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## The Logistics of a Lateral Move Between Law Firms

As the economy appears to show signs of recovery and job prospects improve in the legal community, many attorneys may begin to contemplate a lateral move to a new law firm.<sup>1</sup> Motivations to leave a law firm vary from being passed over for a promotion, a lackluster annual review, a bonus that was smaller than expected, the absence of a clear path to the upper echelon of the law firm or simply a need for a change in one's professional life.

With the evolution of the legal profession and its adaptation to the practice of law in the modern world, the tradition of long term law firm loyalty is fading. Decades of devotion to one law firm are being replaced by a few years of advancement and lateral moves made to spur professional development and avoid stagnation. A lateral move is thus envisioned as professional progress.

Before taking the initial steps to make a lateral move from one law firm to another, numerous considerations and arrangements are involved in order to protect the interests of the attorney and, more importantly, the interests of the transitioning attorney's current and former clients. After reviewing the established guidelines for making a lateral move and appreciating the complexity of a lateral move, an attorney may wish to retain their own independent counsel to advise and guide them through their lateral move.

A lateral move by an attorney or attorneys has a ripple effect that creates challenges for both the soon-to-be former law firm and the hiring law firm. The interests of current and former clients of both law firms also may be at risk with respect to a transitioning attorney. During the transition of a lateral attorney, the integrity of the attorney-client relationships must remain intact. All affected parties also must work to conduct themselves in a professional manner to avoid ethics violations and potential legal actions.

<sup>1</sup> The American Lawyer, "The 2013 Lateral Report," The Am Law Daily, March 1, 2013.

## Hiring Law Firm

All parties involved in a lateral move of an attorney from one law firm to another are exposed to significant risks related to the transition, perhaps none more so than the hiring law firm. A law firm employing a lateral hire must work to protect the interests of their current and former clients, firm attorneys, the lateral hire and any potential clients transitioning with the lateral hire.

### Exposure to Potential Litigation

Many national legal publications have highlighted cases that attest to the complexity of transitioning lateral attorneys.<sup>2</sup> The hiring law firm must perform its due diligence to ensure that the lateral hire is not bringing an exposure to potential litigation, in addition to new business.

Beyond interviewing to determine the amount of business a lateral hire may bring to the new law firm or whether the attorney will adapt well within the established culture of the new firm, the hiring firm also must investigate and understand how the transition will occur, including the anticipated response of the soon-to-be former law firm. The hiring law firm should understand the circumstances under which the attorney will be leaving his or her former law firm. It should, therefore, consider the following:

- Is the former law firm financially stable?
- Is the former law firm on the verge of bankruptcy proceedings?
- Is there a partnership agreement or restrictive covenant that may be triggered by the attorney's lateral move?
- Historically, how has the law firm reacted to lateral moves of attorneys?
- Has the former law firm filed lawsuits against hiring law firms?
- Has the law firm worked with departing attorneys to transition out of the office and provide proper notice to law firm clients?
- How were clients informed of the transitioning attorney's departure from the firm?
- Did the law firm retain the clients of the departing attorney?
- Has any litigation ensued related to the departing attorney's lateral move based upon breach of fiduciary duty, breach of contract or allegations of pre-termination solicitation of firm clients?

The hiring law firm should investigate and evaluate the exposures to litigation instituted by the former law firm. In addition to the former law firm becoming a potential plaintiff, the hiring law firm should consider any potential claims that may be filed by a bankruptcy trustee on behalf of a dissolving law firm. Notwithstanding assurances by the lateral or laterals that they are permitted to take the clients of the dissolving law firm, the bankruptcy trustee or liquidation trustee may not agree. In some instances, the bankruptcy trustees may pursue "Jewel" or clawback claims against the hiring law firm to recover assets.<sup>3</sup> With more law firms filing for bankruptcy, greater opportunities arise for the bankruptcy estate to recover lost profits, "...bankruptcy law provides for clawbacks of money paid to a partner when the firm was insolvent and clawbacks of assets a partner took from the firm, whether it be a conference table or profits from a case."<sup>4</sup>

<sup>2</sup> Sara Randazzo, "Howrey Trustee Makes Good on Promise to Sue Former Partners," *The Am Law Daily*, March 12, 2013.

