

Hocus Pocus or Reality: Evaluating the Soundness of Portable Client Relationships and Revenues—Proof or Poof?

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The process of vetting portable client relationships sometimes triggers in participants, much like a magician's audience, the wishful suspension of disbelief equally affecting the suitor law firm, an individual candidate, and/or a group of candidates desirous of the continuation of their interlinked practices. Only a certain degree of clarity can be expected when predicting the future, yet more than a few law firms have been the recipients of failed efforts to transfer client relationships. I have observed mostly unintentional acts of sleight of hand that left all concerned, bewildered, and not amused. This is surprising because everyone generally recognizes that assessing the value of lateral moves for all parties is a complicated feat in which everything is not always what it seems. My perspective into the process and mechanics of practice acquisitions and lateral movement between firms has been developed over my twenty plus years as a legal recruiter in Washington, DC.

For the lawyer or group contemplating a lateral move, the serious reexamination of the sustainability of their client relationships is necessary prior to the onset of exploratory meetings. Their success in "rainmaking" can be illusionary, but the results are quantifiable and will be tested in the course of lateral move discussions. At the end of the day, vetting of the strength, breadth, and duration of client relationships results in better alignment of expectations between the suitor (and, ultimately, acquiring) firm and the lawyer(s) acquired. Vetting serves to protect institutional and individual interests, but getting to and through the process can prove tricky. The purpose, therefore, of this chapter is to discuss methods law firms should employ to vet lateral partners' portable client relationships and to suggest guidelines for enhancing the effectiveness of that process. It also will provide suggested steps to secure real proof of portable sustainability and not the "poof" of the magician's distracting puff of smoke.

Of course, the vetting process is not magic, but heightened expectations can make things appear to be more real than they are. Perhaps it is the appeal of the candidate's dashing cloak of academic achievement and firm affiliation, the mystifying card shuffling techniques that promise numerous entry points of work from a single client, or even the ever loyal rabbit (associate, counsel, service partner) who never seems to tire of appearing in the top hat to make his/her colleague achieve impressive results. The real trick, then, is to have a sound and well-rehearsed approach to the lateral vetting process applied to individual partners and to groups to avoid being misdirected in the complex performance involving the hiring of marquee talent.

I. Methodology Law Firms Employ to Vet Lateral Partners' Portable Relationships

In applying the practice of magic to the lateral practice acquisition and vetting process, it appears that there are many similarities.

A. Production Value and Stage Setting

A magician has a number of methods for changing the state of being of animate and inanimate objects, and there are multiple ways that lawyers and practice groups might seek to alter a merely satisfactory situation into an ideal one. As with the magician, participants in such discussions need to consider carefully the effect they want to produce.

A common motivator of lateral movement is when a partner feels constrained at his/her current firm in the ability to expand his/her client base or to offer a broader range of services to their existing clients thereby recapturing "lost" revenue otherwise benefitting another law firm. Typically the limitations are structural and may include a lack of foreign offices, inflexibility on billing rate structures, absence of a key area of expertise required by the client, etc. Limitations, especially if external to the partner candidate's expertise, maybe harmful to the practice group's reputation and serve to diminish the likelihood of cross-marketed opportunities stemming from existing firm relationships. These are bottom line based reasons for a change and suggest a seriousness of purpose that makes further consideration worthwhile.

B. Steps to Vet Potential Lateral Practices

1. Endorsement

Magicians get business based on reputation and their ability to attract large audiences. Their ability to draw business also can be enhanced by the magician's affiliation with a prominent entertainment promoter or sponsor which assists in branding the magician and messaging that this performer is consistent with the caliber of entertainment the sponsor is known to provide in its venues.

In the case of attorneys, an endorsement of the client relationships and corresponding revenue are produced through (1) personal acquaintance endorsement and (2) affiliation endorsement. This type of vetting is, at most, a cursory reference check. A lateral suitor firm is comforted by shared personal relationships existing between the desired target candidate(s) and the suitor. Similarly, the target candidate's affiliation with a peer (or aspirational peer) firm presumably reinforces the sameness of client base size (billing rate tolerance), sophistication of matters handled and consistency of work ethic.

