Professionals and Confidentiality†

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We start with a simple proposition. Needless to say we will end in complexity. The proposition is that: "The law implies a term into the contract whereby a professional man is to keep his client's affairs secret and not to disclose them to anyone without just cause."[1]

But because we assume the meetness of this as of course, we do not have a principled understanding of why the law acts so. Save through example — doctor, lawyer, accountant, banker, clergy — we do not know who, here, are to be the law's "professionals". And uncertainty only begins at this point. Though a particular occupation may qualify for professional recognition, the actual burden of its secrecy obligation is another matter. As professions differ, so also do their duties of secrecy — hence the first line of judicial retreat: "[t]he limitation of the implied term must vary with the special circumstances peculiar to each class of occupation."[2] If some professions — and particularly the medical profession — have reason to feel discomforted at this corridor of uncertainty, all need recognise that, where secrecy does bite, it characteristically bites with some intensity. Here, as the explosion in law-firm disqualification cases around the common law world attests, it is the lawyers' turn to feel discomforted. But secrecy, we remind ourselves, is a relative, not an absolute, value in the law. The interests it protects are not the only ones worthy of legal recognition, let alone of paramount recognition. So how is the professional to act when other legitimate interests conflict with secrecy's? Is a doctor, in the face of a patient's refusal to do so, entitled to inform the patient's spouse that the patient has a genetically transmissible disease?[3]

Now to complicate matters a little. While some professionals are sole practitioners, many practice in partnership or in a corporate form. How do secrecy obligations impact on the individual members of a firm or on the disparate parts of a multi-function business, some one or more parts of which render professional services? Is the client information acquired by one partner, for example, to be attributed to all of the others in a firm of accountants? And as firms amalgamate? The questions are not hollow ones. They are at the core of the problem of client-conflict. And now that we are in the age of what is inelegantly described as the "mega-firm",[4] are we to admit the adoption of defensive techniques to isolate protected information in a discrete part of a firm or business so as to relieve other parts of the same firm or business of the infectious burden of secrecy? The questions can be multiplied.

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1 *Parry-Jones v Law Society* [1969] 1 Ch 1 at 7, per Lord Denning MR.

2 *Tournier v National Provincial & Union Bank of England* [1924] 1 KB 461 at 486 per Atkin LJ.

3 Cf *X v Y [1988] 2 All ER 648; W v Egdell* [1990] 1 All ER 835.

4 Cf *MacDonald Estate v Martin* [1991] 1 WWR 705 at 725.

Our concern is with the law. But it is with much more than the law. It is with one important dimension of our social ordering. It is with individual interests and social values. It is with how we are prepared to use our human capital. It is with social practices we wish positively to promote. The relevant themes are large ones. Here, and without straying too far from the practical concerns of the law, I can only hope to sketch lightly the various impulses which are shaping and directing our law of professional secrecy.

It is appropriate at the outset to make three general and preliminary comments, because these, in part at least, help explain the law's course in this sphere. First, while the maintenance of information privacy is important both as a cause and as an effect of professional secrecy, it would be quite mistaken to assume that the purpose and reason of professional secrecy lies in privacy protection as such. Whatever may be the assumption in this in the ethical rules of some professions, privacy protection in the law here seems more in the nature of a means to an end rather than an end in itself. Simply to illustrate this point, the purposes underlying the protection given client information in lawyer-client relationships are not merely intended to protect client interests. As both the legal professional privilege and the law firm disqualification cases illustrate, those purposes owe more to enhancing public confidence in the standards and the integrity of the justice system itself and to facilitating public utilisation of it. Privacy protection, in other words, often provides the individual citizen-serving means to a larger, public interest-serving end.[5]

Secondly, in according professional status to some only of the large variety of service occupations in society, we not only make judgments about such matters as the level of training and skill required of the service provider, the degree to which the service relationship is one of superiority and dependence, and the likelihood of privacy communications being made as of course: we also make judgments about the relative importance of the social interests served by those occupations. It is in the primacy that we give to some social interests over others — for example, the promotion of individual and public health over facilitating the sale of suburban real estate — which influences the manner in which and extent to which we are prepared to resort to protective measures (including secrecy protection) *positively to encourage* the effective utilisation of some but not other public service occupations.[6] Illustrative of this are the observations of Rose J in *X v Y*[7] — an AIDS case:

> In the long run, preservation of confidentiality is the only way of securing public health; otherwise doctors will be discredited as a source of education, for future individual patients "will not come forward if doctors are going to squeal on them." Consequently, confidentiality is vital to secure public as well as private health, for unless those infected come forward they cannot be counselled and self-treatment does not provide the best care.

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5 Cf the alternative opinions expressed by the WA Law Reform Commission in its *Discussion Paper*, "Confidentiality of Medical Records and Medical Research" 13.

6 I here differentiate between protection designed to encourage utilisation of a service, and that designed simply to protect service users from fraud or other abusive activities.

7 Above n3 at 653; see also Neave, M, "AIDS — Confidentiality and the Duty to Warn" (1987) 9 *U Tas LR* 1.

What seems to be clearer now than once it was,[8] is that how we perceive those social interests and their demands influences directly not only our preparedness to impose secrecy obligations, but also the limits to be given to such obligations. Here, most probably, we find the actual explanation for the observation quoted earlier that secrecy's limits "must vary with the special circumstances peculiar to each class of occupation."

Thirdly, a more technical matter. Those who are "professionals" for secrecy law purposes are commonly also fiduciaries for other purposes in the law. Given fiduciary law's earnest to exact loyalty in client-service in fiduciary relationships, its imperatives can interact with those of secrecy law to reinforce, even heighten, the constraints that secrecy obligations can impose on professionals. By way of example one can note the emerging tendency in Australian case law to use fiduciary principles directly to protect client information from possible misuse in law firm disqualification cases.[9]

1. *The Law's "Professionals"?*

This, the first question, will be the one least considered in this paper.[10] The law of confidentiality (or of secrecy) performs quite divergent roles, and protects quite disparate interests, in our society. Its three predominant usages are: first, to protect the exchange and acquisition of information in relationships in which, for diverse reasons, we expect the maintenance of a high level of information privacy; secondly, to secure the economic advantage of commercially valuable confidential information (the "trade secret") to the information "owner"[11] unless and until that information passes into the public domain;[12] and thirdly, to protect governmental information, though this only to the extent that it can be justified on "public interest" grounds in a democratic society.[13] It is the first of these which is of particular (though not exclusive) present concern.[14] It should, however, be noted at the outset that as the law's usage changes from one class of case to another, so also does its emphases and concerns. As one moves from the first to the third of the three usages noted, the protective purpose in the law would seem to vary progressively from that of maintaining the integrity of particular relationships to that of maintaining the integrity of particular information, this

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8 Cf Finn, P D, "Confidentiality and the Public Interest" (1984) 58 *ALJ* 497 at 500ff.

9 See eg *National Mutual Holdings Pty Ltd v Sentry Corp* (1989) 87 ALR 539; *Mallesons Stephen Jaques v KPMG Peat Marwick*, Sup Ct of WA, 19 October 1990 Ipp J.

10 For an earlier indication of the writer's views see above n8.

11 The term is one of convenience. Secrecy law in Australia is not based on a property analysis: see *Moorgate Tobacco Co Ltd v Philip Morris Ltd* (1984) 56 ALR 193 at 208. Nonetheless, trade secrets at least may be accorded proprietary status for some purposes: see eg, the observations of Gummow J in *Smith Kline & French Laboratories Australia Ltd v Secretary, Department of Community Services & Health* (1990) 95 ALR 87.

12 The owner does, of course, bear some responsibility in his or her handling or communication of the information to take steps to secure its confidentiality.

