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Conflicts of Interest, Chinese Walls and the Changing Business of the Law

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The Legal Profession in Flux

As the waves of consolidation and globalisation wash upon the legal system, old traditions crumble. The business structure of the sophisticated law firm has gone through major changes in the last 30 years. Starting in the United States, but now spreading to many countries, law firms have grown in size and sophistication. Law firms have also spread across jurisdictions through alliances and mergers.

A law firm of even 100 lawyers would have been considered large in the 1960s. Now a handful of firms exceed 1,000 lawyers. In firms like these, growth changes not merely the economic presence of the entity—it changes the professional structure too. Specialisation and fragmentation occurs, as firms recognise that effective strategic leadership needs sharper focus—thus the rise of practice groups. The nature of partnership changes too. Firms that grew on strong professional relationships built upon personal friendships, shared visions and common experiences have had to institutionalise and professionalise management and adapt to changes in the business milieu in which their clients thrive.

Changes in the business law firm have spurred change in other, less obvious areas. The pressures facing the legal profession worldwide challenge old rules and long-standing patterns of behaviour. In a world in which law firms grow in size, power and revenue and as other professions converge into areas previously reserved for the legal profession, it is not surprising that ethical rules face reassessment.

This article examines how economic and professional change has affected one of the fundamental ethical rules on which the legal profession is based—the avoidance of conflict of interest. It is regarded as axiomatic that a lawyer cannot let his, or her, professional performance be compromised by competing loyalties—either a conflict between client and personal interests, or between two clients. A body of ethical and legal rules has grown up to define and channel acceptable behaviour when confronted by conflicts.

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The issue is an important one for both law firms and clients, and is recognised as such in all jurisdictions. This article reviews the transformation of conflicts rules over recent years, as traditional approaches have been tested by the rise of sophisticated business law firms and by other changes in the market for legal services. Old rules were premised on the notion that lawyers would likely practice by themselves or in small firms in which lawyers were intimately involved in the practice, collaborating closely and sharing common knowledge and experience. While that model still dominates the profession in pure numbers—the majority of lawyers work in firms of under ten lawyers—the market for legal services has resulted in economically powerful and professionally sophisticated large firms. Ethical rules that presented few problems for solo practitioners or small firms now fit uncomfortably into the larger legal landscape.

Our primary focus is on how the ethical rules have been changed to address the larger changes in the business and professional operations of large law firms. This article adopts a comparative approach, since it has been fascinating to see how different jurisdictions have followed each other in fashioning new, and more nuanced, rules. Its primary focus will be on common-law jurisdictions, but it will contrast these developments with similar rules in civil-law jurisdictions. It attempts to draw conclusions from these parallel developments about how the profession is developing and what the future holds. Since recent case law has explicitly probed the question of whether the same rules apply to accountants working on legal file engagements, conflicts rules have implications for the phenomenon of multi-disciplinary partnerships.

As the rise of global law firms gathers speed, so large accounting firms have diversified away from the staples of audit and accounting advice, transforming themselves into professional service firms with partners drawn from many disciplines. The challenge to law firms started in Europe, but is now becoming global. Leaders of the legal profession argue that the economic forces are not inexorable and that ethical and professional imperatives must be addressed. Old issues of conflict of interest and duty have asserted themselves into that debate. In the process, we are beginning to see the emergence of a global law of conflicts of interest.

All these developments were brought sharply into focus in late 1998 when England's highest court—the House of Lords—decided its most important conflicts case ever. Although the case focussed on forensic accountants, its largest implications are for the legal profession. In its decision, the Court transformed English law, set higher standards for conduct, and challenged both law firms and professional regulators to adapt. The Lords decision was explicitly comparative in its analysis, and also sensitive to the professional context of sophisticated markets for legal services.

This article finishes with a critical examination of the opportunities for the effective use of screening devices or ethical walls to neutralise such conflicts. It concludes that such screening devices, while plausible and attractive, are only intermittently effective. In numerous jurisdictions around the world, such devices have crumbled under challenge and scrutiny by the courts.

Traditional Approaches to Conflicts

In looking at conflicts, a number of professional interests and values are at stake. Of primary importance is the need to protect clients, and to ensure the undivided loyalty of their legal advisors. Even if the lawyer-client relationship has come to an end, the

confidentiality of any information that the lawyer possesses must be scrupulously respected. The high standards of the legal profession depend on the integrity of the justice system. Next in priority comes the desirability of enabling consumer choice—litigants should not be deprived of their counsel of choice without good reason. A third interest relates to a respect for market forces within the market for legal services. As we shall see later, there is a resistance to inter-jurisdictional and interdisciplinary consolidation within the market for legal services, which is being felt in the conflicts jurisprudence. These market forces have manifested themselves both at firm and individual levels. Mergers of law firms started in the 1980s within national markets. The phenomenon of the 1990s has been mergers of firms in different countries and continents. The next decade will almost certainly see a series of cross-profession mergers, as major accounting firms broaden their professional services into legal domains and recruit lawyers to handle these matters. In the slightly longer run, we are likely to see the emergence of true multidisciplinary service firms, in which legal, accounting, financial and engineering professionals work as required on projects which span many disciplines.

The stakes are high, not merely in terms of embarrassment and damage to client relations, but also in monetary terms. In the United States, the consequences of botched conflicts include lawsuits.[2] One Oklahoma firm was reportedly hit with a $120 million claim for attempting to switch sides in an oil industry dispute. In 1996, Louisiana's appellate court upheld a $5.5 million judgment against a lawyer who had tried to act for both sides in a corporate merger. Firms have also had to forfeit fees, with Milbank Tweed reportedly losing a $1.9 million fee award in 1997,[3] and Willkie Farr[4] almost $3 million the following year.[5]

Competing Professional Values

The sources of conflict rules are found in both case law and in local rules of professional conduct.[6] While common law courts are attentive to professional rules, they have made it clear that the various rules of professional conduct are not necessarily congruent with rules that the court will apply.[7] "The codes of professional conduct governing lawyers do not govern common law courts, which must follow the law governing fiduciaries and confidences, not rules of professional ethics. But that theoretical distinction weakens in practice, for the law and the ethics are similar—as are the problems. So professional ethics codes are suggestive, even persuasive, in court."[8] Since a conflict of interest is a

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2 Michael Chambers, Matthew Jones and Patrick Wilkins, Conflicts of Interest—The Growing Climate of Distrust 33 *Commercial Lawyer* (April 1999), at p.27.

3 Matthew Goldstein, "Grand Jury Subpoenas issued in Inquiry on the Milbank Conflict", *N.Y. Law J.*, June 11, 1997, vol. 217, n111, p1, col 1. Paul M. Barrett "Legacy of conflict case haunts Milbank Tweed", *Los Angeles Daily Journal*, Jan 26, 1998, vol. 111, n. 16, p. 8 col. 1.

4 Wendy R. Leibowitz, "Client Conflict Software: No Panacea; Complexity of Client Relationships at Firms like Wilkie Farr presents Ethical Traps", *National Law Journal*, July 21, 1997, vol. 19, n. 47, p. A1, col. 2.

5 Chambers, Jones and Wilkins, *supra* fn. 2, at p.27.

6 Note that conflicts in civil law countries are generally matters for the exclusive control of the bar and similar legal organisations. The court's contribution is purely appellate and in practice insignificant.

7 Some courts have stated (albeit *obiter*) that the courts should defer to the ethical rules and precautions mandated by law societies and take only a supervisory role: *Ford Motor Co. of Canada v. Osler, Hoskin & Harcourt* (1996), 131 D.L.R. (4th) 419, 43 C.P.C. (3d) 156, 24 B.L.R. (2d) 217, 27 O.R. (3d) 181 (Gen. Div.).

8 *Gainers Inc. v. Pocklington* (1995), 125 D.L.R. (4th) 50 at 53, 29 Alta. L.R. (3d) 323, 165 A.R. 274, 89 W.A.C. 274, [1995] 7 W.W.R. 413, 20 B.L.R. (2d) 289 (C.A.); affg. (1994), 21 Alta. L.R. (3d) 363, [1994] 10 W.W.R. 36, 156 A.R. 281 (Q.B.); leave to appeal to S.C.C. refused (1996), 23 B.L.R. (2d) 285n, [1996] 2 W.W.R. lxxxn, 35 Alta. L.R. (3d) xlvn, 130 D.L.R. (4th) viin, 199 N.R. 160n (S.C.C.).

breach of the lawyer's fiduciary duty to the client, such rules are most often construed strictly and applied in such a way that any doubt will be resolved in favour of the client.

The rule against conflict of interest cannot be read alone. Indeed, as recognised by the courts, the rules concerning conflict of interest may have been implicitly modified by the case law concerning other rules.[9] A number of the rules of professional conduct must be borne in mind when considering the scope of the duty to avoid conflict of interest. The most comprehensive rules are those promoted by the American Bar Association which promulgated its Model Rules of Professional Conduct in 1983.[10] Nineteen amendments have been made to the Rules and Comment to them since that time. Professional conduct rules are set on a State-by-State basis, but the majority are based on the Model Rules of Professional Conduct. For comparative purposes we shall contrast the Model Rules with the Code of Professional Conduct (CPC) of the Council of Bars of the Commission of Europe.[11]

In looking at conflicts, the Rules have multiple implications for lawyers, as follows. Lawyers:

- cannot act for two clients who have diverging interests in the same matter,[12] if in order to further the interests of one, they must forego advancing the conflicting interests of another. In short, one cannot be both for and against a client. For example, lawyers cannot represent both a husband and a wife, if they are divorcing, or both buyer and seller.
- cannot subsequently accept employment from another for the purpose of undoing what they had earlier been retained [BY THEIR PREVIOUS FIRM?] to accomplish.
- may not accept subsequent employment from another if it involves the use of confidential information received from their former client. Such actions are forbidden by law and by legal ethics.
- can have no personal interest in a matter,[13] in which that interest may dictate an outcome that runs counter to the client's interests.

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9 *cf., e.g., Ford Motor Co. of Canada v. Osler, Hoskin & Harcourt* (1996), 131 D.L.R. (4th) 419, 43 C.P.C. (3d) 156, 24 B.L.R. (2d) 217, 27 O.R. (3d) 181 (Gen. Div.), which recognises that Canadian rules on conflicts have been modified by rules on transferring lawyers, which permit "Chinese walls".

10 *cf.* American Bar Association, *Model Rules of Professional Conduct* (ABA, revised ed., 1995: the "ABA Code"); this constitutes the bases on which the conflict rules in Arkansas (Disciplinary Rules of Professional Conduct), Arizona (Arizona Rules of Professional Conduct), Colorado (Rules of Professional Conduct), The District of Columbia (Rules of Professional Conduct), Florida (Rules of Professional Conduct), Illinois (Rules of Professional Conduct), Louisiana (Rules of Professional Conduct), Maryland (Rules of Professional Conduct), Pennsylvania (Disciplinary Rules of Professional Conduct), and Texas (Disciplinary Rules of Professional Conduct). It has replaced the Model Code of Professional Responsibility, but the Code is still used as the bases for the conflict rules in New York (Lawyer's Code of Professional Responsibility). For a listing by jurisdiction of State Narratives and Rules or Codes, Ethics Opinions, and Judicial Conduct Codes, see http://www.law.cornell.edu/ethics/listing.html. Other Legal Ethics Material can be found at http://www.law.cornell.edu/ethics/.

11 The comparison with the Code of Professional Conduct (CPC) of the CBCE is contained in the footnotes.

12 ABA, Model Rules of Professional Conduct, r. 1.7; ABA, Model CPC, DR 5–105. Compare Code of Conduct for Lawyers in the European Community, rr. 3.2.1, 3.2.2 (1988).

13 *ibid.*, r. 1.7(b), ABA, Model CPC. DR 5–101; compare Code of Conduct for Lawyers in the European Community, r. 2.1.1 (1988).

The Model Rules include the following guidance for lawyers—

1. "...[a] lawyer is a representative of clients, an officer of the legal system and a public citizen having a special responsibility for the quality of justice" (Preamble, at Comment 1).[14]
2. "...[a] lawyer shall not reveal information relating to representation of a client unless the client consents after consultation" (r. 1.6).[15]
3. "... [t]he lawyer's own interest should not be permitted to have adverse effect on the representation of a client"(r. 1.7, Comment 6).[16]
4. "... a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client. ...Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests" (r. 1.16)[17]
5. "... [i]n representing a client, a lawyer shall exercise independent professional judgment and render candid advice" (r. 2.1).[18]

Similar provisions can be found around the world. For example the Brussels Bar's statement of ethics (*déontologie*) identifies values of independence, loyalty and professional confidence all as being key to conflicts of interest.[19]

Professional governing bodies have generally taken a traditionalist role in the emerging law of conflicts, proscribing conflicts, restricting innovation and imposing controls. In the legal sector, due to the demographics of firm size, the large firms which most frequently confront conflicts issues are less likely to have a dominant voice in governing bodies. In Spain and The Netherlands, governing bodies are taking steps to prevent the spread of multidisciplinary practises, through express legislation or litigation.

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14 *cf.* also CPC of the CBCE, r. 1.1 which states "[a] lawyer's function therefore lays on him a variety of legal and moral obligations ... towards: the client; the courts and other authorities before whom the lawyer pleads his client's cause or acts on his behalf; the legal profession in general ... and the public".

15 "[a] fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation" (r. 1.6, Comment 4); *cf.* also r. 2.3.1 of the CPC of the CBCE which states "[i]t is of the essence of a lawyer's function that he should be told by the client things which the client would not tell to others ... Confidentiality is therefore a primary and fundamental right and duty of the lawyer."

16 "[A] lawyer for a corporation or other organisation who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict ... If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director" (r. 1.7, Comment 14); *cf.* also r. 2.1.1 of the CPC of the CBCE which states "The many duties to which a lawyer is subject require his absolute independence, free from all other influence, especially such as may arise from his personal interests or external pressure."

17 *cf.* also r. 3.1.4 of the CPC of the CBCE which states "[a] lawyer shall not be entitled to exercise his right to withdraw from a case in such a way or in such circumstances that the client may be unable to find other legal assistance in time to prevent prejudice being suffered by the client."

18 *cf.* also r. 3.2.2, *ibid.*, which states "[a] lawyer must cease to act for clients when a conflict of interest arises between those clients and also whenever there is a risk of a breach of confidence or where his independence may be impaired."

19 *cf.* "La Compétence et L'éthique de l'avocat". http://www.barreaudebruxelle.be/j.htm. For general discussions of professional values, *cf.* Emile Durkheim, *Professional Ethics and Civic Morals*, trans. by Cornelia Brookfield (1950); Henry S. Drinker, *Legal Ethics* (1953, reprinted 1980); and L. Ray Patterson, *Legal Ethics: The Law of Professional Responsibility*, 2nd ed. (1984).

The Commonwealth Evolution of Conflicts

The Rakusen decision

For almost 80 years, the common law approach to conflicts was essentially static. Few conflicts issues were raised, and fewer litigated. This was largely due to the liberal approach of the leading Commonwealth case on conflict of interest, *Rakusen v. Ellis, Munday & Clarke*.[20] The English law largely developed to regulate solicitors rather than barristers (advocates) since they practised as sole practitioners rather than in firms where the possibility of conflicting interests and shared knowledge was always present.[21]

In that case, Munday and Clarke were the only partners in a firm of solicitors. But they did business separately, without any knowledge of each other's clients. The claimant, Rakusen consulted Munday about a wrongful dismissal action, which he proposed to bring against a corporation. Then Rakusen changed his solicitors, and sued the corporation. The case was referred to arbitration. Later, Clarke was appointed to act for the corporation in the arbitration. At no time did Clarke know anything of Rakusen's consultations with his partner, Munday. Both lawyers were prepared to undertake that they had not—nor would they in future— discuss the case. The court held that Clarke should be allowed to continue to act and that there is no absolute impediment to one partner in a two-man firm taking instructions against a client, who had, unbeknown to him, previously consulted the other partner in respect of the same litigation.

In doing so, the court explicitly moved away from stricter 19th-century law. The Court of Appeal, in refusing the injunction, stated that each case must be judged upon its own circumstances as to whether there was a probability of mischief and prejudice.[22] Cozens-Hardy M.R. states:[23]

> "I do not doubt for a moment that the circumstances may be such that a solicitor ought not to be allowed to put himself in such a position that, human nature being what it is, he cannot clear his mind from the information which he has confidentially obtained from his former client; but in my view we must treat each of these cases, not as a matter of form, not as a matter to be decided on the mere proof of a

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20 [1912] 1 Ch. 831 (C.A.); English cases following *Rakusen* include *In Re a solicitor* (1987) 131 S.J. 1063.

21 N.B. however that the assumption that a barrister is a sole practitioner may be unduly formulaic in settings of chambers, where different barristers may share clerks, secretarial help, facsimile machines and common technology. Santow J. notes that the same obligation of confidence will arise in *Watson v. Watson* (Supreme Court of NSW, unreported May 25, 1998, quoted in Lee Aitken. A breach in the great walls of China: the "heavy burden" of confidentiality. *Law Society Journal* May 1999 vol. 37 i4 p. 40(4). *cf.* also *Laker Airways v. FLS*, *The Times*, May 21, 1999.

22 In his concurring reasons, Fletcher Moulton L.J. stated: "As a general rule the Court will not interfere unless there be a case where mischief is rightly anticipated" (at p. 841). Cozens-Hardy M.R. aff'd the authority of a court to invoke its special jurisdiction over an officer of the court to prevent him or her from acting where the court is satisfied that "... real mischief and real prejudice will in all human probability result if the solicitor is allowed to act" (at p. 835).

23 Buckley L.J. said, "There is no general rule that a solicitor who has acted in a particular matter for one party shall not under any circumstances subsequently act in that matter for his opponent. Whether he will be restrained from so acting or not depends on the particular circumstances" (at p. 835); *cf.* further, *Farmers Mutual Petroleums Ltd v. U.S. Smelting, Refining & Mining Co.* (1961), 28 D.L.R. (2d) 618 at p. 626, 34 W.W.R. 646 at p. 655 (Sask. C.A.). Rather than applying some absolute principle, Fletcher Moulton L.J. stated, "The Court must act in each case according to the circumstances of the case" (at p. 840).

> former [solicitor] acting for a client, but as a matter of substance, before we allow the special jurisdiction over solicitors to be invoked, we must be satisfied that real mischief and real prejudice will in all human probability result if the solicitor is allowed to act."

The test applied in *Rakusen* was known as the "probability of real mischief" test. Later cases[24] saw *Rakusen* as resting on the need to preserve confidentiality:

> "... the principle upon which it [the court] restrains a solicitor from acting against a former client is the prevention of abuse of the confidence reposed in the solicitor by his former client; accordingly, before an injunction can be obtained, the Court must be convinced of the existence of such confidence and of the probability of its being abused".

Canadian courts continued to follow the *Rakusen* test[25] until *Martin v. Gray*[26]. The same position applied in Australia.[27] The dissatisfaction with *Rakusen* started to manifest itself in the 1970s,[28] but culminated with *Martin v. Gray*. While the *Rakusen* test was not expressly disavowed until *Bolkiah* (below), it has however been regularly distinguished.[29] *Rakusen* was indeed a departure from prevailing 19th-century standards. The tougher test of that century was shown in *Little v. Kingswood Colliers Co.*, in which it was held that:

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24 *cf.* e.g., *Aldrich v. Struk* (1986), 1 B.C.L.R. (2d) 71, [1986] 3 W.W.R. 341, 26 D.L.R. (4th) 352, 12 C.P.C. (2d) 6, 12 C.P.R. (3d) 118 (S.C.).

25 [1991] 1 W.W.R. 705, 121 N.R. 1, 77 D.L.R. (4th) 249, 70 Man. R. (2d) 241, 48 C.P.C. (2d) 113, [1990] 3 S.C.R. 1235, revg [1989] 3 W.W.R. 653, 58 D.L.R. (4th) 67, 57 Man. R. (2d) 161 (C.A.) (also referred to as *MacDonald Estate v. Martin*).

26 *Sinclair v. Ridout* [1955] O.R. 167, [1955] 4 D.L.R. 468 at 483 (Ont. H.C.); *Farmers Mutual Petroleums Ltd v. U.S. Smelting, Refining & Mining Co.* (1961), 34 W.W.R. 646, 28 D.L.R. (2d) 618 (Sask. C.A.), affg (1960), 32 W.W.R. 556 (Sask. Q.B.); *Re Law Society of Manitoba and Giesbrecht* (1983), 2 D.L.R. (4th) 354, [1984] 1 W.W.R. 430, 24 Man. R. (2d) 228, *R. v. Burkinshaw* (1967), 60 D.L.R. (2d) 748 (Alta. S.C., T.D.); *Devco Properties Ltd v. Sunderland* (1977), C.P.C. 158, 2 Alta. L.R. (2d) 37, [1977] 2 W.W.R. 664 (Alta. S.C., T.D.); *Mercator Enterprises Ltd v. Mainland Investments Ltd* (1978), 6 C.P.C. 297, 29 N.S.R. (2d) 703 (S.C.T.D.); *Christo v. Bevan* (1982), 36 O.R. (2d) 797, 28 R.F.L. (2d) 197, 27 C.P.C. 209 (H.C.); *Schmeichel v. Saskatchewan Mining Development Corp.*, [1983] 3 W.W.R. 30, 22 Sask. R. 170 (Q.B.), aff'd [1983] 5 W.W.R. 151 (Sask. C.A.); and *International Electronics Corp. v. Woodside Developments Ltd*, unreported, British Columbia Supreme Court, June 26, 1985.

27 Contrast *D & J Constructions Pty Ltd v. Head* (1987), 9 N.S.W.L.R. 118 (S.C.) with *Mills v. Day Dawn Block Gold Mining Co Ltd* (1882) 1 Q.L.J. 62.

