



# LOOKING FOR HELP OR ASKING FOR TROUBLE?

## *Ethical and Risk Issues with Lateral Hiring*

### **Introduction**

Lateral hiring is a common solution for law firms looking to expand. While a candidate's experience, cultural fit or client following might naturally come to mind when a law firm is seeking to hire laterally, how many law firms also consider that ethical and risk issues can arise? This article considers three issues that lateral hiring can raise: conflicts of interest, confidentiality and the adequacy of staff induction.

### **Conflicts of Interest**

When recruiting at the partner level, many firms would ask the candidate about their expected client following. As part of your due diligence, you should also check that the clients the candidate proposes to bring in do not present conflict issues with the firm's existing clients.<sup>1</sup>

A typical scenario where conflict issues could occur is where the candidate brings to the new firm a client whose interests conflict with those of an existing client of the new firm. Alternatively, a client may stay with the candidate's previous firm, but the new firm may be barred from representing a client whose interests conflict with those of the client from the candidate's previous firm.<sup>2</sup>

The problems that arise from handling potential conflict issues are illustrated in the US case of *O'Donnell v. Robert Half Int'l, Inc*, which exemplified the second scenario above.<sup>3</sup> The plaintiffs and defendants had been engaged in litigation for five years. During this period, the defendants' firm terminated the employment of an associate who had been working there for less than a year. The plaintiffs' firm later hired the associate and immediately screened her from the ongoing matter. However, the court still disqualified the plaintiffs' firm from continuing to represent the plaintiffs because the associate was found to have been privy to significant confidential information. This case illustrates the worst-case scenario - disqualification - for a law firm that fails to correctly assess whether a conflict of interest exists.

The prospect of fighting a disqualification application may even lead to a hiring firm retracting the candidate's employment offer, as had happened in another US case.<sup>4</sup>

Checking for conflicts effectively will usually involve disclosing "clients, adverse parties and interested parties".<sup>5</sup>



If your law practice uses a computerised conflicts database, an additional tip in the US context is to run a conflicts search using the candidate's name and their current law firm as "client, adverse party and interested party".<sup>6</sup>

As to timing, running conflicts searches should be done at the earliest possible stage. Firms often leave conflicts searches to the very last stages of recruitment, which poses multiple dangers: the firm may be tempted to overlook potential conflicts given how much time it has already invested in the candidate; the recruitment process may be delayed if the firm discovers conflicts (e.g. if the firm needs to refer existing clients to other firms); or the firm may have to abandon hiring the candidate entirely.<sup>7</sup>

### **Confidentiality**

The hiring firm should be aware that the candidate is likely to owe confidentiality obligations to his or her employer and to his or her clients. You should take steps to ensure that you do not ask for any confidential information as part of the hiring process, and to remind the candidate not to give you such information.

What information is confidential? In relation to the candidate's employer, the employment contract may define what "confidential information" includes, which will often cover "individual client charge-out rates [and] revenues".<sup>8</sup> In relation to clients, it may be good practice to err on the safe side by assuming that any information acquired in the course of the candidate's work is confidential.<sup>9</sup> For example, many clients would not want their lawyers to disclose "their tardiness in paying bills; the amounts they spend on legal fees in particular matters; forecasts about their financial prospects; or information relating to sensitive client matters (e.g., an unannounced corporate takeover, an undisclosed possible divorce, or a criminal investigation into the client's conduct)".<sup>10</sup>

The commentary to the New York Rules of Professional Conduct suggests measures, framed from the candidate's perspective, on how to minimise the risk of unauthorised disclosure in lateral hiring (see box below).<sup>11</sup> Hiring firms should consider these measures in calibrating the amount of information that they require from the candidate at each stage of the recruitment process.

Measures that candidates can take in minimizing the risk of unauthorised disclosure in lateral hiring (New York Rules of Professional Conduct)

- Disclose client information in stages. Initially, identify only certain clients and provide only limited information. Provide a complete client list and more detailed financial information only at later stages.
- Disclose only basic information, such as:
  - the identities of clients or other parties involved in a matter;
  - a brief summary of the status and nature of a particular matter, including the general issues involved;
  - information that is publicly available
  - the lawyer's total book of business
  - the financial terms of each lawyer-client relationship; and
  - information about aggregate current and historical payment of fees (such as realization rates, average receivables, and aggregate timeliness of payments).
- Limit disclosure to those at the firm who are directly involved in clearing conflicts and deciding whether the lateral hire will proceed.
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If you use questionnaires or ask for a business plan in your recruiting process, you could include a written reminder that the candidate should not reveal any confidential information to you. To get information without putting the candidate in danger of breaching their confidentiality obligations, consider asking your personal contacts.<sup>12</sup> As confidentiality obligations might also be “breached by an enthusiastic candidate eager to impress at interview” (i.e. without the hiring firm asking for such information),<sup>13</sup> you could also remind the candidate not to reveal any confidential information to you throughout the recruitment process.<sup>14</sup>

