

**THE CONCEPT OF THE CHINESE WALL IN LAW: A
MULTI-JURISDICTIONAL APPROACH TO CLIENT
CONFIDENTIALITY AND CONFLICT OF INTEREST**

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THE CONCEPT OF THE CHINESE WALL IN LAW: A MULTI-JURISDICTIONAL APPROACH TO CLIENT CONFIDENTIALITY AND CONFLICT OF INTEREST.

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ABSTRACT

Confidentiality is one of the core assets lawyers offer to clients. It assures clients that all information obtained from the client by the lawyer in the pursuit of justice or in commercial transactions will not be disclosed to a third party without the client's permission. There are instances where lawyers may have two or more clients who are players in the same sector or have the same line of business and, unfortunately, have a dispute. A dilemma is presented; whom does the lawyer represent? What about information gotten from the other client in the course of their previous relationship? Will the knowledge of such privileged information be prejudicial to the current dispute? This dilemma is called a conflict of interest. This article seeks to proffer a perusal of the concept of the Chinese Wall, provide multi-jurisdictional contexts on its applicability, review the position of Nigerian Law, and propose recommendations.

1.0. INTRODUCTION

A conflict of interest, as defined by the People's Law Dictionary,¹ means a situation in which a person owes a duty to more than one person or organisation but cannot do justice to the actual or potentially adverse interests of both parties. A Chinese Wall or an Ethical Wall is a concept used in certain jurisdictions as an antidote to a conflict of interest and, more specifically, to maintain client confidentiality. A Chinese Wall is a procedure used in legal practice by law firms to create a barrier between two or more clients who are in dispute and have had or currently have an existing lawyer-client relationship with the firm. This procedure is done to prevent the exchange of information between lawyers in the firm representing both sides of the dispute. While it is a recognised

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¹Gerald and Kathleen Hill, "The People's Law Dictionary", available at <https://dictionary.law.com/> (accessed 25 November 2022).

remedy to a conflict of interest in certain jurisdictions, the Chinese Wall is yet to be adopted by law firms in Nigeria. The Rules of Professional Conduct and the courts give strict directions to avoid a conflict of interest.

In essence, when two clients with conflicting interests brief a firm, a Chinese Wall is set up if the latter client is also a party to the dispute and insists on using the same firm after disclosure by the firm of a possible conflict of interest. Consequently, two teams of lawyers are set up to work separately, not minding the fact that they all work for the same employer. This helps to maintain client confidentiality and prevent collusion. In practical terms, a Chinese Wall is set up by either of the following methods:²

- a. Storing confidential information in different rooms under lock and key or surveillance;
- b. Issuing written guidelines on client confidentiality as company policy;
- c. Placing two teams in separate parts of the office building or a part of the building with restricted access;
- d. Where the law firm uses a central computer database, using separate file servers to store information and ring-fencing the files using passwords and firewalls. The use of a secure cloud computing service is also practicable.

In **Bolkiah v KPMG**,³ the House of Lords (now the United Kingdom Supreme Court) held that Klynveld Peat Marwick Goerdeler (KPMG) did not satisfy the onerous task of proving that the information gotten from one of their previous clients was not of prejudicial consequence, having been commissioned to investigate him. The facts of the case surround Prince Jefri Bolkiah, a member of the Brunei Royal Family, suing renowned professional services firm KPMG, which had been commissioned to investigate Bolkiah by the Brunei Investment Agency (BIA). It was alleged that Prince Bolkiah

² P. Smith, “Chinese Walls: Maintaining Client Confidentiality” available at: <https://uk.practicallaw.thomsonreuters.com/> (accessed 31 August 2022).

³ *Bolkiah v KPMG* (1999) 2 A.C. 222.

had been involved in certain unethical dealings as he was the one-time head of the agency. KPMG had acted for Prince Bolkiah in a separate matter some years before this dispute. The prince brought an injunction to restrain KPMG from acting on behalf of the agency before the court. The reason was to highlight a conflict of interest, being sceptical that certain knowledge of his finances that had come into KPMG's knowledge could be leaked to the other party. KPMG had set up a Chinese Wall by ensuring that persons who worked on the BIA investigation and had confidential information about Prince Jefri's previous engagement with the firm did not work on the issue.