28 *Szebelledy v. Constitution Ins. Co. of Canada* (1985), 11 C.C.L.I. 140, 3 C.P.C. (2d) 170; *Falls v. Falls* (1979), 12 C.P.C. 270 (Ont. Co. Ct.); *Christo v. Bevan* (1982), 36 O.R. (2d) 797, 28 R.F.L. (2d) 197, 27 C.P.C. 209 (H.C.); J. (A.M.) *v.* J. (N.M.S.) (1986), 49 R.F.L. (2d) 367 (Ont. H.C.); *Schmeichel v. Saskatchewan Mining Development Corp.*, [1983] 3 W.W.R. 30 (Sask. Q.B.), affd [1983] 5 W.W.R. 151 (C.A.); *Fahr v. Fahr* [1985] 3 W.W.R. 261, 37 Sask. R. 56 (Q.B.); *Steed & Evans Ltd v. MacTavish* (1976), 12 O.R. (2d) 236, 68 D.L.R. (3d) 420 (H.C.); *Can. Southern Railway Co. v. Kingsmill*, Jennings (1978), 8 C.P.C. 117 (1978), 4 B.L.R. 257, 8 C.P.C. 117 (Ont. H.C.) *Sniderman v. Sniderman*, Ont. H.C., May 29, 1981; In *Kruse v. Wiesco Can. Ltd* (1987) 58 O.R. (2d) 729 (H.C.); *MTS International Services Inc. v. Warnat Corp.* (1980), 31 O.R. (2d) 221 (H.C.); *Lukic v. Urquhart* (1985), 50 O.R. (2d) 47, 15 D.L.R. (4th) 639 (C.A.), revg in part (1984), 47 O.R. (2d) 462, 45 C.P.C. 19, 11 D.L.R. (4th) 638 (H.C.) *Flynn Development Co. v. Central Trust Co.* (1985), 51 O.R. (2d) 57 (H.C.) and *Diamond v. Kaufman* (1984), 45 C.P.C. 23 (Ont. H.C.).

29 *cf.* e.g., the criticism of Gummow J. in *National Mutual Holdings Pty Ltd v. The Sentry Corporation* (1989) 22 FCR 209, *Re a Firm of Solicitors* [1992] 1 Q.B.159, *David Lee v. Coward Chance* [1991] Ch. 259 and *Re a Firm of Solicitors* [1997] Ch. 1. Parker L.J. in *Re a Firm of Solicitors* [1992] Q.B. 959 at 971 notes "save in a very special case such as *Rakusen*'s I doubt very much whether an impregnable wall can ever be created and I consider that it is only in very special cases that any attempt should be made to do so."

> "Where the second transaction flows after the first and from the nature of the dispute, is so connected with it ... the new client ought not to employ that particular solicitor in the transaction, and the solicitor ought not to accept the employment, and the case is then one in which at the instance of the former client, the solicitor ought upon general principles of equity be restrained from so acting".[30]

In *Rakusen,* Cozens-Hardy M.R. criticised the breadth of the principle enunciated in the *Little* case. In turn, Otton L.J. described the *Rakusen* facts in *Prince Bolkiah v. KPMG* as "peculiar."

Canada

In comparison with *Rakusen*, Canadian courts have moved over the last ten years to apply an increasingly rigorous standard. In part, this has been in the application of the law of fiduciary duties in this area,[31] together with a heightened public sensitivity to conflicts of interest in public arenas.[32] As a result, there has been significantly more conflicts jurisprudence in Canada over the last decade than in England, New Zealand, Australia, or even, proportionately, the United States.[33] It seems clear that Canada's proximity to the United States was a factor in encouraging an approach to conflicts that drew from American experience.[34] Indeed there is some evidence that in particular provinces, motions to disqualify on the basis of conflict of interest have become a routine weapon in the litigator's arsenal. The Ontario Lawyers' Professional Indemnity Company[35]

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30 (1882) 20 Ch. D 733 at 740.

31 *cf. Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, [1994] 9 W.W.R. 609, 97 B.C.L.R. (2d) 1, 22 C.C.L.T. (2d) 1, 117 D.L.R. (4th) 161; revg (1992), 6 C.P.C. (3d) 141, 65 B.C.L.R. (2d) 264, [1992] 4 W.W.R. 330, 45 E.T.R. 270, 5 B.L.R. (2d) 236; revg. (1989), 43 B.L.R. 122 (B.C.S.C.); and *International Corona Resources Ltd v. LAC Minerals Ltd* (1986), 53 O.R. (2d) 737, 32 B.L.R. 15, 39 R.P.R. 113, 25 D.L.R. (4th) 504, 9 C.P.R. (3d) 7 (H.C.J.); affd. (1987), 62 O.R. (2d) 1, 46 R.P.R. 109, 23 O.A.C. 263, 18 C.P.R. (3d) 263, 44 D.L.R. (4th) 592, 28 E.T.R. 245; affd [1989] 2 S.C.R. 574, 26 C.P.R. (3d) 97, 69 O.R. (2d) 287, 61 D.L.R. (4th) 14, 6 R.P.R. (2d) 1, 44 B.L.R. 1, 35 E.T.R. 1, 101 N.R. 239, 36 O.A.C. 57 (*sub nom. LAC Minerals Ltd v. International Corona Resources Ltd*).

32 Office of the Assistant Deputy Registrar General of Canada, *Conflict of Interest in Canada: a Federal, Provincial, and Territorial Perspective* (Ottawa: Supply and Services, 1992). Hon. W.D. Parker, *Commission of Inquiry into the Facts of Allegations of Conflict of Interest Concerning the Honourable Sinclair Stevens* (Ottawa: Supply and Services, 1987). *cf.* also R. McQueen, *Blind Trust: Inside the Sinclair Stevens Affair* (Toronto: Macmillan of Canada, 1987); J.B. Aird, *Aird Report on Conflict of Interest of Ontario Provincial Ministers* (Toronto: Legislative Assembly, 1987). For all the Canadian attention, legislating conflict of interest rules has been difficult and controversial: *cf.* M. Young, *Conflict of Interest: Selected Issues* (Ottawa: Library of Parliament, 1993).

33 For general U.S. discussion, see J.J. Wang, "Conflicts of Interest in Successive Representations: Protecting the Rights of Former Clients" (1998) 11:2 *Georgetown J. of Legal Ethics* 275; R. D. Donoghue, "Conflicts of Interest: Concurrent Representation" (1998) 11:2 Georgetown J. of Legal Ethics 319; *Conflicts of Interest in Legal Representation* (New York: Practising Law Institute, 1988); R. Alexander-Smith, *Conflicts of Interest: Multiple Representations* (Chicago: ABA, c. 1983). *cf.* also 7 Am. Jur. 2d Attorneys At Law, §198 "Where conflict of interest arises from former employment of attorney in firm"; and annotation: "Sufficiency of screening measures (Chinese wall) designed to prevent disqualification of law firm, member of which is disqualified for conflict of interest" 68 A.L.R. Fed. 687. The increasing rigour of the American tests is described in K.L. Penegar, "The Loss of Innocence: a Brief History of Law Firm Disqualification in the courts" (1995) *8 Georgetown J. of Legal Ethics* 831.

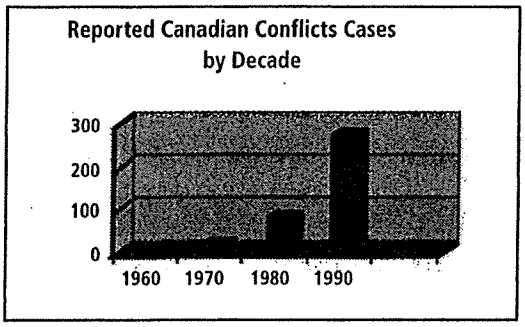
34 Compare the willingness of the Ontario Court of Appeal in *Re R and Speid* (1983), 43 O.R. (2d) 596, 37 C.R. (3d) 220, 3 D.L.R. (4th) 246, 8 C.C.C. (3d) 18 (C.A.) to consider cases such as *U.S.A. v. Dolan* 570 F. 2d. 1177 (1978), with the reluctance of Browne-Wilkinson V.C. in *David Lee v. Coward Chance* [1991] Ch. 259 to consider non-English case law.

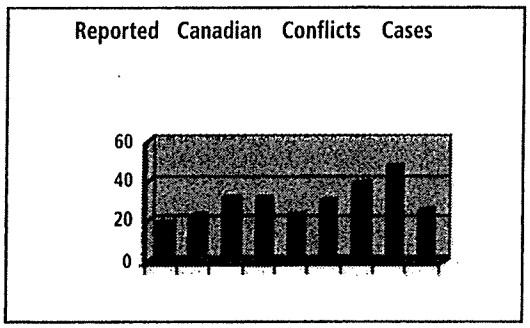
35 In K. Bell, *Managing Conflict of Interest Situations* (Toronto: Lawyers' Professional Indemnity Co., 1998).

notes that "conflicts which arise from acting for more than one party in a matter represent the Secondly most frequent cause of claims for professional liability against Ontario lawyers."

Martin v. Gray—the Case of the Migrating Junior

The revolution in Canadian conflicts law can best be shown in these charts highlighting the reported cases over the past 40 years. What they show is a slow build up in conflicts issues, and an explosion in litigation since 1991.





The case that started the revolution in Canada is *Martin v. Gray*.[36] There, the respondent, William Gray, administrator of the estate of John MacDonald, commenced an action for an accounting against the appellant, William Martin. Mr Martin retained A. Kerr Twaddle, Q.C., to represent him in the action. Kristin Dangerfield, a junior lawyer employed by Mr Twaddle, became actively involved with this file. She assisted in a number of tasks including the preparation of documents, preparation for, and conduct of, the examinations for discovery, and settlement negotiations with the solicitors for the respondent/administrator, the firm, Thompson, Dorfman, Sweatman. When her principal was appointed to the bench, she left the firm and joined another. Two years later, she and other members of that firm joined the firm representing the respondent/administrator, Thompson, Dorfman, Sweatman, but she did not become further involved with the matter. The litigation had been going on for some nine years and was drawing to its conclusion. One discovery was still required, after which the parties expected to be able to set the case down for trial. The appellant brought a motion for a declaration that the respondent's firm was ineligible to continue to act for the respondent, because of the junior's conflict of interest. She was on pregnancy leave and the firm undertook, if necessary, to have her work out of her home until the case was finished or cease work for the firm during that time. The respondent wished to retain the particular lawyer who had been her principal as his counsel. He and she filed affidavits showing that no breach of confidence had occurred. The appellant made an application to the court for a declaration that the law firm was ineligible to continue to act as solicitor of record for the respondent. The issue was the appropriate standard to apply to a law firm in dealing with the possibility of a conflict of interest.

At the Court of Queen's Bench, Hanssen J. initially granted the motion for removal. He applied the principles set out in *Morton v. Asper*,[37] where Jewers J. stated that a solicitor

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36 see fn.25.

37 (1987), 21 C.P.C. (2d) 95, 49 Man.R. (2d) 167, [1988] 1 W.W.R. 47 (Q.B.), affd 45 D.L.R. (4th) 374, 51 Man.R. (2d) 207, [1988] 2 W.W.R. 317 (C.A.). Interestingly, *Morton* and *Martin* arose independently from the same merger of Winnipeg firms.

should be restrained from continuing to act where there may reasonably be said to be an appearance of impropriety. He removed the solicitors because he believed that even if a party's former solicitors undertook not to divulge confidential information, they might appear to be tempted to do so, and the former client would believe they were being treated unfairly.

The Manitoba Court of Appeal divided in dismissing the appeal. The majority in the Court of Appeal considered a number of facts which were thought, either negated any imputation of knowledge from Dangerfield to Thompson, Dorfman, Sweatman,[38] or to outweigh any conflict of interest arising from the imputation of knowledge.[39] By allowing the possibility of mischief to be negated, the Manitoba Court of Appeal chose a middle road between the English test of "probability of mischief" and the American "possibility of mischief."

The Supreme Court of Canada was divided on the issues, with a minority, led by Cory J., arguing for tougher standards than the majority. Sopinka J. wrote for the majority stating that there were two issues. First, did the lawyer actually receive confidential information within a solicitor-client relationship, which is relevant to the matter at hand? Secondly, is there a risk (the test for which will be the objective test of a reasonable person) that the information will be used to prejudice the client?

The Strict Canadian Test

In Canada, any potential conflict must now be assessed against the tests set out by the Supreme Court of Canada in *Martin v. Gray*. In resolving this issue, the court will be concerned with at least three competing values. The first is the desire to maintain the high standards of the legal profession and the integrity of the justice system. Secondly, there is the countervailing value that litigants should not be deprived of their choice of counsel without good cause. Finally, there is the desirability of enabling reasonable mobility in the legal profession.

In determining whether there is a disqualifying conflict of interest, the court must determine whether the possibility exists of real mischief as a result of the challenged lawyer having entered into a solicitor-client relationship with the purported client. The term "mischief" refers to the misuse of confidential information by a lawyer against a former client. The issue of degree of likelihood arises out of the precept that justice must not only be done, but must manifestly be seen to be done. If, therefore, it reasonably appears that disclosure of confidential information might occur, the test for determining the presence of a disqualifying conflict of interest is satisfied.[40] In assessing the possibility of real mischief, the test must be that a reasonably informed person objectively assessing the situation would be satisfied that no use of confidential information would occur.[41] Once the client shows that a previous relationship existed[42]—and one which is sufficiently related to the retainer from which it is sought to remove the lawyer—the court should

38 The factors considered were: their oaths that they would not discuss the case, her relatively junior status, her lack of involvement with the file for the preceding 3 years, her current absence from the firm on maternity leave.

39 In this category was the fact that the litigation was at an advanced stage. If Thompson, Dorgman, Sweatman were removed as solicitors of record, Gray would be put to considerable expense and delay in retaining new counsel.

40 (1990) 77 D.L.R. (4th) 249 at 257 (S.C.C.).

41 *Martin v. Gray* (1990), 77 D.L.R. (4th) 249 at 267 (S.C.C.).

42 This is generally done through affidavit evidence. The rule of disqualification is not mechanically applied. Only when the moving party specifies the subject-matters, issues and causes of action presented in a former representation can the court determine if a substantial relationship test has been met.

infer that confidential information was imparted unless the lawyer satisfies the court that no relevant information was imparted. This will be a difficult burden to discharge,[43] since a simple affidavit contesting the client's assertions will generally not be accepted.[44] Lawyers who have relevant confidential information cannot act against their clients or former clients. If they did, the disqualification would be automatic.[45]

The answer is less clear with respect to the knowledge of partners or associates in a firm when the lawyer has had no direct involvement with the impugned matter or party. Some courts have applied the concept of imputed knowledge, based on the nature of partnership where each partner is the agent of every other partner. The doctrine of imputed knowledge assumes that the knowledge of one member of the firm is the knowledge of all (this assumption may in practice be unrealistic in the era of the multi-jurisdictional mega-firm).[46] However, there is a strong inference that lawyers who work together share confidences. A reasonable member of the public might well conclude that confidences are likely to be disclosed in every such case, despite institutional efforts to prevent it. The court should therefore draw this inference, unless satisfied on the basis of clear and convincing evidence, that all reasonable measures have been taken to ensure that no disclosure will occur by the "tainted lawyer to the member or members of the firm who are engaged against the former client." Such reasonable measures would include institutional mechanisms such as "Chinese walls" (see below) and "cones of silence".[47]

In *Martin v. Gray*, Sopinka J. challenged the Canadian legal profession to develop safeguards to set out clear tests for the adequacy of such mechanisms. He stated that the courts are unlikely to accept institutional mechanisms as being sufficient evidence of effective screening until the profession, through its governing bodies, has studied the matter and determined whether there are institutional guarantees that will satisfy the need to maintain confidence in the integrity of the profession.[48] The Canadian profession has now adopted such institutional guidelines, after study by a Taskforce of the Canadian Bar Association.[49]

The tests recognise that relationships end, and that it would be unreasonable to permanently prevent a lawyer from acting against a former client. A lawyer may act against a former client[50]—provided that a reasonable member of the public *who is in possession of the facts* would conclude that no authorised disclosure of confidential information had occurred or would occur and that the matter is unrelated to the former retainer. In one American case, the court looked at the degree of knowledge and involvement of the lawyer working on the file.[51]

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43 *Martin v. Gray* (1990), 77 D.L.R. (4th) 249 at 268 (S.C.C.).

44 For an example of this being done, see *Schiessle v. Stephens* 717 F. 2d 417 (C.A. 7, 1983).

45 *Martin v. Gray* (1990), 77 D.L.R. (4th) 249 at 268 (S.C.C.).

46 *ibid.*

47 *ibid.*, at 269 (S.C.C.).

48 *ibid.*, at 269 (S.C.C.).

49 The Federation of Law Societies of Canada Rule with respect to Conflicts of Interest Arising as a Result of Transfers Between Law Firms, which in turn largely derives from the Canadian Bar Association Taskforce Report, *Conflict of Interest Disqualification: Martin v. Gray and Screening Methods* (Ottawa: Canadian Bar Association, 1993).

50 Compare Law Society of England and Wales' *Guide to the Professional Conduct of Solicitors* (7th ed., 1996) c. 15.

51 Interestingly, the facts of the case resembled *Martin v. Gray*: not disqualified from representing a claimant when an associate of the firm had previously worked for the firm representing the defendant, even though the associate had worked on the case for both parties, where the associate never acquired any confidential information and handled only routine and perfunctory assignments as a junior associate in the defendant's firm: see *Nissan Motor Corp. v. Orozco*, (F.L.A.A.P.P.D. 4) 595 So. (2d) 240, 17 F.L.W.D. 638; review denied (Fla. Ca., 4th Dist., 1992) 605 So. (2d) 1265.

As the Manitoba Court of Appeal stated in *Mitchell v. Institute of Chartered Accountants (Manitoba)*,[52] the *Martin v. Gray* judgments "encourage a recognition of the importance of the appearance of things when legal conduct is measured". Thus, courts will hold law firms to stringent standards to ensure that no conflicts of interest exist. A client's right to counsel of choice is not an absolute right, but is tempered by the public interest in maintaining confidence in the administration of justice by having lawyers avoid the appearance of impropriety and by assuring that justice is not only done but is seen to be done.[53] Courts frequently justified their strictness[54] in the application of conflict standards by reference to the need to maintain the highest standards in the legal profession since this would directly affect the integrity of the administration of justice.[55]

At this stage in the evolution of Canadian law, the courts are continuing to develop a coherent set of norms to govern conflicts of interests.[56] The break with past jurisprudence was so marked in *Martin v. Gray* that such an exegesis is necessary. Indeed, the Supreme Court's decision itself recognised that detailed development of the law was necessary, beyond what might be accomplished in an individual case.[57] The rules currently in place to regulate transferring lawyers,[58] as well as reinvigorated consideration of traditional conflicts, are the results of their deliberations.[59]

Australia

Australia too has broken away from the traditional English mould in the 1990s. In a series of recent decisions, the Australian courts have moved to embrace the strict approach to assessing potential conflicts of interest in the same way as Canada.[60] In *Mallesons*

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52 [1994] 3 W.W.R. 704, 91 Man. R. (2d) 138 at 144, 22 Admin. L.R. (2d) 182 (Q.B.); affd [1994] 10 W.W.R. 768, 97 Man. R. (2d) 66, 79 W.A.C. 66 (C.A.).

53 Otherwise preference should be given to the party's choice of counsel: see *Planned Insurance Portfolios Co. v. Crown Life Insurance Co.* (1989), 58 D.L.R. (4th) 106, 68 O.R. (2d) 271, 36 C.P.C. (2d) 218 (H.C.J.).

54 It is refreshing at times to come across more realistic decisions such as the recent Ontario case where the court held that "[i]n matters related to conflicts of interest, as in matters of professional competence, what is required of solicitors is not omniscience or perfection, but knowledge and performance which are reasonable in the circumstances." *Canadian Newspapers Co. v. Kansa General Insurance Co.* (1991), 5 C.C.L.I. (2d) 66 at 104, [1991] I.L.R. 1–2751 (Ont. Gen. Div.); rev'd on other grounds (1996), 30 O.R. (3d) 257, 93 O.A.C. 26 (C.A.).

55 *Peel Condominium Corporation No. 395 v. Mahoney* (1996), 6 O.T.C. 315 (Gen. Div.).

56 The best discussion of the traditional rules, together with a useful taxonomy of conflict situations is found in P.M. Perell, *Conflicts of Interest in the Legal Profession* (Toronto: Butterworths, 1995).

57 Sopinka J. in *Martin v. Gray* noted that whatever institutional resolution might result from the various law society responses to that decision should not impair lawyer mobility. *cf.* [1990] 3 S.C.R. 1235 at 1243, 77 D.L.R. (4th) 249 at 254. While at one time, a lawyer might reasonably expect to spend his or her professional career within the same partnership or institution, this pattern does not prevail today. The rules should adapt to the changing realities of professional practice.

58 All provinces have adopted rules based upon The Federation of Law Societies of Canada Rule with Respect to Conflicts of Interest arising as a Result of Transfers between Law Firms, which in turn largely derive from the Canadian Bar Association Taskforce Report, *Conflict of Interest Disqualification: Martin v. Gray and Screening Methods* (Ottawa: Canadian Bar Association, 1993).