Obviously, knowledge of someone on a personal level is a valuable tool in evaluating that individual's cultural compatibility and business development /marketing potential, but such knowledge is not necessarily transferable to how that individual approaches the practice of law nor his/her interaction with and support of colleagues. Frequently the assumption is that a successful partner would only know like kind peers; similarly, someone who is viewed as a valuable resource, but not necessarily a "Star," could not possibly know a "Star." Perhaps Star's

endorsement is accorded extra weight at the onset of the discussions resulting in a too cursory review of the candidate's estimated portable relationships or assessment of the potential he/she represents to the suitor firm. Ultimately, all parties should seek to avoid the awkwardness that results when a critical eye is not introduced early on in the vetting process.

Affiliation endorsement occurs when a partner or group attended a certain law school and practices with certain firms that are considered peers or aspirational peers of the suitor firm. A common assumption is that the individual must be worthy of an offer of employment because of past affiliations (i.e. a firm that hired the partner would not have gotten it wrong). I believe this type of vetting can be improved and this risk of misperception avoided through asking a simple question: why is it that this partner or group believes their situation will improve through an affiliation with our firm? If the motivation for the move is explored (see below), and it makes sense in a not "too good to be true" way, then the partner should enjoy the benefit of the perceived weight of all former and current affiliations.

A reliance on personal relationship and affiliation endorsement seems highest, in my experience, when a firm lacks definition around its business needs creating the justification for the acquisition. Such a muddled approach frequently arises in connection with an opportunistic hire whereby a suitor firm reacts to the availability of an individual partner or practice group with little consideration given to the business justification and strategic value such an addition affords. In short, if the numbers "look" good, then for many firms, a need can be justified irrespective of strategic consideration of how this type of expertise, industry client base, geographic diversity, etc. fits into the broader goals of the suitor firm and its growth strategy.

2. Goal Accomplished Assessment

Next, a firm should explore the probability of how likely an affiliation with it will result in the accomplishment of the candidate's goals and corresponding expansion of matters and clients. Although not a complete checklist, the following questions are a good place to begin:

- Will conflicts or perceived client sensitivities with the suitor firm prohibit such expanded representation?
- Is the client a waiver friendly granting client? What steps has the candidate explored with the client concerning the likelihood of expanded representation?
- Does the client have any history with the suitor firm? If so, is there a current partner who retains internal credit for this client? How can credit be addressed fairly and to the satisfaction of all parties?

As part of a candidate or group's business plan (see Section II. Vetting Process), an analysis of prospective work from existing clients to include work consistent and external to the substantive expertise provided by the partner/group under consideration should be developed and reviewed. Transporting clients, however, will be inhibited if the personal relationship between the client and its credited originating partner or billing credit partner is strained, or if the client has

developed stronger ties with the working attorney actually performing the client's work and that lawyer chooses to remain at the partner candidate's current firm. Despite the lawyer's representation of a viable relationship with a client, ultimately it is the client who controls the selection of its counsel. As with all portable matters and in keeping with all ethical and professional duties, the client should be approached when authorized and at the appropriate time by the suitor firm to provide its "abracadabra" blessing to the continuity of the business relationship it enjoys with the candidate/group.

C. Vanishing Act: Now You See It, Now You Don't

A law firm audience will evaluate the performance of a partner/practice group based on historic and prospective information. In analyzing historical data, it is important to explore the reasons for any continuous decline in handling work for specific clients. There may be (and likely are if it is a long-term relationship) business conditions impacting the client's choice of where and how much business it can refer to the partner candidate or practice group. Such reasons include lessened activity in the client's business, economic difficulty, increase in work client handles in-house, rate increases that have forced the client to send more commodity type of work to a firm with lower rates, etc. On the other hand, perhaps the client is no longer pleased with its counsel and does not regard the partner as its "go to" outside counsel, but has yet to communicate that specifically to its lawyer.

