

THE DEFINITIVE DUE DILIGENCE GUIDE IN LATERAL ATTORNEY LAW FIRM PARTNER AND ASSOCIATE HIRING:

How Law Firms and Search Firms
Can Collaborate



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Partner Due Diligence

Associate Due Diligence

- I. PARTNER LATERAL HIRING IS A FACT OF LIFE FOR LEADING NATIONAL LAW FIRMS.**
- II. THE MOST FREQUENT PROBLEMS IN LATERAL HIRING DUE DILIGENCE ARISE IN THE FOLLOWING AREAS**
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I. PARTNER LATERAL HIRING IS A FACT OF LIFE FOR LEADING NATIONAL LAW FIRMS.

- A. Every year literally thousands of talented lawyers move among the nation's leading firms.** Most of those moves are made without an issue arising. But in a surprising number of situations, facts arise late in the game (or after the game is over) that should have been exposed to the full light of day before the offer was made.
- B. The challenge for law firms is to develop a system that allows this information to be collected accurately, completely, in a timely fashion, without disrupting the hiring process and without becoming unduly burdensome or oppressive for the firm or for the candidate.**
- C. Over the past twenty years lateral hiring of partners and associates has exploded. And, the need for due diligence has increased.** Not a year passes without a disclosure of a lateral lawyer who failed to disclose materials items about their background - resulting in profound embarrassment (or exposure to liability) for the acquiring firm.

SPECIAL COMMENTARY

This problem is not limited to lateral hiring. There are abundant examples of failures to disclose in the entry-level hiring context - e.g., new associates who have not graduated, who cannot be admitted to the bar, who mis-state, invent or exaggerate academic credentials, who lie about previous summer experiences. Some of the frauds are audacious and fairly simple minded. Others are complex and have more threads than a medieval tapestry.



D. The issue is important for several reasons

1. The enormous amount of administrative time that can be wasted unnecessarily if a lateral hire situation turns sour
2. The potential for embarrassing the firm
3. The potential for exposing the firm to liability
4. The potential for making subsequent lateral hiring efforts more difficult

E. How a disciplined system helps - This outline does not cover the separate process of conflict of interest resolution. A vast majority of leading law firms now have detailed conflict of interest review processes for lateral hires.

1. A disciplined approach to collecting this information can improve lateral hiring overall
 - The firm can more accurately compare candidates - and evaluate issues of compensation, promotion, etc.
 - The firm can develop an empirical sense of whether its judgment about candidate's business is correct, too conservative, or too optimistic
2. It can be an important disciplinary spur to the new partner - where they must review their business, their marketing efforts, and all of their professional development issues.

F. Lateral hiring of partners and associates presents a variety of challenges for the acquiring firms. There is often a pressure to move a lateral hire through quickly for a variety of reasons - some related to the lawyer's business, some related to the firm's matters, and the competitive pressure from other suitors who may be seeking the same lawyer

1. This pressure can often cause shortcuts to be taken in due diligence
2. Surprisingly some of the most sophisticated firms often proceed in lateral hiring based on little more than a resume, a cursory memorandum, and quick battery of interviews that represent more of a sales effort than a close look at due diligence



G. BCG Attorney Search assists our clients daily in conducting due diligence on transactions and testing the validity of assertions in litigation. The process of due diligence in lateral hiring is no different.

1. It is an important means of protecting the interests of the firm and its clients, minimizing exposures, managing risks, and assessing the wisdom of the decision itself.
2. Used correctly it can be a powerful tool to improving the quality of lateral hiring, improving retention, reducing the risk of hiring lawyers who do not fit within your culture

II. THE MOST FREQUENT PROBLEMS IN LATERAL HIRING DUE DILIGENCE ARISE IN THE FOLLOWING AREAS

A. Full and accurate disclosures relating to the business of the Prospect including

1. Portability / Credit issues. Firms still miss the mark from time to time in assessing whether the promised business will actually follow
2. Conflict issues - Failure to disclose facts that may create conflicts issues of all kinds for the acquiring firm
3. "Number Issues"
 - Billings
 - Collections
 - Actual hourly rates
 - Write off / realization / premium or other issues
4. Annual cash compensation in prior firm

SPECIAL COMMENTARY

A tough issue can be presented by the mid-year move of a lateral partner. For example, assume that Jack Stevens is a partner with Stevens & Barnes. His anticipated annual compensation of \$800,000 is paid in a draw of \$30,000 per month with the remainder paid in January and April of the following year. The J&B partnership agreement provides that withdrawing partners receive only draws paid to date - not the pro-rata value of the point. So if Sullivan leaves J&B in June he will have received 180,000 in draws - and in theory forfeits \$220,000 the income he would receive for half a year. You will have to address whether you will 'make good' on this loss. Whether you do depends on a host of factors beyond the scope of this outline.



