Disqualification of Counsel: The
Westinghouse Litigation

By Anthony D’Amato

The motion to disqualify counsel is becoming increasingly important in pre-trial strategy. “It can delay a trial, embarrass an opponent, and, if successful, deprive an adversary of his chosen and well-prepared counsel.” In one of several gargantuan cases arising out of Westinghouse Electric Corporation’s alleged breach of long-term uranium supply contracts, a disqualification motion was sustained against Westinghouse’s counsel, Kirkland & Ellis, a large two-city law firm numbering more than 130 lawyers in Chicago and about forty lawyers in Washington D.C. In this particular case, Westinghouse as plaintiff was alleging that twelve foreign and seventeen domestic corporations involved in the uranium industry conspired in restraint of trade to raise worldwide uranium prices. Among the defendants were four companies which moved to disqualify Kirkland: Gulf Oil Corporation, Kerr-McGee Corporation and Getty Oil Company, on the ground that Kirkland was simultaneously acting as their counsel by virtue of representing the American Petroleum Institute of which they were members; and Noranda Mines Limited, on the ground that nine years previously Kirkland had represented Noranda in several unrelated matters. Both the district court (Judge Prentice H. Marshall) and the Seventh Circuit Court of Appeals (Fairchild, Sprecher and Bauer, JJ) had little difficulty dismissing the latter motion by Noranda. But the court of appeals reversed Judge Marshall’s dismissal of the oil companies’ motion, in effect disqualifying Kirkland. (Westinghouse theoretically could have chosen to retain Kirkland and drop the three oil companies from the list of defendants, but the other defendants would have then charged that they were prejudiced by the dismissal of the oil company co-defendants.) Kirkland’s petition to the Supreme Court for a writ of certiorari was denied.

Since it is unlikely that any well-established law firm would proceed on behalf of a client knowing that it had an ethical problem in that representation, the result in the Westinghouse case obviously must have taken Kirkland by surprise. The court’s reasoning in the case should therefore be of considerable interest to the practicing bar. There were three important issues regarding the oil company defendants:

First, there was the apparent conflict in the positions that Kirkland was taking. In representing the Petroleum Institute, Kirkland was arguing that oil companies’ diversification into uranium production was good for competition, whereas in representing
Westinghouse against the oil companies, Kirkland was perforce arguing that the oil companies participated in a cartel that stifled competition. Was Kirkland taking a contradictory stand and, if so, what of it?

Second, Kirkland's Washington office was handling the Petroleum Institute, whereas the Westinghouse antitrust action was being prepared by Kirkland's Chicago office. Could Kirkland argue that a large law firm may often find itself representing adverse interests and that therefore what really matters is whether there has been actual communication between the two sets of lawyers? Was it possible that in this case a "Chinese wall" existed between the Washington and Chicago offices of Kirkland, barring prejudicial communication between them?

Third, although Kirkland was concededly counsel for the Petroleum Institute, did that representation "automatically create an attorney-client relationship" between Kirkland and the 8,000-odd members of the Petroleum Institute, three of whom were the oil companies seeking Kirkland's disqualification? More broadly, can the requirement of confidentiality arise when a law firm has not consented to be counsel for the movant (the three oil companies in this case) and has not been retained by the movant?

Let us consider each of these three broad issue-areas.

**Contradictory Positions**

The oil companies seeking to disqualify Kirkland made much of the fact that in representing the Petroleum Institute, Kirkland was supporting a lobbying position which encouraged oil company diversification into alternate energy sources such as uranium, since thereby competition would be enhanced across all fronts—whereas in representing Westinghouse at the same time Kirkland was contending that uranium producers, including the oil companies, had conspired to destroy competition in uranium marketing and pricing. The trial judge took prominent note of these "inconsistent positions" although he eventually held for Kirkland, whereas the appellate court was not troubled by the inconsistency although in the end it reversed the case and disqualified Kirkland.