In short, vanishing work from long-standing clients may reflect a decline in the ability (or desire) to use this particular lawyer. Such a situation raises a number of questions that must be considered:

- What has the candidate done to investigate the reason for the drop off in work?
- Will the move to the suitor firm platform remedy this decline?
- What has the candidate done to replace this source of revenue? In particular, is the candidate continuing to foster new client relationships or has the candidate become complacent?

Another factor to consider in evaluating the consistency of work flow directly relates to the services provided. An expectation of on-going work flow is much higher among all non-litigation types of practices than it is for litigation, excluding the subspecializations of antitrust, products work, etc. Some flexibility should be applied to the evaluation of ebb and flow of a litigation partner's production as long as a sustained track record of production is demonstrated.

D. Fulfillment of Suitor Firm's Strategic Plan

In the world of practice acquisitions, law firms must exercise discipline such that, in a search for X, they avoid contorting an appealing Y into "another type of X." In effect, the firm reaches consensus on what is needed, but when the search for the ideal is unsuccessful and/or another type of X appears, it raises an alternative practice or partner group over the now back-burnered

ideal with the expectation that the alternative group will provide the required expertise and assume the desired role while offering not yet definable, but additional value.

While I am certain such an approach allows for opportunistic flexibility to respond to otherwise stellar talent, does it address the fundamental business need that created the original demand/interest in a candidate's background? If not, how will that need otherwise be met within the firm? Solid footing is required when balancing the competing appeals of "nice to have" versus "must have."

II. Vetting Process: Proof or Poof?

A major part of the successful magician's art is the set up for each effect, whether that involves the artful positioning of props or the on-stage patter to prepare the audience for the trick's big payoff. In practice building and the acquisition thereof, the proper combinations of skill and craft are most prominently displayed in the form of a business plan.

A. Role of Lateral's Business Plan

Business plans are marketing pitches and should be evaluated as such. The process of preparing a business plan is instructive to the attorney candidate and frequently provides him/her with a better understanding of clients' needs and corresponding opportunities with suitor firms. The author of the plan is not committing to undertake all of the initiatives or predicting success with all targets of business development. Rather, he or she is presenting a forecast based on limited knowledge of the suitor firm and the ability to balance the demands of existing clients, potential for client conflicts, opportunities with suitor firm's client base and the addition of a large dose of good luck, something even magicians need. It also serves as a vehicle to instruct the suitor firm on the candidate's range of capabilities and the promise of the possible performance to come. On the other hand, the reluctance to provide a business development plan from an attorney moving within the private sector may be telling. In my practice, when I encounter push back on the preparation of a business development plan after providing guidance on its structure and content, that raises a red flag that there may be little up this magician's sleeve.

If materials detailing the practice are unavailable or unable to be recycled from internal performance appraisals or client marketing pitches, a suitor has to ask, "Why is this the case?" Everyone is busy and encounters considerable demands on his/her time, but if affiliating with a new firm is a desired outcome, then finalizing a business plan must be a priority. The underlying purpose of a business plan is to provide structure to a suitor firm's analysis of a candidate's potential fit at its firm. It is the first indicator that the promised potential is not an illusion. In addition, the opportunity for misinterpretation of data is reduced if all have the opportunity to review the same data presented in the same document. The benefit to the individual attorney is an analysis by the suitor firm of efforts applied in the past and corresponding success as defined by revenue in the door.

Suitor firms also are presented with a snapshot of the attorney's clients and origination history, typically involving information from the past two or three years and projections for the current year. If the secret to performing any magician's trick successfully is preparation, the secret of vetting business plans is to request the right information and to analyze that information in a critical and detailed manner. Obviously, the ideal is an attorney with long standing clients for which representations increase and services provided diversify throughout the years along with a sprinkling of new clients which provide new opportunities for growth. However, for certain practice areas such as litigation, a three year perspective on representations may not accurately reflect the quality of a client relationship and/or the likelihood of future matters, whereas a two year retrospective with a current year projection would be adequate for most transactional and regulatory attorneys.

