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August 31, 2016

Office of Disciplinary Counsel
Board on Professional Responsibility
District of Columbia Court of Appeals
515 5th Street NW, Building A, Suite 117
Washington, DC 20001

Re: Complaint of Attorney Misconduct

To Whom It May Concern:

I wish to file misconduct complaints against three attorneys for destroying evidence in an apparent attempt to impede various Congressional and Executive Branch investigations. The three attorneys and their addresses are as follows:

David E. Kendall
Williams & Connolly LLP
725 12th Street NW
Washington DC 20005-3901

Cheryl D. Mills
5404 Wisconsin Avenue, Suite 1150
Chevy Chase MD 20815

Heather Faye Samuelson
2125 14th Street NW, Apt. 320
Washington, DC 20009

All three attorneys represented former Secretary of State Hillary Rodham Clinton and were responsible for deleting thousands of emails that had been stored on a secret email server that Mrs. Clinton used in lieu of a government email account. Given the widespread media coverage of the subject, I suspect you are well aware of the factual background surrounding Mrs. Clinton's private email system. Nonetheless, I incorporate by reference the materials found at <http://www.thompsontimeline.com>, and I will cite those materials periodically with the notation "THOMPSON" and the date that they appear on the timeline.

Not later than July of 2014, the U.S. Department of State began asking Mrs. Clinton to turn over work-related emails that had been stored on her private server ([THOMPSON July 2014](#)). Around July 23, 2014, the company hosting Mrs. Clinton's server communicated with Ms. Mills about sending her the emails from the server ([THOMPSON July 23, 2014](#)). In August, State Department officials met with Mrs.

Clinton's lawyers (presumably including Mr. Kendall, Ms. Mills, and/or Ms. Samuelson) in an attempt to obtain the records from Mrs. Clinton's server ([THOMPSON August 2014](#)). On October 28, 2014, the State Department formally asked Mrs. Clinton to turn over the emails ([THOMPSON October 28, 2014](#)). Shortly thereafter, Mrs. Clinton asked Mr. Kendall and Ms. Mills to review the emails in order to determine which emails should be produced to the State Department ([THOMPSON Shortly After October 28, 2014](#)). Ms. Mills later testified that she and Mr. Kendall oversaw the review process, but most of the work was done by Ms. Samuelson ([THOMPSON September 3, 2015](#)). Ms. Mills is primarily a political operative for Mrs. Clinton, and Ms. Mills testified that Ms. Samuelson had no experience in classifying or preserving federal records. *Id.*

On December 2, 2014, the chairman of the Select Committee on Benghazi of the U.S. House of Representatives sent a letter to Mr. Kendall requesting all emails from Mrs. Clinton's private account that were related to Benghazi. *See* Report of the Select Committee on the Events Surrounding the 2012 Terrorist Attack in Benghazi, Part IV, p. 18, n. 62 (<https://benghazi.house.gov/reports>). At that point, there is no question that Mr. Kendall knew that at least some of the emails were evidence. Nonetheless, he and Ms. Mills and Ms. Samuelson began deleting Mrs. Clinton's emails some time in the following two months ([THOMPSON Shortly after January 5, 2015](#)). In a July 5, 2016 public statement, FBI Director James Comey indicated that his agents recovered some of the deleted emails, further stating that “several thousand” of the deleted emails were work-related. *See* July 5, 2016 Statement by FBI Director James B. Comey on the Investigation of Secretary Hillary Clinton’s Use of a Personal E-Mail System (<https://www.fbi.gov/news/pressrel/press-releases/statement-by-fbi-director-james-b-comey-on-the-investigation-of-secretary-hillary-clinton2019s-use-of-a-personal-e-mail-system>).

According to Mr. Comey, the respondent lawyers did not individually review each of the approximately 60,000 emails on Mrs. Clinton's server before deleting nearly half of them. *Id.* He said the respondent lawyers used search terms and only looked at headers.

It is highly likely their search terms missed some work-related e-mails, and that we later found them, for example, in the mailboxes of other officials or in the slack space of a server. It is also likely that there are other work-related e-mails that they did not produce to State and that we did not find elsewhere, and that are now gone because they deleted all e-mails they did not return to State, and the lawyers cleaned their devices in such a way as to preclude complete forensic recovery. We have conducted interviews and done technical examination to attempt to understand how that sorting was done by her attorneys. Although we do not have complete visibility because we are not able to fully reconstruct the electronic record of that sorting, we believe our investigation has been sufficient to give us reasonable confidence there was no intentional misconduct in connection with that sorting effort.

Id. Mr. Comey's last assertion is dubious, and the matter requires further investigation. For starters, Mr. Kendall is a senior attorney at Williams & Connolly, LLP, and Ms. Mills formerly worked as a litigator at Hogan & Hartson, now Hogan Lovells, LLP. Both are

large national law firms that routinely handle document productions totaling hundreds of thousands and even millions of pages. Any first-year associate at such a firm knows that each document must be reviewed individually. Relatedly, no self-respecting trial judge would accept the excuse that attorneys destroyed evidence because they didn't read the evidence before destroying it.

