TYPHOID MARYS:

THE ETHICAL DILEMMA OF LAWYERS WHO SWITCH FIRMS

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This article analyses the conflict of interest that arises when a lawyer moves from one law firm to another. The various responses of the courts and the legal profession, both in New Zealand and in overseas jurisdictions, are considered. The article also examines the use of Chinese walls to prevent law firms from being disqualified from continuing to act for an existing client simply because a new lawyer has joined the firm. The article concludes that Chinese walls should, in some limited circumstances, be recognised as being effective to prevent the disclosure of confidential information.

I INTRODUCTION

The Rules of Professional Conduct prevent a lawyer from acting for a client where that lawyer faces a conflict of interest. Conflicts of interests can potentially occur in a number of different circumstances. This article focuses on the conflict of interest caused when a lawyer seeks to act against the interests of a former client. The legal profession and the courts have placed significant restrictions on the circumstances in which a lawyer can act against the interests of a former client. Rule 1.05 of the Rules of Professional Conduct provides:[1]

> 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 courts have developed similar restrictions which prevent the lawyer from acting against his or her former client's interests by disclosing confidential information. This article will examine how these restrictions, and the restrictions contained in Rule 1.05,

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1 New Zealand Law Society *Rules of Professional Conduct for Barristers and Solicitors* (4th ed 1996).

operate where a former client's interests are likely to be prejudiced when a lawyer transfers from one firm to another. It should, however, be emphasised that the restrictions contained in Rule 1.05 and the decided cases extend beyond this situation and apply equally to conflicts of interests with former clients that may occur in other ways.[2]

This article examines the legal and ethical duties imposed on the law firms which the lawyer transfers into. Should a law firm continue to represent an existing client in circumstances where it is possible for a transferring lawyer to disclose information confidential to that lawyer's former client? Does this necessarily mean that the entire firm, rather than just a section of it, can no longer continue to act for a long-standing client of the firm? How can a law firm mitigate the seemingly harsh consequences that arise simply because the firm has employed more professional staff? This article therefore seeks to identify and assess the competing legal and ethical considerations that determine whether the entire law firm ought to be disqualified.

Part II examines how former client conflicts have been dealt with by the courts in the United States and Canada. How those jurisdictions have balanced the competing policy considerations is relevant to determining how conflicts of interest should be resolved in New Zealand. Part III considers how the issue has been addressed by New Zealand courts and analyses these decisions in detail. The policy considerations that must be weighed in determining whether to disqualify a firm are analysed in Part IV. Part V addresses the issue of whether Chinese walls can properly be used to allow law firms to continue to act where those firms face a conflict of interest caused by a transferring lawyer.

II DISQUALIFICATION OF TRANSFERRING LAWYERS AND LAW FIRMS: THE NORTH AMERICAN STANCE

Applications to prevent transferring lawyers and law firms from continuing to act for a current client against the interests of a former client have frequently been considered by United States courts. The legal principles that courts apply when determining these applications are therefore well developed. The United States courts first determine whether the transferring lawyer can continue to act against the interests of his or her former client. Where the lawyer cannot continue to act, the court then considers whether the lawyer's new firm should be prevented from acting against the interests of the lawyer's former client. This may require the law firm's existing client to be represented by another firm altogether.

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2 See M R Dean and C F Finlayson "Conflicts of Interest: When May a Lawyer Act Against a Former Client? [1990] NZLJ 43 also G E Dal Pont *Lawyers' Professional Responsibility in Australia and New Zealand* (Law Book Company, Australia, 1996).

A Disqualification of the Transferring Lawyer

Where the transferring lawyer actually possesses, or is presumed to possess, confidential information relating to a client of his or her former firm, the lawyer will be disqualified from acting against the interests of that client. This is because where a substantial relationship between the work performed by the lawyer for the former client and the current matter exists, the court assumes that "during the course of the former representation confidences were disclosed to the attorney bearing on the subject matter of the [current] representation."[3] The court will disqualify the lawyer from acting for an existing client where this test is satisfied. Evidence establishing the actual disclosure of confidences is not required. The client making the disqualification application does not have to disclose the confidences that he or she is seeking to protect in court.

Where a substantial relationship is established, the general rule is that the lawyer is irrebuttably presumed to possess confidential information.[4] The difficulty with adopting an irrebuttable presumption is that it is over-inclusive. A lawyer can be disqualified in circumstances even though it can be proven that the lawyer concerned had not worked on the relevant matter and in fact held no confidential information.[5] Some courts have responded to this difficulty.[6] These decisions have held that the transferring lawyer is rebuttably presumed to possess confidential information. Where the lawyer can prove that

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3 *T C Theatre Corp v Warner Bros Pictures Inc* 113 F Supp 265 (SDNY, 1953).

4 R B Bateman, "Return to the Ethics Rules as a Standard for Attorney Disqualification: Attempting Consistency in Motions for Disqualification by the Use of Chinese Walls" (1995) 33 DUQLR 249, 266. Defining what constitutes a substantial relationship is of critical importance. It will determine whether the firm is disqualified. The definitions of a substantial relationship vary between the different Circuit courts. However, most Circuit courts require a relationship between factual contexts of the former and the current representation. For a fuller discussion, see Comment "Developments in the Law - Conflict of Interest in the Legal Profession" (1981) 94 Harv LR 1247, 1323-1333.

5 *Trone v Smith* 621 F 2d 994, 998-999 (9th Cir, 1980). The reason for disqualification in these circumstances was due to early Circuit Courts' reliance on the American Bar Association Model Code of Professional Responsibility when deciding whether to disqualify law firms. Canon 9 of the Model Code required avoiding even the "appearance of impropriety". This requirement strongly influenced some courts and led to the development of a very strict disqualification rule for the lawyer involved. See *T C Theatre*, above n 3, and *Emle Industries v Patentex Inc* 478 F 2d 562 (2nd Cir, 1973). Due to other decisions of the courts and the revocation of the Model Code, the importance of the appearance of propriety is no longer the central justification for the rule. See D R McMinn "ABA Formal Opinion 88-356: New Justification for Increased Use of Screening Devices to Avert Attorney Disqualification" (1990) 65 NYULR 1231, 1236 - 1244.

6 *Silver Chrysler Plymouth Inc v Chrysler Motors Corp* 518 F 2d 751 (2nd Cir, 1975); *Cheng v GAF Corp* 631 F 2d 1052 (2nd Circ, 1981); *Freeman v Chicago Musical Instrument Co* 689 F 2d 715 (2nd Cir, 1982). For a comprehensive discussion of the leading case of *Silver Chyrsler* see HM Liebman "The Changing Law of Disqualification: The Role of Presumption and Policy" (1979) 72 NULR 996.

there was no realistic chance that he or she obtained the former client's confidences, the presumption is rebutted. Such a rule prevents the disqualification of a lawyer who had no actual involvement with a client of the lawyer's former firm or who worked on only peripheral matters. The realities of the situation are therefore considered.

