Acting Against a Former Client: Reforming a Misconceived Disqualification Standard

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I. Introduction

> "One cannot but be conscious of the danger that the over-enthusiastic and unnecessary statement of broad general principles of equity in terms of inflexibility may destroy the vigour which it is intended to promote in that it will exclude the ordinary interplay of the doctrines of equity and the adjustment of general principles to particular facts and changes in circumstances and convert equity into an instrument of hardship and injustice in individual cases."[1]

It is the purpose of this paper to demonstrate that this warning, enunciated by Deane J in *Chan v Zacharia*,[2] is being ignored in the context of the current developments in the law relating to the disqualification of lawyers who attempt to act against former clients. As a consequence, unnecessary hardship is being caused both to the lawyers concerned and, more importantly, to their current clients. This problem is increasingly important due to the emergence of 'mega-firms',[3] which have increased the likelihood of the occurrence of conflict situations. As the legal controls in this area are too rigorous, firms can become disqualified too easily, reducing

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1 *Chan v Zacharia* (1984) 154 CLR 178, at 205 per Deane J.

2 Ibid.

3 P Finn, 'Fiduciary Law in the Modern Commercial World' in E McKendrick (ed), *Commercial Aspects of Trusts and Fiduciary Obligations*, Oxford: Clarendon Press, 1992, at 21 (*Finn, 'Commercial'*); See generally W Nelson, 'Conflict in Representation: Subsequent Representation in the World of Mega Law Firms' (1993) 6 *Georgetown Journal of Legal Ethics* 1023; D Copeland, 'Conflict of Interest in the Mega Firm' (1988) 13 *Journal of the Legal Profession* 255.

the choice of lawyers available to litigants and forcing them to meet the considerable expense of instructing new firms.[4]

The problem facing lawyers who attempt to act against former clients is well recognised. It is often discussed under the rubric of 'conflict of interest' although it is more accurately classified as a question of conflict of duties. To summarise the problem, lawyers are under a duty to keep confidential any information acquired when acting for a client. They are also under a duty to inform their clients of anything they know which may be relevant to the client's claim. These duties conflict when lawyers who have acted in the past for client 'A' are asked by client 'B' to act for them against client 'A' when information previously acquired from client 'A' is relevant.[5] If the lawyers disclose that information they will be liable for breach of confidence and if they accept the retainer but do not disclose it they will be liable for breach of fiduciary duty arising from the non-disclosure.[6] It is this no-win situation which the disqualification rules are designed to avoid.

The focus of this paper is on the equitable rules which will lead a court to order disqualification. In most jurisdictions there are also ethical rules which govern the behaviour of lawyers in conflict situations.[7] As Tur has noted, "since lawyers' ethical standards must at least equal the law, there can be no realm of lawyers' ethics independent of the law unless lawyers' ethical standards exceed the law's requirements."[8] Generally they do appear to exceed legal standards,[9] so if the slightly more liberal rules advocated in this paper were adopted some commensurate relaxation of ethical rules would also be desirable in order to permit lawyers and clients to take advantage of the new rules.

Most of the recent cases in this area are decisions at first instance. Much of the relevant literature consists of the analysis of single decisions in

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4 F Reynolds, 'Solicitors and Conflict of Duties' (1991) 107 *Law Quarterly Review* 536, at 536–537.

5 F Silverman, *Handbook of Professional Conduct for Solicitors*, 2nd ed Scotland: Butterworths, 1989, at 43; See also L Aitken, 'Chinese Walls and Conflict of Interest' (1992) 18 *Monash University Law Review* 91, at 94.

6 *Finn, 'Commercial'*, above, at n 3, at 24–25.

7 See the discussion of the American Bar Association's 1908 Canons, 1969 Code and 1983 Model Rules in C Wolfram, *Modern Legal Ethics*, St Paul Minn: West Publishing Company, 1986, at 363–366 and in R Aronson, 'Conflict of Interest' (1977) 52 *Washington Law Review* 807, at 811. See also the discussion of the Canadian Bar Rule in M Rice, *'Law Society of Manitoba v Giesbrecht*: Conflict of Interest and a solicitor's obligation not to act against a former client' (1985) 15 *Manitoba Law Journal* 117. The Victorian Rule is less well developed but see K Andrews, P Hamilton and G Mann, *Professional Practice Handbook*, Melbourne: Law Book Company, 1982, at para 4.2.

8 R Tur, 'An Introduction to Lawyers' Ethics' (1993) 10 *Journal of Professional Legal Education* 217, at 229.

9 *Supasave Retail Ltd v Coward Chance (a firm)* [1991] Ch 259, at 266 (*'Supasave'*); A Bates, 'Law and Professional Ethics: Solicitors: What constitutes a Conflict of Interest' (1994) 24 *Queensland Law Society Journal* 153, at 155; See also above, at n 7.

professional journals. It is therefore not the purpose of this paper to conduct a detailed case by case analysis. Instead it attempts to draw the cases together in a thematic way, first analysing the specific duties owed by the lawyer and then discussing the disqualification rules. The focus then turns to an examination of the practical operation of the rules, with an emphasis on the presumptions to which they give rise.

II. The Elements of the Conflict of Duty

The relationship between lawyer and client is fiduciary.[10] It has been described as "one of the most important fiduciary relationships known to our law".[11] It is important to bear this in mind when considering the specific duties owed by lawyers, for as Finn has noted:

> "... our preparedness to discriminate among the host of service relationships to be found in contemporary society and to designate some only as fiduciary... is informed in some measure by considerations of public policy aimed at preserving the integrity and utility of these relationships, given the expectation that the community is considered to have of behaviour in them, and given the purposes they serve in society."[12]

As will be seen, this public policy focus is very much evident in defining the duties owed by lawyers to their clients.

A. The Duty to Client One: Confidentiality

It is often said that, as an incident of the fiduciary nature of the lawyer-client relationship, a lawyer is bound by an obligation of confidence "to keep his [sic] client's affairs secret and not to disclose them to anyone without just cause."[13] However, it is not the designation of a person as a fiduciary which determines what obligations are imposed upon them.[14]

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[10] A huge number of cases support this proposition. Notable examples include *Boardman v Phipps* [1967] 2 AC 46; *Farrington Rowe McBride & Partners* [1985] 1 NZLR 83; For a recent example see *Carindale Country Club Estate v Astill* (1993) 115 ALR 112 (*'Carindale'*).

[11] *Re Van Laun; Ex parte Chatterton* [1907] 2 KB 23, at 29 per Lord Cozens-Hardy MR; See also Halsbury's Laws of Australia, *Professional Liability*, Vol 27, at 24–25.

[12] *Finn, 'Commercial'*, above, at n 3, at 9–10; See also P Finn, 'Professionals and Confidentiality' (1992) 14 *Sydney Law Review* 317, at 318 (*Finn, 'Professional'*); P Finn, 'The Fiduciary Principle' in T Youdan (ed), *Equity, Fiduciaries and Trusts*, Ontario: Law Book Company, 1989, at 26 (*Finn, 'Fiduciary Principle'*).

[13] *Parry-Jones v Law Society* [1969] 1 Ch 1, at 7, per Lord Denning MR. The line of cases establishing this principal goes back at least as far as *Beer v Ward* [1814–1823] All ER Rep 534. See also F Horne, *Cordery on Solicitors*, 8th ed London: Butterworths, 1988, at 11.

[14] Francis Gurry, *Breach of Confidence*, Oxford: Clarendon Press, 1984, at 158.

Rather, the obligation of confidence is a fiduciary obligation which defines for its own purposes its own class of fiduciaries.[15] This obligation will come into play when the circumstances of the receipt of information impart an obligation to treat that information on a limited basis.[16] In practical terms, the confidential character of the lawyer-client relationship stems from an obvious appreciation of the types of communication commonly associated with this type of relationship, and the limited use it is assumed the lawyer will make of the information obtained from the relationship.[17] In a formal legal sense, the confidentiality obligation is usually achieved by an implied term in the contract of retainer.[18]

The lawyer's duty of confidentiality is reinforced by reasons of public policy. As officers of the court, lawyers have a role in facilitating the smooth functioning of the legal system. This role is most clearly recognised in the cases on legal professional privilege. The rationale for privilege is:

> "... that it promotes the public interest because it assists and enhances the administration of justice by facilitating the representation of clients by legal advisers, the law being a complex and complicated discipline. This it does by keeping secret their communications, thereby inducing the client to retain the solicitor and seek his [sic] advice and encouraging the client to make a full and frank disclosure of the relevant circumstances."[19]

While it is clear that the lawyer's obligation of confidence differs from legal professional privilege,[20] the obligation of confidence is generally considered to be broader in scope than privilege, and it is informed in part by the same policy considerations.[21] These policy considerations are a further reason for considering the lawyer-client relationship fiduciary. Indeed Finn has suggested that fiduciary law can heighten the constraints that secrecy obligations impose upon professionals.[22] With respect to Professor Finn, it is difficult to give much content to this stricter duty. As Gurry has noted, in the context of a somewhat similar comment made by

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[15] Id 159.

