PROFESSIONAL RESPONSIBILITY AND THE REGULATION OF LAWYERS
LW.11479.005
Fall 2017

Professor William E. Nelson

THE HISTORY OF THE LEGAL PROFESSION

SYLLABUS + PROBLEMS
Below is the schedule of classes. The next page describes the lectures. The problems follow beginning on page 6. Choose ONE problem. Sign up on NYU Classes not later than Monday, September 11 (maximum 8 people per problem). Write a paper that should be 4-5 double-spaced pages in length. Your papers answering the problems must be submitted to me as a PDF via e-mail to william.nelson@nyu.edu not later than 12 Noon on the dates listed, which, except for the first week, are the Thursdays before we discuss the problems. If the papers arrive late, I will not receive them and therefore cannot read them before class.

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LECTURES FOR PROFESSIONAL RESPONSIBILITY
PROFESSOR WILLIAM NELSON
LW.11479.005

FALL 2017

Following is the list of lectures for the course. Along with each lecture title are citations to the historical materials from which the lectures will be largely drawn. The historical materials are recommended but not required reading. Some of the materials can be obtained as e-books, or on WestLaw, Lexis, HeinOnLine, etc. Copies of materials that cannot be obtained electronically will be on reserve in the Law Library. The only required text is Gillers & Simon, Regulation of Lawyers: Statutes & Standards 2017 (Concise Edition).

Lecture 1
The Birth of the Legal Profession


Lecture 2
The Emergence of Legal Opposition


Lecture 3
The Emergence of Judicial Review

Lecture 4  The Distinction Between Law and Politics

Lecture 5  Antislavery
- Korematsu v. United States, 323 U.S. 214 (1943)

Lecture 6  Codifying the Law of War

Lecture 7  Rebuilding the Legal Profession

Lecture 8  Equality for Catholic and Jewish Immigrants

Lecture 9  Anticommunism after World War II

Lecture 10  African-American Lawyers in the 1920s and 1930s

Lecture 11  The Legal Profession and Racial Equality

Lecture 12  First Wave Feminism and the Profession


Lecture 13  
Second Wave Feminism and the Profession


Choose ONE problem below and sign up on NYU Classes in the “Materials” tab. Your paper should be 4-5 double-spaced pages in length. Sign up not later than Monday, September 11 (maximum 8 people per problem). Those who do not sign up by that date will be assigned randomly to vacant slots. **Papers must be submitted as a PDF on the Thursdays due to either (1) my e-mail address william.nelson@nyu.edu or, (2) only if you have last-minute computer trouble given to my assistant in Room 422 Van Hall, not later than Noon on the dates listed. We will discuss each problem on the following Mondays. However, if you sign up for Problem 1, you must turn in your paper by 10 AM on Monday, September 11.**

### Problem 1

(Do Sept 11)

King Charles II and his ministers correctly understood that an inexpensive way to obtain compliance with the law and their other commands, especially when the law and commands were ambiguous, was to allow officials to represent subjects seeking to know how they were required to behave. Subjects likewise understood that an efficient way to obtain approval for past behavior or authorization for future behavior was to retain as their agent (i.e., their lawyer) a member of whatever tribunal would adjudicate the legitimacy of their behavior.

The system was simple, inexpensive, and efficient. In what ways has twenty-first century America become so different from colonial America as to necessitate the complex conflict-of-interest provisions of Rules 1.7 through 1.13 of the ABA Model Rules of Professional Conduct?
Problem 2  
(Due Sept 14)

Assume that you represent Mary Smith, who is a 31-year-old, single mother of three who lives in Vanderbilt City, in the state of Vanderbilt. She is on trial on an indictment charging her with selling cocaine on the previous April 6. She has two prior convictions for selling cocaine, and a Vanderbilt statute provides mandatory life imprisonment for anyone who has three separate convictions for selling the drug.

Following her arrest, Smith signed a confession affirming her sale of cocaine and acknowledging that twice before she had been convicted of similar sales. She did not know, either at the time of her third sale or at the time of her confession, that conviction for three sales would result in mandatory life imprisonment. During the state’s case, the prosecutor, over your objection, which the judge overruled, introduced Smith’s confession and the record of her two prior convictions into evidence, and two police officers testified to her sale of cocaine on April 6.