- a. Some lawyers have an irresistible impulse to shade these numbers up a bit - for example non equity partners for whom a substantial part of their income is a discretionary bonus may shade up a bit on their view of current compensation.
- b. A request for tax returns or prior K-1's is a great wake up call on this issue.
- c. Remember a dollar is not always a dollar
 1. Some firms have expense allowances above and beyond K-1 cash compensation while other firms make partners pay many of their business development expenses out of their distributions
 2. The number quoted by the lawyer may include a capital contribution which they made
 3. Try to make the inquiry as simple as possible - "what was your gross cash compensation from your law firm in the last three years".
 - If they are an equity partner, find out how many points they have and what the budgeted value for the point is this year.
 - Some partners have a tendency to fuzz their current numbers up a bit in the hope that it will influence the offer which you
- d. It is a bit easier with associate placements because you may simply put them on your grid rather than worry too much about prior compensation
 1. However with associates you sometimes have the knotty problem of bonuses which the associate says they are 'leaving on the table' elsewhere.
 2. This is a very tough issue with no easy solution.
 3. Until we return to an almost manic boom period arrival bonuses seem unnecessary.

B. Resume Fraud

1. Yes it still happens - probably more often than we care to believe
 - a. Recall the Notre Dame football coach who did not play football where he said he played football.
 - b. Recall the I.O.C. President who claimed to have a Ph.D. which she did not receive
 - c. Recall the recent CEO who misrepresented an alleged NYU MBA.
 - d. Last week the CEO of a major Silicon Valley company was forced to admit that he did not graduate from Stanford
 - e. Earlier this year the Chairman of gun manufacturer Smith & Wesson admitted that he had failed to disclose to his board a conviction for armed robbery in the 1970's.



- f. Lawyers are not immune to this - two current U.S. Senators had some academic missteps that they avoided speaking about until media spelunkers found the hidden facts.

2. Most common type

a. Slippery dates of employment

1. where someone omits an employer by extending the dates of other employment
2. This is one area where you can still get fairly reliable information from prior employers
3. Gaps or distortions on time of employment are a warning sign of someone with undisclosed expulsion or termination issues

b. Omitted firms where someone was fired or had another problem

- Partners and associates who move around a bit too often may have one employment experience they'd rather not discuss
- Some prospects will assume that if they bury a bad six month experience that took place five years ago that no one will notice
- Due diligence you can perform
- check with all prior employers
- Prior employers may give you the name of the next employer -see if it tracks with the resume
- Something as old fashioned as your old Sullivan law directories can be a great tool to check to see where someone was listed in prior years. Old fashioned. Yep. Old school. Absolutely. Useful. Yep.
- Compare earlier resumes sent by the candidate as a potential lateral or as a law student. Often those who mislead about their employment history can't keep story A straight from story B.
- The ARDC and other licensing authorities keep place of practice records and that information is available in many other states as well on a historical basis
- Your credit check or review of tax returns can sometimes reveal conflicting information on time and place of prior employment.



- c. Exaggerated internal titles at a firm (hard to detect but more common than you suspect in these days of dozens of 'practice groups' in so many firms - while law firm website are useful for confirming current group titles - check prior years' copies of the Leadership Directory Law Firm Yellow Book)
- d. Exaggerated or distorted academic credentials
 - 1. It's worth confirming whether someone's status as a journal editor or winner of a moot court competition. Often this information is easily found at the law school website, or by just strolling down the hall to the library.
- e. Exaggerated descriptions of experience
 - 1. a case or deal list that is too good to be believed
 - 2. a claimed level of responsibility that is not credible
 - 3. this area is frankly a mess and there is a long sloping line from austere candor to outrageous puffery - but I'd beware of the candidate who claims anything that proves to be false.
- f. Bald falsification - a few years ago a lawyer in Washington attempting to move to Chicago forged a transcript. The lawyer had attended New York Law School - but manufactured a dummy transcript showing that he had attended N.Y.U.