59 For more detail on how Canadian courts have applied the law following *Martin v. Gray*, see Simon Chester, "Conflicts of Interest", in Lundy et al. *Barristers and Solicitors in Practice* (Toronto: Butterworths, 1999)

60 For further discussion of the Australian tests, see C. Edmonds, "Trusting Lawyers with Confidences—Conflicting Realities (a review of the test and principles applying to lawyers' conflicts of interests)" (1998) 16 Australian Bar Rev. 222. *cf.* also *Carindale Country Club Estate Pty Ltd v. Astill* (1993), 115 A.L.R. 112, (1993) 42 F.C.R. 307 (Federal Court of Australia), where the court reviewed, but declined to follow, the Supreme Court of Canada's approach in *Martin v. Gray*, [1990] 3 S.C.R. 1235, [1991] 1 W.W.R. 705, 121 N.R. 1, 77 D.L.R. (4th) 249, 70 Man. R. (2d) 241, 48 C.P.C. (2d) 113; rev'g [1989] 3 W.W.R. 653, 58 D.L.R. (4th) 67, 57 Man. R. (2d) 161 (C.A.) (*sub nom. Martin v. Gray*). The Australian courts have consciously

Stephen Jaques v. KPMG Peat Marwick,[61] and later in *Carindale Country Club Estate Pty Ltd v. Astill and Others,*[62] the Supreme Court of Western Australia and the Federal Court of Australia fashioned a mode of analysis which closely resembles that prevailing in Canada.

Marwick Acting Against Former Clients—Mallesons Stephen Jaques v. KPMG Peat

For many years, the Australian accounting firm of KMG Hungerfords annually audited the financial accounts of Rothwells Ltd. However, after the release of Rothwells' financial statements, concerns had been raised that the corporation's yearly accounts failed to accurately disclose the financial position of the company. Hungerfords quickly became concerned that their involvement in the Rothwells audits could ultimately lead to the imposition of criminal charges. As a result, in September, 1988, the accounting firm sought the legal counsel of Mallesons Stephen Jaques about how Rothwells' accounts has been audited in the past. Over the course of the Hungerfords retainer, members of the firm provided Mallesons with confidential information about the advice sought. Upon completing a full analysis, Mallesons concluded that there was no evidence that Hungerfords had acted recklessly or was a party to the production of misleading accounts. Nonetheless, Mallesons advised that it would be prudent for the firm to notify their insurers that claims could possibly be made against the auditors, given Rothwells' precarious financial state.

Unfortunately, despite the conclusions reached by Mallesons, criminal charges were officially laid against the individual accountants involved in the Rothwells audits shortly after the termination of the Hungerfords retainer. Furthermore, in August 1990, Mallesons was also approached by the Commissioner of Corporate Affairs and was asked to aid in the prosecution of the criminal charges pending against the Hungerfords accountants. In response to such news, Hungerfords petitioned the Court for an interlocutory injunction restraining Mallesons from representing the Commissioner on the basis that such a retainer would raise an impermissible conflict of interest.

Grounds for Injunctive Action

In seeking a motion for equitable relief, Hungerfords cited two individual grounds in support of the need for the Court's intervention. First, Hungerfords argued that the information provided to Mallesons during their relationship was subject to legal privilege

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rejected the sort of American models which were so attractive to the Supreme Court of Canada in *Martin v. Gray*. *cf.* R. Teele, "The Necessary Reformulation of the Classic Fiduciary Duty to Avoid a Conflict of Interest or Duties" (1994) 22 Australian Bus. Law Rev. 99, noting that Australian Conflicts Rules are moving from strict prohibition to an analysis of actual breach of confidentiality or prejudice to another client. The Supreme Court of Canada gets a more sympathetic hearing in *Wan v. McDonald* (1992), 105 A.L.R. 473, (1992) 33 F.C.R. 491. Even in those cases Australian law in recent times has developed and applied a more stringent test than that laid down in *Rakusen v. Ellis, Munday and Clarke*, [1912] 1 Ch. 831. (*cf.*: *National Mutual Holdings Pty Ltd v. Sentry Corporation* (1989), 19 F.C.R. 155; *Mallesons Stephen Jaques v. K.P.M.G. Peat Marwick*, [1990] 4 W.A.R. 357; *Equiticorp Holdings Ltd v. Hawkins*, [1993] 2 N.Z.L.R. 737; *Re a firm of solicitors*, [1992] 1 Q.B. 959; L. Aitken, "Chinese walls and Conflicts of Interest" (1992) 18 *Monash University Law Rev* 91; P. Finn, "Conflicts of Interest and Professionals", Seminar on Professional Responsibility, University of Auckland, May 28–29, 1987 at 9; Reynolds, F.M.B. "Solicitors and Conflict of Duties" (1991) 107 L.Q.R. 536.). For further Australian discussion, see M. Gronow, "Chinese Walls and Conflicts of Interest" (1993) 67 *Law Institute Journal* 502–505; R. Nicholson, M. Darling, "Hitting the Chinese wall (Avoiding Conflict of Interest)" (1986) 60 Law Institute Journal 1338(4); and Ipp. J. "Lawyers' Duties to the Court", (1998) 114 L.Q.R. 63 at 93.

61 [1990] 4 W.A.R. 357.

62 (1993) 115 A.L.R. 112, 42 F.C.R. 307 (Fed. Ct.).

and that there was a serious risk that, in representing the Commissioner, Mallesons could disclose the information received, to the prejudice of their former client. In addition, Hungerfords further contended that there was a terminal conflict between the duty owed by Mallesons to their former client and the interests of the Commissioner in seeking the criminal conviction of the accountants responsible for the Rothwells audit.

Legal Basis for Equitable Relief

The Supreme Court of Western Australia referred to the relevant foreign jurisprudence in an attempt to gauge the applicable law governing conflicts of interest. In *Rakusen v. Ellis, Munday and Clarke,*[63] the English Court of Appeal held that the simple fact that a solicitor had represented a client in a specific matter will not, on its own, bar the solicitor from acting against the client in respect of the same matter in the future. Nonetheless, the Supreme Court quickly recognised that the freedom of a solicitor to act against a former client is restrained by a host of limitations. A solicitor may not represent a client if there is a risk that privileged information gathered during a former retainer may be disclosed. Similarly, an attorney may not represent a client on a specific matter when the client's interests conflict with those of a former client on the very same issue.

Not surprisingly, the Court readily recognised that the two bases for equitable intervention are closely intertwined. In fact, prior jurisprudence on the test to be applied in determining when an attorney will be prohibited from acting against a former client was found to be largely inconsistent. On the one hand, in many cases, the applicable test was framed in a rather rigid manner. Any relation that "might" lead to the risk of disclosing privileged information was seen as being unacceptable. By contrast, at the other extreme, many early cases framed the matter in statistical terms. Only in instances in which there was a "probability of mischief" occurring (*i.e.* privileged information being released) would a particular solicitor-client relationship be deemed unacceptable.

In an attempt to reconcile the two competing schools of thought, the Supreme Court looked to the general principles applicable to conflicts of interest involving fiduciaries. In *Re Van Laun, ex parte Chatterton,*[64] the Court commented that the lawyer-client relationship was one of the most important fiduciary relationships known to the law. Furthermore, in *Aberdeen Railway Co. v. Blaikie Bros,*[65] Lord Cranworth L.C. held:

> "It is a rule of universal application, that no one, having such duties to discharge, shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect".

The rationale behind such stringent requirements was said to rest upon the public interest in maintaining professional, workable relationships between an attorney and client, thereby enhancing the administration of justice by encouraging clients to make full and frank disclosures. In turn, the Supreme Court concluded that respect for the public interest requires that a solicitor be prohibited from acting for a former client in cases when:

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63 [1912] 1 Ch 831.
64 [1907] 2 KB 23.
65 (1854) 1 Macq 461.

"If, by a solicitor acting for a new client, there is a real and sensible possibility that his interest in advancing the case of the new client might conflict with his duty to keep information given to him by the former client confidential, or to refrain from using that information to the detriment of the former client."[66]

Privileged Information and Potential Prejudice

The Court concluded that the specific information disclosed to Mallesons during the course of the Hungerfords retainer was clearly relevant to the prosecution of the partners charged criminally in relation to the Rothwells audits. In fact, the Court found that the information gathered during the initial retainer had value that extended far beyond the simple content of the data collected. The Court observed that adversarial proceedings are highly-charged, dynamic events in which appearances are often as potent as hard facts. Hungerfords' knowledge that the solicitors representing their opposing party were privy to confidential information, directly relevant to the case at hand, afforded a notable psychological benefit to the Commissioner in his efforts to secure a conviction. Specifically, the Court held:

> "In a trial involving serious charges, lasting many months, covering many complex issues, there could be an incalculable and prejudicial effect upon the state of mind, and therefore the demeanour, of a defendant who knows that prosecuting counsel has been briefed by the very firm of solicitors whom he previously consulted to advise him on several of the very issues which form the subject matter of he prosecution. Such prejudice would be intangible, but, nevertheless, very real."[67]

Hence, the fact that the Commissioner might later have been able to collect the information gathered during the Hungerfords retainer from other sources, does not account for the intangible benefits which may form another basis for potential prejudice. Accordingly, Mallesons' representation of the Commissioner raises a clear conflict with the interests of the firm's former clients and, therefore, could not be permitted by law.

Imputed Knowledge of Partners and the Effectiveness of Chinese Walls

The Supreme Court was extremely critical of the potential effectiveness of so-called "Chinese walls". The Court characterised such devices as "relatively novel and potentially porous" and discounted the ability of any such barrier to offset the risk of disclosure of privileged information. More particularly, the Court held that "the way the law treats fiduciaries has the effect that undertakings of the kind offered ... do not avoid the consequences that ordinarily flow from a conflict of interest situation". Consequently, the Court firmly held that the use of Chinese walls does not constitute an effective means of avoiding possible conflicts of interest.

In addition, on the question of the imputed knowledge of partners within a single firm, the Court explicitly supported the proposition that, under normal circumstances, the knowledge of one partner will be imputed to other members of a partnership. The seemingly contrary holding in *Rakusen* was distinguished on the basis of the unique and segmented character of the partnership forged between the defendants in that prior precedent.

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66 *Mallesons Stephen Jaques v. KPMG Peat Marwick* (1990) 4 WAR 357, at pp. 362–3.
67 *ibid.*, at pp. 368.

The Supreme Court's ruling in *Mallesons* sent a strong signal to the bar that any substantive conflict between the interests of a former and potential client might serve to disqualify a lawyer from acting on the latter retainer. Yet, after the decision, there was some suggestion that the criminal nature of the impending proceedings served to heighten the Court's strict approach to the question of conflicts of interest. However, in *Carindale Country Club Pty Ltd v. Astill and Others*, the Federal Court of Australia dispelled all such rumours.

Carindale Country Club: the New Law Solidifies

In the late 1980s, Carindale Country Club Pty Ltd was formed as a development enterprise to build and market upscale residential properties with an "exclusive" quality and character. The claimants claimed that Carindale pledged that the properties on the estate would not be sold below a minimum price and that the size of all lots in the development would not fall below a minimum size of 300 square meters. The claimants purchased a residential unit on the strength of those statements and subsequently claimed that they sustained losses as a result of the erroneous character of Carindale's representations.

From the date Carindale was first established through January 1992, the corporation was represented by Mr Astill, who served as its legal counsel. Mr Astill performed a variety of duties including the drafting of the standard contract used by Carindale for the sale of lots in the estate. Mr Astill's association with Carindale also extended beyond the normal bounds of the traditional solicitor-client relationship. Mr Astill served as a director and the company secretary of Carindale for a short period and continued to maintain a financial interest in the corporation. Over the course of his relationship with Carindale, Mr Astill was privy to both general information relating to the pricing strategies adopted by the developer and specific information regarding the substandard size of selected units throughout the development.

In 1992, the claimants launched a claim for damages resulting from the purchases made on the basis of the developer's alleged misrepresentations. They elected to retain a partner of Mr Astill. The defendant, in response, sought to disqualify the claimants' counsel on the grounds that they might be in possession of confidential information gathered by Mr Astill over the course of his legal relationship with Carindale.

Privileged Information: the Controlling Tests

The Federal Court held that the starting point of the relevancy test lay in *Rakusen v. Ellis, Munday and Clarke*.[68] In *Rakusen*, the Court concluded that if it could be proven that "real mischief and real prejudice" would result from allowing a solicitor to act while in possession of confidential information obtained from a former client, the standing retainer would have to be dissolved. However, in light of the current complexities of modern legal practice, the Court reasoned that "modern developments in the law of confidentiality make the principles set out in *Rakusen* too narrow."

While the Court surveyed much of the international jurisprudence on point, it ultimately embraced the conservative approach enunciated by Ipp, J. in *Mallesons Stephen Jaques v.*

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[68] [1912] 1 Ch 831.

KPMG Peat Marwick.[69] In articulating a test based upon the *Mallesons' ratio*, the Court specifically held that:

> "A solicitor is liable to be restrained from acting for a new client against a former client if a reasonable observer, aware of the relevant facts, would think that there is a real, as opposed to a theoretical possibility that confidential information given to the solicitor by the former client might be used by the solicitor to advance the interests of a new client to the detriment of the old client."

The Federal Court justified the tightening of the *Rakusen* test on two notable grounds. First, Drummond J. stressed the importance of the public character of the work performed by a solicitor as an officer of the court. Lawyers play an integral role in the administration of justice and were unlike a private fiduciary. A solicitor's duty of loyalty was ever-present and was not extinguished by the simple termination of his retainer by a client. Secondly, the existence of legal professional privilege would directly conflict with any rule which readily allowed a solicitor who obtained confidential information from one client to later act for another client with adverse interests. Any attempt to permit an attorney to accept a new retainer under such circumstances would be tantamount to undermining the very essence of legal professional privilege.

The Court further concluded that once a solicitor was in possession of confidential information, it was not enough for the attorney simply to pledge that such information would not be used to advance their new client's cause. Drummond J. placed great weight upon the rule articulated in *Spector v. Ageda*,[70]

> "A solicitor must put at his client's disposal not only his skill but also his knowledge ... and if he is unwilling to reveal his knowledge to his client, he should not act for him. What he cannot do is to act for the client and at the same time withhold from him any relevant knowledge that he has."

Drummond J. further noted that even a solicitor with the best of intentions, who is determined not to make use of information gathered from another client, may still subconsciously draw upon such confidential information to the disadvantage of the former client.

Upon developing the tests necessary to ascertain the presence of an impermissible conflict of interest, the Federal Court quickly concluded that the specific information regarding the substandard lot sizes of many units, to which Mr Astill was privy, raised the spectre of a serious conflict of interest. The possession of such information in the hands of Mr Astill was said to give rise to the perception in a "knowledgeable observer" that there was a real possibility that the confidential information concerning the true minimum lot sizes on the estate could, "consciously or unconsciously", be used to the detriment of Carindale. As a result, the Court prohibited Mr Astill or his partners from acting against Carindale in the litigation.

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69 [1991] 4 WAR 357. *cf.* also Ipp. J's extra judicial writing in *"Lawyers Duties to the Court"*, (1998) 114 LQR 63.

70 [1973] Ch 30.

New Zealand

Moving across the Tasman Sea, the New Zealand profession has conflict rules that are in form similar to the rules governing lawyers in other common law jurisdictions.[71] However, the New Zealand courts have declined to apply those rules with the same rigour as other Commonwealth courts,[72] and have constructed an approach to conflicts that has had some attraction in smaller markets for legal services like South Africa.

The judiciary in New Zealand have adopted a far less rigid approach to assessing the breadth and permissibility of potential conflicts of interest within the legal profession. Buoyed by a strong desire to incorporate practical considerations into any controlling conflict of interest test, the New Zealand Courts have fashioned a flexible qualitative standard, capable of permitting the existence of legal retainers that may only be subject to small, benign conflicts. In *Russell McVeagh Bartleet and Co. v. Tower Corporation*,[73] the Court of Appeal of New Zealand resisted the temptation to disqualify any legal counsel whose current representation of a new party might possibly conflict with the interests of a past client.

In September, 1995, the Tower Corporation became entangled in a complicated taxation dispute with the Inland Revenue Department over an alleged liability of over $30 million. In need of specialised legal counsel, Tower approached a partner at the national firm of Russell McVeagh Bartleet and Co. for additional legal counsel. Russell McVeagh is one of the largest firms in New Zealand, with offices throughout the country and principal establishments in both Auckland and Wellington, 64 partners and a total of 190 fee-earning personnel. Mr Heenan, the partner assigned to manage the Tower file, worked out of the firm's Wellington office and represented Tower in the tax dispute until its ultimate resolution in April, 1997.

Yet, despite Russell McVeagh's continuing representation of Tower, the firm proceeded to consider additional retainers from clients whose interests potentially conflicted with those of their original client. In May 1996, a partner in the Auckland office of the firm was approached by SBC Warburg Dillon Read to give advice on a strategy whereby Tower could be acquired and demutualised. The partner was aware of Mr Heenan's involvement with Tower and the two partners discussed the possibility of the firm jointly representing the two parties, albeit with different staff assigned to each file. Mr Heenan saw no reason why both parties could not be represented as he had only provided Tower with specialised tax advice and he believed that he was not in possession of any information which was likely to be of any value to SBC in its aim to seize control of Tower. Accordingly, Russell McVeagh chose to accept the SBC retainer and elected not to inform Tower of the aims of its new client.

In September 1997, 16 months after the acceptance of the SBC retainer, Tower was presented with the takeover proposal spearheaded by SBC. Not surprisingly, Tower rejected the proposal and hostilities broke out between the parties. Tower took strong exception to Russell McVeagh's simultaneous representation of both parties and

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71 *cf.* M.R. Dean and C.F. Finlayson, "Conflicts of Interest: When May a Lawyer Act against a Former Client" [1990] N.Z.L.J. 43. For more recent discussion, see "An Editorial, Conflict of Interest, Discussing *Kooky Garments Ltd v. Charlton*, [1994] 1 N.Z.L.R. 587 (C.A.) and *Russell McVeagh v. Tower Corp.* – No. 86/98 (N.Z.C.A. Aug. 25, 1998)" in N.Z.L.J., Sept 1998 at 305(1).

72 *cf.* David Coull, *Typhoid Mary's: the Ethical Dilemma of Lawyers Who Switch Firms* (Victoria University Law Review).

73 [1998] 3 N.Z.L.R. 641 (C.A.).

immediately sought injunctive relief to prevent the firm from representing the SBC interests in their attempt to take control of Tower. In the eyes of Tower's management, over the course of the prior two years, Russell McVeagh had obtained both general information regarding the manner in which it conducted business, and specific information relating to its financial performance, which would be highly relevant to a party wishing to seek control of the organisation.

Conflicts in a Smaller Market for Legal Services

In considering Tower's application for equitable relief, Gallen J. of the High Court applied an extremely restrictive test for assessing the permissibility of a potential conflict of interest between parties represented by the same firm. Specifically, Gallen J. enunciated the following tests of disqualification:

> "In the case of a direct conflict the courts will disqualify persons involved in that conflict from participation. In all other cases the courts will accept that it is inappropriate for a legal practitioner to have an involvement in proceedings where there is a reasonable perception that a reasonable person apprised of the relevant facts, would perceive a risk that the participation of the person concerned might result in a conflict of interests. If the disclosure advertently or inadvertently of confidential information of sufficient relevance to and significance for the matters in issue make it undesirable in the interests of justice that the person concerned should continue to participate, the courts will also intervene."[74]

While Gallen, J. did not find that the general information, obtained by Russell McVeagh during the course of its retainer, was damaging enough to warrant injunctive relief, the High Court judge did find that the financial information collected in preparing for the taxation dispute was sufficiently sensitive to be of value to a potential suitor.

Moreover, although the High Court judge ruled that the knowledge of one member of a firm will not automatically be imputed to another member of the same firm, the Court held that a reasonable member of the public, apprised of all of the facts of the case, would perceive a risk that the sensitive information collected from Tower could become available to the members of the firm representing the SBC-lead initiative. The High Court was sceptical of the protection afforded by Chinese walls and held that such arrangements would only be acceptable to the courts under exceptional circumstances "where there is ample evidence to indicate not only that no possibility of leakage has already occurred, but that it could not occur in the future".[75]

The Court further dismissed the contention that practical considerations warranted the Court's denial of injunctive relief. Despite the fact that relatively few large law firms practice in New Zealand there was ample evidence indicating that the SBC group could have obtained competent legal counsel from other sources. Consequently, the Court ruled that the information barriers used were not strong enough to dispel the potential public perception that a conflict of interest was present.

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74 Unreported judgment of Gallen J. (CP 347/97) at p.23 as quoted by Henry J. in *Russell McVeagh McKenzie Bartleet & Co v. Tower Corporation* [1998] 3 N.Z.L.R. 641at 645 (C.A.).

75 *ibid.*, at p.28 as quoted by Henry J. in *Russell McVeagh McKenzie Bartleet & Co v. Tower Corporation* [1998] 3 N.Z.L.R. 641at 646 (C.A.).

Court of Appeal's Pragmatic Approach to Conflicts

Contrary to the strict approach adopted by the High Court, the New Zealand Court of Appeal embraced a far more liberal and pragmatic view of the potential legal problems posed by conflicts of interest. In constructing an appropriate test, the Court of Appeal reasoned that the rationale for intervention must not be predicated upon the desire to prevent some form of disloyalty or impropriety. Rather, the justification for granting injunctive relief must rest on principle; most notably, the desire to protect the confidential information provided over the course of a lawyer-client relationship. The Court took due notice of the many foreign authorities. The English Court of Appeal's judgment in *Rakusen*[76] was cited as the logical "starting point" for any conflict of interest analysis. The *Rakusen* decision clearly established the need to seek out the presence of a "real risk" to the interests of a client, to whom a duty is owed, prior to considering the imposition of equitable remedies. Henry J.A., speaking for the majority of the New Zealand Court of Appeal, further noted that in the years following *Rakusen*, courts in other Commonwealth jurisdictions applied far more stringent tests when confronted with possible conflicts of interest. In both Australia and Canada, the courts had established a series of presumptions which effectively served to prevent attorneys from accepting new retainers when there was any risk that confidential information secured under privilege from a client in the past may be used to that client's prejudice.