B Disqualification of the Entire Firm

To determine whether the entire firm should be disqualified because one lawyer possesses confidential information, the court presumes that the transferring lawyer shares confidences with other lawyers in the new firm. Disqualification prevents the new firm from misusing confidential information concerning the transferring lawyer's former client.

Initially, courts held that the presumption of shared confidences was irrebuttable. Where the transferring lawyer was disqualified from acting on certain matters, this disqualification automatically applied to the entire firm.[7] The notion that information flows freely between lawyers in the same office, so that the knowledge of one lawyer is the knowledge of all, provides the justification for the disqualification of the firm. The consequence of such a strict rule was that disqualification applications were used to disqualify the entire firm even where no confidential information had been passed by the disqualified lawyer to other members of the firm. This standard therefore left no flexibility for the court to take into account other circumstances once it was established that the litigated matters were sufficiently related. It is counter-intuitive to disqualify a law firm when there is no realistic chance that confidences have been disclosed.[8] The realisation by the United States courts that confidential information of former clients can be adequately protected without adopting such a harsh and unforgiving standard led to them adopting a rebuttable presumption as to shared confidences.

A rebuttable presumption protects the interests of the former client while not unnecessarily inhibiting clients' ability to choose which law firm represents them or restricting the growing mobility of lawyers. No undue hardship is caused to the law firm or to an existing client of the firm. Therefore, in relaxing the strict rule, the courts sought to fairly balance the interests of current and former clients to reach a just and sensible result.[9] The law firm should be disqualified only where protection of the former client's interests is

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7 There are two reasons that the United States courts have generally used to justify the irrebuttable presumption. First, it avoids the necessity of having to disclose the actual confidential information in open court. Secondly, an irrebuttable presumption was required by the spirit of Canon 9 of the Model Code to avoid even the appearance of impropriety. See generally the Seventh Circuit decision of *Novo Terapeutisk Laboratorium v Baxter Travenol Lab Inc* 607 F 2d 186 (7th Cir, 1979).

8 See McMinn, above n 5, 1272-1273.

9 See *Novo Terapeutisk Laboratorium v Baxter Travenol Lab Inc*, above n 7.

legitimately required. The rationale for preferring a rebuttable presumption was persuasively stated in *Analytica Inc v NPD Research Inc*:[10]

> If prior representation of a particular client will irrebuttably disqualify an entire firm from handling certain cases the result could easily be whole law firms of "Typhoid Marys." This would have a drastic impact on the careers of attorneys in entire firms, would impede the clients' rights to be represented by attorneys of choice and would discourage attorneys with expertise in a particular field of law from handling cases in their respective specialties.

The Court recognised that using a rebuttable presumption more accurately reflects the reality of the way modern law firms operate in the United States. Where a rebuttable presumption is adopted, it is necessary for the court to consider what is required to successfully rebut this presumption. The presumption of shared confidences is rebutted where the new law firm can conclusively show that other lawyers did not receive confidential information from the transferring lawyer.

Precisely what is required to show that other lawyers in the firm did not receive confidential information is unclear. Establishing a Chinese wall or cone of silence when a conflict of interest arises is the method most commonly adopted by law firms to rebut the presumption that confidential information has been shared.[11] However, *Panduit Corp v All States Plastic Manufacturing Co*[12] demonstrates that this presumption can be rebutted even though the law firm had instituted no formal screening procedures. On the basis of the transferring lawyer's testimonial evidence, the court was satisfied that no confidential information had passed or was likely to pass between lawyers in the firm. The Court observed that screening mechanisms were only one way in which the presumption of shared confidences can be overcome.[13] Part V considers the use of Chinese walls and cones of silence to prevent disqualification of law firms.

C *The Approach of the Canadian Supreme Court*

The Supreme Court of Canada considered the position of a transferring lawyer and the new law firm in *MacDonald Estate v Martin*.[14] This case concerned a junior lawyer who possessed confidential information about a plaintiff involved in litigation. The lawyer

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[10] 708 F 2d 1263, 1277 (7th Cir, 1983).

[11] These devices are considered in more detail in Part IV.

[12] 744 F 2d 1564 (Fed Cir, 1984).

[13] Above n 12, 1580. For a contrary view see M Brodeur "Building Chinese Walls: Current Implementation and a Proposal for Reforming Law Firm Disqualification" (1988) 7 Rev Litig 167, 177.

[14] (1991) 77 DLR (4th) 249.

subsequently transferred to a law firm which was acting for the defendant in the same litigation. The defendant sought an order removing the lawyer's new firm as the solicitor of record. A unanimous Supreme Court disqualified the law firm from continuing to act.

1 *The robust approach in MacDonald Estate v Martin*

In determining whether the transferring lawyer and the new law firm should be prevented from continuing to represent a client, the majority of the Supreme Court[15] recognised that lawyers moving from one firm to another was a "familiar feature" of modern legal practice.[16] Sopinka J identified three competing values that had to be balanced to determine the outcome of the case:[17]

> There is first of all the concern to maintain the high standards of the legal profession and the integrity of our system of justice. Furthermore, there is the countervailing value that a litigant should not be deprived of his or her choice of counsel without good cause. Finally, there is the desirability of permitting reasonable mobility in the legal profession.

After an extensive analysis of the relevant authorities, Sopinka J concluded that a standard which prevented actual conflicts of interest and also the appearance of conflict was required. The test that his Honour adopted was whether the reasonably informed member of the public would be satisfied that confidential information would not be used.

Sopinka J proposed a two stage inquiry to decide whether disclosure of confidential information would occur. The court must first determine whether the lawyer received confidential information from a former client that was relevant to the current matter. Where the current and former representations are sufficiently related, the court will presume that the transferring lawyer possesses confidential information pertaining to the former client. The onus of rebutting this inference is a heavy one and falls on the lawyer who faces disqualification. The court will then assess whether that lawyer will misuse the confidential information that he or she possesses. Disqualification of the transferring lawyer is automatic—the potential for the confidential information to be misused is too great. Sopinka J observed that a lawyer cannot "compartmentalise" information acquired from his or her former client and information that was acquired elsewhere.

For other lawyers in the transferring lawyer's new firm, the answer to the question of whether the confidential information has been misused is less clear. Does the risk that the confidential information may be misused by other lawyers in the firm justify

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15 The majority judgment was delivered by Sopinka J and was concurred in by Dickson CJC, La Forest and Gonthier JJ.