[16] Id 4; R Meagher, W Gummow and J Lehane, *Equity Doctrines and Remedies*, 3rd ed Sydney: Butterworths, 1992, at 872; *Marriage of Griffis* (1991) 105 FLR 441, at 444.

[17] *Finn, 'Fiduciary Principle'*, above, at n 12, at 41; *Finn, 'Professional'*, above, at n 12, at 321–322 (noting that the principle is not limited to actual information disclosed and can include information derived from observation); P Finn, *Fiduciary Obligations*, Sydney: Law Book Company, 1977, at 137 *(Finn, 'Fiduciary Obligations')*.

[18] *Parry Jones v Law Society* [1969] 1 Ch 1; *Ansell Rubber Co v Allied Rubber Industries* [1967] VR 37, at 40; *Marriage of Griffis* (1991) 105 FLR 441, at 445; *Carter v Palmer* (1842) 8 Cl & F 657; 8 ER 256 (case concerning counsel).

[19] *Grant v Downs* (1976) 135 CLR 674, at 685, per Stephen, Mason and Murphy JJ; See also *Baker v Campell* (1983) 153 CLR 52, at 114, per Deane J.

[20] F Silverman, above, at n 5, at 151–152; Gurry, above, at n 14, at 156.

[21] Gurry, above, at n 14, at 156.

[22] *Finn, 'Professional'*, above, at n 12, at 318; It should be recalled that just being under an obligation of confidence or secrecy *makes* one a fiduciary. See above, at n 15.

Fletcher Moulton LJ in *Rakusen v Ellis, Munday and Clarke*[23], "if a confidant is bound to respect the confidentiality of information, such a duty would not seem to admit of differing standards".[24]

In summary, with respect to the first client, a lawyer is under a strict duty to protect the client's confidences. This duty will be rigourously enforced, for it is supported by policy considerations which indicate that the law's interest in confidentiality extends beyond any specific lawyer-client relationship.[25]

B. Duty to Client Two — Using all available Skill and Knowledge

The fiduciary standard enjoins one party to act in the interests of the other — to act selflessly and with undivided loyalty.[26] Notions of loyalty have played a much larger role in the United States jurisprudence than they have in Australia.[27] However, they are clearly evident in the classic statement of a lawyer's duty made by Megarry J in *Spector v Ageda*, where he said:

> "A solicitor must put at his client's disposal not only his skill but also his knowledge, so far as is relevant; 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."[28] [sic]

This statement has been approved in numerous cases and represents undoubted law in Australia.[29] When the client retains a firm of solicitors the obligation is to put any knowledge which *any* member of the firm possesses at the client's disposal.[30] It is this extension of the rule which has prompted the only judicial doubts as to the extent of the duty identified in *Spector v Ageda*. Staughton LJ, in dissent in *Re a firm of solicitors*,[31] when discussing a mega-firm with over one hundred partners, said "it

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[23] [1912] 1 Ch 831, at 840 (*'Rakusen'*).

[24] Gurry, above, at n 14, at 150.

[25] *Marriage of Griffis* (1991) 105 FLR 441, at 443; Justice Brennan, 'Pillars of Professional Practice: Functions and Standards' (1987) 61 *Australian Law Journal* 112, 117; A Kaufman, *Problems in Professional Responsibility*, 3rd ed Boston: Little Brown, 1989, at 37.

[26] *Finn, 'Fiduciary Principle'*, above, at n 12, at 4.

[27] Wolfram, above, at n 7.

[28] *Spector v Ageda* [1973] Ch 30, at 48; See also Horne, above, at n 13, at 11.

[29] eg *O'Reilly v Law Society of New South Wales* (1988) 24 NSWLR 204, at 213–215; *Marriage of Thevenaz* (1986) 84 FLR 10, at 12; *Marriage of A and B* (1989) 99 FLR 171, at 175; *Fruehauf Finance Corporation v Feez Ruthning (a firm)* [1991] 1 Qd R 558, at 566 (*'Fruehauf Finance'*); See also *Finn, 'Commercial'*, above, at n 3, at 22.

[30] See the foundation case of *Davies v Clough* (1837) 8 Sim 262; 59 ER 105, at 107, per Shadwell VC.

[31] [1992] 1 All ER 353.

seems to me impractical and even absurd to say that they are under a duty to reveal to each client, and use for his [sic] benefit, any knowledge possessed by any one of their partners or staff. I would not hold that to be the law."[32]

This position is a minority one, and as a consequence firms are now commonly resorting to contractual limitations in their contacts of retainer with the second client which expressly reject any duty to disclose to that client any confidential information disclosed by a previous client.[33] The courts have generally been prepared to accept this contractual limitation.[34] This accords with Mason J's statement of principle in *Hospital Products Ltd v United States Surgical Corporation*[35] that:

> "The fiduciary relationship...must accommodate itself to the terms of the contract so that it is consistent with, and conforms to, them. The fiduciary relationship cannot be superimposed upon the contract in such a way as to alter the operation which the contract was intended to have according to its true construction."[36]

The willingness of the courts to accept this form of limitation, which undermines the duty of loyalty by removing the obligation to have regard only to the client's best interests, may in part be explained by the fact that they take that view that contractual limitations will usually fail to prevent disqualification.[37] As will be seen this is a result of the view that, regardless of any obligation to disclose information, it will inevitably be disclosed in the course of a lawyer trying to advance the interests of their current client, thereby breaching the duty to the former client. The severity of the approach in this area reflects the view that ultimately fiduciary responsibility is imposed, not accepted, and that public policy considerations can ordain what a fiduciary must do, whether they have agreed to it or not.[38] Clearly there is a tension between this view and that expressed in the passage from *Hospital Products* quoted above.

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[32] Id 365.

[33] The factual scenarios in *Fruehauf Finances, Re a firm of solicitors* and *Malleson Stephen Jaques v KPMG Peat Marwick* [1991] 4 WAR 357 (*'Mallesons'*) all provide examples of such contractual limitations.

[34] *Fruehauf Finance* [1991] 1 Qd R 558, at 571; See J Maxwell, 'Conflict of Interest: The duty not to act against a former client' (1991) 29 *Law Society Journal* 27, at 28; M Keith, 'Berlin Wall Down, Chinese walls next?' (1992) 14 *Law Society Bulletin* 12, at 13; Note that Lord Cozens-Hardy MR in *Moody v Cox and Hatt* [1917] 2 Ch 71, the principle authority on which *Spector v Ageda* relied, accepted the propriety of contractual limitation.

[35] (1984) 156 CLR 41.

[36] Ibid 97.

[37] For example see *Mallesons* [1991] 4 WAR 357, at 371; D Searles, 'Conflict of Interest — Chinese Walls or the Emperor's New Clothes' (1991) 21 *Queensland Law Society Journal* 61; Also see the somewhat obscure comments in *Clarke Boyce v Mouat* [1993] 3 NZLR 641, at 648 (Privy Council).

[38] *Finn, 'Fiduciary Principle'*, above, at n 12, at 54.

III. In what circumstances will a practitioner be disqualified due to a conflict of duties?

The disqualification cases are primarily concerned with determining at what point a court should intervene to restrain a lawyer from acting in order to prevent the occurrence of a conflict between the two duties discussed above. The court will intervene *before* the conflict occurs, and so the central question is how likely must the occurrence of a conflict be before the court will intervene.[39]

In answering this question the courts are trying to balance three main policy considerations. These have been most explicitly recognised in the case law in *MacDonald Estate v Martin*,[40] a decision of the Supreme Court of Canada. There they were expressed to be, first, the concern to maintain the high standards of the legal profession and the integrity of our system of justice,[41] second, the countervailing consideration that a litigant should not be deprived of their choice of counsel without good cause and finally, the desirability of permitting reasonable mobility in the legal profession.[42] The final section of this paper will examine these considerations in more detail to assess the effectiveness of the current rules in achieving an appropriate balance between them.

