Westinghouse Electric Corp. v. Kerr-McGee Corp.: Attorney Disqualification for Conflict of Interest

Ted Helwig
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INTRODUCTION

Kirkland & Ellis (Kirkland) is a large,1 prestigious two-city law firm. Its Chicago office (Kirkland-Chicago) had represented Westinghouse Electric Corporation (Westinghouse) for over 15 years when the firm became involved in the defense of several breach of contract suits filed against Westinghouse. These suits had resulted from Westinghouse’s alleged inability to supply uranium to the plaintiffs.2 As an outgrowth of a defense presented in the contract actions, Kirkland filed an antitrust suit on behalf of Westinghouse3 against 29 corporations engaged in the uranium industry. By the time this antitrust suit had been filed, Kirkland had already generated legal fees of 2.5 million dollars conducting the contract aspect of the litigation alone. Despite this extensive involvement with Westinghouse, the Seventh Circuit disqualified Kirkland from acting as Westinghouse’s counsel in the antitrust action.4

The disqualification issue arose as a result of Kirkland’s simultaneous representation of Westinghouse and the American Petroleum Institute (API), a trade association. The API had commissioned Kirkland’s Washington, D.C. office (Kirkland-Washington) to prepare a report for use in a congressional lobbying effort. In compiling data for the study, Kirkland-Washington attorneys received confidential information from several API members, including three oil companies5 who were later named as defendants in the Westinghouse antitrust action. Although the API report was released on the same day that the uranium antitrust suit was filed by Kirkland-Chicago, it developed a thesis opposite to that of the lawsuit. In particular, the report stated that the uranium industry was highly competitive, while the lawsuit alleged a price-fixing conspiracy among uranium producers.

The ABA Code of Professional Responsibility6 sets forth stan-

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1. There are 130 members in the Chicago office of Kirkland & Ellis, and 40 members in the Washington, D.C. office, whose official name is Kirkland, Ellis & Rowe.
5. The three defendants in the antitrust suit are Kerr-McGee Corp., Gulf Oil Corp. and Getty Oil Co.
6. The ABA Code of Professional Responsibility contains Canons, Ethical Considera-
dards of conduct, the breach of which may result in disqualification. In *Westinghouse Electric Corp. v. Kerr-McGee Corp.*, the Seventh Circuit considered the applicability of Canons 4, 5 and 9 to the ethical dilemma in which Kirkland had become embroiled. Canon 4 provides that an attorney should preserve client confidences and secrets. Canon 5 states that lawyers should exercise independent professional judgment on behalf of their clients, while Canon 9 cautions against even the appearance of professional impropriety.

The court found that Kirkland’s conduct had not met these standards.

In discharging Kirkland, the Seventh Circuit ruled that the district court had abused its discretion in finding that disqualification

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7. 580 F.2d 1311 (7th Cir. 1978).
10. *ABA Code of Professional Responsibility*, Canon 9 provides: “A lawyer should avoid even the appearance of professional impropriety.”
11. *See text accompanying notes 81 through 92 infra.*
12. 580 F.2d 1311, 1318 (7th Cir. 1978). In ruling on a disqualification motion, trial courts exercise broad discretion. Richardson v. Hamilton Int’l Corp., 469 F.2d 1382 (3d Cir. 1972), cert. denied, 411 U.S. 986 (1973). This court held: “[T]he district court . . . is authorized to supervise the conduct of the members of its bar . . . [T]he regulation of attorneys . . . will be disturbed only when, on review of the record, we can say that the district court abused its permissible discretion.” 469 F.2d at 1385-86 (citations omitted). *Accord*, Fred Weber, Inc. v. Shell Oil Co., 566 F.2d 602 (8th Cir. 1977); Schloetter v. Railoc of Ind., Inc., 546 F.2d 706 (7th Cir. 1976); NCK Org’n, Ltd. v. Bregman, 542 F.2d 128 (2d Cir. 1976); Cinema 5, Ltd. v.
was not an appropriate remedy for the ethical transgressions involved. The lower court had performed an equitable balancing test and concluded that the harm caused by disqualification would outweigh any possible benefits. The Court of Appeals, however, disagreed with this reasoning.

This article will examine applicable case law on attorney disqualification, analyze the Westinghouse decision, and demonstrate its limited precedential value.

BACKGROUND ON DISQUALIFICATION CRITERIA

Canon 4: Maintaining Client Confidences

A trio of Second Circuit cases decided in the 1950's established the basic criteria for attorney disqualification under Canon 6 of the ABA Canons of Professional Ethics, which evolved into the present Canon 4 of the Code. All three cases involved antitrust matters in the motion picture industry. In T.C. Theatre Corp. v. Warner Bros. Pictures plaintiff's attorney had previously represented one of the defendants in a matter involving antitrust violations similar to those alleged by T.C. Theatre Corp. In deciding to discharge the attorney, the court established two general rules regarding disqualification.

The first rule provided that "[w]here any substantial relationship can be shown between the subject matter of a former representation and that of a subsequent adverse representation, the latter will be prohibited." The second rule stated that when the former client can demonstrate a substantial relationship, the court will assume that confidences were disclosed during the course of the former employment. However, the court suggested that these two principles should be applied only where it can reasonably be as-
sumed that information acquired during the earlier representation relates to the subject matter of the later representation. 18

In Consolidated Theatres, Inc. v. Warner Bros. Circuit Management, 19 the court extended the holding in T.C. Theatre Corp. by disqualifying an entire law firm. One of the plaintiff's attorneys had been previously employed by a firm whose principal clients included one of the defendants being sued by Consolidated. The court reasoned that it was logical to infer that during the course of his former employment the attorney either received or had access to confidential information regarding the defendant. 20 The most notable aspect of Consolidated is its summary disqualification of an entire law firm without citing precedent or discussing its rationale. 21 The court inferred that a single attorney of the firm possessed confidential knowledge of the former client's legal affairs, and proceeded to impute the single attorney's inferred knowledge to every member of the firm with which he was associated.