C. Admission to bar

- 1. Actual admission
- 2. Whether in good standing
- 3. Whether current on dues

D. Distortions of prior employment experience - These range from the creative and subtle to the audacious and grotesque - but among the trouble signs are the following



1. Failure to disclose misconduct within their current firm, e.g.

- Claims for sexual harassment or other illegal, discriminatory, or offensive conduct
- Claims of abuse of expense accounts, abusive billing / collection / write off practices

SPECIAL COMMENTARY

The possibilities here are almost endless but include, over billing, improper billing of disbursements, characterizing time as disbursements or vice versa, undisclosed premiums or write-offs, creation of fictitious dump accounts where time is logged without any realistic hope of it being billed or collected, accumulation of excessive unauthorized and uncollectible disbursements (e.g., the lawyer who flies first class when she knows that the client will only pay for coach travel, or the lawyer with excessive lodging/ meal expenses which exceed client or firm guidelines).

- Many firms like to bury this stuff very deep so it is often hard to find and easy to hide

2. Failure to disclose practice / liability issues

- Asserted or looming malpractice claims
- Asserted litigation against the firm
- Cases in which they may be a witness or a party which they know of but which have not percolated (all of these major issues in an era when hiring from failing accounting firms or law firms is more common)

3. Failure to disclose termination - expulsion. Some firms are masterful at keeping this information soft and fuzzy

- Good lawyers are fired - but terrible ones are also fired. b. There is always a 'story'
- the prospective lawyer will have a story about why he is leaving - usually smooth but sometimes amorphous
- the prospective partner may be a bit anxious to move things along
- even with partners with what appears to be substantial business this can be an issue



- there may be a legitimate disagreement over credit for the business
- which suggests that you may not get what is being promised
- it is worth inquiring - dispassionately about these issues - because it can tell you a lot about whether business is portable
- Many terminated partners are terminated because they 'don't play well with others.' Translations they are 'difficult' to work with and for whatever reasons their current firm has asked them to leave

E. Many lateral partners have never read the partnership agreements for their own firms. Like the cobblers whose children have now shoes, many lateral partners do not understand the process of withdrawal from their current firm. It is often worthwhile to read their partnership agreement - so you can understand if there are problems which concern you.

1. Some firms have provisions (of dubious enforceability) prohibiting departing lawyers from joining competing firms for 30-90 days.
2. Others repay capital over a 1-5 year period and a new partner may ask for a delay in making a contribution in a new firm because of his inability to recover his capital from his former firm. Again, some partners are unaware of this problem until discussions have gone a substantial way down the road.

F. Failure to fully disclose problematical issues dealing with prior employers

1. The troubled employer - As we can all remember from the demise of Dewey LeBeouf - these problems follow departing partners for years and even when the lawyer leaves before the lights go out they may be devoting a lot of their time and energy to disposing of their past rather than building their future.
2. The dissolving law firm - law firms in a death spiral present challenges and opportunities. Fleeing partners may have terrific portable business - but often they come with the baggage of spending the next 1-3 years sorting out the practice and economic mess caused by the collapse of their former firm. Amidst all of that the clients may just drift away to find a firm where they get the focus and service they require.
 - a. Partners leaving troubled firms often carry that experience with them
 - b. They may come from a firm where financial stretches were made to keep the firm afloat and they may be accustomed to practices which you do not countenance



- c. For example one leading national firm will soon be reported to have engaged in Enron / WorldCom - like accounting shenanigans to prop up its apparent financial condition and facilitate bank financings.
- d. Partners arriving from a firm with a disruptive combative culture that is not collegial may simply not be able to adapt to your surroundings no matter how well they present in interviewing.
- 3. For all of the gifts of law firms and lateral partners, the process often accelerates and becomes a sales rather than an evaluative exercise. As in dating, the behavior you see during interviews may not be what you see in practice. Partners who sell clients and courts are often just as gifted at selling themselves in interviews. Don't let the eagerness to 'do the deal' cause you to forego the diligence that makes sense.
- 4. The brewing malpractice issue either (a) one in which the prospect is directly involved or (b) one which involves their current firm
- 5. The brewing liability issue - i.e. this lawyer has been asked to leave or is heading for the hills because a deal gone sour is about to make his career head south - even though it has not hit the press, resulted in any formal investigation by the SEC, or any formal action by another government agency
- 6. The baggage issue - weaknesses of junior lawyers in the package - sometimes way too much attention is paid to the credentials / experience / issues of the senior lawyer and the junior partner or the associates in the package are not vetted as carefully.
 - a. Often these lawyers have issues and limitations independent of those of the senior lawyer in the group
 - b. Some firms rush the rest of the package through and fail to exercise the same caution with junior members of the group
 - c. Some firms get in deep water by meeting with the laterals in groups and having only cursory conversations 1:1 with junior members of the group.