The majority judgment in *MacDonald Estate* also usefully summarised the two main approaches taken in common law jurisdictions to disqualification, which will be termed the 'probability' and 'possibility' approaches. In explaining these approaches Sopinka J stated:

> "The first approach requires proof that the lawyer was actually possessed of confidential information and that there is a probability of its disclosure to the detriment of the client. The second is based on the precept that justice not only must be done but must manifestly be seen to be done. If, therefore, it reasonably appears that disclosure might occur, this test for determining the presence of a disqualifying conflict of interest is satisfied."[43]

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[39] The basis of the court's jurisdiction to intervene in these cases lies in the supervisory power of the court over its own officers. See Reynolds, above, at n 4, at 537; *Yamaji v Westpac Banking Corporation [No 1]* (1993) 115 ALR 235, at 237; *MacDonald Estate v Martin* (1991) 1 WWR 705, at 713 ('*MacDonald Estate*'); Also see an interesting passage in M Dean and C Finlayson, 'Conflict of Interest: When may a lawyer act against a former client?' [1990] *New Zealand Law Journal* 44, at 45 discussing the position of Barristers in the United Kingdom, who are not officers of the court.

[40] [1991] 1 WWR 705.

[41] Often described in Australia as the appearance of justice. For example *Fruehauf Finance* [1991] 1 Qd R 558, at 566.

[42] *MacDonald Estate* (1991) 1 WWR 705, at 711; Also see the following article which in essence identify the same competing policy considerations: R Tomasic, 'Chinese Walls, Legal Principle and Commercial Reality in Multi-Service Professional Firms' (1991) 14 *University of New South Wales Law Journal* 46, at 49; Reynolds, above, at n 4, at 536–537; *Finn, 'Professional'*, above, at n 12, at 333–334.

[43] *MacDonald Estate* (1991) 1 WWR 705, at 714.

These approaches will now be examined in turn.

A. Probability of Disclosure

The probability approach has been the dominant approach to resolving conflict questions within the Commonwealth for most of this century. The leading case which expounds this approach is *Rakusen v Ellis, Munday & Clarke*.[44] This case has been subjected to exhaustive analysis elsewhere,[45] and it is not proposed in this paper to re-examine this ground, for in recent years the law has departed significantly from that set down in *Rakusen*. It is sufficient to note that, while the tests for disqualification set out by each of the three judges in *Rakusen* are somewhat difficult to reconcile, the case has been taken to stand for the proposition that disqualification will occur when disclosure of confidential information is "rightly anticipated".[46]

Whatever precise formulation is preferred, the case is authority for the proposition that the mere fact of acting against a former client is insufficient to lead to disqualification, and that a probability of disclosure must be demonstrated.[47] The decision also established that in some circumstances Chinese walls would be accepted by the courts as an adequate means of preventing the disclosure of confidential information.

In recent years *Rakusen* has come under attack. Professor Finn, in a critique which has received some judicial approval,[48] described the *Rakusen* test as "untenable".[49] He considered that *Rakusen* paid no regard to the fact that use of information, as distinct from disclosure, is offensive, nor to the possibility of unconscious use of information.[50] His most

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[44] [1912] 1 Ch 831.

[45] See, for example, J Midgley, 'Confidentiality, Conflict of Interest and Chinese Walls' (1992) 55 *Modern Law Review* 822 and Aitken, above, at n 5, at 96–98.

[46] *Supasave* [1991] Ch 259, at 267, purporting to follow Hoffmann J in *Re a Solicitor* (1987) 131 SJ 1063, although Parker LJ in *Re a Firm of Solicitors* [1992] 1 All ER 353, at 361 suggested that the full transcript of Hoffman J's judgment made it clear that he had not specifically adopted this test.

[47] *Fruehauf Finances* [1991] 1 Qd R 558, at 570; *Australian Commercial Research and Development v Hampson* [1991] 1 Qd R 508, at 515–8 (*'Hampson'*); *Sogelease Australia v MacDougall*, unreported, Supreme Court of New South Wales, 17 July 1986, Wood J; Two other recent cases, *D & J Constructions v Head* (1987) 9 NSWLR 118 and *Re a firm of solicitors* [1992] 1 All ER 353 both purport to be following *Rakusen*, but view that case so narrowly that it is doubtful whether they can be said to be applying it.

[48] *National Mutual Holdings v Sentry Corporation* (1989) 87 ALR 539 (*'National Mutual'*); *Marriage of Griffis* (1991) 105 FLR 441, at 449.

[49] *Finn, 'Professional'*, above, at n 12, at 336.

[50] Ibid 334. The 'unconscious plagiarism' argument really only applies to cases where an individual lawyer subsequently tries to act against a former client. It is not an issue in cases such a *Rakusen* which are decided on the basis that a Chinese wall prevents the flow of information.

compelling criticism, however, is that:

> "... it undermined the very public interest informing both client secrecy and the related doctrine of legal professional privilege. In placing the onus on the first client to prove not merely that 'protected information' was acquired by the lawyer, but also that there was a real likelihood of some or all of it being misused, it in effect tore aside the protective cloak drawn about the lawyer-client relationship."[51]

While there is a great deal of force in this criticism it applies with equal force, as will be seen, to the new approach which seems to have been adopted by Australian Courts, an approach which retains the worst parts of *Rakusen* but discards its strengths.

B. The Pre-eminence of Possibility

All the authorities cited in the previous section addressed the disqualification problem as one of a potential conflict between the different *duties* owed by a lawyer to their present and previous clients. It was therefore the respective rights of the first and second clients that the courts were concerned to balance. However, in a development which appears to be peculiar to Australian law, courts are increasingly viewing the problem of acting against former clients as a conflict between the duty to protect the confidences of the first client and the *solicitor's interest* in advancing the claims of their current client.[52] The reason for this change is unclear. Certainly the rationale for the change is not articulated in any of the judgments, and it appears likely that it is simply the result of a failure to properly identify the issue in former client disqualifiaction cases, perhaps combined with a desire on the part of lower courts to utilise precedents of high authority, which in Australia and England have (as a matter of chance) tended to concern conflicts between a fiduciary's personal interests and the duty that fiduciary owes to a beneficiary (ie duty-interest cases).

This shift is not just of terminological interest. It has substantive consequences, and indeed underlies, and infects, most of the recent Australian cases concerning the disqualification of lawyers. The reason the change is significant is that different policy considerations inform the determination of the appropriate standard to be exacted from a fiduciary depending upon whom the conflict is between. This has been recognised in the cases where, for instance, it has been said that "arguments for a draconian

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[51] Id 335.

[52] *Finn, 'Commercial'*, above, at n 3, at 27–8; *Finn, 'Professional'*, above, at n 12, at 333–334; I Tunstall, 'Acting for the corporate regulator: a potential conflict of interest' (1991) 29 *Law Society Journal* 57, at 57.

imposition of liability are more understandable when the fiduciary stands to gain personally — anathema to conscience — than when there is a mere conflict between clients."[53]

The interest which was being referred to in the principal duty-interest cases was usually a financial interest which the fiduciary (often a trustee) possessed which conflicted with dedication to advancing the interests of the beneficiaries. The conflict rules which govern this situation are informed in part by punitive and deterrent philosophies directed against the fiduciary in order to discourage fiduciaries from attempting to benefit from their position.[54] By referring to the duty the lawyer owes to their present client as an interest belonging to the lawyer, in any conflict situation the second client's rights are subjected to the punitive deterrent standard designed to subjugate the fiduciary's rights to those of the beneficiary. Once the duty to the second client is reconstructed as an interest of the solicitor, and the solicitor is substituted into the equation which balances the interest of the first and second client, that equation appears to involve balancing the rights of the first client against those of the solicitor. In this situation the result is clear. The first client's rights must prevail absolutely. Their is no balancing process. Hence, by characterising the duty of the lawyer to their current client as the solicitor's interest, the rights of that client are not considered and balanced against those of the first client because this is *precisely the result which the duty-interest rules were designed to achieve.*

Consequently, while few would argue with the contention that the client's rights should take precedence over any actual interests of the lawyer, the question becomes much less clear when it is recognised that it is the rights of the clients which are being balanced. The failure of Australian courts to recognise this goes some way towards explaining why the rights of current clients are almost totally subjugated to those of former clients in the Australian cases as they currently stand, notwithstanding the fact that the lawyer owes fiduciary obligations to *both* clients.

Nevertheless, having accomplished this terminological shift and inaccurately characterised the problem as one of conflict of duty and interest,[55] it was inevitable that the courts would begin to utilise duty-interest

[53] *Mouat v Clark Boyce* [1991] Australia and New Zealand Conveyancing Report, Issue 118, 579, 590 quoted in *Stewart v Layton* (1992) 111 ALR 687, at 713; See also Halsbury's Laws of Australia, above, at n 11, at 28.

