Between a Rock and a Hard Place

Law Firm Conflicts and Lateral Hires

BY AMY DEVAN

Law firms and lawyers must recognize the importance of performing conflict checks any time an attorney makes a lateral move. This article discusses how to handle conflicts when lawyers move between firms.

The days of young associates working their entire careers for the same firm are long behind us. According to a 2016 Bureau of Labor Statistics news release, the average tenure for legal professionals is five-and-a-half-years per job.[1] This means that in the course of a 25- or 30-year career, the typical lawyer will work in at least five different jobs with five different firms. In addition, through mergers or other growth, law firms are getting larger and lawyers are combining in new ways. Through creative combinations, including collaborative work arrangements or office sharing, solo and small firms are also finding themselves in a new world of cooperation. This combination of larger firms with greater lawyer mobility, coupled with innovative solutions to lawyering in general, brings a level of dynamism to the market, but it also brings an increased risk of conflicts created by lateral moves, which can subject lawyers to sanctions or disqualification if they are not careful.[2]

Lawyers and law firms are well aware of the need to avoid conflicts of interest and are familiar with the concept of checking potential clients and adverse parties for conflicts before taking on new cases. But it is equally important to identify lateral-hire conflicts—those created by lawyers moving between firms—before new hires join the firm, both with regard to existing firm clients, as well as clients who will follow the lawyer when he moves. Firms must conflict-check every new hire, carefully analyze the information received, and make thoughtful and appropriate decisions about what to do with it.

This article addresses some of the issues related to lateral-hire conflicts and provides practical advice for lawyers and law firms about how to prepare for and deal with conflicts created by lawyers moving between firms.

Rules of Professional Conduct

Several Colorado Rules of Professional Conduct (Colo. RPC or Rules) may be implicated when firms hire lawyers who potentially bring with them a conflict-of-interest issue:

Rule 1.6—Confidentiality

Under Rule 1.6(a), a lawyer "shall not reveal information relating to the representation of a client" absent client consent or an exception. This Rule often gave lawyers pause when deciding whether to provide client information to a new

firm for purposes of conflict checks before joining the firm. In response, the American Bar Association (ABA) amended the Model Rules of Professional Conduct, and many states, including Colorado, followed suit. Colo. RPC 1.6(b)(7) now states that a lawyer may provide limited information to a new firm "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 is not protected by the attorney–client privilege and its revelation is not reasonably likely to materially prejudice the client[.]"

This exception to the Rule is not intended to give lawyers freedom to reveal all client confidences. Comment [13] makes clear that this is a limited exception and lawyers should reveal information only "to the extent reasonably necessary" for clearing conflicts. This is discussed in more detail below.

Rule 1.7—Conflict of Interest: Current Clients

Under Colo. RPC 1.7, a lawyer must avoid concurrent conflicts of interest. This means that the lawyer cannot represent one client where the representation will be "directly adverse" to another client, or where there is a "significant risk" that the representation will be "materially limited" by some other factor.[3] Clients can waive conflicts by providing "informed consent," but not all conflicts are waivable.[4] For example, a lawyer cannot represent opposing parties in the same litigation matter under Rule 1.7(b)(3), even if the clients would be willing to consent (which seems unlikely).

Rule 1.9—Duties to Former Clients

This Rule prohibits a representation adverse to a former client in the "same or a substantially related" matter. Comment [3] to the Rule explains: "Matters are 'substantially related' for purposes of this Rule if they involved the same transaction or legal dispute or if there otherwise is a substantial risk that confidential information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter."

Of importance is Rule 1.9, comment [4], which addresses lawyers moving between firms. It states in part,

> it should be recognized that today many lawyers practice in firms, that many lawyers to some degree limit their practice to one field or another, and that many move from one association to another several times in their careers. If the concept of imputation were applied with unqualified rigor, the result would be a radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.

> "Firms must conflict-check every new hire, carefully analyze the information received, and make thoughtful and appropriate decisions about what to do with it."

