand Juries > General Overview

HN58 Pursuant to Kan. Stat. Ann. § 22-3001(2), a grand jury shall be summoned when a petition is submitted

bearing the signatures of a number of electors equal to 100 plus two percent of the total number of votes cast for governor in the county in the last preceding election. Pursuant to the law in effect at the time, once summoned by a valid citizens' petition, the role of the citizenry in the grand jury process ceases, and the grand jury operates in the same fashion as a grand jury called by a prosecutor. And like a grand jury called by a prosecutor, the prosecutor has a limited role in part because the grand jury's role is not to determine guilt or innocence, but to investigate and, if warranted, issue a true bill. Kan. Stat. Ann. § 22-3011(1) explains an indictment requires the concurrence of 12 or more grand jurors and that once an indictment is found, the presiding juror shall endorse thereon a true bill. a grand jury's function is investigatory and the county attorney has a limited role in grand jury proceedings.

Criminal Law & Procedure > ... > Grand Juries > Investigative Authority > General Overview

Criminal Law & Procedure > ... > Procedures > Return of Indictments > General Overview

HN59 Kan. Stat. Ann. § 22-3013(1) requires the grand jury to complete its investigation in three months but permits the court to extend that period by an additional three months. The statute of limitations allows the grand jury to issue a true bill on any acts occurring in the preceding five years. Kan. Stat. Ann. § 21-3106(4).

Criminal Law & Procedure > ... > Grand Juries > Investigative Authority > Authority of Prosecutors

HN60 The statutory provisions describing the prosecutor's role as legal advisor to a citizen-requested grand jury authorize the district attorney to act at the grand jury's request, Kan. Stat. Ann. § 22-3007, and most critically require the prosecutor to give advice in any legal matter but only when the grand jury requires such advice. Kan. Stat. Ann. § 19-713.

Criminal Law & Procedure > ... > Grand Juries > Investigative Authority > Authority of Prosecutors

HN61 A prosecutor, in connection with a grand jury, may appropriately explain the law and express an opinion on the legal significance of the evidence.

Criminal Law & Procedure > ... > Grand Juries > Investigative Authority > Authority of Prosecutors

HN62 A prosecutor, in presenting a case to a grand jury, should not intentionally interfere with the grand jury's independence, preempt a grand jury function, or abuse the grand jury's processes.

Criminal Law & Procedure > ... > Grand Juries > Investigative Authority > Authority of Prosecutors

HN63 A prosecutor should advise the grand jury on the law, and when dealing with a grand jury, prosecutor should act as an officer of the court.

Criminal Law & Procedure > ... > Grand Juries > Investigative Authority > Authority of Prosecutors

HN64 The grand jury's function is investigatory and accusatory. Thus, a prosecutor, when called upon to do so, must provide the grand jury with a description of the law that adequately permits the grand jury to conduct an investigation sufficient to lead to a true bill capable of being prosecuted. Additionally, as the statutory language makes clear, the prosecutor appears and takes actions only at the request of the citizens' grand jury. In short, the prosecutor's role is to assist the grand jury, rather than direct its outcomes or manipulate the process.

Family Law > Family Protection & Welfare > Children > Abuse, Endangerment & Neglect

HN65 See Kan. Stat. Ann. § 38-2223.

Family Law > Family Protection & Welfare > Children > Abuse, Endangerment & Neglect

HN66 See Kan. Stat. Ann. § 38-1522.

Family Law > Family Protection & Welfare > Children > Abuse, Endangerment & Neglect

HN67 The meaning of the term "injured" in Kan. Stat. Ann. § 38-1522, the term corresponding with the term "harmed" in the prior statute, is not an open question, nor is it an issue for the grand jury to decide. Rather, under § 38-1522, health care providers, not law enforcement or other charging bodies, has discretion to determine when there is reason to suspect a child had been injured, and decisions by mandatory reporters as to the injury specified in the prior statute rested on a case-by-case determination.

Family Law > Family Protection & Welfare > Children > Abuse, Endangerment & Neglect

HN68 Under the mandatory reporting statute, reporters are not only authorized, but compelled, to make a case-

by-case determination as to whether injury occurred.

Family Law > Family Protection & Welfare > Children > Abuse, Endangerment & Neglect

HN69 Under the mandatory reporting statute's plain language, the reporter has the initial discretion to determine whether the child was injured, not law enforcement. a prosecutor is not in a better position to make an initial determination of "injury," as required by statute, than is a health care professional.

Legal Ethics > Professional Conduct > Tribunals

HN70 Kan. R. Prof. Conduct 8.4(d) prohibits engaging in conduct prejudicial to the administration of justice. The court has not required a showing of actual prejudice to violate Rule 8.4(d). Rather, an attorney violates Rule 8.4(d) if he harmed, injured, or disadvantaged the legal system generally.

Legal Ethics > Professional Conduct > General Overview

HN71 Under Kan. R. Prof. Conduct 5.1(c)(2), an attorney can only be responsible for a subordinate's actions if he knew about them.

Legal Ethics > Professional Conduct > Illegal Conduct

HN72 Kan. R. Prof. Conduct 8.4(g) prohibits engaging in conduct adversely reflecting on the lawyer's fitness to practice law.

Criminal Law & Procedure > ... > Grand Juries > Investigative Authority > Authority of Prosecutors

Criminal Law & Procedure > ... > Investigative Authority > Subpoenas > General Overview

HN73 A county or district attorney acts as a legal advisor to a citizen-requested grand jury. And as the statutory language conveys, a prosecutor acts almost exclusively at the grand jury's request and direction. For instance, whenever required by the grand jury, a prosecutor must attend sessions of the grand jury to examine witnesses, provide advice on legal matters, issue subpoenas or other processes, and draw up bills of indictment. Kan. Stat. Ann. § 19-713; Kan. Stat. Ann. § 22-3007(1). The grand jury's subpoena power authorizes the issuance of subpoenas for witnesses as well as the production of documents.

Criminal Law & Procedure > ... > Grand Juries > Investigative Authority > Authority of Prosecutors

HN74 While Kan. Stat. Ann. § 22-3007(2) utilizes mandatory language regarding a prosecutor's authority to appear before the grand jury, the prosecutor must nevertheless request to appear. Section 22-3007 provides that a prosecuting attorney shall, upon his request, be permitted to appear before the grand jury for the purpose of giving information relative to any matter cognizable by the grand jury. But in the same sentence, the legislature gave the grand jury discretion as to whether to permit the prosecutor to examine witnesses. Section 22-3007(2) provides that a prosecutor may be permitted to interrogate witnesses if the grand jury deems it necessary.

Criminal Law & Procedure > ... > Grand Juries > Investigative Authority > General Overview

HN75 The grand jury functions as an independent body.

Criminal Law & Procedure > ... > Grand Juries > Investigative Authority > General Overview

HN76 The grand jury has a unique role as an investigatory body.

Criminal Law & Procedure > ... > Grand Juries > Investigative Authority > Authority of Prosecutors

HN77 A prosecutor should not intentionally interfere with the independence of the grand jury, preempt a function of the grand jury, or abuse the processes of the grand jury.

Criminal Law & Procedure > ... > Grand Juries > Investigative Authority > Authority of Prosecutors

HN78 A prosecutor should refrain from actions that have the potential to improperly undermine the grand jury's independence.

Criminal Law & Procedure > ... > Investigative Authority > Subpoenas > Power to Subpoena Witnesses

HN79 Kan. Stat. Ann. § 22-3008(1) allows the clerk of the court to issue subpoenas and other process whenever required by any grand jury, its presiding juror or the prosecuting attorney.

Criminal Law & Procedure > ... > Grand Juries > Investigative Authority > Authority of Courts

Criminal Law & Procedure > ... > Investigative Authority > Subpoenas > Power to Subpoena Witnesses

HN80 Kan. Stat. Ann. § 22-3008(1) addresses a clerk's

issuance of subpoenas and other process to bring witnesses to testify before the grand jury, and it indicates the process can be initiated by the grand jury, its presiding juror, or the prosecuting attorney. But this statute has no application whatsoever to efforts to seek court enforcement of grand jury subpoenas, which is the circumstance at issue. Instead, under § 22-3008(2), the district court controls whether compulsory process shall issue.

Criminal Law & Procedure > ... > Grand Juries > Investigative Authority > Authority of Courts

Criminal Law & Procedure > ... > Investigative Authority > Subpoenas > Power to Subpoena Witnesses

HN81 Under Kan. Stat. Ann. § 22-3008(2), the district court can enforce compulsory process when any witness duly summoned to appear and testify before a grand jury fails or refuses to obey the summons. The district court has authority to enforce compulsory process in a citizen-directed grand jury proceeding.

Criminal Law & Procedure > ... > Grand Juries > Investigative Authority > Authority of Prosecutors

Criminal Law & Procedure > ... > Investigative Authority > Subpoenas > Power to Subpoena Witnesses

HN82 Nothing in Kan. Stat. Ann. § 22-3008(1) permits a prosecuting attorney to seek enforcement of a subpoena on behalf of the state without a citizen-requested grand jury's direction to do so.

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

HN83 Arguments without pertinent authority or explanation will be deemed abandoned.

Criminal Law & Procedure > ... > Secrecy > Disclosure > Judicial Proceedings

HN84 The grand jury secrecy statute, Kan. Stat. Ann. § 22-3012, allows disclosure only in limited circumstances: An attorney may disclose matters occurring before the grand jury only when so directed by the court.

Legal Ethics > Sanctions > Disciplinary Proceedings > General Overview

HN85 A recommendation from the disciplinary panel is advisory only and does not prevent the court from imposing greater or lesser sanctions. Kan. Sup. Ct. R. 212(f).

Legal Ethics > Sanctions > General Overview

HN86 The court bases its disciplinary decision on the facts and circumstances of the violations and the aggravating and mitigating circumstances present. And although not mandated by the Kansas Supreme Court rules, the courts and disciplinary panels historically turn to the American Bar Association Standards for Imposing Lawyer Sanctions to guide the discipline discussion.

Legal Ethics > Sanctions > General Overview

HN87 Under the American Bar Association's framework to assist the court in the task of determining the appropriate discipline, the court considers four factors in assessing punishment: (1) the ethical duty violated by the lawyer; (2) the lawyer's mental state; (3) the actual or potential injury resulting from the misconduct; and (4) the existence of aggravating and mitigating circumstances. ABA Stand. Imposing Law. Sanctions 3.0.

Legal Ethics > Client Relations > General Overview

Legal Ethics > Professional Conduct > General Overview

HN88 The most important ethical duties are those obligations which a lawyer owes to clients.

Legal Ethics > Client Relations > General Overview

HN89 As Attorney General of the State and District Attorney for a county, an attorney's client is the public.

Legal Ethics > Client Relations > General Overview

Legal Ethics > Professional Conduct > General Overview

HN90 Public servants have a higher duty to uphold because their client is the public at large.

Legal Ethics > Client Relations > General Overview

Legal Ethics > Professional Conduct > General Overview

HN91 An Attorney General holds a special status because the real client of the attorney general is the people of the state.

Legal Ethics > Client Relations > General Overview

HN92 A government attorney has for a client the public.

Legal Ethics > Client Relations > General Overview

HN93 Kan. Stat. Ann. § 22a-104 provides that it shall be the duty of the district attorney to appear in several courts on behalf of the people.

Legal Ethics > Professional Conduct > Tribunals

HN94 The American Bar Association Standards for Imposing Lawyer Sanctions note the public entrusts lawyers with property, liberty, and their lives. Therefore, the public is entitled to expect lawyers to behave with the highest standards of honesty and integrity and not to engage in conduct involving dishonesty, fraud, or interference with the administration of justice.

Legal Ethics > Professional Conduct > Tribunals

HN95 Lawyers owe duties to the legal system. As officers of the court, lawyers must abide by the rules that shape the administration of justice. Lawyers violate this duty when they fail to operate within the bounds of the law and create or use false evidence, or engage in any other illegal or improper conduct.

Legal Ethics > Professional Conduct > Tribunals

HN96 Because lawyers are a self-regulating profession, cooperation and honesty during the disciplinary process is crucial. An attorney's obligations to the legal profession include a duty to maintain the profession's integrity. An attorney violates this duty when he fails to supplement a false statement to the Disciplinary Administrator in violation of Kan. R. Prof. Conduct 8.1.

Legal Ethics > Professional Conduct > General Overview

Legal Ethics > Sanctions > General Overview

HN97 The second factor the court considers in assessing discipline is an attorney's mental state.

Legal Ethics > Professional Conduct > General Overview

Legal Ethics > Sanctions > General Overview

HN98 The American Bar Association (ABA) Standards for Imposing Lawyer Sanctions identify three mental states: intent, the highest culpable mental state; knowledge, the intermediate culpable mental state; and negligence, the least culpable mental state. Under the ABA Standards, a lawyer acts intentionally when acting with the conscious objective or purpose to accomplish a particular result, while a lawyer acts with knowledge when acting with conscious awareness of the nature or attendant circumstances of his or her conduct both without the conscious objective or purpose to accomplish a particular result. Finally, a lawyer acts negligently when failing to be aware that a result will follow. An attorney acts with intent where he has a clear objective in mind. Assessment of punishment under the ABA Standards focuses on the state of mind relative to the consequences of his or her misconduct rather than the duty violated, recognizing a fine line between intentional and knowing conduct, and holding a lawyer generally acts with intent when acting to benefit himself or herself.

Legal Ethics > Sanctions > General Overview

HN99 The American Bar Association Standards for Imposing Lawyer Sanctions do not require proof of a monetary injury to a client in order to constitute injury.

Legal Ethics > Sanctions > Suspensions

HN100 The American Bar Association Standards for Imposing Lawyer Sanctions provide for suspension when misconduct adversely affects or interferes with a legal proceeding.

Legal Ethics > Professional Conduct > General Overview

HN101 ABA Stand. Imposing Law. Sanctions 5.2 discusses standards related to a failure to maintain the public trust and indicating injury can be to the integrity of the legal process.

Legal Ethics > Professional Conduct > General Overview

HN102 ABA Stand. Imposing Law. Sanctions 7.0 discusses standards related to duties owed to the profession and notes that injury can be to a client, the public, or the legal system.

Legal Ethics > Professional Conduct > General Overview

HN103 When a state attorney general or county district attorney violates rules regulating his professional conduct, he has betrayed that trust, causing incalculable harm to the public's perception of both offices.

Legal Ethics > Professional Conduct > General Overview

HN104 By violating ethical rules in filing false financial disclosure forms and soliciting improper compensation, an Attorney General causes significant harm not only to his office but also to those government agencies, departments, and institutions that the attorney general advises and represents.

Legal Ethics > Professional Conduct > General Overview

HN105 Misconduct of attorneys serving in public positions speaks directly to the integrity of the legal system by placing the reputation of those tasked with serving and protecting the public at issue.

Legal Ethics > Sanctions > Disciplinary Proceedings > General Overview

HN106 The Kansas Supreme Court rules require that a disciplinary panel explain mitigating or aggravating circumstances which affect the nature or degree of discipline. Kan. Sup. Ct. R. 211(f). The panel must consider the evidence presented as to aggravating and mitigating circumstances and determine the weight to be assigned to each in arriving at an appropriate discipline.

Legal Ethics > Professional Conduct > General Overview

HN107 An attorney's efforts at casting a favorable public image toward himself or elsewhere is clearly an improper motive upon which to act when his statutory duty with the grand jury is to serve as its legal advisor. Kan. Stat. Ann. § 19-713.

Legal Ethics > Sanctions > Disciplinary Proceedings > Hearings

HN108 The disciplinary hearing panel is not required to detail testimony, and a finding regarding evidence is sufficient to demonstrate that the panel heard and considered the evidence.

Legal Ethics > Sanctions > Suspensions

HN109 ABA Stand. Imposing Law. Sanctions 6.12 provides that suspension is generally appropriate when a lawyer knows that false statements or documents are being submitted to the court or that material information is improperly being withheld, and takes no remedial action, and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding.

Legal Ethics > Sanctions > Suspensions

HN110 ABA Stand. Imposing Law. Sanctions 6.22 provides that suspension is generally appropriate when a lawyer knows that he or she is violating a court order or rule, and causes injury or potential injury to a client or a party, or causes interference or potential interference with a legal proceeding.

Legal Ethics > Sanctions > Suspensions

HN111 ABA Stand. Imposing Law. Sanctions 5.22 provides that suspension is generally appropriate when a lawyer in an official or governmental position knowingly fails to follow proper procedures or rules, and causes injury or potential injury to a party or to the integrity of the legal process.

Legal Ethics > Sanctions > Disbarments

HN112 ABA Stand. Imposing Law. Sanctions 5.21 provides that disbarment is generally appropriate when a lawyer in an official or governmental position knowingly misuses the position with the intent to obtain a significant benefit or advantage for himself or another, or with the intent to cause serious or potentially serious injury to a party or to the integrity of the legal process.

Legal Ethics > Sanctions > Disbarments

HN113 ABA Stand. Imposing Law. Sanctions 6.11 provides that disbarment is generally appropriate when a lawyer, with the intent to deceive the court, makes a false statement, submits a false document, or improperly withholds material information, and causes serious or potentially serious injury to a party, or causes a significant or potentially significant adverse effect on the legal proceeding.

Legal Ethics > Sanctions > Suspensions

HN114 ABA Stand. Imposing Law. Sanctions 6.12 suggests suspension is generally appropriate when a lawyer knows false statements or documents are being submitted to a court and takes no remedial action to correct those statements or documents, causing adverse or potentially adverse effect on the legal proceeding.

Legal Ethics > Sanctions > Suspensions

HN115 ABA Stand. Imposing Law. Sanctions 6.22 directs suspension when a lawyer knows he or she is violating a court order or rule and causes interference or potential interference with a legal proceeding.

Legal Ethics > Sanctions > Suspensions

HN116 ABA Stand. Imposing Law. Sanctions 5.22 directs suspension when a lawyer in an official or governmental position knowingly fails to follow proper procedures or rules and causes injury or potential injury to a party or to the integrity of the legal system.

Legal Ethics > Professional Conduct > General Overview

Legal Ethics > Sanctions > General Overview

HN117 The American Bar Association Standards for Imposing Lawyer Sanctions advise that they do not account for multiple charges of misconduct and indicate that when an attorney commits multiple instances of misconduct the sanction imposed should be at least the sanction for the most serious conduct.

Counsel: Alexander M. Walczak, Deputy Disciplinary Administrator, and Stanton A. Hazlett, Disciplinary Administrator, argued the cause and were on the brief for the petitioner.

Thomas W. Condit, of Cincinnati, Ohio, argued the cause, and Kyle E. Krull, of Overland Park, was with him on the briefs for respondent, and Phillip Dean Kline, respondent, argued the cause pro se.

Judges: NUSS, C.J.; LUCKERT, J.; BEIER, J.; ROSEN, J.; and JOHNSON, J., not participating. HENRY W. GREEN, JR., J.; KAREN ARNOLD-BURGER, J.; EDWARD E. BOUKER, District Judge; BRUCE T. GATTERMAN, District Judge; and MICHAEL J. MALONE, District Judge, assigned. [1]

Opinion

[*96] **[**327]** ORIGINAL PROCEEDING IN **[***2]** DISCIPLINE

Per Curiam: This is a contested original proceeding in discipline against respondent, Phillip D. Kline. The disciplinary hearing panel concluded Kline committed multiple violations of the Kansas Rules of Professional Conduct (KRPC) while serving as Kansas Attorney General and later as Johnson County District Attorney. The panel recommends an indefinite suspension while the Disciplinary Administrator argues for disbarment.

As fully detailed below, after reviewing each instance of misconduct found by the panel, we find clear and convincing evidence that Kline committed 11 KRPC violations. In assessing discipline, we have considered the facts and circumstances of each violation; the ethical duties violated by Kline to the public, the legal system, and the legal profession; the knowing nature of his misconduct; the injury that resulted from the misconduct; the existence of aggravating and mitigating factors; and the applicable advisory American Bar Association (ABA) Standards for imposing discipline.

Ultimately, after applying that framework, we reject the Disciplinary Administrator's suggestion of disbarment and conclude Kline's misconduct warrants indefinite suspension, the discipline **[***3]** recommended by the panel.

PROCEDURAL BACKGROUND

The formal proceedings began with the Disciplinary Administrator's complaint against Kline filed on January 14, 2010. This **[*97]** complaint alleged multiple KRPC violations for Kline's alleged misconduct related to his investigation of abortion clinics while he served as Kansas Attorney General and for his role with a citizen-requested grand jury while he served as Johnson County District Attorney. The formal disciplinary proceedings spanned a 21-month period. During that time, the three-attorney hearing panel ruled on numerous prehearing motions, including permitting the Disciplinary Administrator to file two amended complaints to which Kline responded.

The proceedings culminated in 12 days of evidentiary hearings—8 in February 2011 and March 2011 related to allegations concerning Kline's abortion clinic investigations and 4 more days in July 2011 concerning Kline's conduct regarding the citizens' grand jury. During the July hearing, the panel also heard evidence regarding aggravating and mitigating circumstances that might affect the nature or degree of discipline imposed.

The panel released its 185-page Final Hearing Report on October 12, 2011, **[***4]** dividing the claims into 14 general areas of misconduct **[**328]** and finding Kline violated the KRPC in 10 areas, with multiple violations in some. And based on its conclusion that Kline "ha[d] repeatedly violated many of the Kansas Rules of Professional Conduct, including the most serious of the rules, the rules that prohibit engaging in false or dishonest conduct," the panel recommended an indefinite suspension of Kline's license to practice law. Kline filed a 175-page pleading captioned "Exceptions to

[1] REPORTER'S NOTE: Judge Green and Judge Arnold-Burger, of the Kansas Court of Appeals, were appointed to hear case No. 106,870 vice Chief Justice Nuss and Justice Luckert, respectively, pursuant to the authority vested in the Supreme Court by K.S.A. 20-3002(c). District Judge Bouker, District Judge Gatterman, and District Judge Malone were appointed to hear the same case vice Justice Beier, Justice Rosen, Justice Johnson, respectively, pursuant to the authority vested in the Supreme Court by Art. 3, § 6(f) of the Kansas Constitution.

the Hearing Panel Final Report" on December 22, 2011, thereby noting his objections to the hearing panel's report and triggering this review.

In an order effective May 18, 2012, five members of the Kansas Supreme Court recused from hearing this action. On June 4, 2012, Presiding Justice Dan Biles appointed two Kansas Court of Appeals judges and three district court judges to serve temporarily on the court to participate in the hearing and decision of this matter. After ruling on several pretrial motions, the court as presently constituted heard oral argument on November 15, 2012.

KLINE'S INVESTIGATION OF ABORTION CLINICS

The Disciplinary Administrator alleged misconduct by Kline **[*98]** spanning a period **[***5]** of nearly 6 years with prosecutorial proceedings before six separate courts. Consequently, the factual history is detailed and voluminous. We have broadly summarized in this section the facts related to Kline's investigation of abortion clinics. A more particularized discussion is included in our subsequent analysis of each violation found by the hearing panel. Later in this opinion, we have set out facts regarding the panel's findings of misconduct related to the grand jury proceeding in Johnson County.

background

Respondent was admitted to the Kansas bar in 1987. At the time of the disciplinary hearing, his license had been suspended for failure to pay the annual registration fee. Kline testified he chose not to pay the fee because "I don't believe I should be here and I didn't want to send you money." Kline, who testified at the hearing that he is a law professor at Liberty University in Virginia, admitted he does not "intend to practice in Kansas anymore" and instead intends to practice in Virginia. Nevertheless, in August 2012, Kline paid his fees and was reinstated.

In November 2002, Kansas voters elected Kline as Attorney General. He took office in January 2003. In January 2007, **[***6]** Kline departed statewide office after losing his re-election bid to then Johnson County District Attorney Paul Morrison. After Kline lost re-election, the Johnson County Republican Central Committee appointed him to complete Morrison's term as District Attorney.

Attorney General Opinion No. 2003-17

Approximately 5 months after taking office as Attorney General, Kline issued Attorney General Opinion No. 2003-17, 2003 Kan. AG LEXIS 21, interpreting the reach of K.S.A. 38-1522. That statute required anyone identified as a "mandatory reporter" to notify the state Department of Social and Rehabilitation Services (SRS) if that reporter reasonably suspected a physically, mentally, emotionally, or sexually abused child was "injured." K.S.A. 38-1522 (revised and now codified at K.S.A. 2012 Supp. 38-2223). Kline's opinion specifically addressed a legislator's question as to "under what circumstances a doctor who provides abortion procedures is required to report rape and/or sexual abuse of a minor." Att'y Gen. Op. No. 2003-17, 2003 Kan. AG LEXIS 21.

[*99] In responding, Kline defined the statutory reporting requirements as to suspected sexual abuse of children 15 and under much more broadly than had his predecessors. Kline's opinion stated:

> "Kansas **[***7]** law clearly provides that those who fall under the scope of the reporting requirement must report any reasonable suspicion that a child has been injured as a result of sexual abuse, *which would be any time a child under the age of 16 has become pregnant. As a matter of law such child has been the victim of rape or one of the other sexual abuse crimes and such crimes are inherently injurious*." (Emphasis added.) Att'y Gen. Op. No. 2003-17, 2003 Kan. AG LEXIS 21.

In this opinion, Kline recognized its potentially broad implications for health care providers **[**329]** in general, not just those providing abortions to minors:

> "We are aware that although this opinion is limited to the question posed, the consequences of the conclusion reach further. Other situations that might trigger a mandated reporter's obligation, because sexual activity of a minor becomes known, include a teenage girl or boy who seeks medical attention for a sexually transmitted disease, a teenage girl who seeks medical attention for a pregnancy, or a teenage girl seeking birth control who discloses she has already been sexually active." Att'y Gen. Op. No. 2003-17, 2003 Kan. AG LEXIS 21.

Kline's predecessor, Attorney General Robert T. Stephan, had issued an opinion in 1992 interpreting **[***8]** K.S.A. 1991 Supp. 38-1522 more narrowly. Instead of suggesting that any child under the age of 16 who becomes pregnant is the victim of a rape or other sexual abuse crime, Stephan's opinion reasoned:

> "Whether a *particular minor in a particular case has been injured as a result of sexual intercourse and a resulting pregnancy must be determined on a case-by-case basis*. The fact of pregnancy certainly puts one on notice that sexual abuse (as statutorily defined) has probably occurred, and *requires persons listed in K.S.A. 1991 Supp. 38-1522(a) to investigate further* whether the child has suffered injury, physical or emotional, as a result of such activity. If there is reason to suspect that the child has been injured, that person is then required to report such suspicions and the reasons therefore." (Emphasis added.) Att'y Gen. Op. No. 1992-48, 1992 Kan. AG LEXIS 48.

In essence, pursuant to Kline's opinion, any child under the age of 16 engaged in sexual activity met the definition of "injured," and a mandatory reporter with knowledge of such activity was required to report or risk conviction of a Class B misdemeanor. See K.S.A. 38-1522(g). In contrast, pursuant to Stephan's opinion, the same sexual activity **[***9]** indicated only potential injury requiring the health **[*100]** care provider to investigate further to determine whether a report was required. Compare Att'y Gen. Op. No. 2003-17, 2003 Kan. AG LEXIS 21 (providing: "Consequently, a doctor called upon to perform an abortion for a girl under the age of 16 years is put on notice that, as a matter of law, an injury as a result of sexual abuse has occurred) with Att'y Gen. Op. No. 1992-48, 1992 Kan. AG LEXIS 48 (stating: "However, we do not believe that pregnancy of an unmarried minor *necessarily* constitutes injury even when that term is understood in its broadest sense.").

Thus, Kline's June 2003 opinion represented a sea change in reporting requirements for health care providers who were aware of the pregnancy of a patient under the age of 16 and potentially for any reporter with knowledge that an individual under the age of 16 was engaged in sexual activity. Kline's advisory opinion sparked a federal lawsuit challenging the constitutionality of his opinion, which ultimately resulted in an injunction prohibiting Kansas prosecutors from enforcing Kline's interpretation of the reporting statute. That case is discussed below on pages 98-101.

Investigation of Abortion Clinics

The record contains a **[***10]** "Special Investigation" memo dated April 2, 2003. The memo does not identify who wrote it or to whom it was directed. It does advise that Kline's office had "received numerous inquiries regarding the conduct" of Dr. George Tiller of Women's Health Care Services (WHCS) in Wichita, Kansas. Further, the memo asserted these inquiries alleged Tiller "continues to perform abortions on females under 16 years of age without filing a report to competent authority concerning '[sexual] abuse of child' as required by K.S.A. 38-1522(a)."

In a "confidential memo" dated July 15, 2003, and directed to Kline and Senior Deputy Attorney General Eric Rucker, Assistant Attorney General Stephen Maxwell and Special Agent in Charge Thomas Williams recommended convening an investigation that would attempt to identify instances when an abortion clinic in Kansas failed to report sexual abuse. Maxwell and Williams suggested to Kline that comparing sexual abuse reports provided to SRS under K.S.A. 38-1522 with termination of pregnancy reports provided **[*101]** to the Kansas Department of Health and Environment (KDHE) under a **[**330]** different statute, K.S.A. 65-445, could accomplish the task.

Sexual abuse reports submitted to SRS **[***11]** contain the name and address of the potential victim, in addition to information about the nature of the injury and potential abuse. Termination of pregnancy reports do not identify the patients who have had their pregnancies terminated, but they do contain demographic information including patient age and address and whether the abortion was necessary to prevent substantial and irreversible impairment of a major bodily function.

In the memorandum, Maxwell and Williams proposed that Kline's office compare the demographic information, such as the address listed in both reports, to identify instances in which a Kansas clinic performed an abortion on a patient under 16 and reported the abortion to KDHE but failed to report the sexual abuse to SRS.

Williams and Maxwell further recommended convening a judicial inquisition as authorized by K.S.A. 22-3101(1) to obtain sexual abuse reports from SRS and termination of pregnancy reports from KDHE. The memo noted that while Kline could access SRS records under K.S.A. 38-1507, which permits law enforcement agencies to view reports when it is "reasonably necessary to carry out their lawful responsibilities," KDHE records could not be obtained without **[***12]** a subpoena. Accordingly, the memo suggested Kline first seek the sexual abuse reports from SRS to develop the "legal showing" to "justify the initiation of a Judicial Inquisition." The confidential memo also advised that if SRS requested an explanation of the nature of the

inquiry, "SRS will be told that the Attorney General desires to determine if there is a serious latent sexual abuse problem." The memo noted a potential legal obstacle to initiating an inquisition—*i.e.*, "the absence of a definitive complainant or allegation that a medical provider knowingly failed to report a specific incident of sexual abuse as statutorily defined by K.S.A. 21-3503(1)(a)." If the SRS records revealed potential violations of K.S.A. 38-1522, the memo recommended Kline's office seek to convene a judicial inquisition.

After Williams sought and obtained statistical information regarding the number and content of sexual abuse reports from SRS, **[*102]** he sought permission from SRS to review the actual reports. In July 2003, SRS, acting through Chief Counsel John Badger, requested additional information about the investigation. Rucker responded, advising SRS the reports were necessary for Kline's office to investigate **[***13]** legal violations by mandatory reporters. SRS replied, expressing concern whether K.S.A. 38-1507 permitted access to the information for "the type of investigation [Kline's] office [wa]s conducting" and requesting Kline's office provide "a thorough and specific explanation" for seeking the reports. SRS noted its caution stemmed from its need to ensure compliance with the law and its concern for the information's sensitivity.

In the meantime, in early October 2003, numerous licensed health care professionals and social workers filed an action in United States District Court for the District of Kansas seeking to enjoin Kansas prosecutors from enforcing K.S.A. 38-1522 as it related to "incidents of sexual activity between adolescents under the age of sixteen and persons of similar age in which injury is not reasonably suspected." See *Aid for Women v. Foulston*, 327 F. Supp. 2d 1273, 1275 (D. Kan. 2004) (*Aid for Women I*). In part, the plaintiffs sought to prevent prosecutors from enforcing the statute in a manner consistent with Kline's Attorney General Opinion No. 2003-17, 2003 Kan. AG LEXIS 21. See 327 F. Supp. 2d at 1278-79. We discuss the *Aid for Women* litigation further on pages 98-101.

*Inquisition in Shawnee **[***14]** County District Court*

In response to SRS's request for further explanation, Kline's staff discontinued seeking the agency's voluntary compliance. Instead, Kline's office applied to open an inquisition in Shawnee County District Court on October 29, 2003. The application, filed by Maxwell, indicated SRS had "not been cooperative" with Kline's requests. Williams' affidavit supporting the inquisition and the documents accompanying that affidavit explained that Kline's office sought to view **[**331]** sexual abuse reports and files but SRS declined, requesting "an explanation of the reason and analysis of the law supporting the request." Shawnee County District Court Judge Richard D. Anderson, then chief judge, approved the application and issued a subpoena to SRS seeking the information Kline's office **[*103]** had sought. SRS complied with the subpoena on November 10, 2003.

In May 2004, Kline's office requested another inquisition subpoena be issued to KDHE. In support, Williams provided an affidavit broadly seeking the "production of records relative to abortions performed in Kansas for the years 2001, 2002, 2003 and 2004, to date." It appears the "records" Kline's office sought were the termination of pregnancy **[***15]** reports abortion providers filed with KDHE.

Judge Anderson issued the requested subpoena, but KDHE objected, arguing K.S.A. 65-445 prohibited the agency from releasing this information without "reasonable cause" to believe a statutory violation had occurred and that Kline had not made the requisite showing. Judge Anderson ultimately ordered KDHE to comply but permitted KDHE to redact abortion providers' names. KDHE partially complied with the subpoena on July 6, 2004, by providing Kline with abortion reports for 2003.

Twenty days later, on July 26, 2004, the United States District Court issued a preliminary injunction in *Aid for Women I* prohibiting prosecutors from enforcing K.S.A. 38-1522, as interpreted by Kline's opinion, as to sexual activity of adolescents of similar age when no injury was suspected. In doing so, the court found the plaintiffs had satisfied their burden to show a likelihood of prevailing on the merits that K.S.A. 38-1522, as interpreted by Kline's opinion, violated patients' informational privacy rights. The court concluded:

> "The court is also struck by the magnitude of the change in policies outlined in [Attorney General Opinion No. 2003-17, 2003 Kan. AG LEXIS 21]. It is persuasive that **[***16]** the parties operated under the 1992 advisory opinion for a substantial period of time without discernible problems. This mitigates against allowing a breach of minors' informational privacy rights even if such a breach is made in an investigatory context. Further, the court is hesitant to sanction such a monumental change in policy considering the new policy's imposition on the informational privacy rights of minors." *Aid for*

Women I, 327 F. Supp. 2d at 1288.

Three days after the federal court's ruling, on July 29, 2004, Williams asked Judge Anderson to issue a subpoena to KDHE requiring it to identify the abortion providers who submitted the **[*104]** reports, information Judge Anderson had previously allowed KDHE to redact. The affidavit supporting this request indicated Kline's office also was investigating late-term abortions irrespective of a patient's age. Judge Anderson issued the requested subpoena on August 9, 2004. In response, KDHE revealed the identities of the two reporting clinics as Comprehensive Health of Planned Parenthood of Kansas and Mid-Missouri, Inc. (CHPP) and WHCS (collectively "the clinics").

An internal memorandum dated, August 3, 2004, documented Kline's recent direction **[***17]** to his staff to expand the investigation beyond compliance with mandatory reporting statutes to the performance of illegal late-term abortions. The memo acknowledged this investigation necessarily would include adult patients and described its focus:

> "[to] fully address the false reporting by abortion providers as to the reason and basis for their determinations to provide a late term abortion, and investigation [*sic*] to determine whether evidence exists to determine that one or more abortion providers may be performing prohibited late term abortions without meeting the exceptions as set forth in KSA 65-6703."

In late August 2004, Kline's staff applied for search warrants of CHPP and WHCS, seeking complete and unredacted copies of abortion patients' medical files. Although Judge Anderson found probable cause to issue the warrants, he expressed "firm opinions" against their execution. Specifically, Judge Anderson identified concern that the seizure would reveal patient identities and potentially cause "public frenzy."

[332]** Instead of executing the warrants, Kline's office requested, and Judge Anderson issued, records subpoenas to both clinics. The subpoena to CHPP required production of 30 **[***18]** complete patient medical records, while the subpoena to WHCS required production of 60 complete patient records. Both clinics filed motions to quash. Judge Anderson conducted a hearing on the motions on October 5, 2004, and ultimately denied them, directing the clinics to comply and deliver the records to his chambers. The court also directed that before production to or photocopying by Kline, the court would apply certain safeguards, including review of the files by a **[*105]** court-appointed special counsel and by physicians designated by Kline and appropriate redaction of patient-identifying information.

Alpha *Mandamus Action and La Quinta Subpoena*

Five days after Judge Anderson's order directing compliance with the subpoenas, the clinics filed an original mandamus action seeking review of Judge Anderson's order and seeking to compel Judge Anderson to quash the subpoenas. *Alpha Med. Clinic v. Anderson*, 280 Kan. 903, 910, 128 P.3d 364 (2006). The *Alpha* court stayed compliance with the subpoenas and ordered that the parties make all filings in the case under seal. See *Alpha*, 280 Kan. at 906, 910-11. Judge Anderson answered under seal and attached a transcript of the motion to quash hearing. **[***19]** In February 2005, the Clerk of the Appellate Courts clarified that the parties' briefs should be publicly filed, but the record would remain sealed.

In February 2005, while *Alpha* pended before the court and the injunction issued by the United States District Court in *Aid for Women I* pended in the United States Court of Appeals for the Tenth Circuit, Williams learned that WHCS referred its patients to a nearby La Quinta Inns & Suites, which gave registrants a medical discount upon request. At Kline's direction, Maxwell applied for and Judge Anderson issued a subpoena to La Quinta for its registration records for all guests who had registered at the Wichita location and received a medical discount since January 1, 2003.

Without objection, La Quinta provided Kline's office with the requested registration records in an electronic format. An investigator with Kline's office, Jared Reed, then cross-referenced La Quinta's registration information with other information obtained through the KDHE subpoena. The result was identification of individuals registered at La Quinta who may have been WHCS patients. Reed developed three spreadsheets: one for Kansas residents under age 16, another for non-Kansas **[***20]** residents under age 16, and one for any person age 16 or over. These spreadsheets, which were captioned "2003 & 2004 KDHE Records & Potential Matches from La Quinta Inns, Inc.," included potential WHCS patients' names, ages, contact information, and medical data regarding fetal viability and gestational age.

[*106] In the meantime, the clinics filed their briefs in *Alpha* and held a press conference publicly identifying themselves as CHPP and WHCS. But despite the *Alpha*

court's directive that the briefs would be public while the record remained sealed, Kline directed his staff to attach to his office's brief documents from the sealed record. These attachments included the transcript from the motion to quash hearing, a redacted version of a subpoena, and Judge Anderson's order. In response, the clinics promptly filed a motion requesting the court hold Kline in contempt, and the court issued an order to show cause why Kline should not be held in contempt. *Alpha*, 280 Kan. at 926.

Former Attorney General Stephan and Rucker appeared at the oral arguments before the *Alpha* court on September 8, 2005. Stephan appeared for the limited purposes of representing Kline on the show cause order, while Rucker **[***21]** handled all other issues. Responding to questions from the court, Rucker stated Kline's office had not subpoenaed any mandatory reporters of sexual abuse other than abortion clinics. But 7 days later, Kline's office filed a "Motion to Clarify" Rucker's statement, declaring that contrary to Rucker's representation, Kline's office indeed had "sought records and information from other mandatory reporters." When the *Alpha* court issued its opinion on February 3, 2006, the court described Rucker's original **[**333]** responses at oral argument as "less than forthright" and concluded the motion "change[d]" rather than clarified those responses. 280 Kan. at 912.

The *Alpha* court's opinion ordered Judge Anderson (1) to withdraw his order compelling the clinics' responses, (2) to re-evaluate the inquisition and subpoenas in light of Kline's interpretation of the criminal statutes at issue, and (3) to determine whether the subpoenas stood on "firm legal ground." If so, the court ruled, the inquisition could continue and "some version" of the subpoenas could remain in effect. 280 Kan. at 924-25.

