

Evaluation of January Ethics Training
10:00 pm – 4:00 pm, January 26, 2018
Essay Assignment

Due: Monday, February 26, 2017 at 10:00 am (*via* assignments.law@utoronto.ca). 500 word limit—approximately 250 words for each question. Please use the Faculty of Law written work cover page, identify yourself by your pseudonym, and be sure to include the word count. These essays will be marked on a credit/no credit scale.

Please choose **two** of the following four questions to answer:

Question 1:

We know that conflict can be hard on children. Research shows that frequent and intense conflict or fighting between parents has a negative impact on children's sense of safety and security. This is obviously a significant issue in family law. Is there an obligation on family lawyers to work to reduce conflict? How might some of the measures discussed by Justice Alison Harvison Young and Lisa Eisen contribute to the reduction of conflict, making the family justice process more child-friendly?

Question 2:

Choose one of the hypothetical problems from “Everyday Problems” and write a 250 word explanation for what action the lawyer involved should take and what outcome he or she should seek. Devote 125 words to one action and outcome, and the second 125 words to a *different* action or outcome.

Question 3:

The rules and practices enforcing the “Pass System” were not codified in any statute or regulation. Contrast this with a similar system that was duly passed into law by a deliberative parliamentary body.

Question 4:

Please comment on the essay below. Do you agree with Rosenzweig’s analysis of the Rosenstein Memo? Is there a link between the professional conventions of legal analysis and legal ethics?

The Strange Inadequacy of the Rosenstein Memorandum

By Paul Rosenzweig; Thursday, May 11, 2017, 10:05 AM, <https://www.lawfareblog.com/strange-inadequacy-rosenstein-memorandum>

At the heart of President Trump’s controversial decision to fire FBI Director Comey is a memorandum from Deputy Attorney General (DAG) Rod Rosenstein which lays out the grounds on which the decision was taken. In their initial reaction to the firing, Ben Wittes and Susan Hennessey characterized the memorandum as “a bad op-ed.” In today’s *Washington Post*, one of Rosenstein’s former AUSAs called the memorandum “very professional and non-political.” Perhaps most accurately, on this blog, Bob Bauer has said that the memo was “short [and] seemingly informal.” Some reports even suggest that identifying this memorandum as the ground for the President’s decision is mistaken and that DAG Rosenstein has threatened to resign after being cast in the role of the impetus for the firing decision.

But perhaps the best way to think of the Rosenstein memorandum is that it is simply inadequate to the task. If the President is about to take the momentous step of firing the FBI Director (for only the second time in history), perhaps based on your recommendation, a decent respect for the rule of law and public opinion would demand a much more detailed and analytical product than the one we now have before us. To take the single, most obvious, gap in the document, it justifies the dismissal on the ground that the

Director had violated the long-standing policy against commenting on investigations in the middle of an election cycle, *without* ever once citing to or quoting that policy.

What then should a more complete and suitable memorandum have looked like? Below is an outline for such a memorandum (with the caveat that it is not my own view but rather my projection of what the DAG might have written, with the assistance of staff...

I. Introduction—A proper analysis would begin by setting the context for what follows. This context would have two essential components. The first would be to establish (and quote!) the statutory framework for the President’s appointment and removal power as applied to the FBI Director. This section would recount ... the origins of the appointment power. It would look at the legislative history of the provision (which I have not looked at but which I suspect resonates with concern about Hoover’s power) to understand its purpose. The section would note, as well, that Congress had failed to provide for any protection against the removal of the Director (by, say, requiring some form of “good cause”) and provide lengthy legal research on the President’s general power of removal (we would swipe here from any number of OLC opinions). The introduction would conclude that while the 10-year term was intended generally to isolate the FBI from political whims, the fundamental purpose behind the statute, its structure and history was to provide control over a powerful investigative agency to ensure that it would not go rogue....

The second part of the introduction would recount the steps taken by the DAG and his team at DOJ to examine the issues. Phrases like “This examination began after receiving reports of misconduct from the DOJ Inspector General” are the sorts of things we might see here. We might also see phrases like “in conducting this examination I spoke with XX individuals and reviewed YY documents” as well as “I invited the Director to respond to this inquiry and he provided me with ...” In short, this is the procedural history of the investigation—how it started and how it proceeded. The intent here is to establish the thoroughness of the examination as a way of buttressing its conclusions....