Additionally, KPMG argued that BIA had waived its rights to any confidential information in the possession of the firm. The Supreme Court's decision mirrored the decision of the lower Court, stating the scepticism of the Court on the effectiveness of Chinese Walls and citing the case of *Re a Firm of Solicitors*⁴ as precedent.

2.0. JURISDICTIONAL APPLICABILITY OF THE CHINESE WALL

The application of the Chinese Wall in legal practice differs from one jurisdiction to the other. It is necessary at this point to take a brief forage into certain jurisdictions to understand the applicability of the concept, as well as the rationale behind it.

2.1. United States of America

In the United States of America (USA), legal practice is largely dependent on the state in question. While certain laws are applicable across states, the states have their distinct bar associations with their peculiarities. The American Bar Association (A.B.A) Rules of Professional Conduct,⁵ provides strict rules on conflict of interest and client confidentiality, thus providing a limit for the use of a Chinese Wall.

⁴ *Re a Firm of Solicitors* [1992] 1 ALL ER 353.

⁵ American Bar Association Model Rules 1983 as amended by the Ethics 2000 Commission.

A concurrent conflict of interest exists if:⁶

- a. The representation of one client would be directly averse to another client.⁷
- b. There is a significant risk that the lawyer's responsibilities will materially limit the representation of one or more clients to another client, a former client, or a third person or by a personal interest of the lawyer.⁸

The rule goes on to state that where a concurrent conflict of interest exists, a lawyer may represent the clients if:

- a. The lawyer reasonably believes that he or she will be able to provide competent and diligent representation to each affected client;
- b. The representation is not prohibited by law;
- c. The representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceedings before a tribunal; and
- d. Each affected client gives informed consent, evidenced in writing.⁹

The ABA Rules provide that while lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practising alone would be prohibited from doing so by Rules 1.7 or 1.9¹⁰ unless the prohibition is based on a personal interest of the lawyer not eligible to represent and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.¹¹

It follows from the above that while the use of a Chinese Wall is generally permissible, there are exceptions barring the procedure in certain situations. In practice, for a lawyer practising in the US, the starting point would be the Rules of Professional Conduct in the

⁶ ABA Rules of Professional Conduct, 1983, Rule 1.7 (a), (b).

⁷ ABA Rules of Professional Conduct, 1983, Rule (17) (a)(1).

⁸ ABA Rules of Professional Conduct, 1983, Rule (17) (a) (2).

⁹ ABA Rules of Professional Conduct, 1983, Rule 1.7 (b).

¹⁰ ABA Rules of Professional Conduct, 1983, Rule 1.10(a)(1).

¹¹ ABA Rules of Professional Conduct, 1983, Rule 1.10(a)(1).

lawyer's state because the ABA Rules are advisory in nature; states either adopt them or amend them to suit their jurisdiction. An example is the state of Alabama which does not even allow for the "personal interest" exception found in the ABA's version.¹² To be on the safe side, lawyers must inform the client(s) of the conflict, and the client(s) must waive the conflict and sign a document called a waiver of conflict. The rationale behind this is to prevent the disqualification of a lawyer because of a conflict that the client is unconcerned about, which makes it not only restrictive for the attorney but also infringes on the client's right to hire a counsel of his or her choice.¹³

2.2. United Kingdom

In the United Kingdom (UK), there is a dichotomy between barristers and solicitors. The Solicitors Regulatory Authority (SRA) is charged with the responsibility of regulating the activities of licensed solicitors. In the UK, the Chinese Wall has similar structures as in the USA. The **SRA Code of Conduct**¹⁴ provides in **Rule 6.1** that, generally, solicitors should not act if there is an "own interest" conflict or a risk of such arising.

The exceptions are that the clients must have the same substantial interest or objective. The conditions include that the client gives informed consent, evidenced in writing, while the solicitor puts in place effective safeguards to protect the client's confidential information.¹⁵

Additionally, **Rule 6.3 of the SRA Code of Conduct** states that solicitors must keep the affairs of their clients confidential and only

¹² James M. McMullan, "How to Avoid Conflicts", available at: http://www.americanbar.org/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/solo_lawyer_conflicts_ethics_client.html (accessed 7 September 2022).