13 *Commonwealth of Australia v John Fairfax & Sons Ltd* (1980) 32 ALR 485 at 493.

14 Some professional relationships can involve the communication of commercially valuable information — the second usage above — and to that extent considerations relevant to the protection of such information can arise in settling the secrecy obligation of the professional.

variation being accounted for by the changing impact of considerations of public interest. As will be noted below, this variation and the reasons for it are of some importance to an understanding of a professional's secrecy obligations.

From early in its modern evolution, our law of breach of confidence accepted a responsibility for the protection of information privacy. The mid-nineteenth century decision of *Prince Albert v Strange*[15] secured at least this much.[16] Though the secrecy obligation of professionals can — and often does — extend beyond privacy protection,[17] it is this little explored dimension of secrecy which is of first importance to the professional. But who is a professional?

In much the greater number of service industries in our society the service provider commonly is afforded with the opportunity to acquire some level of information about the personal affairs, circumstances, interests, proclivities and the like, of its "client" or customer. The travel agent, the architect, the finance company and the hotelier, no less than the psychologist, the lawyer and the banker, share this much in common. Yet the mere possession of that opportunity does not of itself attract an automatic right in a client or customer to information privacy through secrecy law.[18] In most service relationships that right will only exist when, and to the extent that, it is in effect the mutually contemplated understanding upon which "confidential" information is supplied or acquired in a particular dealing.[19] Yet in the first circle of service relationships — that of professional and client — that right characteristically is regarded as an incident of the very relationship itself, so much so in the case of some professions as to extend to the fact that the client is the client of the professional.[20]

The complex factors and policies which produce this exceptional outcome have never been explored systematically in our law. One can, nonetheless, identify what we are likely to regard as the more significant of these, as well as the reasons why we attribute to them the effect we have: that the service in its nature ordinarily necessitates or else results in the acquisition of significant private information; that such information relates to important personal, financial or economic interests of the client to which we, as a society, attribute a marked privacy value; that the circumstances in which and the

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15 1 Mac & G 25; 2 De G & Sm 652 (1849).

16 Its deeper veins still have not been plumbed in our law: cf Warren, S D and Brandeis, L D, "The Right of Privacy" (1890) 4 *Harv LR* 193.

17 Trade secret maintenance can be of some importance where business affairs are the subject of professional confidences.

18 There is a parallel here with our unpreparedness to call all service providers fiduciaries notwithstanding their service function and the capacity they commonly possess to affect the interests of their customers or clients: cf Finn, P D, "The Fiduciary Principle", in Youdan, T G, (ed) *Equity, Fiduciaries and Trusts* (1989) 41ff.

19 This reflects the orthodox basis upon which, professional and intimate personal relationships apart (cf *Argyll v Argyll* [1967] Ch 302; *Stephens v Avery* [1988] Ch 449), duties of secrecy are authored in our law: see *Ansell Rubber Co Ltd v Allied Rubber Industries Ltd* [1967] VR 37 at 40.

20 Cf *Hunter v Mann* [1974] QB 767; see also *Anderson v Strong Memorial Hospital*, 531 NYS 2d 735 (1988); 542 NYS 2d 96 (1989).

purposes for which the service is rendered create a reasonable expectation of information privacy — the more so where the service providers themselves, through ethical rules and otherwise, create a public expectation of information privacy; that the service relationship itself, in affecting important interests of the client, renders the client vulnerable to information abuse; that the societal significance we attribute to a particular service and its purposes, warrants the taking of significant protective measures to promote and encourage the effective utilisation of that service.

History has bequeathed us a non-exhaustive catalogue of secrecy law's "professionals": lawyers, doctors, accountants, bankers, clergy and psychologists. To these we can with safety add some range at least of paramedical, counselling and social work services and, by analogy with accountants and bankers, some of the various functionaries to be found in the modern financial services industry, as also insurers. Our apparent lack, though, is of a definition of a "profession" — a lack unlikely ever to be remedied given the improbability of finding one of any explanatory utility. Our real lack, however, lies in the absence of a principled understanding of why and to what end we exact secrecy on a profession-by-profession basis. If we are uncertain as to when we will ascribe "professional" status to particular service occupations, that uncertainty will, most likely, have little practical effect on any determination as to whether in the circumstances of a case of first impression a secrecy obligation is to be imposed on a given service provider: secrecy obligations can arise for reasons other than simply the nature of the relationship existing between the parties.[21] Our problem is less with the genesis of duties of secrecy than with the scope and effect to be given them. It is here that the lack referred to above can be of no little importance.

2. *The Professional's Secrecy Obligation*

> The privilege of non-disclosure to which a client is entitled may vary according to the exact nature of the relationship between the client or customer and the person on whom the duty rests. It need not be the same in the case of the counsel, the solicitor, the doctor, and the banker, though the underlying principle may be the same.[22]

First, and simply so as to put them to one side, three propositions of general application to professionals which, if not themselves controversial, can be controversial in their factual applications.

(1) The information potentially embraced by professional secrecy is not limited to that actually communicated by the client to the professional. For obvious reasons it can extend to information/opinion derived from observation, the exercise of professional skill and judgment, and the like in

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21 Cf *Ansell Rubber Co Ltd v Allied Rubber Industries Ltd* above n19. In cases of first impression, if a duty of secrecy is not readily suggested on a professional-client basis (whether through resort to analogical reasoning or otherwise), it may be created for reasons related to the nature of the information acquired and to the circumstances of (and, in particular, the purpose of) its acquisition in the particular relationship or dealing.

22 Above n2 at 474 per Bankes LJ.

the professional relationship. And, as the leading case of *Tournier v National Provincial & Union Bank of England*[23] illustrates, it can embrace information about the client derived from third-party sources, provided that, when deriving it, the professional was acting in his or her professional character. It is worthy of note here in passing that where the *client* discloses third-party information to a professional (for example, a patient giving a family history to a doctor), the prevailing orthodoxy is that the professional's legal obligation is owed to the client alone in respect of that information.[24] It is, however, open to serious question whether that orthodoxy will remain unassailable, at least in the doctor-patient context, given the common implication of the privacy details of family members in modern diagnostic practices.[25]

(2) The duration of the obligation is not limited to the period of the retainer or engagement creating the professional relationship. With at least some of the professions (for example, accountants and bankers) it is probably the case that, once created, the obligation terminates as and when the "protected information" passes into the public domain and this for the reason that where "the confidential information has ceased to exist . . . with it should go . . . the obligation of confidence".[26] With others (for example, doctors, lawyers and the clergy) it may well be the case that the obligation endures indefinitely and this for the reason that, at the hands of the professional, that information can only be used for the purpose in virtue of which it was acquired, irrespective of whether it has become publicly available.[27] It is, though, an open question whether in the latter case so expansive a duty is to be said to rest only on ethical or conventional, and not upon legal, grounds.[28]

(3) The professional's secrecy obligation, like that of any other person, is "subject to, and overridden by, the duty . . . to comply with the law of the land".[29] Statute, and the processes of litigation, have made considerable inroads into secrecy's domain. But this noted, it may be the case that the preparedness of courts to apply generally worded legislative provisions in ways that could override the secrecy obligation of a particular class of professional (for example, lawyers) may be affected by a court's appreciation of whether such was the legislature's intent, given the strength of the public

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23 Above n2.

24 The "conscience" based formulation of secrecy obligations adopted by the High Court in *Moorgate Tobacco Co Ltd v Philip Morris Ltd* above n11 at 208 may, however, necessitate a less inflexible view now being taken.