[54] See, for example, the classic case of *Phipps v Boardman* [1967] 2 AC 46; See also R Teele, 'The Necessary Reformulation of the classic fiduciary duty to avoid a conflict of interests or duties' (1994) 22 *Australian Business Law Review* 99, who regards the former client cases as weakening the classic strict fiduciary standard, without recognising that the duty-interest standard is not always the relevant standard.

[55] This process seems to have began as far back as *Mills v Day Dawn Block Gold Mining Co* (1882) 1 QLJ 62, at 63; It is evident, however, in recent cases such a *National Mutual* (1989) 87 ALR 539, at 559, *Mallesons* [1991] 4 WAR 357, at 360–363, *Marriage of Griffis* (1991) 105 FLR 441, at 442 and, by implication, all other modern cases that rely on the above cases as precedents.

precedents which, being informed by different policy considerations, impose a much more stringent disqualification standard than that found in *Rakusen*. Thus in *National Mutual Holding v Sentry Corporation*[56] Gummow J relied upon *Phipps v Boardman*[57] and *Chan v Zacharia*[58] in determining what the disqualification test should be, despite the fact that both cases were duty-interest decisions. Shortly thereafter, having cited *Phipps v Boardman*, *Chan v Zacharia* and *National Mutual*, Ipp J in *Malleson Stephen Jaques v KPMG Peat Marwick*[59] introduced the language of possibility by holding that:

> "... if, by a solicitor acting for a new-client, there is a *real and sensible possibility that his interest in advancing the case of his new client* might conflict with his duty to keep information given to him by the former client confidential...then an injunction will lie."[60]

Given that in *Chan* Deane J refers to the relevant standard as being a "significant possibility" of conflict,[61] and that in *Hospital Products* Mason J refers to a "real or substantial possibility" test in duty-interest cases,[62] it is not difficult to see how the courts came to frame the disqualification test in former client cases in similar terms. The shift from the probability to possibility test can thus be seen to have been achieved without the courts having considered the difference between cases involving a conflict of interest and duty, and those involving conflicts of duty and duty. The effect of this failure is to give insufficient weight to the fiduciary duty owed to the second client, and to their right to retain the legal assistance of their choice.

Nevertheless, the clear trend in Australia is in favour of the possibility test.[63] In a commercial context, in *Mills v Day Dawn Block Gold Mining Co*, the Court held that a lawyer must avoid a situation which "might lead to their being even an unwitting breach of duty."[64] In *Murray v Macquarie Bank*[65] Spender J doubted the correctness of *Rakusen*[66] and referred to a "real possibility of breach of confidence", while in *Carindale Country Club*

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56 (1989) 87 ALR 539, at 559.
57 [1967] 2 AC 46.
58 (1984) 154 CLR 178.
59 [1991] 4 WAR 357.
60 Ibid 362–363 [my emphasis].
61 *Chan v Zacharia* (1984) CLR 178, at 199.
62 *Hospital Products* (1984) 156 CLR 41, at 103.
63 In the author's view, nothing particularly turns on any fine shades of meaning between, eg, 'real possibility', 'significant possibility', 'substantial possibility' or 'non-theoretical possibilities'. All of these formulations can be found at various places in the cases. As will be discussed below the main importance of the tests lie in the presumptions to which they ultimately lead.
64 [1882] 1 QLJ 62, at 63.
65 (1991) 105 ALR 612, at 617.
66 As did Burchett J in *Wan v McDonald* (1992) 105 ALR 473, at 495.

Estate Pty Ltd v Astill[67] Drummond J considered that he should look for a "real, as opposed to theoretical, possibility" that confidential information might be disclosed.[68]

The stricter test is even more evident in the criminal and family law areas. The test used in the *Mallesons* case, a criminal decision, has been outlined above. The Family Court has adopted an even more stringent approach. For example, in the *Marriage of Thevenaz*[69] Frederico J held that:

> "It is of the utmost importance that justice should not only be done but should appear to be done. In the present case, there is a risk which may well be theoretical but still exists, that justice might not appear to be done."[70]

As a result, he disqualified the lawyer. This decision was explicitly approved in the *Marriage of Griffis*.[71] It was also referred to in the *Marriage of Magro*,[72] the *Marriage of Gagliano*,[73] and the *Marriage of A and B*.[74] However, while these cases recognised the conflict between *Thevenaz* (and possibility) and *Rakusen* (and probability) it was not necessary in any of them to choose between these approaches. The trend, however, is clearly away from *Rakusen*.

Having examined the tests which the courts have developed it is apparent that they are cast in broad terms. The remainder of this paper is devoted to an investigation of the operation of these tests in the context of the issues which arise in disqualification cases, with a particular emphasis on the presumptions which they will lead the courts to apply. The analysis falls into two distinct parts. The first examines when the individual lawyer who had primary responsibility for acting for the former client will subsequently be permitted to themselves act against that client. The second assumes that the individual lawyer is disqualified and proceeds to examine when that disqualification will lead to the disqualification of that lawyer's entire firm.

IV. Disqualifying the lawyer who directly acted for the former client

The critical issue in determining when a lawyer who has acted directly for a former client will be disqualified from acting against that client is

[67] (1993) 115 ALR 112.
[68] Id 118.
[69] (1986) 84 FLR 10.
[70] Id 13.
[71] (1991) 105 FLR 441, at 451.
[72] (1988) 93 FLR 365, at 375.
[73] (1989) 95 FLR 88, at 95.
[74] (1989) 99 FLR 171, at 175.

whether or not potentially relevant confidential information has been disclosed to the lawyer, or will be presumed to have been disclosed to them. If so, automatic disqualification will result, notwithstanding some comments in *Rakusen* which would appear to suggest otherwise.[75] "The lawyer cannot compartmentalise his or her mind so as to screen out what has been gleaned from the client and what was acquired elsewhere."[76] The Full Court of the Supreme Court of Victoria has recently indicated that it will "not readily countenance" an attempt to act in such situations.[77]

If no confidential information has been disclosed or been presumed to have been disclosed then, subject to one qualification, the lawyer will generally be free to act against the former client, for there is nothing to give rise to an ongoing duty. The exception is that a lawyer will generally be unable to act against a former client *in the very same matter* regardless of whether or not there is confidential information. This restriction is based on the importance of justice appearing to be done.[78]

A. Must the disclosure of confidential information be proved or is it presumed?

This question raises an important issue of legal principle.[79] In a number of the leading Australian authorities, such as *Mallesons* and *Fruehauf*, the question was not addressed as it was clear that confidential information had been disclosed. While there is certainly a conflict between the remaining authorities, there is clearly support for a position which requires the former client to particularise and prove that confidential information has been disclosed. This is at odds with the shift to a "possibility of disclosure" test discussed above. Nevertheless, in *Carindale* Drummond J held that:

> "... it is a basic requirement that before material will be recognised as having the character of confidential information, the information in question must be identified with precision and not merely in global terms... The requirement is insisted upon even though it may necessitate disclosing to the court the very information the confidentiality of which is sought to be preserved by the action."[80]

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[75] *Rakusen* [1912] 1 Ch 831, at 836.
[76] *MacDonald Estate* (1991) 1 WWR 705, at 725.
[77] *Macquarie Bank Ltd v Myer* [1994] 1 VR 350, at 359. JD Phillips J and Eames J concurring.
[78] *Wan v McDonald* (1992) 105 ALR 473, at 496.
[79] *Finn, 'Commercial'*, above, at n 3, at 28.
[80] (1993) 115 ALR 112, at 120.

A similarly hard line approach was taken by Bryson J in *D & J Constructions Pty Ltd v Head*,[81] and in *Australian Commercial Research and Development Ltd v Hampson*.[82] Interestingly, proof was also required by Renaud J in the *Marriage of Gagliano*,[83] despite the suggestion that due to the sensitive nature of family law litigation different principle should apply.[84] Renaud J specifically rejected this proposition.[85] It also appears from Reinhardt's discussion of the recent unreported Victorian Supreme Court case of *Gordon v Minter Ellison Morris Fletcher* that proof was required in that case.[86]

The problem with requiring the former client to prove that confidential information was disclosed is the very problem recognised but dismissed by Drummond J in the passage cited from *Carindale* above. It is a problem United States courts have been grappling with at least since the leading case of *T C Theatre Corporation v Warner Brothers Pictures* was handed down, in which Judge Weinfeld said:

> "To compel the client to show... the actual confidential matters previously entrusted to the attorney and their possible value to the present client would tear aside the protective cloak drawn about the lawyer-client relationship. For the court to probe further and sift the confidences in fact revealed would require the disclosure of the very matters intended to be protected by the rule. It would defeat an important purpose of the rule of secrecy — to encourage clients fully and freely to make known to their attorneys all facts pertinent to their cause."[87]

A requirement of proof confronts the former client with the unenviable choice of either revealing the confidential information or remaining silent and risking the possible adverse use of it by the lawyer.[88] The courts may well find, having adopted a 'possibility' test which favours the former client, that this client would prefer to risk even a very significant chance of misuse of their confidential information rather than face the certainty of having it disclosed in court were they to bring a disqualification ac-

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[81] (1987) 9 NSWLR 118, at 124. In this case the applicant failed due to inability to prove the existence of confidential information.

