



# Information Barrier Guidelines

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Adopted by the Council of the Law Institute of Victoria on 20 April 2006

**These Guidelines have been prepared by the Law Society of New South Wales in consultation with the Law Institute of Victoria.**

Their aim is to assist law practices guard against the risk of a breach of the duty of confidentiality owed to former clients. By providing guidance on the factors typically taken into account in constructing an effective barrier these guidelines ought to reduce the occurrence of successful challenges in the courts and otherwise to the effectiveness of information barriers.

An information barrier, properly constructed taking into account the issues set out in these Guidelines, is an important element in ensuring that the duty of confidentiality is maintained thereby allowing a law practice to act against a former client without breaching its duty to preserve the confidences of that client. It may also present an effective rebuttal of the presumption of imputed knowledge.

These guidelines are intended to provide a fair and objective basis upon which to assess the adequacy of measures taken by a law practice. It is important to note that whether an information barrier will be effective depends on the facts of each individual case.

An information barrier is of itself no solution to a situation where there is a conflict of interest between one client and another client (or in some cases, former client) of the law practice. An information barrier does not remove the duty of undivided loyalty which a law practice owes to a client. In such situations a law practice may only act with the fully informed consent of both clients.

The Law Society and the Law Institute encourage law practices to employ these steps as minimum standards, adding additional safeguards where appropriate when an information barrier is to be established. They should be read in conjunction with the existing rules and law relating to confidentiality.

# **INFORMATION BARRIERS, COMMON QUESTIONS, GUIDELINES, COMMENTARY & EXAMPLES**

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## 1. INFORMATION BARRIER GUIDELINES

These Guidelines should be read in conjunction with the *Guidelines, Commentary and Examples* and existing rules and law relating to confidentiality. They do not attempt to be nor should they be regarded as being a definitive exposition of the law in this area but points for guidance only and each case should be considered on the basis of its own facts.

In these guidelines:

“*Screened person*” means a person who possesses confidential information from one retainer which is relevant to another, current retainer. The screened person may be a partner, employee solicitor or other employee of the law practice.

“*Earlier matter*” means the retainer in which the confidential information was obtained, access to which the client in the current matter is not entitled.

1. The law practice should have established, documented protocols for setting up and maintaining information barriers. In all matters the law practice should carefully control access to any client information by personnel in the law practice in view of the possible requirement for an information barrier in the future.
2.
  - (a) The law practice should nominate a compliance officer to oversee each information barrier.
  - (b) The compliance officer
    - (i) should be an experienced practitioner with appropriate knowledge of the rules and law relating to confidentiality, conflict of interest and information barriers;
    - (ii) will take appropriate steps to monitor compliance and deal with any breach or possible breach of an information barrier;
    - (iii) will undertake not to disclose any information about the earlier matter to personnel involved with the current matter.
3. The law practice should ensure the client in the current matter acknowledges in writing that the law practice’s duty of disclosure to that client does not extend to any confidential information which may be held within the law practice as a result of the earlier matter and consents to the law practice acting on that basis.
4. All screened persons should be clearly identified and the compliance officer must keep a record of all screened persons.

5. (a) Each screened person should provide an undertaking to the law practice and the law practice should where appropriate provide an undertaking to the court confirming that
    - (i) the screened person will not have during the existence of the current matter any involvement with the client or personnel involved with the current matter for the purposes of that current matter;
    - (ii) the screened person has not disclosed and will not disclose any confidential information about the earlier matter to any person other than to a person in accordance with the instructions or consent of the client in the earlier matter, a screened person or the compliance officer;
    - (iii) the screened person will, immediately upon becoming aware of any breach, or possible breach, of this undertaking, report it to the compliance officer who will take appropriate action.
  - (b) In the event of files and/or information relating to the earlier matter being required to enable the law practice to comply with an obligation at law to provide information or to answer a complaint or defend a claim against the law practice the screened person must not pass the files and/or information to anyone other than the compliance officer who may pass them on to a responsible officer of the legal practice who is not involved in the current matter so that the legal obligation can be honoured. Nothing in these guidelines is intended to restrict a law practice's rights to access and disclose any information relating to the earlier matter for the purposes of enabling the law practice to comply with any legal obligation.
6. Personnel involved with the current matter should not discuss the earlier matter with, or seek any relevant confidential information about the earlier matter from, any screened person. Such personnel should provide undertakings confirming that
    - (i) no confidential information about the earlier matter has been disclosed to them;
    - (ii) they will not have during the existence of the current matter any involvement with a screened person for the purposes of the current matter;
    - (iii) they will not seek or receive any confidential information about the earlier matter from a screened person or in any other way; and
    - (iv) they will, immediately upon becoming aware of any breach, or possible breach, of this undertaking, report it to the compliance officer who will take appropriate action.

7.
  - (a) Contact between personnel involved in the current matter and screened persons should be appropriately limited to ensure that the passage of information or documents between those involved in the current matter and screened persons does not take place.
  - (b) The law practice should consider whether it is appropriate for such personnel to have contact with the client in other matters during the current matter.
8. The law practice should take steps to protect the confidentiality of all correspondence and other communications related to the earlier matter.
9.
  - (a) Any files held by the law practice relating to the earlier matter should be stored in a secure place where they can only be accessed by screened persons and/or the compliance officer.
  - (b) Access to any electronic files the law practice holds relating to the earlier matter and other technological communications related to the earlier matter should be restricted to screened persons and/or the compliance officer. The law practice should set up appropriate forms of technological protection to ensure access is restricted.
10. The law practice should have an ongoing education program in place, including
  - (a) education for all personnel about the law practice's protocol for protecting confidential information and for setting up and maintaining information barriers, including
    - (i) employment terms for staff;
    - (ii) standard retainer terms with clients;
    - (iii) electronic and physical access to documents and files;
    - (iv) firm culture on such issues as discussion of client matters only on a "need to know" basis";
    - (v) sanctions for non-compliance; and
  - (b) additional education for individuals involved in matters affected by an information barrier, including the arrangements in place for the particular case and sanctions for non-compliance.