Rule 1.10—Imputation of Conflicts of Interest: General Rule

Colo. RPC 1.10 addresses the difficulty posed when one lawyer in a firm, including a newly hired lateral, has a conflict that prohibits the entire firm from representing a client, unless the personally disqualified lawyer did not substantially participate in the matter at the old firm and is timely screened from involvement with the matter at the new firm. Screening thus can cure some but not all imputed conflicts. Under Rule 1.10(e), despite the personal disqualification of a lawyer, the firm may avoid imputation if:

> (1) the matter is not one in which the personally disqualified lawyer substantially participated;
> (2) the personally disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom;
> (3) the personally disqualified lawyer gives prompt written notice . . . to the affected former clients and the former client's current lawyers . . .; and
> (4) the personally disqualified lawyer and the partners of the firm . . . reasonably believe that the steps taken to accomplish the screening of material information are likely to be effective in preventing material information from being disclosed to the firm and its client.

Notably, Colo. RPC 1.10(e) differs from ABA Model Rule 1.10 in that the Model Rule permits screening regardless of the lateral hire's level of participation in the matter at the prior firm.[5]

Rule 1.16—Declining or Terminating Representation

When a lawyer brings a conflict to a new firm, can the firm cure it simply by dropping the troublesome client? Under Rule 1.16, the answer is perhaps; however, the "hot potato doctrine," discussed in more detail below, may nullify this option.

Rule 1.18—Duties to Prospective Client

Even potential clients whose cases a lawyer doesn't take may pose a conflict for both the lawyer and the new firm. Lateral hires who previously consulted with, and obtained confidential information from, a prospective client can cause the new firm to be disqualified in the same or a substantially related matter, absent the circumstances and measures set forth in Rule 1.18(d).

Under Rule 1.18(a), a person who discusses with a lawyer the possibility of forming an attorney–client relationship regarding a particular

matter is a prospective client, and per 1.18(c), the lawyer cannot represent a client with interests materially adverse to the prospective client in the same or a substantially related matter. Section (d) allows the representation, even if the limitations of section (c) exist, if both the affected and prospective client give informed consent confirmed in writing, the lawyer takes steps to avoid exposure to more disqualifying information than was reasonably necessary to make the decision whether to take on the representation, and the disqualified lawyer is timely screened from the matter with written notice to the client confirming the same.

Conflict Issues When Laterals Change Firms

Failing to run a conflict check when new attorneys join a firm—whether at the partner, of counsel, or associate level—is a risky proposition, because both the moving lawyer and new firm have duties to detect and resolve conflicts.[6] Firms are well-served by making conflict checking of laterals a routine and required part of their hiring process. Failure to check, or to properly deal with the findings, can have costly consequences.

In a December 27, 2017 decision, *Canta v. Philip Morris USA, Inc.*, the Florida Court of Appeals addressed the unique question of whether terminating the employment of a conflicted lateral hire cured the disqualifying conflict.[7] This case is interesting because it also addressed the failure of the firm to screen a laterally hired lawyer.

In *Canta*, after hiring a lateral who previously worked for a firm representing Philip Morris, the Ferraro firm assigned him to work on the plaintiff's side litigation against Philip Morris and RJR Reynolds on the exact same issues, though not necessarily the same cases, in which he had previously represented Philip Morris.[8] The lateral's former clients and adversaries were not screened, even after Philip Morris began filing motions to disqualify based on the claimed conflict.[9] When the firm was ultimately disqualified by the trial court, the firm terminated the lateral, claiming that it had thus cured the conflict.[10] The Florida Court of Appeals disagreed, determining that the firm did not cure the conflict, especially given its failure to screen the lateral during the preceding period:

> Reviewing a record that is devoid of any proactive effort by the Ferraro Firm to thoroughly and expeditiously investigate any possible conflicts with PM or RJR based on Lima's prior work, *at the outset of their association*, or even ten months later when PM and RJR detailed in writing the existence and nature of the conflict, we agree with the trial court that "law firms must bear some responsibility to determine the conflicts of new hires in advance and take proactive steps to prevent such problems."[11]

By contrast, in early January 2018, in *Balaban v. Philip Morris USA Inc.*, a different panel of the Florida Court of Appeals reached a different conclusion in another case involving the Ferraro firm.[12] In *Balaban*, the appellate court vacated a trial court order disqualifying the firm because given the lateral hire's termination, the court should have decided whether any lawyer remaining in the firm possessed Phillip Morris's confidential information.[13] The appellate court instructed the trial court to determine on remand whether the termination of the lateral did, in fact, cure the conflict.