You have concluded that Smith’s only hope of avoiding life imprisonment is to inform the jury of the difficulty of her life, her loving relationship with her children, and her lack of legal sophistication. You hope that she can thereby convince the jury to acquit her out of sympathy. Accordingly, you have sworn her as a witness and asked her to state her name and place of residence. You then proceed as follows:

Defense Counsel: Do you have a job?

Witness: No.

Defense Counsel: Can you tell the jury about any other jobs you ever held?

Prosecutor: Objection. Relevance.

Defense Counsel: May we approach the bench?

Court: You may approach.

Defense Counsel: I hope to establish that defendant lacked the education and experience to make a knowing confession, which federal law requires.

Court: I’ll allow it.

Defense Counsel (in the jury’s presence): Will the clerk please repeat the question.

The clerk repeats the question.

Witness: I worked in a bodega ten years ago for a week, but I couldn’t count the money so the boss fired me.
Defense Counsel: What other jobs have you had?

Witness: I ain’t had none.

Defense Counsel: How many years of school have you had?

Witness: I was expelled from fifth grade when I was 15 years old ‘cause I had a baby.

Defense Counsel: Does the child still live with you?

Prosecutor: Objection. Relevance.

Defense Counsel: May we approach?

Court: You may approach.

Defense Counsel: The jury needs a full picture of the obstacles standing in the way of defendant gaining education and experience.

Court: I’m not sure I see how her children are relevant, and I’m beginning to lose patience. But I’ll let you go on a little longer.

Defense Counsel (in the jury’s presence): Will the clerk repeat the question.

The clerk repeats the question.

Witness: My daughter and my two sons live with me.

Defense Counsel: Does their father provide support? How do you support them?

Witness: My daughter’s father died in Iraq and my sons’ father is in jail. I don’t get no welfare. I get food stamps and whatever money I earn from selling drugs.

Prosecutor: Objection. Motion to strike. May we approach the bench?

Court (in the jury’s presence): The witness’s answer is stricken, and I direct the jury to ignore it in their deliberations.

Defense Counsel: Did you on June 6 make the sale of cocaine that the prosecutor has accused you of making?

Witness: Yes.
Defense Counsel: On June 6 and when you confessed, did you know that you would receive a life sentence if you were convicted of a third offense?

Prosecutor: Objection. Motion to strike. May we approach?

Court: Please approach the bench.

Defense Counsel: I am attempting to develop an argument that my client’s confession was not a knowing one. It matters whether she knew what penalty would result from her actions. I recognize that current law in Vanderbilt is against me, but I am seeking to build a record so that I can argue on appeal or in future habeas corpus proceedings for a change in the law. I believe it would be better to go forward on a clean record than on a record with the question left unanswered.

Court: I’ll allow it.

Defense Counsel (in the jury’s presence): Will the clerk please repeat the question.

The clerk repeats the question.

Witness: No.

Defense Counsel: Did you know you were committing a crime when you sold the cocaine?

Witness: My landlord said he would throw me and my kids out on the street if I didn’t give him some rent. I had no money. I knew it was a crime, but I had no choice.

Prosecutor: Objection and motion to strike.

Court: Approach the bench. Counselor, you are not acting in good faith. Your client has just admitted her guilt in open court, as you undoubtedly knew she would. A life sentence is mandatory, and the decision whether to impose it is not within the province of the jury. But you’re trying to persuade the jury to nullify the law out of sympathy, while telling me you’re building a record so that you can challenge the validity of her confession. You can’t lie like that.

Defense Counsel: Rule 3.1 of the Model Rules of Professional Responsibility, Comment 3, provides that a lawyer’s obligation to make only meritorious claims is “subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by this Rule.” That’s all I’m doing.

Court (in the jury’s presence): The motion to strike is granted. The witness’s answer is to be stricken from the record, and the jury is to ignore it. I will refer defense counsel’s violation of
Rules 3.1 and 3.3 of the Rules of Professional Responsibility to the appropriate committee of the state bar for disciplinary action.

