job you now seek. Review the information outlined above as with any prospective reference, and ask for a good reference.

If you want to find out what any given reference will say about you, engage the services of a professional reference-checking company. Many such companies are found through an Internet search. For a fee, they call your references and provide you with a report. If you think a situation is irreparable, tell your prospective employer something along the lines of, "Except for Mr./Ms. X, I always hit it off with my bosses and co-workers." Give a brief and neutral account of the difficulty and mention your career growth since then.

To avoid possible legal exposure for defamation, many employers give minimal information about former employees. A reference source that refuses to discuss you doesn't do you any good. Try to reassure them that, in most states, those giving references are covered by a qualified privilege. In other words, they are protected in giving any job-related information as long as it is not in bad faith or knowingly false.

Although reference checking comes at the end of your job search process, start thinking about it at the outset to maximize your chances of success.

## For Partners: The Vetting Process

Lateral hiring at the partner level, especially when a group of lawyers is involved, is a high-risk venture in hopes of high returns. However, performing the necessary due diligence on such a deal is a potential minefield for the acquiring firm, the legal recruiter, and the candidates themselves. High-profile cases challenged some vetting practices as creating unfair competitive advantage or causing a breach of partners' fiduciary duties to their existing law firms and clients. See, for example, *Gibbs v. Breed, Abbott & Morgan*, 271 A.D.2d 180 (1st Dep't 2000).

Lateral partner candidates and potential law firm employers, therefore, must strike a delicate balance: The law firm considering the lateral hire or partner group acquisition wants to obtain as much information from each prospective new partner as possible regarding his or her porta-

From *The Right Moves: Job Search and Career Development Strategies for Lawyers, 2nd Edition*, by Valerie Fontaine (NALP 2013 — available from the NALP bookstore). Excerpt reprinted with permission.

ble book of business and productivity (e.g., clients, billing rates, hours billed, collections, and the like) to reduce economic risks and structure an appropriate deal regarding compensation and partnership status. The partner candidate, on the other hand, must consider his or her fiduciary duties to his or her current firm. Thus, great care must be taken to provide enough information to the hiring firm while honoring current legal and ethical duties. Legal recruiters also wish to avoid potential liability for passing along confidential information.

Despite the risks, due diligence is an essential step in the lateral partner or group hiring decision. Most law firms developed lateral partner questionnaires to facilitate that process. Generally speaking, the more you share data not already in the public domain the more you risk breaching your current fiduciary duty and/or raising issues of unfair competition. Thus, the prospective hiring firm must be reasonable in its requests for information, and lateral partners careful in providing it. Moreover, if the receiving firm knows the material is beyond the parameters of what is acceptable, they could be held liable for taking it. In most cases there won't be a problem but, in rare instances where a deal goes bad or the former firm goes after the exiting partner or the new firm, a key piece of evidence in litigation may be the completed lateral partner due diligence form.

The following are recommendations for lateral partner candidates regarding disclosure of information.

## Solid Ground

1. Reading your partnership agreement regarding notice provisions early in the job search process.

2. Giving financial information regarding yourself only, including hours, billing rates, collections, accounts receivable, K-1 tax returns, etc.

3. Talking only to other full-equity partners of your current firm regarding leaving as a group, but each must provide his or her own financial information to the prospective firm.

4. Proposing the number and seniority of non-equity partners, associates, and other staff necessary to service your book of business and estimating their compensation, hours, and billing rates as part of a business plan and budget without naming specific individuals to fill those slots or their billings or compensation.

5. Offering information in general terms only regarding types of clients represented (e.g., international tire manufacturer, national fast food restaurant chain, biotechnology start-up, etc.), types of services rendered, past and current big cases/matters, and whether a large percentage of the revenues come from a small number of clients.

6. Giving only total historical billings and billing rates and expected future revenue generation, not broken down by specific client.

7. Supplying client names for conflicts check only, not to be contacted for any reason before you give notice to your current firm.

8. Internally analyzing the likelihood of attainability of conflicts waivers without contacting clients before giving notice to your current firm.

## Slippery Slope

1. Soliciting clients before giving notice to your current firm. Once you give notice, however, clients are fair game and you, your old firm, and even your prospective firm may reach out to gain their business. Avoid, however, any negative comments regarding your current firm or its ability to serve the client once you leave.

2. Allowing the prospective hiring firm to "check references" with your clients even in instances where you and the prospective firm both service the same client. (Although

commonly done, this may cross the line into solicitation of clients). Such reference checks cannot explicitly ask whether the clients intend to terminate their relationship with your current firm and follow you to the new firm.