However, in contrast to the bright-line tests advocated by many other Commonwealth courts, Henry J.A. elected to develop an approach that was more sensitive to the unique characteristics of a given case. The Court explicitly rejected the notion of utilising any form of rebuttable or irrebuttable presumption as a guide to ascertaining when a conflict of interest may be present. Instead, the majority reasoned that any conflict analysis must consist of two independent steps. First, it is necessary to identify the duties owed by the solicitor to the respective clients. Secondly, upon examining the obligations owing to each client, it must be determined whether such independent duties are likely to come into conflict. Accordingly, Henry J.A. ruled that it becomes necessary to ask the following three questions prior in order to determine whether the confidential information held by a solicitor will raise a conflict of interest:[77]

1. Is confidential information held which, if disclosed, is likely to affect the former client's interests adversely?
2. Under the particular factual circumstances, viewed objectively, is there a real or appreciable risk that the confidential information will be disclosed?
3. If the first two questions are answered in the affirmative, recognising the significance and importance of the special fiduciary relationship which gives rise to the duty of protection, should the court's discretionary powers to disqualify a particular attorney from continuing to represent a particular client be exercised?

In applying each branch of the test, the Court recognised that such considerations would frequently overlap. It held that the proper performance of any conflict of interest analysis requires a balancing exercise which is both "mindful of the interests of all directly

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[76] [1912] 1 Ch 831.

[77] *Russell McVeagh McKenzie Bartleet & Co v. Tower Corporation* [1998] 3 N.Z.L.R. 641at 651 (C.A.).

concerned, but does not undermine the integrity of the fiduciary relationship".[78] A number of factors, ranging from the nature and sensitivity of the information at issue to the adverse effect associated with the possible disclosure of the confidential information, were raised as potential considerations which could tilt the outcome of any dispute.

The Court was able to apply decisively the newly-minted conflict of interest test in the case at hand. Henry J.A. was quick to stress the requirement that for there to be a conflict, there must be some effective link between the nature of any past retainer and the actions sought to be undertaken by a new client. Equitable intervention by the courts would not be warranted in cases in which a client with potentially adverse interests had been represented in the past, but no pertinent confidential information had been received during the course of that prior retainer. In the present circumstances, the Court ruled that there was nothing incompatible between the interests of Tower which were concerned solely with the tax dispute and the interests of the group led by SBC which were focused upon the takeover initiative.

As for the information gathered during the Tower retainer, the Court again held that, in the present context, there was no "real risk" that confidential information relating to Tower could be disclosed to a client with adverse interests. Upon analysing the information provided to Russell McVeagh, Henry J.A. dismissed the assertion that any of the information received was confidential in character and carried a risk of being disseminated to parties with contrary interests. The Court ruled that the insights regarding the nature of Tower's managerial operations were so general as to be of "little real significance" to the SBC-led action. Similarly, it further noted that all documentation containing the specific financial data collected while litigating the Tower tax dispute had been delivered to the High Court and was subject to a suppression order. Given the unlikelihood that the staff attorneys assigned to the tax dispute would be able to recall the quantum and relative significance of such data, the risk of disclosure of any specific information was also extremely remote. As a result, the Court comfortably concluded that there was no "real risk" that material, confidential information, could be disclosed to the parties associated with SBC.

In rendering their decision, the majority also provided a qualified endorsement of the potential effectiveness of Chinese walls in preventing information flows that may raise a conflict of interest. Henry J.A. commented:

> "Although the concepts of Chinese walls and cones of silence leave much to be desired, and cannot be allowed to obscure the realities of life and the ordinary behaviour and incidents of relationships where individuals practice together in a firm, internal control measures may nevertheless in some circumstances be both appropriate and sufficient to ensure protection."[79]

The Court also drew specific attention to the unique characteristics of the legal profession in New Zealand and their influence on any conflict of interest analysis. The majority commented that the availability of legal counsel "should not be unduly restricted by court-imposed control or sanctions which are not required in the overall interests of justice to protect individual rights".[80]

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78 *ibid.*, at 651 (C.A.).
79 *ibid.*, at 654–655 (C.A.).
80 *ibid.*, at 655 (C.A.).

Blanchard J.A. elected to write a separate minority ruling which largely elaborated upon the judgment rendered by the majority of the Court. Nevertheless, Blanchard J.A. did strive to highlight two additional points which, in his eyes, were crucial to the disposition of the appeal. First and arguably foremost, Blanchard J.A. was extremely sceptical of Tower's motives of in applying for injunctive relief. In his view, the Court must remain acutely cognisant of tactical objections made by parties in pursuance of ulterior objectives. The justice ruling in the minority also chose to present a slight reformulation of the conflict of interest test constructed by the majority. Interestingly, Blanchard J.A. embraced the civil "balance of probabilities" standard and fashioned an alternative controlling test on that basis. Specifically, Blanchard J.A. held that:

> "If the Court finds that the law firm is by reason of its retainer for the first client privy to confidential information the disclosure of which to the secondly client has the potential to be detrimental, it will infer that disclosure has actually occurred or is likely to occur unless on a balance of probabilities the law firm negatives that concern."[81]

The Commonwealth Consensus Asserts Itself: the Dissenting Judgment

In dissenting judgment, Thomas J.A. departed dramatically from the flexible, permissive approach advocated by the remainder of the Court and argued for a conflicts test which more closely approximated that in the rest of the common law world.

Thomas J.A. took exception to both the manner in which the majority articulated a controlling test and the degree to which they integrated supplementary considerations into their analysis. In his dissent, Thomas J.A. dismissed the arguments that (a) the SBC group could not obtain alternative competent legal counsel, citing the presence of several other large firms throughout New Zealand; and (b) the narrow character of the advice provided to Tower could not be classified as relevant to the SBC takeover initiative. The appellate judge further condemned the Court's permissive approach to examining potential conflicts of interest. In his estimation, the identification of any risk is itself worthy of judicial intervention and the use of adjectives such as "real" or "appreciable" to qualify the applicable test serves only to expose past legal clients to possible harm. Thomas J.A. went even further to suggest that the information provided by a client need not even be confidential to be protected from disclosure. The dissenting justice held that the duty of loyalty owed to a client barred an attorney from creating a risk that any information, which may be considered material to a new client, be disclosed during the course of the added retainer.

Thomas J.A. also reiterated concern over the effectiveness of Chinese walls and endorsed the cautious approach adopted by the courts in other jurisdictions. The appellate judge was quick to stress that Chinese walls are "inherently insecure and prone to leak" and should only be used in "exceptional circumstances where there is an overriding and compelling need".[82]

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81 *ibid.*, at 678 (C.A.).

82 By Thomas J.A., *ibid.*, at 670 (C.A.).

Russell McVeagh in Context

The Court of Appeal's judgment in *Russell McVeagh* stands in stark contrast to the rigid and absolute decrees enunciated by most other Western courts. The flexible three-prong test, coupled with a willingness to consider mitigating external factors, runs counter to the principled formulae developed in Canada, England, Australia and the United States. While many commentators have suggested that New Zealand's shallow pool of large legal firms compelled the Court of Appeal to adopt a permissive standard, it remains to be seen whether such a loose test will ultimately succumb to the pressure to conform with the emerging international consensus on the proper treatment of conflicts.

England

The Saga of Prince Jefri Bolkiah v. KPMG

Accountants used to joke that lawyers had conflicts of interest, but they had industry experience. Knowledge that might disqualify lawyers simply made Chartered Accountants more expert at their work. In a case that has thrown the European accounting profession into a tizzy, the House of Lords extended conflict of interest rules for accountants and toughened them for lawyers.

The case of *Prince Jefri Bolkiah v. KPMG*[83] contained all the elements of a high-stake drama, combining crime, intrigue, wealth and deception into a single case which may ultimately alter the manner in which large professional service firms conduct business on the international stage.

The story starts in Brunei, an oil-rich sultanate on the island of Borneo.[84] The world's richest man, the Sultan runs the country, with his three brothers. Each of them has built up staggering fortunes. Brother Jefri acted as Brunei's finance minister and ran the country's crown jewel, the Brunei Investment Agency (the BIA). Prince Jelfri's high-rolling lifestyle involved conspicuous consumption (600 cars), sexual excess (he is being sued for $90M by an ex-Miss America) and controversial business deals (he recently settled the largest personal action in British legal history).

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[83] [1999] 2 A.C. 222 (H.L.) E.; for the rich commentary on *Bolkiah* see Chambers, Jones and Wilkins, Conflicts of Interest (see fn. 2), at p.27. Andrew D. Mitchell. "Chinese Walls in Brunei: Prince Jefri Bolkiah *v.* KPMG. *University of New South Wales Law Journal*", winter 1999 v22 i1 p. 243–255; Tony Levitt, Philip Hartley, "Chinese whispers?" S.J. Jan 29, 1999 v143 i4 p. 80(2); Barry A.K. Rider, "Chinese walls and pragmatism", *The Company Lawyer* Feb 1999 v20 i2 p. 61–62; Janine Griffiths-Baker "Further cracks in Chinese walls", *New Law Journal* Feb 5, 1999 v149 i6874 p. 162(3); "Price Jefri's privilege", *New Law Journal* April 30, 1999 vol. 149 i6886 p. 651(3); "Rakesh Kapila, The truth about Chinese walls", *International Commercial Litigation* November 1998 25 (note that this case comment concerns the High Court decision); "John Kleefeld Prince Jefri Bolkiah v. KPMG: House of Lords holds accountants to solicitors' duty of confidentiality in 'Chinese walls' case", *The Advocate* March 1999 vol. 57 i2 p. 223(12); Lee Aitken, "A breach in the great walls of China: the 'heavy burden' of confidentiality", L.S.J. May 1999 vol. 37 i4 p. 40(4). Jim Kelly, "Opinion: A conflict within these walls?", *Accounting & Business*, October 1998, p. 12; Tony Bingham, "Chinese whispers" at http://www.tonybingham.co.uk/column/1999/19990122.htm. Allen & Overy, Bulletin, "Chinese walls, February 1999; "Confidentiality and Chinese walls: have they sprung a leak?", http://www.phillipsfox.com.au/publications/puf99005.htm. Breon Gravatt and Clive Elliot, "Chinese walls—where to now?" http://www.nz-lawsoc.org.nz/lawtalk/gavett.htm.

[84] For the first extensive discussion of the business affairs of Prince Jefri Bolkiah, see R. Behar, *The Fairy Tale's Over for the Kingdom of Brunei*, in *Fortune*, February 1, 1999.

KPMG, a large, multi-national partnership, provides a range of financial services to a broad array of clients, both large and small. The firm employs almost 5,000 staff in their London office alone and maintains a significant commercial presence around the globe. In 1983, the Government of Brunei asked KPMG to undertake an annual audit of the core funds of a new financial organisation, the BIA, that managed the General Reserve Fund of the Government.

Prince Jefri served as chairman of the BIA from 1983 to March of 1998, during which period he maintained a close relationship with the Sultan. In the middle of 1996, Prince Jefri also retained KPMG to undertake a sizeable financial investigation on his own behalf in connection with a large legal suit in which the Prince was directly involved. After an initial period of delay, the personal investigation was cloaked in a dark veil of confidentiality and was identified by the code name "Project Lucy". Project Lucy required the London branch of KPMG's forensic accounting department to provide a wide range of litigation support services to the Prince, including many tasks normally undertaken by lawyers. The description of the activities carried out by the accountants was extraordinary, since it included fact investigation, witness interviews (both in the presence of and without lawyers), document searches, conference participation, subpoena (WRIT?) drafting and the preparation of cross-examination. In the course of discharging the duties associated with Project Lucy, the KPMG team became fully familiar with much confidential information relating to the identity of the Prince's assets, their location, and the legal structure of the vehicles used to maintain his holdings. However, by March 1998, KPMG's involvement in Project Lucy was cut back, to be finally stopped on May 14, 1998.

Apart from Prince Jefri's personal litigation, it was widely noted that in the years following the initial formation of the BIA, large transfers of capital were frequently diverted from the core funds of the General Reserve Fund. KPMG was required to rely upon an annual representation from the Board of Directors of the BIA that such transfers were legitimate and constituted a bona fide execution of the Agency's mandate. As a consequence, the destination and use of these special transfers were excluded from the scope of KPMG's audits.

In June 1998, the Government of Brunei became suspicious of the legitimacy of the investment activities undertaken by the BIA. It appointed a finance taskforce to conduct a full investigation. Shortly afterwards, KPMG was contacted to assist the Taskforce in determining the position of the agency's core funds preparing a summary of the movement of the funds since the BIA's inception. All of the information required to complete the initial investigatory project was capable of being extracted from the audited accounts prepared by KPMG and the auditor's working papers. Yet, on July 2, 1998, KPMG was again contacted and asked to assist in further investigations aimed at determining the destination and present location of the special transfers.

Although KPMG's initial investigation could legitimately be seen as a simple extension of its existing auditing responsibilities, the newly-broadened mandate raised the real possibility of a conflict arising between the new retainer and the firm's past representation of Prince Jefri. KPMG did not dispute the fact that the interests of the expanded investigation might run contrary to those of Prince Jefri. Moreover, KPMG also conceded that certain confidential information obtained by the Project Lucy team might be relevant to the newly expanded initiative. Nonetheless, despite the warning flags, KPMG ultimately concluded that no substantive conflict of interest existed since the firm had ceased to act for Prince Jefri more than two months before the initiation of the new retainer. It felt it no longer maintained a client relationship with the Sultan's youngest brother. Hence, it was decided that KPMG could justifiably accept the new retainer,

though special systems were needed to guard against the use or disclosure of confidential information relating to the holdings of Prince Jefri which was gathered under prior confidences. KPMG did not elect to inform Prince Jefri of their new assignment, nor did they attempt to obtain his consent to their undertaking of the project. At that point, Project Gemma was born.

Project Gemma started in earnest on July 8, 1998, and attention was immediately turned to constructing an information barrier (*i.e.* "a Chinese wall") capable of preventing the confidential information possessed by KPMG regarding Prince Jefri from reaching the members of Project Gemma. Two primary blocks were used to build the Chinese wall. First, no one who possessed information relating to Project Lucy was permitted to work with the new investigative group. Secondly, the staff selection process was structured so that those privy to confidential information relating to the Prince's affairs would not be permitted to infiltrate the team. All members of the new project team were required to swear affidavits attesting to their lack of knowledge of Prince Jefri's past dealings with the firm. All documents and material relating to the Project were physically and electronically separated from the firm's general population.

Nevertheless, upon learning of KPMG's activities on behalf of the finance taskforce, Prince Jefri immediately contested the legality of KPMG's new retainer, particularly in light of the firm's past representation of his interests and the significant amount of confidential information they received as a result of their involvement in Project Lucy. Although the issue is not discussed in the House of Lords judgment, it appears from the Court of Appeal judgment in *Bolkiah v. KPMG*, that KPMG had initially "stonewalled"[85] in responding to the accusations of conflict of interest. Prince Jefri asked the High Court for an injunction restraining KPMG from further participating in Project Gemma and, on September 15, 1998, Pumfrey J. rendered a decision in his favour.

The Courts Learn from the Commonwealth

The Principled High Court

In advance of the High Court hearing, KPMG volunteered a pledge that it would not use or disclose any information regarding Prince Jefri's affairs acquired during the life of Project Lucy. The BIA expressly recognised that it was not entitled to expect KPMG to make use of such confidential sources and that it would be impossible to obtain a replacement for KPMG in a timely and cost-effective manner. However, despite his conclusion that KPMG had taken all the steps necessary to minimise or avoid the disclosure of confidential information, Pumfrey J. ruled that he was required to assess such protective measures with a "very critical eye." He held that "the intrinsic difficulty with Chinese walls was that, while they were well adapted to deal with foreseeable or deliberate disclosure of information, they were not well adapted to deal with disclosure which was accidental, inadvertent or negligent". In the final analysis, Pumfrey J. concluded that no former client should be exposed to the risk of the disadvantageous disclosure of confidential information, absent compelling countervailing factors. Given the potential difficulties associated with KPMG's prior involvement with Prince Jefri, he granted an injunction restraining KPMG from acting on behalf of the Government of Brunei.

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85 Otton, L.J. in *Bolkiah* described KPMG's behaviour as having "obfuscated" when accused. As the Court of Appeal noted, there was a period of over two weeks when no attempt had been made to erect a Chinese wall.

The Pragmatic Court of Appeal

By contrast to the strict ruling of Pumfrey J., the Court of Appeal did not accept that information barriers were incapable of removing the real risk of disclosure of confidential information. Lord Woolf M.R., speaking for the majority, elected to adopt the pragmatic, analytical approach embraced by the New Zealand Court of Appeal in *Russell McVeagh McKenzie Bartleet & Co. v. Tower Corporation.*[86] Lord Woolf M.R. identified three questions to determine whether a conflict of interest may bar a professional service provider from representing a client whose interests are adverse to those of a former client—

1. Is there confidential information which if disclosed is likely to affect the former clients' interests adversely?
2. Is there a real or appreciable risk that the confidential information will be disclosed?
3. Does the nature and importance of the former fiduciary relationship mean that the confidential information should be protected by the court exercising its discretion and intervening?

The Court concluded that the steps taken by KPMG would ensure that the integrity and confidentiality of the information gathered during the course of Project Lucy remained intact. More particularly, Lord Woolf M.R. held that KPMG's duty need only be restricted to making "reasonable efforts to protect Prince Jefri's confidential information and that it was not reasonable for Prince Jefri to require KPMG to be dismissed unless he 'really would suffer serious damage.' "

The House of Lords: The Reformation Commences ...

Before *Bolkiah*, the controlling English authority on conflicts of interest was the Court of Appeal's previously discussed decision in *Rakusen v. Ellis, Munday & Clarke.*[87] As will be recalled, the Court held in *Rakusen* that solicitors who were nominally partners, yet never collaborated on the substantive management of client files, were not precluded from representing clients whose interests were adverse to those of a past client of the firm. The case has been widely held to stand as authority for two distinct propositions of law:

1. There is no absolute rule of law that a solicitor may not act in litigation against a former client; and
2. A solicitor may be restrained from acting in a dispute against a former client if such a limitation is necessary to avoid a significant risk of the disclosure or misuse of confidential information belonging to the former client.

While *Rakusen* dealt with the regulation of a solicitor/client relationship, KPMG readily conceded that an accountant who performs litigation services such as Project Lucy must be treated in the same manner as a solicitor.

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86 [1998] 3 N.Z.L.R. 641 (C.A.)
87 [1912] 1 Ch. 831

The House of Lords moved away from the looser presumptions of the *Rakusen* test in *Prince Bolkiah.*[88] As Otton L.J. noted in *Prince Jefri Bolkiah v. KPMG,*[89] the facts in *Rakusen*[90] were somewhat unusual,[91] and the partnership worked in ways that would strike a contemporary observer as more like two sole practitioners sharing some common facilities. Yet *Rakusen* became for 80 years the starting point for conflicts analysis.

Bolkiah itself is an unusual case, because of the provocative behaviour of KPMG in moving to act so aggressively against a former client. The contrast between Lord Millett's speech and the judgment of Woolf M.R. is quite remarkable in the assessment of KPMG's behaviour and the tone of censure that resonates through Lord Millett's description of the underlying facts. The Court said that the test has placed an unjust burden on the former client, rendered him vulnerable to a possible and avoidable risk to which he had not consented and did not give him enough reassurance that his confidentiality would be protected. The House of Lords held that the court's intervention in cases in which a conflict of interest may be present is not founded upon the need to eliminate any perception of possible impropriety, but rather on the requirement that information provided under confidence may not be disclosed, especially to a client's potential detriment. Upon the termination of a retainer, the only duty to a former client that persists is the obligation to preserve the confidentiality of information gathered during the course of the past representation. Hence, to be able to establish that an injunction ought to be issued restraining a former solicitor from acting for another client, claimants must prove that:

(i) the solicitor is in possession of information which is confidential to them and they have not consented to its disclosure; and

(ii) the information is or may be relevant to the new matter in which the interest of another client is or may be adverse to their own.

The burden of proof, although not particularly onerous, rests upon the claimant. Moreover, the House of Lords reasoned that, given the underlying basis upon which the court may exercise its equitable jurisdiction, *there is no cause to attribute or deem the knowledge of one partner automatically to be held by his fellow partners.* Such determinations are ultimately questions of fact which must be extracted from the circumstances of a case.

The Solicitor's Duty to Former Clients

The House of Lords held that the duty to preserve client confidentiality is both unqualified and absolute. A solicitor, or any professional engaged in providing litigation support services, must keep all personal information gathered during its practice confidential, irrespective of the cost or sacrifice involved in maintaining such confidences. In fact, the duty of confidentiality extends far beyond the simple obligation not to disclose information to third parties. Lord Millet, speaking on behalf of the majority, reasoned:

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88 *Prince Jefri Bolkiah v. KPMG* [1999] 2 A.C. 222 (H.L.) E.

89 *Prince Jefri Bolkiah v. KPMG,* Royal Courts of Justice (Civil) Court of Appeal, London, Oct 19, 1998, Case No. RC2 98/7087/3 CHANI 98/1196/3, rev'd on appeal—see fn 88.

90 [1912] 1 Ch. 831 (C.A.)