On the particular issue of inconsistent advocacy positions, the appellate court's brushing aside of the matter seems justifiable for two reasons. In the first place, contrary to Judge Marshall's view of the matter at the trial level, the positions taken by Kirkland do not appear inconsistent with each other. Oil company diversification into uranium production may or may not promote competition with respect to uranium, but that issue is a general one, quite unrelated to whether specific uranium producers—including oil companies that have branched into uranium—have in fact engaged in a particular conspiracy to raise uranium prices and hold back uranium supplies. Indeed, since most uranium producers are not also engaged in oil production, it would appear to be hard, even theoretically, to relate oil company diversification plans to any alleged cartel among uranium suppliers. This point will become relevant in another connection later, when we consider the nature of
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the confidential information that served as the basis for Kirkland's disqualification.

Second, even if Kirkland were taking inconsistent positions on the merits of this or any other issue, would there be any ethical consequences? Would there even be an "appearance of professional impropriety" in the language of Canon 9 of the American Bar Association's Code of Professional Responsibility? When a person says he believes one thing and then shortly afterward says he believes the opposite, his listeners may be justified in thinking that he has lied at least once and maybe both times. But consider an attorney acting in his or her professional capacity. In advocating a position, that attorney is definitely not saying that he or she believes in that position, any more than a member of a college debate team is asserting his or her personal belief on the assigned debate topic. For example, in representing a criminal defendant known to the attorney to be guilty, the attorney clearly is not asserting his or her own belief in the defendant's innocence. Of course, sometimes the public has to be reminded of this, or "educated" about it. There have been several notorious cases in criminal history where a particularly effective defense has led to the acquittal of a person who later admitted guilt; often there was a public outcry about the "ethics" of the defense attorney for making such a "persuasive" case to the jury. These cases at best serve as learning experiences for the public; how else could every accused person be assured of defense counsel if counsel's personal beliefs would serve as a disqualification? Similarly, a lawyer paid to advocate a position is simply presenting an argument which the hearer can accept or reject on its merits and apart from the personal beliefs of the advocate. In 1906 Louis Brandeis argued in behalf of United Shoe Machinery Company that tying clauses were legal under the Sherman Act; a few years later, having left United, he publicly argued with great fervor that such clauses were illegal under existing law. Although he was highly
criticized for his "inconsistent positions" at the time, the message he was really imparting to the public was this: Pay attention to the arguments and not to who is making them, for what really counts is what you decide on the merits; otherwise you are, in effect, delegating your own decision-making ability to the spokesman who most impresses you with his apparent sincerity.

The "Chinese Wall"

On the assumption that Kirkland's Washington office received confidential information from the oil companies in the course of representing the Petroleum Institute, should that information be imputed to Kirkland's Chicago office, which was simultaneously preparing an antitrust case against the oil companies? Judge Marshall's opinion at the district court level cited Judge Weinstein of the Eastern District of New York: "Since the largest firms represent the largest corporations with interests in all sectors of the economy, it is almost impossible to have an important client or its subsidiary avoid some kind of legal relationship with another client at some time."

Judge Marshall found factually that no reported communication passed between Kirkland's Washington and Chicago offices with respect to the oil companies. Furthermore, he noted that affidavits filed in the case stated that no Petroleum Institute data received by the Kirkland lawyers in Washington were ever disclosed to the attorneys for Westinghouse in Chicago, and found that these affidavits "are sufficient to support a conclusion that no disclosure of confidences occurred." Of course, the judge noted, "An attorney should not place himself in a position where he will or might be tempted to take advantage of information derived from confidential interviews," and hence found that Kirkland's decision to represent Westinghouse against the oil companies was "an error in professional judgment" and "a minor ethical grievance."

But he held that disqualification of Kirkland would be "drastic, unjustified, and inequitable" in light of the "fairly remote" possibility of improper professional conduct.

Clearly this "Chinese wall" argument relied upon by Kirkland at the trial level was instrumental in persuading Judge Marshall to deny the motion for disqualification, but in winning the trial-level battle Kirkland might have lost the appellate-level war. For the Chinese wall argument was wide open to the damaging and archly phrased rebuttal by Getty Oil Company on appeal: that Judge Marshall's decision was "nothing more than a holding that large law firms in complex litigation will be held to a lower standard of ethics than will smaller firms who act in simpler cases."