Laskey Bros. of W. Va. v. Warner Bros. Pictures 22 expanded the imputation of knowledge principle implicit in Consolidated, but also established the first limitation upon the extent to which imputed knowledge would be irrebuttably presumed. The Laskey court held that once a partner in a law firm was vicariously 23 disqualified from a case, the subsequent dissolution of the partnership would not remove his ineligibility to act as counsel in that case. 24

The court then distinguished the situation in which an attorney, previously vicariously disqualified by virtue of his partnership affiliations, accepted a "new case having no relationship to the old partnership." 25 It held that the imputation of knowledge in that situation would be "logically less compelling and should therefore become rebuttable legally, lest the chain of disqualification become endless." 26

18. Id. at 269.
19. 216 F.2d 920 (2d Cir. 1954).
20. Id. at 925.
21. Id. at 928.
22. 224 F.2d 824 (2d Cir. 1955), cert. denied, 350 U.S. 932 (1956).
23. The term "vicariously" is used to refer to situations in which knowledge is imputed to firm members having no actual knowledge of client confidences.
24. 224 F.2d at 826-27.
25. Id. at 827 (emphasis added).
26. Id. The logic of the court in reaching this conclusion was less than compelling. It changed the focus delineated in T.C. Theatre Corp. from the relationship of the subject matter of the two representations to the relationship of a new case to a dissolved partnership. The two pieces of litigation at issue in Laskey involved the same defendant and substantially the same subject matter. Yet the same attorney was disqualified in one piece of litigation but not disqualified in the other because in the latter action his client had not previously been represented by the old firm. This decision may have been based more on policy considerations than on concern for principles of logic. It stressed that an irrebuttable inference that confiden-
Later courts have approved and followed the criteria established by *T. C. Theatre Corp., Consolidated*, and *Laskey.* The justification presented for strict enforcement of these standards is the maintenance of client confidence in attorneys. A client must be able to discuss his legal problems with his attorney openly and in depth, without fear that the information he reveals may one day be used against him. Therefore, a client must be assured that the lawyer will be permanently barred from taking a position adverse to him in regard to any matters substantially related to those in which the attorney represented him. The result may be that the attorney and his firm are disqualified even though no confidential information was received or divulged. However, the loss of possible clients is thought to be a necessary price to pay in return for the assurance of competent legal representation, which can only be enhanced by honesty and candor between an attorney and his client.

**Canon 5: Multiple Clients**

The gist of Canon 5 of the ABA Code is that an attorney cannot...
serve two masters. He owes undivided loyalty to each of his clients. The Code cautions that such loyalty may not be possible if two current clients, or a present and a former client, have conflicting interests.\textsuperscript{29} Conflict of interest under Canon 5 has seldom been construed by the courts, and then only recently.\textsuperscript{30} One such decision, \textit{Cinema 5, Ltd. v. Cinerama, Inc.},\textsuperscript{31} is important because it sheds light on the burden of proof to be met by an attorney accused of a Canon 5 violation.

\textit{Cinema 5, Ltd.} involved a lawyer who was a partner in both a Buffalo and a New York City law firm. The Buffalo firm filed suit on behalf of a client against a client of the New York firm. In affirming a disqualification order, the Second Circuit noted that an attorney-client relationship which is terminated differs from an ongoing relationship such as that found in the instant case. Whereas the parameters of the relationship are fixed in the former situation,

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29. ABA Code of Professional Responsibility, EC 5-1, provides:

The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client.

ABA Code of Professional Responsibility, EC 5-14, states:

Maintaining the independence of professional judgment required of a lawyer precludes his acceptance or continuation of employment that will adversely affect his judgment on behalf of or dilute his loyalty to a client. This problem arises whenever a lawyer is asked to represent two or more clients who may have differing interests, whether such interests be conflicting, inconsistent, diverse, or otherwise discordant.

Canon 5 is closely related to Canon 4 in that simultaneous representation creates a potential situation in which an attorney might disclose or betray the confidences of another client.

30. In two recent cases, Canon 5 issues were decided using only the language of the Canon and the ethical considerations and disciplinary rules promulgated thereunder. Fred Weber, Inc. v. Shell Oil Co., 566 F.2d 602 (8th Cir. 1977); City of Cleveland v. Cleveland Elec. Illuminating Co., 440 F. Supp. 193 (N.D. Ohio 1976), aff'd mem., 573 F.2d 1310 (6th Cir. 1977). Both cases involved a conflict between a present and former client.

Other Canon 5 cases reveal that courts are beginning to consider the multiplicity of factual situations under which a motion to disqualify can arise. Cannon v. U.S. Acoustics Corp., 532 F.2d 1118 (7th Cir. 1976), examined whether counsel can represent both the officers and directors of the corporation as well as the corporation itself in a shareholders' derivative suit. The court reasoned that potential conflict of interest existed because although the corporation was aligned as a defendant, it was a defendant in name only. The Seventh Circuit adopted the lower court's opinion, which had ordered the corporation to acquire new counsel. See Frunty, \textit{The Shareholders' Derivative Suit: Notes on Its Derivation}, 32 N.Y.U.L. Rev. 980 (1957), for historical background on the peculiarities of a shareholders' derivative suit. Such suits require that a corporation's shareholders name the corporation as a defendant. The result, however, is that the shareholders are in reality suing themselves.

In Whiting Corp. v. White Mach. Corp., 567 F.2d 713 (7th Cir. 1977), a law firm represented both the plaintiff in the action and a corporation which owned 20% of the outstanding stock of the defendant corporation. The firm was permitted to continue its representation of the plaintiff but was prohibited from representing or advising the corporation owning 20% of defendant's stock for the duration of this suit.

31. 528 F.2d 1384 (2d Cir. 1976).
they remain indefinite in the latter. Therefore, the court reasoned, in a case of simultaneous adverse representation, a disqualification motion must be decided under more rigorous criteria than the substantial relationship test applied in Canon 4 cases.

In holding dual representation in litigation prima facie improper, the court succeeded in establishing a higher standard. In order to defeat a motion for disqualification, the attorney must as a minimum requirement convince the court that there will be no actual or apparent conflict in his loyalties or diminution in the vigor of his representation.

Although Canon 5 has been relied on as a basis for attorney disqualification in cases such as Cinema 5, Ltd., EC 5-15 and EC 5-16 indicate that multiple representation may be permissible in litigation where the clients' interests are only potentially adverse. Furthermore, within certain confines, these ethical considerations allow multiple representation in legal matters other than those involving litigation. However, such dual representation is limited by Canon 9 considerations.

