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LARGE LAW FIRM LATERAL HIRE
CONFLICTS CHECKING

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LARGE LAW FIRM LATERAL HIRE CONFLICTS CHECKING:
PROFESSIONAL DUTY MEETS ACTUAL PRACTICE

By James M. Fischer

TABLE OF CONTENTS

1. INTRODUCTION ......................................................................................................... 2
2. THE LAW GOVERNING LAWYER MOBILITY ....................................................... 6
   A. CHANGING DYNAMICS OF LAWYER MOBILITY........................................ 6
   B. CHANGING APPROACH OF PROFESSIONAL CODES TO LAWYER MOBILITY .......................................................... 7
   C. THE COMMON LAW OF LAWYER MOBILITY AND LAW FIRM DISQUALIFICATION .................................................. 10
   D. CONFLICTS DISCLOSURE & CONFIDENTIALITY ....................................... 19

3. HOW LAW FIRMS CONDUCT LATERAL HIRE CONFLICT CHECKS ............. 29
   A. STUDY METHODOLOGY ................................................................................. 29
   B. TIMING OF CONFLICTS CHECK .................................................................. 31
   C. THE LATERAL QUESTIONNAIRE ................................................................. 32
   D. QUESTIONNAIRE COMPREHENSIBILITY .................................................... 37
   E. CONFIDENTIAL INFORMATION ..................................................................... 40
   F. RUNNING THE CONFLICTS CHECK .............................................................. 42
      1. CONSENTS ................................................................................................. 47
      2. SCREENS .................................................................................................... 51
   G. CONTRACT LAWYERS ..................................................................................... 54
   H. DISCLOSURE COMPLIANCE BY LATERALS ............................................... 57

4. REFLECTIONS ......................................................................................................... 59

5. CONCLUSION ........................................................................................................... 69

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INTRODUCTION

Fifty years ago, lawyers did not migrate between large law firms.¹ A lawyer joined a large law firm as an associate and either became a partner or left the firm.² Today, American Lawyer, the chronicler of the late twentieth century reshaping of the legal profession, would identify such a firm as an AM LAW 100 or AM LAW 200 firm.³


Institutional loyalty appears to be in decline. Partners in law firms have become increasingly ‘mobile,’ feeling much freer than they formerly did and having much greater opportunity than they formerly did, to shift from one firm to another and take revenue-producing clients with them.

Id. at 152.


In the past, becoming a partner in a law firm was a little like getting married – both the firm and the lawyer approached the relationship as a long-term mutual commitment. For this reason, it was not at all uncommon to see a lawyer spend his or her entire career at a single law firm. Indeed, such a relationship was the expectation rather than the exception. This was the era of stable law firms.

An environment of law firm stability was supported by the culture of the profession as well as the state of the law. Firms generally avoided recruiting experienced lawyers and focused instead on developing their practices through the hiring and training of recent law school graduates. Mature lawyers had only limited opportunities to change firms. A firm focused on hiring bright but inexperienced lawyers so that it could impress upon its young associates the ways that firm liked to practice law. This reflected belief in a certain brand identity associated with professional practice. Each firm sought to differentiate its product from that of its competitors.


³ The American Lawyer was founded in 1979 to report on the business side of the practice of law. About AmericanLawyer.com and The American Lawyer Magazine, AMERICANLAWYER.COM, http://www.law.comjsp/tal/about.jsp (last visited June 21, 2010). Each May the publication lists the 100 largest private law firms in the United States (AM LAW 100) and each June it lists the second 100 largest private law firms (AM LAW 200). In identifying the firms it uses a series of metrics, including gross revenues, profits per partner, value per lawyer, etc. For 2009, the smallest (based on gross revenues)
When the lawyer left the firm, the lawyer did not transfer to another large law firm; rather, the lawyer moved in-house, usually with a client of the firm, or joined a small law firm. That world is now utterly alien to the legal profession. Movement of lawyers between law firms has become an accepted aspect of professional life. A recent report stated that nearly half of all promotions to partner at AM LAW 100 firms came from lawyers who had begun their professional career at some other law firm. The movement of these lawyers, known as laterals, has now become a business in its own right, including not just associate lawyers who hope to become partners, but partners who believed their practice will be more successful at another firm. At the other end of this transformation is the recent development of “contract” lawyers – itinerant attorneys who move from law firm to law firm, much like migrant farm workers.

AM LAW 100 law firm (Davis Wright Tremaine) was represented to have 489 lawyers, of which 213 were equity partners. THE AMERICAN LAWYER, 138 (May 2010). For 2009, the smallest (based on gross revenue) AM LAW 200 law firm (Morris, Manning & Martin) was represented to have 137 lawyers, of which 41 were equity partners. THE AMERICAN LAWYER 100 (June 2010).

Adams v. Aerojet-General Corp., 104 Cal. Rptr. 2d 116, 124 (Cal. App. 2001) (“Gone are the days when attorneys (like star athletes) typically stay with one organization throughout their entire careers.”)


ROBERT W. HILLMAN, LAWYER MOBILITY §1.1 (2d ed. 2009 Supp.):

Law firms, in short, are in turmoil, and many of their problems arise from within the firms themselves. Increasingly firms are but temporary resting places for their partners. Lateral hiring, once confined largely to junior lawyers, now extends through all levels of a partnership. The partner who can transport clients and revenues to another firm is a particularly attractive candidate for lateral movement...

Id. at 1:3 – 1:4-1 footnote omitted). The euphemism often heard is that the new firm will provide a “better platform” for the partner’s practice.

DEBORAH AARON & DEBORAH GUYOL, THE COMPLETE GUIDE TO CONTRACT LAWYERING (2005):

In 1988, a mere 1,300 attorneys nationwide were estimated to be involved in temp work, according to Lesley Friedman, founder of Special Counsel International, an East Coast contract lawyer placement agency. Friedman said the contract lawyering phenomenon – like paralegals a decade earlier – was slow to be adopted, but quickly found favor in law office management. By the mid-1990s, contract lawyer’s agencies were working with an estimated 10,000 lawyers – an eight-fold increase – with some $40 million in revenues to show for their efforts.
Lawyers have duties of confidentiality that they owe to current and former clients. This professional duty is implicated when lawyers move from law firm to law firm. Lawyers are also subject to imputation and attribution rules by which they acquire conflicts possessed by other lawyers in the firm and, in turn, transmit their own conflicts to other lawyers in the firm. A conflict a lawyer has at Firm A may be transferred to Firm B and its lawyers when the lawyer moves from Firm A to Firm B. A lateral hire, thus, presents an opportunity and a potential cost to the acquiring law firm – the firm gains a lawyer, and the lawyer’s book of business, but it may also gain the lawyer’s conflicts, which may prevent the firm from representing a current or prospective client in a current or prospective representation.

To control the potential cost of conflict acquisition, law firms require laterals to disclose clients the lawyer represents and work the lateral has engaged in that may present a conflict if the lateral joins the firm. This raises the concern that disclosure of the information by the lateral breaches the duty of confidentiality owed to affected clients.

Id. at 6. According to the ABA, this trend is not experiencing any retrenching:

[Law firms are . . . expressing a “growing enthusiasm” for a staffing alternative – contract lawyers, according to an Altman Weil press release. Last year, 39 percent of the law firms used contract lawyers. This year, 53 percent will or might do so, while 52 percent expect that contract lawyers will become a permanent part of their staffing plans.]


ABA Model Rules of Professional Conduct, Rules 1.6(a), 1.9(c) (2010) (“Model Rules”).

Compare ABA Formal Opinion 09-455 (“When a lawyer moves between law firms, both the moving lawyer and the prospective new firm have a duty to detect and resolve conflicts of interest”); with LAWRENCE J. FOX & SUSAN MARTIN, RED FLAGS: A LAWYER’S HANDBOOK ON LEGAL ETHICS §5.03(c), at 92-93 (2005); John S. Dzienkowski & Robert J. Peroni, Conflicts of Interests in Lawyer Referral Arrangements With Nonlawyer Professions, 21 GEO. J. LEGAL ETHICS 197, 226 (2008) (“[B]ecause client identities probably are confidential information for purposes of the ethical duty of confidentiality, their disclosure to the nonlawyer professional requires client consent”); Annotated Model Rules of Professional Conduct 95 (6th ed. 2007) (“Rule 1.6 generally prohibits the disclosure of a client’s identity . . . unless the client consents or the disclosure is impliedly authorized to effectuate the representation.”) (citations omitted). This point is addressed more fully in Part 2D, infra.

Model Rules, supra note 8, Rule 1.10(a). In this paper, I distinguish between attribution of conflicts (taint) among members of the firm and imputation of conflicts (taint) when a lawyer moves from one firm to another firm and brings his conflicts from the first firm to the second firm. In other words, attribution refers to a lawyer having the same conflicts of interest as any other lawyer at the firm; imputation refers to a lawyer bringing conflicts to his or her new firm.
clients. Several commentators have recently addressed the issue\textsuperscript{11} and it has been the subject of several recent ethics opinions.\textsuperscript{12}

The commentary and opinions that have addressed this issue have not, however, looked at actual law firm practices. The analysis of the professional responsibility issue, while competent and thorough, has been abstract. Firm practices have been hypothesized, not examined. This paper examines actual large law firm practices in this area.

Part 2 of this paper discusses the law of attributed and imputed conflicts and recent commentary and opinions addressing whether disclosures by prospective laterals to enable firms to conduct conflicts checks violates the duty of confidentiality owed to affected clients. The paper concludes that the limited disclosure needed to conduct conflict checking does not violate client confidentiality. This, however, does not end the inquiry. There may be the “outlier” case when disclosure does breach the duty and disclosure, even when permitted, should be no greater than necessary to accomplish the legitimate aims and objectives of disclosure. Part 3 of this paper then examines how large firms conduct lateral conflicts checks. The paper draws on interviews with lawyers, primarily general counsel from AM LAW 100 firms. Part 4 of this paper suggests ways in which the conflicts checking process of laterals could be simplified and made more efficient. Finally, this paper concludes that law firm practice in this area is congruent with professional duty.


\textsuperscript{12} ABA Formal Opinion 09-455, \textit{supra} note 9; see generally, Wald, Lawyer Mobility, \textit{supra} note 11, 31 J. Legal Prof. at 204-07 (collecting and discussing opinions).
PART 2
THE LAW GOVERNING LAWYER MOBILITY

A
CHANGING DYNAMICS OF LAWYER MOBILITY

As recently as the beginning of 1980 the practice of law continued the earlier
tradition of lawyers practicing alone or in small groups.\(^\text{13}\) Approximately 50% of lawyers
in private practice were solo practitioners; of the approximately 50% in firm practice
62% practiced in firms of 10 lawyers or less; 25% in firms 11-50 lawyers, 14% in firms of
over 50 lawyers.\(^\text{14}\)

Within 10 years the legal profession experienced a dramatic change that
redefined how large law firms grew and prospered. By 1991, one third of lawyers in
private practice were members of firms with over 50 lawyers.\(^\text{15}\) In 1980, there were 78
law firms with over 100 lawyers; by 1991 there were 324 firms with over 100 lawyers.\(^\text{16}\)
As firms grew, the tradition in large firms of “up or out” gave way to “in and out”; lawyer
movement between firms became an accepted practice.\(^\text{17}\) By 2001, American Lawyer

\(^{13}\) One significant trend already in place by 1980 was the decline in solo practice and the movement
to practice in a “firm” of lawyers. Clara N. Carson, The Lawyer Statistical Report: The U.S. Legal

Within the universe of private practitioners, however, representation of
solo practitioners and that of firm practitioners shifted over time. In 1960,
solos constituted almost two thirds (64%) of all lawyers in private practice
and firm practitioners almost one-third (31%). The size of the solo
majority began to erode after 1960, however, and by 1971 the solo
practitioner majority had contracted to 52%. The decline in solo
representation continued thereafter falling to 49% in 1980 and to 45% by
1991. In the 1990s solo practitioner representation rose to 48% as the
growth rate of firm practitioners declined.

\(^{14}\) Id. at 7.

\(^{15}\) Id. at 8.

\(^{16}\) Id.

\(^{17}\) Id. at 15; see ROBERT L. NELSON, PARTNER WITH POWER 39-49 (1988) (describing the
growth of the large law firm during this period); see also Henderson & Bierman, Lateral Lawyer Trends,
supra note 2 (providing additional data on lawyer mobility in the twenty first century).

\(^{17}\) Compare Nelson writing in 1988:
began publishing each February an annual Lateral Report that discussed not just trends in lawyer inter-firm movement, but included advice and analysis of the now accepted practice of lateral hiring. Although there is yearly fluctuation in the numbers, lateral hiring of lawyers has clearly lost its earlier professional disapproval.

B

CHANGING APPROACH OF PROFESSIONAL CODES TO LAWYER MOBILITY

The first national codification of professional norms and values occurred in 1908 with the promulgation of the ABA Canons of Professional Ethics. Several canons referenced the problem of conflicts of interest between a lawyer and a former client; with few exceptions firms are “up or out” hierarchies in which lawyers who fail to make partner in six to nine years must seek employment elsewhere. A majority of lawyers enter firms directly out of law school. Of the lawyers in my four-firm sample, sixty-one percent had held no previous position; another 11 percent had held nothing more than a judicial clerkship between graduation and entering the firm. The remainder came from other law firms (11 percent), government (5 percent), business organizations (4 percent), and various other positions, such as the military (8 percent). Although hiring lawyers away from other firms or from government has become more important in recent years, these data indicate that this is still quite exceptional.


CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 53-56 (1986) (discussing development of Canons of Ethics by the ABA).

ABA Canons of Professional Ethics, Canon 6, which provides in part:

The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment form others in matters adversely affecting any interest of the client with respect to which confidence has been reposed.

In 1928, the ABA added Canon 36, which adopted a special rule for lawyers leaving public service and entering private practice and which provides in part:
however, the canons did not address the issue of imputation and attribution of conflicts from lawyer to firm or firm to lawyer.\textsuperscript{20} The issue of lawyer mobility and transference of conflicts was ignored. The first apparent attention to the matter was in ABA Formal Opinion 33 in which the issue was attribution within a two-person law firm. Just three years earlier, the ABA had amended the Canons by adding Canon 33 that expressly permitted practice in the form of a law firm, but did so in terms that were more an acknowledgement of reality than an aspirational endorsement.\textsuperscript{21}

This lack of attention to lawyer mobility is not surprising. At the turn of the twentieth century, law “firms” were small and most lawyers practiced alone as “solos.” The pragmatic concern was not lawyers sharing information within firms – a practically non-existent consideration, but lawyers becoming adverse to former clients, what today we call side-switching.\textsuperscript{22}

In 1969, the ABA Canons were replaced by the ABA Code of Professional Responsibility.\textsuperscript{23} As Wolfram notes, although the Code’s treatment of the issue of conflict attribution and imputation lacked nuance, its approach was inhospitable to

\begin{quote}
A lawyer, having once held public office or having been in the public employ, should not after his retirement accept employment in connection with any matter which he has investigated or passed upon while in such office or employ.
\end{quote}

\textsuperscript{20} WOLFRAM, LEGAL ETHICS, \textit{supra} note 18, at 393 (noting that professional codes first addressed the topic of imputation of conflicts of interests to other lawyers in 1969 with the adoption of the ABA Model Code of Professional Responsibility).

\textsuperscript{21} ABA Canons, \textit{supra} note 19, Canon 33 (1928):

\begin{quote}
Partnerships among lawyers for the practice of their profession are very common and are not to be condemned.
\end{quote}

Canon 33 then went on to describe limits to practicing law in the form of a law partnership. This was a difficult issue for the ABA because at this same time it was vigorously opposing the use of a corporate format to practice law. James M. Fischer, \textit{Why Can’t Lawyers Split Fees? Why Ask Why, Ask When}, 6 GEO. J. LEGAL ETHICS 1, 9-10 (1992).

\textsuperscript{22} Weidekind v. Tuolumne County Water Co., 19 P.173 (Cal. 1887) (reversing judgment when lawyer for defendant had previously represented plaintiff on earlier trial of same cause; thereafter, earlier award was reversed and lawyer represented former adverse party on remand).

\textsuperscript{23} ABA Model Code of Professional Responsibility (1969).
lawyer mobility, imposing a “sweeping, per se disqualification of all members of an affected law firm” that was only slightly, and uncertainly, modified in 1974.\textsuperscript{24}

The ABA Model Rules of Professional Conduct, adopted in 1983 after the turn toward lawyer mobility had begun, represented a dramatic recalibration of the Model Code’s approach.\textsuperscript{25} While the Model Rules retained the principle of attribution among members of a firm,\textsuperscript{26} it revised the Model Code’s approach towards imputation of conflicts to new firms by lawyers moving from old firms. Under the Model Rules, there was no automatic disqualification based on the lawyer’s movement to the new firm; rather, the focus was on the actual client work and information obtained by the lawyer at the old firm.\textsuperscript{27} While conflicts created as a result of the lawyer’s work and knowledge would be taken to the new firm, conflicts only vicariously attributed to the lawyer because of the lawyer’s association with the old firm were not necessarily carried by the lawyer to the new firm.\textsuperscript{28} Recently, the Model Rules were amended so that even a lawyer’s actual, prior work-related conflicts are not imputed to the new firm as long as an effective ethical screen is timely created when the lawyer joins the new firm.\textsuperscript{29}

\begin{itemize}
\item \textsuperscript{24} WOLFRAM, LEGAL ETHICS, supra note 18, at 393-94 (noting that 1969 version failed to impute conflicts resulting from the one lawyer’s possession of client confidential information, while the 1974 amendment was so broad as literally to impute a lawyer’s physical incapacity, e.g., heart attack, to all the members of the firm).
\item \textsuperscript{25} ABA Model Rules of Professional Responsibility (1983).
\item \textsuperscript{26} Id., Rule 1.10(a).
\item \textsuperscript{27} Id., Rule 1.9(b). The nomenclature of the Model Rules distinguishes between a “lawyer” who is involved in the same or substantially related matters involving a former client (Rule 1.9(a)) and a “lawyer in a firm” which is involved in the same or substantially related matters involving a former client (Rule 1.9(b)). The approach distinguishes between the lawyer who is a personally-prohibited lawyer, i.e., a lawyer who did actual work for the former client at the former firm, and a lawyer whose conflict arises solely by reason of affiliation, i.e. by attribution only. The “attribution” lawyer, on leaving the old law firm, may purge himself or herself of the taint and not transmit (impute) it to the new firm.
\item \textsuperscript{28} The complicating factor here is the presumption courts have read into Model Rule 1.9(b) that the migrating lawyer gained confidential, protected information about the matter while with the former firm; however, that presumption may be rebutted if the lawyer can prove he did not obtain the information. LaSalle Nat’l Bank v. Lake County, 703 F.2d 252, 255-56 (7th Cir. 1983). I explore this issue in greater detail in Part 2C, infra.
\item \textsuperscript{29} In February, 2009 the ABA House of Delegates added language to Rule 1.10(a) allowing a law firm to avoid the imputation of conflicts of interest from a lawyer to other members of the firm if the lawyer is screened. In August, 2009, the House of Delegates clarified that screening was only available and effect when the conflicts-possessing lawyer was a lateral hire and the conflict involved a former client.
\end{itemize}
The professional codes over the span of 40 years have, thus, moved 180 degrees on this subject. The 1969 Model Code’s automatic disqualification of the new firm based on a migrating lawyer’s attributed conflict has been replaced by 2009 with the Model Rule’s rejection of imputation even when a personally tainted lawyer moves to a new firm, as long as the lawyer is effectively screened.