[82] [1991] 1 Qd R 508; Although, curiously, one of the cases cited by MacKenzie J in support of this rule was *Mills v Day Dawn* [1882] 1 QLJ 62, which actually stands for the contrary proposition and was binding on MacKenzie J.

[83] (1989) 95 FLR 88, at 96.

[84] *D& J Constructions* (1987) 9 NSWLR 118, at 123; In *Marriage of Magro* (1988) 93 FLR 365, at 374 these factors were considered sufficient to justify a presumption of disclosure of confidential information in the family law field.

[85] *Marriage of Gagliano* (1989) 95 FLR 88, at 96.

[86] Greg Reinhardt, 'Solicitors Conflict of Interest' (1993) 67 *Law Institute Journal* 1086, at 1086.

[87] 113 F Supp 265, at 269 (SDNY 1953).

[88] Wolfram, above, at n 7, at 360; Comment, 'Conflicts of Interset in the Legal Profession' (1981) 94 *Harvard Law Review* 1244 (*'Harvard, 'Conflicts'*).

tion. The proof requirement, combined with the recognised difficulty former clients face in proving that they have disclosed relevant confidential information,[89] forms a significant barrier even to former clients with strong grounds for wishing to prevent former lawyers from acting against them.

The solution to this problem which has been adopted in the United States,[90] Canada,[91] and in certain Australian decisions,[92] is to hold that in certain circumstances the court will presume that confidential information has been disclosed. The considerations which lead to the use of a presumption of disclosure are compelling and the presumption should be adopted by all Australian courts.

B. Should the presumption of disclosure of confidential information be rebuttable or irrebuttable?

The difficulty with a rebuttable presumption of disclosed confidences is that it gives rise to the same difficulties discussed above, for client confidences may be disclosed in the course of endeavouring to rebut the presumption. Canadian courts have been prepared to accept that the presumption is rebuttable, but that a lawyer who attempts to rebut it will bear a very difficult burden which must be discharged without revealing the specifics of the confidential communications.[93]

Most United States courts take the view that the presumption is irrebuttable.[94] Gummow J in *National Mutual*, faced with an affidavit to the effect that this was the state of New York law, found that "there is a real possibility that the law in this country is no less stringent than that... to be applied in New York."[95] Burchett J in *Wan v McDonald* also appeared sympathetic to the notion of an irrebuttable presumption.[96] It is submitted that, bearing in mind that the focus here is upon the principal lawyer who had dealings with the former client, an irrebuttable presumption of the disclosure of confidential information should be accepted. Such a rule

[89] *Harvard, 'Conflicts'*, above, at n 88, at 1329.
[90] T C Theatre Corporation v Warner Brothers Pictures, 113 F Supp 265 (1953), at 268–269.
[91] *MacDonald Estate* (1991) 1 WWR 705, at 724–725.
[92] Most notable *Mills v Day Dawn* (1882) 1 QLJ 62; *Marriage of Griffis* (1991) 105 FLR 441, at 452; *Wan v McDonald* (1992) 105 ALR 473, at 495.
[93] For example *MacDonald Estate* (1991) 1 WWR 705, at 725. Note that the Court split 4 judges to 3 on whether it was possible to rebut this presumption, holding by majority that it can be rebutted.
[94] For example *Smith v Whatcott* 757 F 2d 1098 (10th Cir 1985), at 1100; See the cases cited in M Brodeur, 'Building Chinese Walls: Current Implementation and a Proposal for Reforming Law Firm Disqualification' (1988) 7 *Review of Litigation* 167, at 171.
[95] *National Mutual* (1989) 87 ALR 539, at 561.
[96] (1992) 105 ALR 473, at 495.

would appear to be the best mechanism for continuing to encourage full and frank disclosure in the lawyer-client relationship,[97] the policy consideration which forms the foundation of this whole area of law.

C. Avoiding the irrebuttable presumption that confidential information has been disclosed

If the presumption of disclosure of confidential information is held to be irrebuttable, that is not the end of the matter for it may be possible to avoid, as distinct from rebut, the presumption altogether. There are two possible ways this could be achieved.

1. Demonstrating an insufficient relationship between the present and former matter.

Clearly a single disclosure of confidential information in one highly specific matter should not disqualify a lawyer or law firm from ever again acting against a former client even in totally unrelated matters. It therefore becomes necessary to determine how closely related two matters must be before the irrebuttable presumption comes into play. If the two matters are insufficiently related, the presumption is avoided.

Australian courts have not yet directly addressed this question. Instead, as Finn has noted,[98] they have tended to subsume it within the more general duty-interest analysis discussed above, asking if there is a real and sensible possibility of conflict. However, it is impossible to answer this question in the abstract. It can only be answered by examining the specific confidential information alleged to have been disclosed. This appears to have been the approach taken in *Re a firm of solicitors*,[99] where it was held that the two matters may be totally unrelated provided the information was 'relevant'.[100] Australian courts may follow this approach, for it is consistent with the requirement favoured by some courts that the specifics of the confidential information must be proved.[101] However, if it is accepted that the disclosure of confidential information should be irrebuttably presumed rather than proved,

[97] The main situation in which this rule is likely to cause real hardship is with regard to barristers, particularly in the context of opinions. In this regard it is instructive to consider the *Hampson* case, and the discussion of that case in Tur, above, at n 8, at 228. It may be that some modification of the rule would be necessary in circumstances where barristers would be able to prove, perhaps in closed proceedings, precisely what information had been disclosed to them in a brief.

[98] *Finn, 'Professional'*, above, at n 12, at 337.

[99] [1992] 1 All ER 353.

[100] Id 362.

[101] See above, at notes 75–93.

the courts will by unable to take this approach and must instead look more generally at the relationship between the two matters.

The United States courts have adopted a "substantial relationship" test.[102] Disqualification will result if:

> "... there is a substantial relationship between the attorney's former and his present representation, so that he may or could have obtained confidential information from his former client useful to his present client."[103] [sic]

There is quite a significant case law on the meaning of "substantial relationship".[104] Most United States courts hold that a substantial relationship will be found in the absence of a clear indication that the issues in the former representation were unrelated to the issues in the current representation.[105] However, no substantial relationship will exist if the attorney represented the former client merely on the same types of matter as are involved in the current representation,[106] or if the information is community knowledge or not obviously useful in the current litigation.[107] The only U.S. court not to use these rules is the Second Circuit, which finds a substantial relationship only if the relationship between the prior and present case is "patently clear",[108] or "identical" or "essentially the same".[109] This last approach is overly narrow and fails to sufficiently protect confidential information which could be used to the detriment of the former client by their current adversary.[110] It would be preferable for Australian courts to adopt the mainstream definition of substantial relationship and hold that in any cases where such a relationship exists an irrebuttable presumption of relevant confidential information arises,[111] resulting in the disqualification of the lawyer.

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[102] See Wolfram, above, at n 7, at 364 for a codification of this rule in Model Rule 1.9.

[103] Aronson, above, at n 7, at 812.

[104] See Brodeur, above, at n 94, at 174–176; One of the leading cases is *Analytica Inc v NPD Research Inc* 708 F 2d 1263 (7th Cir 1983).

[105] *Westinghouse Electricity Corporation v Gulf Oil Corporation* 588 F 2d 221 (7th Cir 1978); *Heathcoat v Santa Fe International Corporation* 532 F Supp 961 (ED Ark 1982).

[106] *Duncan v Merrill Lynch, Pierce, Fenner & Smith Inc* 646 F 2d 1020 (5th Cir 1981), *cert denied*, 454 US 895 (1981).

[107] *Church of Scientology of California v McLean* 615 F 2d 691 (5th Cir 1980), at 693.

[108] *Silver Chrysler v Chrysler Corporation* 518 F 2d 751 (2d Cir 1975), at 754 ('*Silver Chrysler*').