16 Above n 14, 255.

17 Above n 14, 254.

disqualification of the entire firm? Sopinka J considered that a rule assuming that the knowledge of one lawyer is the knowledge of every lawyer at the firm was "unrealistic in the era of the mega-firm."[18] However, Sopinka J recognised that there is a strong inference that lawyers who work together share each other's confidences. His Honour held that confidential information will be presumed to have been shared within the firm unless the contrary is shown. Therefore, the entire firm will be disqualified unless it can show that all reasonable measures were taken to ensure that the tainted lawyer did not disclose information to other members of the firm. Sopinka J thought that "reasonable measures" included Chinese walls. The potential for using Chinese walls is considered in Part V.

The standard proposed by Sopinka J reflects the paramount importance of preserving the integrity of the justice system. Sopinka J therefore placed the greatest emphasis on first on protecting former client's confidential information. His Honour considered that the loss of public confidence in the confidentiality of information passing between a solicitor and client would deliver a serious blow to the integrity of the profession and to the administration of justice. However, Sopinka J recognised that the mobility of lawyers and allowing clients to choose their representation are important interests which cannot be ignored. A rebuttable presumption that confidences have been disclosed to other lawyers in the firm strikes an appropriate balance between these interests.

2 *The strict approach in MacDonald Estate v Martin*

The minority of the Court[19] sought to impose a stricter duty than the majority. Cory J's persuasive judgment is underpinned by the rationale that ensuring the appearance of justice is a fundamental principle. Although the desirability of a client retaining counsel of choice and the mobility of the legal profession are important considerations, they must not detract from ensuring the integrity of the justice system.[20] The essence of the minority's concern is expressed in the following terms: "[T]he integrity of the judicial system is of such fundamental importance to our country and, indeed, to all free and democratic societies that it must be the predominant consideration in any balancing of these three factors."[21] Cory J stated that, where a lawyer who possesses confidential information joins a firm acting for a client involved in litigation against a former client, there should be an

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18 Above n 14, 268.

19 The minority judgment was delivered by Cory J and was concurred in by Wilson and L'Heureux-Dubé JJ.

20 Above n 14, 274. For an analysis of the extent of the difference between the minority and majority on this point, see H P Glenn "Standard For Disqualification of Law Firm to Act in Litigation: *MacDonald Estate v Martin.*" (1991) 70 Can Bar Rev 351, 356-359.

21 Above n 14, 272.

irrebuttable presumption that lawyers who work together share each other's confidences. Knowledge of the confidential matters should therefore be imputed to other members of the firm. This test necessitates disqualification of the entire firm where one lawyer possesses confidential information sufficient to disqualify that lawyer. Such a strict test is required to maintain public confidence in the administration of justice.

The size of the law firm, in Cory J's opinion, should not reduce the standard imposed on the law firm.[22] His Honour was not prepared to permit "mega-firms" or the lawyers that are employed by these firms to dictate the course of legal ethics. Cory J doubted whether Chinese walls could ever serve to protect the interests of former clients:[23]

> No matter how carefully the Chinese wall[s] may be constructed, [they] could be breached without anyone but the lawyers involved knowing of that breach. ...They do not change the reality that lawyers in the same firm meet frequently nor do they reduce the opportunities for the private exchange of confidential information. The public would, quite properly, remain sceptical of the efficacy of the most sophisticated protective scheme.

The stricter standard imposed by the minority reflects those judges' view that maintaining public confidence in the administration of justice is of paramount importance.

III THE APPROACH ADOPTED IN NEW ZEALAND

Whether a lawyer and his or her new law firm will be disqualified when the lawyer changes firm was considered in *Equiticorp Holding Ltd v Hawkins*.[24] This case concerned three partners in a law firm that wanted to change firms. A client of the new law firm was involved in large scale litigation against a client of these lawyers' former firm. One of the transferring lawyers had been directly involved with the litigation and possessed confidential information. That lawyer's former client sought to disqualify the new law firm from representing its existing client.

Henry J held that the public interest requires that solicitors avoid actual and potential conflicts of interest. This requires that the protection given to confidential information passing between solicitors and clients must not be undermined. Henry J therefore held that the relevant inquiry was whether there was a reasonable possibility that confidential information pertaining to the lawyer's former client had been disclosed. The Court rejected the less onerous "reasonable probability of disclosure" standard on the basis that it would

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22 Above n 14, 274.

23 Above n 14, 273-274.

24 [1993] 2 NZLR 737.

not meet modern public expectations.[25] Where the former client establishes that there is a reasonable possibility that confidential information will be disclosed, the court must assess whether the former client's right to be represented by a solicitor of choice and the desirability of preserving the reasonable mobility of lawyers outweighs the risk of disclosure. Whether the overall public interest requires the lawyer (or law firm) to be disqualified from continuing to act for an existing client depends upon the particular circumstances of the case.

Henry J was clearly influenced by the analysis developed in *MacDonald Estate*. However, Henry J did not agree with the Canadian Supreme Court's use of presumptions to decide the issues before the Court. His Honour said:[26]

> I have reservations as to the desirability of introducing Court prescribed presumptions, whether they be rebuttable or irrebuttable, to the stated situations. I prefer an approach which is directed to applying the facts to general principle so as to ensure the aim of protection is fairly met in the particular circumstances.

Analysing the surrounding circumstances in this way, Henry J held that the transferring lawyer could not act for his new firm against his former client's interests in the continuing litigation. The more difficult issue then considered by the Court was whether the lawyer's new firm should be disqualified from continuing to act for its existing client. Henry J held that he would disqualify the entire firm if the "tainted" lawyer joined the firm. The new firm had not put in place sufficient safeguards to prevent the inadvertent disclosure of confidential information. Henry J thought that: [27]

> There is a necessarily close relationship amongst partners of a legal firm, even when its membership is large, with continuing contact on a business and also to an extent a social basis. That cannot be sensibly avoided.

Although the risk of disclosing confidential information was small, it was not outweighed by the client's desire to retain the firm or by the lawyer's need to obtain a new position. The Court considered the latter factor to be of particular concern but held that it must "yield to the greater public interest in maintaining the integrity of the principle of protection."[28]

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[25] This standard was adopted by the English Court of Appeal in *Rakusen v Ellis Munday & Clarke* [1912] 1 Ch D 831 and derivative case law.

[26] Above n 24, 740.

[27] Above n 24, 740.

[28] Above n 24, 741.

Henry J's approach in *Equiticorp Holdings* was followed in by Speight J in *Turners & Growers Exports Ltd v P & O Containers Ltd.*[29] This case also concerned a solicitor who worked on both sides of the same dispute because he transferred firms. Speight J adopted the reasonable possibility of disclosure test. His Honour acknowledged that this was a strict standard, but held that the reputation of the legal profession and the sacrosanct nature of the solicitor/client relationship required a high test. The reasoning of the High Court in *Equiticorp Holdings* and *Turners & Growers* provides the basis for subsequent courts to analyse and decide whether a law firm should be allowed to continue to act in any particular set of circumstances. Whether this approach adequately protects the former client's interests is considered below.