As to the contempt issue, the *Alpha* court further held that Kline's attachment of sealed documents to a publicly **[***22]** filed brief, while "troubling" for several reasons, did not result in prejudice. Thus, the court declined to hold Kline in contempt. 280 Kan. at 926-30. Finally, the *Alpha* court warned: "This is an unusually high-profile **[*107]** case . . . . We caution all parties to resist any impulse to further publicize their respective legal positions, which may imperil the privacy of the patients and the law enforcement objectives at the heart of this proceeding." 280 Kan. at 929-30.

On remand, Judge Anderson conducted a hearing to determine whether Kline's office had established it was on "firm legal ground" in seeking abortion patient medical files from the clinics. In May 2006, Judge Anderson entered an amended order detailing several protective steps required to comply with the *Alpha* mandate. Pursuant to that amended order, CHPP and WHCS redacted patient-identifying information and produced the requested records. An attorney and two physicians appointed by Judge Anderson reviewed the records *in camera* to ensure that they were properly redacted. Judge Anderson then gave the redacted records to Kline.

Remand of Aid for Women

Just a few days prior to the *Alpha* court releasing its opinion, the Tenth Circuit **[***23]** Court of Appeals, on January 27, 2006, vacated the district court's preliminary injunction in *Aid for Women I. Aid for Women v. Foulston*, 441 F.3d 1101, 1121 (10th Cir. 2006). The federal appellate court disagreed with the district court's conclusion that the plaintiffs had established a substantial likelihood of prevailing on the merits. Further, the court concluded the district court abused its discretion by failing to adequately analyze issues of irreparable injury, balance of harms, and public interest. 441 F.3d at 1120-21.

On remand, the district court conducted a bench trial on the plaintiff licensed providers' request for a permanent injunction. *Aid for Women v. Foulston*, 427 F. Supp. 2d 1093 (D. Kan. 2006) (*Aid for Women II*), *vacated by* Nos. 06-3187, 06-3188, 06-3202, 2007 WL 6787808 (10th Cir. 2007) (unpublished opinion). The court held that "minor patients have a right to informational privacy concerning consensual sexual activity with an age-mate where there is no evidence of force, coercion, or power deferential." 427 F. Supp. 2d at 1105. Further, the court concluded Kline's opinion and its "'zero tolerance'" interpretation of K.S.A. 38-1522 impermissibly encroached upon **[***24]** that right. 427 F. Supp. 2d at 1096, 1116. **[*108]** The court issued a permanent injunction on April 18, 2006, prohibiting prosecutors from enforcing the statute as interpreted by Kline's Attorney General Opinion No. 2003-17, 2003 Kan. AG LEXIS 21. 427 F. Supp. 2d at 1116. Kline appealed the district court's ruling to the Tenth Circuit Court of Appeals. See *Aid for Women v. Foulston*, Nos. 06-3187, 06-3188, 06-3202, 2007 WL 6787808 (10th Cir. 2007) (unpublished opinion).

Effective January 1, 2007, however, the Kansas Legislature repealed the former reporting statute, K.S.A. 38-1522, and replaced it with K.S.A. 2012 Supp. 38-2223. Because of this statutory change, the plaintiffs

and Kline's successor, who by then had assumed the office of Attorney General, argued the case was moot. The United States Court of Appeals for the Tenth Circuit agreed and dismissed the *Aid for Women II* appeal in September 2007 and vacated the district court's opinion. See *Aid for Women v. Foulston*, Nos. 06-3187, 06-3188, 06-3202, 2007 WL 6787808 (10th Cir. 2007) (unpublished opinion).

Kline's Lost Bid for Re-election and Relocation of Clinic Records

Throughout 2006, Kline campaigned to maintain his position as Attorney General. **[**334]** Four days before **[***25]** the election, Kline appeared by remote camera on a nationally televised program, "The O'Reilly Factor." During this appearance, Kline stated that his investigation showed WHCS typically relied on the patient's mental status to justify late-term abortions. He also discussed an incident in Wichita leading to the conviction of a man who had raped and impregnated a child and then took the child to an abortion clinic.

Kline lost his re-election bid in November 2006 to then Johnson County District Attorney Paul Morrison. Following this political defeat, Kline contacted the Johnson County Republican Central Committee and indicated his interest in completing Morrison's unfinished term. That committee, which was empowered by state law to pick a replacement, selected Kline to complete Morrison's term. See K.S.A. 22a-103 (providing that a vacancy in the office of district attorney is filled by a governor's appointment of "a person elected by a district convention"); see also K.S.A. 25-3902 (discussing procedure for district convention).

[*109] On December 20, 2006, before Kline had completed his term as Attorney General, his office filed criminal charges against Tiller in Sedgwick County. But the district **[***26]** court dismissed those charges on jurisdictional grounds the following day. Kline then appointed a special prosecutor to appeal that dismissal, but Morrison fired the special prosecutor after taking office.

Prompted by Kline's departure from statewide office Judge Anderson requested Kline's staff provide him with a status report accounting for the current location of all copies of redacted patient medical records received from the clinics. Maxwell prepared a status report that indicated, in part, that copies of the CHPP records would be sent to the Johnson County District Attorney but gave no indication the WHCS records also would remain in Kline's possession in his new position in Johnson County.

On January 8, 2007—the day Morrison was sworn in as Attorney General and Kline replaced him as Johnson County's District Attorney—Williams and Reed delivered the status report to Judge Anderson and distributed the medical records to other government entities as outlined in the report. As they delivered the records, Rucker, at Kline's direction, phoned Williams and asked him to copy the WHCS records for transfer to Johnson County. Williams and Reed did as instructed. But because of security concerns **[***27]** in the Johnson County office, Reed took the copies of these records to his apartment where they remained for a month and a half. No one updated the status report to Judge Anderson or advised the court that copies of the WHCS records were transferred to the Johnson County District Attorney's office.

The Retention of WHCS Records and the Creation of Handwritten "Summaries"

Beginning in January 2007, Kline, now acting as the Johnson County District Attorney, continued to investigate both clinics, and on April 9, 2007, he met with Judge Anderson to request an additional subpoena in the inquisition. In the course of the conversation, Kline showed Judge Anderson a copy of a WHCS patient's medical file. Judge Anderson asked Kline how he obtained it, to **[*110]** which Kline responded that he "thought [Judge Anderson] knew" he had retained copies of WHCS files.

The following day, after verifying the status report showed Kline had not kept copies of WHCS patient files, Judge Anderson called Maxwell and advised him that Kline's office must return the WHCS records. Later that same day, Kline spoke with Judge Anderson and apparently protested the order to return the files. Judge Anderson agreed to conduct **[***28]** a hearing the following morning to allow Kline to pursue his objection. But Judge Anderson ordered Kline to bring all copies of WHCS records with him to the hearing.

After receiving Judge Anderson's instruction to bring the 62 WHCS patient files, Kline directed his staff to immediately prepare handwritten "summaries" of them. These "summaries" contained demographic information about each patient, including the patient's age, address, corresponding KDHE identification number, identity of the referring physician, and Dr. Tiller's diagnosis.

[335]** The following morning at the hearing before Judge Anderson, Kline surrendered his copies of the

WHCS records to Morrison's staff. But neither Kline nor any staff member informed Judge Anderson that Kline now had handwritten summaries of the WHCS files, including most all of the confidential, substantive information from them.

CHPP *Mandamus Action*

In June 2007, CHPP filed an original mandamus action seeking, *inter alia*, an order directing Kline to return all patient CHPP medical records to Morrison and to provide an accounting of those records. *Comprehensive Health of Planned Parenthood v. Kline*, 287 Kan. 372, 386, 197 P.3d 370 (2008) (*CHPP*). The *CHPP* **[***29]** court appointed Leavenworth County District Court Chief Judge David J. King as special master and directed him to conduct hearings and make findings of fact. To guide Judge King in doing so, the court provided a list of 17 questions. 287 Kan. at 388.

Judge King first directed the parties to file written responses to the 17 questions. Kline complied with this directive. Judge King then conducted 5 days of hearings. At the November 20, 2007, hearing, CHPP's counsel questioned Kline under oath as to **[*111]** whether there were "any summaries of [WHCS] records left in Johnson County?" Kline answered:

> "I have a summary of three records that pertain to a theory of criminal liability that would have jurisdiction in Johnson County against Doctor Tiller. I have mentioned that to the Office of the Attorney General through correspondence to the Attorney General's Office requesting copies of the actual records relating to those three abortions. The Attorney General has refused to provide those records."

On November 30, 2007, Kline supplemented his written response to the 17 questions propounded by the *CHPP* court. One of those questions asked what '"[i]nquisition records and/or documents'" other than medical **[***30]** records Kline had transferred '"in his position as Attorney General'" to himself '"in his position as Johnson County District Attorney.'" *CHPP*, 287 Kan. at 393. In part, Kline responded that he believed no '"summaries'" had been transferred because he was '"not aware of any summaries of the files, etc. that were transferred and as District Attorney [I] have had to ask staff to recreate such summaries.'" 287 Kan. at 394. On January 10, 2008, Judge King provided the *CHPP* court with a report and the parties' responses to the 17 questions. 287 Kan. at 399.

The court directed that Kline appear at oral argument in *CHPP* on June 12, 2008. 287 Kan. at 401. At that argument, the court questioned Kline regarding whether he had advised Judge Anderson about the WHCS patient summaries his office "recreated and then retained." Kline first stated he was not familiar with what the court was referencing. When advised the question was referring to summaries he had sworn to in his written responses, Kline indicated he had not seen those responses for several months. Finally, Kline stated he did not believe he had any summaries of WHCS patient files but added he had "sought the records from [Morrison's **[***31]** office] and been refused."

In its December 5, 2008, opinion, the *CHPP* court ordered Kline to turn over "a full, complete, and understandable set of the patient records and any and all other materials gathered or generated by Kline and/or his subordinates in their abortion-related inquisition while Kline was Attorney General." 287 Kan. at 416-17. Kline complied with the directive, including turning over copies of the 62 **[*112]** WHCS summaries, which as discussed below, Kline's administrative assistant found in late 2008 while preparing a subpoena response.

Criminal Case Against CHPP and Citizen-Requested Grand Jury in Johnson County

On October 17, 2007, while CHPP's mandamus action continued, Kline filed 107 criminal counts against CHPP in Johnson County District Court, which included: making a false information, K.S.A. 21-3711; failing to maintain a record required to be kept by an abortion provider, K.S.A. 65-6703(b)(5); failing to determine fetal viability before performing **[**336]** a late-term abortion, K.S.A. 65-6703; and unlawfully performing late-term abortions, K.S.A. 65-6703. *State v. Comprehensive Health of Planned Parenthood*, 291 Kan. 322, 336, 241 P.3d 45 (2010).

On October 26, 2007, a group **[***32]** of Johnson County citizens filed in Johnson County District Court a petition under K.S.A. 22-3001 seeking a grand jury investigation of CHPP based on multiple allegations including failing to report child sex abuse and failing to follow the proper standard of care in conducting medical procedures. After a determination that a sufficient number of signatures were secured, the citizen-requested grand jury convened in early December 2007 and met through March 2008 but never issued a true bill, *i.e.*, an indictment. As District Attorney, Kline had a

limited statutory role to fulfill with this grand jury as its legal advisor. See K.S.A. 19-713; K.S.A. 22-3007. The disciplinary panel found multiple violations resulting from Kline's actions in either failing to advise the grand jury or in stepping outside of his limited role. The facts and procedural history of the grand jury proceeding are detailed at pages 96-113 of this opinion.

Criminal Case Against Tiller in Sedgwick County

Attorney General Morrison and his successor, Attorney General Stephen Six, continued to investigate Tiller. In 2007, the Attorney General's office filed criminal charges in Sedgwick County against Tiller. In November **[***33]** 2008 and January 2009, Sedgwick County District Court Judge Clark V. Owens II conducted hearings on Tiller's motion to dismiss these charges and motion to suppress evidence. **[*113]** In part, Tiller's motion sought dismissal based on "outrageous governmental conduct," allegedly occurring, in part, during Kline's investigation of Tiller while Kline served as Attorney General. In late 2008, while responding to discovery requests from Tiller, Kline's administrative assistant located the handwritten "summaries" of WHCS patient files. Kline produced the 62 patient summaries pursuant to the subpoena.

Judge Owens conducted a hearing on Tiller's allegations of "outrageous governmental conduct." At that hearing, in response to questioning from Tiller's attorney about respect for patient privacy, Kline testified, "[W]e did not need nor seek adult patient names."

Further, during that hearing, an unknown individual placed a CD on Tiller's counsel's table. This CD included the spreadsheet Reed had prepared in 2005, which used the cross-referenced information derived from the La Quinta subpoena and KDHE records to identify potential WHCS adult patients by name. Judge Owens refused to dismiss the criminal charges **[***34]** against Tiller, and a jury ultimately acquitted him.

In November 2006, the Disciplinary Administrator began receiving complaints against Kline. Kline answered the allegations in a 20-page letter on September 19, 2007.

Against this factual backdrop, we now turn to the parties' arguments and our review of the hearing panel's findings and conclusions.

STANDARD OF REVIEW

HN1 In reviewing a disciplinary panel's report, this court considers the evidence, the panel's findings, and the parties' arguments to determine whether an attorney violated the KRPC and, if so, the appropriate discipline to impose. *In re Ireland*, 294 Kan. 594, 603-04, 276 P.3d 762 (2012). The Disciplinary Administrator must establish misconduct by clear and convincing evidence. 294 Kan. at 604. Clear and convincing requires that the "factfinder believes that the truth of the facts asserted is highly probable." *In re B.D.-Y.*, 286 Kan. 686, 690-98, 187 P.3d 594 (2008). In assessing whether sufficient evidence exists, we refrain from weighing conflicting evidence, assessing witness credibility, or redetermining **[*114]** questions of fact. See *B.D.-Y.*, 286 Kan. at 705. Keeping these standards in mind, we turn to Kline's arguments.

THE PANEL **[***35]** DID NOT ERR IN APPLYING KRPC 8.4 TO SEVERAL VIOLATIONS DESPITE THE EXISTENCE OF A MORE SPECIFIC RULE OR IN FAILING TO "CABIN" KRPC 8.4.

Preliminarily, although Kline separately addresses each violation found by the panel, **[**337]** he asserts two related arguments that apply broadly to several allegations of misconduct in which the panel found violations of KRPC 8.4 (2012 Kan. Ct. R. Annot. 643), including: Kline's responsibility for Williams' interaction with SRS; Kline's directive to attach sealed documents to a publicly filed brief in *Alpha*; Kline's false statements in a motion to clarify filed with the court; Kline's misrepresentation to the *Alpha* court that he did not retain any summaries of WHCS patient medical records; Kline's failure to accurately explain the law to the grand jury; and Kline's filings during the grand jury proceeding.

As relevant to this case, ***HN2*** KRPC 8.4 (2012 Kan. Ct. R. Annot. 643-44) makes it professional misconduct for an attorney to "(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation; (d) engage in conduct that is prejudicial to the administration of justice; . . . or (g) engage in any other conduct that adversely reflects on the lawyer's **[***36]** fitness to practice law." Regarding the panel's application of this rule, Kline contends in each circumstance when the panel found a KRPC 8.4 violation, it erred in doing so because a more specific rule governed the alleged misconduct. Alternatively, Kline argues that even if KRPC 8.4 applies, that rule must be "cabined" or constrained by narrowing principles that would limit this court's application of the KRPC and, as stated in Kline's brief, would ensure that the rules are "[c]lear, [o]bjective, and [p]redictible." Because these arguments apply to multiple panel findings, we address them first, referring back to this discussion as relevant.

[*115] *The Potential Application of a More Specific Rule Does Not Bar Application of a More General Rule.*

Kline argues that when a more specific rule potentially could govern an attorney's conduct, this court cannot apply the more general "catch-all" provisions of KRPC 8.4. He suggests application of a general rule under such circumstances contradicts rules of statutory construction requiring application of specific rules over general ones.

In support, Kline relies primarily on nonprecedential authority, including cases from other jurisdictions as well **[***37]** as the Restatement (Third) of the Law Governing Lawyers § 5 (1998). He points out a comment to the Restatement cites concerns of fair warning and "'subjective and idiosyncratic considerations,'" to support its suggestion that when a more specific rule governs a tribunal should not rely on more general, catch-all rules. Kline also cites two appellate cases declining to find a general rule violation when a more specific rule applied. See *O'Brien v. Superior Court*, 105 Conn. App. 774, 794 n.22, 939 A.2d 1223 (2008) (noting some commentators have suggested application of specific rules over general ones); *In the Matter of the Discipline of Two Attorneys*, 421 Mass. 619, 626, 629, 660 N.E.2d 1093 (1996) (declining to find attorney's conduct was "prejudicial to the administration of justice" but finding attorney's conduct violated more specific rules).

Kline also points to *In re Pyle*, 283 Kan. 807, 156 P.3d 1231 (2007). As Kline correctly notes, in *Pyle*, the hearing panel refused to apply KRPC 8.4(g), which prohibits conduct reflecting adversely on the lawyer's fitness to practice, because "'more specific provisions . . . apply.'" 283 Kan. at 812. But in *Pyle*, each hearing panel member wrote **[***38]** separately and two would have applied *other*, less general, sections of KRPC 8.4. 283 Kan. at 815-16. We simply cannot read *Pyle* as broadly as Kline. At most, *Pyle* demonstrates that a panel may not rely on the more general KRPC 8.4(g) when the conduct engaged in violates another, more specific, provision of KRPC 8.4.

Responding to Kline's "general versus specific" argument, the Disciplinary Administrator directs us to instances in which this **[*116]** court has found a violation of KRPC 8.4 despite factual support for a more specific violation. See *In re Millett*, 291 Kan. 369, 373, 377, 380, 241 P.3d 35 (2010) (approving panel's finding of KRPC 8.4 violation when attorney lied to a detective while representing a client); *In re Arabia*, 283 Kan. 851, 857, 860, 156 P.3d 652 (2007) (approving panel's finding of a KRPC 8.4 violation when attorney provided false information to a detective while representing **[**338]** a client). The Disciplinary Administrator reasons that such circumstances demonstrate an implicit rejection of Kline's argument.

But we need not rely upon cases implicitly rejecting Kline's suggestion because it was rejected in *In re Roth*, 269 Kan. 399, 7 P.3d 241 (2000). There, the respondent argued **[***39]** the Disciplinary Administrator should have charged him with a violation of KRPC 4.4 (1999 Kan. Ct. R. Annot. 381) instead of the more general KRPC 8.4(g). He also argued that because there was insufficient evidence for a KRPC 4.4 violation, he did nothing wrong. *Roth*, 269 Kan. at 403-04. Like Kline, Roth relied upon the statutory construction rule applied in criminal cases—*i.e.*, a more specific statute prevails over a more general one unless it appears the legislature intended to make the general statute controlling. 269 Kan. at 403 (citing *State v. Le*, 260 Kan. 845, Syl. ¶ 2, 926 P.2d 638 [1996]).

Characterizing the respondent's argument as "novel and convoluted," the *Roth* court critically commented: "The lack of logic in this reasoning is readily apparent." 269 Kan. at 403-04. In rejecting *Roth*'s suggestion, the court observed that the specific and general rules codified in the KRPC complement each other rather than conflict. 269 Kan. at 404 (concluding conduct may not have "technically" violated KRPC 4.4 but still constituted an abuse of the legal process that proved prejudicial to the administration of justice, violating KRPC 8.4).

We reject Kline's argument for the same reasons **[***40]** we rejected Roth's—*i.e.*, it would be illogical to forgive dishonest conduct that violates KRPC 8.4 simply because that conduct arguably is also governed by another rule prohibiting dishonesty in a specific setting. We also disagree with Kline that "fair notice" requires we apply general rules only as a last resort. ***HN3*** Every licensed attorney is responsible for observing the Rules of Professional Conduct, regardless **[*117]** of whether the rules recite general or specific obligations. KRPC Preamble ¶ 12 (2012 Kan. Ct. R. Annot. 430) ("Every lawyer is responsible for observance of the Rules of Professional Conduct."); see also KRPC Scope ¶ 19 (2012 Kan. Ct. R. Annot. 431) ("Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process."). Any licensed Kansas attorney reasonably observing the Rules of Professional Conduct would be on notice of a potential for violation of the rules alleged to have been violated under the facts as alleged.

KRPC 8.4(c), (d), and (g) Should Not Be "Cabined" or Confined by Narrowing Standards.

Alternatively, Kline contends that even if a general KRPC 8.4 provision can apply over another more specific rule, the general **[***41]** rule must be "cabined" or constrained in order to provide "clear, objective and predictable standards." Kline urges us to imply limiting language in three provisions: ***HN4*** KRPC 8.4(c), which prohibits engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation; ***HN5*** KRPC 8.4(d), which prohibits engaging in conduct prejudicial to the administration of justice; and ***HN6*** KRPC 8.4(g), which prohibits engaging in conduct adversely reflecting on the lawyer's fitness to practice. He suggests we can find no violation of these sections unless the attorney's conduct is "egregious and flagrantly violative of accepted professional norms that would be recognized by a reasonable attorney practicing in the same situation." Additionally, Kline argues KRPC 8.4(c) requires proof that the lawyer acted with "malevolent intent that rises above mistake." Finally, he contends conduct occurring during a judicial proceeding violates KRPC 8.4(d) only when that proceeding is prejudiced. We address each argument in turn.

Kline's suggested standard of "egregious and flagrantly violative of accepted professional norms" does not constrain this court's reading of KRPC 8.4(c), (d), and (g).

Kline first contends KRPC 8.4(c), **[***42]** (d), and (g), are violated only when conduct is "egregious and flagrantly violative of accepted professional norms." In support, Kline cites cases from other jurisdictions that adopted this or a similar standard. See, *e.g., Attorney* **[*118]** *Grievance v. Marcalus*, 414 Md. 501, 522, 9 **[**339]** 96 A.2d 350 (2010) (concluding Rule 8.4[d] applies only when conduct is "'criminal or so egregious as to make the harm, or potential harm, flowing from it patent'"); *In the Matter of the Discipline of an Attorney*, 442 Mass. 660, 668-69, 815 N.E.2d 1072 (2004) (concluding rule prohibiting "conduct 'prejudicial to the administration of justice'" is violated only when conduct is "'egregious' and 'flagrantly violative of accepted professional norms'"); *In re Hinds*, 90 N.J. 604, 632, 449 A.2d 483 (1982) (concluding conduct is "'prejudicial to the administration of justice'" only when it is "egregious").

But Kline fails to note that with one exception, these other jurisdictions that have adopted this standard did so only in the context of Rule 8.4(d), which prohibits conduct prejudicial to the administration of justice. But see *In re Gadbois*, 173 Vt. 59, 66-68, 786 A.2d 393 (2001) (stating that the rule prohibiting "any **[***43]** other conduct that adversely reflects on the lawyer's fitness to practice law" is only violated by "'conduct flagrantly violative of accepted professional norms'"). Significantly, this court rejected a similar challenge to KRPC 8.4(d) in *In re Comfort*, 284 Kan. 183, 200-01, 159 P.3d 1011 (2007). There we considered the respondent's vagueness challenge and his suggestion that the rule is "'a simplistic standard that warns nobody of what hidden layer of discipline awaits them.'" 284 Kan. at 200. In rejecting this argument, we relied on the definition of "prejudicial" and reasoned that this term sufficiently defined the degree of conduct expected from a licensed attorney. 284 Kan. at 201 (quoting *State v. Nelson*, 210 Kan. 637, 639-40, 504 P.2d 211 [1972]).

For this same reason, we reject Kline's suggestion that the phrase "conduct that is prejudicial to the administration of justice" in KRPC 8.4(d) must be constrained in order to provide a clear, objective, and predictable standard. As we held in *Comfort*, ***HN7*** the word "prejudice" as used in this context sufficiently defines the standard and restricts a lawyer's conduct. As we noted: "'The word "prejudicial" is universally found throughout **[***44]** the legal and judicial system.'" 284 Kan. at 200.

Additionally, a holistic reading of our rules contradicts Kline's suggestion that KRPC 8.4(c), (d), and (g) should be confined by a **[*119]** professional norm standard. As ***HN8*** the Preamble to the KRPC notes, some rules apply to lawyers not actively practicing or to practicing lawyers not acting in a professional capacity. KRPC Preamble (2012 Kan. Ct. R. Annot. 427). Similarly, lawyers can be disciplined for conduct outside the profession if the conduct "functionally relates" to the practice of law. Rotunda and Dzienkowski, The Lawyer's Deskbook on Professional Responsibility § 8.4-1(a) (2013). Holding attorneys to a professional norm standard might hinder this court's ability to punish conduct that is not prohibited by professional norms but may still impact a licensed lawyer's fitness to hold that license.

For these reasons, we reject Kline's suggestion that we should confine the application of KRPC 8.4(c), (d), and (g) to conduct that is egregious and flagrantly violative of professional norms.

A violation of KRPC 8.4(c) does not require that an attorney act with "malevolent intent."

Kline also argues in addition to adopting the egregious and flagrant **[***45]** standard discussed above, this court

should conclude that conduct violates KRPC 8.4(c) (2012 Kan. Ct. R. Annot. 643), which prohibits engaging in "dishonesty, fraud, deceit or misrepresentation," only when such conduct is done with "malevolent intent that rises above mistake." But Kline cites no authority specifically supporting this suggestion and relies instead on implication. He again depends upon *In re Pyle*. In particular, Kline points out the *Pyle* court held that the attorney's conduct did not violate KRPC 8.4(c) because "we discern mistake rather than malevolence." 283 Kan. at 827.

But Kline overstates *Pyle*'s holding. The court there did not require proof of malevolent intent in order to find a violation of KRPC 8.4(c). Rather, it merely used that term to distinguish intentional dishonesty from innocent mistake. See 283 Kan. at 827. **[**340]** Because Kline cites no authority for the proposition that an attorney must act with "malevolent" intent in order to violate KRPC 8.4(c), and we are aware of none, we decline to inject such limiting language in the plain text of KRPC 8.4(c).

[*120] *Conduct occurring during a proceeding can be prejudicial to the administration of justice in violation of KRPC 8.4(d)* ***[***46]*** *even in the absence of proof of actual harm to the proceeding.*

Kline also argues that when potential misconduct occurs during a proceeding, that conduct can only violate KRPC 8.4(d) (2012 Kan. Ct. R. Annot. 643), which prohibits conduct "prejudicial to the administration of justice," when the conduct harms the actual proceeding. But Kline cites no authority to support this assertion, and given that the rule's plain language imposes no such limitation, we will not infer one.

Further, we rejected Kline's argument in *In re Pyle* when we clarified that ***HN9*** an attorney's conduct need not prejudice the proceeding itself in order to constitute a KRPC 8.4(d) violation:

> ***HN10*** "[T]he 'administration of justice' Rule 8.4(d) seeks to protect from prejudice is much broader than the administration of justice to be effected in any single trial or adjudicatory proceeding. . . . *All* lawyers, by virtue of their licenses, enjoy the status of officers of the court. That status brings with it the responsibility to refrain from conduct unbecoming such officers . . . ." 283 Kan. at 829-30.

Although in *Pyle* the respondent attorney's misconduct occurred outside a proceeding, this court did not limit its interpretation of **[***47]** KRPC 8.4(d). Instead, the court relied on a plain reading of the rule and persuasive authority interpreting KRPC 8.4(d) as prohibiting actions that broadly injure the justice system. See 283 Kan. at 829; see also *In re Johanning*, 292 Kan. 477, 487-88, 254 P.3d 545 (2011) (finding a KRPC 8.4[d] violation when attorney's failure to forward client's criminal restitution payment resulted in no quantifiable injury to client but impacted everyone involved in the process including probation officer and district court which expended time in addressing attorney's conduct); Hazard and Hodes, The Law of Lawyering § 65.6 (3d ed. 2013) (noting that drafters of Rule 8.4(d) intended rule to broadly address "violations of well-understood norms and conventions of practice," not just conduct prejudicing other parties). Thus, although in *Pyle* we dealt with a different kind of conduct, our rationale and analysis apply equally here.

[*121] We conclude ***HN11*** KRPC 8.4(d) encompasses conduct that injures, harms, or disadvantages the justice system generally, regardless of the context in which that conduct occurs or whether it prejudiced a particular proceeding.

Having found neither of Kline's suggestions for cabining KRPC 8.4 **[***48]** persuasive and having rejected Kline's argument that KRPC 8.4 applies only when a general rule does not apply, we next consider the individual instances found by the panel to have violated the KRPC.

CLEAR AND CONVINCING EVIDENCE DOES NOT SUPPORT THE PANEL'S CONCLUSION THAT KLINE'S INVESTIGATOR INTENTIONALLY MISLED SRS OR THAT KLINE VIOLATED KRPC 8.4(C) AND KRPC 5.3(B) BY PERMITTING THIS CONDUCT.

Initially, the panel found Kline failed to take "reasonable efforts" to ensure that a supervised nonlawyer, his investigator Williams, acted in accordance with the professional obligations of a lawyer, thus violating KRPC 5.3(b) (2012 Kan. Ct. R. Annot. 615). Further, the panel concluded that if Williams were a lawyer, he would have violated ***HN12*** KRPC 8.4(c) (2012 Kan. Ct. R. Annot. 643), which prohibits engaging in conduct involving "dishonesty, fraud, deceit or misrepresentation." And because ***HN13*** KRPC 5.3(c)(2) makes a lawyer responsible for the conduct of a supervised nonlawyer if the lawyer has direct supervisory authority, knows of the conduct, and fails to avoid or mitigate the conduct, the panel found Kline functionally violated KRPC 8.4(c) through Williams when Williams "intentionally misled" **[***49]** SRS as to the

reasons Kline sought information regarding sexual abuse reports.

[341]** The parties make several arguments concerning the proper scope of KRPC 8.4. But, as discussed below, any reading of KRPC 8.4 requires proof of dishonesty. And because we find no clear and convincing evidence of dishonesty, we conclude the panel erred in determining Williams' actions violated KRPC 8.4 under either party's interpretation of the rule. Additionally, because Williams' actions, as planned or as carried out, did not violate KRPC 8.4, there is no evidence Kline failed to take reasonable measures to ensure Williams acted in accordance with the rules or was required **[*122]** to take measures to mitigate the consequences of Williams' inappropriate actions under KRPC 5.3(b) and (c)(2).

Additional Relevant Facts

As noted in our factual recitation above, the confidential memo of July 15, 2003, to Kline from Maxwell and Williams suggested that if SRS asked for an explanation about the basis for Kline's interest in the number of sexual abuse reports, "SRS will be told that the Attorney General desires to determine if there is a serious latent sexual abuse problem." Regarding his actual statements to SRS, Williams testified **[***50]** he did not feel he had an obligation to describe the investigation's nature; instead, he spoke in "very broad terms." Williams told SRS that Kline's office was attempting to determine "the nature and magnitude of the sex abuse crime problem in Kansas with children being the victims."

Williams' testimony is generally consistent with an e-mail he sent to Kline on July 19, 2003, describing the initial request of SRS. In that e-mail, Williams advised Kline he told SRS employee Betsy Thompson that Kline's office was "attempting to assess the sexual abuse problem in Kansas and desired statistical information as to the number of sexual abuse reports received by SRS since January 1, 2002, involving children 15 years and younger." According to Williams, Thompson advised that SRS would treat the request as a legislative inquiry. Williams also confirmed that he "stayed away from the underlying issue that we are interested in." Williams noted the SRS employee "made reference to the A.G.'s recent opinion" but that he kept the conversation in "very general terms" again referring to the nature and magnitude of the sexual abuse crime problem in Kansas.

Thompson did not testify at the hearing. Instead, **[***51]** the only other evidence regarding Williams' comments to SRS came from testimony by John Badger, SRS's General Counsel. Badger confirmed Williams had contacted Thompson and initially sought a listing of sexual abuse reports received by the agency on children under the age of 16. Badger testified he believed this request sought public information. Further, when specifically questioned about whether SRS was "misled about why [Kline's office] wanted those numbers," **[*123]** Badger said he did not know what justification was offered to Thompson. Badger added the specific reason would not have mattered because the "numbers themselves would probably be public information."

There Is Insufficient Evidence That Kline's Investigator Misled SRS.

Although the parties' briefing of this issue focuses on the proper scope of KRPC 8.4 and whether the rules permit an investigator to mislead a nontarget witness, we need not reach that issue. Instead, we must preliminarily determine whether clear and convincing evidence supports the hearing panel's finding that Williams engaged in conduct involving "dishonesty, fraud, deceit or misrepresentation" in violation of KRPC 8.4(c)—conduct for which Kline would be culpable **[***52]** under KRPC 5.3.

In finding clear and convincing evidence that Williams intentionally misled SRS when seeking information from SRS regarding sexual abuse reports, the hearing panel specifically relied on the confidential memo of July 15, 2003, as well as Williams' testimony regarding his conversation with Thompson and his e-mail to Kline following up on that conversation. Yet this evidence does not show Williams acted dishonestly, fraudulently, or deceitfully, or that he intentionally misrepresented the nature of the investigation.

Instead, the record is clear Williams consistently "stayed away" from discussing the specific nature of the investigation, providing Thompson only with a very general statement as to the reason for the request. **[**342]** Moreover, the general information Williams did provide—*i.e.*, that Kline was investigating a "sexual abuse problem in Kansas"—was not inaccurate. Nor did Badger's testimony contradict Williams' characterization of his request. Instead, Badger simply confirmed the insignificance for the reason given since Kline's office was entitled to the statistical information Williams requested.

Under these circumstances, we find a lack of clear and convincing evidence **[***53]** to support the panel's

conclusion that Williams' conduct violated KRPC 8.4(c). Thus, Kline was neither responsible for such conduct under KRPC 5.3, nor was he required to mitigate any consequences of Williams' conduct.

[*124] THE PANEL'S FINDING THAT KLINE VIOLATED KRPC 3.3(A)(1) WHEN HE TESTIFIED UNDER OATH THAT HIS OFFICE DID NOT SEEK THE IDENTITIES OF ADULT ABORTION PATIENTS IS NOT SUPPORTED BY CLEAR AND CONVINCING EVIDENCE.

The panel found Kline "knew or should have known" in April 2005 that his office had sought the identities of adult abortion patients. Thus, the panel concluded that when Kline testified under oath in November 2007 and again in January 2009 that his office did not seek adult abortion patients' identities, he violated ***HN14*** KRPC 3.3(a)(1) (2012 Kan. Ct. R. Annot. 582), which prohibits a lawyer from knowingly making "a false statement of fact or law to a tribunal."

The panel also found Kline violated KRPC 3.3(a)(1) (2012 Kan. Ct. R. Annot. 582) by failing to "correct a false statement of material fact or law previously made to the tribunal by the lawyer."

Kline's Testimony

In November 2007, Kline testified before Judge King at a hearing King conducted in his role as special master **[***54]** in the *CHPP* mandamus action:

> "Q. [KLINE'S ATTORNEY] Were you seeking the identity of women—the identities of women contained in those records?
>
> "A. [KLINE] The—we had established a method of protecting patient privacy. And Judge Anderson has opined to this. We knew that there would be a concern simply because we were dealing with what might be considered a volatile issue, not because of any strong concern of law. I worked with Judge Anderson to establish a process where the records would be provided in total to him, not to us. But to the court. So *the Court could redact irrelevant information, as well as the identities of adult women* before tendering the records to our possession. I always sought the identity of the children, because the children were victims of crimes. And it was necessary to determine whether actions to protect those children should occur.
>
> "Q. [KLINE'S ATTORNEY] Is that—is that normal for prosecutors to seek the identity of victims of crimes, such as child rape?
>
> "A. [KLINE] Absolutely. In fact, I would say that it's normal to seek the identity of patients when seeking medical records. I just made an exception in our approach in this case as it relates to adult women. **[***55]** . . .
>
> ". . . *So I sought the identity for the Court of adult women but never for our office*." (Emphasis added.)

[*125] In January 2009, Kline testified before Judge Owens in a hearing on the defendant's motion to suppress and motion to dismiss in *State v. Tiller:*

> "Q. [TILLER'S DEFENSE COUNSEL] You have spoken publicly before about your respect for the privacy of Dr. Tiller's patients, correct?
>
> "A. [KLINE] What I have said is that we did not need nor seek adult patient names, and we sought the identities of children because they were victims of crime."

We proceed to determine whether one or both of these statements were knowingly false in violation of KRPC 3.3.

Because KRPC 3.3(a)(1) Requires Actual Knowledge of Falsity, the Panel Erred in Relying on What Kline "Should Have Known."

Kline persuasively argues the panel's rationale for finding a violation of KRPC 3.3(a)(1) **[**343]** is fundamentally flawed because the panel relied upon what he "knew or should have known," but ***HN15*** KRPC 3.3(a)(1) requires that a lawyer "knowingly" make a false statement of fact or law. And, as Kline suggests, the term "knowingly" is defined under the rules as "actual knowledge of the fact in question." KRPC 1.0(g) (2012 Kan. Ct. R. **[***56]** Annot. 433).

Kline contends he did not knowingly give false testimony that his office did not seek the identity of adult patients because he did not direct his staff to identify adult patients; he was unaware that his staff sought adult patient identities; and he did not learn about the spreadsheet containing adult patient identities until after both hearings at which he testified that his office had not sought adult patient identities.

The Disciplinary Administrator's brief did not address Kline's contention that KRPC 3.3(a)(1) requires actual knowledge of the falsity of the statement. However, the Disciplinary Administrator conceded at oral argument

that the rule does not permit a violation based on constructive knowledge and to the extent the panel relied upon what Kline "should have known," its findings are flawed. Nevertheless, the Disciplinary Administrator urges us to find clear and convincing evidence supports the panel's finding that Kline had actual knowledge of his office's efforts to identify adult abortion patients.

[*126] But as discussed below, in light of the panel's fundamental error regarding the level of knowledge required and the indirect evidence the panel relied upon to **[***57]** find violations of KRPC 3.3(a)(1), we cannot accept the Disciplinary Administrator's alternative argument.

Clear and Convincing Evidence Does Not Support the Panel's Finding That Kline Violated KRPC 3.3(a)(1) by Falsely Testifying.

Significantly, the panel cited no direct evidence that Kline ordered his staff to seek adult patients' names or that he knew his staff attempted to identify adult patients. Further, our review of the record reveals no such evidence. Instead, the record shows that while Kline directed his staff to expand the investigation to include illegal late-term abortions performed on adults, he also directed they do so without identifying patient names. According to Kline, he did not need adult patient identities because he intended to litigate any case against the clinics as a "paper case" without patient witnesses. With one exception, discussed below, no one on Kline's staff contradicted this testimony.

Evidence found by the panel

In the absence of direct testimony, the panel implied Kline "knew or should have known" his testimony was false because: (1) Kline directed his office to subpoena records from La Quinta; (2) Maxwell obtained that subpoena; (3) Williams directed **[***58]** Reed to compare the information from La Quinta with KDHE records to obtain names of adult patients; and (4) Reed prepared spreadsheets which included a spreadsheet containing the identities of adult patients and gave that spreadsheet to Williams.

But as discussed above, even if these facts supported a finding that Kline "should have known" of the falsity of his testimony, this finding would be insufficient to support the panel's finding of a violation of KRPC 3.3(a)(1), which requires actual knowledge of the falsity of the testimony. And while we agree each of these factual findings is supported by the record, we conclude none of them, when considered individually or together, support a conclusion that Kline had actual knowledge that his office obtained the identities of adult patients.

[*127] First, while the record supports the panel's finding that Kline directed his staff to seek to subpoena documents from La Quinta, it does not necessarily follow that Kline intended to identify adult abortion patients with this information or that he actually knew his office eventually developed adult patient identities utilizing information obtained through the subpoena. In fact, an internal memorandum **[***59]** dated a few days before Kline's office sought the La Quinta subpoena indicates the subpoena's purpose was to identify "juvenile" patients. This document's validity has not been questioned.

Similarly, while Reed's testimony supports the panel's conclusion that Williams directed **[**344]** Reed to compare the information obtained from La Quinta with the KDHE records in order to obtain names of adult patients, it does not permit an inference that Kline directed Williams to create the spreadsheet or that Kline was aware of or saw the spreadsheets after Reed prepared them. In short, although each of the panel's findings are true, and may demonstrate Kline "should have known" his office sought adult patient identities, the findings do not provide clear and convincing evidence Kline actually knew his office sought adult patient identities prior to testifying to the contrary under oath.