25 For a variant on this see *Doe v Portland Health Centres*,782 P 2d 446 (1989).

26 Cf *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 at 287 per Lord Goff.

27 Cf *Home Office v Harman* [1983] AC 280 — a decision capable of distinction on grounds relating to the law of discovery. For example, the ethical rules of doctors posit that secrecy endures beyond the death of the patient: see AMA Code of Ethics 3.1 (1989).

28 Arguments favouring a legal foundation include (a) the "authenticating" effect disclosure by the professional can have even where the information is in the public domain; (b) the expectation of enduring silence had of the professionals exemplified in the text; and (c) the important public policies which justify their respective secrecy obligation in the first place. See also *Humphers v First Interstate Bank of Oregon*, 684 P 2d 581 (1984).

29 Above n1 at 9 per Diplock LJ; see also *Smorgon v Federal Commissioner of Taxation* (1976) 13 ALR 481; *Hunter v Mann* above n20.

policy considerations which inform that class of professional's secrecy obligation.[30]

But to pass now to the truly controversial: what is the scope of, what limits are there to, the professional's legal obligation? Here, though one can make some comments by way of broad generalisation, the questions are ones which ultimately are to be answered on a profession by profession basis — as the quotation heading this section suggests.

By way of preliminary comment a number of general observations should be made about the roles that public policy and the "public interest" have in shaping and directing legal doctrine in this arena. First, conventional formulations of duties of secrecy acknowledge that, whatever the public interests justifying them, they are not absolute in character; that they may be limited, in some circumstances eliminated, by countervailing public interests. This acknowledgment is reflected in what is described (somewhat misleadingly) as the "public interest" defence to breach of confidence — a defence differently understood by English courts and by our own.[31] The prevailing (though not uniformly accepted)[32] Australian view of this defence is not that it asks the court to balance the rival claims of conflicting public interests, one favouring secret maintenance, another not so.[33] Rather, it admits of information disclosure despite a secrecy obligation —

(a) if the information relates to serious wrongdoing which it is in the public interest to disclose; or
(b) probably, if the disclosure will avert apprehended serious harm to the public or to members thereof.[34]

Secondly, distinct from the "defence", there are those public policies (or public interests) which inform the imposition of secrecy obligations in the first place. It is these that we have little explored in our secrecy law. Yet it is becoming increasingly apparent that an understanding of them is of the first importance to an understanding of the reach, the intensity, and the limits to be given to the duties of professionals on a profession by profession basis. Conventional formulations of secrecy law would have it that, unless authorised or required by law or by the public interest defence, a "confidant" cannot use or disclose information acquired in confidence without the consent

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30 Cf *Corporate Affairs Commission of New South Wales v Yuill* (1991) 100 ALR 609 and *Baker v Campbell* (1983) 49 ALR 385 — legal professional privilege cases; and see the comments on this of Stephen J in *Smorgon v Federal Commissioner of Taxation* above n29.

31 See, eg, the judgment of Gummow J in *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* (1987) 74 ALR 428.

32 Cf *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* (1987) 10 NSWLR 86 at 166ff per Kirby P.

33 Such is the growing tendency in English case law.

34 See, eg, *Castrol Australia Pty Ltd v Emtech Associates Pty Ltd* (1981) 33 ALR 31; *Allied Mills Industries Pty Ltd v TPC* (1981) 34 ALR 105; *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* above n31; *Smith Kline & French Laboratories (Aust) Ltd v Secretary, Department of Community Services and Health* above n11. See also *A v Hayden* (No 2) (1984) 56 ALR 82; *Westpac Banking Corporation v John Fairfax Group Pty Ltd*, Sup Ct of NSW, 25 February 1991, Powell J; *Brown v Brooks*, Sup Ct of NSW, 18 August 1988, McLelland J.

(express or implied) of his or her "confider". But let me give six examples which, despite conventional formulations, suggest the need for the understanding I have mentioned.

(i) A doctor with a particular research interest uses the medical records and histories of patients in a research publication but in a non-identifying way. Or a sole practitioner solicitor, without client-consent, seeks the advice of a colleague in another firm for the purpose of rendering advice to a client and in so doing discloses both the identity and affairs of the client.[35]

(ii) A bank, without the customer's consent, provides a credit reference to a third party to whom the customer has made a credit application in a form which identifies that bank as the customer's bank.

(iii) An insurance company, without the insured's consent, notifies a claim made on an industry-wide register which is accessible only to other insurance companies and which is designed to detect fraudulent claims, though in making the notification the company has no reason to believe that the insured's claim is in any way fraudulent.

(iv) A large firm of solicitors or accountants accepts a retainer from a client in a matter substantially related to one in which it had previously advised another client with a now adverse interest, the second retainer being entered into subject to a "Chinese Wall" agreement, but without the knowledge and consent of the first client.[36]

(v) Because of a patient's refusal to do so, a doctor communicates (a) to that patient's spouse-to-be that the patient has a genetically transmissible disease;[37] or (b) to that patient's employer that the employee has a condition which could result in serious injury to the employee (or to others) in the workplace.[38]

(vi) A bank, having the account of customer A, uses its knowledge of that account for the purpose of determining its response to a loan application from customer B which is seeking to acquire a majority interest in customer A.[39]

It is the law's policies and purposes and not simply its formulae which will tell us when, if at all, the actions of the professional in the above examples give rise, potentially, to an actionable breach of confidence. Importantly, the public interest defence as it is presently perceived in Australia, has little or no bearing on this question.[40] At issue in each instance is what, appropriately,

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35 Cf *McKaskell v Benseman* [1989] 3 NZLR 75; see also *Neal v Corning Glass Works Corp*, 745 F Supp 1294 (1989).

36 Cf *Mallesons Stephen Jaques v KPMG Peat Marwick* above n9.

37 Cf *Martin v Rinck*, 491 NE 2d 556 (1986).

38 Cf *Bratt v International Business Machines Corp*, 467 NE 2d 126 (1984).

39 Cf *Washington Steel Corp v T W Corp*, 602 F 2d 594 (1979).

40 Save possibly in example (v), in some but not all of the possibilities mentioned there and, more distantly, in example (iii).

are to be taken to be the limits of the particular professional's secrecy obligation.

One could not, within the confines of this paper, hope to explore, let alone seek to unravel the multiplicity of possible policy issues raised here. At best all I can hope to do is to advert to what appear to be dominant themes in the law and to suggest how these can or might contrive the limits of secrecy in given cases and in given professions.

First, the information privacy theme — one of general significance to all professionals. The implicit assumption of the case law is that an instrumental purpose of professional secrecy is to secure the privacy interests of the client. This, at least, suggests two propositions, neither of which can be cast in absolute terms. They are, (i) that the unauthorised (that is, non-consented to) disclosure of client information in a way which identifies, or which could lead to the identification of, the client, will ordinarily offend that privacy protection purpose and will be wrongful in consequence; but, (ii) that a non-identifying use or disclosure, if not otherwise inimical to the client's interests, will ordinarily be unobjectionable notwithstanding that it involves the use of information obtained in a professional-client relationship. The doctor-researcher publishing non-identifying patient information has her or his haven here. But, as the use of "ordinarily" in the two propositions suggests, both identifying uses may be unobjectionable in certain conditions, and non-identifying uses objectionable in others. In *McKaskell v Benseman*,[41] for example, it was held not only that a solicitor committed no actionable breach of confidence in making an identifying disclosure of client information to a professional colleague "in the course of a serious and earnest search for assistance in the interests of his clients",[42] but also that to countenance liabilities arising out of such circumstances would "result in a damaging chill to the benefits to society that flow" from such consultations between professional colleagues.[43] By way of contrast, it is an arguable implication of the decision in *X v Y*[44] that it would be an actionable breach of confidence for a hospital to make a non-identifying publication of the fact that it has as a patient a practising doctor who is HIV positive, and this because of the effect that even such publication could have on the preparedness of AIDS sufferers to come forward for counselling. In any event, and because privacy protection provides only one (albeit important) strand in professional secrecy, the non-identifying use of client information — and particularly that which has commercial or economic significance — can be actionable for other reasons.