A Critique of the New Zealand Approach

The nature of the legal environment in New Zealand should be considered by the court when determining whether to disqualify an individual lawyer and that lawyer's new firm. New Zealand is different from Canada and the United States because there is a significantly smaller number of law firms. The effect of unnecessarily restricting clients' choice of counsel is more severe when there are fewer prospective law firms for large corporates to choose between. Similarly, lawyers' ability to transfer firms will be restricted because there may be only a very small number of law firms who can hire an experienced lawyer without facing at least one potentially disqualifying conflict of interest.

The effect of the disqualification on the law firm, its lawyers and its clients should be considered in the light of the approach adopted in *Equiticorp Holdings*. These parties may put in place measures which would prevent the flow of confidential information. Where no confidential information has passed, there is no threat to the integrity of the justice system or to the administration of justice, and no grounds for disqualification. In circumstances where the law firm fails to implement effective screening measures, it has no grounds on which to argue that it has been unjustly disqualified. This approach emphasises the protection of the former client's confidential information, but recognises that other policy considerations require the law firm to be able to advance reasons why it should not be disqualified in the particular circumstances.[30]

Equiticorp Holdings and *Turners & Growers* demonstrate the willingness of New Zealand courts to adopt a flexible approach when deciding whether to disqualify lawyers facing a conflict of interest. While some may argue that the desirability of protecting client confidences warrants the use of a rebuttable presumption that confidences have been disclosed, there is no reason why this must necessarily follow. The tests articulated by the

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[29] Unreported, 14 September 1995, High Court, Auckland Registry, CP 628/86, Speight J.

[30] Above n 14, 270 where the majority in *MacDonald Estate* expressly recognise this point.

New Zealand courts very clearly demonstrate that protecting confidential information from disclosure is of primary importance. This accords with the fiduciary duty owed by lawyers to their current and former clients.[31]

IV THE POLICY CONSIDERATIONS APPLICABLE IN NEW ZEALAND

Whether a lawyer changing firms will have the effect of disqualifying his or her new firm from representing current clients depends upon how the court reconciles the policy considerations already identified in Part III. This decision will depend on the circumstances of the particular case and requires the court to balance the competing considerations in light of the standard expressed in *Equiticorp Holdings*. It is therefore useful to analyse the underlying policy considerations in more detail.

A The Integrity of the Justice System and the Appearance of Justice

Maintaining the high standards of the legal profession and the integrity of the justice system were dominant considerations in *MacDonald Estate*. The integrity of the justice system will be maintained if confidential information is not disclosed, and not perceived to be disclosed. Where a transferring lawyer causes the perception that confidential information may be disclosed, disqualification of the firm is justified to preserve the public's confidence in the due administration of justice. The Canadian decisions that have followed *MacDonald Estate* have placed similar emphasis on the importance of preserving the confidentiality of former client's confidential information.[32] Similarly, United States courts have held that maintaining the highest standards of professional conduct and the scrupulous administration of justice is an important consideration. This requires that confidential information is not disclosed.

Ensuring that justice is done and seen to be done has also been an influential consideration in the decided New Zealand cases. This can be seen from the Court of Appeal's judgment in *Black v Taylor*.[33] This case concerned a barrister who sought to act against a former client's interests. Although the case did not concern a transferring lawyer, the Court considered whether it was appropriate for a lawyer to continue to act for a client when the lawyer faced a conflict of interest. The Court reached the view that the proper administration of justice prevented the lawyer from continuing to act. Disqualification of the lawyer was appropriate where the integrity of the judicial process would be impaired by the lawyer continuing to represent his or her client.

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31 See PD Finn, *Professional Responsibility* (Legal Research Foundation, Auckland, 1987).

32 *G v International Christian Mission* (1995) 125 DLR (4th) 712; *Gouveia v Fejko* (1992) 18 CPR (3d) 12; *Chippewas of Kettle & Stoney Point v Canada* (1993) 17 CPC (3d) 5.

33 [1993] 3 NZLR 403.

McKay J identified the overarching principle as being that disqualification is required where a lawyer has an actual or apparent conflict of interest.[34] The Court commented further that disqualification of a lawyer should not be seen as a punishment for misconduct—it is intended to protect the litigant's interests and the wider interests of justice. It was the inherent jurisdiction of the Court that allowed it to control the conduct of barristers and solicitors facing a conflict of interest.

The decision in *Carindale Country Club Estate Pty Ltd v Astill*[35] demonstrates that the fiduciary duties imposed by the courts upon lawyers also influence whether the existence of a conflict of interest is sufficient to disqualify a lawyer. The integral role played by the lawyers in the administration of justice means that the fiduciary duty imposed on a lawyer not to disclose confidential information must be strictly observed. In this regard, Drummond J observed that:[36]

> In recognition of the special position of the solicitor as a fiduciary and of the importance now placed on the need for the appearance of integrity on the part of solicitors, as repositories of confidences, in the role they play in the administration of justice, I think that the stringent approach to when a solicitor will be free to act adverse to the interests of a former client that has generally been undertaken in recent cases is preferable to the more lenient approach that was generally, but by no means invariably, adopted in past times.

Whether the New Zealand courts will attach similar importance to the role of lawyers as fiduciaries when deciding whether a lawyer should be disqualified remains to be seen.

B Litigants Not Being Deprived of their Choice of Counsel

When a law firm is disqualified from representing the interests of a client because a member of the firm has represented an interest adverse to those of a current client on a related matter, the client is effectively deprived of the right to be represented by the law firm that they would ordinarily choose.

The United States courts have acknowledged the delicate balance between "the sacrosanct privacy of the attorney-client relationship (and the professional integrity implicated by that relationship) and the prerogative of a party to proceed with counsel of its choice."[37] The two interests can be reconciled. Where the possibility that confidential

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[34] *Black v Taylor*, above n 33, 418. See also *Merck Sharpe and Dohme (New Zealand Ltd) v Pharmaceutical Management Agency Ltd* Unreported, 7 June 1996, High Court, Wellington Registry, CP 23/96, Gallen J.

[35] (1993) 115 ALR 112.

[36] Above n 35, 118.

[37] *Schiessle v Stephens* 717 F 2d 417, 420 (7th Circ, 1983).

information will be disclosed is remote, there is no policy justification for the court not to allow the client to retain their first choice of counsel. The courts are suspicious of disqualification applications where the apparent purpose is to deprive a client of his or her lawyer. For example, the court in *Manning v Waring Cox James Sklar & Allen* said:[38]

> Unquestionably, the ability to deny one's opponent the services of capable counsel is a potent weapon. Confronted with such a motion, courts must be sensitive to the competing public policy interests of preserving client confidences and of permitting a party to retain counsel of his choice.