32. Id. at 1387.
33. Id.
34. Id. The court gave no indication of what would be required beyond this initial burden, as the attorney in the case had failed to meet this minimum standard.
35. ABA Code of Professional Responsibility, EC 5-15, provides:

If a lawyer is requested to undertake or to continue representation of multiple clients having potentially differing interests, he must weigh carefully the possibility that his judgment may be impaired or his loyalty divided if he accepts or continues the employment. He should resolve all doubts against the propriety of the representation. A lawyer should never represent in litigation multiple clients with differing interests; and there are few situations in which he would be justified in representing in litigation multiple clients with potentially differing interests. If a lawyer accepted such employment and the interests did become actually differing, he would have to withdraw from employment with likelihood of resulting hardship on the clients; and for this reason it is preferable that he refuse the employment initially. On the other hand, there are many instances in which a lawyer may properly serve multiple clients having potentially differing interests in matters not involving litigation. If the interests vary only slightly, it is generally likely that the lawyer will not be subjected to an adverse influence and that he can retain his independent judgment on behalf of each client; and if the interests become differing, withdrawal is less likely to have a disruptive effect upon the causes of his clients.

36. ABA Code of Professional Responsibility, EC 5-16, states:

In those instances in which a lawyer is justified in representing two or more clients having differing interests, it is nevertheless essential that each client be given the opportunity to evaluate his need for representation free of any potential conflict and to obtain other counsel if he so desires. Thus before a lawyer may represent multiple clients, he should explain fully to each client the implications of the common representation and should accept or continue employment only if the clients consent. If there are present other circumstances that might cause any of the multiple clients to question the undivided loyalty of the lawyer, he should also advise all of the clients of those circumstances.
Canon 9: Appearance of Impropriety

Canon 9 is far more comprehensive in its reach than either Canons 4 or 5. For this reason, recent cases indicate a trend toward resolving conflict of interest cases either by using Canon 9 exclusively, or else in conjunction with Canons 4 and 5. In *Schloetter v. Railoc of Indiana, Inc.*, a patent infringement suit, plaintiff moved to disqualify defendant’s counsel, asserting violations of both Canons 4 and 9. Prior to association with the defendant’s firm, attorney Jeffrey had performed services for the plaintiff on the original patent. However, at the time this suit was filed, Jeffrey no longer had any connections with the plaintiff and had terminated his membership in defendant’s firm.

Defendant argued, following *Laskey*, that on these facts its counsel should be allowed to rebut the imputation that they possessed Jeffrey’s knowledge concerning the plaintiff. In this regard, the lower court noted that defendant’s counsel had failed to rebut the imputation of knowledge yet based its disqualification of defendant’s firm on a Canon 9 violation. The appellate court affirmed the holding of the district court. In dicta, the Seventh Circuit stated that even if defendant’s counsel had met its burden of rebuttal, disqualification would still be necessary to avoid any appearance of impropriety. “In these circumstances, all doubt should be resolved in favor of disqualification . . . .”

The foregoing cases demonstrate that Canons 4, 5 and 9 are susceptible of diverse interpretation by both courts and attorneys. As

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38. *Fund of Funds, Ltd. v. Arthur Anderson & Co.*, 567 F.2d 226 (2d Cir. 1977); *Emle Indus., Inc. v. Patentex, Inc.*, 478 F.2d 562 (2d Cir. 1973). The *Emle* court justified its reliance on Canon 9 by observing:

The dynamics of litigation are far too subtle, the attorney’s role in that process far too critical, and the public’s interest in the outcome is far too great to leave room for even the slightest doubt concerning the ethical propriety of a lawyer’s representation in a given case. These considerations require application of a strict prophylactic rule to prevent any possibility, however slight, that confidential information acquired from a client during a previous relationship may subsequently be used to the client’s disadvantage.

478 F.2d at 571.
39. 546 F.2d 706 (7th Cir. 1976).
40. There was a dispute as to whether the attorney in question should be considered a former or a present partner in the defendant’s firm. Plaintiff argued, in part, that the attorney’s knowledge should be imputed to defendant’s firm by virtue of his ongoing, frequent contacts with that firm, which for purposes of Canon 4 made him a member of the firm. The court found it unnecessary to decide the issue because disqualification would result regardless of the attorney’s partnership status. 546 F.2d at 708 n.2.
41. *Id.* at 711.
42. *Id.* at 712.
the Second Circuit has observed, "[c]ompliance or noncompliance with Canons of Ethics frequently do not involve morality or venality, but differences of opinions among honest men over ethical propriety of conduct." Perhaps in recognition of the ethical quandaries in which well-meaning attorneys can find themselves, some courts have established limits upon the applicability of these Canons.

**Limitations Upon Mechanical Disqualifications**

*United States v. Standard Oil Co.*\(^4\) restricted both the imputation of knowledge principle and the substantial relationship test. It focused upon the size of the governmental agency involved and the duties of the attorney within that agency.

The United States had filed suit to recover funds due from alleged overcharges in crude oil sales financed by the Economic Cooperation Administration (ECA), a part of the Marshall Plan. The ECA maintained offices throughout Europe as well as Washington, D.C. One of the responsibilities of the Washington General Counsel's Office was to draft, publish and enforce purchase and price regulations under which petroleum products would be supplied to various European countries. The Paris General Counsel's Office took no part in these matters.

The United States moved to disqualify the law firm representing one of the defendants because a member of that firm had previously been counsel for the Paris office of the ECA. The government contended that the attorney in question had obtained confidential information from plaintiff and that "he [had] passed upon or should have passed upon matters relating to the present controversy."\(^5\)

The defendant argued that because of the division of duties between the Washington and Paris offices, the attorney in question had derived no knowledge relevant to the suit by virtue of his ECA affiliation. Affidavits presented on this issue convinced the court that there was no substantial relation between the attorney's former responsibilities and the subject matter of the lawsuit. According to the court, "[a]ny other ruling would delete all meaning from the word 'substantial'."\(^6\)

As an alternative argument, the government contended that since the Washington office possessed knowledge bearing a substantial relation to the subject matter of the suit, and since there was a close

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45. Id. at 353.
46. Id. at 357. The court thus narrowed the scope of the substantial relation test to a consideration of the individual attorney's relation to the subject matter as opposed to focusing on the nature of the subject matter itself.
association between the Paris and Washington offices, the knowledge of the Washington office should be imputed to the Paris office. Therefore, if any attorney in the Paris office could be charged with imputed knowledge, the attorney in question should also be so charged.47