The privacy theme, then, has an important role in setting one of the frontiers of professional secrecy. But even in cases where, from the standpoint of the client, it appears to be the sole or principal client interest in question, it does not of itself provide a conclusive determinant of that frontier. In the majority of the six examples given earlier, an identifying disclosure is made.

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41 Above n35.
42 Id at 88.
43 Id at 90. This particular observation was made in the context of a claim against the third party colleague.
44 Above n7.

If all or any of these are to be permissible nonetheless, then privacy protection itself is to be subordinated to other purposes in the law.

Secondly, the "loyalty" theme. Some, though by no means all,[45] professionals characteristically are regarded as being in fiduciary relationships with their clients. In consequence, the concerns of fiduciary law — and in particular that dimension of its liability rules relating to misuse of positions of trust — colour the perceptions we have of the propriety of some information uses made by at least some professionals. There is reason in this. Within the confines of their secrecy obligation, professionals are "trustees" of client information and, as with fiduciaries generally, they should not be allowed to misuse such knowledge, acquired by virtue of their position to their own or another's advantage or to their client's detriment.[46] And so the disinterested loyalty idea (which informs fiduciary law) provides a justification for proscribing, for example, the "insider trading" of solicitors, accountants and financial advisers using confidential, price sensitive client information. Equally, though seemingly uniquely, the present tendency in Australian authority is to use fiduciary law's conflict of duty and interest rule directly to protect "former-client" confidences where a firm of solicitors seeks to act for a later client with an adverse interest in a matter related to the former client retainer.[47] Yet again, perhaps the idea of loyalty in service explains the propriety of the type of consultation engaged in by the solicitor in *McKaskell v Benseman*[48] noted earlier.

But if the maintenance of client loyalty provides yet another strand in the scheme of professional secrecy, it, no more so than privacy protection, can claim to be an absolute determinant of secrecy's demands. The reason for this is that actual or apparent disloyalty in fact may not constitute actionable disloyalty in law, and that because the use made of client information, even if not justified by the public interest exception,[49] may nonetheless be consonant with, or else not offensive to, the particular public policy purposes of a given profession's secrecy obligation. Here I would merely suggest, for example, that the notification of claims by an insurance company on a confidential industry-wide register for the purpose of detecting insurance fraud would, in all probability, be held to be inoffensive, as such a practice, though involving a limited and controlled publication of client information, can properly be said both to reinforce the *uberrimae fidei* principle underlying the insurance relationship itself, and to protect the insuring public from imposition (through premium escalation and the like) resulting from insurance fraud. But, in making this suggestion one again comes back to the law's end purposes in imposing secrecy obligations. Instrumental purposes — privacy protection, loyalty maintenance and the like — are important, often decisive, in setting

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45 For example, banks.

46 For an excellent statement of fiduciary liability — though cast only in "profit" terms — see the judgment of Deane J in *Chan v Zacharia* (1983) 53 ALR 417 at 435.

47 See, eg, above n9.

48 Above n35.

49 The decision of the English Court of Appeal in *W v Egdell* above n3 would, most likely, be justified on this ground in this country.

secrecy's burden in individual cases. It is in the marginal case that they lose their authoritative value.

End purposes, necessarily, are profession specific. Here I will only make some brief, necessarily controversial, suggestions as to what these might be in relation to three of our professions — doctors, bankers and lawyers — and suggest in each instance how these might contrive, direct or limit the incidence of secrecy obligations.

(a) Doctors

Our admittedly slender case consideration of medical secrecy in common law countries is conducted at either of two levels. The one proceeds from the assertion that there is a "public interest in maintaining professional confidences"[50] ("professional" here being used simply as a generic term); that the secrecy duty this justifies is not absolute in character; and that such duty is "liable to be overridden where there is held to be a stronger public interest in disclosure".[51] The practical emphasis in this is less upon the reasons for secrecy than on those justifying disclosure. And so in some United States case law, for example, one finds acceptance of limited disclosures being justified by such countervailing public interests "as where the patient is a danger to himself or others or where the welfare of minor children is involved."[52] When viewed in the light of what is currently accepted in this country of the "public interest" defence,[53] this approach would give very little scope at all for our doctors to act otherwise than as strict secrecy requires:[54] disclosure could justifiably be made of serious patient wrongdoing,[55] but uncertainty in the defence beyond this leaves doctors themselves in a position of considerable uncertainty. In any event, the approach itself, when even a wide "balancing of public interests" view is taken of it,[56] does little to illuminate the actual burden of the public interest in maintaining medical secrecy — the very public interest against which other conflicting public interests should be weighed.

The alternate and, it is suggested, preferable approach first addresses medical secrecy itself. As the quotation from *X v Y*[57] in the opening part of this paper illustrates, it sees secrecy in instrumental terms: it is a concession necessarily given to enhance the effective public utilisation of health services so "to secure public as well as private health".[58] Seen in these terms, medical

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50 Cf *W v Egdell* above n3 at 849 per Bingham LJ; and cf *Halls v Mitchell* [1928] 2 DLR 97 at 105.

51 *W v Edgell* above n3 at 848; see also *Brown v Brooks* above n34.

52 Cf *Ace v State*, 553 NYS 2d 605 (1990) at 608; see also *Neal v Corning Glass Works Corp* above n35.

53 See above.

54 The AMA Code of Ethics above n27 6.2 is to like effect.

55 Cf *Bryson v Tillinghurst*, 749 P 2d 110 (1988); *Brown v Brooks* above n34.

56 As seems now the case in the United Kingdom: see *W v Egdell* above n3.

57 Above n3 at 653.

58 Ibid. This view was affirmed in *W v Egdell* above n3 at 846 per Brown P; see also Parnet, W, "Public Health Protection and the Privacy of Medical Records" (1981) 16 *Harv CR-CL LR* 265.

secrecy suggests its own relativity. To the extent that insistence upon it would be positively inimical to its health goals, then, quite apart from the "public interest" defence, that goal itself would seem to provide secrecy's legal limits — and, in consequence, the justification for such disclosures as are consonant with the maintenance of that health goal. Significantly, the profession's own ethical rules seem consistent at least with this "health purpose" view of its secrecy obligation.[59] So conceived, medical secrecy has *intrinsic limits* — limits set by its own reason and purpose. The public interest which sustains it would in consequence provide justification for limited, though unauthorised, disclosures of information relating to the patient's condition, actions, et cetera, where such are reasonably necessary to protect the health, physical safety and well being of the patient[60] or of some other person or persons.[61]

To revert to the examples earlier given of a doctor's disclosure to a spouse-to-be that the patient suffers from a genetically transmissible disease, or of disclosure to an employer that a patient's condition renders the patient a danger to themselves or others in the workplace, such disclosures would, on the view being put, be prima facie unexceptionable. They would be consistent with, and in furtherance of, the health maintenance purposes which give medical secrecy the justification it has. To put the matter in general terms, disclosure here is not justified by a countervailing public interest,[62] but by the very public interest which sustains medical secrecy itself.