Evidence not cited by the panel

The Disciplinary Administrator points us to additional evidence in the record, not cited by the panel, that he contends supports a finding Kline actually knew his office sought the identities of adult patients. Specifically, the Disciplinary Administrator encourages us to rely upon (1) a statement **[***60]** made by Kline at his disciplinary hearing; (2) evidence indicating Kline eventually learned of the spreadsheets' existence and his office's effort to identify adult patients; and (3) statements made by Kline's staff speculating whether Kline knew his staff made efforts to identify adult patients. But even this does not supply the clear and convincing evidence needed to support a violation.

First, the Disciplinary Administrator suggests Kline's testimony at his disciplinary hearing demonstrates Kline's actual knowledge **[*128]** that adult patient information would be included in the La Quinta response:

> "Q. [DISCIPLINARY ADMINISTRATOR] And to

your knowledge you yourself did not order anybody else in your office to prepare that document?

"A. [KLINE] What I asked my staff to do was try *to identify adult patients and the adult traveling companions*. How they did that was up to them.

"Q. [DISCIPLINARY ADMINISTRATOR] But you didn't specifically you yourself order that this document be prepared?

"A. [KLINE] Well, what I'm saying is my direction could encompass them excluding adult patients to make sure to identify children, but I don't know why they did that. I mean you'd have to ask Mr. Reed or Mr. Williams **[***61]** why the decision to approach the effort to identify children included that spreadsheet. There could be rational explanations regarding the effort to identify children. It makes sense to exclude persons. And I do know that La Quinta gave medical discounts for anybody receiving medical treatment in Wichita. So this would be an effort to try to exclude what might be extraneous information because you don't want to move without full knowledge." (Emphasis added.)

As the Disciplinary Administrator points out, Kline did testify he directed his staff to try and "identify adult patients and the adult traveling companions." But notably, the panel did not rely upon this testimony to support its conclusion regarding this violation. It seems likely the panel chose not to rely upon this testimony because when read in context, it simply does not support the Disciplinary Administrator's argument. Instead, it is apparent Kline intended to convey that his office sought the La Quinta records to identify *child* patients and their *adult* traveling companions and he simply misspoke in indicating that his staff intended to "identify adult patients and the adult traveling companions." As Kline speculated in **[***62]** the second portion of the above-quoted response, Reed may have identified or developed adult patient information in order to isolate it from juvenile patient information based on Kline's direction to focus on identifying juvenile patients. Moreover, other than this one apparent misstatement, Kline testified consistently throughout the hearing that his office sought to identify only juvenile patients not adult patients.

The Disciplinary Administrator also asks this court to rely on evidence that Kline and members of his staff eventually knew of the spreadsheet containing adult identities to find he knew of the **[*129]** spreadsheet during his testimonies. Specifically, the Disciplinary Administrator points to Rucker's testimony at the disciplinary hearing that Kline's office made an effort to identify potential adult patients. But Rucker qualified this "acknowledgement" by explaining that he did not learn of an effort to identify adult patients **[**345]** until 2 years after Kline left his position as Attorney General and that he did not believe Maxwell or Kline knew of this effort. Thus, Rucker's testimony supports Kline's position that Kline did not know of his office's efforts to identify adult patients **[***63]** until after Kline testified and after any obligation to correct his testimony ended.

Further, the Disciplinary Administrator suggests Kline's actual knowledge can be inferred from evidence that during Kline's tenure as Johnson County District Attorney, his office possessed a compact disc containing the spreadsheets with the names of adult patients created by Reed years earlier. But again, as Kline points out, the discovery of a compact disc containing the spreadsheet data in a locked file cabinet nearly 2 years after Kline testified does not demonstrate he knew of the disc's existence and content at the time he testified.

Additionally, the Disciplinary Administrator points out that Deputy Attorney General Jared Maag, who was involved with the investigation, testified at Kline's disciplinary hearing that Maag believed the identity of adult patients would be necessary to prove any charges related to illegal late-term abortions, which also was a topic of the investigation. Further, a physician consulted by Williams and Reed provided the same opinion. The Disciplinary Administrator infers from this testimony that Kline agreed with these opinions and accordingly directed his staff to seek **[***64]** adult patient identities in anticipation of trial.

But, as Kline points out, this evidence does not clearly and convincingly establish Kline agreed with Maag and the consulting physician that adult patient identities were necessary to prosecute illegal late-term abortions. And Maag never testified Kline agreed with his legal assessment; rather, he testified no one "vehemently disagree[d]" with it. Further, as discussed, Kline testified he never intended to use adult patients at trial, and it appears Kline's office was willing to permit the prosecution to hinge on expert testimony. **[*130]** Additionally, Maxwell testified that Attorney General Six prosecuted charges in *State v. Tiller* without identifying adult patients.

Next, the Disciplinary Administrator relies on Maxwell's testimony at the disciplinary hearing indicating Kline's

office realized the La Quinta subpoena might function as a "dragnet" that would reveal adult patients.

But Maxwell's testimony merely established the La Quinta subpoena would necessarily obtain *registration information* for some adult patients. As Maxwell explained, Kline's office would then have to separate this information "like wheat and chaff" to identify the *adult* ***[***65]*** *traveling companions* of child patients and discard information regarding *adult patients*. Thus, while Maxwell's testimony may support an inference that Kline knew the La Quinta registration information necessarily would generate information identifying adult WHCS patients and that this information could be cross-referenced to identify and discard adult patient information, it does not support an inference that Kline knew the La Quinta registration information would in fact be cross-referenced with termination of pregnancy reports for the purpose of identifying adult abortion patients.

Finally, the Disciplinary Administrator alternatively urges us to find that even if the evidence does not convincingly establish that Kline actually knew of his office's efforts to identify adult patients, Kline's "deliberate ignorance" equates to actual knowledge. But in light of the specific definition provided by our rules for the term "knowingly," we are not at liberty to expand that definition as suggested by the Disciplinary Administrator, nor have we been provided with any persuasive authority for doing so.

In light of the absence of clear and convincing evidence regarding Kline's actual knowledge **[***66]** of the falsity of his testimony that his office never sought the identity of adult abortion patients, we conclude the panel erroneously based its ultimate conclusion that Kline violated KRPC 3.3(a)(1) upon its determination that Kline "should have known" of the representation's falsity.

[*131] *Clear and Convincing Evidence Does Not Support the Panel's Finding That Kline Violated KRPC 3.3(a)(1) for Failing to Correct False Testimony.*

The panel also found Kline violated KRPC 3.3(a)(1) (2012 Kan. Ct. R. Annot. 582) by **[**346]** failing to "correct a false statement of material fact or law previously made to the tribunal by the lawyer." The Disciplinary Administrator does not separately address this violation, apparently recognizing it is linked to, and relies upon, the panel's finding of a violation of KRPC 3.3(a)(1) based upon Kline's inaccurate testimony.

But we have found no clear and convincing evidence that Kline knew of his office's efforts to identify adult patients at any point prior to his testimony at either hearing. Additionally, we note that although Rucker testified he believed Kline learned of the spreadsheet containing potential adult patient names at the hearing in *State v. Tiller*, Kline **[***67]** testified he did not know of its existence until after that case was resolved. Under these circumstances, and in the absence of any additional findings from the panel as to this violation, we find no clear and convincing evidence that Kline learned of his office's effort to identify adult abortion patients while he remained under an obligation to correct his testimony. See ***HN16*** KRPC 3.3 Comment 13 (2012 Kan. Ct. R. Annot. 585) (discussing that there must be "[a] practical time limit" on an attorney's obligation to correct false evidence and statements and "[t]he conclusion of the proceeding is a reasonably definite point for the termination of the obligation"). Therefore, we conclude the panel's finding of a KRPC 3.3(a)(1) violation for Kline's failure to correct his false testimony is not supported by clear and convincing evidence.

Clear and Convincing Evidence Supports the Panel's Conclusion That Kline Violated KRPC 8.4(d), KRPC 8.4(g), and KRPC 5.1(c) When He Directed His Staff to Attach Sealed Documents to a Publicly Filed Brief.

This violation resulted from Kline's March 2005 instruction to his staff to attach sealed documents to his office's publicly filed brief in the *Alpha* mandamus **[***68]** action. See *Alpha*, 280 Kan. at 926. In essence, the panel found Kline's directive violated the *Alpha* **[*132]** court's order to the parties to publicly file their briefs but to ensure that the record remained sealed and that Kline's action violated KRPC 8.4(d) (2012 Kan. Ct. R. Annot. 643) prohibiting conduct prejudicial to the administration of justice. Further, the panel found Kline's directive to attach the court-ordered sealed documents to the publicly filed brief defeated the court's purpose in protecting the confidential record and violated KRPC 8.4(g) prohibiting conduct reflecting adversely on the lawyer's fitness to practice.

The panel also found Kline culpable for his staff's actions in following his directive. Specifically, the panel found Kline's staff attorneys violated KRPC 8.4(d) and (g) by following Kline's instructions and, consequently, that Kline violated ***HN17*** KRPC 5.1(c)(2) (2012 Kan. Ct. R. Annot. 612), which places responsibility on a lawyer with direct supervisory authority over another lawyer for the other lawyer's misconduct if the supervising lawyer

knows of the misconduct and fails to take remedial actions when the misconduct's consequences could be avoided. Thus, if we [***69] find clear and convincing evidence supports the panel's conclusion that Kline's directive to publicly file the sealed documents violated KRPC 8.4(d) and (g), we would necessarily find clear and convincing evidence supported the panel's conclusion regarding Kline's responsibility under KRPC 5.1(c)(2) for his employees' actions in following that directive because Kline clearly knew of the conduct and could have avoided its consequences.

Additional Relevant Facts

As noted, the *Alpha* court directed the parties to publicly file their briefs but ordered the record remain under seal. Judge Anderson filed his answer under seal and attached the transcript from the motion to quash hearing, while the clinics publicly filed their briefs but did not attach sealed records.

Prior to filing Kline's brief, Kline's staff attempted to clarify the court's order regarding the briefs. Maag, who was in part responsible for preparing Kline's *Alpha* brief, testified at the disciplinary hearing that he found the court's order confusing because the parties necessarily would base their arguments on the contents of the [*133] record, but the record was to remain sealed. Due to his uncertainty as to how to proceed, Maag [**347] sought [***70] clarification from the Clerk of the Appellate Courts. Maag testified the Clerk provided him with no additional guidance and referred him back to the order.

Maxwell testified that before deciding to attach the sealed documents, Kline's staff had a "really strong debate" about how to write the brief without attaching the record. Maag testified Kline was frustrated by the "[clinics] and the information that they were putting out to the press and the inability to get the office's position out unless these items were attached."

Michael Strong, who represented Judge Anderson in the mandamus action, testified attorneys from Kline's office also contacted him before filing Kline's brief. Strong said Maxwell and other staff attorneys were "frustrated" by what they perceived as misstatements in the clinics' briefs and that "only one side of the story had been presented," *i.e.*, the clinics' side. Maxwell questioned Strong as to whether including information from the sealed record in Kline's brief would violate Judge Anderson's orders. Strong reminded Maxwell that Judge Anderson lacked any authority over orders from the Supreme Court.

Ultimately, Kline directed his staff to publicly file the brief [***71] with four sealed documents attached: subpoenas issued to CHPP and WHCS; the transcript of the hearing on the motion to quash; and Judge Anderson's memorandum decision and order denying the motion to quash. Kline's office redacted the attachments so that, according to Kline, the attachments contained no confidential information. Kline testified at his disciplinary hearing that his staff included the sealed information in the attachments in order for "people to understand the arguments, the Court and others, certainly."

After filing his brief, Kline also conducted a press conference. During this conference, Kline discussed the sealed documents he had attached to his brief. See *Alpha*, 280 Kan. at 926, 928. Kline later argued the press conference was "'necessitated by the false impression left by the public filing of [the clinics'] brief and [the clinics'] representation of the record.'" 280 Kan. at 928.

[*134] The clinics objected to both the public filing of the sealed documents and the press conference and requested a show cause order requiring Kline to demonstrate why he should not be held in contempt for violating the court's order. *Alpha*, 280 Kan. at 926.

After the *Alpha* court issued the requested [***72] show cause order, Maxwell filed a motion with Judge Anderson seeking clarification regarding whether Kline's public filing of documents from the sealed record violated Judge Anderson's nondisclosure orders. Judge Anderson concluded his nondisclosure orders prohibited the parties from revealing the existence of an inquisition and the Supreme Court's directive to publicly file briefs mooted that purpose. But Judge Anderson also clarified that his nondisclosure orders related only to his inquisition proceedings and not to the mandamus action.

In his written response to the show cause order, Kline did not suggest he unintentionally or mistakenly directed his staff to file sealed documents as an attachment to the brief. Instead, he admitted knowingly attaching the sealed court records to the brief because he believed this was necessary to further an understanding of his arguments. *Alpha*, 280 Kan. at 928. But then in oral argument to the *Alpha* court, Kline's attorney, former Attorney General Stephan, "altered the tone" and characterized Kline's actions as honest "mistakes" made in good faith. 280 Kan. at 929. Stephan, on Kline's behalf, also argued the disclosure did not impair the proceeding, [***73] did not harm or prejudice the

administration of justice, and did not deter the court from performing its duty. 280 Kan. at 929.

In ruling on the show cause order, the *Alpha* court gave Kline the "benefit of the doubt," citing the unusual nature of its order and the keen public interest in the case. 280 Kan. at 929-30. It declined to hold Kline in contempt, noting that "[n]o prejudice has resulted from [Kline's] conduct." 280 Kan. at 929.

[348]** *Kline's Conduct Prejudiced the Administration of Justice in Violation of KRPC 8.4(d).*

Initially, Kline argues that because the *Alpha* court declined to hold him in contempt, he could not have violated ***HN18*** KRPC 8.4(d), **[*135]** which prohibits "conduct that is prejudicial to the administration of justice." Additionally, Kline reiterates his "cabining" argument from above, *i.e.*, that when misconduct occurs during a proceeding it must prejudice that proceeding to be "prejudicial to the administration of justice"—an argument we have already rejected. Further, he contends he could not have violated KRPC 8.4(d) because the redacted documents revealed no confidential information and because his attachment of the sealed documents assisted the court in understanding his legal **[***74]** arguments rather than prejudicing the proceeding.

The Disciplinary Administrator argues the *Alpha* court's decision declining to hold Kline in contempt did not resolve whether Kline's "willful disobedience" of the court's orders violated KRPC 8.4(d). Focusing on testimony describing Kline's motives for attaching the documents, the Disciplinary Administrator argues the panel relied on clear and convincing evidence in finding a KRPC 8.4(d) violation.

We agree with the Disciplinary Administrator that the *Alpha* court's refusal to hold Kline in criminal contempt does not preclude a finding that Kline's conduct prejudiced the administration of justice under KRPC 8.4(d). Kline's argument ignores the distinction between criminal contempt, the question at issue in *Alpha*, and a violation of KRPC 8.4(d), which is at issue here. Further, this argument fails to take into account the facts known to the *Alpha* court and the additional testimony heard by the panel. And although the *Alpha* court gave Kline the "benefit of the doubt" primarily because of his counsel's efforts to characterize his mistakes as honest, given the testimony from Kline's disciplinary hearing, we can no longer extend Kline the benefit **[***75]** of any doubt.

We turn first to Kline's argument that the court's statement in *Alpha* directs the conclusion in this disciplinary case. ***HN19*** Conduct rises to the level of criminal contempt when it is "'directed against the dignity and authority of the court, or a judge acting judicially; it is an act obstructing the administration of justice which tends to bring the court into disrepute or disrespect.'" *Hendrix v. Consolidated Van Lines, Inc.*, 176 Kan. 101, 109, 269 P.2d 435 (1954) (quoting 17 C.J.S., Contempt § 5). A finding of criminal contempt requires **[*136]** the court to determine that the person acted with the requisite intent, and such a finding depends not only on the "'nature of the act,'" but also upon "'intent, good faith, and the surrounding circumstances.'" *Alpha*, 280 Kan. at 928 (quoting *Threadgill v. Beard*, 225 Kan. 296, Syl. ¶ 6, 590 P.2d 1021 [1979]). Thus, we must consider the *Alpha* court's conclusion that "[n]o prejudice" resulted from Kline's actions against the backdrop of the criminal contempt elements and Kline's counsel's arguments in *Alpha* that Kline made an "honest" mistake in attaching the documents. See *Alpha*, 280 Kan. at 929.

In considering the criminal contempt issue, **[***76]** the *Alpha* court limited its review to whether Kline's violation of the court's order prejudiced the proceeding before the court. *Alpha*, 280 Kan. at 929 ("Any disclosure of sealed material did nothing to impair the orderly nature of this proceeding or the soundness of its eventual result; the attorney general and his staff did not release information harmful to personal privacy, prejudicial to the administration of justice, or detrimental to this court's performance of its duties.").

In *CHPP*, the court recognized the distinction between a contempt proceeding and the rules of professional conduct. There, the court considered and rejected CHPP's invitation to find Kline in indirect civil contempt for mishandling patient records once they reached his office. In doing so, the court implicitly recognized that Kline's actions might implicate the KRPC, despite not meeting the requirements for civil contempt. *CHPP*, 287 Kan. at 418, 425 (rejecting CHPP's invitation to initiate civil contempt proceedings but noting "these and other instances of [Kline's conduct relating to the handling of confidential medical files] raise troubling questions about Kline's and **[**349]** any other involved lawyer's compliance **[***77]** with the Kansas Rules of Professional Conduct" and ordering a copy of the opinion sent to the Disciplinary Administrator).

In contrast to the contempt question in *Alpha*, we are tasked here with considering the broader implications of Kline's conduct. And as we have discussed, ***HN20*** an

attorney's conduct can violate KRPC 8.4(d) even if it does not result in identifiable harm to an actual proceeding. Rather, conduct is "prejudicial to the administration of justice" when it tends to injure or harm the justice system more **[*137]** generally. See *Pyle*, 283 Kan. at 829-30. In sum, the *Alpha* court's decision regarding contempt does not direct our conclusion here.

Further, in considering whether Kline's conduct violated KRPC 8.4(d), we note the hearing panel considered evidence not available to the *Alpha* court. Namely, in the disciplinary proceeding, Kline's subordinates testified they knowingly attached the sealed documents because of their frustration with the clinics' public statements and the clinics' perceived ability to provide a one-sided version of events to the public. Moreover, Kline specifically admitted that while his office attached the documents in order to aid the court in understanding his **[***78]** position, the record is clear the court already had the hearing transcript in its possession, and Kline testified the documents were attached so "others" would understand his position. In addition, Kline's press conference and his office's public disclosure of the sealed documents through that venue did nothing to further the *Alpha* court's consideration of the issues presented.

Taken collectively, the testimony presented at the hearing does not demonstrate a staff struggling to understand a difficult order so as to present clear arguments to the court, nor does it evidence an "honest mistake." And while Kline's motivations may have been in doubt at the time of the *Alpha* court's decision, his motivations are clear now. The *CHPP* court's prophetic implication that additional facts could become known and warrant sanction was borne out at Kline's disciplinary hearing. See *CHPP*, 287 Kan. at 418-19, 425 (declining to institute a civil contempt proceeding "at this time" but recognizing that such an action might be "appropriate particularly if additional or amplifying information should come to light about [Kline's] behavior" after the patient records came into his possession).

Simply said, regardless **[***79]** of Kline's view about the wisdom of the *Alpha* court's order or any frustration with his inability to fully express his position to the public, as an officer of the court he was obligated to follow the court's directive. Kline's intentional disregard of that directive lessened the public's confidence in the judicial system's integrity and prejudiced the administration of justice generally. Accordingly, we find clear and convincing evidence to **[*138]** support the panel's conclusion that Kline violated KRPC 8.4(d) by directing his staff to attach sealed documents to his brief in contravention of the *Alpha* court's order.

Kline's Conduct Adversely Reflected on His Fitness to Practice Law in Violation of KRPC 8.4(g).

The panel also found Kline's actions in having sealed documents attached to the *Alpha* brief violated ***HN21*** KRPC 8.4(g) (2012 Kan. Ct. R. Annot. 644), which prohibits a lawyer from engaging in "any other conduct that adversely reflects on the lawyer's fitness to practice law." In so finding, the panel specifically noted Kline's actions defeated the court's purpose in sealing the record.

In contesting this violation, Kline again points to the *Alpha* court's refusal to hold him in contempt and suggests **[***80]** this refusal precludes the panel from finding a KRPC 8.4(g) violation. Further, he argues his actions did not defeat the court's purpose in sealing the record because he redacted personal information. In response, the Disciplinary Administrator reiterates that Kline is required to follow court orders and points out the distinction between this proceeding and the proceeding for contempt in *Alpha*.

Just as Kline's actions in directly contravening a Supreme Court order prejudiced the administration of justice, his actions most certainly reflect poorly on his fitness to practice law. Once again, regardless of Kline's **[**350]** view about the court's direction or his frustration with being required to act within the confines of that direction, the KRPC and our caselaw are replete with examples demonstrating that attorneys are obligated to show deference and respect for tribunals. See ***HN22*** KRPC 3.3 (2012 Kan. Ct. R. Annot. 582) (requiring candor towards tribunals); ***HN23*** KRPC 8.2 (2012 Kan. Ct. R. Annot. 640) (prohibiting a lawyer from making a false statement regarding the integrity or qualifications of a judge); see also *In re Nelson*, 278 Kan. 506, 509, 511, 102 P.3d 1140 (2004) (disciplining attorney under KRPC 8.4[g] **[***81]** for failing to follow court's orders); *In re Arnold*, 274 Kan. 761, 765, 773, 56 P.3d 259 (2002) (disciplining attorney for "intemperate" remarks made to judge and noting remarks showed lack of respect).

[*139] Further, Kline's action in redacting personal information supports the violation by demonstrating Kline's awareness of the court's order and his effort to circumvent that order rather than adhere to its directive. Kline's violation of KRPC 8.4(g) is established by clear and convincing evidence.

Kline Failed to Mitigate or Avoid Consequences of His Subordinates' Conduct in Violation of KRPC 5.1(c)(2).

Finally, the panel found Kline's failure to mitigate the consequences of his staff's actions in attaching the sealed documents to the brief in *Alpha* violated ***HN24*** KRPC 5.1(c)(2), which places responsibility on a lawyer with direct supervisory authority over another lawyer for the other lawyer's misconduct if the supervising lawyer knows of the misconduct and fails to take remedial action when the misconduct's consequences could be avoided.

Because we have concluded Kline's directive to his staff to attach sealed documents to his brief contradicted the *Alpha* court's order in violation of KRPC 8.4(d) **[***82]** and (g), it necessarily follows that Kline's subordinates' actions in carrying out this directive violated those same rules. And because Kline clearly knew of his subordinates' misconduct and failed to correct it, clear and convincing evidence supports the panel's conclusion that Kline also violated KRPC 5.1(c)(2).

THE PANEL'S CONCLUSION THAT KLINE VIOLATED KRPC 3.3(A)(1) AND KRPC 8.4(C) BY FILING A MOTION TO CLARIFY CONTAINING FALSE STATEMENTS IS SUPPORTED BY CLEAR AND CONVINCING EVIDENCE.

In arguments before the *Alpha* court on September 8, 2005, Rucker advised that Kline's office had not subpoenaed mandatory reporters of sexual abuse other than abortion clinics. But after the argument, Kline's office filed two motions purporting to clarify Rucker's statements. The hearing panel concluded the second motion, which indicated Kline's office actually had "sought records and information from other mandatory reporters," contained a false statement in violation of KRPC 3.3(a)(1) and KRPC 8.4(c).

[*140] *Additional Relevant Facts*

Rucker argued Kline's position before the *Alpha* court while Kline listened from his office to the live Internet audio feed. During the argument, justices questioned Rucker about **[***83]** the extent of Kline's investigation of the abortion clinics. Justice Donald L. Allegrucci asked Rucker if Kline's office had any evidence, other than medical records, that these clinics had failed to report instances of sexual abuse of patients under the age of 16. Rucker replied that other evidence existed "on a case by case basis." Continuing with that line of questioning, Justice Allegrucci asked if Kline's office had "evidence on other situations like this and which do not involve abortions, but involve a child coming to—being term and being born in a hospital, do you go around to hospitals and attempt to get these records . . . [or] is your evidence only concerning those who have abortions." Rucker replied, "No." Justice Allegrucci then clarified and asked, "You have evidence of those who come to full term, are you pursuing those as well?" and Rucker answered in the affirmative.

At this point, Justice Carol A. Beier clarified, "You subpoenaed hospitals—[?]" Rucker replied, "No," and explained that Kline's office had investigated but not subpoenaed hospitals. Justice Beier then asked whether **[**351]** Kline's office had subpoenaed other mandatory reporters. Rucker described the investigation **[***84]** as secret and advised the court he could reveal only that Kline's office had "looked into live births." Justice Beier asked, "Have you subpoenaed entities who are mandatory reporters like the abortion clinics that you have subpoenaed in this inquisition?" Rucker replied, "At this juncture the answer is no." Rucker then stressed the investigation's ongoing nature and indicated it was not limited to abortion clinics.

After Rucker's argument, Kline, Rucker, Maag, and Assistant Attorney General Kristafer Ailslieger met to discuss the argument. As a result of that discussion, approximately 1 week after oral argument, Kline filed two motions to clarify. The first motion simply clarified that Kline's office had no issues with a court-appointed physician reviewing the medical files for redaction, rather than a **[*141]** physician selected by the State. *Alpha*, 280 Kan. at 912. But the second motion, the one pertinent to this proceeding, stated:

> "1. As part of this criminal investigation and/or inquisition, [*Kline*] *has sought records and information from other mandatory reporters besides the petitioners in the present mandamus action.* This effort has included subpoenas for records relating to live births **[***85]** involving mothers under the legal age of sexual consent.
>
> "2. At oral argument, counsel was unable to directly and adequately respond to the questions from the bench specifically relating to this topic because of the secret nature of the criminal investigation and inquisition and the existence of a do not disclose order relating to the subpoenas of live birth records." (Emphasis added.)

In its opinion, the *Alpha* court concluded Kline's motion to clarify changed rather than clarified Rucker's statements at oral argument. *Alpha*, 280 Kan. at 912.

The court speculated that the "do not disclose" order referenced in the motion to clarify may have caused Rucker to be "less than forthright" with the Supreme Court. Nevertheless, the court pointed out this "order" apparently had been lifted approximately a month later because Kline conducted a press conference during which he stated he possessed birth records for infants born to girls younger than 16. 280 Kan. at 912-13.

At his disciplinary hearing, Kline testified the court drew a false inference that Rucker was untruthful and that Kline "fe[lt] terrible about that" because he believed "Rucker was trying very hard to be forthright." Nevertheless, [***86] Kline characterized as dicta the court's comments regarding Rucker's initial response at oral argument, the motion to clarify, and Rucker's lack of forthrightness. Therefore, Kline decided to "leave it alone" and "get on with business."

In further explanation of the statements in the second motion to clarify, Kline testified his office had subpoenaed documents from KDHE, a state agency, which Kline characterized as a "repository" of information from mandatory reporters. Therefore, he reasoned the motion to clarify accurately indicated his office had subpoenaed "other mandatory reporters." Specifically, Kline testified that prior to the oral argument in *Alpha*, Judge Anderson issued a subpoena to KDHE for live-birth records of mothers under [*142] the age of 16, but the subpoena prohibited revealing its existence. According to Kline, this nondisclosure order put Rucker between a "rock and a hard place" because he could not reveal the existence of the KDHE live-birth subpoena. Kline testified Rucker's responses left an improper impression that the office had not issued other subpoenas—an impression he intended to correct with the motion to clarify.

In contrast, Rucker testified at Kline's disciplinary [***87] hearing that Rucker did not believe KDHE was a mandatory reporter; thus, he did not believe his statement at oral argument required correction or clarification. In fact, Rucker testified he was "disappointed" the motion to clarify was filed and he did not sign the document purporting to clarify his own statements to the court.

Kline's Statement in the Motion to Clarify Was Untruthful.

The panel found Kline's statement that his office had "sought records and information [**352] from other mandatory reporters" was false because Kline, in fact, had not subpoenaed any mandatory reporters other than abortion clinics. Therefore, the panel concluded his statement violated KRPC 3.3(a)(1), prohibiting false statements of material facts, and KRPC 8.4(c), prohibiting dishonesty.

In disputing these violations, Kline points out the panel applied a version of KRPC 3.3(a)(1) that was not in effect until July 1, 2007, which was after the conduct supporting this violation had occurred. Kline contends this court cannot apply a version of the rule not in effect at the time of the alleged misconduct. At oral argument, the Disciplinary Administrator conceded the former rule applies. Therefore, we will consider the [***88] panel's findings utilizing the version of KRPC 3.3(a)(1) in effect at the time. That rule provided: ***HN25*** "(a) A lawyer shall not knowingly: (1) make a false statement of material fact or law to a tribunal . . . ." KRPC 3.3 (2005 Kan. Ct. R. Annot. 462).

For this court to conclude that Kline's motion to clarify contained a false statement violating KRPC 3.3 or KRPC 8.4, we must first determine the statement's truthfulness. See KRPC 3.3(a)(1) (2005 Kan. Ct. R. Annot. 462); KRPC 8.4(c). The hearing panel rejected Kline's explanation that the statement was truthful and [*143] concluded that while Kline did subpoena KDHE, a "repository" of information received from mandatory reporters, he clearly did not subpoena any mandatory reporters other than the clinics.

In arguing against the panel's findings, Kline relies on a game of semantics. Specifically, he claims his statement was truthful because of a single word not included in the statement. Namely, he contends, the motion to clarify did not indicate that "he sought records *directly* from other mandatory reporters." Instead, the motion simply indicated Kline sought records "from other mandatory reporters besides the petitioners in the present mandamus [***89] action." Kline contends that by omitting the word "directly," his motion left open the possibility that he sought information from KDHE, an agency that acts as a *repository* for mandatory reporters.

The Disciplinary Administrator's response is simple and straightforward—Rucker's answers to the court in *Alpha*, when read in context, demonstrate Kline's motion to clarify contained a false statement.

The flaws in Kline's attempts at nuance are numerous, not the least of which is that he now seems to be suggesting he purposefully provided the court with a vague clarification of Rucker's oral argument statement in order to preserve the truthfulness of the clarification.

But putting this aside, the more obvious and fatal flaw is that Kline asks us to consider the clarification's statements in a vacuum, with no context or clues as to their motivation.

As the Disciplinary Administrator points out, the court did not ask Rucker whether Kline's office had sought information from a "repository" for mandatory reporters. Instead, the inquiry pointedly asked, "Have you *subpoenaed entities who are mandatory reporters* like the abortion clinics that you have subpoenaed in this inquisition?" (Emphasis added.) [***90] Rucker answered simply, "[N]o."

Significantly, Kline's motion to clarify acknowledged in the second paragraph that his explanations were directed to "questions from the bench specifically relating to this topic." Yet he now seeks to persuade us that his statements were far more general, responding to a question never asked—*i.e.*, whether the Attorney General had sought information from entities that were merely repositories of information from mandatory reporters.

[*144] Kline further argues that Rucker's responses at oral argument were "consistent with, and clarified by" the motion to clarify. But this is not true. Rucker provided a straightforward response when he answered "no" to the question whether Kline had subpoenaed other mandatory reporters like the abortion clinics. In contrast, Kline's motion essentially sought to change Rucker's "no" to a "yes" by indicating Kline had sought records and information from "other mandatory reporters besides the petitioners in the present mandamus action."

Under these circumstances, we find clear and convincing evidence supports the panel's [**353] conclusion that Kline falsely advised the *Alpha* court through the second motion to clarify that he had "sought records [***91] and information from other mandatory reporters."

Having determined clear and convincing evidence supports the panel's conclusion that Kline's statement in the second motion to clarify was false, we must next consider Kline's claim that his statements were not material to any issue before the *Alpha* court. Notably, Kline cites no authority to support his argument.

HN26 Under KRPC 3.3 (2005 Kan. Ct. R. Annot. 462), "(a) A lawyer shall not knowingly: (1) make a false statement of *material* fact or law to a tribunal . . . ." (Emphasis added.) While the panel made no finding regarding materiality, this court can do so since materiality is a question of law. See *State v. Wilson*, 295 Kan. 605, 617, 289 P.3d 1082 (2012) (stating that this court reviews materiality de novo).

HN27 This court has found evidence to be material when it is ""significant under the substantive law of the case and properly at issue."" *State v. Reid*, 286 Kan. 494, 505, 186 P.3d 713 (2008). Similarly, we have held a fact ""is not material unless it has a legitimate and effective bearing on the decision of the ultimate facts in issue."" *State v. Goodson*, 281 Kan. 913, 922, 135 P.3d 1116 (2006). Thus, Kline's statement was material [***92] if it had "bearing" on an ultimate issue in *Alpha*.

We need not linger long on materiality. By Rucker's own account, his responses were straightforward and truthful. And Kline's actions taken at the time to clarify these straightforward and truthful statements belies his current position that the statements were [*145] not material. Clearly, Kline believed Rucker's responses—and their "clarification"—were material or he would not have insisted on filing the motion over Rucker's objection. Moreover, the recognition in the *Alpha* opinion that the motion to clarify "change[d]" rather than "clarifie[d]" Rucker's responses, demonstrates materiality.

Finally, we note that because we have found clear and convincing evidence to support the panel's finding that Kline's motion to clarify contained a materially false statement, we also agree with the panel that Kline's conduct violated ***HN28*** KRPC 8.4(c) (2012 Kan. Ct. R. Annot. 643), which prohibits engaging in conduct involving "dishonesty, fraud, deceit or misrepresentation."

THE PANEL INAPPROPRIATELY APPLIED KRPC 3.8(F), AND ITS FINDINGS ARE INSUFFICIENT FOR THIS COURT TO DETERMINE WHETHER KLINE'S COMMENTS ON "THE O'REILLY FACTOR" VIOLATED KRPC 3.6.

The panel [***93] concluded that Kline's comments on the nationally televised show, "The O'Reilly Factor," a few days before the general election in November 2006 violated KRPC 3.8(f) (2012 Kan. Ct. R. Annot. 602) because they "had a substantial likelihood of heightening public condemnation of Dr. Tiller" and served no legitimate law enforcement purpose. Kline disputes both that the panel can rely on KRPC 3.8(f) and that the record contains clear and convincing evidence to support this violation. Alternatively, he contends he did not violate the applicable rule, KRPC 3.6 (2006 Kan. Ct. R. Annot. 479), because his actions

fell within the rule's two "safe harbors."

Additional Relevant Facts

Four days before the November 2006 election in which he was a candidate for reelection as Attorney General, Kline appeared by remote interview on "The O'Reilly Factor." The program's host, Bill O'Reilly, opened the program with a monologue questioning Tiller's morality. O'Reilly referred to Tiller's "barbaric [medical] practice" and characterized Tiller's actions as an "abortion mill." Following his monologue, O'Reilly engaged in a heated discussion **[*146]** with a pro-choice advocate. He then conducted a remote interview with **[***94]** Kline, who was in Topeka.

Highly summarized, during the exchange, Kline, who O'Reilly introduced as the Kansas Attorney General seeking to "rectify the [Tiller] situation," discussed that the reason for mandatory reporting laws was uncovering child rape. Specifically, Kline stated, "One of the first steps of a rapist when they have a child victim and the child is pregnant is to **[**354]** eradicate evidence of the rape. And that means stopping in at an abortion clinic." After O'Reilly proffered that Tiller performed abortions based on patients' diagnosis of depression, Kline verified his office's investigation revealed WHCS had performed some late-term abortions based on patients' mental health rather than physical health. At that point in the interview, Kline reiterated, "[I]t's important for your listeners to know that women were never under investigation. Their identity [was] never sought." He then discussed an instance in which he claimed a Wichita man convicted of rape took his child victim to a clinic for an abortion.

O'Reilly closed the interview by asking Kline, "[L]ook, man-to-man, American-to-American, is this just far left craziness gone wild?" To which, Kline replied:

> "Yeah. There's **[***95]** a deception being perpetrated in Kansas and on America. And that is, that we cannot recognize any value at any time in an unborn child. And, therefore, we have to cover up that deception by not admitting at any time that there ought to be any scrutiny for what is happening inside abortion clinics. And as a result, they can be safe havens for child rapists."

Kline further responded, "As a result, illegal late-term abortions can be performed and nobody has the right to look inside the clinic. That is wrong." Finally, Kline reiterated that his job was to enforce the law.

In Finding a Violation, the Panel Relied on a Rule Not in Effect When Kline Appeared on "The O'Reilly Factor."

In considering the Disciplinary Administrator's allegations regarding Kline's interview with O'Reilly, the panel relied on KRPC 3.8(f) to conclude Kline's actions "had a substantial likelihood of heightening public condemnation of Dr. Tiller" and served no legitimate **[*147]** law enforcement purpose. On its face, KRPC 3.8(f) would seem to apply. That rule pertains to the "Special Responsibilities of a Prosecutor" and limits public statements of prosecutors. See ***HN29*** KRPC 3.8(f) (2012 Kan. Ct. R. Annot. 602-603 ("The prosecutor **[***96]** in a criminal case shall . . . except for statements . . . that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused."). And at the time of the interview, Kline continued to criminally investigate Tiller.

But KRPC 3.8(f) was not effective until July 1, 2007, 8 months after Kline appeared on "The O'Reilly Factor" (O'Reilly). Compare KRPC 3.8 (2012 Kan. Ct. R. Annot. 602); with KRPC 3.8 (2006 Kan. Ct. R. Annot. 482). Further, the pre-2007 version of KRPC 3.8 contained no similar prohibition on prosecutorial statements heightening public condemnation of the accused. See KRPC 3.8 (2006 Kan. Ct. R. Annot. 482). Thus, as the Disciplinary Administrator conceded at oral argument, the panel's findings of a KRPC 3.8(f) violation cannot stand.

The Panel's Findings Are Insufficient to Enable This Court to Find a Violation of KRPC 3.6.

Alternatively, the Disciplinary Administrator points out that he also alleged Kline's appearance on O'Reilly violated KRPC 3.6, which regulates trial publicity. The version of KRPC 3.6 in effect when Kline appeared on O'Reilly provided: ***HN30*** "A lawyer shall **[***97]** not make an extrajudicial statement . . . if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding." KRPC 3.6(a) (2006 Kan. Ct. R. Annot. 479).

Although no criminal charges had been filed against Tiller when Kline appeared on O'Reilly, the Disciplinary Administrator contends this court can find clear and convincing evidence that Kline knew or reasonably should have known his statements had a substantial likelihood of prejudicing a future adjudicative proceeding—*i.e.*, a criminal trial against Tiller. Kline disputes the Disciplinary Administrator's suggestion,

arguing there is no evidence Kline knew his statements had a chance of prejudicing an adjudicative [*148] proceeding; alternatively, he contends his statements fell within ***HN31*** two "safe harbors" to KRPC 3.6 that permit a lawyer to "state without elaboration: (1) the general nature of the claim or defense; [or] (2) the information [**355] contained in a public record." KRPC 3.6(c) (2006 Kan. Ct. R. Annot. 480).

But we need not consider application of the safe harbors because we are unable to determine from the panel's report whether it considered KRPC 3.6 and found [***98] a lack of clear and convincing evidence or whether it simply declined to consider KRPC 3.6, opting instead to apply the not-as-yet effective amended KRPC 3.8(f), which specifically applies to prosecutors.

Significantly, while the Disciplinary Administrator charged a KRPC 3.6 violation, we note the Disciplinary Administrator's investigators concluded Kline's appearance on O'Reilly did not violate the Rules of Professional Conduct. And while the Disciplinary Administrator discussed KRPC 3.6 at the hearing and asserted in closing argument that Kline violated that rule, the Disciplinary Administrator also advocated for a violation of KRPC 3.8(f), which required entirely different findings by the panel.

This lack of findings is problematic. To determine whether Kline's conduct violated KRPC 3.6, we would be required to resolve unanswered factual questions, including whether there is evidence that (1) Kline's comments on O'Reilly had a substantial likelihood of materially prejudicing an adjudicative proceeding and (2) whether Kline knew or should have known of the impact of his comments.

In addition to resolving these factual questions, to apply KRPC 3.6, we would also need to consider whether [***99] Kline's statements on O'Reilly should be considered in isolation or in the context of the entire program. While the parties adopt contrary positions as to whether O'Reilly's inflammatory monologue can be attributed to Kline under KRPC 3.6, neither party cites authority for their respective positions. We are unwilling to engage the issue further on this record.

