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October 31, 2016

Mr. Wallace E. Shipp, Jr., Disciplinary Counsel
Office of Disciplinary Counsel
515 5th Street NW, Building A, Suite 117
Washington, DC 20001

Re:	Kendall / Clevenger	2016-U328
	Mills / Clevenger	2016-U329
	Samuelson / Clevenger	2016-U330

Mr. Shipp:

I write in response to Elizabeth Herman's October 14, 2016 letter regarding the cases listed above. I just received the letter on Friday, and I am appalled. In an attempt to justify her refusal to investigate whether David E. Kendall, Cheryll D. Mills and Heather F. Samuelson destroyed evidence related to Hillary Clinton's private email server, Ms. Herman wrote the following:

It appears that your concerns were investigated by the Federal Bureau of Investigation ("FBI"). The FBI and prosecutors declined to file charges against Ms. Clinton, her attorney, or those who allegedly assisted her in deleting the emails. We are satisfied that the misconduct alleged was properly reviewed.

Well, forgive me and a couple hundred million of my fellow citizens (plus a majority of the members in both houses of Congress) if we are not "satisfied that the misconduct alleged was properly reviewed." After all, the FBI itself is no longer "satisfied that the misconduct alleged was properly reviewed."

As you are likely aware, the FBI announced on Friday that it was reopening its investigation into Ms. Clinton's emails. See Rosalind S. Helderman, Matt Zapotosky and Sari Horwitz, "Computer seized in Weiner probe prompts FBI to take new steps in Clinton email inquiry," *Washington Post*, October 28, 2016 (<http://tinyurl.com/jb98lg7>). Even before that development, however, Ms. Herman's refusal to investigate was indefensible. I suspect most first-year lawyers could spot the flaws in her legal analysis:

1. The standard of proof for professional misconduct is substantially lower than that for a criminal conviction, *i.e.*, "clear and convincing evidence" versus "proof beyond a reasonable doubt." Thus your office might be able to prove professional misconduct by clear and convincing evidence even if the FBI could not prove guilt beyond a reasonable doubt.

2. The elements of a Espionage Act violation are fundamentally different from the elements of the alleged professional rules violations.
3. The *mens rea* for a criminal act versus a professional rules violation is fundamentally different. FBI Director James Comey indicated that he did not seek criminal charges against Mrs. Clinton and her cronies because there was no proof of intent to violate the Espionage Act (even though the statute itself does not require any intent beyond mere negligence). To prove a violation of the professional rules, however, your office need only prove recklessness.

Furthermore, the FBI's investigation apparently was targeted at violations of the Espionage Act, not obstruction of justice by the respondent attorneys. There is no indication that Mr. Kendall was investigated by the FBI *at all*, for example, even though the FBI's own records implicate Mr. Kendall in the destruction of evidence. Accordingly, it is preposterous for Ms. Herman to suggest that the FBI and the Justice Department somehow cleared Mr. Kendall when they had never investigated him in the first place.

Equally problematic is Ms. Herman's blind confidence in the FBI and Justice Department. Even before the FBI's about face on Friday, I had already provided evidence that the FBI investigation was fundamentally tainted. On October 19, 2016, I emailed Ms. Herman an October 5, 2016 letter from four Congressional committee chairman to U.S. Attorney General Loretta Lynch regarding Ms. Lynch's role and Mr. Comey's role in the destruction of evidence. The letter can be found at <http://tinyurl.com/gtkl2ap>. As indicated in that letter, both Ms. Lynch and Mr. Comey were *personally* involved in the destruction of evidence sought by Congress, specifically the destruction of laptops belonging to Ms. Mills and Ms. Samuelson.

To an outside observer, it appears that Ms. Lynch and Mr. Comey destroyed evidence to protect others who destroyed evidence, namely Mr. Kendall, Ms. Mills, Ms. Samuelson and, ultimately, Mrs. Clinton. For that reason, I filed bar grievances against Ms. Lynch and Mr. Comey in New York, where they are both admitted to practice. *See* October 20, 2016 Letter from Ty Clevenger to Grievance Committee of the U.S. District Court, S.D.N.Y. (<http://tinyurl.com/hffys78>). If Ms. Lynch and Mr. Comey were aiding and abetting the suspects they were investigating, as the evidence suggests, then it should come as no surprise that the suspects were exonerated. Either way, the FBI's refusal to recommend charges says nothing about whether the respondent attorneys violated the professional rules.

A more fundamental problem is Ms. Herman's seeming disregard for the rules governing your office, particularly D.C. Bar Rule XI(6)(a)(2). That rule imposes a duty to “investigate all matters involving alleged misconduct by an attorney subject to the disciplinary jurisdiction of this Court which may come to the attention of Disciplinary Counsel or the Board from any source whatsoever, where the apparent facts, if true, may warrant discipline.” As a matter of standard practice, your office requires attorneys to respond in writing to misconduct complaints whenever those complaints state a *prima facie* violation of the professional rules. In this case, however, Ms. Herman bypassed the normal practice and dismissed my complaints out of hand without any genuine investigation. Why?

According to Federal Election Commission records, Ms. Herman made two donations of \$250 each to President Obama's campaign during the 2008 election cycle, and a donation of \$200 and \$250 during the 2012 election cycle. It's a good bet that Ms. Herman will be supporting Mrs. Clinton in the current election cycle, thus it appears that Ms. Herman dismissed my misconduct complaints in order to protect her party's Presidential candidate.

Finally, I noticed the following phrase on the envelope that contained Ms. Herman's October 14, 2016 letter: "Serving the Community, and Upholding the Integrity of the Bar." How ironic. I need not tell you that confidence in our public institutions is declining precipitously, as witnessed by the fact that both Republicans and Democrats have now lost confidence in the FBI and its director. If Ms. Herman is allowed to whitewash the misconduct of Mr. Kendall, Ms. Mills, and Ms. Samuelson, that will inevitably undermine public confidence in your office, and it will add to the growing perception that people with the right political connections can get away with almost anything. Accordingly, I ask that you re-open the cases listed above and assign them to another attorney.

Please let me know by November 7, 2016 whether your office intends to take further action. Since Rule XI imposes mandatory duties on your office, I will likely seek mandamus relief from the Court of Appeals if I do not receive a response by that time. Thank you in advance for your consideration.

Respectfully,

A handwritten signature in black ink, appearing to read "Ty Clevenger", with a long horizontal flourish extending to the right.

Ty Clevenger

cc: District of Columbia Court of Appeals
District of Columbia Board on Professional Responsibility