(b) Banks

Judicial explanation of the purpose of banker-customer secrecy seems to be confined to the consideration that the "credit of the customer depends very largely upon the strict observance of that confidence".[63] Without assuming that this can be treated as exhaustive or definitive, it is nonetheless a sufficient indication of purpose to provide a basis for the evaluation of one of banking's more contentious practices — the giving of credit references without customer consent. Does this practice constitute a breach of confidence? Or is it compatible with the actual secrecy obligation of banks? The questions have been given heightened significance because of the 1990 extension to banks of the Commonwealth's *Privacy Act* 1988 and, in particular, of its Information Privacy Principles. For its part the banking industry has tended to assert — or at least would like to believe — that the practice is in any event lawfully authorised[64] either because it should be taken

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59 See, eg, the disclosure rules of the United Kingdom General Medical Council set out in *W v Egdell* above n3 at 843-44; see also *Duncan v Medical Practitioners Disciplinary Committee* [1986] 1 NZLR 513 at 520-21; see AMA, Code of Ethics above n27 6.2.2.

60 For example, disclosures to those in whose care the patient is; cf *Furniss v Fitchett* [1958] NZLR 396 at 405-407.

61 In the United States, medical malpractice and "duty to warn" cases have transformed this justification for disclosure into an obligation of disclosure in some instances: see, eg, *Tarasoff v Regents of the University of California*, 551 P 2d 334 (1976); see also Neave, above n7.

62 This may be so in other circumstances, eg, so as to enable serious criminal activity to be investigated: see *Brown v Brooks* above n34.

63 Above n2 at 474 per Bankes LJ.

64 Cf Information Privacy Principle 11 (1) (d).

to be founded on the implied consent of the customer,[65] or else because it has achieved the status of a custom.[66] Both of these justifications are highly contentious.

Because of developments in other legal doctrines — particularly in equity's unconscionable dealings jurisdiction[67] and in suretyship's "special circumstances" doctrine[68] — it increasingly is bearing in on us, not only that banks (the common defendants in cases involving these doctrines) may in some circumstances properly be expected to disclose credit related information without a customer's consent, but also that a disclosure appropriately so made will not of itself constitute an actionable breach of confidence.[69] Common characteristics in cases raising either of the above doctrines in the banking context (and they involve for the most part the taking by banks of third-party guarantees) are that the customer stands to benefit from the transaction itself, and that information relating to his or her credit, though likely to have a direct bearing on the intrinsic fairness of the transaction, will in the circumstances probably be unknown to the person providing a benefit to the customer in the transaction — for example, through a guarantee. From these cases one can say at least that there may be circumstances where the provision of reliable credit information to a third party is to be allowed to prevail over the maintenance of credit secrecy.

In making a credit application to a third party, a person ordinarily makes his or her own credit-worthiness a matter basic to the dealing. Notwithstanding that the application itself identifies the applicant's bank, does the credit maintenance purpose of a banker's duty extend to precluding the provision of reliable credit information to the third party on request?[70] Beyond such doctrines as mentioned above, is the customer alone allowed to make representations (express or implied) as to his or her own credit? Or can the law's purpose be said to be that, while a customer ordinarily is entitled to credit-privacy, when that customer puts his or her credit in issue in circumstances that makes it reasonable for a potential creditor to apply to that customer's bank for verification of the customer's credit-worthiness, the bank, irrespective of customer authorisation, is entitled to provide a credit reference, and this because the nature of the transaction into which the customer has chosen to enter is one in which the law, for reasons of

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65 Seemingly an implication which is to be drawn unless expressly disavowed.

66 On bankers, references see generally Weaver, G A and Craigie, C R, *Law Relating to Banker and Customer in Australia* (2nd edn, 1990) at 2631 ff.

67 For example, *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447.

68 For example, *Goodwin v National Bank of Australasia Ltd* (1968) 117 CLR 173.

69 Cf *Westpac Banking Corp v Robinson* (1990) ASC 56-002; the emphasis given the secrecy obligation in *Kabwand Pty Ltd v National Australia Bank Ltd* (1989) 11 ATPR 40-950 seems incompatible with the demands of the unconscionable dealings and "special circumstances" doctrines.

70 I here exclude from consideration any question of liability in negligence or fraud arising from the provision of inaccurate credit information: see, eg, *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465; *R H Brown & Co v Bank of New South Wales* [1971] WAR 201, (1972) 126 CLR 337, but cf *Kureyo Trading Ltd v Acme Garment Co (1975) Ltd* (1988) 51 DLR (4th) 334.

creditor-protection, would wish to promote reliability in credit information? Does the customer's reliance on his or her own credit render credit verification by the bank compatible with the purpose underlying banker-customer secrecy?

My intention here is not to add yet another opinion on this long-standing controversy in banking practice. Rather, and consistent with the theme of this paper, it is to suggest that the proper resolution of that controversy is to be found, not in the mechanical application to banks of the conventional formula of secrecy law, nor in the colourable manipulation of secrecy's consent requirement, but in an evaluation of the compatibility, the consonance of this practice with the very purpose justifying banker-customer secrecy.

It is, of course, well accepted that despite the importance to be attributed to protecting the customer's credit, the customer's interest cannot in all circumstances and for all purposes be given primacy over its bank's. The bank, for example, may *disclose* a customer's account details to an extent reasonable and proper for its own protection — as in suing for an overdraft.[71] But can it in any circumstances merely *use* customer information for its own protection without customer authorisation? Obviously it cannot "insider trade" for the purpose of averting a loss on its own investment in a customer. But can it, for example, use information about customer A for the purpose of determining how it will deal with customer B, who applies for finance in respect of a dealing with customer A? This example is given simply for the purpose of questioning when, if at all, will steps taken to protect the bank's own economic interests be said to be beyond what a customer can reasonably be allowed to expect of a bank in protecting the customer's interests. To crystallise this question I quote without further comment observations in the controversial United States decision, *Washington Steel Corp v T W Corp.*[72]

> In making loans, unless it is to take imprudent risks with the funds on deposit with the bank, the commercial loan department must be free to make full use of the information available to it. If, for example, a competitor of a borrower seeks a loan for a purpose which the loan department knows, from information in its files supplied by that borrower, is preordained to failure, it should hardly be permitted, let alone required, to ignore that information, finance a foolhardy venture, and write off a bad loan. Thus, we hold only that the use within that loan department of information received from one borrower, in evaluating a loan to another borrower, does not, without more, state a cause of action against the bank.

(c) Lawyers

Consideration of lawyer-client secrecy, for understandable reasons, tends to focus on legal professional privilege. But whatever the precise reach of that doctrine,[73] it is well accepted that alongside it, and usually far more extensive than it in its information coverage and effect, is the lawyer's "professional"

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71 See, eg, above n2 at 473, 481, 486; *Sunderland v Barclays Bank* (1938) 5 Legal Decisions Affecting Bankers 163.

72 Above n39.

73 See *Baker v Campbell* above n30.

duty of secrecy.[74] If privilege represents the intense core of lawyer-client secrecy, it also demonstrates in decisive fashion that the secrecy concession made to a client is sustained by public interest considerations going beyond the maintenance of confidentiality as such.[75] Its rationale in this sphere contains parallels with that informing medical secrecy in that:

> it promotes the public interest because it assists and enhances the administration of justice by facilitating the representation of clients by legal advisers. This it does by keeping secret their communications, thereby inducing the client to retain the solicitor and seek his advice, and encouraging the client to make a full and frank disclosure of the relevant circumstances to the solicitor.[76]

While for the purposes of, and within the scope of, the law of privilege this rationale attracts particular consequences in the law in relation to the giving of evidence and the production of documents — consequences which can, in exceptional circumstances, be overridden by "higher" public interests[77] — the rationale itself is of pervasive importance in explaining the purpose of the professional secrecy obligation generally,[78] an importance becoming the more apparent today in the emerging criteria now being invoked throughout the common law world to protect former-client confidences in law firm disqualification cases.[79]

The disqualification cases will be considered in some detail in the next section of this paper. As will be seen, they in their own way yet again indicate that the public interests informing the particular secrecy obligation of a profession, themselves contrive the reach, and the limits to be given that profession's obligation. This is the essential point of this part of the paper.

