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Mid-engagement conflicts: lateral hires, firm mergers

By: Thomas E. Peisch and Erin K. Higgins October 16, 2014

The emergence of a conflict of interest in the middle of an engagement is a most unwelcome development for any lawyer. In an Aug. 4 column, we discussed and suggested practice points for several scenarios in which conflicts arise involving either present or former clients. In this installment, we discuss issues presented by the lateral hire of a lawyer by a law firm or the combination of two law practices, large or small, either by acquisition or merger.

Careful attention to actual or potential conflicts must be given in every such situation.

Consider the following scenario: During the course of work on a litigation matter for Client A, Law Firm X enters into negotiations with Lateral Lawyer to move her practice to Law Firm X.

An agreement in principle is reached, the announcements are prepared, and the champagne is cooling.

Lateral Lawyer provides a list of her firm's clients to Law Firm X, and one of the firm's clients is Client A's adversary in the pending litigation matter.

Can Lateral Lawyer still join Law Firm X? As will be shown, a particularly nettlesome aspect of this involves the imputed conflicts provisions of Rule 1.10.

Rule 1.10(a) imputes the knowledge of each attorney associated in a firm to every other lawyer in the firm, and prohibits one associated lawyer from representing a client if any other associated lawyer would be prohibited from representing that client.

By its terms, Rule 1.10 treats a 1,500-lawyer firm in the same fashion as a three-lawyer firm, so if a law firm partner in San Francisco has a conflict, her partners in Boston and Miami have the same conflict. See Rule 1.10, cmt. 6 (a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client); Admonition No. 08-11, 2008 WL 8579290 (Ma. St. Bar Disp. Bd.) ("a violation of the disciplinary rules in a two-person partnership in a small town is equally a violation in a thousand-lawyer professional corporation with offices worldwide").

Rule 1.10(d) specifically addresses our Lateral Lawyer scenario. Rule 1.10(d) says that if Lateral Lawyer joins Law Firm X, Law Firm X will have a conflict in continuing to represent Client A if the pending litigation matter is the same matter in which Lateral Lawyer's firm represents a party with materially adverse interests, or is substantially related to a matter in which Lateral Lawyer's firm previously represented a party with materially adverse interests, unless:

(1) Lateral Lawyer has no confidential information that is material to the pending litigation matter;

(2) Lateral Lawyer had neither substantial involvement nor substantial material information relating to the matter and Lateral Lawyer is screened from any participation in the matter at Law Firm X, per the screening procedures in Rule 1.10(e); or

(3) both clients consent to Law Firm X's continuing representation of Client A.

The "hot potato" doctrine generally prohibits Law Firm X from dropping Client A in order to bring Lateral Lawyer into the firm. Thus, Lateral Lawyer may not join Law Firm X unless one of the Rule 1.10 exceptions applies. We discuss each of those options below.

The comments suggest a presumption that Lateral Lawyer will have confidential, material information concerning a matter if she did any work on the matter, or participated in law firm meetings at which the matter was discussed.

Thus, the comments suggest, Lateral Lawyer must "search [] her files and recollections carefully" to determine whether she possesses confidential information. Rule 1.10, cmt. 9.

If Lateral Lawyer did any work on the matter or knows about it from general discussion at her former firm, Lateral Lawyer then must determine whether she had "substantial" involvement or whether she possesses "substantial" material information relating to the matter. See *O'Donnell v. Robert Half Int'l, Inc.*, 641 F. Supp. 2d 84 (D. Mass. 2009) (associate's 7.2 hours of work on class-action wage and hour case did not constitute "substantial involvement," but associate did receive "substantial material information" concerning defense strategy for former client's case).

If the answer to both inquiries is in the negative, Lateral Lawyer may join Law Firm X, so long as Lateral Lawyer is appropriately screened.

The screening procedures are laid out in Rule 1.10 (e), and require, among other things, notice to the former client of the screening procedures and an attestation by Lateral Lawyer and Law Firm X that no information regarding the matter will be shared with or accessible to Lateral Lawyer.

Lateral Lawyer and Law Firm X must "reasonably believe" that screening will be effective under the circumstances. Rule 1.10(e)(5).

As noted in the comments, screening is less likely to be effective in a very small law firm. Rule 1.10, cmt. 10.

Importantly, Rule 1.10 also prohibits Lateral Lawyer from being apportioned any part of the fee from the matter once she joins Law Firm X. The prohibition likely applies only to compensation directly related to the matter, such as a share of a contingency fee recovery, and not to the determination of Lateral Lawyer's salary or partnership share, where the fees paid to Law Firm X on the matter are just a small part of the firm's overall revenue. See Model Rule 1.10, cmt. 8.

If Lateral Lawyer was substantially involved in the matter or has substantial material information concerning it, Lateral Lawyer may not join Law Firm X without the former client's informed consent. Rule 1.10 (c), cmt. 11.

In our view, this would require, at a minimum, that Lateral Lawyer disclose to the former client: her plans to join Law Firm X; Law Firm X's representation of an adverse party; any restrictions that will be placed on Lateral Lawyer's involvement in the matter once she joins Law Firm X; and the risk that any such screening procedures might fail. Presumably, Lateral Lawyer also will want to advise the former client to obtain independent legal advice on the advisability of consenting to Law Firm X's representation of the client's adversary, notwithstanding the conflict.

If Lateral Lawyer was substantially involved or has substantial material information concerning either the matter or a substantially related matter, and Lateral Lawyer's client declines to waive the conflict, Lateral Lawyer may not join Law Firm X.

That seemingly harsh result for Lateral Lawyer recognizes the preeminent consideration of the conflicts rules, which is the duty of undivided loyalty that a lawyer owes to her client. See *Robert Half*, 641 F. Supp. 2d at 91.

While our hypothetical scenario involves a single lawyer moving her practice to a new firm, the same principles apply to law firm mergers, even when those mergers involve international "legacy firms."

The difficulties presented by these mergers are illustrated in a lawsuit currently pending in the U.S. District Court for the Central District of California. See *Western Sugar Cooperative, et al. v. Archer-Daniels – Midland Company, et al.*, CV11-3473-CBM.

Several of the defendants in that matter have moved to disqualify plaintiffs' counsel, a newly merged combination of two law firms, alleging that one of the merger partners counseled the defendants over a 10-year period on matters directly at issue in the pending lawsuit.

According to the defendants, they are being sued by their own law firm "to halt business practices developed and maintained in part upon legal advice received from this same firm." Doc. No. 232, p. 2.

The newly merged firm has vigorously opposed the disqualification motion, which is scheduled for argument in November, but one can be sure that the plaintiffs are less than happy at the prospect of having to retain new counsel.

A final caveat is in order. The American Bar Association Model Rules of Professional Conduct, and the rules of certain other jurisdictions, are more permissive with respect to the screening of lateral lawyers without client consent than the Massachusetts rules.

The Supreme Judicial Court currently is considering proposals for various changes to the Massachusetts Rules of Professional Conduct, including Rule 1.10, and many lawyers and law firms in Massachusetts are advocating for greater flexibility in the rule. As a result, any attorney considering a lateral move, and any firm considering a merger or practice acquisition, will want to follow closely any action by the SJC with respect to Rule 1.10.

Thomas E. Peisch and Erin K. Higgins are partners at Conn, Kavanaugh, Rosenthal, Peisch & Ford in Boston, where they advise and defend lawyers and law firms on liability and ethical issues. Peisch is a former vice chairman of the Board of Bar Overseers.

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