<sup>3</sup> Gina Passarella, "Coudert Collapse Highlights Clawback Risks of Lateral Hiring," *The Am Law Daily*, August 9, 2012.

<sup>4</sup> *Id.*

If the former law firm is on the verge of filing for bankruptcy or in bankruptcy, the hiring firm should assess and determine the likelihood of clawback claims related to the lateral hire/hires. What may appear to be a strong book of business may, in reality, represent vulnerability to complex and ongoing litigation.<sup>5</sup>

### **Avoiding Conflicts of Interest**

A lateral hire will, of course, be investigated as any new hire to a law firm. Education, law license, employment history and criminal records will be confirmed and/or researched.<sup>6</sup> In addition to the standard background checks, the hiring firm will probably seek information regarding the current/former clients of the lateral hire.

One of the most challenging aspects of engaging a lateral hire and the associated clients involves managing the conflicts of interest that may arise as a result of the transition. A hiring firm does not want to conflict out its entire law firm from a representation or case due to the failure to check for conflicts of interest before bringing the new attorney on board.

American Bar Association (ABA) Formal Opinion No. 09-455 (Disclosure of Conflicts Information When Lawyers Move Between Law Firms) discusses the complexities of sharing information to run conflicts checks at the time an attorney is moving from one law firm to another.<sup>7</sup> The opinion states in part:

Any disclosure of conflicts information should be no greater than reasonably necessary to accomplish the purpose of detecting and resolving conflicts and must not compromise the attorney-client privilege or otherwise prejudice a client or former client. A lawyer or law firm receiving conflicts information may not reveal such information or use it for purposes other than detecting and resolving conflicts of interest. Disclosure normally should not occur until the moving lawyer and the prospective new firm have engaged in substantive discussions regarding a possible new association.<sup>8</sup>

The hiring law firm and the lateral hire must work together to accomplish the goal of performing an appropriate conflicts check while not breaching the attorney-client privilege or Model Rules 1.6, 1.7, 1.8, 1.9 or 1.10. The risks of failing to perform a proper conflicts check may result in imputed disqualification of the lateral hire and the hiring law firm in multiple matters.

As suggested in ABA Formal Opinion No. 09-455, the hiring law firm and lateral hire may elect to retain the services of an intermediary lawyer, "...to receive and analyze conflicts information in confidence. This approach should not compromise any privilege nor frustrate the reasonable expectations of the client..."<sup>9</sup> Both parties and their clients benefit by working together to resolve any potential conflicts of interest before the lateral hire becomes associated with the hiring law firm.

<sup>5</sup> Sara Randazzo, "Ex-Dewey Partners Face New Foe in Firm's Bankruptcy," *The Am Law Daily*, May 22, 2013.

<sup>6</sup> "Client Intake Procedures: Avoiding Problematic Clients." CNA Professional Counsel, 2013.

<sup>7</sup> ABA Formal Ethics Opinion 09-455

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

In August, 2012, the ABA addressed the complex issue of conflicts checks related to lateral hires and amended ABA Model Rule 1.6 to include the following language:

(b)(7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

Comment

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#### **Detection of Conflicts of Interest**

[13] Paragraph (b)(7) recognizes that lawyers in different firms may need to disclose limited information to each other to detect and resolve conflicts of interest, such as when a lawyer is considering an association with another firm, two or more firms are considering a merger, or a lawyer is considering the purchase of a law firm. See Rule 1.17, Comment [7]. Under these circumstances, lawyers and law firms are permitted to disclose limited information, but only once substantive discussions regarding the new relationship have occurred. Any such disclosure should ordinarily include no more than the identity of the persons and entities involved in a matter, a brief summary of the general issues involved, and information about whether the matter has terminated. Even this limited information, however, should be disclosed only to the extent reasonably necessary to detect and resolve conflicts of interest that might arise from the possible new relationship. Moreover, the disclosure of any information is prohibited if it would compromise the attorney-client privilege or otherwise prejudice the client (e.g., the fact that a corporate client is seeking advice on a corporate takeover that has not been publicly announced; that a person has consulted a lawyer about the possibility of divorce before the person's intentions are known to the person's spouse; or that a person has consulted a lawyer about a criminal investigation that has not led to a public charge). Under those circumstances, paragraph (a) prohibits disclosure unless the client or former client gives informed consent. A lawyer's fiduciary duty to the lawyer's firm may also govern a lawyer's conduct when exploring an association with another firm and is beyond the scope of these Rules...<sup>10</sup>