91 Otton L.J.'s epithet is "peculiar".

> "It is a duty not to misuse [confidential information], that is to say, without the consent of the former client to make any use of it or to cause any use to be made of it by others otherwise than for his benefit. The former client ... is entitled to prevent his former solicitor from exposing him to any avoidable risk; and this includes the increased risk of the use of the information to his prejudice arising from the acceptance of instructions to act for another client with an adverse interest in a matter to which the information is or may be relevant."[92]

Accordingly, the duty to a former client endures far beyond the termination of a particular retainer and may properly serve to restrict a professional's ability to counsel certain clients in the future.

Degree of Permissible Risk: the Solicitor's Duty Defined

In *Rakusen*, the Court of Appeal reasoned that injunctive relief may only be granted if there is a "reasonable probability of real mischief". The *Rakusen* test has subsequently been the subject of much judicial criticism abroad. For instance, as noted earlier, in Canada the *Rakusen* standard has been replaced by a stricter set of rebuttable presumptions.[93] The House of Lords took note of the critiques fashioned by other Commonwealth courts and elected to redefine the English law of conflicts of interest. In place of a flexible reasonableness standard, the House of Lords elected to adopt a far more stringent test which promises to both clarify the circumstances under which a conflict is present and heighten the probability that a terminal conflict will be found in a given instance. Lord Millet articulated the following test to gauge the existence of an impermissible conflict of interest:

> "[T]he court should intervene unless it is satisfied that there is no risk of disclosure. It goes without saying that the risk must be a real one, and not merely fanciful or theoretical. But it need not be substantial. ... In my view no solicitor should, without the consent of his former client, accept instructions unless, viewed objectively, his doing so will not increase the risk that information which is confidential to the former client may come into the possession of a party with an adverse interest."[94]

In formulating the new English standard, Lord Millet explicitly rejected the balancing approach advocated by the New Zealand Court of Appeal in *Russell McVeagh*. In Lord Millet's eyes, the focus by the New Zealand Court's analysis goes to the question whether a former client consented to the acceptance of a solicitor's new retainer, not whether a conflict of interest had arisen under a particular set of circumstances.

Prince Jefri, KPMG, and the New Test in Action

Armed with a newly-minted test, the House of Lords set out to examine the relationship between KPMG and Prince Jefri, along with the possibility that confidential information could leak to the KPMG staff assigned to Project Gemma. The House boldly proclaimed that, given the existence of the confidential information that was obtained during the

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92 [1999] 1 All E.R. 517 at 527f, [1999] 2 W.L.R. 215 at 225H (H.L.).

93 *cf. Martin v. Gray* [1991] 1 W.W.R. 705, 121 N.R. 1, 77 D.L.R. (4th) 249, 70 Man. R. (2d) 241, 48 C.P.C. (2d) 113, [1990] 3 S.C.R. 1235, rev'g [1989] 3 W.W.R. 653, 58 D.L.R. (4th) 67, 57 Man. R. (2d) 161 (C.A.).

94 [1999] 1 All E.R. 517 at 528f and 529a, [1999] 2 W.L.R. 215 at 226H and 227D (H.L.).

course of Project Lucy and the potentially damning nature of such knowledge in the context of the new investigation, *unless KPMG could establish that there was no risk that such information would be accessible by the new Project Gemma team*, the firm would be forced to resign on the basis of the impermissible conflict of interest. While KPMG insisted that the Chinese wall constructed to segregate the Project Gemma team from the remainder of the firm was sufficiently strong to preserve the confidentiality of any information obtained during Project Lucy, the House of Lords raised several doubts.

Although their Lordships conceded that there is no rule of law dictating that information barriers are incapable of eliminating the risk of a conflict of interest, Lord Millet reasoned that the Court should grant injunctive relief to a former client unless it is satisfied on the basis of clear and convincing evidence that "effective" measures have been taken to ensure that no disclosure will occur. In the case under review, the Chinese walls constructed upon the initiation of Project Gemma were "ad hoc" and were erected within a single department. Lord Millet countered that, to be effective, a Chinese wall needs to be an established part of an organisation's internal structure and may not simply rest upon the sworn affidavits of those engaged in the relevant work. The number of individuals who worked on Project Lucy, coupled with the fact that they rotated between various positions during the life of the project, raised the real concern that confidential information may have been unwittingly disclosed to others in the firm. Given the special character of the services provided by KPMG and the standing practice of consulting one's peers for professional guidance when working on a project, the probability of information leaking to unaffiliated members of the organisation was high enough. Compounded with evidence that suggested that physical segregation alone is not necessarily an adequate response to preventing information leakage, KPMG lacked the ability to prevent the circulation of previously gathered confidential information. As a result, the House of Lords ruled that the High Court was justified in exercising its equitable jurisdiction to restrain KPMG from acting on behalf of the Government of Brunei in investigating the affairs of the BIA and the potential indiscretions of Prince Jefri.

The House of Lords' ruling in *Prince Jefri Bolkiah v. KPMG* is likely to have wide ramifications for professionals practising in a wide range of disciplines. Although much of the court's discussion was limited to analysing the actions of those engaged in the provision of litigation support services, the fact that the House of Lords was receptive to extending the law of conflicts of interest beyond the traditional realm of the solicitor-client relationship indicate a line of jurisprudence yet to be developed.

One commentator[95] has suggested that the House of Lords' decision may require barristers' chambers to consider whether walls may be required. While barristers are self-employed, the use of shared clerks and fax machines may pose problems to the assumption that information never flows within chambers. It shows that the court will not take a purely formalistic approach to structures and that the court will look hard at what professionals do, not what label they wear. Furthermore, the court's sceptical analysis of the impenetrability of Chinese walls serves as a warning to those professional service providers who may intend to represent clients with adverse interests in the future. The creation and acceptance of conflict procedures well in advance of their required application now stands as a virtual prerequisite to establishing that an information barrier is sufficiently secure to rebut the standing presumption that information will freely travel throughout a firm. The cases also underscore the importance of formally documenting

95 Simmons & Simmons, *Professional Liability Review*, 1998

not merely law firm retainers, but also the termination of retainers. The English Court of Appeal in *Bolkiah v. KPMG* drew attention to the fact that KPMG had not formally notified Prince Bolkiah that their relationship was terminated.

The court in *Bolkiah* also assesses the degree of risk of disclosure or misuse of confidential information, which becomes key when examining the effectiveness of Chinese walls. The House of Lords position can be summarised as follows:

- a former client should not, without its consent, be exposed to avoidable risk, even minimal risk, that confidential information from the former client may come into the possession of a third party and be used to the client's disadvantage.
- indeed, if the information is not merely confidential but also privileged, an even stricter approach will be applied, because clients should be able to have complete confidence that what they tell their lawyers will remain secret.
- faced with any risk of disclosure, the courts will intervene.
- the risk should be real (not merely fanciful or theoretical), but need not be substantial.

Accordingly, a prudent solicitor will not accept instructions unless (viewed objectively) doing so will not increase the risk that confidential information from the former client may come into the possession of a third party whose interests are adverse.

The Aftermath of Bolkiah

This article was penned some nine months after the House of Lords judgment and already the impact has been substantial. The case has been followed in England, Canada and Australia in ways that recognise that *Bolkiah* will be the new benchmark decision.

In *Neto v. Medeiros*,[96] the Ontario court applied *Bolkiah* to disqualify a lawyer who had earlier provided some advice to a couple from representing one spouse in a matrimonial dispute. The key issue in deciding whether to disqualify the former wife's counsel was whether he was in possession of confidential information relevant to the issues. In addressing this issue, Cullity J. noted that the Professional Conduct Rules[97] were

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96 [1999] O.J. No. 1249, court file No. 98-FA-207-378 FIS, Cullity J., April 8, 1999. (Ont. Superior Court of Justice).

97 *cf.* Commentary 13 of r.5 of the Ontario Rules of Professional Conduct, which states: "A lawyer who has acted for a client in a matter should not thereafter act against the client (or against persons who are involved in or associated with the client in that matter) in the same or any related matter, or when the lawyer has obtained confidential information from the other party in the course of performing professional services. It is not, however, improper for the lawyer to act against the former client in a fresh and independent matter wholly unrelated to any work the lawyer has previously done for that person, and where such confidential information is irrelevant to that matter."

inconsistent with the *Bolkiah*[98] test. Similarly in Australia,[99] the Supreme Court of South Australia used *Bolkiah* in assessing the tests to be applied to an accountant acting as a liquidator with respect to a former client. In a case involving KPMG,[100] the Ontario courts have been examining the question whether an accounting firm can act for a receiver when they had for many years acted as the auditors for the former Chief Executive of an insolvent corporation being sued by the receiver.

In *Young v. Robson Rhodes (a firm)*,[101] an English COURT has interpreted the decision in *Bolkiah* as simply holding that "Chinese walls" should be judged by their effectiveness. In that case, a collapsed syndicate of Lloyd's Names, who incurred large losses, brought an action against Pannell Kerr Foster (PKF), their auditors, for negligence and breach of contract. They hired an accountant and partner at Robson Rhodes (RR), Mr Atwood, to assist them. After he had received the Names retainer and commenced his work, Mr Atwood informed them that due to the imminent merger of RR with PKF, he would have to cease acting. The Names requested that RR delay the merger until after the main litigation, but RR would not. Instead, they undertook not to disclosure any confidential information with relation to the Names case. The Names initiated proceedings seeking an injunction to postpone the merger.

The question the court addressed was whether the undertakings went far enough to protect the Names' confidential information in light of the *Bolkiah* decision. Counsel for the Names argued that the undertakings were insufficient and were put in place too late. He relied on Lord Millett's statement in *Bolkiah* that "an effective Chinese wall needs to be an established part of the organisational structure of the firm, not created ad hoc ...". Mr Justice Laddie refused to accept this argument and explained that this was not his understanding of *Bolkiah*. In his view, the court was simply required to ensure that was no additional risk to the client and that the barriers which were put in place were effective to prevent disclosure of confidential information. He stated that:

> "The crucial question is 'will the barriers work?'. If they do, it does not matter whether they were created before the problem arose or are erected afterwards. It seems to me that all Lord Millet was saying was that Chinese walls which have become part of the fabric of the institution are more likely to work than those artificially put in place to meet a one-off problem."

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98 "The possession of relevant confidential information [is] the test of what is comprehended within the expression 'the same or a connected matter'... Lord Millett distinguished the position where the party who seeks the Court's intervention is an existing client of the solicitor whose removal is sought ...". He continued "where the Court's intervention is sought by a former client, however, the position is entirely different. The Court's jurisdiction cannot be based on any conflict of interest, real or perceived, for there is none. The fiduciary relationship which subsists between solicitor and client comes to end with the termination of the retainer. Thereafter the solicitor has no obligation to defend and advance the interests of this former client. The only duty to the former client which survives the termination of a client relationship is a continuing duty to preserve the confidentiality of information imparted during its subsistence".

99 *cf. Pradhan v. Eastside Day Surgery Pty Ltd* [1999] SASC 256 (June 18, 1999).

100 *Drabinsky v. KPMG* [1988] O.J. No. 4836, Div. Ct. No. 664/98, Court File No. 98/-CV155092, November 17, 1998. The case is now pending before the Court of Appeal. Lower court decisions cited *Bolkiah* in the Chancery Division and the Court of Appeal.

101 [1999] 3 All E.R. 524 (Ch D).

Finally, *Bolkiah* was used in one case to disqualify a firm which had recently recruited a partner from another firm who had been adverse in interest to the current client some eight years earlier.[102] In earlier times, the court might have been prepared to countenance on the conflict on the basis that the information was stale. Not so after *Bolkiah*.

As we write, further conflicts cases are being argued before the English courts as litigants seek to apply *Bolkiah* to obtain tactical advantage.[103] Regulators too are re-examining the ground rules concerning conflict of interest.[104] According to recent discussions with the Law Society's head of professional ethics, the Law Society has established a working party to review its professional ethical guidelines, with a separate sub-group examining conflict of interest issues. The working party will consult with the Lord Chancellor and partners of major city firms. The Law Society apparently recognises that its current guidelines do not reflect current commercial practice, and are largely ignored in the City. Current thinking is that the Law Society may embrace broad statements of principle to guide firms' decision-making rather than detailed Codes of Conduct, which could be difficult and inflexible in practice.

In London, the City Disputes Panel has struck a committee to look at conflicts rules in professional services firms. The American Bar Association has an ambitious ethics review being led by the Ethics 2000 Commission, which is looking closely at mandating written consents to conflicts in the light of cases like *Bolkiah*.[105] Across the common law world, bar regulators are also re-examining ethical rules.

Contrasting Civil Law Perspectives

By contrast to the burgeoning jurisprudence and complex rules of the common law, civil law Europe's norms seem singularly underdeveloped.[106] This may reflect the fact that law firms tend to be smaller there than in England, Canada or Australia. Or it may reflect the fact that ethical issues are much less likely to generate litigation on the Continent.[107]

The professional rules tend to prohibit conflicts in a few terse sentences, with none of the detailed commentary that accompanies common law rules. As one American commentator has noted:

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102 *cf.* in *Re A Firm of Solicitors* (Queen's Bench, Technology and Construction Court, July 16, 1999).

103 Current cases include *Laker Airways v. FLS* , The Times, May 21, 1999 and *Sea Containers v. Denton Hall*. The *Laker* case involves a challenge to a barrister appointed as an arbitrator, because barristers within the same chambers were instructed for the other party. The challenge has been unsuccessful.

104 Chambers, Jones and Wilkins, Conflicts of Interest (see fn. 2).

105 *cf.* Ethics 2000 Commission, Public Comment Draft on Model r. 1.7 found at http://www/abanet.org/cpr/e2k/rule17draft.html

106 Piet A. Wackie Eysten, President of the Council of Bars and Law Societies of the European Community, states in *Rights, Liability, and Ethics in International Legal Practice* ed. M. Daly and R. Goebel (Transnational Juris Publications, Inc.: New York, 1996) at 315–16 "I might as in a more general sense, if I may, that I have gotten the impression here these two days that the concept of conflicts of interest is much more developed in the United States than it is in Europe, or indeed at any rate than it is in Holland. I found out that it is used, as somebody said earlier today, as a weapon in litigation. You can have a lawyer prohibited from representing a certain client. That manner in which the problem of conflicts of interest arises has not yet come up in European or Dutch practice. That is why we do not yet have anything like the enormous jurisprudence and case law that the United States has in this area."

107 *e.g.*, in France, conflicts are reserved solely for the Barreau and the court would be involved only in the event of an appeal from the Barreau decision. In Belgium conflicts would be dealt with by a disciplinary board if there was a complaint, but the disciplinary board would not disqualify a lawyer from representing a client. *Rights, Liability, and Ethics in International Legal Practice* eds. Daly and Goebel (see fn. 106).

> "Curiously, the European Code is, on its face at any rate, far more severe with respect to conflicts of interest than are U.S. codes. The U.S. codes permit conflicts in certain situations to be resolved through waivers. This item is not mentioned in the European Code, and so there might have to be a reservation there."[108]

None of the rules we examined explicitly contemplate Chinese walls,[109] or any other structural mechanisms to help deal with conflicts. Indeed, very little appears to have been written in continental Europe on conflicts of interest within the legal profession. In this section, we touch upon the Rules in nine non-common law jurisdictions solely for the purpose of drawing contrasts with the Commonwealth. Since the new phenomenon of multi-disciplinary partnerships has prompted some re-examination of ethical rules we will touch upon those developments, which are continuing to unfold.

Sweden

Swedish lawyers are governed in conflict matters by codes of ethics,[110] promulgated by the Swedish Bar Association.[111] The Swedish Bar Association does not enjoy a monopoly on practice, and for lawyers who are not members of the Swedish Bar Association,[112] there are no rules. The Bar Association handles interpretation of the Code and few cases reach the courts.

Swedish rules have remained stable in recent years, although there has been increasing professional interest in the whole question of conflicts of interest. This has partially come about because of the spate of law firm mergers in Sweden, which have focussed attention on the issue.[113] Since members of the Swedish Bar Association cannot join multidisciplinary partnerships, conflicts rules are not really a factor in the multidisciplinary partnership debate.

There are no Swedish provisions for Chinese walls or screening devices. While theoretically it might be possible to establish a wall, in practice the obstacles are almost insurmountable. The test is far stricter than the common law tests of reasonable precautions and the possibility of real mischief. Instead the Swedish lawyer must prove that it is *not possible* for confidential information to have been disclosed. This would involve *locking* facsimile transmissions, computer databases, mailboxes and other documents.

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108 *International Legal Practice* eds. Daly and Goebel (see fn. 106), at 220.

109 Piet A. Wackie Eysten, President of the Council of Bars and Law Societies of the European Community, states in *Rights, Liability, and Ethics in International Legal Practice* (see n.106) at 319 "I personally feel rather sceptical about the effect of those walls—professional walls, or whatever other word you use. But it may be relevant to draw your attention to Art. 3.2 of the CCBE Code of Conduct on conflicts of interest. Those regulations apply to an association of lawyers as they would apply to one single lawyer. So that would make it extra difficult to make an artificial division within the association in that respect. I do not know what the experience generally is in European associations as to "walls, but for the time being I am very sceptical."

110 Private communication from Sven Unger (Mannheimer Swartling Advokatbyrå, Stockholm), August 31, 1999.

111 Swedish Bar Association Code of Conduct, r. § 14.

112 Significantly lawyers in accounting firms are not permitted to join the Swedish Bar Association.

113 Conflicts rules are unlikely to be a major factor in the expansion of global law firms into Sweden, certainly in comparison with the economic attractiveness of Sweden as a location for expansion.

The Netherlands

In The Netherlands, conflicts are governed by the Advocatenwet, legislation which describes powers of lawyers, the Dean of the Bar and Board of Lawyers. The Advocatenwet is the basis for the codes of ethics (the Gedragsregels) which describe lawyers' professional obligations, including conflict of interests.

In practice, the Dutch rules have become stronger and stricter over the last decade. While some firms might attempt to construct Chinese walls, it is doubtful whether such mechanisms would survive scrutiny. Since all the lawyers in a firm are regarded as one, the internal deciding board (Tuchtrechtspraak) would be unlikely to accept a Chinese wall. The practical effect of deeming all of the lawyers in a firm to be one is to make it more difficult for global law firms to expand into the Netherlands. In such circumstances, partners in New York or London would be regarded as a single lawyer.

The rules may also extend to multidisciplinary partnerships and accounting firms. Litigation is currently underway concerning Arthur Andersen and PriceWaterhouseCoopers[114] which have established legal services operating under the accounting firm's name. The accounting firms have lost at trial. Ernst & Young and KPMG have adopted a different route by establishing separate partnerships of lawyers working under different names, within an affiliation. This may be much more difficult for regulators to attack.

PriceWaterhouseCoopers and Arthur Andersen's challenge against the multi-disciplinary partnerships (MDPs) ban in The Netherlands has been referred to the European Court of Justice. The court's decision on PWC's dispute with the Dutch Bar Association will be important in assessing how other European jurisdictions can impose restrictions on establishing MDPs. For five years, the two accounting firms have been engaged in a review of rules and regulations that prohibit accountancy practices being involved in the running of a law firm. The same rules also remove the rights of employed lawyers within accountancy firms to appear in court in their professional status or claim professional privilege.[115]

Belgium

In Belgium,[116] the Council of each of the Bars[117] is authorised by the Belgian Judicial Code[118] to make rules concerning ethical behaviour.[119] While the basic principles of

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114 For discussion of the Dutch litigation see Michel Van Doosselaere, "Taskforce on MDPs", The Association of the Bar of the City of New York, June 16, 1997; and more recently, Ramón Mullerat *Report on Multidisciplinary Practices in Europe* (April 1999), found at http://www.abanet.org/cpr/mullerat1.html. For the tribunal decision (in French) see http://www.ccbe.org/nova.htm

115 *Accountancy Age*, September 2, 1999, pp. 3 and 10.

116 Private communication from Ivo Van Bael (Van Bael & Bellis, Bruxelles) August 31, 1999.

117 The discussion below relates to the Code of Ethics made by the Council of the Dutch-speaking lawyers of the Brussels Bar. The Bar organisations include Nederlandse Orde van Advocaten bij de Balie te Brussels; Ordre Français des Avocats du Barreau de Bruxelles; Ordre National des Avocats de Belgique; and Deutscher Anwaltverein e.V. (DAV) Buro Brussel. (http://www.hg.org/euro-bar.html)

118 *cf.* Art. 456 which states: "The Council of the Order must keep the honour of the Order of attorneys-at-law and maintain the principles of dignity, honesty and delicacy that underlie their profession."

119 *cf.* Code of Ethics of the Council of the Dutch-speaking lawyers of the Brussels Bar, Arts. 2–11.

conflict of interest have remained unchanged over the past decade, there has been a tendency to apply the rules in a less strict manner. The evolution of the application of the rules has been affected by the increasing internationalisation of the Belgian profession, as more foreign firms open up offices in Brussels, but also because of changing circumstances within the profession.

The general prohibition against lawyers acting in cases where they may prejudice the interests of a current or former client, are subject to the jurisdiction of the Dean of the Bar. The Dean will grant permission to act in a particular case, if it can be shown that confidentiality can be guaranteed. The key will be preserving the lawyer's duty of loyalty and duty of confidentiality. Because of the principle of *Ius Fraternitas*, which is one of the core values of the Belgian bar, Chinese walls have no place in a Belgian law firm.

It is believed that the inability to construct effective Chinese walls will make it more difficult for global firms to expand into Belgium. While there is a tendency towards internationalisation of Belgian practice, it is proceeding at a slow pace, and most Belgian bars are known to be quite conservative. We should also note that multidisciplinary partnerships are not allowed in Belgium.

Switzerland

In Switzerland, the lawyer's obligation to avoid conflict of interests follows from the general law of obligations. The Code of Obligations governing mandates[120] imposes liability on a mandatee (agent) for the faithful and careful performance of the mandate. It thus follows that the mandatee must avoid conflicts and thus a lawyer will have to refuse to take on matters which lead to a conflict of interests. Under Swiss law, this would require declining a retainer in a matter which conflicted with the interests of a former client.

