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Lateral Attorney Hires - Managing Conflicts and Assessing Risk

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Nancy Beauchemin, President, InOutsource

Gone are the days of law school graduates beginning their careers as associates and staying loyal to the firms that trained and promoted them. To stay competitive, firms are aggressively recruiting experienced and well-trained talent to grow their firm. These so called "laterals" often arrive with the promise and expectation of bringing new business to the firm. Before the courting of a lateral can begin in earnest, the recruiting firm must perform a conflicts check on the candidate's prior work history. The efficiency with which a firm can identify and assess conflicts arising out of a lateral's prior work history, the sooner a decision can be made as to whether the candidate is a good fit for the firm. Unfortunately, most firms do not have well-defined protocol to perform a confidential conflicts due diligence. The primary goal of checking conflicts is to determine if a lateral's work history or potential new matters are not opposed to the interests of the recruiting firm's current and former clients. The source of many motions to disqualify opposing counsel is often unidentified and unresolved client conflicts that crop up as a result of an attorney making a move to another firm.

If in place and used properly, technology can be a friend to a firm that plans to grow through acquiring lateral talent. But before a firm can jump into finding or improving upon current conflicts systems, they must also understand the background and professional standards that set the stage for solid systems and processes.

What Data Should Be Searched and Retained in a Conflicts System?

As law firms have grown, the amount of data elements to be searched has increased; subsequently, the potential conflicts hits that must be reviewed has also increased. In an attempt to make the conflicts reports easier to review, some firms have opted to eliminate a lateral's prior work history for matters

that will not be transitioned to the new firm. This shortsighted approach could come back to haunt the firm when it later opens a new matter that conflicts with a lateral's prior work history. In an attempt to halt this practice, New York and other jurisdictions have made it a requirement to store and search all of a lateral's prior work history as part of conflicts check.

The conflicts check process is even more complicated for today's large firms. Often a firm's system and procedures surrounding conflicts due diligence are based upon the ethics rules in the state where the conflicts department resides. Firms that have expanded their geographical footprint need to have an infrastructure to update their conflicts processes to reflect differences in all the jurisdictions in which they practice.

Will an Ethical Screen Alone be Sufficient Protection to Avoid Disqualification?

Some clients affected by a conflict as a result of a lateral hire may agree to waive conflicts if there is a wall or screen established to protect client confidentiality. State Bar Rules of Professional Conduct have held differing opinions as to whether the establishment of an ethical screen alone is sufficient protection to avoid imputed disqualification of the firm as a result of conflicts arising from a lateral's prior work history. In 2001, the American Bar Association considered revising model rule 1.10 Imputation of Conflicts to allow screening in certain situations. Although the screening provision did not pass, several states have subsequently adopted some form of screening.

Business Conflicts

Many firms have a defined strategic plan for growth. These plans often define the nature of the matters the firm wants to handle along with goals for the types of clients the firm wants to pursue. Often the

discussions surrounding firm strategy and practice management are limited to the executive management team and practice group leaders. The gatekeeper for what types of matters are being opened within a firm is often the new matter intake/conflicts department staff. This staff needs to understand the firm's strategic vision. With support of technology, some of the business conflict rules can be built into the new matter opening system.

Proactive Steps to Facilitate the Conflicts Due Diligence Process

Knowing in advance the issues, professional standards, and background will help firms shore up their conflicts due diligence processes and systems. Firms should look for and have in place technology that can:

- Help regularly close inactive matters. It is not recommended to close matters in response to potential conflicts, as this practice can be perceived as the firm choosing the more favorable client.
- Contain enough information in the database about current and former matter representations to allow the firm to make informed decisions based upon updated ethics rules surrounding conflicts.
- Evaluate current data in the conflicts database. Execute a plan to clean up duplicative data elements and streamline conflicts reports. Review internal processes to open a new matter to ensure there is sufficient information regarding potential new matter to identify ethical and business conflicts.
- Protect client confidential information prior to a lateral joining the firm. It is not sufficient to establish a policy in response to a conflict. Implement procedures and technology to erect and manage ethical screens across repositories that contain client confidential information. Technology

should force users to acknowledge ethical screens.

- Help the firm define what types of matters are considered business conflicts, and communicate this information to the attorneys and conflicts staff. There must be oversight to ensure that taking on one matter won't preclude the firm from other, more desirable matters in the future.

It should be noted that solid systems and technology also work in reverse. If a firm finds itself losing one of its talented attorneys to another firm, a well-run process will help the firm and the attorney move on with minimal disruption to everyday workloads and without unnecessary disruptions to current client relationships.

Summary

Law firm policies surrounding due diligence required to perform conflicts checks and protect client confidentiality are often out of synch with the reality of day-to-day practice. It is not reasonable to expect attorneys to remember all of the steps they need to take to comply with protecting client confidentiality. There must be processes supported by technology to automatically enforce compliance.

When solid processes and technology are in place, law firms can handle their due diligence conflicts check with efficiency and effectiveness. This in turn makes the process of growth through hiring lateral talent easier and faster, which is desirable for all parties involved.

Author: *Nancy Beauchemin, President, InOutsource. Ms. Beauchemin has spent more than 20 years working with law firms advising on records management best practices given rising costs, new technologies and risk management issues. She has earned a Certified Records Manager (CRM) designation from the Institute of Certified Records Managers, and is a member of ARMA International. She holds a B.S. Degree from Northeastern University. Ms. Beauchemin can be reached at nbeauchemin@inoutsource.com.*

INOUTSOURCE

Records & Information Management Consulting

888.845.7015

www.inoutsource.com

www.mergerreadiness.com