Furthermore, we now have documentary evidence that the search was not conducted in good faith. On August 30, 2016, the State Department revealed that 30 of the deleted emails related to Benghazi. This begs a question: did the purported email search include terms like “Benghazi,” and do the recovered emails include obvious words like “Benghazi.” Recall that the chairman of the Select Committee on Benghazi had requested all such emails in a December 2, 2015 letter to Mr. Kendall, shortly before Mr. Kendall and his colleagues deleted the emails. In other words, the respondent attorneys deleted emails that they knew were subject to the Congressional investigation, which means they destroyed or attempted to destroy evidence. It is also worth noting that the respondent attorneys used a special software program designed to insure that forensic investigators could not recover the emails. If the deleted emails were only personal communications about yoga and wedding plans, as Mrs. Clinton claimed, then her attorneys would not have gone to such extraordinary lengths to prevent them from being recovered.

The D.C. Rules of Professional Conduct, as well as various federal criminal statutes, prohibit lawyers from destroying evidence:

A lawyer shall not “[o]bstruct another party’s access to evidence or alter, destroy, or conceal evidence, or counsel or assist another person to do so, if the lawyer reasonably should know that the evidence is or may be the subject of discovery or subpoena in any pending or imminent proceeding. Unless prohibited by law, a lawyer may receive physical evidence of any kind from the client or from another person. If the evidence received by the lawyer belongs to anyone other than the client, the lawyer shall make a good-faith effort to preserve it and to return it to the owner, subject to Rule 1.6.”

D.C. Rule of Professional Conduct 3.4(a). Rule 3.9 explicitly indicates that Rule 3.4(a) applies to legislative proceedings. The respondent attorneys therefore violated Rule 3.4(a) in at least two ways: (1) they failed to turn over evidence that belonged to the State Department, and (2) they destroyed the evidence being sought by the Congressional committee. Furthermore, the rule prohibits destruction of evidence “if the lawyer reasonably should know that the evidence is or may be the subject of discovery or subpoena in any pending or imminent proceeding.”

Not surprisingly, the FBI, the State Department, and the Office of the Inspector General for the Intelligence Community began investigating Ms. Clinton's email arrangement shortly after it was revealed. Thus any lawyer in the position of the respondent attorneys should have known that the emails would be evidence in the “immiment proceeding[s]” that followed. Moreover, some of the deleted emails apparently pertained to a “pay-for-play” scheme wherein Mrs. Clinton gave greater access and preferential treatment to individuals and organizations that donated large sums

of money to the foundations associated with her family. *See, e.g.*, “Many donors to Clinton Foundation met with her at State,” *Associated Press*, August 24, 2016 (https://www.yahoo.com/news/many-donors-clinton-foundation-met-her-state-183315225—election.html?soc_src=mail&soc_trk=ma). That corrupt arrangement is reportedly under investigation by the FBI, as one would expect. *See* “Joint FBI-US Attorney Probe of Clinton Foundation is underway,” *Daily Caller*, August 11, 2016 (<http://dailycaller.com/2016/08/11/exclusive-joint-fbi-us-attorney-probe-of-clinton-foundation-is-underway>). Once again, the respondent attorneys should have known that the deleted emails would be evidence in such an investigation.

While Mr. Comey might argue that the respondent attorneys lacked any criminal intent to destroy evidence, and he may or may not be right, that does not exonerate them for purposes of professional discipline. Attorneys may be disciplined for conduct that is merely reckless, *see, e.g.*, *In re Wilkins*, 649 A.2d 557 (D.C. 1994) and *Matter of Shorter*, 570 A.2d 760, 768 (D.C. 1990), and the deletion of the Benghazi emails was reckless at the very least.

In addition to Rule 3.4(a), the respondent attorneys violated Rule 8.3 by failing to report one another's misconduct to the appropriate disciplinary authorities. They may have also violated Rule 8.4(b) by committing “a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects.” In particular, the respondent attorneys may have perpetrated multiple felonies by destroying evidence pertinent to a Congressional investigation as well as various impending Executive Branch investigations. *See* 18 U.S. Code §§ 1505 and 1519. Finally, the respondent attorneys violated Rule 8.4(c) by engaging “in conduct involving dishonesty, fraud, deceit, or misrepresentation.”

Mr. Kendall, Ms. Mills, and Ms. Samuelson should be directed to produce all records, documents, and communications in their possession related to the destruction of emails from Mrs. Clinton's server, including their communications with one another and with Mrs. Clinton. Under the crime-fraud exception, those communications would not be subject to the protections of attorney-client privilege. *See In re Public Defender Service*, 831 A.2d 890 (D.C. 2003).

Finally, I should note that Mr. Kendall was the chairman of the Committee on Grievances for the U.S. District Court for the District of Columbia at the very time the emails were being destroyed, thus his misconduct is particularly inexcusable. I declare under penalty of perjury that the foregoing factual statements are true and correct to the best of my knowledge, as witnessed by my signature below.

Respectfully,

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

Ty Clevenger