The trial then proceeded. On summation, defense counsel told the jury the following, “You should not send a loving mother to jail for life because she committed a crime to save her children from being homeless.” The prosecutor objected, and the judge sustained the objection, struck the statement from the record, told the jury to ignore it, and warned defense counsel that he would refer the matter to the disciplinary committee of the bar of the State of Vanderbilt, which has adopted the Model Rules of Professional Responsibility. The jury then acquitted Mary Smith.

You are a member of the disciplinary committee that must decide whether to sanction defense counsel for violating Rules 3.1 and 3.3 of the Model Rules. What would you recommend, and what arguments would you make to persuade other members of the committee to agree with you?
Problem 3
(Due Sept 21)

Assume that you represent an employee of the United States Department of State, who has been arrested for passing a classified secret document to a cable news network channel that has been critical of the Trump administration. The document, which purports to be a draft of a memo to the President, reports on a tentative agreement between Russia and the United States, in which the United States agrees to recognize secretly Russia’s annexation of Crimea and specified portions of the eastern Ukraine and to end economic sanctions against Russia, and Russia promises to withdraw its armed forces from Syria and to cease all support of the Assad government. The document also reports on an informal side agreement in which the Russian government promises to expedite various approvals that private Trump business interests need to build a hotel and condominium in St. Petersburg.

You visit your client, who is in jail, in order to have him sign a retainer agreement. When he signs the agreement, he also writes some numbers under his signature. When you ask him what the numbers are for, he tells you that they are the combination to a secret safe in his vacation home and asks you to deliver the combination to his brother. He says that his brother needs the money in the safe to provide your client with bail, to support your client’s wife and children, and to pay your retainer fee. You suspect that the safe may also contain more classified documents and worry that the brother may pass those documents to newspapers or cable networks. You ask your client about your worries and suspicions, but he assures you they are totally unfounded.

Should you deliver the numbers to your client’s brother?
Assume you are on the staff of a Democratic United States Senator. Your Senator is a member of the Senate Judiciary Committee, which is about to hold hearings on a Supreme Court nominee, whom President Trump has just named to replace Justice Anthony Kennedy following Kennedy’s retirement. Your Senator expects that the new nominee will follow the strategy adopted by Neil Gorsach, the immediately preceding nominee, and nearly all his predecessors: (1) she will promise that she will decide everything that comes before her in her position as a justice only on a legal and never on a political basis and (2) she will refuse to state how she might decide legal issues in the future because she would then feel bound to recuse herself from future cases presenting those issues.

Your Senator wishes to trap the nominee. He tells you that the nominee once had served on a local school board of trustees that had to decide whether to discipline a teacher for criticizing a local clergyman who had preached that a married heterosexual lifestyle is superior to an unmarried lifestyle. The Senator believes that no clear law exists for resolving that question and that the question must be decided politically.

The Senator asks you to draw up questions that he can ask the nominee at the committee hearing. He would like to ascertain the nominee’s views on the free speech rights of teachers, but he expects the nominee will dodge answering such questions. What he really wants your questions to do is to force the nominee to admit that there is no clear legal line delimiting teachers’ speech rights and that lines can only be drawn politically on a case-by-case basis depending on the precise subject involved.
Assume that, following a recent terrorist attack in Vanderbilt City killing several thousand Americans attending a sporting event — an attack for which ISIS claimed responsibility — President Trump announced that he would order the confinement of all Muslims residing or otherwise present in the United States at what he called relocation centers. Congress immediately enacted legislation authorizing such confinement, with only about ten percent of Democrats and one Republican, Senator Rand Paul of Kentucky, in opposition. A federal district judge in the Southern District of Vanderbilt immediately enjoined the confinement, but the Court of Appeals, by a 2-1 vote, reversed. The case is now before the Supreme Court.