¹³ *Ibid.*

¹⁴ Solicitors Regulation Authority, 'SRA Code of Conduct for Solicitors, RELs and RFLs' *SRA Standards and Regulations* (2019) <https://www.sra.org.uk/solicitors/standards-regulations/code-conduct-solicitors/> accessed December 2022

¹⁵ SRA Code of Conduct, 2011, Rule 6.2(b).

permits disclosure required by law or, in instances, the lawyer has obtained consent from the client. Similar provisions are seen in **Rule 6.5**, where solicitors are employed not to act for current clients against former clients except where measures have been taken to reduce the risk of disclosure of confidential information and the current or former client gives consent in writing.

For barristers, the **Bar Standard Board Code of Conduct**¹⁶ regulates the activities of Barristers and requires that Barristers should not accept instructions from clients where there is a conflict between their interests and the clients' or where there is a conflict between one or more clients except when permitted in the handbook.¹⁷ This is supported by an onus on the barrister to protect the confidentiality of each client's affairs, except for such disclosures as are required or permitted by law or to which the client gives informed consent.¹⁸

2.3. Canada

In Canada, the "bright line rule" is a term used to reflect the boundaries of a lawyer and a previous client to ascertain if such a lawyer can act against the interest of that client, whether in a related or unrelated matter. It has been used as a benchmark to determine when a lawyer or law firm can represent a client with adverse interests without obtaining their consent. The "bright line rule" applies regardless of whether the client's matters are related or unrelated.¹⁹ Not all "bright-line" crossings have consequences. For example, where the court views a complaint as tactical, a remedy could be denied.²⁰ The Supreme Court of Canada in **Canadian**

¹⁶ Bar Standards Board, 'Code of Conduct' *The BSB Handbook* (version 4.3, 2019) www.barstandardsboard.org.uk/the-bsb-handbook.html?part=E3FF76D3-9538-4B97-94C02111664E5709&audience=&q= (accessed December 2022).

¹⁷ Bar Standards Book Code of Conduct, Rule C-12.

¹⁸ BSB Code of Conduct, Rule C-15(5).

¹⁹ Walker Law PC, "Lawyers Acting in A Conflict of Interest," available at: <https://www.lexology.com/library/detail.aspx?g=1832e977-2175-4f92-a23d-3030f1b64ecd> (accessed 21 October 2022).

²⁰ M. Mercer, "A bright line rule of limited scope," available at: <https://www.slaw.ca/2013/09/11/a-bright-line-rule-of-limited-scope/> (accessed 21 November 2022).

National Railway v McKercher LLP²¹ ruled that the law firm of McKercher LLP crossed the bright line after quickly terminating the mandate of Canadian Railway (their former client) upon being briefed by Mr. Wallace, who wished to file a class action suit on behalf of Prairie farmers against Canadian National Rail, Canadian Pacific Railway, and others for allegedly overcharging them for grain transportation over 25 years. The matter in concern was, however, unrelated to any previous work done for the Canadian National Railway. While the law firm was stopped from acting for Mr. Wallace by the lower court, the higher court overruled the decision stating that the former clients' consent ought to have been obtained before proceeding to represent the new client.

The bright line rule was established in **R. v Neil**,²² where the Canadian Supreme Court delivered a landmark decision to the effect that:

A lawyer may not represent one client whose interests are directly averse to the immediate interests of another current client (even if the two mandates are unrelated) unless both clients consent after receiving full disclosure (and preferably independent legal advice) and the lawyer reasonably believes that he or she can represent each client without adversely affecting the other.²³

3.0. THE NIGERIAN SITUATION: A CLAUSTROPHOBIC WALL?

Nigeria is a common law jurisdiction. The **Rules of Professional Conduct (RPC) 2007**²⁴ governs the conduct of lawyers in Nigeria. **Rule 17 of the RPC** mandates a lawyer to disclose to the client all

²¹ *Canadian National Railway v McKercher LLP* (2013) 2 SCR 649

²² *R v Neil* [2002] 3 SCR 631.