3. Contacting clients for conflicts waivers before giving notice to your current firm. (This is a form of client solicitation and, thus, forbidden).
4. Providing any computer-generated financial reports from your current firm.
5. Giving specifics regarding client contact information or billing arrangements.
6. Disclosing names of non-equity partners, associates, or other employees, or their hours, billing rates, or pay information, before giving your current firm notice of leaving.
7. Soliciting or giving offers of employment at the new firm to non-equity partners, associates, or other employees of your current firm before giving your current firm notice of leaving.
8. Providing any other confidential information about your current firm, or anything that gives the prospective firm a competitive advantage.
9. Transferring client files to the new firm without written authorization of the client. Such files are the client's property. This not only breaches your fiduciary duty, but also violates the Rules of Professional Conduct.
10. Deferring client work to increase billing at the new firm. You must continue to serve clients at your current firm as you would normally, up to the point of your departure. You also must in good faith take all appropriate efforts to have outstanding accounts paid by clients to your current firm, especially those that follow you to the new firm.

Warning: Liability imposed on a departing attorney can extend to the acquiring law firm under the doctrines of tortious interference with contract, tortious interference with prospective business relations, or aiding and abetting breach of fiduciary duty. We strongly recommend prospective hiring law firms include on lateral partner due diligence forms a statement that they expect the prospective partner candidate to respect his or her fiduciary duties to his or her current firm. Furthermore, those forms should not request information or materials that are confidential or create an unfair competitive advantage. Potential acquiring firms also can attempt to protect themselves from any exposure to additional liability by requiring lateral partner candidates to provide up to several years of tax returns and requesting a credit check, and asking about criminal and military records, bar disciplinary actions, malpractice claims and coverage, participation on corporate or nonprofit boards, and the like.

In addition, when considering the acquisition of partners from firms in financial trouble, potential new employers must include in their due diligence an assessment of possible exposure to *Jewel v. Boxer* claims. *Jewel v. Boxer*, 203 Cal. Rptr. 13 (Cal. Ct. App. 1984) exposed firms that acquired lateral partners from dissolving law firms to unexpected liability. In that case, the Court decided that profits from "unfinished business" taken to a new firm were assets of the estate of a dissolving firm. A departed partner of the dissolved firm is obligated to disgorge the profits earned on the completion of the unfinished business. In litigation following the demise of firms such as Brobeck, Coudert, Heller, Howrey, and soon perhaps in Dewey, law firms acquiring the departing partners were subjected to claims for disgorgement of profits by the estates of the defunct firms.

Typically the new firms already collected and distributed to all of its partners their profit shares including the "unfinished business" brought by the lateral partner. Thus the new law firm would have to pay the disgorgement monies, and possibly ask the lateral partners for reimbursement. Some law firms, pre-dissolution, now add *Jewel v. Boxer* waivers to their partnership agreements, allowing departing partners to take business. But there's uncertainty whether courts will void the clauses as constructively fraudulent transfers, when they are adopted after the possible date of deemed insolvency. Therefore, the acquiring firm should consider adding an indemnification clause to lateral partnership offers, or expressly contracting with the lateral candidate not to seek reimbursement.

Even when a firm performs thorough due diligence on a potential lateral partner hire, the transition is risky. The partner may not fully integrate into the firm's culture, nor perform as well or as quickly as hoped, and might leave for still greener pastures. Research by Heidrick & Struggles revealed that it takes almost two years for laterals to perform up to expectations. Moreover, if the firm "got it wrong," there's the risk to the firm's reputation. At some point in the due diligence process, however, the potential employer must determine whether or not acquiring the particular lateral partner or group is a reasonable business risk. Often, the proposed deal structure shares the financial risk between the hiring firm and the lateral partner, with a guaranteed base plus an "upside" calculated on actual performance. Then both sides can be comfortable enough to jointly embrace the risk assumption required to close the deal.

## Writing a Business Plan

Law firms increasingly are run like businesses, with emphasis on the bottom line. Therefore, when experienced lawyers wish to change firms, one of the first things a prospective employer asks about is the candidate's portable client base. Senior lawyers must prepare to answer questions regarding how much business will move with them and how hiring them improves their prospective employer's market position. Even junior attorneys should give serious thought to business development to better position themselves for the future. Having your own client base is an essential element to taking control of your destiny, which can mean having the widest possible selection of job offers, starting your own firm, or negotiating a better position in your current firm. Even if you have no intention of making any career moves in the near future, it's a valuable exercise to draft a business plan.