Assume that you are a law clerk for Justice Anthony Kennedy, a possible swing vote in the case. He has asked another clerk to write a memo on the constitutionality of the legislation. He wants you to write a memo from a different, but he thinks overlapping perspective. Your memo should address the professional responsibility of judges and lawyers, as members of the legal profession, to the law. What can and should judges and lawyers in a matter such as this do to preserve the rule of law?
Assume you are a lawyer in the Office of Legal Counsel to the United States Department of State. Your boss, the Counsel, tells you that the Secretary of State is currently engaged in negotiations to end Syria’s civil war. As part of any agreement, Syria’s current president, Bashar-al-Assad will resign and move to Russia as a refugee, where he will be supported by the Russian government and guaranteed immunity from prosecution for his war crimes. An open question is what to do with hundreds or probably thousands of lesser officials and military officers who served the Assad government, many of whom are guilty of serious war crimes such as obeying orders to use chemical weapons against civilians.

Most of these lesser officials and Assad soldiers are members of the Alawite sect of Shi’a Islam, which constitutes a minority of Syria’s total population but was the dominant group in Assad’s government. They fear retaliation from Syria’s Sunni Muslims, who constitute a majority of the country’s population, as well as prosecution for war crimes by international tribunals. In order for them to agree to peace and lay down their arms, they need assurance that they can seek refuge in some safe country that can guarantee them immunity from prosecution.

It is in this regard that the Secretary of State needs your advice. There is no doubt that some significant number of officials and soldiers in the Assad regime committed serious war crimes for which they could be prosecuted and severely punished. Should the United States insist on their prosecution as part of a peace accord? If not, what should the United States demand? Should the United States agree to guarantee them immunity from prosecution? Should the United States agree to admit some or all of them as refugee immigrants? Is Union policy toward former Confederate soldiers and officials in the aftermath of the American Civil War relevant?
Problem 7
(Due Oct 19)

Assume you are an assistant district attorney, who represented the People in a case denominated People v. Husband. The case was as follows: Husband was involved in a messy divorce with his estranged wife. A principal matter at issue was her claim to be awarded title to his multi-million dollar ancestral home, in which she was residing alone during pendency of the divorce proceedings. He strongly opposed her claim. He stopped paying the monthly bills on the home's security system, with the result that it was turned off. The very next night, an intruder broke into the home and murdered the wife while she was asleep in her bed. Several hundred dollars in cash was stolen from her wallet, but nothing else was taken from the house; among the items left behind were a valuable and highly visible coin collection, silver plate, and expensive art. Except for the lock that was picked in order to enter the house, no damage was done to the property.

These circumstances led the police to hypothesize that the husband had hired the intruder to kill his wife. But the intruder was never arrested, and no evidence could be obtained. Then the police brought the husband to headquarters for questioning, and, after 15 hours, he confessed. He named someone as the intruder-killer, who, it turned out, could not have been the person at issue since he had an ironclad alibi as to his whereabouts at the time of the homicide. The only new fact that the confession established was that the husband had not informed his estranged wife that he had turned off the security system, which probably left her with a belief that it was still functioning on the night of the homicide.

At trial, you permitted the police officers who were present at the crime scene to testify, but you did not introduce the confession into evidence or permit the officers to testify about it. You did this after consulting with the District Attorney, who told you that your job was to seek convictions and to leave moral issues to the jury. He accordingly directed you to put the confession in evidence. You disobeyed that instruction because you concluded that the confession was coerced and that the police officer whose testimony was needed to lay the foundation for introducing it was going to commit perjury. It is undisputed that interrogation continued from 7 a.m. until 10 p.m. without any break and, although the officer claims the husband was given food during that interval, there is no receipt for the food or other documentary evidence that food was provided. The defendant also claims that the police punched him several times and threatened to "beat him up" and to hold him incommunicado until he confessed, although the police deny both the punches and any threats.

The husband did not testify at trial, and the jury acquitted him.

The District Attorney has now informed you that, unless you resign immediately, he will commence proceedings before a bar association ethics committee to sanction you for allegedly unethical conduct in disobeying his instruction. You, in turn, are considering the commencement of proceedings against him for giving you an unethical instruction. Is there a valid claim either against you or on your behalf? What should you do?
Assume that, during the course of a trial of a Roman Catholic priest named Father Benedict, the prosecuting attorney, Mr. Morrison, engaged in the below colloquy with another priest, Father Francis. The trial was on an indictment accusing Father Benedict of engaging in unconsented to sex with an 18-year-old male student named John. Father Benedict is a professor at a Roman Catholic college, and Father Francis is the president of the college. As part of the state’s case, Morrison subpoenaed Father Francis, had him sworn as a witness, and asked a series of questions identifying Father Francis and explaining his duties as president. Morrison then proceeded as follows:

Prosecutor: Are you aware of John’s accusation that Father Benedict engaged in a sexual act with him without his consent?

