SERVING TWO MASTERS

CONFLICTS OF INTEREST IN THE MODERN LAW FIRM

It is a *sine qua non* of legal practice that lawyers should not allow themselves to act for two clients whose interests may conflict. However, this principle is being placed under increasing pressure, the main reasons for this being increased demand for specialist legal services, the globalisation of commerce, a dramatic growth in the size of leading law firms, and significantly greater mobility within the legal profession.

As a result there is a growing trend, especially within the commercial legal environment, for solicitors to face conflicts of interest which have no easy solution. Increasingly, conflicts are being 'managed' rather than avoided altogether. This is a field within which the Law Society's own rules are flouted on a daily basis, and in which these rules appear increasingly at odds with the common law.

Based on extensive interviews with lawyers and their clients, this book provides the first thorough consideration of how conflicts of interest are handled within law firms. It will be essential reading to all those who have an interest in professional legal ethics, including law students, legal scholars, practitioners and regulators.

Serving Two Masters

Conflicts of Interest in the Modern Law Firm

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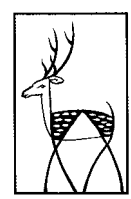

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This book is dedicated to my aunt,
Murlys Thomas (1905–2001)

Preface

It is said that 'no man can serve two masters, for either he will hate the one and love the other, or else he will hold to the one and despise the other.'[1] In keeping with this biblical injunction, it is a well-accepted principle of legal practice that lawyers should not act for two or more clients whose interests may potentially conflict. However, in recent times this proscription has come under increasing pressure, there being four main reasons why a previously unchallenged tenet of legal practice has come to appear increasingly vulnerable. These are: a significantly increased demand for specialist legal services; the globalisation of commerce; a dramatic growth in the size of leading law firms; and significantly greater mobility within the legal profession. As a result of all these factors there is a growing trend, especially within the commercial legal environment, for solicitors to face conflicts of interest which have no easy solution. This book offers what I believe is the first empirically-based account of the way in which conflicts of interest are managed within law firms in England and Wales.

Although some practitioners and academic writers have highlighted the difficulty of managing conflicts of interest in the modern law firm, the subject has not previously been the focus of empirical investigation. The difficulty with relying upon leading cases as a measure of evolving practice is that conflicts of interest are a largely subterranean problem, with the occasional injunction representing a dramatic failure of the more normal strategies for dealing with conflicts. In order to establish whether there has developed a significant gap between the regulatory framework and the way conflicts are managed on the ground, it was necessary to observe the day to day reality of legal practice in the large commercial law firm.

This book started life as a PhD thesis, and I had no idea when I began that I would stumble upon a major disjunction between the rules and the conduct of major law firms. My research revealed significant tension between the regulatory framework and the common law, but a more dramatic gulf between both forms of regulation and the way some law firms actually behave. This 'gap' between rules and behaviour is a common theme of socio-legal research, and over time the pressure to resolve the resulting tension often proves overwhelming.

The question of how conflicts should be 'managed' has taken on increased significance following the Law Society's decision to review the rules and principles governing solicitors' professional conduct. Its aim in conducting such a review is to compile 'a rule book which reflects both the realities of running a

[1] St Matthew 6.24.

solicitor's practice in the twenty-first century and the importance of protecting the public interest'.[2] I hope that this book will contribute to this debate.

The book would not have been possible without the help and support of a number of people. First and foremost I am deeply indebted to Professor Gwynn Davis. He has provided much-appreciated advice, guidance and criticism and has proved an invaluable mentor and friend. This work would have been much poorer without him. I would also like to thank Professor Roger Kerridge and Professor Avrom Sherr for their helpful suggestions following the examination of my thesis.

Thanks are also due to my colleagues Professor John Parkinson, Stephen Jones, Sam Lewis and Brenda Sufrin for their help and encouragement throughout the writing of the manuscript. Lorraine Dyer provided invaluable secretarial assistance, and I also benefited from the support of Sue Pettit and other staff of the University of Bristol law library who located several very obscure articles. I am likewise grateful to the solicitors, barristers and representatives of commercial organisations who participated in the empirical study.

My debt to other authorities and writers is, I hope, sufficiently acknowledged in the text. I am solely responsible for the errors which remain.

Finally, my thanks go to my parents for their unfailing support and encouragement throughout the project.

JG-B.

Bristol
July 2002

[2] Michael Mathews, President of the Law Society, in Taylor, N (ed), *The Guide to the Professional Conduct of Solicitors*, 8th edn, (Law Society Publishing, London, 1999) at xi.

Contents

Table of Cases

1

Introduction

IT IS A central tenet of professional legal practice that a lawyer 'should promote the interests of the client and avoid situations where those interests conflict either with the lawyer's own interests or with those of another client.'[1] In keeping with this, it has been asserted that 'unless the client can confide absolutely freely in the lawyer, confident that the information will not later be used to his disadvantage, and confident that any proposed action will not be tainted by a contrary interest of the lawyer, then the lawyer will not be able to act effectively for the client.'[2]

This book is concerned with those situations in which the above principles come under threat and the lawyer is faced with an actual or potential conflict of interest between two or more clients. Of course, in the realm of legal advice and representation a 'conflict of interest' *could* be understood as a conflict between the interests of the lawyer and the interests of [his] client. There are indeed 'conflicts' of this kind, most obviously over fees, but in this book I shall be primarily concerned with situations of actual or potential conflict between the interests of two or more clients (or prospective clients) of the one lawyer or law firm.

A conflict of interest has been defined as follows:

> A person who acts as representative of another is in a conflict of interest situation if, either at the time when he accepts appointment or subsequently while he acts as a representative, there is a material interest of his own or of a third person for whom he also acts, and the pursuit or protection of that interest would create a substantial risk that he may not act in the best way to pursue or protect the interest of the person he represents.[3]

The requirement not to act in a situation of potential or actual conflict of interest can be justified by reference to the principle of confidentiality and, as Boon and Levin point out, by reference to the principle of client autonomy. However, as those authors observe, there are also conflicting principles. For example, there is scope in commercial disputes to 'conflict out' lawyers as a cynical litigation tactic—in other words, to employ a 'principle' simply to gain an advantage in circumstances where the risk of information being transferred inappropriately is in practice extremely remote.[4] So the principle of sustaining

[1] A Boon and J Levin, *The Ethics and Conduct of Lawyers in England and Wales* (Hart Publishing, Oxford, 1999) at 267.

[2] *Ibid*.

[3] RM Goode (ed), *Conflicts of interest in the changing financial world,* (Institute of Bankers, Centre for Commercial Law Studies, London, 1986) at xvi.

[4] A Boon and J Levin, n 1 above, at 271.

confidence in the profession can be at odds with a second principle, namely that of preserving the client's freedom to instruct a lawyer of [his] choice.

Until relatively recently conflicts of interest received little attention from academic writers. Abel, in reviewing professional failings, considered client complaints, financial misconduct and negligence, but he did not explore conflicts of interest as a specific area of difficulty.[5] Professional bodies also have only recently started to issue consultation documents and detailed advice. In April 2000 the City Disputes Panel published a report giving practical guidance to practitioners on the subject of conflicts,[6] and in June 2001 the Law Society issued a consultation paper inviting debate by its members on how the 'difficult issue' of conflicts of interest could be tackled.[7]

This suggests that whilst conflicts of interest are hardly a new problem, they are now seen as giving rise to issues of considerable complexity, perhaps greater complexity than most academic writing on the subject acknowledges. Boon and Levin, for example, begin their discussion of conflict between existing and potential clients with the striking observation: 'Obviously a lawyer cannot represent one client whose interests conflict with those of another.'[8] This statement, for all its apparent certainty, is almost immediately contradicted:

> If a solicitor acts for a client who is suing a former client of the firm, then the solicitor may have access to confidential information about the latter. If this is the case, the solicitor should not act for the new client unless the firm can successfully erect a 'Chinese wall' which prevents all possibility of leakage of confidential information.[9]

Here we have one strong normative statement, and a second, much weaker, in apparent contradiction of the first. In practice solicitors may be faced with a range of 'conflict' situations. When this happens, is it in fact 'obvious' that they should not act? What is meant by the term 'Chinese wall'? Is it one phenomenon or several? Can a Chinese wall, whatever precisely is meant by this term, 'prevent all possibility' of leakage of information? If the various parties to the proceedings differ in their views concerning the likelihood of 'leakage', whose views should prevail?

Boon and Levin were conducting a general exploration of legal ethics, and it was beyond the scope of their enquiry to undertake an independent empirical examination. In consequence they were driven, as far as conflicts of interest were concerned, to make certain pronouncements of a high level of generality which at the very least need to be 'unpicked'—as indeed do many apparently straightforward normative statements applied to the realm of legal practice.

[5] R Abel, *The Legal Profession in England and Wales*, (Blackwell, Oxford, 1988).

[6] *Review of Conflicts and Duties In Relation to Confidential Information*, (The City Disputes Panel, London, 2000).

[7] *Conflicts of Interest: A consultation document from the Regulation Review Working Party of the Law Society of England and Wales*, (The Law Society, London, 2001). Both reports are discussed below at 164.

[8] A Boon and J Levin, n 1 above, at 269.

[9] *Ibid*.

The above authors' subsequent discussion refers to a need to balance two conflicting principles, namely the protection of client confidence in the profession and the freedom of the client to instruct a solicitor of his choice.[10] They refer to the case of *Re a Firm of Solicitors*[11] in which the court had to weigh the protection of client confidence against the latter principle.[12] They observe that 'maintaining a balance between protecting confidence in the profession and the freedom to instruct a lawyer of choice is difficult.'[13] It can be seen therefore that these authors move quite a long way from their initial assertion that 'obviously' a lawyer cannot represent one client whose interests conflict with those of another. Given that their self-imposed task was to identify the ethical principles which, broadly speaking, ought to underpin legal practice, this is entirely understandable. However, it is extremely difficult to engage in a discussion of ethical principles without reference to the *minutiae* of practice. This is because 'ethics' will tend to appear rather more complex at close quarters than when principles can be considered separately from one another, being in effect viewed as abstractions.

A CHANGING PROFESSION

Why has a principle which appeared for many decades to be uncontroversial begun to give rise to perceived ethical and practical difficulty? The answer may lie in the fact that over the last two decades considerable and unprecedented changes have been taking place within the solicitors' branch of the legal profession.[14] Perhaps the most notable transformation during this period has been in the size and structure of law firms. Until 1967 solicitors were prohibited from forming partnerships of more than 20 members.[15] This changed with the passing of the Companies Act 1967, and now there is no limit on the number of solicitors who may form a partnership.[16] Many firms took advantage of this provision, some expanding by merger to create what has become known as the 'mega' firm.[17] Others grew internally, appointing new partners as they did so.

[10] *Ibid*, at 270.

[11] [1995] 3 All ER 482.

[12] A Boon and J Levin, n 1 above, at 270.

[13] *Ibid*.

[14] AA Paterson, 'Professionalism and the legal services market', (1996) 3 *International Journal of the Legal Profession* 137 and M Galanter, 'Law Abounding: Legalisation Around the North Atlantic', (1992) 55 *Modern Law Review* 1.

[15] This limitation originated in the Joint Stock Companies Act 1844. It still applies to partnerships generally by virtue of section 716 of the Companies Act 1985. See also J Flood, 'Megalawyering in the global order: the cultural, social and economic transformation of global legal practice', (1996) 3 *International Journal of the Legal Profession* 169 at 178.

[16] S 120(1)(a) Companies Act 1967.

[17] On merger see RG Lee, 'From Profession to Business: The rise and rise of the City law firm', (1992) 19 *Journal of Law and Society* 31; J Harrison, 'To merge or not to merge', (1998) 132 *Solicitors Journal* 102; L Schulz, 'Joined at the hip', *The Lawyer* 10 June 1997, p 11; *The Lawyer*, Editorial, 'Are snowballing mergers necessary?' 2 March 1998.

The largest of these firms now has well over 100 partners and employs in excess of a thousand fee-earners.[18] Not only are many of these practices multi-centred, several are also multi-national.[19]

Such growth prompted adjustments in the internal structure of many firms. Management has become a more obvious feature of organisation, with some firms appointing full-time directors to deal with the day-to-day running of the office and to handle marketing.[20] Alternatively firms may belong to a national network of practices formed with the purpose of sharing client contacts, pooling expertise, co-ordinating training and dividing the cost of recruitment and computer technology. The average annual turnover of the largest firms is reported to be in excess of £107 million.[21]

The forces which shaped this transformation are essentially threefold. First, in the 1980s the government was keen to stimulate competition within the legal profession.[22] Measures were therefore introduced which required solicitors to share the conveyancing monopoly, accounting for some 50 per cent of their collective income, with licensed conveyancers.[23] The profession's response was to the effect that if competition was to be allowed, solicitors should be able to compete on an equal footing.[24] The Government was persuaded to consider issues of competition and deregulation of the legal profession in much greater depth. The 1989 Green Paper entitled 'Work and Organisation of the Legal Profession' stated that:

> The Government believes that free competition between the providers of legal services will through the discipline of the market ensure that the public is provided with the most effective network of legal services at the most economic price.[25]

Further measures were subsequently brought into force which outlawed scaled fees, permitted advertising and allowed new providers of legal services to be established.[26] The effect was to stimulate competition as law firms became more

[18] '*[F]ee earners include, besides partners and assistant solicitors, trainee solicitors and paralegals.*' J Flood, n 15 above, at 178. Although large firms account for only 1% of all the firms, they contain 30% of all solicitors and generate 40% of all gross fees. See M Zander, *Cases and Materials on the English Legal System*, (Butterworths, London, 1999) at 635.

[19] For example, Baker & McKenzie has 34 overseas offices, Clifford Chance has 18, and Freshfields has 11 foreign offices. See S Marks, 'The Global 50' *Legal Business*, November 1998 at 34.

[20] S Mayson, *Making Sense of Law Firms,* (Blackstone, London, 1997) at 254. See also EH Greenebaum, 'Development of Law Firm Training Programs: Coping with a Turbulent Environment', (1996) 3(3) *International Journal of the Legal Profession* 315 at 322.

[21] *Legal Business*, Editorial, 'Student Special', February 1998 at 44.

[22] See Y Dezalay, 'Territorial battles and tribal disputes', (1991) 54 *Modern Law Review* 792 and Y Dezalay, 'Big Bang on the legal market; restructuring the field of business consulting', in A Febrajo and D Nelken (eds), *European Yearbook in the Sociology of Law* (Guiffre, Milan, 1993) at 19.

[23] Administration of Justice Act 1985, Part II.

[24] See R O'Dair, *Legal Ethics Text and Materials*, (Butterworths, London, 2001) at 66.

[25] *The Work and Organisation of the Legal Profession*, (HMSO, London 1980) Cmnd No 9077.

[26] Courts and Legal Services Act 1990 ss 34, 53 and 98, the Solicitors' Publicity Code 1990. See also E Skordaki and D Walker, *Regulating and Charging for Legal Services: An International Comparison*, (The Law Society, London, 1996) at para 3.6 and A Boon and J Levin, n 1 above at 78 to 79, and AA Paterson, n 14 above.

entrepreneurial in developing new markets for their services and 'selling' their firm to clients.[27]

Secondly, changes came about as a result of the steady increase in the demand for legal services. Since the end of the Second World War changing patterns of ownership, increased complexity of social relationships, the development of technology and, perhaps most importantly, the growth in resources of the employed population have meant that more people have needed to use solicitors.[28] The introduction of legal aid in 1950 also meant that legal services became accessible to more people. The 'Thatcher Revolution' in the 1980s, which led to the 'big bang'[29] in the City of London and the deregulation and re-regulation of financial services, created further substantial work for law firms.[30] As a result of the Thatcher government's policies, firms were afforded an opportunity to play a part in the growing international market for corporate and commercial legal services.[31] In the words of one solicitor:

> Until the end of the 80s lawyers sold a domestic product—English law and things to do with England. We used to go around the world selling it but it was a domestic product. The 'big bang', the liberation of the London financial markets, and more recently, the collapse of the Berlin wall and the arrival of huge areas of the world for projects, the realisation of governments that you could no longer go on supporting ailing state-run industries, have all opened up huge areas of work for us. We now sell a truly international product.[32]

The third driving influence behind these transformations came from clients themselves. The growth of consumerism led to clients demanding a better service from their lawyers at a cheaper price. As the Marre Committee pointed out in 1988:

[27] Since lawyers have been allowed to produce promotional brochures in 1984 virtually all have done. See J Flood, n 15 above. There has not yet been a complete congruence to business ethos—see C Glasser, 'The legal profession in the 1990s: images of change', (1990) 10 *Legal Studies* 1 and AA Paterson, n 14 above.

[28] See RL Abel, 'Between Market and State: the Legal Profession in Turmoil', (1989) 52 *Modern Law Review* 285.

[29] McVea describes the 'big bang' as follows: 'In the UK, what began as a restructuring of the London Stock Exchange became a much wider cause, embracing every sector of the financial community. "Big Bang", as it became known, was characterised by three main factors: first, the termination of the single capacity system of trading in favour of a new dual capacity regime; secondly, the movement away from fixed commissions towards a more competitive commission scheme; and lastly, the removal of outside ownership restrictions on member firms of the Stock Exchange Association.' H McVea, *Financial Conglomerates and the Chinese Wall—Regulating Conflicts of Interest*, (Clarendon Press, Oxford, 1993) at 18.

[30] See RG Lee, 'From Profession to Business: The Rise and Rise of the City Law Firm', in P Thomas (ed), *Tomorrow's Lawyers* (Blackwell, Oxford, 1992).

[31] See J Flood, 'Megalaw in the UK: Professionalism or Corporatism?: A Preliminary Report', (1989) 64 *Indiana Law Journal* 169 at 171 and AA Paterson, n 14 above.

[32] A full account of the means by which I obtained this and other interviews is given at the conclusion of this chapter and in the Appendix. In terms of the classification of solicitor firms which participated in the empirical component of the research underpinning this book, this was a representative of Firm 15 (see Appendix). See also C Stanley, 'Enterprising Lawyers: Changes in the Market for Legal Services', (1991) 25(1) *Law Teacher* 44 and J Flood, n 31 above.

> More members of the public are now inclined to complain about poor quality or costly services (or what they perceive as poor quality or costly services) and to demand that the traditional ways of doing things be justified. Moreover, members of the public are no longer deferential to those who provide professional services and will no longer tolerate secretiveness. This is not to say that members of the public are better informed about legal matters (although they may be) but simply that consumers are less willing to accept uncritically the authority which used to be attached to professional people.[33]

For the purposes of the themes to be explored in this book a key point is that many clients no longer saw themselves as bound to one firm of solicitors. They sought the best possible service at the cheapest price. It was not just private clients who were prepared to 'shop around'. One commentator described the change in attitudes amongst business clients as follows:

> Previously, many commercial clients had been content to enter into long-term and relatively undemanding relationships with their lawyers. Now, however, these same clients were required to operate in highly competitive global markets and therefore sought to gain the best possible value for money from their lawyers. They began to employ lawyers ('in-house') to monitor and control the work of private practitioners. Fees began to be rigorously scrutinised and work had increasingly to be won by skilful presentations in direct competition with competitors.[34]

In response to these changes in the commercial and legal world, the 'mega' firm was born.[35] These firms were able to handle huge transactions and in general meet the needs of major corporate clients. In parallel with this increase in size amongst the major law firms, the overall number of solicitors in England and Wales also rose dramatically. In 1966 there were 21,672 solicitors practising; in 1970 there were 30,463; in 1996 the figure had increased to 68,037; and by 1999 there were 100,957 practising solicitors.[36] Moreover, specialism became the order of the day within many firms. At least 70 per cent of solicitors in England and Wales claim to specialise, either principally or exclusively, in a given area of legal work.[37] Firms now pride themselves on their reputation in specific fields.[38]

[33] Lady Marre, CBE, *A Time for Change: Report of the Committee on the Future of the Legal Profession,* (General Council of the Bar and Council of the Law Society, London, 1988) at para 3.52, hereafter referred to as the 'Marre Report'. See also *Law Society Gazette*, 16 April 1988, p 16: 'We live in a consumer-orientated society where clients have high expectations and will complain if those expectations are not met.'

[34] See R O'Dair, n 24 above, at 67.

[35] See further A Sherr, *Editorial*, (1994) 1(1) *International Journal of the Legal Profession* 1 at 7. Some say this was sparked off by the merger of Coward Chance and Clifford Turner creating Clifford Chance. See J Flood, n 31 above, at 179: 'Law firm mergers only started because Clifford Chance did it. Everyone got scared.'

[36] *Trends in the Solicitors' Profession Annual Statistical Report* (The Law Society, London, 1996) at 10 and D Egan, 'The legal revolution', (1999) 49 *The Lawyer* 16. The number of practising solicitors is increasing every year. See also M Galanter, 'Law Abounding: Legalisation Around the North Atlantic', (1992) 55 *Modern Law Review* 1.

[37] G Chambers and S Harwood, *Solicitors in England and Wales: Practice Organisation and Perceptions, First Report*, (The Law Society, London, 1990). See also A Sherr and L Webley, 'Legal Ethics in England and Wales', (1997) 1(2) *International Journal of the Legal Profession* 109 at 129.

[38] See R SenGupta (ed), *Chambers and Partners—A Guide to the Legal Profession 1999–2000* (Chambers & Partners Publishing, London, 1999).

The trend towards specialisation, coupled with the growth in numbers, has contributed to much greater mobility within the profession.[39] It is now much less likely that a solicitor will join a firm as an articled clerk and remain there until retirement. Even partners frequently move to new firms, often taking their assistant solicitors, secretaries and clients with them.[40] Many solicitors are 'poached' by competing firms; others move because they believe their chances of promotion will be greater elsewhere.[41]

These changes in the legal and commercial environment have led some firms of solicitors to believe that they should offer their clients a 'one-stop shop'.[42] In other words, they have considered forming a multi-disciplinary partnership (MDP) with other professionals such as accountants, merchant bankers or stockbrokers. The idea behind this is to bring together all the human resources necessary to conduct the work required by corporate clients, thus saving them the burden of instructing representatives of each profession separately.[43]

One effect of the changes which have taken place over the last 20 years has been that the practice of the very large law firms has diverged significantly from that of medium sized and smaller firms.[44] The 20 largest firms now employ 40 per cent of all solicitors and provide legal expertise to solve complex legal problems on a 'massive scale'.[45] This has contributed to the gulf between the 'mega' firms and high-street practices. The clientele is completely different, as is the scale of operation, and this in turn has rendered some areas of legal practice almost unrecognisable compared with, say, the early 1980s when Abel studied the profession in the UK. At that time Abel characterised barristers as being far more exposed than solicitors to market forces. He commented that:

> [Barristers'] immediate consumers—solicitors—are more sophisticated and often endowed with considerable market power (because they are repeat players). Solicitors . . . generally perform in private . . . and their individual consumers are relatively ignorant about law and lawyers and lacking in market power (because demand is

[39] See for example, C Smith, 'Empty nests', (2000) 12 *The Lawyer* 28 and K Bateson, 'A firm relationship', (1997) 20 *Commercial Lawyer* 62. The same can be seen in the US legal profession: 'Lawyers like the rest of the US work force, have become highly mobile. A newly licensed lawyer now can expect to change employment status several times in the course of a career.' J Pelton Pitulla, 'Cleaning up before moving on', *ABA Journal*, April 1996, p 91.

[40] K Bateson, n 39 above; *Legal Week*, Editorial, 'Building the Great Wall of China', 22 July 1999, p 23.

[41] See *The Lawyer*, Editorial, 20 September 1999 and MP Moser, 'Chinese walls: a means of avoiding law firm disqualification when a personally disqualified lawyer joins the firm', (1990) 3 *Georgetown Journal of Legal Ethics* 399.

[42] See *Law Society Gazette*, Editorial, 'Changing Legal Profession', (1999) 96/48 at 24.

[43] No MDPs exist at present. See Lord Chancellor's Advisory Committee on Legal Education, *Multi-disciplinary Practices,* (July, 1999), and The Law Society *Multi-disciplinary Practices,* (Consultation Paper, 1998). See also A Crawley and C Bramall, 'Professional Rules, Codes and Principles Affecting Solicitors (Or What Has Professional Regulation to do With Ethics?)', in R Cranston (ed), *Legal Ethics and Professional Responsibility* (Clarendon Press, Oxford, 1995) at 113.

[44] A Boon and J Levin, n 1 above, at 75 and AA Paterson, n 14 above at 159.

[45] A Boon and J Levin, n 1 above at 76.

> infrequent and unpredictable); even businesses tend to be less knowledgeable about solicitors than solicitors are about barristers.[46]

Abel did however foresee that the size and structure of law firms could change significantly, with a greater degree of specialisation and a small number of firms dominating particular markets:

> Perhaps the most important form of protection is simply the further elaboration of the phenomenon that originally gave rise to the professions, namely specialisation . . . The growth in size of solicitors' firms . . . has allowed their members to specialise as well, confident that large business clients will look to the firm for a wide variety of services. These firms have the same enduring relationship with business clients (and wealthy individuals) that chambers have with their solicitor intermediaries. As firms continue to expand and merge, the market may become increasingly oligopolistic.[47]

Abel anticipated that as a result in the growth in size of some solicitor firms, and the creation of joint partnerships with accountancy firms, there would be a

> transformation of the market from one dominated by exchanges between individual producers and consumers to one in which large institutions organise both producers and consumers and mediate the transactions between them.[48]

However, Abel did not go on to explore the impact—or the potential impact—of these transformations upon the solicitor/client relationship, and in particular upon the bulwark of that relationship, which is the uncompromised allegiance owed by the solicitor to his client, including the duty of confidentiality. He did not consider how the solicitor/client relationship might be transformed by the development of the mega firm, and he did not identify the practical difficulties and ethical dilemmas which might then result.

THE REGULATORY REGIME

Despite the changes which have occurred over the last twenty years, every solicitor, whether practising within a very large firm or operating as a sole practitioner, is, at least in theory, subject to the same regulatory control. The huge variation in the organisation and workload of law firms, ranging from the 'mega' firm on the one hand to the sole practitioner on the other, has led some commentators to question the appropriateness of Law Society rules as a means of regulating this hugely varied legal and commercial environment.[49]

Since 1933 the Law Society of England and Wales has had the power to make rules regulating the professional practice, conduct and discipline of solicitors in

[46] R Abel, n 5 above at 293.
[47] *Ibid*, at 296.
[48] *Ibid*, at 298.
[49] See, for example, RG Lee, n 17 above; AC Hutchinson, 'Legal ethics for a fragmented society: between professional and personal', (1998) 2(3) *International Journal of the Legal Profession* 175; and C Glasser, n 27 above.

respect of any matter.[50] The rules, codes and principles of conduct issued by the Law Society are contained in *The Guide to the Professional Conduct of Solicitors* (the 'Guide') which is currently updated about every three years.[51] All aspects of solicitors' practice are addressed, from the most fundamental rules to more everyday matters such as what solicitors should wear when attending court.[52] At present the Guide is in its eighth edition and runs to some 893 pages.[53] Practice Rule 1 sets out the basic principles of professional conduct for every solicitor, namely:

> A solicitor shall not do anything in the course of practising as a solicitor, or permit another person to do anything on his or her behalf, which compromises or impairs or is likely to compromise or impair any of the following
>
> (a) the solicitor's independence or integrity;
> (b) a person's freedom to instruct a solicitor of his or her choice;
> (c) the solicitor's duty to act in the best interests of the client;
> (d) the good repute of the solicitor or the solicitors' profession;
> (e) the solicitor's proper standard of work;
> (f) the solicitor's duty to the court.[54]

Rule 1 is said to form the 'bedrock of solicitors' practice'[55] and to be the prime consideration if an ethical problem occurs. The other commentaries and material in the Guide represent the Law Society's interpretation of the basic principles as applied to the various circumstances arising in the course of a solicitor's practice.[56]

A breach of the rules by a solicitor or firm of solicitors may in theory elicit a Draconian response from the Law Society. Possible sanctions include striking the solicitor off the roll, suspending the solicitor from practice indefinitely, imposing a fine of up to £5,000 for every allegation proven and ordering the solicitor to take, at his or her expense, such action as is deemed proper in the interest of the client.

In addition to the rules, codes and principles of conduct issued by the Law Society, solicitors are bound by the requirements of the general law. The law of agency, contract, tort, evidence, criminal justice and, especially, fiduciary

[50] Solicitors Act, 1933. Similar powers are now contained in ss 32–34 of the Solicitors Act, 1974.

[51] N Taylor (ed), *The Guide to the Professional Conduct of Solicitors*, 8th edn (Law Society Publishing, London, 1999), hereafter referrred to as 'The Guide 8th edn'; G Chambers, 'Conduct Matters', *Solicitors Journal* 31 July 1989 at p 712: 'A guide to professional conduct was first published in 1960 with the aim of familiarising members of the profession with the expected standards of conduct and behaviour.'

[52] The Guide 8th edn, at Principle 22.12.

[53] It is interesting to note that the previous edition was 746 pages and the original *Guide to the Professional Conduct and Etiquette of Solicitors* by Sir Thomas Lund, 1960, was by comparison a mere 173 pages.

[54] The Guide, 8th edn, at 1.

[55] N Taylor (ed), *The Guide to the Professional Conduct of Solicitors*, 6th edn (Law Society Publishing, London, 1993) at 1.

[56] The Guide, 8th edn, at 2.

obligations, can all have a bearing upon the professional behaviour of solicitors. Indeed, the Guide makes specific reference to this fact.[57]

Furthermore, solicitors are officers of the court and are required to act in a manner befitting that relationship.[58] As one learned judge put it:

> We expect and indeed we extract from solicitors, who are our officers, a higher standard of conduct than we can enforce against those who are not our officers.[59]

To accept anything other than the highest standards from its officers could potentially bring the entire legal system into disrepute. The Supreme Court[60] has inherent jurisdiction over solicitors as officers of the Court by virtue of section 50 of the Solicitors Act, 1974.[61] Sections 51–55 of the Act give the court wide-ranging powers to institute disciplinary proceedings against solicitors.

In principle, therefore, solicitors are subject to stringent regulation. Not only are they bound by the rules of their professional organisation, they are also subject to review by the courts. Indeed, it is doubtful whether any other profession is, at least in theory, subject to such a weight of regulation and oversight.[62]

REGULATING CONFLICTS OF INTEREST

It has been suggested that there are essentially two ways in which a regulatory body can address the issue of conflicts of interest: either it can prevent members from acting where conflicts arise, or conflicts can be controlled by means of a range of appropriate measures.[63] The Law Society has, until now, opted for the first of these two approaches. The rules governing the conduct of solicitors state that a solicitor must not act where the solicitor's own interests conflict with those of the client, or where a conflict of interests (or a significant risk of conflict) arises between two or more clients.[64] More specifically, and with potential conflicts in mind, the Law Society rules have been drafted as follows:

15.01 A solicitor or firm of solicitors should not accept instructions to act for two or more clients where there is a conflict or a significant risk of a conflict between the interests of those clients.

[57] The Guide, 8th edn, at rule 1.03, n 4 at 4.

[58] The full title of a solicitor is in fact Solicitor of the Supreme Court; see *Sittingbourne and Sheerness Railway Co v Lawson* (1886) 2 TLR 605. The court has summary jurisdiction to intervene to maintain the character and integrity of the profession.

[59] Cozens-Hardy MR in *Rakusen v Ellis, Munday & Clarke* [1912] 1 Ch 834.

[60] That is the High Court, the Crown Court and the Court of Appeal.

[61] See *In re the Justices of Antigua* (1830) 12 ER 321; *In re S (a barrister)* [1970] 1 QB 160; *John Fox v Bannister King & Rigbeys* [1988] QB 925.

[62] An analysis of the professional rules of other professions providing a similar service to that of a solicitor is discussed below at 51.

[63] H McVea, n 29 above at 122.

[64] The Guide, 8th edn, at 313.

15.02 If a solicitor or firm of solicitors has acquired relevant information about an existing or former client during the course of acting for that client, the solicitor must not accept instructions to act against that client.

15.03 A solicitor or firm of solicitors must not continue to act for two or more clients where a conflict of interests arises between those clients.

15.04 A solicitor must not act where his or her own interests conflict with the interests of a client or a potential client.[65]

The effect of these rules is potentially wide-ranging. It would appear that wherever there is a conflict of interest, or a *potential* conflict, the solicitor or firm of solicitors must decline to act.

The changes within the solicitors' profession over the last two decades would suggest that the likelihood of a conflict of interest arising is far greater than previously.[66] This is important not only from the solicitor's point of view, in that he may lose business, but also from the client's standpoint, as he may be prevented from employing (or continuing to employ) the solicitor of his choice.[67] Yet there has been little academic study of the operation of the rules relating to conflicts.[68] Those writers who have addressed the issue appear to have accepted that a solicitor cannot act where there is a conflict or a potential conflict. They add, moreover, that in such a situation a solicitor should not want to act.[69] Others have argued that the rules are too lax and should be tightened further, but in so doing they appear not to have investigated how the rules operate in practice.[70]

Only one commentator has observed that modern practice has placed substantial pressure on the rules:

> . . . as the size of law firms increased and different methods of legal practice developed, so pressures were placed upon rules which were not designed for an era of amalgamations and mega-firms. Some firms, for example, are today partnerships in name

[65] The Guide, 8th edn, at 313 to 316.

[66] See *Law Society Gazette*, Editorial, 'Dawning of a New Era', (1996) 96/48 at 24; R Cranston (ed), n 18 above at 109, and A Sherr and L Webley, 'Legal Ethics in England and Wales', (1997)4 1/2 *International Journal of the Legal Profession* 109 at 127: 'Conflict of interest is a perennial difficulty for solicitors as can be seen from the recent number of conflict of interest cases which reach their way to the courts in comparison with other complaints against solicitors.' It should also be noted that clients are less loyal than they once were. This increases the risk of a conflict arising. See V Slind-Flor, 'Client-Conflicts Patrols March On', *The National Law Journal*, 30 March 1992, p 1; SJ Adler, 'Beyond Chinese Walls: Coping with Conflicts', *The American Lawyer*, May 1984, p 6 and *University of Pennsylvania Law Review*, Editorial, 'The Chinese wall defense to law-firm disqualification', (1980) 128, 650 at 677.

[67] E Nosworthy, 'Ethics and Large Law Firms', in S Parker and C Sampford (eds), *Legal Ethics and Legal Practice*, (Clarendon Press, Oxford, 1995) at 62.

[68] For some exceptions see PD Finn (ed), *Essays in Equity,* (Sweet & Maxwell, London, 1985) and J Glover, *Commercial Equity Fiduciary Relationships,* (Butterworths, Adelaide, 1995). Both tend, however, to concentrate more on the legal principles in relation to fiduciary duties rather than the actual rules laid down by the Law Society.

[69] A Boon and J Levin, n 1 above; and D Nicolson and J Webb, *Professional Legal Ethics,* (Oxford University Press, Oxford, 1999), at 8.

[70] C Boxer, 'Chinese Walls: no longer impenetrable', *The Lawyer*, 15 September 1992.

> only. Changes in management structure have caused large law firms to adopt the bodies of partnerships and the minds of corporations and, inevitably, they have had to introduce special mechanisms to comply with professional requirements.[71]

It would seem therefore that whilst some practitioners and academic writers have warned of the risk of conflict which is inherent in the practice of the modern, large commercial law firm, this problem (if indeed it is a problem) has not been the subject of independent empirical investigation.[72]

THE NEED FOR AN EMPIRICAL STUDY

The task which I set myself was to explore the way lawyers deal with a particular set of ethical dilemmas in practice. This is not a study of the entirety of legal ethics, or a study of the sociology of the legal profession. These distinctions were clearly identified by Abel, who observed that

> except for a handful of very recent ethnographic studies of lawyer-client interaction . . . we know little more about what lawyers do than how they allocate their time among different subject matters.[73]

I shall attempt to portray 'what lawyers do' in the context of a reasonably well-defined area of difficulty for the modern law firm. 'Conflicts' confront practitioners with dilemmas which fall within the broad framework of legal ethics, but very little work has been done in describing the particular nature of these difficulties, or how they are resolved in practice.

There is limited value in making normative statements in the absence of full understanding of the practice environment. Before embarking on a review of lawyers' ethics, or an analysis of the contribution of rules to an ethically-based practice, it is necessary to have a reliable account of the problems which confront lawyers in their daily work, of the way in which those difficulties are *described* (or 'constructed') by those who experience them, and of the way they are addressed and resolved. Traditionally, legal scholars have relied upon reported cases to give them an insight into the issues of principle that they wished to explore. But it cannot be assumed that leading cases convey an accurate picture of the scale or nature of the dilemmas confronting practitioners. In some fields, arguably including that of 'conflicts', litigation will be perceived by one or possibly both parties as a catastrophic failure of their normal procedures and safeguards. One needs a sense of the everyday, as well as the extreme case. This calls for an empirical investigation.

[71] JR Midgley, 'Confidentiality, Conflicts of Interest and Chinese Walls', (1992) 55 *Modern Law Review* 822.

[72] In the US, however, the issue has received far greater attention. See for instance, SP Shapiro, *Conflicting Responsibilities: Manoeuvring Through the Minefield of Fiduciary Obligations*, (American Bar Foundation, Chicago, 1995). See also below at 76.

[73] R Abel, n 5 above at 1.

It may thereafter be possible to employ the empirical evidence to help develop an account of legal ethics more broadly, or of the benefits and limitations of professional self-regulation. But without some attempt to examine the way in which regulatory rules and legal endowments are applied on a day-to-day basis, discussion of legal ethics will be impoverished through a lack of adequate contexualisation.

This is not to say that the way in which 'conflicts' are handled in practice is necessarily the 'right' or the 'best' way. It will be important to consider whose interests are being advanced, and whose compromised, and whether alternative solutions need to be found. Empirical research is not in general supportive of the *status quo*—rather the contrary. But it is necessary to engage in an empirical study in order to appreciate the complexity of the issues—or, to put this another way, to appreciate the array of competing principles which may have a bearing on different transactions, and thereafter to arrive at a judgement as to which of these principles has to be accorded priority under a given set of circumstances.

The next question is, what kind of empirical research? For the purposes of this study I was conscious that I was breaking new ground in exploring conflicts at the level of solicitors' practice. In those circumstances it was not feasible for me to attempt some of the more arduous or demanding research strategies.[74] I had to rely, in effect, upon what solicitors and their clients were prepared to tell me. As it happened, once firms decided that they were prepared to talk to me the tenor of the interviews which I secured was not at all defensive. My informants tended, it is true, to defend their own working practices, but they were not inclined to assert that they were operating in harmony with the rules. On the contrary, the picture offered to me was one of quite striking disjunction between the regulatory framework and the way in which some firms dealt with conflicts. In other words, on the basis of an admittedly not especially challenging methodology, representatives of major law firms admitted to me that they broke Law Society rules on a more or less routine basis. As will become apparent, they defended their practice as being necessary and, in context, principled, but it was nonetheless information which, had it been made public, could have been extremely embarrassing for them. So whilst I am unlikely to have secured the *whole* story concerning the manner in which firms respond to conflicts of interest, I was the recipient of what seemed to me to be a remarkable degree of frankness. This included accounts of acting in the face of conflict which had not hitherto entered the public domain.

RESEARCH METHOD

The methods employed in this research were essentially of three kinds. First, traditional archival work was undertaken. An analysis was made of

[74] For a fuller discussion of this point, see Appendix 1 *passim*.

professional guidelines issued by the Law Society and other regulatory bodies, of the relevant case law and Law Commission proposals, and of other academic commentaries. Some difficulties were experienced in finding relevant academic work on the topic in England and Wales. It appears that comparatively little analysis has been undertaken in the United Kingdom of the rules issued by the Law Society on conflicts of interest. There was, however, a wealth of Commonwealth and North American literature.

Secondly, I undertook a study of the 'trade press'[75] of both the legal and accountancy professions. Publications such as *Legal Business*, *Commercial Lawyer*, *The Lawyer*, and, more recently, *Legal Week*, provided a valuable insight into how law firms and lawyers operate and current thinking amongst the profession on most issues, including conflicts of interest. *Accountancy* and *Accountancy Age* provided a similar commentary in respect of accountants.

The third method was to approach members of the legal profession and their clients directly. Both barristers and (especially) solicitors participated in an empirical study.

I approached 100 firms of solicitors between 1 and 7 November 1997. These were the top 100 firms (ranked by number of fee earners) listed in the *Legal 500*.[76] I used the *Legal 500* as a basis for selecting firms because it is geared towards commercial clients. Its self-imposed task is to 'present the commercial client with a selection of solicitors and barristers to consider when faced with legal issues on which he or she requires specialist advice.'[77] The focus of this book is on conflicts of interest as experienced by commercial clients, rather than those experienced by private clients. So the *Legal 500*, including the largest firms operating in the City of London, provided a natural focus for empirical investigation.

At the stage when I contacted firms I could not be sure which firms, from the very largest City firms to relatively modest-sized provincial firms, would provide the most illuminating data on conflicts. I decided that it was not feasible to attempt a survey which would be representative of all firms with a significant commercial client base. Given the limitations of my own resources I decided to give particular attention to the larger firms. This was basically because I thought that the issue of conflicts of interest, and the need to 'manage' conflicts, would be more problematic where there was a large number of solicitors working within the one practice, and where the firm had a correspondingly large client base.

[75] The term 'trade press' is one which was also adopted by J Flood, in 'Megalawyering in the global order: the cultural, social and economic transformation of global legal practice', (1996) 3 *International Journal of the Legal Profession* 169. As he points out: 'there was a time when no professional would talk to journalists, their role was to be self-effacing. With the intensified competitiveness of the professional service marketplace—both on behalf of clients and the firms themselves—professionals have been forced to cultivate a close, working relationship with the trade press, even to the extent of collaborating on joint seminars in such areas as law firm management and specialised areas of work.'

[76] J Pritchard (ed), *The Legal 500*, 12th edn (Legalease Limited, London, 1999).

[77] *Ibid*, at 13.

Between March and May 2001 I also contacted representatives from the legal departments of five large commercial organisations. My purpose in so doing was to obtain clients' views of 'conflicts' and the way the legal profession responds to conflict situations. I selected five clients to reflect different commercial sectors: transport, pharmaceutical, finance, telecommunications and retail. I also interviewed three practising barristers to obtain information on how conflicts affect their arm of the profession.

No empirical research was undertaken in relation to the accountancy profession. However, the Institute of Chartered Accountants in England and Wales provided some advice and guidance early in the study. Other professional bodies also assisted by furnishing relevant materials. The Bar Council, City Disputes Panel and the Law Society each provided copies of consultation papers.[78]

OTHER COMPONENTS OF THE RESEARCH

An empirical study can reveal how conflicts impinge upon the modern law firm, and how firms are responding, but in order to judge the appropriateness of the strategies being employed it was necessary to do three other things. First, I needed to examine the *coherence* of the present regulatory framework, which meant studying the Law Society rules and leading case decisions in tandem, viewing them in effect as a single system, if not necessarily a very coherent one. Little or no analysis had been undertaken of whether the rules adopted by the Law Society reflect the common law.[79] If the Law Society has imposed stricter conditions than the common law, what is its justification for so doing and are these reasons valid? Also, it is difficult to evaluate solicitors' practice without reference to the rules by which, at least in theory, they are bound. The rules may be broken, but they provide a template against which some preliminary judgements can be made.

Secondly, it was important to explore other strategies being developed overseas. The changes in the commercial environment which underpin developments in legal practice are not unique to the United Kingdom; they are a world-wide phenomenon and strategies for resolving conflicts are being developed in other jurisdictions. In the United States, for example, the American Bar Association found that conflicts were becoming such an issue for its members that it set up a task force to examine ways to assist lawyers to resolve potential

[78] Consultation papers considered included *Multi-Disciplinary Practices*, (The Law Society, London, 1998), *Fiduciary Duties and Regulatory Rules* (Consultation Paper No 124, HMSO, London, 1992), *Review of Conflicts and Duties In Relation to Confidential Information* (The City Disputes Panel, London, 2000) and *Conflicts of Interest* (The Law Society, London, 2001).

[79] Some writers have addressed this in relation to former clients. See above at n 12 and below at n 27, ch 2.

problems.[80] There has also been empirical investigation of the ways that US practitioners manage conflicts of interest in practice.[81]

Finally on this comparative theme, it is apparent that solicitors are not alone in confronting these problems. The English Law Commission, for example, has studied the financial services industry.[82] Following changes to the structure of the financial markets in the mid-1980s, in particular the abolition of the Stock Exchange's single capacity requirement and the development of financial conglomerates offering a wide range of services, the potential for conflicts to arise was thought to be much greater. It was therefore necessary to explore what models were being developed in that context in an attempt to manage conflicts. It was also worthwhile to explore how the Bar and accountancy profession balance the competing interests involved. These professions offered potentially fruitful bases for comparison because they have similar responsibilities towards their clientele whilst having experienced the same changes in the commercial environment. These comparisons were unlikely to yield solutions to the problems confronting the solicitors' profession, but they might nonetheless prove to be instructive.

PLAN OF THE BOOK

In chapter 2 I examine whether the current regulatory regime governing solicitors' conduct in conflict situations is appropriate for the commercial environment in which many law firms now operate. This chapter also reviews the Law Society's rules governing conflicts of interest and compares this regulatory regime with that of the common law. Chapter 3 explores the way that related professions have responded to the difficulties presented by conflicts of interest. In chapter 4 I consider the approaches adopted in other jurisdictions, notably in the United States and in the Commonwealth. The following three chapters, chapters 5, 6 and 7, are devoted to an examination of the way that law firms in England and Wales respond to conflicts of interest in practice. Chapter 5 considers the means by which firms identify conflicts. Chapter 6 is concerned with the decision whether or not to act in the face of conflict. Chapter 7 examines the measures which are put in place when a firm decides that it will continue to act in a conflict situation. Chapter 8 reviews the main difficulties with the current regulatory regime and examines various possible strategies for managing conflicts in the future. Appendix 1 provides a full account of the research methods employed in undertaking the study which forms the basis of this work.

[80] See below at 78.

[81] See SP Shapiro, *Conflicting Responsibilities: Manoeuvring Through the Minefield of Fiduciary Obligations*, (American Bar Foundation, Chicago, 1995) and E Lazega, 'Conflicts of Interest in American Business Law Firms—An Organisational Approach', (French title: 'Les Conflits d'interets dans les cabinets americans d'avocats d'affaires: concurrence et auto-regulation'), (1994) 36 *Sociologie du Travail* 315. See below at 76.

[82] Law Commission Report No 236, *Fiduciary Duties and Regulatory Rules*, (HMSO, London, 1995).

2

The Regulatory Regime

INTRODUCTION

THE TERM 'conflicts of interest' covers many different circumstances. Chapter 15 of the Guide to Professional Conduct divides conflicts into two forms:

1. solicitors acting where their own interests are involved (personal conflicts);
2. solicitors acting where a conflict arises between two or more clients.[1]

In this book I am concerned only with the second category—which means that the Law Society's classification does not advance matters as far as this study is concerned. The former category, sometimes referred to as 'fair dealing' conflicts, includes such matters as gifts to solicitors and the making of appointments. The Law Society's rules reflect the common law principles that an agent must not let his own interests conflict with those of his principal and that he must always put the principal's interest before his own.[2] These rules are of fundamental importance for legal practitioners.[3] In itself the guidance is straightforward and easy to comprehend. That is not to say, of course, that difficulties do not arise in practice. But fair dealing conflicts are a separate topic, with many ramifications. These cannot be dealt with adequately in a work which is concerned essentially with exploring solicitors' competing responsibilities to different clients.

[1] N Taylor, (ed), 1999 *The Guide to the Professional Conduct of Solicitors*, 8th edn (Law Society Publishing, London, 1999) at 313, hereafter 'The Guide, 8th edn'.

[2] See J Glover, *Commercial Equity Fiduciary Relationships* (Butterworths: Adelaide, 1995) at 158.

[3] The leading case in this area is that of *Boardman v Phipps* [1967] 2 AC 46. Boardman was a solicitor to a trust which owned 8,000 of 30,000 shares in a company with whose performance Boardman was dissatisfied. As the trust did not wish to purchase the remaining shares, Boardman decided to purchase them himself. He did not obtain the consent of all the beneficiaries and undoubtedly benefited from information he had received in his position as trustee (ie he know how much to offer for the shares). The shares increased in value and Boardman made a large profit. There was no claim of bad faith, or any conflict of interest, since the trust was unable to purchase the shares itself. The majority of the House of Lords, however, found Boardman to hold the shares on constructive trust for the trust, and that he was therefore liable to account for the profits made. They took the view that there was a conflict of interest as the trust might have changed its mind and sought to purchase the shares. As Todd has pointed out, the case demonstrates 'how willing the courts are to find even the most theoretical possibility of a conflict of interest' where a solicitor's interests conflict with the interests of his clients. See P Todd, *Textbook on Trusts*, 4th edn (Blackstone Press, London, 1999) at 340.

A more useful classification for the purpose of this particular study is the attempt to analyse the topic by reference to the *subject matter* of the conflict. Finn divides conflicts into four types:

1. same matter conflicts;
2. former matter conflicts;
3. separate matter conflicts;
4. fair dealing conflicts.[4]

An alternative method, and one employed by Glover,[5] is to classify conflicts on a temporal basis, that is to say, according to when the duties of the solicitor arise. Either one duty precedes the other—for example, where the solicitor represents one client and then takes on another with conflicting interests, in which case the conflict is 'successive', or the duties arise more or less at the same time—for example, where the solicitor acts for more than one party in the same transaction, in which case the conflict is 'simultaneous'.

As we shall see, solicitors themselves tend to classify conflicts in a similar manner to Finn, namely by reference to subject matter.[6] The City of London Law Society, for example, in reviewing the conflict rules for the Law Society,[7] found it helpful to adopt Finn's approach and categorise conflicts by different degrees of severity or 'directness'.[8] Whilst there is much to commend this approach, and it will be used later in this book, for ease of handling material, and in order to gain an historical perspective, in this chapter my analysis will be based around Glover's distinction between 'successive' and 'simultaneous' conflicts. It is this distinction which offers the best route into the subject, providing as it does a convenient framework for reviewing the courts' response to conflict situations over the best part of a hundred years.

SUCCESSIVE REPRESENTATION

Successive representation is covered by the Law Society rules under principle 15.02, namely 'relevant confidential information'. It is stated that:

> If a solicitor or firm of solicitors has acquired relevant confidential information about an existing or former client during the course of acting for that client, the solicitor or the firm must not accept instructions to act against that client.[9]

[4] P Finn, 'Fiduciary Law and the Modern Commercial World', in E McKendrick (ed), *Commercial Aspects of Trusts and Fiduciary Obligations* (Clarendon Press, Oxford, 1992) at 23 to 39.

[5] J Glover, *Commercial Equity Fiduciary Relationships* (Butterworths: Adelaide, 1995) at 202.

[6] See below at 110. Although Finn classifies conflicts in his work in that manner, he perhaps intended to accommodate conflicts in the duties of professional fiduciaries other than solicitors because he states solicitors are '*not of immediate concern*' to his analysis.

[7] *Review of Conflicts Rules* (The City of London Law Society, London, 2000).

[8] *Ibid*, at 6.

[9] The Guide, 8th edn, at 314.

This means that once a client imparts confidential information to a solicitor, it is very unlikely that the solicitor could act against that client in the future. For example, if Prompt Prints Ltd (PP) instructed Firm XYZ in a one-off matter relating to a minor dispute, and some years later, Super Snaps (SS), one of PP's competitors, instructed XYZ to represent them against PP, XYZ would have to decline if in possession of relevant confidential information. No definition is given in the accompanying notes as to what amounts to 'relevant' confidential information. Note 1 states that

> a solicitor in possession of confidential information concerning a client which is *or might be* relevant to another client, is put in an impossible position and cannot act against that client.[10]

Consequently, if PP had told XYZ about their special procedure for processing pictures, that information *might* be relevant to SS and as a result XYZ would be placed in an 'impossible' position.

There is no time limit on when a firm ceases to owe a duty of confidentiality to a former client. The City Disputes Panel has argued that the duty to maintain confidentiality lasts indefinitely unless the information ceases to be confidential.[11] Thus the duty may survive long after any contractual or other business relationship has come to an end.[12] Also, principle 15.02 applies to a solicitor *or firm of solicitors*. Therefore, if PP had imparted confidential information to Mr Smith, a solicitor in XYZ some years previously, and Mr Smith had subsequently left the firm, XYZ would still be prevented from acting against PP. Similarly, if Mr Smith were instructed at his new firm to act against PP, he would be obliged to decline the instruction.

There is an anomaly here within the notes attached to principle 15.02. The guidelines draw a distinction between a partner who changes firms and an assistant solicitor who does the same. Note 8 states:

> Where a partner changes firm, the test to be applied before that firm may act against a client of the former firm is whether he or she personally has relevant confidential information. If challenged the burden of proof is on the solicitor to show that he or she has no confidential information.[13]

Note 9 states:

> Where an assistant solicitor changes firms and the firm he or she moves to is acting against a client of the solicitor's former employer, that solicitor cannot act for the new firm's client in that matter. The solicitor owes a duty of confidentiality to his or her former employer and former clients. The solicitor cannot use any information obtained about a former client to assist his or her new employer's client. The new

[10] *Ibid*, at 314.

[11] *Review of Conflicts and Duties In Relation to Confidential Information* (The City Disputes Panel, London, 2000) at 6.

[12] *Ibid*, at 8.

[13] The Guide, 8th edn, at 315.

> employer can continue acting for the client only if the solicitor can be adequately isolated from the matter.[14]

In both cases, however, the original firm is prevented from acting against its former client. This is difficult to justify given that some firms have over 1000 fee-earners and the person who managed the former client's case may have left some time ago. The distinction between a partner and an assistant solicitor is perhaps more understandable. A partner may be privy to more information than an assistant solicitor as he will attend partners' meetings at which on-going cases within the firm may be discussed.

This raises the question of the extent to which principle 15.02 reflects the common law in relation to former clients. It is sometimes the case that professional bodies impose stricter rules on their members than the law dictates. There may be many reasons for this.[15] The professional body may perhaps consider that the law does not give adequate guidance in respect of a particular area of regulation, or that problems have arisen in other professions which should not be allowed to occur in theirs. The starting point for establishing whether this is true in relation to former clients and the Law Society is the case of *Rakusen v Ellis, Munday & Clarke*.[16] Considered by the Court of Appeal over 90 years ago, long before the Law Society had any say in the regulation of solicitors, the facts of the case were relatively straightforward.

In June 1911 Rakusen sought advice from Munday, a partner in the firm of solicitors Ellis, Munday & Clarke, concerning a possible claim for wrongful dismissal against his former employers. As a result, Munday was given sensitive and confidential information. The Plaintiff then changed solicitors and the matter was referred to arbitration. Clarke, the other partner in the Defendant firm, was appointed to act by the Plaintiff's former employers. Clarke was unaware that the Plaintiff had been a client of the firm. From the evidence adduced, it was clear that Clarke knew nothing about the Plaintiff's consultations and that Munday and Clarke usually conducted business separately without any knowledge of the other's clients. In addition, the firm undertook to ensure that only Clarke participated in the proceedings. Nevertheless, the Plaintiff still sought an injunction to prevent the Defendant firm from acting for his former employers. The Plaintiff lacked confidence that Munday would not, either voluntarily or involuntarily, divulge information which had been conveyed to him.

[14] The Guide, 8th edn, at 315.

[15] Cranston states: 'Even if the codes only repeated the standards contained in the general law they would be more accessible and provide a more practical basis for professional discipline. In fact the codes do more: they identify the main lines of the profession's thinking on professional responsibility and have both educative and moulding effects. New members of the profession can be more easily instructed into acceptable standards of behaviour, and members of the profession generally may be dissuaded from unacceptable behaviour, and may have any disposition to act correctly reinforced' in R Cranston (ed), *Legal Ethics and Professional Responsibility* (Clarendon Press, Oxford, 1995) at 4.

[16] [1912] 1 Ch 831 (CA) (hereinafter, *Rakusen*).

The Court of Appeal was unanimous in stating that

> there is no general principle that a solicitor who has acted for a client in a particular matter cannot, under any circumstance, act for the opposite party in the same matter.

The Court added that 'it depends on the circumstances of each case.'[17] Their Lordships each set out a test to determine the circumstances in which a solicitor should be prevented from acting for a later client.

Cozens-Hardy MR held that:

> We must be satisfied that real mischief and real prejudice will in all human probability result if the solicitor is allowed to act.[18]

Fletcher Moulton LJ provided a slightly wider test, namely:

> As a general rule the Court will not interfere unless there be a case where mischief be rightly anticipated. I do not say that it is necessary to prove that there will be mischief, because that is a thing which you cannot prove, but where there is such a probability of mischief that the Court feels that, in its duty as holding the balance between the high standard of behaviour which it requires of its officers and the practical necessities of life, it ought to interfere and say that a solicitor shall not act.[19]

Buckley LJ stated:

> The whole basis of the jurisdiction to grant the injunction is that there exists, or, I will add, may exist, or may be reasonably anticipated to exist, a danger of a breach of that which is a duty, an enforceable duty, namely, the duty not to communicate confidential information; but directly the existence or possible existence of any such danger is negatived, the whole basis and substructure of the possibility of injunction is gone.[20]

In summary, the tests proposed were:

—Probability of real mischief and prejudice (Cozens-Hardy).
—Reasonable anticipation of mischief (Fletcher Moulton).
—Danger that the duty of confidentiality will be broken (Buckley).