C

THE COMMON LAW OF LAWYER MOBILITY AND LAW FIRM DISQUALIFICATION

For large law firms the economic cost of disqualification is a far more immediate concern than the practically non-existent prospect of professional discipline. Only a few jurisdictions purport to hold law firms, as opposed to individual lawyers, accountable for professional misconduct. And while members of large law firms, as lawyers, are subject to professional discipline, few discipline actions are commenced against lawyers, particularly partners, at large law firms. Disqualification, however, does run to law firms and disqualification results in short term loss of revenue and long term risk of rupture of relationships. Large law firms are, thus, cognizant of, and careful about, the relationship between imputation of conflicts of interest and law firm disqualification.

The judge-made law of lawyer disqualification has followed, but not replicated, the professional rules governing lawyer mobility. The result is that a common law of lawyer disqualification exists side-by-side an evolving professional code as to how lawyer mobility should be addressed when conflicts of interest are concerned. These twin tracks while addressing common concerns are not always synchronized with each other. Judge-made law, formulated at a time when the professional rules were hostile to lawyer mobility, may continue to have precedential salience even though the

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30 Courts frequently intone that while they may look to professional codes for guidance, the courts reserve independent judgment as to whether a lawyer will be disqualified. See Annotated Model Rules of Professional Conduct 9-10 (6th ed. 2007) (collecting decisions); See Fred C. Zacharias, Are Evidence-Related Ethics Provisions Law?, 76 FORDHAM L. REV 1315 (2007) (addressing extent to which, if at all, professional rules are “law” that must or ought to be followed by courts when, for example, considering the disqualification of a lawyer for a conflict of interest) cf. Snow v. Ruden, McClosky, Smith Schuster & Russell, PA., 896 So.2d 787 (Fla. App. 2005) (holding that professional rules governing lawyers was not “law” for purposes of state whistleblower protection act; consequently, professional rule requiring reporting of professional misconduct did not support whistle blowing claim of terminated lawyer).
professional rules have changed and no longer exhibit the earlier hostility.\textsuperscript{31} To further complicate the issue, the ends and aims of lawyer disqualification do not dovetail those of professional regulation.\textsuperscript{32} Consequently, while professional rules are often considered by courts in determining disqualification motions based on lawyer mobility, the actual influence of professional codes in this area is difficult to gauge.

\textsuperscript{31} See \textit{In re Dresser Industries, Inc.}, 972 F.2d 540 (5\textsuperscript{th} Cir. 1992):

The district court clearly erred in holding that its local rules, and thus the Texas rules, which it adopted, are the “sole” authority governing a motion to disqualify. Motions to disqualify are substantive motions affecting the rights of the parties and are determined by applying standards developed under federal law.

\textit{Id.} at 543 (citations omitted). The Texas rules that the district court had followed was an amended version of Model Rule 1.7 that permitted a lawyer or law firm to be directly adverse to another client as long as the two representations were not substantially related. The ABA Model Rules do not have the “substantially related” limitation to a Rule 1.7 conflict. Similarly, California does not have an attribution rule in its Rules of Professional Conduct. California courts have, nonetheless, adopted an attribution rule for purposes of determining whether a lawyer or law firm should be disqualified for “having” a conflict of interest. \textit{Heriksen v. Great American Savings \\& Loan}, 14 Cal. Rptr.2d 184 (Cal. App. 1992):

The California Rules of Professional Conduct do not specifically address the question of vicarious disqualification, and for that reason the vicarious disqualification rules have essentially been shaped by judicial decisions. As a general rule in California, where an attorney is disqualified from representation, the entire law firm is vicariously disqualified as well.

\textit{Id.} at 14 (footnote and citations omitted).


Disqualification motions implicate several important interests, among them are the clients’ right to counsel of their choice, the attorney’s interest in representing a client, the financial burden of replacing a disqualified attorney, and tactical abuse that may underlie the motion. The “paramount” concern in determining whether counsel should be disqualified is “the preservation of public trust in the scrupulous administration of justice and the integrity of the bar.” It must be remembered, however, that disqualification is a drastic course of action that should not be taken simply out of hypersensitivity to ethical nuances or the appearance of impropriety.

\textit{Id.}, at 281 (citations omitted); \textit{In re Home Products Corp.}, 985 S.W.2d 68, 82 (Tex. 1998) (same). The professional values underlying conflicts of interest rules can generally be framed in terms of the lawyer’s duty of loyalty and the duty to protect client confidential information. See \textit{Flatt v. Superior Court}, 885 P.2d 950 (Cal. 1994); see generally, \textit{Developments in the Law, Conflicts of Interest in the Legal Profession}, 94 Harv. L. Rev. 1244, 1262-1270 (1981) (identifying conflicts of interests rules as servicing client autonomy and fiduciary considerations).
Both the professional rules and the common law of lawyer disqualification distinguish between current client conflicts and former client conflicts. Law firms are primarily focused on current client conflicts because the prospect of additional business (the lateral’s portable clients) drives the lateral hiring process. Current client conflicts pose problems for large law firms because the lateral’s portable clients may not mesh with the firm’s existing client base. Of particular concern is the risk that the firm may find itself representing a client, or one of its affiliates, in one matter and be adverse to that client, or one of its affiliates, in another matter, which may cause a disqualification.

Former client conflicts do not raise the same problem. Both the professional codes and the common law of lawyer disqualification recognize that when a lawyer represents a client, the lawyer cannot later accept a representation adverse to that former client when the new representation is the same as or substantially related to the former representation without the former client’s informed consent.33 When the matters are the same, the lawyer is seen as switching sides, a tactic that violates the duty of client loyalty – a fundamental value of the legal profession.34 Matters that are unrelated do not raise this concern; lawyers have traditionally been allowed to be adverse to former clients when the current representation is unrelated to the former representation.35 Matters that are substantially related raise a unique concern. Their

33 Flatt v. Superior Court, supra note 32, 885 P.2d at 954; WOLFRAM. LEGAL ETHICS, supra note 18, §7.4.3.


[Side-switching] implicates the lawyer’s duty of loyalty as well as confidentiality. Where the lawyer switches sides and represents the former client’s adversary in the same matter, everything the lawyer does for the new client necessarily will injuriously affect the former client.

Id. at 136 (Citations omitted) [Brackets added]; Cardona v. General Motors Corp., 942 F. Supp. 968 (D.N.J. 1996):

At the heart of every side switching attorney case is suspicion that by changing sides, the attorney has breached a duty of fidelity and loyalty to a former client, a client who freely shared with attorney secrets and confidences with the expectation that they would be disclosed to no one else.

Id. at 969; see supra text and note 22.

closeness to the prior representation makes it possible that the lawyer’s prior work for the now adverse, former client may give the lawyer’s current client an unfair edge. This is because confidential client information the lawyer may have acquired in the prior representation may be material, e.g., useful, in the current representation against the interest of the former client. While courts and commentators have debated whether the fundamental value being protected is client loyalty or client confidentiality, the consensus view is that the substantially related representation requires the former client’s informed consent to (waiver of) the conflict.

When a lawyer is a member of a firm the question of conflicts is further complicated by the principle that all lawyers in the firm represent all the firm’s clients regardless of whether the lawyer actually worked for a particular client of the firm. During the formative period of the common law of lawyer disqualification, which was largely coextensive with the harsh attitude toward lawyer mobility reflected in the Model Code, a lawyer moving from one firm to another carried potentially two sets of conflicts. First the lawyer carried his own personal conflicts based on his client work, conflicts that extended to substantially related matters, e.g., the lawyer was personally tainted by a conflict of interest. Second, the lawyer carried all the conflicts of all the other lawyers in the firm, conflicts that also extended to substantially related matters, e.g., the lawyer was vicariously tainted because of the attribution rule. Two presumptions come to be recognized here. First, there was the presumption that while the lawyer was at the prior firm, if that firm worked a matter, the lawyer gained confidential client information regarding the matter. Second, there was the presumption that what the lawyer knows, the entire firm knows. Treating these presumptions as irrebuttable or rebuttable had a significant impact on the lawyer’s, and the law firm’s, ability to represent the current client adverse to a former client when the lawyer moved from one firm to another firm.

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36 Compare Developments, Conflicts of Interest, supra note 32, at 1315 (arguing that conflict of interest rules regarding current representations adverse to former client derive from lawyer’s duties to protect client confidential information); with WOLFRAME, LEGAL ETHICS, supra note 18, at 362 (identifying key concern as disloyalty to the former client).

37 Restatement (Third) Law Governing Lawyers §132(d) (2000). Technically, the affected client gives informed consent to waive the conflict of interest and allow the lawyer to represent the client notwithstanding the conflict. Courts and commentators, however, use the term “consent to the conflict” and “waiver of the conflict” interchangeable with the technical understanding implicit in the usage. That usage is adopted in this paper.
Some courts felt the attribution rule was too strict in the context of mobile lawyers; hence, they treated attribution as a rebuttable presumption. A lawyer could avoid being seen as having a conflict if the lawyer could show that he did no work on any matter that was the same or substantially related to the matter to which the former client is now adverse.\(^ {38}\) Other courts, however, treated the presumption as irrebuttable,\(^ {39}\) although this was a minority position.\(^ {40}\) Today the Model Rules no longer treat a lawyer who did no work on a matter and who leaves the firm as having a conflict of interest unless the lawyer actually has confidential information of the former client.\(^ {41}\)

The departing lawyer may carry a conflict because the lawyer acquired client confidential information by representing a client or by actually received the information. Mere presence, however, at the firm does not suffice to create a conflict the lawyer carries to a new firm. The common law of lawyer disqualification does not, however, always recognize this change in the professional view of the issue. Some courts continue to treat the presumption of attribution as irrebuttable because precedent so dictates, even though the professional standard on which the presumption was based no longer exists.\(^ {42}\)

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39 State ex rel. Freezer Services, Inc. v. Mullen, 458 NW2d 245, 250 (Neb. 1990); see Novo Terapeutisk Laboratorium A/S v. Baxter Travenol Laboratories, Inc., 607 F.2d 186, 196 (7th Cir. 1979). (discussing cases)

40 M. Peter Moser, Chinese Walls: A Means of Avoiding Law Firm Disqualification When a Personally Disqualified Lawyer Joins the Firm, 3 GEO. J. LEGAL ETHICS 399, 405 (1990) (stating that courts have resisted irrebuttable application of rule of double imputation). One area where courts would apply the imputation presumption even when the lateral had no involvement in the matter was when the firm was small. State ex rel. Consenza v. Hill, 607 S.E.2d 811, 816 (W. Va 2004) (holding that small size of lawyer’s former firm, coupled with firm’s collegial environment, supported presumption that lawyer acquired confidential client information materials to current matter during lawyer’s tenure at firm); Cheng v. GAF Corp., 631 F.2d 1052, 1058 (2d Cir. 1980) (finding that proposed screening methods were inadequate to prevent imputation due to relatively small size of firm which created unacceptable danger of inadvertent transmission of protected information); State of Ark. v. Dean Foods Products Co., Inc., 605 F.2d 380, 385 (8th Cir. 1979) (same).


The lateral lawyer who moved from one law firm to another, thus, potentially imputed to the lawyers of the new firm all the conflicts the lawyer had, both personal and attributed. The effect of imputation was that all the clients of the lateral lawyer’s former law firm at the time of the lawyer’s departure could be deemed clients of the lawyer’s new law firm. The practical consequence was that the new law firm could not represent a client adverse to a client of the former firm on any matter that was substantially related to matters handled by the former firm without the affected client’s informed consent.

One way to blunt imputation is to screen the tainted lawyer. Screens are not uncommon in professional fields, but their use in the legal profession has been, and continues to be, questioned. For most of the twentieth century the view was that the protecting of confidential information was more important than lawyer mobility and the ability of clients to retain the lawyer(s) of their choice. Sometimes this view was

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43 Cardinale v. Golinello, 372 N.E.2d 26, 29-39 (N.Y. 1977) (holding that an associate who changed firms and who asserted that he had learned nothing about the former client, which was now an adversary of his new firm, should, nonetheless, be disqualified along with his new firm because the prior firm was so small, the associate faced an irrebuttable presumption that he knew whatever the partners and associates knew when he was at the prior firm).

44 For example, both the New York Stock Exchange and the National Association of Securities Dealers use screens to isolate the research arm of members from the control of the investment banking arm of its members. See Release No. 45908, Release No. 34-45908, 77 S.E.C. Docket 1737, 2002 WL 970848 (May 10, 2002) (Approving rules).


The ABA historically resisted recognizing screening as a solution to the migratory lawyer problems, or to other conflict of interest problems generally. The only exceptions were for former government lawyers, under M.R. 1.11 and former judges, under M.R. 1.12.

Id. at 483; see ABA/BNA Lawyers Manual on Professional Conduct, 17 Current Reports 492 (August 15, 2001) (discussing views of Ethics 2000 committee whether screening should be authorized by the Model Rules as mechanism to avoid the imputation of conflicts to other members of the firm).

46 The ABA Ethics 2000 Committee recommended that screening be adopted as a mechanism to avoid imputation of conflicts, but the ABA House of Delegates rejected the recommendation preferring to retain the Model Rules non-acceptance of non-consensual screening in the context of private lawyer movement between firms. ABA/BNA Lawyer’s Manual on Professional Conduct, 17 Current Reports 492, 494 (Aug. 15, 2001).
justified under the now-rejected “appearance of impropriety” standard; sometimes the view was justified under the view that the incentive to leak confidential information would overcome screening.

The absolutist view was not, however, encompassing of all instances of lawyer mobility. For example, exceptions were recognized for lawyers moving to the private sector from public employment. Some jurisdictions rejected attribution in their professional codes, although courts seem to deem this an oversight when disqualification of a law firm was sought based on lawyer movement. More importantly, however, a number of courts and some jurisdictions came to view a broad imputation rule as too harsh for lawyers and for clients. These courts and jurisdictions began to recognize screening as a device that would defeat imputation. How far


48 WOLFRAM, LEGAL ETHICS, supra note 18:

In the end there is little but the self-serving assurance of the screening-lawyer foxes that they will carefully guard the screened-lawyer chickens. Whether the screen is breached will be virtually impossible to ascertain from outside the firm.

Id. at 402; but see Robert A. Creamer, Three Myths About Lateral Screening, THE PROFESSIONAL LAWYER 20 (Winter 2002) (arguing that evidence from jurisdictions that permit screens demonstrate that lawyers can be trusted to abide by screens).

49 Model Rules, supra note 8, Rule 1.11 expressly confirmed the prior practice. WOLFRAM, LEGAL ETHICS, supra note 18, at 462-63. Screening was also accepted in other contexts. Rule 1.18, supra note 8 (permitting screening to avoid imputation when member of firm receives confidential information from prospective client not retained); Rule 1.12, supra note 8 (same with respect to matters in which lawyer personally participated as mediator, arbitrator, etc.)


51 Hitachi, Ltd. v. Tatung Co., 419 F. Supp.2d 1158 (N.D. Cal. 2006).

52 Cromley v. Board of Educ. of Lockport Tp. High School Dist. 205, 17 F.3d 1059 (7th Cir.):

As a first step in deciding whether that presumption has been rebutted, we must determine whether the attorney whose change of employment created the disqualification issue was actually privy to any confidential information his prior law firm received from the party now seeking disqualification of his present firm. The rebuttal can be established either by proof that the attorney in question had no knowledge of the information, confidences and/or secrets related by the client in the prior
screening would be recognized as blocking imputation varied. Screening may only
prevent vicariously acquired conflicts from being imputed; \textsuperscript{53} it may prevent conflicts
based on a small and insubstantial association with a matter from being imputed; \textsuperscript{54} or it
may insulate a lawyer whose involvement in a matter was personal and substantial from
having the conflict imputed. \textsuperscript{55}

Recently, the ABA adopted the position that screening without the consent of
affected clients would prevent imputation of conflicts caused by personal and
substantial involvement in a matter. \textsuperscript{56} In doing so, the ABA joined approximately 24
states that have expressly authorized notice-only screens as a method for avoiding the
imputation of conflicts resulting from private lawyers leaving one law firm and joining
another law firm. \textsuperscript{57} While ABA adoption of this position will likely encourage additional
representation, or by proof that screening procedures were timely
employed in the new law firm to prevent the disclosure of information and
secrets. Uncontroverted affidavits are sufficient rebuttal evidence.

\textsuperscript{53} County of Los Angeles v. United States District Court, 223 F.3d 990, 994-997 (9th Cir. 2000)
(permitting screening to avoid vicarious conflict carried by lateral to new firm even though no California
authority expressly authorized this procedure in this context); Clinar v. Blackwood, 46 S.W.3d 177, 183
(Tenn. 2001) (same., although no Tennessee Rule of Professional Conduct permitted screening to avoid
imputation of conflict to new firm).


\textsuperscript{55} Model Rules, supra note 8, Rule 1.10(a)(2).