Father Francis: Yes.

Prosecutor: How did you first learn of the accusation?

Father Francis: Because of the priest-penitent privilege, I cannot answer that question.

Prosecutor: Did John ever discuss the accusation with you?

Father Francis: Because of the priest-penitent privilege, I cannot answer that question.

Prosecutor: Did you ever discuss the accusation with Father Benedict?

Father Francis: Because of the priest-penitent privilege, I cannot answer that question.

Prosecutor: Your Honor, I ask you to overrule Father Francis’s invocation of privilege and to compel him to answer my questions. He knows what happened. With his testimony, the jury can come to the right result. Without it, it’s simply John’s word against Father Benedict’s. This claim of privilege is simply the Catholic Church protecting its priests and tolerating their sins. The Catholic Church has tolerated the homosexuality of its clergy for centuries while calling sodomy a deadly sin and encouraging governments to put lay homosexuals to death. This is pure hypocrisy. If this had happened in a lay university or college, there’d be no privilege. Your honor can’t allow religion to get away with this slight-of-hand.

* * *

Assume that Mr. Morrison has been nominated by President Trump to be a federal district judge in the Southern District of Vanderbilt. The Democratic and Republican senators from the state of Vanderbilt have an agreement that, when a Republican is president, the Republican senator will get to name two out of every three district judge nominees and the
Democrat will get to name one; vice versa when a Democrat is president. Morrison is a protégé and the nominee of the Democratic senator.

Assume further that you are a member of the staff of the Republican chairman of the Senate Judiciary Committee. Several of his constituents have asked him to block the confirmation of Morrison because of what they say is his disrespect for religious values. The Senator has asked you to write a memo addressing the question whether Morrison’s statement to the judge about Father Francis’s invocation of privilege amounts to a legal reason for refusing to confirm him.
Problem 9
(Due Nov 2)

Assume that a group that calls itself the Radical Lawyers Commune has adopted a policy of suing President Trump for injunctive relief every time he issues an Executive Order or issues any other public directive or public order to the military or to subordinates in his administration. This includes bringing suit against Executive Orders that merely create entities of some sort to do no more than study some issue and make recommendations and directives to deploy military units in some new fashion. Ms. Attorney, who is the organizer, leader, and spokesperson for the Radical Lawyers, claims that the group’s purpose is to “insure that the President obeys the law,” but some elements in the press and other observers think the purpose is to “harass the administration in every way possible.”

Assume that Ms. Attorney is a member of the bar of the State of Vanderbilt, which has adopted the Model Rules of Professional Responsibility. The U.S. Department of Justice has filed a formal request with the state bar to discipline or at least sanction Ms. Attorney for bringing frivolous lawsuits. You are a member of the state bar committee that must pass upon the government’s request. Assume that the other members of the committee have asked you to prepare a memo advising what the committee should do.
Problem 10
(Due Nov 9)


Karen Horowitz: “I’m a 30-year-old fifth-year litigation associate at a large midwestern law firm. I went to law school at Berkeley, clerked for a Ninth Circuit judge, then started at my current firm. Because it is relevant to what I’m about to raise, you also have to know that I’m Jewish. I’m married and have two kids. My husband’s a chemist.

“I have learned a lot at my job. I have always been treated with respect and courtesy. I work with all the litigation partners. That is not to say I like everyone here equally, but that’s another matter.

“Two years ago I began working on a very complicated civil case, brought by a certain southern state in state court, arising out of an alleged violation of state banking laws. The defendant is a bank holding company that our firm represents on many matters. I worked on the pleadings, discovery, evidentiary issues, motions to dismiss and for partial summary judgment, and on a challenge on federal preemption grounds to the constitutionality of the statute under which our client is charged. We won some, and we lost some.

“The case is about to go to trial in a particular county of the state that is not, to put it mildly, known for its enlightened attitudes, religious, gender, or racial. Some say it’s a county that has not yet finished fighting the Civil War. There is some not insubstantial anti-Semitism and antiblack sentiment among the population.