G. Failure to fully disclose problems with a portable client

- 1. Sometimes a partner with a apparently large book of business can be considerably less attractive because



- a. The client gets discounts - either across the board when the engagement begins or in a de facto discount taken as a write off on time billed.
 - b. The client is slow pay - although most law firms are far more disciplined in 2004 than they were 15 years ago, many lateral partners may be accustomed to a billing collection cycle which is different from their new firm. It pays to examine the billing and collection cycle on major books of business.
 - c. The client gets blended rates - which are hard to compare to the new firms hourly rates.
 - d. The client has one (or more) large outstanding receivable with its current firm - which can often be an indication of problems down the road on new matters with a new firm.
2. Some client time is stashed in non-billable marketing accounts - so that the billing sheets for the lawyer misstate the actual investment in / profitability of the business.
 3. The client makes accommodation requests (hiring its lawyers, providing office space, hiring relatives, concessions, requirements of reciprocal business in banking, real estate, travel, etc).

H. Misunderstandings on structural differences between the firm and the prior firm -

1. Draws - firm policies vary widely on monthly draws and supplementary distributions. The arriving partner may ask to be treated differently for cash flow purposes. Understand that special accommodations for new partners (a) are highly likely to irritate current partners and (b) can't possibly be kept secret. Rule #107 of lateral hiring is that secret arrangements are impossible to keep secret.

SPECIAL COMMENTARY

During the peak of the boom, firms often were more generous to laterals than they were to homegrown lawyers in terms of arrival bonuses, base salaries, guaranteed bonuses and all the rest. These arrangements are unwise from a moral standpoint and there is no way that they will be kept secret.

2. Distributions
3. Expense issues
 - a. Things as mundane as first class v. coach travel



- b. To the firm's enthusiasm and "pain point" for supporting the charitable projects of its partners and their clients
- 4. Funding of retirement
- 5. Capital and withdrawal issues
- 6. Termination
- 7. Titles

I. Failure to disclose troubling personal / financial issues. Here one must be sensitive to the privacy concerns of the lawyer but protective of the interests of the firm.

- 1. You should consult with your L&E partners for advice on how far one can reach under the laws of your state, or on any issues that might conceivably raise privacy, or EEOC issues (with due care to the issue of whether a a partner a partner or an employee issue).
- 2. The most common issues in this area are the following
 - a. A partner with a substance abuse problem
 - b. A partner with a civil / criminal misconduct issue
 - 1. insider trading
 - 2. massive financial losses in the stock market, real estate investments, side businesses, etc.
 - 3. defaulted loans (ranging from student, to mortgages, to credit card debt, to real estate limited partnerships)
 - 4. looming investigations by any government agency over any topic whatsoever
 - 5. the possibilities are almost as extensive as your imagination but the point of the exercise is to see if the potential partner is in any warm water with anyone that should concern you as his next employer.
 - c. A partner with a track record of physical violence on family members or a criminal history of any kind (this happens more often than many would care to believe)
 - d. Partners embroiled in litigation of whatever kind
 - e. Partners who are late, in any fashion, with any tax obligation of any kind to any authority - anywhere.
 - f. A partner with credit or financial problems of any kind
 - g. Partners with outside business interests



1. Beware the partner with too many outside business interests in areas that are prone to litigation or financial risks.
 2. For example partners with a lot of tax shelters or real estate investments that have gone south, partners who have taken a beating in the market or have spent too much time in the margin call sauna may not be as focused on work as you would hope. Yes an argument can be made that they will be more focused than ever - but the firm should be able to make this judgment
- h. Partners involved in litigation with their prior firms.
1. Astonishingly some firms just don't ask and don't find out until later that Mr. X sued his last 2 law firms over various matters.
 2. A partner who is locked in death battle with a prior firm will not be focused on your interests
 3. A partner like this may well be one of those 'difficult' cases in which you are next up to ride on his merry go round of litigation.
- i. Partners with peculiar personal litigation practices - Beware the partner who litigates against his neighbors

J. Failure to Understand your firm - Many partners breeze through the process until the very end (or even afterwards) and only discover then that the new firm and their old firm have different approaches to many issues.