In considering whether a boundary should be imposed upon the imputation of knowledge in a vast, multi-office government agency, the court rejected the government's strict imputation of knowledge approach. Instead, it suggested that a distinction should be made between vertical and horizontal imputation. As to the former, the court recognized that an attorney should always be charged with the knowledge of his juniors. As to the latter, however, the court concluded that an inquiry would be necessary to determine the appropriateness of charging an attorney with the knowledge of another division head of coordinate rank within the same agency.48 In analyzing the facts before it, the court refused to apply horizontal imputation of knowledge since it appeared unlikely that the attorney had attained any knowledge of the oil transactions while situated in the Paris office. With this distinction the Standard Oil court carved an exception to the general rule of imputing knowledge to all members of an office, at least when an attorney in a vast government agency is involved.49

Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.50 also qualified the imputation of knowledge principle but in a different setting. The case involved the limited duties of an associate in a large, single-office law firm. An attorney in plaintiff's law firm had previously worked for a firm which had represented defendant in substantially related matters. In response to a motion to disqualify, plaintiff admitted that while in the employ of defendant's firm the young associate had been involved with these substantially related matters, but argued that his work had been limited to specific legal

47. Id. at 360.
48. Id. at 362.
49. Standard Oil also rejected disqualification based on an appearance of impropriety. The court ruled that unless it was proven that the attorney had been specifically ordered to consider the matter, there was not a close enough relation to give rise to an appearance of impropriety. The court stated that:

[It is hardly reasonable to hold that an appearance of evil can be found in his undertaking a case against the government where there is not some closer factual relationship between his former job and the case at hand other than that the same vast agency is involved.

Id. at 364.

See Note, The Second Circuit and Attorney Disqualification—Silver Chrysler Steers in a New Direction, 44 Fordham L. Rev. 130 (1975), for an argument that Canon 9 should apply only to situations involving a former judicial or other public employment.
50. 518 F.2d 751 (2d Cir. 1975).
questions. His only other involvement with the defendant had been on matters unrelated to the controversy.

The Second Circuit recognized that it would be absurd to automatically conclude that an associate of a large law firm could have knowledge of all clients and all confidential disclosures made by clients to other lawyers in the firm. For this reason it differentiated for disqualification purposes between "lawyers who become heavily involved in the facts of a particular matter and those who enter briefly on the periphery." Therefore, the court held where an attorney had been only peripherally involved in the subject matter of the litigation, his role could not be considered "representation" within the meaning of T.C. Theatre Corp. As a result, the motion for disqualification was denied.

At the time that the motions to disqualify were presented in Westinghouse, two distinct methods of resolving conflicts of interest and attorney disqualifications had evolved. The first, representing the mechanical approach, emphasizes strict adherence to the letter of the Canons. The second, best characterized as a rule of reason

51. Id. at 756.

In dicta the lower court had gone much further than the Second Circuit's holding. It had observed that since the largest firms represent the largest corporations, it would be almost impossible to have a major client avoid some kind of legal relationship with another major client. In that situation, the court reasoned that it would be possible for attorneys within a firm to effectively insulate themselves from exposure to confidences of other clients. Thus, a mechanical imputation of knowledge to all members of a firm would not always be appropriate even where a substantial relationship has been demonstrated. Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 370 F. Supp. 581, 588 (E.D.N.Y. 1973). In City of Cleveland v. Cleveland Elec. Illuminating Co., 440 F. Supp. 193 (N.D. Ohio 1976), aff'd mem., 573 F.2d 1310 (6th Cir. 1977), an Ohio federal court indicated it would take a different perspective on imputation of knowledge in the context of a large law firm. Instead of focusing on the degree to which an attorney had been involved in the subject matter of the case, the court would apply the vertical imputation standard established in Standard Oil. In dicta the court noted:

Imputing to an attorney in the private practice all confidential information obtained, or presumed to have been obtained, by other members of his law firm may severely limit the scope of the private attorney's future career and the effective operation of his firm, as well as the individual's right to legal counsel of choice. The rule in the private practice of law should therefore limit the imputation of confidential disclosures, actual or presumed, to only those lawyers practicing in the attorney's area of concentration. Absent direct proof to the contrary, the attorney would not be deemed to have shared confidential information relating to matters and services exclusively within the sphere of representation of another department or section of his firm. This rule is more acutely dramatized in the large, departmentalized law firms characteristically more prevalent in an era of evolving legal specialization.

52. Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 518 F.2d 751, 757 (2d Cir. 1975).

approach," views the Canons as guidelines and calls for a balancing
of interests. Relevant considerations under the balancing approach
include the encouragement of public confidence in the legal profes-
sion, public interest in the outcome of the litigation and the client's
right to competent counsel of his choice. Also considered is the
attorney's right to unrestricted employment opportunities. In
Westinghouse the district court followed the latter method, while
the Seventh Circuit adhered to the former.

KIRKLAND DISQUALIFIED

The Facts

The conflict of interest alleged against Kirkland grew out of
events involving the purchase and sale of uranium. Westinghouse
is a major manufacturer of nuclear reactors. Upon the sale of the
reactors, Westinghouse often entered into a long term uranium sup-
ply contract with the purchaser. On September 8, 1975, Westing-
house notified several utility companies that performance of 17 of
its supply contracts had become commercially impracticable under
Section 2-615 of the Uniform Commercial Code. It claimed that it
was faced with a tremendous increase in price as well as a shortage
of supply due to several unforeseen circumstances. In response, the
affected utilities filed 13 federal actions, one state action, and three
foreign actions against Westinghouse, alleging breach of contract
and challenging the invocation of Section 2-615.

As an outgrowth of its defense of the contract actions, Westing-
house investigated the possibility that the uranium price increases
had been caused by conspiratorial activities of uranium producers.
This investigation culminated in an antitrust action filed on Octo-
ber 15, 1976, against 12 foreign and 17 domestic corporations en-
gaged in various aspects of the uranium industry. Some of these
corporations also held ownership interests in the oil industry.
Throughout the uranium litigation, Westinghouse employed
Kirkland-Chicago as its lead counsel.