These cases illustrate the perils of a firm's failure to screen for and resolve lateral-hire conflicts. Even if the firm ultimately survives the motions to disqualify, tens of thousands of dollars, and many hours of frustration, will have been expended by both sides on an issue that was easily avoided.

A similar disqualification result occurred in a case where the lateral hire professed a lack of memory as to the prior representation. In *Cytimmune Sciences, Inc. v. Giulio Paciotti*, a partner moved from one firm to another, subsequently taking on a representation adverse to a former client in which he challenged the enforceability of a form non-compete agreement—the same form agreement on which he allegedly advised the former client.[14]

In response to a motion to disqualify, the lateral partner indicated he had only a vague recollection of the company and no recollection of work he might have performed for it. The court determined that his denials lacked "substantial force," and because the record demonstrated a "clear possibility" that he did provide legal advice, disqualification was appropriate because the prior representation represented a serious risk that his duty to his current client would be materially limited:

> I am left with the impression that Rose's inability to recall the precise details of his prior work for Cytimmune placed him squarely between the Scylla of MLRPC 1.9 and the Charybdis of MLRPC 1.7. And if Odysseus could not navigate such treacherous waters, then respectfully neither can Rose. And the Rules forbid any such attempt.[15]

The overall lesson for lawyers and law firms is that imputed disqualification is a reality and steps must be taken to guard against it. As noted in *Canta*, law firms have a responsibility to "thoroughly and rigorously investigate any possible conflicts" and "take proactive steps" to address them before hiring lateral attorneys.[16]

> "While the conflict analysis is fact-specific and disqualification may or may not result, it is preferable for all concerned that a scenario where it is even possible be prevented."

Related Conflict Issues

Rule 1.9(a) states that a lawyer may not represent a client in a matter that is the "same or substantially related" to a matter in which the lawyer previously represented another client whose interests are adverse to the current client. Rule 1.9(c) states that a lawyer may not use "information relating to the representation to the disadvantage of the former client."

Playbook Conflict

This Rule 1.9(c) language may be used to argue that a lawyer has a "playbook conflict" in which she gained confidential information about a client, often a corporate client, through prior representation, and now seeks to use that information against that client in subsequent litigation. Clients often argue the attorney gained integral knowledge of their internal processes, systems, and litigation strategy through the prior representation and thus should be barred from undertaking adverse representation against them in the future. Typically, mere knowledge about the inner workings of the company is not enough. As stated in comment [3] to Rule 1.9, "In the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation[.]" In other words, the presumption is against disqualification based on a playbook conflict. While a playbook conflict is difficult to prove, and disqualification is rare, it is nevertheless important that lawyers carefully analyze the issue to ensure no such conflict is present.[17]

Positional Conflicts

Positional conflicts have also been a basis for disqualification motions. These conflicts can arise when firms merge or hire laterals who bring with them cases that lead the new or merged firm to find itself simultaneously putting forward divergent arguments on behalf of existing clients and newly added clients.

Positional conflicts are, however, relatively rare. Rule 1.9, comment [2], indicates that "a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a factually distinct problem of that type even though the subsequent representation involves a position adverse to the prior client." Comment [24] to Rule 1.7 clarifies that a positional conflict exists only "if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client."

These issues can be hard to spot on a standard conflict check. Careful analysis of conflict-search results—for instance paying

close attention to a result listing two corporate clients in the same industry—will help firms spot these issues before they become problematic.[18]

The "Hot Potato"

The childhood game of hot potato is often invoked when lawyers and firms—faced with the potential for a conflict—are tempted to simply drop the offending client (often the less lucrative of the two) to cure a conflict created by a lateral hire. In almost every case where this issue has arisen, courts have determined this is impermissible and does not cure the conflict.[19] While courts recognize that unforeseeable circumstances may lead to the need to drop a client for reasons other than self-interest, lateral hires or law firm mergers do not meet the test, and conflicts generally will not be cured by dropping one client and continuing with the other. On the other hand, if the conflict is thrust upon a law firm by a corporate merger in which an adverse party becomes a client, courts will allow the firm to obviate the conflict by dropping either its existing client or the newly created client.[20]