On examining the evidence, the Master of the Rolls found no mischief or prejudice and accepted that none would arise in the future, as the Defendant solicitors had given an undertaking that only Clarke would participate in the proceedings and that Munday would not disclose any information concerning the Plaintiff.[21] Fletcher Moulton LJ was of a similar view, finding 'an absolute absence of any reasonable probability of mischief whatever'.[22] Buckley LJ agreed that, in light of the solicitors' undertaking, the danger of communicating confidential information was eliminated.

[17] *Ibid*, at 833 per Cozens-Hardy MR. See also 837–838 and *Johnson v Marriott* (1833) 149 ER 725.
[18] *Ibid*, at 835.
[19] *Ibid*, at 841.
[20] *Ibid*, at 845.
[21] *Ibid*, at 836.
[22] *Ibid*, at 841.

Perhaps unfortunately, it was not made clear in *Rakusen* which of their Lordships' tests was the correct one to follow. Although the decision was unanimous, the tests differed from one another. Furthermore, their Lordships' tests are much less strict than the 'relevant information' test subsequently laid down by the Law Society in principle 15.02. This of course raises the question of why the Law Society adopted a stricter test than that of the common law.

1. The Rationale Behind the Law Society's Rules

The current rules governing conflicts of interest were adopted by the Law Society in 1986. Between the decision in *Rakusen* and the Law Society's framing of these rules, the matter had not been differently decided before another court.[23] *Rakusen* had not been overruled. Why then did the Law Society choose to adopt a stricter test?

The most compelling explanation for the adoption of principle 15.02 lies in two further principles of professional conduct. These are:

1. A solicitor is usually under a duty to pass on to the client and use all information which is material to the client's business regardless of the source of that information;[24]
   and
2. A solicitor is under a duty to keep confidential to his or her firm the affairs of clients and to ensure that the staff do the same.[25]

Thus, according to principles 16.06 and 16.01, if a solicitor has information about a former client which is relevant to an existing client, he cannot pass all relevant information to one client without breaching his duty of confidentiality to the former client. These rules in turn reflect the basic principles laid down in Rule 1.[26]

To suggest that the Law Society's guidelines governing conflicts of interest are stricter than the common law because the Law Society's own rules require such strictness does not, in itself, take one very far. *Why* are the rules framed with such scrupulousness? In fact it is often the case that professional bodies impose stricter rules on their members than the law dictates.[27] In promoting the professionalism of its members, one of the most important considerations for the Law Society is the solicitor-client relationship. As a previous President observed: 'It is only through the maintenance of high standards . . . that justice will be served,

[23] See for example, *Moody v* Cox *and Hatt* [1917] 2 Ch 71 and *Re a Solicitor* (1987) 131 SJ 1063.

[24] The Guide, 8th edn, at Principle 16.06, at 331. There are, however, exceptional circumstances where such a duty does not apply.

[25] *Ibid*, at Principle 16.01, at 324. This duty continues after the end of the retainer until the client permits disclosure or waives the confidentiality. See accompanying note 3 to this principle.

[26] See above at 9.

[27] See JR Midgley, 'Confidentiality, Conflicts of Interest and Chinese Walls', (1992) 55 *Modern Law Review* 822 at 834 and *Swain v The Law Society* [1982] 2 All ER 827.

the public will be protected and the profession as a whole will thrive.'[28] It is considered to be of fundamental importance that a client has full confidence in his solicitor and, therefore, all rules relating to a purported conflict must be completely clear and protective of the client's interest. Confidence in the legal profession has not always been high, and suspicions about the integrity of lawyers are nothing new.[29] Hazard argued that the ethics of lawyers in general have always been the subject of popular anxiety and suspicion and that lawyers are often thought of as dissimulators who pervert natural justice.[30] Maintaining public confidence in solicitors is, unsurprisingly, a major concern for the Law Society.

The solicitor-client relationship is perhaps the Law Society's primary consideration when drawing up rules and principles of professional conduct.[31] It is of fundamental importance that a client has trust in his solicitor and can be confident that his interests will be safeguarded. It is doubtful whether a client would have such confidence if his solicitor were in a position subsequently to use confidential information for the benefit of another.

The question of confidence aside, the solicitor owes a fiduciary duty to his client.[32] A fiduciary can be defined as a person who holds a position of trust or confidence with respect to someone else and who is obliged to act solely for that person's benefit.[33] Fiduciary relationships include those between trustees and their beneficiaries,[34] directors and their companies,[35] guardians and their wards,[36] accountants and their clients[37] and bankers and customers.[38] The nature and exact extent of fiduciary duties in relation to other professions will be discussed in more detail in chapter 3. For present purposes it is sufficient to say that the whole of chapter 15 of the Guide to the Professional Conduct of Solicitors reflects equitable principles in that:

> A fiduciary
> a) cannot misuse his position, or knowledge or opportunity resulting from it, to his own or to a third party's possible advantage;

[28] M Sheldon, President of the Law Society, in his Foreword to The Guide to the Professional Conduct of Solicitors, 6th edn (Law Society Publishing, London, 1993) at xiii.

[29] 'The first thing we do, let's kill all the lawyers', King Henry VI, Part III, I.iv. 137; also R Samborn, 'Anti-lawyer attitude up', (1993) *National Law Journal* at Table 1; C Sampford, *Legal Ethics and Legal Practice* (Clarendon Press, Oxford, 1990) at 13; H Kirk, *Portrait of a Profession* (Oyez Publishing, London, 1976) at vii; and MH McCormack, *The Terrible Truth About Lawyers* (Collins, London, 1987) at 9: 'In the general view, lawyers are a clubby group who, with the benefit of an arcane body of knowledge and under the smokescreen of an elaborate system of professional courtesies and rituals, look out for their own—at the expense of the rest of us.'

[30] GC Hazard, *Ethics in the Practice of Law* (Yale University Press, Yale, 1978) at xiii.

[31] See for example, *Swain v The Law Society* [1982] 2 All ER 827 at 830.

[32] See *Cordery's Law Relating to Solicitors*, 6th edn (London, Butterworths, 1968) and *Parry-Jones v The Law Society* [1969] 1 Ch 1.

[33] See J Glover, n 5 above at 6.

[34] See JC Shepherd, *The Law of Fiduciaries* (The Carswell Company, Toronto, 1981) at 23.

[35] *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134.

[36] *Hatch v Hatch* (1804) 9 Ves 292.

[37] *Evitt v Price* (1827) 1 Sim 483.

[38] *Lloyd's Bank v Bundy* [1974] 3 All ER 757.

b) cannot, in any matter falling within the scope of his service, have a personal interest or an inconsistent engagement with a third party;
unless this is freely and formally consented to by the beneficiary or is authorised by law.[39]

Imposing a fiduciary duty, therefore, is meant to ensure that persons in a position of trust do not misuse information to their advantage or to the benefit of a third party.

Their Lordships specifically recognised these duties in *Rakusen*, observing that 'the law says . . . you shall not disclose or put at the service of your new employer the secrets that belong to your old employer'[40] and that the solicitor-client relationship is such that in this respect the law can 'fix a standard for the behaviour of its own officers which is higher than it would be practicable to extract from persons in other types of confidential relations.'[41] Nevertheless it was held that each case would depend on the facts given and that there was no general principle that a solicitor who acted for a client in a particular matter could not subsequently act for the opposite party in the same matter. In *Rakusen* the court did not question the professional integrity of the solicitors involved and there appeared to be no suggestion that they would allow commercial considerations to impinge on their professional responsibilities. However, the modern-day Law Society is responsible for regulating the profession in a somewhat different climate,[42] one in which all professions are subject to more searching scrutiny, and the voice of the 'consumer' figures prominently.

2. Endorsement of *Rakusen*

In the year following the adoption of the Law Society rules, two major developments took place in the area of conflicts of interest. First, the question of which test should be followed arose in another case.

In 1987 Hoffmann J in *Re a Solicitor*[43] appeared to support the reasoning of Fletcher Moulton LJ, namely, that the question facing the court was whether mischief was rightly anticipated. Although the conflict concerned two existing clients rather than a current and former client, the reasoning used by Hoffmann J was based on the *Rakusen* decision. The applicant had employed a firm of solicitors for over 10 years, although at the time of the application he had merely instructed them to handle the probate of his father's estate. The firm also acted for *O*, who was a director of a large public company of which the applicant had

[39] See E McKendrick (ed), n 4 above at 9. This quotation is an adaptation of the formulation of Mr Justice Dean in *Chan v Zacharia* (1983) 53 ALR 417 at 435.

[40] *Rakusen*, per Fletcher Moulton LJ at 839.

[41] *Ibid*, per Fletcher Moulton LJ at 839 and 840.

[42] A Boon and J Levin, *The Ethics and Conduct of Lawyers in England and Wales* (Hart Publishing, Oxford, 1999) at 56.

[43] (1987) 131 *Solicitors Journal* 1063.

formerly been managing director. The company was being investigated by a government department and O gave evidence that was hostile to the applicant. The parties' interests were, therefore, in conflict and the applicant objected to the fact that the respondents were acting for O. However, Hoffmann J, applying Fletcher Moulton's reasoning, concluded that there would not be any real risk of prejudice to the applicant if the firm were to continue to act for O.

A second key development followed when the Law Society introduced an exception to the rules governing conflicts of interest. Although this exception related to existing rather than former clients, the Law Society appeared to accept the ruling in *Rakusen*. In note 3 of principle 15.03, the Guide now states that solicitors may continue to act in a conflict situation following the amalgamation of two or more firms, provided they erect a 'Chinese wall'.[44] Upon amalgamation, the clients of the former two firms automatically become clients of the new firm. If the interests of the clients of the new firm conflict, the firm must cease to act for both clients unless the firm is able to establish one of two things. First, if the firm is able to show that no confidential information has been obtained whilst acting for one of the clients, then it may continue to represent the other. The other option for the amalgamated firm is to erect a 'Chinese wall.'

A Chinese wall is a procedure

> for restricting flows of information within a firm to ensure that information which is confidential to one department is not improperly communicated (and this includes inadvertent communication) to any other department within the . . . firm.[45]

In other words, the firm must ensure that the department advising the first client is separated from those other members of the firm who are advising the second client. Moreover, care must be taken to prevent any accidental spillage of information and to ensure that the two departments remain isolated from each other.[46]

It must be stressed that the Guide provides that such a device may be used only where two or more firms of solicitors amalgamate, and then only in 'exceptional circumstances.'[47] The Law Society rules conceive that those situations will indeed be rare and will reflect circumstances where it is in the best interests of the respective clients for the amalgamated firm to continue to act for one or, possibly, both.[48]

[44] Also sometimes referred to as an 'ethical wall' (see DK Orlik, 'California Narrows the Ethical Wall; Pennsylvania Expands It', *Legal Assistant Today*, May/June 1993, at 144) and sometimes even 'insulation walls' (see GC Hazard, 'Erecting a Wall to Prevent Conflicts of Interest', *National Law Journal*, 21 July 1997, at A19). Indeed, in these politically correct times, some have argued that the term 'Chinese wall' is discriminatory, see KJ Conger, 'Standards of Conduct Issue—"Chinese Walls" ', *Public Power*, Jan/Feb 1998.

[45] Law Commission Consultation Paper No 124, *Fiduciary Duties and Regulatory Rules*, para 4.5.1; see also Penningtons, 'Chinese Walls', *Solicitors' Journal*, 26 March 1993, p 27.

[46] There are several ways in which a wall may be created. See below at 144.

[47] The Guide, 8th edn, Annex 15A, at 322.

[48] *Ibid*.

Any Chinese wall erected in these circumstances has to be effective, and the following must apply:

a) both clients must have consented (if one does not, that must be an absolute bar to the firm acting for either);
b) it must be in the client's best interest that the new firm continues acting despite the conflict of interest;
c) there must be no embarrassment to the solicitors, who must not favour one client to the detriment of the other; and
d) the clients must have the risks fully explained.[49]

The rules stress that the purpose of the wall is to preserve confidentiality in relation to the affairs of each client. To this end, the following (minimum) safeguards must be in place:

> If acting for both clients, the relevant personnel must adopt appropriate guidelines.
> If acting for both clients, complete physical separation into different rooms should be made (as far as can reasonably be achieved) of:
>
> a) all papers relating to each client; and
> b) all property relating to each client; and
> c) all personnel dealing with each client.[50]

It is debatable why the Law Society introduced the idea of the Chinese wall into the rules.[51] It may have been in response to the changing economic climate and the impact of this upon the profession, this being a period when significant numbers of law firms opted to merge with one another.[52] It is noteworthy, however, that although the exception relates to *existing clients*, effectively all that the Law Society has done is to approve the conduct of the solicitors in the circumstances that pertained in *Rakusen*. Although in 1912 their Lordships were not familiar with the term, what they had identified in the *Rakusen* case was the existence of a Chinese wall. Effectively, Munday and Clarke separated all information and personnel relating to their respective clients and ensured that confidential information known by one partner would not be communicated to the other. The only differences were that the *Rakusen* case involved litigation and, second, that it did not follow the amalgamation of two firms.

[49] The Guide, 8th edn, Annex 15A, at 322.

[50] The seventh edition of the Guide placed a further restriction upon the amalgamated firm in that the new firm could not continue to act for both clients where the matter was subject to litigation (see note 7, Annex 15A at 282). This restriction has now been removed. The idea of a Chinese wall was introduced by the Law Society in May 1987. The guidelines were revised in February 1999. It is interesting to note that prior to the seventh edition of the Guide, the Law Society's view was that Chinese walls were to be used extremely rarely. However, provided that a firm could overcome the problems with separation and embarrassment, in principle, a wall could be used for litigation.

[51] Law Society minutes were inspected at the Law Society library but no discussion was recorded as to the reason behind the introduction of Chinese walls.

[52] See for example RL Abel, 'Comparative Sociology of Legal professions', in RL Abel and PSC Lewis (eds), *Lawyers in Society Volume 3—Comparative Theories* (University of California Press, Berkeley, 1989) at 122 to 125, and C Rose, 'Clifford Chance The Merger That Worked', (1997) 15 *Commercial Lawyer* 32.

This raises the question of why the Law Society does not allow the possibility of Chinese walls in other circumstances found with growing frequency in modern legal practice.

3. Is *Rakusen* Applicable to Modern Practice?

The decision in *Rakusen* has been heavily criticised by some commentators and rejected by other commonwealth countries.[53] Finn describes the judgment as 'untenable today', stating that it should be allowed to 'sink into oblivion'. According to Finn, the 'vices' of *Rakusen* are four-fold:

> —First, it was formulated when our law of breach of confidence was in an embryonic state. In particular it paid no heed to the now well accepted phenomenon of 'unconscious plagiarism' or unconscious use of information;
> —Secondly, with the onus now being on the former client to prove not merely that his former lawyer acquired information in confidence but also that there is a real likelihood that some or all of that information will be misused, the *Rakusen* ruling does in effect 'tear aside the protective cloak drawn about the lawyer-client relationship' and undermines the policy ensuring both client secrecy and the related doctrine of legal professional privilege;
> —Thirdly, if as is well accepted, a solicitor cannot pray in aid a duty of confidence to justify his non-disclosure to his client of relevant information he possesses, then the assumption underlying the *Rakusen* rule conflicts with the duty of lawyer to his second client, namely to put at that client's disposal not only his skill but all of his relevant knowledge;
> —Fourthly, and consistent with the guarantee of legal professional privilege, the rule adopted must eliminate the apprehension a client might have that disclosures he may make to a lawyer might somehow become available to third persons. To allow that apprehension is to prejudice the possible utilisation of legal services.[54]

Other commentators have observed that the decision was made some 85 years ago when telephones were rare, and telexes, faxes, photostat machines, computer links and the like were unknown.[55]

In response, several points can be made. First, although the law of breach of confidence may have been in an embryonic state, the Master of the Rolls, Cozens-Hardy, recognised that such problems could exist, stating:

> 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.[56]

[53] For example, see *Littlejohn v Phillips Fox (a firm)* [1999] WASC 171, discussed below at 88 and *MacDonald Estate v Martin* (1990) 77 DLR (4th) 249, discussed below at 82.

[54] P Finn, 'Conflicts of Interest and Professionals', in *Professional Responsibility* (New Zealand Legal Research Foundation, University of Auckland, 1987) at 9.

[55] C Boxer, 'Chinese Walls: no longer impenetrable', *The Lawyer*, 15 September 1992.

[56] *Rakusen*, at 835.

The judges in *Rakusen* were merely maintaining that there was no general principle that a solicitor who has acted for a client in a particular matter could not, under any circumstances, act for the opposite party in the same matter. They stressed that it depended on the circumstances pertaining in each case.[57] The 'unconscious use of information' is not something which will alter this general principle. It may be a factor which will be taken into consideration in deciding the outcome of a particular case, but the recognition of such a phenomenon does not mean that an effective Chinese wall can never be erected.

The next issue raised by Finn concerns solicitor-client confidentiality. He contends that the former client, in proving his case, will be placed in a position where he is almost bound to reveal the precise nature of the confidential information which he fears may be disclosed. However, this may not be a true reflection of what actually happens at the hearing. For example, in *Rakusen* all we learn about the information in question is that the client 'gave him much confidential information in regard to the matters in dispute between him and the company.'[58] Whilst it is conceivable that, in some cases, the court will have to examine what was actually said to the former solicitor, there are a number of ways of overcoming such difficulties. One would be to hold the proceedings *in camera*.

Finn's third argument seemingly has the most weight. How can a solicitor discharge his duty to the second client if he is unable to make available all relevant information? Sole practitioners may indeed be faced with substantial problems and would be unwise to act. Yet is it reasonable to impose the same restrictions upon multi-partner firms? There is no obvious reason why different partners in the same firm cannot act against former clients if the firm preserves confidentiality. It has also been argued that it is 'artificial and unrealistic' to suggest that the knowledge of one partner must be imputed to another, and that client A is entitled to all of the information that is known to the partner acting for client B.[59]

Finally, the argument that *Rakusen* should not apply because modern technology has made it easier to disclose information is surely questionable. Modern technology may have made the transfer of information faster, but this does not mean that an effective Chinese wall cannot be maintained. If solicitors could be trusted to maintain such a device in 1912, why doubt their integrity today? Any solicitor making disclosures would face disciplinary proceedings and the possibility of very heavy penalties. Moreover, it could be argued that modern technology may assist the erection of a Chinese wall. Computer programmes can be protected with passwords, and rooms containing confidential information can

[57] *Rakusen*, at 833.
[58] *Ibid*, at 831.
[59] AA Lusk, 'Commentary on Paul Finn's Paper "Conflicts of Interest and Professionals" ' (New Zealand Legal Research Foundation, University of Auckland, 1987) in Part Two at 310. This point was also made in the subsequent case of *Re a Firm of Solicitors* [1992] 1 All ER 353. See below.

be made secure through granting access only to personnel who have the necessary codes.

It may therefore be argued that, provided Chinese walls are properly maintained, the decision in *Rakusen* is both correct in law and offers a practical solution to some of the problems experienced by solicitors today.[60] The reasoning adopted by the court requires that high standards of professional behaviour be maintained, while at the same time it attempts to ensure that the best interests of the clients are served.

Nevertheless, given that the Law Society prohibits the use of Chinese walls as a means of enabling firms to act against former clients, and that it is reluctant to regulate practice along the lines proposed in *Rakusen*, it is debatable whether a firm today could successfully rely on a Chinese wall, or on the *Rakusen* case itself, when defending its decision to act in the face of conflict.

4. *Rakusen* and the Chinese Wall

Use of the Chinese wall was judicially recognised in 1991 in the case of *Supasave Retail Ltd. v Coward Chance; David Lee & Co (Lincoln) Ltd v Coward Chance*.[61] Moreover, it appeared that Fletcher Moulton's formulation in *Rakusen* was the preferred test. Sir Nicholas Browne-Wilkinson followed what he believed to be Hoffmann's reasoning from *Re a Solicitor (1987)*.[62] The case involved the amalgamation of two firms of solicitors, one situated in London, the other in Sheffield. Prior to the amalgamation the firms were acting for opposing sides in litigation involving a fraudulent breach of trust by the plaintiff company's directors. One of the clients wished to retain the services of the merged firm because the partner who had represented them throughout had extensive knowledge of the case. The other client, however, objected to this and refused to give consent on the grounds that some of the partners of the merged firm had previously advised them on matters which had a bearing on their defence. In order to continue to represent their client, the merged firm undertook to keep separate and confidential the information which they had concerning the two earlier cases. Furthermore they gave an assurance that if any sensitive information from one side reached the other, they would either cease to act or would apply to the court for directions. They also contended that there was minimal opportunity for any leakage of sensitive information since the earlier cases had been managed separately, using offices in different parts of the country.

Sir Nicholas Browne-Wilkinson, VC, acknowledged that there was some difficulty in deriving a definite test from *Rakusen*. He therefore relied heavily on

[60] This issue and the effect of conflicts on the profession are examined in greater depth in chs 5, 6, 7 and 8.

[61] [1991] 1 All ER 668 (hereinafter, '*Supasave*').

[62] (1987) 131 SJ 1063.

Hoffmann J and said that '. . . the test [as to whether] mischief was rightly anticipated . . . seems to me to be a fair expression of what the court has to look for.'[63] He concluded that as no detail had been given as to how the firm was organised, or who was aware of the confidential information, and that as no concrete steps had been taken to ensure that staff were aware of the sensitive nature of the issues, the risk of leakage of information had not been eliminated.[64] Accordingly he decided that it would not be lawful for the amalgamated firm to continue to act. Although a wall was not successfully erected in this case, the Vice-Chancellor recognised that there was no general rule prohibiting a firm from acting for both sides.

It seemed, however, that the question of which test should be followed had still not been settled. In 1992, in *Re a Firm of Solicitors*,[65] it transpired that the edited report of *Re a Solicitor* did not accurately reflect what Hoffmann J had said. Rather than relying on a passage from Fletcher Moulton LJ, he had in fact used a passage from the Master of the Rolls, Cozens-Hardy.[66] The effect of this was that Hoffmann J's decision and Vice-Chancellor Browne-Wilkinson's reasoning were mutually inconsistent. So in *Re a Firm of Solicitors* the Court of Appeal was left once again with the task of determining which of the three *Rakusen* tests to apply, or indeed whether some other test was more appropriate.

The test propounded by Cozens-Hardy MR was unanimously rejected. Parker LJ stated:[67]

> I have no hesitation in rejecting the test . . . If adopted it would seem to me to enable a firm which had acted for client A in one matter thereafter to act for client B against client A in the same or a related matter provided only that there were undertakings.

Likewise, the test suggested by Fletcher Moulton LJ was thought by Parker LJ to be too limited, as it did not cover such matters as the nature of the mischief, or by what standard one considers whether mischief was rightly anticipated.[68] He suggested that Buckley LJ's test of whether 'there may reasonably be anticipated to exist a danger' of breach of duty not to communicate information was the most useful, adding that the proper approach is to consider whether a reasonable man informed of the facts might reasonably anticipate such a danger. In his opinion this approach had the advantage of addressing over-sensitivity on the part of the objector whilst at the same time maintaining public confidence in the process of litigation.

Sir David Croom-Johnson was of the same view, stating that the court would act if danger of a breach of duty might reasonably be anticipated.[69] However,

[63] *Supasave*, at 673.
[64] *Ibid*, at 673 and 674.
[65] [1992] 1 All ER 353.
[66] *Ibid*, at 361 and 366.
[67] *Ibid*, at 361.
[68] *Ibid*, at 362.
[69] *Ibid*, at 369.

Staughton LJ thought that Fletcher Moulton LJ's test was the correct one, namely: 'whether there is or is not a reasonable anticipation of mischief.'[70]

Their Lordships' respective tests were then applied to the facts. The case concerned a large and well-known firm of solicitors which had acted for a group of companies and their subsidiaries in litigation arising out of the Lloyds scandal. Some five years later, and with the group no longer a client, the same firm was instructed to defend one of the parties who had been closely associated with the other side in the original case. The claim was being brought by subsidiary companies of the original client. The solicitors in question offered to erect a Chinese wall, proposing that all documents relating to the previous case be put in storage, that no-one who appeared in the first case would take part in the second, and that those who would be or had been involved in the two cases would not communicate with each other during the proceedings.[71]

Parker LJ was not satisfied with these measures. He concluded that:

> Any reasonable man with knowledge of the facts . . . including the proposals for a 'Chinese wall', would consider that some confidential information might permeate the wall and would indeed regard it as astonishing that the plaintiffs should be faced with solicitors on the other side to whom, over a considerable period, they had forwarded much confidential information concerning matters being investigated in the main action.[72]

Moreover, he added:

> Save in a very special case such as Rakusen's case, I doubt very much whether an impregnable wall can ever be created . . . In the very particular circumstances of Rakusen's case the undertakings given, coupled with the retainer being not of the firm but of Mr. Clarke personally, afforded an impregnable barrier against leakage or misuse of information . . . The situation here is very different. The firm is a very large one and it acted for three years in a matter which attracted great public interest and much discussion in the legal profession and in the insurance world.[73]

Thus, whilst Parker LJ appears at first to adopt the approach laid down in *Rakusen*, namely that the court should intervene only when there may reasonably be anticipated to exist a danger of a breach of duty, when he applied the test to the facts his conclusion was substantially different from that arrived at in *Rakusen*. His view that Chinese walls would hardly ever be effective is perhaps another way of saying that the court will automatically raise a presumption that a risk exists and it will then be up to the solicitors to establish that the circumstances amount to a 'special case.'[74]

[70] *Ibid*, at 366.
[71] *Ibid*, at 367 and 369.
[72] *Ibid*, at 363.
[73] *Ibid*.
[74] This should be compared to the comments of Lord Donaldson in *Watkinson v Legal Aid Board* [1991] 2 All ER 936, where he states 'In cases where people seek to sue the Legal Aid Board, the board has very properly instituted a system of Chinese walls, and these are real Chinese walls as opposed to the artificial variety which we sometimes experience. There has accordingly, and very properly, been absolutely no communication . . .'

Sir David Croom-Johnson agreed with Parker LJ and added:

> There is no analogy to be drawn from the two-man firm in *Rakusen's* case to a large firm of 107 partners and obviously a correspondingly large staff of executives and other employees. The reasonable man would recognise the existence of a risk of use of the earlier information no matter what steps the firm had taken to protect it.[75]

Staughton LJ, however, dissented, saying that the test was whether there is or is not a *reasonable anticipation* of mischief and, having regard to the measures which the solicitors had taken to ensure that information remained confidential, he concluded that there were no grounds for supposing that mischief was rightly anticipated.[76] More fundamentally, he stated:

> I cannot detect . . . any authority for the proposition that a large law firm of many partners is obliged to disclose to each client any knowledge relevant to his affairs that may be possessed by any of its partners or staff. Nor do I think it is right to enlarge the law to that extent . . . There has no doubt been a change in the way that many solicitors practise since 1912. In [*Rakusen*] Mr. Munday and Mr. Clarke were the only partners in the firm; they were in the habit of doing business separately and without any knowledge of each other's clients, and each of them had the exclusive services of some of their clerks. There are, of course, still sole practitioners or small firms today. But there are also giants with 100 partners and more, employing large numbers of assistant solicitors and articled clerks . . . It seems to me impracticable and even absurd to say that they are under a duty to reveal to each client, and use for his benefit, any knowledge possessed by any one of the partners or staff. I would not hold that to be the law.[77]

It is Staughton LJ's dissenting judgment which is closest to *Rakusen*, both in wording and application, although the majority also claimed to follow that early case.

5. Applying the Principles

For some years it was thought that the matter had been resolved. Following *Re a Firm of Solicitors* (1992),[78] it seemed that a solicitor could not act against a former client if the firm had prior to that received relevant confidential information. This seemed to be the case even if a Chinese wall were attempted, given that the courts doubted whether an impregnable wall could ever be created. Thus, while the courts paid lip service to the principle laid down in *Rakusen*, namely that there is no general principle prohibiting a firm from acting against a former client, in practice they were unwilling to support this proposition. Moreover, although the judges admitted that the Guide to Professional Conduct

[75] *Re a firm of solicitors* [1992] 1 All ER 353 at 369.
[76] *Ibid*, at 366 and 367.
[77] *Ibid*, at 365.
[78] *Ibid*.

was stricter than the general law,[79] it appeared that they did not wish a less rigorous approach to be applied by the court.

Therefore, when in 1995 Lightman J was faced with a case involving a conflict of interest,[80] he followed the reasoning of the Court of Appeal in *Re a Firm of Solicitors* (1992). The facts of the case are worthy of repetition as they involve a different circumstance from those seen thus far, namely that of a partner moving firms. Lightman J's judgment is also noteworthy for its clear summary of the law.

The plaintiffs were involved in substantial international patent litigation in the United States. They had retained a firm of English solicitors, specialists in intellectual property law, to act for them in the United Kingdom. The first defendant was a partner in the intellectual property department of that firm, but was not involved in the plaintiffs' litigation. After 11 months the first defendant left the firm to become head of the intellectual property department of another firm of solicitors. Some two-and-a-half years later one of the defendants in the patent litigation instructed the new firm. There was evidence that although confidential information relating to the plaintiff's litigation was available to the first defendant through general office conversation, none was in fact communicated to him. The plaintiffs did not challenge the first defendant's integrity and good faith but they were concerned that although he had no present recollection of any relevant confidential information, he might in fact have received some and its recollection could be triggered by future events, thereby giving rise to a real risk of prejudice to the plaintiffs.

Lightman J concluded that the law regulating the freedom of a solicitor to act against a client for whom he (or his firm) had previously acted reflected a need to balance two potentially conflicting public interests. First, there is the right of that client to the fullest confidence in the solicitor whom he instructs. This requires that there shall be no risk or perception of a risk that confidential information relating to the client or his affairs will be disclosed to anyone else. Secondly, there is an interest in allowing solicitors freedom to obtain instructions from any member of the public, and in members of the public being able to instruct solicitors of their choice. In every case these two interests must be weighed against each other. There must be good and sufficient reason to deprive the client of his chosen solicitor, or the solicitor of the client. Lightman J analysed the position which had been reached by English law as follows:

1. The basis of the courts' intervention is not a possible perception of impropriety: it is the protection of confidential information.
2. In view of the special importance of the relationship of confidence between solicitor and client and of the fact that the solicitor is an officer of the court, the court is particularly sensitive to the need to afford the fullest and, where required, special protection to such confidential information.

[79] *Ibid*, per Sir David Croom-Johnson at 360.
[80] *In Re a Firm of Solicitors* [1997] Ch 1.

3. Confidential information passing between solicitor and client and otherwise acquired by a solicitor on behalf of his client may, like any other confidential information communicated to anyone else, subsequently cease to be confidential. Confidential documents and information may become common knowledge or at least known to an opponent in the course of a trial. Some information may be memorable and some eminently forgettable. Common sense requires recognition that not all confidential information acquired by a solicitor will remain in the mind of the solicitor or be susceptible of being triggered as a recollection after the lapse of a period of time. For the purpose of the law imposing constraints upon solicitors acting against the interests of former clients, the law is concerned with the protection of information which (a) was originally communicated in confidence, (b) at the date of the later proposed retainer is still confidential and may reasonably be considered remembered or capable, on the memory being triggered, of being recalled and (c) relevant to the subject matter of the subsequent proposed retainer. I shall refer to information that satisfies these three qualifications as 'relevant confidential information'.
4. (a) A solicitor at one time retained by a client, but not in possession of relevant confidential information, is not by reason of the fact of such past retainer precluded from subsequently acting against him; (b) a solicitor possessed of relevant confidential information is precluded from acting against his former client; (c) in the case of a firm previously retained by a client: (i) the members of the firm, whether partners or employees, who are in possession of relevant confidential information are likewise subject to such a constraint, whether they remain with the firm or practise elsewhere; (ii) the members who are not in possession of such information (a) are free from such restraint once they have left the firm and are practising elsewhere, (b) so long as they remain with the firm are undoubtedly precluded from so acting if the court considers there is a real, as opposed to fanciful, risk of a communication to them of any such relevant confidential information by those within the firm possessed of it and may possibly be precluded in any event even if there is no such risk save in exceptional circumstances.
5. On the issue of whether the solicitor is possessed of relevant confidential information: (a) it is in general not sufficient for the client to make a general allegation that the solicitor is in possession of relevant confidential information if this is in issue: some particularity as to the confidential information is required. But the degree of particularity required must depend upon the facts of the particular case, and in many cases identification of the nature of the matter on which the solicitor was instructed, the length of the original retainer and the date of the proposed fresh retainer and the nature of the subject matter for practical purposes will be sufficient to establish the possession by the solicitor of relevant confidential information. (b) It may readily be inferred that confidential information is imparted to members of the firm having the conduct of the client's matter. Such information may, however, be imparted to other members in the course of partnership meetings or social meetings of members of the firm. (c) The court attaches weight to the evidence of the solicitor as to his state of knowledge and whether he has received confidential information, in particular where there is no challenge to his integrity and credibility.

Accordingly Lightman J adopted the reasoning of the Court of Appeal *In Re a Firm of Solicitors* (1992),[81] concluding that

[81] [1992] QB 959.

> the members of the firm wishing to act against a former client are disqualified from so acting if there is any real risk of subsequent communication to them of relevant confidential information by members of the same firm possessed of such information; and the same strict test (*i.e.* the need to establish the absence of any real risk) is appropriate in determining whether the solicitor is already possessed of such information.[82]

He decided that on the facts before him there was no risk. The former partner had satisfied the court that there was no real possibility that confidential information was ever communicated to him and that there was therefore no risk that his memory would be triggered. No injunction was therefore given to the plaintiffs. He added that

> if stricter rules are thought desirable and greater limitations on the freedom of solicitor are thought necessary . . . avenues are available. The Law Society may adopt such a rule of conduct to this effect if it thinks this appropriate.[83]

It seemed, therefore, that the position in relation to former clients was now settled and only where it could be shown that there was no real risk of prejudice to a client could a firm act. Chinese walls were seen as insufficiently secure to eliminate such risks. However, in November 1998 the House of Lords finally had an opportunity to address the issues raised by *Rakusen*.

6. Reconsideration of *Rakusen* Eighty Years On

The extent of the interest in the House of Lords' decision in *Prince Jefri Bolkiah v KPMG*,[84] prompted one commentator to observe:[85]

> A few weeks ago a sign appeared in the front window of one of the legal bookshops, advertising copies of the judgment in the Prince Jefri case. It is rare indeed that a judgment has attracted such attention.[86]

What attracted so much attention was the possibility of the Lords adopting a more relaxed attitude towards Chinese walls. Although the case concerned not a firm of solicitors but an accountancy firm (KPMG), comparison was made

[82] *Ibid*, at 25.
[83] *In Re a Firm of Solicitors* [1996] 3 WLR 16 at 25.
[84] [1999] 2 AC 222.
[85] S Gee, 'Above Suspicion', (1999) 30 *Commercial Lawyer* 80.
[86] See C Passmore, 'Prince Jefri's privilege', (1999) 49 *New Law Journal* 651: 'Don't turn away: this is not another article about the efficacy (or otherwise) of Chinese walls in professional firms.'; G Barboutis, 'Prince Jefri Bolkiah v. KPMG: the rejection of an "inadequate" Chinese Wall', (1999) 20 *The Company Lawyer* 286; P Lush and P Satyadeva, 'Chinese walls and client consent', *Solicitors Journal* 25 June 1999, p 610; H McVea, 'Heard it through the grapevine: Chinese walls and former client confidentiality in law firms', (2000) 59 *Cambridge Law Journal* 370; R Tobin, 'Former Clients and Chinese Walls: Russell McVeagh v Tower and Prince Jefri Bolkiah v KPMG', (1999) *New Zealand Law Review* 305; AD Mitchell, 'Chinese Walls in Brunei: Prince Jefri Bolkiah v KPMG', (1999) *University of New South Wales Law Journal* 243; T Petch, 'Chinese walls', (1999) *Cambridge Law Journal* 485.

with the position of solicitors as there were no authorities dealing with the duties of accountants when acting in a forensic capacity.

KPMG was asked by the Brunei Investment Agency (BIA) to investigate Prince Jefri, a former chairman of the BIA, following a family dispute between the Prince and his brother, the Sultan. From its establishment in 1983, BIA had instructed KPMG to undertake the annual audit of its core funds. In addition KPMG carried out advisory and consultancy work for the BIA. As a result, a long and close working relationship had been established between the BIA and KPMG. The difficulty for KPMG in being asked to investigate Prince Jefri was that the firm had acted as forensic auditors for the Prince some two years previously in connection with a major dispute in which he had been involved. Whilst acting in this matter they had obtained full knowledge of his financial affairs over the preceding 14 years. KPMG concluded that, as the Prince was no longer a client, there was no conflict. They decided, however, that they still owed him a duty of confidentiality which they sought to maintain by establishing a Chinese wall. On discovering what was happening, Prince Jefri started action to restrain KPMG from acting for BIA.

At first instance, Pumfrey J,[87] following Lightman J in *Re a Firm of Solicitors* (1997),[88] was of the view that there should be 'no risk or perception of a risk that confidential information relating to the client or his affairs acquired by the solicitor will be disclosed to anyone else.' The only evidence that KPMG could put forward to demonstrate the absence of such risk was a Chinese wall. Pumfrey J concluded that this was inadequate and, therefore, granted an injunction. He emphasised that the courts had, on a number of occasions, expressed 'extreme scepticism as to the efficacy of Chinese walls.'[89] Such devices, he stated, could prevent deliberate disclosure, but provided inadequate protection against accidental, inadvertent or negligent disclosure. He was of the view that Prince Jefri should not be exposed to such a risk unless there were powerful reasons for saying that he should. No such reasons were identified.

The Court of Appeal, in a majority judgment, disagreed.[90] The Master of the Rolls, Lord Woolf, and Lord Justice Otton were particularly impressed with the reasoning adopted by the New Zealand Court of Appeal in *Russell McVeagh McKenzie Bartleet v Tower Corporation*.[91] Drawing on that case, Lord Woolf said that three questions should be asked to determine issues of this kind: 1) Is there confidential information which, if disclosed, is likely to affect the former

[87] *The Times*, 25 September 1998. A full copy of the transcript can be found at www.newlawonline.com, case No 2980914101.

[88] See n 80 above.

[89] He was referring specifically to the courts' decisions in *Re a Firm of Solicitors (1995)*, *Supasave*, *Re a Firm of Solicitors (1992)*, *Pavel v Sony*, Court of Appeal, unreported, 1995 and the Australian cases of *D&J Constructions Pty v* Head [1987] NSWLR 118 and *Mallesons v KPMG* Peat Marwick [1990] 4 WAR 357.

[90] *Bolkiah v KPMG*, Court of Appeal, 19 October 1998, unreported. A copy of the transcript of the Court of Appeal's decision can be obtained at www.newlawonline.com, case No 2981015801.

[91] [1998] 3 NZLR 641. Confidential information in this instance had been given purely to one partner in the firm who was not involved in the new case.

clients' interests? 2) Is there a real 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 through the court's intervention?

Lord Woolf thought there was a risk that Prince Jefri's affairs might be disclosed, but considered that the firm had taken reasonable action to prevent disclosure. He believed that as KPMG had been BIA's auditors for 15 years, finding new accountants would involve BIA in considerable expense and delay. Largely for these reasons, he refused to grant an injunction. Of particular importance were his remarks on the adequacy of Chinese walls. In Lord Woolf's opinion, an 'unrealistic standard for the protection of confidential information' would be set if KPMG were not allowed to rely on the wall they had erected. This, he stated, would create unjustifiable impediments for large international firms in the way they conducted their business. He added:

> There are differences between the position of solicitors and accountants, but where what is involved on the accountants' part is forensic work, it is not likely that the difference between the two professions will be decisive . . . It is the ability of the firm to protect those interests which will be critical.

The House of Lords was not persuaded by this reasoning and unanimously overturned the Court of Appeal's ruling. Speaking on behalf of the House, Lord Millett stated that *Rakusen* was authority for two propositions:

> (i) that there is no absolute rule of law in England that a solicitor may not act in litigation against a former client; and (ii) that the solicitor may be restrained from acting if such a restriction is necessary to avoid a significant risk of the disclosure or misuse of confidential information belonging to the former client.[92]

He confirmed that the basis of the court's jurisdiction to intervene on behalf of a former client was founded not 'on the avoidance of any perception of possible impropriety, but on the protection of confidential information.' He observed that former clients are in a different position from existing clients because the fiduciary relationship which exists between a solicitor and client comes to an end with the termination of the retainer. The only duty to the former client which survives is a continuing duty to preserve the confidentiality of information imparted. For this reason Lord Millett laid down that a plaintiff who seeks to restrain a former solicitor from acting for another client must establish:

> (i) that the solicitor is in possession of information which is confidential to him and to the disclosure of which he has not consented and (ii) that the information is or may be relevant to the new matter in which the interest of the other client is or may be adverse to his own.[93]

Lord Millett emphasised that, whether in contract or equity, the solicitor's duty to preserve confidentiality is unqualified. He added, however:

[92] n 84 above, at 234.
[93] *Ibid*, at 235.

> The former client cannot be protected completely from accidental or inadvertent disclosure. But he 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.[94]

His Lordship then turned to examine the appropriate test for determining the degree of risk to which the former client may be put. He rejected the 'reasonable probability of real mischief' test adopted by the Court of Appeal in *Rakusen*, saying that the test has been 'the subject of criticism both in this country and overseas . . . and a more stringent test has frequently been advocated.'[95] In his view, the criticisms of the test laid down in *Rakusen* were 'well founded' as the test imposes an unfair burden on the former client, exposes him to a potential and unavoidable risk, and fails to give him a sufficient assurance that his confidence will be respected. Lord Millett preferred instead to adopt the simple test that 'a court should intervene unless it is satisfied that there is no risk of disclosure'.

Once the former client has established that the defendant firm is in possession of confidential information, the evidential burden moves to the defendant firm to show that there is no risk that the information will come into the possession of those now acting for the other party. Lord Millett stated that

> there is no rule of law that Chinese walls or other arrangements of a similar kind are insufficient to eliminate the risk. But the starting point must be that, unless special measures are taken, information moves within a firm.[96]

Adopting Sopinka's test in *MacDonald Estates v Martin*,[97] he concluded that firms should be restrained from acting for the second client 'unless on the basis of clear and convincing evidence . . . all reasonable measures have been taken to ensure that no disclosure will occur.'[98] In considering what measures were to be regarded as reasonable, he referred to five guidelines laid down by the Law Commission:[99]

—physical separation of the various departments in order to insulate them from each other, often extending to such matters of detail as dining arrangements;
—on going educational programmes for staff;

[94] n 84 above, at 235.

[95] Lord Millett gave as examples Professor Finn's paper *Conflicts of Interest and Professionals* published by the New Zealand Legal Research Foundation in the volume Professional Responsibility and which was cited with approval by Gummow in *National Mutual Holdings Pty Ltd v The Sentry Corporation* (1989) 22 FCR 209 and the fact that it has been abandoned in Canada in the case of *MacDonald Estates v Martin* (1990) 77 DLR (4th) 249.

[96] n 84 above at 237.

[97] (1990) 77 DLR (4th) 249 at 269.

[98] n 84 above at 237 to 238.

[99] Consultation Paper on Fiduciary Duties and Regulatory Rules (1992) (Law Com No 124). Discussed below at 69.

—strict and carefully-defined procedures for crossing walls and the maintenance of proper records where this occurs;
—monitoring by compliance officers of the effectiveness of the wall;
—disciplinary sanctions where there has been a breach of the wall.[100]

Lord Millett was of the view that, to be effective, a Chinese wall needed to be an

> established part of the organisational structure of the firm, not created *ad hoc* and not dependent on the acceptance of evidence sworn for the purpose by members of staff engaged on the relevant work.

He concluded that 'where effective arrangements are in place, they produce a modern equivalent of the circumstances which prevailed in *Rakusen's* case.' As KPMG's wall was created *ad hoc* and within a single department, the House of Lords believed that it could not be satisfied that there was no risk of disclosure and, accordingly, the injunction to prevent the firm from acting for BIA was granted.

7. Implications of the KPMG Decision

Opinion following the Lords' ruling was sharply divided. Some commentators read it as quite a narrow judgment, limited to accountants carrying out litigation work. Others believed that the judgment was not about accountants at all.[101] Indeed, it was reported that the accountants involved were seeking 'top-level legal advice' about the case as they were unsure what to make of it.[102]

Lord Millett's speech certainly clarified the position following *Rakusen*. It is now clear that there is no general rule that a solicitor cannot act against a former client, but a former client is entitled to prevent his former solicitor from exposing him to *any* risk of disclosure of relevant confidential information, and a court should intervene to prevent a solicitor from acting unless it is shown that all risk has been eliminated. Chinese walls or other arrangements may be sufficient to eliminate such risk provided they are not created *ad hoc* and provided they comply with the guidelines laid down by the Law Commission.

The controversy over Lord Millett's judgment centred on whether his remarks were intended to be of general application or whether they applied just in relation to accountancy firms. He stated:

[100] n 84 above at 238.

[101] For a full discussion of the various views see G Bain, 'An end to Chinese walls?', (1999) 30 *Commercial Lawyer* 78; see also the judgment of Walker J in the case of *Re a Firm of Solicitors*, 18 October 1999, unreported, where it is clearly suggested that *Bolkiah* applies equally to solicitors.

[102] *Financial Times*, Editorial, 'City firms seek advice on Jefri Ruling', 31 December 1998. See also C Timmis, 'Accountancy merger faced a conflict of interest roadblock', (1999) 94 *Legal Business* 74.

> The duties of an accountant cannot be greater than those of a solicitor, and may be less, for information relating to his client's affairs which is in the possession of a solicitor is usually privileged as well as confidential.[103]

He added, however, that in the present case:

> . . . some of the information obtained by KPMG is likely to have attracted litigation privilege . . . and an accountant who provides litigation support services of the kind which [KPMG] provided to Prince Jefri must be treated for present purposes in the same way as a solicitor.[104]

The use of the words 'for present purposes' suggests that the main body of the judgment at least is also applicable to solicitors. However, when Lord Millett examined the adequacy of the wall used by KPMG, he said:

> It is one thing, for example, to separate the insolvency, audit, taxation and forensic departments from one another. Such departments often work from different offices and there may be relatively little movement of personnel between them. But it is quite another matter to attempt to place an information barrier between members, all of whom are drawn from the same department and have been accustomed to work with each other. I would expect this to be particularly difficult where the department concerned is engaged in the provision of litigation support services. Forensic accountancy is said to be an area in which new and unusual problems frequently arise and partners and managers are accustomed to share information and expertise.

This may be taken to mean that where accountants are acting in a solicitor-type role, a Chinese wall will never be adequate, in which case firms of solicitors can never create a secure wall. However, as will be seen below, the House of Lords' decision in *Bolkiah v KPMG* has subsequently been cited with apparent approval in relation to solicitors.[105]

8. Institutionalised Chinese Walls

Following *Bolkiah v KPMG* it was believed that, to be effective, Chinese walls had to be part of the organisational structure of a firm and not be created *ad hoc*. Subsequently, doubts were cast upon this view by Laddie J in *Young and others v Robson Rhodes (a firm) and another*.[106] Laddie J interpreted *Bolkiah* to mean that the test was whether the Chinese wall was effective in *each* case. He thought that the only distinction between established barriers within an organisation and *ad hoc* barriers was that the former were likely to be more effective. In this case a syndicate of Lloyds names sued their auditors and instructed a partner in

[103] n 84 above at 234.
[104] n 84 above at 239.
[105] See *Re a Firm of Solicitors* (1999), 18 October 1999, Walker J, unreported and *Halewood International v Addleshaw Booth & Co*, 5 November 1999, Neuberger J, unreported, discussed below.
[106] [1999] 3 All ER 524.

Robson Rhodes to undertake forensic accountancy work. Some time later Robson Rhodes and the auditors (Pannell Kerr Forster) proposed to merge and sought to terminate their retainer with the plaintiffs.[107] The plaintiffs in turn sought an injunction to prevent the merger taking place until after their action. Robson Rhodes offered to erect a Chinese wall, but the plaintiffs rejected this on the grounds that it was *ad hoc*. Laddie J held that an *ad hoc* wall was sufficient given the facts of the case.[108]

In *Re a Firm of Solicitors* (1999),[109] Walker J appeared to reaffirm that, to be effective, any barriers within a firm had to be part of the organisational structure. What was particularly interesting about his analysis, however, was that he believed that such structures could be present within a law firm. In this case the evidence was that the two matters had always been handled by two separate departments. As Walker J observed:

> The partner and his assistant [in the one department] have their offices on the third floor of one building, and the partner [in the other department] has his office on the second floor of another building. His assistant has his office on the first floor of the former building.

There was, therefore, physical separation of the relevant personnel and paperwork. Furthermore, the individuals in charge of the two cases had never been into each other's offices and had never met before the case arose. Thus there had been no 'cross-pollination' between the two departments and it appeared that social contact was limited. In any event, Walker J stated:

> I have to say . . . the subject matter of the two cases is hardly the stuff of which gossip is made. Documents are only held in hardcopy, and are stored in the respective departments of those concerned.

He concluded that these arrangements were not *ad hoc*, drawn up to cover the concerns of breach of confidence in the specific case:

> In my judgment the barriers are not artificial, but were very substantially in place already as 'an established part of the organisational structure of the firm' (to re-quote Lord Millett's words of *Bolkiah v KPMG*).

A further and slightly different interpretation of *Bolkiah v KPMG* was offered by Neuberger J in *Halewood International v Addleshaw Booth & Co*.[110] There, a solicitor, Mr Robinson, was appointed to work for Addleshaw Booth & Co (ABC), a firm which was acting against Mr Robinson's former client (Halewood International). ABC's evidence was that Mr Robinson would have no involvement in the case. A Chinese wall had been set up when the conflict arose and undertakings had been given by all the lawyers involved (including

[107] For further details see C Timmis, n 102 above.

[108] He did impose additional conditions such as the relevant personnel were to have no professional contact and were to be physically separated.

[109] 18 October 1999, Walker J, unreported.

[110] *Halewood International v Addleshaw Booth & Co*, 1999, unreported.

Mr Robinson) that they would not discuss the case. All documentation was to be kept in a specific partner's room—not the same room as Mr Robinson's. Although Neuberger J was not prepared to accept that all risk had been eliminated, and ordered that Mr Robinson be transferred to a different office for the remainder of the case, he pointed out that ABC's intellectual property department in Leeds was relatively small in comparison with departments of the firms in *Bolkiah*, *Robson Rhodes* and *Re a Firm of Solicitors* (1999). He stated that it appeared to him to be 'self-evidently easier to police a system involving fewer people rather than more people.' He continued:

> Mr Robinson is a single individual. This is not a case like *Bolkiah* or indeed like [Robson Rhodes], where there are a large number of staff who have confidential information, indeed, a vast amount of obviously confidential, and obviously relevant information, accumulated over a long period.

Thus, by implication, Neuberger J was suggesting that it might be easier for smaller firms to act against former clients, and that in these circumstances Chinese walls erected within a single department might be sufficient to eliminate risk.

9. Conclusion

Significant questions remain about the legal position of a solicitor who is faced with a successive representation conflict. Although the House of Lords' decision in *Bolkiah* upheld the fundamental principle laid down in *Rakusen* that there is no absolute rule prohibiting a solicitor from acting against a former client, it now appears that, unless there is absolutely no risk of impropriety, a court should intervene to protect the former client. Thus it would not in most circumstances be difficult for a plaintiff to obtain an injunction against a former solicitor: the burden of proof that he would be required to discharge is not a heavy one.

In addition, although judicial recognition has been given to the use of Chinese walls, the conditions are strict. Whether an *ad-hoc* wall similar to the one erected in the *Robson Rhodes* case would suffice is debatable. It has been suggested that Laddie J believed that to grant an injunction preventing a merger would have been disproportionate on the facts, and that he interpreted *Bolkiah* accordingly.[111] Alternatively it has been argued that, 'essentially, what Laddie J. did . . . was, by metaphorically "knocking the parties heads together," to reach a settlement which both parties were, in view of the circumstances, happy to accept.'[112] Moreover, although Walker J found an institutionalised Chinese

[111] See P Lush and P Satyadeva, n 86 above.

[112] H McVea, 'Heard it through the grapevine: Chinese walls and former client confidentiality in law firms', (2000) 59 *Cambridge Law Journal* 370; quoting S Allen, 'Chinese Walls Still Stand After Case', *Law Society Gazette*, 8 April 1999, at 13.

wall to exist within a law firm, it is unclear whether the Lords would consider a firm of solicitors as capable of creating anything other than an *ad-hoc* wall. In addition, it is questionable how effective most firms of solicitors would be in separating different departments. It may merely have been a coincidence that the firm in *Re a Firm of Solicitors* (1999) lacked office space so that the practice was spread between several buildings.

Further questions have been raised as to the measures required following Neuberger J's comments in the *Addleshaw Booth* case. He implied that it might be easier for smaller firms to invoke measures to permit them to act against former clients, and that no physical separation of personnel was therefore needed.

The question essentially is whether the only effective means of safeguarding client confidentiality is to erect formal barriers to the transmission of information, or whether, in the end, the client is bound to rely upon his solicitor's (and his firm's) commitment to the integrity of the solicitor-client relationship. There is at least a theoretical possibility that information will be passed on no matter what physical or electronic barriers are in place. Equally, solicitors may ensure, through their adherence to the professional ethic of confidentiality, that nothing untoward is disclosed even to colleagues sharing the same office space. These issues are explored further in chapter 7.

Meanwhile, the Law Society's rules governing a solicitor's duty to former clients appear comparatively simple and straightforward. A solicitor or firm of solicitors should not act if in possession of relevant confidential information.

SIMULTANEOUS REPRESENTATION

There are two types of conflicts which fall under this heading:

a) Same matters conflicts, where a solicitor or firm represents separate clients who have adverse interests in the same matter.
b) Separate matter conflicts, where a solicitor or firm acts for separate clients in different matters but information gained from one client may be relevant to the other, or the matter in which they are assisting client A could impact adversely on client B.

The Law Society does not make such a clear distinction in chapter 15 of the Guide. Simultaneous representation is covered by principles 15.01 and 15.03. These state:

> A solicitor or firm of solicitors should not accept instructions to act for two or more clients where there is a conflict or a significant risk of conflict between the interests of those clients.[113]
>
> A solicitor or firm of solicitors must not continue to act for two or more clients where a conflict of interest arises between those clients.[114]

[113] The Guide, 8th edn, at 314.
[114] *Ibid*, at 316.

It is perhaps surprising that there is no definition of what amounts to a conflict, or a significant risk of conflict, in such cases. The introductory note at the beginning of chapter 15 does give some guidance:

> The number of enquiries to Professional Ethics suggests that many solicitors have difficulty in identifying when a conflict of interest between clients has arisen or may arise. Two important points to bear in mind are:
>
> —Where a solicitor is acting for two or more clients, whether they be husband and wife, partners or a corporation embarking on a joint venture, the solicitor always owes a duty to each individual body or person and he or she must advise each individual what is in that individual's interests.
>
> —A possible initial test to apply to the above circumstances to assist in identifying if a conflict exists, is: what would occur if the solicitor were acting for only one of the parties?
>
> - Would the advice be different?
> - Do the parties have different interests?
> - Has one of the parties given the solicitor a piece of information on a 'confidential' basis that would affect the advice given to other clients, if the solicitor could disclose it?
>
> If these factors apply, a conflict of interests has arisen.[115]

Despite this attempt at clarification, the City of London Law Society has concluded that the lack of a clear definition of 'conflict of interest' has the potential to leave the meaning of 15.01 unclear and open to 'starkly differing interpretations' by solicitors.[116] It found that some practitioners interpreted the wording to mean that a firm cannot act against the interests of an existing client even in a matter which is unrelated to the pre-existing instructions. This view was referred to as the 'wide interpretation'.[117] The City Society found that others, favouring the so-called 'narrow interpretation', believed that under 15.01 a conflict only arises where the firm is acting for two parties on the same or related matters and that the sub-paragraph permits a firm to act on unrelated matters for one client against the interests of another client.[118]

The commentary accompanying the Law Society's statement of principles does not resolve the difficulty. It is stated that even if both clients consent to the solicitor or firm acting in a conflict situation, the solicitor must not accept the instructions.[119] Thus, returning to our example of Prompt Prints and Super Snaps: if PP decided to go into business with SS, and the two firms wanted to instruct XYZ to handle the matter, even were they both to consent, XYZ would have to refuse to act.[120] The only exception permitted by the Law Society is one

[115] The Guide, 8th edn, at 313.
[116] See above, n 8 at 6.
[117] *Ibid*.
[118] *Ibid*, at 7.
[119] The Guide, 8th edn, at 314, n 2.
[120] The conflict arises here because, although both firms are embarking on a joint venture, each has different interests that need protecting.

which was noted above, namely use of a Chinese wall upon amalgamation of two or more firms.[121]

How far do the Law Society's rules reflect the common law? In fact the common law draws a distinction between same matter conflicts and separate matter conflicts.