“Last week Blair Thomas, the head of our litigation department, told me that I would not be going down as part of the defense team. The reason: They think a Jewish woman lawyer on the defense team will prejudice the jury against our client. I was told that the client concurred in this judgment. They said it was bad enough that some of the lawyers are northerners — we also have local counsel — we couldn’t afford to complicate matters by bringing me into the courtroom. I must say, Blair was quite candid. He could have made some excuse — they needed me elsewhere, for instance. I appreciate that, I guess. He said I was a valuable associate, whose work was appreciated and would be recognized at bonus time and with other important assignments. But the firm had a responsibility to its client, which came first.

“Well, I think the firm has a responsibility to me too, and that’s a responsibility not to exclude me from an important case — on which I’ve already been working for two years — because of my gender or religion. If clients don’t like it, the firm shouldn’t represent them. It used to be that businesses justified discrimination against this group or that by pointing to their customers. ‘It’s not us,’ they’d say, ‘we’re not prejudiced. But our customers won’t work with you-name-it, so what can we do?’ Or, ‘We can hire you, but we can’t let you interact with the clientele.’

“Well, if you ask me, this is no different. The firm tells me it’s not prejudiced, even its clients aren’t prejudiced, it says, but someone else is and so my career gets sidetracked.

“I don’t know what I’m going to do about this. I don’t know what I can do. But I don’t buy the ‘our client comes first’ explanation.”

J. Blair Thomas: “I know how Karen feels. It stinks. No question about it. We would never tolerate such treatment here for any other reason but this one — our responsibility to our client. Make no mistake about it. It’s not the firm that wants to exclude Karen, or even the client, which has worked with Karen on this matter and other matters for years. But we can’t ignore where we’re trying this case. The demographics of
this county are astonishing. Most of the jurors will be fundamentalist rednecks, and the judge isn’t much better. If these people don’t belong to some hate group or supremacist organization, they probably have at least one friend who does.

“Also, this case can cost our client between $20 million and $30 million if it goes the wrong way. Look what happened to Texaco before a local jury in Texas. They had to settle for $3 billion. I think Karen has to be reasonable. The fact is, there are situations — other cases, other states — where we’d want her in the courtroom because we’d expect to do better if we had a woman or a Jewish lawyer on our team. The same goes for members of other groups — racial, religious, you name it. Some cases, I want a minority right up there. Other cases, I want a woman. Other cases, I want a younger lawyer or an older lawyer, depending. Gosh, there are some courtrooms a client would have to be crazy to send in an obvious Yankee WASP like me. This courtroom is a good example. I’m not going either.

“A good lawyer structures his or her trial team to appeal to the jury, or at least not to alienate it. You know it’s the same thing when a firm hires local counsel. Those guys down there don’t do anything but sit around, smile at the jurors, and talk in the local idiom a couple of minutes a day. Why do we — why does anyone — hire them? And we all do. It’s not because they know the law. It’s to curry favor with the locals.

“The judge and jury are going to decide this case. We have to appeal to them whether we like their biases or not. I find those biases repulsive. But I don’t count. I’m a lawyer with a client who is at serious risk. My client is my only concern, whether it’s a bank or a death row inmate. Karen has to understand that. Her day will come in other matters. Her career hasn’t been sidetracked at all. No one blames her for not being able to continue on this case, and no decision is going to be made based on her religion or the fact that she’s a gal or anything else except the quality of her work.”

Is Karen putting her own professional interest ahead of the interest of her client? Is her “problem” a “conflict” within the meaning of ethics rules? Would Blair’s treatment of Karen violate any of the rules forbidding discrimination in law practice?

How Roger Baldwin Picked a Lawyer

Consider the perspective of Roger Baldwin, founder of the American Civil Liberties Union. (This information comes to us in a portrait of Baldwin by Peggy Lamson.†) Baldwin was arrested in a labor demonstration in Patterson, New Jersey, in the fall of 1924. Citing a 1796 statute, the indictment charged that Baldwin “unlawfully, riotously and tumultuously did make and utter great and loud noises and threatenings” with the intent to “commit assault and battery upon the police officers and . . . to break, injure, damage and destroy and wreck the city hall.” Baldwin was convicted by the trial judge and sentenced to six months in jail. A New York lawyer, Samuel Untermyer, “volunteered to take the case on appeal to the New Jersey Supreme Court,” and “Roger and his ACLU colleagues accepted with gratitude.” But after a delay of nearly two years, the conviction was affirmed.

