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## Delicate Dance:
## Risk Management Considerations in Law Firm Mergers

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Law firm mergers have become increasingly common for firms large and small. Many elements enter the mix when evaluating a potential merger ranging from firm "culture" to compensation systems. Risk management considerations are among the most central. In this column, we'll look at two: conflicts and claims.

***Conflicts***

Business conflicts among corporate clients often figure into the strategic analysis from both sides of potential law firm mergers. Business conflicts alone, however, do not generally equate with legal ethics conflicts. Comment 6 to ABA Model Rule 1.7, on which Oregon's multiple client conflict rule is patterned, puts it this way: "[S]imultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients."

Conflicts under the RPCs, however, can arise even before a merger is completed if lawyers from the respective firms involved are actively litigating or negotiating against each other on behalf of their clients. Very preliminary inquiries, such as a casual conversation over lunch between two managing partners about whether their firms would have an interest in combining, in most circumstances will not trigger a conflict. By contrast, once firms embark on detailed merger discussions, a conflict would be triggered when they are on opposite sides of a case or transaction. In that instance, the conflict rule involved is RPC 1.7(a)(2), which governs "material limitation" conflicts between a firm and its own clients. These conflicts are normally waivable—but the client involved needs to be told that the firm is negotiating with the adversary's lawyers. ABA Formal Opinion 96-400 (1996), which is available on the ABA Center for Professional Responsibility's web site, discusses the issues involved extensively. Although it is framed in terms of job negotiations between a single lawyer and a law firm, the principles involved have equal application to law firm mergers.

If a conflict arises from a single pending case or transaction in which the prospective merger partners are working opposite each other, screening may be a solution. RPC 1.10(a), the so-called "firm unit rule," imputes one lawyer's conflicts to the law firm as a whole. RPC 1.0(c), however, permits the lawyers from one firm to be screened (and withdraw) from the matter involved when they join the new firm. In *Cavender v. U.S. Xpress Enterprises, Inc.*, 191 F Supp2d 962 (ED Tenn 2002), for example, the court refused to disqualify a successor firm when the lawyers joining the firm through merger had been on the other side of the case involved but were screened and had withdrawn. On a practical level, screening becomes a less viable option when multiple matters or clients are involved. OSB Formal Opinion 2005-120, which is available on the OSB web site, discusses screening procedures in the lateral-hire context in detail.

One option that is not available under the colorfully named “hot potato rule” is to simply “fire” a less economically attractive client creating a conflict. OSB Formal Opinion 2005-11 (at 2 n.1) describes the essence of this rule : “A lawyer cannot ‘fire’ a current client in mid-matter to avoid the current-client conflict-of-interest rules.” In *Picker Intern., Inc. v. Varian Associates, Inc.*, 670 F Supp 1363 (ND Ohio 1987), for example, a large law firm was disqualified when a smaller firm it acquired through a merger “fired” a long-standing client in multiple matters to “clear” a conflict with one of the larger firm’s clients that stood in the way of the merger.

Because conflicts can arise even before a merger is completed and may even be “show stoppers” for the merger if they cannot be resolved, early conflict review is essential. RPC 1.6(b)(6) allows conflict checking information (such as client names and the general nature of the matters involved) to be shared with a potential merger partner unless the very fact of a representation is itself confidential.

***Claims***

Claims usually present two distinct issues when considering law firm mergers: (1) have all potential claims been disclosed? and (2) are claims stemming from pre-merger conduct covered?

On the first point, both firms need to know what they are getting into. If, for example, one of the firms has a checkered history of malpractice claims, that often raises “red flags” about the competence and management skills of the lawyers who may soon be the other firm’s new partners. Further, if one claim or set of claims potentially exceeds the firm’s malpractice coverage, the risk must be evaluated dispassionately and balanced against the corresponding potential benefits of the merger. Finally, even a set of claims that is within the firm’s policy limits may trigger significant distractions from billable work for the newly merged firm.

On the second, if both of the firms are solely within Oregon and the claims involved do not exceed the PLF basic plan, then any claims should be covered. If, however, the firms have non-Oregon offices and the potential claims involved are significant, excess or other potential coverage should be examined carefully to determine both the liability of the successor firm for pre-merger claims and the extent of coverage for those claims.

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