1. Same Matter Conflicts[122]

This type of conflict has been described as being 'in the very heartland of fiduciary law.'[123] The principle behind the rule reflects a client's right to his solicitor's undivided loyalty. Although the protection of confidentiality may form part of the need to ensure that there is no conflict of interest, it is a subordinate to the prohibition upon serving two masters.[124] Glover describes it as a 'self-evident wrong-doing' and quotes St. Matthew, chapter 6, verse 24:

> No man can serve two masters: for either he will hate the one, and love the other; or else he will hold to the one, and despise the other.[125]

Fiduciary law upholds this principle, stating that 'an agent cannot lawfully place himself in a position in which he owes a duty to another which is inconsistent with his duty to his principal'.[126]

The Law Society rules, therefore, reflect these equitable principles. Where they differ, however, is with regard to the issue of consent. The Guide is quite clear that disclosing the conflict to the respective clients, and obtaining their consent, does not permit a solicitor or firm to act. However, as was noted above, Lord Millett specifically makes reference to the fact that a solicitor can, with the consent of both clients, act for the one while his partner is acting for the other.[127] Indeed, this has been recognised in a case involving a solicitor. In *Clarke Boyce v Mouat*[128] a mother lent money to her son, a businessman, using her house as security. The defendant solicitors acted for both the mother and the son in the mortgage transaction. Before starting work on the case, the solicitors repeatedly advised the mother to seek independent legal advice and advised her of the consequences should her son not keep up the

[121] See above at 25.

[122] For an example see *Legal Week* (1999), Editorial, 'A&O, CC conflicted out of £554m Medeva deal', 18 November, p 3.

[123] P Finn, n 54 above, at 24 and E McKendrick (ed), n 4 above at 23.

[124] J Glover, n 5 above at 207.

[125] *Ibid*, at 208.

[126] *South Trust Co v Berkeley* [1971] 1 WLR 470, at 484. See also E McKendrick (ed), n 4 above: 'The law's object here is twofold: (a) to preserve the expectation the client is entitled to have that it is his interests alone that the fiduciary is safeguarding; and (b) to preclude the fiduciary from putting himself in a position 'where he may be required to choose between conflicting duties, or be led to an attempt to reconcile conflicting interests' (*Anderson v Eaton* 293 P 788, at 790 (1930).'

[127] n 84 above at 234.

[128] [1994] 1 AC 428.

payments on the loan. The son subsequently went bankrupt and the mother became liable to repay the loan and arrears of interest. She sued the solicitors, alleging that they had breached their fiduciary obligations because they had not:

i) refused to act for her;
ii) advised her that it was not in her interests to enter the transaction;
iii) advised her adequately of the need for independent legal advice.

The Privy Council, in finding against the mother, said that there was no general rule of law that a solicitor should never act for both parties in a transaction where their interests might conflict. A solicitor could act provided he obtained the 'informed consent' of both parties.

The difficulty with this decision lies in determining what amounts to informed consent. The Privy Council thought that

> consent should be 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 he may be disabled from giving advice to one party which conflicts with the interests of the other.

It went on to emphasise the importance of establishing, in the instructions given to the solicitor, the scope of the solicitor's duties towards the client. Fiduciary duties 'cannot be prayed in aid to enlarge the scope of the contractual duties.'[129]

In some cases it may not be easy to establish informed consent. There is a considerable difference between the consent of a large corporate client with its own legal department and that of a lay person wishing to set up in business for the first time. In addition, how much information must be disclosed to the client to allow an 'informed' decision to be made? This may in part be why the Law Society has adopted stricter rules than the common law. It is responsible for regulating the whole profession. So it must try to protect those clients who may be incapable of giving informed consent.

Having said this, the Law Society does permit one exception to its blanket prohibition on acting for two clients in the same matter. This is contained in note 4 of principle 15.01. Where a solicitor is invited to act for seller and buyer, he may in exceptional circumstances act for both parties.[130] In this respect the Guide reflects the decision in *Clarke*. But as the exception relates only to conveyancing transactions, it is narrower than the *Clarke* decision and thus it may be said, once again, that with same-matter conflicts the Law Society, in its for-

[129] [1994] 1 AC 428. As there was no contractual duty on the defendants in this case to advise the plaintiff on the wisdom of entering into the transaction, there was no fiduciary duty to give that advice. Neither was there a duty to refuse to act as she was fully aware of what she was doing and had declined to seek independent legal advice.

[130] See also, Practice Rule 6 of the Guide which contains specific instructions for solicitors proposing to act for more than one party in a conveyancing transaction. Although this rule has been reviewed extensively in the literature (see for example, A Boon and J Levin, n 42 above at 273), I do not propose to discuss the problems associated with it here. Conflicts of this nature pose a distinct problem for solicitors. However, such problems are rarely associated with confidential information and often involve a one-off transaction.

mal rules, adopts a stricter approach than that which is reflected in the common law.

2. Separate Matter Conflicts

It has been said that, 'of all types of conflict these are potentially the most problematic.'[131] Take the following example. Firm XYZ is advising Prompt Prints and acquires confidential information about its business. The firm is also advising Super Snaps in a matter quite distinct from their dealing with Prompt Prints. The information acquired from Prompt Prints is relevant to Super Snaps. The difficulty arises because XYZ is under a duty to maintain client confidentiality and, at the same time, is required to inform its clients of all relevant information regardless of its source. As the Law Society states:

> Any information acquired by a solicitor whilst acting for a client is confidential and cannot be disclosed without that client's consent. However, a solicitor is under a duty to inform the client of all matters which are material to the retainer. Consequently, a solicitor in possession of confidential information concerning a client which is or might be relevant to another client is put in an impossible position and cannot act against that client.[132]

This principle reflects the legal proposition that in the absence of the consent of the first client, any unauthorised use or disclosure of the information by the solicitor will be actionable.

Problems occur when different solicitors are acting for different clients within one firm and may be unaware of the relevance of certain information. To what extent can the second client demand that the *whole firm* support his case, on the basis that all members of the firm are under an obligation to provide any information which could be to his benefit? Lord Justice Staughton in *Re a Firm of Solicitors* (1992)[133] stated that he knew of no proposition that a large firm of many partners is obliged to disclose any relevant knowledge to all partners. Mitchell,[134] on the other hand, has suggested that the presumption of imputed knowledge can be traced to the case of *Davies v Clough*,[135] in which it was held that the knowledge of one partner is to be imputed to all other partners. He also notes that this presumption has been justified by the 'danger of inadvertent disclosures of confidences inherent in everyday interchange of ideas and discussion of problems amongst law partners', and secondly, by a concern to avoid 'even the appearance of impropriety.'[136]

[131] E McKendrick (ed), n 4 above at 30.
[132] Above at n 24.
[133] Above at n 65.
[134] A Mitchell, 'Whose Side Are You On Anyway? Former Client Conflict of Interest', (1998) 26 *American Business Law Review* 418 at 429.
[135] (1837) 8 Sim 262.
[136] A Mitchell, n 134 above at 429 quoting P Finn, 'Professionals and Confidentiality', 1(1992) 4 *Sydney Law Review* 317 at 338.

The leading case in this area is that of *Kelly v Cooper*.[137] The plaintiff was selling a property through the defendants, a firm of estate agents. The defendants also acted as agents for the vendor of the adjoining property. A prospective purchaser was shown around both properties and made offers for both. The defendants did not inform the plaintiff that the purchaser had agreed to buy the adjoining property. He maintained that had he known the purchaser was interested in both properties, he would have sought a higher price. He brought an action for damages, alleging that the defendants had failed to disclose the material fact that the purchaser was also negotiating to buy the other property and that the agents had put themselves in a position where their duty to the plaintiff to disclose all relevant information conflicted with their own interest in gaining the commission on both sales.

The Privy Council held that the rights and duties of a principal and agent are dependent upon the express *and implied* terms of the contract between them.[138] The contract did not limit the scope of the fiduciary duties owed. However, Lord Browne-Wilkinson said that the business of estate agents inevitably gives rise to conflicts of interest, but that estate agents must nonetheless be free to perform their function. A customer would know that the agent would be acting for other people with comparable properties. The Privy Council was of the opinion that the two transactions were separate matter transactions, but that certain terms may be implied into contracts which limit the scope of fiduciary duties. When considering this point, Lord Browne-Wilkinson emphasised that the plaintiff would be 'well aware' that the defendants would be acting for the sellers of competing properties, and that the exclusion of relevant fiduciary duties was necessary in order to enable estate agents to perform their function.

There is a suggestion, therefore, that the nature of the business with which the fiduciary is involved will play a part in determining whether terms may be implied in a contract. Lord Millett adopted this interpretation of *Kelly* in *Bolkiah*. He stated:

> . . . a fiduciary cannot act at the same time both for and against the same client, and his firm is in no better position. A man cannot without the consent of both clients act for one while his partner is acting for another in the opposite interest.
>
> This is not to say that such consent is not sometimes forthcoming, or that in some situations it may not be inferred. There is a clear distinction between the position of a solicitor and an auditor. The large accountancy firms commonly carry out the audit of clients who are in competition with one another. The identity of their audit clients is publicly acknowledged. Their clients are taken to consent to their auditors acting for competing clients, though they must of course keep confidential the information obtained from their respective clients. This was the basis on which the Privy Council decided *Kelly v Cooper* in relation to estate agents.[139]

[137] [1993] AC 205.

[138] *Ibid*, at 213–214. Lord Browne-Wilkinson was guided by the decision of Mason J in *Hospital Products International v US Surgical Corp*, 701 F Supp 314. See further, A Berg, 'The topsy-turvy world of Chinese walls', (1992) 11(12) *International Financial Law Review* 26.

[139] n 84 above at 234 to 235.

The type of service provided by the agent will thus be crucial in determining whether there is implied consent. In *Kelly*, the agent offered a single service, and as the Law Commission has pointed out:

> While it will be clear to any customer of a broker that the broker acts for other customers, and that the broker would not be able to operate without doing so, the large range of different functions which the different departments of a financial conglomerate carries out for customers may be less obvious to any one customer of a particular department, especially if the customer is an inexperienced private customer.[140]

It may therefore be that the wide-range of services offered by solicitors would prevent any implied terms being incorporated into their contracts with clients. This is not to say, however, that express terms specifically drafted in the contract would not have that effect.

3. Conclusion

The common law allows fiduciary duties to be modified for same matter conflicts and for separate matter conflicts. It appears that implied terms may be inferred only for separate matter conflicts, and then only where the agent is providing certain types of services. There is nothing, however, to prevent solicitors from drafting contracts expressly limiting the scope of their fiduciary duties, except of course the prohibitions contained within the Law Society's rules.

SUMMARY

Identifying the principles governing conflicts of interest which are applied within the common law on the one hand and by the Law Society on the other is not clear-cut. Both contain elements of ambiguity, or apparent self-contradiction. What can be said is that, in general, the common law allows a solicitor or firm of solicitors to act in a considerably greater range of conflict situations than is permitted under current Law Society rules.

Given the confusion surrounding many aspects of the common law, it is not unreasonable that the Law Society should take a stricter approach. At the same time it could be argued that clearer guidance is needed from the Law Society. In the next chapter I shall review the way other regulatory bodies have approached the regulation of conflicts of interest in relation to their members.

[140] Law Commission, n 45 above, at para 3.32.

3

The Modern Fiduciary: Conflicts in Other Professions

INTRODUCTION

RATHER THAN allowing its members to 'manage' conflicts of interest within specified guidelines, the Law Society seeks to prevent conflicts from arising and, to that end, prohibits its members from acting in almost all conflict situations. This chapter compares the Law Society's approach with that of other regulatory bodies whose members provide a service comparable to that of solicitors. The most fruitful comparisons in this context are with three groups whose professional responsibilities are in varying degrees related to those of solicitors, namely barristers, accountants and members of the financial services industry.

1. Barristers

Barristers are generally considered the senior branch of the legal profession.[1] They act as specialist advocates for parties in courts or tribunals, and undertake the writing of opinions and some of the work preparatory to trial.[2] The conditions under which barristers work differ from those experienced by solicitors in several respects. Most importantly, they cannot be instructed directly by lay clients[3] and

[1] WR Prest, *The Rise of the Barrister: A Social History of the Bar 1590–1640* (Clarendon Press, Oxford, 1986) at 8 and C Glasser, 'The legal profession in the 1990s: images of change', (1990) 10 *Legal Studies* 1.

[2] Kerridge and Davis in their work on higher rights of audience for solicitors suggest that 'the rules which now govern the relationship between barristers and solicitors appear to assume, tacitly, that all barristers are not only specialist advocates but are also capable of giving advice on any branch of the law. Yet this cannot possibly be true.' Whilst they recognise that certain barristers are advocacy specialists, they suggest that it is possible to divide lawyers into four types: general practitioners, who may undertake some advocacy; specialist lawyers who are not advocates; specialist advocates not confining themselves to a particular area of law; and specialist advocates who specialise in a particular area of the law. See R Kerridge and G Davis, 'Reform of the Legal Profession: An Alternative "Way Ahead" ', (1999) 62 *Modern Law Review* 807 at 816.

[3] Lay clients are those clients who are not qualified solicitors. For some exceptions, see *Bar Code* paras. 210, 305, 306 and Annexes E and F which allow certain professional bodies to instruct barristers directly such as accountants, patent agents, surveyors, members of the Institutes of Taxation, the Association of Average Adjusters, the Institute of Chartered Engineers, the Incorporated Society of Valuers and Adjusters and Chartered Secretaries and Administrators.

they may not form partnerships or companies.[4] Therefore they are, at least in theory, sole practitioners. It is however customary for barristers to practise in groups called 'chambers' and to share the cost of accommodation and clerking.[5] The clerk acts as a practice manager, allocating work to barristers and negotiating fees with solicitors.[6]

As well as providing office accommodation, chambers afford other benefits for individual barristers. They may call upon each other for advice on points of law, share the cost of training, and the chambers will also provide for their information technology needs. Indeed, as competition at the Bar has increased and professional clients demand more specialist advice, chambers have responded accordingly.[7] Many specialise in particular areas of law and market their practices by offering conferences and seminars for both solicitors and lay clients.[8] Some have even appointed chambers' directors to manage their needs in this increasingly competitive environment.[9] As some commentators have observed, this in turn has strengthened collegiality amongst barristers:

> Chambers have become more specialised, concentrating on particular areas of work and dropping others. This could be seen to strengthen collegiality because of the support practitioners working in similar fields are able to offer each other. Indeed, it has been stated that many barristers' chambers became more supportive environments as specialism increased.[10]

As well as having a place in chambers, every barrister is a member of one of the four Inns of Court.[11] The Inns 'call' barristers to the Bar when they have completed their training, and provide libraries and other collegiate benefits. This collegiate structure is deeply ingrained at the Bar:

[4] *Bar Code* para 207. But see *The Lawyer*, Editorial, 15 November 1999, p 1, where it is suggested that measures are being taken by some barristers to form limited companies. Also, see *The Lawyer*, 'Top silks call for partnership rights', 6 December 1999, p 1.

[5] Average chambers would appear to consist of 22 barristers, A Boon and J Levin, *The Ethics and Conduct of Lawyers in England and Wales* (Hart Publishing, Oxford, 1999) at 135.

[6] But see *Commercial Lawyer*, Editorial, 'Changing Role of Barristers' Clerk', 20 Nov/Dec 1997, p 13 and P Shrubsall and J Flood, *Barristers' Clerks: The Law's Middlemen* (Manchester University Press, Manchester, 1983). See also M Griffiths, 'Relations between Barrister and Clerk', in *Inns of Court School of Law Professional Conduct 1998/9* (Blackstone, London, 1998) at 48: 'The clerk's role is unusual. He or she is the agent and business manager of the barrister, the ultimate manager of the support team within chambers and the personal adviser to the barrister on all aspects of his or her professional life . . . The modern clerk is an experienced and skilful manager at the helm of what is often a multi-million pound business.'

[7] See Mullally, 'Building the case for Chinese walls at the Bar', (1999) 29 *Legal Week* 10: 'The modern reality of the Bar is now quite different; chambers share overheads, adopt a more corporate approach and share facilities and computer systems—Jonathan Kelly, Simmons & Simmons'.

[8] A Boon and J Levin, n 5 above at 89.

[9] See, for example, *Commercial Lawyer*, Editorial, 'Bar News', (1998) 22/21: 'Wilberforce Chambers has appointed Suzanne Cosgrave as Chambers Director . . . [she] has the professional management abilities that Chambers need in order to adapt to the changing environment at the bar today. She has considerable experience of working in areas and organisations that are undergoing change, and that experience will be invaluable to us in planning for the future.'

[10] A Boon and J Levin, n 5 above at 89.

[11] Gray's Inn, Lincoln's Inn, Inner Temple or Middle Temple—Courts and Legal Services Act 1990 s 41(3).

> Historically, the Bar was an archetypal collegial structure whereby barristers associated not only with members of chambers but with all of those in their Inn of Court. Collegiality, 'this good spirit, a part of the professional tradition, enables them to contest with their professional brethren all day in the forum, and meet outside on the friendliest terms and with respect for those with whom they have been engaged in the strife of litigation'.[12]

Barristers and solicitors owe similar fiduciary duties towards their clients, receive similar training, and are regulated in a similar fashion.[13] The Bar Code of Conduct, Rule 203, emphasises this fiduciary relationship:

> A practising barrister . . . must promote and protect fearlessly and by all proper and lawful means his lay client's best interests and do so without regard to his own interests or to any consequences to himself or to any other person (including his professional client or fellow members of the legal profession).

Secondly, both solicitors and barristers are educated to degree level[14] and undertake one year's professional training.[15] Then, both professions require an apprenticeship to be undertaken. For barristers this training is termed 'pupillage' and for solicitors it is completed by way of a two-year training contract with a solicitors' firm.

Finally, both the Bar and the solicitors' profession are self-regulating. Barristers are regulated by the Bar Council[16] and solicitors by the Law Society.[17] The Bar Council confers rights of audience on its members, issues rules of conduct, and enforces disciplinary sanctions.

2. Accountants

Curiously, there is nothing to stop anyone from calling himself an accountant and setting up in business offering accountancy services.[18] Some accountancy work is, however, restricted[19] unless the accountant is qualified with one of the six major accountancy bodies:

[12] A Boon and J Levin, n 5 above at 72, quoting R Pound, *The Lawyer form Antiquity to Modern Times: with Particular Reference to the Development of Bar Associations in the United States* (St Paul West Publishing, Minnessota, 1953) at 127. This collegiality is still seen today in that barristers are required to dine at their Inn.

[13] They are not, however, allowed to hold money on behalf of clients.

[14] If their degree is not in law, they are required to do the Common Professional Examination (often abbreviated to 'CPE'). One exception to this is where a solictor has come through ILEX, that is the Institute of Legal Executives. Once qualified as a legal executive, a person may become a solicitor without being educated to degree level.

[15] The Bar Course for barristers and the Legal Practice Course for solicitors.

[16] By virtue of s 31 of the Courts and Legal Services Act, 1990.

[17] See above at 8 to 10.

[18] J Dyson, *Accountancy for Non-Accounting Students* (Financial Times Pitman Publishing, London, 1997) at 13.

[19] For example, the audit of larger limited companies.

i) Institute of Chartered Accountants in England and Wales (ICAEW)
ii) Institute of Chartered Accountants in Ireland (ICAI)
iii) Institute of Chartered Accountants in Scotland (ICAS)
iv) Association of Chartered Certified Accountants (ACCA)
v) Chartered Institute of Management Accountants (CIMA)
vi) Chartered Institute of Public Finance and Accountancy (CIPFA).

It is the practice and regulation of chartered accountants which will be addressed in this chapter, specifically of those accountants who are members of ICAEW. The work which such accountants now undertake ranges far beyond their traditional role of summarising information in order to calculate how much profit a business has made, how much it owes, and how much is owed to it.[20] Some accountants now offer a range of services which include auditing, book-keeping, cost accounting, financial management, taxation and insolvency work, personal and corporate finance, and advice on information technology.[21]

Accountants, too, owe fiduciary duties to their clients,[22] and they adopt similar organisational arrangements as solicitors, namely partnerships. Accountants have also experienced similar changes over the last two decades in respect of their size, structure and organisation. They have been subject to increased competition and have developed their services accordingly, searching out new areas of work.[23] Some firms have attempted to provide a 'one-stop shop' for their clientele and indeed there have been suggestions that accountancy firms and law firms could merge.[24] Were this to happen, it would raise the possibility of yet more conflicts of interest arising.[25]

3. Financial Services

In 1986 the Financial Services Act introduced a new system for the regulation of firms providing financial services. It was believed that as a result of the changes to the structure of the financial markets in the mid-1980s—in particular, the abolition of the Stock Exchange's single capacity requirement and the development of financial conglomerations offering a wide range of services—there was much greater potential for professionals to be placed in situations where they owed conflicting duties to different customers, or where there was a conflict

[20] M Fowle, 'Conflicts of Interest and the Accountancy Profession', in RM Goode (ed), *Conflicts of interest in the changing financial world* (Institute of Bankers Centre for Commercial Law Studies, London, 1986) at 34.

[21] *The Institute of Chartered Accountants in England and Wales* http://www. Icaew.co.uk/menus/ institut/instintr.htm.

[22] *Evitt v Price* (1827) 1 Sim 483 and *Prince Jefri Bolkiah v KPMG* [1999] 2 AC 222.

[23] R Kingston, 'Invasion of the Bean Counters', *The Independent*, 11 February 1999, p 28.

[24] See R Lindsay, 'Accountants have lost their way', (1999) 28 *Legal Week* 10 and M Chambers and R Parnham, 'Accountants in the Legal Market: Has the strategy failed?', (1998) 21 *Commercial Lawyer* 40.

[25] M Swallow, 'Welcome to the two-stop shop', (2000) 17 *The Lawyer* 16.

between their own interests and those of their customers.[26] The 1986 Act introduced a new system for the regulation of firms providing financial services. It allowed them, both expressly and by implication, to adopt a lower standard of conduct than that required by fiduciary law.[27]

It is beyond the scope of this book to undertake a thorough examination of these rules and their operation in practice, an exercise which has been undertaken elsewhere.[28] What is of interest, however, is the subsequent Law Commission Report entitled *Fiduciary Duties and Regulatory Rules*. Although the Commission's report was concerned principally with the financial services industry, it concluded that 'the terms of reference include all areas subject to statutory and other forms of public law regulation.'[29] The Commission's findings therefore have application to all three professions.

The report analyses in particular:

i) contractual techniques for avoiding potential breaches of duty;
ii) structural techniques for managing conflicts;
iii) the public law dimension, that is, how far a regulatory system can be taken to have modified the common law and equitable duties owed by fiduciaries.

The final part of this chapter will, therefore, examine the Law Commission's main findings and recommendations, and consider their significance for solicitors.

CONFLICTS AT THE BAR: THE APPROACH OF THE BAR COUNCIL OF ENGLAND AND WALES

At present, the rules of conduct for barristers are contained in the Bar Code of Conduct.[30] First published in 1981,[31] the Code is noticeably shorter than that governing solicitors.[32] It is also more general in its guidance, containing no

[26] Law Commission Consultation Paper No 124, *Fiduciary Duties and Regulatory Rules* at 3.

[27] H McVea, *Financial Conglomerates and the Chinese Wall—Regulating Conflicts of Interest* (Clarendon Press, Oxford, 1993) at 23 to 28.

[28] *Ibid*.

[29] Law Commission, n 26 above at 3.

[30] The General Council of the Bar of England and Wales, London, 1998.

[31] Thornton states: 'Until 1980 the Bar had no code of conduct. The professional rules and obligations required of practising barristers, known colloquially as the Bar's conduct and etiquette, were passed on by word of mouth, mainly during pupillage, and were based on tradition, resolutions of the Bar Council which were endorsed by a subsequent General Meeting of the Bar, specific rulings of the Bar Council and judicial influence, usually by way of dicta in judgments raising points of court procedure.' A Thornton, 'Responsibility and Ethics of the English Bar', in R Cranston (ed), *Legal Ethics and Professional Responsibility* (Clarendon Press, Oxford, 1995) at 55.

[32] The eighth edition of The Guide runs to some 893 pages whereas the Bar Code of Conduct is only some 200 pages or so. See also, D Nicolson and J Webb, *Professional Legal Ethics*, (Oxford University Press, Oxford, 1999) at 99: '. . . the [Guide] devotes separate and fairly lengthy chapters to precise definitions of the solicitor's general duties regarding conflicts of interest and maintaining confidentiality. Whereas the CCB contains only a handful of paragraphs merely exhorting barristers to avoid conflicts of interest and breaching confidentiality.'

specific examples or accompanying commentaries. Unlike the Law Society, the Bar Council makes no distinction between different types of conflict of interest. Conflicts are covered by rule 501, which states that:

> A practising barrister must not accept any brief or instructions if to do so would cause him to be professionally embarrassed.

Such embarrassment may be caused:

> (e) if there is or appears to be some conflict or a significant risk of some conflict either between the interests of the barrister and some other person or between the interests of any one or more of his clients;
> (f) if the matter is one in which there is a risk of a breach of confidences entrusted to him by another client or where the knowledge which he possesses of the affairs of another client would give him an undue advantage.

It can be seen that although the rules do not specifically distinguish between different types of conflict, they are similar to those adopted by the Law Society in that they are designed to prevent barristers from acting in conflict situations, rather than to determine the way in which such conflicts should be 'managed'. In short, it appears that a barrister should not act if:

i) his interests conflict with his client's interests;
ii) the interests of one or more of his clients conflict with those of a new client;
iii) he is in possession of information from one client which would be beneficial to another client.

The duty to maintain confidentiality in respect of clients' affairs continues even after the conclusion of the case:

> Whether or not the relation of counsel and client continues, a practising barrister must preserve the confidentiality of his lay client's affairs and must not without prior consent of his lay client or as permitted by law lend or reveal the contents of papers in any brief or instructions to or communicate to any third person (other than a devil, his pupil or any of the staff of his chambers who need to know it for the performance of their duties) information which has been entrusted to him in confidence or use such information to his lay client's detriment or to his own or another's advantage.[33]

To a considerable extent, therefore, the Bar Council's rules provide a similar framework to that which is provided by the Law Society for solicitors. However, there are two significant differences.

The first relates to acting simultaneously for different clients who have conflicting interests. Rule 506 states:

> A practising barrister must cease to act . . .
> (b) if having accepted a brief or instructions on behalf of more than one client there is or appears to be:
> (i) a conflict or a significant risk of a conflict between the interests of any one or more of such clients; or

[33] Para 603.

> (ii) risk of a breach of confidence;
> and the clients do not all consent to him continuing to act.

This allows a barrister to act in a same matter conflict provided that he first obtains both clients' consent. Therefore, in theory, he could represent two or more co-defendants in a criminal or civil case. Further guidance is given on this matter in rule 504.4:

> In cases involving several parties, a practising barrister must . . . consider . . . whether, consistently with the proper and efficient administration of justice and having regard to all the circumstances and any actual or potential conflict of interest, his client needs to be separately represented or advised or whether he could properly be jointly represented or advised with another party or, where there is more than one client, whether it is in all their interests to be jointly represented.

There is potential difficulty in deciding these issues on receipt of instructions from both clients, and by the time a conflict comes to light the case may be well advanced. If, for example, a co-defendant in a criminal case wishes to change his story halfway through the trial in order to blame the other defendant, withdrawing from the case at that stage might not be in the interests of either defendant.

The second difference between the Bar Council and the Law Society's approach to conflicts relates to barristers acting against other members of the same chambers. There is no prohibition on barristers from the same chambers acting against each other in the one case. Moreover, the Code does not provide for any safeguards to prevent information passing within chambers. It would appear that acting against members of the same chambers is commonplace. One barrister stated in interview with me:

> We frequently act against each other. I have often acted against the person who shares my room in chambers. There are no physical barriers to prevent information from being seen by your opponent, although I don't tend to leave things lying around on my desk in such situations.

It may seem odd that it is acceptable for a barrister to act against fellow barristers from the same chambers, and yet it is considered inappropriate for a large firm of solicitors to act for several clients in potential conflict situations, even if those clients give their consent.[34] The justification for this is, presumably, that each barrister is a sole practitioner, whereas a firm of solicitors is a single economic entity. However, it might be argued that as barristers offer a similar service to solicitors, namely advocacy and the provision of legal advice, the same rules should be applicable to both branches of the profession. It could even be argued that barristers should be bound by stricter rules as by the time most barristers get involved in a case, proceedings have already been issued. Although

[34] Cranston has commented on this point, stating: 'The Bar needs to address the issue; chambers now are much more than a collection of individuals, not least because they permit barristers to call upon each other's judgment and skill.', R Cranston (ed), n 31 above at 19, n. 104.

barristers often act for a particular client for a short period, perhaps dealing with one specific aspect of a case which requires specialist advice, the possibility that confidentiality will be breached still remains.

Another point of concern relates to the supervision of such arrangements. In the case of solicitors there is the possibility of an instructed barrister querying whether a firm should be acting for clients with conflicting interests,[35] but there is no equivalent oversight in respect of barristers.

Why therefore does the Bar Council permit barristers from the same chambers to act against each other? Part of the answer may lie in the fact that the Bar is a much smaller profession,[36] so there would be less choice for clients if barristers were not allowed to act in potential conflict situations. This is consistent with the so-called 'cab-rank' principle:

> A barrister in independent practice must comply with the 'cab-rank' rule and accordingly . . . accept any brief to appear before a court in which he professes to practise; accept any instructions; act for any person on whose behalf he is briefed or instructed; and do so irrespective of (i) the party on whose behalf he is briefed or instructed, (ii) the nature of the case and (iii) any belief or opinion which he may have formed as to the character, reputation, guilt or innocence of that person.[37]

Moreover, it is probably still the case that members of the Bar tend to specialise to a greater degree than solicitors, while particular chambers specialise in specific areas of law.[38] As one solicitor specialising in insurance work pointed out:

> Sometimes solicitors representing different sides in a dispute phone the same chambers requesting the same counsel. It can be a bit of a rush sometimes. It is such a problem in certain fields of expertise that it is almost a fight to see who gets in first. Of course, it is vital that you can instruct the barrister of your choice to ensure that your client receives the best possible representation.

The choice of barrister would be considerably restricted if the Bar Council were to adopt the principle that no barrister could act against a fellow member of chambers.[39]

[35] Ironically, para 605 states that 'if a barrister in independent practice forms the view that there is a conflict of interest between his lay client and his professional client he must advise that it would be in the lay client's interest to instruct another professional adviser and such advice must be given either in writing or at a conference at which both the professional client and the lay client are present.' It appears that barristers are more than happy to invoke this provision if they feel there is such a conflict. One senior barrister reported: 'I have had cause to intervene on more than one occasion where I believed there was a conflict of interest between my professional client and my lay client. That is the advantage of being a referral profession. We keep an eye on solicitors as well.'

[36] In 1996, there were approximately 68,000 solicitors holding practising certificates as opposed to 9,369 barristers, see *Trends in the Solicitors' Profession: Annual Statistical Report* (The Law Society, London, 1996) at 10, cited in A Boon and J Levin, n 5 above, n 83 at 57.

[37] A Boon and J Levin, n 5 above at 89.

[38] For example, 3 and 8 New Square are renowned for their work in intellectual property law, and Atkin and Keating Chambers for their expertise in construction law. See R SenGupta (ed), *Chambers and Partners—A Guide to the Legal Profession 1999–2000* (Chambers & Partners Publishing, London, 1999).

[39] See further, A Arden, 'The case for partnership', (1999). 47 *The Lawyer* 30: 'It has been suggested that there are chambers so specialist that they would not be economically viable if they were

Three additional factors were suggested by one senior barrister to account for the difference in approach between the Bar Council and the Law Society. These were:

i) the fact that there is no financial incentive to act dishonourably;
ii) the competitiveness of barristers; and
iii) the strong ethical code at the Bar.

He stated:

> There is no financial incentive to abuse your position as we are individuals and not part of a partnership. . . . You still get your brief fee, win or lose. Also, you very much want to beat someone from your own set. So you will do your very best for your client. Undoubtedly you get cheats in all walks of life but ethics are ingrained in you at the Bar and people simply do not look at anyone else's papers.[40]

Another barrister echoed these thoughts:

> There is a strong ethical code at the Bar. We are trained quite extensively in this and it is just something that you would not breach. It is akin to killing your mother. You just would not do it. You will fight tooth and nail against someone from your own set. In fact, I used to share a flat with another person from chambers, and obviously we were good friends, but as soon as we were against each other the whole atmosphere in the house used to change. I would go to my room and she would go to hers and we would prepare totally separately.

Are barristers, therefore, more ethical than solicitors? It has been suggested that this may indeed be the case:

> Ethicality is strongly associated with sole practice in professional and legal culture. This is because professionalism is an individualistic notion; the individual is the unit of service, and individual qualities, judgement and responsibility are the essence of professionalism . . . The Bar is a good example of this.[41]

This suggestion that ethical standards tend to be higher amongst sole practitioners than amongst members of an organisation is a recurring theme:

> Psychologists, organisation theorists, and economists all know that the ethics of ethical decision-making change dramatically when the individual works in an organisational setting. Loyalties become tangled and personal responsibilities get diffused. Bucks are passed and guilt knowledge by-passed. Chains of command not only tie people's hands, they fetter their minds and consciences as well.[42]

unable to act on both sides of a case (something of which solicitors are in any event increasingly—and publicly—wary). There are three answers to this, if there is any truth in it at all. It is extremely rare and should not be allowed to wag the dog. At worst, it may mean some reallocation of work between a small number of specialist sets. And those same market forces will lead to retention of the current chambers system in those areas.'

[40] He did, however, foresee that the first of these reasons may cease to apply when conditional fee agreements are introduced at the Bar (now in place as of 1 April 2000).

[41] A Boon and J Levin, n 5 above at 70.

[42] DJ Luban, 'Milgram Revisited', (1998) 9(2) *Researching Law: An ABF Update* 1 at 4, cited in A Boon and J Levin, n 5 above at 68.

Barristers also emphasise the importance of maintaining their individual reputations. As one barrister put it to me:

> Your reputation at the Bar is the only thing you've got and you would never risk jeopardising your integrity.

It appears that some members of other jurisdictions do indeed regard the English Bar as a model of integrity. For example, this is the view of one Canadian commentator:

> We all recognise the power of the bar's ability to secure a high degree of cultural conformity . . . accordingly, in the case of the English Bar, culture can be seen as an important vehicle for the transmission of values and the regulation of behaviour.[43]

In contrast, it has been suggested that the solicitors' profession has lost its collegiate culture and the introduction of corporate-style management.[44]

The courts have upheld this view of barristers' probity. In *Laker Airways Inc v FLS Aerospace Ltd*.[45] the court was asked to determine whether a barrister who had been appointed as an arbitrator by one party under a contract should be removed by the court on the ground that another barrister from the same chambers had been instructed in the arbitration by the other party. The appellant put forward three main arguments as to why the arbitrator should be removed:

i) there was an inherent conflict of interest between the arbitrator and counsel which prevented the arbitrator from acting with impartiality;
ii) there was a risk that information might be transmitted between arbitrator and counsel; and
iii) the arbitrator's judgment might be coloured by his familiarity with counsel.

In dismissing the applicant's case, Rix J refuted each one of these points in turn. First, whilst admitting that there was 'a conflict of interest', he went on to state that:

> . . . it was not really a conflict, as a conflict of interest only properly arises as an impediment when the same person (or what in law is regarded as the same person) undertakes conflicting duties to different clients or puts himself in a position where he has a conflict between his duty to his client and his own self-interest.

He justified this conclusion by holding that as 'barristers are all self-employed', they were not regarded in law as the 'same person'. He added:

> If barristers were employed by the same organisation or were all partners of one another in the same firm, and then sought to appear against or before one another, the position would be different.

[43] HW Arthurs, 'Lawyering in Canada in the 21st Century', (1996) *Windsor Yearbook of Access to Justice* 202 at 223.

[44] See D Egan, 'The legal revolution', (1999) 49 *The Lawyer* 16.

[45] [1999] 2 Lloyd's Rep 45; [1999] CLC 1124; *The Times*, 21 May 1999; *The Independent*, 24 May 1999.

Moreover, Rix J believed this not only to be a correct exposition of the law but also a practical necessity:

> If it were otherwise, public access to the bar would be severely limited: each time a member of a set of chambers accepted instructions, he would debar any other member of those chambers, although independently practising self-employed barristers, from accepting instructions from another party with a different interest in the dispute . . . This would be a severe limitation on the administration of justice in this country. Especially in the context of specialist legal services, where it may be that only a handful of chambers practise within a particular speciality, it would mean that public choice of counsel would be drastically cut.[46]

Rix J also held there was no risk of information being transmitted between the two barristers:

> Were barristers partners of one another, or fellow-employees, then it might be that even 'Chinese walls' of the most successful kind would not be enough to prevent a conflict of interest arising out of the danger that obligations of confidence would be prejudiced. Since, however, barristers are independent self-employed practitioners, it seems to me that if an applicant wished to complain because of instructions given to two members of the same chambers on either side of the case, the burden would lie on him to show a quia timet case of breach of confidentiality.[47]

No such risk had been proven on the facts of the case.

In dismissing the final concern of the applicant, that familiarity might colour the arbitrator's judgment, Rix J found that, in this instance, the two barristers hardly knew one another. However, he added:

> It remains the case in any given speciality that the bar's numbers, even in London, are not so great as to make it unlikely that counsel, and particularly senior and experienced counsel such as may well be appointed . . . know each other well. But it is as much a matter of daily routine of practice over many years as a reflection of the sharing of tenure in the same chambers. In any event, one barrister may be on better terms with a barrister in other chambers than with anyone in his own set.

On the question of whether there was a collegiate atmosphere within chambers, with members promoting the employment of their fellows, socialising with one another, and holding themselves out to clients as a group sharing a special expertise, the learned judge felt unable to generalise about such matters. He did concede that 'some chambers are happier places than others', but held to his view that 'chambers are made up of their individual barristers with their separate reputations, each working on their own papers for their own clients, and sharing neither career nor remuneration.'[48]

[46] Citing *R v Gough* [1993] AC 646 and *R v Essex Justices* [1927] 2 KB 475.

[47] Citing *Bolkiah v KPMG* [1999] 2 AC 222. The point made by Mr Justice Rix is used as a basis for arguing that partnership should not be permitted at the Bar, see A Arden, n 39 above.

[48] Many may consider this view to be outdated, see for instance, *The Lawyer*, Editorial, 'Chambers of the year becomes plc', (1999) 44/1.

It would appear, therefore, that the judge's decision in *Laker Airways Inc v FLS Aerospace* was justified on two grounds. First, as barristers are self-employed and do not form partnerships, knowledge is not imputed to other members of chambers. Secondly, barristers have high ethical standards. On the first point, one commentator has suggested that

> although the judgment is correct as a matter of law, it is a 'legal quirk' and it seems a pretty astonishing distinction . . . Barristers' chambers can be relied on to keep the information confidential, whereas professional people such as accountants and solicitors cannot be relied on.[49]

The head of professional standards and legal services at the Bar Council, as might be anticipated, disagrees. He maintains that, from both a legal and practical point of view, the Bar is very different from solicitors and accountants:

> Solicitors are entirely different from the Bar. As a matter of law, one partner knows what the other partner knows.[50]

It does seem difficult to defend such a stark difference between the two regulatory regimes on the basis of the different contractual relationship applicable within chambers as compared with solicitors' firms. Moreover, it has previously been suggested by the Court of Appeal that there is no legal authority for the proposition that a 'large law firm of many partners is obliged to disclose any knowledge relevant to [a client's] affairs that may be possessed by any of its partners or staff.'[51] On the other hand, the fact that barristers do not share their profits with other members of chambers, and as such could be said to be in direct competition with one another, could indeed contribute to a different culture as far as their approach to 'conflicts' is concerned.

It may be, however, that it is the second basis for the judgment that explains the difference in the courts' attitude towards barristers acting in conflict situations—namely, that barristers do indeed have higher ethical standards than their solicitor counterparts.[52] This is despite the fact that some commentators have argued that barristers offer less protection than solicitors when acting in a conflict situation:

> Common complaints are that papers are left lying around chambers for all to see—briefs headed up for one barrister's attention could quite easily be passed to another

[49] David Baker, Litigation Partner at Lovell White Durrant, quoted by *Legal Week*, 'Building the case for Chinese walls at the Bar', (1999) 29/10.

[50] *Ibid*, at 10.

[51] Above, at 32. Reynolds also questions the theory of imputed knowledge, see FMB Reynolds, 'Solicitors and conflict of duties', (1991) 107 *Law Quarterly Review* 536 at 537.

[52] This perception is nothing new and may be founded on historical grounds. See R Kerridge and G Davis n 2 above, at 808. 'It was clear during the latter part of the eighteenth century and throughout the nineteenth century that barristers were in general better educated than, and socially superior to, solicitors.' It appears, however, that this is no longer the case: 'Many of the best graduates chose to become solicitors rather than barristers, and it could no longer be asserted that solicitors were, as a group, socially inferior to barristers.'

> counsel in the same set . . . Then there is the general chat that must go on when people work together in close proximity and discuss interesting legal points 'over tea'.[53]

Some barristers concede that there are insufficient safeguards in place. A newly-qualified barrister told me:

> Sometime you can't help seeing papers or talking about a case. I once started telling the chap who shares my room in chambers about my latest brief and after about five minutes he said, 'Oh, hang on. I think I've just been instructed for the other side.'

It must also be remembered that many barristers share one clerk, so that confidential materials on either side of the one case will often be seen by at least one other person in chambers. As one barrister pointed out to me:

> When the instructions or brief comes in, the clerk must read it for two reasons. Firstly, if a particular barrister has not been requested he will have to decide which of us to give it to. Secondly, he should have some idea what the case is about to answer queries from solicitors and to see whether the person he chooses to act has already been instructed by the other side.

Despite the obvious dangers involved in allowing members of chambers to act against one another, one solicitor reported that he found it quite useful to instruct a barrister from the same set as the barrister who had been briefed by the other side:

> Sometimes you get cases which really ought to be settled and then it's very often easier if you've instructed counsel in the same chambers so that the two of them can sit down in the pub and have a chat. They inject some sense into the situation.[54]

It is unlikely that the Bar Council's attitude towards such 'conflicts' will change, even though there has been pressure from some quarters to amend current practices.[55] Following the decision in *Laker Airways v FLS Aerospace*, the Bar Council set up a working group to examine the issue of conflicts of interest. However, both the executive secretary to the professional standards committee and the head of the professional standards division were keen to point out that 'the Bar is free to advise competing parties because barristers work independently'. Moreover, they observed that it is 'unlikely that any guidelines issued by the working group would be binding on barristers.'[56]

ACCOUNTANCY CONFLICTS: A 'MANAGED' APPROACH

The vast range of professional services carried out by chartered accountants immediately raises the possibility of potential conflicts of interest. Take the following three set of circumstances:

[53] M Mullally, n 7 above.
[54] Firm 17.
[55] See, for example, *Legal Week*, 5 August 1999, p 1.
[56] *Ibid*.

1. If a firm of accountants is auditing a company, the duties they owe as auditors are to the shareholders of the company.[57] In practice, however, auditors are appointed by and rely on the co-operation of the board of directors. Moreover, auditors are used by the board to give advice on company affairs. Thus they may end up auditing the results of their own advice, perhaps running the risk of not being appointed to audit the company the following year.[58]
2. Similar difficulties can arise in respect of take-overs. Some firms of accountants have a very large client base which means that they are frequently acting for two separate companies whose interests conflict—for example, a bidder and a target.
3. Difficulties also occur where a firm is advising two competing companies on the same business proposition. For example, advice may be given to two companies on a tender which is based on each client's 'bottom line', that is, the minimum sum the client would require in order to do the work. The firm has information from one client that must not be revealed to the other client.

Despite these obvious difficulties, and in stark contrast to the Law Society, the ICAEW allows its members to 'manage' conflicts of interest. The head of ethics and legal services for ICAEW told me:

> The European accountancy bodies have a somewhat more 'sophisticated' approach to issues of independence and objectivity than their legal equivalents.

He explained the need for this as follows:

> The relationship between an accountant and his/her client is likely to be continuing rather than assignment-based. If an accountant or auditor were required to disengage whenever there was a theoretical or perceived threat to objectivity, the client and/or its shareholders could be substantially disadvantaged.

The current manifestation of this 'sophistication' is the 'framework approach' which is found in the *Guide to Professional Ethics* issued by the ICAEW. Conflicts of interest are covered in statement 1.204 of the ICAEW Guide. Two types of conflict are identified in the introductory note—conflicts which arise because the interests of the accountancy firm may conflict with those of its clients, and conflicts which arise because the interests of one or more clients conflict with those of other clients.

The ICAEW addresses conflicts in a similar manner to that of the Law Society, namely from a relationship standpoint—considering first the accountant's personal relationship with clients, and secondly the clients' relationships with one another.[59] However, issues relating to the possession of confidential

[57] RM Goode, n 20 above at 42.

[58] *Ibid*, at 43: 'Can you advise directors, can you put in an information system, can you make recommendations on board level strategy, and then purport to be independent when you audit the results of your advice?'

[59] It is not proposed to address the issue of conflicts between the firm's own interests and those of clients as this topic has only briefly been explored in relation to solicitors.

information are not viewed in terms of relationship. The head of ethics and legal services for ICAEW told me:

> Situations frequently arise which are perceived by the clients to be a conflict of interest but which, in reality, are no more than concerns about confidentiality of information which is a separate issue.

In other words, what would be regarded by solicitors as a commercial conflict (knowledge received from one client which would be of interest to another client) is not considered to be a conflict of interest by the accountancy profession.[60]

On this view, although such information should not be disclosed except with consent, the mere possession of it by a firm does not preclude that firm from acting for another party to whom such knowledge may be relevant.[61] This immediately distinguishes the accountancy profession's way of handling conflicts from that of the Law Society. It also, of course, means that there are far fewer 'conflicts' (as defined), and far fewer restrictions against taking on new clients.

Firms are instructed to set up procedures for the identification of potential conflicts so that precautionary measures may be taken:

> Firms should have in place procedures to enable them to identify whether any conflicts exist and to take all reasonable steps to determine whether any conflicts are likely to arise in regard to new assignments and to existing clients. Firms should consider recording the safeguards adopted to address any conflicts which have been identified.

Section B of statement 1.204 addresses what should be done when conflicts of interest do arise:

> 1.0 A self-interest threat will arise or be seen to arise where the interests of two or more clients are in conflict.
> 1.1. There is, however, nothing improper in a firm having two clients whose interests are in conflict with each other.
> 1.2. In such a case the activities of the firm should be so managed as to avoid the work of the firm on behalf of one client adversely affecting that on behalf of the another.
> 1.3. Where a firm believes that the situation may be managed, sufficient disclosure (see paragraph 4.6 below) should be made to the clients or potential clients concerned, together with details of any proposed safeguards to preserve confidentiality and manage conflict.

Provided, therefore, that the firm believes that it can manage the conflict without detriment to either client, and provided safeguards are in place, it may continue to act for both parties.

[60] *Accountancy*, Editorial, 'Conflicts over conflicts', (1998) 1262/3: 'So accountants believe that it's perfectly all right to work for two different clients whose interests are in conflict. And lawyers believe that it's perfectly all right to proclaim their client's innocence to the world even when they know he's as guilty as sin. Lawyers think this shows that accountants have lower standards. Accountants think the same about lawyers.'

[61] Statement 1.205.

According to rule 4.4, such safeguards should include the following:

(a) the use of different partners and teams of staff for different engagements, each having separate internal reporting lines;
(b) standing instructions and all other steps necessary to prevent the transfer of confidential information between different teams and sections within the firm;
(c) regular review of the situation by a senior partner or compliance partner not personally involved with either client;
(d) advising all the relevant clients that, in the particular circumstances, they may wish to seek alternative independent advice; and
(e) obtaining informed consent to act from all the clients concerned.

These safeguards are similar to those identified by the House of Lords in *Bolkiah v KPMG*.[62] They differ, however, in one important respect. There appears to be nothing to prevent a firm from creating a Chinese wall *ad hoc*. This is despite the fact that Lord Millett, at least by implication, suggested that accountants do not ordinarily create walls *ad hoc*:

> It is one thing, for example, to separate the insolvency, audit, taxation and forensic departments from one another and erect Chinese Walls between them. Such departments often work from different offices and there may be relatively little movement of personnel between them.[63]

In addition, Lord Millett appeared to accept KPMG's claim that the devices used were indeed secure:

> K.P.M.G. insist that, like other large firms of accountants, they are accustomed to maintaining client confidentiality not just within the firm but also within a particular team. They stress that it is common for a large firm of accountants to provide a comprehensive range of professional services including audit, corporate finance advice, corporate tax advice and management consultancy to clients with competing commercial interests. Such firms are very experienced in the erection and operation of information barriers to protect the confidential information of each client, and staff are constantly instructed in the importance of respecting client confidentiality. This is, K.P.M.G. assert, part of the professional culture in which staff work and becomes second nature to them.[64]

So it would appear that, in general, Chinese walls erected by an accountancy firm will comply with the provisions set out by the House of Lords. In that case the facts of *Bolkiah v KMPG* were perhaps unusual as they related to a relatively new area of accountancy, namely forensic work. Such work is akin to the work undertaken by solicitors, and in respect of that kind of practice the

[62] Above, at 38.
[63] *Bolkiah v KPMG* [1999] 2 AC 222 at 239.
[64] *Ibid*, at 238.

Law Lords concluded that it was difficult to erect a secure wall within one department.[65]

Several observations can be made in respect of accountants' use of Chinese walls. First, the rules seem to cater for the fact that some accountancy firms are extremely large. Indeed, perhaps the rules were designed with these firms specifically in mind. Even so, this does not seem to prejudice smaller firms as although it may be more difficult for them to operate in a conflict situation, there is no absolute prohibition on their undertaking such work. Principle 4.8 states:

> Any decision on the part of a sole practitioner should take account of the fact that the safeguards at (a) to (c) of paragraph 4.4 above will not be available to him or her. Similar considerations could apply to a small firm where the number of partners is insufficient to spread the work as indicated in 4.4 (a) and (b) above.

Secondly, no account appears to be taken of the argument advanced in respect of solicitors, namely that where there is a partnership, 'partners are obliged to disclose any knowledge relevant to [a client's] affairs that may be possessed by any of its partners or staff.'[66] On the contrary, it would appear that accountancy firms (and the profession generally) take for granted the viability of Chinese walls.

Yet, how secure are such walls and would it ever be possible to allow law firms to operate such a system? This issue is topical given that accountants have made no secret of their desire to move into the legal market[67] and to set up multi-disciplinary partnerships.[68] What truth is there in the claim that 'if an accountant or auditor were required to disengage whenever there was a theoretical or perceived threat to objectivity, the client and/or its shareholders could be substantially disadvantaged'?[69] Should this consideration override the risk that a client's interest might be damaged through the passage of confidential information? If these arguments are accepted, does it mean that the Law Society should likewise devote its energies to managing (rather than prohibiting) conflicts?

There is some ground for caution. Some accountancy *clients* appear to be of the view that Chinese walls do not afford sufficient protection. In a survey of the heads of legal services and finance directors in FTSE 350 companies, conducted in February 1998,[70] 112 of 129 directors interviewed were opposed to

[65] As noted above, Lord Millett believed that 'some of the information obtained by KPMG [was] likely to have attracted litigation privilege'. This is because forensic accountancy involves carrying out investigations which are likely to be used for subsequent court proceedings. Above at 40.

[66] Above at 28.

[67] See for example, J Gibeaut, 'Squeeze: As accountants edge into the legal market, lawyers may find themselves not only blindsided by the assault but also limited by professional rules', *ABA Journal*, February1998, p 42; R Kingston, n 23 above; P Wilkins, 'Andersen fail to get Simmons & Simmons', (1997) 20 *Commercial Lawyer* 20.

[68] See D Andrew, 'The agony and the MDP', *Legal Business*, March 1998, p 68.

[69] Head of Ethics & Legal Services, The Institute of Chartered Accountants. Informal communication.

[70] (1998) 21 *Commercial Lawyer* 43.

the idea of accountants providing legal services. Among the reasons given was the allegedly different ethical standards maintained by lawyers and accountants:

> Lawyers have higher ethical standards . . . The two professions have different cultures—they are important and valuable and should not be merged.[71]

Of particular interest were the concerns raised about an increased likelihood of conflicts of interest:

> Accountants are already riddled with conflict of interest situations . . . Chinese walls don't work. I wouldn't want an accounting firm even to know we had instructed their legal practice. It creates nervousness on the other side if the same accountants do work for them . . . Already, finance/consultancy arms of the big accounting firms are sharing client confidential data among associated parts of the same firm without clients' knowledge and consent. This is not acceptable.[72]

Other clients seemed satisfied that accountants were able to 'manage' conflicts of interest by means of Chinese walls. One FTSE 100 client stated:

> Our view on the conflict issue is perfectly illustrated by the fact that we were and still are clients of Dundas & Wilson. Their merger has not made the slightest difference. Some might see a conflict. But I would be perplexed at how they arrived at such a decision. The quality of the service does not change. In fact, it gets better, because they have the whole of the Andersen database to tap into. Therefore, for the same fee, we get better value. Even if we were audited by Andersen, or bought some other service such as IT, tax or management consultancy, there would still be Chinese walls in place. The fact is the goalposts are constantly shifting on what constitutes a conflict as all these service firms—which means lawyers, accountants, consultants and so on—get more and more global . . . The world is getting smaller and we have to live with all the professional firms getting larger.[73]

Another FTSE client has observed:

> There are always upsides and downsides when you look at potential conflicts . . . But you have to weigh up whether there is more risk in instructing a new firm that does not know your business, or whether the conflict issues can be resolved by using Chinese walls. We would only sack the other firm if there was a true risk of shareholders losing out—and this would be rare.[74]

The viability of a Chinese wall as a means of preventing the flow of information within a firm, be it within the accountancy or legal profession, is a matter which will be considered in greater depth below.[75] For now, all that can be said is that the accountancy profession believes that there is nothing improper in 'managing' conflicts. Whether solicitors should or could follow this approach is also considered below. First, it is important to establish whether it is in fact legally

[71] (1998) 21 *Commercial Lawyer* 43.
[72] *Ibid*.
[73] (1997) 20 *Commercial Lawyer* 21.
[74] *Ibid*.
[75] See below at 157.

possible, through regulation, to amend the duties which a fiduciary owes to his client.

FIDUCIARY DUTIES AND REGULATORY RULES: THE LAW COMMISSION'S FINDINGS

In 1990 the Law Commission was charged with the following task:

> Certain professional and business activities are subject to public law regulation by statutory and self-regulatory control. The Law Commission is to consider the effect of such controls on the fiduciary and analogous duties of those carrying on such activities, and to make recommendations.[76]

As mentioned above, the report focused on:[77]

i) contractual techniques for avoiding potential breaches of duty;
ii) structural techniques for managing conflicts;
iii) the public law dimension, that is how far a regulatory system can be taken to have modified the common law and equitable duties owed by fiduciaries.

1. Contractual Techniques

The first question of interest to the Commission was whether fiduciaries could amend the duties owed to their clients under the general law by means of either express or implied contractual provisions. It undertook an extensive review of the cases of *Kelly v Cooper*[78] and *Clark Boyce v Mouat*[79] and concluded that both decisions had gone a long way to clarifying the law on this matter. The Commission found that fiduciary duties could be modified by the express or implied terms of a particular contract.[80] In certain circumstances, where the contract was silent on the matter, terms could be implied into the agreement if trade custom could be regarded as reasonably modifying obligations and providing adequate protection for the client's interests.[81] An express provision in the contract would cover circumstances where retainers stated that, although the firm was under a fiduciary duty to pass on all relevant information to a client, there might be circumstances in which confidential information would be held within the firm and not passed on to the client. Implied provisions, on the other hand, would cover professions (such as estate agents) where it is common trade practice to act for clients with conflicting interests in different transactions. For example, if the agent were to act for client A and client B in the sale

[76] Law Commission Consultation Paper No 124, *Fiduciary Duties and Regulatory Rules*, at 1.
[77] The Commission also addressed other issues but, for the purpose of this work, the three most relevant have been selected.
[78] [1993] AC 205.
[79] [1993] 4 All ER 268.
[80] Above, n 78, at 84.
[81] *Ibid*, at 85.

of their similar properties on the same road, as is common, the agent would not be required specifically to state that this situation might arise when entering into the contract to sell the properties.

The Commission added, however, that there were limits to the circumstances in which the court would imply terms into the contract. The first was where the firm had acted for two customers in *the same transaction* (for example, being employed by a party to find a specific type of property and valuing that property without informing the seller of the other client's interest). Secondly, where the conflict was between a firm's own interest and its duty to a customer (for example, if the property being sold was adjoining a property owned by the estate agent). Thirdly, where there had been 'iniquity' or 'malpractice' (for example, if a financial adviser deliberately advised a customer to purchase stocks, despite having confidential information that the stock was going to fall in price). Beyond these situations, contractual provisions—express or implied—would depend on the court's interpretation of the facts of the case.