## 2. COMMON QUESTIONS

### 2.1 What is an Information Barrier?

In *Prince Jefri Bolkiah v KPMG (A firm)* [1999] 2 W.L.R. 215 Lord Millett noted that information barriers (in decided cases referred to commonly as “Chinese Walls”) “contemplate the existence of established organisational arrangements which preclude the passing of information and the possession of one part of the business to other parts of the business ... good practice requires there to be established institutional arrangements designed to prevent the flow of information between separate departments. Where effective arrangements are in place, they produce a modern equivalent of the circumstances which prevailed in *Rakusen’s case* [1912] 1 Ch831”.

### 2.2 When can an Information Barrier be used?

These guidelines deal with the use of information barriers where a law practice acts for a current client against a former client for whom the law practice acted in an earlier matter. They do not address the use of information barriers in concurrent matters.

An unsatisfactory barrier can result in enormous expense, inconvenience and loss of reputation. The information barriers guidelines, together with the Commentary & Examples, are intended to assist firms to ensure that a necessary information barrier will be effective.<sup>1</sup>

The threshold question is not whether an information barrier can be set up to prevent a breach of duty arising from a conflict of interest and/or duties but whether there is such a conflict at all which should prevent a law practice from acting against a former client.

### 2.3 Grounds for intervention – the Court’s inherent jurisdiction and the fiduciary duty (confidentiality and loyalty)

The courts have recognised a number of bases for restraining a law practice from acting against a former client. These include the need to uphold the fiduciary duty owed to clients and former

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<sup>1</sup> For examples of steps implemented by firms successfully establishing Information Barriers (“Chinese Walls”), see –

*Bureau International De Vins Bourgogne v Red Earth Nominees Pty Ltd (t/as Taltarni Vineyards)* [2002] FCA 588 (9 May 2002), particularly at paragraph 12 – Corrs Chambers Westgarth

clients and the court's inherent jurisdiction to control its own officers to ensure that they act and are seen to act in the interests of justice and to uphold the good repute of the profession.

### 2.3.1 Fiduciary duty

#### a. Confidentiality

The primary element of the fiduciary duty to be considered in relation to acting against a former client is the duty of confidentiality.

It is this issue which may be directly addressed by an effective information barrier.

In New South Wales and Victoria the courts recognize the authority of *Prince Jefri Bolkiah v. KPMG*<sup>2</sup> for the proposition that a basis for restraining a solicitor from acting against a former client is if there is a 'real risk' that the duty of confidentiality owed to the former client will be breached.

In New South Wales this is reflected in Rule 3 of the Revised Professional Conduct and Practice Rules 1995 which provides:

#### **3. *Acting against a former client***

*Consistently with the duty which a practitioner has to preserve the confidentiality of a client's affairs, a practitioner must not accept a retainer to act for another person in any action or proceedings against, or in opposition to, the interest of a person -*

- (a) for whom the practitioner or the firm, of which the practitioner was a partner, has acted previously;*
  - (b) from whom the practitioner or the practitioner's firm has thereby acquired information confidential to that person and material to the action or proceedings; and*
- that person might reasonably conclude that there is a real possibility the information will be used to the person's detriment.*

In Victoria, Rule 4 of the Professional Conduct & Practice Rules 2005 provides:

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<sup>2</sup> *Prince Jefri Bolkiah v. KPMG* [1999] 2 WLR 215

#### 4. **Acting against a former client**

*A practitioner must not accept an engagement to act for another person in matter against, or in opposition to, the interest of a person (“the former client”) –*

- (a) for whom the practitioner (or, in the case of a practitioner not being a firm, the practitioner’s current or former firm) or the former firm, of a partner, director or employee of the practitioner or of the practitioner’s firm has acted previously and has thereby acquired information personally, confidential to the former client and material to the matter and*
- (b) if the former client might reasonably conclude that there is a real possibility the information will be used to the former client’s detriment.*

#### b. An ongoing “duty of loyalty”?

In Victoria, the ongoing duty of loyalty surviving the termination of the retainer is another possible ground on which a court may intervene to stop a law practice from acting against a former client. However, in the context of these guidelines it is important to note that the use of an information barrier will be of no assistance. It is discussed at length by Brooking JA in *Spincode Pty Ltd v Look Software Pty Ltd and Ors* [2001] VSCA 248<sup>3</sup>, as a ground for preventing a law practice from acting against a former client in *the same or a related matter*<sup>4</sup>, notwithstanding compliance with these Guidelines or absence of relevant confidential information.

The application of this duty in Australia as a whole is unclear. It has been dismissed in a number of New South Wales decisions.

In *British American Tobacco Australia Services Limited v Blanch* [2004] NSWSC 70

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<sup>3</sup> *Spincode Pty Ltd v Look Software Pty Ltd and Ors* [2001] VSCA 248. His Honour discusses several Canadian and US authorities which support this proposition, as part of a detailed analysis of the case law from Australia and overseas. Those aspects of His Honour’s decision relating to a continuing duty of “loyalty” are not as isolated as many papers would have the reader believe. Similar statements had been made in Australia in the 1990s, although with the caveat that this was not an “absolute rule”. Within the *Spincode* decision, Ormiston JA said, “I would like to have been able to reach a conclusion also on ... the principle of fiduciary “loyalty” and the precise obligations owed by solicitors to former clients. Those aspects do raise, however, issues only touched upon in argument and authorities and papers ... If I had had the luxury of further time to consider them, I may have reached agreement with Brooking JA on each of those aspects...” (para 61) Chernov JA also found it unnecessary to decide whether there is an absolute obligation on solicitors not to act against their former clients in the same or substantially the same proceeding, but significantly added, “... if I may say so with respect, the learned judgment of Brooking JA makes a compelling case for such a view.” (para 63)

<sup>4</sup> For a brief discussion of what constitutes “the same or a related matter”, see Nettle J in *Sent and Primelife Cororation Ltd v John Fairfax Publications Pty Ltd and Hills* [2002] VSC 429 (7 October 200) at paragraph 108. Also note that in *Village Roadshow*, Byrne J at paragraph 43 says “This question should not be determined by the taking of fine distinctions.”