Even after a candidate is hired, there is a risk that they may use confidential information from their previous position to generate new business. A recruiting firm could mitigate this risk by making its offer conditional on the candidate complying with their confidentiality obligations, and reminding the candidate in writing to do so.<sup>15</sup>

### **Staff Induction**

When a new hire arrives, many law firms simply say: “Here is your office, here is your computer and here is the secretary ... now go and make money for us.”<sup>16</sup> This approach has been criticised as “at least as likely to fail as it is to succeed”.<sup>17</sup> While the new firm may (understandably) assume that a partner-level hire should know the rules of professional conduct, the new hire’s former firm may not have sufficiently emphasized such rules, or another person at that firm may have been responsible for handling such issues.<sup>18</sup>

It has been suggested that law practices should brief the new hire on the firm’s policies and procedures as part of a formal induction procedure, rather than by gradual exposure to the firm’s working practices.<sup>19</sup>

This could be a program where a firm representative, such as the office manager, sits down with the new hire to go through the firm’s office manual and risk management policies, and notes down any areas where the new hire needs more training.<sup>20</sup>

### **Conclusion**

Experience from other jurisdictions shows that failing to handle the lateral hiring process properly can result in serious consequences such as disqualification due to conflict issues or breach of confidentiality obligations. Singapore practitioners should be mindful of these risks when hiring laterally. They should ensure that they comply with the relevant professional conduct rules and adopt sound risk management practices. The foreign best practices highlighted in this article offer a starting point for Singapore practitioners to work towards completing a successful lateral hire.

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*First published in the September 2018 issue of the Singapore Law Gazette*

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## Endnotes

1. Hermann J Knott, *Risk Management in Law Firms* (Globe Business Publishing, 2014) at p 202 (“Knott”).
  2. Robert William Hillman, *Hillman on Lawyer Mobility: The Law and Ethics of Partner Withdrawals and Law Firm Breakups* (Aspen Publishers, 2nd Ed, 2016 supplement) at 2:133.
  3. 641 F. Supp. 2d 84 (D. Mass. 2009).
  4. Marian C. Rice, “Lateral movement”, November/December 2012, Volume 38(6), *Law Practice Magazine* <[https://www.americanbar.org/publications/law\\_practice\\_magazine/2012/november-december/ethics.html](https://www.americanbar.org/publications/law_practice_magazine/2012/november-december/ethics.html)> (accessed 23 August 2018).
  5. Dentons, “Successfully navigating lateral hiring”, (9 August 2017) <<https://www.dentons.com/en/insights/newsletters/2017/august/9/practice-tips-for-lawyers/successfully-navigating-lateral-hiring>> (accessed 10 August 2018).
  6. *Ibid.*
  7. Dan Pinnington, “A checklist for avoiding conflicts on lateral lawyer transfers”, *Slaw: Canada’s online legal magazine* (27 February 2012) <<http://www.slaw.ca/2012/02/27/a-checklist-for-avoiding-conflicts-on-lateral-lawyer-transfers/>> (accessed 10 August 2018).
  8. Knott at p 193.
  9. For example, in Singapore’s context, see the principle in rule 6(1) of the Legal Profession (Professional Conduct) Rules 2015, that a legal practitioner is responsible to maintain the confidentiality of any information acquired in the course of professional work.
  10. New York Rules of Professional Conduct R1.6” (1 January 2017, commentary amended 28 March 2015) <<http://www.nysba.org/WorkArea/DownloadAsset.aspx?id=50671>> (accessed 14 August 2018) at comment 18C.
  11. “New York Rules of Professional Conduct R1.6” (1 January 2017, commentary amended 28 March 2015) <<http://www.nysba.org/WorkArea/DownloadAsset.aspx?id=50671>> (accessed 14 August 2018) at comment 18B and 18F.
  12. Grania Langdon-Down, “How to: Hire a partner”, *The UK Law Society Gazette* (19 May 2014) <<https://www.lawgazette.co.uk/practice/how-to-hire-a-partner/5041311.article> > (accessed 10 August 2018).
  13. Knott at p 193.
  14. Knott at p 201; Grania Langdon-Down, “How to: Hire a partner”, *The UK Law Society Gazette* (19 May 2014) <<https://www.lawgazette.co.uk/practice/how-to-hire-a-partner/5041311.article> > (accessed 10 August 2018).
  15. Knott at p 193.
  16. Knott at p 206.
  17. Knott at p 206.
  18. Olivia Burren and Nick Worthington, “Rainmaker – or cloud on the horizon?”, *The Journal of the Law Society of Scotland* (20 October 2008) <<http://www.journalonline.co.uk/Magazine/53-10/1005797.aspx>> (accessed 10 August 2018).
  19. *Ibid.*
  20. *Supra* n 18. Singapore practitioners may also wish to refer to the Law Society’s Practice Management Guide, which contains a sample office manual with chapters on personnel and risk management policies (available by logging into the Law Society’s Members’ Library.)
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