1. Many times a partner has been in one firm their entire career and discovers during the transition that the new world is vastly different. The new partner must be advised fully, and early on of how your systems work in a variety of areas
 - a. Title - when someone becomes or is eligible to become an equity partner. The fuzzier this is, the greater the risk for a misunderstanding
 - b. When capital must be paid in.
 - c. Whether the firm will adapt its capital pay in to match capital pay out elsewhere
 - d. Draw/distribution issues.



1. How monthly draws and catch up distributions work
 2. Whether the firm is 'into the bank' or is more on a cash basis throughout the year (astonishingly this still varies widely)
 3. Withdrawal rights - currently very much in flux throughout the country
 4. Capital pay outs
 5. Retirement Pay outs
 6. Independently funded retirement accounts
 7. The payment of fringe benefits
 8. Whether the firm encourages / requires / prohibits the partners to be P.C.s
 9. The firm's view on LLC / LLP issues
2. And, the firm should understand any problems the partner has on his plate with his former firm. Again the issues are many but the most probable areas of difficulty are these
- a. Withdrawal rights
 - b. Return of Capital
 - c. Non solicitation of lawyers
 - d. Non competes
 - e. Non solicitation of clients
 - f. Ease of transfer of client files

K. Minor But Noteworthy Items. I've seen lateral hire situations stall on the tracks when seemingly minor issues are encountered. You are best to just handle these straight on

1. Furniture - the former firm won't let the lateral hire take his expensive furniture and you don't usually do things for new partners
2. Expense accounts -
 - a. some firms still have budgeted amounts of expense accounts
 - b. Most approve expenses periodically at the department level
 - c. At some firms the budgeted expense account is a substantial dump account (one leading Los Angeles firm gives each partner above \$500,000 an expense account of \$50,000 or more)



1. at one firm it is almost like the government-budget-dance - and partners feel that if they don't spend their expense account it will be reduced next year so there is a late in the year flood of 'entertainment' expenses
2. Whatever the case, and particularly with partners with substantial practices make sure you understand each other about how your expense culture works because the approaches to this are frankly a complex mess.
3. Lawyers or staff that have to be part of the deal
 - a. Frequently you find out at the last minute that these are musts and there is a tendency to rush them through
 - b. Be careful here - because when you rush on bringing in two or three other junior lawyers as part of the package - you must be sure that they meet all of your standards as well. If they do not, that is a clear warning sign of trouble to come in terms of client service, assimilation and other issues.
4. One firm has a great health care plan and the other has one which is somewhat different.
 - a. A lateral partner may have trouble bringing himself in or family members under pre existing condition clauses -
 - b. The lateral partner will be mightily frustrated if he discovers he is out of luck on health care because of this issue
5. Every firm has a sacred cow. The lateral prospect may be enjoying a benefit of substantial value which strikes most people as unusual or weird. Nevertheless they have enjoyed it for years. And they may just assume that you have this benefit as well. To quote one lateral partner prospect I worked with years ago "What do you mean I don't get a car." This Chicago firm arranged leases of fine imported automobiles. Another Chicago firm's partnership agreement has particular cars spelled out for 'founding partners.' and a guarantee of parking at particular spots in the most expensive parking garage in the city. Some prospects have complex relationships with their egos, their cars, and many other things. Again, common sense should prevail and both sides should work towards full understanding so that no one is surprised.



6. Seemingly small issues that arise during negotiations can be distracting and cause unwarranted distractions. Still they must be dealt with.

III. HOW TO DESIGN A SYSTEM THAT WORKS

a. Priorities

1. Efficiency
2. Accuracy
3. Thorough without disrupting the lateral hire process

b. Sensitive issues

1. Some lateral partners will rail about 'vetting' - and some of those who complain the loudest or fuzz up the tough issues are the ones where you should exercise great caution.
2. This should be presented to the lateral candidate as a standard part of the process
3. Understand that some lateral partners will not have been through a drill like this ever in their career. Tact and simplicity can avoid having you appear as inappropriately intrusive.

c. Developing A Questionnaire

1. A questionnaire has several purposes
 - a. To collect concrete information
 - b. To obtain representations on conduct
 - c. To ask and obtain answers on wide ranging and open ended questions to avoid surprises.
 - d. The bar application itself is a decent example of the type of information you may wish to collect