The amendment to ABA Model Rule 1.6 is instructive regarding the type of information that may be disclosed to address potential conflicts of interest after "substantive discussions" have taken place between the parties. The amended rule does not define what would constitute "substantive discussions" but probably would not permit the disclosure of such information during a first interview. The rule also cautions that attorneys contemplating a transition should consider their fiduciary duty to their current law firm.

<sup>10</sup> August, 2012, Amendments to ABA Model Rules of Professional Conduct.

Hiring law firms should determine if the amendment to ABA Model Rule 1.6 has been adopted within their jurisdiction and should refer to the comments provided within their jurisdiction for guidance.

The hiring law firm should evaluate the benefits of a lateral hire in the context of possible exposures related to the new addition. It should conduct a thorough investigation to ensure an understanding of the current relationship between the former law firm and the potential lateral hire before taking any steps that would expose the hiring firm to conflicts or potential litigation. The hiring law firm should be aware of any potential animosity or employment disputes between the former law firm and lateral hire before entering into negotiations with the lateral hire.

## Transitioning Attorneys

When contemplating a lateral move, attorneys should research the process within their own jurisdiction and law firm. They must review any and all contracts related to their employment with the current law firm. Before committing to a lateral move, an attorney should have an understanding of his or her obligations to the current employer and clients. Due to the sensitive nature of client representations and firm politics, leaving a law firm is not as simple as giving notice, collecting client files and walking out the door.

### Making an Ethically Sound Lateral Move

One of the first resources attorneys may wish to consider is the American Bar Association's Formal Ethics Opinion No. 99-414. ABA Formal Ethics Opinion No. 99-414 (Ethical Obligations When a Lawyer Changes Firms) addresses the various obligations related to a lateral move by an attorney, such as:

- 1) disclosing her pending departure in a timely manner to clients whose active matters for which she is currently responsible or in which she plays a principal role in the current delivery of legal services (sometimes referred to in this Opinion as "current clients");
- 2) assuring that client matters to be transferred with the lawyer to her new law firm do not create conflicts of interest in the new firm and can be competently managed there;
- 3) protecting client files and property and assuring that, to the extent reasonably practicable, no client matters are adversely affected as a result of her withdrawal;
- 4) avoiding conduct involving dishonesty, fraud, deceit, or misrepresentation in connection with her planned withdrawal; and
- 5) maintaining confidentiality and avoiding conflicts of interest in her new affiliation respecting client matters remaining in the lawyer's former firm.<sup>11</sup>

ABA Formal Ethics Opinion No. 99-414 discusses the complexities of departing a law firm and the need to research applicable rules and regulations, "Before preparing to leave one firm for another, the departing lawyer should inform herself of applicable law other than the Model Rules, including the law of fiduciaries, property and unfair competition. She should also take care to act lawfully in taking or utilizing the firm's information or other property."<sup>12</sup>

<sup>11</sup> ABA Formal Ethics Opinion 99-414

<sup>12</sup> Id.

In connection with a lateral move, the hiring law firm often will request a client list and billing information related to the transitioning attorney's practice. Transitioning attorneys must scrupulously assess what, if any information, they may provide to the hiring law firm in order to avoid breaching the attorney-client privilege or disclosing sensitive information related to client representations.

In addition to ABA Formal Ethics Opinion No. 99-414, an attorney may wish to reference the American Bar Association Formal Ethics Opinion 09-455 (Disclosure of Conflicts Information When Lawyers Move Between Law Firms), which addresses the complications of protecting the lateral attorney's current and former clients, as well as the clients of the hiring law firm. ABA Formal Opinion states, in part, the following:

Any disclosure of conflicts information should be no greater than reasonably necessary to accomplish the purpose of detecting and resolving conflicts and must not compromise the attorney-client privilege or otherwise prejudice a client or former client.