Finally, even if this court were willing to resolve these factual and legal questions to find a violation of KRPC 3.6, we would then have to consider Kline's argument that his statements fall under [*149] the two safe harbors. Again, these determinations would require factual findings regarding whether Kline stated "without elaboration" the "general nature of the claim or defense" or whether the "information [was] contained in a public record." KRPC 3.6(b)(1)-(2) (2006 Kan. Ct. R. Annot. 480).

To summarize, while Kline's appearance on O'Reilly might well invite questions regarding the scope and prohibitions of KRPC 3.8(f), he cannot be held responsible for his conduct under a rule that did not exist at the time of that conduct. And while appearances like Kline's on O'Reilly certainly can implicate an attorney's responsibilities under KRPC 3.6, [***100] we have not been presented with a sufficient record to make the multiple findings necessary to consider whether Kline's conduct violated that rule.

THE PANEL'S CONCLUSION THAT KLINE VIOLATED KRPC 3.3 BY FAILING TO CORRECT A FALSE STATEMENT IN A STATUS REPORT IS NOT SUPPORTED BY CLEAR AND CONVINCING EVIDENCE.

The panel concluded Kline had personal knowledge that his office filed a status and disposition report with Judge Anderson identifying the location of the copies of all medical files obtained by Kline's office when he was Attorney General. Therefore, the panel found Kline violated KRPC 3.3(a)(1) (2012 Kan. Ct. R. Annot. 582) when he failed to update the report after he ordered copies of the WHCS medical records be taken to Johnson County, a fact not contained in the report. And by failing to update the report, the panel found the report contained false information, which Kline failed to correct in violation of ***HN32*** KRPC 3.3(a)(1)'s prohibition on "fail[ing] to correct a false statement of material fact or law previously made to the tribunal." Additionally, the panel found Maxwell violated KRPC 3.3(a)(1) by failing to correct the report and, as Maxwell's direct supervisor, Kline was responsible [***101] for Maxwell's violation under KRPC 5.1(c).

Additional Relevant Facts

On January 8, 2007, the day Morrison was sworn in to statewide office and Kline was sworn in as Johnson County District Attorney, Williams and Reed delivered a status report to Judge Anderson. [*150] That report, [**356] which Judge Anderson requested to ensure that all copies of the medical files were accounted for, indicated WHCS records would be delivered to the Shawnee County District Attorney for potential prosecution. By implication, the report informed Judge Anderson that Kline would not retain a copy of the WHCS medical records when Kline moved to his new position in Johnson County.

But later that same day, after the report had been delivered to Judge Anderson, Kline ordered Rucker to have Williams and Reed copy the WHCS medical files and take those copies to the Johnson County District Attorney's office. This request frustrated Williams because the transition plan did not include taking a copy of the WHCS records to Johnson County. Additionally, Williams asked Rucker who authorized copying the records, and Rucker assured him Kline, as Attorney General, had authorized the copying.

This late request forced Williams and Reed, [***102] who had already delivered a copy of the WHCS records to the Shawnee County District Attorney, to retrieve those records, take them to a local copy shop, personally copy each record, and then return the initial copies to the Shawnee County District Attorney's office. Williams directed Reed to retain the new copies of the WHCS medical records at Reed's apartment until he was instructed to deliver them to the District Attorney's office.

In spite of this late change of plans, Kline's office did not update the status report given to Judge Anderson. Nor did Kline's office update the status report to show that due to turmoil in the transition and security concerns, these copies of WHCS patient files were being kept in Reed's apartment in a plastic container from January to mid-February 2007, when Reed delivered them to Kline's Johnson County office.

Judge Anderson testified he relied on the status report and sent a letter and copy of it to then Attorney General Morrison. After receiving Judge Anderson's letter and the status report, a member of Morrison's staff, Chief Counsel Richard Guinn, sent written correspondence to Kline asking him to return all records related to the abortion clinic [***103] investigation. Kline quickly replied by letter that "[a]ll of the documents were accounted for during my tenure as [*151] Attorney General" and that "[a] report was filed with the Court reflecting [the] same." Kline indicated any additional questions should be directed to Maxwell.

Kline continued to investigate CHPP and WHCS in his new role as Johnson County District Attorney. On April 9, 2007, as a part of that effort, Kline met with Judge Anderson to request a subpoena in the Shawnee County inquisition to allow Kline to obtain additional records. During this meeting, Kline showed Judge Anderson a copy of a WHCS patient file and indicated he believed some WHCS patient files contained evidence of a criminal conspiracy between CHPP and WHCS to commit illegal late-term abortions. Judge Anderson, who was "pretty sure" the status report had not indicated the "Tiller records were going to Kansas City," testified he asked Kline where he obtained the WHCS file. Kline indicated his staff members had taken copies to Johnson County and Kline "'thought [Anderson] knew' or something of that nature."

After confirming the status report did not indicate Kline retained copies of WHCS patient files, Judge Anderson [***104] telephoned Maxwell the next day, April 10, 2007, and advised him the court would order the WHCS records returned. Later that same day, Kline telephoned Judge Anderson and advocated that he be permitted to retain the WHCS patient files. Judge Anderson set a hearing on the matter for the following day in order to permit Kline to "make [his] position known" but indicated the court intended to issue a written order requiring Kline to return the files.

The panel concluded that Kline and Maxwell violated ***HN33*** KRPC 3.3(a)(1), which governs "Candor toward the Tribunal," by failing to correct the status report provided to Judge Anderson. The panel also held Kline responsible for Maxwell's violation under KRPC 5.1(c).

[**357] *The Record Does Not Contain Clear and Convincing Evidence That Kline Had Actual Knowledge of the Falsity of Statements in the Status Report.*

In arguing the panel's findings regarding this violation of KRPC 3.3 are not supported by clear and convincing evidence, Kline reiterates [*152] his argument that KRPC 3.3 requires proof of actual knowledge of the statement's falsity. He contends the evidence does not clearly and convincingly show he had actual knowledge of the status report's omissions [***105] regarding the location of the WHCS files. As Kline argues, if he was unaware the report contained a false statement, he cannot be obligated to correct it. We agree.

Instead, as with the panel's findings regarding Kline's testimony about whether his office sought adult patient identities, it appears the panel relied upon evidence that indicates, at best, that Kline should have known the report contained false information regarding the location of the WHCS records. Specifically, the panel's findings can be summarized as follows: (1) Maxwell, with Williams and Reed's assistance, prepared the status report requested by Judge Anderson; (2) the status report did not indicate a copy of redacted WHCS records would be transferred to Johnson County; (3) shortly after Williams and Reed delivered the status report to Judge Anderson, Kline directed Rucker to have

copies of the redacted WHCS patient files taken to Johnson County; (4) Rucker then instructed Williams and Reed to retrieve the WHCS records, which had already been delivered to the Shawnee County District Attorney's office, and make copies of them for delivery to Johnson County; and (5) Williams and Reed retrieved the records, made copies, **[***106]** and delivered them to Reed's apartment in Topeka.

Significantly, while the panel clearly found Maxwell prepared, and thus had actual knowledge of, the status report's contents, the panel made no findings regarding whether Kline actually knew the report's contents. Instead, the only finding regarding Kline's knowledge of the report noted Judge King specifically found as part of the mandamus proceedings that Kline was not familiar with the "'content of the Status and Disposition Report,'" nor was Kline aware that Judge Anderson had requested an accounting of the location of the files. Nevertheless, the panel minimized Judge King's findings, noting Judge King "must not have realized the significance" of Kline's statement in a letter to Morrison's newly appointed Chief Counsel, Rick Guinn, that a "'[status] report was filed with the Court.'" But as Kline points out, his letter to Guinn establishes only that Kline had knowledge a report was prepared **[*153]** by Maxwell and provided to the court, *not* that Kline had actual knowledge about the report's *specific content* or its falsity.

In his response brief, the Disciplinary Administrator fails to address Kline's argument that KRPC 3.3 requires clear **[***107]** and convincing evidence that Kline had "actual knowledge" of the falsities contained in the report. Instead, the Disciplinary Administrator simply reiterates the panel's finding that within 4 days of the status report's issuance, Kline "was familiar with the status and disposition report," because he referred to it in written correspondence to Guinn.

We reiterate that if the panel had been tasked with determining whether Kline "should have known" of the report's contents prepared by Maxwell, the result of our review might be different. Instead, because KRPC 3.3 requires actual knowledge of the statement's falsity, we conclude the panel's findings are not supported by clear and convincing evidence.

In light of this conclusion, we need not consider Kline's additional argument that even if he had actual knowledge of the statement's falsity, he had no obligation to correct it because it was not material. Similarly, we need not consider Kline's reply brief argument that the panel applied a version of KRPC 3.3 that was not in effect at the time the conduct at issue occurred. While it does appear the panel applied the version of KRPC 3.3 that became effective on July 1, 2007, nearly 3 months **[***108]** after Kline surrendered the WHCS records, the current rule, like the prior rule, requires proof Kline had actual knowledge of the report's falsity. Thus, under either the current rule or the former rule, we would lack clear and convincing **[**358]** evidence of Kline's actual knowledge of the statement's falsity.

The Panel's Finding That Kline Violated KRPC 5.1 Due to His Subordinate's Failing to Correct the Report Is Not Supported by Clear and Convincing Evidence.

The panel also found Maxwell violated KRPC 3.3(a)(1) by failing to correct the report and that as Maxwell's direct supervisor, Kline was responsible for Maxwell's violation under KRPC 5.1(c)(2).

[*154] But ***HN34*** KRPC 5.1(c)(2) (2012 Kan. Ct. R. Annot. 612) holds a supervising lawyer responsible for another lawyer's conduct only if the lawyer "knows of the conduct at a time when its consequences can be avoided." As discussed above, while there may well have been clear and convincing evidence that Maxwell knew of the falsity in the report, there is no clear and convincing evidence Kline knew of the misstatements at a time when the consequences could be avoided. Therefore, we cannot uphold the panel's finding that Kline violated KRPC 5.1(c)(2).

THE PANEL'S **[***109]** CONCLUSION THAT KLINE VIOLATED KRPC 3.3(A)(3) BY FAILING TO CORRECT HIS FALSE TESTIMONY TO JUDGE KING THAT HE HAD THREE SUMMARIES OF WHCS PATIENT MEDICAL FILES IS SUPPORTED BY CLEAR AND CONVINCING EVIDENCE, AS IS THE PANEL'S FINDING THAT KLINE VIOLATED KRPC 8.4(C) BY ADVISING THE COURT IN ORAL ARGUMENT THAT HE HAD NO SUMMARIES.

The panel found Kline's testimony on the same subject on two different occasions formed the basis for multiple rule violations. All stemmed from Kline's attempt to retain information from WHCS patient files, in spite of Judge Anderson advising Kline during a telephone call on April 10, 2007, that Kline would likely be ordered to return these patient files. But unbeknown to Judge Anderson, Kline then directed a staff member to make handwritten "summaries" of all 62 WHCS patient files. And at a hearing on April 11, 2007, Kline was ordered to return the files to Judge Anderson. Seven months later,

in November 2007, while Kline still had those 62 summaries, he testified under oath before Judge King that he had only 3 summaries.

The panel concluded Kline's testimony violated ***HN35*** KRPC 3.3(a)(3), which prohibits offering false evidence and failing to take remedial measures **[***110]** if a lawyer comes to know false material evidence was presented, and ***HN36*** KRPC 3.3(a)(1), which prohibits, in part, making false statements.

The other violations found by the panel relate to Kline's testimony during oral argument before the *CHPP* court on June 12, 2008. During that argument, Kline advised that he possessed no **[*155]** summaries of patient files, when in fact he still had the same 62 summaries he had directed his staff to create in April 2007. The panel concluded this statement violated KRPC 8.4(c) (2012 Kan. Ct. R. Annot. 643), which prohibits dishonesty.

Additional Relevant Facts

An understanding of the significance of Kline's actions with respect to these violations requires the recitation of a detailed factual history spanning approximately 18 months.

As discussed above, on the day he left statewide office Kline directed his staff to copy the WHCS patient files and take them to the Johnson County District Attorney's office. But Kline's office had already provided Judge Anderson with a status report that same day that did not indicate any WHCS files would go to his new office in Johnson County. When Judge Anderson eventually discovered on April 9, 2007, that Kline had transferred WHCS **[***111]** patient files to Johnson County, he ordered all copies returned to his court at a hearing on April 11, 2007. Judge Anderson testified at Kline's disciplinary hearing that Kline was "really upset" about returning these medical records to the court and that Kline ardently advocated he had a right to maintain possession of them as Johnson County District Attorney.

While Kline brought the WHCS patient medical files to the hearing, he did not tell Judge Anderson he had directed a staff member to prepare handwritten "summaries" of all 62 WHCS patient files in the 24-hour **[**359]** period preceding the hearing or that he had retained the information contained in those files.

Notably, although described by Kline as "summaries," the information prepared by Kline's staff is more accurately characterized as a handwritten transcript of large portions of the contents of the WHCS files. Each summary states nearly all of the substantive information included in the corresponding WHCS patient files, including: the patient's age, address, current medications, and medical history; the patient's corresponding KDHE number; the name of the referring physician, if any; and Dr. Tiller's diagnosis. We have continued to **[***112]** use the term "summaries" to refer to these documents because they have been referred to in that manner **[*156]** throughout the disciplinary process; but we do so reluctantly and only for ease of reference.

Kline, Rucker, Maxwell, Williams, Reed, and another attorney from Kline's office all appeared at the April 11, 2007, hearing ordered by Judge Anderson, as did members of Morrison's staff. Kline advised Judge Anderson that he had brought with him "*[a]ll the records that [Judge Anderson] requested be returned*." (Emphasis added.) In doing so, Kline suggested that Judge Anderson had granted authority for him to take the files to Johnson County and commented that Judge Anderson's "forgetfulness" had resulted in the misunderstanding. Kline indicated, however, that he understood this forgetfulness, "considering the circumstances which we were under at the time."

Unmoved, Judge Anderson reiterated that he had ordered Kline to return all copies of the WHCS files and that he had not been informed that the files would be taken to Johnson County. At one point, Judge Anderson clarified, "But, the point is clear now, those records are on the table and those are the records that—*all of the records* that are **[***113]** subject to this present dispute; is that right?" (Emphasis added.)

Kline reiterated that he had brought "*all copies*" with him to the hearing and that his staff had even had "sufficient time to remove work product notes and tabs from the record." Kline further informed Judge Anderson that no "scan[s]" had been taken of the records and that he had even returned the office's "working cop[ies]." But despite this specificity about the documents returned, Kline avoided mentioning the 62 handwritten summaries prepared at his direction on the eve of the hearing.

At his disciplinary hearing, Kline testified he used the information in the summaries to request three particular WHCS patient medical files from Morrison. Kline said he believed those files might provide evidence of a conspiracy between WHCS and CHPP to commit criminal late-term abortions. But while Kline's May 25, 2007, letter to Morrison refers generally to three files, it

does not appear to indicate the number, nature, or circumstances of creation of the 62 summaries.

[*157] In a letter to Kline, dated June 1, 2007, Morrison's staff denied Kline's request. According to Kline, when Morrison denied the request, Kline considered his conspiracy **[***114]** investigation "dead." Kline testified that at some point between Morrison's denial and Kline's testimony before Judge King in late 2007, Kline simply forgot he had the 62 handwritten summaries.

In the meantime, CHPP filed a mandamus action before the Kansas Supreme Court seeking to compel Kline to return CHPP's medical records and provide an accounting of the records taken to the Johnson County District Attorney's office by Kline. CHPP also sought issuance of a show cause order asking why Kline should not be held in contempt for failing to comply with *Alpha CHPP*, 287 Kan. at 386.

On October 24, 2007, the court appointed Judge King to resolve factual disputes and, as previously discussed, issued 17 specific questions. *CHPP*, 287 Kan. at 388. Significantly, these 17 questions, which Judge King directed the parties to answer, addressed the handling of both CHPP and WHCS records. See *CHPP*, 287 Kan. at 389-95.

In his written response, dated November 13, 2007, to Question 9, which asked Kline to describe "[e]xactly what inquisition records and/or documents, other than WHCS and/or **[**360]** CHPP records, were transferred by" Kline as Attorney General to Kline in his capacity as District Attorney, Kline **[***115]** provided the following response:

> "I have no knowledge of any 'inquisition records and/or documents' that have been transferred by me in my position as Attorney General to myself in my position as District Attorney. I do have information and belief that electronic copies and drafts of pleadings and legal research compiled by Assistant Attorney General Stephen Maxwell (category 4, above) were transferred by Mr. Maxwell to his new office at the Johnson County District Attorney during transition. However, it is my information and belief that these did not include attorney notes and summaries, *as I am not aware of any summaries of the files, etc. that were transferred and as District Attorney have had to ask staff to recreate such summaries.* I have made requests to Attorney General Morrison for assistance in this regard, however, such assistance has been not forthcoming." (Emphasis added.)

Kline's written responses to this and the remaining 16 questions do not specifically mention the 62 summaries created only 7 months earlier under the last minute and hurried circumstances **[*158]** following the phone conversation between Kline and Judge Anderson, nor do they provide any information to alert Judge **[***116]** King to the circumstances in which the summaries were created.

At the November 20, 2007, hearing conducted by Judge King, CHPP's counsel appears to refer to Kline's reference to "summaries" in questioning Kline:

> "Q. [CHPP'S COUNSEL] Are there any summaries of Doctor Tiller's records left in Johnson County?
>
> "A. [KLINE] *I have a summary of three records that pertain to a theory of criminal liability that would have jurisdiction in Johnson County against Doctor Tiller. I have mentioned that to the Office of the Attorney General through correspondence to the Attorney General's Office requesting copies of the actual records relating to those three abortions. The Attorney General has refused to provide those records.*
>
> "Q. [CHPP'S COUNSEL] What is the—the nature of those summaries that you have regarding Doctor Tiller's records?
>
> "A. [KLINE] Your Honor, we're getting into an area of executive privilege in which I'm engaged in a criminal investigation that involves this counsel's clients, as well as Doctor Tiller.
>
> "THE COURT: This is a matter since it does not involve your [CHPP's] records, although it is—that I'm going to—so I'm clear about what I'm saying, I'm just going to start over. This is a **[***117]** matter that does not involve records of your client. It is a matter that the Supreme Court is interested in some answers to. I'm going to ask that you leave this to me to inquire into on this particular subject." (Emphasis added.)

During his disciplinary hearing, Kline explained his inaccurate testimony to Judge King: "It's one of two explanations. I can't remember my mind-set in this, when I get asked this question. I'm either saying I've got three that I'm evoking an executive privilege on [*sic*] aware of the others or I had forgotten about the others. I can't tell you which it is." Kline further explained he was

"stunned" to be asked about the WHCS records because he believed Judge King's hearing concerned only CHPP records.

In any event, Judge King testified at Kline's disciplinary hearing that after Kline's statement regarding the summaries, Judge King conducted an *in camera* discussion with Kline about those summaries and his claim of executive privilege. Although Judge King could not recall the details of that discussion, he testified the purpose was to determine whether he would allow questions about **[*159]** the contents of the summaries. Judge King's written report to the court contained **[***118]** no mention of any summaries.

Due to CHPP's request for Kline to be held in contempt, on May 2, 2008, the *CHPP* court ordered Kline to personally appear at oral argument on June 12, 2008. See *CHPP*, 287 Kan. at 401. From the court's 17 questions propounded to Judge **[**361]** King, Judge King's report, and the record of the proceedings before Judge King, it is clear the *CHPP* court was interested in Kline's transfer of WHCS patient medical file records from the Attorney General's office to the Johnson County District Attorney's office. See 287 Kan. at 405-06 (discussing Kline's "last-minute removal" of records during the transition and Kline's failure to correct the status report given to Judge Anderson).

During oral argument, the transcript shows the following exchange occurred between Kline and the court:

> "[JUSTICE BEIER:] The record makes reference to the *summaries that were retained by your office—well actually recreated and then retained by your office*, Mr. Kline, have you ever told, or any of your subordinates, told Judge Anderson that those summaries were retained?
>
> "KLINE: I'm not familiar as to what you're referencing, Justice Beier.
>
> "JUSTICE BEIER: I'm referring to summaries that you swore to **[***119]** in your responses?
>
> "KLINE: Again, Justice Beier, I have not seen those responses for several months.
>
> "JUSTICE [BEIER]: *So you don't know whether you have summaries of certain records from the Wichita Clinic?*
>
> "KLINE: *I don't believe that I do. I have sought the records from the Office of Attorney General and been refused.*" (Emphasis added.)

Kline then changed the subject, offering a lengthy explanation as to the role played by Judge Anderson in maintaining custody of the patient files, the redacting of the patient files, and Kline's office's maintenance of a working copy of the redacted file.

Significantly, although not cited by either party, the transcript of the hearing before the *CHPP* court demonstrates further attempts by the court to ascertain the nature of the summaries referenced in the proceedings before Judge King:

> "JUSTICE BEIER: *I think the handling of the [WHCS] records is at issue before this Court.*
>
> **[*160]** "[KLINE'S COUNSEL]: I agree, Justice, the handling certainly is.
>
> "JUSTICE BEIER: That's exactly what we're here for today.
>
> "[KLINE'S COUNSEL]: The—what happened—and Your Honor I believe is referring to the Tiller records. And simply put, what happened with the Tiller records—
>
> "JUSTICE **[***120]** BEIER: Which [Kline] was not authorized to take to Johnson County. Correct?
>
> "[KLINE'S COUNSEL]: Was not authorized by Judge Anderson, correct.
>
> "JUSTICE BEIER: And which he was in fact ordered to return as soon as Judge Anderson learned he had taken them. Correct?
>
> "[KLINE'S COUNSEL]: That's correct. And Judge Anderson learned that he took—
>
> "JUSTICE BEIER: And he assured Judge Anderson, he or his subordinates, that he had not kept copies of those records. Correct?
>
> "[KLINE'S COUNSEL]: That is correct.
>
> "JUSTICE BEIER: And yet [Kline] had kept summaries of some of those records, had he not, and he continues to maintain those summaries?"
>
> "[KLINE'S COUNSEL]: Your Honor, I don't know what the record reflects with regard to summaries. I'm not aware of specific summaries."
>
> "JUSTICE BEIER: We'll just rely on the record then, [Counselor]? We'll just rely on the record, what it tells us?" (Emphasis added.)

Later in the argument, the court again expressed uncertainty, while questioning counsel for the intervenor Attorney General Six, as to what the "summaries" were, and the court attempted to clarify whether those summaries were "work product" that remained at the Attorney General's office. It appears this **[***121]** questioning was generated by Kline's written response to Judge King indicating Kline had not taken any summaries to Johnson County and that his staff had to "re-create" **[**362]** them, implying the summaries remained at the Attorney General's office.

> "JUSTICE BEIER: *I'm still a little unclear about what's been referred to as summaries.* The copies that were left with Judge Anderson, were those of medical records and the KDHE records only?
>
> "[COUNSEL FOR ATTORNEY GENERAL]: 'Um—
>
> "JUSTICE BEIER: Was there any work product left with Judge Anderson, work product of the Attorney General's Office?
>
> "[COUNSEL FOR ATTORNEY GENERAL]: I don't know the full extent of what the work product left, but I don't believe there was any.
>
> "JUSTICE BEIER: Was there any of that left in the Attorney General's Office?
>
> "[COUNSEL FOR ATTORNEY GENERAL]: The only work product that we—that we had in the Office when we got there was the stuff—what was materials **[*161]** that had been shipped or been picked up from Mr. McKinney, the special prosecutor who had been engaged in Sedgwick County." (Emphasis added.)

In late 2008, and before the *CHPP* court had issued an opinion, Tiller's attorney issued a subpoena to Kline in the Sedgwick County case, **[***122]** *State v. Tiller.* Kline's assistant found the 62 summaries in Kline's Johnson County office case file while preparing the subpoena response. Kline testified this discovery surprised him and that he called Judge Anderson on November 10, 2008, to inform him of the existence of these summaries. But there is no evidence Kline discussed with Judge Anderson the quantity or nature of the summaries, nor did he indicate the circumstances in which the summaries were created. Further Kline did not seek to correct his statements to Judge King or the *CHPP* court regarding these summaries.

In its December 5, 2008 opinion, the *CHPP* court noted Kline had "admitted more than once" that his staff members "created *summaries of at least three WHCS patient records* and have kept and employed those summaries in their activities in Johnson County." (Emphasis added.) 287 Kan. at 385. Significantly, the court also noted Kline did not admit he had any summaries in response to direct questioning by the court. 287 Kan. at 385. The court referred critically to Kline's office's "creation and use of summaries of WHCS records." 287 Kan. at 406. Finally, the court generally referred to the summaries in concluding that **[***123]** while it accepted Judge King's conclusion that Kline did not deceive Judge Anderson in failing to advise him in the status report of the transfer of the WHCS records to Johnson County, "the same cannot be said about Maxwell's, and thus Kline's, subsequent failure to set the record straight." 287 Kan. at 421. The court noted:

> "Once Judge Anderson discovered that Kline had possession of the WHCS records, he demanded that the records be returned and questioned whether copies had been kept. He was told no. Yet Kline's sworn responses to the 17 fact questions reveal that Kline and his subordinates failed to disclose to [Judge] Anderson that certain summaries of the WHCS records had been created and maintained." 287 Kan. at 421-22.

The *CHPP* court's opinion left no doubt as to the scope of its order, demanding that Kline turn over on or before December 12, 2008,

> **[*162]** "a full and complete and understandable set of any and all materials gathered or generated by Kline and/or his subordinates in their abortion-related investigation and/or prosecution since Kline was sworn in as Johnson County District Attorney. Neither Kline nor any of his subordinates or lawyers may make any exceptions whatsoever for **[***124]** any reason or on any rationale to the foregoing order. 'Full, complete, and understandable' means exactly what it says." 287 Kan. at 423.

Kline eventually admitted at a January 2009 hearing before Judge Owens on Dr. Tiller's motion to dismiss in *State v. Tiller* that when he told Judge King he had 3 summaries, he actually had 62.

[363]** *The Parties' Arguments*

In challenging the hearing panel's findings regarding the summaries, Kline does not suggest that either his

testimony regarding the summaries before Judge King or his statements regarding the summaries to the *CHPP* court were truthful. Instead, he posits what he contends are plausible explanations for these misstatements and contends that based on this plausibility, he did not *knowingly* make these false statements; therefore, Kline contends he could not have violated KRPC 3.3 or KRPC 8.4.

Specifically, as to his testimony to Judge King, Kline argues he did not knowingly make a false statement because after he testified he had three summaries, he invoked executive privilege. He also asserts his failure to correct his statement to Judge King was not material and did not violate KRPC 3.3 because his "right to have one, two, or all the summaries" **[***125]** has never been in question and because Kline was not ordered to "disgorge" the summaries as the Attorney General requested in *CHPP*.

As to his statement to the court in *CHPP* during oral argument, Kline contends it was not knowingly false because he had not prepared for the argument because he had not expected to be required to answer questions. Further, he points out he never advised the *CHPP* court that he did not have any summaries; rather, he said, "I don't believe that I do have" any summaries. Finally, he appears to make a "no harm, no foul" argument, asserting his responses to the 17 questions disclosed the summaries, the *CHPP* court assumed he had summaries, and the court's opinion "showed it was obviously under no misapprehension."

[*163] In urging us to find clear and convincing evidence supports the rule violations found by the panel regarding Kline's testimony to Judge King, the Disciplinary Administrator primarily relies upon the significance of Kline's initial directive to his staff to prepare the summaries in contradiction of Judge Anderson's order to immediately return all WHCS patient files and records to the court. The Disciplinary Administrator contends that in light of the hurried **[***126]** circumstances in which the summaries were created, the panel correctly chose not to believe Kline's testimony that he forgot about them. Further, the Disciplinary Administrator points out that although Kline subsequently learned of his misstatement to Judge King, Kline never attempted to correct his false testimony.

The Disciplinary Administrator makes a similar argument regarding Kline's proffered reasons for his misstatement to the court in *CHPP*. Namely, that in light of the highly unusual circumstances in which the summaries were created and the court's focus on Kline's handling of confidential patient medical files, it is simply not credible that Kline "forgot" he had any summaries when questioned.

Further, the Disciplinary Administrator argues that in light of the court's questioning regarding the summaries and Kline's professed uncertainty regarding their existence, it is "inconceivable" that Kline would not have verified his statement following oral argument and filed a motion to correct or clarify his statement if necessary. The Disciplinary Administrator points out Kline clearly knew how to correct a perceived misstatement from an oral argument, as he had done so in connection **[***127]** with Rucker's argument in *Alpha*. See discussion at pages 50-57.

Clear and Convincing Evidence Supports the Panel's Finding That Kline's Failure to Correct His Testimony to Judge King Violated KRPC 3.3(a)(3).

The panel concluded Kline's testimony to Judge King violated three provisions of KRPC 3.3. First, the panel found Kline made a false statement in violation of ***HN37*** KRPC 3.3(a)(1) (2012 Kan. Ct. R. Annot. 582) which provides: "A lawyer shall not knowingly: (1) make a false statement of fact or law . . . ." Next, the panel found **[*164]** Kline violated ***HN38*** KRPC 3.3(a)(3) (2012 Kan. Ct. R. Annot. 582-83), which restricts a lawyer from, "knowingly . . . offer[ing] evidence that the lawyer knows to be false." Finally, by not correcting the false testimony, the panel found Kline violated an additional clause in ***HN39*** KRPC 3.3(a)(3) (2012 Kan. Ct. R. Annot. 583): "If a lawyer . . . offered material evidence and the lawyer **[**364]** comes to know of its falsity, the lawyer shall take reasonable remedial measures . . . ."

In his brief, Kline does not specifically address the KRPC 3.3(a)(3) violation for failing to correct his testimony, except to suggest his testimony before Judge King was neither material nor knowingly false. **[***128]** But ***HN40*** KRPC 3.3(a)(3) does not require that Kline make a knowingly false statement. Instead, it requires that Kline take remedial measures if he offers material evidence and *comes to know* of its falsity. And as noted, Kline does not contest that he came to know his testimony was false, and the record establishes that at a minimum, he clearly came to know his testimony was false by November 2008 when his assistant located the 62 summaries in his Johnson County office.

Even if Kline's initial false testimony can be excused because he failed to give his full recollection or forgot

about 59 patient medical summaries, Kline clearly knew he possessed 62 summaries in November 2008. And by that time, Kline had testified before Judge King in connection with the *CHPP* mandamus action that he had three summaries of WHCS files. Significantly, at that point the *CHPP* court had not yet issued its opinion. Thus, when Kline *came to learn* of the falsity of his testimony, KRPC 3.3(a)(3) required him to correct his statement with Judge King, but he did not.

Kline's testimony to Judge King was material.

Kline repeatedly claims his testimony before Judge King was immaterial and therefore he was not required to **[***129]** correct it. In support, he points out that because the mandamus action was brought by CHPP, rather than WHCS, his testimony regarding WHCS records was unimportant. Further, he contends that because the *CHPP* court knew he had three summaries, and his right to the summaries "has never been in question," the fact that he maintained **[*165]** an additional 59 summaries and the circumstances of their creation was unimportant.

But, as discussed below, our review of the transcript of the *CHPP* oral argument, as well as the *CHPP* court's opinion issued in December 2008, leaves no doubt as to the materiality of Kline's testimony and responses.

The WHCS summaries were at issue.

Kline takes issue with the panel's finding that a "material fact" in the *CHPP* proceeding was whether Kline retained any materials in the Johnson County District Attorney's office. Kline argues "this general question was raised not by the Tiller Clinic, but by Kline's successor as Attorney General in an effort to disgorge them."

Implicitly, Kline suggests his testimony before Judge King was immaterial because CHPP—not WHCS—was the petitioner in the mandamus action and because the Attorney General, and not WHCS, sought to require Kline **[***130]** to turn over the records he continued to possess. We find this suggestion wholly unconvincing. The *CHPP* court directed answers to fact questions regarding whether Kline had any materials from *either* clinic in his possession in Johnson County and, if so, how those documents came to be in his possession. Kline's testimony before Judge King directly concerned the court's inquiries in the *CHPP* mandamus action. Simply stated, what Kline said to Judge King mattered to the *CHPP* court.

Further, in arguing the WHCS records were not important to the *CHPP* court, Kline overlooks the key questions at issue. CHPP brought the mandamus action, in part, to ensure compliance with *Alpha*. *CHPP*, 287 Kan. at 386. The court's questions were focused on the nature of information Kline possessed from *both* clinics. And, critically, at oral argument in *CHPP*, the intervenor Attorney General Six specifically asked that any summaries of WHCS patient files be returned. See 287 Kan. at 404 ("These items include, as asserted at oral argument, any summaries Kline or his subordinates have created of WHCS patient records.").

Finally, Kline's current argument as to the immateriality of WHCS records is particularly curious **[***131]** in light of his attorney's candid responses during the *CHPP* oral argument and his agreement **[*166]** that the handling of the WHCS records was "certainly" at issue. **[**365]** Moreover, in light of the court's comment following this concession that the handling of the WHCS records is "*exactly* what we're here for today," we have no hesitation in rejecting Kline's current rationalization that his handling of the WHCS records was not at issue in the *CHPP* proceeding. (Emphasis added.) Kline's "handling" of the WHCS records would necessarily include his direction to staff to hurriedly prepare handwritten summaries of the records on the eve of the April 11, 2007, hearing with Judge Anderson and Kline's retention of those summaries afterwards.

The CHPP *court was not aware of the full nature and existence of the summaries.*

Kline further suggests his statement to Judge King that he had three summaries was immaterial because the *CHPP* court was aware of the summaries, as evidenced by the comments in the *CHPP* opinion.

But the oral argument transcript and the *CHPP* court's opinion make quite clear the court was not at all aware when it issued its opinion in December 2008 of the significance of 3 summaries Kline admitted **[***132]** to Judge King that he possessed, much less the existence of 59 other summaries, each containing almost all of the substantive confidential information from the WHCS patient medical files. Instead, the record reflects the court was struggling to grasp the number, nature, and scope of the summaries when at the close of the argument, Justice Beier indicated she was still "*unclear about what's been referred to as summaries.*" (Emphasis added.)

Not surprisingly, this confusion remained even as the court questioned Kline, his counsel, and the Attorney

General's counsel about these summaries. Kline told the court he did not believe he had any summaries, while Kline's counsel responded that he did not know what the record reflected regarding the summaries, and he was not aware of any "specific summaries." The Attorney General's office, which at that point had not received the summaries, accurately advised the court there was no work product, or "summaries," in the materials Kline's office returned to Judge Anderson.

[*167] Thus, in reciting the lengthy factual and procedural history of the case in its *CHPP* opinion, the court noted only the limited information it knew for certain from Kline's written **[***133]** responses to and testimony before Judge King:

> "The record reflects that Kline has admitted more than once—although not in response to direct questioning by this court at oral argument in this case on June 12, 2008—that his *staff members have created summaries of at least three WHCS patient records* and have kept and employed those summaries in their activities in Johnson County." (Emphasis added.) 287 Kan. at 385.

Further, in reaching its conclusions regarding Kline's mishandling of patient medical records, the court again refers to the existence of "certain summaries" and expresses skepticism about Kline's uncertainty regarding the existence or possession of the summaries:

> "We are also deeply disappointed by Kline's casual treatment of the WHCS patient records. First, he moved them to the Johnson County District Attorney's office, despite the clinic's location in Sedgwick County. Second, he and Maxwell failed to correct the Status and Disposition Report given to Judge Anderson on this point. Even accepting, as we do, Judge King's factual finding that no initial deception or misrepresentation was intended, the same cannot be said about Maxwell's, and thus Kline's, subsequent failure to **[***134]** set the record straight. Once Judge Anderson discovered that Kline had possession of the WHCS records, he demanded that the records be returned and questioned whether copies had been kept. He was told no. *Yet Kline's sworn responses to the 17 fact questions reveal that Kline and his subordinates failed to disclose to Anderson that certain summaries of the WHCS records had been created and maintained. By the time Kline appeared before this court for oral argument, he again expressed uncertainty as to whether the summaries existed or were in the possession or use of his* ***[**366]*** *office.*" (Emphasis added.) 287 Kan. at 421-22.

Thus, at the time it issued its *CHPP* decision, the court did not know what Kline admittedly did know by that point—*i.e.*, that when he told Judge King he had 3 summaries, he in fact had 62. Further, the *CHPP* court did not know what Kline knew about the context in which those summaries were created—*i.e.*, that Kline had directed the immediate creation of those *handwritten* "summaries" on the very same day Judge Anderson directed the return of all *copies* the following morning. Finally, at the time the *CHPP* court issued its decision in December 2008, the court still did not **[*168]** know **[***135]** what Kline knew about the summaries' content, *i.e.*, they contained nearly all of the substantive detail in the WHCS patient medical files, including highly confidential identifying information and specific medical data.

In addition to claiming his testimony to Judge King was not material because the *CHPP* court was aware of the summaries, Kline also contends in his reply brief that his statement to Judge King was not material because "there was only marginal variation between Kline's live testimony and his fully correct sworn written responses, all of which were before both Judge King and the Supreme Court." Kline further surmises that because of that "fully correct" sworn response, "[n]either tribunal labored in ignorance of the only (possibly) material fact: that Kline did, in fact, have summaries."

We are not persuaded for several obvious reasons. First, Kline's after-the-fact claim that the "only (possibly) material fact" was his possession or lack of possession of summaries is simply wrong. As we have stated, the *CHPP* mandamus action was *not* solely about the quantity of highly confidential and private patient medical information possessed by Kline but about CHPP's allegations of **[***136]** Kline's *mishandling* of that information. In appointing Judge King as a special master and asking Judge King to investigate Kline's handling of confidential information, the court certainly did not limit Judge King's inquiry to quantifying how many pieces of confidential information Kline possessed. Instead, the court clearly was interested in Kline's alleged mishandling of the patient records, including receipt, copying, storing, dissemination, and transmission of the content contained in both clinics' patient medical records.

Further, Kline's brief notably fails to cite to the location in

the record where he provided "fully correct sworn written responses," and we are aware of none other than what is quoted above from the 17 questions and those can hardly be considered "fully correct sworn written responses" based on this record. Nor does Kline explain how the responses provided Judge King and the *CHPP* court with all of the information necessary to dispel any ignorance or misunderstanding either tribunal might have had as to the true facts.

[*169] Indeed, the only sworn written response regarding the summaries was Kline's cryptic reference in response to Question 9:

> "I am not aware of any summaries **[***137]** of the files, etc. that were transferred and *as District Attorney have had to ask staff to recreate such summaries.* I have made requests to Attorney General Morrison for assistance in this regard, however, such assistance has been not forthcoming." (Emphasis added.)

Characterizing this response as "fully correct" is patently incorrect on several levels. First, Kline's written response suggested he had directed the "re-creation" of information from the files. The information was not re-created; it was hand-copied. But the use of the term "re-create" is not surprising since Judge Anderson had required Kline in no uncertain terms to return all *copies* of the WHCS records. Kline's careful word choice seems calculated to deflect attention away from the hand-copied material prepared by his staff. Further, Kline's vague written response references "summaries" but fails to explain that the summaries were, in fact, handwritten copies of the substantive confidential patient information in each of the 62 files. Finally, Kline's written response certainly did not alert Judge King that the summaries were developed overnight in response to Judge Anderson's direction to return *all* WHCS documents the **[***138]** following day.

[367]** Under these circumstances, we have no hesitancy in concluding that accurate information regarding the number of "summaries" (which not coincidentally equaled the number of WHCS patient files turned over to Judge Anderson) would most certainly have led to further inquiry regarding the summaries' content and, ultimately, a realization that the summaries were not really summaries at all.

Thus, even giving Kline the benefit of the doubt and assuming he did not know of the falsity of his statements to Judge King while giving his testimony, he admittedly came to know of that falsity by November 2008. Kline's failure to correct his testimony to Judge King, which the *CHPP* court relied upon, clearly violated ***HN41*** KRPC 3.3(a)(3) (2012 Kan. Ct. R. Annot. 583), which prohibits a lawyer from "offer[ing] material evidence" and failing to correct it if "the lawyer comes to know of its falsity."

