

## The Dangers of a Lateral Move

### A talk with Sarah McShea

#### I. Before Attorney Lateral Move

##### A. Overview

1. When a lawyer changes firms, what issues may arise depends on many factors including the seniority of the lawyer, where the lawyer is moving to, the type of practice and work the lawyer will take on at the new firm, and the extent of confidential client information obtained while working at the existing firm.

##### B. Conflicts check prior to a lateral move

1. The firm should perform a conflicts check prior to the addition of the new lawyer.
  - a. Any conflict should be disclosed or discovered prior to the move.
  - b. The move may only be effective where no conflicts or substantial conflicts are brought to the new firm, or where those conflicts regarding past representations can be screened off so as not to taint other lawyers in the new firm.
2. A wrinkle in being able to discover conflicts is that information about existing clients at the old firm will usually be confidential and cannot be disclosed to the new firm without client consent.
  - a. Each state bar imposes its own set of rules on the lawyers admitted to practice in the jurisdiction.
  - b. The American Bar Association's Model Rules of Professional Conduct provides general guidelines that each state may incorporate into its ethics rules.
  - c. Model Rule 1.6 provides that a lawyer shall not reveal information relating to the representation of a client unless:
    - i. The client gives informed consent;
    - ii. The disclosure is impliedly authorized in order to carry out the representation; or
    - iii. The disclosure is permitted by an exception in Rule 1.6(b).See Appendix A.

##### C. Limited disclosures

1. In some jurisdictions, though not in New York, limited disclosures are permissible for the purpose of seeing whether there are conflicts in a proposed lateral move.
2. Model Rule 1.6(b)(7) permits disclosure 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 attorney-client privilege, or prejudice the client.

3. In accordance with Official Comment [13],<sup>1</sup> any disclosure should include no more than:
  - a. The identity of the persons and entities involved in a matter;
  - b. A brief summary of the general issues involved; and
  - c. Information about whether the matter has terminated.
- D. Third parties and agreements
  1. In some instances, a firm may choose to designate a person, screened from the rest of the firm, to oversee any conflict checks on the firm's behalf.
  2. The parties may then enter into a written agreement prohibiting that lawyer from disclosing any confidential information it receives to anyone else in the firm. However, no attorney-client relationship exists between that lawyer and the moving lawyer.
  3. Less commonly, a third-party conflicts checker (sometimes referred to as an ethicist) may be hired to determine any potential conflicts by matching up each firm's client list.
- E. Firm processes and procedures
  1. Firms should implement a conflict-checking procedure and policy that ensures the recording of its engagements, and a system in which proposed engagements are checked against current and previous engagements.
  2. The process must incorporate a conflicts check at the commencement of a matter and provide for an on-going conflict checking mechanism.
  3. In some jurisdictions, such as New York, this is required by the State's Rules of Professional Conduct. See Rule 1.10 New York Rules of Professional Conduct Appendix E.

## II. Duties Owed to Current Clients and Firm

- A. Duties owed to current firm
  1. A lawyer owes their existing employer a duty of loyalty, good faith and fair dealing.
  2. The moving lawyer should not seek to solicit clients before they have provided notice to their existing firm of their departure. Such actions may constitute a breach of the lawyer's fiduciary duties owed to the existing firm.
  3. Therefore, at the least, the moving lawyer should notify the firm of the intent to depart prior to conferring with any firm clients about the move. This is so even if the moving lawyer brought the client to the firm, or is the only lawyer at the firm working for that client.
  4. A significant factor in a lateral move, particularly at a senior associate or partnership level, will be whether the moving lawyer can be expected to bring

---

<sup>1</sup>[http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_1\\_6\\_confidentiality\\_of\\_information/comment\\_on\\_rule\\_1\\_6.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_6_confidentiality_of_information/comment_on_rule_1_6.html)

- their book of business or clients. This implicates the duties owed to the current firm and to clients.
- B. Duties owed to current clients
1. Duty to inform
    - a. The impending departure of a lawyer responsible for a client's representation is information that may affect the status of a client's matter as contemplated by Model Rule 1.4. Both the departing lawyer and the existing firm are obligated to ensure that current clients are informed that the lawyer is moving.
  2. Client's right to choose counsel
    - a. The client has the ultimate right to select counsel of her choice. Notice that the lawyer is leaving and information about the new firm will be useful to the client in determining whether to move with the departing lawyer.<sup>2</sup>
    - b. In order for a client to make a choice as to counsel, the departing lawyer may inform the client whether he or she will be able to continue the representation at the new firm, but must make clear that the client has the ultimate right to decide who will complete or continue the representation.
    - c. Under the ABA's Formal Opinion No. 99-414 on the "Ethical Obligations When a Lawyer Changes Firms," the Committee advises that under Model Rule 1.16(d), the departing lawyer must take steps to the extent practicable to protect her current clients' interests. Members of the existing firm must comply with Rule 1.16(d), respecting the decisions of clients who select the departing lawyer to represent them. See Appendix C.
- C. Work product
1. Moving lawyers should be mindful that a lawyer's work product belongs to her existing firm.
  2. Removing or copying any such work product without firm consent may have serious consequences at both the state and federal level.
  3. If a departing lawyer inadvertently retains work product, for example on a laptop, the lawyer must return it. Mere deletion or destruction may not suffice.