²³ H. Gardiner, "McKercher breached bright-line rule: SCC", available at: <https://www.canadianlawyermag.com/news/general/mckercher-breached-bright-line-rule-scc/272082> (accessed 20 October 2022).

²⁴ Nigerian Legal Practitioners (Amendment) Rules 2007, Legal Notice No. 21 of 2007.

the circumstances of his relation with parties and any interest in or connection with the controversy which might influence the client in the selection of the lawyer. The Rule goes on to state that a lawyer should not accept a retainer if their professional judgement would be compromised through financial or personal interest in the matter. Additionally, the RPC mandates lawyers to turn down proffered employment if that would likely impair the lawyer's judgement and cause a representation of diverging interests. This is so unless it is obvious that the lawyer can adequately represent the interest of each client and consents to the representation after full disclosure of the possible effect of such representation on the exercise of his own dependent professional judgement on behalf of each.²⁵ In keeping up with other jurisdictions, there is also a bar on lawyers to take on employment turned down due to conflict by another lawyer, partner, or associate affiliated with such a lawyer.²⁶

However, on the issue of maintaining client confidentiality, **Rule 19(3) of the RPC** allows lawyers to divulge confidential information in the following circumstances:

- a. With the confidence of the client after full disclosure;
- b. When such divulgence is necessary as permitted by the rules or court order;
- c. To expose the intention of the client to commit a crime or;
- d. Where such divulgence is necessary to collect the lawyer's fee or to defend against an allegation of unlawful conduct.

It is quite glaring from the foregoing that the issues of conflict of interest and confidentiality are played safe and do not give much room for concession. Indeed, the Legal Practitioners Disciplinary Committee of the Body of Benchers has ruled in **Nigerian Bar Association v Hakeem Giwa**²⁷ that the rationale behind this is that;

²⁵ Rules of Professional Conduct 2007, rule 17(4).

²⁶ Rules of Professional Conduct 2007, rule 17(6).

²⁷ *Nigerian Bar Association v Hakeem Giwa* (2016) NWLR Pt. 1527.

... the jurisdiction to restrain counsel from acting for the antagonist of his former client stems from the principle that a man ought to be restrained from doing any act contrary to the duty that he owes to another; and that the jurisdiction will be exercised at the instance of the former client, per **J.B. Daudu, S.A.N.**

On the issue of whether a counsel can act against someone they previously represented in a matter unconnected with the new case at hand, the Committee held that when a case bears no semblance to the present case, it would be wrong for counsel not to act, especially if they were not engaged in any act(s) amounting to a conflict of interest.

In the same vein, the Court of Appeal in *Mary Ogbonna & Anor v Celestine Ogbonna & Ors*,²⁸ highlighted the need to maintain a balance when restraining a party from employing the services of a counsel and also restraining a counsel when it has been established before the Court that a conflict of interest exists between counsel and opposing party. The Court deemed it necessary to exercise caution when attempting to prevent a lawyer from representing an individual, as the request is public knowledge. Nevertheless, there is a provision to be made for a former client who has genuine concerns, especially if the present case is linked to their prior legal issue. The rule does not apply to a dissatisfied former client if the new case is unrelated to the previous one. This is because the right to counsel is a component right to a fair hearing and is codified in the Constitution²⁹ to enable fairness of legal proceedings.

Furthermore, while the conservative/no-risk approach to issues of confidentiality and conflict of interest is understandable, there is room for possible practical concessions. There may be situations where expertise, skill, knowledge, and simply reputation, and at other times, familiarity may endear one lawyer or a law firm to a wide range of persons. This may be because of competence displayed in previous dealings or, in the case of a law firm, niche expertise in an

²⁸ *Mary Ogbonna & Anor v Celestine Ogbonna & Ors* (2013) NWLR Pt. 1366 Pg. 462.