B. Business Plan Format

I recommend that business plans include the following elements regardless of the presentational format, which usually is unique to the suitor firms involved:

- 1) Originations from the prior two or three years and projections for the current year. Note: in the event that the attorney candidate was not credited with origination, but serves as the billing attorney and otherwise believes that he/she is regarded by the client as its primary attorney for certain matters, such revenue should be accounted for in the partner candidate's revenue history with appropriate explanation that the revenue reflects billing and not origination credit. A statement could be added that the candidate attorney is optimistic that the client will accompany him/her to a new firm. Subsequent in time to the delivery of this financial information and obviously consistent with bar and other fiduciary obligations, direct conversations with each client regarding the on-going nature and desired representation by the candidate is essential;
- 2) Description of the work performed in connection with originations and projected revenues;
- 3) Attorney time to provide above service (candidate attorney, number and amount of other partners' and associates' time to generate work for which origination is claimed);
- 4) Billing rates for prior two or three years and current billing rates for candidate attorney, as well as all attorneys staffed on his/her matters who would accompany the partner to another firm;
- 5) Number of hours candidate attorney billed in current year and each of prior two to three years;
- 6) Identification of the relationship contact at client's and the quality/duration of relationship. Do consider the following questions: does the relationship extend beyond a single decision maker? What if the primary relationship contact departs the company? What, if any, expectation is there that work will remain with the partner candidate?

- 7) Amount and substantive nature of work partner candidate originates from his/her clients, but which he/she is not qualified to service;
- 8) Potential work candidate attorney assesses could be originated provided that the suitor firm has certain resources which are unavailable at his/her current firm. This discussion will be enhanced by requests for examples of work that the candidate attorney had an opportunity to capture, but lost because of the absence of desired capability, etc. at his/her current firm; and,
- 9) Compensation for prior two or three years and the projected compensation for current year.

C. Candidate's Vetting of Suitor Firm: Know Your Audience

From a candidate's perspective, the counterpart of his/her business plan is the suitor firm's ability to identify a pre-existing business justification for the attorney's addition to the firm. This is not unlike the magician's effort to determine if the venue is appropriate for his performance. An audience expecting grand illusions will not be satisfied with basic card tricks, while a too small stage will make most of the magician's major effects impossible. In the performance of magic, in the presentation of client pitches, and in lateral recruiting, it pays to know your audience. In our firm's practice, suitor firms that have difficulty identifying a candidate friendly reason for desired growth tend to enjoy much less lateral hiring success as measured by acceptances. Candidate friendly reasons include the existence of overflow work, inability to service a particular kind of work for a major client, desire to add a sub-expertise to an already flourishing practice (i.e. insurance product expertise in connection with the representation of mutual funds and related financial services companies), etc. If a suitor firm is of the "We have exercised an option to lease a third floor, and we need to fill up that space with revenue producers" school, it is a valid reason for the firm to hire additional attorneys, but hardly a compelling argument as to why the addition of this partner's practice makes sense to the firm. Every lateral partner candidate wants to feel that he/she is special and not just serving as a filler of office space.

At the outset of every senior level targeted search our firm undertakes, one of the first pieces of information we seek is to understand the business justification for the desired practice addition. By doing the hard work of identifying untapped opportunities within the current client base and how those may comport with a desired lateral addition before a search is initiated, firms greatly enhance the likelihood of success. The reasons for this include:

- 1) A desire to exploit client relationships of others without relying solely on a partner candidate's own generation of client matters;
- 2) An ability to cross market services to a partner's clients that he/she cannot directly perform;
- 3) An enhanced mutuality of purpose between the partner and the firm; and,

4) An opportunity for expedited integration.