\textsuperscript{56} \textit{Id.}

\textsuperscript{57} For a listing of jurisdictions, see THOMAS D. MORGAN & RONALD D. ROTUNDA, 2010
SELECTED STANDARD ON PROFESSIONAL RESPONSIBILITY, Appendix B, at 168-173. William
Freivogel’s website (www.freivogelonconflicts.com) has an extensive, annotated survey of state and
federal cases discussing the position of all 50 states on the subject of screening lawyers and non-lawyer
member of a firm. Illinois does not require notice (II. CS S.Ct. Rules of Prof. Conduct, RPC Rule 1.10);
however interviewees consistently stated they would not risk a business relationship with a firm client by
jurisdictions to adopt screenings, at the present time screening to avoid imputation of conflicts is the slight minority position. More importantly, several large states California, New York, Texas, and Florida presently do not permit non-consensual, notice only screening to avoid the imputation of a conflict by a lateral to members of the firm. Large, multi-jurisdictional law firms by their very nature must look at the rules in all the jurisdictions in which they are present. In this regard, the lowest common denominator principle often applies, particularly when many large, commercial jurisdictions continue to apply rigorous attribution and imputation rules to lawyers moving between private law firms. In addition even when screens prevent imputation of a conflict to other members of the firm, the screen must be effective and to be effective the firm must know what it is that the firm must screen against.

Imputation of conflicts due to prior work is, however, only part of the reason firm’s conflict check potential lateral hires. The truly desirable laterals are those who bring business to the firm in the form of portable clients. These portable clients raise, however, current client conflicts that cannot be screened. By taking on the lateral’s clients, the firm may find itself in conflict with one or more of its current clients. This risk is enhanced when the conflict involves affiliates of clients. In taking on laterals conflicts erecting a screen without notifying that client. The situation was otherwise if the screen was simply precautionary.

Law Firm G interview, copy on file with the author (noting that the firm has offices in a number of jurisdictions and is sensitive to state variations over what constitutes a conflict of interest); Law Firm J interview, copy on file with the author (conflicts issue controlled by law of jurisdiction in which lateral will be officed). See Laryngeal Mask Company Ltd. V. Ambu A/S, (S.D. Cal. 2008) 2008 WL 558561 (disqualifying law firm that acquired confidential information from prospective client that met with lawyers who worked in the firm’s District of Columbia office; court applied California law to resolve conflicts and disqualification issue).

To determine whether screening would be effective in preventing a former client’s secrets and confidences from being shared with the other members of the disqualified lawyer’s new firm, courts that have accepted the efficacy of screening to avoid imputation have considered a number of factors. In addition to the size of the firm and the extent of its departmentalization, other elements considered have included whether the disqualified lawyer: (1) is able to gain access to the case files; (2) shares in the profits or fees derived from the matter; (3) has frequent contact with those personnel who are handling the lawsuit in the new firm; and (4) is given an opportunity to review any of the case documents. The number of tainted lawyers in the new firm, the similarity of the matters, and the extent of involvement of the tainted lawyer in the former representation also are among the factors that courts have weighed along with counsel to represent it. These and other factors are weighed on a case-by-case basis. See generally Kevin Brown, Annot., Sufficiency of Screening Measures (Chinese Wall) Designed to Prevent Disqualification of Law Firm, Member of Which is Disqualified for Conflict of Interest, 68 A.L.R. Fed. 687 (1984).
checking helps the firm gauge not only what it stands to gain, but also what it stands to lose.

Thus, conflict checking is, and will likely remain, a significant issue for law firms when considering lateral hires. Widespread adoption of screening would alleviate the concern, but not eliminate the issue. Law firms would still need to acquire information in order to erect effective screens and make good business decisions regarding the effect hiring the lateral will have on the firm’s existing client base.

D

CONFLICTS DISCLOSURE & CONFIDENTIALITY

To determine whether a disqualifying conflict exists, law firms need to know (1) what clients will accompany the lateral to the firm,60 and (2) what matters the lateral is currently working on and has worked on for clients who will not follow the lateral to the new firm,61 and (3) what confidential information the lateral has.62 Because of

60 This will raise possible current client conflicts under Rule 1.7(a) of the Model Rules, supra note 8.
61 This will raise possible former client conflicts under Rule 1.9 of the Model Rules, supra note 8.
62 This will raise a possible conflict because the duty to protect the confidence may conflict with the lawyer’s duty to the current client. Model Rules, supra note 8, Rule 1.9(c); see In re Deutsche Bank Trust Co. Americas, 605 F.3d 1373 (Fed. Cir. 2010) (holding that a lawyer who prosecuted a related patent action for a client may be barred from prosecuting patent applications before the Patent and Trademark Office (PTO) for the client if the lawyer acquired, as a result of that first representation, another party’s confidential information that is relevant to the patent application prosecutions before the PTO); Nichols v. Village Voice, Inc., 417 N.Y.S.2d 415 (App. Dept. 1979):

The disqualification of an attorney by reason of conflict of interest will not be denied solely because there is no actual attorney-client relationship between the parties. A “fiduciary obligation or an implied professional relation” may exist in the absence of a formal attorney-client relationship (Westinghouse Electric Corporation v. Kerr-McGee Corporation, 7 Cir. 580 F.2d 1311). It is clear that where an attorney receives confidential information from a person who, under the circumstances, has a right to believe that the attorney, as an attorney, will respect such confidences, that law will enforce the obligation of confidence irrespective of the absence of a formal attorney-client relationship.

Id. at 418 (citation in original). In Westinghouse Electric Corp. lawyers were representing a uranium industry trade association and received confidential information from members of the organization with the understanding that the lawyers were acting in the members’ interest. Several years later the lawyers, on behalf of a different client from the trade association filed antitrust action against several of those members who had provided confidential information in the matter involving the trade association. The court stated that a “fiduciary relationship may result because of the nature of the work performed and the circumstances under which confidential information is divulged that required the lawyer to maintain the
attribution and imputation principles, this inquiry could be extended into the representation and work done by other lawyers at the lateral’s firm. As will be noted in Part 3, law firms have structured their conflicts checking so that it focuses solely on what the lateral is doing, has done, or knows; law firms do not inquire more broadly, apparently viewing the chance of imputation of all of the lateral’s vicariously acquired conflicts as too remote to be worth considering. Law firms do, however, seek disclosure of the lateral’s activities while at the lateral’s current firm. This raises the question whether the lateral’s disclosures violate the professional duty of confidentiality owed to clients of the lateral’s current firm?

Modernly, the ABA defines the professional duty of confidentiality broadly and exceptions narrowly. All information a lawyer acquires “relating to the representation” is encompassed by the professional duty of confidentiality. This definition is generally followed by individual jurisdictions in their operational professional codes.63 This

63 ABA Model Rules, supra note 8, Rule 1.6(a); Restatement (Third) Law Governing Lawyers §59 (2000). Some jurisdictions while adopting the Model Rules format retain the Model Code definition of confidentiality as extending to information the client has instructed the lawyer to keep secret or information, which, if disclosed, would cause or result in embarrassment or harm to the client. See, e.g., Va. R.S. Ct. PT 6 §2, Rules of Professional Conduct, Rule 1.6(a). However, Virginia uses the “relating to the representation” test in dealing with former client conflicts. Id. at Rule 1.9(c) (2); cf. Va. Leg. Ethics Opn. 1832 (applying “relating to the representation” test as a gloss on basic duty of confidentiality owed by lawyer to client). Minnesota’s version of the duty of confidentiality adopts the “relating to the representation” language as the basic definition, but then creates an express exception permitting disclosure using the Model Code’s approach:

(a) Except when permitted under paragraph (b), a lawyer shall not knowingly reveal Information relating to the representation of a client.

(b) A lawyer may reveal information relating to the representation of a client if:

(2) the information is not protected by the attorney-client privilege under applicable law, the client has not requested that the information be held inviolate, and the lawyer reasonably believes the disclosure would not be embarrassing or likely detrimental to the client;
definition practically means that everything the lawyer knows about the client is protected from disclosure unless one of three conditions apply: (1) the client gives informed consent to the disclosure; (2) the lawyer has implied authority to disclose the information; or (3) an express exception to confidentiality, recognized in the professional rules, applies. 64  This modern view is an expansion on earlier views that the professional duty was limited to information the client had instructed the lawyer to keep confidential or the disclosure of the information would be embarrassing or harmful to the client. 65

A moment’s reflection will suggest that a lateral completing a law firm questionnaire that seeks information (1) about who the lateral represents or has represented, (2) matters the lateral is working on or has worked on, or (3) confidential information the lateral has acquired, will involve information that “relates to a representation.” The lateral only acquired the information because the lateral or the firm “represented” the client in some capacity. This suggests that completing the conflicts questionnaire violates professional duties of confidentiality, absent client informed consent, implied authority, or specific exception.

This question has sparked two well researched and well reasoned law review articles by Professors Paul Tremblay and Eli Wald 66 and a well considered ethics

52 M.S.A., Rules of Prof. Conduct, Rule 1.6. Internet links to the various state rules of professional conduct are available at http://www.abanet.org/cpr/links.html.

64 There is some debate whether this duty includes publicly known information. Compare Restatement (Third) Law Governing Lawyers §59 (2000) (“Confidential client information consists of information relating to the representation of a client, other than information that is generally known.”); with Annotated Model Rules of Professional Conduct 97 (6th ed. 2007) (“Rule 1.6 contains no exception for ‘information previously disclosed or publicly available.’”) Model Rule 1.9(c), Model Rules, supra note 8, does permit the use of generally known information against a former client. I do not want to overstate the difference. It is unclear if a difference is intended or the difference is one of grammatical usage that is not intended. Information that is generally known is not necessarily correlative with information that is publicly available. See Iowa Supreme Court Attorney Disciplinary Bd. v. Marzen, 779 N.W.2d 757, 768 (Iowa 2010) (rejecting contention that information that was a matter of public record was information that is generally known).

65 ABA Canons of Professional Ethics, Canon 37: Model Code of Professional Responsibility, DR 4-101(A) (1969), see supra note 63.

opinion by the ABA’s Standing Committee on Legal Ethics and Professional Responsibility.\textsuperscript{67}

Tremblay, Wald, and the Ethics Committee each concluded that:

1. The information requested by conflicts questionnaires, e.g., client identity, related to the representation and, therefore, was client confidential information;\textsuperscript{68}

2. The lawyer did not have implied authority to disclose the information because disclosure did not directly advance the client’s ends and aims of the representation;\textsuperscript{69}

3. Disclosure was not authorized by the “other law” exception to client confidentiality because there is no “other law” that authorizes disclosure.\textsuperscript{70}

Notwithstanding the above conclusions, the Ethics Committee concluded that “the need to disclose” conflicts information permitted limited disclosure for conflicts checking purposes,\textsuperscript{71} a position Tremblay and Wald rejected.\textsuperscript{72} Both Tremblay and Wald argued that disclosure for conflicts checking required an amendment to the rules, an approach Tremblay supported\textsuperscript{73} but Wald rejected.\textsuperscript{74}

\textsuperscript{67} ABA Formal Opinion 09-455.

\textsuperscript{68} Tremblay, Migrating Lawyers, supra note 66, 19 GEO. J. LEGAL ETHICS at 508-09; Wald, Lawyer Mobility, supra note 66, 31 J. LEGAL PROF. at 201; ABA Opinion, supra note 67, at ____.

\textsuperscript{69} Tremblay, Migrating Lawyers, supra note 66, 19 GEO. J. LEGAL ETHICS at 533; Wald, Lawyer Mobility, supra note 66, 31 J. LEGAL PROF. at 218-19; ABA Opinion, supra note 67, at ____.

\textsuperscript{70} Tremblay, Migrating Lawyers, supra note 66, 19 GEO. J. LEGAL ETHICS at 517-533; Wald, Lawyer Mobility, supra note 66, 31 J. LEGAL PROF. at 226; ABA Opinion, supra note 67, at ____.

\textsuperscript{71} ABA Opinion, supra note 67 at ____.

\textsuperscript{72} Tremblay, Migrating Lawyers, supra note 66, 19 GEO. J. LEGAL ETHICS at 519-20, 548-49; Wald, Lawyer Mobility, supra note 66, 31 J. LEGAL PROF. at 223-24.

\textsuperscript{73} Tremblay, Migrating Lawyers, supra note 66, 19 GEO. J. LEGAL ETHICS at 545-49.

\textsuperscript{74} Wald, Lawyer Mobility, supra note 66, 31 J. LEGAL PROF. at 273 (arguing that disclosure to further the lawyer and the firm’s personal interests was inconsistent with larger professional values of client loyalty).
Both Tremblay, Wald, and the Ethics Committee note prior ethics opinions that have questioned the propriety of conflicts disclosures to assist lawyer movement from firm to firm.\textsuperscript{75} Those ethics opinions have done little to staunch the practice of eliciting and providing information to permit conflicts checking. It is difficult to envision a court or disciplinary authority taking the position today that limited disclosure to facilitate conflicts checking is not permitted by the rules of professional conduct or is inconsistent with professional values. Conflicts checking and confidentiality are like two porcupines; to propagate the species they must mate, but they must do so carefully to avoid injuring each other. If lawyers are to be allowed to move from one firm to another and if conflicts of interests in the form of portable clients or prior work is to be avoided or mitigated, some disclosure of client information is necessary to conduct conflicts checks. The Ethics Committee’s decision to rest acceptance of limited disclosure to facilitate conflicts checking for lateral hiring on “necessity” concedes the difficulty of squaring the practice with the letter of the law. Ultimately, the Ethics Committee preferred the utility of the practice of conflicts checking to avoid or mitigate conflicts of interest over the effective discouraging of firm-to-firm lawyer movement because the cost of securing consent would be high and the risk of not securing consent would be prohibitive.

Should conflicts checking disclosures by laterals raise real professional responsibility concerns? As noted above, Tremblay, Wald, and the Ethics Committee each concluded that conflicts checking information fell within the broad “relating to the representation” test used in the Model Rules to define client confidential information.\textsuperscript{76} The Ethics Committee concluded that as to client lists an implied exception based on necessity existed.\textsuperscript{77} The Restatement takes a different approach. The Restatement resurrects the Model Code approach, which identified client confidential information in terms of the consequences of disclosure rather than the method of acquisition:

\textsuperscript{75} Tremblay, \textit{Migrating Lawyers, supra} note 66, 19 GEO. J. LEGAL ETHICS at 524-26; Wald, \textit{Lawyer Mobility, supra} note 66, 31 J. LEGAL PROF. at 204-07.

\textsuperscript{76} See \textit{supra} at text and note 68.

\textsuperscript{77} See \textit{supra} at text and note 71. The opinion did not opine on the propriety of further disclosures, e.g., descriptions of matters worked on or disclosure of other parties. The opinion is silent as to why it is limited to approving only disclosure of client lists.
[T]he lawyer may not use or disclose confidential client information as defined in §59 if there is a reasonable prospect that doing so will adversely affect a material interest of the client or if the client has instructed the lawyer not to use or disclose such information . . . .

Thus, while the Restatement defines client confidential information similarly to the Model Rules, the Restatement defines the lawyer’s duty to protect client confidential information more narrowly than the Model Rules.

Tremblay criticizes the Restatement position as unsupported because it relies on the definition of confidential client information contained in the ABA Model Code of Professional Responsibility that was rejected by the ABA Model Rules of Professional conduct. The matter is, however, complicated, as Tremblay notes, by inconsistent adoption of Model Rule language by jurisdictions, although most of the differences relate to the exceptions to the duty of confidentiality rather than the definition of confidentiality. It is also complicated by the distance between the common law of lawyer professionalism and the Model Rule language. That said, I believe Tremblay is incorrect in his criticism. Conflicts checking disclosures are permissible unless the client would be harmed by the disclosure.

79 Tremblay, Migrating Lawyers, supra note 66, 19 GEO. J. LEGAL ETHICS at 522-23.
80 See THOMAS D. MORGAN & RONALD D. ROTUNDA, 2009 SELECTED STANDARDS OF PROFESSIONAL RESPONSIBILITY, 150-168 (providing state-by-state listing of crime/fraudulent act exceptions to professional duty to maintain client confidentiality); see supra note 63.
81 The common law of confidentiality flows from the lawyer’s fiduciary relationship with the client. See Maritrans GP, Inc. v. Pepper, Hamilton & Scheetz, 602 A.2d 1277, 1283 (Pa. 1992) (stating that “[a]t common law, an attorney owes a fiduciary duty to his client” and “that adherence to those fiduciary duties ensures that clients will feel secure that everything they discuss with counsel will be kept in confidence”). As noted in Section 2C of this paper, while both the common law and professional rules may share common general ends and objectives, the articulation and achievement of those ends and objectives in particular cases may differ, leading to disparate results.
82 The client could instruct the lawyer not to disclose and this would bend the lawyer under the Restatement’s approach. The client would have to give an advance instruction and no firm I interviewed indicated clients did so in the context of conflict checking for lateral movement to another firm. Moreover, in the absence of harm resulting from the disclosure, it is unlikely the disclosure would constitute a significant development that must be reported to the client. Model Rules, supra note 8, Rule 1.4(a); Restatement (Third) Law Governing Lawyers §20(1) (2000).
For conflicts checking to succeed, some disclosure of client confidential information is required. This disclosure is necessary whether the objective is to identify and clear a conflict or interpose a screen to prevent imputation of a conflict to other members of a firm. A screen cannot be created unless the firm knows what the screen is supposed to shield the affected lawyer from knowing. The Model Rules expressly recognize the use of screens, most importantly, as of 2009, when a lawyer moves from one firm to another, even when the lawyer is personally tainted with the conflict. For a screen to be effective in this context, the facts that give rise to the conflict must be disclosed so that an effective screen can be created. To understand Rule 1.6 as not permitting disclosures to effectuate screening under Rule 1.10(a)(2) would render Rule 1.10(a)(2) superfluous. Rule 1.10 was not amended in a vacuum. Permitting non-consensual screening, but requiring client consent to obtain the information necessary to determine if screening is needed and, if so, the boundaries of the screen is inconsistent.

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(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 previously engagements when:

. . . .

(3) the firm hires or associates with another lawyer, or . . . .

This is a carryover from prior New York practice. New York Code of Professional Responsibility, DR 5-105(E) (1969) (requiring a law firm to check for conflicts of interest); N.Y. City Formal Op. 2006-3 (including among a law firm’s supervisory duties a duty to check for conflicts when outsourcing legal support services to sites overseas). Whether there is a duty to check for conflicts absent a specific command is debatable. One can tease such a duty out of the “reason to know” requirement in comment 10 to Rule 1.0, which states that “[i]n order to be effective, screening measures must be implemented as soon as practicable after a lawyer, or law firm, knows or, reasonably should know, that there is a need for screening.” Model Rules, supra note 8. The reason to know obligation suggest a “duty” to know. But cf. Robert Kehr, Lawyer Error: Malpractice, Fiduciary Breach, or Disciplinary Offense?, 29 W.St. U. L. Rev. 235 (2002) (arguing that disciplinary rules do not impose a duty on lawyers to conduct conflict check(s)).