Transitioning attorneys should conduct a detailed review of the Model Rules of Professional Conduct as adopted by their state. Model Rules of Professional Conduct that may be relevant to transitioning attorneys are:

- Model Rule 1.1 Competence
- Model Rule 1.3 Diligence
- Model Rule 1.4 Communication
- Model Rule 1.6 Confidentiality of Information
- Model Rule 1.7 Conflicts of Interest: Current Clients
- Model Rule 1.9 Duties to Former Clients
- Model Rule 1.16 Declining or Terminating Representation
- Model Rule 5.6 Restrictions on Right to Practice
- Model Rule 7.1 Communications Concerning a Lawyer's Services
- Model Rule 7.3 Solicitation of Clients

### **Providing Proper Notice to Current Law Firm and Clients**

One of the most challenging aspects in effecting a lateral move involves how and when to provide notice to the current employer and current clients in compliance with the Model Rules, ABA Formal Ethics Opinion No. 99-414 and any relevant laws in their jurisdiction.

ABA Formal Ethics Opinion No. 99-414 states that the preferred method of client notice calls for the transitioning attorney and current law firm to work together in providing joint notice to the client. The opinion also provides guidelines if the attorney elects to notify current clients prior to informing the law firm when the attorney, "...reasonably anticipates that the firm will not cooperate on providing such a joint notice..." An attorney contemplating such a move should research the issue of pre-termination solicitation within the relevant jurisdiction to avoid future litigation. Numerous cases have examined scenarios in which the departure notice to the client prior to the law firm was challenged as pre-termination solicitation and/or breach of fiduciary duty to the law firm on the part of the departing lawyer.<sup>13</sup>

<sup>13</sup> For example, see *Dowd & Dowd, Ltd. v. Gleason*, 181 Ill.2d 460 (Ill. 1998); *Graubard Mollen Dannett & Horowitz v. Moskovitz*, 86 N.Y.2d 112 (N.Y. 1995); *Meehan v. Shaughnessy*, 404 Mass. 419 (Mass. 1989); *Vowell & Meelheim, P.C. v. Beddow, Erben & Bowen, P.A.*, 679 So.2d 637 (Ala. 1996).

### **Exposure to Potential Litigation**

Attorneys contemplating a lateral move tend to focus on its benefits – professional advancement, increased salary, as well as expanded contacts and resources of the new firm. However, the transitioning attorney also must be cognizant of the exposure to litigation. As with the hiring law firm, the transitioning attorney also may create such vulnerability related to a lateral move.

Transitioning attorneys must plan accordingly so that their actions do not precipitate allegations of improper conduct related to client notice (pre-termination solicitation), misappropriation of law firm property (copies of client matters and client contacts), breach of fiduciary duty (partnership agreement), the enforceability of restrictive covenants in the governing jurisdiction (poaching of support staff or attorneys).

Prior to giving notice to the current law firm and clients, the transitioning attorney must determine notice protocols, including the information and materials that may be retained and those materials which remain with the current law firm. Failure to observe appropriate procedures may result in litigation against both the lateral attorney and the hiring law firm.

Transitioning attorneys must always prioritize their clients' interests over their own professional or pecuniary interests. By investing the necessary time to research the proper method to transition from the former firm to the hiring firm, the attorney will be acting to protect the interests of all parties involved.