At the end of the day, if a candidate's business does not materialize as quickly as he/she had hoped, they will have the security of knowing that their particular expertise remains valued by their new firm since they were a strategic hire consistent with the fulfillment of a larger firm goal or acquisition of desired skill set. This contrasts with the contemptuous view of a firm "just buying a practice." In short, a firm is advantaged by communicating its needs for the expertise, as well as for the particular person who possesses the expertise; it takes both for most candidates to be interested in exploring an opportunity if they otherwise are currently content or content enough.

III. Efficient Vetting

Efficient vetting is achieved by requesting and analyzing the right data. As a means to enhance efficiencies and to reduce the amount of time spent in exploring the possibility of entering into discussions with an individual partner or group, some firms restrict courtship to only those candidates fulfilling a predefined additive profile that replenishes what is missing from or diversifies the firm's portfolio in connection with expertise, client industry representation, geographic diversity, etc. If such an analysis of need is undertaken on an annual basis by a firm or practice group, then the ability to identify and to recruit targeted candidates with certain skill sets is enhanced by the precision of the search and the candidate/client assessment process.

A. Steps minimizing vetting burden and enhancing quality of process

- 1) Formulization of assessment process reduces mistakes and promotes consensus reaching within the firm.
- 2) As described above, define the existence of a business justification for the addition to the firm.
- 3) Identify existing practices (and individuals) disadvantaged or enhanced by this addition. Seek their input and arrange meetings between the partner or group and those affected.
- 4) Prepare a thorough description of the role to be assumed by this partner or group and determine what measures are in place to gauge the effectiveness of the candidate in fulfilling that role within the firm.
- 5) Utilize a single partner to be the dedicated critic, the "bad" cop for all contemplated lateral additions. Consistency in hard question asking and fact gathering will be maintained. Further, this individual will have a baseline reference and informed view of what really matters to the institution versus that which is less significant. As a process matter, the individual partner will know the necessary administrative procedures to be contemplated and can bring past practices to bear on the analysis of this individual or group's value to the firm.

Amazingly, the very individuals who advise their clients to undertake exhaustive levels of due diligence before committing to any course of action will approach the expansion of their own firm with cavalier delicacy. There is a reluctance to ask “the hard questions” out of concern that the mere inquiry into certain matters will generate ill will. Suitors should not avoid frank inquiries regarding the duration of client relationships, quality of contact(s) with the client, if another attorney at their current firm receives origination and billing credit for the client, whether the client seeks out other counsel at their current firm because the candidate’s billing rate is too high, what steps the candidate is taking to further expand the existing relationship, and what has been the tangible economic benefit of those efforts by the candidate, etc.

There is a generalized concern that such targeted inquiries will be interpreted as too direct, too bottom line, and a challenge to the professional integrity and veracity of the individual. If conducted in the appropriate manner, hard questions can be asked respectfully and in a dispassionate and nonjudgmental manner without appearing unrefined or devoid of professional courtesy. The happy outcome will be insights into the quality of the relationship between the partner or group and his/her clients.

B. Conducting Client Reference Checks:

Another critical, but particularly sensitive part of the vetting process, is conducting client reference checks which typically is the final step before an offer is formalized. Obviously, these reference checks must be treated in confidence and be done only with the candidate’s expressed authorization. Discussions with clients signal a “no turning back point” and should only be conducted at the point the firm is prepared to formalize an offer. The following may be useful in evaluating the strength of the relationships:

- 1) Nature and volume of work performed and over what time period;
- 2) Level of satisfaction with work;
- 3) When/for what does client seek counsel from the candidate;
- 4) Who within corporate structure controls outside counsel selection;
- 5) Do you have any current matters with which the candidate is assisting;
- 6) What work would you like to send to counsel but do not? Why do you not send such work?
- 7) What prompted your decision to select the candidate as counsel? How did you learn about the candidate’s abilities?
- 8) How would you characterize the candidate’s client management skills?
- 9) Has the candidate ever missed a deadline or otherwise failed to be responsive to your request? If so, how was that resolved?