Contemporaneously with Kirkland-Chicago's representation of
Westinghouse in the uranium cases, Kirkland-Washington repre-
sented the American Petroleum Institute (API). In October, 1975,

54. See, e.g., Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 518 F.2d 751, 757
(2d Cir. 1975); City of Cleveland v. Cleveland Elec. Illuminating Co., 446 F. Supp. 193 (N.D.
Ohio 1976), aff'd mem., 573 F.2d 1310 (6th Cir. 1977).
57. In particular, the Arab oil embargo of 1973 was cited as contributing to this crisis in
the uranium market. Westinghouse Elec. Corp. v. Rio Algom Ltd., 448 F. Supp. 1284, 1288
(N.D. Ill. 1978).
Congress was presented with legislative proposals to break up oil companies, both vertically within the oil industry itself and horizontally by prohibiting ownership of other energy sources, including uranium. This proposed legislation threatened oil companies with a potential divestiture of millions of dollars of assets. Within a month, the API had organized a committee to lobby against the proposals.58

On February 25, 1976, the committee contacted a partner of the Kirkland-Washington office, retaining the firm to review the divestiture hearings. Kirkland was also to prepare arguments in opposition to the divestiture legislation, arrange testimony analyzing the probable legal consequences and antitrust considerations of the legislation, and conduct a study of the probable effects of such legislation.59 As part of the study, interviews were to be arranged with a cross-section of petroleum industry personnel. The contact letter between API and Kirkland-Washington concluded:

Your firm will, of course, act as an independent expert counsel and hold any company information learned through these interviews in strict confidence, not to be disclosed to any other company, or even to API, except in aggregated or such other form as will preclude identifying the source company with its data.60

Kirkland-Washington eventually interviewed representatives of eight oil companies, including three defendants subsequently named in the Westinghouse antitrust action. The Washington office's final report, issued on the same date that the Chicago office filed the antitrust action, contains 230 pages of text and 82 pages of exhibits. The uranium industry is the primary subject of 25 pages of text and 11 pages of exhibits. The thesis of the report is that oil company diversification does not threaten overall energy competition. In particular, the report claims that current increases in uranium prices had resulted from increasing demand and that oil company entry into uranium production has actually stimulated competition. The report also asserts that the oil companies have no incentive to act in concert to restrict uranium production and that the historical record refutes any such charge. In conclusion the report states that "the energy industries, both individually and collec-

58. The organization was known as the Committee on Industrial Organization. On December 10, 1975, API's president requested that each member company designate one of its senior executives to facilitate coordination of the Committee's activities with the individual companies. The Committee was organized into five task forces. Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311, 1313 (7th Cir. 1978).
59. Id.
60. Id.
61. Id. at 1314.
tively, are competitive today and are likely to remain so."

In early 1977, three of the defendants in the antitrust action, who were also API members, filed motions to disqualify Kirkland-Chicago as Westinghouse's counsel in the antitrust litigation. The complaints were based on Canons 4, 5 and 9 of the ABA Code. The oil companies' concern centered on the confidential information disclosed by their officials to Kirkland-Washington in interviews and questionnaires which the firm had conducted and prepared for the API report. Some of the information Kirkland-Washington had acquired from each company involved statistics concerning production, reserve holdings, prices, and competition within the uranium industry.

**District Court Decision**

In *Westinghouse Electric Corp. v. Rio Algom Ltd.*, the oil companies argued that "Kirkland's simultaneous representation of both Westinghouse and the API creates a substantial conflict of interest, a potential for disclosure of confidential information, and the appearance of impropriety." Kirkland did not deny that the antitrust complaint and the API report developed opposite theses on the same subject matter. Instead, it argued that an attorney-client relation-

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62. *Id.*

63. The corporations asserting the conflict of interest were Kerr-McGee Corporation, Gulf Oil Corporation, and Getty Oil Company. Several other motions to disqualify were also filed. Twelve other corporate defendants presumed the validity of the oil companies' motion and argued that if those companies were dismissed, equitable considerations would compel the court to disqualify Kirkland from suing the remaining defendants. Another defendant, Noranda Mines Limited, filed a motion to dismiss Kirkland on the basis of a conflict arising from Kirkland's prior representation of Noranda. *Westinghouse Elec. Corp. v. Rio Algom Ltd.*, 448 F. Supp. 1284, 1289 (N.D. Ill. 1978). See note 98 infra.

64. Samples of the questions relevant to the uranium industry included:

- Are you presently developing coal reserves, uranium reserves? At what rate? If you do not presently plan to develop certain reserves within the near future, why not?
  - How easy or difficult is entry into the uranium mining and uranium milling businesses?
  - Is the uranium industry competitive? Is that industry becoming more or less competitive? What evidence could you give to support your answer?
  - What are the benefits from the entry of oil companies into uranium mining? Into uranium milling?
  - Are the oil companies aiding uranium production?
  - Do the oil companies control the most producible and most economical uranium reserves?
  - Have oil companies increased their holdings of uranium reserves faster than they have increased uranium production?


66. *Id.* at 1289.
ship between Kirkland-Washington and the movants could not be demonstrated because the Washington office’s professional employment had been extended only to API, not to individual API member companies. Kirkland also contended that the API study did not produce any significant confidential information which had been or would be used against the oil companies in the antitrust suit. Finally, Kirkland argued that any actual or potential prejudice to the oil companies would be outweighed by the hardship which Westinghouse would suffer if Kirkland were to be disqualified from this complex piece of litigation.

The district court identified the issue before it as:

whether the mechanical disqualification of law firms for ethical transgressions is an appropriate remedy in cases involving large multi-city corporate law firms, enormously complex multi-district litigation, and corporate litigants with nationwide and even multinational connections.

Foreshadowing the decision in the case, Judge Marshall initially noted that, “it is becoming increasingly difficult to insist upon absolute fidelity to rules prohibiting attorneys from representing overlapping legal interests.” The court agreed with Kirkland that no attorney-client relationship existed between the individual oil companies and Kirkland-Washington. It therefore held that Kirkland could not have violated Canons 4 or 5. However, Judge Marshall also found that the disclosures made by the oil companies to Kirkland-Washington

67. Id. at 1290.
68. Id. In support of this argument, Kirkland claimed that, except for aggregated data on oil company assets and research and development expenses in alternative energy fields, all quantitative data used in the API report had been derived from publicly available sources. Also, all questionnaires had been returned to the companies when the report was completed. Id. at 1295.
69. Id. at 1290. Kirkland quite possibly also had in mind the hardship it would suffer from the loss of substantial fees should it be disqualified.
70. Id. at 1287. It should also be noted that in the same paragraph Judge Marshall referred to the conflict as one involving a prior representation of the oil companies, rather than characterizing it as a simultaneous representation problem.
71. Id. at 1287-88.
72. Id. at 1300-03. The district court based its determination on the fact that an attorney-client relationship is one of agency and therefore the general law of agency applies. According to Judge Marshall, the relationship arises only when the parties have given their consent, either express or implied, to its formation.