84 Babbitt v. Sweet Home Chapter, Communities for Great Ore., 515 U.S. 687, 698 (1995); cf. 2a C. Sands, Sutherland on Statutory Construction §46.06, 104 (rev. 4th ed. 1984) (“A statute should be construed so that effect is given to all of its provisions, so that no part will be inoperative or superfluous, void or insignificant”) (footnotes omitted); Richards v. United States, 369 U.S. 1, 11 (1962) (“a section of a statute should not be read in isolation from the context of the whole Act”).
If we look beyond the Model Rules to the common law of lawyer and law firm disqualification, which is the fundamental concern driving the conflicts checking process, we find support for the Restatement approach. Disqualification is often seen as a severe remedy that should be restricted to contexts where it will reduce or abate palpable harm if the lawyer or the firm is not disqualified. There are contrary decisions in which the absence of harm has not prevented the court from disqualifying counsel, although many of these decisions invoke the now discontinued “appearance of impropriety” standard. The presence of “harm” is, however, increasingly identified as a relevant factor by courts in determining the extent to which professional rules should

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85. Roush v. Seagate Technology, LLC, 58 Cal. Rptr.3d 275, 281 (Cal. App. 2007) (holding that “disqualification is a drastic course of action that should not be taken simply out of hypersensitivity to ethical nuances or the appearance of impropriety”); Musa v. Gillette Communications, 641 N.E.2d 233 (Ohio App. 1994): [A] trial court should bear in mind that disqualification is a drastic measure. In fact, a violation of the Code of Professional Responsibility alone should not result in disqualification unless disqualification is found to be absolutely necessary. Certainly, more is required than a mere allegation of an ethical violation.


We hold, therefore, that when an attorney in private practice has actual knowledge of the confidences of a former client in a particular case, and he or she undertakes employment with a law firm representing a party whose interests in that identical case are adverse to that former client, the construction of a Chinese Wall does not refute the appearance of professional impropriety – the possible disclosure of the former client’s confidences which is prohibited by Canon 9 of the Texas Code of Professional Responsibility. In such a case, the entire new firm must be disqualified from representing the adversary of the challenged attorney’s former client.

Id. at 201; see Arkansas Valley State Bank v. Phillips, 171 P.3d 899, 908-09 (Okla. 2007) (collecting decision applying “avoidance of the appearance of impropriety” standard to disqualify lawyers before and after adoption of ABA Model Rules of Professional Conduct): see generally James Lindgren, Toward a New Standard of Attorney Disqualification, 1982 AM. B. FOUND. RES. J. 419, 424-40 (1982) (discussing judicial view that the Model Code’s “avoidance of the appearance of impropriety” was an appropriate standard for disqualifying lawyers).
be used to sanction lawyers.\textsuperscript{87} While within the realm of professional discipline, the notion of harm is usually reserved for the determination of the appropriate level or amount of discipline,\textsuperscript{88} outside that area, the mantra of “no harm-no foul” may be the proper principle to apply.\textsuperscript{89}

Conflicts checking disclosure is consistent with the profession’s actual practice. There has been no reported instances any harm resulting to any client as a result of conflicts checking. The situation, thus, is somewhat analogous to cases when the lawyer has obtained confidential information innocently or inadvertently. In this context courts have interposed a “harm” or “prejudice” requirement as a condition to disqualification based on receipt of the confidential information.\textsuperscript{90}

\textsuperscript{87} See, e.g., Burrows \textit{v.} Arce, 997 S.W.2d (Tex. 1999) (addressing whether violation of professional rules should result in forfeiture of fees and concluding that while actual damages need not be established by the client fee forfeiture should be reserved for situations when the lawyer failed to provide valuable services for the client and forfeiture would result in a windfall to the client). Even decisions that eschew a harm requirement as essential or necessary require more than a violation of a rule of professional conduct to justify disqualification of a lawyer. In \textit{re Nitta} S.A. \textit{de C.V.}, 92 S.W.3d 419 (Tex., 2002):

Even if a lawyer violates a disciplinary rule, the party requesting disqualification must demonstrate that the opposing lawyer’s conduct caused actual prejudice that requires disqualification.

\textsuperscript{88} In \textit{re Bourcier}, 939 P.2d 604, 607 (Or. 1997) ("A potential injury to a client, due to an ethical violation, will support the imposition of a sanction; the injury need not be actual."); see Barrie, Althoff, \textit{Lawyer Disciplinary Sanctions}, 200 PROF. LAW. 105.

\textsuperscript{89} Restatement (Third) Law governing Lawyers §§49, 53 (2000).

\textsuperscript{90} In \textit{Estate of Myers}, 130 P.3d 1023 (Colo. 2006), a lawyer’s paralegal apparently misunderstood what was expected of her and obtained a confidential document through a ruse. The lawyer sealed the document without reading it, but the other side moved to have the lawyer disqualified. The court held that the order to disqualify the lawyer could not stand:

[D]isqualification of an attorney may not be based on mere speculation or conjecture, but only upon the showing of a clear danger that prejudice to a client or adversary would result from continued representation.

\textit{Id.} at 1024. The record did not contain the required showing. \textit{Cf. Coral Reef of Key Biscayne Developers, Inc. v. Lloyd’s Underwriters}, 911 So.2d 155 (Fla. App. 2005) (holding that when plaintiff’s counsel receive the privileged documents by a court order that was subsequently quashed, the party moving to disqualify plaintiff’s counsel must show that plaintiff’s counsel’s review of the privileged document caused actual harm to the moving party and disqualification is necessary because the trial court lacks means to remedy the moving party’s harm).
This study proceeds on the assumption that limited disclosure to accomplish conflicts checks in connection with prospective lateral hires is professionally proper and does not subject lawyers to discipline or law firms to civil liability.
PART 3
HOW LAW FIRMS CONDUCT LATERAL HIRE CONFLICTS CHECKS

A. STUDY METHODOLOGY

The purpose of the study was to discover how large law firms conduct conflicts checks for lateral hires. Most of the study participants were law firm General Counsel. In a few cases, the interview was conducted with a member of the firm who was not General Counsel. This was because either the firm did not have such a position or I was directed to that person in response to my inquiry whether the firm would participate in the study. The interviews were conducted by telephone and lasted from 25 to 60 minutes. In several cases there were follow up telephone conversations or email communications.

In each instance I promised the participants that I would respect in two ways the confidentiality of any information provided. First, I would not identify or link any law firm by name to any specific practice discussed in the study. Second, I would not identify any law firm as having participated in the study without the firm’s consent. Although a number of law firms provided consent, others did not. Rather than identify a partial list of participating law firms, I elected not to disclose the identity of any of the participating law firms. However, all the law firms that did participate in the study are large law firms, many of whom have a global presence. Of the 22 law firms that participated in the study 20 are AM LAW 100 firms and 2 are AM LAW 200 firms.

I do not represent that the firms that participated in this study necessarily represent the larger AM LAW 100 and AM LAW 200 universe of large law firms. The sample size, while reasonable, was not statistically correlated. Nor can I discount the possibility of a self-selection bias that encourages certain law firms to participate in the study.91 If participating firms are unlike non-participating firms,92 there may be

91 Self-selection bias reflects the skewing of the sample because factors that encourage or cause participation in the study may affect the randomness of the sample. McGraw-Hill Dictionary of Scientific & Technical Terms, 6E (2003).

92 No law firm I contacted expressly refused to participate. A number of law firms never responded to my email and telephone requests for interviews. In some cases, law firms agreed to participate, but we were unable to schedule an interview. In one instance the firm provided its Lateral Questionnaire, but we were unable to schedule the interview. I treat all of these as non-participating firms. In all, I sought
discrepancies between the practices described in this paper and practices at the non-participating law firms.

Because the study relied on voluntary participation and self-reporting, there are also limits to how confident one can be in the validity and accuracy of study’s findings. That said, there are a number of factors that I believe substantiate this study findings. First, the participating firms were both geographically diverse and well distributed within the AM LAW 100 ranking. Thus, the study findings are not skewed because they represent law firms within a small subset of the AM LAW 100 list. Second, most participating firms provided a copy of their Lateral Questionnaire, which the firm uses to obtain the conflicts checking data from laterals. Thus, I had a means of corroborating the information I was receiving during the interview. Third, and most importantly, the participating interviewees were, for the most part remarkably candid during the interviews. In some cases, there was an extended discussion about the propriety of some actions that had been taken by the firm in the past that was at the line, or over, of professional responsibility. Although the interviewees were careful with their responses, as one would expect lawyers to be, they were open and forthcoming about their firm’s practices regarding conflicts checking. Many of the interviewees acknowledged deficiencies in the completeness of their firm’s practices, a response one would not

93 Self-reported data may be based on or reflect external pressure to be respected, well liked, socially accepted, etc. Cf. Robert E. Rosen, “We’re All Consultants Now”: How Change in Client Organizational Strategies Influences Change in the Organization of Corporate Legal Services, 44 ARIZ. L. REV. 637, 638 (2002) (“The self-reports of elite actors, like lawyers, are especially suspect, for often they are speeches to an audience (other than the interviewer).”); Alyce S. Adams, Stephen B. Soumeral, Jonathan Lomas, and Dennis Ross-Degnan, Evidence of Self-Report Bias on Assessing Adherence to Guidelines, 1999 INTERNATIONAL JOURNAL FOR QUALITY IN HEALTH CARE 187, 190 (noting overestimate of compliance to guidelines by clinicians).

94 There were no noticeable differences between the practices of the AM LAW 100 and AM LAW 200 firms; however, the small number of AM LAW 200 firms in the study limit the conclusion that there are no meaningful differences between AM LAW 100 and AM LAW 200 firms in conducting conflicts checks of laterals.

95 16 of the 20 AM LAW 100 firms that participated in the study provided either the full questionnaire or the conflicts portion of the questionnaire to the author. Both of the AM LAW 200 firms that participated in the study provided their full questionnaire. One additional AM LAW 100 law firm provided its questionnaire along with an email message explaining the firm’s lateral hiring process; however, we were unable to schedule an interview.
expect if the interviewees were dissembling. Several of the interviewees acknowledged their lateral conflicts checking process was incomplete or lacked adequate structure. Several of the interviewees acknowledged that their firm’s questionnaire was incomplete and in some cases confusing. Again, these responses are reflective of candor and openness on the part of the interviewees and their firms regarding the lateral hire conflicts checking process.

B. TIMING OF CONFLICTS CHECKS

Unlike most law school graduates hired by law firms as associates, laterals bring some baggage with them in the form of potential conflicts of interest. These potential conflicts may, as noted earlier, compromise the hiring firm’s ability to represent its current client base or take on new matters. However, not all lateral candidates will join the law firm and conflicts checking can be burdensome from both the lateral’s and the law firm’s point of view in terms of time commitment and manpower. So the question arises when should the lateral’s potential conflicts be checked?

All the firms I interviewed deferred the conflicts checking process until the relationship got “serious.” In most cases, this point was after the parties had several meetings. It was not unusual, however, for the parties to have informal, preliminary discussions over portable clients the lateral expected to bring to the firm. The firm would often run these potential clients through its conflicts system to determine if they presented conflicts with the firm’s current client base. In some cases, these preliminary conflicts checks ended the discussions. As several of the interviewees put it, these were the “show-stoppers.” That did not, however, appear to be a frequent occurrence. When laterals were being considered because they had potentially portable clients, both

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96 It is possible that recently graduated hires have potential conflicts. I did not explore conflicts checking by law firms of individuals hired directly for law school. However, because these direct hires are not lawyers (yet) they would likely fall under the profession’s more lenient treatment of non-lawyer law firm personnel (See ABA Model rules, supra note 8, Rule 1.12), e.g., law clerks. Law clerk conflicts have generally not appeared in reported cases. A New Jersey Ethics Opinion, [No. 633] holds that a law clerk’s new affiliation would not operate to disqualify the new firm when (1) the law clerk did not have substantial involvement in a substantially related or the same matter and/or access to confidential information when at his prior employment; and, (2) the law clerk is “screened” at his present employment. In Bechtold v. Gomez, 576 N.W.2d 185, 190-92 (Neb. 1998) the court refused to attribute taint from a law student, who had previously worked for opposing counsel, to another counsel with whom the student was also affiliated.
the lateral and the firm were usually aware of possible conflicts form the beginning of the process. When laterals with clients are courting and being courted, both parties usually have some awareness of the lateral’s portable client make-up. A primary reason for the courtship is the perception that the lateral’s clients will complement the firm’s client base. That is not always the case, however, and surprises are an ever present risk. So firms run preliminary checks to be on the safe side and to determine whether discussions with the lateral are worth pursuing.

Some firms had somewhat formal requirements before the lateral candidate would be conflicts checked. For example, there might be a preliminary determination by the managing partner of the office, the head of the practice group the lateral would join, and/or the firm’s executive committee that the lateral would be a desirable acquisition before the lateral would conflicts checked. At some firms the process was less formal and the decision when to conflicts check a lateral was a case-by-case determination.

C. THE LATERAL QUESTIONNAIRE

The questionnaire that law firms have laterals complete seeks much more information than that is necessary to conduct a conflicts check. A composite questionnaire is much like any application for employment. The questionnaire usually seeks information regarding: (1) education, (2) prior employment; (3) professional licenses; (4) prior professional discipline or current complaints of unprofessional conduct; (5) prior or current claims of malpractice or breach of fiduciary duty; (6) billable

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97 Firms usually designated one of their lawyers as the lateral’s “sponsor.” Insofar as the courtship of the lateral was concerned, the sponsor was the lawyer who fronted for the firm. In some cases, the sponsor was the primary person designated by the firm for addressing and resolving conflicts issues identified by the lateral questionnaire. Law Firm C interview, copy on file with the author; Law Firm U interview, copy on file with the author.

98 Tremblay notes that conflicts checking is really two-way disclosure. Both the firm and the lateral must disclose their respective client base so that each can determine the suitability of the lateral’s movement to the firm. Tremblay, Migrating Lawyers, supra note 66, 19 GEO. J. LEGAL ETHICS at 541. A number of the firm I interviewed identified their anchor or primary clients on the questionnaire provided to the lateral, although that information was redacted on the questionnaire provided to me. Law Firm F interview, copy on file with the author; Law Firm R interview, copy on file with the author.

99 For example, if the firm represents Coca Cola and the lateral represents Pepsi, the conflict is apparent, but conflicts are less obvious when they involve client affiliates or client suppliers. Conflicts may also arise because of constraints clients impose on firms in the engagement contract.
hours, billings, and realization rates; (7) past and expected compensation; (8) practice needs, e.g., staffing, technology requirements, space needs; (9) compliance with state and federal tax filing requirements; and, (10) information necessary to conduct conflicts checking. Many of the questionnaires were identified as “Duty Diligence” documents and many of the interviewees identified the lateral acquisition process in that term. 100

The conflicts checking portion of the questionnaire usually consists of five categories: (1) identification of clients the lateral expects to bring to the firm; (2) a description of matters worked on by the lateral; (3) identification of the party(ies) adverse to the client or to the matter on which the lateral worked; (4) business with or investments in clients the lateral expects to bring to the firm; and (5) director or officer positions held by the lateral or the lateral’s immediate family members. In this study I focused on the first three categories.

With respect to client identity the questionnaires vary in detail. Some asked only for client identity; others dug down deeper and requested information regarding affiliates of the client, subsidiaries, or parents. Most questionnaires asked that the lateral describe matters on which the lateral worked prior to joining the firm; 101 however, several of the questionnaires asked for information only with respect to “open” matters. 102 A number of questionnaires limited responses to matters in which the lateral participated and the firm represented an adverse party. 103 The questionnaires varied as to inquiries regarding adverse parties in matters on which the lateral had worked. Many

100 Many of the questionnaires have a “risk management” quality orientation, at least in part. ANTHONY E. DAVIS & PETER R. JARVIS, RISK MANAGEMENT: SURVIVAL TOOLS FOR LAW FIRMS (2d ed. 2007). The firms themselves were divided on the risk management aspects of the questionnaire. Several stated that the questionnaire received substantial vetting by the firm’s malpractice insurer; other firms stated the insurer was not involved in the questionnaire’s development. I did not develop or delve into the point as it was outside the scope of the study.

101 While many of the interviewees expressed familiarity with and reliance on ABA Formal Opinion 09-455, discussed supra in Part 2D, no interviewee acknowledged that the opinion only expressly authorized disclosure of client identity for the purpose of conflicts checking.

102 Law Firm K Questionnaire, copy on file with the author; Law Firm S Questionnaire, copy on file with the author; Law Firm V Questionnaire, copy on file with the author.

103 Law Firm O Questionnaire, copy on file with the author; Law Firm R Questionnaire, copy on file with the author. One firm limited inquiries (1) to matters in which the firm was adverse to the client represented by the lateral’s firm and (2) active matters. Law Firm M Questionnaire, copy on file with the author.
questionnaires omitted this category. Questionnaires tended to use a chart approach in which conflicts disclosure amounted to filling in the blanks provided on the questionnaire.

The questionnaires varied on the issue of confidentiality. Some contained express disclaimers advising the lateral not to disclose information that might be confidential. Other questionnaires were silent on the subject. Some questionnaires stated that the information provided by the lateral would be kept confidential by the firm. Other questionnaires were silent on this topic. No questionnaire defined the concept of confidentiality or attempted to explain how the duty to protect client confidential information applied to the conflicts checking process. Laterals were left to themselves, at least initially, to determine whether and to what extent completing the questionnaire was professionally proper. Only one interviewee stated that laterals raised a general concern about confidentiality.

The questionnaires varied in how far back they wanted the lateral to go in describing prior work. Questionnaires had “look-backs” than ranged from 1 year to no limit, with 3-5 years being the average.

The questionnaires varied as to how much, if any, instruction was provided regarding completing the questionnaire. Most questionnaires were non-descriptive; they simply asked for information, e.g., “[t]o your knowledge, have you ever been involved in any legal representation (in any capacity) adverse to any [law firm] client?”