Peripheral Representation as a Defense

Peripheral representation may be a defense where a conflict might otherwise exist. A lawyer or firm might be able to argue that the work done previously was so inconsequential and so unlikely to have resulted in material or confidential information being shared that disqualification following a move would not be appropriate given the circumstances. In *Pacific Employers Insurance Company v. P.B. Hoidale Company, Inc.*, the court determined that even though plaintiff's counsel had previously worked for the firm representing defendant, the work consisted of reading material and legal research compiled by another person, and no material confidential information was revealed to the lawyer; therefore disqualification was denied.[21] This underscores the importance of not only checking for conflicts but also carefully analyzing the results. In some instances, even if it appears that there is a conflict on the surface, further analysis may reveal a defense to stave off disqualification.

Tips to Protect Yourself

Both firms and lawyers can take steps to detect conflicts and protect against disqualification when laterals move from one firm to another.

As noted above, most lawyers are understandably reluctant to reveal confidential information relating to their clients, which is a hurdle given the need to check conflicts when they move firms. But Rule 1.6(b)(7) codifies the importance of conflict checking through a limited exception to the normal sanctity of confidentiality in the lawyer–client relationship. Enough information should be provided to produce meaningful results in a conflict check, but not so much that it goes too far in revealing confidential client information. For example, providing the name of the client, names of adverse parties, jurisdiction, and general topic of representation (e.g., oil and gas, real estate dispute, contract interpretation) will enable the hiring firm to determine whether a conflict exists. Including information such as client payment history, amounts owed, case interpretation, or confidential facts related to the representation is unnecessary and would likely exceed the limited exception.

Lawyers should contemporaneously keep lists of their clients and adverse parties. Reviewing Rule 1.6(b)(7) is instructive in understanding what information can and should be shared. Lawyers need to remember it is first and foremost *their* obligation to comply with the Rules relating to conflicts. Relying on a prior employer to provide conflicts-related information at some future date is unwise, as the response may be (and often is) "no." Keeping contemporaneous records alleviates the need to reproduce information later.

Some lawyers have a concern that providing the information to a new employer will violate

signed confidentiality agreements. Whether such a confidentiality agreement would be enforceable to prevent a required conflict check is questionable. Firms should view providing this information as something that is not only allowed, but necessary. Comment [13] to Rule 1.6 clarifies the circumstances under which confidentiality is waived for the purpose of checking conflicts and indicates that lawyers and law firms are permitted to provide "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."[22] The comment further clarifies that even the limited information disclosed should only be provided to the extent reasonably necessary to detect and resolve conflicts.

Firms should understand the need for departing laterals to submit information for conflict checking purposes, because they should also be checking conflicts for lawyers they hire. Given that the comment indicates information should be provided after substantive discussions have taken place, it is a good practice for firms to request the conflict information after meeting with the candidate in whom the firm has serious interest but before the offer is made. If conflict checking identifies a conflict that would potentially preclude the lawyer's employment, it is better for the firm to know before extending an offer and—perhaps more important—before the lateral gives notice to his or her firm about an impending departure.

Conclusion

The legal market has changed, and with it has come greater lawyer mobility. This gives rise to an issue that is becoming more and more complex for lawyers and law firms to navigate—conflicts posed by lateral hires. While the effects of a conflict can be severe for both the moving lawyer and the new firm, the problem is manageable. But to detect and resolve conflicts, firms must commit to making conflict checking a standard part of their lateral hire process. Laterals can help the firms, and themselves, by ensuring their information is accurate and up to date. While the conflict analysis is fact-specific and disqualification may or may not result, it is preferable for all concerned that a scenario where it is even possible be prevented.