Each Swiss canton has its own code concerning lawyer's conduct. For example, the Zurich code[121] prohibits lawyers in a firm from representing conflicting parties in the same matter. There is very little Swiss case law on the operation of the rules concerning conflict of interests.

While the rules have not significantly changed in the 1990s, there has been increasing focus upon their application. As elsewhere in the world, sophisticated law firms have databases and computerised checking systems in place to determine whether a possible conflict might exist.

There is no consensus within Switzerland as to whether Chinese walls could be effective, or how indeed such a wall can be constructed. It would be easier to construct Chinese walls between separate offices, than within the same office. In Switzerland, conflicts have come to the forefront in the case of law firm mergers, in which some loss of clients has proved inevitable. Some clients have been prepared to provide waivers to permit law firms to continue to act. The fact that Swiss law on conflicts of interests is relatively undeveloped means that the impact on global law firms is somewhat uncertain. The size of the law firm, rather than its nationality, is likely to be the determining factor. Under

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120 *cf.* Art. 394ff.

121 Anwaltsgesetz, ss. 8 and 11.

Swiss law, law firms are permitted to have partners who are non-lawyers.[122] Generally, Swiss law concerning conflicts of interest would also apply to accounting firms and to multidisciplinary partnerships.

France

The French used to follow the rule found in the decree of June 9, 1972 regulating lawyers,[123] and the Code of Conduct. It states that parties with opposing interests cannot be represented by the same lawyer or by lawyers who are members of the same firm.[124] This area of French law is now governed by Art. 155 of the decree of December 31, 1990, which incorporates, word for word, the Council of Bars of the Commission of Europe definition of conflict of interest.[125]

It has been reported that new Bar rules have been introduced in France—specifically within the latest regulations of the Conseil National des Barreaux introduced early in 1999. The object of these regulations was to harmonise the disparate regulations of the many different French Courts of Justice, as part of the movement towards the integration of the French profession.[126] These "regulations" do not have the force of law, but are merely for guidance. The key provision is Art. 4, which provides that, unless both parties agree, a lawyer cannot advise different parties to one dispute if there is a serious risk of conflict. This therefore limits the principle that clients are free to choose any lawyer they want. For an Anglo-Saxon observer, the fact of professional integration and harmonisation is more interesting than the content of the new norm on conflicts.

Since MDPs in France emerged more by accident than design, conflict issues are only now being addressed. [127] In France, lawyers decide what client files and client-related files are confidential and privileged. Consequently, a lawyer's entire client file can be covered by confidentiality, unless the lawyer is involved in a crime or misdemeanour. French accountants also have confidentiality rules with respect to the provision of information to third parties; however, these rules are less stringent than those that apply to lawyers since accountants have a duty to reveal certain information to authorities, such as the fiscal or antitrust authorities.

In practice, the approaches to confidentiality colour the issue of conflicts of interest. Mr Laurent Chambaz[128] of the French National Bar Council indicated that lawyers tend to interpret the ethical constraints strictly. Specifically, a lawyer should not act for a client if the client is already an audit client of the firm network. Gérard Nicolay,[129] managing partner of Coopers & Lybrand law firm in Paris, France, indicated that his firm's clients are drawn from the common clientele of the wider accounting firm. Nevertheless the

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122 *cf.* Regulations of the Zurich Bar Association, Art. 2 para. 3.

123 Décret No. 72-468 du 9 juin 1972 Organisant la Profession d'Avocat, 1972 J.O. 5884, 1972 D.S.L. 268 (Fr.).

124 *ibid.* Art. 70.

125 Art. 3.2 of the Code of Conduct of the Council of the Bars and Law Societies of the European Community.

126 *cf.* generally http://www.avocats-bobigny.com/avoc/journ/trava.htm ; see also Les avocats préparent leur grand-messe unitaire, La Tribune - du 99/09/08.

127 "Background Paper on Multidisciplinary Practice: Issues and Developments" submitted to the ABA Multidisciplinary Practice Commission, January 1999, at 5.

128 Summary of the Testimony of Laurent Chambaz before the ABA Multidisciplinary Practice Commission, June 8, 1998, at 1.

129 Summary of the Testimony of Gérard Nicolay before the ABA Multidisciplinary Practice Commission, June 8, 1998, at 1.

Coopers lawyers strictly observe the rules of confidentiality and do not disclose any confidential information to the auditors.

Denmark

In Denmark, conflict of interests are dealt with under the Act on the Administration of Justice and the Danish Bar Association's Code of Ethics. The provisions of the Code of Ethics are similar to those found in the Code of Conduct of the Council of the Bars and Law Societies of the European Community provisions.

Complaints against lawyers' are dealt with by the Danish Bar Association's Disciplinary Committee ("Advokatnævnet"). The Code of Ethics is not binding on the Disciplinary Committee, which bases its decisions on section 126 of the Act on the Administration of Justice. However, the Code of Ethics serves as guidance to the Disciplinary Committee, and the courts, with respect to the interpretation of section 126 of the Act. The current Code of Ethics was passed by the Danish Bar Association on August 12, 1999 resulting in a stricter wording compared to the previous Code of Ethics. Since the Code acts as a guide to section 126 of the Act on the Administration of Justice, its interpretation is likely to become stricter.

The rule governing conflicts of interest apply to global law firms operating in Denmark irrespective of whether Danish lawyers or EU-lawyers are involved. The Act on the Administration of Justice also specifically provides that lawyers may only practise as sole practitioners, in association or partnership with other lawyers or through a limited company with must be fully owned by practising lawyers. As a consequence, no multidisciplinary partnerships owned by lawyers can be established in Denmark.

Spain

In Spain, only registered lawyers are permitted to practice. The Code Deontologie of Legal Practice, which was approved by the General Council of Spanish lawyers on June 30, 1995, governs Spanish practice. The General Council has also accepted the contents of the Council of Bars of the Commission of Europe Code, adopted on October 28, 1988. Although the Spanish code lacks legislative effect, the general statute of Spanish lawyers[130] prescribes that any act of omission which constitutes a serious breach of the ethics rule can result in practice rights being suspended for between three months and two years.

The Spanish code[131] states that clients must be consulted if there is any doubt about the ability of a firm to act independently and in the client's interests. The code expressly states that it is unacceptable for two members of the same firm to appear on opposing sides in the same litigation matter. However, the Spanish code recognises that the same sensitivities may not apply in dealing with commercial and contractual activities. In such a case, the lawyer may act for all parties, provided that he preserves a "strict objectivity". The codes states that it is inadvisable for a lawyer to accept a retainer which entails acting against a former client. The passage of time, however, diminishes risk, as long as the lawyer could never use confidential information against the former client.

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130 Approved by Royal Decree 2090/1982 of July 24, 1982.
131 *cf.* 6.11.

The Spanish Code's rules are expressed in absolute terms. However, in order to satisfy the requirement that confidential information not be used contrary to the interests of a former client, it might in theory be possible to establish Chinese walls. However, the Spanish Code does not specifically spell out how this should be accomplished. From a practical point of view, a law firm faced with this issue would inform the prospective client about the existence of a potential conflict between its interests and those of a former client. The new client would have the choice whether or not to have its interests represented by the firm. In order to protect the confidentiality of information within the firm, the firm would establish how a Chinese wall would be constructed. There have been no cases testing the effectiveness of such walls.

Spanish law restricts membership in a law firm to lawyers admitted to a bar association. In theory, therefore, there are obstacles to the formation of multidisciplinary partnerships. In recent years, such practices have been tolerated. Accounting firms have always rendered tax advice, which has never been seen as a problem, so that accountants and tax lawyers compete in the area of tax counselling. In 1999, the Spanish profession has been debating whether new regulatory structures should be established to deal with lawyers associating with accounting firms. Among the driving factors for this debate are the need to deal with conflicts of interests and the needs for clients to receive independent and objective counselling from the two disciplines. The Consejo General de la Abogacía has prepared a new general statute of Spanish lawyers, which specifically regulates collective and multidisciplinary partnerships. Section 29 of the draft statute provides that lawyers may only form alliances with other professionals if this is compatible with the practice of law and the association does not give rise to conflict of interest situations, anti-competitive acts, or compromises of the lawyer's obligation of confidentiality. The draft statute requires that all members of a multidisciplinary partnership promise in writing that they will comply with the obligations set forth in the lawyer's Code. Thus, obligations for ethical compliance will continue to fall on individual lawyers practising in multidisciplinary partnerships.

An advisory Council to the Spanish government (the Consejo de Estado) has objected to the statute, which it believes goes beyond the competence of the Consejo General de la Abogacía, since it purports to impose obligations on non-lawyers. Because of this objection, passage of the new legislation is being held up. Interestingly, the draft statute expressly states that any activity which affects the freedom, independence or integrity of the practice of law will be prohibited. It expressly mentions that an association with accounting firms is to be regarded as an incompatible act. Ultimately, it will be up to Spanish competition regulators to assess what the public interest requires.

Scotland

In Scotland, the conflict rules have remained stable for the last decade.[132] The Solicitors (Scotland) Practice Rules 1986[133] govern conflicts of interest, supplemented by Law Society Guidelines within the Code of Conduct.[134] Since the decisions of the House of Lords also bind the Scottish courts, the *Bolkiah* decision will have an impact North of the Border. Note also that the relatively small number of commercial firms in Glasgow and Edinburgh may present practical problems.

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132 Private communication from Ross Harper, Harper Macleod, August 30, 1999.
133 *Parliament House Book,* vol. 3, p. F 328.
134 Code of Conduct Rules (*Parliament House Book,* vol. 3, p. F 701).

Germany

In Germany, a lawyer is forbidden to represent conflicting interests (actual not potential). A lawyer's prohibition against representing conflicting interests applies to the entire firm.[135] This prohibition is laid down[136] in the Lawyers Act (BRAO),[137] in the Professional Rules of Conduct[138] and in criminal law.[139] This prohibition applies to the entire firm, so no lawyer within a firm may work against a colleague. Since there is a public interest component in the Rules, the clients may not waive compliance with these conflict of interest rules. The public interest consists of the independence of the individual lawyer and the integrity of the bar within the justice system. Clients can only give either a joint mandate or exclude the area of conflict from the mandate.

On March 22, 1999 a significant change was made to the existing German *Berufsordinung* governing the conduct of lawyers in German law firms.[140] A new section 3(3) inserted in the *Berufsordinung*, provides that if a lawyer, who is not a partner in law firm A joins law firm B (again not as a partner), he can work on projects with which law firm A was involved, provided he or she was not previously personally involved in, or had personal knowledge of, those projects.[141]

Germany has liberal rules about MDPs. The German Federal Attorney-at-Law statute of 1994 which allows full partnerships between attorneys, patent lawyers, auditors, accountants, tax advisors and other similar professionals (both inside and outside Germany), did not introduce new rules with respect to conflicts of issues.[142] Instead it indicated that any inconsistencies among the professional rules that apply to the members of an MDP must be resolved by applying the most stringent rule. For instance, if a lawyer determines that there is a conflict of interest, that determination applies to all other partners in the firm, regardless of their professional designation.

The German *Wirtschaftsprüferordnung* §28 (German Accountants Act), following the prescriptions of the 9th EC Directive on Company Law, holds that the independence of the accounting profession must not be compromised. It requires that accountants control MDPs (management, capital and voting rights). The rules on conflicts for accountants differ from the Lawyers Act, the Professional Rules of Conduct and the Criminal Code. The Accounting Act[143] prohibits accountants from acting if there is concern that he may be prejudiced; the Professional Rules of Conduct for Accountants[144] prohibits the representation of conflicting interests, unless all clients agree. This provision focuses on audit work, rather than other activities such as accounting, business consulting, and legal advice. This should be contrasted with the firm's clients' inability to waive conflicts rules.

Both lawyers, accountants and tax advisors in Germany have effectively the same obligation of confidentiality and the same right to refuse testimony.[145] German auditors

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135 Lawyers Act/§43a para. 4BRAO, Professional Rules of Conduct/§3 para. 1, Criminal Code/§156.
136 §43a para. 4
137 Federal Code for Attorneys (*Bundesrechtsanwaltsordnung*).
138 § 3 para. 1.
139 § 156 Criminal Code.
140 *Berufsordnung in der Fassung* vom 22.3.1999, § 3 *Widerstreitende Interessen, Versagung der Berufstätigkeit.*
141 The text (in German) can be found at http://www.raekoeve.de/Beruf.htm
142 Summary of the Testimony of O. Verhoeven before the ABA's Multidisciplinary Practice Commission, November 13, 1998, at 2.
143 §49
144 §3,1 BOWP
145 ABA Commission on Multidisciplinary Practice, Presentation at the Public Hearing on February 4, 1999 in Los Angeles by Dr Hans-Jürgen Hellwig, Germany found at http://www.abanet.org/cpr/hellwig1.html

are not bound to disclose to the authorities suspicious matters discovered during an audit. So the confidentiality obligation of one profession and the disclosure obligation of the other do not conflict.

Dr Hans-Jürgen Hellwig reported on MDP attitudes to conflicts when testifying to the ABA in Los Angeles:

> "It happens occasionally in Germany that in a M&A transaction one and the same accounting firm is acting for both the seller and the purchaser. A partner in the German member firm of one of the Big Five ... prided himself that his firm in a large M&A bidding process had done the legal and financial due diligence for a total of three bidders, using, of course, for the different clients different teams from different offices. While all of this seems almost unthinkable for a lawyer the explanation is quite simple for an accountant: the clients have waived the conflict rules based on the promise of Chinese walls."

What this brief survey of European developments has shown is how comparatively underdeveloped the rules on conflicts are and how seldom regulations, doctrine or jurisprudence deal with practical aspects of conflicts management like Chinese walls. This is likely to change however, since Europe is in the vanguard of the rise of multi-disciplinary practices—the future driver of change in the professional regulation of markets for legal services.

The Challenge of Multidisciplinary Practices

One of the most complex issues to be addressed in the global market for legal services throughout the Nineties has been the rise of multidisciplinary practices.[146] Starting in the

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[146] The literature on multi-disciplinary practices is recent and not very analytical. The best discussion is found in the ABA Commission on Commission on Multidisciplinary Practice, *Background Paper on Multidisciplinary Practice: Issues and Developments*, at http://www.abanet.org/cpr/multicomreport0199.html. For other references see: Ward Bower, *Multidisciplinary practices: the impact of MDPs on law firms* ("What's Ahead for Law Firms? Experts Predict Your Future") *Legal Management*, Sept–Oct 1999 vol. 18 i5 p46(2); Simon Chester, "ABA Commission Says MDP's Need Ethics Rules Changes", *Law Practice Management Magazine*, July/August 1999, at http://library.findlaw.com/scripts/getfile.pl?FILE=legpub/abalpm/abalpm000004; Siobhan Roth, "Facing the future of the practice—now; a guide to the ABA debate over multidisciplinary firms", *Legal Times*, August 2, 1999 vol. 22 i12 s0 p18 col 1; A.J. Noble, "The metamorphosis; Ernst & Young already manages a 'captive' law firm in Toronto, Is this the dawn of the profession's future?" *American Lawyer*, July 1999 vol. 21 i6 p51(2); Patrick J. McKenna, "So you want to compete: lessons from the leading accounting firms", *Law Practice Management*, July–August 1999 vol. 25 i5 p67(4); R. A. Shepherd, "Lawyers, accountants and beyond; ABA fee-splitting idea would spark multidisciplinary firms", *National Law Journal*, June 21, 1999 vol. 21 i43 pA1 col 2; A.J. Noble, "Eyes on the prize: while the profession debates where to draw the line between accountants and lawyers, the Big Five firms are already cosying up to corporate clients", *American Lawyer*, June 1999 vol. 21 i5 p51(2); D.Baker, "Voices from the other side; accounting firm calls for changes in lawyer conduct rules", *ABA Journal*, April 1999 vol. 85 p83(1); D. Molvig, "Multidisciplinary practices: service package for the future?" *The Wisconsin Lawyer*, April 1999 vol. 72 i4 p11(5); Stefan F. Tucker, "Whom do the Model Rules protect? Multidisciplinary practice would answer clients' needs", *Legal Times*, March 1, 1999 vol. 21 i40 p25 col 1; B.W. Hildebrandt, "Meet the enemy (attorneys and accountants working together)" *American Lawyer*, June 1998 vol. 20 n5 p56(1); N.D. Israel, "Multidisciplinary practices", N.Z.L.J., Oct 1996, p381(3); Kevin H. White, "Developments in practice structure" (multi-disciplinary practices and professional support groups) (New South Wales), *Law Society Journal*, July 1995 33 n. 6 p. 50(4), For early discussion, see Quinn, Jack (1982), "Multidisciplinary Services and Preventive Regulation", in Evans, R.M. and Trebilcock, M. J. (eds.), *Lawyers and the Consumer Interest*, Toronto, Butterworths.

areas of tax, where there had long been significant overlap between the professional roles of accountants and lawyers acting as tax advisers, the major accounting firms started to recruit from the ranks of legal specialists. In Spain and France, the battle to resist the incursion of accounting firms into the legal market was hard-fought.[147] But it ultimately could not withstand the desire to encourage greater competition in the market for legal services. This resistance to professional overlap has been criticised as selfish. Professor Michael Trebilcock of the University of Toronto has commented that:

> "The function of self-regulation is not to parcel up various monopoly privileges on particular professional domains in order to advance the economic self-interest of one or another professional group."

In addressing the issue of conflicts as it presents itself in a multidisciplinary partnership, the ethical obligations imposed on lawyers and accountants must be examined. Both have obligations of impartiality and independence,[148] but the lawyers' responsibilities to the court system are unique.[149]

The accounting firms claim that they can provide a greater pool of professionals, within all major jurisdictions and in some areas with greater depth of international expertise, than can the law firms. The accountancy profession has also argued that conflict risks can be managed within a multidisciplinary partnership if the legal profession's rules on conflicts and imputations are relaxed.[150] The accountancy profession's conflict rules are more liberal than the bar's rules in permitting clients to waive conflicts even in situations where the clients are directly adverse to each other.[151] The accounting rules on "indirect conflicts" are similarly more liberal than bar rules. Indirect conflicts arise when a second client who is adverse to an existing client in a particular matter seeks to retain a firm in an unrelated matter. Under accounting conflicts rules, the conflicts of one firm member are

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147 European authorities are considering recommendations that the audit function within accountancy firms should be separated from all others. This is because of the auditor's responsibility as a whistleblower if evidence of fraud or improper conduct is revealed. The Securities and Exchange Commission has stated that it will not allow auditors of issuing corporations to carry out legal or other conflicting services for such corporations.

148 *cf.* Ramón M. Mullerat "Remarks on the report and recommendations of the ABA Commission on MDPs", June 1999, found at http://www.abanet.org/cpr/mullerat2.html

149 *cf. ibid.* citing ABA, Model Rules, Preamble [1]: "A lawyer is a representative of clients, an officer of the legal system and a public citizen having a special responsibility for the quality of justice"; Bundesrechtsanwaltsordnung, § 3: "the lawyer is an independent organ of the administration of justice." Crompton, J., *R v. Connell* (1844): "the advocate at the bar as well as the judge at the bench are equally members of that temple [of justice]"; Piero Calamandrei, Elogio dei giudici scrito da un avvocato, XXIX: "giudici e avvocati sono ugualmente organi de la giustizia."; XXVIII: "solo là dove gli avvocati sono independenti, i giudici possono essere imparziali." Mucius Scaevola, Comentarios al Código Civil, XXIV, 1: "en él (abogado) debe verse, sobre todo, un verdadero colaborador del órgano judicial en la función esencial de administración justicia."

150 *cf.* testimony of Richard Spivack, General Counsel of Arthur Andersen, before ABA Commission on Multidisciplinary Practice, March 31, 1999.

151 Accounting rules such as AICPA Code r. 301, and ICAO Code r. 207 and Council Interpretation 207, permit conflicts to be waived by both clients, upon full disclosure, with informed consent, and the necessary screens. AICPA, Special Reports—Conflicts of Interest in Litigation Services Engagements (1993). See also the new English Rules at http://www.icaew.co.uk/pso/ethics/1204.pdf. One thing that *Bolkiah* does not definitely settle is whether the obligations of confidentiality imposed on accounting firms are the same as those imposed upon law firms. KPMG had, in the *Bolkiah* case, conceded without argument that the nature of litigation support services or forensic accounting might well lead to such an equality of treatment. Yet *Bolkiah* is now being used to imply that the same position would hold true for audit or consulting clients. The auditor's statutory obligation to disclose suspicious financial activities suggests that this issue needs further airing.

not imputed to all firm members, and there is no need to disclose the firm's prior representation and to seek consent.[152]

Obviously there are fundamental questions as to how an MDP would deal with conflicts of interest.[153] In a number of jurisdictions, both bar regulators and accounting associations have each insisted that their own professional rules should apply to an MDP. From the legal side, one of the main duties of lawyers is to provide independent advice to clients, untainted by conflicts of interest. There may be special situations of potential conflict, which arise in an MDP. Inappropriate referrals or a desire to ensure that a transaction goes through, because other services would be sold only if it did. Of course these issues are not unique to MDPs. Any referral or cross-selling arrangements carry with them the possibility of compromised judgments.

The English Law Society Discussion Paper on Multi-Disciplinary Partnerships speculates that:

> "If there is a conflict between the interests of one client and another client, different professions may not have the same obligations as solicitors. As a matter of law, solicitors may not act for two clients if there is a conflict of interests between those two clients. Other professions may be allowed to manage conflict in different ways—e.g., accountants make much use of client consent and 'Chinese walls' within a firm. The solicitors' duties could affect an MDP as a whole, because the MDP would not be able to go beyond what the law allows the solicitors to do."