[*170] Having found clear and convincing evidence to support the panel's finding that Kline violated KRPC 3.3(a)(3) by failing to correct his testimony to Judge King after he came to know of the falsity of his testimony, we find it unnecessary to consider whether clear and convincing evidence supports the **[***139]** panel's findings that this same evidence supported two additional violations of KRPC 3.3.

Clear and Convincing Evidence Supports the Panel's Conclusion That Kline's Statement in Oral Argument before the CHPP *Court Violated KRPC 8.4(c).*

The panel also concluded that when Kline advised the *CHPP* court in the oral argument that he did not believe he had any summaries, he engaged "in conduct involving dishonesty" in violation of KRPC 8.4(c) (2012 Kan. Ct. R. Annot. 643). In his brief, Kline makes no specific argument regarding this finding, although he generally contends he was confused by the court's questions and his statement was a miscommunication rather than a falsehood. Thus, he essentially argues his statement was not knowingly false. The Disciplinary Administrator reiterates that given the circumstances surrounding Kline's order to create the summaries and their importance to his ability to continue investigating WHCS from his office in Johnson County, clear and convincing evidence supports the panel's conclusion that Kline was not credible when he responded he did not believe he had any summaries.

Kline further asserts his inaccurate response was due to surprise at having "to testify **[***140]** again . . . months later, without the record before him in open court." Thus, he suggests he was "unable to confirm the premise in Justice Beier's question" about whether he had any summaries. From this, Kline seems to proffer that he was unprepared to respond to questions at the *CHPP* argument, a suggestion the *CHPP* court implicitly rejected:

> "Also at oral argument, Kline took the offered chance to address this court personally, and he responded to the court's questions. He nevertheless repeatedly expressed a lack of preparation, asserting he had read the language in the court's May 2 order only to require him to be

physically present in the courtroom rather than to be prepared to speak knowledgeably about his or his subordinates' conduct. He also described himself, at one point, as too busy discharging his obligations [*171] as the Johnson County District Attorney to address this matter. He expressed ignorance of the content of the record and said he had not reviewed his two sets of sworn written responses to this court's 17 questions." 287 Kan. at 402.

Kline essentially argues it would be nonsensical for him to have falsely responded to Justice Beier's question because he had provided "correct" [***141] information in his sworn written responses to Judge King and because "the Court's opinion showed it was obviously under no misapprehension." But as we explained in the previous section, Kline's brief reference in his sworn written response to "re-creating summaries" is a far cry from providing "correct information."

Moreover, Kline's suggestion that he was forthcoming with information about the summaries rings hollow now because Kline promptly claimed executive privilege when pressed for further explanation and refused to answer CHPP's counsel's question: "What [**368] is the—the nature of those summaries that you have regarding Doctor Tiller's records?"

Thus, the *CHPP* court had scant, highly incomplete, and largely inaccurate information about the "summaries" at oral argument, and Kline's response that he had no summaries only added to the court's misconception.

Further, as the Disciplinary Administrator points out, the panel obviously did not believe Kline's explanations about the oral argument that he simply forgot he had any "summaries." The panel had good reason for finding Kline's statements incredible, and we have no reason to challenge the panel's determination. See *In re B.D.-Y.*, 286 Kan. 686, 705, 187 P.3d 594 (2008) [***142] (discussing that ***HN42*** appellate courts do not reassess credibility determinations).

Finally, in addition to the panel's credibility findings, we note that ***HN43*** knowledge may be "inferred from circumstances." KRPC 1.0(g) (2012 Kan. Ct. R. Annot. 433). The circumstances that permit an inference of knowledge here are: (1) Judge Anderson's order to Kline to return *all* WHCS documents after Judge Anderson learned the files had been taken to Johnson County without his knowledge and in contradiction of the status report provided to him a few months earlier; (2) Judge Anderson's testimony that Kline was very upset about having to return the files; (3) Kline's [*172] order to his staff, after learning he would have to return the files the next day, to hand copy the files' content to "summaries"; (4) Kline's staff's overnight creation of 62 handwritten summaries containing nearly all of the substantive and highly confidential patient information from the medical files; and (5) Kline's statement to Judge Anderson at the hearing the next day verifying he had returned all of the documents, including "scan[s]," but failing to mention 62 handwritten "summaries."

Under these circumstances, we have no hesitancy in concluding [***143] that clear and convincing evidence supports the panel's finding Kline knew his statement in oral argument before the *CHPP* court that he did not believe he had any summaries was false and violated KRPC 8.4(c)'s prohibition against engaging in "conduct involving dishonesty." KRPC 8.4(c) (2012 Kan. Ct. R. Annot. 643).

THE PANEL'S CONCLUSION THAT KLINE VIOLATED KRPC 8.1 BASED ON STATEMENTS HE MADE DURING THE DISCIPLINARY INVESTIGATION IS SUPPORTED, IN PART, BY CLEAR AND CONVINCING EVIDENCE.

The panel found Kline made two statements in a letter dated September 19, 2007, that violated ***HN44*** KRPC 8.1 (2012 Kan. Ct. R. Annot 634), which prohibits a lawyer, in connection with a disciplinary matter, from "(a) knowingly mak[ing] a false statement of material fact; or (b) fail[ing] to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter . . . ."

Specifically, the panel found Kline falsely advised the Disciplinary Administrator that the clinics' confidential patient medical files were constantly maintained "under lock and key," when in fact the files were kept in a plastic container in Reed's Topeka apartment for 5 weeks at the start of Kline's tenure as [***144] Johnson County District Attorney. Additionally, the panel found Kline's failure to correct this response constituted a separate violation of KRPC 8.1(b). Further, the panel found Kline separately violated KRPC 8.1(a) by falsely advising the Disciplinary Administrator that he "did not have direct access to the [patient files]" while he was Attorney General and that when he reviewed the files "the documents [*173] were immediately returned to the locked closet by an investigator." The panel found Kline knew this statement was false because on at least one occasion, the files were not returned to the locked closet but instead were left out overnight in Kline's office.

Additional Relevant Facts

In November of 2006, attorneys who represented the clinics filed a complaint with the Disciplinary Administrator regarding Kline's conduct during the investigation. In part, that complaint questioned Kline's handling of patient medical files and whether he maintained those files in a secure and confidential manner as mandated by the *Alpha* court. Sometime later the Disciplinary Administrator asked Kline to respond to the allegations. **[**369]** Kline did so in a letter to the Disciplinary Administrator dated September **[***145]** 19, 2007.

In that letter, Kline stated that while he served as Attorney General, he could access the files only by requesting an investigator retrieve them:

> "I did not have direct access to the records while I was Attorney General. To gain access it was necessary that I make a request to my investigative division. The only time I reviewed the documents, others where [*sic*] in the room and the documents were immediately returned to the locked closet by an investigator."

Kline further stated the records were kept under "lock and key the entire time since they have been produced," referring to his time as both Attorney General and as Johnson County's District Attorney.

In finding Kline falsely stated he did not have access to the patient files while he was Attorney General unless he requested them from Williams or Maxwell, the panel relied upon Williams' testimony at Kline's disciplinary hearing that Williams occasionally worked from a conference table in Kline's office when Kline was out of the office. According to Williams, on one such occasion—November 5, 2006—he inadvertently left a box of patient files in Kline's office overnight. The following morning, Rucker found the box, gave it to **[***146]** Williams, and Williams placed a memo in the file.

In finding Kline falsely indicated the confidential patient files were "constantly under lock and key," the panel also relied upon **[*174]** evidence that for a 5-week period in January and February 2007, while Kline was Johnson County District Attorney, copies of the patient files were kept in a Rubbermaid tub in Reed's Topeka apartment and not under "lock and key." The panel concluded Kline knew of the falsity of the "lock and key" statement at least 8 days after his September 19, 2007, letter, when Morrison filed a memorandum in support of CHPP's petition for writ of mandamus indicating, *inter alia*, that Reed kept copies of patient medical files in Reed's apartment.

On October 19, 2007, Kline personally responded to the petition for writ of mandamus. Significantly, Kline did not challenge Morrison's allegation that the confidential patient files were kept in Reed's apartment during January and February of 2007. Instead, Kline simply indicated he had delegated responsibility for moving the patient medical files to his staff.

At his disciplinary hearing, Kline initially testified he did not recall reading in the mandamus filings that patient files **[***147]** were stored in Reed's apartment for a period of time in 2007. Further, Kline claimed the location of the confidential patient files was not relevant to him because his concern was whether "anybody had access who didn't have the authority to have access and the answer is no." But Kline later testified he "generally learned" about the files being kept in Reed's apartment in the same time period as he filed his personal response to the writ of mandamus, October 19, 2007.

Although not cited by the panel, the evidence at the hearing further showed that in September 2007—the same month Kline responded to the allegations in the disciplinary complaint against him—he received a copy of a transcript of a deposition given by Reed in which Reed verified that he had the WHCS patient files in his apartment in January and February 2007. Reed gave this deposition in April 2007 in exchange for immunity, after he heard "water cooler talk" that Morrison might pursue criminal charges against individuals involved in the Tiller investigation if Morrison's investigation revealed criminal misconduct. In September 2007, Morrison's office released Reed's deposition, and Kline received a copy.

[*175] Reed testified at **[***148]** Kline's disciplinary hearing that Kline angrily confronted Reed about Reed's deposition statement concerning the files being stored in his apartment, and Kline threw the transcript across the room. Although Kline claimed he did not recall when that meeting with Reed occurred, Kline admitted he probably read the information regarding the storage of the WHCS patient files if that information was contained in Reed's statement.

The Record Does Not Contain Clear and Convincing Evidence of Kline's Knowledge of the Falsity of His Statement That He Never Had Access to Patient Medical Files.

The panel concluded that because Williams left a box of

patient medical files in **[**370]** Kline's office overnight on November 5, 2006, Kline falsely advised the Disciplinary Administrator in his September 19, 2007, letter that he had never had direct access to patient files while he was Attorney General. The panel found this conduct violated KRPC 8.1(a)'s prohibition against "knowingly mak[ing] a false statement of material fact." KRPC 8.1(a) (2012 Kan. Ct. R. Annot. 634).

Kline argues the panel inappropriately assumed from Williams' testimony that Kline knew patient files were left in his office overnight. Alternatively, **[***149]** he contends that even if the evidence supported his knowledge of the falsity of this statement, the statement was not material. Notably, the Disciplinary Administrator does not separately address the sufficiency of the evidence regarding whether Kline had direct access to the patient files.

We agree the record does not contain clear and convincing evidence that Kline knew on September 19, 2007, that his statement regarding access to the patient files was false. While Williams testified he discussed the event with Maxwell and Rucker and that he placed a memo in the case file regarding the incident, there is no evidence Williams discussed the incident with Kline or that Kline ever saw that memo. Further, Williams testified he only used Kline's office when Kline was not there.

Because we have found a lack of clear and convincing evidence to support the panel's conclusion that Kline violated KRPC 8.1(a) by falsely stating that he never had direct access to the patient files, **[*176]** we need not address Kline's alternative argument regarding the materiality of that statement.

*Clear and Convincing Evidence Supports the Panel's Finding That Kline Violated KRPC 8.1(b) by Failing to Correct His Statement **[***150]** to the Disciplinary Administrator That His Office Continuously Stored the Confidential Patient Files "Under Lock and Key."*

The panel further found Kline falsely advised the Disciplinary Administrator that his offices "constantly" stored the confidential patient files "under lock and key" in violation of KRPC 8.1 (2012 Kan. Ct. R. Annot. 634), which prohibits a lawyer, in connection with a disciplinary matter, from "(a) knowingly mak[ing] a false statement of material fact; or (b) fail[ing] to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter . . . ." The panel based this finding on evidence that for a 5-week period in January and February of 2007, the patient files were stored in Rubbermaid tubs in Reed's apartment and Kline either knew this when he wrote his letter to the Disciplinary Administrator or he later learned of his statement's falsity and failed to correct the misstatement.

Before us, Kline argues his statement regarding the patient files being "kept under lock and key" was neither knowingly false nor material. Further, he contends he was unaware the Disciplinary Administrator was "laboring" under a misapprehension regarding **[***151]** this statement and thus he was not responsible for correcting the misstatement under KRPC 8.1(b). Specifically, Kline suggests the Disciplinary Administrator would have known of the misstatement because he received Judge King's report in June 2008, which discussed the fact that the patient files were maintained in Reed's apartment. Therefore, Kline urges us to conclude he could not have "known" that the Disciplinary Administrator misapprehended his statement.

The Disciplinary Administrator's argument is straightforward. He contends that at the latest, within a few weeks of Kline's September 19, 2007, letter, Kline knew of the falsity of his statement that the patient files were "constantly under lock and key" and that, under KRPC 8.1(b), Kline "had an obligation to clear up that misapprehension **[*177]** and failed to do so." Further, the Disciplinary Administrator contends Kline essentially conceded the materiality of the misstatement by responding to questions posed to him by the Disciplinary Administrator about how the patient files were kept under "lock and key."

We agree with Kline that the record does not contain clear and convincing evidence **[**371]** that he knew on September 19, 2007, when the **[***152]** letter was dated, that the records had been stored in Reed's apartment for 5 weeks and thus were not under "lock and key." So we cannot agree with the panel's finding that Kline knowingly made a false statement of material fact under KRPC 8.1(a) when he first stated the patient files were constantly maintained under lock and key.

But Kline's own testimony establishes that within just a few weeks after his September 19, 2007, response, Kline knew of the falsity of his statement. Specifically, Kline testified that sometime in September 2007, he received Morrison's mandamus filing and personally filed a response in October 2007. Morrison's filing made clear that at least for a 5-week period in early 2007, patient medical files were not under lock and key

because they were in Reed's Topeka apartment. Further, about that same time, Kline had reviewed Reed's deposition, which provided even greater detail regarding the storing of the records and would unquestionably have alerted Kline to the falsity of his statement that the patient medical files were "constantly under lock and key."

This is buttressed by Reed's testimony regarding Kline's angry confrontation with him in September 2007 after [***153] Kline learned that Reed had given a sworn statement to Morrison about storing the files in Reed's apartment. According to Reed, Kline was so angry that he threw Reed's deposition across the room.

Kline's statement that the files were constantly maintained under "lock and key" conveyed the erroneous impression that his office continuously maintained the files in a secure location with access only by authorized individuals—an impression entirely at odds with reality—*i.e.*, patient medical files were kept for approximately 5 weeks in a Rubbermaid tub in Reed's apartment. Under these circumstances, we have no hesitancy in finding clear and convincing [*178] evidence that even if Kline did not know of the falsity of his "lock and key" representation to the Disciplinary Administrator when he made the statement in his September 19, 2007, response, he knew it was false shortly thereafter, and KRPC 8.1(b) required him to correct this misstatement.

Kline alternatively argues that even if he was aware of the misstatement, he was not obligated to correct it absent some evidence that he knew the Disciplinary Administrator was "laboring under any 'misapprehension'" because of the misstatement. Kline cites [***154] no authority to support this suggestion, and, in fact, the comment to the rule indicates otherwise:

> ***HN45*** "Paragraph (b) of this Rule also requires correction of any prior misstatement in the matter that the . . . lawyer may have made *and* affirmative clarification of any misunderstanding on the part of the admissions or disciplinary authority of which the person involved becomes aware." (Emphasis added.) KRPC 8.1(b), Comment 1 (2012 Kan. Ct. R. Annot. 634).

Consistent with the language of the comment, we read ***HN46*** KRPC 8.1(b) to require correction of misstatements made by the lawyer as well as clarification of any misunderstanding on the part of the disciplinary authority of which the lawyer becomes aware. See also *State Ex Rel. Okla. Bar Ass'n v. Gassaway*, 2008 OK 60, 196 P.3d 495, 500 (Okla. 2008) (finding violation based on respondent's failure to correct misapprehension when respondent knew he falsified a letter but administrator presented no other evidence regarding respondent's knowledge of disciplinary authority's misapprehension).

Finally, Kline points out that because the Disciplinary Administrator had access to Judge King's report in June 2008, which indicated the falsity of Kline's September 19, [***155] 2007, statement that the records were constantly maintained under lock and key, Kline was not required to correct his misstatement. But just as the Disciplinary Administrator need not prove that he was "laboring under any 'misapprehension'" based on Kline's misstatement and that Kline knew of that misapprehension, Kline is not absolved of responsibility under KRPC 8.1(b) for correcting a misstatement when the Disciplinary Administrator has the ability to learn of its falsity through a third party. Moreover, even if we were to adopt Kline's "no harm, no foul" approach to a lawyer's obligation under [*179] [**372] KRPC 8.1(b), we would nevertheless uphold the panel's decision here. The record is clear Kline definitively learned of the falsity of his statement more than 8 months before the Disciplinary Administrator had access to Judge King's report in June 2008. At a minimum, even under Kline's liberal reading of KRPC 8.1(b), he was obligated during that 8-month period to correct his misstatement to the Disciplinary Administrator, and his failure to do so violated KRPC 8.1(b).

Factual Summary Related to Kline's Advisory Role with a Johnson County Citizen-Requested Grand Jury

While Kline was serving as [***156] Johnson County District Attorney, a citizen-requested grand jury convened in Johnson County District Court in December 2007. The citizens' petition charged the grand jury with investigating whether CHPP violated statutes regulating abortion providers, including K.S.A. 38-1522, which concerned mandatory reporting by certain professionals of child sexual abuse. During the grand jury's investigation, Kline's office was also in the midst of prosecuting CHPP on 107 criminal counts, charges Kline's office filed 2 months earlier.

As ***HN47*** District Attorney, Kline had a statutory role to fulfill with this grand jury as its legal advisor. See ***HN48*** K.S.A. 19-713 ("Whenever required by the grand jury . . . it shall be the duty of the county attorney . . . [to give

the grand jury] advice in any legal matter."); see also ***HN49*** K.S.A. 22a-107 (construing the term "county attorney" to include district attorneys); ***HN50*** K.S.A. 22-3007 (prosecuting attorney can advise the grand jury on "any legal matter" or examine witnesses, but only at the grand jury's request).

The disciplinary panel found multiple violations resulting from Kline's actions with the grand jury. Generally speaking, the panel concluded Kline acted dishonestly **[***157]** and prejudiced the administration of justice by failing to fully advise the grand jury about the law applicable to its investigation, violating KRPC 8.4(c) and (d). The panel further held Kline responsible for Maxwell's violations of those same rules arising from Maxwell's own failure to fully advise the grand jury. Finally, the panel concluded Kline's direction to his staff regarding two public court filings reflected adversely on his **[*180]** fitness to practice law, violating KRPC 8.4(g), because Kline ignored the grand jury's request to see additional pleadings before filing and because the public nature of the filings and their contents violated K.S.A. 22-3012 (secrecy of grand jury proceedings).

Statutory and Federal Case Law Relevant to Reporting Statutes

The significance of Kline's actions in advising or failing to advise the citizen-requested grand jury can be understood only in the context of the procedural and factual history of the child abuse reporting statute in effect until January 1, 2007, K.S.A. 38-1522, information we discussed briefly at pages 4-6, but now elaborate on. In addition to the statutory framework itself, that backdrop includes the two Attorney General advisory opinions **[***158]** interpreting the statute and significant federal caselaw interpreting—and ultimately rejecting—Kline's advisory opinion.

K.S.A. 38-1522 and related Attorney General opinions

As previously discussed, ***HN51*** the Kansas Code for Care of Children requires individuals engaged in certain professions, including those licensed under the Board of Healing Arts, to report suspected child abuse to state authorities. ***HN52*** K.S.A. 38-1522, the reporting statute in effect until January 1, 2007, provided: "When any of the following persons has reason to suspect that a child has been *injured* as a result of physical, mental or emotional abuse or neglect or sexual abuse, the person shall report the matter promptly . . . ." (Emphasis added.)

HN53 As defined in the Code for Care of Children, the term "sexual abuse" encompassed all sexual activity with someone under the age of 16 regardless of the age of the other participant and regardless of whether the activity was voluntary. See K.S.A. 38-1502(c); see also *Aid for Women v. Foulston*, 327 F. Supp. 2d 1273, 1283-84 (D. Kan. 2004) (*Aid for Women I*) (discussing that the term "sexual abuse" encompassed all sexual activity with someone under the age of 16 regardless of the other **[***159]** participant's age; thus voluntary **[**373]** sexual contact between two people under the age of 16 fell within the definition of "sexual abuse").

But the statute did not define the term "injured." In 1992, Attorney General Robert T. Stephan examined the statute and concluded **[*181]** ***HN54*** the pregnancy of a minor "puts one on notice that sexual abuse (as statutorily defined) has probably occurred" but the determination whether sexual abuse has caused an "injury" should be made on a case-by-case basis. Att'y Gen. Op. No. 1992-48, 1992 Kan. AG LEXIS 48. In short, Attorney General Stephan's opinion "left the reporter to determine if there was reason to suspect the child had suffered an injury requiring reporting." *Aid for Women v. Foulston*, 427 F. Supp. 2d 1093, 1099 (D. Kan. 2006) (*Aid for Women II*), *vacated by* Nos. 06-3187, 06-3188, 06-3202, 2007 WL 6787808 (10th Cir. 2007) (unpublished opinion). A few years later, Attorney General Carla Stovall issued a letter opinion reaching a similar conclusion. See 427 F. Supp. 2d at 1099.

Aid for Women *litigation*

A few months after Kline began serving as Attorney General, a state senator asked his office to provide a legal opinion as to the following question: "[U]nder what circumstances a doctor **[***160]** who provides abortion procedures is required to report rape and/or sexual abuse of a minor." See Att'y Gen. Op. No. 2003-17, 2003 Kan. AG LEXIS 21; see also pages 4-6. Kline's June 18, 2003, opinion noted its disagreement with Stephan's 1992 opinion, which focused on whether the minor's pregnancy constituted an "injury" under K.S.A. 38-1522, suggesting the proper focus was whether the sex act leading to the pregnancy was "inherently injurious and harmful." And after examining insurance caselaw from this and other jurisdictions and the purpose of the statutory rape laws, Kline's opinion concluded that "sexual intercourse by minors under the age of 16, whether voluntary or involuntary" was "injurious as a matter of law." Att'y Gen. Op. No. 2003-17, 2003 Kan. AG LEXIS 21. Accordingly, Kline's opinion further concluded that abortion clinics "called upon to perform an abortion for a girl under the age of

16 [are] put on notice that, as a matter of law, an injury as a result of sexual abuse has occurred. Such doctor is obligated to report this injury to the proper authorities." `Att'y Gen. Op. No. 2003-17, 2003 Kan. AG LEXIS 21.

Kline recognized that although his opinion responded to a question concerning abortion providers, the opinion would have far-reaching **[***161]** implications for any mandatory reporter with knowledge **[*182]** of sexual activity by a minor. See Att'y Gen. Op. No. 2003-17, 2003 Kan. AG LEXIS 21(noting that "[o]ther situations . . . might trigger" a reporting obligation, including teenagers who are already sexually active seeking birth control, treatment of a sexually transmitted disease, or medical attention for a pregnancy).

Within 4 months after Kline issued his opinion, a group of licensed professionals, including abortion providers, social workers, and a clinical psychologist, filed suit in United States District Court seeking to enjoin prosecutors from applying Kline's interpretation of K.S.A. 38-1522 to cases involving consensual sexual activity between consenting minors under the age of 16 and minors of a similar age, or "age mates." See discussion pages 8-15. The plaintiffs argued, in part, that the statute, as interpreted by Kline, unconstitutionally violated minor patients' confidentiality and informational privacy rights. See *Aid for Women I*, 327 F. Supp. 2d at 1285. On July 26, 2004, United States District Judge J. Thomas Marten issued a preliminary injunction, finding it likely the plaintiffs would prevail on the merits. 327 F. Supp. 2d at 1288, 1294. **[***162]** Subsequently, on appeal, the Tenth Circuit Court of Appeals vacated the injunction and remanded the case to the district court, determining the plaintiffs failed to show a substantial likelihood of success on their informational privacy claims and the district court failed to adequately address three factors in the preliminary injunction analysis. *Aid for Women v. Foulston*, 441 F.3d 1101, 1121 (10th Cir. 2006).

After conducting a 7-day bench trial on remand, Judge Marten issued a permanent injunction on April 18, 2006, enjoining prosecutors from enforcing the statute as Kline had suggested in Attorney General Opinion No. 2003-17, 2003 Kan. AG LEXIS 21. *Aid for Women II*, 427 F. Supp. 2d at 1096; see discussion pages 14-15. The court held that ***HN55*** mandatory reporters are not required to report consensual sexual **[**374]** activity between minors under the age of 16 and of a similar age when the reporter does not suspect injury, and, in doing so, the court rejected Kline's assessment that *any* sexual activity with a minor as a matter of law was injurious under the statute. Further, the court specifically concluded that Kline's opinion contradicted the statute's plain meaning, which could not be interpreted **[*183]** to include a per **[***163]** se reporting requirement when a reporter suspected consensual sexual activity between age-mates. 427 F. Supp. 2d at 1102-04.

In reaching this conclusion, Judge Marten essentially agreed with Stephan's 1992 opinion finding a minor's pregnancy to be a natural condition rather than a per se "injury." Under Stephan's assessment, the statute did not require a mandatory reporter to report every pregnancy of a minor under the age 16. Instead, Stephan concluded mandatory reporters should make a case-by-case determination whether a minor had been "injured" by a pregnancy. 427 F. Supp. 2d at 1102-03 (discussing Att'y Gen. Op. No. 1992-48, 1992 Kan. AG LEXIS 48). In contrast, Kline's opinion "shifted the focus away from the condition of pregnancy and toward the underlying sexual intercourse." 427 F. Supp. 2d at 1102. In sum, Judge Marten's opinion rejected Kline's "'zero tolerance'" interpretation of K.S.A. 38-1522, finding Kline's advisory opinion inappropriately "eliminate[ed] all discretion on the part of the reporter." 427 F. Supp. 2d at 1116.

Recodification of K.S.A. 38-1522 and dismissal of Aid for Women

On May 22, 2006, the Kansas Legislature enacted a recodification of the Kansas Code for Care of Children, which **[***164]** included amending and moving the mandatory reporting statute. ***HN56*** Effective January 1, 2007, the mandatory reporting law provides:

> "When any of the following persons has reason to suspect that a child has been *harmed* as a result of physical, mental or emotional abuse or neglect or sexual abuse, the person shall report the matter promptly . . . ." (Emphasis added.) K.S.A. 2012 Supp. 38-2223.

HN57 Under the new version of the law, "sexual abuse" is defined as "any contact or interaction with a child in which the child is being used for the sexual stimulation of the perpetrator, the child or another person." K.S.A. 2012 Supp. 38-2202(dd). The new statute substitutes the word "harmed" for the word "injured" and defines "harm" as "physical or psychological injury or damage." K.S.A. 2012 Supp. 38-2202(l). The committee that recommended reworking the statute suggested the change because the term "'injured' [is] too often misinterpreted to require serious physical harm **[*184]** before abuse is to be reported." Revised Kansas Code

for Care of Children (Including Committee Comments) 47, http://www.kansasjudicialcouncil.org/Documents/JO_CINC/cinc_code_new05[1].pdf.

After this statutory change, the plaintiffs in *Aid* ***[***165]*** *for Women* sought dismissal of the appeal, arguing the case was moot. The Tenth Circuit Court of Appeals agreed, dismissed the case, and vacated the lower court's order. *Aid for Women v. Foulston*, Nos. 06-3187, 06-3188, 06-3202, 2007 WL 6787808, at *1 (10th Cir. 2007) (unpublished opinion). At the time the plaintiffs sought dismissal, Kline was no longer Attorney General.

Citizen-Requested Grand Jury

Kansas is among six states permitting its citizens to petition for a grand jury. See 1 Beale, Bryson, Felman, Elston & Yanes, Grand Jury Law and Practice 2d § 4:2 & n.1 (2012). In 2013, the Kansas Legislature revised the grand jury statutes, including provisions dealing with the citizen-requested grand juries. None of those changes are at issue or relevant here.

HN58 Pursuant to K.S.A. 22-3001(2), a grand jury "shall be summoned" when a petition is submitted "bearing the signatures of a number of electors equal to 100 plus 2% of the total number of votes cast for governor in the county in the last preceding election." Pursuant to the law in effect at the time, once summoned by a valid citizens' petition, the "role of the citizenry in the grand jury process ceases," and the grand jury operates in **[***166]** the same fashion as a **[**375]** grand jury called by a prosecutor. See *Tiller v. Corrigan*, 286 Kan. 30, 37, 182 P.3d 719 (2008). And like a grand jury called by a prosecutor, the prosecutor has a limited role in part because the grand jury's role is not to determine guilt or innocence, but to investigate and, if warranted, issue a true bill. See K.S.A. 22-3011(1) (explaining an indictment requires the concurrence of 12 or more grand jurors and that once an indictment is found, the presiding juror "shall endorse thereon 'a true bill.'"); *State v. Snodgrass*, 267 Kan. 185, 190, 979 P.2d 664 (1999) (stating a grand jury's function is investigatory and the county attorney has a limited role in grand jury proceedings).

[*185] Nine months after Kline began serving as Johnson County District Attorney, the Life Is For Everyone Coalition, led in part by the Concerned Women for America and Operation Rescue, secured enough valid signatures to summon a citizen-requested grand jury in Johnson County. The petition directed the grand jury to investigate CHPP and its affiliated entities and persons in seven areas: (1) performing illegal late-term abortions; (2) failing to report suspected child abuse; (3) failing to **[***167]** follow the standard of care in providing medical advice or failing to conduct medical procedures required by statute; (4) providing false information to induce government action or inaction; (5) harvesting and/or illegal trafficking in fetal tissue; (6) failing to comply with the parental consent law; and (7) failing to enforce the 24-hour waiting period.

This citizen-requested grand jury convened on December 10, 2007, and Johnson County District Court Judge Kevin P. Moriarty selected Juror Number 9 to preside. After convening, the grand jury asked for special counsel. Judge Moriarty appointed local attorney Richard Merker and retired Johnson County District Court Judge Larry McClain as special counsel on December 19, 2007. The applicable statute, ***HN59*** K.S.A. 22-3013(1), required the grand jury to complete its investigation in 3 months but permitted the court to extend that period by an additional 3 months. The statute of limitations allowed the grand jury to issue a true bill on any acts occurring in the preceding 5 years. See K.S.A. 21-3106(4).

Kline omits relevant statutory and caselaw in advising the grand jury.

Kline and his staff members appeared before the grand jury on December 17, **[***168]** 2007, prior to the appointment of special counsel, to provide jurors with an explanation of the law necessary to investigate CHPP. Kline gave the grand jury a copy of K.S.A. 2012 Supp. 38-2223, the mandatory reporting law in effect as of January 1, 2007, but he did not provide or discuss the prior statute, K.S.A. 38-1522, or mention the *Aid for Women II* decision, which permanently enjoined state prosecutors during a portion of the time period relevant for the grand jury from enforcing K.S.A 38-1522 **[*186]** pursuant to Kline's "'zero tolerance'" Attorney General Opinion No. 2003-17, 2003 Kan. AG LEXIS 21. See 427 F. Supp. 2d at 1116.

Kline provided the grand jury with what he termed an "overview" of the law necessary for them to conduct their investigation. Regarding the mandatory reporting issue, Kline identified the "operable language" of K.S.A. 2012 Supp. 38-2223 as "has reason to suspect that a child has been harmed as a result of physical, mental or emotional abuse or neglect or sexual abuse." He then proceeded to define the terms used in that operative language, including the term "child" and the phrase

"sexual abuse." But in defining sexual abuse, Kline focused on sexual offenses, noting that a child cannot [***169] legally consent to sexual activity. He then explained:

> "And by definition of the statute, if you have a 13-year-old that is pregnant, you have a child that has been raped and you have a mandatory report because it is sexual abuse. *Some might say I don't have reason to believe there was harm to the child.* That's an issue for you all to take up, but that is how Kansas law works in this area." (Emphasis added.)

Kline then described the crime of "voluntary sexual relations," or consensual sex between two partners within 4 years of age when no coercion is used. Finally, Kline explained the reporting requirements under the Child Rape Protection Act, K.S.A. 2012 Supp. 65-67a09, and indicated he believed CHPP and its affiliates were following that statute.

[**376] A juror then asked, "There is still mandated reporting for a 14- and 15-year-old; correct?" Kline replied, "Yes. Under the statute, reason to suspect harm caused by sexual abuse. All of this is defined as sexual abuse. The only issue you are dealing with is reason to believe there's harm caused by."

In concluding his presentation on the mandatory reporting issue, Kline stated,

> "Now the theory behind this, as it relates to abortion providers, [***170] is that law enforcement has better tools to determine the truth as relates to who is the father of the child than an abortion clinic just engaging in an intake application form.
>
> "In other words, oftentimes when reports of child sexual abuse do not occur to the police and a pregnancy results, someone with authority or control over the child is the perpetrator of the sexual abuse. Parents report when their children are raped unless somebody in that environment is engaged in the sexual abuse that caused the pregnancy or it truly was an issue of consenting teens making a [*187] mistake. *In either event, law enforcement has better tools to determine the truth so the legislative thinking behind the statute is you don't just let the rapist walk in with the child and say, 'It was her boyfriend,' because that gives them magic words to get away with the crime.*" (Emphasis added.)

Kline then discussed other issues related to the citizens' petition. Near the end of his presentation, Kline suggested a method by which the grand jury could begin its investigation of mandatory reporting and illegal late-term abortions. Specifically, he suggested the jury obtain KDHE termination of pregnancy reports for patients [***171] under the age of 16 as well as termination of pregnancy reports for all patients who had late-term abortions. Kline further suggested the grand jury obtain SRS sexual abuse reports. He concluded, "By comparing [SRS and KDHE reports], you have a feel whether there are any reports. If they match up, there's no need to go further really." Later a juror asked, "All three of these records should match up, KBI, SRS, and Kansas Department?" Kline replied:

> "If everybody is doing their job, under the law there should be some ability to match. There are some exceptions, of course. Those exceptions being that if SRS is not open and the reporter can go to local law enforcement, and the followup might be to go to local law enforcement to see what reports they have sent to SRS. And that can be done."

Two days later, Maxwell appeared before the grand jury. He began by explaining that when a child under the age of 16 is pregnant, a felony has been committed and that in 2003, Kline's office began an investigation into whether medical providers were reporting child rape. He further explained a method by which the grand jury could discover whether "medical providers" were reporting rape:

> "To answer that [***172] question, you have to look at records that are required to be submitted to the state, because every time a child is in that situation, it's supposed to be reported to SRS . . . .
>
> "Now, all of us know what when that happens, it could either be little Johnny down the street, the 15-year-old boyfriend or the 14-year-old boyfriend, or it could be stepfather or it could be uncle.
>
> "Now, we're not necessarily as a society necessarily concerned with two 14-year-olds having sex, but we are concerned with uncle or stepfather or father if it's him. The only way to determine that is to report it and look into it."

[*188] Later during Maxwell's presentation, the presiding juror requested that Maxwell provide the grand jury with law review articles, judicial opinions, and official opinions relating to mandatory abuse reporting. Maxwell told the grand jury it "can look at anything" it wanted and agreed to supply information.

On January 2, 2008, Maxwell provided the grand jury with a notebook containing "legal research." Maxwell testified at the disciplinary hearing that he did not personally compile the notebook but instead asked another attorney to prepare it. According to Maxwell, he did not instruct the **[***173]** attorney as to what to include in the notebook, nor did he review the notebook himself.

[377]** The notebook is not included in the record before this court, but according to the parties and the record, it appears the notebook contained Kline's Attorney General opinion, Att'y Gen. Op. No. 2003-17, 2003 Kan. AG LEXIS 21, as well as Attorney General Stephan's 1992 opinion on the same topic, Att'y Gen. Op. No. 1992-48, 1992 Kan. AG LEXIS 48. According to the presiding grand juror, the notebook contained no law review articles but did include cases related to insurance law. Further, it is uncontroverted the binder did not contain the previous mandatory reporting statute in effect for 4 of the 5 years being investigated by the grand jury. Nor did it include a copy of the *Aid for Women II* decision in which the United States District Court found Kline's Attorney General Opinion No. 2003-17, 2003 Kan. AG LEXIS 21, unenforceable.

On January 7, 2008, the grand jury issued a subpoena to CHPP seeking 16 patient files, all from procedures occurring in 2003. About the same time, the jury also subpoenaed KDHE seeking termination of pregnancy reports from 2004 to 2007 relating to all abortions performed by CHPP on patients 16 years old or younger and all abortions performed on **[***174]** patients of any age when the fetus was 22 weeks or older. The grand jury also requested information from SRS.

The grand jury met on January 9, 2008, and asked Maxwell to draft a letter seeking CHPP's voluntarily appearance before the jury. The letter requested CHPP contact McClain, the jury's special counsel. At some point thereafter, McClain began communicating with counsel for CHPP.

[*189] *The grand jury discovers* Aid for Women *and K.S.A. 38-1522.*

That same day, the grand jury had additional questions for Maxwell regarding the mandatory reporting requirements:

> "JUROR NO. 2: Well, I understand that, but the concept of mandatory reporting—
>
> "MR. MAXWELL: Right.
>
> "JUROR NO. 2: —is not for that person to investigate and decide whether it was little Johnnie, big Johnnie, Uncle Johnnie, Daddy Johnnie. Okay. it was that [the pregnancy] occurred.
>
> ". . . .
>
> "[MR. MAXWELL]: The purpose of the mandatory reporting statute is to allow the proper people to look at the issue. . . . It's so that the proper people get notice of the fact.
>
> "JUROR NO. 14: It also takes it off our back. It totally takes me out of the judgment. I do what the law says. . . .
>
> "MR. MAXWELL: For example, you are a principal, and you have little **[***175]** Susie saying she is having sex with little Johnnie. . . . *Do you have to make the judgment of whether it's true or not? Instead of having to make the judgment yourself, you just report it.*" (Emphasis added.)

The presiding juror then asked a question about whether family practitioners were required to report teenagers seeking contraception. Maxwell responded:

> "You have provided [*sic*] 38-2223, and I can't quote that statute. . . . But I have read it, and it defines pretty much what has to be reported. Okay. There's been multiple opinions from the Attorney General and at various prior—the Attorney General before Mr. Kline, the one before that. There's been multiple court decisions.
>
> "The statute got changed, I think—and if I'm not mistaken it was '07."

After Maxwell mentioned the previous statute, a copy of the statute was retrieved and the grand jury reviewed K.S.A. 38-1522 for the first time. An annotation in that copy of the statute to the *Aid for Women II* federal court decision led the grand jury and Maxwell to briefly discuss the decision. During lunch, McClain and the presiding juror more thoroughly reviewed the *Aid for Women II* decision; afterward, McClain confronted Maxwell about why **[***176]** Kline's office had not provided the grand jury with that decision. And as a result of that failure, McClain told Maxwell he no longer trusted him.

[*190] On January 14, 2008, Special Counsel Merker gave copies of the *Aid for Women II* decision to the grand jury, and each juror reviewed it. Merker testified at Kline's disciplinary hearing that the grand jury was "not

happy" when it read the decision. According [**378] to Merker, "You could have dropped a pin in that room and heard it if you would have listened closely enough. They weren't happy and they expressed it clearly."

After reading *Aid for Women II*, the grand jury concluded its subpoena issued to CHPP lacked reasonable suspicion for requesting records related to the reporting issue. The presiding juror testified the grand jury discontinued its consideration of potential mandatory reporting violations. But the grand jury did not withdraw the subpoena because, as the presiding juror testified, it "considered the subpoena to be somewhat of a leverage."

CHPP filed a motion to quash the grand jury's subpoena on January 17, 2008. Kline's office responded on behalf of the grand jury, arguing that contrary to CHPP's assertions, the subpoena protected [***177] patient privacy in a manner consistent with *Alpha*. Judge Moriarty conducted a hearing on the motion to quash on February 15, 2008.

At that hearing, Judge Moriarty indicated the court preferred not to extend the grand jury's service and hoped to find common ground among the parties so that the grand jury could review information from CHPP before the 3-month service period expired. McClain informed the court the grand jury had reached an agreement with CHPP whereby CHPP would provide some but not all of the information sought by the grand jury. Kline advised the court he had only learned of the agreement just prior to the hearing and objected to this compromise, stating, "It is either compliance or non-compliance."