### **Former Law Firm**

Upon hearing of a transitioning attorney's impending departure, the initial reaction of the soon-to-be former law firm may be to contact security and escort the departing attorney to the door immediately. The former law firm thus seeks to prevent the departing attorney from additional access to computer databases or active files in order to avoid any misappropriation of client information. The soon-to-be former firm may exercise its prerogative in this manner. However, the interests of the departing attorney's current clients must receive the highest priority in formulating its policies and procedures regarding such departures.<sup>14</sup>

### **Notice to Clients**

The departing attorney and the law firm are responsible for informing the "current clients", in whose representation the departing attorney has been substantially involved, of the departing attorney's intention to leave the law firm.<sup>15</sup> Said notice should be timely so that the client may determine whether it wishes to remain with the current law firm, transition with the attorney to the new firm or seek outside counsel for representation.<sup>16</sup>

Ideally, an attorney would be permitted to provide notice to the current firm. Then, the parties would work together to notify the client in a timely manner and either transition current matters to newly assigned counsel or transfer the file to the transitioning attorney's new law firm.<sup>17</sup> Ultimately, the client must decide upon legal counsel of its choice.<sup>18</sup>

<sup>14</sup> ABA Formal Ethics Opinion 99-414

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

By working with the transitioning attorney to notify current clients of the impending departure, the former firm retains awareness and involvement with the notice process, including supervision of the transitioning attorney and their actions and intent towards the current client. ABA Formal Opinion No. 99-414 provides guidelines for notice to clients prior to the attorney giving notice to the law firm, if it is deemed necessary.<sup>19</sup>

“When the departing lawyer reasonably anticipates that the firm will not cooperate on providing such a joint notice, she herself must provide notice to those clients for whose active matters she currently is responsible or plays a principal role in the delivery of legal services...”<sup>20</sup>

If the law firm culture establishes an environment in which transitions are conducted in a professional manner, it may not be necessary to inform current clients of a departure before the law firm.<sup>21</sup>

### **Compliance with the Model Rules**

At the time a transition is taking place, the soon-to-be former law firm should review applicable Model Rules of Professional Conduct, including but not limited to:

- Model Rule 1.4 Communication
- Model Rule 1.6 Confidentiality of Information
- Model Rule 1.7 Conflict of Interest: Current Clients
- Model Rule 1.9 Duties to Former Clients
- Model Rule 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers
- Model Rule 5.6 Restrictions on Right to Practice

In addition, the transitioning attorney and the former firm are held to conformity with Model Rule 1.16(d). As stated in ABA Formal Opinion No. 99-414, “The Committee also is of the opinion that a departing lawyer must, under Rule 1.16(d), take steps to the extent practicable to protect her current clients’ interests. Moreover, the responsible members of the former firm must themselves comply with Rule 1.16(d) respecting all clients who select the departing lawyer to represent them, whether or not they are current clients of the departing lawyer.”<sup>22</sup>

### **Contemplating Potential Litigation**

The soon-to-be former law firm may find itself in the unique position of being a potential plaintiff in response to the lateral move of an attorney or attorneys. Based upon the actions of the transitioning attorney and hiring law firm, the former law firm may determine that it has potential claims to assert against the lateral attorney and new law firm.

Litigation may arise related to the lateral attorney’s pre-termination solicitation of clients or staff, misappropriation of firm property or client contact information, mishandling or possession of client files, breach of fiduciary duty related to partnership agreements or other employment contracts.

<sup>19</sup> Id.

<sup>20</sup> Id.

<sup>21</sup> ABA Formal Ethics Opinion 99-414

<sup>22</sup> Id.

When contemplating litigation against a lateral attorney and/or the new firm, the former law firm should assess the benefits and risks of litigation. Although fees may be recovered, a law firm may cause damage to its reputation by suing its former attorneys. Movement within the legal community is common, and a law firm will probably encounter challenges in professional development if they acquire a reputation for litigation against their attorneys.

Before filing suit, the former law firm should determine the advantages of litigation and whether it outweighs reputational damage. Fees may be recovered but it is unlikely that litigation will result in the return of clients. Clients will always possess the privilege of attorney selection, regardless of any potential litigation that may ensue between the departed law firm, lateral attorney and hiring law firm.

If the soon-to-be former firm elects to work with the transitioning attorney, the clients' interests will remain at the forefront of the transition and the parties may work together to protect the interests of all involved.