To add insult to injury, Getty continued with the telling argument that even if the Chinese wall were intact up to the present moment, to allow Kirkland to continue as Westinghouse's counsel was to invite the possibility that the wall could be breached at any future point in the course of the Westinghouse litigation against the oil companies. The court of appeals was, unsurprisingly, convinced. It held that "there is no basis for creating separate disqualification rules for large firms."
Kirkland might have been well advised to forget the Chinese wall argument at the trial level, even though the kinds of conflicts envisaged by Judge Weinstein (quoted above by Judge Marshall) were real and potentially damaging to large law firms. For at the most fundamental level the attractiveness of a large law firm is its ability to bring its members' broad and varied expertise to bear upon any individual client's problem. This is an obvious advantage that even a two-person law partnership has over the solo practitioner. Any firm, whether consisting of two partners or two hundred, is in effect holding out to the public a unified, internally communicative resource group. Without such internal communication and pooling of talents, there would be no public justification for a number of lawyers to hold themselves out as a firm of lawyers. Thus Westinghouse, in hiring Kirkland to file its antitrust case, would even have a right to expect that if Kirkland had some attorneys in Washington who were experts in the oil-uranium field, these attorneys would be called upon to help in the litigation. (Of course Westinghouse in fact might choose to waive that right, but in general the right is the same for any person who engages a law firm as to any case.) If such rightful expectation makes it difficult for a firm to grow bigger and bigger, if inevitable conflicts exert a pressure upon large law firms to restrict their growth, and if such pressures occasionally result in disqualification from a major case involving fees that could run into the millions of dollars, as presumably occurred in the Westinghouse case for Kirkland—then such constraints will have to be accepted. There is no ethical rule that suggests law firms should grow bigger and bigger, but there is an ethical rule that suggests a client has the right to the undivided loyalty of all the members of a firm—for the simple reason that this is what a law firm holds itself to provide.

Although Kirkland largely backed away from the Chinese wall argument on appeal, the stress on that argument at the trial level and the trial judge's findings on the point inevitably served to shape expectations at the appellate level. The case thus seemed to focus upon the "confidential information" which, under the Chinese wall theory, was never imparted to the Chicago office and which, under the next theory that we shall discuss, was or was not part of the attorney-client relationship. What tended to get lost in the shuffle was the precise relevance, even if disclosed, of the "confidential information" to the antitrust case instituted by Westinghouse. But since that matter was minimized, let us turn first to the theory of whether an attorney-client relationship existed between Kirkland and the oil companies.

Was There an Attorney-Client Relationship?

Kirkland's major contention on appeal was that it had no attorney-client relationship with the oil companies seeking to disqualify Kirkland from the Westinghouse case. Therefore Kirkland could breach no duty to them with respect to any information its Washington office might have received in the course of representing the Petroleum Institute. To examine
this contention, we must now delve in greater detail into the facts of the case.

Kirkland was retained in 1976 by the American Petroleum Institute to prepare a report of legal arguments that could be used in API's lobbying efforts against legislative proposals in Congress which were designed to break up oil companies by requiring divestiture of their alternative energy resources, such as uranium and coal. Part of Kirkland's job was to interview some of API's member companies, including the three movants in the instant case—Gulf, Kerr-McGee and Getty. The Kirkland lawyers were introduced to the member companies by a memorandum stating that Kirkland "is acting as an independent special counsel for API, and will hold any company information 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." Kirkland attorneys then interviewed Gulf and Kerr-McGee officials personally and Getty by means of a written questionnaire only. Some of the questions the attorneys prepared for discussion during the interviews (which were presumably asked of the oil company officials) include the following:

Would your divestiture of alternative energy businesses violate any contractual provisions of your loan or debenture agreements? Other contractual agreements? If so, which?

Do you know of any oil or gas companies that have lower cost alternative sources of energy that they are not developing?

Have the oil companies blocked coal liquefaction research?

Is the uranium industry competitive? Is that industry becoming more or less competitive?

Are the oil companies aiding uranium production?

Have oil companies increased their holdings of uranium reserves faster than they have increased uranium production?