104 Law Firm A Questionnaire, copy on file with the author; Law Firm B Questionnaire, copy on file with the author; Law Firm C Questionnaire, copy on file with the author; Law Firm D Questionnaire, copy on file with the author; Law Firm F Questionnaire, copy on file with the author; Law Firm M Questionnaire, copy on file with the author; Law Firm S Questionnaire, copy on file with the author.

105 Law Firm C Questionnaire, copy on file with the author; Law Firm O Questionnaire, copy on file with the author.

106 Several questionnaires did instruct laterals to err on the side of caution or raised the concern that confidential information may be disclosed in providing the requested information. Law Firm C Questionnaire, copy on file with the author. On the other hand, some questionnaires advised the lateral to err on the side of more disclosure rather than less. Law Firm G Questionnaire, copy on file with the author.

107 Law Firm T interview, copy on file with the author (noting reluctance of lateral associates to provide disclosure). Interestingly, once the laterals were told disclosure was okay, they complied.

108 Law Firm F Questionnaire, copy on file with the author.
Sometimes the questions required subjective interpretation by the lateral, e.g., “[t]o your knowledge have you ever been involved in any legal representation (in any capacity) that you think could create a conflict for [law firm]?”

Most questionnaires asked the lateral to provide a client list. In some instances that was all the firm wanted to see. Most questionnaires did not specify how the client should be identified, leaving the matter to the lateral’s judgment. Several questionnaires, however, asked for more specificity, e.g., the addresses for the clients identified, or that affiliates of the client be identified.

Most questionnaires asked the lateral to disclose prior work. Few questionnaires, however, specified with any particularity how much disclosure was desired. A few questionnaires omitted the request for a description of the matter, simply asking the lateral to identify the client and provide related information, e.g., the names of the lawyers involved in the matter, the case name and forum in which the matter is pending, etc. When a description cue was provided, it was general, e.g., laterals were instructed to provide a “brief” description. In some cases the lateral was asked only to identify the matter as “transaction” or “litigation” work. In some cases the lateral was asked to identify the “subject matter” of the representation. Some questionnaires provided examples. When they did the examples were general, e.g.,

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109 Law Firm V Questionnaire, copy on file with the author.
110 Law Firm J Questionnaire, copy on file with the author; Law Firm K Questionnaire, copy on file with the author; Law Firm S Questionnaire, copy on file with the author.
111 Law Firm O Questionnaire, copy on file with the author.
112 Law Firm N Questionnaire, copy on file with the author; Law Firm O Questionnaire, copy on file with the author.
113 Law Firm B Questionnaire, copy on file with the author (seeking disclosure of all open and closed matters on which lateral worked during prior 3 years); Law Firm G Questionnaire, copy on file with the author (requesting identification of “Non-portable and prior matters” to which lateral “had access to material confidential information related to that client”); Law Firm J Questionnaire, copy on file with the author (“[P]leas provide details regarding work performed by you during the prior three years…”) (emphasis in original).
114 Law Firm F Questionnaire, copy on file with the author.
115 Law Firm C Questionnaire, copy on file with the author.
116 Law Firm D Questionnaire, copy on file with the author.
“Violation of license agreement and trade secret misappropriation,” “Securities Fraud.”

Approximately one-half of the questionnaires asked the lateral to also disclose adverse parties in addition to identifying clients and prior work. For the most part, questionnaires did not identify how “adversity” was to be understood. “Adverse” could mean directly adverse, positionally adverse, or potentially adverse, to identify a few possibilities. Some questionnaires, on the other hand, went the other direction, asking the lateral to identify all “other” parties involved in matters listed by the lateral, whether adverse or related or third parties.

While few questionnaires provided any guidance as to how much information the lateral was expected to supply, two questionnaires bucked the trend. These questionnaires provided illustrations to show how the question should be completed.

None of the questionnaires set out a minimum or floor, insofar as the lateral’s involvement in a matter was concerned. If the lateral worked on a matter or represented a client, even if fleeting, the lateral was supposed to identify the client, describe the matter, etc. On the other hand, questionnaires did not seek to bring “prospective” clients into the disclosure net unless the lateral expected the prospective client to be a potential client and follow the lateral to the firm. Thus, prospective client conflicts, as envisioned by Model Rule 1.18, were not addressed. In some cases the

117 Law Firm D Questionnaire, copy on file with the author.
118 Law Firm N Questionnaire, copy on file with the author.
119 Law Firm B Questionnaire, copy on file with the author; Law Firm G Questionnaire, copy on file with the author.
120 Law Firm M Questionnaire, copy on file with the author (asking for information even if the lateral’s involvement was “de minimis”).
121 This was often amended during the conflicts checking process. See Section 3F infra.
122 Law Firm G Questionnaire, copy on file with the author.
123 Model Rules, supra note 8, Rule 1.18(a) (encompassing limited duty of confidentiality owed to person who discusses with lawyer the possibility of forming a lawyer-client relationship). Given the recent changes in lawyer-client relations that have made the retention of legal services more a “buyer’s market,” the failure of questionnaires to explore the lateral’s involvement in law firm beauty contests, business solicitations, law firm advertising, etc. was surprising. See generally Susan Martyn, Accidental Clients, 33 Hofstra L. Rev. 913, 921-29 (2005) (identifying hidden traps in dealing with prospective clients).
“prospective” client conflict might be reached by a question seeking disclosure of confidential information, but this would depend on the structure of the question and whether the lateral understood the question to include Rule 1.18 type prospective clients.\textsuperscript{124}

\section*{D. QUESTIONNAIRE COMPREHENSIBILITY}

In order for the questionnaire to be useful it must be comprehensible to the lateral in the sense that the lateral understands what it is that the lateral is to provide the firm by way of information disclosure. Several of the interviewees acknowledged that their questionnaires were unclear and expressed the intent to revisit and review the questionnaire after the interview was concluded.\textsuperscript{125} Most interviewees stated they saw the questionnaire as designed to broadly capture information so that all conflicts could be vetted. Interviewees consistently said that the questionnaire was the beginning of the conflicts process not the end. A client list was for many interviewees sufficient to start the process. Once “hits” were identified, the firm could then go to the lateral with specified requests for more information. Dealing with the lateral personally enabled firms to obtain sufficient information to conduct conflicts checking to their satisfaction.

Much of the conflicts checking process is disaggregated and distributed to members of the firm (sponsors) or takes place one-on-one between a firm member and the lateral. This makes it difficult to determine with precision how deep the information disclosure is. In some cases the interviewee was directly involved in obtaining information from the lateral necessary to flesh out hits produced by the questionnaire information.\textsuperscript{126} In other cases, the interviewee simply reported concerns to other

\textsuperscript{124} Law Firm D Questionnaire, copy on file with author (“Please list all matters on which you have worked or obtained confidential information . . . ”)

\textsuperscript{125} Law Firm R interview, copy on file with the author; Law Firm S interview, copy on file with the author; Law Firm T interview, copy on file with the author.

\textsuperscript{126} Law Firm I interview, copy on file with the author; Law Firm J interview, copy on file with the author; Law Firm L interview, copy on file with the author; Law Firm P interview, copy on file with the author; Law Firm R interview, copy on file with the author.
lawyers in the firm more directly involved in the lateral hiring process. Whether and how these concerns were resolved was not always communicated back to the interviewee.

As noted earlier, most questionnaires asked fairly specific questions, e.g., (1) the names of clients represented, (2) the identity of adverse parties, and (3) a description of the subject matter of the representation. Several questionnaires, however, in using this approach, dense-packed the inquiry running the risk that it might be misread. For example, one questionnaire used a chart format and in the masthead asked the lateral to identify clients represented or from whom confidential information was received. The risk here is that reading the instruction the lateral might overlook the disjunctive “or” and combine the two concepts. As so construed, the lateral might believe that only clients the lateral actually represented and from which the lateral actually received confidential information need to be disclosed. This reading is enhanced by the look-back timeframe of the question (10 years), which might encourage the lateral to believe the firm does not want every client listed but only a select few.

Questionnaires did not define “confidential” information. Confidential information could be understood to encompass all information relating to the representation or information the disclose or use of which would be harmful or embarrassing to the client. Which understanding the lateral adopted could significantly influence scope of disclosure.

Some questionnaires adopted a narrower approach. Rather than casting a wide net for all clients for whom the lateral worked, the questionnaire attempted to be more precise. For example, one questionnaire asked:

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127 Law Firm K interview, copy on file with the author; Law Firm N interview, copy on file with the author; Law Firm O interview, copy on file with the author; Law Firm S interview, copy on file with the author.

128 Law Firm A Questionnaire, copy on file with the author “(Client (Full Names of Persons or Entities Represented or from Whom Confidential Info Rec’d; Whether or Not as Attorney; Any Time in Past 10 years)).”

129 Model Rules, supra note 8, Rule 1.6(a).

Are there pending legal matters (arbitration, administrative proceedings, contract negotiations, acquisitions, etc.) in which you participated while working for another law firm (or about which you obtained any nonpublic information), whether as an attorney, summer associates, law clerk, paralegal or in any other capacity, in which [law firm] is currently representing parties other than the one represented by your prior law firm?\textsuperscript{131}

The question is limited to pending matters in which the lateral participated, although participation is not defined. It could mean “had a discussion about” or “worked on.” “Nonpublic information” is also unclear and raises the same uncertainty as the undefined term “confidential” discussed earlier. I ran the language through an online “readability” calculator and it scored a 24.68 on the Gunning Fog index,\textsuperscript{132} which means it would be comprehensible to a person with 24 plus years of formal education, 5 years more than the average lawyer. I achieved similar scores with other questionnaires. I do not want to overstate the readability issue; this paper would not achieve a good readability score. This paper, however, is not read in the same context as the lateral questionnaire, nor does a failure to understand have the same consequences. If questionnaire language is unclear or ambiguous, the lateral may construe the request narrowly. Many interviewees commented that laterals complained that completing the questionnaire was burdensome. Many interviewees stated that laterals often failed to fill out the questionnaire completely.\textsuperscript{133}

\textsuperscript{131} Law Firm S Questionnaire, copy on file with the author. This question was supplemental to an earlier request in the questionnaire for disclosure of portable clients the lateral expected to bring to the firm and for disclosure of matters the lateral was involved with in which the firm represented an adverse party.

\textsuperscript{132} A description of the index is available at the website: www.readabilityformulas.com/gunning-fog-readability-formula.php

\textsuperscript{133} See Section 3H, \textit{infra}.  

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may, thus, have an incentive to construe requests for disclosure narrowly and lack of charity in the questionnaire may facilitate this tendency.

E. CONFIDENTIAL INFORMATION

A lateral may acquire confidential information even though the lawyer is not representing the client. For example, the firm may be representing the client and the lateral may have a discussion with the relationship lawyer responsible for the client about the matter. Interviewees often euphemistically referred to this by the sobriquet “watercooler information,” or “office buzz.” Alternatively, the lateral may acquire confidential information pursuant to a joint prosecution/joint defense agreement or the lateral may have acquired confidential information during the interview of a prospective client. The possession of such actual confidential information may result in disqualification of the lateral and the firm (due to imputation).

Firms varied as to whether they sought disclosure of participation in joint prosecution/joint defense agreements from lateral candidates. Some firms asked whether the lateral had acquired “confidential” or “non-public” information, but did not

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134 This situation is distinct from attribution of knowledge pursuant to Model Rule 1.10(a). Model Rules, supra note 8.

135 Compare San Gabriel Basin Water Quality Authority v. AeroJet General Corp., 105 F. Supp.2d 1095, 1106 (C.D. Cal. 2000) (“[T]he Court finds that Tatro’s involvement in the Heller representation, which may have consisted of some lunchroom discussions, is at most peripheral involvement providing for minimal exposure to confidential information about Defendant.”); with Applied Concepts Inc. v. Superior Court, (Cal. App. 2002) (not published) 2002 WL 819237 (“[W]e do not find the weekly luncheon meetings at Jory, during which Peterson discussed specific strategies and issues related to this case in order to facilitate and exchange of ideas with colleagues to constitute ‘peripheral involvement.’”).

136 Joint Prosecution/Defense agreement. United States v. Henke, 222 F.3d 633 (9th Cir. 2000) (holding that lawyer who acquired confidential information as part of a joint defense arrangement could not use that information to cross examine another party to the arrangement); see ABA Formal Opinion 95-395 (same); but cf. Restatement (Third) Law Governing Lawyers §132, cmt. g(ii) (treating the issue as involving the law of agency rather than the law of professional responsibility.); see supra note 61. Prospective client interview. Laryngeal Mask Company Ltd. v. Ambu A/S (S.D. Cal. 2008) (disqualifying lawyers and firm based on receipt of confidential information from prospective client not retained). ABA Model Rules, Rule 1.18, supra note 8 identifies as the threshold whether the disclosure or use of the information imparted by the prospective client would cause that person “significant harm.” As might be expected this is a fact-based inquiry. See Freivogel on Conflicts, Initial Interview-Hearing Too Much (collecting authorities), available at: www.freivogelonconflicts.com.
specify exactly what this meant. Questionnaires also did not generally distinguish between (1) information gained while representing a client and which related to that client’s representation and (2) information gained outside of representing a client. The risk was that the lateral filling out the questionnaire might not be alerted to the fact that the firm seeks “watercooler” type information, not information that falls within Rule 1.6 because it “relates to the representation.” In some cases, however, the questionnaire identified the issue precisely. Some interviewees thought the issue was inconsequential and not worth pursuing.

A few firms specifically asked the lateral about participation in joint prosecution/joint defense agreements. If the lateral answered affirmatively, the lateral was asked to identify the parties to the agreement and describe the matter to which the agreement applied. On the other hand, one interviewee expressed reluctance to explore the issue because an affirmative answer would expose the firm to a claim that it was improperly seeking client confidential information.

137 Law Firm A Questionnaire, copy on file with the author; Law Firm D Questionnaire, copy on file with the author; Law Firm O Questionnaire, copy on file with the author; Law Firm P Questionnaire, copy on file with the author.

138 Law Firm B Questionnaire, copy on file with the author:
In addition to confidences relating to clients on whose matters you worked, you may have (or be claimed to have) material confidential information realign to other parties represented by your then firm by reason of, for example, participating in practice group meetings at which client matters were discussed, discussions with lawyers in offices near to you, or general office buzz. Such situations, in which you have material confidential information that could be used against another party, can potentially lead to disqualification motions. So, please list any clients and matters as to which you may be claimed to have such material confidential information and, in doing so, plead be over-inclusive.

139 E.g., Law Firm C interview, copy on file with the author; Law Firm U interview, copy on file with the author.

140 Law Firm O Questionnaire, copy on file with the author; Law Firm P Questionnaire, copy on file with the author.

141 Law Firm V interview, copy on file with the author. Some techniques other firms developed to address this issue are discussed at text and notes 153-54, infra.
F. RUNNING THE CONFLICTS CHECK

After the lateral returns the questionnaire, the information is run through the firm’s conflicts checking system. When the system registers a “hit” indicating a potential conflict of interest, the results are then reviewed by the firm’s General Counsel, a lawyer within the General Counsel’s office, or a lawyer or non-lawyer employee within the firm’s designated conflicts checking office. The consistent initial response was to determine whether the “hit” was real, or false. In this regard, many of the interviewees stated that they had difficulty getting the laterals, particular lateral partners to fill out the questionnaire completely. The interviewees stated that the information provided, usually client identification, was sufficient to identify possible conflicts, but was often insufficient to clear the possible conflicts. This was not always the case, but all interviewees reported the need to obtain additional information in many cases involving lateral hires before the true dimension of a “hit” could be ascertained.

The firm may attempt to resolve the concern by eliciting more information from the lateral. Usually this was usually done by the firm’s general counsel or a lawyer in the firm’s general counsel office. In some cases, the process of eliciting additional information from the lateral was handled by the in firm sponsor of the lateral. When responsibility for obtaining information and clearing conflicts was disaggregated in this manner, the completeness and thoroughness of the process could suffer.

Firms evidenced good practices in actually clearing potential conflicts based on information provided in the questionnaire. However, few firms had a procedure for independently validating the completeness of questionnaire disclosure in the sense of picking up matters or clients not disclosed (unknown unknowns) as opposed to matter or clients incompletely disclosed (known unknowns). Questionnaires often reflected the tension in the delicate balance between being comprehensive and complete while at the same time being manageably brief.

Many of the interviewees acknowledged that the heart of conflicts checking was the personal contact with the lateral to obtain more information than disclosed in the

142 See Section 3H infra.
143 Law Firm I interview, copy on file with the author; Law Firm R interview, copy on file with the author.
questionnaire. The questionnaire would identify possible conflicts, but often lacked sufficient detail to enable the firm to clarify the conflict. For example, the questionnaire may disclose that the lateral represents “Paul Brown” adverse to “Peter Smith” and the firm’s conflicts system lists “Peter Smith” as a firm client. This produces a hit, but does the hit represent an actual or false conflict? A more complete description of the client may indicate that the client that firm represents is not the same person the lateral listed as adverse to the lateral’s client. For example, the lateral’s client is adverse to Peter Smith who lives in Los Angeles; the firm represents Peter Smith who lives in New York. The system recognizes “Peter Smith”, but, in fact, there are two “Peter Smiths” and the “Peter Smith” the firm represents is not the “Peter Smith” that raises a conflict.

How much information the firm will seek from the lateral to clarify the apparent conflict is difficult to describe with precision. Clarification is not a static concept, a firm may have different comfort levels depending on the information it already has, the desirability of acquiring the lateral, the work that will be foreclosed if a conflict exists, and the willingness of the lateral to provide additional information. Some firms expressed the view that conflicts compliance was an absolute; the failure of the lateral to provide as much information as needed to resolve the conflict would cause the firm to treat the hit as real.\footnote{Law Firm G interview, copy on file with the author.} If that hit would meaningfully affect the business interests of the firm, i.e., prevent it from handling a matter for a major client, the firm might decide not to pursue the lateral further. Other firms, however, expressed a more risk-taking point of view. These firms might elect to bring on the lateral, even though the hit had not been resolved, because the lateral’s acquisition was desirable.\footnote{Law Firm A interview, copy on file with the author (“judgment call”); Law Firm B interview, copy on file with the author (“gut check” decision in some cases); Law Firm D interview, copy on file with the author (might ignore “insignificant” involvement); Law Firm I interview, copy on file with the author (“it depends”). In this context, some firms indicated they may screen the lateral, even though screening had not been adopted as an approved method for avoiding imputation, in the hope a court would treat the screen as sufficiently ameliorative to avoid disqualification of the firm. Law Firm V interview, copy on file with the author.}

No interviewee indicated that the information necessary to complete a conflicts check involved more than broad, general disclosure. Even in the case when the lateral had actual client confidential information that may be material to a matter involving a
firm client, inquiries were generally limited. Conflicts checking systems do not require sensitive data. They operate on the basis of general facts, e.g., the name of the client, and the names of other parties. If a “hit” was registered because of information provided by the questionnaire, clarification is achieved not by disclosing litigation strategy or the client’s business plan, but by providing the address or home office of the person identified so that the firm could determine if the person or entity identified by the lateral was the same person or entity who was a firm client or who was adverse to a firm client.

