



Fake News, Alternative Facts, Legal Ethics

What with all the talk about “fake news,” “alternative facts” and other new expressions floating around since the last election, I guess it should have come as no surprise when, on February 20, 2017, 15 professors at 12 different law schools, all of whom teach courses relating to legal ethics, filed an ethics complaint¹ with the Office of Disciplinary Counsel for the District of Columbia against none other than Kellyanne Conway, Counselor to the President, who was called on during the campaign and in the White House to defend what was said by Mr. Trump.

The ethical rule the professors said was violated is what Arizona has adopted as ER 8.4(c),² stating it is professional misconduct for a lawyer to “engage in conduct involving dishonesty, fraud, deceit or misrepresentation.” ER 8.4 defines ways lawyers get crosswise with disciplinary authorities, seven of which are easy to understand.

But two other ways are not as clear, including that found in subsection (c), quoted above. And subsection (d) states that it is professional misconduct for a lawyer “to engage in conduct that is prejudicial to the administration of justice.”³ Examples include when a prosecutor filed an indictment with knowledge that some of the charges were time-barred, filed a lawsuit against judges when she knew they had judicial immunity, and filed a criminal complaint against a judge without probable cause,⁴ and another case where the prosecutor had an affair with a judge before whom she appeared regularly and then denied the fact when questioned by the State Bar.⁵ Subsection (d) can be violated through purely negligent conduct.⁶

Not so with the conduct proscribed by ER 8.4(c). The “dishonesty, fraud, deceit or misrepresentation” contemplated under this part of the rule must be shown to have been intentional.⁷ Examples are the surreptitious recording of telephone conversations with opposing counsel⁸; the use, under certain circumstances, of private investigators who misrepresent their identities in order to collect information⁹; and the participation in a sham trial after the plaintiff and a defendant had settled in order to get evidence before the court that bore on a pending motion against a co-defendant.¹⁰

Back to Ms. Conway. First, the professors take her to task for her references to a “Bowling Green Massacre” as justification for an executive order banning immigrants from seven predominantly Muslim countries. The professors point out that such an event never happened and that Ms. Conway’s statement had been intentionally repeated on several other occasions. Second, they refer to Conway’s misstatement that then-President Obama had banned Iraqi refugees from coming into the United States after the events she described as the “massacre.” The complaint points out that Mr. Obama had only ordered enhanced screening procedures. Third, the professors address Conway’s reference to “alternative facts” when discussing the size of the inauguration crowd, accusing her of using the expression to justify facts she knew were wrong. Finally, the complaint accuses her of abusing her position to endorse Ivanka Trump’s products on national television, a violation of federal conflicts of interest rules.

The professors’ complaint drew considerable comment, pro¹¹ and con.¹² As they admit in the letter, Comment [5] to most jurisdictions’ versions of Model Rule 8.4, including

Arizona, states, “Lawyers holding public office assume legal responsibilities going beyond those of other citizens.” The Comment, however, is not found in the District of Columbia’s ethics rules. Critics of the professors’ position claim that the basis of their complaint could just as well have been used against Mr. Obama’s “if you like your health plan, you can keep it” and Secretary Clinton’s misstatements when trying to explain the attack at the Benghazi consulate. Recognizing that disciplining lawyers in public office under Rule 8.4(c) could lead to “mischief and worse,” the professors still insist that Conway’s actions call into serious question her fitness for the practice of law.

Whatever the outcome of the complaint, the rule is broad enough to include a lot of “wobble” in its interpretation—though it’s unlikely the remarks of one commentator will help clarify the question: “If one of the president’s chief advisors cannot freely speak her mind, even when it is full of nonsense, then who can?”¹³ **AZ**

Ethics Opinions and the Rules of Professional Conduct are available at www.azbar.org/Ethics



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endnotes

1. [Assets.documentcloud.org/documents/3474086/Read-the-misconduct-complaint-sent-by-law.pdf](https://assets.documentcloud.org/documents/3474086/Read-the-misconduct-complaint-sent-by-law.pdf)
2. Ariz. Rules of Professional Conduct, Rule 42, ARIZ.R.S.CT.
3. There is an excellent discussion of these two provisions in ARIZONA LEGAL ETHICS HANDBOOK ¶¶ 8.4:400, 8.4:500 (4th ed. 2016).
4. *In re Aubuchon*, 309 P.3d 886 (Ariz. 2013).
5. *In re Dean*, 129 P.3d 943 (Ariz. 2006).
6. *In re Clark*, 87 P.3d 827 (Ariz. 2004).
7. *Id.*
8. Ariz. Ethics Op. 95-03 (Tape Recording; Opposing Counsel) (Feb. 1995).
9. Ariz. Ethics Op. 99-11 (Misrepresentation; Investigators; Employees of Lawyers) (Sept. 1999).
10. *In re Alcorn*, 41 P.3d 600 (Ariz. 2002).
11. Joe Patrice, *Read the law professors’ ethics complaint against Kellyanne Conway*, <http://abovethelaw.com/2017/02/read-the-law-professors-ethics-complaint-against-kellyanne-conway/>
12. Steven Lubet, *The misconduct complaint against Trump’s advisor is dangerously misguided*, www.slate.com/articles/news_and_politics/jurisprudence/2017/02/the_misconduct_complaint_against_kellyanne_conway_is_dangerously_misguided.html
13. *Id.*