With a few simple steps, lawyers and firms can avoid finding themselves between the "Scylla and Charybdis" of a disqualifying conflict. CL

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NOTES

1. www.bls.gov/news.release/pdf/tenure.pdf.
2. *See Restatement (Third) of the Law Governing Lawyers* § 121, cmt. f (2000).
3. Colo. RPC 1.7(a).
4. Colo. RPC 1.7(b).
5. *See* ABA Model R. Prof'l Conduct 1.10(a)(2).
6. *See* ABA Comm. on Prof'l Responsibility, Formal Opinion 09-455, Disclosure of Conflicts Information When Lawyers Move between Law Firms (Oct. 8, 2009).
7. *Canta v. Philip Morris USA, Inc.*, 2017 WL 6598577 (Fla.Dist.Ct.App. Dec. 27, 2017).
8. *Id.* at *1.
9. *Id.*
10. *Id.* at *3.
11. *Id.* at *5 (emphasis in original).
12. *Balaban v. Philip Morris USA Inc.*, 2018 WL 356275 (Fla.Dist.Ct.App. Jan. 10, 2018).
13. *Id.* at *2 (relying on Florida's version of Rule 1.10(c)).
14. *Cytimmune Sciences, Inc. v. Giulio Paciotti*, 2017 WL 57213 at *2 (Jan 5, 2017).
15. *Id.* at *7–*8.
16. *Canta*, 2017 WL 6598577 at *8.
17. As an indication of the specificity necessary to prove a true playbook conflict, ABA Comm. on Prof'l Responsibility, Formal Opinion 99-415, Representation Adverse to Organization by Former In-House Lawyer (Sept. 8, 1999), indicates that even a former in-house lawyer may represent a client in a matter adverse to the former employer without consent, unless the lawyer personally represented the former employer in the same or a substantially related matter, or another member of the organization's legal department did so and the former in-house lawyer acquired protected information material to the new matter. For a case where the court declined to disqualify counsel based on a claimed playbook conflict, *see State ex rel. Ogden Newspapers, Inc. v. Wilkes*, 566 S.E.2d 560, 565–67 (W.Va. 2002). Conversely, *see Mitchell v. Metro. Life Ins. Co.*, No. 01 CIV. 2112 (WHP), 2002 WL 441194 at *2, *8–9 (S.D.N.Y. Mar. 21, 2002), where the court disqualified the attorney and firm based on a playbook conflict.
18. *See* ABA Comm. on Prof'l Responsibility, Formal Opinion 93-377, Positional Conflicts (Oct. 16, 1993).
19. *Markham Concepts, Inc. v. Hasbro, Inc.*, 196 F.Supp.3d 345, 352 (D.R.I. 2016), is a case where the court found disqualification was appropriate, where the conflict was caused not by a full merger of two firms but by a group of laterals joining a firm, which was aware of the conflict before hiring the group. The law firm sought a waiver, and when the client refused to grant it, the law firm withdrew from representation of the client. In discounting the firm's argument that no prejudice resulted, the court stated that the argument "overlooks the intangible harm that comes with ethical violations. As this court has previously noted, '[w]hile the spurning of a longtime and intimate client is particularly troubling, any perceived disloyalty to even a 'sporadic' client besmirches the reputation of the legal profession' and has 'the potential to erode public confidence in attorneys.'" *Id.*
20. For an example of a case where a law firm was not disqualified in a circumstance that would otherwise trigger a "hot potato" concern, *see Gould, Inc. v. Mitsui Min. & Smelting Co.*, 738 F.Supp. 1121, 1122, 1127 (N.D. Ohio 1990). Here, the conflict was caused by merger activity on the part of the clients, not a merger involving the law firm, although the court did find the law firm failed to timely notify the client that the merger resulted in a conflict. The court determined counsel was required to withdraw from either plaintiff or subsidiary, and it was up to counsel to choose. Interestingly, while refusing to disqualify the law firm, the court indicated that the failure to notify the client timely was a "breach of the ethical standards" and as a result "the court has notified disciplinary counsel to the Supreme Court of Ohio of this ethical violation by Jones, Day."
21. *Pacific Employers Ins. Co. v. P.B. Hoidale Co., Inc.*, 789 F.Supp. 1112, 1113–17 (D.Kan. 1992).
22. *See also North Carolina State Bar*, 2016 Formal Ethics Opinion 3, Negotiating Private Employment with Opposing Counsel (Jan. 27, 2017).