The Seventh Circuit totally rejected the notion that an attorney-client relationship can arise only under agency law. It found that the “professional relationship for purposes of the privilege for attorney-client communications” depends upon the client’s belief that he is consulting a lawyer in that capacity, and upon his manifest intention to seek professional legal advice. Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311, 1319 (7th Cir. 1978).
were closely related to the subject matter of the Westinghouse complaint.\footnote{448 F. Supp. at 1304. Note that the phrase “substantially related” was not used.} Since Kirkland-Chicago had placed itself in a position where it would or at least could take advantage of the information derived from these confidences, the court found some evidence of a Canon 9 violation.\footnote{448 F. Supp. at 1305.} However, it relied on a Fifth Circuit opinion\footnote{Woods v. Covington County Bank, 537 F.2d 804 (5th Cir. 1976).} for the proposition that a Canon 9 violation should result in disqualification only where two conditions are present. First, there must exist a reasonable possibility of improper professional conduct and second, public disapproval must outweigh the social interests served by continued participation.\footnote{Id.}

Applying this test, Judge Marshall found that only a remote possibility of misconduct existed. He noted that there was a “rigid segregation”\footnote{448 F. Supp. at 1296.} in attorney duties resulting in part from the geographic separation of the Kirkland-Chicago and Kirkland-Washington offices. He also stressed the absence of any hint of an exchange of confidential information between the two offices.\footnote{Id. at 1305.}

\footnote{448 F. Supp. at 1296.} There was one overlap between Chicago and Washington attorneys. William Jentes, one of the lead attorneys working on the antitrust complaint had been requested by the API Legal Task Force to prepare a memorandum. The memorandum analyzed arguments concerning the possible expansion of the scope of existing antitrust laws to apply them to interlocking directorates. That issue had been raised by proponents of the divestiture legislation as an example of the collusive behavior of large corporations. The district court characterized this as a “partial overlap” in that the memorandum addressed the antitrust issues from a theoretical perspective and contained nothing on uranium. \textit{Id.} at 1296.

\footnote{Id. at 1296.} The court stated that:

\begin{quote}
[Although the Washington office did know of Kirkland’s representation of Westinghouse on the utility contracts litigation, none of the Washington attorneys working on the API divestiture assignment knew of the separate Westinghouse antitrust complaint until it was filed in court . . . . The Chicago attorneys also had little awareness, if any, of the API work by the Washington office . . . .] They state they did not communicate with the Washington attorneys about the API work prior to October 15 [, 1976,] and had no knowledge of the data collected for the API report.
\end{quote}

\textit{Id.} at 1296.

The court referred to the “changing realities of modern legal practice” and quoted extensively from \textit{Silver Chrysler Plymouth} and \textit{City of Cleveland} regarding the inappropriateness of mechanically imputing knowledge to all members of a firm. \textit{Id.} at 1304-05. \textit{See} text accompanying notes 50 and 51 \textit{supra}; \textit{see} note 51 \textit{supra}.
In addressing the second prong of the attorney disqualification test, Judge Marshall initially examined the effects which disqualification would have on the public interest. He determined that forcing Westinghouse to retain new counsel lacking Kirkland’s expertise in the antitrust field as well as its familiarity with the case derived from the contract litigation would only further delay the antitrust suit. More importantly, disqualification might lead to the “compromise [of] the just resolution of a vital public issue,” since high uranium prices are directly reflected in public utility costs. In the final analysis, Judge Marshall concluded that any possible public suspicion did not outweigh the social interests which would be served by Kirkland’s continued representation. The court therefore denied the motions for disqualification notwithstanding its finding of some evidence that a Canon 9 violation had occurred.

The Seventh Circuit’s Decision

In Westinghouse Electric Corp. v. Kerr-McGee Corp., the Seventh Circuit overruled the district court’s denial of the oil companies’ motions to disqualify Kirkland. The appellate court primarily objected to the tests which the lower court had employed in determining whether an attorney-client relationship had existed between Kirkland and the three defendants. It found that the district court had applied “too narrow an approach for determining whether a lawyer’s fiduciary obligation has arisen.” The deciding factor, according to the appellate court, should be the client’s belief that he is consulting a lawyer in his professional capacity at the time the confidential disclosures are made. The court found that affidavits presented to the district court had conclusively established this belief on the part of the oil companies. After concluding that an attorney-client relationship had existed, the Seventh Circuit went on to hold that Canons 4 and 5, in addition to Canon 9, would be applicable to a consideration of the disqualification motions.

Having determined that Canons 4 and 5 were relevant, the court

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79. 448 F. Supp. at 1306.
80. Id.
81. 580 F.2d 1311 (7th Cir. 1978).
82. The issues were presented by the court as follows:
   (1) Whether an attorney-client relationship arises only when both parties consent to its formation or can it also occur when the lay party submits confidential information to the law party with reasonable belief that the latter is acting as the former’s attorney and (2) whether the size and geographical scope of a law firm exempt it from the ordinary ethical considerations applicable to lawyers generally.
83. Id. at 1318.
84. See note 72 supra.
reasoned that actual knowledge of an attorney should be imputed to every member of his firm. It rejected Kirkland's assertion that this imputation of knowledge should not be imposed since the flow of information between its two offices with respect to matters at issue in Westinghouse had been virtually nonexistent. The court then emphasized that there is no basis for creating separate disqualification rules for large firms even though compliance with ethical considerations may be more difficult for them by virtue of their size.