Ward Bower,[154] managing partner of the global legal consulting firm, Altman Weil Pensa, summarised the conflicting approaches as follows:

> "The assertion that MDPs inherently present conflicts of interest is based on the difference in the fundamental roles and functions of auditors and lawyers. Auditors are engaged to serve as economic judges and to divulge information to find third parties, whereas lawyers are charged with professional responsibility for preserving client confidences and protecting client information. Opponents claim these requirements cannot be reconciled in any one organisation.

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152 The interpretations to AICPA r. 102 provide that if the professional service can be performed with objectivity and there is corresponding disclosure and consent, the Rule shall not operate to prohibit the performance of the professional service. As quoted in New York State Bar Association Report of Special Committee on Multi-disciplinary Practice and the Legal Profession, (January 8, 1999).

153 *cf.* generally the New Zealand and California reports found respectively at http://www.nz-lawsoc.org.nz/general/mdp3.htm (Discussion Paper: *Multi-Disciplinary Practices and other Related Matters*, April 1999, New Zealand Law Society) and at http://ocbar.org/multidis.html (Report of the Orange County Bar Association Taskforce on Multidisciplinary Practice). In Ontario, Canada, the Proposed Draft Rules of Professional Conduct, Prepared by the Taskforce on Review of the Rules of Professional Conduct, The Law Society of Upper Canada, April 29, 1999 state at r. 2.04 (10), "A lawyer in a multi-disciplinary practice shall ensure that non-lawyer partners and associates observe this rule for the legal practice and for any other business or professional undertaking carried on by them outside the legal practice".

154 *The Philadelphia Lawyer*, reprinted at http://www.philabar.org/pbs/pplart8.html. *cf.* also http://www.hg.org/wardbower.html and http://www.altmanweil.com/publications/articles/mamagement/body_mgt3a.htm. In print, see W. Bower, "The new competition: time for a wake-up call? Lawyers who ignore the threat from accounting firms and other non-lawyers do so at their peril", *American Lawyer*, Oct 1994 16 n.8, p.23(1); W. Bower, "Law firm economics and professionalism" (symposium: "A Nation under Lost Lawyers; The Legal Profession at the Close of the 20th Century"), Dickinson Law Review, spring 1996 100 n. 3 pp.515–529; W. Bower, "The case for MDPs: should multidisciplinary practices be banned or embraced?", *Law Practice Management*, July–Aug 1999 vol. 25, i.5, p.61(5); W. Bower, "Multidisciplinary practices: the impact of MDPs on law firms" (What's Ahead for Law Firms? Experts Predict Your Future), *Legal Management*, Sept–Oct 1999 vol. 18 i5 p. 46(2).

> Supporters of MDPs make the argument that law firms frequently represent clients with conflicting interests by obtaining waivers from clients involved, building Chinese walls or screens within the law firm, and MDPs should be allowed to do the same. Some accountants make the point that even outright prohibition of the provision of legal services to auditing clients would be acceptable to them, given the fact that each of the Big Five firms necessarily would be prohibited from providing legal services to a maximum average of only twenty percent of possible publicly held clients, and that their Big Five competition for legal work from the other 80 per cent of the market would consist of only three other firms, the fourth conflicted out by the audit relationship".

The most coherent defence of the accounting firms' position on conflicts was presented to the ABA Commission by Professor Michael Trebilcock of the University of Toronto Law School and his colleague at Charles River Associates, Lilla Csorgo.[155] Trebilcock and Csorgo provide point and counterpoint on three arguments, pointing out generally that few of the conflict points raised are unique to multidisciplinary partnerships. Conflicts problems arise as firms become larger and more specialised. Fears about compromises to lawyers' professional values were also overstated, since to elevate this consideration above all others would be to deny informed client choice: clients [should] have the prerogative of deciding whether substantial industry-specific expertise in the matter at hand matters more to them than the risk that they will receive less than uncompromising fidelity to their own interests exclusively". But there may be some validity to the fear that MDPs may face inherent and intractable dilemmas because of the divergent pulls of ethical norms. For example, auditors have a duty to whistle-blow, while lawyers are constrained by privilege in what they can reveal.

This debate has been brought to a head by the battle before the American Bar Association's House of Delegates about whether to permit multidisciplinary partnerships with the United States. In June 1999, the ABA Commission on Multi-disciplinary Practice recommended unanimously that profession conduct rules be changed to permit lawyers to practice in firms that included other professionals. The recommendation must be passed by the ABA House of Delegates, and approved by individual States. However, the ABA Commission recommendation opens the way to the explicit entry of major accountancy firms into the market for legal services. The Commission felt that three ethical principles were fundamentally important: independence of judgment, lawyer-client privilege and the avoidance of conflict of interest. It recommended, however, that any threat to compromise core professional values could be met by designing structural safeguards. These would include requirements that multi-disciplinary practices comply with lawyer rules concerning conflict of interest.

The Report of the ABA Commission on Multidisciplinary Practice,[156] recognises the issues of conflict of interest which it says "arise from differences between the rules of lawyer conduct related to the lawyer's obligation of loyalty to the client and the ethics rules of other professions". It recommended against any attenuation of a lawyer's obligation of loyalty to the client. It recommended that "in connection with its delivery of legal services, an MDP be governed by the same rules of professional conduct as a law firm with regard to the imputation of conflicts and permissible screening measures". This would include disciplinary procedures. The Commission expressly noted that "For the purposes of a conflict of interest analysis, the lawyer must treat each and every client of the MDP as the lawyer's client".

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155 *cf.* Charles River Associates, Multi-Disciplinary Professional Practices: A Consumer Welfare Perspective August 4, 1999, found at http://www.abanet.org/cpr/canada.html

156 Found at http://www.abanet.org/cpr/mdpreport.html

However, this analysis did not prevent the Commission's recommendations from being seriously attacked on the floor of the House of Delegates.[157] While the internal political processes of the ABA digest the issue, effective action has been delayed indefinitely. Accounting firms will, we predict, continue to enter the United States market through services where there is no bright-line demarcation between lawyering[158] and accounting.

In other jurisdictions, the debate has not been much less contentious. In Canada, the first study to be released was in Ontario, where the Law Society of Upper Canada released in mid-1998 a report which raised serious ethical concerns about multidisciplinary practice. It recommended a form of partnership in which it was clear that non-lawyers would work within a professional framework dominated by the lawyers. The Report was a departure[159] for the Law Society, which had up to that point largely ignored the form of entities within which practice was carried on. The Society believes it regulates lawyers, rather than law firms. Following that Report, a taskforce re-examined the entire Code of Professional Conduct. Its interim report is currently receiving public comments, and it is expected that new Rules will be passed in 2000. Significantly, the taskforce proposed no serious revisions to the rules on conflict of interest.

In September 1999, a Committee of the Canadian Bar Association reported on its researches into the International Practice of Law. It endorsed a *laissez faire* approach to multidisciplinary practice. It concluded that "lawyers should be able to offer their services in any business entity delivering services, so long as those services conform with applicable regulatory or other legal requirements". The Canadian Bar Association Report has been described as impractical, naïve and foolish by the Treasurer of the Law Society of Upper Canada, who also happened to be the Chair of the Ontario Committee that had recommended strict controls on multidisciplinary practice.

In Canada, the major accounting firms have responded to these bar recommendations by commissioning their own study.[160] The accounting firm's report argues strongly that consumer choice should drive professional structures, and that there are benefits to "one-stop shopping". The report argues strongly that clients need a range of professional services, such as tax advice, legal advice and financial advice and that segmenting the provision of these services between different professions is inherently inefficient.

In the debate about whether multi-disciplinary practices will be permitted, those who argue for the preservation of the professional hegemony of the legal profession frequently point to potential weakening of ethical rules as a justification for the *status quo*. In late October 1999, as we write this article, the entire issue is in flux.

The issues involving large organisations and conflicts—including multidisciplinary practices—are complex and it has become easy to criticise the rigid application of the conflicts rules as artificial. The struggle to establish acceptable screening devices to negate the presumption of automatic information flow has followed the rise of larger firms. The question for the immediate future is whether screening devices can reduce the conflict by segmenting institutions into those "in the know" and those "in the dark".

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157 The Discussion in the ABA House of Delegates was spirited and referred often to conflict of interest. Although we cannot quote from or summarise the discussion (because of explicit ABA limitations) those seeking further information can find an unofficial transcript at http://www.abanet.org/cpr/mdphouse.html

158 "Lawyering" is a term developed by Vern Countryman of the Harvard Law School to define law by what lawyers do.

159 This statement is qualified by the continuing debate within the Canadian profession about whether to permit law firms to incorporate or otherwise make use of structures which serve to limit personal liability.

160 Charles River Associates, "Multidisciplinary Professional Practices: a Consumer's Welfare Perspective". Substantially reproduced at http://www.abanet.org/cpr/canada.html

Chinese Walls—or Potemkin Villages?

Accountants deal with conflicting interests in the same way as their clients in the capital markets, through the use of institutional mechanisms called Chinese walls.[161] We have seen the scepticism with which these mechanisms have been met in Commonwealth courts. The institution is well-established in American law and it is there that the most sophisticated thinking has been done on the theory and practice of wall construction.

The presumption that knowledge given to one lawyer is shared by all members of the lawyer's firm may be rebutted.[162] An Ethics Opinion of the American Bar Association (ABA)[163] suggests that the presumption that all members of a firm may be disqualified if one member is disqualified may be overcome if the firm institutes adequate measures to screen a disqualified lawyer. This practice led to the institution of "Chinese walls" within firms.[164] It is possible for a law firm to set up an effective screen or "Chinese wall"[165] which will allow the firm to act for clients whose interests conflict.[166–67] Because of a

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161 For contrasting approaches in the 3 leading capital markets, compare "Abuse on Wall Street: conflicts of interest in the securities markets: report to the 20th Century Fund Steering Committee on Conflicts of Interest in the Securities Markets (Westport, Conn.: Quorum Books, 1980); For London, see Wood, P.R. *Financial conglomerates and conflicts of Interest in Conflicts of interest in the changing financial world*; ed. R.M. Goode London, Institute of Bankers, 1986. For comparisons in Tokyo, see Chizu Nakajima, "The 'Chinese Wall' in Nakajima, Chizu Conflicts of interest and duty: a comparative analysis in Anglo-Japanese law London": Kluwer Law, 1998 at p. 285; Nakajima C. "Conflicts of Interest and Duty in Japanese Companies" in M. Andenas and D.Sugarman (eds.), *Developments in Company Law: Conflicts of Interest and Duty* (1999, forthcoming) Kluwer Law International; Nakajima, C. (1995) "Conflicts of interest in Japan" in *The Fiduciary, the insider and the conflict*. B. Rider and M. Ashe (ed.) *Brehon*, Sweet and Maxwell. Nakajima, C. "Conflicts in the US and Japan" chapter 12 in *The Fiduciary, the Insider and the Conflict* (Brehon, 1994). *cf.* generally, R. Schotland, "Conflicts of Interest Within the Financial Firm: Regulatory Implications" in Edwards, F. (ed.), *Issues in Financial Regulation* (NY, McGraw-Hill).

162 *Novo Terapeutisk Laboratorium A/S v. Baxter Travenol Laboratories, Inc.*, 607 F.2d 186, 201 U.S.P.Q. 642, 206 U.S.P.Q. 769 (en banc) (1979 U.S.C.A. 7th Circ.).

163 *cf.* ABA, Commission on Ethics and Professional Responsibility, Formal Opinion 342 (1975) reprinted in (1976) 62 A.B.A.J. 517.

164 "The Chinese wall Defense to Law Firm Disqualification" (1980), 128 U. Pa. L. Rev. 677 at 678. *cf.* also L.A. Hammermesh, "In Defence of a Double Standard in the Rules of Ethics: A Critical Re-evaluation of the Chinese wall and the Vicarious Disqualification" (1986) 26 J. of Law Reform 245; M.P. Moser, "Chinese Walls: a Means of Avoiding Law-firm Disqualification When a Personally Disqualified Lawyer Joins the Firm" (1990) Georgetown J. of Legal Ethics 399; M.C. Brodeur, "Building Chinese Walls: Current Implementation and a Proposal for Reforming Law-firm Disqualification" (1988) 2 Rev. of Lit. 167, also reprinted in (1989), 38 Defence L.J. 259. J.M. McCauley, "Screening to Avoid Disqualification: Erecting 'Chinese Walls' " http://members.aol.com/jmccauesq/ethics/chinwall.htm (from Nov 1997 issue, Virginia Lawyer Register). R.B. Bateman, "Return to the Ethics Rules as a Standard for Attorney Disqualification: Attempting Consistency in Motions for Disqualification by the Use of Chinese Walls" (1995) 33 Duquesne Law Rev. 249; J. R. Parker, "Private Sector Chinese Walls: their Efficacy as a Method of Avoiding Imputed Disqualification" (1994) *19 Journal of the Legal Profession* 345; G. S. Kaplan, "Chinese Walls: a New Approach" (1990) 15 *Journal of the Legal Profession* 63; W. I. Weston, "Is the Chinese Wall Viable? (Management of Conflict of Interest Problems)" (1987) 4 *Compleat Lawyer* 26(3).

165 The "Chinese wall" mechanism was first approved for use in a government lawyer disqualification case: see *Kesselhaut v. United States*, 555 F.2d 791 (Court of Claims, 1977).

166 The origin of such screening devices can be found in the financial services industry. *cf.* generally H. McVea, *Financial Conglomerates and the Chinese Wall: Regulating Conflicts of Interest* (Oxford: Clarendon Press, 1993). *cf.* also L.J.W. Aitken, "'Chinese Walls' and Conflicts of Interest" (1992) 18 Monash U. L. Rev. 91; Strong, "The Chinese wall Came Tumbling Down?" (1991) 12 *Company Lawyer* 180; D. Searles, "Conflict of Interest: Chinese Walls or The Emperor's New Clothes" (1991) 21 Queensland L. Soc. J. 61.

167 *cf.* G.M.W. Kolling. "'Chinese wall' is Relic of Sordid Past" (expression used to describe limits imposed on communication, often used to describe legal ethic demanding that attorneys with a conflict be shielded from a case) (1993) 106:158 *Los Angeles Daily Journal* 6; and more generally C.J. Dunnigan, "The Art Formerly Known as the Chinese Wall: Screening in Law Firms: Why, When, Where, and How" (preventing conflicts of interest from successive representations) (1998) 11 *Georgetown J. of Legal Ethics* 291.

1988 Federal Court decision[168] in the United States, the phrase "Chinese wall" may be considered discriminatory there. "Ethical wall" means the same as Chinese wall and is the phrase currently used by most American legal professionals.

A Chinese wall is no more than the arrangement put in place within large firms or corporations designed to prevent information available to one group of partners and employees becoming available to other partners or employees.[169] An Australian analysis was cited with approval in the *Bolkiah* case in the Chancery Division; "the derivation of the nomenclature is obscure. It appears to me to be attempt to clad with respectable antiquity and impenetrability something that is relatively novel and potentially porous. It is a practice that apparently emanates from the United States of America, having been devised by large firms of lawyers in an attempt to justify representation of conflicting interests at the same time. It has been subject to considerable criticism and scrutiny there."[170]

To overcome the presumption that the knowledge of one lawyer is the knowledge of all, it is imperative (at least in Canada and the U.S.) that any screening device be put into place when the conflict first arises, prior to the possibility of improper disclosure.[171] This means that the law firm must implement a Chinese wall prior to taking on the conflicting retainer.[172] If the screen is not set up early enough, regardless of how effective a wall it may be, the firm will be removed by the court.

Nevertheless, the comparative trend is against Chinese Walls—in Scotland,[173] Australia, Sweden, and the United States.[174] One may question whether too much trust may be placed in a structure that is inherently frail. Indeed, in a post-*Bolkiah* environment, are they really walls, or Potemkin Villages?[175]

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168 *Peat, Marwick, Mitchell & Co. v. Superior Court*, 245 Cal. Rptr. 873 (1988) (Low, J., concurring). The controversy over the name reflects Californian political correctness at its most fascinating. The decision of the Chinese authorities to rent the Great Wall to Ferrari SPA for its 2000 advertising campaign described in *The Globe and Mail* (Toronto), October 25, 1999, p. D-1, "The Emperor's New Toys", shows that Beijing is not unduly sensitive to the meaning of Chinese Walls. The seminal work on such meanings is Jorge Luis Borges, "The Wall and the Books" in Labyrinths (1970) at p.221. Homenaje a Borges.

169 *cf. Baden Barnes Groves and Co. v. Bristol West Building Society* (unreported, November 22, 1996), as cited in *Prince Bolkiah v. KPMG* (unreported October 19, 1998, Court of Appeal, SC2 98/7079/3: SCW 98/7083/3.

170 *Mallesons Stephens Jaques v. KPMG Peat Marwick* [1990] W.A.R.357 at 371–372.

171 For recent examples of successful walls, see *Kala v. Aluminum Smelting & Refining Co.* 688 NE 2d 258 at 266 (OH Sup. Ct. 1998),

172 *cf. Ford Motor Co. of Canada v. Osler, Hoskin & Harcourt* (1996), 131 D.L.R. (4th) 419 at 441, 43 C.P.C. (3d) 156, 24 B.L.R. (2d) 217, 27 O.R. (3d) 181 (Gen. Div.), where the screen was not put in place at the outset of the retainer and therefore Osler, Hoskin & Harcourt was removed as solicitor. *cf.* also *A.K. Film Ltd Partnership v. Gallery Pictures Inc.* (1996), 50 C.P.C. (3d) 170 (Ont. Gen. Div.), involving an application to remove Miller Thomson as the claimant's solicitor because of a conflict which arose when the defendant's former lawyer became a member of the firm. Prior to the lawyer's arrival at Miller Thomson, the firm put a proper Chinese wall in place and this timing was important to the court in dismissing the application. In contrast, in *Chippewas of Kettle & Stony Point v. Canada (Attorney General)* [1994] 2 C.N.L.R. 33 (Ont. Div. Ct.); aff'g (1993), 17 C.P.C. (3d) 5 (Ont. Gen. Div.), a screen was implemented too late even though the wall was put in place a few days after the firm was retained. Where the lawyer who had worked extensively on the claimants' case became employed by the defendants' firm during litigation, and the defendants' firm had not erected a Chinese wall in a timely manner, the firm would be disqualified from representation of the defendants. *Cobb Publishing v. Hearst Corp.*, 891 F. Supp. 388, 1995 U.S. Dist. LEXIS 9784 (1995, E.D. Mich.).

173 *cf.* Private communication from Ross Harper, Harper Macleod, August 30, 1999, Code of Conduct Rules (*Parliament House Book*, vol. 3, pp. F328 and F701).

174 Are we a profession or merely a business? The erosion of the conflicts rules through the increased use of ethical walls. Neil W. Hamilton; Kevin R. Coan, *Hofstra Law Review*, 1998 vol. 27 i1 p57–108

175 Grigory Aleksandrovich Potemkin (1739–91), favourite of Empress Catherine II of Russia, was reputed to have built sham villages with cardboard houses and paste palaces, in order to create a false picture of progress and prosperity, for Catherine's tour of the Crimea in 1787.

Walls in the United States

In 1975, the American Bar Association (ABA) first specifically addressed the screening procedure regarding former government lawyers with the Model Code of Professional Responsibility Disciplinary Rules 9–10(B).[176] In general, it did not allow former government lawyers complete freedom to represent whomever regardless of their past actions involving one or more of the parties, but it did permit firms to establish screening procedures. The ABA expanded the requirements to include notice and approval by the former government employee's agency.[177] In 1983, the Model Rules of Professional Conduct codified the screening policy.[178] In 1988, the ABA eliminated the distinction between former government attorneys and non-government attorneys, which set the stage for the private sector to also institute screening procedures to avoid conflicts of interest.[179] Through Formal Opinion 88–356, the ABA considered the scope of screening to cover attorneys who were not former government attorneys or temporary attorneys.[180] The ABA declined to endorse any broad-based notion of screening, holding that screening may only be used when the information concerning previous clients that was revealed was neither extensive nor sensitive information.[181] Today, Model Rule 1.9 addresses this issue by stating that an attorney who formerly represented a client in some matter must respect the confidences of that relationship.[182] Screening is a way of addressing that concern. Screens are often referred to as "Chinese Walls," but sometimes because of linguistic sensitivities,[183] they are called "insulation walls," "ethical walls," "zones," "cones of silence," "confidentiality screens," or "fire walls."

This decision created a fundamental split between the ABA, whose formal opinions are advisory only, and many courts because each State and circuit has its own specific policies. Currently, the Secondly,[184] Third,[185] Sixth,[186] Seventh,[187] and Eleventh[188] Circuits have allowed some degree of private sector screening. In contrast, the First,[189] Fourth,[190]

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176 Model Code of Professional Responsibility Dr 9–101(B) (1970).

177 ABA Comm. of Ethics and Professional Responsibility, Formal Op. 342, 5 (1975).

178 Model Rules, r. 1.11 (1983).

179 ABA Comm. on Ethics and Professional Responsibility Formal Op. 88–356 (1988).

180 *ibid.*

181 *ibid.*

182 Model Rules, r. 1.9, Commentary 11 (stating specifically, that an attorney who has formerly represented a client in some matter, "shall not thereafter (a) represent another person in the same or substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation; or (b) use information relating to the disadvantage of the former client except when the information has become generally known").

183 *Peat, Marwick, Mitchell & Co. v. Superior Court*, 245 Cal. Rptr. 873 (1988) (Low, J., concurring).

