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## Quandaries and Quagmires: Ethics professors resist!

By: [Charles Lundberg](#) March 2, 2017 \_

The Washington Post broke the story a little after 3 p.m. Thursday, Feb. 23:

[“Law professors file misconduct complaint against Kellyanne Conway”](#):

*A group of law professors from around the country has filed a professional misconduct complaint against White House counselor Kellyanne Conway, a graduate of George Washington University Law School who was admitted to the D.C. Bar in 1995.*

*The letter, filed with the office that handles misconduct by members of the D.C. Bar, said Conway should be sanctioned for violating government ethics rules and “conduct involving dishonesty, fraud, deceit or misrepresentation,” the letter says.*

*The 15 professors, who specialize in legal ethics, cite several incidents, including a television interview in which Conway made the “false statement that President Barack Obama had ‘banned’ Iraqi refugees from coming into the United States for six months following the ‘Bowling Green Massacre,’” and the use of her position to endorse Ivanka Trump products.*

*“We do not file this complaint lightly,” the professors said in their filing. “We believe that, at one time, Ms. Conway, understood her ethical responsibilities as a lawyer and abided by them. But she is currently acting in a way that brings shame upon the legal profession.”*

Finally, the complaint letter (conveniently linked to the article) expresses a sentiment all too familiar to any ethics lawyer — that not filing the complaint would itself violate the rules:

*We feel compelled to file such a complaint under DC Rule 8.3(a), which states that “A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.”*

By 3:30 p.m., the story had been posted on the Listserv of the Association of Professional Responsibility Lawyers [APRL], a national group of about 500 legal ethics lawyers.

Within the next 12 to 18 hours there was a storm of comments posted by various legal ethicists, everything from people agreeing with the complaint (that Conway’s misstatements about the Bowling Green massacre, for example, constituted a violation of Rule 8.4 (c)), to arguments that the Constitution would prohibit applying 8.4(c) to circumstances lying outside of the practice of law, to comments like “Political theater at its best!” One member wryly suggested a program on the topic for APRL’s next national meeting: *“When Asserting Alternative Facts Can Lead to Discipline.”*

At 6 p.m. that evening, APRL President Don Campbell — no stranger to posting provocative opinions — called the complaint “fake ethics.” He was especially incensed by the idea of ethics professors issuing press releases about an ethics complaint they had filed: “The public announcement of a request for investigation is not cool and I think shameful,” adding that it is wholly inappropriate and in no way consistent with the attorney investigation/discipline process.

The next morning, Friday, Feb. 24, Professor Jonathan Turley, a nationally recognized legal scholar, published a [critical analysis](#) of the complaint. After disclosing that Conway had been one of his students over 10 years earlier, Professor Turley took the complaint apart, finding it “without merit” and “overtly political”:

*[E]thics charges should not be a form of politics by other means and, with all due respect to these accomplished academics, this letter strikes me as raising largely political objections to Conway’s work as a spokesperson for the Administration.*

To Turley, the allegations were “highly suspect as the basis for an ethics charge” and “they destroy the legitimacy of the complaint.” He continued, “I fail to see the basis for a formal ethics charge based solely on the product endorsement and view the other references as bordering on frivolous as the foundation for an ethics complaint.”

The same day, the Powerline Blog went on the attack, in a piece titled, [“Law Profs File Frivolous Bar Complaint Against Kellyanne Conway.”](#) As might be expected, the attack was somewhat more political, suggesting that the allegations “open up a future in which partisans will call for bar investigations every time a political figure misstates a fact — an everyday occurrence — or maybe states a fact someone doesn’t agree with,” and concluding:

*I hope someone is cataloging all of the low tactics employed by the left to impair the Trump administration. Such a catalog will be useful the next time a Democratic president takes office.*

*But many of the tactics will have to be rejected as too idiotic. Filing a bar complaint is one of them.*

On Monday, Feb. 27, Slate published a piece by another legal ethics scholar, Professor Stephen Lubet, titled "[In Defense of Kellyanne Conway](#)" that went straight to the point:

*As a liberal Democrat, I have no sympathy for Conway's habitual disregard for truth. As a professor of legal ethics, however, I think this complaint is dangerously misguided and has the potential to set a terrible precedent.*

And in an [article](#) updated Tuesday, Feb. 28, Professor John F. Banzhaf III, of George Washington University Law School criticized the complaint on two grounds, saying it "seeks a remedy which appears to be unconstitutional because it would chill the freedom of speech of any political figure simply because he or she was a member of the bar, and create an untenable double standard in which a tiny group of unelected officials could wreck someone's livelihood."

He added, "the very filing of this complaint upon such specious grounds could open the law professors themselves up to the filing of a bar complaint and subsequent investigation."

### **My view**

I think Profs. Turley and Lubet are correct: the complaint is fundamentally misguided and has the potential to set a terrible precedent.

I also agree that issuing a press release announcing an ethics complaint is classless and without excuse. As a professor of legal ethics myself, I am embarrassed by my colleagues' breathtakingly bad judgment.

In addition, the haughty and condescending rhetoric ("We do not file this complaint lightly"; Conway's statements "bring shame upon the legal profession,") does not reflect well on the writers. (Did they not have someone read this before it was filed?)

Finally, the professors' attempt to cloak this as a Rule 8.3 mandatory report is laughable — beyond the pale. Yes, Rule 8.3 requires a lawyer to report particularly bad conduct by another lawyer. But 8.3 does not require the filing of a complaint. An attorney who feels compelled to report misconduct under Rule 8.3 can simply write a short letter — even an email — to the disciplinary authority, stating the known facts that constitute misconduct — period.

That's how you satisfy Rule 8.3.

Once you've decided to file an actual complaint, however, Rule 8.3 has no further force. It is the height of sanctimonious hypocrisy to file a formal complaint against a lawyer, and then cry, "Rule 8.3 made me do it." Crocodile tears. And you certainly don't accompany the complaint with a press release. Conduct unbecoming a professor of legal ethics — or any good lawyer, for that matter.

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