2. Structural Techniques

The structural device considered by the Law Commission was that of the Chinese wall. Several doubts were raised about its efficacy.[82] The Commission was of the view that unless appropriate provision was made in the contract between a firm and a client, a Chinese wall could not be relied on in all cases as a means of managing conflicts of interest. The Commission also expressed doubts about the effectiveness of Chinese walls as a means of managing conflicts, but concluded that 'they were essential if the [financial services] industry is to operate in its present form with multi-functional investment houses performing a wide range of services.'[83] Therefore, it was felt necessary to

> remove any doubts . . . about the legal efficacy of the practice of withholding information by means of a Chinese wall which complies with the regulatory requirements as a method of managing conflicts of interest and duty.[84]

Legislation was recommended, the effect of which would be that if a firm operated a Chinese wall which complied with relevant regulatory requirements, it would not be regarded as being in breach of duty in circumstances where:

i) it withholds information from a customer pursuant to the Chinese wall arrangement; or
ii) it places itself in a position where its own interest in one department conflicts with a duty owed to a customer of a different department and as a result neither department is aware of the conflict; or

[82] Above n 76, at 49.
[83] *Ibid*, at 98.
[84] *Ibid*, at pp 98–99.

iii) it owes conflicting duties to the customers of different departments on either side of the wall, but as a result of the wall neither department is aware of the potential conflict.[85]

A Chinese wall would comply with regulatory requirements provided:

—there was physical separation of the various departments in order to isolate them from each other, often extending to such matters of detail as dining arrangements;
—there were on-going educational programmes for staff;
—there were strict and carefully-defined procedures for crossing walls and the maintenance of proper records where this occurs;
—compliance officers monitored the effectiveness of the wall;
—disciplinary sanctions were available where there had been a breach of the wall.[86]

The Commission emphasised that such walls would have to be established arrangements within firms rather than created *ad hoc*. It would seem this requirement, in particular, may inhibit law firms from ever successfully relying on such a device. The organisation and structure of solicitors' practices are such that lawyers usually work in teams rather than in separate departments. In addition, clients often require legal advice that crosses departmental boundaries. In a corporate transaction, for example where one company is buying another company, almost every department in the firm may be called upon to give advice.[87] Perhaps, therefore, the only way in which law firms would be able to satisfy the need for established walls would be when they had separate regional offices which routinely acted independently of one another.

It is as well to bear in mind that although the Commission's findings were said to apply to all publicly-regulated bodies, their focus was on the financial services industry. There has for some time been a widely-held perception that financial institutions must, as a matter of practical necessity, act in conflict situations. Professor Gower states:

> Conflicts are, inevitably, endemic among those providing financial services and are aggravated by the increasing tendency for a wide range of such services to be provided by a single firm or group.[88]

It may be argued that the same is true of solicitors' firms, but as no empirical evidence existed as to the effect of conflicts on law firms, the Commission was unable to give equal consideration to the legal environment.

[85] *Ibid*, at 99.
[86] *Ibid*, at 109.
[87] The following departments would usually have an input: employment, taxation, pensions, property, intellectual property, commercial and competition particularly in relation to the process of 'due diligence'.
[88] J Gower, 'Review of Investor Protection', (1984) Cmnd 9125, Part 1, at para 6.30.

3. The Public Law Dimension

The Law Commission also considered whether there should be legislation to provide that the courts should take account of reasonable regulatory rules in ascertaining the precise content of the common law and equitable obligations. The Commission was of the opinion that courts should take account of the regulatory regime. It indicated that the cases of *Kelly* and *Clark Boyce* went a long way towards avoiding problems which might arise through a mismatch between fiduciary duties and regulatory rules.[89] This was because it appeared that contractual provisions could allow firms and clients to waive such rules. Although *Kelly* was not seen by the Commission as the complete answer to any mismatch between fiduciary duties and regulatory rules,[90] it believed that a court, when faced with such a mismatch, would probably take account of the rules in determining the content of the fiduciary duty.[91] No legislation was recommended on this point.

SUMMARY

It has been shown in this chapter that the Law Society in England and Wales, in framing its regulations, adopts a much stricter approach to conflicts of interest than do some other regulatory bodies. Some, such as the Bar Council, have implemented a similar regime in that the rules are designed to prevent rather than to 'manage' conflicts. However, the Bar Council's rules differ in two key respects. First, members are allowed to act for two clients with conflicting interests, provided client consent is obtained. Secondly, barristers are allowed to act against fellow barristers from the same set of chambers.

The justification given by the Bar Council for this apparently more relaxed attitude is that barristers do not work in partnerships. However, in practice it seems that more protection is likely to be offered to clients by large law firms which employ separate departments or offices. There is also the view that, by virtue of their acting as sole practitioners, barristers are imbued with the principle of maintaining client confidentiality by means of an informal (but well understood) system of 'walls'. This, of course, is open to question. It might equally be argued that an individual barrister has more to gain by acting unethically than has a solicitor employed in a large partnership.

The fact that their members practise in partnerships has not stopped other regulatory bodies from adopting a 'managerial' approach to conflicts. Accountants provide one example. It could, however, be said that accountants

[89] Law Commission Consultation Paper No 124, *Fiduciary Duties and Regulatory Rules*, at 1.
[90] *Ibid*.
[91] *Ibid*, at 89.

and solicitors operate under very different conditions. Lord Millett emphasised that accountancy firms usually organise themselves within separate departments.[92] Law firms do not tend to operate on that basis.[93] In addition, it is at least arguable that accountants are involved in a wider range of activities than are solicitors. However, the degree of specialisation by individual members within each profession will vary considerably, and it is by no means obvious that, overall, one profession is more 'specialised' than the other. As things stand, despite some clients having reservations about the use of Chinese walls by accountancy firms, both the professional body which regulates chartered accountants and the House of Lords have accepted their validity.[94]

The Law Commission also accepts that regulatory bodies have the power to amend the fiduciary duties which their members owe to clients. It accepts that individual firms can amend the duties owed to their clients by means of contractual provisions, either expressly or by implication. Moreover, it specifically endorses Chinese walls as a means of managing conflicts within firms.

It can be seen, therefore, that the Law Society's approach differs significantly from that of other regulatory bodies. Arguably, this approach, which effectively prevents its members entering into contracts with clients in order to amend the nature of the duty owed, would not survive a legal challenge. Nevertheless, the difference between the Law Society's rules and the other regimes is striking.

Perhaps there is something fundamentally different about the type of service provided by solicitors which justifies this stricter attitude. In order to explore this question, the next chapter will analyse how conflicts of interest experienced by solicitors are treated in other jurisdictions.

[92] Above at 40.

[93] See below at 150 and S Mayson, *Making Sense of Law Firms* (Blackstone, London, 1997) at 287.

[94] Above at 40.

4

Conflicts of Interest: An International Perspective

INTRODUCTION

HAVING in the previous chapter examined the way other professions approach conflicts of interest, this chapter will explore another comparative dimension, namely the way in which legal professions in other jurisdictions manage conflicts. Given that modern businesses and the modern law firm operate in a global market, it is vital to consider conflicts from an international perspective.[1] Lawyers have become transnational in their work, with many firms having overseas offices to cater for clients' needs. In many jurisdictions the legal profession has undergone a similar transformation to that experienced by solicitors in England and Wales, with the creation of 'mega' firms catering for large corporate clients.[2] As the Supreme Court of Canada has pointed out, such changes bring in their train an increased likelihood of conflicts of interest:

> The legal profession has changed with the changes in society. One of the changes that is most evident in large urban centres is the virtual disappearance of the sole practitioner and the tendency to larger and larger firms. This is a product of a number of factors including a response to the demands of large corporate clients whose multi-faceted activities require an all-purpose firm with sufficient numbers in every area of expertise to serve their needs . . . Merger, partial merger and the movement of lawyers from one firm to another are familiar features of the modern practice of law. They bring with them the thorny problem of conflicts of interest.[3]

The same difficulties are found in other sophisticated legal markets. For example, it has been observed that following a spate of recent mergers there are now only a few Australian firms able to offer the kind of service required by large corporate clients:

> The problem in the [Australian] marketplace is that there are so few major players that these problems of conflict are bound to crop up.[4]

[1] S Cavusgil, 'Globalization of Markets and Its Impact on Domestic Institutions, (1993) 1(1) *Indiana Journal of Global Studies*.

[2] *Ibid*, at 6.

[3] *MacDonald Estate v Martin* (1991) 77 DLR (4th) 249 per Sopinka J at 255.

[4] Robert Hanley, a partner at top-five Australian firm Minter Ellison, *The Lawyer*, 27 September 1999, p 3.

Concentration of expertise within a comparatively few large law firms brings with it the prospect of a proliferation of conflicts of interest. As one US commentator has obsereved:

> Clients are attracted to firms with particular expertise—for defending environmental pollution or particular kinds of product liability claims, handling large bankruptcies, enforcing intellectual property rights, and the like. But many of these speciality clients will necessarily have adverse interests—whether because they are trying to pass off liability on the other, to assert an entitlement or right or priority over the other, to preclude the other from encroaching on its technology, or merely because they are cutthroat competitors entrusting proprietary business confidences in their lawyers. In short, when legal markets tap into established social networks . . . responsibilities can be expected to collide.[5]

These conflicts of interest need somehow to be managed and controlled.When considering the range of responses within the legal profession to conflicts of interest, the United States provides an obvious starting point. The subject has received far greater academic attention there than in the United Kingdom,[6] with several studies having been commissioned into the effect of conflicts on law firms.[7] Moreover, within today's global business arena two legal frameworks predominate, namely English law and New York State law.[8] Commonwealth countries such as Canada, Australia and New Zealand are also natural choices for comparison as their legal systems are based on English law. They too have been forced to re-examine the rules governing conflicts of interest following changes in the delivery of legal services.

European nations are likewise having to address issues relating to fiduciary duties, confidentiality and codes of conduct.[9] As the UK moves towards fuller economic and political integration with its European neighbours this raises the

[5] SP Shapiro, *Conflicting Responsibilities: Manoeuvring Through the Minefield of Fiduciary Obligations*, (American Bar Foundation, Chicago, 1995).

[6] See, for example, GC Hazard, 'Conflict of Two Roles', (1996) 18 *National Law Journal*; GC Hazard, 'The Would-be Client', (1996) 18 *National Law Journal*; M Chambers, 'Conflict Problems Abound', (1994) 16 *National Law Journal*; RH Aronson, 'Conflicts of Interest', (1977) 52 *Washington Law Review*, 807; it appears that problems over conflicts are not limited to particular states and that it is a nationwide issue: SR Martyn, 'Conflict about Conflicts: The Controversy Concerning Law Firm Screens', (1993) 46 *Oklahoma Law Review* 53; L Gallagher and AS Hanes, 'Attorney-Client Conflicts of Interest and Disqualification of Counsel in Texas Litigation', (1993) 24 *Texas Tech. Law Review* 1039; DK Orlik, 'California narrows the ethical wall; Pennsylvania Expands it', (1993) 10 *Legal Assistant Today* 144.

[7] The American Bar Foundation has conducted empirical research—see SP Shapiro, *Conflicting Responsibilities: Manoeuvring Through the Minefield of Fiduciary Obligations*, (American Bar Foundation, Chicago, 1995). See also E Lazega, 'Conflicts of Interest in American Business Law Firms—An Organisational Approach', (French title: 'Les Conflits d'interets dans les cabinets americans d'avocats d'affaires: concurrence et auto-regulation'), (1994) 36 *Sociologie du Travail* 315.

[8] J Flood, 'Megalawyering in the global order: the cultural, social and economic transformation of global legal practice', (1996) 3 *International Journal of the Legal Profession* 169.

[9] France, Belgium and Italy have all expressed concern. See M Chambers *et al*, Chambers, Jones and Wilkins, 'Conflicts of Interest: the growing climate of distrust', (1999) 33 *Commercial Lawyer* 26, at 29. It is beyond the scope of this book to examine these countries in detail as their legal systems are not derived from an English common-law background.

prospect of a more closely aligned regulatory regime governing all areas of legal practice. Indeed some headway has already been made in this direction. The Council of the Bars and Law Societies of the European Union (CCBE), of which the Law Society is a member, has drafted a Code of Conduct for lawyers. Its purpose is to have 'a statement of common rules which apply to all lawyers from the Community whatever bar or law society they belong to in relation to their cross-border practice.'[10] Any solicitor who has 'professional contacts' with other lawyers practising in member states of the European Community is directed by the UK Law Society to observe the rules codified in Articles 2 to 5 of the CCBE Code of Conduct.[11] Moreover, under the terms of the Code, if the Law Society amends its rules of professional conduct it is obliged to take account of the rules in the Code 'with a view to their progressive harmonisation.'[12]

In the remainder of this chapter I will explore in greater depth the regimes governing conflicts of interest in the US, in Canada, Australia and New Zealand and in Europe. I will first examine how the American Bar Association has responded to the problems generated by conflicts of interest, analysing the 'model rules of professional conduct' which it has adopted. Then I will consider how Canada, Australia and New Zealand have dealt with the same problems. Finally I will review the CCBE Code to see whether its rules on conflicts offer a viable alternative to the UK model.

UNITED STATES

It has been suggested that the recent increased interest in conflicts in the United Kingdom has been prompted by the growing presence in Europe of United States law firms and companies.[13] As the Americans expand their presence in Europe, they bring with them their own approach to conflicts. This has been developed through a period of intense interest in ethical issues in US law schools, further stimulated by litigation on a range of related matters.[14] There have been numerous cases brought by disgruntled clients,[15] and it now appears

[10] Article 1.3.1 of the CCBE Code.

[11] N Taylor (ed), *The Guide to the Professional Conduct of Solicitors*, 8th edn (Law Society Publishing, London, 1999), hereafter referred to as 'The Guide 8th edn', Ch 10. The CCBE is the Council of the Bars and Law Societies of the European Union.

[12] Article 1.3.2 of the CCBE Code.

[13] M Chambers, M Jones and P Wilkins, 'Conflicts of interest: the growing climate of distrust', (1999) 33 *Commercial Lawyer* 26: 'Lawyers have never seen a case quite like it. Sea Containers, a valued and important client, have issued a writ to restrain their solicitors, Denton Hall, from leaking confidential information . . . Interestingly, Sea Containers' chairman, Jim Sherwood, is American, the son of an attorney, and his UK lawyer is New York qualified . . .'

[14] This has been prompted by increased lawyer mobility, multi-departmental firms, firms offering a broad range of services, law firm mergers and the growth of the mega-firm. See D Copeland, 'Conflicts of Interest in the Mega Firm', (1988) 13 *Journal of the Legal Profession* 255. See also *The Lawyer*, Editorial, 'Denton Hall pulled out of merger talks because of fears over conflicts', 12 November 1996.

[15] See, for example, *TC Theatre Corp v Warner Bros Pictures Inc*, 113 F Supp 265 (US Dist. Ct, SDNY, 1953); *EF Hutton & Co Inc v* Brown, 305 F Supp 371 (US Dist Ct, SD Tex, 1969); *Emle Industries Inc v Patentex Inc*, 478 F 2d 562 (USCA, 2nd Circ, 1973); *Re Asbestos Cases*, 514 F Supp

that conflicts are being used tactically to disqualify a particular law firm from acting.[16] Conflicts are now of such concern in the United States that the Attorneys' Liability Assurance Society has issued guidelines on how firms should protect themselves against potential claims.[17]

The American Bar Association (ABA) was established more than 80 years ago to provide 'leadership in legal ethics and professional responsibility through the adoption of professional standards which serve as models of the regulatory law governing the legal profession'.[18] The ABA recommends rules for adoption by State bar associations across North America.[19] In 1995 it found that conflicts of interest caused such problems for lawyers and their clients that it decided to set up a 'Task Force' to examine 'the most troublesome conflicts in today's law practice and suggest one or more written agreements to be signed by lawyers and their clients to resolve . . . issues before they arise.'[20]

Conflicts of interest are addressed by the ABA in their model rules under 'client-lawyer relationships'.[21] Rule 1.7 sets out the general rule on conflicts, defining a conflict of interest as either (a) representing a client with 'directly adverse' interests or (b) having interests or responsibilities which would limit the lawyer from doing the best for his client.[22] In either case a lawyer is prohibited from representing the client. The rule reflects the Law Society's approach in England and Wales in that it prevents lawyers from acting where there is a simultaneous conflict, or from using confidential information obtained from one client for the benefit of another.

There is, however, an important difference between the rules of the Law Society and those of the ABA. In the United States, rule 1.7 allows clients to

914 (US Dist Ct, ED Va, 1981); *Nemours Foundation v Gilbane, Aetna, Federal Ins Co*, 632 F Supp 418 (USCA, D Del, 1986); *USA for the Use and Benefit of Lord Eletric Co v Titan Pacific Construction Corp*, 637 F Supp 1556 (US Dist Ct, WD Wash, 1986).

[16] M Chambers, 'Conflicts as Weapons', (1994) 17 *National Law Journal*: 'A trend that seems to be emerging . . . is the apparent purposeful manipulation of the conflicts issue in order to keep a law firm from representing a specific client. A large corporation may spread insignificant business to law firms all over the town, knowing that at some point a case will come up that will conflict them all out.' See also KD Spickelmier and K Kattner, 'Client, Attorney Mobility Creates Growing Conflict of Interest Concerns', *Texas Bar Journal*, April 1990, p 406 and V Slind-Flor, 'Client-Conflicts Patrols March On', *The National Law Journal*, 30 March 1992, p 1.

[17] M Chambers, n 16 above: 'The ALAS pay out so much money in compensation that they have compiled a detailed compendium which sets out conflict liabilities and advises lawyers on best practice.'

[18] AH Garwin (ed), *ABA Compendium of Professional Responsibility Rules and Standards* (American Bar Association, Chicago, 1999) at 7.

[19] At the time that the 1999 edition of the Model Rules went to press, more than two-thirds of the jurisdictions in America had adopted new professional standards based on the Model Rules. *Ibid*, p 8.

[20] See *American Bar Association*, Editorial, 'The Business Lawyer: A Bulletin of the Section on Corporation and Mercantile Law', (1995) 1381/50 n 4.

[21] The US case law will not be examined in this chapter. For further reference see JR Midgley, 'Confidentiality, Conflicts of Interest and Chinese Walls', (1992) 55 *Modern Law Review* 822.

[22] Rule 1.7, ABA Model Rules of Professional Conduct, *op. cit.*, p 31. Garwin (ed), *ABA Compendium of Professional Responsibility Rules and Standards* (American Bar Association, Chicago, 1999) at 7.

consent to the lawyer acting in a conflict if 'the lawyer reasonably believes the representation will not adversely affect the relationship or [his] relationship with the other client.'[23] Moreover, in the accompanying commentary to this rule, note 3 states that 'simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not require consent of the respective clients.'[24] Therefore, to take an extreme example, if Firm XYZ represented the Coca-Cola Company and were asked to act for Pepsi, although the two clients had competing commercial interests, there would be nothing to prevent the firm from acting for both companies provided the advice sought was not in respect of an issue in which the two companies were directly competing.

In this respect the ABA rules reflect the common law position in England and Wales, in that a client can waive the fiduciary duties owed to him.[25] The US rules are thus less strict than the rules adopted by the Law Society. It has been suggested, however, that a rule allowing clients to give such consent is 'fundamentally flawed'.[26] The arguments against rule 1.7 appear to be four-fold:[27]

1. The rule seems to focus entirely on the lawyer-client relationship and, therefore, the only issue the lawyer must consider is whether the representation of one client will adversely affect *the relationship* with the other client. The lawyer is not required to consider whether, from the client's perspective, it is wise to give such consent.
2. Where the lawyer's involvement is limited by his obligations to other clients, the only issue the lawyer must consider is whether the 'representation will be adversely affected'. Such 'representation' includes limitations to which the lawyer and client may already have agreed under the terms of the retainer. The rule does not, therefore, prohibit an agreement under which the lawyer is precluded from doing his best for the client.
3. Although the rule does not require the lawyer to explain the implications and risks of giving such consent, it does require [him] to explain the potential costs of dual representation to the client. It also requires the lawyer to identify the *advantages* of common representation.
4. A single rule cannot adequately embody the separate interests of clients, lawyers and the legal system as a whole.

[23] *Ibid*, at pp 31 to 32. Note 7 prohibits representation of opposing parties in litigation and note 112 prevents a lawyer from representing multiple parties to a negotiation if their interests are fundamentally antagonistic to each other, pp 33 to 34.

[24] *Ibid*.

[25] See *Kelly v Cooper*, Above at 48.

[26] FC Zacharias, 'Waiving Conflicts of Interest', (1998) 108 *The Yale Law Journal* 407 at 408. See also, PR Jarvis and B Tellam, 'When Waiver Should not be Good Enough: An Analysis of Current Client Conflicts Law', (1997) 33 *Willamette Law Review*, 145; L Moore, 'Conflicts of Interest in the Simultaneous Representation of Multiple Clients: A Proposed Solution to the Current Confusion and Controversy', (1982) 61 *Texas Law Review* 211.

[27] FC Zacharias, 'Rethinking Confidentiality', (1989) 74 *Iowa Law Review* 351 at pp 416–23.

A further issue, which has not been specifically identified by commentators, is that no recommendations are made as to how best to protect the interests of two clients where a firm is representing both in the same matter. No guidance is given, for example, on the desirability of establishing separate teams of fee-earners. Therefore, where the clients concerned are on the same side in a joint action, but where their interests are nonetheless potentially at odds, a lawyer or firm may represent these two or more clients without taking any protective measures, provided that both clients give their consent to such action.[28]

The attitude of the ABA to other types of conflict is not as straightforward. In general a much stricter approach has been adopted. This can be seen, for example, in relation to lawyers who practise in association with other lawyers. Rule 1.10 states that 'none of them shall knowingly represent a client when any one of them practising alone would be prohibited from doing so by the [rules].' The use of the word 'knowingly' here suggests that a lawyer would have to be aware of the work his colleague was doing in order to fall foul of this rule. Yet Point 6 of the commentary to rule 1.10 states that

> the rule of imputed disqualification stated in [the rule] gives effect to the principle of loyalty to the client as it applies to lawyers who practise in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for the purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated.

It would seem, therefore, that lawyers practising in a large firm are imputed with the knowledge of each of their colleagues.

The rule on acting against former clients is equally strict. It prevents a lawyer from acting against a former client in the same or in a substantially related matter in which a current client's interests are opposed to the interests of the former client.[29] Moreover, if a lawyer moves to a new firm and the firm he joins is acting against one of his former clients, that firm must cease to act in the matter. No provision is made to permit the new firm to screen the lawyer by means of a Chinese wall unless the lawyer was previously employed as a public officer or public employee.[30] This is the case even though the ABA recognises the difficulties presented by such a rule:[31]

> There are several competing considerations. First, the client previously represented by the former firm must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the rule should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the rule should not unreasonably hamper lawyers from forming new associations and taking on new

[28] The advantages of allowing such a rule is discussed below at 171.

[29] Model Rule 1.9.

[30] Model Rule 1.11. In such cases, it appears that the wall consists of screening the lawyer from any participation in the matter and informing the appropriate government agency to enable it to ascertain compliance with the provision of the rule.

[31] Comment [3] to Model Rule 1.9.

> clients after having left a previous association. In this connection, it should be recognised that today many lawyers practise in firms, that many lawyers to some degree limit their practice to one field or another, and that many move from one association to another several times in their careers.

Although the transferring lawyer has to be shown to have some knowledge of the affairs of the former client,[32] if he or she has acquired relevant information, then his new firm is excluded from acting against that client.[33] It would seem that the ABA's primary concern with respect to successive representation conflicts is to ensure that the lawyer's duty of confidentiality to the original client is not compromised.

THE COMMONWEALTH

The approach of the regulatory bodies in Canada, New Zealand and Australia is almost identical to that of the American Bar Association with regard to simultaneous transactions. All three countries allow clients to give consent to such representation.[34] However, the reasons for allowing such representation may differ. In Australia such conflicts are said to arise through the lack of alternative sources of legal advice, particularly in sparsely-populated areas:

> There are many areas of Australia . . . where parties have little choice but to brief the same solicitor to act for them in a transaction unless they wish to travel a great distance to obtain separate advice.[35]

In New Zealand it has likewise been claimed that clients have a more limited choice of law firm following recent mergers:

[32] Comment [2] to Model Rule 1.9 states: 'The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a wholly distinct problem of that type even though the subsequent representation involves a position adverse to the prior client.'

[33] See, for example, *United States Football League v National Football League*, 605 F Supp 1448; *Cheng v GAF Corp* 631 F2d 1052 (2nd GR. 1980); *Kopco Mfg, Inc v C&O Ente., Inc* F Supp 1231; *Herron v Jones*, 276 Ark 493, 637 SW 2d 569 and MP Moser, 'Chinese walls: a means of avoiding law firm disqualification when a personally disqualified lawyer joins the firm', (1990) 3 *Georgetown Journal of Legal Ethics* 399.

[34] See, for example, 'Impartiality and Conflict of Interest between Clients' of the Code to Professional Conduct adopted by the Law Society of Saskatchewen; Rule 1.04 of the Law Society of New Zealand Rules of Professional Conduct; and Rule 8 of the Guide to Professional Conduct of the Australian Capital Territory.

[35] S Parker and C Sampford (eds), *Legal Ethics and Legal Practice* (Clarendon Press, Oxford, 1995) at 62. Nosworthy also recognises that conflicts arise in the cities: 'In the cities, it is clear that clients have ready access to other legal advice. However, clients often do not wish to avail themselves of alternative advice, preferring instead to deal with the solicitor of their choice . . . The nature of practice in large law firms is that lawyers tend to specialise and clients tend to instruct large law firms not only because of the reputation of the law firm itself but also, and most particularly, because the client wishes to use a certain partner who has relevant expertise.' See E Nosworthy, in S Parker and C Sampford (eds), 'Ethics and Large Law Firms'(Clarendon Press, Oxford, 1995) at 10.

> Practising mainly in Auckland and Wellington, there are in New Zealand five so-called mega-firms consisting of 50 or more partners employing a large number of staff and three firms comprising more than 25 partners . . . The mega-firms in New Zealand are larger per head of population than their overseas counterparts . . . The influence of the mega-firms in the delivery of legal services in New Zealand is immense, especially in the area of commercial law. They are pictured by some as bestriding the legal profession dominating, in oligarchal fashion, the practice of law in this country.[36]

Each of these jurisdictions offers rather more guidance than the USA as to what amounts to consent, and how such consent should be obtained. In Canada lawyers are advised to make 'adequate disclosure to enable the client to make an informed decision' and to

> guard against acting for more than one client where, despite the fact that all parties concerned consent, it is reasonably obvious that an issue contentious between them may arise or their interests, rights or obligations will diverge as the matter progresses.[37]

The New Zealand code recommends that firms should establish systems to separate information within the firm where clients are represented by different practitioners in the same transaction.[38]

Differences emerge, however, in the approaches of these three countries to the management of successive representation conflicts.

1. The Canadian Solution

In 1991 the Federation of Law Societies in Canada[39] was forced to re-examine its rules on conflicts of interests following the Supreme Court of Canada's decision in *MacDonald Estate v Martin*.[40] That case, which has subsequently been cited with approval in other jurisdictions,[41] concerned an application by one party in a dispute to prevent a former adviser's new firm from acting for the other party. The Court held that the sole issue to be decided was the appropri-

[36] *Russell McVeagh Mckenzie Bartleet & Co v Tower Corporation* [1998] 3 NZLR 641 per Thomas J.

[37] Law Society of Saskatchewen, Note 4 and 5 of the rule on impartiality and conflict of interest between clients. Note 5 also states: 'Before the lawyer accepts employment from more than one client in the same matter, the lawyer must advise the clients that the lawyer has been asked to act for both or all of them, that no information received in connection with the matter from one can be treated as confidential so far as any of the others is concerned and that, if a dispute develops that cannot be resolved, the lawyer cannot continue to act for both or all of them and may have to withdraw completely.'

[38] Commentary (3) of Rule 1.04.

[39] The Federation is the umbrella organisation of the 13 governing bodies of the legal profession in Canada. See further http://www.flsc.cca/.

[40] (1990) 77 DLR (4th) 249.

[41] In England, in the House of Lords' decision in *Bolkiah v KPMG* [1999] 2 AC 222; New Zealand in *Russell McVeagh McKenzie Bartleet v Tower Corporation* [1998] 3 NZLR 641; Australia in *Littlejohn v Phillips Fox (a firm)* [1999] WASC 171.

ate standard to be applied in determining whether the firm was disqualified from continuing to act in the litigation by reason of a conflict of interest.

In determining this standard the Court stated that it was concerned to obtain the appropriate balance between three competing principles, namely:

1. the concern of all to maintain the high standards of the legal profession and the integrity of the justice system;
2. the principle that a litigant should not be deprived of his choice of counsel without good cause; and
3. the desirability of permitting reasonable mobility in the legal profession.

After an extensive review of relevant cases at home, in the United Kingdom, the United States, and Australia, the Court concluded that the test to be applied in determining whether there was a conflict of interest was not the probability of mischief occurring, for that did not satisfy the requirement that there be an appearance of justice, but whether a reasonably informed person would be satisfied that no use of confidential information would occur. In determining this, the Court held that two questions needed to be answered:

1. Had the solicitor received relevant confidential information; and
2. Was there a risk that this would be used to the client's prejudice?

Sopinka J, giving the leading judgment, thought that in response to the first of these two questions it was sufficient to show that there existed a previous fiduciary relationship related to the present case. For the second, he thought that the Court should automatically disqualify a solicitor unless there was clear and convincing evidence that all reasonable measures had been taken to prevent disclosure.

It was considered that such reasonable measures would include Chinese walls and cones of silence,[42] but Sopinka J observed that as such devices were 'not familiar to Canadian courts', he expected the Canadian Bar Association to take the lead in determining whether they were effective and to develop standards for their use. In this respect he stressed that although he was not prepared to say that a Court should never accept these devices as sufficient evidence of effective screening, he did not foresee a court accepting such devices unless there were 'exceptional circumstances.'[43]

Although this attitude towards Chinese walls echoed that of previous judgments,[44] the Supreme Court of Canada was prepared to accept that the Canadian Bar Association had the final say in the matter:

> It must be borne in mind that the legal profession is a self-governing profession. The legislature has entrusted to it and not to the court the responsibility of developing standards. The court's role is merely supervisory, and its jurisdiction extends to this

[42] For a description of a 'cone of silence' see below at 145.

[43] Above, n 40 at 269.

[44] See, for example, *D & J Constructions Pty Ltd v Head* (1987) 9 NSWLR 118; *Lee (David) & Co Ltd v Coward Chance (a firm)* [1991] Ch 259; *Re a Firm of Solicitors* [1992] QB 959.

> aspect of ethics only in connection with legal proceedings. The governing bodies, however, are concerned with the application of conflict of interest standards not only in respect of litigation but in other fields which constitute the greater part of the practice of law. It would be wrong, therefore, to shut out the governing body of a self-regulating profession from the whole of the practice by the imposition of an inflexible and immutable standard in the exercise of a supervisory jurisdiction over part of it.[45]

The Supreme Court decided that, on the facts of the *Martin* case, the former lawyer was in possession of confidential information. Accordingly, sworn statements that there would be no discussion of the case at the new firm were insufficient to rebut the strong inference of disclosure. Nevertheless the door had been left open for the Federation of Law Societies in Canada to draft a rule permitting the use of Chinese walls within law firms.

It was not until some three years later that the Federation produced such a rule.[46] The rule,[47] which runs to some seven pages, is entitled 'Rule with respect to conflicts of interest arising as a result of transfer between law firms.' It states that:

> Where the transferring member actually possesses relevant information respecting the former client which is confidential and which, if disclosed to a member of the new firm, may prejudice the former client, the new law firm shall cease its representation of its client in that matter unless:
>
> (a) the former client consents to the new firm's continued representation of its client, or (b) the new law firm establishes, in accordance with sub-rule (8), that:
>
> (i) it is in the interests of justice that its representation of its client in the matter continue, having regard to all relevant circumstances, including:
>
> (A) the adequacy of the measures taken under (ii),
> (B) the extent of prejudice to any party,
> (C) the good faith of the parties,
> (D) the availability of alternative suitable counsel, and
> (E) issues affecting the national or public interest, and
>
> (ii) it has taken reasonable measures to ensure that no disclosure to any member of the new law firm of the former client's confidential information will occur.

The direction to firms to have regard to all relevant circumstances listed in (A) to (E) reflects the concern of the Supreme Court in *Martin* to obtain the appropriate balance between competing interests. Yet the Federation, by stating that firms can act provided they take reasonable measures, has authorised the use of institutional devices—the very devices in respect of which the Supreme Court expressed misgivings. Do these 'reasonable measures' ensure that information

[45] Above, n 40, per Sopinka J at 269 to 270.

[46] In the interim, firms were left in something of a quandary as to what to do in such a case. See J Middlemiss, 'Canada: Conflict of interest hits lawyers—waiting for results of Guidelines Study', *Financial Post*, 6 April 1993.

[47] See www.flsc.ca/English/ac-conflictsrule.htm.

will not move within a firm? Are they sufficient to protect the former client's interests?

The Federation felt it was 'not possible to offer a set of "reasonable measures" which [would] be appropriate or adequate in every case.' It recommended that the new law firm should 'exercise professional judgment in determining what steps must be taken.' Some guidelines are included at the end of the rule.[48] These included what might be thought obvious recommendations, such as that the transferring lawyer should have nothing to do with the case or discuss it with anyone. In addition it was stipulated that:

—The files of the current client, including computer files, should be physically segregated from the new law firm's regular filing system, specifically identified, and accessible only to those lawyers and support staff in the new law firm who are working on the matter or who require access for other specifically identified and approved reasons.
—The measures taken by the new law firm to screen the transferring member should be stated in a written policy explained to all lawyers and support staff within the firm, supported by admonition that violation of the policy will result in sanctions, including dismissal.
—Affidavits should be provided by the appropriate firm members, setting out that they have adhered to and will continue to adhere to all elements of the screen.
—The former client should be informed of the procedures to be adopted.
—The screened member's office or workstation should be located away from the offices or work stations of those working on the matter.
—The screened member should use associated and support staff different from those working on the current client matter.

On the face of it these guidelines would protect the former client's interest to a far greater extent than the proposals put before the Supreme Court in *Martin*. It is surprising however, given that the new firm is acting without the former client's consent, that there is no insistence upon a physical barrier (unless this is the construction which we are expected to place upon 'located away from'). Moreover, no provision is made for some sort of independent supervision to ensure the integrity of the wall.

What is clear is that the Federation of Law Societies in Canada has adopted a pragmatic approach to conflicts of interest. Rules have been drawn up which seek to protect the interests of former clients whilst at the same time reflecting the transformation which has taken place in the legal environment.[49]

[48] The guidelines were adapted from the Canadian Bar Association's Task Force report entitled 'Conflicts of Interest Disqualification: Martin v. Gray and Screening Methods.'

[49] The reasoning is the same as that adopted by the New Zealand courts: see *Equiticorp Holding Ltd v Hawkins* [1993] 2 NZLR 737 and *Turners & Growers Exports Ltd v P&O Containers*, 14 September 1995, CP 628/86.

2. New Zealand and Australia

These two countries have adopted an approach to the regulation of the legal profession which differs markedly from that of Canada. Rather than the regulatory bodies of the profession having the final say over the conduct of its members, the Professional Conduct Codes of these two countries focus upon the need for lawyers to have regard to their responsibilities under the common law.

The introduction to the Code of the Australian Capital Territory specifically refers to this point:

> Practitioners should serve their clients competently and diligently. They should be acutely aware of the fiduciary nature of their relationship with their clients. . . .

The New Zealand Code also makes reference to the common law, noting the appropriate case law in the commentary which accompanies the rules.[50] The matter is covered by rule 1.05 which states:

> A practitioner must not act for a client against a former client of the practitioner when through prior knowledge of the former client or of his or her affairs which may be relevant to the matter, to so act would be or would have the potential to be to the detriment of the former client or could reasonably be expected to be objectionable to the former client.

The commentary accompanying this rule then refers practitioners to recent cases and articles on the subject.

The Australian Capital Territory Code also prohibits lawyers from acting against former clients if the '[lawyer] might reasonably conclude that there is a real possibility the information will be used to the [former client's] detriment.' No guidance is given as to what amounts to a 'reasonable conclusion' or what amounts to a 'real possibility'. In both jurisdictions, therefore, it is necessary to examine case law to determine whether it is possible for a new firm to act against one of its lawyers' former clients.

The leading authority in New Zealand is the case of *Russell McVeagh McKenzie Bartleet v Tower Corporation*.[51] Here, Tower Corporation sought to restrain the firm of Russell McVeagh from acting against it in a reverse take-over bid on the grounds that, although not using the firm as its principal solicitor, it had sought advice on taxation law from its Wellington office between 1995 to 1997. During this period a partner in the Auckland office was consulted by a different client with regard to the possible acquisition of Tower. The Auckland partner spoke to the partner in the Wellington office at that time

[50] See, for example, the commentary to rule 1.05.

[51] This case was relied on heavily by Lord Woolf in the Court of Appeal's decision in *Bolkiah v KPMG*, see above at 36. See also the cases of *Black v Taylor* [1993] 3 NZLR 403, *Carindale Country Club Estate Pty Ltd v Astill* (1993) 115 ALR 112 and *Equiticorp Holdings Ltd v Hawkins* [1993] 2 NZLR 737, *Turners & Growers Exports Ltd v P&O Containers*, 14 September 1995, CP 628/86 and *McNaughten v Tauranga County Council (No 2)* (1987) 12 NZT PA 429.

to determine whether it was appropriate for the firm to act for both clients. They concluded that there was no conflict of interest as the two matters were separate and there was no relevant information in common. The firm did not inform Tower of the potential conflict at that time as this would have alerted Tower to the fact that they could be subject to a take-over bid.

It was not until several months later, when the bid for Tower was in progress, that Tower discovered what had happened. By that time Russell McVeagh had ceased to act in relation to the taxation matter, but it nevertheless erected barriers to ensure that no confidential information passed between the two teams.[52] Tower sought an injunction to prevent Russell McVeagh from acting against them.[53]

The New Zealand Court of Appeal stated that three questions emerged from the case:

1. whether confidential information was held which, if disclosed, was likely to affect the concerned former client;
2. whether in the particular factual circumstances, viewed objectively, there was a real or appreciable risk that confidential information would be disclosed; and
3. if 1 and 2 were answered affirmatively, whether the Court's discretionary power to disqualify should be exercised.

In considering whether such disqualification was necessary, the Court felt it should take into account the following additional factors:

1. a person's right to the services of a solicitor of his choice;
2. the right of a solicitor to offer his services to the public generally;
3. mobility within the profession;
4. access to specialist services and market competition; and
5. the integrity of the fiduciary relationship.

In trying to achieve a balance between these competing interests the Court rejected the notion that a lawyer could never act against a former client, preferring instead what it called a 'common sense, practical approach'. It held that:

> The circumstances will dictate whether there is an unacceptable risk of disclosure of information where there is possession of relevant information. In the absence of negating evidence of protection the Court will readily infer there is a risk of disclosure.

On the facts of the particular case, the Court did not consider that Tower Corporation had put forward sufficient evidence to justify disqualifying Russell McVeagh from acting against them. Although Chinese walls and cones of silence were to be viewed with suspicion, changes to the way in which the legal

[52] The barriers consisted of undertakings by the solicitors involved and the storage of sensitive information.

[53] The injunction was granted by the High Court but subsequently overruled by the Court of Appeal.

profession operated made such devices an essential feature of modern legal practice:

> 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 practise together in a firm. Internal control measures may nevertheless in some circumstances be appropriate and sufficient to ensure protection. Other aspects of today's conditions must also be kept in mind. New Zealand is still comparatively small, and in some professional areas the availability of expert advice is limited. That availability 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.

As one commentator observed:

> What the majority has done . . . is [to] take a pragmatic and less strict approach than might have been anticipated from its earlier decisions. In particular, in advancing an approach that requires a balancing of the factors outlined . . . it has opened the way for judicial approval of the Chinese wall.[54]

This pragmatic approach is in line with the position adopted by the Federation of Law Societies in Canada. Australian courts, on the other hand, do not appear so willing to amend the traditional duties owed by fiduciaries. The leading decision in that jurisdiction is the Western Australian Supreme Court case of *Littlejohn v Phillips Fox (a firm)*.[55]

In 1996 Mr and Mrs Littlejohn instructed the firm of Hely Edgar to act in a dispute against Fletcher Construction. In April 1999 it was announced that the firm of Hely Edgar was dissolving and that some of the staff were joining Phillips Fox, the firm representing Fletcher Construction. The Littlejohns were informed that no-one at Hely Edgar would be able to continue to represent them and that all staff who had worked on their case and who were transferring to Phillips Fox would give written undertakings that they would maintain the confidences which had been entrusted to them.[56] The Littlejohns were not happy with these proposals and sought an injunction to restrain Phillips Fox from acting.

Steyler J, who delivered the judgment of the Court, believed that the justification for the court intervening in such a case was founded on three principles: the protection of confidential information; restraint from a breach of fiduciary duties in the context of a conflict of interest; and the court's control over the conduct of solicitors as its officers. He held that on the facts of the case, the first and third of these principles provided sufficient foundation for intervention.

[54] R Tobin, 'Former Clients and Chinese Walls: Russell McVeagh v. Tower and Prince Jefri Bolkiah v. KPMG', (1999) *New Zealand Law Review* 305 at 312.

[55] [1999] WASC 171

[56] Additional measures which were offered included separating the lawyers by putting them on different floors and giving an undertaking that all concerned would have no contact.

Nevertheless the Court stated that it also proposed to take into account policy considerations. These policy considerations included the following:

1. the general preservation of confidentiality and encouragement of full and frank disclosure between client and solicitor;[57]
2. the principle of loyalty to the client (namely, whether the existence of the former relationship has the potential to create in the mind not only of the former client but also of the reasonable bystander a reasonable apprehension that use will be made of information provided in the course of the former relationship to the detriment of the former client);[58]
3. the right of a client to have the services of a solicitor of choice;
4. the need to preserve mobility of lawyers;
5. the principle of whether an entire firm should be disqualified because one lawyer possesses confidential information (namely, is there a presumption of imputed knowledge between solicitors of the same firm?).

It was against this background of competing policy considerations that the Court had to decide whether the firm should be disqualified.

The test eventually adopted was that laid down by the House of Lords in *Bolkiah v KMPG*—that the Court should intervene unless it was satisfied that there was no risk of disclosure. Steyler J felt that such a stringent test was justified by the need to 'safeguard the proper administration of justice', as this was 'the most important of all the policy considerations'.

In considering whether the risk had been eliminated by Phillips Fox, the Court held:

> Walls or information barriers . . . have not often found favour with the courts (see *D & J Constructions* at 122–123 per Bryson J, *Effem Foods Ltd v Trade Consultants Ltd* [1998] BCL 77 and *Mallesons* at 373]. These examples are . . . more than adequate to illustrate the difficulty facing any firm seeking to answer a challenge of this kind by reference to an intention to construct a Chinese wall.

Although the Court was unwilling to suggest that a wall could never be relied upon, it identified the guidelines set out by Lord Millett in *Bolkiah v KMPG* as the minimum measures which would need to be in place within a firm. In effect, therefore, the Western Australian Supreme Court dismissed any walls which were created *ad hoc*. As the measures put in place by Phillips Fox were indeed *ad hoc*, an injunction was granted to restrain them from acting further in the case:

[57] This was said to derive from cases such as *Grant v Downs* (1976) 135 CLR 674: 'The rationale of this head of privilege according to traditional doctrine 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 thereby inducing the client to retain the solicitor and seek his advice, and encouraging the client to make full and frank disclosure of the relevant circumstances to the solicitor.'

[58] See *Wan v McDonald* (1992) 33 FCR 491 at 513; *Murray v Macquarie Bank Ltd* (1991) 33 FCR 46 at 49; *Fordham v Legal Practitioners' Complaints Committee* (1997) 18 WAR 467 at 489–90.

> The 'wall' which has been proposed falls . . . short of what is required. Like that in *Bolkiah* it is proposed only to be established *ad hoc*. It will be unaccompanied by any educational programme or procedures of the kind discussed in *Bolkiah*. Nothing has been proposed with respect to monitoring and record keeping and nor is there any proposal with respect to the imposition of disciplinary sanctions.

This decision was reached even though the Court recognised that 'a change of lawyer [would] unquestionably prejudice Fletcher Construction'[59] and that 'Chinese walls [might] become more important as legal talent in particular areas of expertise becomes increasingly concentrated in the "mega-firms".' The justification given was that prejudice to the interests of one client cannot outweigh the fundamental policy considerations of the need to safeguard the proper administration of justice.

Although there were differences between the facts in *Littlejohn v Phillips Fox* compared to those in *Russell McVeagh McKenzie Bartleet v Tower Corporation*,[60] it is the underlying policy considerations thought by each court to be significant which make the two cases interesting. The New Zealand court, whilst accepting that it was important to maintain the integrity of the fiduciary relationship which exists between solicitors and their clients, was strongly influenced by what it saw as the practicalities of modern commercial and legal practice. The Western Australian Supreme Court, on the other hand, was not prepared to compromise the traditional duties owed by solicitors to their clients.[61]

EUROPE

In 1988 the Council of the Bars and Law Societies of the European Union (CCBE) adopted a Code of Conduct for Lawyers in the European Community.[62] It was anticipated that by setting out a common set of rules for lawyers operating across Europe, any difficulties which might arise through lawyers being subject to incompatible regulatory regimes would be overcome. Although the Code applies only to cross border activities, it is hoped that member states will interpret and apply their national rules in a way that is consistent with the Code.

In keeping with this aspiration, some countries have incorporated the wording of the CCBE Code into their national rules. Other countries have not done this, but whilst conflict rules in continental Europe differ as between jurisdictions, they are broadly similar to the CCBE Code. As a broad generalisation,[63]

[59] Phillips Fox had been working with Fletcher Construction on the case for some four years.

[60] For example, the partners in the New Zealand case were working from separate offices, whereas in *Littlejohn v Phillips Fox*, the lawyers would have been in one office. Moreover, in the former case, the law firms were dealing with corporate clients whereas, in the latter, the applicants were private clients.

[61] The merits of each approach are discussed in ch 8.

[62] The Code was revised in 1998.

[63] For further analysis see *Review of Conflicts and Duties In Relation to Confidential Information* (2000), (The City Disputes Panel, London, 2000) at 10.

the regulatory regimes in other European countries are less restrictive than the UK in that:

1. a firm may act adverse to the interests of an existing client without consent unless:
   - the firm acts for that client on the same or a related matter and/or
   - there is a risk that duties of confidentiality might be violated.
2. a lawyer is under no obligation to communicate to a client any information relevant to that client where it is received by the lawyer from another source in confidence.[64]

The position is similar in effect to Article 3.2 of the CCBE Code which also permits lawyers to act in certain conflict situations that are currently prohibited by the Law Society. Article 3 is drafted as follows:

> 3.2.1 A lawyer may not advise, represent or act on behalf of two or more clients in the same matter if there is a conflict, or a significant risk of a conflict, between the interests of those clients.
> 3.2.2 A lawyer must cease to act for both clients when a conflict of interests arises between those clients and also whenever there is a risk of a breach of confidence or where his independence may be impaired.
> 3.2.3 A lawyer must also refrain from acting for a new client if there is a risk of a breach of confidences entrusted to the lawyer by a former client, or if the knowledge which the lawyer possesses of the affairs of the former client would give an undue advantage to the new client.
> 3.2.4 Where lawyers are practising in association, paragraphs 3.2.1 to 3.2.3 above shall apply to the association and all its members.

The CCBE Code differs from the Law Society rules in three respects. First, Article 3.2.1 only prohibits a lawyer from acting for two or more clients *in the same matter*. Thus, whereas solicitors in England and Wales may not act against an existing client on matters unrelated to advice given to that client, lawyers in continental Europe face no such bar. Client consent, whether it be express or implied, is not deemed to be necessary and no guidance is given as to what measures, if any, should be in place to protect the interests of both parties. Second, the Code allows a lawyer to act against a former client provided there is *no risk* that confidential information will be used against the former client for the benefit of the new client.[65] This is impossible under Law Society rules in England and Wales and only possible at law if the very stringent standards set out by the House of Lords in *Prince Jefri Bolkiah v KPMG*[66] are met. Once again client consent is not considered to be necessary and, rather surprisingly, no information barriers are required. Third, by virtue of Article 3.2.2, if a conflict arises between two clients, the lawyer must cease acting for *both*. Law Society rules

[64] This summary is taken from the City Disputes Panel Report, *ibid*, and is based on a survey of the rules in Germany, France, Spain and the Netherlands.
[65] Article 3.2.3.
[66] [1999] 2 AC 222.

are not so restrictive on this point and allow a solicitor to continue to act for *one* party (provided there is not a problem with possession of confidential information provided by the other).[67]

The CCBE Code, however, is less permissive in one respect than the rules adopted in the US and in the Commonwealth countries analysed above. It does not allow clients to give their consent to a lawyer acting in the *same matter* where there is a potential conflict of interest. This seems odd given that the test to be applied when considering whether to act against a *former* client is considerably more permissive than that adopted by the US and Commonwealth jurisdictions since it does not require information barriers to be in place.

The difference between the CCBE rules and UK regulations, coupled with the fact that the national rules of other European nations have a broadly similar effect, has prompted some to argue that the current UK rules make solicitors in England and Wales 'uncompetitive' compared to their counterparts in continental Europe.[68] This is true even where a UK solicitor is conducting cross-border transactions as, although the CCBE Code has been adopted by the Law Society, the extent to which English and Welsh solicitors are liberated from their own more restrictive regulatory regime remains unclear. Practice rule 16, which is set out in chapter 10 of the Guide to Professional Conduct, states:

> In relation to cross-border activities within the European Community, solicitors shall, without prejudice to their other obligations under these rules or any other rules, principles or requirements of conduct, observe the rules codified in articles 2 to 5 of the CCBE Code. . . .[69]

The rules on conflicts of interest are set out in Article 3.2 of the Code. It would at first appear that any solicitor conducting cross-border activities, and faced with a potential conflict, should refer to this Article of the Code. However, in July 1999 the Council of the Law Society issued a statement to the effect that a solicitor will fulfil his obligations under Articles 2 to 5 of the Code by observing the rules of conduct adopted by the Law Society.[70] This, in turn, seems to negate the liberating effect of the Code's generally more permissive conflict rules.

SUMMARY

It is clear that many of the problems confronting law firms and the Law Society in England and Wales are also proving difficult for lawyers and regulators in other countries. Yet it is apparent that other jurisdictions have responded differently to the problems posed.

[67] The Guide, 8th edn, subpara 1 of ch 15.03.
[68] *Conflicts of Interest* (The Law Society, London, 2001) at 59.
[69] The Guide, 8th edn, at 196.
[70] *Ibid*, at 197.

In the United States and the Commonwealth this is most notable in the regulations governing a situation where lawyers are acting for two clients whose interests may on some occasions be in conflict. All the countries examined above allow, in some form or another, clients to consent to lawyers acting in these circumstances. Admittedly the rules are stricter in some countries than others, with the United States being unique in allowing lawyers to act without the consent of the clients if the conflict relates solely to competing commercial interests. The broad principle which has been adopted is, however, the same: the lawyer needs the consent of both clients if he is to represent them both in the one transaction. The European approach, however, denies clients the right to consent to a lawyer acting for both sides in the same matter.

As far as successive representation is concerned, the United States and Western Australia adopt a similar approach to the Law Society in England and Wales in that they prohibit lawyers from acting against former clients where confidential information has been imparted to the lawyer. The maintenance of justice and principles of loyalty to one's client override commercial considerations.

Canada and New Zealand, on the other hand, have allowed themselves to be more influenced by commercial developments within law firms. The Federation of Canadian Law Societies has drawn up detailed rules which allow firms to use Chinese walls so that they can continue to act when lawyers move between firms. New Zealand has not formerly accepted such devices, but *Russell McVeagh* allowed scope for such regulations to be introduced.

Although restrictive in its approach to same matter conflicts, the CCBE Code offers lawyers remarkable latitude when it comes to successive representation. It allows lawyers the freedom to act against former clients without providing *any* notes of guidance on when such behaviour is appropriate.

It would appear somewhat paradoxical, therefore, that the concern over conflicts of interest in the UK has to some extent been prompted by overseas law firms and companies, as it would appear that the regulations adopted by the UK Law Society are considerably stricter than those laid down by its counterparts in other jurisdictions. If the UK rules are stricter than those adopted by other nations, what has prompted such concern by foreign clients with regard to conflicts in England and Wales? Secondly, how are UK law firms to compete on a global scale with their overseas rivals if they are bound by stricter rules?

The answers to both of these questions may lie in the way firms manage conflicts in practice. Concerns may have been raised because, although there are strict rules in place in the UK, firms do not abide by them. This might also account for the fact that, although subject to a highly restrictive regime governing the management of conflicts, the United Kingdom remains one of the world's leading providers of legal services in respect of company and commercial matters.[71] In order to find answers to these questions, the chapters which

[71] *The Guardian*, 7 January 2000.

follow analyse how law firms in England and Wales manage conflicts of interest in practice.

5

Discovering Conflicts: Procedures and Dilemmas

> Identifying and resolving conflicts requires such a huge commitment of time that it's often the subject of breathless lamentation.[1]

INTRODUCTION

AN EXAMINATION of the rules governing conflicts of interest would be of purely academic interest were not solicitors troubled by such matters in practice. This chapter and the two which follow examine the way in which solicitors in England and Wales attempt to deal with conflicts. It will also analyse how the regulatory regime adopted by the Law Society impacts upon law firms.

Before a solicitor or firm of solicitors can respond appropriately to conflicts of interest, let alone apply the rules set out in the Guide to Professional Conduct, a potential conflict must first be recognised. With some firms having well over 1,000 fee-earners and several different offices, identifying a potential conflict may be far from straightforward. Knowing for whom a colleague in a different department or office is acting, or has acted, in each and every transaction would seem an impossible task. This is all the more so when you consider that former clients, and clients of solicitors who have left the firm, must also be taken into account. Yet it is of paramount importance that any potential conflict is dealt with early, as discovering one at a later stage could be costly, embarrassing and time-consuming for both firm and clients. Should a conflict come to light well into a case, the firm in question may find itself fighting off an injunction application from the other party's solicitors, or even defending a negligence action brought by its own disgruntled client.[2] The client, for his part, would have to

[1] See V Slind-Flor, 'Client-Conflicts Patrols March On', *The National Law Journal*, 30 March 1992, p 1.

[2] An example of the embarrassment such a situation can create was seen in two separate cases. In June 1999 *Commercial Lawyer* reported that Sea Containers, a long-established client of Denton Hall, had issued a writ to restrain their solicitors from leaking confidential information. *Commercial Lawyer* dedicated seven pages to the story. The case was eventually settled out of court but it still received wide coverage in the legal press. Similar embarrassment was caused to Dibb Lupton Alsop when it was reported that the firm was being sued for £600,000 over accusations that it acted for both sides in a multi-million pound property finance deal. See *The Lawyer*, (1999) 40/13.

instruct new solicitors and perhaps incur significant expense in acquainting the new firm with all the relevant material. The more advanced the case, the more acute these problems would be.

The matter is further complicated when rule 16.06 is considered.[3] As a solicitor is under a duty to convey to his client all information which is material to the client's interests, regardless of the source of that information, simply being approached and asked to act in a certain matter can create a conflict situation. If, for example, Company ABC intends to make a hostile take-over bid for Company DEF and wishes to use the firm of XYZ Solicitors to act on its behalf, in merely enquiring whether XYZ are prepared to undertake the work, a number of potential conflicts can arise. Should the firm already be acting for Company DEF, or for another client who would be interested to discover that such a bid was being considered, then, in theory, the firm must convey that information to Company DEF. However, the firm would also owe ABC a duty of confidentiality.[4] In these circumstances the only solution available to the firm would appear to be to cease to act for DEF and to decline to act for ABC.

If the above scenario were to occur frequently in practice, clients would understandably be wary of approaching firms of solicitors and, likewise, firms would be in constant fear of being approached by new clients. Perhaps it could be argued that the onus should be on the new client to ensure that the firm of solicitors he is intending to instruct does not act for any of his competitors. This, however, could be a formidable task, depending on the number of those competitors. In any event, discovering which firm of solicitors was acting for which competitors might not be feasible, especially given that law firms are under a duty to maintain client confidentiality.

It might be argued that the person or company asking whether a firm would be prepared to act is not really a client in the strict sense, but rather a 'would-be' or 'prospective' client, who is not owed the same duty of care as an existing client. No guidance is given by the *Guide to Professional Conduct* as to what to do in such a situation.[5] The Guide simply states: 'A solicitor who acquires information on behalf of a prospective client may be bound by the duty of confidentiality even if there is no subsequent retainer at law'.[6] The use of the phrase 'may be bound' is unfortunate here as it gives no indication as to when the rule is applicable. Moreover the matter is further complicated when the wording of the section is considered. Acquiring information *on behalf* of someone would seem to suggest finding out things *for them* rather than being informed of mat-

[3] N Taylor (ed), *The Guide to the Professional Conduct of Solicitors*, 8th edn (Law Society Publishing, London, 1999), Rule 16.06, at 331. Hereafter referred to as 'The Guide, 8th edn'.