Although Kirkland sent its legal bills to API and was compensated only by API, affidavits submitted at the trial (quite after the fact, of course) stated that Gulf's counsel in Washington "was given to believe that the Kirkland firm was representing both API and Gulf," that Kerr-McGee's vice-president understood a Kirkland partner to have explained that Kirkland was working on behalf of API and also its members such as Kerr-McGee, and that Getty's vice-president submitted data to Kirkland "upon the belief and expectation" that Kirkland needed the data "to render legal service to Getty in furtherance of Getty's interests."14

Kirkland's final report to API was released on October 15, 1976, and, fortuitously or not, on that same day Kirkland's Chicago office filed its antitrust suit on behalf of Westinghouse. The report to API contained 230 pages of text and 82 pages of exhibits. It asserted, among other things, that the relatively high concentration ratios in the uranium industry could be expected to decline, that current increases in uranium prices were a result of increasing demand, that oil company entry into uranium pro-
duction had stimulated competition and diminished concentration, that oil companies had no incentive to act in concert to restrict coal or uranium production, and that the historical record refuted any charge that oil companies had restricted uranium output. (Parenthetically, we might note that this report—on its face, and especially the last clause of this summary—tends to support Kirkland’s Chinese wall theory, inasmuch as the preparers of the report in Kirkland’s Washington office would probably be surprised by the antitrust suit coming out of Chicago against the oil companies.)

Kirkland’s argument that the above facts do not amount to a lawyer-client relationship between Kirkland and the oil companies was based on a strict interpretation of the law of agency. Kirkland did not consent to be the oil companies’ attorney, submitted no bill to them, and was not paid by them; and all the contemporaneous documents prepared in connection with the API report stated that Kirkland was retained by API and made no reference to API members as Kirkland’s clients. But, as the court of appeals said, the trial court’s acceptance of the Kirkland argument applied a “narrow, formal agency approach to determining the attorney-client relation.”15 Yet isn’t the attorney-client relationship one of agency? The answer is that it may be for certain purposes, but one must be especially careful when a matter of legal ethics is involved. When we have a matter of ethics or professional responsibility, a paramount consideration must be that by definition the lay person seeking advice does not know what the law is, and hence any lawyer talking with a lay person cannot reasonably expect to be shielded by particularistic rules of agency (or any other area of law) which the lawyer knows but the layman does not know. The very sensitivity of the attorney-client relationship requires a most liberal interpretation of the boundaries of that relationship. Indeed, the boundaries extend well beyond the precise relationship itself. For example, suppose a person walks into a law office seeking advice and an attorney, after listening to his story, turns the case down. Then, even though that person certainly is not a “client,” nevertheless what he has revealed to the attorney is fully protected by attorney-client confidentiality.16 Kirkland tried unsuccessfully to argue on appeal that Canon 4 of the Code of Professional Responsibility (“A Lawyer Should Preserve the Confidences and Secrets of a Client”) plainly applies only to the benefit of a present or former client of the attorney.17 Clearly this would be a narrow, if not stultifying, view of professional ethics, and it was properly rejected by the court of appeals.

As the court put it in the instant case, the attorney-client relationship can arise “when the lay party submits confidential information to the law party with reasonable belief that the latter is acting as the former’s attorney.”18 In a sense the word “reasonable” begs the question, for the Kirkland position might arguably be that it would be unreasonable in any case to expect that the law party is one’s attorney if nothing is said before or afterward about fees, and indeed if the lay party has no inten-
tion of paying the attorney. But apart from begging the question, Kirkland in fact argued that the oil companies were represented by top executives as well as by their own legal counsel in the interviews, and they could hardly have believed that Kirkland was acting as their attorney. Moreover, they were aware that Kirkland was representing Westinghouse in matters growing out of the uranium supply contracts (though not, of course, that Kirkland was preparing an antitrust suit on behalf of Westinghouse), and this too should have put them on notice that Kirkland was not acting as their attorney. Finally, in all the contemporaneous documents Westinghouse was referred to as "special counsel for API." How, then, could the court of appeals find that Kirkland was disqualified in the Westinghouse antitrust case with respect to the defendant oil companies?