The Seventh Circuit quoted, with apparent approval, the test applied by the district court after it had found evidence of a Canon 9 violation. However, in direct opposition to the lower court's ruling, the appellate court concluded that Kirkland's position in this matter had created "a very reasonable possibility of improper professional conduct despite all efforts to segregate the two sizeable groups of lawyers." Kirkland had contemporaneously undertaken two contradictory matters, "each involving substantial stakes and [each] substantially related to the other." The court found that the situation was sufficiently egregious to outweigh the client's interest in continuing with its chosen attorney. Accordingly, West-

86. See note 77 supra.
In a footnote to the decision, Judge Fairchild noted that he felt Kirkland was not relying on a wall of separation theory. If a genuine separation in all relevant particulars between the two groups of lawyers had been established, Judge Fairchild suggested that the court's decision may have been different. 580 F.2d at 1321 n.28.
87. The appellate court apparently attributed the formulation of such separate rules to the district court. In fact, one of the two issues listed by the Seventh Circuit for resolution involved whether the size of a law firm exempts it from certain ethical considerations. See note 82 supra.
88. 580 F.2d at 1321. See text accompanying note 75 supra.
89. Id.
The remainder of the opinion involving the three oil companies dealt with the rejection of a consent argument presented by Kirkland. Kirkland-Chicago had sought discovery from Kerr-McGee Corp. and Getty Oil Co., and unsuccessfully from Gulf Oil Corp., relating to the contract litigation in Virginia. Kirkland argued that the oil companies must have been aware that Kirkland was representing Westinghouse. Therefore, since no objection had been raised concerning this representation, the oil companies should be charged with consenting to that representation. In addition, given Westinghouse's adverse position, the oil companies could not honestly contend that they believed Kirkland also represented them. The court quickly disposed of this contention by noting that the issue was not whether the oil companies had been aware of Kirkland's representation of Westinghouse but whether they had been aware that the representation would result in the antitrust suit. It appeared obvious to the court that the three oil companies lacked this knowledge. Id.
90. Id. at 1322.
91. Id.
inghouse was given the option of discharging Kirkland from the antitrust suit or dismissing the three movants from the case.92

**Limited Value of Westinghouse: An Analysis**

The Seventh Circuit handled the sensitive issue of attorney disqualification with great dispatch but with little clarity of reasoning. While Canons 4, 5 and 9 were thought to be applicable in *Westinghouse*, the court failed to provide guidelines for future situations involving possible ethical conflicts. The bulk of the opinion was devoted to determining whether an attorney-client relationship had existed,93 along with some misplaced emphasis on Kirkland's size.94

However, the court never specifically found a violation of Canons 4, 5, or 9. Instead, by using the phrase “substantially related,” the court merely implied a Canon 4 violation.95 The court did determine that the information acquired by the Kirkland-Washington attorneys was substantially related to the antitrust complaint filed by Kirkland-Chicago.96 It also rejected any wall theory of separation97 and imputed confidential knowledge to all members of both offices. Despite this apparent use of a Canon 4 analysis of the problem, the court failed to establish a nexus between the substantial relationship test and the imputation of knowledge.98

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92. Westinghouse had retained a second law firm as co-counsel on February 17, 1978.
93. Without diminishing the importance of this issue, once it was resolved, more attention to the applicability of the Canons was warranted.
94. See note 87 and accompanying text supra. Although Judge Marshall took a different approach to the issue, the district court decision did not establish separate disqualification rules for large law firms. Judge Marshall weighed the likelihood of harm to the oil companies against the detrimental effects of disqualifying Kirkland. The size and geographical division of Kirkland were considered relevant factors in deciding whether any of the oil companies' confidential disclosures had been or would be misused in the antitrust litigation. However, the court's reliance on these factors as an aid in determining an equitable balance cannot be said to have created separate rules for large law firms.
95. 580 F.2d at 1322.
96. See text accompanying notes 55 through 64 supra. See, e.g., note 64 supra.
97. In rejecting the wall theory and imputing knowledge to all members of the firm, the court cited two cases. The first, Schloetter v. Railoc of Ind., Inc., 546 F.2d 706 (7th Cir. 1976), supported the view that knowledge should be imputed to all members of an attorney's firm but made no reference to the wall theory. In the second case, Fund of Funds, Ltd. v. Arthur Anderson & Co., 567 F.2d 225 (2d Cir. 1977), the law firm charged with a conflict of interest argued that it had built a Chinese Wall within the firm so that no information passed between the two groups of attorneys. The Fund of Funds court summarily dismissed this argument by saying it did not believe that such a separation could be successfully created in a single firm. Id. at 229 n.10. However, that case differed from Westinghouse because the law firm in Fund of Funds was not geographically split. It is questionable whether these two cases support the court's decision in Westinghouse that knowledge should be imputed to all members of Kirkland.
98. In affirming the district court's denial of a disqualification motion presented by defendant Noranda Mines Limited (Noranda), the Seventh Circuit did indicate that a nexus
By asserting that Kirkland had engaged in contemporaneous contrary undertakings, the court also implied a Canon 5 violation. Yet the court did not consider whether Kirkland was able to exercise independent professional judgment on behalf of both its clients. In this regard, the court omitted all reference to EC5-14, which seems particularly relevant in this context.

If the court had found violations of Canons 4 and 5, then there would have been no necessity to rule on Canon 9, other than in response to the district court opinion. However, use of the phrase "improper professional conduct" suggests a Canon 9 violation. Once again, the court did not elucidate the basis for such a finding.

Even if the Seventh Circuit had specifically found Canon violations and provided the rationale for such findings, the district court's approach to and resolution of the disqualification motions were far more reasonable. Compliance or noncompliance with ethical standards can generate honest disagreement among reasonable people. The situations which give rise to such disagreements are often brought about unintentionally. For these reasons, legal counsel should not be mechanically disqualified for nonconformance with the literal letter of the ABA Code. In order to give proper consideration to all competing interests, an equitable balancing test, such as that used by Judge Marshall, should be required.

The district court opinion was sensitive not only to the gravity of the ethical transgression involved, but also to the harm that would be caused by attorney disqualification. Kirkland had not engaged in the dual representation with the intention of violating the Code.

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between substantially related subject matters of representation and client confidences was necessary before disqualification would be appropriate. Noranda claimed that Kirkland's representation of Westinghouse created a conflict of interest because the law firm had previously represented Noranda.

From 1965 to 1967, Kirkland was employed by Noranda on several matters, including negotiations for the purchase of 51% of the shares of Essex Wire Corporation. Although the purchase offer was ultimately rejected, Kirkland had organized an American subsidiary corporation for Noranda and had prepared a "Fact Book" which analyzed the competitive impact of the proposed acquisition. Antitrust issues were researched because both Noranda and Essex sold copper wire and cable in the United States.