[4] With the example given, insider-dealing regulations would also cover any inappropriate action by the firm but the principle still applies and would be applicable to all areas of practice.

[5] Similar difficulties are experienced in the United States. See, for example, GC Hazard, 'Conflict of Two Roles', (1996) 18 *National Law Journal*: 'The rules do not address how much and what kind of information a lawyer can properly obtain from a prospective client, what measures the lawyer is required to take in obtaining the information or what duties devolve upon the lawyer from obtaining the information.'

[6] The Guide, 8th edn, Rule 16.01, note 4 at 324.

ters *by them*. If this is the correct interpretation, solicitors would be bound by a duty of confidentiality to potential clients only where they had gathered information *for* them. Whilst it could be said that *acquiring information on behalf of a prospective client* really means being told something about the client's affairs, the ambiguity in the wording does not assist firms who are faced with a potentially difficult problem.

In practice firms have developed complex procedures for, first, identifying potential conflicts at an early stage and, secondly, ensuring that the firm is not placed in an embarrassing position. As indicated in chapter 1, it is difficult to be entirely confident, on the basis of interviews and questionnaire returns, that the accounts which were provided by my informants fully reflect the range of practices adopted in checking for conflicts. It is possible that some firms exaggerated the extent to which, in practice, conflict checks were undertaken. This is something to bear in mind when considering my informants' accounts of the strategies which they employed in checking whether there was in fact a conflict of interest.

OBTAINING INSTRUCTIONS AND THE CONFLICT CHECK

As has been pointed out, acquiring work from clients is no longer as straightforward as perhaps it once was. One newly-qualified solicitor stated:

> Being a solicitor these days involves obtaining work rather than actually doing it. You don't realise that a lot of our job is marketing and bringing in new work. Even trainees are expected to be doing marketing and attending beauty parades. You are marketers and conflict situations could arise when you are simply going out getting the work.[7]

'Beauty parades' or 'contests' are part and parcel of the work of large commercial firms.[8] Before solicitors are retained on a particular matter, they meet the prospective client and discuss both the case and the firm's capacity to handle the affair. This procedure may then be repeated with a number of different firms until the client is satisfied that he has chosen the appropriate firm for the task.

Tendering is another method of obtaining work. A representative of firm 24 described the process as follows:

> We are asked to submit a tender for work for a particular body along with a number of other firms. As well as considering price, tendering can involve giving written answers to a number of scenarios presented by the potential client.

Scenarios given in the tender can, of course, be hypothetical, but there is nothing to prevent clients from using real-life facts.

[7] Firm 28.

[8] See ES Singleton, 'Beauty Parades—the Legal Issues', (1998) 16(2) PPM 18 and A Sherr and L Webley, 'Legal Ethics in England and Wales', (1997) 1(2) *International Journal of the Legal Profession* 109 at 135.

The potential dangers involved in such procedures were exemplified in the Canadian case of *Ainsworth Electric Co Ltd v Alcatel Canada Wire Inc.*[9] A dispute arose between the plaintiff, Ainsworth, and the defendant, Alcatel, in relation to the installation of a radio communications system for the Toronto underground. Ainsworth refused to proceed further when Alcatel demanded it undertake work which Ainsworth claimed was not part of the contract. Alcatel issued a notice of default in September 1995, and then a notice of termination under the contract in October 1995. In October 1995 Ainsworth instructed Howard Wise, a partner at the Toronto firm of Fraser & Beatty, to act on its behalf. Mr Wise had handled Ainsworth's construction litigation for many years. He began a lien action against Alcatel in December 1995 and subsequently, in January 1996, an action against Alcatel's insurers.

Meanwhile, Alcatel interviewed three firms as part of a 'beauty contest' in order to find lawyers for the anticipated litigation. In October 1995 the project manager of Alcatel and two members of its in-house legal team met two lawyers from the Toronto firm of Goodman Phillips Vineberg. The meeting lasted an hour and a half, in which time the Alcatel representatives claimed to have disclosed confidential information regarding the dispute, in particular their proposed defence. A second meeting was held five days later which also lasted 90 minutes and, again, Alcatel's representatives alleged confidential matters were discussed. Shortly after this meeting Goodman Phillips Vineberg were informed that they would not be instructed.

Two years later, Howard Wise left Fraser & Beatty to join Goodman Phillips Vineberg, taking the Ainsworth account with him. Potential conflicts were checked but, as no file had been opened, Goodmans had no record of the Alcatel interview and, therefore, no conflict became apparent to them at that stage. Alcatel's solicitors wrote to Goodmans reminding them of the meetings and alleging that confidential information had been disclosed to the firm. Mr Wise stated that he had not discussed the matter with the members of the firm who had taken part in the beauty parade and, at the same time, he arranged for a Chinese wall to be erected. Alcatel shortly afterwards changed solicitors and applied to the court to have Mr Wise and Goodmans removed from the case.

The judge held that a solicitor-client relationship existed between Goodmans and Alcatel, even though Alcatel had merely been 'shopping' for a firm, and that, therefore, Goodmans owed Alcatel a duty of confidentiality under the Canadian Law Society's rules of professional conduct. Moreover, it was held that the firm, through its representatives at the meetings, had received confidential information from Alcatel which was relevant to the dispute. The information was, however, said to be of a general nature, and no documents had ever been disclosed. Since documents are a necessary part of cases of this type, Goodmans would not have learned much about the critical facts and it was held

[9] Unreported, handed down by Master Sandler on 13 May 1998. [1998] OJ No 2101. See also *BF Goodrich Co v Formosa Plastics Corp*, 638 F Supp 1050.

that no confidential information prejudicial to Alcatel had been imparted. This, combined with the fact that Mr Wise had erected a Chinese wall as soon as possible, and that this appeared to be secure, led the judge to conclude that Mr Wise could continue to act for Ainsworth.

Whilst the outcome in this instance was fortunate for the firm of Goodman Phillips Vineberg, the case illustrates that merely trying to obtain work can create a conflict.[10] As one solicitor observed to me:

> Spotting potential problems is not something that you are given training on or taught about in law school.[11]

Another problem associated with obtaining new instructions is the danger of what has become known as 'taint shopping'. This describes 'the behaviour in which someone purporting to be seeking legal assistance interviews a lawyer or law firm for the purpose of disqualifying them from future adverse representation.'[12] Firm 19 had experienced difficulties of this nature. As one partner recalled:

> We have one highly specialist department and you will get people phoning up for five minutes of advice knowing that this will then bar the firm from acting for their competitors.

Various methods have in fact been adopted to avoid a conflict or potential conflict. Firms reported that the first task to be undertaken before any fresh instructions are taken from a new or existing client is a procedure which they referred to as a 'conflict check'.[13] Ideally this process should be completed before any detailed information, beyond that necessary to conduct the check, is acquired by the firm. Initially, therefore, all that should be done is 'to make a list of names, because you have to find out from the person instructing you the names of all

[10] For a discussion of this case see LA Belasco, 'Conflicts of Interest', *The Practical Lawyer*, December 1990, p 12. Firms in other jurisdictions have not been as fortunate. See, for example, *Bridge Products Inc v Quantum Chemical Corpn* No 88C 107B4 (ND III, Apr 30, 1990). In this case, the court held that a law firm was under a duty to inform a prospective client at the initial interview that the meeting was preliminary and that the confidences disclosed during the meeting could not necessarily be protected.

[11] Firm 28. Lawyers' ethics are considered in detail in Ch 8. This view has been echoed elsewhere. See, for example, *Commercial Lawyer*, 33 June 1999: 'The training of young solicitors has never emphasised professional ethics. Richard Linsell, a partner at Rowe & Maw, comments: "You pass all your law exams and then somebody says to you: By the way, here's your professional code".' Some improvements have been made recently in respect of training for new solicitors and barristers. The vocational stage training for both now includes professional conduct as a pervasive topic, see also A Boon and J Levin, *The Ethics and Conduct of Lawyers in England and Wales* (Hart Publishing, Oxford, 1999) at 160 and J Webb, 'Conduct, Ethics and Experience in Vocational Legal Education: Opportunities Missed', in K Economides (ed), *Ethical Challenges to Legal Education & Conduct* (Hart Publishing, Oxford, 1998) at 271 *et seq*. Ironically, this may mean that trainees joining a firm may be more familiar with the rules on conflicts of interest than senior members of the firm.

[12] GC Hazard, above, at n 5. See also n 16, ch 4.

[13] If the client is new to the firm, confirmation of his identity must also be obtained before any work may be undertaken in compliance with money-laundering regulations. See further, The Guide, 8th edn, Rule 3.16, at 84, Rule 16.07, at 333 and the accompanying commentary.

those actually involved in the transaction.'[14] One firm reported that they had a specialist unit dedicated to this task,[15] another that they had designated conflict officers,[16] but in over three-quarters of the firms interviewed any check would be carried out by the fee-earner who had been approached on the matter.

Once the necessary information has been gathered from the client, it is then meant to be checked against information held by the firm concerning existing and former clients. This process is commonly referred to as a 'client check'. Procedures for carrying out such checks varied widely between practices, with some firms reporting that the process could take up to a day to complete.[17] Some firms have a specially-constructed database containing all necessary information and say that the client check can be completed at the fee-earner's desk. One firm described the system as follows:

> The firm is quite highly computerised and anyone sitting at a desk can check whether we have—historically, from a specific date when computerised records were kept—done anything for that client.[18]

Those firms which did not possess such a database relied heavily on communication with colleagues in the firm to establish whether there might be a problem. One explained: 'E-mail is the quickest way of getting around and we quite regularly get e-mails asking about specific situations and clients.'[19] Some firms used both methods for conducting the search: 'We check the marketing database, the accounts database, and we also have a national e-mail checking system.'[20]

In the main, firms with computerised checking systems were large organisations with fee-earners and offices in several countries.[21] National firms also employed a database system to cover all their offices.[22] On the other hand, firms which handled litigation work in specialist fields tended to rely on electronic mail when checking whether there was a conflict. Firm 16 illustrated this practice:

> We are a niche firm dealing with insurance litigation. Because of the very nature of litigation, that is one side against the other, it is pretty apparent if you have a potential conflict. For example, a building collapses and it's either the fault of the architect or the engineer. They will both have insurance for professional negligence and they will both go to their insurers who will want to instruct lawyers renowned for construction work. Whichever insurer gets in touch with us first will be taken on as a client and then, if the other comes along, it is obvious that we cannot act. As most insurance companies are dealing with individual facts with each new claim, it makes it easy for

[14] Firm 14.
[15] *Ibid*.
[16] Firm 30.
[17] Firm 29.
[18] Firm 18.
[19] This situation is more common amongst the smaller firms with fewer fee-earners.
[20] Firm 23.
[21] Firms 14 and 29 are typical of this type of firm and both have highly computerised systems.
[22] For example, Firms 30 and 23 adopt this approach.

> us to spot a conflict and, therefore, we do not need a very complicated computer system to identify a conflict.

This, what might be termed more simplistic approach to identifying conflicts, raises the question of how such firms ensure that they are complying with rule 15.02 of the Guide. This rule states that if a firm has acquired relevant confidential information concerning a former client, the firm must not accept instructions to act against the client. Having acted for X insurance company against Y insurance company in one case, should a firm then accept instructions to act against X? Firm 16 responded to this question as follows:

> I suppose you could dress it up as a conflict if, for example, XYZ insurance company were to say: 'You can't act against us because you know what makes us tick'. But it doesn't work like that, because in the context of XYZ insurance company having an architect and ABC insurance company having an engineer . . . cases are dealt with on their merits and, by and large, one is looking to see whether the architect was negligent or whether it was the engineer. Clearly, I suppose you could get to know individuals within the insurance company and know who was the claims handler for the case. You will know whether he is bullish by nature or wet. But you would be hard-pressed to determine an insurance-company-wide policy for particular issues. It doesn't, therefore, give rise to problems. If British insurers all got together and decided that they were going to object to the fact that we are a happy band of taxi drivers who will happily go to whoever appoints us first, then, they could probably make a case of it at an intellectual level. But nobody ever has, because they would probably lose out. Apart from anything else, it is very difficult to police, because when a writ comes in with, as is often the case, four or more defendants, determining whether you have actually ever acted for the first, third, fourth and fifth is bad enough—let alone trying to get behind the scenes to see who their insurers are. People won't tell you who their insurers are. So it is only in the fulness of time that it's eventually smoked out that they're insured by XYZ. More often than not, you never find out because people tend to keep that thing quiet. Moreover, it doesn't matter because insurance companies never act in a consistent manner. They are in a litigation environment, so they don't want to be consistent.

Whilst a simple method of name-checking will uncover the most obvious difficulties (for example, that one of the parties in the dispute is or has been a client of the firm), it will not reveal any underlying conflicts. It may be that although there is no conflict between the would-be client and the other parties to the case, the transaction itself would create a potential conflict. For example, the name check will not reveal if there are subsidiary companies involved, or if the transaction itself would be of interest to an existing client of the firm. Perhaps an existing client has considered bidding for the company or piece of land in question. It was for this reason that some firms reported that it was necessary to run a second check, commonly referred to as a 'matter check'. Firm 30 described a matter check as follows:

> The most important thing to do is to obtain as much information as possible from the new client concerning the proposed transaction. For example, get all the names of the

> parties involved even if they are not directly relevant to this piece of work. Find out who is financing the deal. If you are dealing with a company, you also need to make a list of their subsidiaries. You then type all the relevant names into the computer, and see what it comes up with. It may be the case that the new client wishes to make a bid for Smith and Jones Limited and, when you type that into the computer, you may discover that your colleague has been instructed by a third party to make a take-over bid for Smith and Jones.

Discovering conflicts at this level is certainly not easy. As one solicitor put it: 'The system for checking transactional conflicts is only as good as what the fee-earner can think of at the time.'[23] Often, verification was sought from colleagues that there would be no difficulty in acting for a particular party in a particular matter. As one firm described: 'We just put around a straight e-mail which says: Any problems in acting for ABC against XYZ?'.[24]

In addition to undertaking a client and matter check, many firms said that they also considered at this stage whether there was a 'commercial' or 'business' conflict. A client-and-matter check encompasses all those instances where, as firm 15 put it, 'the Law Society would take a dim view of a firm acting.' In other words, this is a strictly 'legal' conflict. Commercial conflicts, on the other hand, included circumstances where a firm would not deem it to be in its interests to act lest another major client remove its account, or perhaps a prospective client would be deterred from instructing the firm.[25] As one senior partner put it:

> We would deem it not in our interests to act for one client because a major client of ours would be so cheesed off with us acting that he wouldn't give us any more business.[26]

Many firms observed that they regarded commercial conflicts as their primary consideration in deciding whether to act. Indeed, some firms appeared uncertain as to what was meant by the term 'conflict of interest', addressing their thoughts solely to commercial considerations.

THE FRUSTRATED CLIENT

Where there was a commercial conflict, firms claimed that more often than not the matter was taken no further and the prospective client turned away. Sometimes a conflict check was not even undertaken as the firm simply said that it was not its policy to act against certain bodies, for example, insurance com-

[23] Firm 24.

[24] Firm 15.

[25] *Commercial Lawyer* reports that 'this distinction between "real", "legal" and "commercial" conflicts is widely held both here and in the United States'. Above at n 2. The two categories were defined slightly differently. 'Real' conflicts were said to include 'disputes and litigation' whereas 'commercial' conflicts were defined as 'more generally competing interests, and commercial competition'.

[26] Firm 15.

panies or health authorities.[27] This blanket refusal to act against certain bodies can create problems for some would-be clients. An example drawn from personal experience arose when a group of university lecturers was seeking to claim unfair dismissal against their employer and sought to instruct a large regional firm to handle their claim. They were informed by all major practices in their area that 'conflicts of interest' prevented their taking on the case. It appeared to the lecturers concerned (all of whom were qualified solicitors) that there was no legal conflict for the majority of firms but rather that a policy decision had been taken that this was a commercial conflict. In order to obtain the type of representation they required the lecturers were driven to instruct a London practice—an option which was more costly and time-consuming.

Most of the firms which admit to adopting a blanket policy of refusing to act against certain institutions are well-known in their field.[28] It may be suggested, however, that to allow solicitors to 'pick and choose' the clients for whom they wish to act is ethically dubious as it could result in certain members of society being unable to obtain legal representation. One proposal would be to operate a 'cab-rank' rule for solicitors, but, as has been highlighted elsewhere,[29] barristers likewise place commercial considerations before the principle that they should accept every piece of work offered to them. This is despite the so-called cab-rank rule.

Problems can also arise for those clients who spread their legal work amongst different firms. Client A highlighted the difficulty in obtaining specialist legal advice in certain fields:

> We pick and choose lawyers for particular transactions to try to ensure that we instruct a specialist each time. We are not loyal to one particular firm because we are looking for the best lawyer in the field. This approach can be problematic in some areas, for example competition law, as it is often difficult to find a firm with sufficient expertise that has not previously worked for one of the other companies involved. As a result, we are often forced to use our fifth or sixth choice of lawyer and we then end up feeling that we are getting second-class advice.

ENSURING CONFIDENTIALITY FOR WOULD-BE CLIENTS

A straightforward client-and-matter check cannot be used in circumstances where merely to ask whether a firm can act in a particular matter creates a conflict of interest. Only the very large firms are affected by this type of problem.[30] One way of handling this situation, especially when dealing with sophisticated clients, such as merchant banks, is for the firm to be given a list of six or seven names and asked whether there would be a problem in their acting against any

[27] Firm 16.
[28] See K Economides (ed), n 11 above at 241.
[29] See A Boon and J Levin, above at n 11 at 182.
[30] For example, firms 14, 15 and 29.

of the names on the list. A conflict check would then be carried out in respect of each name. Should there be a problem in acting against any of the names, the bank would be informed. It would then instruct another firm, or else continue if the 'true' name on the list did not reveal any difficulties. If, after a particular name had been identified, the merchant bank said that it was going elsewhere, the firm would inevitably know which of their existing clients was to be the subject of some action against it, say a take-over. One senior partner described this procedure as follows:

> We often get phone calls from a merchant bank [which] says I'm going to name three companies to you and I want to know whether there will be any difficulty in your acting in a hostile way as regards that company. I say, no problem with the first two. If the bank then says you'd better forget we had this conversation and I'm now going elsewhere, I know that the third is in the frame for the bid. My client would be fascinated to know that someone was actually contemplating a bid for them . . . But life can't work unless the merchant bank can ask me the question 'Are you free to act?' I have to say that the fact we had this conversation rests with me and I will tell nobody, not even any of my partners, because one of my partners is very close to that company and there's the danger he might go skidaddling off to them . . . So, when the book [that is, the Guide to Professional Conduct] says that information held by the firm which would be of value to a client must be passed to the client or turned to the account of the client, we ignore it because it can't be done.

Several firms adopted this practice, that is, relying on the fee earner approached to keep any information gleaned from a prospective client to himself, in the frenetic circumstances which obtained when Barings Bank collapsed. Firm 15 described the events as follows:

> Mr. Leeson was arrested and Barings went under on a Friday night. There were a hundred and one people ringing in to every City firm and people were being rung up in the middle of the night. The way all firms dealt with it was to say to people ringing them up: '(1) You'll have to take a risk and (2) You'll have to rely on me to keep what you tell me confidential. We can't find out now whether there is a conflict but I will find out in the next day or two. You won't find anyone who is ready to give advice immediately. So you'll just have to take the risk that we may have to turn you away after a couple of days if we find we have a conflict. But what I learn in those couple of days, I will keep to myself and not pass to my partners.' Everyone had to proceed on that basis because of what had happened and the fact that it was all going on too quickly.[31]

By acting in this manner firms have developed a system to deal with an area of practice which they perceive to be inadequately covered by the Guide. In effect what seems to happen is that a 'wall' is erected between the partner receiving the information and the rest of the firm, following which the information is deemed not to have become the knowledge of the firm. Theoretically, once the conflict is discovered, the firm should cease to act both for the existing and the would-be client. However, firms stated that this would be unworkable and would cause

[31] For a more detailed analysis of how firms coped with the collapse of Barings see below at 125.

them to lose a substantial amount of business. They maintained that they offered maximum possible protection to the would-be client by not passing the information to anyone else in the firm. It is perhaps a little worrying that the senior partner quoted above felt that he should not tell his partners of the query as he could not trust the partner closest to the client not to divulge information. This raises the question of whether a Chinese wall can ever be effectively maintained within a firm because, to a certain extent, the system is based on trust.[32]

It might be argued that the would-be client receives less protection in this instance than he would if the firm were to act in a direct conflict. This is because he has only the undertaking of the partner that the information will not be divulged. There is still the chance of accidental leakage and, should this happen, it may be difficult—depending on how many firms the would-be client has approached—to establish the source of the leak.

PROTECTING CLIENTS' IDENTITIES FROM COLLEAGUES

There can be circumstances in which a fee-earner does not wish his colleagues to know the identity of one of his clients. Such secrecy is usually required in highly sensitive cases or, as one solicitor put it, 'where we need to keep the element of surprise, such as a hostile take-over, or if the client doesn't want anyone to know what he is up to.'[33] Sometimes a firm may be involved in a project which is so sensitive that only the senior or managing partner and the fee-earners directly involved in the matter will know about it. In these circumstances a conflict check in respect of other matters will not reveal the necessary information because the names and parties involved in the 'secret' project will not be on the database. Such highly confidential information will be kept in a file to which access is severely restricted, perhaps referred to as a 'black book' or 'black box'. Firm 29 outlined what happens in these circumstances:

> Should someone in the firm complete a conflict check and information contained in the black book be relevant to them, they will be told that there might be a problem. No reasons would be given but an independent third party, usually a senior or managing partner, would act as a go-between for the fee-earners involved and would establish whether there was an actual conflict without revealing any information to either side.

Thus, once again, firms relied on individual members to keep confidential information acquired from prospective clients to themselves.

[32] See below at ch 7.

[33] Again, it is usually only the larger commercial practices which must maintain secrecy within the firm, as it is these firms which undertake such work.

EVALUATING THE DATA

The volume of data produced by these various search processes can be substantial, especially where many different parties are involved. Much of the information may prove irrelevant, but where there is or may be a potential conflict, the matter must be considered further. As has been demonstrated above, the procedures for checking conflicts vary from firm to firm, and this determines the amount of data collected. Larger practices have elaborate databases, enabling them to use complex search engines, whereas smaller firms rely principally on direct communication between fee-earners. However, computer technology is still relatively primitive in the sense that most systems will search only for specific names that are typed in. If a name is missed off the search, or entered incorrectly, there is no guarantee that a potential conflict will be identified. Many firms, therefore, will circulate a list of new clients and matters to all fee-earners. In addition, as electronic mail is not a completely reliable way of ensuring that all members of the firm have considered the necessary information, some firms have regular meetings where new cases are considered.[34]

Firms acknowledged that they may have been caught out on some occasions, but by and large they claimed that the procedures in place worked well for everyday transactions. Firm 14 was typical in claiming:

> The system for identifying a potential conflict has to be good because otherwise firms would get into trouble if they started acting for a client and there was an actual conflict. Most potential conflicts are identified before we agree to act for a client.

SUMMARY

One could be forgiven for imagining that identifying a potential conflict would be straightforward and that the difficulty would come when a firm was deciding whether to act in a potential conflict situation. However, as this chapter demonstrates, the initial check may be far from simple. Difficulties can arise at several stages in the process. Larger practices encounter the greatest difficulty as they have a substantial client base and a great many fee-earners.

Whilst all the firms interviewed were aware of the need to address conflicts of interest and had devised some method of identifying potential conflicts, the degree of computerisation varied, depending on the size and nature of the firm. It was usually the case that the bigger the firm, the more technical support there was available to fee-earners. Larger practices, with commercial and banking clients, have complex systems in place and may need to carry out more than a simple client-and-matter check. Nonetheless, smaller firms did not appear to be

[34] Firm 17 and Firm 20. Sometimes it may purely be the case that the firm would be embarrassed by taking on a particular matter as it would attract a great deal of media attention.

obviously disadvantaged in this respect. It could even be said that smaller firms found it easier and quicker to highlight potential problems as their client base was not as extensive, making it easier for them to consult colleagues.

However, the way in which conflicts of interest are handled at this preliminary stage does not merely reflect the quality of the computerisation within a firm. The establishment of an efficient system for identifying potential conflicts does not assist a firm which encounters problems merely as a result of being asked whether it can act for a certain client. It was the larger firms which experienced this type of problem. They claimed that if they followed the Guide to Professional Conduct to the letter they would not be able to function. Accordingly they said that they had developed their own systems for handling the problem. But in creating a 'wall' around the partner who has received the information from the would-be client, firms are dependent on the trustworthiness and integrity of the individual concerned. In effect such firms are operating a system of mini-Chinese walls in order to minimise the risk that they will be required to cease to act for an existing client.

It is difficult to determine, on the basis of the interviews which I conducted with firms, whether client interests are being safeguarded by means of these devices. It would have been necessary to undertake a different kind of empirical study, one involving access to firms' handling of specific cases, in order to verify some of the statements made to me. That having been said, little consideration appears to be given to ways in which the amount of information received can be limited at the initial point of contact with the prospective client. Some US firms, for example, train secretaries and receptionists to limit the amount of initial information acquired (confined to the identities of the parties and a short description of the case) when a potential client contacts the firm.[35] As this information is usually taken over the telephone, a preliminary conflicts check can be made before any other meeting or conversation with the potential client. In this way the check can be carried out before a significant amount of information is acquired by fee-earners.

Two firms reported that they took the responsibility for the initial conflicts check out of the hands of the fee-earners involved in the case. By appointing an independent person or a team of people to investigate possible conflicts, these firms were effectively by-passing rule 16.06 completely, as the person carrying out the check was not necessarily a member of the partnership, or even a qualified solicitor. As the information was not passed to any of the partners, would-be clients were presumably advised that their affairs remained strictly confidential. Such an approach would also appear to avoid the difficulty which arises when one partner has information which he must not divulge to another partner. As the time pressures on fee-earners in practice today are considerable, it could, at least in theory, ensure that situations similar to the one outlined

[35] See SP Shapiro, *Conflicting Responsibilities: Manoeuvring Through the Minefield of Fiduciary Obligations* (American Bar Foundation, Chicago, 1995) at 13.

above are dealt with satisfactorily. However, this may not be practical for small firms. There is also a more fundamental consideration, which is that it is difficult to conceive of any person working within an organisation remaining entirely 'independent' and unaffected by the firm's own commercial interests.

Many of the concerns raised over the effectiveness of firms' procedures for identifying conflicts of interest could perhaps be ameliorated by clearer guidance from the Law Society. It is doubtful, however, whether an effective system of mandatory checks could be devised which would ensure that *all* potential conflicts were identified before any information has been transmitted to a firm. As has already been pointed out, no matter how effective the firm's computer system, the check is still dependent on the fee-earner obtaining the necessary information from the client. This is not to say that the Law Society could not draft guidelines which highlighted the need for caution when taking on new instructions and identified the minimum safeguards which should be in place.

Although it has been demonstrated in this chapter that the problems faced by firms depend to a great extent on the nature of their practice, it is clear that solicitors are in general aware of the need to discover a conflict as soon as possible. It is at the next stage—namely, deciding what is to be done about the conflict—that clear differences emerge.

6

The Decision Whether to Act: Procedures and Interests

INTRODUCTION

WHILST SYSTEMS exist to enable fee-earners to highlight potential conflicts at an early stage, it is a far more complex matter to decide on the action to be taken once a problem is identified. Not only may a firm's conception of what amounts to a conflict be different from that of the Law Society, commercial factors may also come into play.[1] Firm 30 provided an example of some of these complexities. First, conflicts can create tension between individual fee-earners within the firm:

> Certain partners will guard their clients zealously and if you identify a potential conflict in relation to one of those clients, problems can arise. If the firm can either act for the new client or for your colleague's established client on a particular matter, even if the established client has only instructed the firm for a small proportion of their legal work over the last four years and the new client is bringing in a sizeable piece of work, your colleague may not be happy about upsetting his client. He will therefore oppose any decision that is made about the conflict. The result is that neither of the partners will want to give up their client, each arguing that the other should be 'conflicted out'. A decision will have to be reached as to whether we can accommodate both partners' wishes and, if not, which client should be turned away. Conflicts can therefore sometimes create bad feeling between the fee-earners and no-one is keen to upset colleagues or turn their own clients away.

Secondly, deciding whether to proceed can involve a commercial calculation. The firm may need to weigh up the value of the business it will lose if it refuses to act against the chance that a complaint will be made in the future. At the same time it must take into account the views of the prospective client. Firm 30 was one which made this point:

> Reaching a decision is more often than not the culmination of several different balancing acts. On the one hand, you have to consider how much business you are going to lose if you turn down the work. On the other hand, you must calculate the likelihood of the other side challenging your right to act should they object to the potential

[1] For example, *The Lawyer* has reported that 'Most US banks take a very negative view of any law firm that acts for them issuing proceedings against them on behalf of another client.'—'Freshfields rocked by US bank snub', (1999) 47 *The Lawyer* 1.

> conflict. The decision is even harder to reach when your client is adamant that they wish you to represent them.[2]

It seems, therefore, that the decision to act involves much more than a consideration of the legal position. The interests of individual fee-earners may need to be taken into account, as well as the overall risk for the firm. All this is rendered more complex because the one term 'conflict of interest' may cover a range of circumstances. In the questionnaire issued to firms, the term 'potential conflict' was used. No definition of conflict was given and thus each firm provided answers based on their own understanding of the issues. As it turned out, conflicts identified by fee-earners in the search process can be divided into five categories.

1. Direct Conflict

A direct conflict of interest can arise either by clients directly opposing one another or because clients have directly competing interests. For example:

Partner A has always acted for both Tom and Jerry. A dispute arises between Tom and Jerry and both clients instruct the firm to handle the matter.[3]

* * * * * * *

Monarchs Forever Ltd wishes to sell a large section of its business. It decides to conduct the sale by holding a quasi-auction and invites offers from potential purchasers. The twenty bidders closest to the required price are asked to bid again. The process is then repeated until there are only two remaining bidders. The rival bidders instruct the same firm to prepare the bids.

Where there is a direct conflict between two or more clients, the firm may wish to consider whether there is any way in which it can accommodate the needs of both. If, however, it is considered inappropriate to act for both clients, perhaps because they are in direct conflict (as in the case of Tom and Jerry), a choice will have to be made as to which client will be turned away. This decision may involve a calculation as to which client will bring in more work for the firm in the future. It may even be the case that the firm has to evaluate whether it is appropriate to act for either client, as it may be in possession of confidential information relating to both. On the other hand, if both Tom and Jerry are

[2] M Mullally, 'How Olswang got its signals crossed', (2000) *5 Legal Week* 10: 'A combination of intense competition for the third generation licences and a shortage of telecoms law expertise created a scramble for advisers. Olswang tried to act for two bidders, but it was an unhappy experience for the firm.'

[3] The hypothetical examples given are entirely fictional and are in no way connected to real-life people, firms or clients.

happy for the firm to act for both parties, the likelihood of the one or other of the them complaining at a later date may be considered minimal.

Similar considerations apply where the rival bidders are involved. If one party wins the bid, the other may feel aggrieved and consider complaining because the firm acted in a direct conflict. Yet the 'conflict' in these circumstances may be assessed differently by the firm given that the clients are not suing one another. It may, therefore, be feasible to act for both sides should they each consent.

2. Potential Conflict

A potential conflict is the term generally used when the search process has produced a name or a fact which must be investigated further. For example:

A firm is instructed by a new client, Monica's Models Ltd, to issue proceedings against Starr Incorporated. The conflict search has brought up Monica's name in relation to a case being dealt with by a partner in a different department on behalf of Jones & Co.

The relevant considerations in this type of conflict are even more complicated. The fee-earner has no way of knowing whether there is a conflict without investigating the matter further. It may simply be that Monica's name has come up in the search because the firm had considered using Monica's managing director as a witness in the proceedings involving Jones & Co. Alternatively, the fee-earner dealing with Jones & Co may have information about Starr Incorporated because Jones & Co are involved in litigation against Starr's subsidiary company, Clinton Incorporated. The fee-earner carrying out the search would have a fair idea of the facts in relation to Monica's Models Ltd, but in order to establish whether there was a conflict, the partner acting for Jones & Co would have to reveal certain information to him. At that point, should there be a conflict, information has moved within the firm. Not only may it then be too late for measures to be taken to enable the firm to act for both clients, but the firm may also have to turn away both Monica's Models Ltd and Jones & Co.

3. Common Goal Conflict

If several parties wish to put together a deal, each will have the same overall objective in the sense that they all wish to complete the proposal successfully. Their interests may nonetheless be different. Moreover, although all are amicable at the beginning of the project, a dispute may arise at any stage.[4] Should they

[4] See further OJ Sloane, 'Serving Two Masters May Jeopardize Client Interests', *National Law Journal*, 25 November 1996, p B7: '. . . a lawyer's professional judgment or ability to pursue all courses of action may not be compromised in situations in which one or more equally sophisticated

jointly approach a single firm to handle the matter for them, the firm is placed in a potential conflict situation. For example, say a new motorway is to be constructed in Eastern Europe. A firm is instructed by the bank financing the project, the bondholders putting up the bonds to create the security documents and the main constructor. All wish to use the same firm to complete the necessary documentation.

An assessment of all the relevant considerations is not easy in these circumstances. Deciding whether the firm should act for all the parties may involve judging the likelihood of their falling out.[5] This, in turn, may reflect the ease or difficulty of the project. However, even with the most straightforward project, problems can occur. The firm may risk this on the understanding that they will have to send one of the parties elsewhere if a major dispute arises.[6] Again, the decision may not be easy if the work would produce good income for the firm.

4. Confidential Information Conflict

If, somewhere in the firm, there is confidential information received from one client which may be relevant to another client, the firm may find itself in a conflict situation. Three examples may be given:

Last year a firm acted for BSE Ltd in a dispute with Herd & Co. The dispute was settled amicably and the firm has carried out no other work for them since. Now Heifer & Sons have instructed the firm to act against BSE.

* * * * * * *

A firm is acting for John Brown in a dispute with Wood Enterprises. Wood is represented by the firm of Wallis Williams and Partners. Two weeks' before the case is due to be heard, Robert Gibbs, a former partner at Wallis Williams, starts work at the firm representing John Brown.

* * * * * * *

clients are looking to the lawyer either to act as the scrivener of an agreement the parties have reached themselves or to present the various options from which the parties can choose.'

[5] J Flintoff, 'What Conflict?', *Legal Business*, March 1997, p 39: 'Every so often, the suggestion comes from clients. They actually ask law firms to take more than one role on a transaction, in a bid to keep down the overall cost of the deal. "One benefit of using a single firm is that you will get some economics" reports one banker. And a non-lawyer at a leading trustee company adds, "if there is only one firm, the co-ordination with the documentation all in one place—that expedites the transaction." ' See also *The Lawyer*, Editorial, 'Clifford Chance denies conflict of interest charge', 18 March 1997, where Clifford Chance's managing partner, Geoffrey Howe stated: 'These are not private clients but sophisticated institutions. They realise that transactions can be done more cheaply with one firm.'

[6] See further, SP Shapiro, *Conflicting Responsibilities: Manoeuvring Through the Minefield of Fiduciary Obligations*, (American Bar Foundation, Chicago, 1995).

Partner X is acting for ABC Ltd in a contractual dispute with Read UK Ltd. Partner Y, in a different department, is advising the Bright Books Company in an entirely separate matter. During the course of the case, partner X receives information from ABC Ltd which would be of interest to Bright Books.

In the first of these examples, even if the firm thinks that it has no relevant confidential information, it will have to consider the chances of BSE Ltd complaining about its decision to act. This is a valid consideration because the firm does not want to involve Heifer & Sons in the additional expense and inconvenience which would be involved in fighting off an injunction. On the other hand, the firm may be in possession of relevant information gained from BSE but believe that as the information was given to partner X, whilst it is partner Y who will be dealing with Heifer & Sons' case, it will be able to act.

A similar difficulty arises in the example involving John Brown. It is quite possible that Robert Gibbs was not involved in the Wood Enterprises case when he was employed by Wallis Williams and Partners. However, should he have been involved, John Brown would not be pleased to have to instruct new solicitors so close to the trial. The firm might, therefore, risk continuing to act for him, at the same time taking measures to ensure that Robert Gibbs has no contact with the staff working on the case. There would always be the danger, however, of Wood Enterprises bringing an action to prevent Wallis Williams from acting.

In the final example, Bright Books may complain if they discover that the firm obtained information which was relevant to them but was not passed on. On the other hand, ABC Ltd may fear that there is a risk of the information passing within the firm. Again, one or other client may have to be turned away. The question then would be, which one. Neither partner will want to lose his client. If Bright Books is more profitable and the firm decides to continue to act for them, there is a risk that ABC will contend that the firm should not act.

5. Commercial Conflict

As we saw in the previous chapter, a commercial conflict encompasses all those situations where firms believe it would not be in their long-term commercial interests to take on work when this might upset an established client.[7] For example:

[7] See above at 102 and OJ Sloane, n 4 above: 'The sales pitch to a potential client may elevate the indirect conflict of interest to a benefit. The lawyer could convince the client that he or she should be represented by that lawyer because the lawyer has an excellent relationship with the other side, has represented the other side or is a personal friend or business associate of the chief executive or principals of the other side. The other party may in fact have even recommended the lawyer to the client, which the client takes as an endorsement of the lawyer or as an implied or actual threat that to fail to engage that lawyer will result in the clients getting a less desirable deal from the other party.' See also D Arthur, 'Building on the Great Wall of China', *Legal Week*, 22 July 1999, p 23: 'Clients often target specialist firms because of the perceived benefits in using a firm with industry-wide clients. The lessons learned while acting for one client can be passed on to others.'

A firm is held on retainer by a large and well-known enterprise called Blair & Co. In the last four years, the firm has carried out 10% of Blair's legal work. Smith Ltd., a competitor of Blair & Co, approaches the firm with a profitable piece of work. The firm knows that if they accept work from Smith Ltd, Blair will never instruct them again.

Again, a judgement as to whether in the long run it would be more profitable for the firm to stay with Blair & Co will have to be made. Pressure is likely to be brought to bear on the decision-maker from the fee-earners in charge of the Smith and Blair accounts.

CLASSIFYING CONFLICT

It may be helpful at this point to review the different means of classifying conflicts which have been employed to date. Essentially there are four. Conflicts can be classified by reference to:

1. relationship, as defined by the Law Society;
2. temporally, as defined by Glover;
3. subject matter, as defined by Finn;
4. subject matter, as defined by my informants.

All four classifications have something to commend them, but there is potential confusion because each is arrived at without reference to the other. So far I have not attempted any cross-reference to the different modes of classification. In summary the classifications are as follows:

i. Law Society Classification

The Law Society distinguishes conflicts simply by reference to whether the conflict of interest is between solicitor and client or between one client and another:

1. solicitor/client;
2. client/client.

ii. Glover's Classification

Glover offers a temporal classification:

1. simultaneous representation conflicts;
2. successive representation conflicts.

iii. Finn's Classification

Finn defines conflicts by reference to subject matter:

1. same matter conflicts;
2. former matter conflicts;
3. separate matter conflicts;
4. fair dealing conflicts.

iv. Solicitor Firms' Classification

In interviews with me, representatives of solicitor firms described their experience of conflicts in a way which invited the following classification:

1. direct conflicts;
2. potential conflicts;
3. common-goal conflicts;
4. confidential-information conflicts;
5. commercial (or 'fair dealing') conflicts.

The Law Society's classification does not take us very far in distinguishing different conflict types. Solicitor/client conflicts, whilst important, do not figure largely in this analysis as I am not concerned with conflicts which arise between solicitors' personal interests and those of their clients. The Law Society places all other conflict types within the one category, labelled client/client conflicts.

Glover's analysis divides the Law Society's client/client category into two. This is on the basis that either the solicitor's duties to two or more clients come into conflict simultaneously, or the duty the solicitor owes one client precedes the duty to another client. This classification does not distinguish between the many different forms of simultaneous and successive representation conflict.

Finn, on the other hand, focuses upon the nature of the conflict—first, the conflict may be one which concerns the solicitor's own personal interests; secondly, it may concern parties who are involved in the same transaction; thirdly, it may arise because the firm is representing different parties in different transactions who have information relevant to one another; fourthly, the conflict may arise because the firm has information concerning a former client and is now asked to act against that client.

My informants, on the basis of their own practice experience, arrived—it would seem intuitively—at a more complex classification. They effectively divided Finn's 'same matter conflicts', 'separate matter conflicts' and 'former matter conflicts' into a further four sub-categories, namely: direct, potential, common-goal and confidential-information conflicts. Each of the classifications which solicitors were impliedly making in the course of their interviews with me can be linked to the various classifications employed by Finn, Glover or the Law

Society. These classifications, and the relationship between them, are represented by Figure 1 below.

COMPETING INTERESTS

For the remainder of this chapter, and in chapter 7, I rely upon the classification of conflict types which emerged from my interviews with solicitors. In each of these categories of conflict the respective parties have different interests. The views of the client, the position of the firm, and the opinions of individual partners will all contribute to the decision which is taken. The factors which have to be considered by the person making the decision may differ with each type of conflict. These considerations can be summarised as follows:

1. legal rules—the law as laid down by the courts;
2. rules of the profession;
3. client interests—ensuring that clients' interests are adequately protected;
4. client wishes;
5. commercial considerations.

The last of these, commercial considerations, may be further sub-divided as follows:

i) firm as a whole—the best course of action for the firm in the immediate future;
ii) firm as a whole—in the longer term;
iii) individual fee-earners—immediate interests of the fee-earner;
iv) individual fee-earners—longer-term interests.

Before we examine how firms manage these competing interests, it will be useful to consider how firms *should* conduct themselves in each of the above hypothetical situations[8] in order to comply with the Law Society's current rules. It is also helpful to bear in mind the client perspective on what constitutes a conflict.

LAW SOCIETY GUIDANCE

1. Direct Conflicts

In relation to direct conflicts involving two existing clients of the same firm, Rule 15.03 states that the firm must not continue to act.[9] In the commentary to this rule, the Guide states that the firm must cease to act for both clients and may continue to represent one only if it is not in possession of relevant confidential

[8] See above at 110–14.
[9] See above at 43.

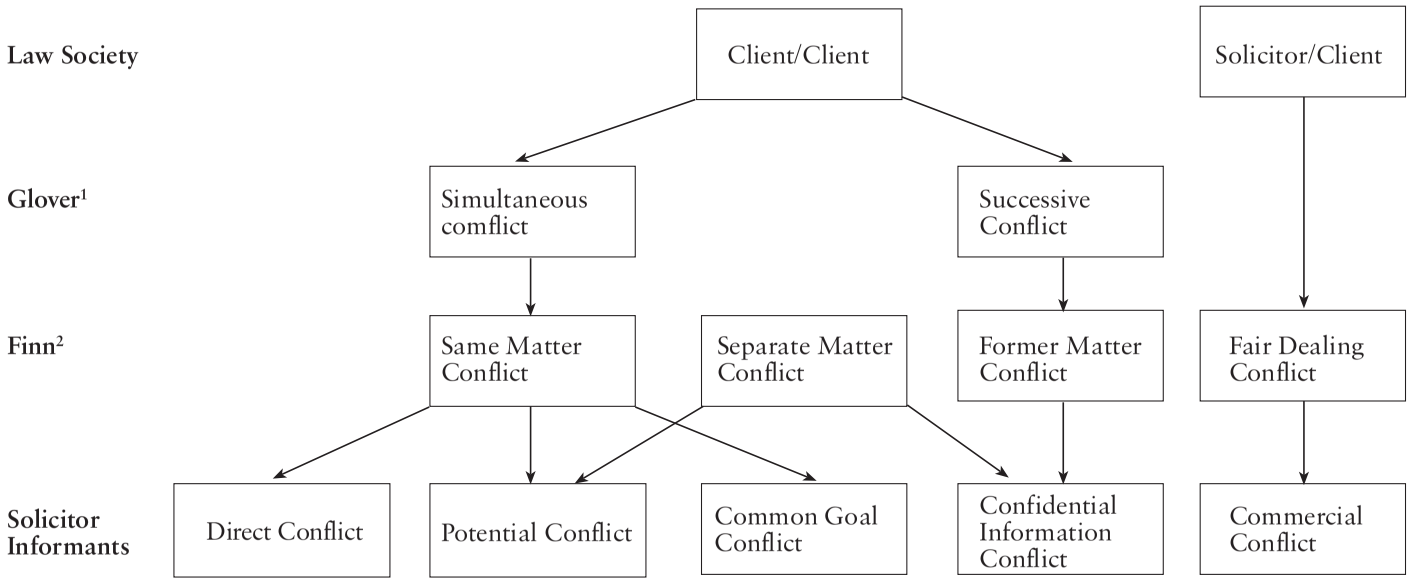

Figure 1. Classification of Conflicts

[1] Temporal classification
[2] Subject matter classification

information. Thus, with Tom and Jerry, Partner A should send both Tom and Jerry to other firms of solicitors. He could, however, continue to act for one of them if he had no relevant confidential information about the other. In the case of the rival bidders for Monarchs Forever Ltd, although they are not directly opposing each other, their interests will conflict as both are determined to win the bidding. As with Tom and Jerry, the firm cannot act for both clients because, according to rule 15.01, where the clients' interests conflict, the firm should not act. This is the case even if the firm informs both clients of the conflict and both consent to the firm's acting.[10] In this instance, however, the bidder who first approached the firm will still be allowed to retain its services as there is not the complication of their both being established clients.

2. Common-goal Conflicts

Similarly, where the firm is faced with a common-goal conflict, rule 15.01 will apply. The Guide is clear that a firm should not act for two or more clients where there is a conflict, or a significant risk of conflict, between those clients. Thus, in the case of the parties wishing to construct a motorway, not only may their interests be said to conflict at the start of the project, but there is also a significant risk of conflict developing later. Therefore the firm in this instance could act for the bank, or the bondholders, or the constructor, but not for all three.

3. Confidential-information Conflicts

With a confidential-information conflict, the rules are slightly different. According to rule 15.02, the firm is prohibited from acting only if it is in possession of information which is or may be relevant to the new client. Thus, if BSE Ltd has imparted information to the firm which is relevant to the matter in hand, the firm should decline instructions from Heifer & Sons. Likewise with Wallis Williams, if Robert Gibbs is in possession of information relevant to John Brown's dispute with Wood Enterprises, the firm should not continue to act.[11] With Bright Books there is an unresolvable conflict between the duty to keep ABC's affairs confidential (rule 16.01) and the duty to disclose all relevant information to the client regardless of the source of that information (rule 16.06). Bright Books should, therefore, be turned away, or perhaps both clients should be turned away if Bright Books is an established client of the firm.

[10] The Guide, 8th edn, Rule 15.01, note 2 at 314.
[11] *Ibid*, Rule 15.02, note 8 at 315.

4. Commercial Conflicts and Potential Conflicts

For the remaining scenarios, namely commercial conflicts and potential conflicts, the Law Society gives no guidance as to what a firm should do. These types of conflicts are not seen as 'legal' conflicts but rather as commercial decisions, and as such are matters for each firm to decide. Moreover, potential commercial conflicts (in the sense given above) cannot be judged until the firm is in full possession of the facts.

It can be seen therefore that the Law Society Guidelines are reasonably clear with regard to each type of conflict. This assumes that the only relevant considerations are those laid down in the Guide to Professional Conduct. But solicitors may find themselves under pressure from their clients to act in ways which reflect those clients' perception of their own broader interests. The clients' view concerning what constitutes a conflict, and how that conflict should be handled, may have considerable bearing upon the way firms respond to these dilemmas.

CLIENTS' VIEWS ON CONFLICTS

From my interviews with clients it appeared that their view of what amounts to a conflict of interest depends to a large extent on the industry within which they operate. Clients who have businesses in fiercely competitive markets had a similar stance to the Law Society. Indeed, Client C expected his solicitors to behave in a manner which exceeded Law Society requirements:

> Firms can expect to earn several million pounds a year in fees from us. We would expect, quite rightly, that their behaviour would go above and beyond Law Society rules. Even if, as a strict matter of interpretation, taking an instruction from a competitor would not be contrary to the rules, we would not want them to do that.

Client A held a similar view:

> Take the example of rival bidders. In that scenario there is bound to be a loser and therefore there is a lot to gain. The other side would clearly like to know how much we're bidding and vice versa. So, I just think that information really shouldn't be held within the one firm.

These clients would, at the very least, expect their solicitors to act in accordance with Law Society guidance.

Others[12] took a more relaxed view. Although all agreed that a conflict would arise if a firm acted for both parties in the same dispute, as in the example of Tom and Jerry, they did not consider it a problem if a firm were to act for two sides who were in competition, but not direct opposition, with each other. Client B gave one example:

[12] Clients B, D and E.

> We would be surprised to see the firm representing the other side if they'd represented us in a situation which had a direct bearing on the deal. But we wouldn't be surprised to find them on the other side in the same transaction if we didn't have any kind of history in that regard. Likewise, if we'd instructed a firm which was also representing another party and we were both competing to be the arranger of a syndication, we wouldn't be particularly alarmed.

These clients did not regard common-goal conflicts, confidential information conflicts and commercial conflicts as 'proper' conflicts. Client D explained why:

> These types of situation are not really an issue. It would be unreasonable for us to say that a firm can never act against us because we use more than one firm. Indeed, it can be quite advantageous to use just the one firm, especially where all parties are working towards one goal.

Client E added:

> I'm not concerned about firms acting for the other side if I'm not instructing them on that matter.

In the remainder of this chapter I shall analyse the procedures adopted by firms when faced with a conflict or potential conflict. In particular, I shall consider what criteria firms employ in reaching a decision. The first question to be asked is: who within the firm makes the final decision on whether instructions from a particular client should be accepted?

THE DECISION-MAKER

The choice of decision-maker within a firm might be considered by some to be the most important aspect of managing conflicts.[13] As the position may involve an evaluation of underlying relationships with both clients and colleagues, it may be difficult for a fee-earner directly involved with the case to remain impartial. The temptation presented by a prestigious or profitable piece of work may result in a potential conflict not being addressed.[14] Moreover, should the fee-earner concerned hold a relatively junior position within the firm, he could find it more difficult to resist the pressure brought to bear by senior colleagues. A study of large firms of corporate lawyers on the East Coast of the United States highlighted some of these difficulties.[15] By posing a hypothetical situation to fee-earners and asking who within the office they would expect to handle the matter, certain patterns of behaviour were identified—namely, that there were

[13] The decision as to who will deal with conflict dilemmas must take account of the time it takes to deal with conflicts. See further, V Slind-Flor, 'Client-Conflicts Patrols March On', *The National Law Journal*, 30 March 1992, p 1.

[14] This could be seen in the Olswang example discussed above, see M Mullally, n 2 above.

[15] E Lazega, 'Conflicts of Interest in American Business Law Firms—An Organisational Approach', (French title: 'Les Conflits d'interets dans les cabinets americans d'avocats d'affaires: concurrence et auto-regulation'), (1994) 36 *Sociologie du Travail* 315.

stronger and weaker fee-earners in most firms. This was reflected in the pressures brought to bear when a decision had to be made concerning which client to give up.

The Law Society lays down no guidelines as to who within the firm should be the decision-maker. One option, as we have seen, is to take the decision out of the hands of the lawyers directly involved in the case. This, however, can be expensive. It may also be impractical as independent assessors require a degree of knowledge of the case. Yet the benefits of impartiality may outweigh the additional expense and inconvenience in the long run. One firm commented:

> We ensure that any decision is taken by independent partners. If a fee-earner closely connected with the client makes the decision, it can have implications for us all. After all, each and every partner is equally liable for any decision taken. Therefore, if the solicitors involved with the case are prepared to take a risk in order for both of them to retain their respective clients, they are putting the whole partnership in danger of being caught out.[16]

Firms which adopted this approach were in the minority. Of the firms which participated in the research, only three said they ensured that any issue relating to a conflict of interest was independently decided. Firms 14 and 22 said they referred *any* conflict or potential conflict to 'an ethics committee chaired by a senior partner with at least two other partners not involved with the relevant client'. Firms 9 and 30 had conflict officers in each of their offices with whom any conflict was to be discussed. The ultimate decision rested with individual officers, but where there was doubt, the officer was meant to refer to a colleague in a different office. Even this system appeared not to remove peer pressure from those officers:

> I will often be of the opinion that we really should not act on a particular matter but one or sometimes both of the partners involved will come and say, 'Why can't we act? We're both happy, the clients are happy and there shouldn't really be a problem.' You are then put in a very difficult position and I must admit that I have sometimes capitulated and allowed the firm to act.[17]

The remaining firms adopted a more informal approach. Two practices were happy to leave the decision entirely to the fee-earner conducting the search, with one saying that the term 'fee-earner' included legal executives and para-legals as well as qualified solicitors.[18] However, in the majority of firms there was some sort of referral system in place. Firm 12 was typical in this regard:

> Initially the decision is left entirely to the fee-earner concerned. If he is unsure, he will refer the matter to his supervisor. If a decision still cannot be reached, the matter is then referred to the departmental manager.

[16] Firm 23.
[17] Firm 30.
[18] Firms 7 and 25.

Some firms left the ultimate decision to the senior or managing partner:

> We leave the decision to the partner in charge of the department. If partners cannot agree between themselves, then the senior partner will arbitrate.[19]

It would appear from the above that most firms deal with conflicts on an *ad-hoc* basis. Typically, no guidelines are provided as to when a matter should be referred to a senior colleague. The dangers of such an approach are self-evident. Whilst the fee-earner who does not refer a matter might find himself in some difficulty should a complaint be made at a later date, he may nonetheless be tempted to take the risk. Nor do such concerns appear to be confined to the more junior members of the firm. The use of the word 'arbitrate' in the above comment gives some clue as to the problems which may arise in allowing partners directly involved with clients to have a say in the matter. 'Arbitrate' suggests that neither partner may be prepared voluntarily to relinquish his client. This raises a question concerning the basis for their decision where other partners have not been involved and they have decided the issue themselves.[20]

A system of informal consultation can create further problems, as no measures may be in place to protect confidentiality during the consultation. If, for example, fee-earner A is in some doubt as to whether he should act, he may refer the matter to senior fee-earner B. Perhaps B is also unsure and passes the matter to section head C. C thinks that it is a difficult decision and asks the senior partner. The senior partner decides that he needs to discuss the conflict with the solicitors in the litigation department, as that is the department in respect of which the conflict has arisen. Therefore, by the time a decision is reached on the case, half the firm may be aware of the relevant facts and it might then be too late to erect a Chinese wall to allow the firm to act. Moreover, as information has moved within the firm, other clients may need to be turned away.

The fact that questions have been raised about the decision-making process does not necessarily mean that firms are unable to protect the various interests involved. Provided the criteria used in reaching a decision are objectively based and universally applied, it may not matter who within the firm is charged with the responsibility of deciding conflicts.

A CLEAR DIVIDE

Up to this point I have not attempted to distinguish between firms in their approach towards conflicts of interest. Significant differences emerge, however, when we examine the criteria used in deciding whether to act. Some solicitors

[19] Firm 5.

[20] This is especially likely when profits are split on an 'eat what you kill' basis; see also J Flood, 'Megalawyering in the global order: the cultural, social and economic transformation of global legal practice', (1996) 3 *International Journal of the Legal Profession* 169 at 178.

appeared to apply high ethical, legal and professional standards, whilst others seemed to attach greater importance to clients' wishes, or to commercial considerations. Yet although there are these differences, there are also similarities amongst various groups of practices. Very broadly, attitudes towards conflicts of interest tend to be similar amongst large City firms, likewise similar within the medium-sized City firms and national firms, and again comparable amongst the smaller City and provincial practices.

TABLE 1

Type of Firm	Average Number of Fee-Earners	Areas of Practice	No. of Firm*
Very large London-based practices (Group One)	1,050	Specialists in banking & finance, company & commercial law	1, 2, 3, 14, 29, 15
Medium-sized London firms/ national practices (Group Two)	450	Majority specialise either in litigation and insurance or in company & commercial law. Some private client work undertaken	4, 5, 6, 7, 9, 16, 17, 21, 22, 23, 30
Small London firms/prominent provincial practices (Group Three)	190	Diverse—some company & commercial law, shipping, private client (including specialist work), legal aid, litigation, health care, insurance, property	8, 10, 11, 12, 13, 18, 19, 20, 24, 25, 26, 27, 28

*As identified in the Appendix

GROUP ONE: THE BIG AND BOLD

When firms within this group were asked to set out the criteria used in determining whether they could act in a conflict situation, a typical response was as follows:

> Well, of course, first off, we consider whether there is a legal conflict. If not, we then think about whether any of our major clients would feel uncomfortable with us acting which would result in future loss of business.[21]

As to what was meant by a legal conflict, one senior partner defined it as:

> A legal conflict, quite simply, is a situation where if one party decided to go to the Law Society and complain, the Law Society would uphold that complaint. So it's a true conflict.[22]

[21] Firm 15.
[22] Firm 14.