The courts will not look favourably upon a disqualification application being used to prevent an opposing party from retaining a particular firm to represent them in litigation. Further, it is detrimental to the administration of justice where a litigant can improve their position by depriving an opponent of competent counsel. Hamermesh has convincingly argued that disqualification applications should not be allowed to needlessly interfere with litigant's rights to obtain competent lawyers of their own choosing, particularly where the lawyer practises in a specialised area requiring special training and expertise.[39]

The courts have recognised that law firms should be disqualified only when absolutely necessary, in order not to unduly deprive clients of their representation.[40] Disqualifying a law firm has serious consequences. A new law firm must be found, instructed and briefed. In many circumstances the disqualification order will not permit the work product of the first firm to be shared with the newly retained firm.[41] This may cause significant expense and unnecessary duplication of work to bring the new firm up to speed.[42]

However, the problem is more complex still. Where the disqualification application is granted close to when the litigation is scheduled to start, it may prove impossible for lawyers in the new firm to gain a complete understanding of the factual and legal issues that are involved in a complex case.[43] An influential note in the Yale Law Journal observed that an over-inclusive application of firm-wide disqualification rules will unnecessarily

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38 849 F 2d 222, 224 (6th Circ, 1988).

39 F W Hamermesh "In Defence of a Double Standard in the Rules of Ethics: A Critical Re - evaluation of the Chinese Wall and Vicarious Disqualification." (1986) 20 U Mich JL Rev 245, 274.

40 See *Freeman v Chicago Musical Instrument Co*, above n 6, 722. In New Zealand, the right of clients to choose their representation is not unfettered. See also *Gazley v Attorney-General* (1995) 8 PRNZ 313 (HC); (1996) 10 PRNZ 47 (CA).

41 For example, *EZ Paintr Corp v Padco Inc* 746 F 2d 1458 (Fed Circ, 1984).

42 McMinn, above n 5, 1249-1250; *David Lee & Co v Coward Chance* [1990] 3 WLR 1278, 1285-1286.

43 See the dissenting judgment of Judge Coffey in *Analytica Inc v NPD Research Inc*, above n 10.

restrict other parties from access to the lawyers most familiar with the facts of their case.[44] Peterson has argued that the effects of this are two-fold. There is the psychological hardship, because the client must obtain new counsel with whom the client has not worked before and the financial hardship, being the fees that the client incurs in reinstructing counsel.[45]

Where the firm is advising in a highly specialised area, disqualification of the firm deprives the client of the specialised skill, expertise and experience that the law firm may possess or has accumulated over time.[46] These factors are likely to be why the client retained the law firm in the first place.

C *The Mobility of the Legal Profession*

Preserving the mobility of lawyers was of concern to the court in both *MacDonald Estate* and *Equiticorp Holdings*. Both courts weighed the effect of the law firm being disqualified against the importance of protecting confidential information. In *Equiticorp Holdings*, Henry J expressed concern that his decision effectively impeded the ability of the lawyer possessing the confidential information to obtain a new position, but held that this concern must yield to ensuring the protection of confidential information.

In circumstances where a transferring lawyer may cause the law firm to be disqualified from continuing to work for an existing client, that lawyer may face difficulties in transferring between law firms. Law firms may not be prepared to risk the possibility that they will be disqualified from representing an existing client, simply to hire a single lawyer. Preserving the mobility of lawyers requires that law firms must be allowed the opportunity to prevent disqualification of the firm when a lawyer holding relevant confidential information joins the firm. The importance of the mobility of lawyers has also been recognised in the United States:[47]

> [T]o extend the attorney's disability [ie his disqualification] to all attorneys in any firm he joins ... may increase the security of former clients, but it devastates the attorney's future employment prospects. In such situations permitting Chinese wall rebuttal of the presumption of shared knowledge can save the attorney from becoming a professional pariah.

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44 Note "Disqualification of Attorneys for Representing Interests Adverse to Former Clients" (1955) 64 Yale LJ 917, 928.

45 CA Peterson "Rebuttable Presumptions and Intra Firm Screening: the New Seventh Circuit Approach to Vicarious Disqualification of Litigation Counsel" (1984) 59 Notre Dame L Rev 399, 400-401.

46 See *Government of India v Cooks Industries* 569 F 2d 737 (2nd Cir, 1978).

47 Comment, above n 4, 1366.

Lawyers transferring between firms have become a significant feature of modern legal practice. Many courts have shown an awareness of this change in the legal profession by considering the impact that vicarious disqualification has on the mobility of lawyers. Adopting a disqualification rule that is too strict has the potential to seriously curtail the careers of lawyers simply because of a temporary association with a large law firm.

This difficulty becomes even more acute when the lawyer practises in a specialised area of law. It would be difficult for such a lawyer to transfer to a firm that practises in the same specialised area of law as that lawyer's previous firm and competes for a relatively small number of potential clients.[48] This is because of the high probability that the new law firm will act for the opponents of the transferring lawyer's former client. This consequence may prevent a lawyer from developing a specialised skill that would otherwise be highly sought after.

D Disqualification Applications Being Used for Improper Purposes

Disqualification applications are increasingly being used for tactical purposes during complex litigation proceedings.[49] The purpose of such an application can be to escalate costs, to cause inconvenience and delay,[50] or to remove a particularly competent opposing counsel.[51] Used in such a manner, successful disqualification applications serve to create an injustice rather than to prevent one. As one court stated:[52]

> [J]udges must exercise caution not to paint with a broad brush under the misguided belief that coming down on the side of disqualification raises the standard of legal ethics and the public's respect. The opposite effects are just as likely—encouragement of vexatious tactics and increased cynicism by the public.

The frequency with which disqualification applications are brought in North American jurisdictions is of real concern to the courts. One judge recently described such applications as being a "common feature of major litigation."[53] Disqualification applications that are

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48 K L Penegar "The Loss of Innocence: A Brief History of Law Firm Disqualification in the Courts (1995) 8 Geo J Legal Ethics 831, 865.

49 See L A Winslow "Federal Courts and Attorney Disqualification Motions: A Realistic Approach to Conflicts of Interest" (1987) 62 Wash LR 683, 683.

50 *Bottaro v Hatton Association* 680 F 2d 892 (2nd Cir, 1982).

51 *Dalrymple v National Bank & Trust Co* 615 F Supp 979, 985 (W D Mich, 1985). Where the court noted the dangers of the use of such applications for solely tactical purposes.

