

MINNESOTA LAWYER



Quandaries and Quagmires: Carefully vetting lateral partner candidates

By: [Charles Lundberg](#) August 1, 2017

It's the end of July 2017 — the bar exam was last week — and the hottest trending topic in legal ethics and risk management right now is this: *How badly some law firms have screwed up in vetting new lateral partners.* Here's just a sampling of the most recent headlines in the legal press about lateral hire disasters:

- [Hiring Misfires Show Need for Tougher Law Firm Vetting](#) (*The American Lawyer*, 6/22/17)
- [Lateral Hazard: Legal Malpractice Claims Rise With New Hires](#) (*The American Lawyer*, 6/30/17)
- [Stat Of The Week: How Much Can A Bad Lateral Hire Cost A Firm?](#)(*Above the Law*, 6/23/17)
- [Survey: Lateral Attorneys Blamed for Most Legal Malpractice Claims](#)(*JD Journal*, 7/3/17)

- *Lateral Partner Due Diligence: Where Should A Firm Begin?*(Law360, 6/13/17)

In "Hiring Misfires," The American Lawyer focuses on the worst-case scenario for the law firm: when you find out your recent lateral hire is a criminal, a scenario that has recently become epidemic: "In less than a year, Big Law has seen at least three lateral hires go seriously — even criminally — awry," (discussing three large law firms where a recent lateral hire was *indicted or convicted*).¹

An even better example happened at the end of 2015, when Evan Greebel, a recent lateral hire at Kaye Scholer, made headlines when he was indicted — and his perp-walk televised on the national news² — along with his client, Martin Shkreli (the notorious "PharmaBro," a/k/a "the most hated man in America").

The Shkreli criminal trial has been going on in a Brooklyn federal courtroom for almost a month at this writing. It has been, in a word, colorful.³ The prosecution may finally rest this coming week; Shkreli's attorney recently announced that his client would not take the stand. Greebel's trial will follow later.

The "*Hiring Misfires*," article acknowledges that all these lateral-partner-turned-criminal-defendant situations may be just "extreme cautionary tales." The bigger story is the shockingly high percentage of all lateral hires — 50 percent — that flop for more ordinary reasons, "lackluster business prospects, poor people skills or a missing cultural fit." And the cost of a bad lateral hire can be substantial — two to four times the lateral's annual compensation.⁴

And that doesn't even account for some intangible costs that could be far more expensive to the firm:

- *Like the expense of an unforeseen motion to disqualify your firm from a big case based on an undetected imputed conflict triggered when the lateral walked in the front door.*
- *Like losing one or more clients who choose to retain new counsel rather than stay with you and fight the DQ motion.*

- *Like the fact that your malpractice insurance carrier may perceive an increased underwriting risk in your firm's lateral hiring practices (translation: higher premiums).*
- *Like the incalculable internal cost to the firm from bringing in a culturally incompatible partner.*
- *Like the unexpected telephone call from the respected judge who has always been a friend of your firm, who quietly asks why in the world you would hire that lawyer as a lateral.*

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In any event, the conclusion of the piece seems obvious: "Many firms, including at the top end of the legal market, don't do the kind of vetting that might stop a problematic hire in its tracks."⁶

And trust me about this: When a lateral *does* flop spectacularly, you do not want to be the subject of this angry question among your partners: "Who was the genius who wanted to bring *that lawyer* into the firm?"

All of which is not to say that firms should not engage in lateral hiring. A carefully chosen lateral partner can be worth his or her weight in gold. Indeed, the firm where I spent my entire professional career — Bassford Remele — built its sterling reputation and enviable growth in significant part on a series of extraordinary lateral partners, starting with Lew Remele in 1988, followed by a long line of other tremendous lawyers who joined the firm and eventually became part of its leadership.

But the decision to hire a lateral must be done with great care, with a full understanding of how badly it could go wrong. The vetting process is neither easy nor quick.

Lawyers who have negotiated many lateral hires have some good advice. Confidentiality is critical. Some spoke of using text messages to communicate rather than email. Consider preparing a mutual confidentiality agreement at the outset of negotiations. Any offer should of course be made contingent on clearing all conflicts.

You also can get a short course in lateral hiring online. Google "lateral partner due diligence" to get started. Some commercial firms offer search and due diligence services. One of them offers "The Definitive Due

Diligence Guide in Lateral Attorney Law Firm Partner and Associate Hiring.”⁷

A recent Law360 article⁸ by an expert in the field makes several important points: Treat lateral due diligence as seriously you would an M&A transaction for a client; many firms spend hundreds or thousands of hours vetting such a transaction, and lateral vetting should be no different. Indeed, it is usually more difficult, because a candidate’s practice and relationships are not summarized in audited financial statements prepared by an independent third party.