Speaking in another context, Sir Robin Cooke has observed that "[w]e are deluding ourselves if we are seeking to solve problems by formulae".[80] This is particularly so of professional secrecy. A professional's obligation is the servant of public interests. They, rather than conventional formulae of secrecy law need to be understood if the obligation itself is to be understood on a profession by profession basis. Here I have only used three professions by way of example, to suggest why this, ultimately, is so.

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74 See id at 395 per Gibbs CJ.

75 A theme stressed in the judgments in *Baker v Campbell* id.

76 *Grant v Downs* (1976) 135 CLR 674 at 685; see also *Waterford v Commonwealth* (1987) 71 ALR 673.

77 See *Attorney-General for the Northern Territory v Kearney* (1985) 61 ALR 55; see also *Finers (a firm) v Miro* [1991] 1 WLR 35.

78 See, eg, the comments of Deane J in *Baker v Campbell* above n30 at 433.

79 For a useful international survey see the judgment of the Supreme Court of Canada above n4. The position in England has recently been brought into line with Commonwealth trends in *Re a firm of solicitors* [1992] 1 All ER 353; and see *Mallesons Stephen Jaques v KPMG Peat Marwick* above n9.

80 "Tort Illusions", in Finn, P D, (ed), *Essays on Torts* (1989) at 75.

3. *Secrecy, Firms and Companies*[81]

One of the more intractable problems in contemporary secrecy law lies in the appropriate adaptation of its burden to the modern forms of business structure through which professional practice — and for that matter commercial activity — commonly is conducted. The value systems, the human and social needs, served by professional secrecy in no way depend for their vitality upon the business structure adopted in the rendering of professional services. But the paradigm of the "professional relationship" presupposed in the law itself is very much that of the sole practitioner dealing directly and personally with an individual client, and relying upon his or her own memory or else a relatively unsophisticated record keeping system for such knowledge as is possessed of the affairs, et cetera of that client. This no longer reflects our world. The sole practitioner may still be with us. But so also now are the large professional partnerships with regional, national and international offices, and the multi-function business providing diverse client services, some of which may well be relevantly "professional". To be added to this are the capacities we now possess to acquire, to store, and to retrieve information on scales which even in recent times were beyond our contemplation.

There may well be distinct economic incentives — and consequential social benefits — which accrue from size and diversification in professional practices and businesses. What, though, is becoming starkly apparent is that a range of client-liability hazards follow almost inevitably in their wake. These hazards have their origins (a) in factual phenomena commonly resulting from size and diversification — for example, the scales upon which client information is gathered, management practices which produce de facto fragmentation of the component units of a firm or business, client proliferation, et cetera; and (b) in the conventional understanding of some number of legal doctrines (for example, that an adviser is obliged to make available to a client *all* relevant information in his or her possession),[82] which gives those doctrines a potentially onerous impact on large firms and businesses. Client proliferation is of particular moment. It increases the possibility of a firm or company (often unwittingly) incurring conflicting obligations to clients whom it services, sometimes simultaneously, more often sequentially. Principles of company law[83] and of partnership law,[84] of

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81 The adaptation of secrecy and fiduciary law to the circumstances of the large professional partnership and the multi-function business enterprise has been considered in detail by myself in "Conflicts of Interest and Professionals" in *Professional Responsibility* (1987) and "Fiduciary Law and the Modern Commercial World" in Oxford Law Symposium, *Commercial Aspects of Trusts and Fiduciary Obligations*, September 1991 (to be published).

82 Cf *Spector v Ageda* [1973] Ch 30 at 48; *Thevanez and Thevanez* (1986) FLC 75, 444.

83 For example, *Harrods Ltd v Lemon* [1931] 2 KB 157; *Corneau v Canada Permanent Trust Co*, 27 NBR (2d) 126 (1980); *Standard Investments Ltd v Canadian Imperial Bank of Commerce* (1985) 22 DLR (4th) 410.

84 For example, *Mallesons Stephen Jaques v KPMG Peat Marwick* above n9; *Davey v Woolley, Hames, Dale & Dingwall* (1983) 133 DLR (3d) 647; *Thevanez and Thevanez* above n82.

fiduciary law[85] and of negligence,[86] rules governing advice giving[87] and protection against fraudulent,[88] misleading and deceptive conduct can all be implicated in the web of possible liabilities that client conflicts create. But of first importance is the law of secrecy, and this because it is the secrecy obligation owed in one client relationship which so often occasions the conflict with the obligations owed in another.

This is not the place to explore the morass of problems arising from client conflicts in which secrecy law can seriously be implicated. Here I will focus on one only, and this in a way which brings out the professional responsibility theme of this seminar. Best known to law firms,[89] it is the problem of "former client" conflict. While it can have a number of variants,[90] in its simplest form it involves a firm, having acted for a client in one retainer, later accepting a retainer from another client with an adverse interest in a matter related to that of the former retainer.[91] By way of background to this, it is necessary to note one principle of partnership law. It is that, unless a partnership relationship is terminated ad hoc for the particular matter, a person who engages the services of a partner engages the services of the partnership and not merely of the person who actually renders the service.[92]

While "former client" conflicts can give rise to possible liabilities to a second client because of a firm's inability to use in the second retainer confidential information acquired in the first,[93] the matter to be considered here is the extent to which the secrecy obligation owed to the first client affects the ability of a firm to accept and act in a later retainer for a client with an interest adverse to the first client. Though some Australian courts are now tending to characterise the issue raised in terms which draw on fiduciary law's "conflict of duty and interest" rule,[94] it is, quintessentially, one as to the disability which should be imposed on the professional to secure the integrity of "confidences" acquired in the first retainer, given (a) the public interests which inform the duty of secrecy owed to the first client; and (b) such countervailing public interests as there may be both in client-choice of their

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85 The cases particularly of law firms acting "two ways" are now numerous: see, eg, *Farrington v Rowe, McBride & Partners* [1985] 1 NZLR 83.

86 For example, *How v Carman* [1931] SASR 413; and see the important unreported decision of *Mid-Northern Fertilizers Ltd v Connel, Lamb, Gerard & Co*, H Ct of NZ 18 September 1986 Thorp J.

87 For example, above n82; *Moody v Cox & Hatt* [1917] 2 Ch 71.

88 For example, *Black v Shearson, Hammill & Co*, 72 Cal Rptr 157 (1968).

89 Though by no means their exclusive concern.

90 Cf above n4; *National Mutual Holdings Pty Ltd v Sentry Corp* above n9.

91 The unsatisfactory reasoning of Lee J in *Freuhauf Finance Corporation Pty Ltd v Feez Ruthning (a firm)* [1991] 1 Qd R 558, is perhaps best explained away on the basis that the respective retainers in that case did not, relevantly, involve any "related matter".

92 *McNaughton v Tauranga County Council* (No 2) (1987) 12 NZTPA 429; *Davey v Woolley, Hames, Dale & Dingwall* above n84; *D & J Constructions Pty Ltd v Head* (1987) 9 NSWLR 118 at 122-123; *Mallesons Stephen Jaques v KPMG Peat Marwick* above n9.