10) Were you to select another counsel to represent you, what would you look for that is different from what this candidate provides?

IV. Predicting Future Success

Finally, an economic assessment of the candidate's current, former, and prospective relationships and overall potential is a key for a successful lateral acquisition because it can help determine the size and strength of new client relationships and increased revenue brought to the suitor firm. Beyond the economic assessment, however, there should be a strategic and process assessment regarding the lateral hiring process for this particular partner or group as a further measure of success and/or of how to avoid similar missteps in the future.

A. Economic Assessment

It is important to understand the compensation system of the candidate attorney's current firm, how revenues are credited, and who controls the client relationships. Control of client relationships may not rest with the person credited with originations. The client's view of who its attorney is remains the key predictor of future work. The best means of assessing the strength of the relationship is to speak directly with several of the attorney candidate's clients. Again, these conversations must be consistent with various bar guidelines, be treated in confidence, and done only with the candidate's express authorization. After developing an understanding of the compensation system of the candidate attorney's current firm, a further review of the candidate's compensation history should be undertaken. Does the history of earnings (request a W-2 and all other internal correspondence concerning credit allocation and client origination) correspond with increasing credited revenue? If not, perhaps further vetting of control of the client relationship is required. Does an increase in time spent marketing correspond with new clients and new matters for new clients?

B. Process Assessment

Once discussions with a partner candidate or group conclude with either a decline or an acceptance, it is important to review the outcome and determine if any lessons learned may be gleaned from the courtship. In my experience, when an offer is accepted, the "success" of the process is assumed and no further consideration is given to measuring the outcome of getting to the acceptance. Similarly, when an offer is declined, law firms rarely exercise introspection regarding what they could have done differently; rather, they choose to focus on the particular distinguishing aspects of the other firm's platform or offer terms.

While such distinctions are critical to the outcome of the lateral hire's decision, perhaps consideration of the following also would be instructive:

- 1) What did we do that worked? What could we have done better to increase the likelihood of a successful outcome? Are there lessons learned that we can take from this process and apply to the next target of acquisition?
- 2) Is our internal process for assessing candidates too lengthy/burdensome to the individual?
- 3) Do we have a key partner in the firm who embraces the role of lateral partner contact? Who is effective and seasoned in the role and able to avoid predictable glitches along the way?
- 4) Did we provide the candidate with specific examples of synergies that exists within and among our existing client base?
- 5) What do we know now about the candidate and his/her performance that we wish we had known before we extended the offer? Is there a means to identify those concerns earlier in our process?
- 6) Did we demonstrate to the candidate a high regard for their confidentiality, practice support capability, and sensitivity to actual and perceived client conflicts?

Perhaps it would be useful to collect these lessons learned into a more formalized lateral practice vetting process document and, going forward, transfer lessons learned into questions to pose and steps to undertake when in discussions with subsequent lateral partner candidates.

V. Summary

At the end of the day, a lateral partner candidate or group must be evaluated based on what has been, what is, and what may be. While a proven track record with a long standing and robust clients is ideal, some practices and/or highly specialized work do not lend themselves to on-going representation. However, a firm should look for a consistent history of success in generating a repeated (and growing) level of business year in and year out even if generated from a rotating set of clients.

Numbers matter—and not just as they reflect revenue levels. The more members who comprise a group, the greater the scope of work those individuals likely perform for their clients. Conveniently, this also creates multiple intake points through which work can be referred into the firm. The firm develops a greater understanding of the client and its business, thereby enhancing the likelihood of on-going and continuous work.

While due diligence should be as thorough as all interested parties can achieve while operating within ethical and appropriate guidelines, any lateral combination ultimately requires a belief

that more rather than less will be achieved with the combination. It also requires a leap of faith that the past is an indicator of future success, but not an infallible measure of such success. At the end of the day, fortuitous timing and a poof of magic can always help in expanding a firm's client base.

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