[109] *Government of India v Cook Industries* 569 F 2d 737 (2d Cir 1978), at 739–740; See also Brodeur, above, at n 94, at 176; *Harvard, 'Conflicts'*, above, at n 88, at 1325.

[110] On the requirement of detriment see *Carindale* (1993) 115 ALR 112, at 119; Wolfram, above, at n 7, at 358.

[111] This test would be most clearly satisfied when a practitioner changed sides in the same proceedings. For example *Fruehauf Finances* [1991] 1 Qd R 558, at 566; *Wan v McDonald* (1992) 105 ALR 473, at 492–494.

2. **Demonstrating an insufficient relationship between the lawyer and former client.**

One other way of avoiding the irrebuttable presumption may be by proving that a lawyer-client relationship never existed between the lawyer and former client. Bryson J decided *D & J Constructions* on this basis.[112] However, it now appears that disqualification may occur even when there is no previous lawyer-client relationship, at least in cases where the individual seeking to protect confidential information is 'as good as' as client.[113] It is unclear what it means to be 'as good as' as client. It may be, however, that much will turn on the belief of the prospective client when they made the disclosure of confidential information to the lawyer, provided their belief is reasonable.[114]

In cases where there is no clear lawyer-client relationship it would appear that the applicant will be required to prove the disclosure of confidential information,[115] for it would be unreasonable to irrebuttably presume disclosure in the absence of such a relationship.[116] If disclosure can be proved, however, there is no reason why the courts should not protect the confidence.

V. The individual lawyer acts for the first client, and then subsequently different lawyers in the firm agree to act against that client

The main issue in this context is one of imputation, or sharing of knowledge.[117] The rules discussed in the previous section are used to determine whether the individual lawyer who acted for the former client would be entitled to act against them. If not, it is important to determine whether the disqualification of that individual will lead to the disqualification of

[112] (1987) 9 NSWLR 118, at 123.

[113] *Re a firm of solicitors* [1992] 1 All ER 353, at 368, 364; See the criticism of the 'as good as' criteria in *Macquarie Bank v Myer* [1994] 1 VR 350, at 352; Also see the peculiar circumstance of *Marriage of A and B* (1989) 99 FLR 171 where disqualification was granted when the primary witness for one side was a former client of the lawyers who acted for the other side.

[114] *Westinghouse Electricity Corporation v Kerr-McGee Corporation* 580 F 2d 1311 (7th Cir 1978), *cert denied*, 439 US 955 (1978); *Harvard, 'Conflicts'*, above, at n 88, at 1322–1323.

[115] *Macquarie Bank v Myer* [1994] 1 VR 350, at 352.

[116] Given that the presumption is largely based on assumptions as to the types of communication which occur in lawyer-client relationships.

[117] See generally G Steele, 'Imputing Knowledge from one member of a firm to another: Lead us not into temptation' (1990) 12 *Advocates' Quarterly* 46; G Steele, 'Imputing Knowledge from one member of a firm to another: *MacDonald Estate v Martin*' (1991) 13 *Advocates' Quarterly* 90; F Hamermesch, 'In defence of a double standard in the rules of ethics: A critical evaluation of the Chinese wall and vicarious disqualification' (1986) 20 *Journal of Law Reform* 245.

the entire firm. It is in this area that the balancing of policy factors is most apparent, for while an appearance of injustice may result from a firm acting against a former client, if overly strict rules are adopted there can be drastic consequences for the client's choice of lawyer and for mobility within the profession.[118]

A. Is the sharing of confidential knowledge within a firm presumed?

In all common law jurisdictions it is quite clear that sharing is presumed. At least since *Davies v Clough*[119] in 1837 it has been the law that the act of one partner will be considered the act of all and that the knowledge of one can be imputed to the others.[120] Furthermore, there seems to be no basis for distinguishing between partners in a firm and the lawyers employed by them.[121] This is particularly so in light of the emphasis in the cases on what has been termed the 'canteen factor',[122] meaning idle social chat that gives away vital information. There has also been a concern with wordless communication taking part inadvertently and without specific expression.[123] The presumption of shared knowledge is further reinforced by the importance of avoiding even the appearance of impropriety,[124] and it finds recognition in the ethical rules of many jurisdictions.[125]

B. Is the presumption rebuttable?

While there is general agreement that sharing of information should be presumed, there is much less agreement about whether or not that presumption should be rebuttable and, if so, how difficult it should be to rebut. The trend in Australia and other Commonwealth countries is towards making it very difficult to rebut indeed, with some cases effectively advocating irrebuttable presumptions. This approach is misconceived and, were it to be strictly applied, would have catastrophic effects on the legal community.

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[118] Kaufman, above, at n 25, at 108.

[119] (1837) 8 Simm 262; 59 ER 105, at 107.

[120] R Garratt and A Stavrianou, 'Solicitors — Duty not to act against former client — Chinese Wall' (1991) 65 *Australian Law Journal* 229, at 230.

[121] M Gronow, 'Chinese Walls and Conflict of Interest' (1993) 67 *Law Institute Journal* 502, at 505; *Silver Chrysler* 518 F 2d 751 (2d Cir 1975), at 756.

[122] B Strong, 'The Chinese wall came tumbling down?' (1991) 12 *The Company Lawyer* 180, at 181.

[123] *D & J Constructions* (1987) 9 NSWLR 118, at 123; *Mallesons* [1991] 4 WAR 357, at 373; *Marriage of Magro* (1988) 93 FLR 365, at 374.

[124] *Finn, 'Professional'*, above, at n 12, at 338; *Marriage of Thevenaz* (1986) 84 FLR 10, at 11.

[125] See, for example, Ethics Committee Ruling (Vic) (1988) 62 *Law Institute Journal* 862; Aronson, above, at n 7, at 851 (Discussing US Disciplinary Rule 5–105).

A simple example illustrates the point. It is common practice for large law firms to take on law students as "vacation clerks" over the university vacation periods. Some students undertake clerkships at five or six different firms. While working at these firms, they are unquestionably given access to at least some confidential information relating to the files on which they work,[126] and they take part in firm social activities and seminars and so have ample opportunity to take part in general law firm 'canteen' conversation. If the presumption of shared information were irrebuttable, the following situation could result.

A student undertakes a clerkship a Firm A. On beginning her employment she would be presumed to have acquired all the confidential information ever communicated by any client of the firm to any lawyer in the firm, including communications made to the firm's overseas and interstate offices.[127] This presumption would be irrebuttable, despite its obviously fanciful nature. Next month the student undertakes another clerkship at Firm B. All of Firm A's confidential information, whether actual or imputed, would them be imputed to all the lawyers in Firm B, who would now be disqualified if they endeavoured to act against any of Firm A's clients in matters substantially related to those in which Firm A acted. This situation could repeat itself several times as the student undertook further clerkships. Even without extending the imputation rule to the movement of secretaries between firms, as some United States cases have done,[128] it is apparent that given that well over one hundred students undertake clerkships each year, an irrebuttable presumption would result in the disqualification of every large law firm in Australia if they attempted to act for most significant clients.[129]

Clearly no Australian court would countenance this result, but it a result which cannot be avoided if an irrebuttable presumption of shared confidences is adopted, or even if the presumption is rebuttable but the burden of discharging it is set too high. Occasionally attempts are made to distinguish between imputing to the new firm that confidential information actually held by the new lawyer and that which they are imputed to hold.[130] It is submitted, however, that this distinction is untenable as the reason for imputing the knowledge to all lawyers in a firm is that it is

[126] *Silver Chrysler* 518 F 2d 751 (2d Cir 1975), at 753–754.

[127] See *National Mutual* (1989) 87 ALR 539 for a case involving overseas offices.

[128] For example *Lackow v Walter E Heller & Co* 466 So 2d 1120 (Fla Dist Ct App 1985); See other cases discussed by Kaufman, above, at n 25, at 99.

[129] The above hypothetical is not as outlandish as it seems. In two of the leading cases, *MacDonald Estate* and *Silver Chrysler*, quite junior lawyers changed firms and attempts were made to disqualify the new firms, although in both cases there had been at least peripheral involvement in the former matter.

[130] It would appear to be this type of distinction Cory J had in mind when he expressly left open the question of the appropriate imputation rule when there was imputed knowledge at issue in *MacDonald Estate* (1991) 1 WWR 705, at 733.

possible that they have actually acquired it, and hence are in a position to share this knowledge with the new firm even though it might be thought to be 'imputed' knowledge.