2. 5 years of baseline data should be collected on the following issues

| | 2011 | 2012 | 2013 | 2014 | 2015 |
|-----------------------|------|------|------|------|------|
| Billings | | | | | |
| Collections | | | | | |
| Realization | | | | | |
| Hourly Rate | | | | | |
| Total K-1 Comp. | | | | | |
| Client Billable Hours | | | | | |
| Non Billable Hours | | | | | |

Client by Client Data

| Client | Billing | Collections | Write Offs | Average Aging | Any issues re collection, discounts, or special arrangements with client |
|--------|---------|-------------|------------|---------------|--|
| | | | | | |
| | | | | | |
| | | | | | |

- To the extent that the firm is looking as much forward as backward - many firms now require lateral entrants to provide a comprehensive memorandum or outline on their business development plans for the next 12-36 months
- Some firms ask lawyers to simply write a memo
- Others require completion of a detailed chart which might appear something like the following



| Client | Names / Titles Key Contact | Substantial Matters in Last 1-3 Years | Projections For Next 1-3 Years - Including Portable and Non Portable Matters | Marketing Efforts In Next 1-3 Years | Assessment of Cross Selling |
|--------|----------------------------------|--|--|--|--------------------------------|
| ABC | | | | | |
| DEF | | | | | |
| | | | | | |
| | | | | | |
| | | | | | |

- These completed questionnaires can be quite useful but also run the risk of just being too darned much work for both sides
- On the other hand - it can be a great device for getting to the bottom of illusory promises about business to come.
- Knowing the nature of one's contacts with a client and the nature of marketing efforts to date can tell a firm a lot about whether this partner is real or illusory.

D. Data to Be Collected From External Sources

1. Credit check
2. Confirm law school (and college) degrees
 - Original transcripts should be required.
 - Every one knows of examples of doctored transcripts - so getting an original from the school makes sense
 - recall the Cravath applicant who designed UCLA transcript on his Mac
 - recall the lawyer few years ago who put an NYU header on a New York law school transcript
 - Pick a random honorary and see if they are right
 - e.g., - Phi Beta Kappa



- often there is puffery on a resume and if you find a false fact here it is often a powerful indicator of bad news elsewhere

3. Bar Issues - admission and in good standing

- This can be done by telephone in most states - In California it can be done on line by visiting www.CalBar.org.
- A confirming letter should be obtained in states where on line information is not available.
- Don't just rely on bar cards or a photo of a bar card - I could make one for \$5 on a laser printer
- Pick another random fact on the resume and confirm it - for example - I have seen people claim admission into the Trial Bar of the Northern District who were not admitted.

4. Last 3 years tax returns or letter from CPA firm or transcripts from IRS and IDOR on all tax obligations being current.

E. Timing of the Questionnaire -

1. Obviously timing is an important issue - you don't want to get to this comprehensive a level until discussions are mutually serious.
2. The lateral prospect will be understandably reluctant to volunteer this road map into his business development plan until it seems reasonably likely that both parties are willing to proceed to detailed discussions.

F. How to make it easy on the firm and the applicant

1. Make it a form that can be completed electronically -filling in a Word chart or
2. A document that can be filled in by hand
3. 50%of lateral partners are not computer literate
4. Be flexible here and just do what works
5. Spend time designing it so it looks easy but is comprehensive enough to get the information you want



G. The Balance - You want to get the information but you don't want to be insulting or acting like the Sanhedrin inquisitors. A good prospect won't be offended - they may be momentarily annoyed but we have all had to become accustomed to conflicts questionnaires, travel expense reports and all of the other paper of professional life.

H. Review by an Independent Partner

1. Completion of the questionnaire and a review of its contents should be supervised by a partner outside the department in which the lawyer would be located
2. This reduces the pressure to rush things along
3. The partner should be at the management level of the firm and one willing to take on tough issues and to know when an issue is not really troubling.
4. The partner responsible for 'sponsoring' the lateral hire should not be involved because they may be biased
5. The reviewing partner should be responsible for
 - Review all external information
 - Reviewing the questionnaire
 - Determining if any problems exist that must be discussed with senior management
6. The reviewing partner should also meet 1:1 with the lateral prospect to discuss
 - Any issues raised by the external information and the questionnaire
 - More importantly - just as applicants are vetted in the Executive Branch - to ask the applicant the blunderbuss question - "is there any fact, issue, or life experience which if we read about it tomorrow on the front page of the New York Times would cause any embarrassment, liability, difficulty, etc. for you, our firm, or its clients." And that question must be asked of every applicant and it must be asked with care.
 - It is not likely to produce a confession worthy of media attention but it is a good way to make certain that nothing has been overlooked