Young CJ in Equity made an order restraining a firm of solicitors from acting against a former client on the hearing of a cross claim for contribution before the Dust Diseases Tribunal of NSW. In doing so his Honour considered submissions based on the duty of loyalty argument in *Spincode* and also considered his earlier comments in *Belan v Casey* [2002] NSWSC 58 and *Prince Jefri*, rejecting the loyalty argument, saying “*it may be that there are some exceptional cases where equity will give relief in favour of a former client where there is no confidential information present. However, almost every judge who has recently given a judgement on the matter has recognised that there is still no rule forbidding a lawyer acting against former client. As Chernov JA points out in Spincode, such a rule would come into play if one adopted a too liberal view as to the basis of the jurisdiction*”.

### 2.3.2 The Court’s inherent jurisdiction to control its own officers

The Court has an inherent jurisdiction to control its own officers, to ensure that justice is done and seen to be done.<sup>5</sup>

Whether or not an information barrier is solid, and whether or not the Courts accept that “loyalty” prohibits acting against a former client even where there is no issue of confidential information, law practices should always be mindful of their duty to act in the interests of justice and to uphold the good repute of the profession. Brooking JA in *Spincode Pty Ltd v Look Software Pty Ltd and Ors* [2001] VSCA 248 said, “*I am not deterred by the suggestion that, once infringement of legal or equitable rights ceases to mark off what may be proscribed, solicitors and their would-be clients will be subject to a great and unfair uncertainty, being unable to say in advance what view the court will take. No experienced solicitor of sound judgment would have done what has been done in this case.*” (at paragraph 58).

Other relevant decisions include:-

- a. *D & J Constructions Pty Ltd v Head* (1987) 9 NSWLR 118 at 123

Bryson J: the appearance which matters is that which is “*presented to a reasonable observer who knows and is prepared to understand the facts*”.

- b. *Sent and Primelife Corporation Ltd v John Fairfax Publications Pty Ltd and Hills* [2002] VSC 429 (7 October 2002) Nettle J endorsed Brooking JA’s approach from

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<sup>5</sup> See *Asia Pacific Telecommunications –v- Optus Networks Pty Limited* [2005] NSW SC 550 and *Kallinicos & anor v Hunt & ors* [2005] NSWSC 1181 (22 November 2005)

- Spincode* and found that a “fair minded, reasonably informed member of the public” would conclude that the proper administration of justice prevented Counsel from acting, where Counsel had advised in conference 14 years earlier, possibly on a related matter, and had no recollection of it, notwithstanding the public interest that litigants should not be deprived of their choice of legal advisers without good cause.
- c. *Asia Pacific Telecommunications v Optus Networks Pty Limited* [2005] NSWSC 550 (20 June 2005): Bergin J “*In my view a fair minded reasonably informed member of the public would conclude that the administration of justice is not adversely affected by the processes that have been put in place to protect the confidential information given to Clayton Utz during the Retainer. By reason of the proof that there is no real risk that the information, said to be confidential, will be available to the solicitors for the defendant, I do not accept that the perception that justice must be done and appear to be done is at risk*”.
- d. *Kallinicos & Anor v Hunt & Ors* [2005] NSWSC 1181 (22 November 2005) Brereton J “*However, the court always has inherent jurisdiction to restrain solicitors from acting in a particular case, as an incident of its inherent jurisdiction over its officers and to control its process in aid of the administration of justice ... The test to be applied in this inherent jurisdiction is whether a fair-minded, reasonably informed member of the public would conclude that the proper administration of justice requires that a legal practitioner should be prevented from acting, in the interests of the protection of the integrity of the judicial process and the due administration of justice, including the appearance of justice ... The jurisdiction is to be regarded as exceptional and is to be exercised with caution*”.

However, courts also recognize that there are limited circumstances in which exceptions may be justified, provided it does not undermine the solicitor’s fundamental duty to act in the best interests of each client and confidential information is protected.

## **2.4 The presumption of imputed knowledge**

The doctrine of imputed knowledge means that all solicitors in a law practice are implied to have the knowledge of all other solicitors in the practice. It is beyond doubt that a solicitor who has personally acquired the relevant, confidential information cannot act against the former client in

the new matter.<sup>6</sup> It is assumed that knowledge moves freely within a law practice, and imputed knowledge would then prohibit the law practice as a whole from acting.

This doctrine no longer applies universally. It is still the starting point – there is a “strong inference that lawyers who work together share confidences”<sup>7</sup> - but it is a rebuttable presumption. Imputed knowledge is not always justified in the context of some modern firms.<sup>8</sup>

An information barrier may sometimes be used to rebut that presumption.

## 2.5 What test is applied to an information barrier?

The “tainted” individual(s) must be effectively screened from the new matter so that there is no real and sensible possibility of misuse of the confidential information.

The “real and sensible possibility” test is now favoured by the Australian courts in commercial cases (see Ipp J in *Mallesons*, Habersberger J in *Australian Liquor Marketers Pty Ltd v Tasman Liquor Traders Pty Ltd* [2002] VSC 324 (14 August 2004); and others). The more lenient test from *Rakusen v Ellis, Munday and Clarke* [1912] 1 Ch. 831 is often mistakenly thought to apply here. It does not. In *Prince Jefri Bolkiah v KPMG (a firm)* [1999] 2 AC 222, Lord Millett (at 236-

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<sup>6</sup> Sir Robert McGarry in *Spector v Ageda* [1973] Ch 30: “A solicitor must put at his client’s disposal not only his skill but also his knowledge so far as is relevant; and if he is unwilling to reveal his knowledge to his client, he should not act for him. What he cannot do is to act for the client and at the same time withhold from him any relevant knowledge that he has.”