The problem with the vacation clerk scenario is that, particularly in the context of large firms, it is absurd to conclude that immediately upon joining a new firm the lawyer becomes the recipient of knowledge as to the contents of all the firm's files, all confidential disclosures, or even all the client's names. As Judge Moore recognised in *Silver Chrysler*, "the mere recital of such a proposition should be self-refuting."[131] It is clearly necessary to allow the presumption of information sharing to be rebutted in some cases. The main approach[132] which has been attempted to rebutting this presumption has been the use of Chinese walls.

C. Chinese walls as a method of preventing information sharing

The efficacy or otherwise of Chinese walls is one of the most contentious issues in the modern case law, and it presents a serious issue to be resolved by the Australian courts.[133] The term 'Chinese wall' has been criticised as "an attempt to clad with respectable antiquity and impenetrability something that is relatively novel and potentially porous".[134] Indeed, a critic has commented that "The Chinese used to make walls out of paper through which you could whisper and therefore the name is a flagrant indication of what goes on".[135] One judge has attempted to avoid the metaphor and instead refer to "information barriers".[136] However the term 'Chinese wall' is so entrenched within the literature and cases that the use of the term is unavoidable.

In essence, a Chinese wall is an organisation device intended to insulate a part or parts of a firm from confidential information which is located in another part of the firm. This is often attempted by physically separating the affected lawyers, limiting access to relevant files, and seeking undertakings from the relevant lawyers and the new client that no

[131] *Silver Chrysler* 518 F 2d 751 (2d Cir 1975), at 754.

[132] The other approach occasionally mooted in the US is a doctrine known as 'peripheral representation'. It is almost certain to be rejected by Australian Courts, which are prepared to disqualify lawyers who have had no involvement in a case whatsoever because of the 'canteen factor'. See *Silver Chrysler* 518 F 2d 7511 (2d Cir 1975), at 756 for the origins of the doctrine.

[133] Sir Anthony Mason, 'Legal Liability and Professional Responsibility' (1992) 14 *Sydney Law Review* 131, at 135.

[134] *Mallesons* [1991] 4 WAR 357, at 371.

[135] J Quarrell, 'Modern Trusts in Legal Education' (1991) 5 *Trust Law International* 99, 103–104.

[136] *Re a firm of solicitors* [1992] 1 All ER 353, at 367, per Staughton LJ.

disclosure will be volunteered or requested.[137] The wall is intended to serve the dual purpose of preventing the spread of information and of excusing the firm from the breach of duty which would otherwise result from the failure to disclose relevant information.[138]

There is fairly general agreement about the criteria by which a wall should be assessed in any given case. One author has summarise seven relevant factors, they being:

> "... (1) the substantiality of the relationship between the former and current matters,... (2) the time elapsing between matters,... (3) the size of the firm,... (4) the number of tainted attorneys,... (5) the nature of the disqualified attorney's involvement in the former matter,... (6) the speed with which the wall is erected, and... (7) the strength of the wall."[139]

This final factor, the strength of the wall, depends upon factors such as geographical separation, restricted access to files, and arrangements to ensure that the affected lawyers do not receive fees from the current representation.[140]

However, even in cases where it appears that a very good wall has been constructed, courts in the Commonwealth have been very reluctant to allow the presumption of shared confidences to be rebutted. Indeed, there is some doubt as to the ability of Chinese walls to rebut the presumption in any circumstances, a doubt which arises partially from a scepticism about whether walls will ever be practically effective, and partially from a determination to give absolute primacy to preventing the appearance of injustice in order to foster public confidence in the justice system.

1. Can Chinese walls ever rebut the presumption of shared confidences?

The only modern case in which a Chinese wall successfully rebutted the presumption of shared confidences is *Fruehauf Finance*,[141] in which Lee J held that the pre-existing divisions within a firm, combined with

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[137] Aitken, above, at n 5, at 92; Brodeur, above, at n 94, at 168; *Harvard, 'Conflicts'*, above, at n 88, at 1367–1368; Note that unlike some US courts, Australian courts are usually not concerned with a wall being able to withstand deliberate attempts to breach it. They are very quick to express confidence in the integrity of the lawyers involved. For example *Fruehauf Finances* [1991] 1 Qd R 558, at 571; *Mallesons* [1991] 4 WAR 357; *Re a firm of solicitors* [1992] 1 All ER 353, at 367.

[138] N Poser, *International Securities Regulation*, London: Little Brown, 1991, at 189–190; See also Tomasic, above, at n 42, at 67.

[139] Comment, 'The Chinese Wall Defence to Law Firm Disqualification' (1980) 128 *University of Pennsylvania Law Review* 677, at 712–714 (*Pennsylvania, 'Disqualification'*).

[140] *Harvard, 'Conflicts'*, above, at n 88, at 1367–1368; Brodeur, above, at n 94, at 182–184; *Schiessle* 717 F 2d 417 (7th Cir 1983), at 421.

[141] [1991] 1 Qd R 558, at 571.

a network of undertakings relating to non-disclosure, were sufficient to prevent disqualification.

The remaining cases fall into two categories, those which favour an irrebuttable presumption, although this is often not made explicit, and those which will allow the presumption to be rebutted in very rare circumstances. The leading Australian case in the first category is probably *D & J Constructions*,[142] in which Bryson J said:

> "I would think that the court would not usually undertake attempts to build walls around information in the office of a partnership, even a very large partnership, by accepting undertakings or imposing injunctions as to who should be concerned in the conduct of litigation or as to whether communications should be made among partners or their employees... Enforcement by the court would be extremely difficult and it is not realistic to place reliance on such arrangements."[143]

In *Mallesons* Ipp J stated that:

> "... the consequences of a firm of solicitors placing itself in a conflict of interest situation cannot be avoided by some partners undertaking not to disclose information to others."[144]

Subsequently, having cited the above passage from Bryson J with approval and emphasised the importance of avoiding the appearance of injustice, his Honour proceed to find the proposed Chinese wall ineffective.[145] Finally, in *Wan v McDonald*,[146] Burchett J approved the comments in the minority judgments in *MacDonald Estate*[147] which favoured an irrebuttable presumption.

The above cases should not be followed due to the anomalous results they produce in, for example, the clerkship situation. It is therefore necessary to turn to the second group of cases. Sopinka J in *MacDonald Estate* acknowledged that:

> "... if the presumption that the knowledge of one is the knowledge of all is to be applied, it must be applied with respect to both the former firm and the firm which the moving lawyer joins. Thus there is a conflict with respect to every matter handled by the old firm that has a substantial relationship with any other matter handled by the new firm irrespective of whether the moving lawyer had any involvement with it."[148]

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142 (1987) 9 NSWLR 118.
143 Id 122–123.
144 *Mallesons* [1991] 4 WAR 357, at 372.
145 Id 375. The proposed wall looked quite sturdy, and Ipp J may have been influenced in his assessment of it by the fact that criminal charges were involved.
146 (1992) 105 ALR 473, at 495.
147 (1991) 1 WWR 705, at 727.
148 Id 725.

He considered this 'overkill', and so was prepared to accept that walls could be effective, but only in "exceptional circumstances".[149] This would also seem to be the final position reached in *Re a firm of solicitors*, despite comments in that case which doubt whether an impregnable wall can ever be created,[150] for a test was developed in that case for determining when walls *will* be effective.

That test, which is common to all the cases which accept the potential efficacy of walls,[151] is whether a reasonable person who is informed of the relevant facts might reasonably anticipate that confidential information might be disclosed.[152] While this test is widely accepted, and is cast in a form which is comfortably familiar to the legal practitioner, it is submitted that it is inappropriate. This is because the stated purpose of the test is to protect public confidence in the legal system,[153] yet if that is the case it is difficult to see why the reasonable person is considered to be *informed of the facts*. Most members of the public in any given case would not be so informed, particularly given the unlikelihood of media coverage of the detailed and technical devices used in Chinese walls. If public confidence is truly the concern, the test should focus upon the reasonable uninformed observer, a test which would invariably lead to disqualification. Once there is a departure from this standard, there seems to be little justification for stopping halfway, and it would be preferable for the court to decide for itself whether there was a risk of disclosure, in the hope that the public sufficiently trust the courts to make such judgments accurately.

It is in this area of perceived risk, whether by informed or uninformed observers, that the attitude of the courts to the probability-possibility dichotomy discussed above becomes significant. On the *Rakusen* probability tests, a Chinese wall was held to be effective both on the facts of that case, and in *Fruehauf Finances*.[154] However, most modern courts, having adopted the duty-interest classification and thereby subjected the second client to the harshness of deterrent fiduciary rules, have adopted the possibility formulation and have attributed very great sensitivity to the reasonable person.[155] This means that Chinese walls will very rarely be able to rebut the presumption of shared confidences, and disqualification will often result. As discussed above, the duty-interest formulation is doctrinally unjustifiable, and

[149] Id 726.