52 Above n 12, 1576-1577.

53 *Manville Canada Inc v Ladner Downs* (1992) 88 DLR (4th) 208, 224. This decision was approved on appeal: (1993) 100 DLR (4th) 321, 331 and has subsequently been approved of in *Moffat v Wetstein* (1996) 135 DLR (4th) 298; (1997) 144 DLR (4th) 188.

used for improper tactical purposes are an abuse of process to which the court must remain alert.[54] Courts should not disqualify firms without good reason. It is only appropriate where the protection of a former client's confidential information is legitimately required.

If law firms are regularly disqualified in circumstances where such action is not warranted, there is a danger that a "disqualification industry", similar to that which exists in the United States, could develop.[55] This is a danger that New Zealand courts should remain aware of. The courts could prevent such a development by imposing appropriate sanctions against the party seeking disqualification where there is no realistic chance of the application succeeding. The sanctions could range from an adverse award of costs to a contempt of court order, depending on the seriousness of the abuse of process. Such measures will help to ensure that disqualification applications do not become an abuse of the court process.

V THE USE OF CHINESE WALLS TO PREVENT DISQUALIFICATION

The approach adopted in *Equiticorp Holdings* requires law firms to prevent the possibility of confidential information being disclosed by the transferring lawyer to other lawyers in the firm. The risk of a law firm being disqualified from continuing to act for a client is reduced where measures designed to prevent this information flow are implemented. However, precisely what measures will be effective in preventing the courts disqualifying law firms remains unclear. The mechanism used most commonly in practice, the Chinese wall, has not been viewed favourably by the New Zealand Law Society or by the courts.

Chinese walls are intended to prevent knowledge held by one lawyer being imputed to other lawyers in the same firm. They generally consist of a number of procedural and physical barriers that prevent the flow of confidential information between lawyers in the same firm. The Court in *Equiticorp Holdings* recognised that "safeguards" may prevent confidential information being disclosed but seemed to reject the possibility that Chinese walls would be effective for this purpose. Henry J commented that a Chinese wall was a device that "generally has little to offer in resolving conflict of interest situations".[56] Henry J did not elaborate on why Chinese walls would be unhelpful. However, his Honour's

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54 *Black v Taylor*, above n 33, 420.

55 Above n 31, 21.

56 Above n 33, 741.

comments reflect a view frequently expressed by New Zealand courts.[57] New Zealand judges seem sceptical as to whether Chinese walls can successfully achieve their intended purpose. As Tompkins J said in *McNaughten v Tauranga City Council (No 2)*:[58]

> In my view, once a potential conflict of interest situation has arisen or an allegation of breach of fiduciary duty is made, the protection thought to be given by a "Chinese wall" will almost always prove to be illusory.

The effectiveness of Chinese walls has also been questioned in other jurisdictions. The English Court of Appeal considered whether a Chinese wall was sufficient to prevent disqualification in *Re a firm of solicitors*.[59] This case concerned a large law firm which had received confidential information from a company associated with a former client. This company sought to prevent the law firm from representing a new client because of the risk of disclosure. The majority of the Court held that the law firm should be disqualified even though it had put in place a "formidable" Chinese wall intended to prevent the flow of confidential information between lawyers. The majority was particularly concerned about the possibility of confidential information being inadvertently disclosed.[60] Another factor that influenced the court was that the confidential information had been obtained in high profile litigation which was unlikely to be easily forgotten. The measures adopted by the law firm were not sufficient to alleviate the risk of confidential information being disclosed.

Chinese walls have also been viewed with scepticism in Australia. Bryson J in *D & J Construction Ltd v Head* usefully summarises the perceived difficulties with Chinese walls. His Honour said:[61]

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

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[57] See *McNaughten v Tauranga City Council (No 2)* (1987) 12 NZTPA 429; *Mid-Northern Fertilisers Ltd v Connell, Lamb, Gerard & Co* Unreported, 18 February 1985, High Court, Auckland Registry, A151/85, Thorp J; *Kupe Group Ltd v Auckland City Council* (1989) 2 PRNZ 60.

[58] Above n 57, 431.

[59] See also *David Lee & Co Ltd v Coward Chance* [1991] Ch 259 where Sir Nicolas Browne-Wilkinson VC held that measures taken to prevent confidential information being disclosed after two law firms amalgamated were not effective.

[60] [1992] 2 WLR 809, 825.

[61] (1987) 9 NSWLR 118, 122-123.

> place reliance on such arrangements in relation to people with opportunities for daily contact over long periods, as wordless communication can take place inadvertently and without explicit expression, by attitudes, facial expression, or even by avoiding people one is accustomed to see, even by people who sincerely intend to conform to control.

The preceding analysis demonstrates the reluctance of the New Zealand, Australian and English courts to allow law firm to continue to act for clients in circumstances where those law firms face conflicts of interests. This view is premised on the basis that Chinese walls are ineffective in achieving their intended purpose. This can be contrasted with how Chinese walls are viewed in the United States and Canada.

B Judicial Recognition of Chinese Walls in the United States

The large majority of courts in the United States have approved the use of Chinese walls to prevent knowledge being imputed to all lawyers in a firm.[62] These measures therefore serve to prevent disqualification of law firms facing conflicts of interest concerning former clients.[63] The United States courts require that the Chinese wall consists of procedures to prevent the flow of confidential information and that it is implemented in a timely manner.

1 The components of the Chinese wall

The success or otherwise of any screening mechanism will depend on how well the court perceives the measures adopted by the firm prevent the flow of confidential information. To be effective, the Chinese wall must consist of "specific institutional mechanisms" that are sufficient to isolate the transferring lawyer.[64] The nature and extent of the procedures that the law firm must implement to prevent disqualification depend on the circumstances that surround the particular case. The court in *Schiessle* identified five factors that courts consider to determine the effectiveness of a Chinese wall:[65]

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[62] *Kesselhaut v United States* 555 F 2d 791 (Ct Cl, 1977). The United States Supreme Court has ruled that appeals from disqualification applications which have granted *or* denied disqualification of the law firm are interlocutory matters which cannot be appealed to the Federal appellate courts. This decision inhibits the Federal courts' ability to re-evaluate the status of Chinese walls: *Richardson-Merrell Inc v Koller* 472 US 424 (1985).

[63] For example, Chinese walls have been relied upon in *Armstrong v McAlpin* 625 F 2d 433 (2nd Cir, 1980); *LaSalle National Bank v County of Lake* 703 F 2d 252 (7th Cir, 1983); *Freeman v Chicago Musical Instrument Co*, above n 6; *Schiessle v Stephens*, above n 37; *Manning v Waring Cox James Sklar & Allen*, above n 38.

[64] Above n 37, 421.