On the face of it, therefore, these firms felt themselves bound by the Law Society's rules. Yet my follow-up interviews revealed this not to be the case. The senior partner quoted above was asked whether his firm adhered to the rules laid down by the Law Society in its Guide to Professional Conduct. This was his response:

> Well, I think at some stage someone is going to have a big argument about what that guide actually means. Part of the difficulty stems from the fact that the Law Society is a hopelessly inadequate animal to guide the profession as it now stands. And that isn't a criticism of the Law Society. It has an impossible task because it has a committee filled with lower-level solicitors, whose interests are fundamentally different from ours. It's just that rules that would apply to us, they don't like because they wouldn't work well applied to them and vice versa. The rules are fine in principle but they don't work for our particular firm. We think we've got a better feel for these things than anyone at the Law Society might have.[23]

His views were echoed by a managing partner in a different firm:

> The Law Society rules, it seems to me, are fine. They are quite rightly protecting those who need protection. But you've got to understand one thing: the business we are in and that all big City law firms are in, is fundamentally different from that of XYZ solicitors in Cardiff or Bolton or wherever else. If you took the rules literally out of the Law Society's guidelines, the City would come to a halt. There just aren't enough lawyers with the expertise needed to be involved in the international financial legal sector to go around. The profession is now split to such an extent that no one body can look after everyone's interests. We have a much better idea of how things work than anyone at the Law Society might have and so we, I mean the City firms, apply our own standards.[24]

It soon became apparent that all the firms within this group adopted a similar stance. Two other partners justified ignoring the rules by saying:

> Well, I just think the Law Society is out of touch. If we enforced the rules on conflicts, we'd be losing work hand over fist and life would become impossible. You get no value out of consulting the rules—they're hopeless. We, the City firms, live by certain standards which are high and, therefore, we just apply our own rules.[25]

> The interests of our clients might be prejudiced if we were to be 'conflicted out' under the rules because they would be forced to use other firms lacking the necessary resources and expertise.[26]

[23] Firm 14. This comment reflects the perceived polarisation of the legal profession. See further *The Lawyer*, Editorial, 'Onwards, upwards . . .', 10 June 1997, p 35.

[24] Firm 15.

[25] Firm 14. It appears that such opinion is not uncommon within large City firms. See for example, *Legal Business*, March 1997, p 41: 'Inevitably most City lawyers who spoke to Legal Business laughed at the mention of the Law Society. One senior partner says that the Law Society is "for widows and orphans." '

[26] Firm 29. See also *Keeping Clients: A Client Care Guide for Solicitors* (The Law Society and Office for the Supervision of Solicitors, London, 1997): 'Clients are the lifeblood of solicitors' practices. Without clients, there is no fee income and no profit . . . Dissatisfied clients generate complaints that are costly to deal with . . . It is good business practice to keep the client happy.'

So although these large City firms claimed to abide by Law Society rules, in reality their approach was quite different. Whether or not the reasons provided for disregarding Law Society guidance are defensible will be examined later.[27] First we should ask: what criteria do these firms adopt when deciding whether to act in a conflict situation?

Comments such as 'We live by certain standards, which are high, and . . . apply our own rules' and 'We, the City firms, apply our own standards', might be taken to suggest that these firms have a defined set of rules to guide their decision-making. However, no firm could provide a specific set of criteria, and decisions appeared to be taken on an *ad hoc* basis. Nevertheless, some general observations can be made.

All practices within this group draw a distinction between direct conflicts of interest and other types of conflict. Where two clients had directly opposing interests this was seen as a 'true' conflict and it would be considered unprofessional, and indeed dangerous, to take on such work. Examples quoted were parties opposing each other in litigation, vendors and purchasers, and borrowers and lenders.[28]

In situations where clients are not directly opposing each other but are nonetheless in competition, a slightly different approach might be adopted. The collapse of Barings Bank, referred to in the last chapter, provided one clear illustration of this:

> When Barings Bank collapsed, we found that we were acting for people who might technically have had a conflict between them because they were competing over what was left. If you said that you could only act for the first person who got in touch with you, people would soon get fed up. We had something like seventy or eighty people demanding urgent advice. Clients are perfectly happy to accept that you will be acting for other people and that it is on the basis that the work you do for each client will be, as it were, 'Chinese Walled', but there is an understanding that if there were a spat and two clients were fighting over the same piece of security, we would have to consider our position and decline to act for either party.[29]

Another firm allowed itself similar freedom of manoeuvre when dealing with rival bidders:

> Barings was obviously up for sale after its collapse and a lot of clients asked us to act in bidding for the bank or for the fund management side of it. We, therefore, asked each client whether they minded us acting for other potential bidders provided we kept everything in strict compartments so there was no possibility of rival bidders knowing what you were thinking of bidding. With that sort of problem, there isn't a strict conflict because there can only be one eventual buyer and as there has not yet been a transaction, there is no real problem. But, each party would hate it if one of the

[27] See below ch 8.
[28] Firms 14 and 15.
[29] Firm 29.

> other contending buyers knew what they had in mind. Thus, provided all clients agree, we will act for them all.[30]

It would seem, therefore, that even where clients' interests are in direct conflict, large City firms may still be prepared to act.[31]

Common-goal conflicts are handled in a similar way:

> We are happy to act for the different parties because although they have conflicting interests, they are all interested in getting the documents done properly and securely in the right place. If they wanted different solicitors in every part of the transaction, first of all, there wouldn't be enough lawyers to go round and, secondly, it would be much more expensive because each lawyer would need to be up to speed on all the transactions. If we didn't agree to act for all, the clients would take their business elsewhere.[32]

Firms within this group also drew a clear distinction between what they termed a 'straight' or 'direct' conflict and professional difficulties arising from the possession of confidential information. As one firm put it:

> The rule that solicitors' retainers require the firm to deploy relevant confidential information held on one client for the benefit of another seems to me to be ridiculous. It is usually relatively easy to deal with, because you can make the papers so that they are not generally available and warn those concerned not to discuss it.[33]

Possession of such information may be regarded not as a 'true' conflict so much as an 'inconvenience'. This view was also, it appeared, shared by major commercial clients. Client B explained:

> We have established relations with the top five firms in the City but this does create conflict situations. We are relatively sophisticated however about assuming that we're not their only client. The days of expecting exclusivity from law firms are gone but likewise we don't expect law firms to turn us away because there might be some kind of conflict. We expect that efficient mechanisms will be in place to 'manage' the conflict.

Where two or more clients would benefit from knowledge of confidential information held by the firm, it is common practice to obtain all parties' consent to the firm acting in this 'theoretical' conflict situation:

> In the main, clients tend to accept this as part of the commercial world in which we live. They are quite happy to agree to us acting for various parties by ensuring that all information is kept confidential by use of Chinese walls. If we couldn't act in this manner, the City would simply grind to a halt. We act for the world's major banks, governments and corporations. So the people we are dealing with are sophisticated

[30] Firm 14.

[31] See further J Flintoff, n 5 above.

[32] Firm 14.

[33] Firm 14. *Commercial Lawyer* reports that 'acting simultaneously on unrelated matters for two or more clients who compete with each other generally in the market place has become an accepted custom among lawyers.' (1999) 33 *Commercial Lawyer* 28.

> clients, many of whom have their own in-house legal advice. Usually it's their own lawyers we're talking to when we are clearing these things.[34]

Another firm expressed its position as follows:

> Under a strict interpretation of the Law Society rules, we know we should not act in this way. Such rules are too restrictive for the kind of situation in which we operate. We a dealing with very sophisticated clients, normally with in-house lawyers. They know precisely the score and are well able to protect themselves. But, more importantly, at the end of the day we are not going to do something which is going to damage our reputation. You are looking at things which everyone agrees are mutually convenient.[35]

Sometimes, however, a firm will not be able to obtain consent from a client because that client does not want its solicitors to act for a competitor. Large commercial clients may take a sophisticated view of conflicts, but they also have a sharp appreciation of their own commercial interests, and of the power that they wield. Client C put it like this:

> I have no wish to strengthen my competitors in any way. Even if a firm does not use confidential information they may be learning market know-how. I believe that I have the economic weight to demand the service I require since I will be one of the firm's top five clients.

The economic value to them of this particular client is something that firms will take into account when deciding whether to abide by the client's wishes:

> We often have the situation where a firm, for example ABC Ltd, uses six firms of solicitors for their corporate work. We are approached to make a bid for them. We know that they use five firms apart from us to handle their affairs and we have only done two tiny jobs for them in the last four years. We don't really know anything relevant. This is a wonderfully big job we are being offered. What do we do? Well, the first thing we have to do is ask whether, if we take the job on, we will be a burden to the new client. Will ABC Ltd go to court immediately for an injunction saying that we have confidential information? If we conclude no, then there is the commercial judgment. Is it so exciting to be asked by this client to bid for them that we are willing to cut ABC off the list and never have anything more to do with them? ABC Ltd are a huge concern and if we were to be given more work from them it would be very profitable for the firm. I may also experience difficulties with the client partner of ABC if we decide to drop them as a client. At the end of the day it has to be a commercial decision: what will be the most profitable thing to do for the firm in the long run?[36]

A similar approach might be adopted when it came to acting against former clients:

[34] Firm 15. M Chambers, M Jones and P Wilkins, 'Conflicts of interest: the growing climate of distrust', (1999) 33 *Commercial Lawyer* 26 at 31: 'Some industry sectors are particularly relaxed about conflicts. Partners we spoke to mentioned finance as one of them . . . Clients in industries which engender fierce competition tend to be less relaxed about conflicts.'

[35] Firm 29.

[36] Firm 14.

> If we'd done some work for a client and they'd never instructed us again, say there had been a three-year gap, we would not take the view that there was an outstanding solicitor/client relationship but you would say: 'What did we learn in that transaction and is there a confidential information part of it?' If we decided we knew nothing, then, we would act against the former client. Sometimes these issues are raised as a litigation tactic and you just have to stand firm.[37]

Other large firms reported occasions when they had been challenged over their right to act and had been forced to send the client elsewhere:

> Since 1991 I've received three complaints of this type. Two out of the three were raised by US corporations as they take a much tougher line on the issue of conflicts of interest, using it as a tactical advantage. In these two cases, we concluded that we had to cease to act. Luckily, in both cases it happened fairly early on but our clients didn't like it.[38]

US corporations are not the only firms to have raised these issues. Other bodies have voiced slightly different concerns about solicitors acting for and against them in litigation. They may be concerned not so much about the firm's knowledge of specific confidential information as the insight it will have gained into their business practices:

> We sometimes act for accountants and we sometimes act against them. In the last two years, we acted on their behalf defending claims. We, therefore, know all about their insurance cover, their partnership affairs and how they approach a case in terms of settling it and what would be contributed by the insurers and what by the partners. So, even though you don't have confidential information on the facts of this particular case and there isn't the traditional solicitor/client block on acting, you still have information on how they operate.[39]

But this group of firms maintained their freedom to act even in these circumstances, basing their decision on purely commercial considerations:

> Clients have raised the fact that we have 'insider knowledge' of how they operate, but unless they are willing to say that they will only use us for their legal work, they recognise that we are at liberty to sue them.[40]

Another firm justified this approach as follows:

> This situation is no different from that whereby you are frequently up against the same lawyer from another firm or the same insurers. You think that you have some understanding as to how they approach claims but no two cases are ever the same and the response is always different. This is the nature of litigation.[41]

It can be seen that firms within this group adopt a highly pragmatic approach in deciding whether to act in a particular matter. Although they are wary of acting

[37] Firm 14.
[38] Firm 29.
[39] Firm 14.
[40] Firm 14.
[41] Firm 29.

for parties directly opposing one another, they are happy to act in most other conflict situations provided their clients consent:

> Although the courts distrust walls, it doesn't really matter because we would never allow the thing to be litigated. If there was any prospect that someone would be so angry about it, we would not take the risk. So it all depends on the attitude of the client. We would only take the risk, and we have had this, where someone is abusing a very tenuous historical client relationship as a way of preventing their own solicitor from acting for someone else.[42]

One firm, however, claimed to take into account the public perception of their acting for a particular party. When asked what precisely was meant by 'public perception', the senior partner said:

> We don't want to draw too much attention to ourselves. People will say, 'How on earth can [Firm XYZ] be acting in that capacity for that person and in that capacity for that person?' or 'Oh look, there's [Firm XYZ] acting again. They're absolutely desperate to earn any fee they can. Surely they shouldn't be doing that.' We could hardly come back and comment by saying that the rules are all unfair and nonsensical or say to the public not to worry because we especially put it to the two clients and the two clients agreed. We can't start talking about our clients' affairs. So we sometime decline to act even where the clients have agreed because it would not look good. We would look greedy. Obviously, this does not occur with smaller clients, as no-one is really interested in small transactions.[43]

Where it is apparent that a firm can act for only one party in a transaction, the matter is usually decided on economic grounds:

> We assess which client is likely to produce the most income for the firm and we go with them.[44]

Perhaps inevitably, this decision will not be popular with all members of the firm:

> Occasionally sending one client away will involve upsetting one partner's relationship with a client for the benefit of the firm as a whole, but it is very infrequent as we usually find a way of accommodating both clients if they agree to it.[45]

As to whether these firms ever worry about falling foul of clients or regulatory bodies when acting in conflict situations, the following comment was typical:

> Of course there is always a risk that a client will complain but it is minimal. After all, we would not do anything that they weren't happy about and didn't agree to. If there were any suggestion of their taking action against us, we would settle the matter. We don't worry about interference from the Law Society because in order for

[42] Firm 29.
[43] Firm 14.
[44] Firm 15.
[45] Firm 15.

> them to get involved a client has first to complain and that simply isn't going to happen.[46]

It could therefore be said that clients effectively have the final say on whether firms act in such situations. This is understood by the clients themselves. Client D, for example, said:

> If a conflict were to arise the law firm would ring up and say 'We may have a conflict' and explain to me that they may be able to act for both sides if both sides are happy. So if it were a norm, as it were, it would be handled in a sort of consensual way, both sides being aware that there may be a conflict and then both sides deciding whether they are happy with it.

In these circumstances the client's decision will reflect the information provided by the firm. It would seem, however, that these clients are on the whole content to rely upon that information:

> I think generally speaking our big firms behave honourably and sensibly. I am sure that they are very aware that they don't wish to fall out with us as it is not good business sense for them to ride roughshod over conflicts of interest.[47]

This belief stems from two factors. First, these clients are familiar with the potential risks that conflicts of interest pose because they regularly encounter such situations and their in-house legal teams are available to oversee the firms' procedures. In other words, they regard themselves as sophisticated consumers of legal services:

> We understand the process and therefore I suppose conflicts are one of those things you could be worked up about unnecessarily if you didn't understand what was going on and if you didn't know the law firms very well. I mean suppose two companies from outside London which didn't normally do the sort of transactions we do want to use a London law firm for the first time and someone came along and said 'Oh, by the way, that same law firm will act for the other side as well'. If it was your first dabbling into that sort of transaction and you didn't have your own in-house lawyers, you might easily convince yourself that it was a much bigger risk than it really is.[48]

Second, these clients are aware that they generate millions of pounds in fees for law firms. They know their own commercial power, and believe that firms will not lightly act against their financial interests:

> They clearly won't act in a hostile manner to us as we are a big client and we pay a lot of fees.[49]

[46] Firm 14. This view is echoed by W Bishop, 'Regulating the market for legal services in England: Enforced separation of function and restrictions on forms of enterprise', (1989) 52 *Modern Law Review* 326.

[47] Client D.

[48] Client D.

[49] Client E.

It is little wonder then that such clients tend to support these firms in their view that the Law Society rules bear no relationship to daily practice. As Client D put it:

> The horrible reality is that we see the Law Society's view as completely and utterly irrelevant to real life. To be honest I don't particularly care what the Law Society rules say.

Rather than conforming to Law Society rules, the manner in which firms within this group 'manage' conflicts broadly corresponds with the position reported by the City of London Law Society in its review of the subject.[50] It stated that:

> The lack of any definition of 'conflict of interest' leaves the meaning of 15.01 unclear and open to starkly differing interpretations. Some practitioners interpret the wording to mean that a firm cannot act against the interests of an existing client even in a matter which is unrelated to the pre-existing instructions. That interpretation is then often 'softened' (at least within the City) because the main financial institutions do not in practice object to a law firm which acts for them on a transaction acting for another party in another transaction.

GROUP TWO: THE MINDFUL MODERATES

Almost all of the firms in this second group (namely, medium-sized City and national firms) cited the Law Society rules as their primary yardstick when determining whether they should act in a conflict situation. Although a few practices adopted slightly different criteria, their approach appeared to be in broad conformity with that laid down by the Law Society:

> The criteria which we take into account are diverse. Obviously, if there is an actual conflict we would not act. In a potential conflict situation we would tread very carefully, pointing out to all parties that there was a potential conflict and as soon as we felt uncomfortable, we would immediately say so. The object at all times is to have happy clients and most clients appreciate that conflicts do arise from time to time.[51]
>
> * * * * * * *
>
> We assess the likelihood of there being a real conflict. We also ask the clients whether they accept that we may have to pull out at a later date.[52]

Unlike their colleagues in the very large City firms, solicitors within medium-sized City and national practices appeared for the most part to operate in conformity with the professional rules. One conflicts partner said:

> I do actually go to the rules contained within the Guide and look at them and consider what is proper. I don't just say, 'Blow that, we'll just go on with it'.[53]

[50] See www.citysolictiors.org.uk
[51] Firm 30.
[52] Firm 21.
[53] Firm 17.

His response was typical of others within this group. Many of those interviewed were able to quote verbatim from the Guide and showed that they had a good working knowledge of the rules. This is not to say that all solicitors found the rules easy to follow. Indeed, some reported the rules to be 'baffling' or 'not particularly clear'.[54] Firm 17 was typical in this respect:

> Take Rule 15.01, for example. It states that a firm should not accept instructions to act for two or more clients where there is a conflict or a *significant risk* of a conflict between the interests of those clients. How are we to know precisely what is meant by 'significant risk'? Again, with Rule 15.02, the Guide states that we should not act against a former client if we have relevant confidential information. Now what we consider relevant and what a client considers relevant may be two different things, but no definition is given. Perhaps the clearest example is provided by 15.03. The Rule definitely says that a firm *must* not continue to act for two or more clients where a conflict arises between those clients. Then, in the notes, it says that the firm must *usually* cease to act for both clients but may continue to act for one if not in possession of any relevant confidential information. What on earth is meant by 'usually'? It gets worse. Having been told that we must not continue to act for these two clients, note 4 states, and I quote, 'It is doubtful whether, in circumstances other than where there has been an amalgamation of two or more firms, a 'Chinese wall' can be erected so that a firm can continue to represent the interests of two clients whose interests conflict.' Talk about vague!

Another firm complained that the rules were illustrated by reference to examples that were not relevant to a practice such as theirs:

> Even where commentary is provided to accompany the Rules, the examples given all relate to high-street practice and are not relevant to bigger firms like ours.[55]

A closer analysis of firms within this group revealed some departures from the Guide. Nine of the eleven practices said that they had employed a Chinese wall on at least one occasion.[56] Moreover, of these nine, five admitted that Chinese walls were, as one put it, 'not a rare thing within the firm'. Even those who did not admit to using a wall, conceding in the words of one that 'the Law Society takes a dim view of such behaviour', admitted that they would act 'if clients are prepared to agree to us acting in a conflict situation.'[57]

Firm 17 explained how they justified acting outside Law Society rules:

> We are not so much breaching the rules as working within the spirit of them. We normally try to find a way of accommodating clients' wishes. Of course, always at the

[54] Firms 16 and 22. Difficulty in understanding the Guide is not uncommon amongst practitioners. See G Chambers, 'Conduct matters', *Solicitors Journal* 31 July 1998, p 712: 'As many as one in three solicitors who had consulted the Guide described it as not that helpful in solving the problem . . . Solicitors' preferred method for resolving questions was discussion or consultation with other colleagues.'

[55] Firm 16.

[56] Although, for two of these firms, use of a wall had been for a conflict arising out of a merger and therefore fell within Rule 15.03.

[57] Firm 23.

> back of our mind is the thought that if the conflict does become too acute, we will have to send the clients elsewhere. These situations are difficult and sometimes we do turn to the ethics and guidance department of the Law Society for advice. They usually err on the side of caution and tell us to give both clients up.

Some practices were keen to point out that devices such as Chinese walls were only used for non-contentious commercial matters and then only where the parties were long-established clients of the firm and there was no danger of the matter becoming contentious.

It would appear, therefore, that there are two main differences between this group of firms and large City practices. First, these firms do not encounter as many conflict situations, and secondly, whilst the large City firms freely confess to breaching the rules, the medium-sized firms are more cautious about admitting this. There is also a third difference, which I discuss further below, namely that the medium-sized firms appear not to experience many conflicts arising from the possession of confidential information; the most common difficulty they face is that involving direct conflicts.

These medium-sized firms were also less inclined to criticise the Law Society, although that did not mean that there was no criticism of the existing regulatory regime:

> The Law Society is seen in London as somewhere you go for lunch or to do a bit of research. In the provinces, it seems to have a bit more clout. If ever I've tried to complain that one of the big firms has a conflict, I've got very short shrift. It always comes down to 'If they've got a conflict, it's their business. If they failed to watch their own back and their client decides to complain, it's up to them. What's it got to do with you as a third party?'[58]

This was not the only firm to suggest that large City firms got away with flouting the rules, thereby securing an advantage in the market-place. Another managing partner made the point as follows:

> I think we are prejudiced by adopting a more stringent approach to conflicts. What is aggravating is that by applying the rules more strictly than other firms we do lose clients. You apologise to the parties concerned and hope that they will come back to you next time but life isn't like that. The new firm will be keen to provide a very good service. A level playing field would be appreciated if we are not going to be squeezed out of the market. This, however, requires the Law Society to enforce the professional rules.[59]

The question which needs to be asked at this point is why these firms do not have the same attitude towards conflicts as do their colleagues in very large City

[58] Firm 16. Similar problems occur if a judge feels that there is a conflict of interest. See *Hood Sailmakers Ltd v Bertham Boat Co Ltd* (1999) 149 NLJ 529 p 529 'A judge may not of his own motion take a point on conflict of interest concerning a solicitor involved in the case before him; it is for the party affected, whose interests and confidentiality the doctrine is there to protect, to take that point.'

[59] Firm 23.

practices. A simple answer may be that they do not wish to attract attention to themselves. They may feel that they do not carry the same amount of weight in the legal community and are thus more wary of openly opposing the Law Society. In addition, as they do not have the same number of fee-earners it may be less feasible for them to act in a conflict situation. Although it could be argued that national firms are in many ways better equipped to adopt such measures, it could well attract adverse comment if one office were to act against another.

Another possible explanation concerns the precise nature and client-base of these firms. Over half the firms within this group specialise in a particular type of litigation. Accordingly, they may not be troubled by conflicts to such an extent as a firm dealing mainly with corporate and commercial clients. Support for this theory was found in the comments of some managing partners:

> We do not really experience any problems in abiding by the rules. But then perhaps it's the nature of our work. We do 75–80% litigation and then it is only defending insurance companies. It is, therefore, very easy to spot a conflict and to say 'Sorry, we are already acting for the other side'.[60]

Secondly, clients who instruct firms of this size may not be as sophisticated as clients of the major City firms. For example, they may not have in-house lawyers to protect their interests and may not understand how a firm can continue to act where there is a conflict. In other words, commercial considerations may not at present be driving medium-sized City and national firms to 'manage' conflicts to the same degree as large City firms.

Although firms within this group may not face the same types of conflict as the large City firms, the risks involved may be greater. If their clients are less sophisticated, there is perhaps a greater danger of their complaining at a later date. Also, these clients are more likely to complain to the Law Society than to commence legal action and there is thus less opportunity to ward off potential embarrassment for the firm. Moreover, the risk of individual fee-earners acting in their own interests is arguably greater as they may see a particular piece of work as an opportunity to make their mark within the firm. So these firms may still be confronted with awkward dilemmas in practice. This was succinctly expressed by one senior partner as follows:

> We want to compete with the larger firms. In order to do this, we need to attract more work and bigger clients but we can't do this unless we can offer the same service. But this involves adopting the same approach towards conflicts. Unfortunately, we are not big enough not to draw attention to ourselves and we cannot grow without breaching the rules. So we are in a cleft-stick unless something is done to alter the rules.[61]

[60] Firm 16.
[61] Firm 17.

GROUP THREE: THE PIOUS PROVINCIALS

All the firms within this third group claimed that they followed Law Society rules when facing conflict situations. Indeed, some claimed to adopt an even stricter approach:

> We would not act if there were the merest and slightest possibility of a conflict arising.[62]

These firms had little or no criticism of either the rules or the Law Society. Most believed that the regulation was easy to interpret:

> The guidelines are reasonably straightforward and the Law Society actually gives telephone advice. This can be very helpful because where there is uncertainty, they are quite willing to answer questions on the telephone and in writing. So, if you feel you are running into a conflict which you can't resolve yourself or through discussion within the firm, then the Law Society themselves will aid. They will help you in interpreting the existing rules.[63]

Those who questioned whether the rules were appropriate for the profession as a whole did not direct their criticisms at the Law Society:

> I think it is necessary that the Law Society lays down guidelines because whilst I think some firms would probably ask these questions of themselves, there is a danger that if there aren't guidelines, the scent of a big deal can overcome the independence one ought to have. Therefore, I think it's right there are guidelines and that the Law Society keeps them under review. They don't suit everyone but they need to be there.[64]

However, whilst there appeared to be a consensus as to the criteria to be applied in a conflict situation, there were differences in the firms' precise interpretation of the rules. In this respect it is possible to sub-divide these provincial and smaller City firms into three further groups:

1. The Truly Pious

Five practices, as well as claiming to adhere strictly to the rules, had excellent knowledge and understanding of the various requirements contained in the Guide. Such firms claimed never to have used a Chinese wall and said they would not contemplate acting in a conflict situation, even if both clients gave their consent.

> The Law Society does not allow Chinese walls and so we implement that precisely. Where we have decided that there is a potential conflict and both clients have

[62] Firm 19.
[63] Firm 20.
[64] Firm 18.

> requested that we continue to act, we adamantly refuse. Law Society rules specifically state that disclosure of a conflicting interest does not permit us to act even where the clients consent. They couldn't make it much plainer than that, could they?[65]

When asked whether a strict application of the rules prejudiced their firm in any way, four out of five thought it did not. In fact, quite the reverse:

> I would be happier if the rules even prohibited acting for two established clients on a conveyancing transaction.[66]
>
> As we apply the rules to the letter, there is neither any question of us taking clients' or individual fee-earners' views into account. This creates happiness within the practice and clients are not put out because it is the Law Society rather than the firm which is making the decision.[67]

One firm, however, held that it did suffer commercially because of the strictness with which it applied the rules governing conflicts:

> There is little doubt that we are prejudiced by applying the rules to the letter. Not only are we affected but sometimes our clients lose out as well. We provide an excellent commercial service to clients and we are especially renowned for certain areas of practice. As we are situated in the provinces, it is quite a small legal community. Therefore, when we say we cannot act, clients very often cannot obtain the same standard of legal service within the locality and are often put to the additional expense of instructing London lawyers. What affects us the most is the implementation of the rules which say that where a conflict arises between two or more clients, then we should stop acting for all of them.[68]

2. The Blindly Pious

Four provincial firms claimed that they never applied anything other than the Law Society rules, but when questioned further revealed that their understanding of the Guide was poor. Some lacked basic knowledge of the regulations. One assistant solicitor said:

> You just get a gut feeling for conflicts. It is something that you pick up from practice rather than learn from scratch. You would only look at the actual rules themselves if you had a complaint. In fact, don't ask me to quote from them because I wouldn't know where to start.[69]

Another solicitor was surprised to learn that a new Guide had been produced. Pointing to the latest edition of the book, he said, 'Oh, is there a new Guide?' In fact, the 'new' Guide had been in circulation for some two years.[70]

[65] Firm 25.
[66] Firm 13.
[67] Firm 12.
[68] Firm 26.
[69] Firm 28.
[70] Lack of knowledge of the Guide has been highlighted elsewhere. See, for example, G Chambers, n 54 above: 'Only a third of those who had their own copy of the Guide knew that they

Where these firms had tried to apply the rules, they may well have done so inaccurately. An example was provided by one managing partner:

> If all parties to a transaction require us to act, then we would be able to, because then there is no existing conflict. But we only do it where the Courts and Law Society say we can.[71]

Although these firms were not able to quote the relevant provisions from the rules, they appeared to work on the premise that they should not act in any conflict situation. Thus they operated for the most part within the Law Society's parameters, but there remained an element of doubt given their limited grasp of the regulations.

3. The Outwardly Pious

The remaining four firms had quite large commercial and private client practices. These firms at first claimed that they were complying fully with all relevant regulations, but eventually all admitted to the occasional lapse. Indeed, firms in this group had experienced problems from clients and disciplinary bodies when they had acted outside Law Society guidelines. Firm 20 provided three examples of this. The first related to a complaint made to the Office for the Supervision of Solicitors:

> I have been involved in a battle royal with the Office for the Supervision of Solicitors concerning Rule 15.03 because we continued to act for a partnership after a dispute arose between the partners. The dissident partner requested the advice that we'd given to the others on the grounds that they were a client of the firm at the time. When we refused, that partner referred the matter to the Office for the Supervision of Solicitors. The Office took their side and said we were in conflict with Rule 15.03. On the face of it, we were in breach of 15.03 because it states that a firm should not continue to act for two clients if a conflict arises. But, then, if you read note 1 of the commentary to the rule, it states that the firm must usually cease to act for both clients unless it is not in possession of relevant confidential information and even then it would be prudent to confirm that the other party does not object to us acting. I asked them to tell me in what circumstances a solicitor could continue to act under the terms of that note and what was the meaning of the word 'prudent'. They refused to answer and referred me to the Law Society's Ethics Division. The Ethics Division said that it was perfectly permissible to act against a dissident partner despite a conflict, provided that the firm had no relevant confidential information. They also stated that the use of the word 'prudent' was only advisory which means that you have a discretion whether or not to do

had a copy of the seventh edition. One in five were using the sixth edition and one in 10 the fifth or earlier. The greatest number, however, did not know which edition they possessed.' *Commercial Lawyer*, 33 June 1999, 'A senior solicitor . . . complained that he was "always astonished at how little my partners know of the actual conflict rules." He's had to write a paper on them "because we recently had to retire from a case, and looking around the firm I realised that people do not pick up the Guide to professional conduct every week." '

[71] Firm 8.

> it. We proved that we were not in possession of relevant confidential information but the Office for the Supervision of Solicitors indicated that they were still going to rebuke us.

The second complaint resulted in a disgruntled client threatening to sue the firm for negligence:

> We were involved in a high-value sale of assets and share capital. We acted for three individuals who were shareholders in the company. Just before the transaction was completed, one of the three took himself off to another firm of solicitors and tried to stop the transaction being completed. We knew that we had a conflict but it was too late to pull out as our clients had already signed some contracts and were bound to complete the sale. We, therefore, completed the transaction for them. We are now in the process of dealing with the complaints and there is a threat of a negligence action against the firm.

The third instance did not lead to an action against the firm but, nonetheless, demonstrated how embarrassing it can be when a conflict situation goes wrong:

> We acted for a company who owned a ransom strip leading to an estate of executive houses.[72] We were instructed to sue all of the householders on this estate for trespass for using the ransom strip without authority. The case went to the Court of Appeal and we won but still the other side refused to purchase the strip. We were once again instructed to sue the householders. It turned out that we had acted for two of the householders in the purchase of their properties . . . We were caused a huge amount of embarrassment. It even resulted in an early day motion in the House of Commons in which we were condemned for acting in a conflict of interest.

Apart from the embarrassment to the firm and the rebuke imposed by the Office for the Supervision of Solicitors, these examples demonstrate how expensive and time-consuming conflicts can be. But why have these firms been caught out whilst larger firms appear to have escaped censure? One explanation is that provincial firms are not dealing with the same type of clients as City firms. Large corporate clients would be unlikely to make a complaint to a disciplinary body, preferring instead either to take their business elsewhere or to initiate proceedings.[73]

It is little wonder, therefore, that these smaller firms were reluctant to admit to breaching the rules. Indeed, such experiences had prompted them to keep a closer eye on the work of other members of the firm to ensure that the firm was not embarrassed further. One senior partner said:

[72] A ransom strip is the term used where one party sells a plot of land for development but retains a tiny strip which leads to the highway. The developer cannot obtain access to the houses without either buying the strip or obtaining rights of way over it. Hence it is termed a ransom strip because the other party can in reality name their price.

[73] A Boon and J Levin, *The Ethics and Conduct of Lawyers in England and Wales* (Hart Publishing, Oxford, 1999), n 12 at 70. This has certainly been found to be the case in Canada. See A Boon and J Levin, at 70: 'Yet paradoxically, Canadian research shows that it is busy sole practitioners acting for individuals . . . who are most likely to the subject of complaints.'

> I keep a careful watch over everyone. A few months ago, two partners were arguing because one was acting for a partnership and the other had been instructed by one of his prize clients to sue one of the partners. I stepped in and said that we will withdraw from both cases.[74]

Fear of complaints was not the only concern of these practices. As they were based in the provinces and client choice was limited, two further problems arose. First, a client might bring pressure to bear on them to act in a conflict situation, arguing that there was no other firm in that locality capable of handling the work. This is a particular version of a problem to which I have already referred, namely that a broader interpretation of the client's interests might suggest that it is desirable, from both the solicitor's and client's perspective, to continue to act even though facing what is notionally a conflict. Secondly, assistant solicitors cause more problems than their City counterparts if they choose to move between firms. Because these provincial firms tend to be smaller in size, assistants are often involved in more cases and get to know more clients. If they decide to take up a different post in the same town, there is a considerable likelihood thereafter of a conflict arising and a client complaining:

> Potential conflicts are something that we have been forced to start thinking about when we are recruiting new staff. It's not just partners and assistants you have to consider. We have to look to see how heavily support staff have been involved in cases before they start working on something for us.[75]

Although these firms were fully aware of the penalties involved should a conflict turn against them, it did not mean that they were unprepared to act in such situations. A partner in firm 20, having experienced three major complaints, explained why:

> I think I would be hypocritical if I said there had never been an occasion when we hadn't taken into account the size and profitability of the job involved and decided to take a risk and act.

Perhaps all that can be said in favour of such an approach is that those firms which have encountered difficulties with disgruntled clients, or with the Office for the Supervision of Solicitors, are likely to take special care to ensure that, where they act in a potential conflict again, no-one has cause to complain:

> Because we have been disciplined about the matter, we are doubly sure that all parties are happy with us acting and that all necessary procedures are in place to protect clients, solicitors and the firm.[76]

[74] Firm 24.
[75] Firm 19.
[76] Firm 20.

SUMMARY

At the beginning of this chapter five examples of conflict situations were given, coupled with the Law Society's approved response in each instance. After reviewing the criteria adopted by various firms it would seem that only nine out of 30 claimed to act entirely in accordance with the regulations. Moreover, half of those did not have a sound understanding of the requirements. It could therefore be said that if they were indeed complying with the rules, this was more by luck than judgement.

The remaining 21 firms adopted differing approaches depending on their size, client-base and location. Firms in Group one—the very large City firms—appeared to pay little or no attention to the Law Society's rules and were prepared to act in most conflicts other than where clients were directly opposed. In most of these situations the consent of the parties was required before the case would be taken on, although where firms considered that there was little or no risk of a complaint being made they were prepared to act without authority. Individual fee-earners had no reason to act in opposition to the firm's strategic goals as they rarely had to give up their clients. In most cases a way was found to accommodate the wishes of all parties. Thus, these firms' responses to the hypothetical examples given at the beginning of the chapter would be as follows.

a) They would continue to act for either Tom or Jerry, but not both. The decision as to which one to drop would be made after an assessment of the long-term commercial interests of the firm.
b) Both rival bidders would be represented.
c) All parties involved in the construction of the motorway would be represented.
d) The firm would act against BSE if they concluded they were not in possession of relevant confidential information. Some firms would act even if in possession of such information, at the same time erecting a Chinese wall.
e) John Brown would continue to be represented and Robert Gibbs would be prohibited from having anything to do with the case. Firms would usually seek authority from Wallis Williams for this action.
f) The firm would represent both ABC Ltd and Bright Books.

Firms in Groups two and three, namely the medium-sized City, national and provincial practices, tended to feel more bound by the legal and professional rules. Most approached conflicts with a belief that it was not practical to function entirely within the rules and so they attempted to work within the spirit rather than the letter of the law. These firms were very much of the view that they should act only where they had obtained the consent of all parties to the conflict. Thus, they would act for the rival bidders if they both agreed; likewise for the various parties involved in the motorway construction; and also for ABC

Ltd and Bright Books. The remaining situations would be judged by reference to Law Society guidelines. Where they could continue to act for only one client, their decision, like that of the larger firms, would be based on consideration of long-term profitability.

Where these two groups of firms divided was in the pressures which they faced when reaching a decision. The medium-sized City and national firms were very much influenced by commercial considerations, including their desire to compete with the very large firms. At the same time, the danger of individual fee-earners taking a risk in their own interests was greater. Provincial firms, on the other hand, were able to keep a closer watch on their fee-earners. They too were influenced by commercial considerations. However, in their case this reflected a desire to maintain income in the short and medium term, rather than to increase the scale of their operations.

Whether these firms were too sanguine in asserting that their approach to, in effect, 'managing' conflicts prevented any breach of client confidentiality is a matter which it is difficult to determine with confidence on the basis of the empirical methodology which I employed. One test of a failure to maintain confidentiality is an application to the court to prevent the firm in question from acting. As we have seen, that happens rarely. However, there may be other indications of a loss of client confidence which are less apparent to the outside observer. These include the client's decision to take his business elsewhere, coupled perhaps with negative messages conveyed to third parties. This is something which I explored in my interviews with firms and it is fair to say that there were few reports of such a breakdown in relations.

On the other hand, some provincial firms had been the subject of complaint to the Office for the Supervision of Solicitors on this very point, perhaps suggesting that there is a level of dissatisfaction which has yet to be voiced publicly. Those firms which had been brought to account by disciplinary bodies tended to claim that they had learned from the experience. Their claim that they were especially careful when acting in a conflict situation will be explored further in the next chapter, in which I review the procedures adopted by firms when acting in the face of conflict.

7

Acting in the Face of Conflict

INTRODUCTION

In chapter 6 I examined the way solicitor firms respond when confronted with a decision whether to act in the face of conflict. In this Chapter I shall explore the measures which are put in place when a firm decides that it will continue to act in the face of what, at least under a strict interpretation of the rules, is a conflict of interest.

Although Law Society rules are designed to prevent solicitors from acting in conflict situations, there is no rule of law prohibiting such action.[1] As discussed in chapter 2, the law recognises that, provided certain conditions apply, solicitors may act where there is a conflict. Much depends on the nature of the conflict. When acting against former clients, for example, the courts have determined that 'reasonable measures' must be in place to prevent information from moving within a firm.[2] Such measures have been held to include Chinese walls or 'other similar arrangements' provided that:

—they are not established *ad hoc* but form part of the established working arrangements of firms;
—there is an on-going educational programme in place for all staff;
—there are strict and carefully-defined procedures for staff who wish to cross the wall;
—walls are monitored by compliance officers;
—disciplinary sanctions are enforced where there is a breach of the wall.[3]

Where, on the other hand, a conflict arises because a firm wishes to represent separate clients who may have opposing interests in the same transaction (same matter conflicts), or where the firm acts for various clients whose interests may conflict (separate matter conflicts), client consent is the crucial requirement. Informed consent must be obtained for same matter conflicts but implied consent may be sufficient for separate matter conflicts.[4]

In law, therefore, a distinction is drawn between different types of conflict when determining the action which needs to be taken by firms. The most stringent measures are required where a firm seeks to act against a former client. In

[1] Above at 20.
[2] Above at 38.
[3] Above at 39.
[4] *Clarke Boyce v Mouat* and *Kelly v Cooper*, above at 45 and 48.

these cases physical barriers must be in place to prevent information moving within the firm. However, no physical barriers are required for other types of conflict.

Some two-thirds of the firms which participated in this study reported that they had acted in a conflict situation.[5] Of these, the majority said that they did so on a regular basis.[6] This chapter examines what 'special measures' firms adopt where there is a conflict, whether such measures comply with the legal requirements, and whether they offer clients adequate protection. In order to evaluate the appropriateness of the protective measures used by firms, it is first necessary to review the mechanisms available and to assess whether the type of conflict *ought* to make any difference to the measures selected.

THE AVAILABLE OPTIONS

There are a number of different options open to a firm which chooses to act in the face of conflict. Some are well known, others less so.

1. Chinese Walls

The most obvious way to stop information from moving within a firm is to separate the relevant parties and erect physical barriers between them, thereby, it is hoped, preventing staff from having any contact with each other. By ensuring that internal controls are put in place to isolate various departments, the risk that confidential material will be spread to all areas of the firm is at least reduced. This compartmentalised approach is commonly referred to as a 'Chinese wall'.

I have, to this point, considered the use of Chinese walls only in relation to former clients or on amalgamation of two or more law firms. It is possible, however, that a wall may be erected in other conflict situations. The City Disputes Panel, in its recent review, maintained that

> Chinese walls are a tried and tested method of keeping the affairs of a client and a firm, or the client and another client, which might be adverse, separate so that the interests of the client or clients can be safeguarded.[7]

How then ought a firm to set about constructing a secure wall?

The City Disputes Panel observed that an 'effective' wall must ensure that information which is within the knowledge of one part of the firm does not flow into another part of the firm, where that information could otherwise be used to

[5] Firms 1, 3, 4, 5, 6, 7, 9, 10, 14, 15, 17, 18, 19, 20, 23, 24, 27, 28, 29, 30.

[6] Firms, 1, 3, 5, 7, 9, 10, 14, 15, 17, 18, 19, 20, 23, 27, 28, 29, 30.

[7] *Review of Conflicts and Duties In Relation to Confidential Information* (The City Disputes Panel, London, 2000) at 9.

further another client's interests and may prejudice the interests of the owner of the information. However, there appear to be no set criteria in law determining how a Chinese wall should be established. As has been shown above, the courts and the Law Society have identified various procedures which they see as the minimum conditions that need to be satisfied in respect of any wall. These include:[8]

—walls must be established, not created *ad hoc*;
—there must be complete physical separation of staff and documentation;
—educational programmes should be provided for staff;
—there need to be strict and carefully-defined procedures for crossing walls;
—there should be regular monitoring by compliance officers;
—disciplinary sanctions should be imposed where there is a breach of the wall.

If adhered to, these measures should substantially reduce the risk that information will pass from one side of the wall to the other. Furthermore, any breaches of the wall can be dealt with swiftly since independent compliance officers should be able to spot any deficiencies in the arrangements. The introduction of on-going training programmes for staff, and the imposition of sanctions if the wall is breached, should help to maintain high standards of integrity on the part of all those involved.

2. Other Possible Conflict Management Strategies

Closely associated with the idea of Chinese walls is a simple understanding not to disclose information to fellow members of a firm.[9] This is sometimes referred to as a 'cone of silence'.[10] Each solicitor in possession of relevant confidential material promises not to reveal what he knows to anyone else within the firm. The success of this approach does of course depend entirely on the integrity of individual members of a firm.

Because it may be difficult to isolate just one person within an organisation it may prove simpler for the individual not to come to work for the duration of the case. That person may, therefore, be given a sabbatical, sometimes referred to as 'gardening leave'.[11] An example of this strategy was seen in 1997 when a senior member of one firm was given leave. This was done to prevent the collapse of a proposed merger of two law firms because a client of the other firm

[8] Above at 39.

[9] JR Midgley, 'Confidentiality, Conflicts of Interest and Chinese Walls', (1992) 55 *Modern Law Review* 822 at 822.

[10] This method appears particularly appropriate where a solicitor changes firms, as in the case of *Halewood International v Addleshaw Booth & Co*, discussed above at 41. See also the US case of *Nemours Foundation v Gilbane Aetna Federal Ins Co* 632 F Supp 418 which deals with the effectiveness of 'cones of silence'.

[11] See *Commercial Lawyer*, Editorial, 'Garden Leave put to the test', (1997) 19/10.

was unhappy about the knowledge possessed by this partner. The partner remained on leave until that client's case had been settled.[12]

Another possible strategy is 'storage'. All relevant papers in respect of work previously carried out on a case may be stored away and not made available to the fee-earners working for the present client. Likewise, access to any information contained on a firm's computer system can be restricted by the use of passwords.

Finally, it is possible, at least in theory, to secure the agreement of clients to allow any confidential information to be revealed to the party with whom the conflict has arisen. In other words it may be accepted that there is not, after all, a conflict, or that the conflict is insignificant, or that the information held in respect of the other party is, relatively speaking, trivial. Of course the feasibility of this approach will very much depend on the type of information held by the firm and, most fundamentally, on the willingness of the clients to co-operate.[13]

SELECTING THE MEASURES (IN THEORY)

All the above measures are designed to ensure that information received from clients remains confidential. Each option, however, has different strengths and weaknesses. Some offer a substantial degree of physical protection, whilst others work entirely on trust. A Chinese wall erected in the manner described above would seem, on the face of it, to provide greater physical protection than a cone of silence. How should firms decide which devices to use when facing a given conflict?

On one view the decision should be determined by the type of conflict. In the previous chapter it was suggested that conflicts of interest fell into three categories:

1. Direct conflicts:
   a) clients directly opposing each other;
   b) clients' interests directly conflicting;
2. Common-goal conflicts;
3. Confidential information conflicts:
   a) information on former clients;
   b) information possessed by new staff;
   c) existing client reveals information relevant to another existing client.[14]

[12] *The Lawyer*, 9 September 1997. Such an option was also advocated by Neuberger J in *Halewood International v Addleshaw Booth & Co*, above at 42.

[13] In certain jurisdictions, the courts may, theoretically at least, still object. See *Tsakos Shipping & Trading v Juniper Garden* 12 Cal App 4th 74, 15 Cal Reptr 2d 585 (1993). For an example of a case where the parties did all agree to the same firm acting see *Commercial Lawyer*, Editorial, 'C&W Communications voted this year's deal of the year', (1997) 20/74.

[14] Potential conflicts and commercial conflicts are not included here as it is assumed that any potential or commercial conflicts will have been investigated further and that the any potential conflict either becomes an actual problem (and thus falls within one of the other categories of conflict) or turns out not to pose a problem for the firm.

Certain types of conflict may be deemed more 'acute' than others and thus, perhaps, to require more stringent measures. One might expect that, in general, the more directly opposed the parties or their interests, the greater the need to segregate all documents and personnel relating to those clients. There are at least five reasons why this may be so:

1. Any leak of confidential information could provide the other side with a substantial advantage. If, for example, a firm is representing two rival bidders, knowledge of, say, the other side's 'bottom line' is bound to benefit one client to the detriment of the other.
2. In a direct conflict, where the interests of the two parties are directly opposed, one or other of the parties is more likely to raise objections if they consider the measures employed to be inadequate. Moreover, as the outcome of a direct conflict will usually result in one client losing to the other, if there is any indication that confidentiality has been breached it is more likely that action will be taken against the firm.
3. Where two parts of the same firm are competing directly against each other there may be a greater temptation for someone in the firm to obtain access to confidential information held by the other side.
4. Where there is a direct conflict the case is on-going and, therefore, will generate more documents and more information as it progresses.
5. Where a firm acts in a direct conflict situation, third parties may take an interest in the case. In these circumstances not only must both clients' interests be adequately protected, they must be seen to be protected.[15]

Some of the above points are also applicable to confidential information conflicts. It could be said that such conflicts are likewise acute and require physical barriers to be in place. However, where one client's case is no longer active (for example, where the firm holds confidential information on former clients, or such information is possessed by new members of staff) lesser measures may be appropriate. This is because the information in question is clearly identifiable and no further information or documentation is likely to be generated.

With common-goal conflicts even these safeguards may not be necessary. This is because much more information will be held in common by the parties. They will be working together rather than in opposition, and the degree of trust between them can also be expected to be greater.

Other factors may also play a part in determining which measures firms should adopt. For example, the number of fee-earners involved may be a factor. If, say, the case involves only two fee-earners, one representing client A and one

[15] An example of such outside interest was seen when the law firm Olswang attempted to act for two rival bidders. The firm erected a Chinese wall but then decided that it could not act for the second bidder given the 'highly competitive bid situation which was potentially very aggressive with winners and losers.' The interest in Olswang's conduct prompted several articles in the legal press. See, for example, M Mullally, 'How Olswang got its signals crossed', (2000) 5 *Legal Week* 10.

representing client B, it may be possible to rely on a simple agreement that they will not communicate with one another. If, on the other hand, many fee-earners are involved, the risk of information being leaked is far greater and in these circumstances it may be more appropriate to impose physical and/or electronic barriers.

Another key consideration will, of course, be the client's view of the matter. A client may not feel completely reassured by a simple undertaking that the fee-earner will not reveal any information. He may believe that further steps should be taken to isolate that member of the firm. In these circumstances it may be necessary either to ensure physical separation or, if only one fee-earner is involved, to insist that the person in possession of relevant confidential information take leave for the duration of the case.

An additional concern for firms when considering these issues is whether their methods of protection will ever be challenged, whether this be by another law firm or by one of their own clients. This may be of particular concern if a firm chooses to act in a conflict situation without the consent of all parties. For example, if the firm acts against a former client without his consent, an agreement not to discuss the case and storage of relevant papers may be insufficient to allay the concerns of the former client. That client may then decide to challenge the firm and, in these circumstances, it would appear that only a properly-maintained wall could be relied on in court.[16]

SELECTING THE MEASURES (IN PRACTICE)

Only the large City firms appeared to make a distinction between the different types of conflict and the options available to them. For this reason the practice of these firms will be considered separately.

1. Large City Firms

The various measures employed by these firms were explained by one managing partner as follows:

> Sometimes we will use a full-scale Chinese wall whereby there is total separation of personnel. More often though, we use 'mini walls' or cones of silence. In these cases, there is no physical separation but all relevant fee-earners are warned not to discuss the matter with so-and-so, and the papers are not made generally available. Alternatively, if it's just a case that one person within the firm has at one time or other acted for a client and we are now acting against them, the relevant papers will be put away securely and if that fee-earner is still with us, he will undertake not to discuss the matter with anybody else.[17]

[16] Above at 39.
[17] Firm 29.

The above full-scale walls are distinguished from a variety of other devices. It may be helpful at this point to define exactly what was meant by a 'full-scale' and 'mini' wall and to review the protection afforded by such devices.

i. Full-scale Chinese Walls

Most large City firms said that written procedures were in place governing how a Chinese wall should operate. Firm 3 provided one example of the template which is meant to be adopted:

—Each party gives informed consent in writing to the firm.
—Each party expressly consents in writing to the structure, organisation and maintenance of the Chinese-wall arrangement (such arrangement having been fully disclosed in writing to each party).
—An explanation is given by the firm to each party of potential risks associated with the wall arrangement.
—The firm gives a commitment not to favour one party to the detriment of the other.
—It is a condition of the retainer with each relevant party that the firm shall cease acting for all parties where any party, at any time during the retainer, requests in writing the firm to do so.
—Separate departments (and sub-departments within specialist departments) of the firm are located as far apart as can be reasonably achieved on separate sides of the wall (hereafter departments A and B respectively).
—No practitioner outside department A or B is to work on the relevant transaction.
—All members of departments A and B, and all other relevant members of the firm, are informed in writing at the outset of the transaction and reminded at regular intervals thereafter of the rules of the wall arrangement and the requirements of confidentiality within and outside the firm.
—There is control of all documentation, property, know-how and other information, whether on the firm's computer system or otherwise, and whether archived or non-archived, relating directly or indirectly to the transaction.
—The firm's computer system is set so that documents connected to the transaction on one side of the wall are not accessible to any member of the firm or members of the relevant department on the other side of the wall, other than to persons employed or contracted by the firm as information-technology specialists.

Whilst this outline appears at first sight to accord almost exactly with the measures set out by the courts and Law Society, there are some significant differences. First, there is no independent supervisor. Secondly, there is no on-going educational programme for staff. Thirdly, and most fundamentally, these walls are created *ad hoc*. Although my interviews with firms were conducted before

the House of Lords decision in *Bolkiah v KPMG*, it is unlikely that their stance will have altered significantly.[18] There are two reasons for this. First, firms were well aware that the courts did not approve of solicitors' use of Chinese walls prior to the House of Lords' judgment.[19] Nevertheless they persisted in that use. Secondly, the nature of legal practice does not lend itself to a regime whereby different departments are segregated by 'walls' on a permanent basis. Lawyers are accustomed to working as a team, sharing ideas and calling on each other for advice.[20]

Though firms erected walls *ad hoc*, this was not to say that they were not secure. Furthermore, it was asserted that clients were briefed fully beforehand on the measures which would be employed and would be asked to give their consent in writing before the firm would agree to act. Firm 29 demonstrated how difficult it would be for any member of the firm to breach a wall constructed in this way:

> Each floor of our building is access-protected. So you can't move around the building without your card for the proximity readers. When there is a wall in place, your access will be restricted. Although we don't have independent supervisors, our conflict officers would reserve the right to make personal inspections of both sides of the wall.

Even where there were no electronic barriers in place, Firm 14 observed that clients were usually happy to agree that physical barriers prevented movement of information and that staff could be trusted not to breach the wall:

> Most clients are prepared to say, if you've got a wall in place, they are happy for the firm to act for both. So we make sure there is a letter setting out their agreement and then the firm writes to everyone saying, 'As you know, the two clients have agreed we can proceed on this basis. The two teams are xxxx for that client and xxxx for that client and it is fundamental that the people in Team 1 have nothing to do with the people in Team 2 and, furthermore, that all steps are put in place to make sure that documents are not left lying around.' We also make sure that the support staff is separated and that the two teams are not sharing the same secretaries. These things work on the trust of all involved. I know the courts think that we sit around drinking coffee and discussing the case but, quite frankly, life is not like that.

ii. Mini Walls

Firm 15 described what might be involved in a 'mini' wall:

> Either an individual fee-earner will be appointed to work for each client or a team of fee-earners (depending on the complexity of the case). Of course, if there is a need for secrecy, the papers will be kept separately and all involved will keep the affairs of their

[18] See further, JE Griffiths-Baker, 'Further Cracks in Chinese Walls', (1999) 149 *New Law Journal* 162.

[19] Above at 35 and *Legal Week* 22 July 1999, at p 23: 'Although Jefri has undoubtedly heightened the awareness around conflicts of interest generally in the City, there have not been significant changes to the existing practices to identify and manage conflicts.'

[20] See Rix J in *Laker Airways Inc v FLS Aerospace*, discussed above at 60.

> particular client to themselves. There is no physical separation. It is all worked on trust. If you like, I suppose you could say that a system of mini-walls operates.

As defined, this so-called 'mini' wall is substantially different from a full-scale Chinese wall. As there is no physical separation of the fee-earners, the risk that information will be leaked, advertently or inadvertently, is presumably greater. The senior partner of firm 15, quoted above to the effect that everything works on trust, was the same senior partner who would not tell his fellow partners that the firm had been approached to act in a hostile take-over bid for an existing client of the firm.[21] His argument then was that he could not be entirely sure that the partner whose client was to be subject of the bid would keep the information secret. He therefore appeared to be saying that he would trust his staff to maintain confidentiality in one instance, but he was unsure that they would not breach it in another. Arguably, there is a difference between the two circumstances as, in the former, the partner would have to be deliberately dishonest in order to gain information, whereas in the latter he would already be in possession of the information. However, a partner who has knowledge that he is not supposed to use may find it difficult to judge the matter objectively. It is always possible that the temptation to use information to the benefit of his client may prove too great.

Another concern about the 'mini-wall' relates to the degree of understanding which clients possess. As no details of the procedures used for erecting a wall appeared to be given to clients in these circumstances, it seems doubtful that clients will be fully aware of what is going on within the firm. They may believe that they are approving a complete Chinese wall, whereas what they are in fact agreeing to affords them rather less protection. Firms, however, argued that this was not the case, essentially because their clientele comprised experienced commercial operators. As one managing partner put it:

> Our clients recognise that we have to operate in this fashion as it is a natural consequence of today's business world. There are undoubtedly going to be conflicts. They are sophisticated clients who understand the score. They will often have in-house legal teams advising them. So we are often dealing directly with another lawyer. There is no way they would agree to such arrangements if there were any cause for concern.[22]

When these firms were asked whether they were ever concerned about information being transferred between fee-earners working for different sides in the same matter, typical responses were as follows:

> Once you lay down the rules, people abide by them. You have to remember the cultural approach of our type of practice. We are doing price-sensitive activity all the time. At any one time, we'll have a number of transactions which are stock-exchange sensitive. People recognise that they have to be discreet. They don't sit around saying 'I'm doing such-and-such a take-over'. So it is the kind of environment we operate in.

[21] Above at 104.
[22] Firm 14.

