Professional Responsibility

Elon University School of Law

Summer 2011

Eric M. Fink

# Organizational & Government Lawyers

# Review Problems

### Attorney, who is corporate counsel for Company, is investigating a possible theft ring in the parts department of Company. Attorney knows that Employee has worked in the parts department for a long time and believes that Employee is a suspect in the thefts. Attorney believes that if Employee were questioned, Employee would not answer truthfully if she knew the real purpose of the questions. Consequently, Attorney plans to question Employee and tell her that she is not a suspect and that her answers to the questions will be held in confidence. Is this proper?

### John, who is employed by ABC as a truck driver, was involved in an accident last month. The other driver recently sued both ABC and John. ABC’s president has asked Attorney to handle the litigation. Before commencing her investigation, Attorney needs to know:

#### Who does she represent?

#### May she represent both ABC and John?

#### Assuming she only represents ABC, will her conversations with the president be privileged?

#### What about her conversations with John?

#### Assume Attorney decides to represent both ABC and John. John tells Attorney in confidence that he (John) was drinking on the day of the accident. What are Attorney’s ethical obligations?

### Attorney is an in-house Lawyer at ABC Corporation. Attorney recently learned that Jill, ABC’s senior vice-president, has been providing fraudulent financial information to the IRS. If the fraud is discovered, ABC will face serious civil and criminal penalties. What should Attorney do?

### While Attorney worked for the EPA, she spent most of her time in the preparation, trial, and appeal of a case involving the illegal discharge of toxic chemicals in 1999 by Deftco. Deftco was found liable and paid a $1 million fine. Thereafter, Attorney left the EPA and joined the Smith Law Firm. While at the Smith Law Firm, B asks Attorney to represent him in an action against Deftco, in which B alleges property damage related to Deftco’s 1999 toxic discharge.

#### May Attorney represent B?

#### May Attorney represent Deftco?

#### If not, may another lawyer in the Smith Law Firm represent B or Deftco?

### Attorney Alpha was employed as an assistant prosecutor during the time D was being investigated. Alpha played no role in the investigation and had no knowledge of facts other than those disclosed in the press. Two months ago, Alpha left the prosecutor’s office and formed a partnership with Attorney Beta. Last week, D asked Alpha to represent him.

#### May Alpha represent D?

#### If not, may Beta represent D?

### As an assistant prosecutor, Attorney represented the state in a criminal non-support action against Husband. Husband received 60 days in jail and was ordered to pay a fine. After leaving the prosecutor’s office, Husband’s spouse, Wife, asked Attorney to represent her in a suit against Husband to collect the past-due child support that was at issue in the criminal case.

#### May Attorney represent Wife?

#### If not, may another lawyer in Attorney’s firm represent Wife?

### While Attorney worked for the IRS, he learned that B owned substantial assets in Japan. Under federal law, this information is confidential and may not be disclosed outside the IRS. Attorney later left the IRS and joined the Smith Law Firm. C has asked Attorney to represent him in an action to collect a $1 million judgment from B. Thus far, C has been unable to locate any assets owned by B.

#### May Attorney represent C?

#### If not, may another lawyer in the Smith Law Firm represent C?

### While a partner at the Jones Law Firm, Lawyer represented A in civil suit filed by the SEC against A. While the litigation was still pending, Lawyer joined the SEC’s legal staff.

#### May Lawyer represent the SEC in its suit against A?

#### May the other lawyers at the SEC continue to represent the agency in its suit against A?

### Lawyer is an attorney for the FDA. While working on the application for approval of a new drug manufactured by Pharmco, Pharmco’s General Counsel asks Lawyer if she would be interested in joining Pharmco’s legal staff.

#### May Lawyer discuss such employment opportunities?

#### What if Pharmco’s outside lawyers had asked Lawyer if she were interested in joining their firm?

### Altman, a lawyer for the SEC, supervised an investigation and litigation against certain defendants, including McAlpin. The SEC litigation alleged that McAlpin and others looted millions of dollars from Capital Growth companies. McAlpin and other defendants defaulted, and the court appointed Armstrong as receiver for Capital Growth, to recover all misappropriated property. Armstrong hired the Gordon Hurwitz firm as receiver’s counsel. Altman, who had left the SEC, was now associated with Gordon Hurwitz.

#### May Altman represent Armstrong as the receiver for Capital Growth? No, unless SEC gives informed consent. But SEC may not consent if Altman has confidential government information about a person that could be used in the representation of a private client whose interests are adverse to that person.