<sup>7</sup> Sopinka J in *MacDonald Estate v Martin* [1990] 3 SCR 1235 (Supreme Court of Canada)

<sup>8</sup> See for example *Re a Firm of Solicitors* [1992] QB 959 at 973 per Staughton J, adopted by Ipp J in *Unioil International Pty Ltd v Deloitte Touche Tohmatsu* (1997) 17 WAR 98 at 110-111. In the earlier decision of *Mallesons Stephen Jaques v KPMG Peat Marwick*, Ipp J had held that the knowledge of one partner was to be imputed as the knowledge of all partners. His Honour had relied amongst others on the Canadian decision of *Davey v Woolley Hames Dale & Dingwall* (1982) 133 DLR (3d) 647. The *Davey* decision was subsequently overruled by the Supreme Court of Canada in *MacDonald Estate v Martin* (1990) 77 DLR (4th) 249 in which Sopinka J (delivering the majority judgment) found a strong *but rebuttable* inference of shared knowledge. In *Unioil*, Ipp J confirmed at 108 that this approach was to be preferred

Similarly in *Newman v Phillips Fox* [1999] WASC 171; 21 WAR 309 at 316-7, Steytler J of the Supreme Court of WA found that the question of whether a particular individual is in possession of confidential information is a question of fact, and the knowledge will not necessarily be imputed from another lawyer at the firm. Although the danger of inadvertent disclosure must be considered, and the appearance of impropriety avoided, imputation of knowledge is not necessarily sensible in the context of the modern large firm.”

Lord Millett in *Prince Jefri Bolkiah v KPMG* [1999] 2 WLR 215 at 235 confirmed that there is no absolute rule that Chinese Walls (Information Barriers) are insufficient, but “the starting point must be that, unless special measures are taken, information moves within a firm.

Per Gillard J in *Yunghanns and Ors v Elfic Lt and Ors* [1998] – “We would have to be satisfied by the defendants and the firm that there is no risk of seepage of information to those conducting the case.”

In *Bureau Interprofessional Des Vin De Bourgogne v Red Earth Nominees Pty Ltd* [2002] FCA 588 (9 May 2002) the doctrine was not limited to partners. At 34, Ryan J expressly referred to “lawyers or employees”.

A similar position of “rebuttable presumption” exists in the USA. See for example *Analytica Inc v NPD Research Inc* (1983) 708 F2d 1263 at 1277, where the concept of “Typhoid Marys” was discussed.

7) stated the requirement as “no risk”, with the rider that any risk justifying intervention must be “a real one, and not merely fanciful or theoretical. But it need not be substantial.”

This is often run in conjunction with a test – similar to that preferred in Canada<sup>9</sup> - of whether a reasonable person, aware of the relevant facts, would perceive a real possibility of a breach. (See for example *Murray v Macquarie Bank* (1991) 105 ALR 612 at 51; in the UK, *Re a firm of solicitors* [1992] 1 All ER 353.)

A stricter test tends to be applied in family law cases. See for example *In the Marriage of Thevenaz* (1986) 84 FLR 10 in which Frederico J found intervention was justified even where the risk was “more theoretical than practical”. Similarly in *In the Marriage of Magro* (1993) 93 FLR 365, citing *Thevenaz* with approval, the husband’s solicitors were disqualified when they employed a solicitor from the wife’s solicitors’ firm.

The burden of establishing that there is no unacceptable risk is upon the law practice.<sup>10</sup>

In *Village Roadshow Ltd v Blake Dawson Waldron*<sup>11</sup> as to the burden of proof, quoting the *Prince Jefri* case Byrne J said “once it appears that a solicitor is in receipt of information imparted in confidence, the burden shifts to the solicitor to satisfy the Court on the basis of clear and convincing evidence that all effective measures have been taken to ensure that no disclosures will occur” and “in applying the principle it may not be possible for the client to point to a specific item of confidential information. It may be that such a requirement would defeat the very purpose of the duty of confidentiality by disclosing to the Court and to the other party the information in question and its significance ... it may be that this information comprises no more than the knowledge of the client’s thinking, its attitudes and of the personalities involved ... given the relationship between solicitor and client in the ambit of professional confidence of which professional privilege is a manifestation, the Court should, in my view, not be slow to accept the existence of such confidential information”.

His Honour in this case rejected the submission based on the apprehension of leakage of confidential information - “even accepting that I should approach this aspect of the case generously, I am unable to see or imagine that such confidential information was given to BDW”.

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<sup>9</sup> See for example *Bank of Nova Scotia v Imperial Developments (Canada) Ltd and others* [1989] 58 Man. R. (2d) 100. In *MacDonald Estate v Martin* [1990] 3 SCR 1235, Sopinka J similarly preferred to ask whether “the public represented by the reasonably informed person would be satisfied that no use of confidential information would occur.”

<sup>10</sup> See for example *Newman v Phillips Fox* (1999) 21 WAR 309; *Prince Jefri Bolkiah v KPMG* [1999] 2 AC 222

In some jurisdictions, lobbyists have sought recognition of information barriers based on the “reasonableness” of the steps taken to ensure that no disclosure will occur. (See for example Canadian Lobbyists’ Code of Conduct.) In Australia, the courts have made it clear that they will assess the *effectiveness* rather than the reasonableness of the steps. (See *Prince Jefri Bolkiah v KPMG (a firm)* [1999] 2 AC 222 at 237, in which Lord Millett adopted the reasoning of the Supreme Court of Canada in *MacDonald Estate v Martin*, save for the substitution of “effective” for “all reasonable” steps.) If reasonable steps cannot provide security for the information, then in Australia the information barrier must fail.

## 2.6 Why is the standard so high?

Australian courts are unimpressed with solicitors who act in conflict of duties or interests or otherwise attempt to lower the ethical standards expected of the legal profession and stress the importance of maintaining the good reputation of the profession and confidence that justice is done and seen to be done.

In *Village Roadshow Ltd v Blake Dawson Waldron*<sup>12</sup>, Byrne J said:

*“It is a notorious fact that a good deal of commercial litigation in this state is conducted by a handful of very large firms. How is a client to obtain the services of one of them if the conflict rule is applied too strictly? To my mind, this is the price which the clients of such firms and the firms themselves must pay. The firms have found it commercially convenient to become large. This is but one disadvantage of this trend. It is certainly no reason for the courts to weaken the traditionally high standard of a practitioner’s loyalty to the client which have characterized the practice of law in this State.”*

An effective barrier must prevent not only deliberate disclosure of confidential information but also accidental or inadvertent dissemination.<sup>13</sup>

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<sup>11</sup> [2003] VSC 505 (23 December 2003)

<sup>12</sup> [2003] VSC 505 (23 December 2003)

<sup>13</sup> See for example arguments presented to the court in *Bureau Interprofessional Des Vin De Bourgogne v Red Earth Nominees Pty Ltd*, [2002] FCA 588 (9 May 2002) discussed at paragraph 48.