One line of attack was that API was simply an umbrella title for its members, who pay all its costs including costs of counsel. But this approach would prove too much; it would mean that Kirkland would find itself attorney for 350 major corporate and 7,500 individual members in taking on API as a client. The result would be that API might find it impossible to hire any moderately large law firm because of conflicts of interest that could arise. Although some cases have held that each member of an unincorporated association is a client of the association's lawyer, the court of appeals avoided resting its decision on this ground.

A second approach, which the court did adopt, was to find that a "fiduciary obligation or an implied professional relation" existed between Kirkland and the oil companies on the basis of the facts of the case. Note that the court was not labeling this a "lawyer-client relationship." Nevertheless the "implied professional relation" was sufficient to disqualify Kirkland.

Apparently, the decisive factor from the court's standpoint was that Kirkland, in soliciting confidences from API members, came to them wearing its legal hat. "Kirkland did not disavow its capacity as attorneys," the court held, "but came expressly represented as lawyers." But, then, is there no limit to this "implied professional relation"? The court said that the relationship does not arise when one consults an attorney "in a capacity other than as an attorney." Yet, realistically, when does anyone—other than a personal friend—consult an attorney in a capacity other than as an attorney? It would be very difficult for an attorney to demonstrate that any advice he or she gives in the course of a business day is in a non-attorney capacity. In other words, there are practically no bounds to the "implied professional relation" with respect to the attorney's capacity as an attorney.

However, there is a second aspect to the "implied professional relation" test—the receipt by an attorney of confidential information from the lay party. (The court talks about "soliciting" confidences, but surely an unsolicited confidence can equally trigger the "implied professional relation" test—as when a person tries to engage an attorney, the attorney says he does not want to hear any more since he will not take the case, and yet the

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person persists in volunteering additional confidential information.) But the court's test, while not impossibly broad, is potentially applicable in all cases in which confidential information was received by an attorney. The potential for many disqualification motions in the wake of the Westinghouse case is thus formidable indeed. Attorneys in all firms, large or small, will now be on notice that an apparently harmless activity, such as the preparation of a report, could lead to the receipt of confidential information, thereby disqualifying the firm from proceeding in litigation against the sender of the confidential information. The very breadth of this danger of disqualification, in light of the Westinghouse case, would suggest that future courts will narrow its scope and refine its purpose.

**Criticism**

It would appear that the court in the Westinghouse case was largely taken in by appearances. Clearly it was troubled by Kirkland coming on as an attorney and soliciting confidences from the oil company defendants who were members of the Petroleum Institute, then suing those same oil companies for antitrust violations. But appearances can be deceptive. A criminal defense attorney may give a powerful summation statement to a jury on behalf of a client he knows is guilty. If we went on the basis of appearances alone, we might say such a lawyer was unethical. This and many other instances that could be mentioned indicate that for resolving a matter of legal ethics we must look below the surface.23

Unfortunately, the court of appeals was not helped by the briefs of the parties. Kirkland in particular submitted highly unsophisticated briefs in the case, focusing on narrow agency rules for the determination of the lawyer-client relationship, relying on Chinese walls, and in general treating a matter of ethics the same way one would treat a technicality in the Uniform Commercial Code. To a large extent the substandard performances of many firms in cases involving the Code of Professional Responsibility are due to the lack of any exposure to legal ethics as a subject in law school. Now that legal ethics is becoming a more serious part of the curriculum of the leading law schools, one would hope that future cases involving questions of legal ethics will be better argued by attorneys and decided on more sophisticated grounds by courts.

In the Westinghouse case what seems crucial is not that Kirkland received confidential information from the oil companies, but rather the nature of the confidential information that was received. Did the information relate at all to the antitrust case? The report that Kirkland filed on behalf of API certainly seems to suggest that the Kirkland attorneys in the Washington office did not have the remotest idea that the oil companies might be involved in a cartel to restrict the supply of uranium. Nor would it appear probable that the oil companies ever disclosed any such information to the Kirkland attorneys; conspiracies in restraint of trade are not blurted out to any stranger who walks in the door. If anything, one might reasonably suppose that the oil companies went out of their way to
“sell” the Kirkland attorneys on how much competition was being fostered by their involvement in uranium production. It would appear that nothing that Kirkland received from the oil companies, whether confidential or not, had any bearing on the antitrust case. If this conclusion is correct, then the “implied professional relation” the court talked about should not count toward disqualifying Kirkland from this case (even though it might count toward disqualifying Kirkland from some other case against the oil companies, where the information received was relevant to that other case).