In some instances the identity of a client may pose a risk of harm to the affected client, e.g., the client might be preparing a hostile takeover of a target company or the client may be contemplating filing a major action against a company with whom it presently has good relations. Consider, for example, a lawyer (Assistant United States Attorney) who is working on an investigation of a target entity but the investigation is secret. Can the lawyer disclose the identity of the target on the questionnaire? If the lateral does so, that disclosure might compromise the investigation if word gets back to the target, which it might if the target is a firm client. Disclosure may also violate the law. On the other hand, failure to disclose the information could lead to the firm not being able to represent the “target” if the lateral joined the firm. While public lawyers are not subject to the same constraints as private lawyers when transitioning to a private firm, the lawyer must be screened to avoid the

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146 Law Firm C Questionnaire, copy on file with the author; Law Firm D Questionnaire, copy on file with the author; see test and notes 153-54, infra (describing indirect ways firm’s attempted to resolve possible conflicts in this area).

147 See ABA Formal Opinion 09-455 (Noting problem).

148 Several of the firm questionnaires stated that information disclosed by the lateral would not be disseminated outside the conflicts checking process. Law Firm C Questionnaire, copy on file with the author; Law Firm C Questionnaire, copy on file with the author; Law Firm F interview, copy on file with the author; Law Firm M interview, copy on file with the author.

imputation of the lawyer’s conflicts to other members of the firm.\textsuperscript{150} However, absent disclosure, the firm will not be able to create an effective screen.\textsuperscript{151}

Interviewees were aware of the problem and identified a number of approaches to resolve the issue. A few said that the inability of the lateral to disclose necessary information to identify conflicts would likely kill the deal.\textsuperscript{152} Most interviewees, however, said they would approach the problem indirectly. For example, the firm could show the lateral a list of the firm’s primary clients and ask if the matter involved one of the clients.\textsuperscript{153} Alternatively, the firm might ask if the investigation involved certain practice areas or technologies.\textsuperscript{154} By eliminating the area of concern, the firm might be able to achieve a comfort level with the risk presented without complete disclosure by the lateral. This would allow the firm to acquire the lateral without a consent or screen in place, neither of which could be obtained without disclosure.

Most, but not all, questionnaires asked the lateral to provide a description of the lateral’s work for current and former clients. As noted previously, questionnaires were consistently vague as to how much information to provide. On the other hand, most questionnaires were formatted in a manner that precluded anything more than a brief response, e.g., “landlord-tenant” or “lease.” Most interviewees said they had difficulty getting the lateral to put down any facts describing the nature or subject matter of the representation.\textsuperscript{155} When follow-up was undertaken, that inquiry tended to be limited. For example, the “lease” matter might be expanded so that the location of the leased premises was described, e.g., 123 Broadway. A matter described as involving a

\begin{itemize}
\item \textsuperscript{150} Model Rules, \textit{supra} note 8, Rule 1.11.
\item \textsuperscript{151} See Section 3F2, \textit{infra}.
\item \textsuperscript{152} Law Firm D interview, copy on file with the author; Law Firm F interview, copy on file with the author.
\item \textsuperscript{153} Law Firm H interview, copy on file with the author; Law Firm J interview, copy on file with the author; Law Firm P interview, copy on file with the author; Law Firm R interview, copy on file with the author.
\item \textsuperscript{154} Law Firm J interview, copy on file with the author; Law Firm K interview, copy on file with the author; Law Firm P interview, copy on file with the author; Law Firm R interview, copy on file with the author.
\item \textsuperscript{155} Section 3H, \textit{infra}.
\end{itemize}
“contract” might be further expanded as involving an “employment contract.” All interviewees who addressed the topic stated that description were kept general and limited to just enough information to enable the firm to determine if the matters were related. Thus, it was sufficient if a matter was identified as “drafting an employment contract” or litigating an “age-discrimination claim.” No interviewee indicated any deeper disclosure was sought. The interviewees consistently stated that they were seeking only a brief description, sufficient to enable them to clear any “hits” produced by the client list conflicts search. No interviewee stated that disclosure went beyond a general description, e.g., “securities regulation,” “commercial lease,” except for the field of intellectual property, particularly patents. In that area, a number of firms dialed down deeper and expected disclosure of a description of the technology involved in the patent. On the other hand, because the lateral was being sought because the lateral had clients or expertise in a particular technology, the more specific description simply added to what was already known about the lateral.

The firm may also attempt to resolve the conflict by staying within the firm. This seemed to be a common practice. The lawyer responsible for clearing the conflict may contact the relationship partner who handles the affected client for the firm and seek information as to the nature of the firm’s work for the client relative to the matter identified by the lateral on the questionnaire. For example, the questionnaire may disclose that the lateral worked on a completed matter – a lease with Peter Smith, the lessor, and XYZ Corp., a firm client, the lessee. The relationship lawyer knows that XYZ’s commercial real estate issues are not handled by the firm, thus, the conflict is apparent but false. Firms frequently went in house to clarify hits because it was easier than getting information from the lateral. Several interviewees stated that going in-house first to attempt to resolve conflicts minimized the risk that the firm would acquire

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156 As one interviewee put it, “the firm did not want specificity.” Law Firm P interview, copy on file with the author.

157 Law Firm D Questionnaire, copy on file with the author); Law Firm O Questionnaire, copy on file with the author.

158 Law Firm J interview, copy on file with the author; Law Firm M interview, copy on file with the author; Law Firm P interview, copy on file with the author; Law Firm Q interview, copy on file with the author.
client confidential information from the lateral that could prove problematic to the firm down the road.\textsuperscript{159}

If this effort is unsuccessful at clearing the conflict, the firm and the lateral have to decide how to address the actual conflict. In some cases they didn’t or couldn’t; the conflict killed the deal. In other (most) cases, the parties looked for approaches that would allow them to continue the deal despite the conflict. In general, firms and laterals used two approaches -- consents (or waivers) and screens -- to neutralize conflicts.\textsuperscript{160}

1. CONSENTS

A conflict of interest creates a risk that the lawyer’s duties to the client may be limited by non-client interests. Risk is, however, part of everyday life; not all risks come to fruition; and some risks have positive attributes. Risk acceptance or risk avoidance is invariably a cost-benefit calculation and a client (and lawyer) may elect to proceed

\textsuperscript{159} Law Firm J interview, copy on file with the author; Law Firm O interview, copy on file with the author; Law Firm Q interview, copy on file with the author; Law Firm T interview, copy on file with the author. In cases dealing with public lawyers, the interviewee stated that he usually could go to the specific agency to obtain information to clear a possible conflict. Law Firm M interview, copy on file with the author.

\textsuperscript{160} Several interviewees mentioned that advanced consents to conflicts might be sufficient. Law Firm U interview, copy on file with the author. There was, however, concern over the efficacy of these devices in this context. Law Firm P interview, copy on file with the author. No interviewee expressed great confidence in the use of advance consents to avoid conflicts brought by laterals. That caution is appropriate. There is disagreement whether advance waivers should be allowed, although most authorities now support their use as a general proposition. See, e.g., ABA Formal Opinion 05-436 (recognizing validity of advance waiver when (1) the affected client is an experienced user of legal services and is reasonably informed about the conflict risk; (2) the affected client is independently represented in connection with the waiver and the waiver is in writing; (3) the conflict is waivable and is unrelated to the current representation; and (4) the lawyer does not use confidential information of the affected client. Some courts permit more extensive waivers. See Zador Corp. v. Kwan, 37 Cal. Rptr.2d 754, 762-63 (Cal. App. 1995) (permitting advance waiver of conflict in same litigation and use of confidential information against affected client); some courts less (See Celgene Corp. v. KV Pharm. Co. (D. N.J. 2008) (2008 WL 2937415) (holding advance waiver invalid even though it was reviewed and approved by client's general counsel). See generally Angela R. Elbert and Sarah G. Maliz, Playing Both Sides?: Navigating the Murky Waters of Advance Client Waivers, 19 THE PROF. LAW. 14 (2008). In one case the firm tried to prevent imputation resulting from a conflicted lateral by arguing that the affected client had waived the conflict in the Joint Defense Agreement by which the conflict was acquired. All American Semiconductor, Inc. v. Hynix Semiconductor, Inc., CCH Trade Cases \$76,465 (N.D. Cal. 2008) (2008 WL 5484552) (rejecting waiver claim because nature of future conflict was insufficiently disclosed in Joint Defense Agreement).
notwithstanding the risk.\textsuperscript{161} When the client makes this decision, the client is said to have consented to or waived the conflict.\textsuperscript{162} This approach is generally supported by the Rules of Professional Conduct and the common law, subject to the requirement that the client’s consent is informed and the lawyer reasonably believes the risk will not compromise the lawyer’s representation of the client.\textsuperscript{163}

When the apparent conflict becomes real rather than false, the firm and lateral are put to an election – (1) hire the lateral with the open conflict and suffer the consequences; (2) terminate the conversation about moving to the firm; or (3) mitigate the conflict. No firm I interviewed expressly adopted, as a matter of practice,\textsuperscript{164} the first option, although as noted earlier, some firms did run this calculated risk on a case-by-case basis when they could not clear a conflict due to incomplete information.\textsuperscript{165} All firms (and laterals) employed the second option when it was thought that a needed consent (1) would not be obtainable, (2) was not worth the effort to obtain, or (3) risked the relationship with the firm’s existent client. In most instances, however, firms (and

\textsuperscript{161} Conflicts present opportunities that may appeal to some clients. Jack P. Sahl, \textit{A 2010 Update: What Every Entertainment Lawyer Needs to Know – How to Avoid Being the Target of a Legal Malpractice Claim or Disciplinary Action}, available at :http://ssrn.com/abstract:1588293:

It is worth noting that conflicts of interest are common in the entertainment industry. At least one well-known entertainment lawyer has gone so far as to suggest that, “[a]nyone that does not have conflicts is not a player in Hollywood.” Adam Sandler, \textit{Legal Eagles Swoon Down on Hollywood Suit: Conflict of Interest: Latest Legal Scuffle}, Variety, Aug. 28, 1995. The New York Times reported that the prominent entertainment lawyer, Bert Fields, “has drawn some heat in Hollywood for simultaneously representing both talent and studios.” See Allison Hope Weiner, \textit{Telling Hollywood It’s Out of Order}, N.Y. Times, May 15, 2005, at S1. Fields said that after he discloses the conflict to his clients, “[t]hey usually think it’s a great advantage.” See \textit{id}. \textit{See also} Abdo & Sahl, \textit{supra} note 2, at 3-4 (noting that sometimes the “package deal” – where a lawyer simultaneously represents a successful movie producer and a famous actor – may result in a lucrative production in which “\textit{e}veryone wins”).

\textsuperscript{162} \textit{See supra} note 37 (defining “consent” and “waiver”).

\textsuperscript{163} Model Rules, \textit{supra} note 8, Rule 1.7(b)(1)-(4).

\textsuperscript{164} Same firms noted that this option was a possibility. Law Firm K interview, copy on file with the author.

\textsuperscript{165} \textit{See supra} text and notes 143-44.
l laterals) used consents to mitigate conflicts that would otherwise impede the movement of the lateral to the firm.

When the conflict involves a portable client, the obtaining of consent can be handled by the firm and the lateral, each of whom can go to the respective client for a consent to the conflict. The involved clients cannot be litigationally directly adverse as this type of conflict is not subject to mitigation by consent under the Model Rules of Professional Conduct or the common law of lawyer disqualification. Unilateral withdrawal by either the firm or the lateral from the representation would not suffice to mitigate the conflict. This is known as the “hot potato” doctrine and courts have consistently refused to permit firms or lawyers to fire a client to take on adverse representations.

In general, interviewees said that transaction conflicts were commonly mitigated by consents, whereas litigation consents were more difficult to obtain. However, even litigation consents were achieved in many instances, particularly when the conflict involved prior work and the affected client was not accompanying the lateral to the new firm. In a few cases, the hire was made dependent on the lateral giving up the client

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166 Model Rules, supra note 8, Rule 1.7(b)(3). When the clients are directly adverse on a transaction matter, e.g., buyer and seller courts have divided as to whether the conflict may be waived by the clients. Bill Freivogel captures the division well:

The new version of Model Rules 1.7(b)(3), adopted by the ABA House of Delegates in February 2002, specifically declares that being on both sides of litigation is not waivable. Neither the new Rule 1.7 nor its Comment does much to clarify the buyer-seller, lender-borrower situation.


168 Law Firm B interview, copy on file with the author; Law Firm D interview, copy on file with the author; Law Firm I interview, copy on file with the author; Law Firm N interview, copy on file with the author; Law Firm O interview, copy on file with the author; Law Firm S interview, copy on file with the author.

169 Law Firm C interview, copy on file with the author; Law Firm D interview, copy on file with the author; Law Firm E interview, copy on file with the author; Law Firm K interview, copy on file with the author. Some interviewees did express reluctance to pursue waivers for litigation conflicts (Law Firm F interview, copy on file with the author), particularly if it was a “hard” conflict, a matter involving side-
and refunding fees if necessary.\textsuperscript{170} When that occurred, the involved firms acted as though the conflict had been resolved; they did not require a consent from the affected former client to the continued representation by the firm of its client after the lateral joined the firm.\textsuperscript{171} Another option that some firms mentioned was to fire a firm lawyer to ease the path for a lateral acquisition. If the affected client leaves the firm with the departing lawyer, this is not seen as the prohibited “hot potato” gambit.\textsuperscript{172} No firm acknowledged that it had engaged in this practice, but several interviewees mentioned it as a possible way to clear a conflict.\textsuperscript{173}

When the conflict involved prior work by the lateral on non-portable client matters, approaches varied. The dominant approach was to deal with the lateral’s law firm. This was necessary when the lateral was an associate because associate often do not know whom to contact to obtain the consent. Contacting the associate’s firm to secure a consent, however, alerted the associate’s law firm to the associate’s intent to depart. This could put the associate in some difficulty because, absent the consent, the firm would not consummate the hire, but notifying the lateral associate’s firm of the associate’s intention (desire) to depart may affect the associate’s retention by that law firm.

\textsuperscript{170} Law Firm K interview, copy on file with the author.

\textsuperscript{171} Law Firm J interview, copy on file with the author; Law Firm K interview, copy on file with the author; Law Firm L interview, copy on file with the author; Law Firm M interview, copy on file with the author; Law Firm N interview, copy on file with the author; Law Firm S interview, copy on file with the author.

\textsuperscript{172} See supra text and note 163. Model Rules, supra note 8, Rule 1.10(b). In effect, the client, by choosing to stay with the departing lawyer, “fires” the firm. Coke v. Equity Residential Properties Trust, 800 N.E.2d 280 (Mass. 2003).

\textsuperscript{173} Firing lawyers was a tactic that firms used to enable mergers between firm to proceed. This is a little explored area of the law. “Firing” may be the wrong term. Partners are encouraged to leave so that the merger may happen. By taking their client with them, the left-behind firm may shed the conflict. Even if the conflict is not shed, a court may treat the resulting conflict less harshly. Kinzenbaw v. Case, L.L.C., (N.D. Iowa, 2004) 2004 WL 1146462 (finding that although as a result of a merger a law firm represented adverse parties simultaneously, the firm would not be disqualified; the simultaneous representation was inadvertent, the firm upon discovery of the conflict took immediate steps to mitigate the conflict by erecting a screen, and there was no allegation that confidential client information was shared). Conflicts Issues can derail firm mergers. See Jill Redhage & Sara Randazzo, Townsend Merger Talks Called Off Over Conflicts, Los Angeles Daily Journal, July 20, 2010 (reporting that merger discussions between AM LAW 100 firm Townsend and Townsend and Crew and AM LAW 200 firm Kilpatrick & Stockton cratered over the inability to resolve conflicts of interests that would arise rule were the two firms to merge).
firm. Consequently, lateral associates often sought to delay notification until they had at least a conditional offer of employment, the condition being the obtaining of needed consents.¹⁷⁴

Most interviewees recognized that they were as likely to be considering the hiring of a lateral associate as being at risk of losing an associate to another firm. Interviewees said that they did not deliberately or unreasonably delay or block the providing of consent.¹⁷⁵ A few interviewees, however, acknowledged that assisting the departure of an associate from the firm was not a high priority.¹⁷⁶

Almost all the firms stated a reluctance to deal directly with the lateral’s affected client. Partly this was due to the belief that the affected client’s law firm was the proper contact. Some interviewees were concerned that contact with the lateral’s affected client may raise a liability exposure to the lateral’s law firm.¹⁷⁷ In one instance, however, the firm dealt directly with the affected client to secure a consent so a lateral associate could join the firm.¹⁷⁸

2. SCREENS

Screening is a technique to avoid the imputation of a conflict from one lawyer to another lawyer. As noted earlier, screening has been the focus of significant debate within the legal profession.¹⁷⁹ It is not, however, a matter of debate within or among the

¹⁷⁴ Law Firm D interview, copy on file with the author; Law Firm G interview, copy on file with the author; Law Firm J interview, copy on file with the author; Law Firm V interview, copy on file with the author. One firm, however, took the view that a consent could not be obtained until the lateral joined the firm. Law Firm K interview, copy on file with the author.

¹⁷⁵ Law Firm D interview, copy on file with the author; Law Firm E interview, copy on file with the author; Law Firm G interview, copy on file with the author; Law Firm I interview, copy on file with the author; Law Firm L interview, copy on file with the author; Law Firm R interview, copy on file with the author.

¹⁷⁶ Law Firm E interview, copy on file with the author; Law Firm F interview, copy on file with the author.

¹⁷⁷ Law Firm E interview, copy on file with the author; Law Firm F interview, copy on file with the author; Law Firm K interview, copy on file with the author.