## 2.7 What amounts to “relevant confidential information”?

In many cases the answer is obvious. There is a large body of case law relating to confidentiality.

Practitioners should be aware that “getting to know you factors” (as described by Gillard J in *Yunghanns v Elfic Ltd* (Unreported, 3 July 1998) at pages 10-11 may amount to relevant confidential information in some circumstances. These might include a solicitor knowing “a great deal about his client, his strengths, his weaknesses, his honesty or lack thereof, his reaction to crisis, pressure or tension, his attitude to litigation and settling cases and his tactics... The overall opinion formed by a solicitor of his client as a result of his contact may in the circumstances amount to confidential information that should not be disclosed or used against the client.”

Information obtained during an earlier retainer from a source other than the client may also amount to “confidential information”.<sup>14</sup>

In some cases, it may be helpful to narrow the scope of the current retainer so that any confidential information is not relevant to the retainer.<sup>15</sup>

## 2.8 Commercial realism – other factors to consider

The courts will certainly take into account factors such as the inconvenience to a client who is forced to change solicitors mid-case, the ability to instruct a solicitor of choice, and the need for mobility of lawyers. However where a proposed information barrier is found to be ineffective, those other factors cannot alter that fact.

A similar view is taken in other jurisdictions. In England, in *Re a Firm of Solicitors* [1992] QB 959, Parker LJ said that the need to avoid “a situation of apparent unfairness and injustice” is “every bit as much a matter of public interest as the public interest in not unnecessarily restructuring parties from retaining the solicitor of their choice.” In Canada, Cory J in *MacDonald Estate v Martin* [1990] 3 SCR 1235 said the “requirements of change imposed on a client is, on balance, a small price to pay for maintaining the integrity of our system of justice... Neither the merger of law firms nor the mobility of lawyers can be permitted to adversely affect

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<sup>14</sup> See for example *Re a firm of solicitors* [1992] 1 All ER 353; *Asia Pacific Telecommunications Ltd v Optus Network Pty Ltd* [2005] NSWSC 550 per Bergin J; *In the Marriage of A and B* (1990) 13 Fam LR 798 per Smithers J.

<sup>15</sup> This was one factor (of many) in *Australian Liquor Marketers*

*the public's confidence in the judicial system.*" See also Henry J (High Court of New Zealand) in *Equiticorp Holdings Ltd.*

While other cases have confirmed that it is not desirable to *unnecessarily* restrict the right of a client to instruct their solicitor of choice, whether or not that restraint is necessary will be a question of fact in each case. In *Newman v Phillips Fox* [1999] WASC 171; 21 WAR 309 Steytler J confirmed that the inconvenience – and even the prejudice – of changing lawyers cannot outweigh other “fundamental policy considerations”. If the inconvenience is necessary because a proposed information barrier is otherwise found to be inadequate, that is unlikely to change the court’s assessment of the barrier.

## **2.9 Do Information Barriers only apply to successive retainers?**

“Information barriers” are most often used when a law practice is instructed to act against a former client of the law practice. For the sake of simplicity, that language is used throughout the Guidelines and Commentary.

Information barriers may also be relevant in other alleged conflict situations. For example, the screened solicitor may have acted for the former client at another law practice, before being employed at the current law practice, as was the case in *Newman v Phillips Fox* [1999] WASC 171. These guidelines apply equally to that situation (and indeed may be simpler to implement in that situation, because of the reduced number of screened individuals).

These guidelines are not intended to apply to “concurrent retainers” as different considerations apply.

## **2.10 Do the Information Barriers Guidelines apply to small law practices too?**

Yes. The information barriers guidelines are intended to apply to all law practices.

However, it may be extremely difficult for a small firm to demonstrate compliance with the guidelines as a question of fact, particularly the requirements to keep staff and files physically separate. While the courts acknowledge the hardship this may cause for litigants, particularly in rural areas or in specialized areas of law with limited numbers of practitioners, that hardship is but one factor and it does not outweigh the importance of confidentiality.

The vast majority of decided cases have involved large firms and the courts have approached the doctrine of implied knowledge on the basis that it is not necessarily sensible in the context of

the large modern law practice. (See for example *Newman v Phillips Fox* [1999] WASC 171; 21 WAR 309 per Steytler J at 318.) There are few reported cases involving smaller firms. In *Rakusen v Ellis, Munday and Clarke* [1912] 1 Ch. 831, an information barrier was recognized in a 2-partner firm, but the circumstances were unique. In *Freuhauf Finance Corporation Pty Ltd v Feez Ruthning (a firm)* [1991] 1 Qd R 558, Lee J found that a firm of 28 partners had erected an effective barrier.

### **2.11 Can an Information Barrier be used in criminal proceedings?**

The standards required will be higher where criminal proceedings are involved. In concurrent matters, practitioners are discouraged from acting for two or more co-accused, even where there is no apparent conflict between the clients' interests at the outset.<sup>16</sup> Even in successive matters, criminal proceedings will influence the court against recognizing an information barrier.

In *Mallesons Stephen Jaques v KPMG Peat Marwick* (1990) 4 WAR 357 at 374, Ipp J said: “*It cannot be sufficiently emphasised ... that litigation involving the prosecution of serious criminal charges calls for the most careful measures to secure not only that justice is done, but also that it is apparent that it is done. More than in any other kind of litigation, the appearance of justice being done would not survive any general impression that a firm of solicitors could readily change sides ...*”

### **2.12 Do the Guidelines only apply to cases before the courts?**

Confidential relevant information is more likely to arise where parties are in dispute. However there is no reason that conflict rules should be applied less strictly in quasi-judicial settings (expressly considered in *Ontario Hydro v Ontario (Energy Board)* 25 Admin LR (2d) 211, 114 DLR (4th) 341, 71 OAC 227) or indeed in non-litigious matters where clients may still have competing interests.

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<sup>16</sup> See LIV guidelines on acting for two or more co-accused.