93 Cf *North & South Trust Co v Berkeley* [1971] 1 WLR 470; *Moody v Cox & Hatt* above n87.

94 See, eg, above n9.

representatives and in facilitating the use (and mobility) of our professional resources.[95]

Law Firms

Until quite recently, an early twentieth century decision of the English Court of Appeal — *Rakusen v Ellis, Munday & Clarke*[96] — comfortably cocooned lawyers and law firms from significant jeopardy in "former client" cases. Concerned more with the individual integrity of the law's own court officers than with public perceptions of professional behaviour,[97] Cozens-Hardy MR in that case felt able to accept that —

> . . . solicitors of the highest honour and integrity may frequently be perfectly able to act in the *same matter* for a new client, and at the same time may be perfectly able to avoid disclosing secrets [of the former client] without putting any strain upon their memory, conscience, or integrity.[98]

In so benign a climate, the test the Court of Appeal propounded — or at least was subsequently interpreted as propounding[99] — limited a first client's capacity to object to a law firm's acting in a second retainer to cases where, in the circumstances, there was a "*probability* of real mischief" occurring (that is, of misuse of confidential information of the first client).[100] Despite earlier and more stringent Australian authority,[101] the *Rakusen* test became the accepted orthodoxy in this country — as also elsewhere in the Commonwealth.[102]

The test was, of course, flawed at its inception, and made the more obviously so by later developments in the law of breach of confidence. First, it paid no heed to the fact that use as distinct from disclosure is offensive. Nor did it acknowledge the now well accepted phenomenon of "unconscious plagiarism" (unconscious use of information).[103] United States courts early acknowledged the latter to be a real possibility to be guarded against,[104] as did Lilley CJ in a perceptive judgment in the Full Court of Queensland in *Mills v Day Dawn Block Gold Mining Co Ltd.*[105] Secondly, though not a matter of concern to the first client, it contradicted the duty a lawyer has to make available *all* relevant information to the second client — an obligation which has no respect for duties of secrecy.[106] Thirdly, of fundamental

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95 Cf above n4.
96 [1912] 1 Ch 831.
97 Cf the observations made in *Magro and Magro* (1989) FLC 92-005.
98 Above n96 at 839, emphasis added.
99 There were differences between the formulations given in the three separate judgments: see the comments of Parker LJ in *Re a firm of solicitors* above n79 at 359-60.
100 For a very useful international survey see above n4.
101 *Mills v Day Dawn Block Gold Mining Co Ltd* (1882) 1 QLJR 62.
102 See above n4.
103 On which see, eg, *Talbot v General Television Corp* [1980] VR 224.
104 For example, *T C & Theatre Corp v Warner Bros Pictures*, 113 F Supp 265 (1953).
105 Above n101.
106 See above n82; above n87; *O'Reilly v Law Society of New South Wales* (1991) 24 NSWLR 204 at 213-15. The terms of retainers with second clients now seek to address this problem directly through express agreements to exclude from the advice information subject to prior secrecy obligations.

importance, it undermined the very public interest informing both client secrecy and the related doctrine of legal professional privilege.[107] In placing the onus on the first client to prove not merely that "protected information" was acquired by the lawyer, but also that there was a real likelihood of some or all of it being misused, it in effect tore "aside the protective cloak drawn about the lawyer-client relationship."[108] Put in jeopardy was the very public confidence that secrecy — and privilege — sought to secure. This third objection is the one of note for the purposes of this paper. It goes to the heart of the matter.

The *Rakusen* test has long since been abandoned in United States jurisprudence.[109] It has recently been disavowed by the Supreme Court of Canada.[110] It has been severely qualified by the Court of Appeal in England in a decision in May 1991.[111] And beginning with a decision of Fredrico J in the Family Court in 1986,[112] its authority in this country has been put in extreme jeopardy.[113]

The most significant recent re-evaluation of it is to be found in the Supreme Court of Canada's decision in *MacDonald Estate v Martin*,[114] in proceedings, to disqualify a law firm from continuing to act for the plaintiff in proceedings in circumstances where a junior solicitor, having worked on the defendant's file in another law firm, later joined the plaintiff's firm, though she did not then participate in the matter on the plaintiff's behalf. All seven judges of the Court accepted that "three competing values" were in issue:

> 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.[115]

With primacy to be given the first of these values, the *Rakusen* test was rejected categorically — although the Court divided on whether an absolute prohibition should be imposed on a firm, irrespective of its size, where it acts

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107 Cf *Baker v Campbell* above n30; *Re Regina and Speed* (1983) 3 DLR (4th) 247 at 249.

108 Above n104. While it may be said that this effect can be offset in some measure by using in camera proceedings and the like to maintain secrecy — a possibility suggested by Lord Eldon in *Bircheno v Thorp* (1904) 37 ER 864 — United States courts again have acknowledged such expedients to be unrealistic if the prior retainer involved a matter of some magnitude and complexity: cf *Consolidated Theatres Inc v Warner Bros Circuit Management Corp*, 216 F 2d 920 (1954).

109 See "Conflicts of Interest in the Legal Profession", (1981) 94 *Harv LR* 1244; American Bar Association Model Rules Rule 1.9; Gross, M, "The Long Process of Change: The 1990 Amendments to the New York Code of Professional Responsibility" (1991) 18 *Fordham Urban LJ* 283 at 314 ff.

110 *MacDonald Estate v Martin* above n4.

111 *Re a firm of solicitors* above n79.

112 *Thevanez and Thevanez* above n82.

113 It has of recent times been followed in *D & J Constructions Pty Ltd v Head* above n92 and *In the marriage of A and B* [1990] FLC 77,839. It has been rejected or doubted in *Mallesons Stephen Jaques v KPMG Peat Marwick* above n9 and *National Mutual Holdings Pty Ltd v Sentry Corp* above n9 . See also *Magro and Magro* above n97.

114 Above n4.

115 Id at 711.

for a second client with an adverse interest in a matter "sufficiently related"[116] to the prior retainer.

The *Rakuser* test, I would suggest, is an untenable one. Its intrinsic flaws, but most importantly, its subversive effect on the public interest which sustains legal professional secrecy, warrant it being accorded no further place in our law. Consistent with the value we have attributed to that public interest — and our more recent privilege cases are testimony to this[117] — a test more reassuring to the public and to those who avail of the professional services of lawyers, must be embraced. It is in the settling of that test and, in particular, of the subsidiary rules which should govern its application to partnerships, that is the pressing issue.

In addressing that issue three questions need be answered. Here I can only advert to them briefly though my own biases in their answering will be apparent enough.

1. *Should a first client, as a precondition for seeking relief, be obliged positively to prove that confidential information was acquired in the first retainer?*

Consistent with the law's policy of utilising secrecy to induce the retaining of solicitors and to "encourage the client to make a full and frank disclosure of the relevant circumstances to the solicitor",[118] there is, I would suggest, a compelling argument in favour of a court's simply inferring that "confidential information was imparted"[119] without requiring the client positively to point to and identify that information.[120] Such a course was endorsed in the Supreme Court of Canada, as also in some, though by no means all, of the slender Australian case authority we have.[121] It should, however, be noted that a thin majority in the Supreme Court of Canada was prepared to allow a solicitor to rebut that inference, though not in a way that would reveal "the specifics" of the client's communications — a "heavy burden", it was acknowledged.[122]

2. *What degree of relationship should exist between the subject matter of the two retainers?*

This, in a sense, could be said to be the fundamental question, for it bears directly upon such reasonable apprehension as the first client could entertain

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116 Cf the "substantially related" formula used in United States case law and professional conduct rules.

117 See, eg, *Baker v Campbell* above n30; but cf *Corporate Affairs Commission of New South Wales v Yuill* above n30.

118 *Grant v Downs* above n76 at 685.

119 Above n4 at 725.

120 The contrary course would require the revelation of that which secrecy aims to preclude and could require the court to choose between conflicting testimony of lawyer and client. On which see the views of Lilley CJ in *Mills v Day Dawn Block Gold Mining Co Ltd* above n101 at 63. See also *In the Marriage of Griffis* (1991) 14 Fam LR 782.