¹⁷⁸ Law Firm O interview, copy on file with the author.

¹⁷⁹ See supra text and notes 52-58.
firms I interviewed. These firms embrace screening as a method for managing conflicts created by the sheer size of their operation.\textsuperscript{180} Law firms employing hundreds, if not thousands, of lawyers and opening thousands, if not tens of thousands, of new matters a month, would be hamstrung if they were not able to use screens to avoid conflicts that would disqualify the firm from representing a client or taking on a new retention.

Lateral screening is handled in several ways. When the lateral will reside in a jurisdiction that permits screening without the need to secure the affected client’s consent, many firms stated that they resolve the conflict by screening.\textsuperscript{181} The allowance of screening enabled firms to avoid going to laterals for additional information to see if the “hit” represented a real or false conflict.\textsuperscript{182} Screens were simply easier and cheaper to erect than the time expended in information gathering.

Some firms had roots in jurisdictions where screening without the affected client’s consent was not permitted. Several interviewees from these firms expressed reluctance to adopt the practice of notice-only screening if it were available. The stated concern was that a current firm client may be displeased were the client to learn that the firm was representing a party adverse to the client through the magic of screening. Screening without consent was said to be too risky to the current business relationship with the affected firm client. As one interviewee noted, “clients dislike seeing their lawyer represent their adversary.”\textsuperscript{183}

\textsuperscript{180} One interviewee, however, did express the view that screens are largely “window dressing”; either you trust lawyers or you don’t, a screen won’t prevent a lawyer from leaking information if the lawyer wishes to do so. Law Firm B interview, copy on file with the author. This is no doubt true. Screens do, however, help prevent inadvertent disclosure. Even honest lawyers may unintentionally disclose confidential information. In this sense screens are consistent with the professional duty to protect confidential information from being disclosed by erecting systems and protocols to prevent inadvertent disclosure.


\textsuperscript{182} Law Firm K interview, copy on file with the author; Law Firm N interview, copy on file with the author; Law Firm S interview, copy on file with the author.

\textsuperscript{183} Law Firm Q interview, copy on file with the author.
The rise of screening has led to the development of software that can be programmed to properly isolate a lateral hire from contact with persons or materials with whom the lateral should not be in contact. Firms use this software to create screens to manage the conflicts presented by a lateral hire. Whether the screen would in fact effectively prevent the imputation of a conflict was not pursued as it was beyond the study design.

Firms also used screens as inducements to secure the consent of the affected client. Even when a jurisdiction would not recognize a screen as avoiding imputation, all jurisdictions accept consent as avoiding disqualification. Firms that used screens generally expressed the belief in the efficacy and adequacy of screens to protect against disclosure of client confidential information. Law firms could, thus, recommend to their clients that they provide consent because doing so would not cause the client any harm. Firms are, thus, incentivized to ask for consents and, for the most part, clients follow their lawyer’s recommendations.

In some cases, firms thought there was no conflict, but were concerned about the appearance of a conflict. In these cases the likelihood of a complaint or motion to disqualify was thought to be remote, but could not be excluded completely. In this setting a number of the interviewees said they would screen prophylactically. Several

184 A number of firms use or were considering using a software screening systems designed to isolate the screened lawyer and provided notification if there is an effort, deliberate or inadvertent, to compromise the screen.

185 In re Guar. Ins. Services, Inc., 310 S.W.3d 630 (Tex. App. Austin 2010) (noting that a firm’s screening procedures must be “actually effective” in order to preclude imputation); In re Essex Equity Holding USA, LLC v. Lehman Bros., Inc., ___ N.Y. S.2d___ (Sup. Ct. 2010) (2010 WL 2331407) (holding that firm’s screen was ineffective because it failed to timely implement the screen).

186 Restatements (Third) Law Governing Lawyers §122(1) and cmt.a (2000).

187 See supra text and note 180.

188 Law Firm Q interview, copy on file with the author (“clients trust their lawyers”).

189 Law Firm C interview, copy on file with the author; Law Firm V interview, copy on file with the author. Some courts have imposed screens as a condition to not disqualifying law firms for conflicts of interest. Kassis v. Teacher’s Ins. and Annuity Ass’n, 717 N.E.2d 674 (N.Y. 1999) (requiring screening of lateral who had no involvement with matter at prior firm to which clients of current and former firm were adverse). In effect the court treated the attribution rule as irrebuttable, but the imputation rule as rebuttable through the erection of a screen. As noted previously, the Model Rules would not treat this fact pattern as raising a conflict. One court, however, treated the creation of a prophylactic screen as evidence that the lateral had received material confidential information and that the lateral had a duty to
of the interviewees placed reliance on a recent California decision in which the court stated that a screen could avoid the imputation of taint even though neither California’s Rules of Professional Conduct nor its Supreme Court expressly authorize screening to mitigate a conflict.\footnote{Kirk v. First American Title Ins. Co., 108 Cal. Rptr.2d 620 (Cal. App. 2010). This interpretation may be too generous. The decision involved a prospective client conflict rather than a prior work conflict. Moreover, the court noted that the infectious lawyer had since left the firm and it was unclear whether any remaining members of the firm had actual confidential information of the prospective client, or access to that information. On the other hand, the court did comment favorably on the need and efficacy of screening.}

G. CONTRACT LAWYERS

Contract lawyering (temporary lawyers) is a recent phenomenon.\footnote{See supra text and note 6.} A contract lawyer is hired for a specific task. Whether contract lawyers should be treated the same or differently from other lawyers hired by the firm has provoked some debate. A few of the interviewees said that contract lawyers were scrutinized for conflicts the same as all other laterals.\footnote{Law Firm U interview, copy on file with the author; Law Firm V interview, copy on file with the author. Most firms simply used the conflicts questions from the lateral questionnaire. I did not pursue how much information, if any, beyond that necessary for conflicts checking the firm sought from contract lawyers. I did not explore whether firms sought disclosure of professional licenses, disciplines, etc. The tone of the conversation with the interviewees on this point was that most firms asked few[er] questions because the firms do not consider contract (temporary) lawyers to be members of the firm.} Most firms, however, used an abbreviated conflicts check.\footnote{Law Firm D interview, copy on file with the author; Law Firm O interview, copy on file with the author.} The firms sought the disclosure of the identity of clients the contract lawyer had worked for previously.\footnote{Law Firm G interview, copy on file with the author; Law Firm J interview, copy on file with the author.} Most firms did not rely on the organizations that provide contract lawyers to do even this minimal conflicts search.\footnote{Some firms, however, did rely on the provider. Law Firm N interview, copy on file with the author.} Firms did not expend energy in clarifying or clearing possible conflicts the contract lawyer may possess. If the contract lawyer protect that information. All American Semiconductor, Inc., v. Hynix Semiconductor, Inc., CCH 2009-1 Trade Cases ¶176,465, at pp. 113,162-63 (N.D. Cal. 2008) (2008 WL 5484552).
presented a risk, e.g., the conflicts check produced a hit, the contract lawyer was not offered employment.\textsuperscript{196}

Firms justified their abbreviated conflicts checking by noting that the firm limited the contract lawyer’s access to the firm’s files and email.\textsuperscript{197} Contract lawyers were usually housed at the job site, not at the firm offices. Contract lawyers were given access only to files that were relevant to the task they had been hired to perform. Thus, contract lawyers were largely isolated and kept apart from the firm’s other lawyers and information. In effect, the firms created an ethical screen around the contract lawyer(s), but no firm referred to it in this manner.

Some firms required contract lawyers to sign confidentiality pledges, agreeing not to disclose what they learned as a contract lawyer to anyone else.\textsuperscript{198} Contract lawyers were also required by some firms to promise not to take other contract offers while employed as a contract lawyer for the firm.\textsuperscript{199} Whether these efforts assist the effort to avoid imputation is unclear. They do seem to duplicate procedures that are used to screen, but no court or professional rule has upheld the specific use of screening for contract lawyers when screening would not avoid imputation if applied to non-temporary members of the firm.\textsuperscript{200}

\textsuperscript{196} Law Firm R interview, copy on file with the author; Law Firm T interview, copy on file with the author; Law Firm V interview, copy on file with the author.

\textsuperscript{197} District of Columbia Bar Ethics Opinion 352 opined that in some circumstances a lawyer may join a firm but not be associated with a firm for purposes of imputation of conflicts of interest. Whether a lawyer is associated with a firm turns on several factors: (1) the scope of the lawyer relationship with the firm; (2) the length of the relationship with the firm; and (3) the extent to which the lawyer has access to the firm’s client confidential information. These factors largely cohere with the approach large firms claim to apply when hiring contract lawyers.

\textsuperscript{198} Law Firm J interview, copy on file with the author; Law Firm K interview, copy on file with the author.

\textsuperscript{199} Law Firm O interview, copy on file with the author; Law Firm R interview, copy on file with the author. While full time, permanent lawyers are likely barred from “moonlighting” (see Douglas R. Richmond, \textit{Professional Responsibility of Law Firm Associates}, 45 BRANDEIS L. J. 199, 260 (2007)), it is unclear whether the proscription would apply to a temporary lawyer; therefore, a contractual commitment is a good backstop.

\textsuperscript{200} ABA Formal Opinion 88-356 did opine that a firm could avoid general association of a contract lawyer as a member of the firm by screening the contract lawyer from access to confidential information of firm clients other than the matter for which the contract lawyer was retained:
I discussed with interviewees the option of having the client rather than the firm hire the contract lawyers. Some interviewees said they were aware of that approach being used, but indicated the initiative for that approach would have to come from the client.\textsuperscript{201} The tone of the discussion was that this was not an approach the firm’s clients would be inclined to adopt.\textsuperscript{202} Many firms treat contract lawyers as employees of the vendor,\textsuperscript{203} but run conflicts checks nonetheless.\textsuperscript{204}

\begin{quote}
[A] temporary lawyer who works for a firm in the firm office, on a number of matters for different clients, under circumstances where the temporary lawyer is likely to have access to information relating to the representation of other firm clients, may well be deemed to be “associated with” the firm generally under rule 1.10 as to all other clients of the firm, unless the firm, through accurate records or otherwise, can demonstrate that the temporary lawyer had access to information relating to the representation only of certain other clients. If such limited access can be demonstrated, then the temporary lawyer should not be deemed to be “associated with” the firm under Rule 1.10. Also, if a temporary lawyer works with a firm only on a single matter under circumstances like the collaboration of two independent firms on a single case, where the temporary lawyer has no access to information relating to the representation of other firm clients, the temporary lawyer should not be deemed “associated with” the firm generally for purposes of application of Rule 1.10. This is particularly true where the temporary lawyer has no ongoing relationship with the firm and does not regularly work in the firm’s office under circumstances likely to result in disclosure of information relating to the representation of other firm clients.
\end{quote}

\textsuperscript{201} Law Firm H interview, copy on files with the author; Law Firm L interview, copy on file with the author.

\textsuperscript{202} It appears that clients are increasingly comfortable with this practice. Gina Passarella, \textit{New Hiring System Keep Contract Attorneys Away From Law Firms}, The Legal Intelligencer (July 12, 2010), available at: http://www.law.com/jsp/law/careereenter/CareerCenterArticleFriendly.jsp?id=120263417.

\textsuperscript{203} Law Firm T interview, copy on file with the author.

\textsuperscript{204} Law Firm V interview, copy on file with the author. One firm stated that in the situation where the client hired the contract lawyer, the firm would not run the contract lawyers through the firm’s conflicts checking system. Law Firm T interview, copy on file with the author.
H. DISCLOSURE COMPLIANCE BY LATERALS

Many interviewees commented that the initial level of information provided by the lateral on the questionnaire was sparse. In general lateral partner candidates provided less information than lateral associate candidates.\(^{205}\) This can be partially explained by the likelihood that lateral associate candidates had a shorter practice history than lateral partner candidates. Lateral associates, thus, had less to report and what they had to report was more current. A number of interviewees, however, reported that lateral partner candidates felt that providing a client list was sufficient or ought to be sufficient.\(^ {206}\) Lateral partner candidates claimed that they were too busy to complete the conflicts portion of the questionnaire or did not see the need for it.\(^ {207}\) Completion of the questionnaire often ended up a negotiation between the lateral partner candidate and the firm with negotiation leverage sometimes being the admitted deciding factor.\(^ {208}\) Other firms claimed that full completion of the questionnaire was non-negotiable.\(^ {209}\)

The fact that the degree of information provided varied or was a product of negotiation does not mean that firms necessarily sacrificed client interests for business opportunities. Inadequate checking can also result in lost business for the firm. Most interviewees saw conflict disclosure and compliance as a somewhat subjective process.\(^ {210}\) Professional standards and judicial decisions provided somewhat

\(^{205}\) Law Firm B interview, copy on file with the author; Law Firm J interview, copy on file with the author; Law Firm N interview, copy on file with the author; Law Firm O interview, copy on file with the author. Law Firm S interview, copy on file with the author.

\(^{206}\) Law Firm E interview, copy on file with the author.

\(^{207}\) Law Firm D interview, copy on file with the author; Law Firm M interview, copy on file with the author; Law Firm R interview, copy on file with the author.

\(^{208}\) Law Firm E interview, copy on file with the author; Law Firm J interview, copy on file with the author; Law Firm K interview, copy on file with the author; Law Firm N interview, copy on file with the author; Law Firm R interview, copy on file with the author.

\(^{209}\) Law Firm K interview, copy on file with the author; Law Firm L interview, copy on file with the author.

\(^{210}\) Law Firm E interview, copy on file with the author.
capacious standards in this area. Firms treated the issue whether disclosures are sufficient to find or clear conflicts as a judgment call.  

The information requested on the questionnaire was only the beginning of the information disclosure process. Interviewees were unanimous that if the initial level of disclosure by the lateral was insufficient to clarify the matter, i.e., was there a conflict, the firm requested more information as needed to identify whether a conflict existed. How far a firm would press a lateral depended on the importance of the firm’s affected client. A conflict involving one of the firm’s primary client received more attention that one involving a minor, marginal client. Business considerations influenced the thoroughness and completeness of the conflicts checking process, but to what extent, if at all, they controlled the decision making process is difficult to say.

Laterals were also a factor here. A desirable lateral acquisition, e.g., one with a significant portable book of business, gave the lateral some ability to push back information requests, not in the sense of refusing to participate and provide information but in the scope of information provided. For example, the lateral might be able to negotiate a shorter look-back period, e.g., 1 year instead of the 3 year period on the questionnaire, or the lateral might be able to limit disclosure to client lists without a description of the nature of the matters in which the lateral represented the client. In the end, many of the interviewees said that, as to lateral partners with substantial books of business, the amount of disclosure was negotiated rather than demanded.

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211 See supra text and note 145.


213 See supra text and note 208.
Conflicts checking is an important aspect of the lateral hiring process, but it is not the primary concern. What drives the process is the desired acquisition by the firm of the lateral’s potential book of business or the expansion or enhancement of the capabilities of a firm’s practice group, with the first point being dominant. Most questionnaires devoted far more attention to the lateral’s billing and realization rates than to potential conflicts. Even when conflicts related information was prominent, there is an evanescent line between the business side and the conflicts side of client identification and matter description. Both can help the firm spot potential conflicts and, at the same time, help the firm determine the “real” book of business the lateral can bring to the firm, e.g., does the lateral’s book of business consist of one large client or many large clients, to what extent will the lateral’s clients provide business to other lawyers in the firm, etc. Conflicts checking helps protect firms from disqualification while at the same time enabling them to make more accurate determinations about the value of the lateral to the firm.

Lateral disclosures also help the firm assess how the firm’s existing clients will react to and mesh with the firm’s absorption of the lateral’s clients. Even if a representation is professionally permitted, the new representation may have business ramification that the firm cannot ignore. Law firms frequently went in-house during the lateral hiring process to determine from the firm’s relationship lawyers how the existing client would react to the firm taking on the lateral’s clients. A negative response often put an end to the pursuit of the lateral.

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214 Law Firm C interview, copy on file with the author; Law Firm G interview, copy on file with the author; Law Firm L interview, copy on file with the author; Law Firm P interview, copy on file with the author; Law Firm Q interview, copy on file with the author; Law Firm R interview, copy on file with the author; Law Firm S interview, copy on file with the author; Law Firm V interview, copy on file with the author.

215 Law Firm R interview, copy on file with the author.

216 Positional conflicts are a good example of this. A firm may be permitted to urge a legal position that is in the interest of one firm client, but not another firm client (Model Rules, supra note 8, Rule 1.7, cmt.24); however, doing so may cause the disaffected client to seek new lawyers.
Information disclosure is not limited to the conflicts-related questions on the questionnaire or the follow up questioning that was undertaken to clarify “hits” or fill out incomplete responses to the questionnaire by the lateral. Laterals, particularly, potential lateral partners, were selling themselves to the firm and in doing so were often expounding about clients and business they could bring to the firm. Lateral had compensation objectives that they had to justify. That justification often included detailed statements about the lateral’s clients and their legal activities. Several interviewees commented that sometimes the lateral’s breadth and depth of disclosure about client activities concerned them as they did not want to be put in professional or liability cross hairs. Interviewees also noted that materials provided by the lateral during the initial courting period could also be reviewed to clear conflicts and fill gaps in the questionnaire. The problem of confidentiality in conflicts checking, if there is a problem, is not just firms seeking information, but also laterals volunteering information to make themselves more marketable and more desirable.

The questionnaires firms distributed to the lateral varied greatly. Some were bare boned, simply asking a series of questions to the lateral. At the other end, some questionnaires were very precise and detailed. In these questionnaires, the lateral was asked to provide an extensive accounting of the lateral’s activities over the look-back period, which could go back 5 to 10 years. Most questionnaires fell in between, but this does not mean the questionnaires were identical. There was no visible standardization. What similarities existed were the byproduct of the fact that firms were ultimately seeking the same information – a synopsis of the lateral’s legal business activities over a discrete period of time. How firms identified the relevant time period varied greatly. How firms identified the relevant scope of inquiry varied greatly. Whether firms centralized the conflicts checking process varied greatly. How detail oriented firms were

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217 Law Firm C interview, copy on file with the author; Law Firm D interview, copy on file with the author; Law Firm M interview, copy on file with the author; Law Firm N interview, copy on file with the author; Law Firm R interview, copy on file with the author.