When the grand jury convened again on February 20, 2008, Kline advised the grand jury to ask Judge Moriarty to order CHPP to fully comply with the subpoena but then allow CHPP to file a mandamus challenging the order. Kline further advised the grand jury to ask Judge Moriarty to extend its service until the court ruled on that mandamus. Special Counsel Merker advised the jury that McClain had met with CHPP's attorneys and CHPP had agreed [*191] to give the jury some of the information [***178] contained in the 16 patient files if the jurors executed a confidentiality agreement. CHPP also agreed to answer certain questions posed by the grand jury if the grand jury signed a second confidentiality agreement.

Kline and Maxwell argued to the grand jury that the confidentiality agreements were unwise and would prevent Kline's office from prosecuting a case. After an off-the-record discussion among the grand jury members, the grand jury decided not to use the confidentiality agreements.

That same day, a grand juror who apparently spoke for the group, advised Kline the grand jury did not want to extend its service. The same juror then asked Kline if he could provide evidence on all seven areas of the investigation prior to the expiration of the 3-month period. After Kline indicated he could not do so, Judge Moriarty offered to conduct a hearing and order CHPP to provide certain information so the grand jury could continue working without requiring compliance with the subpoena. Given the grand jury's decision not to enter into a confidentiality agreement but its desire to see records, as well as CHPP's refusal to comply with the subpoena, Judge Moriarty agreed to hold a telephone conference [***179] the next day to facilitate discussions with CHPP regarding its willingness to voluntarily provide information.

According to Kline's Assistant District Attorney John Christopher Pryor, who testified at Kline's disciplinary hearing, at about the time of the February 20, 2008, grand jury session, Pryor and Maxwell were in Kline's office when Maxwell advised Kline that Kline was "losing this grand jury." According to Pryor, Maxwell's statement bothered Kline, and Kline responded that he wanted to "keep trying to convince [the grand jury]." After Maxwell left the room, Pryor asked Kline why he cared about the grand jury, given that it was convened by a citizens' petition and had independent status and that Kline had 107 counts pending against CHPP. Pryor testified Kline "became very angry, his body was stiff and he slammed the table and he said if I lose this grand jury it will destroy me."

[*192] [**379] *Kline disregards the grand jury's request to review pleadings.*

Following a telephone conference with Judge Moriarty, CHPP voluntarily provided information, although its nature and format are unclear from the record. On February 25, 2008, the grand jury viewed the information, and after an off-the-record [***180] discussion, the grand jury, through the presiding juror, requested:

> "[PRESIDING JUROR]: Second is a request, and while we understand that we don't have the authority to issue this, we are asking the DA's office and anyone else that might submit any documents to the Court in our name, that the Grand Jury be advised of those prior to the filing.

"THE COURT: Say it one more time now.

"[PRESIDING JUROR]: The Grand Jury would like to review any documents that are provided to the Court in our name. For example, if there are to be any more briefs related to the subpoena, we would like to see that information since it's being submitted in our name prior to that.

"THE COURT: Okay.

"[PRESIDING JUROR]: It's a request.

Pryor, who appeared on behalf of Kline's office, agreed to relay that request stating:

"MR. PRYOR: In all candor from our office's standpoint, I don't have the authority to accept or reject, but I will pass that on. I just wanted to—

"[PRESIDING JUROR]: We understand that.

"MR. PRYOR: Unless you order it.

"[PRESIDING JUROR]: That's just a general request.

. . . .

"[THE COURT]: If you believe that you don't need your subpoena, if that's what one of your thoughts is, then you simply have to tell **[***181]** me that you want to withdraw your subpoena request. If you want the subpoena fulfilled, you have to simply tell me that as well. . . .

"[PRESIDING JUROR]: Okay. That's fine. We would just want to review anything before anything is submitted on our behalf."

The grand jury also advised the court that it had nearly completed its investigation and asked Kline's office to present any true bills that were warranted. Pryor testified at the disciplinary hearing that he informed Kline about the grand jury's request to see any additional filings submitted on the grand jury's behalf.

The presiding grand juror testified the grand jury requested to review before filing any documents prepared in its name because the District Attorney's office's supplemental response to CHPP's **[*193]** motion to quash had contained information "contrary to what [the jury was] trying to accomplish."

Despite this grand jury direction, on February 26, 2008, Kline's office filed a new motion to enforce the grand jury subpoena without first permitting the grand jury to review it. The motion, captioned "State's Motion to Enforce Grand Jury's Subpoena and Original Citizen Petition," was not filed under seal and discussed the number **[***182]** of days the jury had met, the necessity of the CHPP subpoena, and the confidentiality agreement proposed by special counsel but not agreed to by the grand jury. Additionally, the motion accused McClain of violating the grand jury secrecy statute by communicating with CHPP.

Pryor, who drafted the motion, testified Kline also directed him to attach the proposed confidentiality agreement but Pryor refused because it was under seal. According to Pryor, Kline sought to attach the confidentiality agreement in order "to get the truth out."

On February 27, 2008, Rucker and Pryor informed the grand jury that Kline's office would not present any true bills and that Kline's office believed the jury's investigation was incomplete because CHPP had not complied with the subpoena. After the grand jury indicated its members were divided as to whether to enforce the subpoena, Judge Moriarty advised it of several options: enforce the subpoena; ask CHPP to voluntarily provide additional information; or make a decision without additional information. The judge further informed the grand jury that **[**380]** any order the court issued regarding the subpoena likely would be appealed and the grand jury's time would expire **[***183]** before it received the additional information.

Later that same day, Judge Moriarty, on behalf of the grand jury and with Kline's staff present, requested additional information from CHPP. The following day, CHPP agreed to provide that information in a spreadsheet format, which was delivered to Judge Moriarty on March 3, 2008. The judge gave it to the grand jury.

Also on March 3, 2008, Kline directed Pryor to file another request to enforce the CHPP subpoena. That request, captioned "State's Fourth Request to Enforce Subpoena," like the prior enforcement motion, was not filed under seal and was not provided **[*194]** to the grand jury before filing. Unlike the prior motion, however, when Pryor presented this motion to Kline for his approval, Kline directed Pryor to remove Kline's signature block. Pryor explained that Kline made the request because "there was abortion controversy and he didn't want to have another thing to make it appear like he was just the abortion attorney."

Finally, on March 3, 2008, the grand jury withdrew its subpoena and ended its 3-month service period without

issuing a true bill.

CLEAR AND CONVINCING EVIDENCE SUPPORTS THE PANEL'S CONCLUSION THAT KLINE VIOLATED KRPC 8.4(C) [***184] AND (D) WHEN HE FAILED TO INFORM THE GRAND JURY ABOUT THE *AID FOR WOMEN* DECISION AND K.S.A. 38-1522.

The panel found the failure by both Kline and Maxwell to inform the grand jury about the *Aid for Women II* decision and provide it with a copy of K.S.A. 38-1522 when purporting to inform the jury about the mandatory reporting law violated three disciplinary provisions: (1) KRPC 8.4(c), which prohibits engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation; (2) KRPC 8.4(d), which prohibits engaging in conduct prejudicial to the administration of justice; and (3) KRPC 5.1(c)(2) (2012 Kan. Ct. R. Annot. 612), which makes a lawyer (in this case, Kline) with direct supervisory authority over another lawyer (in this case, Maxwell) responsible for the actions of the other lawyer if the supervising lawyer "knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action."

Kline contends in reaching its conclusions, the panel departed from the facts and ignored the grand jury transcripts, records, and filings. He suggests a review of those documents reveals that, although he failed to cite the previous mandatory [***185] reporting statute or provide the jury with the *Aid for Women II* decision, he otherwise accurately explained the applicable law to the grand jury. Therefore, he reasons his description of the law did not violate KRPC 8.4(c)'s prohibition against dishonesty, fraud, deceit, or misrepresentation. Further, he argues his actions did not prejudice the grand jury's investigation or constitute a violation of KRPC 8.4(d) [*195] because the grand jury did not alter its course after learning of the *Aid for Women II* decision and K.S.A. 38-1522.

The Disciplinary Administrator argues clear and convincing evidence supports the panel's finding, noting Kline and Maxwell failed to inform the jury of the applicable statute and caselaw relevant to the legal obligations of CHPP during a significant period of the time subject to the grand jury's investigation and that this significant omission prevented the jury from making an informed decision regarding the issuance of a subpoena.

The Role of the Prosecutor in Guiding a Citizen-Requested Grand Jury

In challenging the panel's findings, Kline does not suggest he and Maxwell were not required to provide the grand jury with an accurate summary of the law. Instead, he [***186] once again employs semantics to restate his obligation, claiming he "was under a duty *not to incorrectly* state the law to the grand jury. . . ." (Emphasis added.) Maxwell testified at the disciplinary hearing that a prosecutor is a "legal advisor" to the grand jury and should ensure that the jury understands the criminal law.

[**381] Maxwell's description is consistent with ***HN60*** the statutory provisions describing the prosecutor's role as legal advisor to a citizen-requested grand jury. These statutes authorize the district attorney to act at the grand jury's request, see K.S.A. 22-3007, and most critically require the prosecutor to give "advice in any legal matter" but only when the grand jury "require[s]" such advice. See K.S.A. 19-713.

Similarly, the ABA Standards for Criminal Justice Prosecution Function explains that ***HN61*** the prosecutor, in connection with a grand jury, may appropriately explain the law and express an opinion on the legal significance of the evidence. Further, the ABA standards direct that ***HN62*** a prosecutor, in presenting a case to a grand jury, should not intentionally interfere with the grand jury's independence, preempt a grand jury function, or abuse the grand jury's processes. See [***187] ABA, Standards for Criminal Justice Prosecution Function and Defense Function 3-3.5, 3-3.6(f), (3d ed. 1993); see also 2 United States Department of Justice, United States Attorneys' Manual 9-11.010 [*196] (1997) (***HN63*** Prosecutor should advise the grand jury on the law, and when dealing with a grand jury, prosecutor should act as an "officer of the court.").

Logically, we must consider the prosecutor's duties with respect to a citizen-requested grand jury in the context of the grand jury's role—*i.e.*, to investigate, and if appropriate, issue a true bill. See *Snodgrass*, 267 Kan. at 190 (stating ***HN64*** the grand jury's function is "investigatory and accusatory"). Thus, a prosecutor, when called upon to do so, must provide the grand jury with a description of the law that adequately permits the grand jury to conduct an investigation sufficient to lead to a true bill capable of being prosecuted. Additionally, as the statutory language makes clear, the prosecutor appears and takes actions only at the request of the citizens' grand jury. In short, the prosecutor's role is to assist the grand jury, rather than direct its outcomes or manipulate the process.

So while Kline may be correct that a prosecutor is obligated [***188] "not to incorrectly state the law to the grand jury," that does not mean, as Kline implies, that a prosecutor may provide incomplete information necessary to permit the jury to make an informed decision. To do so undoubtedly would not assist or aid the jury in its investigation as to whether there has been a violation of the law.

Clear and Convincing Evidence Supports Kline's Violation of KRPC 8.4(c).

The panel concluded that by failing to inform the grand jury about the pre-2007 mandatory reporting statute and the *Aid for Women II* decision, Kline presented false and misleading information by omission. Kline contends that although he did not cite the applicable statute or decision, he adequately informed the grand jury. The Disciplinary Administrator's brief as to this issue is conclusory, suggesting only that the grand jury acted on its "misunderstanding of the law caused by [Kline's] and his staff's omissions."

It is helpful at this juncture to be reminded that the relevant portion of the mandatory reporting statute actually provided to the jury is quite succinct:

> [*197] ***HN65*** When any of the following persons has reason to suspect that a child has been *harmed* as a result of physical, mental or emotional [***189] abuse or neglect or sexual abuse, the person shall report the matter promptly. . . ." (Emphasis added.) K.S.A. 2012 Supp. 38-2223.

Similarly, the statute's relevant portion in effect until January 1, 2007, was relatively straightforward:

> ***HN66*** "When any of the following persons has reason to suspect that a child has been *injured* as a result of physical, mental or emotional abuse or neglect or sexual abuse, the person shall report the matter promptly. . . ." (Emphasis added.) K.S.A. 38-1522.

Kline points out that he correctly informed the grand jury that as to age-mate minors, the grand jury "would still need to find that 'harm' occurred," and he argues that without citing the case he "precisely stated the holding of" *Aid for Women II*. And while he does not cite to a particular portion of the record to support this contention, we presume he is referring to his comment: "Some might say I [**382] don't have reason to believe there was harm to the child. That's an issue for you all to take up, but that is how Kansas law works in this area." While later, Kline commented, "All of this is defined as sexual abuse. The only issue you are dealing with is reason to believe there's harm caused by."

First, we must [***190] point out the obvious. In light of the grand jury's complete lack of context to Kline's cryptic comments, Kline can hardly be said to have "precisely stated the holding" of *Aid for Women II*, as he casually now claims. Moreover, assuming for the moment that Kline's obscure comments somehow adequately informed the jury of the results of the *Aid for Women II* litigation and the federal court's interpretation of the statute, Kline failed to advise the jury that the statute he was discussing was not even in effect for 4 years of the 5-year period being investigated by the grand jury. Kline's argument does nothing to dispel the fact that his failure to provide the grand jury with a copy of the prior statute and its corresponding legal analysis in the *Aid for Women II* decision were significant omissions.

Further, Kline's suggestion to the grand jury that the issue of "harm" was for the jury to take up was blatantly incorrect. As Kline was acutely aware after his office unsuccessfully litigated the same [*198] issue for 3 years in federal court, ***HN67*** the meaning of the term "injured"—the term corresponding with the term "harmed" in the prior statute—was *not* an open question, nor was it an "issue" for the [***191] grand jury to decide. Rather, under K.S.A. 38-1522, "health care providers," not law enforcement or other charging bodies, had "discretion to determine when there is 'reason to suspect a child had been injured.'" See *Aid for Women II*, 427 F. Supp. 2d at 1116. And under the Attorney General's opinion preceding Kline's assumption to that office, decisions by mandatory reporters as to the "injury" specified in the prior statute rested on a case-by-case determination. 427 F. Supp. 2d at 1099, 1103 (discussing Stephan's opinion).

In sum, the grand jury was not tasked with considering whether it believed a child was injured by sexual activity. Instead, after *Aid for Women II*, the only open question was whether the *reporter* had reason to suspect injury, or at most failed to investigate potential injury, and nevertheless failed to report it. The United Stated District Court for the District of Kansas had already decided this same issue contrary to Kline's interpretation and had issued an injunction specifically prohibiting prosecutors from enforcing Kline's interpretation of the statute. By any measure, this information was directly relevant to the grand jury's charge as outlined in the citizens' [***192] petition that summoned it into being.

Kline also seems to imply the grand jury should have inferred Kline was referring to Judge Marten's *Aid for Women II* decision in advising the grand jury that "[s]ome might say I don't have reason to believe there was harm to the child." But it goes without saying a citizens' grand jury would not have understood Kline's remark absent further context and explanation, which could most pointedly come by providing a copy of the relevant statute or key court decision, as well as accurately describing their background. As it happened, the grand jury got an incomplete informational background under Kline's guise of objectively aiding it in the performance of its duties.

We have no hesitancy in rejecting Kline's claims that his enigmatic comments, as fully set out above, somehow adequately informed the grand jury about the correct interpretations and applications **[*199]** of the reporting statute as they evolved during the time frame relevant to the grand jury's investigation. In fact, if anything, Kline's comments misled the grand jury because they suggested mandatory reporters were required to report any suspicion that a minor (under the age of 16) has engaged in **[***193]** sex, whether consensual or with an age-mate, during the preceding 5 years.

Further, Kline reinforced the grand jury's misapprehension when he suggested it could simply compare KDHE and SRS reports. Kline emphasized that if the records matched, *i.e.*, if the clinic reported to KDHE that 10 young women under the age of 16 underwent abortions and the clinic also reported to SRS 10 cases of potential sexual **[**383]** abuse of young women under the age of 16, the grand jury's investigation could end. And by implication, the jury understood that if the records did not match, the grand jury would have sound evidence the clinic failed to report sexual abuse.

But as Kline was acutely aware, this would not necessarily be true. *Aid for Women II* had concluded that whether an individual had been "harmed" by sexual abuse was dependent upon individual circumstances. Put another way, ***HN68*** under the reporting statute, "reporters were not only authorized, but compelled, to make a case-by-case determination as to whether injury occurred." 427 F. Supp. 2d at 1103. This required case-by-case determination could easily explain why some KDHE termination of pregnancy reports might not have a corresponding SRS sexual abuse **[***194]** report—but without a fuller presentation of the law's background, this possibility would not be apparent. Instead, Kline identified a single exception when the two reports might not match up—when SRS offices were closed, so reports would be made to law enforcement.

By failing to explain the grand jury's investigation could not end with a record comparison, Kline left the grand jury with the mistaken impression that if the records did not match, a per se violation of the reporting law had occurred. And this is exactly what the grand jury erroneously believed based on Kline's comments until the truth was discovered later.

As the presiding grand juror testified at Kline's disciplinary hearing, after getting Kline's description of the law, the grand jury believed **[*200]** reporters who learned that a minor under the age of 16 was pregnant by necessity knew that minor had been sexually abused and thus had been harmed, so the reporter would have had no choice but to report the abuse. Significantly, the presiding juror also testified that before the jury learned of the *Aid for Women II* decision, the grand jury intended to issue a true bill as to the allegations regarding CHPP's failure to report allegations **[***195]** of sexual abuse and that the grand jury intended to base that indictment on its comparison of the 2003 KDHE termination of pregnancy reports and SRS records, which fell within the time frame of the prior statute not disclosed by Kline.

Kline further misled the grand jury with his statement that "law enforcement" is better equipped than a statutory reporter to determine if a child has been "harmed." Kline told the grand jury, "[L]aw enforcement has better tools to determine the truth so the legislative thinking behind the statute is you don't just let the rapist walk in with the child and say, 'It was her boyfriend,' because that gives them magic words to get away with the crime."

Thus, Kline advocated to the grand jury that even if a minor patient reports that her pregnancy resulted from consensual sex with an age-mate boyfriend, a statutory reporter was not entitled to believe that explanation. Instead, according to Kline, the incident must be reported so that law enforcement could determine the truth to the patient's statement.

Again, Kline's interpretation of the statute was entirely inconsistent with the federal district court's decision in *Aid for Women II*. There, the court held **[***196]** that ***HN69*** under the statute's plain language, the reporter had the initial discretion to determine whether the child was injured, *not* law enforcement. 427 F. Supp. 2d at 1116 ("Contrary to defendants' claims, a prosecutor is not in a better position to make an initial determination

of 'injury,' as required by statute, than is a health care professional.").

Kline argues in his reply brief that his statement to the grand jury that law enforcement is better equipped to deal with the issue referred to the identity of the father and not the issue of harm or injury and therefore was consistent with *Aid for Women II*. But the court in *Aid for Women II* concluded that Kline's opinion that **[*201]** age-mate intercourse was per se reportable was flawed because the legislature allowed some voluntary sexual activity, such as age-mate sex, to fall outside the statute when no injury had been caused. 427 F. Supp. 2d at 1102-03. Thus, as the *Aid for Women II* decision made clear, if the father of the unborn child was the age-mate boyfriend, the pregnancy was not a per se injury. Therefore, Kline's **[**384]** statement that law enforcement was better equipped to determine whether the father of the unborn child was the minor patient's **[***197]** boyfriend or father was inconsistent with the *Aid for Women II* decision—something the grand jury could have determined for itself if Kline had provided it with the decision.

Further, by omitting any discussion about the key element of "injured" and failing to discuss the only caselaw interpreting that crucial element, Kline hindered the jury's informed decision making. The presiding grand juror testified that after learning of *Aid for Women II*, the jury no longer believed it had reasonable suspicion to subpoena records from CHPP on the reporting issue. Similarly, Merker testified the grand jury was "not happy" it had not learned earlier of the *Aid for Women II* decision. Simply stated, the grand jury was obligated to make an informed and objective decision on how to proceed. By failing to provide the jury with K.S.A. 38-1522 and discuss the federal litigation surrounding the meaning of the term "injured" and its explicit rejection of Kline's interpretation, Kline prevented that informed and objective decision making.

Read in its entirety, we find clear and convincing evidence supports the panel's finding that Kline substantially and significantly misrepresented the law by omitting not **[***198]** only the relevant statute itself, but any explanation of the *Aid for Women II* decision prohibiting prosecutors from enforcing the statute in the manner Kline suggested to the grand jury was legally required. Kline thereby engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation in violation of KRPC 8.4(c).

Clear and Convincing Evidence Supports Kline's Violation of KRPC 8.4(d).

Kline argues his failure to inform the grand jury of the prior reporting statute and the surrounding litigation did not impact the **[*202]** grand jury's investigation. Therefore, he reasons there can be no clear and convincing evidence that he violated ***HN70*** KRPC 8.4(d), which prohibits engaging in conduct prejudicial to the administration of justice. But as addressed in our discussion of Kline's actions in attaching sealed documents to his *Alpha* brief, this court has not required a showing of actual prejudice to violate KRPC 8.4(d). See pages 45-48. Rather, Kline violated KRPC 8.4(d) if he harmed, injured, or disadvantaged the legal system generally. See *Pyle*, 283 Kan. at 829-30.

We find clear and convincing evidence that Kline's conduct harmed, injured, and disadvantaged the legal system generally. His failure **[***199]** to mention the only federal court decision interpreting the reporting statute the grand jury was being called upon to enforce or the fact that the decision specifically rejected his assessment of that statute calls into legitimate question his trustworthiness as a prosecutor and impacted the efficiency and reliability expected from the grand jury process.

Further, clear and convincing evidence demonstrates actual harm. As discussed, two individuals with direct knowledge of the grand jury's reaction to the *Aid for Women II* decision—the presiding grand juror and the jury's legal counsel—testified the grand jury was unhappy that it had not learned of the *Aid for Women II* decision earlier. The presiding juror specifically testified the discovery of the opinion impacted the investigation as the grand jury felt it no longer had reasonable suspicion to request records from CHPP on the reporting issue. The panel determined these witnesses were credible, and the evidence bears the panel out

We Decline to Hold Kline Liable for Maxwell's Violations.

HN71 Under KRPC 5.1(c)(2) (2012 Kan. Ct. R. Annot. 612), Kline can only be responsible for Maxwell's actions if he knew about them. And as to this, the panel **[***200]** simply found Kline "knew or should have known" about Maxwell's omissions but did not describe the evidence it relied on to support this conclusion. As previously noted, the term "knows" does not encompass constructive knowledge, and the panel could not properly rely on a conclusion that Kline "should **[*203]** have known" about Maxwell's omissions and statements to the grand jury.

Having found clear and convincing evidence that Kline's own conduct before the [**385] grand jury directly violated KRPC 8.4(c) and (d), and in the absence of the necessary findings from the panel regarding Kline's actual knowledge of Maxwell's conduct, we decline to engage in an analysis of what evidence might support it.

THE PANEL'S CONCLUSION THAT KLINE VIOLATED KRPC 8.4(G) BY DIRECTING AN ATTORNEY TO PUBLICLY FILE TWO PLEADINGS TO ENFORCE GRAND JURY SUBPOENAS IS SUPPORTED, IN PART, BY CLEAR AND CONVINCING EVIDENCE.

The panel concluded Kline violated KRPC 8.4(g)'s prohibition against conduct adversely reflecting on a lawyer's fitness to practice law when he directed his staff to file two motions to enforce the grand jury's subpoena without first permitting review of the motions by the grand jury, as the grand jury had requested. [***201] The panel found Kline acted intentionally in filing the "unauthorized" enforcement motions and contrary to the grand jury's efforts to seek voluntary disclosure of information from CHPP. The panel also found a second KRPC 8.4(g) violation, concluding Kline violated the grand jury secrecy statute when he directed the two motions be publicly filed.

Clear and Convincing Evidence Supports the Panel's Finding That Kline Violated KRPC 8.4(g) by Failing to Comply with the Grand Jury's Request to Review Pleadings Before Filing.

Kline first challenges the panel's finding that his direction to a staff attorney to file two enforcement motions without first providing them to the grand jury for review violated ***HN72*** KRPC 8.4(g) (2012 Kan. Ct. R. Annot. 644), which prohibits engaging in conduct "adversely reflect[ing] on the lawyer's fitness to practice law. In doing so, Kline reiterates his argument, discussed at pages 26-27, that his conduct was not "clearly egregious and flagrantly violative of accepted professional norms"—a standard we have already rejected. Kline further contends the jury "requested," rather than directed, review of documents filed in its name and therefore he [*204] had no obligation to [***202] comply with the request. Alternatively, Kline contends he filed the enforcement motions on behalf of *the State*, rather than the grand jury, and therefore his actions did not implicate the grand jury's request. Finally, he argues these filings did not prejudice the proceedings or impact the grand jury's investigation.

The Disciplinary Administrator responds that Kline could act only in his statutory capacity as a legal advisor with respect to the citizens' grand jury and, as such, he was duty-bound to follow its request. Further, the Disciplinary Administrator argues Kline's actions were egregious by contradicting the grand jury's efforts to obtain CHPP's voluntary compliance with the grand jury's requests in order to avoid an appellate challenge.

Kline was charged with assisting, not directing, the citizen-requested grand jury.

As discussed, ***HN73*** a county or district attorney acts as a legal advisor to a citizen-requested grand jury. And as the statutory language conveys, a prosecutor acts almost exclusively at the grand jury's request and direction. For instance, "*whenever required by the grand jury*," a prosecutor must attend sessions of the grand jury to examine witnesses, provide advice [***203] on legal matters, issue subpoenas or other processes, and draw up bills of indictment. K.S.A. 19-713; K.S.A. 22-3007(1); see also *Tiller*, 286 Kan. at 38 (grand jury's subpoena power authorizes the issuance of subpoenas for witnesses as well as the production of documents).

Similarly, ***HN74*** while K.S.A. 22-3007(2) utilizes mandatory language regarding a prosecutor's authority to appear before the grand jury, the prosecutor must nevertheless *request* to appear. K.S.A. 22-3007 (providing that a prosecuting attorney "*shall*, upon his request, *be permitted* to appear before the grand jury for the purpose of giving information relative to any matter cognizable by the grand jury" [Emphasis added.]). But in the same sentence, the legislature gave the grand jury discretion as to whether to permit the prosecutor to examine witnesses. K.S.A. 22-3007(2) (providing prosecutor "*may* be permitted to interrogate witnesses if the [**386] grand jury deems it necessary" [Emphasis added.]).

[*205] As Kline acknowledged during the grand jury proceeding and in his disciplinary hearing, ***HN75*** the grand jury functions as an independent body. See *Tiller*, 286 Kan. at 39-43 (relying on *United States v. R. Enterprises, Inc.*, 498 U.S. 292, 111 S. Ct. 722, 112 L. Ed. 2d 795 [1991] [***204] for proposition that ***HN76*** grand jury has a "unique role" as "an investigatory body," and recognizing that despite differences in federal and state systems, federal rules and caselaw regarding the grand jury process provide guidance); see also ABA. Standards for Criminal Justice Prosecution Function and Defense Function 3-3.6(f) (3d ed. 1993) (stating that ***HN77*** a prosecutor should not "intentionally interfere with the independence of the grand jury,

preempt a function of the grand jury, or abuse the processes of the grand jury"); National District Attorneys Association, National Prosecution Standards § 4-8.3 (3d ed.) (providing that ***HN78*** a prosecutor should refrain from actions that "have the potential to improperly undermine the grand jury's independence").

By directing the two enforcement motions be filed, Kline contradicted the plain desires and goals of an independent investigatory body.

Kline does not dispute the panel's finding that he intentionally ignored the grand jury's request to review documents before they were filed. Significantly, Kline fails to acknowledge the circumstances leading to the jury's request—a previous filing in which Kline's office sought to extend the grand jury's service **[***205]** without first seeking the grand jury's input as to whether it wished to extend its service. And Kline also fails to acknowledge that by this point in the proceedings, his office's relationship with the grand jury was strained—the jury was unhappy about Kline's and his office's failure to disclose *Aid for Women II*, and it questioned whether it had reasonable suspicion to issue the CHPP subpoena with respect to mandatory reporting.

Instead, Kline embarks upon a misguided trajectory. He claims he did not violate the grand jury's wishes, or his ethical duty, because the filings were "made solely in the name of *the State* and signed by his office,—in stark contrast to other documents which **[*206]** the grand jury did purport to issue or request be filed in its own name." (Emphasis added.)

Not surprisingly, Kline points to no legal authority supporting his suggestion that a prosecutor occupies dual roles in a citizens' grand jury proceeding and that when those roles diverge, the prosecutor may elect to act on the State's behalf rather than the grand jury's behalf. Simply stated—this was *not* an inquisition brought by the prosecutor on behalf of the State in which the prosecutor assumes a more independent **[***206]** role. This was a statutorily defined citizens' grand jury proceeding in which Kline played a limited and specific role—a role explicitly set out by statute. He was not free to assume a different role once he no longer approved of the grand jury's direction.

Moreover, Kline's recognition that his enforcement motions represented a "stark contrast" to previous filings made at the grand jury's request only solidifies our conclusion that Kline's singular purpose in filing these motions was inconsistent with his statutory role as an advisor to an independent grand jury and that Kline was acutely aware of this distinction. In other words, Kline sought to prod the grand jury proceeding in the direction he wanted it to go, rather than allowing the grand jury to chart its own course.

Notably, the only citation Kline provides to support his argument, K.S.A. 22-3008(1), is relegated to a footnote in his brief. ***HN79*** That statute allows the clerk of the court to issue subpoenas and other process "[w]henever required by any grand jury, its presiding juror or the prosecuting attorney." But Kline provides no explanation for his reliance upon this statute or its application here.

Kline's failure to expand on **[***207]** the footnoted citation is predictable since K.S.A. 22-3008(1), by its very terms, is not relevant. ***HN80*** That statute addresses a *clerk's issuance* of "subpoenas and other process to bring witnesses to testify before the grand jury," and it indicates the process can be initiated by the grand jury, its presiding juror, or the **[**387]** prosecuting attorney. But this statute has no application whatsoever to efforts to seek *court enforcement* of grand jury subpoenas, which is the circumstance at issue. Instead, under K.S.A. 22-3008(2), the district court controls whether compulsory process shall issue.

[*207] ***HN81*** Under K.S.A. 22-3008(2), the district court can enforce compulsory process when "any witness duly summoned to appear and testify before a grand jury *fails or refuses to obey*" the summons. See *Tiller*, 286 Kan. at 38 (noting district court has authority to enforce compulsory process in a citizen-directed grand jury proceeding). Here, it is undisputed CHPP had filed a motion to quash the subpoena and was working with the grand jury and its special counsel to voluntarily produce information. Thus, CHPP had not failed or refused to obey the summons. Moreover, even if we were concerned with the enforcement of the **[***208]** subpoena, we see ***HN82*** nothing in K.S.A. 22-3008(1) permitting a prosecuting attorney to seek enforcement of a subpoena on behalf of the State without a citizen-requested grand jury's direction to do so.

When Kline filed the two enforcement motions, he purported to act on behalf of the State, yet he had no statutory authority to do so. Instead, his role was limited only to acting on behalf of and at the request of the grand jury. But the grand jury had specifically requested to review any documents filed, and this request came only *the day before* Kline filed the first of the two motions. Even more significantly, Kline filed the second

motion on the *very same day* the grand jury was reviewing information voluntarily provided by CHPP and had chosen to end its service.

By intentionally and purposefully failing to honor the grand jury's request and by acting on behalf of the State without authority to do so, Kline exceeded his statutory responsibility to the grand jury in favor of his own interests. Under these circumstances, we conclude the evidence clearly and convincingly establishes Kline's actions violated KRPC 8.4(g)'s prohibition against conduct adversely reflecting on a lawyer's fitness **[***209]** to practice law.

Additionally, we note as did the panel, that at the time Kline filed his enforcement motions, the grand jury had already redirected its efforts towards seeking voluntary compliance from CHPP. And while the grand jury maintained its subpoena as leverage, it did not wish to pursue enforcement based on its concern that such action would lead to a mandamus action challenging the subpoena and redirecting the course of the proceedings. The grand jury had clearly expressed its desire not to extend its service beyond **[*208]** its initial 3-month limitation, and the court was unwilling to order an extension without the jury desiring it. In other words, despite Kline's recognition that the grand jury was an independent investigatory body, his two motions seeking enforcement of the CHPP subpoena directly contradicted the jury's independent efforts and goals. Again, that is not the role the statute gave Kline's office in this circumstance.

Further, both motions filed by Kline's office engaged in substantial criticism of the grand jury, its special counsel, and even the judge; thus, the motions went well beyond seeking subpoena enforcement. For example, the first motion chided the grand jury's **[***210]** special counsel for "chit chat[ting]" with CHPP, *i.e.*, in seeking to mediate an agreement permitting the grand jury to view requested information without extending its time. And the motion hinted at chiding the grand jury for not meeting regularly.

Similarly, the second enforcement motion took issue with the "mediated agreement" through which CHPP had agreed to provide information, even though by that point the grand jury had expressed its willingness to review information voluntarily provided by CHPP. Unquestionably, Kline's intent, especially regarding the second motion filed on the last day of the grand jury's service, was *not* to advance the grand jury's direction or to benefit its process in any way. Instead, he acted at complete cross-purposes with the grand jury—a course that contradicted the grand jury statutes defining his role.

While Kline's conduct in filing the enforcement motions contrary to the direction and purpose of the grand jury provides strong **[**388]** circumstantial evidence of Kline's contrary purpose, the testimony of Kline's assistant district attorney, Pryor, provides direct evidence of Kline's motive. Although Kline disputes some of Pryor's testimony, the panel's decision **[***211]** to cite Pryor's testimony and not Kline's is a credibility determination we will not reexamine. Pryor told the disciplinary panel that approximately 1 week prior to the filing of the first enforcement motion, Maxwell advised Kline that Kline was "losing this grand jury." This statement bothered Kline, who wanted to "keep trying to convince [the grand jury]." Pryor questioned Kline as to why he cared so much about this grand jury and **[*209]** reminded Kline that Kline had not called the independent body and that Kline had already filed 107 charges against CHPP. In response, Kline "became very angry, his body was stiff and he slammed the table and he said if I lose this grand jury it will destroy me." Pryor's testimony leaves no question that while Kline understood and was even reminded of the independence of the citizen-requested grand jury, he intentionally proceeded to act based on his own motive and contrary to the grand jury's direction.

Similarly, Pryor testified that Kline directed him to attach the confidentiality agreement, brokered by the grand jury's special counsel but later withdrawn, to the enforcement motion Kline had directed be publicly filed with the court. According to Pryor, **[***212]** Kline's purpose in attaching the agreement was to "get the truth out." While Pryor wisely chose not to comply with Kline's direction because the agreement was sealed, his testimony further supports the panel's conclusion that Kline clearly acted for his own purpose, and not that of the grand jury, in filing the motion.

Further, Pryor testified that when he presented Kline with the second enforcement motion for approval before filing it on March 3, 2008, Kline directed Pryor to remove Kline's signature block. According to Pryor, Kline did not want to appear on the pleading because "he didn't want to have another thing to make it appear like he was just the abortion attorney." Kline's insistence on filing the enforcement motion on the last day of the grand jury's service while simultaneously refusing to take responsibility for the motion provides further evidence that Kline understood that his actions were inconsistent

with his advisory role.

Finally, Kline again makes an alternative "no harm, no foul" argument suggesting his conduct did not violate KRPC 8.4(g) because his direction to file the two enforcement motions did not impact the grand jury. Essentially, he argues his actions were **[***213]** neither prejudicial nor material. But neither of these factors is relevant or necessary to finding a KRPC 8.4(g) violation because they ignore the professional responsibility imposed by the grand jury statute and assumed by Kline under it. The court will not entertain this argument further.

[*210] We find clear and convincing evidence to support the panel's findings that contrary to the grand jury's request to view any document prepared in its name, and contrary to the grand jury's efforts to seek voluntary compliance from CHPP, Kline filed two motions to enforce the subpoena. We have no hesitation in concluding Kline's purposeful disregard for his obligation to act at the request of, and on behalf of, the grand jury negatively reflects on Kline's fitness to practice law in violation of KRPC 8.4(g).

Clear and Convincing Evidence Does Not Support the Panel's Finding That Kline's Direction to Publicly File the Enforcement Motions Violated KRPC 8.4(g).

The panel also found Kline violated KRPC 8.4(g) when he ordered the enforcement motions be publicly filed. In challenging this finding, Kline first contends he did not receive notice that he was being charged with a violation based on the public **[***214]** filing of the motions. Therefore, he claims, the panel's finding should be discarded on due process grounds. Alternatively, he contends the panel erred in finding a KRPC 8.4(g) violation because the grand jury secrecy statute, K.S.A. 22-3012, had already been disregarded by the grand jury's own special counsel.

The Disciplinary Administrator argues the complaint provided adequate notice with respect to this violation and that Kline's public filings of the two enforcement motions revealed to the public the grand jury's confidential **[**389]** workings in violation of K.S.A. 22-3012 and KRPC 8.4(g).

Initially, we note that while the Disciplinary Administrator characterizes Kline's "notice" argument as a due process challenge, Kline's brief does not directly raise a due process issue. Instead, he simply asserts the "[p]anel failed to provide Kline notice." We could deem Kline's notice argument abandoned. See *State v. Berriozabal*, 291 Kan. 568, Syl. ¶ 20, 243 P.3d 352 (2010) (deciding that ***HN83*** arguments without pertinent authority or explanation will be deemed abandoned). Instead, we decline to address Kline's notice argument, as we agree with Kline that under the circumstances, the record lacks clear **[***215]** and convincing evidence of a KRPC 8.4(g) violation.

[*211] Turning to the merits, it appears that in finding a KRPC 8.4(g) violation, the panel relied upon its conclusion that Kline's public filing of the enforcement motions violated ***HN84*** the grand jury secrecy statute, K.S.A. 22-3012, which allows disclosure only in limited circumstances: "[An] attorney . . . may disclose matters occurring before the grand jury only when so directed by the court . . . ."

As the panel noted, in the first enforcement motion, Kline: (1) pointed out the grand jury had met for 11 days; (2) discussed Special Counsel McClain's efforts to voluntarily obtain information from CHPP; (3) accused McClain of violating the grand jury secrecy statute; and (4) discussed the confidentiality agreement's terms ultimately rejected by the grand jury. Further, while not specifically noted by the panel, in the second motion, Kline: (1) discussed the February 27 and 28, 2008, grand jury hearings; (2) described a "mediated agreement" brokered by Judge Moriarty resulting in CHPP providing information to the grand jury; and (3) questioned both the wisdom and legality of the manner in which CHPP provided information to the grand jury.

For purposes **[***216]** of our decision today, we will assume without deciding that Kline's public filing of the motions resulted in disclosure of "matters occurring before the grand jury." But unlike the panel, we find a lack of clear and convincing evidence to establish that Kline's actions adversely reflect on his fitness to practice law under the circumstances.

As Kline points out, when he filed the enforcement motions, information contained in the motions had already been publicly disclosed because Judge Moriarty permitted the media to attend and report on several grand jury proceedings. Further, Kline notes the grand jury's special counsel had filed other documents publicly. The Disciplinary Administrator does not respond directly to either argument.

While Kline's allegations regarding the media's participation and reporting appear to be supported by the record, the record is unclear as to whether other documents were publicly filed. Further, the case history does not indicate whether any documents were filed

under seal. And while Pryor testified at the disciplinary hearing the first pleading or document to be filed publicly was Kline's [*212] request to enforce the subpoena, the record indicates Special Counsel [***217] McClain advised the grand jury that SRS's Protective Order had been publicly filed.

In light of the Disciplinary Administrator's failure to respond, as well as the gaps in the record as to media participation and the public filing of other documents, we find a lack of clear and convincing evidence to conclude Kline's direction to publicly file two enforcement motions adversely reflects on his fitness to practice law.