One more possible appeal remained, to the Court of Errors, the highest tribunal in the state. At this point Roger and all the ACLU lawyers came to a conclusion that Mr. Untermyer would have to be replaced. “They all said, including our Jewish lawyers, that a New Yorker, a rich Jew like Untermyer, would certainly get licked pleading before the Court of Errors in New Jersey.

Lamson then pursued the issue with Baldwin:

“Does that mean you can’t conceive of a situation in which a black lawyer would defend, let’s say, a Mormon who was prevented from holding a public meeting?”

“No, I can’t conceive of such a situation.”

“Then do you think Mr. Redding [an ACLU cooperating lawyer] or any other black lawyer would be less effective in such a case just because he was black?”

“Yes, of course, that’s what I think. He’d be less effective unless he was extraordinarily good. Because he’d have to be extraordinarily good to overcome a jury’s prejudice.”

“Whereas a white lawyer would just have to be average good, is that it?”

“Not necessarily,” Roger said calmly. “It depends on the prejudice. For instance, we wouldn’t use a New York lawyer in Alabama, and we wouldn’t use a southern lawyer, particularly one with a strong accent, in a northern court. In New Jersey we all decided not to use a Jewish lawyer when we knew prejudice against him existed. And you have to remember that because of that tactic we won the Patterson, New Jersey, case, which was far more of a victory than just keeping me out of jail.”

“I realize that, Roger, but still —”

“If the original judgment had stood in New Jersey,” Roger broke in, now pressing his advantage, “it would have meant that men could go to jail for doing something which the Constitution clearly says they have a perfect right to do — peaceably to assemble and petition for redress of grievance.

School District of Abington Township v. Schempp, 374 U.S. 203 (1963), was an important Supreme Court opinion on the constitutionality of school prayer. Ellory Schempp was a high school student in Abington Township, a Philadelphia suburb. In 1957 he wrote to the ACLU’s Philadelphia chapter. As a Unitarian, he wrote, he felt discomfort when the Lord’s Prayer and the Bible were read each day in school. Bernard Wolfman, a young partner at a Philadelphia firm and a member of the ACLU, interviewed Ellory and urged the ACLU to take the case. It agreed. But as Judge Louis Pollak writes in a memorial to Henry Sawyer, Wolfman (now a Harvard law professor) did not argue the case. Instead, the work fell to Sawyer, then a young partner at another Philadelphia firm.

The Board’s decision to provide counsel for the Schempps, however, did not mean that Wolfman would be that counsel. Wolfman decided that for him, as a Jew, to represent the Schempps in a challenge to Bible reading and recitation of the Lord’s Prayer merely would add unnecessary and perhaps detrimental baggage to what clearly would be a controversial and, in many quarters, an unpopular course.

Problem 11
(Due Nov 16)

Was *NAACP v. Button*, 371 U.S. Reports 415(1963), rightly decided?
Problem 12
(Due Nov 22)

First-wave feminism did not place many women in high public office or in positions of executive authority in the private sector. There were notable exceptions, such as Florence Allen, Frances Perkins, and Eleanor Roosevelt, but they were few.

Did the lack of high office and positions of private power mean that first-wave feminism was a failure? In terms of the ideological preconceptions of its own leaders? Of your own preconceptions? Does your feminist ideology differ from theirs and, if so, how?
I graduated from law school in 1996 and came to work for a New York law firm. A few months later I met a man who was a fifth-year associate in a different firm. We dated for several months, moved in together, and in 1999 were married. In 2001, my husband became a partner in his firm.