### III. Imputation of Conflicts & Screening

- A. Imputation of conflicts
1. Where one lawyer has a conflict, that conflict is imputed to every lawyer in the firm.

---

<sup>2</sup> ABA Formal Opinion No. 99-414, *Ethical Obligations When a Lawyer Changes Firms*, September 8, 1999.

- a. Model Rule 1.10 provides that while lawyers are associated in a firm, none of them shall represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7 (Conflict of Interest: Current Client) or 1.9 (Duties to Former Clients).
    - b. Firms should therefore be mindful that failing to identify a potential conflict of interest relating to the incoming lawyer could result in the new firm being disqualified from representing a current client in an ongoing matter.
    - c. This conflict may be magnified when two law firms merge.
  - 2. When a lawyer changes firms, the moving lawyer's prior representation of clients at the old firm moves with the lawyer to the new firm such that the lawyer's former clients may potentially become the new firm's former clients.
- B. Screening
- 1. In 2009, the ABA amended Model Rule 1.10 allowing for the use of ethical screens to cure conflicts of interest created by a lawyer's association at a prior firm. See Model Rule 1.10, Appendix D.
    - a. Under Model Rule 1.0(k) "screened" means "the isolation of the lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obliged to protect under these Rules or other law."
    - b. Screens should therefore be implemented at the earliest opportunity, with an aim to protect against access to relevant client information, formal or informal communications regarding the matter, and receipt of emails or the like.
  - 2. The conflicted lawyer should not receive any part of the fees from the conflicted matter (Model Rule 1.10(a)(2)(i)).
  - 3. Practically, screening in small firms is more difficult and should generally be avoided unless client consent is provided.

#### IV. Practical Tips

- A. Avoid prematurely disclosing confidential client information or existing firm proprietary information in a bid to secure a position with a new firm.
  - 1. Disclose only that which is necessary for a sufficient conflict check and due diligence.
- B. Avoid asking clients whether they will follow you to their new firm without first informing the existing firm of the impending departure, unless an exceptional circumstance arises.
  - 1. While there is an overarching duty under Model Rule 1.4 to communicate with your client, this may not be used as a guise to prematurely ask your clients whether they will move with you, though there may be circumstances when this is appropriate.

2. In asking your clients, at the appropriate time, the moving lawyer should not disparage their old firm or urge clients to sever relationships with the existing firm. Ultimately, it must be remembered that the client has the right to choose counsel.
  3. Avoid further commenting on the old firm's ability to handle the matter in your absence.
  4. A joint announcement of the old firm and the moving lawyer is preferable. This should comprise a joint notification of the impending departure and a statement that clients have a choice as to who will continue the representation.
- C. Avoid having conversations with other members of your legal team at the existing firm about a potential departure until you have first given notice to your firm that you are moving.
  - D. Ensure that client matters that are transferred to the new firm do not create conflicts of interest and can be competently managed by the new firm.
  - E. Respect client matters that remain in the old firm.

## Appendix

### A. ABA Model Rule 1.6 Confidentiality of Information

[http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_1\\_6\\_confidentiality\\_of\\_information.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_6_confidentiality_of_information.html)

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(6) to comply with other law or a court order; or

(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.

### B. ABA Model Rule 1.4: Communications

[http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_1\\_4\\_communications.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_4_communications.html)

(a) A lawyer shall:

- (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
- (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
- (3) keep the client reasonably informed about the status of the matter;
- (4) promptly comply with reasonable requests for information; and
- (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

**C. ABA Model Rule 1.16(d): Declining or Terminating Representation**

[http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_1\\_16\\_declining\\_or\\_terminating\\_representation.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_16_declining_or_terminating_representation.html)

...

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

**D. ABA Model Rule 1.10: Imputation of Conflicts of Interest: General Rule**

[http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_1\\_10\\_imputation\\_of\\_conflicts\\_of\\_interest\\_general\\_rule.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_10_imputation_of_conflicts_of_interest_general_rule.html)

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless

(1) the prohibition is based on a personal interest of the disqualified lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm; or

(2) the prohibition is based upon Rule 1.9(a) or (b) and arises out of the disqualified lawyer's association with a prior firm, and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom;

- (ii) written notice is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this Rule, which shall include a description of the screening procedures employed; a statement of the firm's and of the screened lawyer's compliance with these Rules; a statement that review may be available before a tribunal; and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures; and
  - (iii) certifications of compliance with these Rules and with the screening procedures are provided to the former client by the screened lawyer and by a partner of the firm, at reasonable intervals upon the former client's written request and upon termination of the screening procedures.
- (b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:
- (1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and
  - (2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.
- (c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.
- (d) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

**E. New York Rules of Professional Conduct Rule 1.10(e)-(f): Imputation of Conflict of Interest**

<http://www.nysba.org/WorkArea/DownloadAsset.aspx?id=50671>

...

- (e) A law firm shall make a written record of its engagements, at or near the time of each new engagement, and shall implement and maintain a system by which proposed engagements are checked against current and previous engagements when:
- (1) the firm agrees to represent a new client;
  - (2) the firm agrees to represent an existing client in a new matter;
  - (3) the firm hires or associates with another lawyer; or
  - (4) an additional party is named or appears in a pending matter.
- (f) Substantial failure to keep records or to implement or maintain a conflict- checking system that complies with paragraph (e) shall be a violation thereof regardless of whether there is another violation of these Rules.

...