> There is always the risk that someone will say something inadvertently but where a wall has been established, this is unlikely because everyone is alert to the dangers.[23]
>
> * * * * * * *
>
> With the number of fee-earners we have, you will often be on the opposite side of a transaction to someone you hardly know. It is, therefore, most unlikely that solicitors will discuss the case socially.[24]

These firms argued that to breach any walls that were put in place would disadvantage both the fee-earner and the practice as a whole. After all, one of the purposes of acting in a conflict situation is to maintain an on-going relationship with both sets of clients. If trust is breached it is unlikely that the firm would be asked to act again. As one observed:

> Even if somebody on the right-hand side of the wall found something out about the left-hand side, he simply wouldn't use it. After all, he wouldn't be doing himself any favours in the long run.[25]

Perhaps the critical issue is how firms select which measures to use when faced with a conflict. Large City firms were generally clear that this would be determined by the type of conflict:

> If it is a direct conflict, that is where clients' interests are directly opposed, then you need a full-scale Chinese wall. In such cases there is a greater need to ensure confidentiality. Moreover the clients demand it. But where you have acted on something a long time ago and now are instructed to act against that client, lesser measures can be adopted. We just make sure that all relevant paperwork is securely stored and that anyone who acted for the former client has nothing to do with the new case. Similarly, where the conflicts are less acute, there is no need for a proper wall to be erected. You can use 'mini-walls' whereby Mr X would act for client A, Mr Y for client B, and so forth. Mini-walls would be used if all clients party to a project wished us to act for all of them.[26]

It would appear therefore that large City practices perceived the measures required when acting in a conflict situation to be determined by what they deemed to be the severity of the conflict and, secondly, by the views of their clients. They regarded physical separation as necessary when the clients' interests were directly opposed, but a full-scale Chinese wall was not thought to be necessary when, for example, acting in a common-goal conflict. As one managing partner explained:

> If all parties to a deal want to get the documentation sorted out properly but are in agreement as to what the basic terms will be, there is no need to erect a full Chinese wall. In fact, no physical measures need be taken. This is not to say that each individ-

[23] Firm 15.
[24] Firm 29.
[25] Firm 14.
[26] Firm 29.

> ual party's interests will not need protection. But such protection can be afforded by appointing particular fee-earners to be responsible for each client.[27]

Arguably this approach matches the legal requirements in that the firm ensures that all clients agree to it acting. It circumvents the conflict by relying upon client consent. In fact, by appointing individual fee-earners to watch over each party's interests, it could be argued that these firms afford more protection to clients than the law requires.

On occasions, however, it appeared that large City firms did not seek the express consent of clients before acting in the face of conflict. This can be seen particularly with reference to confidential information conflicts. First, in relation to acting against former clients, one firm explained its procedures as follows:

> Former clients are easy to deal with because you just store the relevant paperwork and tell all the people who worked on the other case not to talk about it.[28]

Although in practice this method of isolating information may be effective, no reassurance is given to former clients that their affairs will not be discussed within the firm. Moreover, such an approach would almost certainly be considered inadequate by the courts.[29]

Large City firms also took the view that consent was not required when the conflict arose because the firm was in possession of confidential information from one client which would be of interest to another client. Nor, in these circumstances, did it appear that barriers were in place to prevent information from being passed to other fee-earners. When asked to justify this, one managing partner explained that such consent was deemed to be implicit when certain clients gave their instructions:

> We are particularly well-known as a banking practice. In fact, we act for well over one hundred banks. Of course, their interests are going to conflict, but these clients realise that when they come to us. They know we will already be acting for several of their rivals but that is taken for granted because there are only so many solicitors firms who can offer the expertise which they require.[30]

Firms which adopted this approach admitted that, from time to time, they had received complaints. One partner explained what usually happened on such occasions:

> If the client complaining is a valued and important client then we will have to weigh up our options and decide whether it would be better for us commercially to drop the other client. Usually such complaints arise not because concerns are raised that information will be leaked in the firm, but because that client is unhappy about us acting for that particular competitor.[31]

[27] Firm 14.
[28] Firm 29.
[29] Following *Bolkiah v KPMG* discussed above at 40.
[30] Firm 15.
[31] Firm 29.

In other words, some clients expect loyalty, defined in terms of exclusivity, from the solicitors they instruct. If this is not forthcoming, they are inclined to go elsewhere.

iii. Conclusion

Based on my interviews, the approach of large City firms to acting in the face of conflict can be summarised as follows:

a) different devices were used depending on the nature and degree of the conflict;
b) the most physically secure devices were employed only where there was a direct conflict;
c) mini walls were used for common-goal conflicts;
d) where firms faced a confidential information conflict concerning a former client, 'storage' was the method typically employed;
e) for confidential information conflicts arising because one client imparted information which was relevant to another client, no measures were employed;
f) prior consent to the above arrangements was obtained in most circumstances, but not when a firm was acting against a former client, or when the firm was in possession of information from one client which might be considered of interest to another client.

2. The Remaining Practices

It appeared at first that little if any distinction was made by the remaining firms between the type of conflict facing the practice and the nature of the measures employed. A typical response was to the effect that 'where we act in any conflict we always erect a Chinese wall.' However, as will be demonstrated below, it appeared that the term 'Chinese wall' was a label employed by these firms to describe almost *any* form of isolation procedure. In other words, no distinction was drawn between a Chinese wall, as defined by the courts and Law Society, and an undertaking by one partner not to reveal information in his possession. Both were subsumed under the one heading of 'Chinese wall'.

By way of example, the following definitions were used by these firms to describe what was meant by the term 'Chinese wall':

—an agreement between the partners involved not to talk about a case;
—an understanding that no-one looks at each other's papers;
—separate teams;
—two members of the firm treating each other as if they were in different offices.

The label attached to the measures taken by these firms may be immaterial. It is the effectiveness of the steps taken to isolate information that matters. To this

extent the national firms within this group enjoyed an advantage because they had, in effect, an in-built system of Chinese walls. As these firms had several offices in different parts of the country, they did not have to take any physical steps to erect Chinese walls. Firm 30 described how this worked:

> Different offices sometimes act against each other. There are, of course, different personnel, and each office has its own computer system which cannot be accessed by any of the other offices. There is, therefore, complete physical separation of fee-earners, paperwork and support staff. There is never any danger of the wall being breached, because it is as if we are dealing with a separate firm. Moreover, from a practical point of view, the offices are sometimes situated hundreds of miles apart and, more often than not, we do not know the fee-earners in the other offices.

It can perhaps be said that these large multi-office practices adopted the safest possible procedures when they acted in such a way, as these walls were not created *ad hoc* but existed as a matter of course. However, Firm 30 added:

> We sometimes erect a Chinese wall within a single office. This happens where one office is keen to keep the work generated by both clients. Although we have one profit-share agreement between the offices, we are quite competitive with each other.

Where this happened, national firms were on a par with other practices. These one-city firms did not have an in-built system of walls, relying in effect on informal mechanisms. All walls were constructed *ad hoc* and no written guidelines were available to clients. Again, definitions as to what constituted a Chinese wall varied quite considerably. Firms 17 and 18 appeared to have the clearest procedures:

> We assemble all the parties and stress that strict confidentiality procedures apply. If communications are necessary between the different sides of the wall, then they are to be made through a third party. Any post which comes into the office bears a specific reference so that it does not get delivered to the wrong side of the wall by mistake. I could see that if we had a huge matter, then it might be desirable for a colleague to move to a different floor, but we haven't found that necessary. At the end of the day, the whole procedure is operated on trust. You don't look at each other's documents and you don't discuss the case.[32]
>
> * * * * * * *
>
> We ensure physical separation to the extent that the team involved would be a partner, a fee-earner and maybe a wider group of people providing backup and secretarial services. The same secretary would not work on both sides of the transaction. To a limited extent, we also use codenames and we password all documents on the computer system so that they cannot be read by the other side.[33]

Firm 20, on the other hand, appeared to have no clearly-defined arrangements:

> Different sides are represented by different individuals, sometimes different offices, but even if it is in the same office, there shouldn't be a problem. We divide our

[32] Firm 17.
[33] Firm 18.

> solicitors into teams anyway. So you might work in one team and not necessarily have anything to do with another team.

Firm 5 was likewise typical of the less well-organised practices, having a very loose definition of what constituted a Chinese wall:

> A wall exists where two different members of the firm treat each other as if they were in different firms for the purposes of the case. Strict self-discipline is observed over the confidentiality of documents.

A similar view was held by firm 28, which maintained in respect of one conflict that:

> No-one looked at each other's papers and there was no discussion about the case.

Even less protection appeared to be afforded to clients by firm 10, as that practice was under the impression that no specific measures were needed where 'clients wished us to act, because [client consent] negates any conflict'.

In most provincial firms, therefore, it appeared that there was no attempt at physical separation and, in some instances, the same support staff were available to both sets of fee-earners. Nevertheless such firms generally claimed that adequate protection was afforded to their clients:

> Lawyers are trained to be confidential about their clients' affairs. You don't talk about clients' business at dinner parties, and so on. So why shouldn't you continue to meet socially and for lunch when you are acting in a conflict? Your instincts tell you that certain topics are just off-limits.[34]

One firm, however, provided a slightly different response, appearing to accept that the cases might well be discussed by the fee-earners involved:

> You mean—do they talk about the case? I suspect that they probably do on occasions. It's only natural. But there is a senior person in charge. So hopefully not too much of that goes on.[35]

It appeared that these firms were actually relying upon 'cones of silence' rather than Chinese walls, and that the term 'Chinese wall' was a catch-all term applied to protective measures of all types. This falls far short of the physical protections commonly understood to be implied by the term Chinese wall, but often the size of these practices meant that physical separation was impractical. As one managing partner explained:

> We do not have the premises to separate physically teams of solicitors and support staff permanently. Also, it would not be a good use of resources to adopt such a structure.[36]

Even though no physical protection might be provided by these firms to safeguard confidential information, client consent would be sought in some

[34] Firm 17.
[35] Firm 20.
[36] Firm 19.

circumstances before deciding to act. Provided such consent was given, these practices could be said to be complying with legal requirements. However, as with large City firms, questions may be asked about the degree of understanding which clients possessed when they agreed to such devices being employed. It might be supposed that some of these clients were less sophisticated than the clientele of large City firms, and by and large would not have their own legal departments from which they could obtain independent advice. So what did these firms consider amounted to informed consent? Firm 30 explained how consent was usually obtained:

> When clients ask what measures will be in place, we usually use the blanket expression, 'We'll establish a Chinese wall', because Chinese walls mean different things to different people. In reality, how much information is provided will often depend firstly on the fee-earner involved and secondly on individual clients. Some clients will require more detail than others. I suppose you could say that there might have been circumstances when clients have given their consent in the perhaps mistaken belief that a full-scale Chinese wall will be erected and when, in reality, the only measures adopted were cones of silence.

No firm claimed to advise clients to seek independent legal advice before giving their consent. Moreover, it appeared that in respect of certain conflicts *no* express consent was sought from clients:

> We have also acted without getting consent where a conflict exists because we have information from one client which may be of relevance to another. Consent is inferred in such cases because clients are well aware that we will be acting for some of their competitors. Express consent would only become an issue in such cases if we ended up acting for the only two players in a particular specialist field.[37]

By and large these firms were of the view that express consent was not needed unless there was a direct conflict. The mere fact of the firm having access to information which would be of interest to another client was not, for the most part, deemed to constitute a conflict.

Conclusion

The approach adopted by firms in this group, as it was reported to me, can be contrasted with the approach of the large City firms in a number of respects:

1. there was no systematic distinction between different conflict management strategies and different conflict types;
2. much greater reliance was placed on cones of silence, and on trust, than upon physical separation;
3. client consent was sometimes sought prior to acting in a conflict situation, but this depended very much on the nature of the practice and the type of conflict encountered.

[37] Firm 17.

THE CLIENT PERSPECTIVE

We have seen that many of the measures adopted by firms when acting in the face of conflict are heavily dependent for their success on the integrity of the individual solicitors involved. But how much confidence do clients place in a system that relies so much on trust? Client A described what happened when the law firm his company had instructed in respect of a management buy-out discovered that the firm was acting for a rival company:

> I suppose you could say that the firm had fully informed consent as when the conflict was discovered they obviously asked the other acquiring company and us whether we were prepared to accept the conflict. Because we were so far down the line with the deal, neither of us had much choice. Although the two teams were physically separated, they worked on the same computer system. But I trusted the partner that I was working with and believed his integrity in relation to ensuring that Chinese walls were erected and maintained. I am surmising that they did maintain the Chinese walls within the computer systems.

This client acknowledged that he had no way of checking whether the measures introduced by the firm were secure:

> As soon as work goes to our outside lawyers we sort of lose control and you think, 'Well, I presume they're operating Chinese walls'. We can never be sure though.

Client D held the same view:

> You have to trust the law firm because there is absolutely no way we could monitor what the solicitors actually get up to.

There appear to be two reasons why clients allow firms to act in a manner which could potentially damage their interests. The first is that clients may have little choice but to accept the situation because by the time they discover the conflict the case has reached an advanced stage. The scenario outlined above by Client A, where it was almost too late to halt the transaction, provides a good illustration of this. As that client pointed out:

> It would have been extremely difficult for us to have done anything else bearing in mind the late stage of the proceedings and the fees we'd incurred up to that point.

There could be a number of other reasons why clients were prepared to take a relaxed view of firms' wish to continue to act for both parties to a conflict. For example, as in the following illustration, the client might feel relatively invulnerable within any prospective litigation, or alternatively, the client may have felt that the information which the firm had about them was unlikely to be damaging even if passed on:

> I felt that we did at least have the upper hand in the transaction and therefore I was more comfortable about the measures employed. I suppose, on the evidence, I was sure we were going to win but I am confident that I would have felt very nervous if the

> shoe had been on the other foot. In other cases where I have had to assume proper Chinese walls were in place we haven't handed over any particularly confidential information, so the firm was predominantly dealing with paperwork.[38]

Client B told me that he felt he had little option other than to trust the firm in these circumstances:

> If we were working with our solicitors to market something and we found out that they were working for a competitor of ours who was directing his efforts at the same market, we would want to be satisfied that some measures were in place. We want an assurance that they had appropriate segregation, but we just have to trust them that the measures will work.

This client took some reassurance from the fact that he could also draw on the advice of his own in-house team of experienced lawyers:

> Our own legal team acts as a double check where there is a conflict. I suppose in that respect we can be regarded as quite a sophisticated client.

He also observed that clients are always in competition—one could say 'in conflict'—in the sense that they are competing for the services of the best lawyers in the firm:

> If by diverting lawyers from us . . . the firm is depriving us of the high level of service it would otherwise give us, you could say there is always a conflict whenever a lawyer acts for more than one client.

Client B suggested that in expecting a certain level of service from the largest law firms, clients must be prepared, in return, to adopt a more flexible attitude towards conflicts:

> The biggest firms have spent a long time thinking about conflict procedure because they know that there can't be one-horse law firms. This is because we, as clients, demand a firm which is large enough to provide the expertise and resources we require. So we accept that they will act for us one day and then against us another.

Client B maintained this view despite the fact that the measures employed by certain firms had caused difficulties for his company. The only sanction considered was that of withdrawing their business:

> We complained to the firm and said, 'How can you possibly have done this? Never do this again.' We then didn't use them for a while but I would never say that we would boycott them permanently.

However, other clients, who could also be described as 'sophisticated', are less confident that the measures which firms adopt to manage conflicts are sufficient. Client C had one experience of a firm acting in a clear conflict situation. Even though the firm in question devised mechanisms for separating information, he felt uncomfortable about the whole process:

[38] Client A.

> They said that they'd erected a complete Chinese wall, with two completely separate teams. But by the very nature of the case, the wall was built *ad hoc* and because of the size of the transaction in question (£11 billion) you needed to have at least four employment lawyers and four tax lawyers for each client. The corporate and litigation departments were also involved. Therefore, the wall had to run, not just across one department, but across the whole firm. I don't doubt that they made a good show of it as they'd found themselves in this conflict situation (for which they'd get two sets of fees) but I never used the firm again.

In summary, it would appear that major clients, such as those who routinely instruct the large City firms, have a 'sophisticated' approach to conflicts not unlike that of the firms they instruct. They understand very well the financial power that they wield, and for the most part they are content to rely upon this power as the best insurance against unethical conduct on the part of those law firms with which they have an established relationship.

SUMMARY

We have seen in this chapter that the degree of protection offered to clients varies significantly between practices. Where full-scale Chinese walls are used, the most secure seem to be those erected by the large City firms, or those that exist naturally within multi-office national practices. These firms have the personnel and facilities to enable them to separate all relevant staff and documentation. Yet such walls are rarely used. In most cases a simple undertaking is given by fee-earners that they will not disclose relevant confidential information. In these circumstances there is bound to be a risk that information will pass within a firm to the detriment of one or more clients.

It is difficult to assess the protection afforded to clients in these circumstances. Much depends upon the ethos of the firm concerned. Smaller firms certainly believe they have high ethical standards and can trust colleagues not to abuse a system that operates almost entirely on trust. Larger firms, on the other hand, tend to adopt a pragmatic approach, distinguishing between different types of conflict. They too rely on trust, but where there is a conflict and they still wish to act, they have a range of protective measures which they are then able to apply. Where there is a direct conflict they may impose a full-scale Chinese wall. In other situations they will rely on what they describe as 'mini-walls', these being, in effect, no different from the procedures adopted by medium-sized firms in similar circumstances. It may be more difficult for very large firms, given the number of fee earners involved, to establish beyond question that a form of protection which is essentially based on trust can indeed be relied upon.

Some firms appear to believe that physical separation is not required provided their clients consent to the firm acting. The difficulty with this strategy is that clients will not necessarily understand all the implications of giving consent. The degree of understanding possessed by the corporate client of a large City

firm may be very different from that of an inexperienced private client. This is presumably why the Law Society prohibits firms from acting in conflict situations even when clients give their consent.

Firms may respond by saying that their members are meticulous when acting in a conflict situation and that, if there were any risk that a client's interests would be compromised, the firm would decline to act. It is questionable whether it is reasonable, given the commercial pressures on solicitors, to place absolute reliance upon their adherence to the highest ethical standards. Arguably, the leading judgements in this field have taken the changed commercial environment into account when reviewing protections that have to be in place before a firm can be allowed to act in a conflict situation. Whether we should accept at face value solicitors' own claims to professional integrity is something that needs to be considered in the context of a broader review of conflicts of interest. This is a topic that I shall address in the concluding chapter of this book.

8

Conclusion

> As we enter the new millennium, the rules and principles which govern solicitors' professional conduct continue to evolve to reflect changes in society and the role of solicitors in society.
>
> Michael Mathews, President of the Law Society, 1998–1999[1]

INTRODUCTION

THE MAIN aim of this book has been to examine whether the current regulatory regime governing solicitors' conduct in conflict situations is appropriate for the commercial environment in which many law firms now operate. In other words, do Law Society rules sufficiently reflect changes in society and in the demands placed upon solicitors? I have also been concerned with the question of whether solicitors abide by the current rules; if not, why not; and the degree to which solicitors' responses to conflicts of interest (whether or not in conformity to the rules) protect their clients against inappropriate and damaging disclosure. In attempting to provide answers to these questions, the preceding chapters have examined:

—the scope of the current Law Society and common law rules governing solicitors' conduct in conflict situations;
—the rationale behind the regulations;
—the way other professions and law societies approach the issue; and
—the effect of existing regulations on firms.

In this concluding chapter I review what can be regarded as the main difficulties with the existing rules and examine various possible strategies for managing conflicts of interest.

LAW SOCIETY RULES AND LEGAL PRINCIPLES: THE DEBATE

In chapter 2 we saw that the Law Society adopts a preventative stance in relation to conflicts of interest. Rather than allowing solicitors to 'manage' conflicts by reference to specific guidelines, the rules prohibit firms from acting where

[1] N Taylor, *The Guide to the Professional Conduct of Solicitors*, 8th edn (Law Society Publishing, London, 1999) at xi. Hereafter referred to as 'The Guide 8th edn'.

there is or *may be* a significant risk of conflicting interests. The rationale behind this blanket prohibition appears to be the Law Society's desire to maintain public confidence in the profession. Maintaining confidence in the solicitor-client relationship is regarded as of paramount importance. Clients should have confidence that the solicitor's partisanship is not compromised by his potentially conflicting responsibilities to others. The rules are designed to ensure that solicitors abide by principles of loyalty and confidentiality. Permitting members to represent clients whose interests conflict would undermine this whole philosophy.

As one commentator has observed, however, rules of this nature have

> drawn their inspiration and vitality from relatively simple relationships and dealings in which the relevant actors were natural persons usually known to each other and in which the business or professional function of the person subject to fiduciary duties was of a known and limited character and was geographically confined.[2]

Relationships between solicitors and their clients have undergone fundamental changes over the last 50 years. Firms have grown dramatically in size; competition has increased; solicitors are more mobile; clients seek specialist advice in increasingly complex areas of law; and they often use more than one firm.

The Law Society has recognised that existing rules can be criticised on a number of grounds. For example, it can be argued that the rules fail to reflect modern business practices, and, in particular, that they do not reflect the needs of large corporate clients. Nor, it could be said, do the rules take account of the increased size of firms and the global nature of practice today.[3] Nonetheless the Law Society continues to hold to the principle that a solicitor should not act when there is a conflict of interest.[4] Faced with having to reconcile these conflicting findings and aspirations, the Law Society sought a review of the existing rules on conflicts and commissioned a 'City'-inspired draft of suggested rules for the future.[5] As previously noted, The City of London Law Society convened a working party with a brief to review the rules governing conflicts of interest and to make proposals. That working party reported in 2000. After widespread consultation,[6] the Council of the Law Society approved a proposal that revision to the rules on conflicts be undertaken in accordance with the suggestions made by the City Solicitors' working party.[7]

[2] P Finn, 'Fiduciary Law and the Modern Commercial World', in E McKendrick (ed), *Commercial Aspects of Trusts and Fiduciary Obligations* (Clarendon Press, Oxford, 1992) at 20.

[3] *Conflicts of Interest: A consultation document from the Regulation Review Working Party of the Law Society in England and Wales* (The Law Society, London, 2001) at 6.

[4] *Ibid*, at 4.

[5] See www.citysolictiors.org.uk at 1.

[6] Above at n 1.

[7] Council Minutes 31 January 2002. Although Council approved in principle the approach adopted by the Working Party, it may be sometime before new rules are adopted. It considered further work was needed on the precise wording of the rules and, once this has been completed, additional consultation with the profession should be undertaken.

The main thrust of the working party's proposals were as follows:

1. to define 'conflicts of interest';
2. to take the duties of confidentiality and disclosure outside the conflict rule and deal with them in the rule on confidentiality;
3. to place outside the definition of conflict certain specific situations which might be considered as involving minor, or potential, conflict;
4. to introduce the idea that in situations of minor or potential conflict a solicitor may continue to act with the client's consent; and
5. to examine whether or not a solicitor who acts personally for any party in litigation can act against that party in an unrelated matter.[8]

With these aims in mind, the working party proposed the following definitions, effectively limiting the circumstances in which there would be, as defined, a conflict of interest.

1. It was proposed that there would be a conflict if:
   (a) a solicitor owes separate duties to act in the best interests of two or more clients in relation to the same or related matters, and those duties conflict, or there is a significant risk that those duties will conflict; or
   (b) a solicitor owes a duty to act in the best interests of any client in relation to a matter and that duty conflicts, or there is a significant risk that it will conflict, with his own interests in relation to that or a related matter; or
   (c) a solicitor acts personally for one party in litigation (or another form of dispute resolution) and acts personally for an opposing party in those proceedings in an unrelated matter.
2. No conflict would exist for the purposes of 1(a) above if:
   (a) the different clients have a substantially common interest in relation to that matter or a particular aspect of it, and the conflicting interests of these clients are substantially less important to all of them than their common interest, and it is unlikely that a subsequent dispute will arise between those clients; or
   (b) there is no contractual or other cause of action between the clients whose interests will or may conflict in connection with that matter, and there is no significant risk that such a cause of action will arise;

   and it is reasonable for the solicitor to act for all those clients in relation to that matter in all the circumstances.[9]
3. A solicitor who himself holds information confidential to a client or former client must not put such confidentiality at risk by himself acting on any matter for another client where the confidential information might reasonably be expected to be relevant.

[8] RRWP report at 16.

[9] Any solicitor relying on this exception must be able to demonstrate that he has drawn all the relevant issues to the attention of the clients by notice in writing and that those clients are of full capacity and possess the experience and ability to understand the issues and exercise their own independent judgement in relation to them.

4. A solicitor working in a firm may act on a matter where confidential information held, or to be held, by another member of the same firm for a different client, former client, or prospective client would be relevant to the retainer provided:—
   (a) adequate safeguards are put in place to protect the confidentiality of the information held, or to be held, on behalf of the other, or former, client or prospective client;[10] or
   (b) the other client, being of full capacity and possessing the experience and ability to understand the issues and exercise their own independent judgement in relation to them, has agreed in writing to the arrangements.

If implemented, these proposals would significantly alter the current position with regard to conflicts of interest. For example, provided certain safeguards were in place, firms would be able to act against former clients without their consent. Solicitors would also be able to act for two or more parties in the same matter where the parties give their informed consent, and on separate matters without specific consent.

Following the working party's report, the Law Society, through its Regulation Review Working Party (RRWP), drafted a consultation document[11] which summarised the above proposals and offered them as a possible template for a revised set of rules governing conflicts of interest. Then, at the conclusion of this consultation exercise, the Law Society Council, at its meeting in January 2002, approved in principle the approach proposed by the RRWP. However, rules governing conflicts are as yet unchanged. The intention, apparently, is to undertake further work on a possible re-drafting of the rules and, thereafter, to consult the profession yet again in respect of this proposed re-draft.[12]

It is a feature of both the City Solicitors' Working Party Report and the subsequent consultation document prepared by the RRWP that they canvass possible options for reform of the rules, but do not attempt a thoroughgoing review of the underlying issues. This gives a sense that solutions are being sought to a problem that remains ill-defined and only partly articulated. The most fundamental question, one could say, is still to be answered: should commercial interests, whether of the solicitor or the client, be a factor when determining the rules

[10] 'Adequate safeguards' were thought to include as a minimum: confirmation in writing that the client waives any right to require the firm or any member of it to divulge confidential information, identification by the firm of all of its members holding confidential information, an understanding by such members that they must not discuss such information with colleagues working for the other client, an undertaking that no member of the firm has done anything which would amount to a breach of the information barrier, and that all physical documents containing confidential information are stored in a suitable manner. The following may also be appropriate: physical separation of teams, password protection on computer systems, a statement pointing out that any breach of the information barrier is a serious disciplinary offence, written confirmation from members of the team that they understand the terms of the barrier, appointment of a partner to ensure compliance with the barrier, and regular training for members of the firm on the duties of confidentiality and information barriers.

[11] Above at n 3.

[12] Informal communication from the Secretary to the Council in March 2002.

governing conflicts of interest? The courts have recognised that the changed environment within which solicitors operate should be taken into account when reviewing the solicitor-client relationship.[13] They have nonetheless concluded that confidentiality needs to be maintained in order that clients may have the confidence to disclose all relevant information.[14]

In determining the appropriate balance between preserving confidentiality and permitting solicitors to meet the needs of their commercial clients in an increasingly specialised legal environment, the courts have distinguished between different types of conflict of interest.[15]

1. Successive Representation

Where the conflict arises because a firm seeks to act against a former client, the courts have determined that the overriding principle should be the protection of confidential information.[16] Although there is no absolute rule prohibiting a firm from acting against former clients, the courts will intervene to prevent this from happening unless all risk of inappropriate disclosure has been eliminated.[17] It appears that the only way in which a firm can satisfy the court that such risks are eliminated is by having in place a pre-existing system of Chinese walls.[18] As was explained above, this is not a viable option for most firms.[19]

2. Simultaneous Representation

If a firm wishes to act in the same matter for two or more clients whose interests may potentially conflict, then the courts accord much more weight to the clients' right to retain the solicitor of their choice.[20] Provided informed consent is obtained from all involved, there is nothing to stop firms from taking on such work. Where the conflict arises because a firm wishes to act for two or more clients with potentially conflicting interests in separate matters, the courts have taken the principle of consent one step further. It has been held that if a client instructs a firm knowing that, because of the nature of that firm's business, it is likely that his interests will conflict with the interests of another of the firm's

[13] See, for example, *Re a Firm of Solicitors* (1999), 18 October 1999, Walker J, unreported; *Halewood International v Addleshaw Booth & Co*, 1999, unreported; *Re a firm of Solicitors* [1997] 1 Ch 1; and *Bolkiah v KPMG*, Court of Appeal, per Lord Woolf.

[14] See *Bolkiah v KPMG* [1999] 2 AC 222 at 236 per Lord Millett.

[15] Above at 32 to 49.

[16] Above at 35 to 42.

[17] Above at 32 and 49.

[18] Above at 41.

[19] Above at 150.

[20] Above at 45.

clients, then the client's consent is impliedly given to the firm for it to continue to act for both parties.[21]

Commercial considerations, therefore, have been accorded a lesser importance in successive representation conflicts, but have been deemed to be overriding in simultaneous representation conflicts. Have the courts got the balance right? Alternatively, has the Law Society been correct to ignore changing commercial patterns and, at least for the present, to maintain a blanket prohibition on firms acting in conflict situations?

In considering these issues it is necessary to distinguish between successive and simultaneous conflicts, even though some of the points raised may be applicable to both. This is because, with the first type of conflict, the solicitor or firm of solicitors is attempting to act in direct opposition to the former client's wishes. In simultaneous conflicts, however, the firm is presumed to be acting with consent, or in circumstances where consent may reasonably be inferred.

3. Allowing Successive Representation: Arguments For and Against

There is no doubt that information given in confidence to solicitors by their clients requires protection. This stems not only from the general need to maintain client confidentiality, but also because of the practical needs of the practice of law and the administration of justice.[22] As one judge has put it: 'The freedom for a client to divulge its affairs to its solicitors in confidence is an important factor in the public interest and underlies the fiduciary relationship of solicitor and client . . . Knowledge that information which is imparted will be kept confidential and not placed at risk of disclosure to others reassures the client and leads to the free and full exchange of information essential for the conduct of legal affairs.'[23]

Against this, it has been suggested that for a firm to be disqualified from acting against a former client where it cannot be demonstrated that there is a genuine risk of disclosure, creates a standard which flies in the face of commercial reality.[24] Accordingly, the test adopted by the House of Lords in *Bolkiah v KPMG*[25] has been considered by some to be too strict and to result in unjusti-

[21] See *Kelly v Copper* [1993] AC 205, discussed above at 48.

[22] AD Mitchell, 'Chinese walls in Brunei: *Prince Jefri Bolkiah v KPMG*', (1999) 22 *University of New South Wales Law Journal* 243, at 254 quoting P Perell, *Conflicts of Interest in the Legal Profession* (Butterworths, London, 1995) at 15.

[23] Bingham LJ in *W v Edgill* [1990] 1 All ER 835 at 848. See also M Brindle and G Dehn, 'Confidence, Public Interest and the Lawyer', in R Cranston (ed), *Legal Ethics and Professional Responsibility* (Oxford University Press, Oxford, 1995) at 115 who cite *W v Edgill* [1990] 1 All ER 835.

[24] See AD Mitchell, n 22 above, at 254; JE Griffiths-Baker, 'Further Cracks in Chinese Walls', (1999) 149 *New Law Journal* 162 at 175; and H McVea, 'Heard it through the grapevine: Chinese walls and former client confidentiality in law firms', (2000) 59 *Cambridge Law Journal* 370; who in turn refers, inter alia, to 'The Chinese Wall Defence to Law-Firm Disqualification', (1980) 128 U Pa L Rev 677 at 714.

[25] Above at 35 to 39.

fied impediments to the way large solicitor firms and major commercial clients conduct their business.[26]

At present, once a former client has established that information of a confidential nature was at some stage passed to a law firm, that firm will be disqualified from acting against that client unless it can be shown that all risk of disclosure has been eliminated. This rule takes no account of the nature of the information held, or of the extent of the harm which may be suffered by the former client should the information be disclosed. Therefore, as was seen in the case of *Re a Firm of Solicitors* (1999),[27] although it is not enough for a former client to make a general allegation that his solicitors are in possession of relevant confidential information, the burden of proving such possession is relatively easily satisfied. In that case Walker J acknowledged that the former client was not in a position to identify any specific relevant information. He nevertheless was prepared to

> draw the inference that some of the existing (or future, if the dormant file revives) information imparted by the [former client] to the solicitors acting on behalf of the [existing client was] or may be relevant to the proceedings.[28]

One commentator has argued that disqualification in these circumstances 'is an excessive sanction for a concededly non-existent impropriety' and that 'the mere appearance of impropriety is too slender a reed on which to rest a disqualification order except in the rarest of cases.'[29]

It can be argued, on the other hand, that a presumption of risk is appropriate given that firms are seeking to act against former clients without their consent. As Ipp J has pointed out:

> Even if confidential information is not used against a client, the opponent would be granted a psychological benefit over the former client which could have a real prejudicial effect in the person's state of mind and demeanour.[30]

[26] Lord Woolf in *Bolkiah v KPMG*, above at 37

[27] Above at 41.

[28] Although Walker, J, believed that the burden then automatically passed to the firm of solicitors to establish that all risk had been eliminated, he was of the opinion that 'the relative weakness of the link is a matter which . . . can and should [be taken] into account when considering the existence of any real as opposed to theoretical risk of disclosure adverse to the former clients' interests.' This interpretation goes against Mitchell's belief that 'if matter is taken to court, [a client] would have to establish the existence, nature and relevance of the confidential information, thereby disclosing it in detail to both the court and the opposing party'. He advocates that 'it would be better for the client to be required to show simply that there was a substantial relationship between the matters in the former and current representation and, upon establishing such a relationship, for the receipt of confidential information to be presumed.' See AD Mitchell, n 22 above at 254 to 255.

[29] 'The Chinese Wall Defence to Law-Firm Disqualification', (1980) 128 U Pa L Rev 677 at 700, quoting, in part, *Board of Education v Nyquist* 590 F2d 1241 (2d Cir 1979).

[30] *Mallesons Stephen Jacques v KPMG Peat Marwick and Others* (1990) 4 WAR 357 at 368. This view has been echoed elsewhere. See Walker J in *Re a Firm of Solicitors* (1999): 'It was apparent from the evidence that the Club were considerably upset by the mere fact that the solicitors had accepted instructions against them.'

In such circumstances it might be considered appropriate that firms should bear the burden of having to prove that no harm would result to the former client.

Does a rule requiring solicitors to show that *all* risk has been eliminated 'create an unrealistic standard for the protection of confidential information which would create impediments in the way . . . large international firms conduct their practice'?[31] The size and scale of operation of large international firms is such that the number of former clients is enormous. It must also be remembered that solicitors frequently move between firms,[32] clients often spread their legal work between a number of firms,[33] and the number of firms offering services in certain specialised areas of law can be quite limited.[34] If the only manner in which adequate protection can be offered to clients is by establishing permanent Chinese walls within firms, such a standard of protection will make life very difficult for solicitors. An established system of walls could undermine many of the benefits associated with practising as a large firm.

It is not only the firm of solicitors which may be disadvantaged by such a rule. Clients may lose out as well. As one commentator has observed:

> . . . against this danger [of the risks to former client confidences] must be weighed the public interest in larger and better-equipped law firms able to handle substantial transactions, and in persons being able to choose their advisers. If legal controls on such situations are too rigorous, firms may too easily become disqualified and the choice available to litigants and others much reduced; perhaps more important, litigants may too easily have to meet the considerable expense of instructing new firms.[35]

It has been suggested that a better approach would be to allow firms to continue to act if they had taken all reasonable measures to protect confidences and, furthermore, if the disclosure of information were not probable.[36] In that case, the test for safeguarding confidential information might be similar to that advocated by Lord Woolf in the Court of Appeal decision of *Bolkiah v KPMG*, namely:

1. Is there confidential information which, if disclosed, is likely to affect the former clients' interests?
2. Is there a real risk that 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 means of the court exercising its discretion and intervening?

[31] Lord Woolf in *Bolkiah v KPMG*, above at 37. See, for example, Neuberger J in *Halewood International v Addleshaw Booth & Co*, 5 November 1999, unreported: 'It is wrong to overlook the countervailing factors . . . There are the rights of the professional adviser to act subsequently for whatever party chooses to instruct him. . . .'

[32] Above at 7.

[33] Above at 6.

[34] Above at n 37, ch 1.

[35] FMB Reynolds, 'Solicitors and conflict of duties', (1991) 107 *Law Quarterly Review* 536 at 537.

[36] AD Mitchell, n 22 above at 255.

The advantage of this more relaxed approach would be that former client confidences are offered protection, whilst at the same time some account is taken of the commercial environment.

Not all are agreed, however, that the principles which have traditionally governed the fiduciary relationship should be modified in order that lawyers' practice may accord with commercial reality. Some maintain that even if the test laid down by the House of Lords in *Bolkiah v KPMG* creates difficulties for the way in which large firms operate, it is fundamentally important that the legal profession adheres to the highest possible ethical standards.[37] Moreover, if impediments are created for large firms, this is not necessarily a bad thing. For some, the creation of the mega-firm is seen as a threat to the ethical standards upon which the legal profession rests.[38] The fact that it is often these large firms which are contending that ethical standards ought to be relaxed could be seen as lending weight to this argument. In other words, the mega-firm is seeking to operate as an independent commercial entity in much the same way as do its larger customers. In these circumstances the practices, and the underpinning values, risk becoming those of the commercial world rather than those of the legal profession.

Is it possible to reconcile these differing views and so to maintain high ethical standards whilst allowing commercial developments to be taken into account? The manner in which the courts have dealt with simultaneous conflicts suggests that there are possible solutions to these dilemmas.

4. Allowing Simultaneous Representation: Arguments For and Against

The starting point in explaining the courts' different approach to these types of conflict could be said to derive from the basis of the courts' jurisdiction to intervene on behalf of clients. The position was clearly expressed by Lord Millett:

> [With regard to a former client] the court's intervention is founded not on the avoidance of any perception of possible impropriety but on the protection of confidential information . . . It is otherwise where the court's intervention is sought by an existing client, for a fiduciary cannot act at the same time both for and against the same client, and his firm is in no better position. A man cannot without the consent of both clients act for one client while his partner is acting in the opposite interest. His disqualification has nothing to do with the confidentiality of client information. It is based on the inescapable conflict of interest which is inherent in the situation.[39]

It can be seen therefore that with simultaneous conflicts the courts are not concerned to protect confidential information, but to uphold the fiduciary relationship between solicitor and client. In these circumstances the courts accept

[37] See H McVea, n 24 above.

[38] M Galanter and T Palay, 'Large Law Firms & Professional Responsibility', in R Cranston (ed), *Legal Ethics and Professional Responsibility* (Clarendon Press, Oxford, 1995) at 190.

[39] [1999] 2 AC 222 at 234.

that the duty owed to a client by the solicitor may be varied by agreement. Thus the key factor is consent. The thinking behind allowing a firm to act for two clients in these circumstances is presumably that clients would not give consent if they felt that their interests were compromised. If no consent is obtained then the firm would be in breach of its fiduciary duty and the court could intervene if necessary. Yet, even though consent must be obtained, this approach has been deemed undesirable. This rests on a view that 'the duty of loyalty is, of course, the essence of the fiduciary relationship.'[40] How can a firm do justice to two parties' interests where the possibility exists that those interests will, at some point in the future, conflict? One commentator has observed:

> It seems to me that the practice of a solicitor acting for both parties cannot be too strongly deprecated. It is only because of the possibility that something may be wrong in a transaction, or may go wrong during its implementation, that the employment of highly trained professional people at professional scales of remuneration can be justified. To scrutinize a transaction to discover whether something is wrong in a way that may affect his interests, or to notice and deal with something that goes wrong during the transaction, is what a party employs such a person for. He is entitled to assume that that person will be in a position to approach the matter with nothing [in mind] but the protection of his client's interests against [those] of the other party. He should not have to depend on a person who has conflicting allegiances and who may be tempted either conscientiously or unconsciously to favour the other client, or simply to seek a resolution of the matter in a way which is least embarrassing to himself.[41]

It may, however, be argued that the courts ought to allow dual representation because otherwise some clients will be disadvantaged. For example, the cost of legal representation is likely to rise, the scope for 'conflicting out' purely to gain a strategic advantage will increase, and there is likely to be increased delay. As Shapiro has noted with respect to US law firms:

> By encouraging downsizing, boutique practice, and divesting of specialisations, [the rules] may be limiting economies of scale and, thereby, increasing the cost of legal representation. By discouraging lawyers from acting on behalf of multi interests, the rules increase the need for multiple lawyers and, thereby, the cost of resolving disputes or facilitating transactions. Indeed, in some instances, the increased cost results in the denial of legal representation entirely for some clients. The rules also limit clients' choice of lawyers, in some instances compelling the clients' own experienced lawyers to refer their case elsewhere because of conflicts; in others, restricting access to experts because they have been conflicted out by the clients' competitors or adversaries. The need to get these new unconflicted lawyers up to speed once again increases the cost of legal services and probably reduces the efficacy of representation . . . The rules also encourage strategic efforts to conflict out one's adversaries' law firm by contriving facades of responsibility or inciting disqualification battles in which assertions of

[40] JC Shepherd, *The Law of Fiduciaries* (The Carswell Company, Toronto, 1981) at 48.

[41] J Glover, *Commercial Equity Fiduciary Relationships* (Butterworths, Adelaide, 1995) at 208 citing Wootten J in *Thompson v Mikkelsen*, unreported (SC (NSW)) 3 October 1974, quoted in *Wan v McDonald* (1992) 105 ALR 473, at 492 to 493.

> responsibility are made purely for strategic outcomes. Again, these strategic activities increase the cost of legal representation and contribute to delay in the legal process.[42]

The question therefore becomes one of whether legal principle overrides economic considerations even if this means that some clients are adversely affected. Of course it is also not in firms' commercial interests to be restricted from acting in simultaneous conflicts. In this respect there may be some danger in permitting firms to act on the sole proviso that informed consent has been obtained from their clients. In these circumstances firms may be tempted to place their own interests first. Nicolson and Webb have pointed out that this test is vulnerable in that it contains elements of circularity:

> It was said that lawyers must disclose material facts. Consequently informed consent means consent given in the knowledge of the material facts. . . . The courts have been at pains to suggest that materiality is assessed in the light of what clients want. This rather overlooks the fact that what they want will depend on what they know, which in turn will depend on what their lawyers have told them.[43]

These problems are compounded when one considers implied consent in relation to separate matter conflicts. It would cause difficulty if consent could not be deemed to be given in such circumstances. For example, a large firm specialising in commercial work is bound to be instructed by many companies, some of which would be greatly advantaged by learning of other clients' business strategies. It would be unrealistic to obtain express consent from each client to every transaction because a conflict might occur without the firm even realising it. Against this, some clients may not realise that their law firm is acting for a competitor. Other clients may feel unable to have a full discussion with their solicitor if the firm is under no duty to ensure that measures are in place to protect the confidentiality of the information which is being given.

It is for these reasons that the Law Society currently prohibits members from acting in conflict situations. Much can be said for this approach, even if it takes no account of the changed commercial environment. On the other hand, what harms result from allowing firms to follow their commercial instincts? These were questions which I posed in the course of my empirical investigations.

THE EMPIRICAL EVIDENCE

As no empirical research had previously been undertaken into how firms in England and Wales respond to conflicts of interest, it was essential to study the matter at first hand.

[42] SP Shapiro, *Conflicting Responsibilities: Manoeuvring Through the Minefield of Fiduciary Obligations* (American Bar Foundation, Chicago, 1995) at 46.

[43] D Nicolson and J Webb, *Professional Legal Ethics* (Oxford University Press, Oxford, 1999) at 144.

1. The Scale of the Problem

The first thing to emerge from my conversations with representatives of law firms was that conflicts do indeed pose a significant problem. Difficulties arise at all stages. As firms have become larger, so too has their client-base. With more fee-earners, the likelihood of a conflict arising somewhere in the firm is greatly increased. Although solicitors have developed complex procedures for identifying potential conflicts, merely trying to secure work, or an approach from a potential new client, can create seemingly irreconcilable problems.

2. Do Firms Comply with the Rules?

The way in which many solicitors cope with the increasing number of conflicts is, in effect, by breaching Law Society rules. Only 30 per cent of the firms questioned appeared, by their own account, to comply with Law Society regulations when faced with a conflict of interest. The manner in which the remaining practices approach conflicts depends on their size, client-base and location, and on the type of conflict which they face. Large City firms are prepared to act in a wide range of conflict situations. Where they are faced with a successive representation conflict, they will act against former clients if they conclude that they are not in possession of *relevant* confidential information. With simultaneous conflicts, these firms will generally obtain express consent for same matter conflicts but they will tend to assume that consent is given where separate matter conflicts may arise.

The remaining firms, namely medium-sized City, national and provincial practices, are more cautious about undertaking work where there is, or may be, a conflict of interest. Client consent is regarded as being of paramount importance in all types of conflict. By and large, these firms will act against a former client only if *no* confidential information was obtained *or* if the former client gives his consent. Likewise with simultaneous representation conflicts, express consent is generally required before these firms will act.

3. Why Do Firms Not Comply?

Large City firms justify their failure to comply with Law Society rules on the grounds that these rules are out of touch with commercial reality. They maintain that the number of potential conflicts is so great that the City would grind to a halt if they were bound by the rules. In addition they argue that sophisticated clients would be prejudiced because they would be forced to use solicitors who lacked the necessary expertise and resources. Accordingly, they argue that they are entitled to adopt their own criteria for determining when a conflict

exists. They maintain that clients are happy for them to act in conflict situations, and indeed believe that it is in their interests for the firm to continue to act.

Medium-sized City and national practices believe that the only way they can hope to compete with larger firms is by expansion. This cannot be achieved if they are forced to operate within the Law Society rules governing conflicts. Smaller firms, on the other hand, tend to argue that where they do breach the rules this is at the behest of their clients. They are preoccupied with maintaining existing relationships with clients and will only act in the face of conflict where this does not compromise the interests of any of the parties involved.

4. What Measures Do Firms Adopt When Acting in a Conflict Situation?

Large City firms use a variety of measures, depending on the nature and severity of the conflict. Where the clients' interests are directly opposed in a same matter conflict, a full-scale Chinese wall will usually be erected. This ensures that teams working for different clients are physically separated. If a conflict arises in the same matter, but the parties' interests are not directly opposed, each will be represented by a different fee-earner and documentation will be kept separate. However, solicitors and support staff will not be kept physically apart. For separate matter conflicts, on the other hand, no special measures are deemed to be necessary. Firms say that their fee-earners can be trusted to keep information to themselves. Where such firms are acting against former clients, the appropriate safeguards are thought to be storage of all relevant paperwork and, secondly, undertakings by the personnel who worked on the former case not to reveal what they know.

Smaller firms, in the main, do not employ physical barriers in order to separate staff and paperwork. They maintain that individual fee-earners can be trusted to safeguard the interests of whoever they are asked to represent.

5. Are Clients' Interests Safeguarded?

It might be argued that by acting in conflict situations firms place their own commercial interests above the interests of their clients and those of the profession in general. However, these firms, although not complying with Law Society rules, maintain that clients' interests are nevertheless safeguarded as:

—consent is usually obtained;
—where it is not practical to obtain consent, clients are generally aware when instructing the firm that a conflict may arise;
—solicitors would not do anything to damage their relationships with clients;
—where the firm acts in a conflict situation, physical barriers may be erected to

inhibit the flow of information; failing that, individual fee-earners can be relied on to protect clients' interests;
—for the most part (other than where very large firms act against former clients) firms act in accordance with guidelines laid down by the courts, and indeed in some instances they provide more protection for their clients than the law dictates.

Firms which routinely act in conflict situations contend that no harm is suffered by their clients, and indeed that in successfully 'managing' conflict situations they are both lubricating commercial practice and maintaining the spirit (if not the letter) of the prescribed solicitor/client relationship.

6. What Do Clients Think?

Clients' attitudes towards conflicts of interest depend, to a large extent, on the nature of their business interests and whether they instruct one or a number of law firms. Those who tend to use only one firm would not be happy for that firm to act in any type of conflict situation. On the other hand, clients who routinely spread their work amongst several firms believe that conflicts are inherent within legal practice. Clients are asked to give their consent when a firm wishes to act even though a conflict has arisen, and they usually give their approval. The system operates on trust, as clients have no way of checking that any measures adopted to protect their affairs are in place. Clients nevertheless have reasonable confidence that their interests are protected. This is because:

—firms would not wish to upset them and, as a result, lose their business;
—their own in-house legal team oversees all work;
—given they wish to instruct firms with the necessary resources and expertise, they have to accept (inevitable) conflicts.

Clients operating in highly competitive business environments, and those who may suspect that they carry less commercial weight with law firms, are less confident that it is appropriate for lawyers to act in conflict situations. Some believe that they are in a position to circumvent the problem by 'buying' a firm's loyalty. Others feel forced to accept that firms will continue to act in these circumstances.

7. What is the Impact on the Profession if the Rules are Broken?

The fact that some firms are prepared to act in contravention of Law Society rules means that not all solicitors are operating within the same parameters. Therefore, at least in theory, some firms may have a commercial advantage over others. Those solicitors who adhere strictly to the rules will turn down work

where there is a potential conflict of interest. As the chances of a conflict arising are much greater than they once were, this means that certain firms may turn away significant amounts of business. This, on the face of it, places these firms at a disadvantage compared with their competitors who do not obey the rules.

It is also necessary to consider the effect on the legal profession, which is supposed to be self-regulating. What is the impact on the profession as a whole if some members ignore those components of the regulatory framework which they find inconvenient? Although no significant harms may result at present from non-compliance in the area of conflicts of interest, this does not mean that clients will not be prejudiced in the future. Also, might this not suggest a cavalier approach to other rules, breach of which might indeed be damaging to clients' interests? It is difficult to assess what damage may be done to the reputation of the profession through firms breaching their own professional code of conduct, but it is plausible to suppose that a gulf between rules and practice may damage the image of the profession in the longer term.

8. Do Firms Think the Rules Should be Amended?

Whether firms believe that the current Law Society rules should be amended depends very much on how conflicts of interest currently affect them. Although very large firms face the greatest problems, the manner in which they handle conflicts means that their business practices are not unduly restricted. Such firms, therefore, see no reason for the rules to be reviewed, but of course this is on the basis that they are free not to comply with those rules. Indeed, some firms even suggested to me that the rules should remain exactly as they are for the benefit of smaller firms which 'may not be as ethically minded' [as the informant and his colleagues].

The Law Society, in inviting the City of London Solicitors to make recommendations for new draft rules on conflicts, recognised that the current requirements caused 'particular problems for the City firms and their clients'.[44] It was unsurprising, therefore, that the City Solicitors panel—contrary to what individual firms told me—advised the Law Society that new rules on conflicts were urgently needed. After all, they could hardly be seen to give public support to practices which operate outside the existing rules.

It is the medium-sized City firms, national practices and provincial firms which are most troubled by conflicts in practice. They told me that they would like to see a change in the rules. For the most part they take the view that the Law Society's rules should reflect the position reached by the courts, namely that clients should be able to give their consent to allow firms to act in conflict situations. They argue that such a step would also allow fairer competition between themselves and their larger City counterparts. These firms no doubt

[44] Above at n 5 at 6.

welcomed the proposals put forward by the Regulation Review Working Party of the Law Society in its consultation document.

Smaller provincial firms do not at present experience the same amount of difficulty with conflicts of interest as do larger firms. For the most part they favour the status quo, arguing that it is important that the profession adhere to high ethical standards of behaviour, and that it be seen to promote such standards.

POSSIBLE WAYS FORWARD

The Law Society's reluctance to reflect the changed commercial environment in its rules has resulted in a significant proportion of solicitors acting outside the current regulatory regime. The consequences of this are:

1. the degree of protection afforded to clients where firms act in conflict situations is brought into question;
2. some firms may be commercially disadvantaged because they adhere to Law Society rules;
3. the reputation of the profession as a whole may be tarnished where firms do not comply with the rules.

Is it feasible, then, to accommodate the needs and interests of a disparate clientele and a heterogeneous legal profession? What are the possible ways forward?

1. Enforce the Rules

One possible answer to these problems would be for the Law Society actively to enforce the existing rules. This would mean, at least in theory, that clients' interests were safeguarded, all firms would be placed on an equal footing, and the reputation of the profession would be maintained. However, as the empirical evidence has shown, conflicts of interest feature most prominently in the environment inhabited by large firms. If they had to comply with the rules as presently drafted it would be virtually impossible for the 'mega' firms to serve their current clientele. Some niche practices would also find themselves in difficulties. Although some commentators might welcome such a move,[45] some clients would probably face increased legal bills. They might also experience difficulties in finding a firm with the necessary resources and expertise.[46] In addition, this 'solution' is premised on the notion that the Law Society would be able to police conflicts effectively and would impose sanctions which would deter solicitors from committing further breaches of the rules. This could well prove to be an impossible task, if only because, should clients wish firms to act

[45] See, for example, the views of H McVea, 'Heard it through the grapevine: Chinese walls and former client confidentiality in law firms', (2000) 59 *Cambridge Law Journal* 370.

[46] This is what has happened in the US. See above at n 42.

in conflict situations, it would be very difficult for the Law Society to discover a breach in the rules where no complaint was received.[47]

2. Develop a More Detailed Regulatory Framework

Another option would be for the Law Society to develop a far more complex and sophisticated regulatory framework. The arguments in favour of this at first appear compelling. Account could be taken of the changed commercial environment, at the same time ensuring that firms adopt adequate safeguards to protect clients' interests. It might be possible, for instance, to distinguish between different types of firm operating in different commercial environments. Rules could be devised to allow firms to act in conflict situations provided certain criteria were met.[48] The criteria could be determined, for example, by the type and size of firm, the nature of their clientele, and the area of practice. Guidelines could be drafted with respect to the measures which should be employed by solicitors to protect client interests when acting in a conflict. By issuing clearer guidance to solicitors operating in very different commercial environments, the profession might retain its responsibility to self-regulate.[49] Paradoxically, developing a framework of rules which *discriminated* between different practice environments might be the best way to preserve a unified profession.

However, detailed codes can become very unwieldy and even then cannot cover all situations. Such detailed guidelines would require constant amendment, in which case their content would be unlikely to be familiar to all members of the profession.[50] Also, solicitors have a trained capacity to find ways around detailed rules and so might become rather *less* scrupulous in their conduct. After all, professional codes can be used as an excuse to justify questionable behaviour. As Cotterrell has observed, 'lawyers dwell in the details, making little use of abstract interpretative skills. . . .'[51] In effect Cotterrell argues that firms are not good at seeing the wood for the trees on ethical issues. It could be that the more detailed the rules, the less lawyers will exercise their ethical judgment appropriately. Shapiro concurs:

> [T]his more narrow legalistic conception competes with and frequently precludes realising alternative extra-legal notions of loyalty or responsibility. Strategies that allow law firms to manoeuvre through the minefields of their fiduciary obligations often

[47] A Boon and J Levin, *The Ethics and Conduct of Lawyers in England and Wales* (Hart Publishing, Oxford, 1999) at 413: 'This is expensive and imposes greater burdens on practitioners. Poor members of the profession are likely to object to the cost of the bureaucracy which high service standards require.'

[48] This is effectively what the accountancy profession has done. See above at 63 to 69.

[49] As experienced in the Financial Services Industry.

[50] A Sherr and L Webley, 'Legal Ethics in England and Wales', (1997) 1(2) *International Journal of the Legal Profession* 109 at 136. The empirical work also reflects this (*ie* that knowledge of the Guide is poor), see above ch 6.

[51] R Cotterrell, *The Sociology of Law*, 2nd edn (Butterworths, London, 1992) at 194 to 200.

> create a formulaic adversariness, a kind of stripping away or cleansing of social networks and ties of familiarity, a distancing between lawyer and client that collide with lay conceptions of loyalty or a commitment to looking out for what is truly in the best interests of one's clients . . . These tensions frustrate many lawyers and confound their relationships with clients.[52]

A detailed framework of rules has not aided lawyers in other jurisdictions. In the United States, for example, the rules are frequently used for commercial reasons as a litigation tactic to disqualify particular law firms from acting against specific clients.[53] There is nothing 'ethical' about the way these strategies are sometimes employed.

Drafting a regulatory framework which catered for all conflict situations would be a formidable task. The profession is fragmented to such an extent that it is unlikely to be possible to cover all types of practice within a single regulatory framework without damaging the interests of any one sector of the profession or their clientele.[54] Also, as in the United States and Canada, problems would arise with regard to interpretation of provisions.[55] In other words, it is likely that a more detailed framework would lead to even more complaints and even more litigation.

3. Enforce a More Narrowly-defined Set of Rules

A possible alternative to enforcing the existing rules or drafting a more detailed regulatory framework would be to enforce the rules but in respect of a more narrowly-defined set of conflicts. This approach has been advocated by the City of London Law Society. It claims that narrowing the rules would resolve any existing uncertainties and at the same time allow the needs of the market in England and Wales to be accommodated.[56] If accompanied by an increased likelihood of enforcement, amending the rules in this manner might also result in a greater level of compliance.