[65] Above n 37, 421. These factors have been adopted and applied by other courts. See, for example, *Manning v Waring Cox James Sklar & Allen*, above n 38.

> Factors appropriate for consideration by the trial court might include, but are not limited to, the size and structural divisions of the law firm involved, the likelihood of contact between the "infected attorney" and the specific attorneys responsible for the present representation, the existence of rules which prevent the "infected" attorney from access to relevant files or other information pertaining to the present litigation or which prevent him from sharing in the fees derived from such litigation.

It is difficult to determine which factors will always be required and which will not. Courts in the United States generally require substantial restrictions on the availability of confidential information before they approve the particular Chinese wall that they are assessing. For example, a firm that successfully prevented its disqualification took measures which included physically removing all relevant case files to central storage and allowing only the senior counsel access; a firm-wide policy that nobody was to talk to the new lawyer about the case, any breach of which resulted in dismissal; and instructions to both legal and support staff not to leave any part of the relevant files unattended.[66] The overarching principle is that the law firm must effectively isolate the transferring lawyer and take all reasonable measures to prevent him or her from spreading confidential information to other lawyers in the firm.[67]

2 *The timeliness of the Chinese wall*

The Chinese wall must be implemented before or immediately after the transferring lawyer joins the firm or immediately upon the firm becoming aware of the problem. The Chinese wall will not achieve its intended purpose if the lawyers involved have deliberately or inadvertently disclosed confidences prior to its inception. The overarching principle is that the measures put in place must actually be capable of preventing the disclosure of confidential information.

In some circumstances the courts have disqualified law firms simply because a proposed Chinese wall was not implemented with sufficient speed. In *LaSalle National Bank v County of Lake*,[68] the Court considered whether the disqualification of one transferring lawyer required disqualifying the entire firm from continuing to act for its client. Judge Cudhay disqualified the entire firm because the otherwise effective Chinese wall had not been implemented in a timely manner. The screening arrangement must be in place either when the lawyer first joined the firm or when the case presenting the ethical problem was

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[66] *Petroleum Wholesale Inc v Marshall* 751 S W 2d 295 (Tex Ct App, 1988).

[67] Hamermesh, above n 39, 266. Refer also to the cases cited in McMinn, above n 5, 1259.

[68] Above n 63.

accepted.[69] Establishing the Chinese wall in response to a disqualification application will therefore not suffice to prevent the law firm from being disqualified.

C *Recognition of Chinese Walls by the Profession in North America*

Chinese walls are gaining increasing acceptance in Canada and the United States as effective mechanisms for preventing the disqualification of law firms. The American Bar Association and the many Canadian law societies have acknowledged that Chinese walls can be used to prevent entire law firms from continuing to represent existing clients in some circumstances. The American Bar Association has, in a limited way, approved the use of Chinese walls. Chinese walls have been accepted as preventing law firms from being disqualified where temporary or government lawyers are concerned but have not yet been accepted in the case of lawyers transferring between private firms.[70]

The treatment of this issue by the various Canadian law societies is of particular interest. The Supreme Court's decision in *MacDonald Estate* has sparked a considerable number of ethical pronouncements on the issue of Chinese walls.[71] Sopinka J's majority decision in *MacDonald Estate* clearly emphasised that Chinese walls were more likely to be upheld by the Canadian courts once they had been approved by "the governing bodies of the legal profession".[72]

The Canadian Bar Association responded promptly to this suggestion by adopting a resolution allowing law firms to use screening mechanisms to prevent law firms from being disqualified. This resolution contained guidelines that law firms should follow when implementing these screening devices so that they will be effective. The Canadian Bar Association's guidelines have already been applied to prevent the disqualification of a law firm in *Watson v Trace Estate*.[73] The court relied on the reasoning of the majority in *MacDonald Estate* and the guidelines in upholding the effectiveness of a Chinese wall. The court held that the screening measures implemented by the firm when a new lawyer

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[69] Above n 63, 259.

[70] It can be argued that there is no conceptual distinction between temporary, government and private lawyers and that the American Bar Association's guidelines serve to distort the real issues surrounding the effectiveness of Chinese walls.

[71] The guidelines issued by Canadian law societies on the use of Chinese walls include the Guidelines issued by the Federation of Law Societies Conflicts of Interest Committee, the relevant portion of the Alberta Law Society's Code of Professional Conduct and the guidelines in relation to the disqualification of transferring lawyers issued by the Canadian Bar Association.

[72] Above n 14, 269.

[73] (1994) 29 CPC (3d) 180. See also *Ford Motor Company of Canada Ltd v Osler, Hoskin & Harcourt* (1995) 131 DLR (4th) 419 where considerable importance was attached to these existence of these guidelines.

transferred into the firm were sufficient to prevent the possibility that confidential information would be disclosed.

The decision of the Alberta Court of Appeal in *Canada Southern Petroleum v Amoco Canada Petroleum Company Ltd* demonstrates the effectiveness of Chinese walls.[74] This decision is important because a Canadian appellate court held that a Chinese wall was sufficient to prevent a law firm being disqualified where a lawyer that knew relevant confidential information joined the firm. The Court of Appeal cited *MacDonald Estate* and placed particular emphasis on Sopinka J's comments concerning the necessity for the concept of a Chinese wall to be approved by governing bodies before it could be readily accepted by the courts. The Court upheld the effectiveness of the Chinese wall and was clearly influenced by the applicable ethical guidelines. The factual circumstances in *MacDonald Estate* were seen as distinct from those before the Court because:[75]

- the lawyer who joined the firm worked in a different city from the other lawyers acting on the same matter for the firm's existing client (even though both lawyers were members of the same firm) - this physical separation was described as "key";
- the law firm had circulated a memorandum to all staff concerning the protective measures taken and the sanctions which would result if these were breached;
- the transferring lawyer had not worked directly on the matter in respect of which the conflict of interest arose;
- the former client had "no concerns" about the transferring lawyer joining a new firm; and
- applicable ethical guidelines that applied in the current circumstances now existed.

The Alberta Court of Appeal's decision is a sensible and practical solution to what is a complex issue. Disqualifying the transferring lawyer's new firm would have been pointless in the circumstances. The approach taken by the Court commends itself as one that strikes a sensible balance between a lawyer's ethical duties and the realities of the way in which most modern law firms now operate.

D Should Chinese Walls be Adopted in New Zealand?

New Zealand courts have rejected the use of Chinese walls to prevent law firm disqualification where lawyers transfer firms. A different view is expressed by Aitken:[76]

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[74] (1997) 144 DLR (4th) 30.

[75] The importance of the transferring lawyers being physically separated from the other lawyers facing the conflict has been influential in the Canadian courts. See *MacDonald v Howard Estate* (1995) 29 Alta LR (3d) 177.