But suppose for the moment that one of the oil company executives said to a Kirkland partner during one of the API interviews, “You might be amused to know that we’re engaged in a cartel to restrict the supply of uranium—this is off the record, of course.” Since we have no knowledge that some such statement was not made to a Kirkland lawyer, then perhaps what might have been said in the interviews was relevant, after all, to the Westinghouse case. However, this supposition is so improbable as to deserve no weight in the motion for disqualification—not only because the oil company officer, by making it, would be admitting a continuing criminal course of conduct, but also because Kirkland could reasonably suppose that the oil company counsel would have had to resign rather than participate as house counsel in an illegal course of corporate conduct. Indeed the Kirkland attorneys, if they heard any such statement, might themselves not be bound to hold that statement confidential because it involves a continuing crime. Thus, the very statement that theoretically would prove the relevance of the confidence to the Westinghouse antitrust case is one on which a good argument can be made under the Code of Professional Responsibility that it is inherently not confidential!

Accordingly, if we dissociate the “confidential information” received by Kirkland from any use in the Westinghouse antitrust case, we are left with no substantive reason to disqualify Kirkland. In the same litigation the court of appeals did not sustain a motion by Noranda Mines Limited to disqualify Kirkland on the ground that Kirkland had represented Noranda nine years earlier on a different situation. But surely it is not the passage of time that is significant. Rather, the significance lies in the fact that Kirkland’s representation of Noranda was on a clearly distinguishable situation. Similarly, as to the oil companies, the court of appeals could have found that although there was no time gap and although “uranium” was one of the matters that Kirkland investigated for the API, nevertheless there was no relationship between information received by Kirkland for API and the issues in the antitrust litigation. On that analysis, the court should have held that Kirkland did nothing that was even remotely unethical in representing Westinghouse against the oil companies.

Footnotes


5. 448 F. Supp. at 1296.
7. 448 F. Supp. at 1305.
8. Id. at 1304.
9. Id.
10. Id. at 1306.
11. Id. at 1305-06.
13. 550 F.2d at 1321.
15. 550 F.2d at 1318.
17. Brief of the Plaintiff-Appellee, supra n. 4 at 16.
18. 550 F.2d at 1312.
20. 550 F.2d at 1319.
21. Id. at 1320.
22. Id.
23. One example in the confidentiality area is the notorious “bodies case.” See People v. Belshe, 50 A.D.2d 1088, 376 N.Y.S.2d 771 (4th Dept. 1975). In that case there was public clamor for disbarment of two attorneys who did not report the location of the bodies of two young women. The attorneys’ client, indicted for a separate murder, told them of other murders he had committed and where the bodies were located. The attorneys visited the location and took photographs but never revealed any of it. When the bodies were later accidentally discovered, the dead girls’ parents asked the New York Bar Association to disbar the two attorneys. Clearly the lawyers were preserving their clients’ confidences even though “appearances” were that they did something unethical. A rote application of Canon 9 of the Code of Professional Responsibility (“A lawyer should avoid even the appearance of professional impropriety”) cannot solve these cases. Canon 9 has useful application in some circumstances, but cannot be used as a broad ethical test without reducing professional ethics to the level of uneducated “gut” public reaction.
24. Of course, if Kirkland were actually the attorney for the oil companies, then it would be disqualified because it could not represent Westinghouse against its own clients. But Kirkland’s position vis-à-vis the oil companies was not attorney-client; rather it was an “implied professional relation” resting on two pillars: the fact that Kirkland came as an attorney, and the fact that it received confidential information. But it is precisely the latter—the nature of the confidential information received and its relevance to any other matter in which Kirkland may be engaged in the course of being an attorney—that should determine whether there is any conflict in Kirkland’s handling of the antitrust suit for Westinghouse.