DISCIPLINE

Having found clear and convincing evidence that Kline committed 11 violations of the Kansas Rules of Professional Conduct, we now turn to the issue of discipline. Before doing so, it is helpful to summarize the violations found:

- violations of KRPC 8.4(d), 8.4(g), and 5.1(c) from Kline's direction to attach sealed documents to a public brief in violation of the *Alpha* court's order;

- violations of KRPC 3.3(a)(1) and 8.4(c) from Kline's direction to file a false motion to clarify in *Alpha;*

- violations of KRPC 3.3(a)(3) and 8.4(c) from Kline's false testimony to Judge King and his false statement to the *[**390] CHPP* court in oral argument concerning his retention of WHCS patient file summaries;

- violation of KRPC 8.1(b) from Kline's failure to supplement his letter to the [***218] Disciplinary Administrator to correct his prior incorrect statements regarding the storage of patient medical files subject to a protective order;

- violations of KRPC 8.4(c) and 8.4(d) from Kline's failure to advise the grand jury *of the Aid for Women* litigation and K.S.A. 38-1522; and

- violation of KRPC 8.4(g) from Kline's direction to file two motions to enforce the grand jury's subpoena against the express direction and wishes of the grand jury.

Based on the violations it found, which were more numerous than those we have found, the hearing panel recommended indefinite suspension. ***HN85*** This recommendation is advisory only and does [*213] not prevent us from imposing greater or lesser sanctions. Supreme Court Rule 212(f) (2012 Kan. Ct. R. Annot. 368); see *In re Ireland*, 294 Kan. 594, 603-04, 276 P.3d 762 (2012). The Disciplinary Administrator urges disbarment. Kline maintains he committed no violations of the KRPC and argues no discipline is warranted.

HN86 We base our disciplinary decision on the facts and circumstances of the violations and the aggravating and mitigating circumstances present. *In re Johanning*, 292 Kan. 477, 490, 254 P.3d 545 (2011). And although not mandated by our rules, this court [***219] and disciplinary panels "[h]istorically" turn to the American Bar Association Standards for Imposing Lawyer Sanctions to guide the discipline discussion. See ABA Compendium of Professional Responsibility Rules and Standards (2012); see also *In re Woodring*, 289 Kan. 173, 180, 186, 210 P.3d 120 (2009) (discussing and applying ABA Standards); *In re Rumsey*, 276 Kan. 65, 78-79, 71 P.3d 1150 (2003) (citing and discussing ABA Standards). Like the panel, we choose to utilize the ABA's framework to assist us in the task of determining the appropriate discipline.

HN87 Under that framework, we consider four factors in assessing punishment: (1) the ethical duty violated by the lawyer; (2) the lawyer's mental state; (3) the actual or potential injury resulting from the misconduct; and (4) the existence of aggravating and mitigating circumstances. See *Rumsey*, 276 Kan. at 78 (listing the four components of the ABA Standards' framework); ABA Standard 3.0.

Kline Violated Ethical Duties to the Legal System, the Legal Profession, and the Public.

The panel generally concluded Kline violated his duties to "the legal system, the legal profession, and the public to maintain his personal integrity." Kline does not [***220] dispute the panel's conclusion. Instead, he takes issue with the significance, noting the ABA Standards emphasize ***HN88*** "the most important ethical duties are those obligations which a lawyer owes to clients." See ABA Standards, 461. Kline points out the panel did not find he violated any duties to a client.

But the obvious flaw in this is that ***HN89*** as Attorney General of the State of Kansas and District Attorney for Johnson County, his "client" [*214] was the public. See *Gray Panthers v. Schweiker*, 716 F.2d 23, 33, 230 U.S. App. D.C. 219 (D.C. Cir. 1983) (***HN90*** Public servants "have a higher duty to uphold because their client is . . . the public at large."); *Commission on Spec. Revenue v. Freedom of Information Commission*, 174 Conn. 308,

319, 322, 387 A.2d 533 (1978) (***HN91*** Attorney General holds a "special status" because "the real client of the attorney general is the people of the state."); *Humphrey on Behalf of State v. McLaren*, 402 N.W.2d 535, 540-41, 543 (Minn. 1987) (***HN92*** A government attorney "has for a client the public."); see also ***HN93*** K.S.A. 22a-104 ("[I]t shall be the duty of the district attorney to appear in several courts . . . on behalf of the people . . . ."). And, as discussed below, we find several violations implicating this **[***221]** relationship

Moreover, Kline's argument that he did not violate any duty to "a client" appears designed to minimize the significance of his violations of duties to the general public, the legal system, and the legal profession. We reject this notion.

[391]** Initially, ***HN94*** the ABA Standards note the public entrusts lawyers with "property, liberty, and their lives." Therefore, the public is entitled to expect lawyers to behave with the highest standards of honesty and integrity and not to engage in conduct involving dishonesty, fraud, or interference with the administration of justice. See ABA Standards, 462 (citing Rule 8.2, prohibiting false statements regarding the qualifications or integrity of a judge, and Rule 8.4(b) and (c), prohibiting criminal acts and dishonest conduct).

We have found clear and convincing evidence of several violations implicating Kline's duty to his client—the public—including dishonest conduct in: directing the filing of a false motion to clarify in *Alpha*; falsely advising the *CHPP* court he had no summaries of WHCS records; and misrepresenting the applicable law to the grand jury when he failed to inform it of *Aid for Women II* and K.S.A. 38-1522, all in violation of KRPC 8.4(c). **[***222]** Additionally, as chief prosecutor for the State and later for Johnson County, Kline clearly had a duty to the public to refrain from conduct adversely reflecting on his fitness to practice law. Thus, when Kline violated KRPC 8.4(g) by directing sealed documents to be attached to a publicly filed brief in disregard of the *Alpha* court's order and later directed two enforcement motions be filed against the grand jury's **[*215]** instructions and desire, he violated his duty to the public to act with integrity.

Further, as the panel recognized, ***HN95*** lawyers also owe duties to the legal system. As officers of the court, lawyers must abide by the rules that "shape" the administration of justice. ABA Standards, 462. Lawyers violate this duty when they fail to "operate within the bounds of the law" and "create or use false evidence, or engage in any other illegal or improper conduct." ABA Standards, 462 (citing numerous rules implicating a lawyer's duty to the legal system, including Rule 3.3, requiring candor to the tribunal, and Rule 8.4[d], prohibiting conduct prejudicial to the administration of justice).

We have found clear and convincing evidence of multiple violations of rules implicating Kline's duty **[***223]** to the legal system. He engaged in conduct prejudicial to the administration of justice in violation of KRPC 8.4(d) and KRPC 5.1(c) by directing sealed documents to be attached to his publicly filed brief in *Alpha* in direct contravention of the court's order and by failing to advise the grand jury of *Aid for Women II* and K.S.A. 38-1522, causing the grand jury to issue a subpoena it later believed was not supported by reasonable suspicion, at least with respect to the mandatory reporting aspect. Further, Kline failed in his duty of candor to a tribunal, running afoul of KRPC 3.3(a)(1) and (a)(3), respectively, when he directed a false motion to clarify to be filed with the *Alpha* court and failed to correct his false testimony to Judge King.

Finally, ***HN96*** because lawyers are a self-regulating profession, cooperation and honesty during the disciplinary process is crucial. Kline's obligations to the legal profession include a duty to maintain the profession's integrity. See ABA Standards, 462 (citing Rule 8.1 and Rule 8.3 as rules concerning a lawyer's duties to the legal profession). Kline violated this duty when he failed to supplement a false statement to the Disciplinary Administrator in **[***224]** violation of KRPC 8.1.

Kline Acted Knowingly in Violating Multiple Rules of Conduct.

HN97 The next factor we consider in assessing discipline is Kline's mental state. Before us, Kline argues there is no evidence he acted **[*216]** in "knowing" violation of the rules, reiterating his earlier arguments that there is no evidence he violated any rule. But the panel concluded Kline knowingly violated his duties, and we must determine whether that conclusion is warranted.

HN98 The ABA Standards identify three mental states: "intent," the highest culpable mental state; "knowledge," the intermediate culpable mental state; and "negligence," the least culpable mental state. Under the ABA Standards, a lawyer acts intentionally when acting with the "conscious objective or purpose to accomplish a particular result," while a lawyer acts with knowledge

when acting "with conscious awareness of the nature or attendant circumstances of his or her conduct [**392] both without the conscious objective or purpose to accomplish a particular result." Finally, a lawyer acts negligently when failing "to be aware . . . that a result will follow . . . ." See ABA Standards, 462; see also *In re Carpenter*, 337 Or. 226, 237-38, 95 P.3d 203 (2004) [***225] (concluding attorney acted with "intent" because he had a clear objective in mind); *Discipline of Eugster*, 166 Wash. 2d 293, 318-20, 209 P.3d 435 (2009) (noting that assessment of punishment under the ABA Standards focuses on the "state of mind relative to the consequences of his [or her] misconduct rather than the duty violated," recognizing a "fine line" between intentional and knowing conduct, and holding a lawyer generally acts with intent when acting to benefit himself or herself).

We have already found, by clear and convincing evidence, that Kline acted "knowingly," or "with conscious awareness of the nature or attendant circumstances of his . . . conduct . . . ." Namely, we found he acted knowingly in directing the attachment of sealed documents to a public brief in violation of the *Alpha* court's order and in directing the filing of a motion to clarify in *Alpha* falsely conveying to the court that his office had subpoenaed mandatory reporters other than abortion clinics. As to this violation, Kline's knowing conduct is best evidenced by the testimony of Kline's Senior Deputy, Rucker, who testified he was disappointed with the filing of the clarification motion. Rucker testified [***226] that because he had spoken accurately when he advised the court that Kline's office had not subpoenaed any other mandatory reporters, he believed "clarification" was unnecessary.

[*217] We also concluded Kline acted knowingly when he failed to correct his testimony to Judge King regarding the WHCS summaries and when he falsely told the *CHPP* court he did not believe he had any summaries of WHCS records. As we discussed, the panel's findings demonstrate the panel did not believe Kline's claim that he "forgot" that he had 62 handwritten summaries. But we further found Kline's knowledge could be inferred from the highly unusual circumstances in which he directed creation of those "summaries." Specifically, after Kline learned that despite his protestations, Judge Anderson would require him to return all copies of WHCS patient files the next day, Kline ordered his staff to hand copy the content of all 62 files to "summaries" and to complete this task overnight.

Further, Kline acted knowingly when he became aware that confidential patient files had not been maintained constantly under "lock and key" as he represented to the Disciplinary Administrator but failed to correct that false statement. Kline's [***227] knowledge of the falsity of this misstatement is best evidenced by the testimony of Kline's former staff member, Reed, who testified that when Kline became aware Reed had given a statement to Morrison about storing the files in Reed's apartment, Kline became so angry that he threw Reed's deposition across the room.

Similarly, Kline clearly acted with conscious awareness of the nature and attendant circumstances of his conduct when he failed to advise the grand jury about the mandatory reporting statute in effect for 4 of the 5 years the grand jury was investigating and in failing to advise the jury of the *Aid for Women* litigation. The omission of any reference to the statute or to the result of the litigation, which enjoined prosecutors from enforcing the mandatory reporting statute in the manner Kline advocated before the grand jury, is evidence that Kline knowingly misdirected the grand jury.

Finally, we found that Kline knowingly disregarded the grand jury's request to review all documents to be filed in its name when he filed two motions to enforce the grand jury's subpoena without the grand jury's review or knowledge. That Kline acted knowingly is again supported by testimony from [***228] one of his subordinates, Pryor, who told the panel he informed his superiors of the grand [*218] jury's request. Further, Kline's knowing mental state is evidenced by his direction to file the two enforcement motions in the name of the State rather than the grand jury in an effort to assert a duality in roles that the statute does not authorize.

Thus, although we were not required to find a specific mental state with respect to each violation found to be supported by clear [**393] and convincing evidence, the evidence demonstrates Kline acted, at a minimum, with conscious awareness of the nature of his conduct as to each violation.

Kline's Violations Resulted in Actual and Potential Injury.

The panel concluded Kline's misconduct caused "actual injury to the legal system and the legal profession" as well as "potential injury to the public." In his brief, Kline challenges these conclusions, suggesting there is no evidence any violation found by the panel caused prejudice or potential injury to any party or legal proceeding and implying that in absence of monetary damage there can be no injury. At oral argument before

this court, Kline's counsel took this position further, suggesting there were no "victims" [***229] of Kline's misconduct. We reject both notions.

Preliminarily, ***HN99*** we reject the implication that the ABA Standards require proof of a monetary injury to a client in order to constitute "injury." See, *e.g.*, *Ireland*, 294 Kan. at 601, 605 (finding attorney's false accusations against a judge injured legal profession); *In re Harris*, 292 Kan. 521, 528, 530, 257 P.3d 1231 (2011) (finding attorney's violation of rules regulating attorney registration injured legal profession and legal system); *In re Millett*, 291 Kan. 369, 378, 380, 241 P.3d 35 (2010) (finding attorney's dishonest actions during police investigation of client caused injury to the legal profession and legal system). Additionally, the ABA Standards contradict Kline's suggestion that proof of monetary injury is required because ***HN100*** the Standards provide for suspension when misconduct adversely affects or interferes with a legal proceeding. See discussion at pages 147-48; see also, *e.g.*, ***HN101*** ABA Standard 5.2 (discussing standards related to a failure to maintain the public trust and indicating injury can be to the "integrity of the legal process"); ***HN102*** ABA Standard 7.0 (discussing standards related to duties owed to the [*219] profession and noting that [***230] injury can be to "a client, the public, or the legal system").

As Kansas Attorney General and later as Johnson County District Attorney, Kline held positions of particular honor, responsibility, and trust—positions bestowed on him by the citizens of Kansas and the Johnson County Republican Central Committee, respectively. ***HN103*** When Kline violated rules regulating his professional conduct, he betrayed that trust, causing "incalculable harm to the public's perception" of both offices. See *Disciplinary Counsel v. Dann*, 134 Ohio St. 3d 68, 74, 2012 Ohio 5337, 979 N.E.2d 1263 (2012) (***HN104*** By violating ethical rules in filing false financial disclosure forms and soliciting improper compensation, Ohio Attorney General caused significant harm not only to his office but also to "those government agencies, departments, and institutions that the attorney general advises and represents."); see also *In re Marinoff*, 819 So. 2d 305, 312-13 (La. 2002) (Adverse publicity from assistant city attorney's professional misconduct in making false statements regarding automobile accident harmed the public's perception of the legal profession.); *Office of Disciplinary Counsel v. Cappuccio*, 616 Pa. 439, 48 A.3d 1231, 1240 (2012) (***HN105*** Misconduct [***231] of attorneys serving in public positions "speaks directly to the integrity of the legal system by placing the reputation of those tasked with serving and protecting the public at issue.").

Similarly, as the State's chief prosecutor and later as Johnson County's chief prosecutor, Kline was a highly visible member of the legal profession. Thus, Kline's misconduct reflects poorly on his profession and the legal system with even greater prominence than might otherwise be the case.

Our conclusion that Kline's conduct injured the public, the legal system, and the legal profession mandates our rejection of Kline's claims of "no injury" and "no victims." Further, we note our findings regarding some of Kline's violations explicitly recognize evidence of injury. For instance, Kline's directive to disobey the *Alpha* court's order and attach sealed documents to a public brief, as well as his directive to file a false motion to clarify, most certainly lessens the public's confidence in the judicial system. And the record demonstrates Kline's actions resulted in additional filings related to the [*220] show cause order with respect to the sealed documents, oral argument devoted to the show cause order, and [***232] the *Alpha* court's [**394] devotion of considerable time and effort to address these issues.

In the same vein, Kline's failure to correct his false statement to Judge King that he possessed only 3 WHCS summaries instead of 62, and his false statement to the *CHPP* court that he possessed no WHCS summaries, misled both courts as to the existence of the summaries and misdirected their efforts to determine the nature and scope of the question whether Kline had mishandled patient medical records.

In addition, Kline's failure to advise the grand jury about *Aid for Women II* and K.S.A. 38-1522 prejudiced the administration of justice—*i.e.* harmed the judicial system generally—because it calls into question the trustworthiness of the county's prosecutorial process and impacted the grand jury's efficacy and the integrity of its work. Kline's failure to properly advise the grand jury resulted in actual harm when, after learning of *Aid for Women II* midway through the investigation, the grand jury questioned whether its subpoena to CHPP regarding mandatory reporting was supported by reasonable suspicion. Further, the grand jury's belated discovery of key legal authority led to the grand jury's special counsel [***233] distrusting Kline's office. And, Kline's filing of two enforcement motions without first obtaining grand jury review harmed the judicial system in that it contradicted the grand jury's specific request

and compromised its efforts to voluntarily negotiate with CHPP, while at the same time casting public doubt as to the credibility of its internal workings and the confidence that should attend its ultimate conclusions.

The Existence of Aggravating and Mitigating Circumstances

HN106 This court's rules require that a disciplinary panel explain "[m]itigating or aggravating circumstances which affect the nature or degree of discipline." Supreme Court Rule 211(f) (2012 Kan. Ct. R. Annot. 350). The panel must consider the evidence presented as to aggravating and mitigating circumstances and determine the weight to be assigned to each in arriving at an appropriate discipline. *In re Walsh*, 286 Kan. 235, 248, 182 P.3d 1218 (2008). **[*221]** In its recommendations, the panel did this. We next determine whether we agree.

Aggravating factors

The panel found seven aggravating factors: dishonest or selfish motive; pattern of misconduct; multiple offenses; bad faith obstruction of the disciplinary process; submission **[***234]** of false evidence, false statements, or deceptive practices during the disciplinary process; refusal to acknowledge the wrongful nature of conduct; and substantial experience in the practice of law. Kline takes exception to the panel's findings of dishonest or selfish motive, bad faith obstruction of the disciplinary process, and deceptive practices during the disciplinary process.

First, Kline argues there is no evidence he acted with a dishonest and selfish motive. Instead, he contends he acted at all times as a public official diligently performing his duties. But we have found numerous instances in which Kline demonstrated, at a minimum, a selfish motive. For instance, Kline testified he directed the attachment of sealed documents to his office's *Alpha* brief in contradiction of the court's order so that "others" could understand his argument. Thus, Kline not only disobeyed the court's order and placed sealed court documents in the public domain, he did so intentionally to achieve public exposure of them to promote his own message—not to benefit the *Alpha* court's understanding of the issues.

Perhaps the strongest evidence that Kline acted to benefit himself or his own motives can **[***235]** be found in Kline's directive to file the two motions to enforce the grand jury subpoenas without permitting the grand jury to first review them, contrary to the grand jury's explicit request and in direct conflict with its efforts to voluntarily seek information from CHPP. Kline's improper motive is corroborated by the content of the motions, which engaged in substantial criticism of the grand jury, its special counsel, and even the presiding judge, and by Pryor's testimony regarding Kline's conduct with respect to those motions. Specifically, Pryor testified that prior to filing the enforcement motions, he confronted Kline about why Kline was so **[**395]** upset about "losing the grand jury." Kline responded **[*222]** angrily, slamming the table and declaring that if he lost the grand jury, "it [would] destroy [him]." And then Kline specifically directed Pryor to remove Kline's signature block from the final motion so Kline would not appear to be "just the abortion attorney."

The evidence demonstrates that with respect to several violations, Kline acted to protect himself from perceived ridicule and unfavorable public scrutiny and cull favor with the public for his cause. But regardless of whatever fervid **[***236]** belief or desire to see his cause succeed, ***HN107*** Kline's efforts at casting a favorable public image toward himself or elsewhere was clearly an improper motive upon which to act when his statutory duty with the grand jury was to serve as its legal advisor. See K.S.A. 19-713.

We also reject Kline's challenge to the panel's finding that he obstructed the disciplinary process by disobeying an evidentiary ruling twice made by the panel. This finding relates to Kline's unsuccessful attempt on two occasions to admit a 911 recording originating from WHCS. On both occasions, the panel refused to admit the evidence, finding the content irrelevant. One panel member specifically noted, "I think you've already got in the fact that there was a death associated with La Quinta, they were contacted and investigated. I don't think we need to go into the bullet by bullet details of how the death occurred." But despite the panel's rejection of Kline's two previous attempts to admit the evidence, in his closing argument, Kline personally provided the panel with a detailed recitation of the call, disregarding the panel's order.

We do not agree, however, with the panel's conclusion that Kline engaged in deceptive **[***237]** practices during the disciplinary process. Initially, the panel found that Kline engaged in deceptive practices when he proffered in his initial answer that in April 2007, he was unaware that summaries were created. Notably, Kline later filed an amended answer correcting this misstatement, and when asked about the initial answer at the hearing, Kline candidly responded that he could not say whether

the mistake was "[a]ttorney error or bad information." And given the volume of information contained in the initial complaint and answer, the subsequent correction, and Kline's candid comment at the hearing, we cannot attribute deceptive intent to his initial answer in this regard.

[*223] Likewise, we cannot conclude Kline engaged in a deceptive practice when he testified that his office, rather than the clinics, sought to include the inquisition record in the record on appeal in *Alpha*. Before Kline proffered his potentially offending testimony, Maxwell testified that Kline's office filed a motion requesting the inquisition record be made part of the record on appeal. When asked about the same series of events, Kline initially testified his office filed the motion, but after being informed that **[***238]** this court's records verified that the clinics had in fact filed the motion, Kline essentially deferred to the record and indicated he could not remember.

Although we disagree with Kline's characterization of the panel's conclusion as going "to great lengths in a futile attempt to establish that Kline gave false testimony," we agree the record does not establish that he "intended to mislead" the panel. Instead, it appears equally likely Kline simply relied on Maxwell's earlier testimony to supplement his memory of a sequence of events in which his level of involvement is unclear. Thus, we conclude the record does not bear out the panel's finding that Kline engaged in deceptive practices in the panel's proceeding in this regard.

Mitigating factors

The panel found the presence of three mitigating factors: absence of prior disciplinary record, previous good character and reputation, and cooperative attitude towards the proceedings. Kline takes issue only with the panel's conclusions regarding his prior good character and reputation, suggesting essentially that the panel's findings were insufficiently detailed.

As Kline suggests, the panel's findings were brief: "Several friends and associates **[***239]** of [Kline] testified regarding [Kline's] good character." Nevertheless, ***HN108*** the panel was not **[**396]** required to detail this testimony, and the finding is sufficient to demonstrate the panel heard and considered this evidence. See *In re Lovelace*, 286 Kan. 266, 269-70, 182 P.3d 1244 (2008) (approving a panel's findings when the findings implicitly considered specific acts). Like the panel, we have reviewed the evidence of mitigating circumstances **[*224]** submitted by Kline and conclude he demonstrated mitigating evidence of good character and positive reputation.

Conclusion: Aggravating and mitigating circumstances

In conclusion, we find the evidence supports the panel's finding of the following aggravating factors: selfish motive; pattern of misconduct; multiple offenses; bad faith obstruction of the disciplinary process; submission of false evidence or false statements; refusal to acknowledge the wrongful nature of conduct; and substantial experience in the practice of law. Further, the evidence supports the following mitigating factors found by the panel: absence of prior disciplinary record, previous good character and reputation, and cooperative attitude towards the proceedings.

Applicable ABA Standards

The **[***240]** conclusions we reach above—that Kline violated his duties to the public, the legal system, and the legal profession; that he acted knowingly in doing so; and that he caused actual injury to the legal system and legal profession and injury to the public— inform which of the ABA Standards we turn to in guiding imposition of discipline. In recommending indefinite suspension, the panel considered ABA Standard 6.12, concerning conduct involving false statements, and 6.22, concerning a lawyer's obligations to the legal system:

> ***HN109*** "6.12 Suspension is generally appropriate when a lawyer knows that false statements or documents are being submitted to the court or that material information is improperly being withheld, and takes no remedial action, and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding.
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> . . . .
>
> ***HN110*** "6.22 Suspension is generally appropriate when a lawyer knows that he or she is violating a court order or rule, and causes injury or potential injury to a client or a party, or causes interference or potential interference with a legal proceeding." ABA Standards, 472.

Although not cited by the panel, **[***241]** in light of Kline's status as a government official during the period of misconduct, we believe ABA Standard 5.22, concerning a lawyer's failure to maintain the public trust, also is relevant. That standard provides:

> [*225] ***HN111*** "5.22 Suspension is generally appropriate when a lawyer in an official or governmental position knowingly fails to follow proper procedures or rules, and causes injury or potential injury to a party or to the integrity of the legal process." ABA Standards, 471.

The Disciplinary Administrator recommends disbarment, but in his brief, he cites no particular ABA Standard to support that recommendation. However, in his closing argument at Kline's disciplinary hearing the Disciplinary Administrator cited the following standards:

> ***HN112*** "5.21 Disbarment is generally appropriate when a lawyer in an official or governmental position knowingly misuses the position with the intent to obtain a significant benefit or advantage for himself or another, or with the intent to cause serious or potentially serious injury to a party or to the integrity of the legal process.
>
> . . . .
>
> ***HN113*** "6.11 Disbarment is generally appropriate when a lawyer, with the intent to deceive the court, makes a false statement, [***242] submits a false document, or improperly withholds material information, and causes serious or potentially serious injury to a party, or causes a significant or potentially significant adverse effect on the legal proceeding." ABA Standards, 471-72.

Thus far, we have found clear and convincing evidence that Kline committed 11 rule violations, that he acted knowingly in committing those violations, and that his misconduct caused injury. Further, we have found [**397] several aggravating and mitigating circumstances, and we have specified the ABA Standards which guide us in our determination of the appropriate discipline. All that remains is the task of imposing discipline.

Submission of false documents and testimony

HN114 ABA Standard 6.12 suggests suspension is generally appropriate when a lawyer knows false statements or documents are being submitted to a court and takes no remedial action to correct those statements or documents, causing adverse or potentially adverse effect on the legal proceeding. As the panel found, application of ABA Standards 6.12 and 6.22 to the facts leads to the conclusion that Kline's conduct, at a minimum, warrants suspension from the practice of law. Further, application [***243] of ABA Standard 5.22 lends additional support to that conclusion.

[*226] In two instances, Kline knowingly submitted a false document or testimony to a court or knowingly failed to correct false testimony. First, Kline directed the filing of a false motion to clarify Rucker's statement at oral argument in *Alpha*. We concluded this motion changed Rucker's response in direct questioning as to whether Kline's office had subpoenaed other mandatory reporters like the abortion clinics from a truthful "no," to a false "yes."

Further, we found Kline's "clarification" to be materially false based on Rucker's testimony that he believed no "clarification" of his straightforward response was necessary. And in light of this court's direct question to Rucker as to whether Kline had subpoenaed other "mandatory reporters . . . *like the abortion clinics*," we specifically rejected Kline's carefully nuanced suggestion that his "clarification" somehow left open the possibility that he had subpoenaed information from KDHE, an agency acting as a *repository* of information from mandatory reporters. (Emphasis added.)

Likewise, we have found clear and convincing evidence Kline knowingly falsely advised the *CHPP* court [***244] that he did not have summaries of the 62 WHCS patient file summaries and knowingly failed to correct testimony to Judge King on the same subject matter. The information Kline's office possessed and his handling of that issue went to the very heart of the *CHPP* mandamus action. Kline's false submissions and failure to correct those submissions adversely impacted, or potentially adversely impacted, the outcome of the proceeding, warranting his suspension.

Violation of a court order

HN115 ABA Standard 6.22 directs suspension when a lawyer knows he or she is violating a court order or rule and causes interference or potential interference with a legal proceeding.

Directly relevant to this standard is our conclusion that Kline knowingly disobeyed the *Alpha* court's order when he instructed his staff to attach sealed documents to his office's publicly filed brief. In so finding, we relied upon the testimony of Kline's subordinates indicating Kline's motive was to increase public exposure—not to benefit the *Alpha* court's understanding of the issues.

[*227] We found that regardless of Kline's views as to the wisdom of the *Alpha* court's order or any frustration

with his inability to fully express his positions [***245] publicly, as an officer of the court he was obligated to follow the court's order. His actions in knowingly disobeying the court's directive lessened the public's confidence in the judicial system and prejudiced the administration of justice generally, warranting his suspension.

Failure to follow proper procedure and rules

As noted, ***HN116*** ABA Standard 5.22 directs suspension when a lawyer in an official or governmental position knowingly fails to follow proper procedures or rules and causes injury or potential injury to a party or to the integrity of the legal system. This standard directly implicates Kline's conduct before the grand jury.

As we found, Kline stepped outside his limited statutory role of advising the grand jury and attempted first to direct, but then later to undermine, the grand jury. This jeopardized the integrity of the independent citizens' grand jury and the legal system. [**398] Kline's actions in this regard are especially concerning in light of their potential for abuse and probable impact.

Kline's failure to advise the grand jury of either the statute applicable to mandatory reporting for 4 of the 5 years it was investigating (K.S.A. 38-1522), or of the *Aid for Women* litigation, [***246] which interpreted that statute contrary to Kline's own opinion, directly and adversely impacted the grand jury proceeding—*i.e.*, it led the grand jury to issue a subpoena it later felt was not supported by reasonable suspicion, at least as it pertained to mandatory reporting.

Kline's actions in response to the grand jury's direction are equally troubling. Directly contrary to the grand jury's expressed desire to see any future pleadings or documents to be filed in its name, Kline filed two separate motions seeking to enforce the subpoena without first permitting the grand jury to review the motions. Further, he filed these motions with knowledge of the grand jury's efforts to seek CHPP's voluntary compliance. And more notably, the motions included information beyond what an "advisor" of the grand jury should have disclosed, including: publicly criticizing the [*228] grand jury's special counsel, characterizing the negotiations between special counsel and CHPP as "bizarre" and "absurd," criticizing the grand jury's election to allow Judge Moriarty to facilitate obtaining information from CHPP, and asking that the grand jury be "clearly directed to carry out [its] investigative functions." More [***247] fundamentally, Kline's overreaching conflicted with a fundamental tenet of the legal system recognizing the citizens' grand jury as an independent and objective body. Kline's actions before the grand jury warrant his suspension.

In sum, a number of the violations found by this court merit suspension of Kline's law license under the advisory ABA guidelines. Notably, ***HN117*** the ABA Standards also advise that they "do not account for multiple charges of misconduct" and indicate that when an attorney commits multiple instances of misconduct the sanction imposed should be at least the sanction for the most serious conduct. ABA Standards, 464.

Disciplinary Administrator's recommended ABA Standards

Next, we briefly turn to the standards advocated by the Disciplinary Administrator during his closing argument to the panel, ABA Standards 5.21 and 6.11. Initially, we note a concern with application of these standards. Namely, each standard requires a specific "intent" and we have no findings or argument by the Disciplinary Administrator that Kline acted with "intent" as that term is defined and used in the ABA Standards.

That being said, we do not lightly reject application of the standards suggested by [***248] the Disciplinary Administrator. As discussed, we have found Kline acted with improper motives when he knowingly filed the enforcement motions and in directing the attachment of sealed documents to a public brief in contravention of the *Alpha* court's order. We have further determined Kline made a materially false statement to the *Alpha* court and failed to correct a materially false statement made to Judge King and that those statements impacted, or potentially impacted, the outcome of the *CHPP* litigation. But these findings, while significant and consequential, do not compel us to conclude that Kline acted with "conscious objective or purpose to accomplish a particular result" such [*229] that disbarment becomes the obvious, or correct, method of discipline. See ABA Standards, 462.

Further, we have considered and rejected imposition of a definite term of suspension. A termed suspension simply would not adequately address the multiple and significant violations of Kline's professional obligations to the public, the profession, and the legal system. Nor would it account for the injury his misconduct caused.

Kline's Conduct Merits an Indefinite Suspension of His Law License.

We conclude indefinite [***249] suspension is the

appropriate discipline. In arriving at this conclusion, we have considered all the aggravating and mitigating circumstances described above. But three of those aggravating circumstances compel our ultimate conclusion that indefinite suspension is the **[**399]** appropriate discipline: Kline's selfish motive; his pattern of misconduct; and his refusal to acknowledge the wrongful nature of any of his misconduct.

We detailed above the multiple instances in which the evidence demonstrates Kline acted with a selfish motive, and we described the pattern of conduct that causes us great concern. But we have not yet commented on Kline's refusal to acknowledge the wrongful nature of his conduct, and we briefly do so.

While Kline is certainly entitled to challenge each and every allegation made by the Disciplinary Administrator and to take exception to each and every negative finding made by the panel, his approach must be viewed from the strength of the evidence against him. The violations we have found are significant and numerous, and Kline's inability or refusal to acknowledge or address their significance is particularly troubling in light of his service as the chief prosecuting attorney **[***250]** for this State and its most populous county.

Ultimately, we unanimously conclude the weight of the aggravating factors—*i.e.*, Kline's inability or refusal to acknowledge the line between overzealous advocacy and operating within the bounds of the law and his professional obligations; his selfish motives; and his lengthy and substantial pattern of misconduct—weigh **[*230]** more heavily than the mitigating factors and merit his indefinite suspension.

CONCLUSION

IT IS THEREFORE ORDERED that Phillip Dean Kline be indefinitely suspended from the practice of law in the State of Kansas effective on the filing of this opinion in accordance with Supreme Court Rule 203(a)(2) (2012 Kan. Ct. R. Annot. 294).

IT IS FURTHER ORDERED that Kline comply with Supreme Court Rule 218 (2012 Kan. Ct. R. Annot. 397), and in the event Kline seeks reinstatement, he shall comply with Supreme Court Rule 219 (2012 Kan. Ct. R. Annot. 398).

IT IS FURTHER ORDERED that the costs of these proceedings be assessed to Kline and that this opinion be published in the official Kansas Reports.

NUSS, C.J.; LUCKERT, J.; BEIER, J.; ROSEN, J.; and JOHNSON, J., not participating.

HENRY W. GREEN, JR., J.; KAREN ARNOLD-BURGER, J.; EDWARD E. BOUKER, **[***251]** District Judge; BRUCE T. GATTERMAN, District Judge; and MICHAEL J. MALONE, District Judge, assigned. [1]

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[1] **REPORTER'S NOTE:** Judge Green and Judge Arnold-Burger, of the Kansas Court of Appeals, were appointed to hear case No. 106,870 vice Chief Justice Nuss and Justice Luckert, respectively, pursuant to the authority vested in the Supreme Court by K.S.A. 20-3002(c). District Judge Bouker, District Judge Gatterman, and District Judge Malone were appointed to hear the same case vice Justice Beier, Justice Rosen, Justice Johnson, respectively, pursuant to the authority vested in the Supreme Court by Art. 3, § 6(f) of the Kansas Constitution

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As of: September 26, 2016 9:32 AM EDT

Muex v. State

Court of Appeals of Indiana, Fourth District

December 18, 2003, Filed

No. 79A04-0302-CR-66

Reporter
800 N.E.2d 249; 2003 Ind. App. LEXIS 2337

IRA L. MUEX, Appellant-Defendant, vs. STATE OF INDIANA, Appellee-Plaintiff.

Prior History: [**1] APPEAL FROM THE TIPPECANOE SUPERIOR COURT. Cause No. 79A04-0302-CR-66. The Honorable Steven R. Knecht, Judge Pro Tem.

Disposition: Affirmed.

Core Terms

sentence, trial court, probable cause, misconduct, container, sealed, chain of custody, public record, membrane, factors, samples, test result, inappropriate, laboratory

Case Summary

Procedural Posture

Defendant appealed his convictions by the Tippecanoe Superior Court (Indiana) for criminal deviate conduct and robbery, as well as his cumulative sentence of 78 years to be served consecutively to another sentence. Defendant asserted the trial court erred when it denied his motions to dismiss, to suppress, and for change of venue premised on prosecutorial misconduct. He also asserted insufficient chain of custody for admitting DNA results.

Overview

Defendant, while holding a gun, anally raped the victim three times and forced her to perform oral sex. The appellate court held that since defendant did not provide a cogent argument as to why the affidavit of probable cause was not a public document or why the DNA test results should not have been included in the affidavit, it could not say the trial court erred in denying his motions. Any references made by the prosecutor in public were made to something that was a public record, and thus were not "extrajudicial." Nor did the prosecutor's conduct place defendant in grave peril. The voir dire was not included in the trial transcript; as a result, the appellate court had no way of determining the effect of the pre-trial publicity. In regard to the chain of custody, the presence of the sealed container in an unaltered condition created a reasonable assurance that the DNA results passed through the chain of custody in an undisturbed manner. Defendant was properly sentenced, as he had an extensive criminal history showing a pattern of violence, among other things. He also had a history of sexual predatory conduct.

Outcome

The judgment of the trial court was affirmed.

LexisNexis® Headnotes

Criminal Law & Procedure > Appeals > Prosecutorial Misconduct > General Overview

Legal Ethics > Prosecutorial Conduct

HN1 When the appellate court reviews a claim of prosecutorial misconduct, it determines (1) whether the prosecutor engaged in misconduct, and if so, (2) whether that misconduct, under all of the circumstances, placed the defendant in a position of grave peril to which he or she should not have been subjected. The "gravity of peril" is measured by the probable persuasive effect of the misconduct on the jury's decision, not on the degree of impropriety of the conduct.

Legal Ethics > Professional Conduct > Tribunals

HN2 Ind. R. Prof. Conduct 3.6(a) prohibits an attorney from making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.

Legal Ethics > Professional Conduct > Tribunals

HN3 See Ind. R. Prof. Conduct 3.6(b)(3).

Legal Ethics > Professional Conduct > Tribunals

HN4 A lawyer involved in the investigation or litigation of a matter may state information contained in the public record. Ind. R. Prof. Conduct 3.6(c).

Administrative Law > Governmental Information > Personal Information > General Overview

Criminal Law & Procedure > ... > Accusatory Instruments > Indictments > General Overview

Criminal Law & Procedure > Preliminary Proceedings > Bail > General Overview

HN5 When the prosecutor files an affidavit or obtains an indictment it becomes a public record, unless in the case of an indictment, the person has not yet been taken into custody or given bail.

Legal Ethics > Prosecutorial Conduct

Torts > ... > Proof > Violations of Law > General Overview

HN6 Ind. R. Prof. Conduct 3.8(e) provides a prosecutor must exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Ind. R. Prof. Conduct 3.6.

Evidence > Authentication > Chain of Custody

Evidence > Relevance > Preservation of Relevant Evidence > Exclusion & Preservation by Prosecutors

HN7 In substantiating a chain of custody, the State must provide reasonable assurances that the property passed through various hands in an undisturbed condition. The State does not have to establish a perfect chain of custody; any gaps go to the weight of the evidence and not to admissibility.

Criminal Law & Procedure > Sentencing > Appeals > General Overview

Criminal Law & Procedure > Sentencing > Corrections, Modifications & Reductions > General Overview

Criminal Law & Procedure > Sentencing > Corrections, Modifications & Reductions > Illegal Sentences

HN8 Ind. R. App. P. 7(B), as amended, which took effect January 1, 2003, provides the appellate court may revise a sentence that is inappropriate in light of the nature of the offense and the character of the offender.

Criminal Law & Procedure > Sentencing > Appeals > General Overview

Criminal Law & Procedure > Sentencing > Corrections, Modifications & Reductions > General Overview

HN9 Ind. R. App. P. 7(B) is directed to the appellate court as the reviewing court and applies to the review that is made as of the date the appellate court's opinion is handed down.

Criminal Law & Procedure > Sentencing > Appeals > General Overview

Criminal Law & Procedure > Sentencing > Sentencing Guidelines > General Overview

Criminal Law & Procedure > Sentencing > Imposition of Sentence > Factors

HN10 When considering the appropriateness of the sentence for the crime committed, the sentencing court should focus initially on the presumptive sentence. It may then consider deviation from the presumptive sentence based on a balancing of the factors that must be considered pursuant to Ind. Code § 35-38-1-7.1(a) together with any discretionary aggravating and mitigating factors found to exist.

Criminal Law & Procedure > Sentencing > Imposition of Sentence > Factors

HN11 See Ind. Code § 35-38-1-7.1(a).

Counsel: ATTORNEY FOR APPELLANT: KEVIN R. O'REILLY, Lafayette, Indiana.

ATTORNEYS FOR APPELLEE: STEVE CARTER, Attorney General of Indiana. CHRISTOPHER C.T. STEPHEN, Deputy Attorney General, Indianapolis, Indiana.

Judges: MAY, Judge. BARNES, J., and DARDEN, J., concur.

Opinion by: MAY

Opinion

[*250]

MAY, Judge

Ira L. Muex was charged with Count I, criminal deviate conduct, a Class A felony; [1] Count II, criminal deviate conduct, a Class A felony; Count III, criminal confinement, a Class B felony; [2] and Count IV, robbery, a Class B felony. [3] A jury found Muex guilty of all counts. Conviction was entered on Counts I, II, and IV. The trial court sentenced Muex to fifty years on Count I, twenty years on Count II and eight years on Count IV, for a total of seventy-eight years.