[76] L Aitken "'Chinese Walls' and Conflicts of Interest" (1992) 18 Monash ULR 91, 118.

> A "Chinese wall", however, may be the only practical solution in large scale commercial litigation between national corporations. ... A large corporate client may then be faced with an invidious choice: either retain the professional services of its preferred "national firm" and take the consequences of a conflict, or be forced to seek the counsel of another smaller firm which lacks the perceived and actual abilities of the "mega-firm" but which is free of conflict.

The extensive analysis of Chinese walls undertaken in the United States and Canada suggests that any difficulties with Chinese walls are practical and not conceptual.[77] A Chinese wall that can be guaranteed to prevent the disclosure of confidential information ensures the appearance of justice and that the lawyer is not breaching the fiduciary duties owed to his or her client by disclosing confidential information. However, the integrity of any Chinese wall cannot be guaranteed. A number of difficulties are likely to arise in practice which render the Chinese wall ineffective.

Chinese walls can be breached deliberately where one lawyer discloses confidential information to another.[78] The lawyers involved can share information in such a way that only they know of the breach of the Chinese wall. As Wolfram has colourfully noted:[79]

> In the end there is little but the self-serving assurance of the screening-lawyer foxes that they will carefully guard the screened-lawyer chickens. Whether the screen is breached is virtually impossible to ascertain from outside the firm.

Even where the court fully accepts the sincerity of the undertakings given by the lawyers involved not to breach the Chinese wall, there still remains the possibility of unintentional disclosure of confidential information. This possibility seems to have influenced the courts that have criticised the effectiveness of Chinese walls. The risk of inadvertent disclosure exists not only in a professional environment but also in the social interactions between lawyers. Confidential information may be disclosed even where the lawyer concerned is not consciously aware that he or she is doing so. An example of this is where a lawyer communicates information through the use of body language and gestures. The practical difficulties associated with inadvertent disclosure of information are therefore not easy to effectively guard against.

These practical difficulties justify the New Zealand courts adopting a cautious approach when applicants seek the courts' approval of a Chinese wall. However, to reject

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[77] See further JR Parker "Private Sector Chinese Walls: Their Efficacy as a Method of Avoiding Imputed Disqualification" (1995) 19 J Legal Prof 345, 349

[78] Above n 14, 273. This was the reason why Cory J did not approve the concept of a Chinese wall in *MacDonald Estate.*

[79] C W Wolfram *Modern Legal Ethics* (West Publishing Co, Minnesota, 1986) 402.

Chinese walls out of hand would be ignore that Chinese walls represent a pragmatic solution to the ethical difficulties associated with conflicts of interests. The courts should not lose sight of the fact that Chinese walls are often relied upon in practice to allow a law firm to continue to act for one of its longstanding clients. This consideration is particularly relevant in New Zealand where many clients faced with large scale commercial disputes may only want to be represented by a relatively large firm. The court should assess the nature of the Chinese wall that is proposed or has been established and determine whether the competing interests identified in *Equiticorp Holdings* and analysed in this article allow for the particular Chinese wall to be approved by the court. This approach has regard to commercial realities while still allowing law firms to discharge their ethical and fiduciary duties to their clients.

The New Zealand Law Society should also carefully scrutinise the guidelines developed by the Canadian Bar Association in response to *MacDonald Estate.* A strong argument can be made in favour of the New Zealand Law Society approving Chinese walls in some circumstances. Whether this in fact happens will depend upon how effective Chinese walls are considered to be in light of the ethical duties imposed upon lawyers by the Rules of Professional Conduct.

E Undertakings Given by the Lawyers Involved

In some circumstances it will be appropriate for the lawyers involved in a potential conflict of interest to undertake to the court that they will not disclose the confidences of their former clients. Such an undertaking successfully prevented a law firm from being disqualified in *Fruehauf Finance Corporation Pty Ltd v Feez Ruthning (a firm)*[80]. A law firm that sought to act against a former client gave a number of detailed undertakings that satisfied the Court that no conflict of interest would arise. Whether such undertakings would be acceptable in every case where conflicts of interests occur is unclear. Recent Canadian authorities establish that the acceptability of undertakings will depend on the circumstances of each case.[81]

United States jurisprudence expresses some support for the concept of "cones of silence". Cones of silence are conceptually similar to undertakings in that the lawyer concerned resolves not to disclose confidential information pertaining to former clients. The Court in *Neamours Foundation v Gilbane Aetna Federal Ins*[82] accepted that enclosing a transferring lawyer in a cone of silence was sufficient to prevent the disqualification of the

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[80] [1991] 1 Qd R 558

[81] Above n 74.

[82] 632 F Supp 418 (D Del, 1986).

lawyer's new firm.[83] The cone of silence required the lawyer not to disclose communications, documents or information to which he had had access. Nor did the lawyer retain any documents when he transferred firms. The court was also influenced by the fact that the information which the lawyer had had access to at his previous firm was not particularly important information. Whether New Zealand courts will easily accept undertakings given by lawyers and law firms that want to continue to act for a client is yet to be determined.

VI CONCLUSION

This article identifies and analyses the consequences of a lawyer transferring firms in terms of the ethical duties imposed upon that lawyer and that lawyer's new law firm. When determining whether to disqualify a law firm from continuing to act for an existing client, the court must balance a number of competing considerations. In summary, these considerations are:

- protecting the integrity of the justice system and the appearance of justice;
- ensuring clients can use the lawyer of their choice;
- preserving the mobility of lawyers; and
- preventing disqualification application from being used for improper purposes.

The approach adopted in *Equiticorp Holdings* seems likely to be continued to be adopted by the New Zealand courts. This approach requires the court to weigh the competing policy considerations in light of the circumstances of the case. This is a sensible approach because the court retains sufficient flexibility to rule on the disqualification application without being shackled by artificial rules or presumptions. Such an approach is likely to achieve a result which is fair to all parties concerned.

Although Chinese walls have not readily been accepted in New Zealand, the North American courts have held that Chinese walls can prevent law firms from being disqualified. Thus Chinese walls are a possible solution to the ethical problems posed by lawyers transferring between law firms. It would however seem unlikely that the courts will support the use of Chinese walls or other protective devices (such as cones of silence) without them first being sanctioned by the New Zealand Law Society. Courts in overseas jurisdictions have attached importance to the sanction given to Chinese walls by the appropriate professional bodies. The New Zealand Law Society should therefore seriously consider the potential of Chinese walls to prevent conflicts of interests from arising.

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[83] The speed and deliberateness in establishing the cone of silence was an important factor in not disqualifying the firm in *Nemours*. On this point, see further *Lemaire v Texaco Inc* 496 F Supp 1308 (E D Tex, 1980).