Against this, such a redefinition could simply be viewed as an attempt to treat the symptoms rather than the cause of the existing problem. Changing the scope of the conflict rules does not tackle the underlying issues which led to their creation. Furthermore, the proposals advanced by the City of London Law Society are intended to apply to all solicitors irrespective of the size or the nature of their practice. The use of Chinese walls, for example, is not intended to be restricted to City firms with a sophisticated clientele. This would almost certainly give rise to difficulties in practice. First, smaller firms do not possess the necessary

[52] SP Shapiro, n 42 above at 46 to 47.
[53] See above, ch 4.
[54] AC Hutchinson, 'Legal ethics for a fragmented society: between professional and personal', (1998) 2(3) *International Journal of the Legal Profession* 175 at 176.
[55] See above, ch 4.
[56] Above at n 5.

resources to erect Chinese walls. This could lead to even more mergers between legal practices, something which may not always be to the advantage of less powerful clients and could create even more conflict situations. Secondly, some clients may be forced to accept that conflicts of interest are inevitable when instructing a firm of solicitors. Some clients will not understand that there is no prohibition on a firm acting for one of their competitors.

Another problem with narrowing the conflicts rule would be the role of the solicitor in interpreting the provisions. The City of London Law Society, for example, envisages that where a conflict of interest exists, provided that the client's fully informed consent is obtained, a firm may act for more than one party to the conflict.[57] In determining whether 'informed consent' has been obtained, a solicitor must decide whether a client possesses 'the experience and ability to understand the issues and exercise their own independent judgement'. These terms are not tightly defined. One might suspect that some solicitors will conclude fairly easily that such requirements have been met.

4. The Client Autonomy Model

Another possibility is to abandon detailed regulation and to focus instead on the solicitor-client relationship. If the only 'rule' were one of openness, so that solicitors were under a duty to inform clients of all potential conflicts, the client's voice would be the determining factor in deciding what conduct was acceptable. If clients were not satisfied with the way in which their solicitor was acting, they could take their custom elsewhere. The advantage of this approach is that it would force solicitors to reflect on their own ethical standards and, it could be argued, to act in a way which was acceptable to their clientele.

However, such a 'rule' may be considered somewhat insubstantial and not to offer clients sufficient protection. Everything would depend on firms' commitment to inform clients of the material facts, and thereafter on clients' having sufficient understanding to realise when their interests were being compromised. As previously highlighted,[58] what clients decide to do when party to a conflict may very well depend on what they know, which will in turn depend on what their lawyers have told them. What is to prevent firms from placing their own interests above those of their clients when deciding what information to convey, and how to convey it?

Moreover, as one commentator has observed, it is doubtful whether solicitors should abdicate to the client their responsibility to maintain the highest ethical standards in their practice:

[57] Above at 165.
[58] Above at 158.

> Central to the concept of professionalism is the notion that only the initiated—those with actual professional knowledge, skills and credentials—are able to determine proper professional procedures and standards of practice.[59]

It would also be wrong in principle, where a solicitor-client relationship has terminated, to allow that former client an unfettered right to bar his former solicitor from acting for another client whose interests might conflict with his. Thus, under this proposal, the difficulties currently associated with successive representation conflicts would remain, as some former clients would be unlikely to allow firms to act against them.

Finally, there are some instances where even to seek the approval of one client (or potential client) would be to breach confidence. For example, if a firm is approached by a potential client who wishes to mount a hostile take-over against an existing client for whom the firm acts on a general retainer,[60] the prospective client's interests would be prejudiced if the 'target' were to be given early notice of the intended take-over.

5. The Professional Autonomy Model

Another option would be to leave the resolution of conflicts to the integrity and judgement of individual solicitors/firms. Some support for this idea can be found amongst writers on legal ethics.[61] For example, it is argued that the more it is left to solicitors' own judgement to determine matters of professional conduct, the more likely they are to give thought to ethical dilemmas and to reach justifiable decisions.[62] In addition, it is suggested that as written codes become increasingly complex and unwieldy as they attempt to cover the different circumstances of mega firms, high-street practices, sole-practitioners and employed lawyers, solicitors may be inclined to reduce issues of ethical judgement to questions simply of risk analysis and commercial calculation.[63] Also, a framework of rules does not guarantee that the practice of a profession will be imbued with what outsiders would recognise as high ethical standards. As de Groot-van Leeuwen has argued: '[Lawyers] escape from ethical reflection by phrasing all problems they may encounter in purely legalistic terms.'[64] In other

[59] HW Arthurs, 'Why Canadian Law Schools Do not Teach Legal Ethics', in K Economides (ed), *Ethical Challenges to Legal Education & Conduct* (Hart Publishing, Oxford, 1998) at 105.

[60] A general retainer means that the firm is contracted to provide general advice to the client on any matter it chooses to seek advice upon without formal instructions being required each time.

[61] See, for example, WH Simon, 'Ethical Discretion in Lawyering', 101 *Harvard Law Review*, (1988) 1083, R Atkinson, 'Beyond the New Role Morality for Lawyers', (1992) 51 *Maryland Law Review* 853, and S Salbu, 'Law and Conformity, Ethics and Conflict: The Trouble with Law-Based Conceptions of Ethics', (1992) 68 *Indiana Law Journal* 101.

[62] D Nicolson and J Webb, n 43 above at 279.

[63] *Ibid*, at 114.

[64] L de Groot-van Leeuwen, 'Lawyers' moral reasoning and professional conduct, in practice and in education', n 59 above at 238.

words, lawyers have a tendency to interpret rules literally and to ignore the broad picture which the regulation is intended to cover.[65] Other commentators have likewise suggested that formal guidelines tend to encourage cynicism and a lack of concern for questions of ethics and morality.[66] There are also practical considerations. No code can cover every foreseeable situation, whilst detailed rules freeze professional ethics at the moment of drafting.[67]

By placing the onus on firms to determine when it is appropriate to act in a conflict, solicitors would have to accept responsibility for their handling of all ethically complex situations. For most commentators, however, total deregulation of professional conduct would be a step too far. Some have expressed scepticism as to whether the legal profession operates within the kind of moral framework that deregulation requires if it is to prove anything other than a means of allowing commercial interests to run unfettered:

> First, total deregulation of professional legal ethics goes much further than the existing regime of self-regulation in freeing lawyers from public accountability. Instead, it relies heavily on the outdated *noblesse oblige* tradition and a 'professional mystique' which disregards calls for greater accountability and transparency as misguided. Secondly . . . the idea that the solutions to ethical dilemmas in professional life are self-evident and derivable from first principles involves naïve wishful thinking. . . . Thirdly, deregulation may well lead to a lowering rather than a raising of ethical standards. Deregulation assumes educational and institutional frameworks capable of developing and sustaining the moral character and reflexive moral capabilities of individual professionals.[68]

The Lord Chancellor's Advisory Committee on Legal Education and Conduct has also suggested that leaving ethical decisions entirely to solicitors may prove unwise given the commercial environment in which firms now operate:

> [T]he high ethical standards of the profession . . . have been very much grounded in the close-knit professional communities represented by such institutions as the Inns of Court and local law societies. As the organisations in which law is practised become larger and more complex, as competition and instability in the market for legal services increases, and as many legal practitioners experience a growing sense of insecurity, there are real dangers that professional standards will be threatened unless counter-balancing steps are taken to reinforce ethical values.[69]

Clients likewise may not be satisfied that their interests are protected if there is no framework of rules governing solicitors' conduct. Not everyone regards lawyers as especially principled:

[65] See for example, RE Rosen, in K Economides (ed), 'Devils, Lawyers and Salvation Lie in the Details: Deontological Legal Ethics, Issue Conflicts of Interest and Civil Education in Law Schools', n 59 above, at 73.

[66] R Granfield, in K Economides (ed), 'The Politics of Decontextualised Knowledge: Bringing Context into Ethics Instruction in Law School', n 59 above, at 311.

[67] D Nicolson and J Webb, n 43 above at 113.

[68] *Ibid*, at 114.

[69] First Report on Legal Education and Training (ACLEC, London, 1996) at 17.

> Lawyers these days are no longer depicted as crusaders of justice or enlightened upholders of the law, but as a parasites feeding on the misery of others, as servants of the Mafia, or as common mortals at best.[70]

As larger firms already act in conflict situations, deregulation would remove one of the few remaining restrictions on the size of law firms. This raises the related question of whether it is in clients' or the profession's interests to allow firms to continue to expand. Rather than competition being stimulated and a better service provided, very large firms may simply increase their already substantial share of the market. This in turn would further encourage the tendency for policy issues to be determined according to the commercial interests of such firms rather than in the interests of their clients, or of the profession as a whole.

6. Develop an 'Aspirational' Regulatory Framework

One way of coping with the diversity which exists within the profession would be to make the conduct rules 'basic' or 'aspirational'. Boon and Levin describe such an approach as follows:

> An alternative therefore, is to renew the commitment to professional ethics in terms of the values which the profession espouses, which it attempts to imbue in its entrants and which it seeks to sustain in its practitioners . . . The rules may then become less detailed but more principled. Lawyers would thereby regain professional autonomy in interpreting their ethical obligations.[71]

It might be argued that such rules would be too vague to provide adequate guidance to practitioners or adequate protection for clients. They might also be undermined by the creation of another set of norms with a lower standard. Nicolson and Webb have responded with a suggestion that such codes of conduct should contain three normative levels:[72]

1. a general statement of underlying values which should underpin the lawyer-client relationship;
2. a statement of principles which govern the lawyer-client relationship (for example, loyalty, integrity, candour and informed consent), fleshed out with commentary which would set out their rationale and underlying values;
3. contextual factors which are relevant to the way in which lawyers should apply the general principles.

These authors acknowledge that a change in lawyer attitudes will not occur simply through changes in the content and form of regulations.[73] Accordingly they suggest that such a regime would have to be coupled with:

[70] L de Groot-van Leeuwen, n 64 above at 237.
[71] A Boon and J Levin, n 47 above at 413. Nicolson and Webb also promote this idea: see D Nicolson and J Webb, n 43 above at 283.
[72] *Ibid*, at 280 to 281.
[73] *Ibid*, at 286.

—changes in legal education;
—greater participation by consumers on regulatory bodies;
—appointment of in-house compliance officers;
—engagement of firms in more *pro bono* work;
—recruitment of solicitors from different ethnic and social backgrounds;
—a move away from the present adversarial system of justice.[74]

Needless to say, these accompanying changes in the legal environment may also be deemed 'aspirational'.

Would such an 'aspirational' set of guidelines be effective as a means of governing solicitors' conduct in conflict situations? Two possible objections to this approach are acknowledged by Nicolson and Webb, namely that normative rules would be time-consuming for practitioners to apply, and secondly, that they would be construed by some as too 'hard' for solicitors to operate.[75] Perhaps the real difficulty, however, lies in the fact that large City firms have shown themselves to operate as commercial enterprises rather than as traditional professional partnerships.[76] Such firms may, therefore, be opposed to increased regulation, preferring instead to concentrate on devising guidelines which reflect the commercial environment in which they now operate.

7. Let the Courts Decide

A final option would be to adopt the same approach as certain other Commonwealth countries, namely to allow the issue of conflicts of interest to be determined by the courts under the common law. The potential threat of litigation, in other words, would determine the way everyone behaves. The advantages of this approach could be said to be threefold. First, if clients believe their interests have been prejudiced, they can seek redress. In this sense the whole issue is subject to commercial calculation, with the courts having the responsibility to ensure that clients are protected. Secondly, firms might be prompted to behave appropriately because the threat of being sued over an alleged conflict would bring adverse publicity[77] and might well result in business being lost. Thirdly, firms would have a financial incentive to behave well because their professional liability insurance premiums would increase whenever they were required to pay damages.[78]

Yet this solution too has obvious limitations. First, it could prove costly to clients and solicitors should either misjudge the situation. It is a litigation-based

[74] *Ibid*, at 286 et seq.

[75] *Ibid*, at 283 to 286. These objections are dismissed by the authors on the grounds that as law firms are making so much money, it is only right that more time is spent on ethical matters.

[76] David McIntosh, senior partner of Davies Arnold Cooper has stated, 'Davies Arnold Cooper is determined to run itself like a business rather than a traditional firm of solicitors.' See www.dac.co.uk/human.html.

[77] For example, Denton Hall, see above, n 13, ch 4.

[78] This is what happens in the US—see SP Shapiro, n 42 above at 11.

solution and that is inherently expensive. Secondly, it is questionable whether we want to promote litigation on these lines between members of the legal profession since it necessarily undermines trust and collegiality. Thirdly, some clients may employ the threat of litigation as a tactic to 'conflict out' firms they do not wish to see acting against them. This threat of litigation would not operate equally across the board. It would enable more economically powerful clients to impose their will on the financially vulnerable.

There is also the argument that this 'solution' assumes that the courts will provide an appropriate and sufficiently clear answer to the problems posed by conflicts of interest. As was seen in chapters 2 and 4, this may not be the case. Different courts may come to different decisions on similar cases. In the United Kingdom the legal position cannot be stated with absolute clarity or confidence. Courts in New Zealand have adopted a more lenient approach to firms acting against former clients than have courts in Australia or the United States. The result may be that neither clients nor solicitors would be entirely sure when a firm was entitled to act when faced with a potential conflict of interest.

SUMMARY

Seven possible ways forward have been identified above, namely:

—enforce the existing rules;
—devise a more detailed set of rules;
—enforce a more narrowly-defined set of rules;
—draft an 'aspirational' regulatory framework;
—allow clients to determine what standard of conduct is appropriate from solicitors;
—permit solicitors to decide when it is appropriate to act;
—rely upon the courts.

Individually none of these provides a satisfactory method for regulating solicitors' conduct in conflict situations. It will almost certainly be necessary, therefore, to combine a number of different elements. The existing regime already incorporates three of the above, namely: regulatory rules; client autonomy; and court intervention. It could be said to offer a compromise between three competing considerations: solicitors' commercial interests; client demands; and the desire of the courts and Law Society to maintain public confidence in the profession as a whole. The present arrangements have evolved over a period of time. Is this 'compromise' the best we can do as a means of reconciling incompatible aspirations? Does anything need to be done, therefore, about the existing state of affairs?

There appear to be three main difficulties with the present situation. First, because the Law Society's rules governing conflicts of interest are flouted in a significant proportion of cases, there is a risk that clients' reasonable expecta-

tion of absolute trust in their relationship with their legal adviser is not being met. This could have one of two possible consequences: either the client's economic interests could be damaged through inappropriate disclosure of information, or [he] may be denied the level of service (including disclosure of all relevant information held by the firm) which he has a right to expect. Secondly, there is a concern that those firms which *do* adhere strictly to the current regulatory rules may be commercially disadvantaged as a consequence. Thirdly, the gulf between regulation and practice may damage the image of the profession in the longer term. This could arise through high-profile clients of large law firms, perhaps dissatisfied with the service which they have received, accusing those firms of acting in the face of conflict—and, in so doing, of breaching Law Society rules.

On the other hand, the evidence of my interviews with the large City firms could be taken as an indication that the changed commercial environment has been taken into account whilst, at the same time, providing some check upon solicitors' untrammelled pursuit of their own commercial interests. That, however, is a judgement which cannot be arrived at solely on the basis of my interviews with practitioners. It could be that the solicitors whom I interviewed underestimated the threat to their clients' interests that was represented by their willingness to 'manage' simultaneous and successive representation conflicts. It may be that the less economically powerful client is more vulnerable than these solicitors acknowledge. At the same time we have to take seriously the claims of those solicitors who argued that they were bending the rules at the behest of a sophisticated commercial clientele who understood and accepted the risks involved. If one were to accept these solicitors' argument that they were serving their clients' interests (as well as their own), it would seem that a reasonable way forward would be to permit continued evolution in respect of each of the three components of the present system. That, indeed, is the conclusion to which I am drawn.

1. Regulatory Rules

The existing rules could be made clearer to draw a distinction between former client conflicts (successive representation) and conflicts between existing clients (simultaneous representation) in order to reflect the position reached by the courts and by solicitors in practice. In other words, provided that consent were obtained from clients, there would be nothing improper in a firm undertaking work in a simultaneous representation conflict. This change would not require major redrafting of the existing rules. Indeed the Law Society has already made some moves in this respect under the auspices of the Regulation Review Working Party. The effect of such action would be to create a level playing field for all firms and, at the same time, to at least narrow the gap between regulation and practice, thereby helping to safeguard the image of the profession. In

addition, concerns that may arise as to what amounts to informed consent from clients might be addressed by issuing clearer guidance to practitioners within the amended rules.

2. Client Autonomy

Under the present regime clients' wishes are paramount in simultaneous representation conflicts. Firms maintain that they act in conflict situations only where consent is obtained from clients or, where it is not practical to obtain consent, where clients ought to be aware when instructing the firm that a conflict might arise. Solicitors are already concerned not to do anything to damage their relationships with clients. It seems right that in simultaneous representation conflicts the client's voice should be the key factor in determining what is acceptable.

3. Court Intervention

In successive representation conflicts it is reasonable that clients should be able to have their interests protected by the courts. In these circumstances solicitors are already having to exercise caution because they face the possibility that the former client will initiate proceedings to prevent them from acting.

In this context the courts are attempting to strike a balance between the interests of two sets of clients. They are also having to take account of lawyers' need to retain freedom to act for whomsoever they wish, and to move between firms—both of which are prominent features of the present environment. At the moment the standard expected of solicitors in safeguarding the confidentiality of former clients is high. Only when a firm can establish that *all* risk of disclosure has been eliminated may it act against a former client. The courts in this respect clearly favour traditional professional values over commercial considerations. It seems plausible to suppose that the law will continue to evolve to maintain a balance between these competing considerations.

If the number of successive representation conflicts were to increase, perhaps as a result of an increased tendency for large commercial clients to spread their work around, the courts would doubtless have an opportunity to reconsider the situation. They may in future come to the view that *ad-hoc* Chinese walls and other devices are an essential feature of modern legal practice in the commercial sector. That is the view to which I too am drawn on the basis of these investigations.

THE WIDER CONTEXT: LEGAL ETHICS WITHIN A CHANGING PROFESSION

In 1988 Abel wrote:

> One reason for writing this book is my hope that its description of the social organisation of the legal profession will enable and stimulate others to undertake the more difficult task of studying the content and form of their daily activities.[79]

'Studying the content and form of . . . daily activities' is what I have tried to do in this book, although I concede that interviewing lawyers about their practice cannot be equated with 'studying the content and form' of what they do. In undertaking this task I did not encounter a wealth of other academic enquiry into conflicts of interest. There has likewise been limited academic writing on legal ethics, certainly until the past few years.[80] Even within that literature, the subject of conflicts of interest between the clients of law firms, and firms' reaction to those conflicts, is not addressed in any detail. When the subject *is* raised it is seldom discussed with reference to any empirical study of solicitors' practice. The only available reference points are the judgments delivered in those comparatively few cases in which the courts have been asked to intervene in order to bar a given firm from acting. Where the subject of 'conflicts' is raised within the literature it is treated cursorily, as conduct prohibited under the rules and therefore outside the scope of proper professional practice.[81] Other writers have identified the willingness of some firms of solicitors to act in the face of conflict as a developing problem, but not one which they have then gone on to explore in any depth.[82]

My task, as I defined it, was to gain a better understanding of the practice of major law firms when confronting an actual or potential conflict of interest, and having done that, to review and evaluate that practice in the light, first, of the regulatory framework governing the profession, and second, by reference to the common law. The research objectives, in other words, were to examine solicitors' practice, to evaluate the practice and the rules and to consider the relationship between the two, and thereafter to assess whether the present rules required amendment. Such an investigation is timely given the changes in the legal and commercial environment since the rules governing solicitors' conduct were drafted. These changes include, most obviously:

—increased competition, now sanctioned and positively encouraged by government;

[79] R Abel, *The Legal Profession in England and Wales* (Blackwell, Oxford, 1988) at 3.

[80] An early and very well known example of socio-legal research focusing upon lawyers' questionable ethical conduct in the field of criminal justice is J Baldwin and M McConville, *Negotiated Justice: Pressures to Plead Guilty* (Martin Robertson, London, 1977).

[81] A Boon and J Levin, n 36 above at 267; and D Nicolson and J Webb, n 33 above at 8.

[82] A Sherr, in K Economides (ed), 'Legal Ethics in Europe', n 38 above, at 356–357.

—deregulation, for example of financial services, which in turn has opened up additional fields of work for solicitor firms;
—increased mobility of solicitors between firms;
—the development of the 'mega' firm;
—greater demand for legal services across the board; and
—the growth in consumerism, as manifested in the demand for higher quality, specialist, and cheaper services.

It is beyond the scope of this book to explore the implications of these research findings for other, larger questions concerning developments in the legal profession—for example, the case for and against continued self-regulation; the appropriateness of further mergers between solicitor and accountancy firms; and, most fundamentally, the viability of maintaining a unified profession with a single ethical and regulatory framework. I have examined just one problem area. That, on my understanding, is what empirical research is best able to do. It is not feasible to conduct an empirical study of 'legal ethics'. Empirical research has to focus on the particular, but that is a necessary starting point for any consideration of wider issues of practice and principle. Discussion of any area of legal practice is likely to be richer for being informed by a good understanding of how practitioners see their world, and how they (even if erroneously) construe the ethical dilemmas which confront them.

Appendix
Methodology

SURVEY OF SOLICITORS' FIRMS

In the first instance firms were simply asked to return a form indicating whether they would be prepared to complete a short questionnaire on the subject of conflicts of interest within the legal profession and possibly to participate in a brief follow-up interview. Letters were addressed to the managing partner or senior partner of these firms, although the recipients were asked to indicate who, within the firm, would be completing the questionnaire. The letters were phrased in this way in the hope that managing or senior partners would forward the letter to the appropriate person within the firm.

Sixty-seven firms replied to the initial letter. Fifty agreed to complete the questionnaire and 17 said that they did not wish to participate. Of those that declined to take part, 12 gave no reason, five reported that they had so many requests that they adopted a policy of blanket refusal, and two maintained that they 'rarely had conflicts' and, therefore, thought that there was little point in their completing the questionnaire. It is interesting to note that one of these two firms subsequently received a great deal of adverse publicity when one of its clients served a writ seeking an injunction to prevent the firm from acting in a conflict situation. The case was eventually settled out of court, but it highlighted some of the problems noted by those firms which did participate in the research.

Questionnaires

Questionnaires were sent to the 50 firms in January 1998. It was requested that all questionnaires be returned by the end of February 1998. Follow-up letters were sent to those firms which had failed to return their forms approximately one month after the closing date. In addition, where telephone numbers were available, calls were made to those firms which had still not replied.

Eventually, 30 firms completed the questionnaire. Of these, seven firms were amongst the 10 largest in the *Legal 500*; four came from amongst those ranked 11 to 20; and the rest were fairly evenly spread through the remainder of the top 100.

The questionnaire was completed by a variety of different people within the firms. The views of managing partners, department heads, assistant solicitors and trainee solicitors were all reflected within the sample. It is difficult to judge

whether this made any difference to the findings. Sometimes a junior member of the firm, for example a trainee, was assigned the task of responding, acting under the guidance of a senior member of the firm. The response rate from the top ten firms was 70 per cent. This was probably because they appreciated the significance of the issues for their practices. Although it had not been my intention to focus to quite this extent on the very largest firms, I welcomed this pattern of response because it meant that I was talking to those firms which were likely to have had the most experience of conflicts.

The questionnaire was in four parts. Part I was designed to obtain information on how conflicts of interest affected firms at present. Part II was intended to discover whether firms were prepared to act for clients where a conflict of interest existed. Part III gave firms the opportunity to express their views on the existing rules regulating conflicts. Part IV allowed firms to raise any issue of importance to them which had not been previously addressed. Questions were drafted broadly, seldom asking for simple yes or no responses.

FOLLOW-UP INTERVIEWS

Once the various responses had been received, a series of follow-up interviews with the respondents took place in March and April 1998. Some firms declined to participate further, saying that they did not feel able to assist beyond the answers contained in their questionnaires. In total, representatives of 17 firms were interviewed. Five interviews were conducted with firms from the top 10; five with firms ranging from the eleventh to the fiftieth largest practices; and seven interviews were with firms in the 51 to 100 category.

Again, it can be seen that the response rate amongst the 10 largest firms was notably high. This meant that I could be reasonably confident that I was able to secure an accurate portrayal of the way in which these very large firms viewed and responded to conflicts. As not so many of the medium/smaller firms were interviewed in proportion to the number in the group, I was less confident of the representativeness of the findings from those interviews. More interviews with these medium-sized firms would undoubtedly have been helpful, particularly when it came to establishing differences between them and the large City firms.

Eight interviews were conducted face to face, the other nine being conducted over the telephone. In the latter case an appointment was arranged beforehand to ensure that a time was reserved to prevent interruptions.

Of the interviews conducted, 12 were with managing/senior partners, three were with partners, and two were with assistant solicitors. It was found that the more senior the person interviewed, the more they knew about the firm's overall approach to conflicts and the less their replies related solely to their own experiences. Interviews were semi-structured, with questions exploring, in further detail, answers given in questionnaires. Conversations were allowed to flow freely, with new avenues of interest being pursued as and when they arose.

On average, interviews lasted between 20 minutes and one hour. Those conducted over the telephone tended to be shorter. All interviews were tape recorded with the permission of the interviewee.

DATA ANALYSIS

In a few instances, information provided by firms participating in the initial survey lent itself to numerical analysis. Because only 30 firms were included in the research, no computer package was used for this purpose. It should be stressed, however, that this research was essentially qualitative rather than quantitative. Almost all of the data required painstaking thematic analysis.

Subsequent Developments

It must also be noted that as the empirical study was conducted between November 1997 and April 1998, the latest edition of the *Guide to Professional Conduct* had not been issued to solicitors. In addition, the House of Lords' decision in *Bolkiah v KPMG*[1] had not been delivered. Although the changes made to the rules by the eighth edition of the Guide were slight, any differences have been noted in the analysis of the interviews.

Confidentiality

Some firms felt that the information they were providing was sensitive and thus an assurance of absolute confidentiality regarding all information was given. This principle has been adhered to throughout this book, with each firm being identified by a random number between 1 and 30. In places, some identifying details have also been changed.

An outline description of the firms and the respondents is contained at the end of this appendix.

COMMERCIAL CLIENTS

Between March and May 2001 representatives from the legal departments of five large commercial organisations were contacted. An alphabetical letter identifies each client. Client A is engaged in the retail industry; Client B operates in the financial sector; Client C manages a telecommunications company; Client D runs several transport businesses, and Client D produces pharmaceutical supplies.

[1] [1999] 2 AC 222.

Interviews, lasting approximately one hour, were conducted face-to-face with the head of the legal department in each company. A letter outlining the key findings from my empirical study of law firms was sent to the participants beforehand. This formed the basis for much of the discussion during the interview, with clients identifying any areas of particular concern to them.

BARRISTERS

Three barristers were interviewed in July 1999. Each was identified through personal contacts. One barrister was a senior practitioner, one had several years' experience, and the other had recently qualified. An alphabetical letter identifies each barrister.

Two interviews were conducted face-to-face and the third over the telephone. These interviews lasted approximately one hour. Certain topics were identified beforehand, but no set format was adopted, with participants being allowed to raise issues of particular concern to them.

The information obtained in these interviews was used for comparative purposes only. The objective was simply to gain some insight into how barristers view and 'manage' conflicts.

REFLECTIONS UPON THE EMPIRICAL DATA

The more powerful the empirical methodology which one adopts in seeking a description of what lawyers actually do, the better. I adopted a methodology which socio-legal scholars would tend to agree is *not* the most powerful, but it is one which I believe has proved, in this instance, quite effective. Asking practitioners to describe their work—whether their answers are conveyed directly face to face, over the telephone, or on paper—is acknowledged to have certain limitations as a means of establishing what it is that one's informants actually do. This is because, leaving aside the possibility of deliberate misrepresentation, practitioners in all spheres (including the academic) develop 'stories' of what it is they do, of what represents the typical 'case' or the typical day, and how they behave when confronted by certain difficulties or ethical dilemmas. Those accounts may be sincerely held, and they may be oft-repeated, but that does not mean that they bear any very close relationship to 'reality'—as reality would be perceived by third parties.

Research techniques adopted by socio-legal researchers as a means of overcoming this include, first, *direct observation* (or a mixture of observation and interview); second, they can involve various forms of 'triangulation' (seeking a range of potentially competing insights into one set of transactions—for example, by interviewing practitioners representing different interests in a case, or by interviewing legal adviser *and client*); and thirdly, as far as interviewing is con-

cerned, it is possible to direct informants to certain specific pieces of work, not chosen by them, so that there is less opportunity to deliver a standardised account or 'story' concerning their practice, and a requirement instead to confront the specifics of a particular piece of work in respect of which the researcher has some other evidence (an interview with 'the other side', access to the case file, or an interview with the client).

In this instance, I did not do these things. I approached firms with a list of questions, many of them quite broadly framed, and thereafter I conducted interviews in which I invited my informants to address the issues in greater depth, but without requiring them to account for their practice in respect of particular cases or problems which I had identified. I did not attempt to interview clients, and likewise I made no attempt to approach other lawyers involved in any of the cases discussed with my informants.

There were a number of reasons why I did not go beyond the single interview format. The first, and most immediate, was that the fieldwork which I *did* undertake was in an unmapped area and the first task, as far as I was concerned, was to persuade representatives of the major commercial firms to talk to me at all. Secondly, I had to give assurances of confidentiality. The area under discussion was sensitive, and I judged that it was not feasible or appropriate to attempt to go beyond the very generous access which I was being granted in order to ask my informants to focus upon specific cases which I had identified by reference to some objective criterion—say, a given start date. That would in theory have been possible, but I felt that the access that I was being granted was in any event generous, and since I had indicated at the outset that my research was essentially exploratory—and since I had been granted access on that basis—I did not consider it feasible to ask for information pertaining to specific cases.

SOLICITORS' DETAILS

30 firms returned a completed questionnaire—16 firms participated in a follow-up interview.

Firm 1
A very large City practice with one London office and several overseas offices. The firm specialises in banking and commercial work. A trainee solicitor provided all information. No interview was conducted.

Firm 2
A very large, well-established, City firm specialising in corporate work. The firm has many overseas offices. The senior partner provided all information. He has particular expertise in corporate finance and company law. No interview was conducted.

Firm 3
This is a large City firm with several overseas offices. The firm is well known for its company and commercial work. An assistant solicitor provided all the information. No interview was conducted.

Firm 4
A medium-sized City firm specialising to some degree in insurance work. The firm has two offices in the City. The Senior Partner provided all information. He specialises in company commercial work. He was articled with the firm and has remained there since qualification. No interview was conducted.

Firm 5
This is a medium-sized City firm well known for its maritime and insurance work. The firm has three international offices, but only one UK office. A relatively senior partner provided the information. He specialises in shipping finance. He qualified with the firm and has been a partner for nearly 30 years. No interview was conducted.

Firm 6
This is a medium-sized City law firm with several overseas offices. It deals with both commercial clients and some prominent private clients. In addition, the firm undertakes a high proportion of international work. The Managing Partner provided all information. He is well known for his international litigation practice and has been a partner with the firm for over 15 years. No interview was conducted.

Firm 7
A medium-sized, well-established City firm, with two offices, which handles a substantial amount of litigation and commercial work. The head of litigation provided all information. Articled in the City, she has been a partner for over five years. No interview was conducted.

Firm 8
This is a small to medium-sized City firm. It undertakes a wide range of commercial work. The firm has only one office. The Managing Partner provided all information. He specialises in corporate finance and advertising. He was articled with the firm and has been a partner for over 30 years. No interview was conducted.

Firm 9
This is a medium to large national law firm with several offices based in three cities, including London. The firm also has one overseas office. The firm is a major commercial practice and is particularly well regarded for its banking work. All information was obtained from an assistant solicitor who was based in a regional office. No interview was conducted.

Firm 10
This is a prominent West Country firm, dealing with both commercial and private clients. It undertakes some Legal Aid work. The firm has only one office. The Managing Partner provided all information. He specialises in partnership law. He has practised both locally and in a medium-sized City firm. He has been a partner for 25 years. No interview was conducted.

Firm 11
This is a firm with offices throughout England. It is a medium sized regional practice. It deals with all areas of commercial law. It also deals with a large number of private clients. A senior administrative assistant provided all information. No interview was conducted.

Firm 12
This is a small to medium-sized practice which has offices spread mainly around outer London. The firm handles both commercial and private client work. It also undertakes Legal Aid work. The Managing Partner provided all information. No interview was conducted.

Firm 13
A small to medium-sized regional practice with an office in London, this firm undertakes a variety of work for both commercial and private clients. The Senior Partner provided all information. He undertakes company and commercial work. No interview was conducted.

Firm 14
A large City firm with several overseas offices, dealing with all major aspects of commercial work. This firm has a particular reputation for its litigation work. The Senior Partner provided all the information. He has extensive experience in corporate work and has been a partner for approximately 30 years. A face to face follow-up interview was conducted.

Firm 15
A very large City practice, this firm has numerous overseas offices and is particularly renowned for its banking and finance work. The Managing Partner provided all information. Articled with the firm, he has been a partner for over 20 years. His main area of expertise is litigation. A face to face follow-up interview was conducted.

Firm 16
A medium-sized City firm with several other offices. The vast majority of its work is insurance litigation. The Senior Partner provided all information. He specialises in contentious construction work. A face to face follow-up interview was conducted.

Firm 17
A medium to large City firm with a reputation for insurance and reinsurance work. The firm has more than one London office and an overseas office. A partner in the firm provided all the information. He has been a partner for over 25 years and specialises in solicitors' negligence defence work. A face to face follow-up interview was conducted.

Firm 18
A medium-sized City firm, this practice handles a large proportion of private client work. The Senior Partner, specialising in private client work, and a partner responsible for residential property, provided all the information. A face to face follow-up interview was conducted.

Firm 19
This is a large West Country firm, undertaking commercial and specialist private client work. The Managing Partner provided all the information. A face to face follow-up interview was conducted.

Firm 20
A prominent Welsh firm of medium size, this practice concentrates mainly on commercial work. It also has a substantial litigation and insurance practice, providing services to both corporate and private clients. The Senior Partner provided all the information. A face to face follow-up interview was conducted.

Firm 21
This is a medium-sized City firm with several other offices both abroad and in other parts of England. It is a broadly based commercial practice providing services for both companies and private clients. The Managing Partner provided all information. Having worked at several other City firms, he has been a partner for over 15 years. He specialises in commercial property. A follow-up interview was conducted over the telephone.

Firm 22
A medium to large City firm with other offices in England and several abroad, this practice concentrates mainly on commercial work. It is particularly well known for its commercial property work. The Senior Partner provided all the information. A follow-up interview was conducted over the telephone.

Firm 23
A large national firm with a City presence and overseas offices, this firm provides a wide range of legal services. It handles commercial and private client work. A leading partner provided all the information. He specialises in financial litigation and has been a partner for over 10 years. A follow-up interview was conducted over the telephone.

Firm 24
This is a large West Country practice dealing with a wide range of work both for private individuals and companies. There are approximately 50 partners and 220 fee-earners. The Managing Partner provided all information. He has been a partner for over 15 years and specialises in private client work. A follow-up interview was conducted over the telephone.

Firm 25
A smaller regional firm with three offices in the surrounding areas of the City, this practice concentrates mainly on litigation work. A partner in the commercial department provided all the information. He specialises in corporate finance and whilst he has only been with the firm for two years he has had experience as a partner for over five years. A follow-up interview was conducted over the telephone.

Firm 26
This is a prominent southern firm with several offices. It handles a wide variety of work for both commercial and private clients. The Managing Partner provided all information. He specialises in litigation work of a commercial nature. He has been a partner for over 10 years. A follow-up interview was conducted over the telephone.

Firm 27
A medium sized regional firm with two offices. A wide variety of work is undertaken mainly in corporate, insurance and commercial areas. The Managing Partner provided all the information. Specialising in commercial law and articled with the firm, he has been a partner for over 10 years. A follow-up interview was conducted over the telephone.

Firm 28
A medium-sized northern firm, this practice handles a wide range of commercial, property, litigation and private client work. An assistant solicitor specialising in litigation provided all the information. He has four years post-qualification experience. A follow-up interview was conducted over the telephone.

Firm 29
A very large City law firm with many overseas offices, this firm handles all areas of commercial work. It also handles international cases. A senior partner provided all the information. A follow-up interview was conducted over the telephone.

Firm 30
This is a large multi-centred firm with several overseas offices. It undertakes a wide variety of work from both commercial and private clients. An assistant solicitor provided all the information. He specialises in litigation work. A face to face follow-up interview was conducted.

Bibliography

Abel, RL, (1988) *The Legal Profession in England and Wales* (Blackwell, Oxford)

—— (1989) 'Between Market and State: the Legal Profession in Turmoil', 52 *Modern Law Review* 285

—— (1989) 'Comparative Sociology of Legal professions', in RL Abel and PSC Lewis (eds), *Lawyers in Society Volume 3—Comparative Theories* (University of California Press, Berkeley)

Accountancy (1998) Editorial, 'Conflicts over conflicts', 1262/3

Adler, SJ, (1984) 'Beyond Chinese Walls: Coping with Conflicts', *The American Lawyer*, May, p 6

Allen, S, (1999) 'Chinese Walls Still Stand After Case', *Law Society Gazette*, 8 April, at 13

American Bar Association (1995) Editorial, 'The Business Lawyer: A Bulletin of the Section on Corporation and Mercantile Law', 1381/50 n 4

Andrew, D, (1998) 'The agony and the MDP', *Legal Business*, March, p 68

Arden, A, (1999) 'The case for partnership', 47 *The Lawyer* 30

Aronson, RH, (1977) 'Conflicts of Interest', 52 *Washington Law Review*, 807

Arthur, D, (1999) 'Building on the Great Wall of China', *Legal Week*, 22 July, p 23

Arthurs, HW, (1996) 'Lawyering in Canada in the 21st Century', *Windsor Yearbook of Access to Justice* 202

—— (1998) 'Why Canadian Law Schools Do not Teach Legal Ethics', in K Economides (ed), *Ethical Challenges to Legal Education & Conduct* (Hart Publishing, Oxford)

Atkinson, R, (1992) 'Beyond the New Role Morality for Lawyers', 51 *Maryland Law Review* 853

Bain, G, (1999) 'An end to Chinese walls?', 30 *Commercial Lawyer* 78

Baldwin, J and McConville, M, (1977) *Negotiated Justice: Pressures to Plead Guilty* (Martin Robertson, London)

Berg, A, (1992) 'The topsy-turvy world of Chinese walls', 11(12) *International Financial Law Review* 26

Barboutis, G, (1999) 'Prince Jefri Bolkiah v. KPMG: the rejection of an "inadequate" Chinese Wall', 20 *The Company Lawyer* 286

Bateson, K, (1997) 'A firm relationship', 20 *Commercial Lawyer* 62

Belasco, LA, (1990) 'Conflicts of Interest', *The Practical Lawyer*, December, p 12

Bishop, W, (1989) 'Regulating the market for legal services in England: Enforced separation of function and restrictions on forms of enterprise', 52 *Modern Law Review* 326

Boon, A and Levin, J, (1999) *The Ethics and Conduct of Lawyers in England and Wales* (Hart Publishing, Oxford)

Boxer, C, (1992) 'Chinese Walls: no longer impenetrable', *The Lawyer*, 15 September

Brindle, M and Dehn, G, (1995) 'Confidence, Public Interest and the Lawyer', in R Cranston (ed), *Legal Ethics and Professional Responsibility* (Oxford University Press, Oxford)

Chambers, G, (1989) 'Conduct Matters', *Solicitors Journal*, 31 July, 712

Chambers, G and Harwood, S, (1990) *Solicitors in England and Wales: Practice Organisation and Perceptions*, *First Report* (The Law Society, London)
Chambers, M, (1994) 'Conflict Problems Abound', 16 *National Law Journal* A21
—— (1994) 'Conflicts as Weapons', 17 *National Law Journal* A23
——, Jones, M and Wilkins, P, (1999) 'Conflicts of interest: the growing climate of distrust', 33 *Commercial Lawyer* 26
—— and Parnham, R, (1998) 'Accountants in the Legal Market: Has the strategy failed?', 21 *Commercial Lawyer* 40
Commercial Lawyer (1997) Editorial, 'C&W Communications voted this year's deal of the year', 20/74
—— (1997) Editorial, 'Changing Role of Barristers' Clerk', 20 Nov/Dec, p 13
—— (1997) Editorial, 'Garden Leave put to the test', 19/10
Conflicts of Interest: A consultation document from the Regulation Review Working Party of the Law Society of England and Wales (2001) (The Law Society, London).
Conger, KJ, (1998) 'Standards of Conduct Issue—"Chinese Walls" ', *Public Power*, Jan/Feb
Copeland, D, (1988) 'Conflicts of Interest in the Mega Firm', 13 *Journal of the Legal Profession* 255
Cordery, A, (ed), (1968)*Cordery's Law Relating to Solicitors*, 6th edn (Butterworths, London)
Cotterrell, R, (1992) *The Sociology of Law*, 2nd edn (Butterworths, London)
Cranston, R, (ed), (1995) *Legal Ethics and Professional Responsibility* (Clarendon Press, Oxford)
Crawley, A and Bramall, C, (1995) 'Professional Rules, Codes and Principles Affecting Solicitors (Or What Has Professional Regulation to do With Ethics?)', in R Cranston (ed), *Legal Ethics and Professional Responsibility* (Clarendon Press, Oxford)
de Groot-van Leeuwen, L, (1998) 'Lawyers' moral reasoning and professional conduct, in practice and in education', in K Economides (ed), *Ethical Challenges to Legal Education & Conduct* (Hart Publishing, Oxford)
Dezalay, Y, (1991) 'Territorial battles and tribal disputes', 54 *Modern Law Review* 792
—— (1993) 'Big Bang on the legal market; restructuring the field of business consulting', in A Febrajo and D Nelken (eds), *European Yearbook in the Sociology of Law* (Guiffre, Milan)
Dyson, J, (1997) *Accountancy for Non-Accounting Students* (Financial Times Pitman Publishing, London)
Egan, D, (1999) 'The legal revolution', 49 *The Lawyer* 16
Fiduciary Duties and Regulatory Rules (1992) (Consultation Paper No 124, HMSO, London)
Financial Times (1998) Editorial, 'City firms seek advice on Jefri Ruling', 31 December
Finn, P, (1987) 'Conflicts of Interest and Professionals', in *Professional Responsibility* (New Zealand Legal Research Foundation, University of Auckland)
—— (1992) 'Fiduciary Law and the Modern Commercial World', in E McKendrick (ed), *Commercial Aspects of Trusts and Fiduciary Obligations* (Clarendon Press, Oxford)
—— (1992) 'Professionals and Confidentiality', 14 *Sydney Law Review* 317 at 338
—— (ed), (1985) *Essays in Equity* (Sweet & Maxwell, London)
Flintoff, J, (1997) 'What Conflict?', *Legal Business*, March, p 39

Flood, J, (1989) 'Megalaw in the UK: Professionalism or Corporatism?: A Preliminary Report', 64 *Indiana Law Journal* 169

—— (1996) 'Megalawyering in the global order: the cultural, social and economic transformation of global legal practice', 3 *International Journal of the Legal Profession* 169

Fowle, M, (1986) 'Conflicts of Interest and the Accountancy Profession', in RM Goode (ed), *Conflicts of interest in the changing financial world* (Institute of Bankers Centre for Commercial Law Studies, London)

Galanter, M, (1992) 'Law Abounding: Legalisation Around the North Atlantic', 55 *Modern Law Review* 1

—— and Palay, T, (1995) 'Large Law Firms & Professional Responsibility', in R Cranston (ed), *Legal Ethics and Professional Responsibility* (Clarendon Press, Oxford)

Gallagher, L and Hanes, AS, (1993) 'Attorney-Client Conflicts of Interest and Disqualification of Counsel in Texas Litigation', 24 *Texas Tech Law Review* 1039

Garwin, AH (ed), (1999) *ABA Compendium of Professional Responsibility Rules and Standards* (American Bar Association. Chicago)

Gee, S, (1999) 'Above Suspicion', 30 *Commercial Lawyer* 80

Gibeaut, J, (1998) 'Squeeze: As accountants edge into the legal market, lawyers may find themselves not only blindsided by the assault but also limited by professional rules', *ABA Journal* February, p 42

Glasser, C, (1990) 'The legal profession in the 1990s: images of change', 10 *Legal Studies*

Glover, J, (1995) *Commercial Equity Fiduciary Relationships* (Butterworths, Adelaide)

Goode, RM (ed), (1986) *Conflicts of interest in the changing financial world* (Institute of Bankers, Centre for Commercial Law Studies, London)

Gower, J, (1984) 'Review of Investor Protection', Cmnd 9125, Part 1

Granfield, R, (1998) 'The Politics of Decontextualised Knowledge: Bringing Context into Ethics Instruction in Law School', in K Economides (ed), *Ethical Challenges to Legal Education & Conduct* (Hart Publishing, Oxford)

Greenebaum, EH, (1996) 'Development of Law Firm Training Programs: Coping with a Turbulent Environment', 3:3 *International Journal of the Legal Profession* 315

Griffiths, M, (1998) 'Relations between Barrister and Clerk', in *Inns of Court School of Law Professional Conduct 1998/9* (Blackstone, London) at 48

Griffiths-Baker, JE, (1999) 'Further Cracks in Chinese Walls', 149 *New Law Journal* 162

Harrison, J, (1988) 'To merge or not to merge', 132 *Solicitors Journal* 102

Hazard, GC, (1978) *Ethics in the Practice of Law* (Yale University Press, Yale)

—— (1996) 'Conflict of Two Roles', 18 *National Law Journal* A21

—— (1996) 'The Would-be Client', 18 *National Law Journal* A19

—— (1997) 'Erecting a Wall to Prevent Conflicts of Interest', *National Law Journal*, 21 July, at A19

Hutchinson, AC, (1998) 'Legal ethics for a fragmented society: between professional and personal', 2:3 *International Journal of the Legal Profession* 175

Jarvis, PR and Tellam, B, (1997) 'When Waiver Should not be Good Enough: An Analysis of Current Client Conflicts Law', 33 *Willamette Law Review*, 145

Keeping Clients: A Client Care Guide for Solicitors, (1997) (The Law Society and Office for the Supervision of Solicitors, London)

Kerridge, R and Davis, G, (1999) 'Reform of the Legal Profession: An Alternative "Way Ahead" ', 62 *Modern Law Review* 807

Kingston, R, (1999) 'Invasion of the Bean Counters', *The Independent*, 11 February, p 28
Kirk, H, (1976) *Portrait of a Profession* (Oyez Publishing, London)
Lady Marre, CBE, (1988) *A Time for Change: Report of the Committee on the Future if the Legal Profession* (General Council of the Bar and Council of the Law Society, London)
Law Society Gazette (1999) Editorial, 'Changing Legal Profession', 96/48 at 24
—— (1999) Editorial, 'Dawning of a New Era', 96/4
Law Society, The, (1998) *Multi-disciplinary Practices* (Consultation Paper, Law Society Publishing, London)
Lawyer, The (1996) Editorial, 'Denton Hall pulled out of merger talks because of fears over conflicts',12 November
—— (1997) Editorial, 'Clifford Chance denies conflict of interest charge', 18 March
—— (1997) Editorial, 'Onwards, upwards . . .', 10 June, p 35
—— (1998) Editorial, 'Are snowballing mergers necessary?', 2 March
—— (1999) Editorial 'Chambers of the year becomes plc', 44/1
—— (1999) Editorial, 'Top silks call for partnership rights', 6 December, p 1
Lazega, E, (1994) 'Conflicts of Interest in American Business Law Firms—An Organisational Approach', (French title: 'Les Conflits d'interets dans les cabinets americans d'avocats d'affaires: concurrence et auto-regulation'), 36 *Sociologie du Travail* 315
Lee, RG, (1992) 'From Profession to Business: The Rise and Rise of the City Law Firm', in P Thomas (ed), *Tomorrow's Lawyers* (Blackwell, Oxford)
—— (1992) 'From Profession to Business: The rise and rise of the City law firm', 19 *Journal of Law and Society* 31
Legal Business, (1998) Editorial 'Student Special', February
Legal Week, (1999) Editorial, 'A&O, CC conflicted out of £554m Medeva deal', 18 November, p 3
—— (1999) Editorial, 'Building the Great Wall of China', 22 July, p. 23
—— (2000) Editorial, 'Conflicts committee to remove ambiguity in conflict rules', 20 April, p 2
Lindsay, R, (1999) 'Accountants have lost their way', 28 *Legal Week* 10
Lord Chancellor's Advisory Committee on Legal Education, *Multi-disciplinary Practices*, (July, 1999)
Lund, T, (1960) *Guide to the Professional Conduct and Etiquette of Solicitors* (The Law Society, London)
Lush, P and Satyadeva, P, (1999) 'Chinese walls and client consent', *Solicitors Journal* 25 June, p 610
Lusk, AA, (1987) 'Commentary on Paul Finn's Paper "Conflicts of Interest and Professionals" ' (New Zealand Legal Research Foundation, University of Auckland)
Marks, S, (1998) 'The Global 50', 89 *Legal Business* 32.
Martyn, SR, (1993) 'Conflict about Conflicts: The Controversy Concerning Law Firm Screens', 46 *Oklahoma Law Review* 53
Mayson, S, (1997) *Making Sense of Law Firms* (Blackstone, London)
McCormack, MH, (1987) *The Terrible Truth About Lawyers* (Collins, London)
McVea, H, (1993) *Financial Conglomerates and the Chinese Wall—Regulating Conflicts of Interest* (Clarendon Press, Oxford)
—— (2000) 'Heard it through the grapevine: Chinese walls and former client confidentiality in law firms', 59 *Cambridge Law Journal* 370
Middlemiss, J, (1993) 'Canada: Conflict of interest hits lawyers—waiting for results of Guidelines Study', *Financial Post*, 6 April

Midgley, JR, (1992) 'Confidentiality, Conflicts of Interest and Chinese Walls', 55 *Modern Law Review* 822

Mitchell, A, (1998) 'Whose Side Are You On Anyway? Former Client Conflict of Interest', 26 ABLR 418

Mitchell, AD, (1999) 'Chinese Walls in Brunei: Prince Jefri Bolkiah v. KPMG', *University of New South Wales Law Journal* 243

Moore, L, (1982) 'Conflicts of Interest in the Simultaneous Representation of Multiple Clients: A Proposed Solution to the Current Confusion and Controversy', 61 *Texas Law Review* 211

Moser, MP, (1990) 'Chinese walls: a means of avoiding law firm disqualification when a personally disqualified lawyer joins the firm', 3 *Georgetown Journal of Legal Ethics* 399

Mullally, M, (1999) 'Building the case for Chinese walls at the Bar', 29 *Legal Week* 10

—— (2000) 'How Olswang got its signals crossed', 5 *Legal Week* 10

Multi-Disciplinary Practices (1998) (The Law Society, London)

Nicolson, D and Webb, J, (1999) *Professional Legal Ethics* (Oxford University Press, Oxford)

Nosworthy, E, (1995) 'Ethics and Large Law Firms', in S Parker and C Sampford (eds), *Legal Ethics and Legal Practice* (Clarendon Press, Oxford)

O'Dair, R, (2001) *Legal Ethics Text and Materials* (Butterworths, London)

Orlik, DK, (1993) 'California narrows the ethical wall; Pennsylvania Expands it', 10 *Legal Assistant Today* 144

Parker, S and Sampford, C (eds), (1995) *Legal Ethics and Legal Practice* (Clarendon Press, Oxford)

Passmore, C, (1999) 'Prince Jefri's privilege', 49 *New Law Journal* 651

Paterson, AA, (1996) 'Professionalism and the legal services market', 3 *International Journal of the Legal Profession* 137

Pelton Pitulla, J, (1996) 'Cleaning up before moving on', *American Bar Association Journal*, April, p 91

Perell, P, (1995) *Conflicts of Interest in the Legal Profession* (Butterworths, London)

Petch, T, (1999) 'Chinese walls', *Cambridge Law Journal* 485

Pound, R, (1953) *The Lawyer form Antiquity to Modern Times: with Particular Reference to the Development of Bar Associations in the United States* (St Paul West Publishing, Minnessota)

Prest, WR, (1986) *The Rise of the Barrister: A Social History of the Bar 1590–1640* (Clarendon Press, Oxford)

Pritchard, J (ed), (1999) *The Legal 500*, 12th edn (Legalease Limited, London)

Review of Conflicts and Duties In Relation to Confidential Information, (2000) (The City Disputes Panel, London)

Reynolds, MB. (1991) 'Solicitors and conflict of duties', 107 *Law Quarterly Review* 536

Rose, C, (1997) 'Clifford Chance The Merger That Worked', 15 *Commercial Lawyer* 32

Rosen, RE, (1998) 'Devils, Lawyers and Salvation Lie in the Details: Deontological Legal Ethics, Issue Conflicts of Interest and Civil Education in Law Schools', in K Economides (ed), *Ethical Challenges to Legal Education & Conduct* (Hart Publishing, Oxford)

Salbu, S, (1992) 'Law and Conformity, Ethics and Conflict: The Trouble with Law-Based Conceptions of Ethics', 68 *Indiana Law Journal* 101

Samborn, R, (1993) 'Anti-lawyer attitude up', *National Law Journal* at Table 1

Sampford, C, (1990) *Legal Ethics and Legal Practice* (Clarendon Press, Oxford)
Schulz, L, (1997) 'Joined at the hip', *The Lawyer* 10 June, p 11
SenGupta, R (ed), (1999) *Chambers and Partners—A Guide to the Legal Profession 1999–2000* (Chambers & Partners Publishing, London)
Shapiro, SP,. (1995) *Conflicting Responsibilities: Manoeuvring Through the Minefield of Fiduciary Obligations* (American Bar Foundation, Chicago)
Shepherd, JC, (1981) *The Law of Fiduciaries* (The Carswell Company, Toronto)
Sherr, A, (1998) 'Legal Ethics in Europe', in K Economides (ed), *Ethical Challenges to Legal Education & Conduct* (Hart Publishing, Oxford)
——and Webley, L, (1997) 'Legal Ethics in England and Wales', 1(2) *International Journal of the Legal Profession* 109
Shrubsall, P and Flood, J, (1983) *Barristers' Clerks: The Law's Middlemen* (Manchester University Press, Manchester)
Simon, WH, (1988) 'Ethical Discretion in Lawyering', 101 *Harvard Law Review* 1083
Singleton, S, (1998) 'Beauty Parades—the Legal Issues', 16(2) Professional Practice Management 18
Skordaki, E and Walker, D, (1996) *Regulating and Charging for Legal Services: An International Comparison* (The Law Society, London)
Slind-Flor, V, (1992) 'Client-Conflicts Patrols March On', *The National Law Journal*, 30 March, p 1
Sloane, OJ, (1996) 'Serving Two Masters May Jeopardize Client Interests', *National Law Journal*, 25 November, p B7
Smith, C, (2000) 'Empty nests', 12 *The Lawyer* 28
Spickelmier, KD and Kattner, K, (1990) 'Client, Attorney Mobility Creates Growing Conflict of Interest Concerns', *Texas Bar Journal*, April, p 406
Stanley, C, (1991) 'Enterprising Lawyers: Changes in the Market for Legal Services', 25(1) *Law Teacher* 44
Swallow, M, (2000) 'Welcome to the two-stop shop', 17 *The Lawyer* 16
Taylor, N (ed), (1993) *The Guide to the Professional Conduct of Solicitors*, 6th edn. (Law Society Publishing, London)
——(ed), (1996) *The Guide to the Professional Conduct of Solicitors*, 7th edn (Law Society Publishing, London)
——(ed), (1999) *The Guide to the Professional Conduct of Solicitors*, 8th edn (Law Society Publishing, London)
Thornton, A, (1995) 'Responsibility and Ethics of the English Bar', in R Cranston (ed), *Legal Ethics and Professional Responsibility* (Clarendon Press, Oxford)
Timmis, C, (1999) 'Accountancy merger faced a conflict of interest roadblock', 94 *Legal Business* 74
Tobin, R, (1999) 'Former Clients and Chinese Walls: Russell McVeagh v Tower and Prince Jefri Bolkiah v KPMG', *New Zealand Law Review* 305
Todd, P, (1999) *Textbook on Trusts*, 4th edn (Blackstone Press, London)
Trends in the Solicitors' Profession Annual Statistical Report, (1996) (The Law Society, London)
University of Pennsylvania Law Review (1980) Editorial, 'The Chinese wall defense to law-firm disqualification', (128)650
Webb, J, (1998) 'Conduct, Ethics and Experience in Vocational Legal Education: Opportunities Missed', in K Economides (ed), *Ethical Challenges to Legal Education & Conduct* (Hart Publishing, Oxford)

Wilkins, P, (1997) 'Andersen fail to get Simmons & Simmons', 20 *Commercial Lawyer* 20

Zacharias, FC, (1989) 'Rethinking Confidentiality', 74 *Iowa Law Review* 351

—— (1998) 'Waiving Conflicts of Interest', 108 *The Yale Law Journal* 407

Zander, M, (1999) *Cases and Materials on the English Legal System* (Butterworths, London) at 635

Index

Page references for notes are followed by n