II. ASSOCIATE LATERAL HIRING - DUE DILIGENCE ISSUES

A. Due diligence in associate lateral hiring is a considerably simpler exercise but not one free from complications.



B. The most frequent due diligence issues which arise are

1. Distorted Academic history
2. Distorted employment history
3. Misleading disclosure of reasons for leaving their present firm. It is increasingly difficult to determine whether an associate is terminated. Law firms are concerned about their exposure for defamation or other claims and will often only confirm that someone is employed. Reference checking can be productive - but partners of the associate's current firm are likely to shade their evaluations positively for many reasons. "Back-channel" reference checks should be done with caution. Your 'other sources' at a firm may not be any more reliable than a formal reference check. And, the firm must be careful about exploring these contacts before a decision is made to extend an offer because it may compromise the candidate's confidentiality.
4. Exaggerations in work experience
5. Confusion over whether the associate resume was submitted first by which headhunting firm, received through another source, or generated through an associate bounty system
6. Other undisclosed 'time bombs.'

C. The questionnaire / due diligence process should be undertaken at the time when a firm is prepared to extend an offer. The offer to the associate should be conditioned on the completion of the background check process.

D. Where do we go from here? In 2020 will we see any or all of the following in law firm due diligence?

1. Criminal background checks
2. Credit checks
3. Investigation of litigation in which the candidate has been a party
4. Drug / substance abuse tests
5. Psychological testing

V. WORKING WITH HEADHUNTERS ON DUE DILIGENCE

A. The headhunter is useful tool but has inherent biases /limitations

1. Obviously they are interested in a completed placement and earning their fee.



2. But the best headhunters value the long-term relationship with the client and are equally interested in placements that meet the firm's long-term interests.

B. Do not assume that the headhunter has done any due diligence

1. Too many headhunters just grab and fax resumes
2. They do not have the ability to test the accuracy of assertions about business, its portability, and whether it really is deliverable
3. Non lawyer headhunters are often buffaloed by candidates who have something they would rather not discuss

C. You can ask the headhunter to deliver some preliminary information to you but this is no substitute for your own independent evaluation

D. Should you ask a headhunter to do reference checks? It depends

1. For associates - perhaps - with routine junior associate placements a good head hunter can do a lot in terms of collecting references from prior (but not the current) employer. But please understand they are biased - whether contingent or retained.
2. The impulse to be superficial can be overwhelming - so act with care here. Certainly you should work with headhunters who provide the following detail in their presentation packet to the firm
 - For associates
 - Resume
 - Law School transcript
 - Writing Samples
 - Deal or case list
 - Bio from firm website and Martindale Hubbell
 - For partners
 - A 3-5 year historical chart on hours / billings / collections / realization / rates / discounts / premiums / cash compensation
 - An up front discussion of tough cash issues
 - withdrawal issues
 - timing of capital contribution issues



- whether a bonus is being left on the table and if so how much (and how reliable is this information)
- any other concerns about draws etc
- whether the firm they are leaving has any peculiar accounting issues that will make the acquisition tough for you or the candidate including fiscal year / distribution issues / whether the firm is cash or accrual / whether points are set prospectively or retrospectively / whether a % of income is in a residual partner bonus pool
- Other media and public information that is material to the candidate
- An assessment memorandum which explores issues that are significant to the firm including why they approached you and why they say they are leaving
- For partners - it is hard to imagine any situation where the head hunter should do reference checks. If they are done require a memorandum be sent

VI. THE CAREFUL CONDITIONAL OFFER LETTER

A. The offer letter to the candidate should make it clear that the offer is subject to a determination by the firm, in its exclusive judgment, that the candidate meets all of its standards and has disclosed all information the firm feels is material to making an offer decision.

B. It should incorporate by reference the questionnaire and make it plain that an omission or mis statement in the questionnaire is grounds for revocation of the offer.

C. You may wish to consider a dispute resolution clause - some firms have incorporated mandatory arbitration (losing party pays lawyer fees) clause in the offer letter.

D. The letter can protect your interest without being overbearing

1. Compare - one west coast law firm has a 9 page offer letter to associates -.
2. Compare - a 2 page letter can do it - if it incorporates by reference relevant terms of the questionnaire or the partnership agreement or their materials

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