[2]** Muex raises the following issues:

1. Whether the trial court erred when it denied his pre-trial Motions to Dismiss, to Suppress and for Change of Venue from County premised on prosecutorial misconduct;

2. Whether the State established a sufficient chain of custody for the admission of DNA test results; and

3. Whether Muex's sentence was inappropriate.

We affirm.

FACTS AND PROCEDURAL HISTORY

On the evening of September 8, 1997, S.O. returned to her apartment. The building had two entry doors that led to the stairway to the apartment. When S.O. was between the first door and the second, she saw Muex running toward her. Muex grabbed S.O. and forced her into the doorway. She noticed a small chrome gun in his hand, and thinking Muex was robbing her, gave him all her money. After putting the money in his pocket, Muex removed S.O.'s shorts and underwear, and penetrated her rectum with his penis. He withdrew, removed some items from the doorway that he apparently thought were making noise, and penetrated her again. He then removed his penis and forced S.O. to perform oral sex on him before penetrating **[*251]** her rectum for a third time. Muex left after warning S.O. not to move.

[3]** S.O. went upstairs to her apartment, where her boyfriend notified the Lafayette police. Police found seminal or other fluid on S.O.'s shorts and underwear, on a cushion where she sat after the attack, and in the doorway. They found a rubber glove with petroleum jelly on it in the entryway. A rape kit performed at the hospital included swabs of S.O.'s vaginal, rectal and mouth areas.

DNA samples from Muex [4] and another suspect were sent to the FBI Laboratory for analysis. The items were sent via Federal Express in an enclosed container. After analysis, the FBI manager, Richard Guerrieri, resealed the evidence containers and wrote his initials on them. He placed everything in a sealed container and entrusted the evidence to Federal Express. The items did not arrive overnight as scheduled. Guerrieri was in Lafayette when the sealed container arrived two days later. He opened the container and determined all the seals were intact and there was no evidence of tampering.

[4]** A probable cause affidavit was filed on November 15, 2000, after the DNA test results implicated Muex. In that affidavit, the investigating officer related the events of September 8, 1997, as well as the steps taken to obtain the DNA analysis and the results of that analysis. Prior to trial, newspapers published stories related to Muex's arrest, the charges brought against him, and the information in the probable cause affidavit. In those articles the prosecutor discussed the information in the probable cause affidavit.

On July 30, 2002, Muex filed motions to dismiss, to suppress the DNA evidence, and for change of venue from county. All were denied, and a jury found Muex guilty of all charges.

DISCUSSION AND DECISION

1. Prosecutorial Misconduct

Muex claims his motions should have been granted because the prosecutor's public disclosure of the results of the DNA testing violated Rules 3.6 and 3.8 of the Indiana Rules of Professional Conduct.

HN1 When we review a claim of prosecutorial misconduct, we determine 1) whether the prosecutor engaged in misconduct, and if so, 2) whether that misconduct, under all of the circumstances, placed the defendant in a position of grave **[**5]** peril to which he or she should not have been subjected. *Coleman v. State*, 750 N.E.2d 370, 374 (Ind. 2001); *Wright v. State*, 690 N.E.2d 1098, 1110 (Ind. 1997), *reh'g denied*. The "gravity of peril" is measured by the "probable persuasive effect of the misconduct on the jury's

[1] Ind. Code § 35-42-4-2.

[2] Ind. Code § 35-42-3-3.

[3] Ind. Code § 35-42-5-1.

[4] Muex's samples were included because he had been involved in an unrelated crime.

decision, not on the degree of impropriety of the conduct." *Coleman*, 750 N.E.2d at 374 (quoting *Kent v. State*, 675 N.E.2d 332, 335 (Ind. 1996)).

Prof. Cond. R. 3.6(a) ***HN2*** prohibits an attorney from making "an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding." Prof. Cond. R. 3.6(b)(3) provides:

HN3 A statement referred to in paragraph (a) will be rebuttably presumed to have a substantial likelihood of materially prejudicing an adjudicative proceeding when it refers to that proceeding and the statement is related to . . . the performance or results of any examination or test or the refusal or failure of a person **[*252]** to submit to an examination or **[**6]** test, or the identity or nature of physical evidence expected to be presented[.]

The State contends the prosecutor's reference to the DNA results was permissible, as the results were included in the Affidavit of Probable Cause. ***HN4*** A lawyer involved in the investigation or litigation of a matter may state information contained in the public record. Prof. Cond. R. 3.6(c). The trial court agreed that the Affidavit of Probable Cause was a public record.

Muex does not address whether the Affidavit was a public record or whether the DNA evidence was properly included in the Affidavit; instead, he argues only that disclosure of the DNA test results gives rise to a presumption misconduct occurred. Because Muex does not provide cogent argument as to why the Affidavit of Probable Cause was not a public document [5] or why the DNA test results should not have been included in the Affidavit, we cannot say the trial court erred in denying Muex's motions.

[7]** Muex also contends the prosecutor violated Prof. Cond. R. 3.8(e). That rule ***HN6*** provides a prosecutor must "exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6." Because the DNA test results were included in the Affidavit for Probable Cause, we agree with the trial court that any references thereto were made to something that was a public record, and thus were not "extrajudicial."

Nor can we say the prosecutor's conduct placed Muex in grave peril. The voir dire is not included in the trial transcript; as a result, we have no way of determining the effect of the pre-trial publicity.

2. Chain of Custody of DNA Evidence

In 1997, known samples taken from Muex were sent to the FBI laboratory and a DNA membrane was created. That DNA membrane was returned to the Lafayette Police Department in July or August of 1998. The DNA membrane arrived in Lafayette two days later than expected. The following month, the DNA membrane was resubmitted to the FBI laboratory where additional **[**8]** testing was performed. Muex claims that because neither the Lafayette Police Department nor the FBI could account for the whereabouts of Muex's DNA membrane for two days, there was a break in the chain of custody.

HN7 In substantiating a chain of custody, the State must provide reasonable assurances that the property passed through various hands in an undisturbed condition. *Culver v. State*, 727 N.E.2d 1062, 1067 (Ind. 2000), *reh'g denied*. The State does not have to establish a perfect chain of custody; any gaps go to the weight of the evidence and not to admissibility. *Id.*

Here, Muex raises only the two day period during which the DNA membrane was en route from the FBI laboratory to the Lafayette Police Department. Guerrieri received the samples at the FBI laboratory, performed his analysis, resealed the samples, put his initials on them and **[*253]** placed them in a sealed package. Guerrieri was in Lafayette when the samples arrived. They were still in the sealed container with the evidence labels intact and without evidence of tampering. In *Gilliam v. State*, 270 Ind. 71, 383 N.E.2d 297, 302 (Ind. 1978), our supreme court held that "the possibility **[**9]** of tampering was precluded by the sealing of the envelope and that of loss or substitution precluded by recording of the registered mail." Here, the presence of the sealed container in an unaltered condition gives us a reasonable assurance the DNA results passed through the chain of custody in an undisturbed manner. The trial

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[5] We need not decide in order to resolve this case whether every probable cause affidavit is a "public record." We note, however, our supreme court's statement that ***HN5*** "when the prosecutor files an affidavit or obtains an indictment it becomes a public record, unless in the case of an indictment, the person has not yet been taken into custody or given bail." *State ex rel. Atkins v. Juvenile Court of Marion County*, 252 Ind. 237, 242, 247 N.E.2d 53, 56 (Ind. 1969) (addressing Burns' Ind. Stat. Ann. §§ 9-904, 9-906).

court did not err in admitting the DNA evidence.

3. Sentencing [6]

Muex argues his sentence was manifestly unreasonable [7] because "the attack in this case lasted only a few minutes. Muex did not strike the victim. This crime was not the 'worst offense.'" (Br. of Appellant at 9.)

[10]** ***HN10*** When considering the appropriateness of the sentence for the crime committed, the sentencing court should focus initially on the presumptive sentence. *Kien v. State*, 782 N.E.2d 398, 416 (Ind. Ct. App. 2003), *reh'g denied, trans. denied* 792 N.E.2d 47 (Ind. 2003). It may then consider deviation from the presumptive sentence based on a balancing of the factors that must be considered pursuant to Ind. Code § 35-38-1-7.1(a) [8] together with any discretionary aggravating and mitigating factors found to exist. *Id.*

[11]** The trial court found as aggravating factors:

Defendant has a history of delinquent and criminal activity, including a history and pattern of violence, that the defendant is presently incarcerated in the Department of Correction for a crime of violence, there is a risk that he **[*254]** will commit other crimes, has a history of sexual predication, that the crimes in the instant case were premeditated, and there was more than one act of violence during the attack.

(App. at 62-63). The trial court found as mitigating factors that "defendant is attending church and is helping other inmates at the Department of Correction." (*Id.* at 62.) The trial court found the aggravating factors outweighed the mitigating factors and sentenced Muex to seventy-eight years to be served consecutively to a ninety-three year sentence he was already serving.

The record indicates Muex had an extensive criminal history showing a pattern of violence, including assault, armed robbery, and several battery convictions. He was written up while he was in the Tippecanoe County Jail for fighting and insubordination. He had a history of sexual predatory conduct including impregnation of a fourteen year old when he **[**12]** was twenty-two years old. Muex's sentence is not inappropriate in light of his character.

Nor is his sentence inappropriate in light of the nature of the offense. Muex presumably could have injured S.O. more severely than he did. However, we find that forcing S.O. to submit to three independent acts of anal intercourse, in addition to oral sex, while Muex was armed with a gun, was so heinous as to support an aggravated sentence.

Affirmed.

BARNES, J., and DARDEN, J., concur.

---

[6] Muex did not include a copy of the sentencing transcript or order in his brief, in violation of Ind. App. R. 46(A)(10).

[7] On July 19, 2002, our supreme court amended Ind. Appellate Rule 7(B), which governs our review of sentences. When Muex was sentenced, the rule stated in pertinent part: "The Court shall not revise a sentence authorized by statute unless the sentence is manifestly unreasonable in light of the nature of the offense and the character of the offender." The amended rule, ***HN8*** which took effect January 1, 2003, provides we may revise a sentence that is "inappropriate in light of the nature of the offense and the character of the offender."

App. R. 7(B) ***HN9*** is directed to us as the reviewing court and applies to the review that is made as of the date our opinion is handed down. *Kien v. State*, 782 N.E.2d 398, 405 (Ind. Ct. App. 2003), *reh'g denied, trans. denied* 792 N.E.2d 47 (Ind. 2003). Accordingly, we review Muex's sentence to determine whether the sentence was inappropriate in light of his character and the nature of his offense.

[8] That section provides:

HN11 (a) In determining what sentence to impose for a crime, the court shall consider:

(1) the risk that the person will commit another crime;

(2) the nature and circumstances of the crime committed;

(3) the person's:

(A) prior criminal record;

(B) character; and

(C) condition;

(4) whether the victim of the crime was less than twelve (12) years of age or at least sixty-five (65) years of age;

(5) whether the person committed the offense in the presence or within hearing of a person who is less than eighteen (18) years of age who was not the victim of the offense;

(6) whether the person violated a protective order issued against the person under IC 31-15, IC 31-16, or IC 34-26-5 (or IC 31-1-11.5, IC 34-26-2, or IC 34-4-5.1 before their repeal); and

(7) any oral or written statement made by a victim of the crime.

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Neutral
As of: September 26, 2016 11:38 AM EDT

Bd. of Prof'l Responsibility v. Murray

Supreme Court of Wyoming

September 27, 2006, Decided ; September 27, 2006, Filed

No. D-06-5

Reporter
143 P.3d 353; 2006 Wyo. LEXIS 131; 2006 WY 123

BOARD OF PROFESSIONAL RESPONSIBILITY, WYOMING STATE BAR, Petitioner, v. L. ROBERT MURRAY, Wyoming State Bar Attorney No. 5-2874, Respondent.

Prior History: Grady v. State, 914 P.2d 1230, 1996 Wyo. LEXIS 61 (Wyo., 1996)

Core Terms

Censure, discharged juror, extra judicial statement, report and recommendation, recommended, derogatory, discipline, prosecution team, conversation, jurors, further ordered, disciplinary, murder

Case Summary

Procedural Posture

Petitioner Board of Professional Responsibility for the Wyoming State Bar filed a report and recommendation for public censure of respondent attorney.

Overview

The attorney assisted in trying a defendant for alleged sexual assault and murder. The first trial ended in a mistrial. Later, the prosecuting team joined some of the discharged jurors for lunch at a local restaurant. Two of the discharged jurors arrived at the restaurant to pick up take-out food. The attorney in this matter was overheard making a derogatory remark about a juror. The juror approached the attorney, and the attorney repeated the remark. The supreme court concluded that the attorney's conduct was prejudicial to the administration of justice in violation of Wyo. R. Prof. Conduct 8.4. That evening, the attorney made extrajudicial statements to a member of the print media about the defendant's character and expressed his opinion as to guilt. The attorney's conduct violated Wyo. R. Prof. Conduct 3.6. A reasonable person would expect the comments to be disseminated through public communication. The attorney reasonably should have known that his extrajudicial statements would have a substantial likelihood of materially prejudicing an adjudicative proceeding. Moreover, the trial judge had issued an order incorporating the prohibited categories of Wyo. R. Prof. Conduct 3.6.

Outcome

The supreme court found that the report and recommendation should be approved, confirmed, and adopted. Public censure of the attorney was ordered. The attorney was ordered to reimburse the Wyoming State Bar for some of the costs incurred in handling the matter, as well as pay an administrative fee.

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Legal Ethics > Professional Conduct > General Overview

Legal Ethics > Professional Conduct > Opposing Counsel & Parties

Legal Ethics > Professional Conduct > Tribunals

Legal Ethics > Sanctions > General Overview

Legal Ethics > Sanctions > Reprimands

HN1 Reprimand or public censure is generally appropriate when a lawyer is negligent in determining whether it is proper to engage in communication with an individual in the legal system, and causes injury or potential injury to a party or interference or potential interference with the outcome of the legal proceeding.

Legal Ethics > Professional Conduct > General Overview

Legal Ethics > Sanctions > General Overview

Legal Ethics > Sanctions > Reprimands

HN2 Reprimand or public censure is generally appropriate when a lawyer in an official or governmental position negligently fails to follow proper procedures or rules, and causes injury or potential injury to a party or

to the integrity of the legal process.

Legal Ethics > Sanctions > General Overview

Legal Ethics > Sanctions > Disciplinary Proceedings > General Overview

Legal Ethics > Sanctions > Disciplinary Proceedings > Hearings

HN3 In considering aggravating and mitigating circumstances in deciding an appropriate sanction in a professional responsibility matter, aggravating circumstances are defined as any consideration, or factors that may justify an increase in the degree of discipline to be imposed. Mitigating circumstances as any considerations, or factors that may justify a reduction in the degree of discipline to be imposed.

Judges: [1]** William U. Hill for BARTON R. VOIGT, Chief Justice.

Opinion by: William U. Hill

Opinion

[*354] ORDER OF PUBLIC CENSURE

This matter came before the Court upon a "Report and Recommendation for Public Censure," filed herein September 13, 2006, by the Board of Professional Responsibility for the Wyoming State Bar. The Court, after a careful review of the Board of Professional Responsibility's Report and Recommendation, Bar Counsel's "Motion for Public Censure and to File a Report and Recommendation for Discipline," the Respondent's "Section 16 Affidavit and Stipulation to Discipline," and the file, finds that the Report and Recommendation should be approved, confirmed and adopted by the Court; and that Respondent L. Robert Murray should be publicly censured in the manner set forth in the Report and Recommendation. It is, therefore,

ADJUDGED AND ORDERED that the Board of Professional Responsibility's Report and Recommendation for Public Censure, which is attached hereto and incorporated herein, shall be, and the same hereby is, approved, confirmed, and adopted by this Court; and it is further

ADJUDGED AND ORDERED that L. Robert Murray shall receive a public censure for his conduct, **[**2]** and he shall be publicly censured in a manner consistent with the recommended censure contained in the Report and Recommendation for Public Censure; and it is further

ORDERED that, pursuant to Section 26 of the Disciplinary Code for the Wyoming State Bar, L. Robert Murray shall reimburse the Wyoming State Bar the amount of $ 100.00 for some of the costs incurred in handling this matter as well as pay an administrative fee of $ 500.00. Mr. Murray shall pay the total amount of $ 600.00 to the Clerk of the Board of Professional Responsibility on or before November 1, 2006; and it is further

ORDERED that the Clerk of this Court shall docket this Order of Public Censure, along with the incorporated Report and Recommendation for Public Censure, as a matter coming regularly before this Court as a public record; and it is further

ORDERED that, pursuant to Rule 4(c) of the Disciplinary Code for the Wyoming State Bar, this Order of Public Censure, along with the incorporated Report and Recommendation for Public Censure, shall be published in the Wyoming Reporter and the Pacific Reporter; and it is further

ORDERED that the Clerk of this Court cause a copy of the Order **[**3]** of Public Censure to be served upon Respondent L. Robert Murray; and it is further

ORDERED that the Clerk of this Court transmit a copy of this Order of Public Censure **[*355]** to members of the Board of Professional Responsibility, and the clerks of the appropriate courts of the State of Wyoming.

DATED this 26TH day of September, 2006.

BY THE COURT:

William U. Hill

for BARTON R. VOIGT

Chief Justice

BEFORE THE BOARD OF PROFESSIONAL RESPONSIBILITY

WYOMING STATE BAR

STATE OF WYOMING

In the matter of L. ROBERT MURRAY WSB Attorney No. 5-2874, Respondent

Docket No. 2006-02

REPORT AND RECOMMENDATION FOR PUBLIC CENSURE

The Board of Professional Responsibility makes the following report and recommendation for public censure, with its findings of fact, conclusions of law, and recommendation to the Supreme Court of Wyoming:

FINDINGS OF FACT

1. Respondent is currently an active member of the Wyoming State Bar, registration number 5-2874, and has been since 1992. Respondent has been a member of the Colorado State Bar since 1990, registration number 19902, and his membership is currently in inactive status. Respondent **[**4]** resides in Cheyenne, Wyoming.

2. On Tuesday, October 25, 2005, Respondent began to assist the Fremont County and Prosecuting Attorney in the murder case of the *State of Wyoming v. Floyd Dewayne Grady,* Crim.No. 5988 (Wy. D.C. Ninth Judicial District). The defendant was charged with the murder of Tammy Sue Watts, who was sexually assaulted and killed by strangulation and repeated blows to the head on April 15, 2004. Floyd Dewayne Grady was subsequently charged in the Watts murder by the State of Wyoming with two counts of first-degree murder, attempted sexual assault and kidnapping. The State also sought the death penalty upon conviction. Grady had been incarcerated at the Wyoming State Penitentiary in Rawlins and was transferred to the Honor Farm sometime before the killing. Grady had been serving a 10 to 30 year sentence stemming from a 1995 violent rape conviction in Laramie County, Wyoming. *State v. Grady,* 914 P.2d 1230 (Wy. 1996).

3. A jury trial in the case began during the week of October 31, 2005 and ended Friday, November 18, 2005, in the late afternoon after the jury announced it was hopelessly deadlocked. The Honorable Norman E. Young declared a mistrial **[**5]** and discharged the jury. Respondent represented the State of Wyoming during the trial as a specially appointed Deputy County Attorney.

4. After the jury was discharged, some of the jurors who held out for a guilty verdict discussed their concerns about the jury's deliberations with Judge Young on the record. Those jurors and other jurors who held out for a guilty verdict thereafter stayed in the courtroom and later moved to the County Attorney's Office to speak to the prosecution team. Respondent joined the conversation with the discharged jurors after meeting with the victim's family. After some time passed, Respondent joined members of the prosecution team and some of the discharged jurors, accompanied by several spouses, at a restaurant that shares space with a bar in Lander, Wyoming.

5. Approximately a half-hour later, one of the two discharged jurors who held out for acquittal of the defendant arrived at the restaurant to pick up a take-out order of food. A member of the prosecution team approached the discharged juror to discuss her jury service. The discharged juror was standing at a counter across the room from the table where Respondent was sitting with members of the prosecution **[**6]** team and other discharged jurors. Upon seeing the other discharged jurors with the prosecution team, the discharged juror made comments towards the group about her perception of jurors socializing with the prosecution team. At that time, the discharged juror observed Respondent make a derogatory remark about her to the persons sitting with him. The discharged juror later approached Responden and asked if Respondent had made a derogatory remark about her. Respondent repeated the derogatory remark.

[*356] 6. Respondent's conduct was prejudicial to the administration of justice in violation of Rule 8.4 of the Wyoming Rules of Professional Conduct, in effect on November 18, 2005.

7. Later in the evening of November 18, 2005, Respondent engaged in a casual conversation and under informal circumstances with a member of the print-media on the sidewalk outside the front entrance to the same establishment in Lander, Wyoming. From the beginning of the conversation, Respondent understood the conversation was "off the record," and Respondent further understood that Respondent would not be quoted even as an "anonymous source." During the conversation, Respondent made extrajudicial statements related **[**7]** to the character of the defendant and expressed his opinion as to the guilt of the defendant. Respondent did not act intentionally -- either knowingly or purposefully -- to violate the Wyoming Rules of Professional Conduct. His conduct, however, was wrong. Respondent acknowledges that Respondent acted in reckless disregard of his ethical obligations regarding extrajudicial statements.

8. Respondent made extrajudicial statements that a reasonable person would expect to be disseminated by

means of public communication and Respondent reasonably should have known that his extrajudicial statements would have a substantial likelihood of materially prejudicing an adjudicative proceeding. At the time Respondent made these statements, Respondent knew Rule 3.6 of the Wyoming Rules of Professional Conduct, in effect on November 18, 2005, provided that extrajudicial statements regarding the character of the accused and extrajudicial statements expressing an opinion as to the guilt of a defendant are presumptively improper when made in a criminal case.

9. Respondent's conduct violated Rule 3.6 of the Wyoming Rules of Professional Conduct, in effect on November 18, 2005.

10. On November 30, 2005, defense **[**8]** counsel moved to disqualify Respondent from the retrial of the defendant and for a change of venue, and requested a show cause order to hold Respondent in contempt based upon the extrajudicial statements Respondent made to the member of the print-media.

11. An Order to Show Cause was issued by Judge Young on December 5, 2005, requiring Respondent to appear and show cause why Respondent should not be held in contempt for making extrajudicial statements in violation of an order entered by Judge Young, on April 20, 2005, incorporating the prohibited categories of Wyoming State Bar Rule 3.6. The Show Cause hearing and hearing on the defense motions were held on December 15, 2005, during which Judge Young criticized Respondent for his extrajudicial statements and his conduct toward the discharged juror. Judge Young granted the defense's renewed motion for change of venue, accepted Respondent's resignation from the case and, in light of his action, granted a defense motion to withdraw its motion to hold Respondent in contempt. A new trial was set in the matter for April 2006 in Jackson, Wyoming. Judge Young entered his order changing the venue for trial based upon all of the media reports **[**9]** following his declaration of a mistrial, including the article written by the member of the media that reported the extrajudicial statements Respondent made to him during our conversation on November 18, 2005.

12. At the conclusion of the retrial in Jackson, Wyoming, in April 2006, the jury returned a unanimous verdict finding Floyd Dewayne Grady guilty of the sexual assault and murder of Tammy Sue Watts, declined to impose the death penalty and returned a verdict recommending the defendant be sentenced to life imprisonment without the possibility of parole. The Fremont County and Prosecuting Attorney advised Respondent that his misconduct in making a derogatory remark to the discharged juror and his misconduct in making extrajudicial statements to a member of the print-media did not affect the retrial of Floyd Dewayne Grady.

13. This is the first time a complaint has been filed against Respondent with the Wyoming Board of Professional Responsibility. Before and after this incident with the discharged juror, Respondent has tried numerous jury trials. Never before or after the incident on November 18, 2005, has Respondent **[*357]** made a derogatory remark to any juror. It is usually his practice **[**10]** to refrain from discussing a case with a discharged juror.

14. Respondent has been disciplined by his employer for the misconduct Respondent engaged in during the evening hours of November 18, 2005. On March 9, 2006, his employer required Respondent to follow an aggressive 60 day performance improvement plan, which Respondent successfully completed on May 9, 2006. Respondent also received a 14 day unpaid suspension, which Respondent served in August 2006.

CONCLUSIONS OF LAW

15. Standard 6.33 of the ABA Standards for Imposing Lawyer Sanctions discusses the acts which result in a public censure for violation of Rule 3.5: ***HN1*** "Reprimand [or public censure] is generally appropriate when a lawyer is negligent in determining whether it is proper to engage in communication with an individual in the legal system, and causes injury or potential injury to a party or interference or potential interference with the outcome of the legal proceeding."

16. Standard 5.23 of the ABA Standards for Imposing Lawyer Sanctions discusses the acts which result in a public censure for violation of Rule 3.8: ***HN2*** "Reprimand [or public censure] is generally appropriate when a lawyer in an official or **[**11]** governmental position negligently fails to follow proper procedures or rules, and causes injury or potential injury to a party or to the integrity of the legal process."

17. ABA Standards for Imposing Lawyer Sanctions 9.1 provides for ***HN3*** consideration of aggravating and mitigating circumstances in deciding on an appropriate sanction. Section 9.21 defines aggravating circumstances as "any consideration, or factors that may justify an increase in the degree of discipline to be

imposed." Section 9.31 defines mitigating circumstances as "any considerations, or factors that may justify a reduction in the degree of discipline to be imposed."

a. Applicable aggravating factors in this case are:

i. Section 9.22 (i)--substantial experience in the practice of law.

b. Applicable mitigating factors are:

i. Section 9.32 (a)--absence of a prior disciplinary record;

ii. Section 9.32 (b)--absence of a dishonest or selfish motive;

iii. Section 9.32 (e)--full and free disclosure to disciplinary board or cooperative attitude toward proceedings; and

iv. Section 9.32 (k)--imposition of other penalties or sanctions.

RECOMMENDATION TO THE SUPREME COURT [**12] OF WYOMING

18. As an appropriate sanction for Respondent's violations of the Wyoming Rules of Professional Conduct, it is recommended that he receive a public censure.

19. The following should be provided in a press release:

"Cheyenne Attorney L. Robert Murray received a formal public censure by order of the Wyoming Supreme Court on ___. Mr. Murray made a derogatory remark to a juror who had been discharged following a mistrial in a first degree homicide case. In addition, Mr. Murray made inappropriate comments to a member of the print media following this jury trial. The Wyoming Rules of Professional Conduct regulate the conduct of Wyoming attorneys. Mr. Murray's derogatory remark to the discharged juror violated Rule 8.4(d), which prohibits an attorney from engaging in conduct that is prejudicial to the administration of justice. He also violated Rule 3.6, in effect on November 18, 2005, which prohibited a lawyer from making extrajudicial statements relating to the character of the accused and prohibited a lawyer from expressing an opinion as to the guilt of a defendant. Under the Rule in effect on November 11, 2005, Mr. Murray's extrajudicial statements presumptively **[**13]** had a substantial likelihood of materially prejudicing an adjudicative proceeding. The sanction was mitigated since Mr. Murray had no prior disciplinary record. Mr. Murray stipulated to these facts and consented to this discipline. The Board of Professional Responsibility approved the **[*358]** stipulation, recommending that the Wyoming Supreme Court publicly discipline Mr. Murray. After reviewing the record and recommendation, the Wyoming Supreme Court entered its order publicly censuring Mr. Murray and required him reimburse the Wyoming State Bar $ 100 in costs and pay an administrative fee of $ 500."

19. Respondent should reimburse the Wyoming State Bar for the costs of handling this matter, capped at $ 100.00 and pay the administrative fee of $ 500.00 no later than November 1, 2006.

This decision is unanimously made by a quorum of the Board of Professional Responsibility. It is therefore so recommended September 7, 2006.

Richard Honaker, Vice-Chair

Board of Professional Responsibility

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Prosecutor faces discipline for press comments over ruling for killer

Dave Stafford September 23, 2016 KEYWORDS ATTORNEY DISCIPLINE, DISCIPLINARY COMMISSION, DISCIPLINE, JOHNSON COUNTY, PROSECUTORS

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Johnson County Prosecutor Bradley Cooper faces possible professional sanctions for comments he made to the Indianapolis Star and the Associated Press after a judge ruled a man facing the death penalty wasn't competent to be executed.

Cooper was a deputy prosecutor and among the first witnesses to see the body of 18-year-old Franklin College student Kelly Eckart in 1997 after her body was discovered in a ravine near Camp Atterbury in Brown County. She had been abducted, raped and murdered. Michael Overstreet was convicted of her rape and murder and sentenced to death in 2000.

After Overstreet failed to gain post-conviction relief that would spare him from lethal injection in 2013, the Indiana Supreme Court authorized a successive PCR petition on the claim that Overstreet was insane.

Justice Robert Rucker wrote for the court that a psychiatrist's evaluation of Overstreet opined that he "does not have, and does not have the ability to produce, a rational understanding of why the State of Indiana plans to execute him."

When Johnson Superior Judge Cynthia Emkes recused herself from the subsequent post-conviction proceeding because she had presided over Overstreet's criminal trial, the case ultimately was assigned to a judge in St. Joseph County, about 165 miles away. In November 2014, St. Joseph Superior Judge Jane Woodward Miller granted Overstreet's petition.

The Indiana Supreme Court Disciplinary Commission's complaint against Cooper claims he committed professional misconduct for comments he made in the wake of Miller's ruling. The complaint seeks appropriate sanctions against Cooper's license to practice law.

According to the commission, Cooper told The Star:

"I was angry and suspicious when this case was sent to a distant judge who is not accountable to the Johnson County citizenry or a grieving mother who couldn't even afford to drive up for the hearing. The idea that this convicted murdering monster is too sick to be executed is nothing short of outrageous and is an injustice to the victim, her mother, the jury and the hundreds of people who worked to convict this animal."

The commission also cited this statement Cooper made to AP:

"Once this case got shipped to a distant judge who is not beholden to the voters and citizens of Johnson County, it didn't surprise me that she didn't want to create the headache for herself by keeping with this case

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… I think the idea that this rapist murderer is basically too sick to be executed is ridiculous."

Eckart's parents, Dale and Connie Sutton, told IL in 2011 they planned to continue showing up at Overstreet's hearings until the death sentence was carried out.

Cooper is charged with violating Rule of Professional Conduct 8.2(a), which states, "A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office."

Cooper, who's represented by Indianapolis attorneys James Voyles and Jennifer Lukemeyer, acknowledged the comments in his response to the commission's complaint, but he denied the comments were a violation of Rule 8.2(a).

In his response to the complaint, Cooper said of his comment to The Star that "He emotionally responded to an inquiry from a reporter … and did so via text messaging."

A month after Overstreet was ruled incompetent, Attorney General Greg Zoeller announced his office would not appeal after determining the decision comported with prior U.S. Supreme Court rulings.

Cooper's disciplinary hearing is set for 1:30 p.m. Oct. 5. Like the post-conviction proceeding, it will take place far from where Overstreet was convicted. The hearing will be in Richmond, about 80 miles from the courthouse in Franklin. Hearing officer and Wayne Superior Court Judge Charles Todd Jr. will preside.

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Mass Media, the Right to a Fair Trial and 'Celebrity Threesomes': No Smoke without Fire?

April 21, 2016 | Charles McKeon

Nothing gets people going like a scandal. Celebrity escapades, sexual deviance, lawbreaking – all whet the national appetite for a good story. Rightly or wrongly, people have a burning desire to know about the less polished aspects of famous strangers' lives. Difficulties arise, however, when instances of celebrity wrongdoing lands them in court. The right to a fair trial can be frustrated by mass publicity. The more notoriety a case receives, the more media coverage it generates. Tension between a free press and fair trial standards is not a new phenomenon. Since the inception of mass media, cases have been influenced by popular opinion and news reports. With every technological advance, this discord has grown more strained. With information democratised by the internet and social media, is the tension getting out of hand? Can the right to a fair trial ever be fully realised when the full weight of the media's influence is felt?

Article 6(1) of the European Convention on Human Rights (ECHR) reads:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

When the ECHR was drafted in the late 1940s, media publicity clearly exerted enough of an influence to warrant safeguarding against it internationally. It was acknowledged even then that "publicity would prejudice the interests of justice," and that the press and the public could be removed from part or all of the trial's proceedings if this was the case. The wording "independent and impartial tribunal" is important here – does mass media in the digital age preclude the possibility of a truly impartial tribunal in famous cases?

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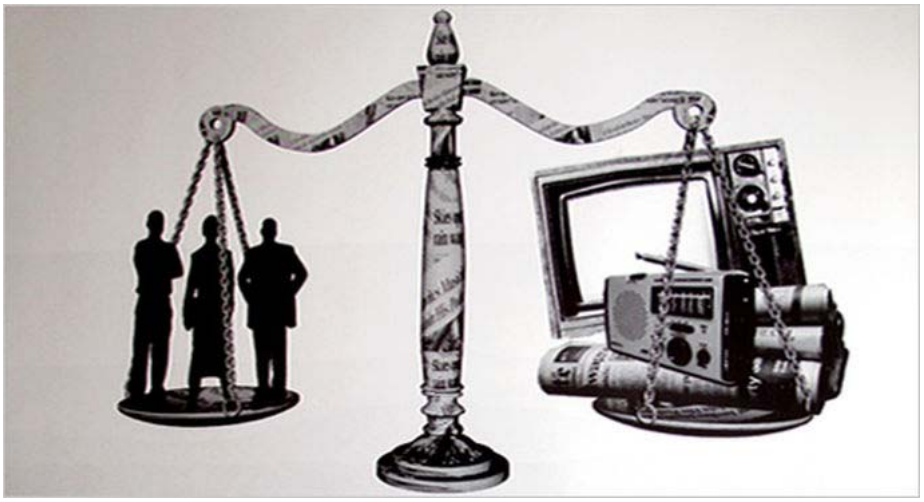
The media exercises a degree of control over public opinion. Media bias against a party involved in a trial takes its toll; if negative information is consistently circulated and reinforced in the press, both juries and judges may form an opinion based on material outside of the courtroom. The media often rely on emotive and dramatized language to increase the impact of a story, which can adversely affect the objectivity of those involved in the case. Such language can offer a powerful counterweight to factual evidence, distorting the fairness of the trial. The memory of witnesses, jurors and judges alike can be retrospectively influenced by press coverage. Arbitrators may deny being influenced by external forces, but it is arguably impossible to remain utterly objective in the face of a media onslaught. Such publicity often takes place before the trial has even began, warping the presumption of innocence before the facts have been presented. The extent to which the media exerts an influence on trial proceedings is up for debate, but at the bare minimum it can be said that the news can help set the parameters for the debate, to frame it in opinion rather than in fact.

This influence can be felt in the great media cases of recent history. The quintessential publicity versus facts case is surely the OJ Simpson murder case, in which extraordinary media coverage played an integral role in the outcome. Judge Ito, along with other senior figures related to the case, were accused of succumbing to the power of the media in finding a not guilty verdict. In more recent memory, the trials of Amanda Knox and of Oscar Pistorius demonstrated the tension between freedom of the media and the right to a fair trial. Facts are drowned out by the barrage of emotion-driven, often unsubstantiated claims in the press. Therein lies the danger – the media is less constrained than the law in terms of permissible evidence. Media furore often results in a case of guilty before trial, in which the arbiters of justice are headlines and editors instead of judges and jurors.



Perhaps the clearest examples of media versus courtroom are injunctions. Publicity is not only a factor in court proceedings but is ultimately the subject of the verdict. Democratic principles of free press and fair hearing are at loggerheads, weighing the reputation and privacy of individuals against the right of the media to publish what it chooses. This has been borne out in the recent 'celebrity threesome' case – a juicy name even in the world of celebrity scandal.

The case revolves around a famous married individual taking part in extramarital activities, being caught, and consequently taking out an injunction against the press. Understandable comparisons

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for the media's influence on the fairness of proceedings. At the Court of Appeal, Lord Justice Jackson seemed to endorse the futility of injunctions, stating in an outspoken judgement that "the internet and social media have a life of their own. This court has little control over what foreign newspapers and magazines may publish. Websites discussing the story will continue to pop up." In the modern day, argued Jackson, injunctions may be defunct. He added that:

> "the Court should not make orders which are ineffective. It is inappropriate for the Court to ban people from saying that which is common knowledge. Knowledge of the relevant matters is now so widespread that confidentiality has probably been lost."

This appears to indicate a bending of the law to accommodate the might of the media, perhaps a tacit acceptance that the availability of information in the digital age negates the validity of injunctions. The law in the 'celebrity threesome' case seems to have been interpreted progressively by Lord Justice Jackson, despite the ruling that the injunction still stands. If senior figures in British justice see media as capable of influencing the way in which law is interpreted, perhaps this indicates a tipping of the scales towards the press in its tension with the law. The ever-growing power of social media and online publications continues to democratise information and make it increasingly available; can the law remain in tension with the freedom of the press, or does this signal a shift in the dynamic? Perhaps the future of press versus the courtroom relationship is one of accommodation rather than conflict.

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Prosecutor faces discipline for press comments over ruling for killer

Dave Stafford September 23, 2016 KEYWORDS ATTORNEY DISCIPLINE, DISCIPLINARY COMMISSION, DISCIPLINE, JOHNSON COUNTY, PROSECUTORS

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Johnson County Prosecutor Bradley Cooper faces possible professional sanctions for comments he made to the Indianapolis Star and the Associated Press after a judge ruled a man facing the death penalty wasn't competent to be executed.

Cooper was a deputy prosecutor and among the first witnesses to see the body of 18-year-old Franklin College student Kelly Eckart in 1997 after her body was discovered in a ravine near Camp Atterbury in Brown County. She had been abducted, raped and murdered. Michael Overstreet was convicted of her rape and murder and sentenced to death in 2000.

After Overstreet failed to gain post-conviction relief that would spare him from lethal injection in 2013, the Indiana Supreme Court authorized a successive PCR petition on the claim that Overstreet was insane.

Justice Robert Rucker wrote for the court that a psychiatrist's evaluation of Overstreet opined that he "does not have, and does not have the ability to produce, a rational understanding of why the State of Indiana plans to execute him."

When Johnson Superior Judge Cynthia Emkes recused herself from the subsequent post-conviction proceeding because she had presided over Overstreet's criminal trial, the case ultimately was assigned to a judge in St. Joseph County, about 165 miles away. In November 2014, St. Joseph Superior Judge Jane Woodward Miller granted Overstreet's petition.

The Indiana Supreme Court Disciplinary Commission's complaint against Cooper claims he committed professional misconduct for comments he made in the wake of Miller's ruling. The complaint seeks appropriate sanctions against Cooper's license to practice law.

According to the commission, Cooper told The Star:

"I was angry and suspicious when this case was sent to a distant judge who is not accountable to the Johnson County citizenry or a grieving mother who couldn't even afford to drive up for the hearing. The idea that this convicted murdering monster is too sick to be executed is nothing short of outrageous and is an injustice to the victim, her mother, the jury and the hundreds of people who worked to convict this animal."

The commission also cited this statement Cooper made to AP:

"Once this case got shipped to a distant judge who is not beholden to the voters and citizens of Johnson County, it didn't surprise me that she didn't want to create the headache for herself by keeping with this case

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… I think the idea that this rapist murderer is basically too sick to be executed is ridiculous."

Eckart's parents, Dale and Connie Sutton, told IL in 2011 they planned to continue showing up at Overstreet's hearings until the death sentence was carried out.

Cooper is charged with violating Rule of Professional Conduct 8.2(a), which states, "A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office."

Cooper, who's represented by Indianapolis attorneys James Voyles and Jennifer Lukemeyer, acknowledged the comments in his response to the commission's complaint, but he denied the comments were a violation of Rule 8.2(a).

In his response to the complaint, Cooper said of his comment to The Star that "He emotionally responded to an inquiry from a reporter … and did so via text messaging."

A month after Overstreet was ruled incompetent, Attorney General Greg Zoeller announced his office would not appeal after determining the decision comported with prior U.S. Supreme Court rulings.

Cooper's disciplinary hearing is set for 1:30 p.m. Oct. 5. Like the post-conviction proceeding, it will take place far from where Overstreet was convicted. The hearing will be in Richmond, about 80 miles from the courthouse in Franklin. Hearing officer and Wayne Superior Court Judge Charles Todd Jr. will preside.

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