184 *Cheng v. GAF Corp.*, 631 F.2d 1052, 1057–58 (2d. Cir. 1980).

185 *Nemours Found v. Gilbane*, Aetna, Fed. Ins. Co., 632 F. Supp. 418, 428 (1986) (citing *U.S. v. Miller* 624 F. 2d 1198 (3rd Cir. 1980)); *Webb v. E.I. Du Pont de Nemours & Co.* 811 F.Supp. 158, 163 (1992).

186 *Manning v. Waring, Cox, James, Sklar & Allen* 849 F. 2d 222, 226 (6th Cir. 1988); *Cobb Publishing v. Hearst Corp.* 891 F.Supp 388, 390 (1995).

187 *Cromley v. Board of Education* 17 F3d 1059 (7th Cir. 1994).

188 *Cox v. American Cast Iron Pipe Co.*, 847 F.2d 725, 731 (11th Cir. 1988) (holding that screening measures combined with other mitigating factors to constitute a sufficient evasion of conflict of interest, however the court did not decide if screening devices alone are sufficient); *Blitch Ford v. MIC Prop. & Cas. Ins. Corp.* 980 F.Supp. 1261, 1262 (1997).

189 *Kevlik v. Goldstein* 724 F.2d 844 (1st Cir. 1984) (declining to evaluate the legitimacy of screens and instead finding the case to be one of first impression); *In re Ferrantee* 126 B.R. 642 (1991); distinguished by *Starlight Sugar v. Soto* 903 F.Supp. 261 (1995).

190 The Fourth Circuit does not appear to have considered the issue of screening.

Fifth,[191] Eighth,[192] and Tenth[193] Circuits have not. The Ninth Circuit has specifically chosen not to endorse screening, yet it expressed a willingness to consider it.[194] The D.C. Circuit Court of Appeals has not dealt with the issue. It is likely that American law will have to face up to the realities of contemporary practice.

As it was put by Coffee J., Circuit Judge (in dissent) in *Analytica, Inc. v. NPD Research, Inc.*[195]—

> "The irrebuttable presumption that all information is shared among every attorney in a firm ignores the practical realities of modern day legal practice. The practice of law has changed dramatically in recent years, with may lawyers working in forms consisting of 20, 30, 60, 100 or even 300 or more attorneys, and with some firms having offices located throughout the country or even throughout the world. Additionally, the trend within law firms has been toward greater specialisation and departmentalisation. Surely, it defies logical and common sense to establish a presumption, with no opportunity for rebuttal, that every individual lawyer in such a multi-member and multi-specialised firm has *substantial knowledge* of the confidences of each of the firm's clients. Recognising these realities of the modern practice of law, we must continue to take a more realistic view toward the law of attorney disqualification by allowing the presumption that confidences have been shared throughout a firm to be rebuttable."

American law has always held that independent professional judgment lies at the heart of the lawyer's service. If conflicting interests compromise this independence, the lawyer must decline engagement.[196] For many years, American law was more fully developed than the law of other jurisdictions in addressing conflict issues.

In dealing with lawyers transferring between firms, the American courts apply a two-fold test: Can the transferring lawyer continue to act against the interests of his or her former client? If the individual lawyer cannot continue to act, should the lawyer's new firm be prevented from acting against the interests of the lawyer's former client? The key factor in assessing the lawyer's ability to act will be whether the lawyer actually possesses (or is presumed to possess) confidential information relating to the client. In the United States, there are many examples of effective screening devices. But there is very little uniformity of approach, and much will turn on the jurisdiction where the issue is raised. In general, screening procedures created to avoid conflicts of interest within legal firms are largely recognised by the US federal and state courts.

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191 *In re American Airlines, Inc.*, 972 F.2d 605 (5th Cir. 1992).

192 Because the Eighth Circuit holds the presumption of shared confidences is irrebuttable, it has logically precluded itself form use of screening to rebut the presumption.

193 *Smith v. Whatcott* 757 F.2d 1098,1102 (10th Cir. 1985) (declining to judge the acceptability of screening procedures). However, the Tenth Circuit questioned this holding in *SLC, Ltd v. Bradford Group West, Inc.* 999 F.2d 464 (1993).

194 *U.S. v. Lynn Boyd Stites* 56 F.3d 1020, 1025 (1995) (stating that it was within the trial court's discretion to reject a screen)

195 708 F 2d 1263 (7th Circ. 1983).

196 *cf.* Canon 5 and DR 5–105, ABA Code of Professional Responsibility.

The Consenting Client

The pressure upon existing conflicts rules has manifested itself in resort to waivers and consents.[197] Yet there is little clarity in the case law in how effective these waivers are.[198] The law does not precisely state whether client consents will always be effective,[199] but they cannot hurt. If one views the responsibility of a lawyer as stemming from a fiduciary relationship with a client, then it is far from clear that a fiduciary can request a beneficiary to excuse a fiduciary's breach of that duty. Of course, as sophisticated investor rules in securities regulation suggest, not all beneficiaries are so helpless that they need absolute rules to protect them. The courts recognise that informed consent may neutralise potential conflicts,[200] but the requirements of *informed consent* are set high. As the Privy Council stated in *Clark Boyce v. Mouat*:[201]

> "Informed consent means consent given in the knowledge that there is a conflict between the parties and that as a result the solicitor may be disabled from disclosing to each party the full knowledge which he possesses as to the transaction or may be disabled from giving advice to one party which conflicts with the interest of the other".

However, such consent is always liable to be withdrawn or challenged, unless it can be shown to have been freely given under circumstances of full disclosure and with the benefit of independent legal advice. It may also be difficult for lawyers to fully inform a potential client of possibly conflicting interests, because of legal professional privilege or separate obligations of confidentiality. Such information could not be disclosed to a potential client in order to obtain fully informed consent. In practice, such disclosure will be made immeasurably more difficult by the requirements of preserving privilege and protecting confidential information. It is always difficult for fiduciaries to protect themselves from beneficiaries by means of gratuitous waivers.

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197 Brief of Irwin L. Trieger and William J. Lipton (Co-Chairs, National Conference of Lawyers and Certified Public Accountants), March 11, 1999. ABA Commission on Multi-disciplinary Practice, http://www.abanet.org/cpr/multicom.html.

198 Paul Lush; Prashanth Satyadeva, "Chinese walls and client consent", S.J. June 25, 1999 vol. 143 i.25, p.610(3); D.L. Karpman, "Written consents to prospective conflicts of interest", *California Lawyer*, Dec 1998 vol. 18, i.12, p.29(1); T.E. Moore, "Conflicts of interest: disclosure, consent and related issues", *Georgetown Journal of Legal Ethics*, summer 1991 5 n.1, p99–106; J. Reynolds, "Conflicts of interest: disclosure, consent, and related issues" *Georgetown Journal of Legal Ethics*, summer 1988 2 n.1. pp. 143–153.

199 There are circumstances under which full disclosure and consent of all clients will not necessarily stop disciplinary proceedings against a lawyer who attempts to represent competing interests. *cf. In re A & B* 44 NJ 331, 209 A2d 101, 17 ALR3d 827

200 The requirement that informed consent is a precondition to the implementation of Chinese walls was recently endorsed by the New South Wales Court of Appeal in *Citicorp Australia Ltd v. O'Brien* (1996) 40 NSW.L.R. 398.

201 [1994] 1 A.C. 428 at 435 *per* Lord Jauncey. *cf.* also *Hawkins v. Clayton* (1988) 164 CLR 539 (H.C.). For analysis of *Clark Boyce v. Mouat* [1993] 4 All E.R. 268 (P.C.) *see* C.I.Howells, "Mortgagees and purchasers: separate solicitors?" *New Law Journal* Feb 10, 1995 145 n. 6682, p.193(2); H.W. Wilkinson, "Acting for buyer and lender" *New Law Journal*, Sept 30, 1994 144, n. 6665, p. 1327(3); R. Tobin, "Intolerable burden or good conveyancing practice?", *Conveyancer and Property Lawyer*, Sept–Oct 1994, pp. 404–411; A. Bates, "Law and professional ethics: solicitors: what constitutes a conflict of interest?" Queensland Law Society Journal, April 1994 24 n.2, pp. 153–155; R.C. Nolan, "Conflicts of duty and the morals of the marketplace", *Cambridge Law Journal*, March 1994 53 n.1, pp. 34–36; J. Francis, Privy Council decision (fiduciary duties of solicitors in dealing with an elderly client) *New Zealand Law Journal*, March 1994 p. 83(2); S. Fennell, "Conflicts of interest: Clark Boyce v. Mouat" *Professional Negligence*, March 1994, 10 n.1, p. 22(2); R.C. Nolan, "Conflicts of duty—helping hands from the Privy Council?", *The Company Lawyer*, Feb 1994 15, n.2, pp. 58–60.

In England, the Law Society has explicitly said that even consent will not rescue a conflict "where there is a conflict or a significant risk of a conflict between the interests of [two or more clients]"[202] The commentary elaborates:

> "Disclosure of the conflicting interest to the client or potential client does not permit the instructions to be accepted by the solicitor, even where the client consents". This assumes an unsophisticated client, rather than the type of commercial client (often with large in-house legal departments) that is currently litigating conflicts issues.

The Law Society permits the use of Chinese walls in very limited circumstances – following a law firm merger, where no confidential information concerning the competing interests has been received, and in exceptional circumstances.[203] One recent commentator on City practice has concluded that the Law Society guidelines are being widely ignored, and that this non-compliance may afford an easy avenue for anyone challenging a Chinese wall. As noted earlier, post-*Bolkiah,* the Law Society is revisiting its guidelines.

There has been a consistent Australian scepticism about the effectiveness of Chinese walls which culminated in a significant decision in September 1999. A ruling in Western Australia has been reported as threatening the end for "Chinese walls" in Australia. It may also constrain future mergers. Philips Fox was ordered to sever its ties with a long standing client, Fletcher Construction, which was involved in a dispute with another contractor. The contractor had been represented by Hely Edgar for four years. The firm later dissolved and the senior partner and staff joined Philips Fox. At trial, the judge ruled there could be conflict of interest, rejecting arguments that a Chinese wall adequate. It has prompted the Western Australia Law Society to condemn the practice. One Australian partner commented: "It may well spell the end of Chinese walls. The problem in the [Australian] marketplace is that there are so few major players that these problems of conflict are bound to crop up".

A Practical Guide to Wall Construction

Assuming that you practice in a jurisdiction where Chinese Walls are not expressly outlawed, how should construction proceed? The case law in England and elsewhere contains many practical hints for sound construction.[204]

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202 Rule 15.01, Guide to the Professional Conduct of Solicitors (Seventh Edition).

203 *cf.* Guide to the Professional Conduct of Solicitors (7th ed.), guidelines 15.03/3 and 15.03/1).

204 In the same way that the Canadian case of *Ford Motor Co. of Canada v. Osler, Hoskin & Harcourt* (1996), 131 D.L.R. (4th) 419, 43 C.P.C. (3d) 156, 24 B.L.R. (2d) 217, 27 O.R. (3d) 181 (Gen. Div.) provides a useful checklist to assess whether a particular set of institutional screening mechanisms will be considered to be effective, so *Bolkiah* sets out a road map for the construction of Chinese walls. The walls within KPMG were not satisfactory because of three structural flaws: Initially, they were established on an ad hoc basis, rather than being an established part of the organisational structure of the firm. They were erected within a single department. Secondly, KPMG's working practices were to involve a large number of people in this type of retainer, and to rotate team members. The implication is that smaller tighter teams with stable membership are more likely to withstand scrutiny. Next, the separation of different departments is possible if there is little personnel movement between them and they are located in different buildings. Finally, firms should be careful about attempting to erect information barriers between members drawn from the same department who normally work together. Particularly in forensic accounting, the novel nature of problems encountered in the practice had led to close sharing of information and expertise between the professionals in the department.

- Don't wait until a problem arises. To construct an effective wall, it must be part of the institutional fabric of the firm. Management should send out a memorandum on walls, which is revised regularly and circulated to all firm members, not just the legal professionals.
- When you face a potential conflict, start planning early: don't leave wall construction until work has actually started on a retainer, or more importantly until confidential information has been exchanged. As soon as there is any indication that a Chinese wall might be necessary, examine the structural requirements.
- Have an independent firm member (outside the immediate client service team) assess the conflict and design and construct the wall. Make sure that the independent lawyer is available to monitor the effectiveness of the wall and to deal with any difficulties.
- Identify the nature, sources and current location of confidential information.
- Consider asking for clearly worded client consents. The law does not state precisely whether client consents will always be effective,[205] but they cannot hurt. However the consent must be clear, freely given and confirmed by independent legal advice. Indeed, a court may well prefer the lawyer's position, if a sophisticated client grants consent and then for tactical reasons, seeks to remove counsel. Courts have held that delay may be fatal.
- Arrange for independent legal advice.
- Ensure that the wall is universal, and that screening mechanisms are respected across the firm.
- Keep all files relating to a case in an area to which only authorised team members may have access.
- File precautions must extend to computer systems: not merely to word processing files, but to electronic mail files, spreadsheets, databases and transcript archives. The counsel of perfection is a separate computer network, but much can be done through password protection and the use of virtual drives to partition access.
- If files must be deleted from computer systems, ensure that this extends to back-up copies and archives.
- For failsafe security purposes, it is prudent to make one back up on CD-rom or floppy and for the record to be held in escrow, only to be released upon the authorisation of the opposing party.
- Select an independent systems auditor[206] to ensure that all computer systems comply with the wall.
- Consider whether it is appropriate to structure the firm's profit sharing and accounting systems so that screened lawyers do not share in fees derived from the firm's work behind the wall.
- Ensure that authorised team members do not discuss the case with anyone outside the team.

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205 There are circumstances under which full disclosure and consent of all clients will not necessarily stop disciplinary proceedings against a lawyer who attempts to represent competing interests. *cf. In re A & B* 44 N.J. 331, 209 A2d 101, 17 A.L.R. 3d 827

206 It might be prudent to ensure that the other party finds the auditor acceptable.

- Ensure that no disclosure of confidential client information or the team's working documents is made to anyone outside the wall.
- If the firm has different offices or multiple floors, consider locating the screened members of the firm physically apart from team members.
- Ensure that all members involved affirm these facts under oath by executing affidavits.
- Remind firm members that the firm will enforce compliance through disciplinary measures.[207]
- Provide procedures to deal with future changes: these may be done on consent or with court approval.
- File and retain any undertakings, waivers and affidavits. Ensure that the wall is fully documented.
- Management should institute a regular mandatory review of existing walls, and their effectiveness.
- Institute a conflicts checking system[208] Successful conflict checking systems[209] depend upon:
    - integration with other office systems;
    - the existence of a conflicts avoidance policy;
    - zero tolerance for opting out of the conflict checking system;
    - open communication within the firm concerning clients and potential clients;
    - client intake procedures to analyse new clients and matters; and
    - ongoing education and training about conflicts and conflict review processes.

Finally, always be prepared for the worst. As this article has pointed out, walls will be challenged and may have to be dismantled.

Conclusions

The legal profession faces unprecedented challenges at the century's turn—legal, business and ethical. The single most common ethical problem faced by lawyers

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207 In Canada, the Rule on Transferring Lawyers states explicitly that this should refer to sanctions up to and including termination of employment. All provinces have adopted Rules based on The Federation of Law Societies of Canada Rule with respect to Conflicts of Interest Arising as a Result of Transfers between Law Firms, which in turn largely derive from the Canadian Bar Association Taskforce Report, *Conflict of Interest Disqualification: Martin v. Gray and Screening Methods* (Ottawa: Canadian Bar Association, 1993).

208 K. Bell, *Managing Conflict of Interest Situations* (Toronto: Lawyers' Professional Indemnity Co., 1998).

209 Law offices of any size require accurate, comprehensive, and up-to-date client records which can be reviewed to assess whether a new retainer may trigger a conflict of interest. For the smallest offices these may still be retained in paper form, but the better solution is a comprehensive computerised system including fully searchable client and docket databases. *cf.* D. Novachick and M.A. Miller, "Conflict Avoidance Strategies: an Update" (1995) 21 *Law Practice Management*; and C.A. Canfield and R.D. Kraus, "Conflict-of-Interest Systems: Welcome to the New Generation" (1998) 220:58 *N.Y. Law J.* 5. D. Z. Ribakoff, "Conflicts checks must be thorough and accurate", *Los Angeles Daily Journal*, August 9, 1999 vol. 112, i.152, p.5, col. 1; P. Person, "Good fences make good partners", *Legal Times*, August 2, 1999, vol. 22, i.12, p.30, col 1; D. Beckman, D. Hirsch, "The human side of managing risk; software programs are fine but not a substitute for a lawyer's diligence", *ABA Journal*, Dec 1998, vol. 84, p. 71(1).

continues to be conflicts of interest. The jurisprudence, as discussed in this article, is complex. The fundamental principles underlying the conflict rules are not.

Whatever the setting in which law is practised, care and attention paid to devising conflict management systems will pay dividends. The important issue is to be sensitive to the existence of conflicts of interest, and to be prepared to deal with them, in a timely fashion, in accordance with the applicable rules.

As we have argued in this article, there has been a veritable revolution in conflicts doctrines in recent years. The phenomenon is taking place in so many jurisdictions that it may represent the beginning of a sea-change for the legal profession. Clearly, the revolution is not yet over. Further development is needed in two areas.

First, the growth of multi-professional and inter-jurisdictional partnerships will require clear ethical rules, normative hierarchies to settle which of two competing principles might apply and authorities to provide guidance and binding decisions. For example, in a global law firm how do conflicts rules apply? Since ethics rules bind lawyers not firms, each lawyer must comply with the professional conduct rules of the national professional body to which they belong. Global firms will need to be careful not to presume that the rules in each jurisdiction are the same. Indeed, firms may find that there could be tactical advantages that may result from ethical differences in their decisions about how to staff multi-jurisdictional transactions. For example, if The Netherlands frowns on Chinese walls, but England permits them, if constructed according to Lord Millet's specifications, might a transaction be staffed from London rather than Rotterdam, precisely to avoid this problem? In the long run, the works at the harmonisation of national ethical rules may solve this potential problem.[210]

Secondly, the rules need to be more sensitive to the different circumstances within which practice occurs. There needs to be a debate within the profession on whether the rules that govern a small two or three person firm should apply in the same way to a partner of a large multi-jurisdictional firm who may never have met a partner whose detailed knowledge of a client's matters he or she is deemed to possess.[211]

One major implication of the leading Commonwealth cases is that large professional service firms are much more likely to face conflict of interest issues than so called "boutique" firms who specialise in niche areas. It may no longer be sensible to presume that the representation of a multinational corporate client X by the Tokyo office of a law

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210 The Council of Bars of the Commission of Europe has a draft European Code scheduled to be published in late 1999, which was unfortunately not available to us at the time of writing. For a more theoretical approach see, John Toulmin, Q.C., "A Worldwide Common Code of Professional Ethics?, in *Rights, Liability, and Ethics in International Legal Practice* ed. M. Daly and R. Goebel (Transnational Juris Publications, Inc.: NY, 1996).

211 As the ABA Section of Business Law Taskforce on Conflict of Interest put it (see (1995) 50 *Bus. Lawyer* 1381 at 1382–83): "(i). Conflict Rules reflect an earlier time when individual practitioners and small law firms dealt with long-time, loyal clients. The current reality includes large law firms with domestic and foreign branch offices, clients that spread their business among many firms, and lawyers who change firms with increasing frequency; (ii) The divergent views and assumptions of law firms and clients often lead to misunderstandings. *e.g.,* lawyers see no conflict when the firm takes different positions on recurring legal issues, while clients may consider such an issue conflict of breach of loyalty; (iii) The disqualification of a law firm often becomes a litigation ploy and results in considerable expense to the client involved. Furthermore, conflicts of interest are often alleged to support malpractice allegations.

firm conflicts with the representation of client Y by the Brussels office of the same firm, merely because some unrelated business units of X and Y are adversaries in a lawsuit in Madrid.[212]

Clearly the context within which conflict issues are considered has changed, leading to a dramatic growth in incidents. The increase in conflicts claims may be due to a number of factors:[213]

- increased competition between lawyers and other professionals;
- increased consumerism;
- broadening definitions of legal duties;
- the movement of lawyers from firm to firm;
- the large size of some firms; and
- the development of more intricate inter-relationships of corporate clients as a result of mergers and globalisation.

Conflicts rules date from times when law firms were typically so small that every firm member knew of all the files in an office. Lawyers ate together, discussing their day's work. Consultation on difficult points of law might involve every lawyer. That paradigm still underlies the assumption that every partner is deemed to have the knowledge of every other partner. Imputed knowledge, however, may appear strained in a firm of a hundred specialist lawyers, but it is artificial in a firm of a thousand, where some partners will be strangers to other partners, in offices on different continents.

With the global movement towards consolidation in the market for professional services, it was likely inevitable that old traditions, rules and practices would be tested, challenged and transformed. The remarkable fact in the conflicts area is how fast this process is gathering speed. A domain of ethical practice that was stable, unproblematic and uncomplicated is being changed country by country. For all that lawyers focus on their own jurisdictions, it is striking how closely courts have paid attention to developments in sister jurisdictions, adopting doctrinal innovation and practical solutions from abroad. As we cross into the millennium, market developments will dictate continued and quickened evolution and innovation.

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212 Brief of I. L. Trieger and W. J. Lipton (Co-Chairs, National Conference of Lawyers and Certified Public Accountants), March 11, 1999, ABA Commission on Multi-disciplinary Practice, http://www.abanet.org/cpr/multicom.html.

213 *cf.* K. Bell, *Managing Conflict of Interest Situations* (Toronto: Lawyers' Professional Indemnity Co., 1998) at 3.