Meanwhile, my career was progressing spectacularly. I had chosen to become a litigation associate because I liked to write and I liked evidence and the simulated trial practice course I took. Also it seemed to me that litigators were sort of the last generalists. A lot of different kinds of cases could come along. As it turns out, the cases that have come along are mainly securities and antitrust cases and occasional trademark and breach of contract cases. The head of the litigation department, Frank Lester, is a hardworking, serious man and a good lawyer. I’ve learned a lot from him. I wish everyone could have a mentor as competent and concerned as Frank. Frank’s a bit gruff and peremptory at times, but we associates know when to lie low and when it’s all right to come out of hiding.

I felt that I was well on my way to becoming a partner, but my husband had other ideas. He wanted us to have children and perhaps even to have me quit practice. He said we would have enough money now that he was a partner. But I was not ready. I wanted to become a partner myself and feared that even a slight cutback in my commitment to the firm might become an obstacle.

My husband would not drop his demand that we have children, and it began to affect our relationship. Without going into details, I will say that our love-life deteriorated. Next, I learned that my husband was seeing another woman. I decided to get a divorce.

Getting the divorce took about a year – it was finalized last April. During the year, I was not always at my best; I don’t imagine my now ex-husband was either. But Frank Lester was very helpful. He was very solicitous and covered for me on a few occasions when I couldn’t get my assignments done. He himself had gone through a divorce a few years before, and he understood the difficulties involved.

I have gotten back on track professionally in the last few months. I’ve been assigned as head associate on a case that Frank is scheduled to try in San Jose in about a month, working on the pretrial motions, an interlocutory appeal, and a lot of discovery.

Now a new problem has emerged. Frank is becoming too attentive. First, he started taking me out to dinner on nights we were working late, and two weeks ago he invited me to dinner and a show on a Saturday night. I made an excuse. Then he started talking about how we
should take a few weekend breaks during the trial and go down together to the Monterrey Peninsula. Three days ago he again invited me to dinner and a show on the weekend.

I decided I had to talk with Frank. I told him of my concern that he was making our relationship something other than the purely professional one it ought to be. He said he couldn’t help it: he had simply come to care about me too much, and he wanted to get to know me better. I ran out of his office astounded.

I then went to talk with Tom Smith, the firm’s managing partner. He promised to talk to Frank, who he said was a reasonable guy and would never force me to do anything I didn’t want to do. He didn’t understand that force was not the issue – that I felt uncomfortable saying no to Frank because I knew that saying no would eventually marginalize me at the firm. What should I do? I’m really afraid to be alone with Frank in San Jose. Should I refuse to go? Should I respond impolitely to Frank’s requests? Should I simply recognize that Frank’s behavior has compromised my future at the firm and quit?

Frank Lester

I can’t really explain what’s happened. I certainly have not meant and do not mean to do Jane any harm, but, whether I like it or not, I fear I’ve fallen in love. I can’t ignore the possibility that Jane could come to love me too except for a stupid rule that prohibits our even contemplating a relationship with each other. Of course, I would never force myself on her, but neither can I deny to myself or to Jane how I feel about her.

Of course, I understand, as Tom Smith explained to me, that I can no longer approach Jane with the same distance and impartiality that I once had. I understand that telling her how I feel irrevocably changed our relationship. Indeed, feeling as I feel changed everything. But let’s face it – we cannot always fully control how we feel or fully hide those feelings from others. The best I can do in the future, if others demand it, is to recuse myself from any decisions involving Jane.

Tom Smith

Jane and Frank have put me in a bind. It’s unfortunate that Jane feels uncomfortable around Frank, but there’s nothing I can do about it. I can’t excuse Jane from traveling to San Jose or take her off the case; she knows it better than anyone else -- we won’t give the client the best representation we’re capable of giving if Jane is off the case. Obviously, Frank must remain on the case. Some might think I should go to San Jose to monitor the situation, but my going isn’t realistic. I have too much else to do and, in any event, I can’t bill the client for the time.

I think the firm must simply tough it out. Frank is not engaging in harassing behavior: he has been and wants to be good to Jane. It’s impossible and wrong to keep love and sex entirely out of life; Frank can’t help his feelings toward Jane and can no longer hide them. Frank
has not committed any wrongful overt act toward Jane, nor do I think he will. There’s nothing I can do about Jane being uncomfortable about Frank’s feelings toward her.

What do you think?