Everyone Has Baggage

Limiting the Liability that Travels with Lateral Hires

By Cassidy E. Chivers and Noah D. Fiedler

Hiring practicing lawyers with an existing book of business can greatly benefit a law firm. Lateral hires provide instant growth and increased revenue. Firms can immediately address perceived or real deficits in service offerings by bringing on lawyers experienced in specific areas of practice. By adding groups of lawyers, new, growing, and profitable areas of practice can be swiftly added to a firm's practice mix and bottom line. But silver linings wouldn't exist without a cloud.

Lateral hires and the potential claims that they bring with them present a significant exposure to any firm. While it's not possible to avoid risk arising from a lateral's history completely, firms can take steps to limit and manage reasonably the potential costs and claims that travel with lateral hires.

A hiring firm's main concern (and the topic of this column) is protecting itself against exposure for alleged negligent acts that a newly hired attorney may have committed before the matter transfers to the hiring firm. In other words, how best can a firm avoid being pulled into a malpractice claim arising from an error or omission that the lateral committed before transferring to the new firm?

The first place to start limiting possible exposure is by conducting thorough due diligence on the lateral hire. As part of the hiring process, be direct with the candidate. Ask if the candidate has been a party to prior claims, lawsuits, or disciplinary matters. Verify the answers by performing docket searches and other online investigations. A simple Google search can turn up issues that might later grow into problems for the hiring firm.

Conduct a similar inquiry about the clients that the candidate expects to bring to the new firm. Have those clients complained about the amount of work performed, the amount of any invoice billed, or the strategy employed? Have the clients that are expected to move to the new firm previously asked for discounted fees or refused to pay for work already performed? Are any of the moving clients difficult, do they have unrealistic expectations, or do they require unreasonable amounts of non-billable or staff time to keep them satisfied?

Carefully review the matters that are expected to transfer to the hiring firm to determine not only whether the cases would be a good business fit, but also whether any errors might have occurred. If there were possible errors, can the errors be addressed or mitigated? Along with this inquiry come considerations of client notification of the errors and their effects. *See, e.g.*, ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 481.

Note that Model Rule 1.6(b)(7) of the Model Rules of Professional Conduct provides a limited exception to client confidentiality for the purposes of detecting or resolving conflicts of interest arising from a lawyer's change of employment. Because of the limited nature of the exception, firms doing an extensive background review should consider whether a candidate must obtain client consent before providing client files for review.

All of this inquiry requires a lot of work and time. The larger the incoming book of business is, the more work and time the hiring firm will devote to conducting due diligence. At some point, the costs might outweigh the benefits of using internal resources, even to support such a critical goal as protecting the firm from legal malpractice claims. There are a few reputable and experienced lateral-hire screening vendors that can provide this service. The more substantial the book of business, or the greater the risk in the underlying matters or representing the clients, the more likely it is that engaging an experienced, lateral-hire screening firm will be the most efficient and effective way to conduct due diligence.

Once due diligence has been completed and the move scheduled, the hiring firm should decide how to address two issues. First, the lateral hire and the prior firm

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should communicate with the clients. This step raises a whole host of other factors that are beyond the scope of this column. However, the hiring firm should satisfy itself that these communications are proceeding within the ethics rules and decisional law of the state of practice.

Second, the hiring firm should evaluate how to take in the new clients and matters. Properly structuring the new engagements can provide protections that might otherwise be lost. Because these are new engagements, the hiring firm should determine whether new engagement agreements should be prepared. If so, in addition to including any terms and conditions required by the firm, the firm should also assess limiting the scope of the firm's work, accounting for the procedural posture and history of the matter.

A statement in the engagement agreement that the attorney–client relationship commenced on a specific date on or after the lateral hire starts working at the hiring firm can provide a defense against a claim that the firm had a responsibility to the client at some earlier time. In addition, the engagement agreement should also describe the relationship as a new one with the hiring firm. The point of such language is to position the relationship with the new firm as comparable to replacement or successor counsel. This would be an important argument if an error was not correctable by the hire date.

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As soon as the lateral hire begins, the best thing that a firm can do is to assign someone to review the new matters immediately to determine if there are steps that may, should, or must be taken to protect the clients' interests. As anyone who's worked a legal malpractice case knows, if a subsequent firm can correct or mitigate an error made by a prior firm but fails to do so, that failure is a defense to any malpractice claim against the prior firm. If there is not enough time to correct a previous error, then the hiring firm must address the obligation to report material errors to the client, including whether the firm may or should continue to represent the client.

There may be some temptation to attempt to limit the hiring firm's liability in the engagement agreement. In this regard, be very careful about Model Rule 1.8(h), which limits lawyers' ability to make an agreement prospectively limiting liability for malpractice. Lawyers and firms can form such an agreement with a client, but if they do so, the rule requires that the client be independently represented in making the agreement. This rule also varies significantly from state to state, so consult your state's version of the rule when considering what will work best in your specific circumstance.

Professional liability brokers or carriers can also provide guidance and advice during the lateral vetting and hiring process. Of particular interest is considering tail coverage from the lateral's prior firm. Brokers and carriers will have knowledge of, and insight into, the available insurance products and which coverage issues might exist.

Obviously, none of these steps—separately or together—can completely protect a hiring firm or prevent a client from suing the firm for an error that occurred before hiring. However, each measure moves the firm in the right direction. Taking small protective measures consistently in each step of the lateral hiring process can help firms limit the possibility of suit, and they can also erect viable defenses to possible claims. FD

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must meet a performance-based standard of liability. The product either must have (1) caused them harm or (2) failed to perform as intended. Yet in the face of the *Ranbaxy* case, the Third Circuit's approach to this issue may be in jeopardy.

In *Ranbaxy*, a manufacturer recalled multiple lots of its generic cholesterol medicine after employees noticed blue particles, glass from glass liners on machines used in the manufacturing process, in the raw material of a *different batch* of the drug. *Ranbaxy*, 353 F. Supp. 3d at 319.

The plaintiffs neither alleged physical injury nor that the drug failed to perform as intended. In fact, they did not even allege that the pills that *they* had purchased contained *any* contaminant, and even if they had, the U.S. Food and Drug Administration had advised that "the possibility of health problems related to the recalled product is *extremely low* and patients who have the recalled medicine *can continue taking it unless directed otherwise by their physician or health care provider*." *Id.* (internal citations and quotation marks omitted) (emphasis added). The court found that the named plaintiffs had suffered an injury in fact because, among other things, "batches of pills in recalled lots [] *could* have been contaminated." *Id.* at 322 (emphasis added). This is a clear retreat from the performance-based standard of liability articulated in *Koronthaly*, *Hubert*, and *Myers*, in which the courts determined that plaintiffs who suffered no physical injury and did not allege that the product that they purchased failed to perform as intended could not establish injury in fact under Article III.

Despite the fact that *Ranbaxy* is a win for the defense on the issue of class certification, defense counsel should be uncomfortable with the expansion of Article III standing that *Ranbaxy* portends. Manufacturers of drugs should not be forced to litigate with consumers who have benefitted from their products without incident, whether these claims are litigated individually or joined in a class action. Any other result is merely death by a thousand cuts. FD