²⁹ Constitution of the Federal Republic of Nigeria, 1999 as amended, s. 36.

area of law. The current rule as it stands would be a wall to potential clients who might want to “call again” at the law firm’s or lawyer’s office and agreeably waive any conflicts that can be waived. This permits the lawyers to render their services, and the action of conflict waiver by a client is a product of trust in the lawyers’ capabilities. Practically speaking, a lawyer can only handle so much by way of clients, a plethora of waivers, and endless due diligence; however, the lawyer should exercise professional judgement in decision-making. The rules of professional conduct should be consulted to give an ambit of operation and hold a stop sign for overreaching practitioners.

4.0. RECOMMENDATIONS: MAINTAINING CLIENT CONFIDENTIALITY & PREVENTING CONFLICT OF INTEREST

Although it may not be possible to waive all conflicts, it would be a step forward for jurisdictions that have not yet done so to utilize waiver forms and officially acknowledge them as legally binding evidence of waived conflicts. From a chronological analysis, the use of the Chinese Wall is slowly fading away, with courts expressing doubt about its durability. The use of the term has been criticised by legal scholars, with its effect being insensitive to people of Chinese descent, as stated in the case of **Peat, Marwick, Mitchell & Co v Superior Court**,³⁰ per Justice Harry Low.

Incorporating the Chinese Wall concept into the Nigerian legal system is a challenging choice that requires consideration of numerous cultural, ethical, and practical factors. It is essential to strike a balance between safeguarding client confidentiality and preserving the traditional values and practices of the Nigerian legal profession. For Nigeria, a comprehensive evaluation of the specific needs and expectations of Nigerian clients and law firms is crucial in determining whether Chinese Walls align with the country's legal culture and values. A commission would be best set up by the Nigerian Bar Association (N.B.A) to evaluate whether the Chinese Wall concept aligns with the Nigerian legal culture, values, and

³⁰ 200 Cal.App.3d 272, 293-294, 245 Cal. Rptr. 873, 887-888 (1988).

practices. This study ought to consider factors such as client expectations, lawyer-client relationships, and the structure of Nigerian law firms. A report by the commission would paint a clearer picture of the practical issues the implementation of the Chinese Wall could face in Nigeria, including the adaptability of Nigerian law firms and legal practitioners to the use of legal technology.

Additionally, it is recommended that Chinese Walls be used sparingly, if at all, by mid to larger-size law firms in Nigeria with multiple multinational clients operating in the same sector or similar lines of business. This would help restrict the scope of its use and application in Nigeria. While this would serve as an exclusive rule, the rationale for this is that usually, large law firms inevitably provide legal services for multiple clients in the same sector, and when a dispute arises, these clients might want to retain the services of the firm. For safety and to avoid ethical misconduct, it is recommended that when such a matter arises, especially after confirmation of waiver by the parties involved, such a law firm ought to lodge a notice to the NBA to alert the association of such development. An ideal situation would be where such notice would be reviewed by the disciplinary committee or a special committee set up for such responsibility and either accepted on certain grounds or rejected due to, e.g., bad precedent, the complexity of the dispute, or even inadequate resources needed to set up an effective Chinese Wall. This would ensure that due process is followed if the general consensus of lawyers accepts the adoption of the concept in the Nigerian legal system.

Confidentiality remains one of the sacred services a lawyer offers to their client. It moulds a large part of the lawyer's image, and unnecessary risks should not be taken in the interest of justice, where a lawyer, in their judgement, harbours doubt on their ability to separate issues and act professionally by keeping sensitive information private. Where obtained, consent and waivers to conflict should be a compass and not a blank cheque aiding lawyers in the diligent and responsible dispensation of their duty.

5.0. CONCLUSION

In conclusion, underneath the use of the term “Chinese Wall”, there ought to be an improvement in cultural sensitivity. The term, as used here, is aimed to employ easy recognition as some secondary legal sources use its alternative name, “Ethical Wall.”. While there is a race to time on the gradual decline in the use of the term, courts must strike a balance to enable parties to exercise their constitutional right to counsel whilst acting as a guardian of professional ethics to ensure that the non-absolutism of the right is not foregone in its enforcement. Client confidentiality and the prevention of conflict of interest are two sides of the same coin, which enable lawyers to earn their keep for their clients(s) whilst certifying them with a distinct mark of honour.