The district court denied Noranda's motion because the prior representation concerned "a completely different industry and a completely different time." 448 F. Supp. at 1310. Since Noranda could not demonstrate a substantial relationship, disqualification was not required. The Seventh Circuit agreed that "the more than 10-year past representations for two specific matters unrelated to the present case did not warrant disqualification of Kirkland." 580 F.2d at 1322.

99. 580 F.2d at 1322.
100. See note 29 supra.
101. 580 F.2d at 1321.
102. This position is taken only with respect to the equitable approach adopted by the district court and not with respect to the treatment of the attorney-client relationship, which is outside the scope of this article.
Attorney Disqualification

At worst, it made an error in judgment. To discharge the firm would deny Westinghouse qualified and experienced legal counsel, deny Kirkland the right to represent a major client which was generating substantial fees and further delay the complex antitrust litigation. Judge Marshall felt that these harms outweighed the oil companies' apprehensions concerning the possible misuse of confidential disclosures in the antitrust litigation.

If Judge Marshall had found an attorney-client relationship between Kirkland and the oil companies, he would then have been forced to consider Canons 4 and 5. It is reasonable to assume that in so doing he would have continued to apply a rule of reason approach similar to that established by his treatment of Canon 9. Silver Chrysler could be relied on to support a finding that the mechanical approach to the Code should be rejected.103

Kirkland-Washington attorneys had played no part in the antitrust suit, since there had been no contact with the Chicago office relative to that suit. Even within the Chicago office itself, information on the suit had been closely guarded. Similarly, the Kirkland-Chicago office had been only peripherally involved with work performed by the Washington office on behalf of the API.104 On these facts, neither office should be charged with having the knowledge of the other, and therefore disqualification would not be warranted under Canon 4.

A similar realistic approach to Kirkland's conduct would lead to the conclusion that Canon 5 had not been violated either. Kirkland was not representing the oil companies in the antitrust suit. Kirkland-Washington's employment had extended only to the preparation of the API report. Kirkland-Chicago cannot be considered to have represented the companies because it had been only peripherally involved with the Washington office. Thus, Kirkland was not simultaneously representing conflicting interests in litigation, and therefore the EC5-15 prohibition of such representation should be inapplicable.

EC5-15 and EC5-16 indicate that dual representation may be possible where interests are only potentially adverse.105 Kirkland

103. See notes 50 through 52 and accompanying text supra.
104. The work performed by the one Kirkland-Chicago attorney for the API was precisely the type which the Silver Chrysler court described as peripheral involvement. The attorney prepared a memorandum analyzing arguments which had been raised in support of broadening the scope of antitrust laws so that they would apply to interlocking directorates. The antitrust issues were discussed from a theoretical perspective and the uranium industry was never mentioned. Furthermore, no Kirkland-Chicago attorney had any contact with any API member or representative except the head of the API Legal Task Force. Westinghouse Elec. Corp. v. Rio Algom Ltd., 448 F. Supp. 1284, 1296 (N.D. Ill. 1978).
105. See notes 35 and 36 and accompanying text supra.
submitted affidavits to the effect that no confidences had been disclosed between offices and that none would be used to the disadvantage of any party in the antitrust litigation. If the content of these affidavits is accepted, then Kirkland has met the burden announced in *Cinema 5, Ltd.* of showing no actual or apparent conflict in loyalties or reduction in the vigor of its representation.

Independent professional judgment can only be impaired where the attorney has knowledge of relevant facts which might influence his decision. This was not the case in *Westinghouse*. Furthermore, the simultaneous issuance of the API report and filing of the antitrust suit, which took opposite stands on the same issue, indicates that the professional judgment of each office had remained totally independent.

Although a rule of reason approach to the facts in *Westinghouse* would result in a finding of no violation of either Canon 4 or 5, it could result in the finding of a Canon 9 violation since Kirkland's conduct raises at least an inference of impropriety. However, the all-inclusive yet vague nature of Canon 9 would make mechanical disqualification too drastic a remedy. Therefore, once evidence of a Canon 9 violation is found, an equitable balancing of interests such as that engaged in by Judge Marshall should be required.

A reasonable approach to attorney disqualification where an unknowing violation of the Code has occurred merely takes cognizance of the present state of society. Legal relations between corporate clients have become so enmeshed that it is likely that unchallenged conflicts of interest frequently occur. However, a rule of reason approach to disqualification should not be used to circumvent the dictates of the Code, especially where the violations were intentional.

**CONCLUSION**

Disqualification of attorneys is always a sensitive issue for the legal community, not only because it implies unethical conduct, but also because it could result in the loss of both present and prospective fees. For Kirkland & Ellis, a firm of national repute earning huge sums from its representation of Westinghouse, both of these considerations were important.

The immediate result of the Seventh Circuit's decision is that

106. See note 34 and accompanying text *supra*.
108. Also, attorneys should not relax intra-firm policies and regulations which aid in avoiding potential conflicts of interest.
Westinghouse has lost qualified and experienced legal counsel and that the oil companies need no longer worry about the possible misuse of confidential disclosures made to Kirkland-Washington. In addition, it is conceivable that the outcome will assure the public that the legal profession is guided by a Code which operates for the benefit of clients.

However, the Seventh Circuit’s application of the Code has serious implications for future attorney disqualification motions. As the district court recognized, in the modern legal world of large law firms and vast corporate clients, a mechanically applied Code of Professional Responsibility could lead to unnecessary injustice. Therefore, while the district court did not relax the standards of the Code, it did relax the remedies for inadvertent violation where potential harm to the complaining party is minimal.

The district court opinion was well-reasoned and could serve as a useful guide to the legal community. The Seventh Circuit opinion is quite the opposite. Unfortunately, since the United States Supreme Court denied certiorari, it is the Seventh Circuit’s decision to which attorneys must look for direction on the issue of attorney conflicts of interest.
Introduction

At the time this symposium issue was conceived, the Illinois Supreme Court had under consideration a proposed Illinois evidence code. The court has since decided to take no action at this time on the proposal.

The proposed code was modeled primarily on the Federal Rules of Evidence, and as such, it retained those problems associated with the Federal Rules. In that sense, rejection of the proposed code may actually be beneficial. Nevertheless, the Illinois common law of evidence is badly in need of reform, as these articles and notes demonstrate. What is needed now is not a blind acceptance or rejection of the federal pattern, but a reasoned, balanced approach to Illinois rules of evidence. Rejection of the proposed code should only be a step toward a more cohesive and fair Illinois evidence code.

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