II. Factual Investigation—In this section, you would expect the DAG to lay out the factual conclusions on which his analysis rests. In a typical memorandum, this might cite to reports of interviews, Congressional testimony, and documents. In criminal investigations (which this is NOT) it would include grand jury testimony and other forensic evidence. *[This piece is almost completely absent and that is passing strange. The memo seems to assume familiarity with all the facts and relies, exclusively, on public reports from news sources for its limited description of events. There is no apparent effort to fill out the back story of the Director’s decision (yet we know from press reports that such a back story exists—irrespective of its persuasiveness). The lack of factual inquiry is one casualty of the apparently hurried nature of the memorandum’s preparation].*

III. Analysis—Here, of course, is where the rubber meets the road. In this section, we might expect the DAG to first cite and quote the underlying DOJ policy against election influence (and the more general policy against commenting on criminal matters) and then expand at length on the value of such a policy—how it protects the innocent and protects the integrity of the elections. The analysis might also deal with the internal DOJ history of the application of this policy to other prior cases. We know, for example, from Matthew Miller of at least one case where the policy was applied during the Obama Administration. Comey referred in his testimony to another (that of Lois Lerner). Surely this prior history could be used to develop a “common law” if you will of how the policy is applied and also of those rare “exceptional circumstances” when it might be violated.

Having laid the groundwork for the analysis, this section would then describe how Comey's conduct violated the policy and it would attempt to distinguish any contrary circumstances (like the Lerner case that Comey cited) on whatever grounds seem most persuasive....

The analysis would then turn to the second ground for removal that seems to be buried in the DAG's brief memorandum -- the fact that the Director's refusal to acknowledge error makes it impossible for him to be tasked with implementing any corrective measures. Here, again, we would first recite the Director's testimony before Congress (of the "I would do it again" variety) and then advert to the need to reimpose DOJ policy standards on the FBI and the inability of a leader who is not committed to reform to be the reform leader the Department needed. The memo could go on, at some length, about the need for a leader who is willing to enforce the policy as delivered from superiors.....

Finally, thirdly, the memorandum would turn to the portion that is the meat of the actual memo that the DAG wrote—the loss of public confidence in the FBI director (occasioned by his violation of policy and by his refusal to acknowledge error). It could, here, quote all of the outside sources that it did (though perhaps with more care not to quote people who might publicly distance themselves from the firing) and use that to buttress the conclusion of actual misconduct with the "agreement" from outside the Department....

IV. Pre-rebuttal—A final section of any appropriate memorandum would anticipate, take on, and directly address anticipated criticisms of the decision. At least three come to mind and might suitably be addressed in this section....

First, there is the "this is trivial" argument—in other words, critics might say that the grounds for this dismissal pale in comparison to the only other time in history that a Director was dismissed (namely the Sessions dismissal that was grounded on an OIG report alleging financial misconduct). This section would both acknowledge the factual differences in the two cases but make the argument that, if anything, the Director's failure, in this case, was far more serious. After all, Sessions' failures (as alleged) were mostly personal in nature; Comey's (as alleged) were far broader and directly undermined confidence in America's democracy. The DAG should have little trouble asserting the severity of Comey's failures....

Second, there is the "why now" argument—which is implicitly a suggestion that other motivations exist. Here, of course, the DAG's memorandum is challenged—it needs to answer the question of "why not right after inauguration" as well as the question of "why not after a more lengthy investigation?" But the memo might, for example, say that action was delayed until a senior non-partisan official of the DAG's stature could review the matter, as a way of removing any taint of politicization....

Finally, there is the "what about Russia" question—in other words, there is the lingering question (so prominent in the news) that the true motivation for this action was anger about the FBI's inquiry into the Russia-Trump connection. A rebuttal of this would take the form of assurances from the DAG that the dismissal was only about Clinton/management issues and that the Russia investigation would continue unimpeded. Those assurances could take many forms: a promise of more resources; a call to the lead investigative agent promising independence and continued support; a promise to Congress of greater transparency into the investigation; or even the appointment of a special counsel....

My view: I wish, beyond measure, that DAG Rosenstein had written such a memorandum. It would have taken a while. It would have required staffing and investigative assistance. It would have provided a better public justification for so significant and momentous a decision. It might not have satisfied everybody (especially in the absence of a "The Russia Investigation Will Continue" section) but it at least would have provided us with a fuller, clearer public record on which to base our discussion.