A detailed lateral partner questionnaire is usually one of the first steps; this provides critical information needed to perform several key vetting processes:

- It provides the information needed for conflict-clearance purposes.
- It allows the firm to evaluate the business case and any projections prepared relating to the recruitment.
- It answers what should be a standard list of ethics questions related to the candidate’s employment history, personal reputation, etc.
- It provides adequate information to be able to assess the candidate’s compensation expectations.

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And perhaps most importantly, it obtains the written consents necessary to enable the firm to perform background and other market reputation checks.

From there, some firms go on to hiring a search firm to do a professional background check. This can be expensive, but as one wise partner put it, “\$5,000 to 10,000 strikes me as a small amount of money to save you from taking on an idiot.”

Finally, the article discusses a very interesting topic: the relationship between the length of debate and diligence results, positing that “the longer the internal debate over a candidate’s red and yellow flags, the less likely the candidate is to succeed, even if those warning signs are ultimately rationalized away by reason of inertia, a good faith belief or otherwise.”

Footnotes

1. "There was the case of [former Arent Fox partner Robert Schulman](#), who was indicted last August and [convicted in March](#) on charges that he passed on an insider trading tip to an investment adviser. Schulman had moved to Arent Fox in 2015 from Hunton & Williams, about [two years after his name came up](#) in a U.S. Securities and Exchange Commission case related to the insider trading allegations.

"Akin Gump Strauss Hauer & Feld found itself at the center of a lateral hiring mishap in February, when [federal prosecutors accused](#) a recently hired partner, Jeffrey Wertkin, of trying to sell a confidential whistleblower complaint. And in May, former Foley & Lardner real estate and banking lawyer Walter "Chet" Little was [arrested in connection](#) with an alleged insider trading scheme less than a year after jumping to Bradley Arant Boult Cummings. Bradley Arant dismissed Little quickly after word of his arrest."

2. Google <*greebel perp walk*>

3. See, e.g., "The Strange Defense of Martin Shkreli" *New Yorker*, July 17, 2017), describing defense counsel's opening statement:

On Wednesday, June 28th, the criminal-defense attorney Benjamin Brafman stood in front of a Brooklyn jury and presented an unusual argument. In white-collar trials, which this was, defense lawyers often do their best to portray their clients—typically wealthy executives from companies or industries that may not be known for high ethical standards—as generous folk who go to church and coach children's soccer leagues, gentle-hearted people who happen to drive Porsches. In this case, though, Brafman was representing Martin Shkreli, the notorious hedge-fund manager and drug-company entrepreneur, and such an argument wasn't an option. Instead, Brafman tried to build a case around Shkreli's greatest potential liability, one that Shkreli has highlighted live-streaming himself and in interviews—his behavior. "Is he strange? Yes," Brafman said, of his client, during his opening argument. "Will you find him weird? Yes." He said that Shkreli had been compared to "Rain Man" for his eccentricity, and finally added, "As Lady Gaga would say, he was born this way."

<http://www.newyorker.com/sections/business/the-strange-defense-of-martin-shkreli>

4. According to one expert, "Fifty percent of all laterals will fail within five years. And that pretty much shows up across the board in every study that's been done."

And missteps can be costly for law firms, "which often shell out money for recruiters and may offer guaranteed compensation deals to their hires, especially in their first year at the firm. All told, "the cost of a failed lateral partner can be as much as 200-400 percent of that lawyer's actual compensation, including the costs of replacing the lawyer after a departure."

5. The classic Minnesota lateral DQ case is *Lennartson v. Anoka-Hennepin Independent School District*, 662 N.W. 2d 125 (Minn. 2003) (firm disqualified after hiring lateral who had worked on the case for the other side).

6. All the sources cited above are from just *the last few weeks*. For an only slightly older take on the topic, see "*Law Firm Lateral Partner Hiring Doomed by Atrocious Due Diligence (This is a pretty expensive mistake)*" (*Above the Law*, 12/12/16)

<http://abovethelaw.com/2016/12/law-firm-lateral-partner-hiring-doomed-by-atrocious-due-diligence/>

7. <http://www.bcgsearch.com/pdf/900042944.pdf>

8. *Lateral Partner Due Diligence: Where Should a Firm Begin?* (Law360, 6/13/17)

<https://www-law360-com.ezproxy.law.umn.edu/articles/933983/lateral-partner-due-diligence-where-should-a-firm-begin->