[150] *Re a firm of solicitors* [1992] 1 All ER 353,per Parker LJ, at 363; per Sir David Croom-Johnson, at 369.

[151] See also *MacDonald Estate* (1991) 1 WWR 705, at 727; *Carindale* (1993) 115 ALR 112, at 118; *Marriage of Gagliano* (1989) 95 FLR 88, at 95; *Fruehauf Finance* [1991] 1 Qd R 558, at 571.

[152] *Re a firm of solicitors* [1992] 1 All ER 353, at 362.

[153] Ibid.

[154] [1991] 1 Qd R 558, at 571.

[155] For example *Re a firm of solicitors* [1992] 1 All ER 353, at 363; *MacDonald Estate* (1991) 1 WWR 705, at 726–727.

its consequence is that the standard of rebuttability is now almost unattainably high.[156] The consequence of these rules, if strictly applied, would be the disqualification in almost every case of every major law firm in Australia. The courts should therefore reduce the burden that must be discharged in order to rebut the presumption of shared confidences, preferably by adopting a probability standard,[157] leaving a much greater role for Chinese walls.

2. Public Policy and Chinese Walls.

It will be recalled that earlier in this paper the role of public policy in the imposition of fiduciary duties upon lawyers was discussed and three policy factors were identified which impact upon how a potential conflict between the fiduciary duties owed to the present and former clients should be resolved.

The first of these, the importance of fostering confidence in the legal system by avoiding even the appearance of impropriety, is traditionally considered to be paramount,[158] and to lean strongly against the use of Chinese walls. However, as the American Bar Association has gradually come to recognises, the appearance of impropriety is too vague a standard by which to judge disqualification,[159] and there is a growing recognition that justice must be done and appear to be done to the current clients and lawyers themselves, as well as to the former clients.[160] As Keith has noted:

> "The public view of the profession can be harmed just as much by rules of conduct that prevent choice of legal adviser where a conflict can properly be avoided... as it can by rules that risk the disclosure of confidences imparted to a solicitor in the expectation that confidence would be kept."[161]

Clearly a balance needs to be struck. It is, however, important to recognise that every time a disqualification motion is granted, the current client suffers from increased costs, delays in the system are increased, and in many cases the client's chance of success in their pending action is decreased by the necessity of briefing lawyers who are

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[156] See *Silver Chrysler* 518 F 2d 751 (2d Cir 1975), at 754 which warns against this approach.

[157] Note that 'probability' does not necessarily mean greater than 50 % chance. See the discussion of the High Court in the criminal law case of *R v Crabbe* (1985) 58 ALR 417.

[158] Aronson, above, at n 7, at 855; Midgley, above, at n 45, at 832 noting the tension between this doctrine and the immunity of legal practitioners in court if the factor is considered paramount when it benefits lawyers, but not paramount when it restricts them.

[159] See *Harvard, 'Conflicts'*, above, at n 88, at 1327; American Bar Association Communication on Ethics and Professional Responsibility, *Formal Opinions*, No. 342, n 17 (1975).

[160] *Marriage of Gagliano* (1989) 95 FLR 88, at 95.

[161] M Keith, 'Information Barriers must stand tough tests' (1993) 15 *Law Society Bulletin* 23, at 26.

unfamiliar with the issues involved.[162] These are certain consequences of disqualification, as opposed to the speculative costs of not disqualifying the lawyer. It is important that in striking the balance between these concerns the courts do not indulge in "timid reluctance to risk some imaginary appearance of conflict which has no substance."[163]

When, however, disqualification is necessary it is the disqualified firm, not the client, who should bear the cost. It should be remembered that a failure by the firm to put all their skill and knowledge at the disposal of the client is a breach of fiduciary duty.[164] It is clear that a fiduciary cannot plead a duty to one client as an excuse for failure to perform a duty owed to another,[165] and that if they put themselves in a position of conflict they will be liable to pay compensation for their breach of duty.[166] If the client is unable to prove actual damage, Finn has suggested that they may fall back on their right to refuse to pay the fiduciary's fees for service rendered.[167] If this seems harsh, it should be remembered that the law firm is in a much better position to detect potential conflicts than are its potential clients, and in large firms, where detection of conflicts is likely to be most difficult, sophisticated computer systems are often relied upon to perform this task.[168] It should also be noted that non-disclosure may give rise to concurrent liability for both breach of fiduciary duty and negligence.[169]

The second policy consideration, the desirability of not unduly restricting a client's choice of lawyer, is clearly greatly advanced by the acceptance of Chinese walls. The very strict disqualification rules which presently apply have given rise to at least one case where a client had to try four different firms before one was eligible.[170] This type of situation could cause real hardship for clients, particularly when work is of a specialised kind which few firms have the capacity to handle. This policy factor, which traditionally has not been given great weight, is becoming more important, with the Victorian Supreme Court recently holding that "the Court will be slow to interfere with the *prima facie* right of a litigant to choose his, her or its solicitor."[171]

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[162] Strong, above, at n 122, at 180; *Supasave* [1991] Ch 259, at 270, where the cost of disqualification was estimate at between £50,000 and £100,000.

[163] *Re a firm of solicitors* [1992] 1 All ER 353, at 365.

[164] *Finn, 'Commercial'*, above, at n 3, at 24–25.

[165] *Moody v Cox and Hatt* [1917] 2 Ch 71, at 81; Finn, *'Fiduciary Obligations'*, above, at n 17, at 256.

[166] *North & South Trust Co v Berkeley* [1971] 1 WLR 470, at 486; Gummow, 'Compensation for Breach of Fiduciary Duty' in T Youdan, *Equity, Fiduciaries & Trusts*, Ontario: Law Book Company, 1989, at 59; Finn, *'Fiduciary Obligations'*, above, at n 17, at 256.

[167] *Finn, 'Fiduciary Obligations'*, above, at n 17, at 257.

[168] Keith, above, at n 161, at 25; Aitken, above, at n 5, at 93, 118.

[169] *Finn, 'Commercial'*, above, at n 3, at 24–26; Also see the recent decision of the Full Court of the Federal Court in *Blackwell v Barroile Pty Ltd*, unreported, 29 June 1994.

[170] Gronow, above, at n 121.

[171] *Macquarie Bank v Myer* [1994] 1 VR 350, at 352.

The final policy factor, the desirability of protecting professional mobility, has informed much on the analysis in the body of this paper. The current rules, applied literally, have the potential to destroy the possibility of inter-firm mergers and the mobility of young lawyers. The rules as they stand may turn specialties into liabilities,[172] and mean that firms cannot afford to hire a lawyer because of the loss of clients which would result, even though that lawyer does not in fact possess any relevant confidential information.[173] It is submitted that Chinese walls must be accepted as a device for rebutting the presumption of shared confidences thereby preventing these consequences.

VI. Conclusion

Given the few decisions of Australian appeal courts on the disqualification question, the law as it stands in Australia is difficult to state categorically.[174] However, it appears that a former client wishing to disqualify a law firm must prove that they disclosed confidential information to at least one lawyer in the firm. Once that is proved, there is a presumption that the knowledge has been shared with all members of the current firm, a presumption which travels with any member of that firm as they change firms. This presumption, if it may be rebutted at all, may only be rebutted in rare circumstances, when a reasonable informed person would think that there was no *possibility* of the information being disclosed.

This law is in need of reform. Confidential information should be protected by being irrebuttably presumed to be disclosed. However, it should be possible to rebut the presumption of information sharing more easily. The possibility approach is based upon an error of principle and disqualification should only result if there is a probability of disclosure. This should be determined by the court exercising its own judgment, not by hypothesising that the public is informed of all the measures taken to prevent disclosure. It is submitted that in this way the most appropriate balance is struck between protecting the integrity of the justice system, the client's choice of lawyer, and professional mobility. The present rules will lead either to a disastrously and unnecessarily high level of disqualifications or to the making of unprincipled exceptions to the rules. Both these results can only serve to undermine the profession and the justice system, which the conflict rules were initially designed to protect.

[172] Keith, above, at n 161, at 25.

[173] *Harvard, 'Conflicts'*, above, at n 88, at 1320; *Pennsylvania, 'Disqualification'*, above, at n 139, at 679.

[174] See also the summaries given by Gronow, above, at n 121, at 505 and Aitken, above, at n 5, at 108–109.