## Lawyers Professional Liability Coverage

Appropriate lawyers professional liability coverage should be a priority to the lateral attorney, hiring law firm and the soon-to-be former law firm. When a lateral transition is being implemented, all parties should have a clear understanding of the various professional liability coverages in effect and how they will or will not apply to the lateral move of an attorney or attorneys. All parties associated with the lateral move endeavor to protect their respective clients and entities against professional liability claims through insurance coverages in place at the time of the transition.

## Conclusion

Trust and loyalty are essential aspects of the legal profession. Law firms rely on the loyalty of their attorneys and clients to prosper and grow in a challenging economy. In today's legal environment, long term loyalty to law firms is diminishing. In contrast to a history of abiding attorney and client loyalty to a law firm, attorneys and clients often gravitate from one law firm to another. Although making a transition between law firms is not uncommon, the transitioning attorney/s must prepare well in advance of the move to protect their interests and more importantly, the interests of their clients.

Lateral movement may prove beneficial to attorneys and their respective clients in seeking to evolve and learn from their new law firm experience and grow their book of business. With this professional transition, however, many challenges derive. Such transitions must be effected only after the appropriate preparation on the part of the transitioning attorney.

By working together and in accordance with the applicable Model Rules and jurisdictional requirements, the lateral attorney/s, hiring law firm and former law firm may benefit by prioritizing and protecting the interests of law firm clients and the reputations of the respective law firms and attorney/s.

As lateral moves continue to increase in the legal community, law firms and attorneys should conduct the proper research to protect their interests and, more importantly, the interests of their clients.

## Lateral Hire Checklists

CONSIDERATIONS FOR THE HIRING LAW FIRM	YES	NO	COMMENTS
What is the current status of the soon-to-be former law firm? Is the firm financially sound? Is the firm on the verge of bankruptcy? Has it initiated bankruptcy proceedings? Is it dissolving the law practice?			
What, if any, legal constraints exist related to a partnership agreement, restrictive covenant provision of an employment contract or other contracts between the lateral and the former law firm?			
Has the former law firm filed lawsuits against past laterals or their hiring law firms?			
In prior lateral move situations, did the former law firm work with the lateral to provide notice to law firm clients?			
In previous lateral moves, how were the clients of the soon-to-be former law firm provided notice of attorney departures?			
Does the lateral understand what, if any, materials or information may be removed from the former law firm?			
Should a third-party be engaged to conduct a conflicts of interest check related to the lateral and our law firm, lateral's clients and our law firm, lateral clients and our attorneys?			
Has amended ABA Model Rule 1.6 been adopted within our jurisdiction?			
Are we following the suggested guidelines of ABA Formal Ethics Opinions 09-455 and 99-414?			
Are there professional liability policies in place to address any and all potential matters resulting from the lateral move?			
CONSIDERATIONS FOR THE TRANSITIONING/LATERAL ATTORNEY			
Have I reviewed all contracts related to my current employment/law firm? -Partnership Agreements -Employment Contracts (including non-compete provisions, if applicable) -Benefits (including penalties to retirement funds due to departure)			
Should I retain counsel related to this lateral move?			
Have I reviewed ABA Formal Ethics Opinion No. 09-455?			
Have I reviewed ABA Formal Ethics Opinion No. 99-414?			
Have I reviewed the applicable ABA Model Rules as adopted within my jurisdiction?			
Has revised ABA Model Rule 1.6 been adopted within my jurisdiction?			
Will a third-party be used to conduct conflicts of interest checks related to my former and current clients and the hiring law firm?			

## CONSIDERATIONS FOR THE FORMER LAW FIRM

Did the attorney provide proper notice of the departure to the law firm?			
Has the attorney complied with the provisions of the partnership agreement or employment contract?			
Considering the best interests of firm clients, how should we provide notice to the departing attorney's current clients?			
If law firm clients decide to transition with the departing attorney, how will files be transferred?			
Did the transitioning attorney and hiring law firm conduct a proper conflicts of interest check related to this lateral move?			
Is the law firm adhering to the requirements of the applicable ABA Model Rules of Professional Conduct?			
Are there professional liability policies in place to address any and all potential matters resulting from the lateral move?			



For more information, please call us at 866-262-0540 or email us at [lawyersrisk@cna.com](mailto:lawyersrisk@cna.com).

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