### 3. GUIDELINES, COMMENTARY AND EXAMPLES

#### Guideline 1

**The law practice should have established, documented protocols for setting up and maintaining information barriers. In all matters the law practice should carefully control access to any client information by personnel in the law practice in view of the possible requirement for an information barrier in the future.**

Internal information barrier protocols which incorporate the Guidelines should be part of the law practice's ongoing risk management and complaint prevention process. The rationale is that *ad hoc* barriers, erected for the purpose of specific files, are unlikely to bring about the necessary changes to a law practice's culture and internal communication patterns which will ensure prevention of inadvertent disclosure. For this reason, any law practice which knows or suspects that it will create an information barrier in the future should establish and document appropriate protocols at the earliest opportunity.

In *Prince Jefri Bolkiah v KPMG (a firm)* [1999] 2 AC 222 , Lord Millett said *"In my opinion an effective Information Barrier needs to be an established part of the organizational structure of the firm, not created ad hoc and dependent on the acceptance of evidence sworn for the purpose by members of staff engaged on the relevant work."*

In *Marks & Spencer v Freshfields Bruckhaus Deringer* [2004] EWCA Civ. 741 in which Pill LJ found that undertakings had been given too late, Kay LJ added, *"... the obligation was on the defendant to put in place adequate safeguards before acting for the bidders. I view it as far too late in the day for proposed further measures. The reality is that the spread of information within the firm may already have taken place and it is impossible to conclude that if the arrangements were inadequate until now, that fresh arrangements made at this stage will prevent the consequences of the earlier inadequate arrangements."*

It is only in exceptional circumstances – coupled with undertakings that information has not yet flowed - that *ad hoc* arrangements will suffice. See for example the decision of Laddie J in *Young and Others v Robson Rhodes (a firm)* [1999] 3 All ER 524 at 539.

The law practice should regularly review its internal protocols and conflict check procedures, including appropriate measures to be taken as part of the interview process for prospective employees.

## **Guideline 2**

- (a) The law practice should nominate a compliance officer to oversee each information barrier.**
- (b) The compliance officer**
  - (i) should be an experienced practitioner with appropriate knowledge of the rules and law relating to confidentiality, conflict of interest and information barriers;**
  - (ii) will take appropriate steps to monitor compliance and deal with any breach or possible breach of an information barrier;**
  - (iii) will undertake not to disclose any information about the earlier matter to personnel involved with the current matter.**

A compliance officer should be appointed to supervise the implementation and maintenance of an information barrier. The compliance officer's role should include

- regular evaluation of the effectiveness of the information barrier; and
- responsibility for ensuring the firm meets the educational requirements of Guideline 10.

The compliance officer may be the law practice's designated Ethics partner, a member of the law practice's Conflicts Committee or equivalent, or another lawyer.

The compliance officer should document all steps taken.

### Guideline 3

**The law practice should ensure the client in the current matter acknowledges in writing that the law practice's duty of disclosure to that client does not extend to any confidential information which may be held within the law practice as a result of the earlier matter and consents to the law practice acting on that basis.**

Absence of informed consent can be enough to undermine an information barrier. For example

- In *D&J Constructions*, Bryson J noted at 122 that “*the new client would have to join in such an arrangement and give up his right to the information*”.
- “Informed consent” is mentioned in passing by Byrne J in *Village Roadshow Ltd v Blake Dawson Waldron* [2003] VSC 505 (23 December 2003) at paragraph 40, and again in the final paragraph of the judgment. In discussing the duty of loyalty, his Honour notes that Brooking J in *Spincode* had likened it to a fiduciary obligation and “[a]s such, the solicitor might be permitted so to act, where it establishes that the former client has given an informed consent for it to do so.”
- In *Australian Liquor Marketers Pty Ltd v Tasman Liquor Traders Ptd Ltd* [2002] VSC 324 (14 August 2002), the fact that an intermediary firm was involved in one proceeding was taken into account.

However, “informed consent” is not clearly defined by Australian courts. There is a good argument that “informed consent” does not require independent advice in the case of experienced, commercially savvy clients, particularly where in-house counsel is involved. By contrast, for an inexperienced client, merely saying that independent advice “could” (rather than “should”) be taken may not be enough.<sup>17</sup>

Practitioners should be mindful of the dangers of breaching confidentiality inadvertently, when explaining the purpose of the consent to the current client. For example, the law practice may

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<sup>17</sup> See for example *Mahoney v Pumell* [1996] - UK

not provide detail about the nature of the confidential information to be withheld, since to do so would itself be a breach.

### **Can consent be withdrawn?**

The onus is on a practitioner seeking to act to establish that no conflict exists. In theory at least an objection may be raised, or consent withdrawn, at any stage. Injunctions have occasionally been granted in the interests of the administration of justice notwithstanding late objections or even late withdrawal of express consent.<sup>18</sup>

Even where the late objection suggests a tactical ploy, an injunction may be granted. For example in *Village Roadshow Ltd v Blake Dawson Waldron* [2003] VSC 505 (23 December 2003) Byrne J said at paragraph 51, “*I was pressed to doubt the bona fides of the application. It was brought late and without convincing explanation and at a time which strongly suggests that it was but a tactical ploy to disadvantage [the current client]. I am inclined to agree. The protestations of [the applicant] of its concerns for the interests of [another party] certainly have a hollow ring.*” Despite this, the solicitor was prohibited from acting further. Similarly in *Hudson v Hudson* (1993) 10 Alta LR (3d) 322, 16 CPC (3d) 1 (QB), a firm was disqualified when consent was withdrawn.

However a late objection (or withdrawal of express consent) reduces its credibility and that may be taken into account. For example –

- In *In the Marriage of McGillivray and Mitchell* (1998) 23 Fam LR 238, the Full Family Court said at 245, “[A] failure to take the point initially must also cast doubt on the bona fides of any later complaint concerning the existence of confidential information in the practitioner in question, and on the bona fides of any alleged apprehension regarding the possible misuse of such confidential information.”
- In *South Black Water Coal Ltd v McCulloch Robertson* (Unreported, 8 May 1997) Muir J declined to make an order restraining a solicitor from acting, where the former client had been expressly aware of the conflict for some time and had decided not to object.