#### Assuming Altman is disqualified, is the disqualification imputed to Gordon Hurwitz? No, the firm may represent the receiver, provided Altman is adequately screened

### Prior to his election as City Attorney, Herrera represented Cobra Solutions, Inc. in various matters, including dealings with the City. Following an investigation, which began under the direction of Herrera’s predecessor in office, the City sued Cobra for fraud in connection with a city contract.

#### Is Herrera disqualified from representing the City in the suit against Cobra? Yes, based on the duties of confidentiality and loyalty, because the suit was substantially related to the subject of Herrera’s prior representation of Cobra

#### Is the disqualification imputed to the rest of the City Attorney’s office? Yes. “Public perception that a city attorney and his deputies might be influenced by the city attorney’s previous representations of the client, at the expense of the best interests of the city, would insidiously undermine public confidence in the integrity of municipal government and its city attorney’s office.”

### Deft, who has been indicted for auto theft, is represented by Attorney. Prosecutor reasonably believes that Deft committed the offense, but, because of Deft’s youth, it is in the interest of justice to permit Deft to plead guilty to the lesser offense of joy-riding in return for an agreement by Prosecutor to recommend probation. Prosecutor has so advised Attorney, but Attorney told Prosecutor that she would not plead guilty. Attorney informed Deft of Prosecutor’s offer and advised Deft not to accept it. Deft followed Attorney’s advice. Attorney is a candidate for public office, and Prosecutor suspects that Attorney is insisting on a trial of the case to secure publicity for herself. Which of the following would be proper for Prosecutor?

#### Send a member of his staff who is not a lawyer to consult with Deft.

#### Move the court to dismiss the indictment and accept a new complaint charging the offense of joy-riding.

#### Proceed to trial on the indictment and prosecute the case vigorously.

### A, B, and C are charged with raping X. Immediately after the alleged rape, X was treated at a local emergency room. While in the hospital, the nurse completed a “rape kit,” which included material that could be tested for DNA. When Prosecutor sent the rape kit to the lab for testing, the DNA of several men were found on the X’s body and undergarments. None of the DNA tests, however, matched A, B, or C. Despite requests by defense counsel, Prosecutor failed to disclose the DNA matches of the other men in the rape kit. Is Prosecutor subject to discipline?

### Pros, an elected prosecutor, plans to run for reelection in 6 months. Last year two teenage girls were kidnapped from a shopping center and sexually assaulted. The community was in an uproar and demanded a conviction. Four months ago, Deft was arrested and charged with the crimes. The trial is scheduled for next week. Pros met with the police chief last week and learned for the first time that, before they were interviewed, the two victims had been tape-recorded discussing the case. Reviewing the tape, Pros realized that the girls’ descriptions of the assailant differed significantly. When officially interviewed, however, their descriptions matched perfectly. Deft’s counsel, who had the right to request access to the prosecution’s investigative file, failed to do so because of her busy schedule. Pros reasonably believes Deft committed the crimes, so Pros did not reveal the existence of the tape to defense counsel.

#### Is Pros subject to discipline?

#### Is Deft’s counsel subject to discipline?

### Pros, a prosecutor, was assigned to try a criminal case against Deft, who was charged with robbery of a convenience store. Deft denied any involvement, contending that he was home watching television with his mother on the night in question. At the trial, Wit, a customer at the convenience store, testified that he had identified Deft in a police line-up and provided other testimony connecting Deft to the crime. In addition, Pros entered into evidence a poor-quality videotape of the robbery as recorded by the store surveillance camera. The jury convicted Deft of the crime charged. Unknown to Deft’s court-appointed lawyer, Wit had first identified another person in the police line-up and selected Deft only after encouragement by the detective. Pros was aware of these facts but did not notify Deft’s counsel who made no pretrial discovery request to obtain this information. Is Pros subject to discipline?

#### Yes, unless the jury could make its own identification of Deft from the videotape.

#### Yes, because this information tended to negate Deft’s guilt.

#### No, because Deft’s counsel made no pretrial discovery request to obtain this information.

#### No, unless it is likely that the jury would have acquitted Deft had it known that Wit first identified someone else.

### In 1995, D was convicted of armed robbery in Green County and sentenced to imprisonment for 10 years. In 1998, L is elected District Attorney for Green County. In 1990, L is presented with convincing evidence indicating that D was wrongfully convicted. L played no role in D’s conviction and, in fact, was in private practice in 1995. What are L’s ethical obligations?