121 See *Mills* case ibid and *Magro and Magro* above n97 at 77,183.

122 Above n4 at 725.

of the lawyer's possible actions in the second retainer, given what has been ascertained from the first. Information obtained by a solicitor in performing a domestic conveyance for a client is, for example, unlikely to be seen as constituting any impediment to that solicitor's later acting against that client in a motor vehicle-negligence action, though not necessarily so in matrimonial proceedings involving a property dispute.[123] While United States and now Canadian authority tend to approach this question by resort to formulae which prescribe a necessary degree of relatedness between the retainers — for example, "substantially related"[124] or "sufficiently related"[125] — it is here that the emerging tendency in Australian cases to invoke the conflict of duty and interest analysis of fiduciary law is apparent. It subsumes the "relatedness" question within the fiduciary one of whether "there is a real and sensible possibility that the solicitor's duty and interest might conflict".[126] So in *Mallesons Stephen Jaques v KPMG Peat Marwick*,[127] for example, Ipp J observed that:

> . . . if, by a solicitor acting for a new client, there is a real and sensible possibility that his interest in advancing the case of the new client might conflict with his duty to keep information given to him by the former client confidential, or to refrain from using that information to the detriment of the former client, then an injunction will lie.

The attractions here to a fiduciary analysis are (i) its replacement of *Rakusen's* "probability" test by a "possibility" test with which we already have some familiarity; (ii) its known emphasis upon appearances — a matter which relates directly to the vital issue of maintaining public confidence in the justice system; and (iii) its avoidance of possible controversies arising out of the appropriateness of using a particular "relatedness" based test to resolve the matter.

3. *When the first retainer is with a partnership, should the client-information acquired in that retainer by one partner be imputed to all members of the firm?*

Given the principle of partnership law that when a client engages the services of a partner, the client engages the firm itself, should the consequence be accepted, as it has by the American Bar Association in its Model Rules (1989), that "a firm of lawyers is essentially one lawyer for the purposes of the rules governing loyalty to the client". In consequence "[w]hile lawyers are associated in a firm, none of them shall knowingly represent a client where any one of them practising alone would be prohibited from so doing."[128]

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123 Cf *Thevanez and Thevanez* above n82 at 75,444.

124 Cf American Bar Association Model Rules Rule 1.9 (1989); and see *T C Theatre Corp v Warner Bros Pictures Inc* above n104 at 268-69.

125 *MacDonald Estate v Martin* [1991] above n4 at 725.

126 *Mallesons Stephen Jaques v KPMG Peat Marwick* above n9 at 11; see also *National Mutual Holdings Pty Ltd v Sentry Corp* above n9 at 558 ff; *In the Marriage of Griffis* above n120.

127 Above n9.

128 Rule 1.10.

This conclusion has been said to be further sustained by the considerations (a) of the "danger of inadvertent disclosures of confidences inherent in the everyday interchange of ideas and discussion of problems amongst law partners"; and (b) that "even the appearance of impropriety" should be avoided.[129]

Here, needless to say, is one of the most controversial questions about secrecy's burden, for acceptance of the above view involves an imputation of client information to all members of a firm — information that they carry with them as they change or amalgamate firms. The value we are to place upon secrecy's public interest comes into contention at this point in a particularly stark form.

It was on this very issue that the Supreme Court of Canada divided in *MacDonald Estate v Martin*,[130] the majority, while accepting the importance of secrecy's public interest purpose, being of opinion that imputation "is unrealistic in the era of the mega-firm";[131] the minority, that such imputation should be irrebuttably presumed "if public confidence in the administration of justice is to be maintained".[132] The practical effect of the difference may however be more apparent than real, for the majority in the event adopted a rebuttable presumption of "shared confidences" — a presumption the court should give effect to:

> . . . unless satisfied on the basis of clear and convincing evidence, that all reasonable measures have been taken to ensure that no disclosure will occur by the "tainted" lawyer to the member or members of the firm who are engaged against the former client. Such reasonable measures would include institutional mechanisms such as "Chinese Walls" and "cones of silence".[133]

Significantly, and because of the strength of the public interest in maintaining public confidence in the integrity of the profession, the majority conceded that they would not foresee evidence of such "screening mechanisms" prevailing save in exceptional circumstances.[134] A similar conclusion as to the likely efficacy of "Chinese Walls" in this context recently has been arrived at by the English Court of Appeal.[135]

It is beyond the scope of this paper to traverse the varied questions raised by the imputation debate. There are two points I should, however, emphasise. First, and again consistent with the theme of this paper, it is in the evaluation we make of public interests and how best these are to be served and — where necessary — reconciled, that our resolution of this debate should be found. Secondly, if in the event we opt for what is in essence a rebuttable presumption of shared confidences, Commonwealth courts — and not only in this country — have signalled that "Chinese Wall" defences will be viewed

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129 *National Mutual Holdings Pty Ltd v Sentry Corp* above n9 at 557 per Gummow J; see also *Thevanez and Thevanez* above n82 at 444 and *D & J Constructions Pty Ltd v Head* above n92 at 122-23.

130 Above n4.

131 Id at 725.

132 Id at 730.

133 Id at 726.

134 Ibid.

135 *In re a firm of solicitors* above n79.

with little sympathy (save in truly exceptional cases).[136] That lack of sympathy, if reflecting an evident scepticism about the efficacy of Walls themselves, seems also to be informed in some measure by the public policy implications of allowing a Wall defence to law firms, even if the Wall itself could be shown to be effective. But by not totally discountenancing Walls, the courts have left open a corridor of opportunity for their use (and possibly more readily countenanced use) in other professions, for example, accountancy, where the relevant public interests may well be arrayed and balanced differently.

Conclusions

I forshadowed that my progress would be from simplicity to complexity. That complexity is, in part at least, the product of the phenomenon with which we have been dealing. But it is attributable, equally, to our less than perfect recognition and understanding of the values and interests we seek to promote and protect through professional secrecy. I am conscious that, in much of what I have said, I have simply asserted or suggested what are the law's purposes. My object, though, has not been to conclude inquiry but to suggest the vital future need for it. We presently labour in some degree of ignorance. It is little wonder that in varying degrees we have taken refuge in legal formalism and in professional paternalism if not professional self-interest. We need to understand the law's "why" to comprehend what should be its "is".

Our end in imposing professional standards — be these in secret maintenance or otherwise — lies ultimately in securing the professional function itself and in realising that function's public purposes. Professional regulation, necessarily, has to be considered in this light. And if, on occasion, we appear to be too exacting in our demands of professionals, if, on occasion, we appear to be over-sensitive to apprehended public reaction to particular forms of professional behaviour, it is salutary to remind ourselves of the view Sir Owen Dixon expressed in *Jesting Pilate*:[137]

> Unless high standards of conduct are maintained by those who pursue a profession requiring great skill begotten of special knowledge, the trust and confidence of the very community that is to be served is lost and thus the function of the profession is frustrated.

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136 See *Mallesons Stephen Jaques v KPMG Peat Marwick* above n9; *D & J Constructions Pty Ltd v Head* above n92; see the New Zealand cases referred to in Dean, M and Finlayson, C, "Conflicts of Interest" [1990] *NZLJ* 43; *In re a firm of solicitors* above n79; *MacDonald Estate v Martin* above n4. There is an extensive United States journal literature on the "Chinese Wall" defence to law firm disqualification: see, eg, 128 *Univ Penn LR* 677 (1980); 20 *Journal of Law Reform* 245 (1986). There would, however, appear to be some softening in attitude to "Chinese Walls" in some United States jurisdictions: see, eg, *Margiotta v McLaren*, 115 BR 922 (1990).

137 *Jesting Pilate* (1965) at 192.