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<sup>18</sup> For an example of the latter, see *Carol Ann Hudson v Gilbert David Hudson* 10 Alta LR (3d) 322, 16 CPC (3d), 142 AR 236. In that case there was no question of an effective Chinese Wall on the facts.

- In *Bank of Nova Scotia v Imperial Developments (Canada) Ltd and others* [1989] 58 Mann. R. (2d) 100, an injunction was refused where the applicants had “*specifically instructed their counsel to withhold the demand for disqualification until after [the solicitor] had in fact moved to the receiver’s firm.*”

#### **Guideline 4**

**All screened persons should be clearly identified and the compliance officer must keep a record of all screened persons.**

Practitioners should carefully read the introductory notes to this Commentary, including the section headed “What test is applied to an Information Barrier?” It is essential that any individual actually in possession of relevant confidential information has no contact at all with the current matter. If such contact occurs, the information barrier must fail.

The “no contact” rule is not limited to partners or legal practitioner directors, as they are not the only staff considered likely to share knowledge. In *Phillips Fox*, Steytler J at 325 expressly considered two articled clerks who were amongst those proposed to be screened by an information barrier. He said they would “*as part of their training, no doubt be exposed to a range of different types of work and, consequently, personnel at [the firm]. They can be expected to mix with other articled clerks and young practitioners at that firm. They can also be expected, as is the case with other young practitioners, to share experiences and to exchange advice.*”

Nor is the “no contact” rule limited to those with legal qualifications. Steytler J also specifically expressed concerns about administrative staff who may have been exposed to confidential information but were not proposed to be screened along with the legally qualified staff. In *Bureau Interprofessional Des Vin De Bourgogne v Red Earth Nominees Pty Ltd* [2002] FCA 588 (9 May 2002) and other cases, the undertakings offered included an undertaking not to share support staff.

## **Part-time work**

Where the person holding the confidential information is employed part time, that may be taken into account. See for example *Bureau Interprofessional Des Vins De Bourgogne v Red Earth Nominees Pty Ltd* [2002] FCA 588 (9 May 2002) and the *Koch Shipping* case. However it is only relevant to the extent that it reduces the interaction between personnel. It certainly does not, of itself, eliminate the risk.

The greater the number of individuals in a law practice who possess the relevant confidential information, the more difficult it will be to establish an effective information barrier. As a simple question of fact, it is more difficult to screen large numbers of people.

In some cases, the fact that only one individual possesses relevant confidential information has been a persuasive factor in refusing to grant an injunction. This is most likely to apply where that person has obtained the information in a different law practice, before transferring to the current law practice. Where the earlier matter was handled by the current firm, an information barrier may therefore be more difficult to establish.

The firm should clearly identify and maintain separate records of all staff who

- a. hold the relevant confidential information; and
- b. have any involvement with the new matter.

These records must be kept up to date, usually by the compliance officer. All identified individuals should be part of the ongoing education program required under Guideline 10.

## **Guideline 5**

- (a) Each screened person should provide an undertaking to the law practice and the law practice should where appropriate provide an undertaking to the court confirming that**
  - (i) the screened person will not have during the existence of the current matter any involvement with the client or personnel involved with the current matter for the purposes of that current matter;**
  - (ii) the screened person has not disclosed and will not disclose any confidential information about the earlier matter to any person other than to a person in accordance with the instructions or consent of the client in the earlier matter, a screened person or the compliance officer;**
  - (iii) the screened person will, immediately upon becoming aware of any breach, or possible breach, of this undertaking, report it to the compliance officer who will take appropriate action.**
- (b) In the event of files and/or information relating to the earlier matter being required to enable the law practice to comply with an obligation at law to provide information or to answer a complaint or defend a claim against the law practice the screened person must not pass the files and/or information to anyone other than the compliance officer who may pass them on to a responsible officer of the legal practice who is not involved in the current matter so that the legal obligation can be honoured. Nothing in these guidelines is intended to restrict a law practice's rights to access and disclose any information relating to the earlier matter for the purposes of enabling the law practice to comply with any legal obligation.**

## **Guideline 6**

**Personnel involved with the current matter should not discuss the earlier matter with, or seek any relevant confidential information about the earlier matter from, any screened person. Such personnel should provide undertakings confirming that**

- (i) no confidential information about the earlier matter has been disclosed to them;**
- (ii) they will not have during the existence of the current matter any involvement with a screened person for the purposes of the current matter;**
- (iii) they will not seek or receive any confidential information about the earlier matter from a screened person or in any other way; and**
- (iv) they will, immediately upon becoming aware of any breach, or possible breach, of this undertaking, report it to the compliance officer who will take appropriate action.**

The law practice should obtain timely, written undertakings from all screened staff, whether legally qualified or not, confirming that

- a they understand they may possess (or come to possess) confidential information; and
- b they understand they must not discuss that information or the matter generally with any other person within the law practice; and
- c they have not previously had such discussions or done anything which would amount to a breach of the information barrier; and
- d they will inform the designated compliance officer immediately upon becoming aware of any possible breach of the information barrier.

- e. if they are required to produce documents for example in order to comply with a subpoena or a notice to produce they will forward the relevant material (including the former client's physical or electronic files) to the compliance officer.

The giving of such undertakings must be timely. In *La Salle National Bank v County of Lake* (1983) 703 F2d 252, the entire firm was disqualified because an otherwise effective information barrier was found to be implemented too late.

Undertakings are only one aspect of the wall and will not generally be sufficient on their own. See for example:-

- *Newman v Phillips Fox* [1999] WASC 171; 21 WAR 309 per Steytler J;
- *Bureau Interprofessional Des Vin De Bourgogne v Red Earth Nominees Pty Ltd* [2002] FCA 588 (9 May 2002) at paragraph 57;
- Lord Millett in *Prince Jefri Bolkiah v KPMG (a firm)* [1999] 2 AC 222 at 530, who said an effective wall should not be “*created ad hoc and dependent on the acceptance of evidence sworn for the purpose by members of staff engaged on the relevant work.*”

The law practice should also be ready and willing to offer undertakings directly to the Court, as was done in *Australian Liquor Marketers* at page 27, although it will not always be necessary (see for example *Asia Pacific Telecommunications Ltd v Optus Network Pty Ltd* [2005] NSWSC 550 per Bergin J).