218 Law Firm E interview, copy on file with author; Law Firm F interview, copy on file with the author; Law Firm K interview, copy on file with the author.

219 Law Firm P interview, copy on file with the author; Law Firm R interview, copy on file with the author.
regarding the conflicts checking process varied greatly. There was no template that I could identify that firms used in this area.

Firms were careful about conflicts that lateral’s identified, but generally unprepared for the possibility that laterals would fail to disclose information on the questionnaire that would enable the firm to detect a conflict. There appear to be several reasons for this. First, firms apparently trusted laterals to do the right thing, which in this case was to provide sufficient disclosure to enable firms to determine and clear conflicts. While there may be some scholarly concern about conflict checking disclosure, that concern was not shared by the interviewees. All the interviewees expressly or impliedly accepted limited disclosure of client identity, party identity, and brief general matter description as permitted (if not compelled) by the legal profession’s rules of conduct.

Second, disclosure was seen as both beneficial to the firm (and its clients) and the lateral (and the lateral’s clients). Disqualification, and the loss of revenue it entails, is not conducive to either party. As noted earlier, the primary concern was not prior work conflicts, but current client conflicts that would result from the movement of the lateral’s clients to the firm. Disqualification may cost the lateral part of the lateral’s compensation package. Laterals, thus, have an interest in being forthcoming. Incomplete or inaccurate disclosures by the lateral in this area may lead to strained relations at the firm that may cause the lateral to take the book of business.

As one interviewee noted, the underlying assumption is that the lateral will “honestly report.” Law Firm A interview, copy on file with the author. “Honestly report” is not, however, the same as “accurately and completely report.”

Law Firm A interview, copy on file with the author (stating that disclosure for conflicts checking is beneficial for clients because:

- It allows the firm to identify problems and, for example, erect screens that prevents disclosure of client confidential information; non-disclosure would prevent/hamper erection of screens.
- Disclosure permits client to maintain flexibility and freedom in lawyer selection; lateral is not lost to client as client’s lawyer because lateral failed to disclose and therefore
  - Consents were not obtained
  - Screens were not erected.
elsewhere. A lateral who thought a client would be well received by the firm may recalculate the desirability of staying if conflicts prevent the lateral from representing the client at the firm.

Third, a firm’s leverage in securing disclosure is inversely proportional to the desirability of the lateral as an acquisition. A desirable lateral may have multiple opportunities. Hectoring a lateral about conflicts disclosure may not be the image the firm wishes to convey. Securing information disclosure from laterals was often a matter of negotiation, which meant compromise by both sides of their preferred position.

Firms have different risk-reward thresholds when conducting lateral conflicts checking. Some firms are highly cautious and risk adverse and require laterals to disclose any activity that might give rise to a conflict; other firms are less risk adverse and limit disclosure to activities that carry a high potential for raising disqualification issues if the lateral joins the firm. Because firms have different goals and objectives when conducting lateral hiring conflict checking, I hesitate to suggest a model form or model language that firms should use in this area. I do, however, offer a few observations and suggestions that firms could adopt to make the process more complete and, at the same time, more efficient.

First, several of the firms I interviewed adopted the practice of running the lateral’s law firm through the firm’s conflicts checking data base. Although one interviewee expressed concern that this practice raised the problem of potentially too many false hits, the practice does seem to be an efficient way to catch omissions in the lateral disclosures. The conflicts checking system for lateral hires operates on the

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222 Law Firm S interview, copy on file with the author (describing unhappiness when due to possible miscommunication lateral discovered continued representation of client would engender conflict with another client of firm that could not be waived).

223 A lateral who moves to a firm may not be shy about moving from that firm. Eric A. Seeger, Do-It-Yourself Lateral Hiring, available at:www.altmanweil.com

224 See supra text and note 208.

225 Law firm G interview, copy on file with the author; Law Firm H interview, copy on file with the author; Law Firm J interview, copy on file with the author.

226 Law Firm M interview, copy on file with the author.
assumption of complete and accurate disclosure by the lateral. Laterals have an interest in complete disclosure so there is a reasonable basis for firms to rely on laterals for this information. Human memory is, however, imperfect. Many interviewees acknowledged that disclosure by laterals was often incomplete.\textsuperscript{227} Running the lateral’s law firm through the conflicts data base provides an independent means to validate the completeness of the lateral’s disclosures.

Second, firm questionnaires would profit by providing some instruction to laterals as to how much information should be provided. Several firm questionnaires used filled-in examples, which made the process more easily understandable.\textsuperscript{228} Even if firms don’t want to go that far, comprehensibility would be advanced if the questionnaire clearly delineated what information the firm seeks and what information the firm doesn’t seek. For example, if a firm only wants disclosure of open matters, a specific, highlighted instruction to that effect would be helpful; alternatively a negative instruction that closed matters need not be disclosed would be helpful. The same approach would

\textsuperscript{227} See supra text and notes 205-07.

\textsuperscript{228} Law Firm D Questionnaire, copy on file with the author, used the following format which I have adapted:

<table>
<thead>
<tr>
<th>Client: X Corporation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Employer: Alpha Law Firm</td>
</tr>
<tr>
<td>Name of [Firm] Party: Zeta Partnership</td>
</tr>
<tr>
<td>Relationship of Firm Party: ☐ Adverse ☐ Potential Adverse ☐ Non-Adverse</td>
</tr>
<tr>
<td>Type of Matter: Trademark</td>
</tr>
<tr>
<td>Subject of Matter: Dilution of Mark</td>
</tr>
<tr>
<td>If Intellectual Property Matter, Describe Technology involved: N/A</td>
</tr>
<tr>
<td>Dates: 06/09 to Present Is the Matter Concluded: ☐ Yes ☐ No</td>
</tr>
<tr>
<td>Extent and Nature of Your Involvement: Prepared legal memorandum on dilution law in relevant jurisdiction (7th Cir.); participated in strategy sessions with client and lead partner.</td>
</tr>
<tr>
<td>Did you work on this matter yourself, and/or obtain confidential information about the matter? ☐ Yes ☐ No</td>
</tr>
</tbody>
</table>
be helpful if the questionnaire only seeks disclosure of matters in which the firm represented another party. Most questionnaires finesse the issue by incorporating the limits into the question itself. The difficulty with that approach is that instructions focus the attention of the lateral on the issue. When the limits are contained in the question, the lateral may be uncertain whether the limits constitute words that exclude and defines or words that merely illustrate. Quick reading may cause any nuance in the question to be lost.

Some questionnaires directly addressed this issue. For example, one questionnaire identified the scope of the process as follows:

Please complete the form and return it to [firm] as soon as possible. Please be sure to include each party’s correct and complete name, and to provide a general description of each matter (e.g., “represented X in trademark litigation against Y,” “represented X in acquisition of assets of Y,” etc.). Include all clients and adverse parties during the course of any legal employment during the last three years. Please note that abbreviations or shortened names can cause errors.²²⁹

Another questionnaire provided:

For each employer, please list all clients for whom or which you have performed legal services during the past five years. For each client, describe the matter(s) on which you worked either by case name or general description of the matter, and include the names of all other parties in the matter. If known by you, please include all related corporate entities (parent, subsidiaries, affiliates).²³⁰

²²⁹ Law Firm D Questionnaire, copy on file with the author.
²³⁰ Law Firm T Questionnaire, copy on file with the author.
Third, many of the questionnaires used fill-in-the-blank formats. These formats identify the information the firm wants the lateral to provide, which is helpful. The typical format was to set forth the information desired in a masthead and provide space below for the lateral to fill in an answer. For example, one questionnaire used the following format:

<table>
<thead>
<tr>
<th>Client Name</th>
<th>Address</th>
<th>Affiliates Represented</th>
<th>Dates of Representation</th>
<th>Nature of Representation</th>
<th>Matter and Party Information</th>
</tr>
</thead>
</table>

Another questionnaire provided:

*(Please TYPE or PRINT clearly; and please include FULL names of parties.)*

<table>
<thead>
<tr>
<th>Full Legal Name Of Client For Whom You Work Or Worked</th>
<th>Full Legal Name Of Party Represented By [This Firm]</th>
<th>Name of [This Firm’s]Lawyer(s) Involved in The Matter</th>
<th>If a Lawsuit, Arbitration, etc, Name of Case &amp; Name of Forum in Which it is Pending</th>
<th>Status of Matter <em>(Pending or Completed)</em></th>
<th>Law Firm or Company at Which you Were Working</th>
</tr>
</thead>
</table>

Questionnaires that use this approach should, however, consider format design. A number of questionnaires were so tight and dense-packed that it was difficult to write more than a word or two in the space provided. Such a format encourages the lateral to provide incomplete information.

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231 Law Firm O Questionnaire, copy on file with the author. The “client Name” and “Matter and Party Information” headings have footnotes which described the scope of information requested for each. For “Client Name” the lateral was asked to “Please provide complete legal name of entities and middle initials for individuals.” For “Matter and Party Information” the lateral was asked “For each active matter that would follow to [the firm], please describe the nature of matter and list all involved parties, along with their relationships to the client.”

232 Law Firm M Questionnaire, copy on files with the author.
Incomplete information often requires that the firm contact the lateral for additional information. These after-the-fact contacts can be time consuming and disruptive. Firms should design the questionnaire so that it induces the lateral to provide sufficient information to identify real potential conflicts. Designing the conflicts form so that the lateral can write complete names of clients, firms, parties, etc. makes the conflicts checking process more efficient by reducing (1) the number of false hits and (2) the need to go back to the lateral to get more information to complete conflicts checking.

Fourth, some firms double checked against incomplete disclosure by focusing on areas where an omission or mistake could cause the greatest harm to the firm. For example, one firm listed its major practice areas, in some cases by specific product (e.g., ladders), and asked what the lateral had or has “been involved in, or [has] any confidential information regarding the legal representation involving [that] practice [area].” Another firm asks for a list of projects in which the lateral has been adverse to the firm. A firm might show the lateral a list of the firm’s anchor clients and inquire whether the lateral has been involved in a representation in which one of those clients was also involved, or a party, or about which the lateral possessed confidential information. As one general counsel put it, “[t]his is merely a second chance to catch a problem.”

Fifth, one firm supplemented the traditional conflicts checking approach of seeking client identity, matter description, etc., by questioning the lateral on issues that would likely raise real issues of confidentiality to an affected client. This questionnaire, as did all others, sought disclosure regarding portable clients of the lateral. But beyond this information the questionnaire limited its inquiry to critical information a client would likely have a real interest in keeping confidential, for example, information relating to (1)

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233 Law Firm F Questionnaire, copy on file with the author (brackets added).

234 Law Firm W email, on file with the author.

235 Law Firm F Questionnaire, copy on file with the author; Law Firm R Questionnaire, copy on file with the author; Law Firm W email, copy on file with the author;

236 Law Firm W email, copy on file with the author.
unpublished sensitive financial matters; (2) confidential business practices or policies; (3) specific internal problems or evidence of wrongdoing; (4) a proposed financing or business combination; (5) litigation settlement practices.  

The limits imposed by the above questionnaire get to the heart of conflict of interest concerns in the area of prior work conflicts. Putting asides the largely rejected “appearance of impropriety” test, what drives conflicts is the fear that the migrating lawyer has material confidential information, the disclosure or use of which will likely harm the client. The broad expansion of the conflicts rules is not driven by concern that mere involvement in a matter by a lawyer creates a conflict, but by the need (or desire) for prophylactic tests that avoid the need for actual disclosure of confidential information by the affected client to determine if there is a real risk that the lawyer will disclose the client’s confidential information “assess to” become the surrogate for “has and will use.”

The firm’s desire to focus on the real issue is commendable; the problem is the firm may be ahead of the law here. While the areas identified by the firm are central concerns in conflicts analysis, courts have not oriented to tying conflicts analysis to these discrete problems. Judicial focus remains tied to the traditional “same or substantially related” test. The inquiry, thus, risks being underinclusive because the lateral may have sufficient contact with a matter to be deemed “involved” for conflicts purposes; yet, the lateral may reasonably believe that he or she does not possess information of the type requested by the questionnaire. The question may work as a back-up question; it is risky as an initial question seeking identification of possible disqualifying conflict.

Law Firm P Questionnaire, copy on file with the author. The five listed examples are the ones offered on the questionnaire. The lead into the listed areas asks the lateral to:

Identify any entities with respect to which you have had a relationship that might be pertinent to a conflict analysis. Please list each individual or entity for which you performed legal or paralegal work, whether adversarial or not, and about which you learned important, confidential information which, if known, would give an unfair advantage to someone currently investing in, contracting with, or litigating against that client or person, such as . . . .


See supra Part 2C.
Sixth, firms need to consider fully the risks they run when they limit the scope of the lateral hire conflicts checks, as, for example, many firms did by not inquiring into closed matters, joint defense agreements, or prospective client meeting. The consequences of such limited inquires can be significant. For example, in *All American Semiconductor, Inc. v. Hynix Semiconductor* \(^{240}\) a lawyer, while at a prior firm, received confidential information from a non-client pursuant to a joint defense agreement. That non-client later became adverse to a client of the lawyer’s new firm. When the firm became aware of the adversity it erected a screen, but the effort was to no avail. While the court expressed awareness of the mobility of modern lawyers, it was unwilling to recognize screening as a means of avoiding imputation in the absence of prior authority from a court of competent jurisdiction.\(^{241}\)

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\(^{241}\) Plaintiffs have not cited, and this court could not find, California case law approving use of an ethical wall in lieu of disqualification in the circumstances presented here. Even though as plaintiffs, and some of the cases upon which they rely, had noted, the law in California might well be headed in that direction. It is however, not there yet. And while the court agrees to some extent that given the realities of today’s legal climate, with increased mobility of lawyers and frequent mergers of law firms, that mandatory vicarious disqualification may be both unfair and unnecessary in some cases, the court is not persuaded this is such a case. It is undisputed that Vandevelde previously worked extensively for Hefner in proceedings involving the same alleged DRAM price-fixing at issue in this litigation, and that in those proceedings Vandevelde was privy to Infineon’s confidential information as a participant in the JDA. It is also undisputed that subsequent to Vandevelde’s representation of Hefner, his entire law firm merged with Crowell. Thus, even assuming Crowell erected a broad ethical wall immediately after discovering Vandevelde’s participation in the prior litigation the court nonetheless finds that disqualification is proper because the current litigation and the prior litigation in which Vandevelde represented Hefner are so substantially similar. Further, plaintiffs have not cited a single case in which a court has held that an ethical wall prevented the vicarious disqualification of an entire firm where the matters were as closely related as the matters at issue here, and where the disqualified attorney had spent so much time on the earlier matter and was directly privy to confidential information as a participant in a joint defense agreement.

*Id.* at pp. 113,163-64. Rule 1.18 does permit screening when the lawyer receives material confidential information from a prospective client not retained. If a jurisdiction has adopted Rule 1.18, but not yet adopted the amended Rule 1.10(a)(2), it could be argued that the proper rule to apply a lateral who brings such confidential information to the new firm is 1.18. The new firm should not be in a worse or different position from that the lateral’s prior firm would be in had the lateral remained at that firm.
This is not to say that good practice requires that lateral hire conflict checking must include inquiry into certain discrete areas. The issue is one of balancing the costs and benefits of digging deeper. More disclosure avoids surprises. Disclosure doesn’t necessarily change results; the affected client(s) may refuse to waive the conflict with or without screening. Knowledge does, however, allow the firm to be proactive rather than reactive. The ability to initiate inquiries into the possibility of a waiver may sufficiently alter the dynamics and timing of the negotiation so that some consents are obtained that otherwise would not have been obtained ex post. The law in this area is much too fluid to permit absolute positions to control decision making. Firms need to ask how much risk they are willing to undertake. This calculation requires, however, information. The absence of information is uncertainty. Decision making in the grip of uncertainty can be dangerous to a firm’s reputation and bottom line.\textsuperscript{242}

CONCLUSION

It is an oft repeated refrain that the best is the enemy of the good.\textsuperscript{243} Protecting client confidences and maintaining fidelity and loyalty to clients are certainly good. But allowing lawyers the freedom to move is also good in the sense that it enhances opportunities for both the lawyer, who can advance his or her professional career, and the client, whose interests and needs may be better served at the lawyer’s new firm.

No one should assume that lawyer mobility is always beneficial to the client and never undertakes to promote the naked, self-interest of the lawyer or the firm. There is, however, no credible evidence that such occasions are other than exceptional. Lawyers, as agents, can be expected in general to act in the manner that is mutually beneficial to both the agent and the client. Both the law of agency and the core idea of professionalism are premised on that assumption.

\textsuperscript{242} FRANK H. KNIGHT, RISK UNCERTAINTY, AND PROFIT (1921). Knight’s seminal work distinguished between risks, which are events that can be statistically measured and predicted – in a sense known – and uncertainty, which is a state that can only be intuitively, estimated. To restate in modern, popular vernacular, a risk is a “known unknown,” whereas uncertainty is an “unknown unknown.”

\textsuperscript{243} The original quote is “Le mieux est l’ennemi du bien.,” from Voltaire’s \textit{Dictionnaire Philosophique} (1764) Commonly translated as “The perfect is the enemy of the good, but literally translated as “The best is the enemy of good.”
If we accept that we are dealing with various good ends here, the proper focus, I believe, is not to create a hierarchy in which one good (lawyer mobility) must necessarily give way due to hypothetical risks to an other good (client loyalty and confidentiality). Rather, preferential exclusion should be reserved for cases where real harm would result from the attempt to have both goods. Real harm to clients has not, however, been demonstrated as an actual or necessary byproduct of conflicts checking disclosures. The risk of harm remains theoretical.

This conclusion does not ignore the business side of lateral hiring; it concedes the point. Law, however, has always been both a profession and a business. A business aim and objective does not make a practice professionally improper. If it did, lawyers could not charge fees. Business concerns should not consume professional values, but a hyper-technical adherence to professional values should not be used to condemn reasonable business practices. The reasonable touchstone here is harm to the client. This study found no evidence that lateral disclosures to facilitate conflicts checking put real client interests at risk. Firms were consistently careful in seeking only that amount of information needed to identify and clear conflicts. Firm could improve the process to make it simpler, less costly, and more efficient. There is no evidence, however, that current practices and procedures of large law firm in conducting lateral hire conflicts checks put client actual interests in harm’s way.

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244 In re Gulusha, 195 P. 406, 407 (Cal. 1921) (The occupation of attorney at law is both a profession and a business).