Law practices should specifically be aware of the role of articulated clerks and paralegals, and others who may be required to move between departments.

### **Guideline 7**

- (a) Contact between personnel involved in the current matter and screened persons should be appropriately limited to ensure that the passage of information or documents between those involved in the current matter and screened persons does not take place.**
- (b) The law practice should consider whether it is appropriate for such personnel to have contact with the client in other matters during the current matter.**

The current matter should only be discussed within the limited, identified group working on the file. Individuals within the group should be aware of the identity of others in the group so that they can confine those discussions appropriately, and should offer undertakings confirming that they have not received, and will not seek, any information about the earlier matter.

Practitioners should note that non-legally qualified staff are not exempt.

The simplest way of complying with this guideline is by physical separation of offices and staff, whether on separate floors, separate buildings, or even different States. It must always be combined with appropriate separation or restriction of access to electronic information.

In *D&J Constructions Pty Ltd v Head* (1987) 9 NSWLR11, Bryson J (at 123) pointed out that “*wordless communication can take place inadvertently*”. Without enforced physical separation, staff may communicate inadvertently “*by attitudes, facial expression or even by avoiding people one is accustomed to see*”. In *MacDonald Estate*, Sopinka J at 269 referred to the likelihood of inadvertent disclosure at “*partners’ meetings or committee meetings, at lunches or the office golf tournament, in the boardroom or the washroom*”. In *Newman v Phillips Fox* [1999] WASC 171; 21 WAR 309 at 314, separation of relevant staff on to the 18th and 19th floors – and even an offer to move the screened personnel to separate premises – was insufficient, although that was on the basis that the separation had taken place too late. In *Unioil* 17 WAR 98 at 105, even interstate offices which were not in fact a partnership at law had sufficient “identity of interest” to warrant a finding of conflict.

By contrast, in *Asia Pacific Telecommunications Ltd v Optus Networks Pty Ltd* [2005] NSWSC 550 the court found there was no “real risk” of disclosure, despite evidence that screened solicitors “bounced” matters off each other and attended litigation seminars with other staff.

Where geographic separation is not possible, offices containing relevant files should be locked and/or signs should be placed on doors limiting access. In any event, all files should be clearly labeled indicating restricted access.

The law practice should implement an appropriate system for the use of facsimile machines, photocopiers and printers. For example, the law practice may offer undertakings that separate machines will be used for the current matter; that documents relating to the current matter will not be left unattended on those machines; and that any unwanted copies of documents will be appropriately destroyed.

### **Guidelines 8 and 9**

- 8. The law practice should take steps to protect the confidentiality of all correspondence and other communications related to the earlier matter.**
- 9. (a) Any files held by the law practice relating to the earlier matter should be stored in a secure place where they can only be accessed by screened persons and/or the compliance officer.**  
**(b) Access to any electronic files the law practice holds relating to the earlier matter and other technological communications related to the earlier matter should be restricted to screened persons and/or the compliance officer. The law practice should set up appropriate forms of technological protection to ensure access is restricted.**

The law practice should implement a system for the receipt, opening and distribution of post, facsimiles, e-mails and other technological communications such as by mobile phone or personal digital assistant to ensure that confidential information is not disclosed to any unscreened person.

This might include arrangements for all incoming correspondence in the current matter to be marked “confidential”, addressed personally to the designated compliance officer, and to be opened personally by the designated compliance officer and the setting up of technological

protection including the computer firewall.<sup>19</sup> Alternative arrangements may be appropriate for the circumstances of a particular case. As with all aspects of an information barrier, the onus is on the law practice to demonstrate that the steps taken are adequate to ensure protection of confidential information.

Modern communication techniques mean that geographic separation will often be inadequate to prevent a flow of information.

Computer access to relevant files should be restricted, by the use of passwords or varying access levels for different personnel, and the locking down of computers when a staff member is away from his or her desk.

Some law practices have found it helpful to introduce a new layer to their electronic conflict check systems, which allow partners to restrict access to all information about a new matter immediately the file is opened.

#### **Guideline 10**

**The law practice should have an ongoing education program in place, including:-**

- (a) education for all personnel about the law practice's protocol for protecting confidential information and for setting up and maintaining information barriers, including
  - (i) employment terms for staff;**
  - (ii) standard retainer terms with clients;**
  - (iii) electronic and physical access to documents and files;**
  - (iv) firm culture on such issues as discussion of client matters only on a "need to know" basis";**
  - (v) sanctions for non-compliance; and****
  
- (b) additional education for individuals involved in matters affected by an information barrier, including the arrangements in place for the particular case and sanctions for non-compliance.**

The education program should be in place before the information barrier is established. For that reason, all law practices are encouraged to implement an education program.

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<sup>19</sup> This was one of the steps taken by the firm which successfully created a Chinese Wall in *Bureau Interprofessional Des Vin De Bourgogne v Red Earth Nominees Pty Ltd* [2002] FCA 588 (9 May 2002)

The program should ensure that all affected practitioners and staff (including both lawyers and support staff non-legally qualified staff) are made aware of the law practice's protocol on information barriers. It should consist of formal and regular training on duties of confidentiality and responsibilities under information barriers, including the dangers of inadvertent disclosure. These general sessions may (if they meet the criteria set out in the *Continuing Legal Education Scheme Rules 2004* and Rule 42 of the NSW Revised Professional Conduct and Practice Rules 1995 (MCLE), accrue points towards the compulsory ethics component of the Victorian CLE scheme and the NSW requirements for mandatory CLE .

The law practice should always ensure that new staff are aware of the protocol and their obligations. In addition to educational sessions, these should therefore be included in the law practice's policy manual.

Where an information barrier has been established, there should be additional ongoing education for all staff directly affected. Separate sessions should be conducted for staff involved with the earlier matter and staff involved with the current matter, to limit their interaction with each other. These may appropriately be conducted by the designated compliance officer. Targeted sessions relating to a particular matter will not normally accrue CLE scheme points.