Migratory Nonlawyers and the “Typhoid Mary” Problem

By N. Gregory Smith
Most Louisiana lawyers are probably aware that hiring a lawyer who previously worked at another law firm might entail the risk of a “Typhoid Mary” problem. That is, the migratory lawyer might bring a disqualifying conflict of interest to the new firm that can be imputed to the other lawyers at the firm. Fewer Louisiana lawyers may be aware that there could be a similar risk in hiring a nonlawyer, such as a paralegal.

Basics of the “Typhoid Mary” Problem for Migratory Lawyers

Before discussing the situation of nonlawyers who move from one law firm to another, here’s a reminder of what the rules say about migratory lawyers.

Rule 1.9(b) of the Louisiana Rules of Professional Conduct deals with individual disqualification of the migratory lawyer. It states:

A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter, unless the former client gives informed consent, confirmed in writing.¹

The application of Rule 1.9(b) may be illustrated this way. Old Firm and New Firm are on opposite sides of the same matter. Client One, represented by Old Firm, is suing Client Two, represented by New Firm. While employed at Old Firm, Migratory Lawyer learned some information relating to the representation of Client One that is material to the litigation between Client One and Client Two. Thereafter, Migratory Lawyer left Old Firm and joined New Firm. Migratory Lawyer is barred from knowingly representing Client Two at New Firm in the lawsuit involving Client One.

The disqualification can apply even if Migratory Lawyer did not actually represent Client One while employed at Old Firm. The focus is not on whether Migratory Lawyer personally performed legal services for Client One at Old Firm. It is on whether Migratory Lawyer acquired information relating to the representation of Client One that is material to the litigation between Client One and Client Two. Perhaps Migratory Lawyer got the information in an Old Firm business meeting or in an informal discussion with another Old Firm lawyer. Regardless, if Migratory Lawyer obtained information protected by Rule 1.6 or 1.9(c) that is material to the litigation between Client One and Client Two, the rule applies, and Migratory Lawyer cannot knowingly represent Client Two at New Firm in the litigation with Client One. The information is disqualifying. It is “typhoid.”

If Migratory Lawyer is disqualified under Rule 1.9(b), imputed disqualification also needs to be considered. The basic teaching of Rule 1.10 of the Louisiana Rules of Professional Conduct is that “[w] hile lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9.”² In other words, the disqualification of the individual lawyer is imputed to all of the other lawyers in the firm. As applied to the example, the individual disqualification of Migratory Lawyer is imputed to the other lawyers at New Firm. Migratory Lawyer is a “Typhoid Mary.”

In some jurisdictions, courts have said that disqualifying conflicts will not be imputed to the new law firm, at least in some circumstances, if the migratory lawyer is properly “screened” from participation in the matter.³ “Screened,” according to a definition in the Model Rules of Professional Conduct, “denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect.”⁴

The Restatement would countenance screening in some circumstances,⁵ and so does the most current version of the ABA Model Rules of Professional Conduct.⁶ But the Louisiana version of Rule 1.10 does not. As things currently stand, under the Louisiana Rules of Professional Conduct, screening of the migratory lawyer will not alone resolve a “Typhoid Mary” problem.⁷ Of course, Louisiana Rule 1.10 does provide that a “disqualification prescribed by this rule may be waived by the affected client under conditions stated in Rule 1.7.”⁸ These conditions include the informed consent of the affected client, confirmed in writing. A screen might be something that the affected client would seek as a condition to giving consent.

There are other issues that could be addressed regarding migratory lawyers and conflicts of interest,⁹ but this discussion is enough to set the stage for consideration of the risk of hiring a nonlawyer who worked at another firm.

Migratory Nonlawyers: A Louisiana Perspective

The Louisiana Rules of Professional Conduct do not apply directly to nonlawyers. But Rule 5.3 requires lawyers to supervise the conduct of their nonlawyer employees.¹⁰ The supervisory rule figured prominently in a Louisiana decision that disqualified a law firm in a migratory paralegal situation.

The case, T.S.L. v. G.L.,¹¹ was decided by the 3rd Circuit Court of Appeal. The attorney for the respondent hired a paralegal who had had “prior access to relator’s privileged information while working for relator’s former counsel.” Relator moved to disqualify respondent’s attorney, but the trial court denied the motion. Reversing, the 3rd Circuit said that this amounted to an abuse of discretion. The court explained:

A lawyer is responsible for the conduct of nonlawyer employees, and the lawyer “having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person’s conduct is compatible with the professional obligations of the lawyer.” L.A. Rules Prof. Conduct Rule 5.3. Without informed, written consent, a lawyer
is prohibited from representing a person in the same or substantially related matter in which a firm with which the lawyer was previously associated represented a client with materially adverse interests from the person or “about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter.” La. Rules Prof. Conduct Rule 1.9(b). Here, a paralegal employed by the attorney for respondent had prior access to relator’s privileged information while working for relator’s former counsel. Therefore, because respondent’s counsel is responsible for the conduct of her employees and because her paralegal has a direct conflict of interest in this case, this conflict disqualifies her from representing respondent.12

Because the paralegal’s new attorney-employer was responsible for the paralegal’s conduct, the attorney-employer was charged with the conflict of interest and was disqualified. The paralegal was a “Typhoid Mary.”

**Other Perspectives**

Although T.S.L. v. G.L. appears to be the only reported opinion in Louisiana that deals with law firm disqualification based on the hiring of a nonlawyer, the issue has received a fair amount of attention elsewhere. Several cases stand for the proposition that a migratory nonlawyer can bring a disqualifying conflict of interest to the new firm.13

However, there is a split of authority on how to handle the problem. In Hodge v. URFA-Sexton, L.P., a case involving a migratory paralegal, the Georgia Supreme Court stated:

> There is a split of authority among the courts on this issue. The minority approach, which is what Hodge argues we should apply here, is to treat nonlawyers the same way we treat lawyers. Under this approach, when a nonlawyer moves to another firm to work for opposing counsel, the nonlawyer’s conflict of interest is imputed to the rest of the firm, thereby disqualifying opposing counsel. URFA-Sexton argues that we should adopt the majority approach and treat nonlawyers differently from lawyers. Under this approach, rather than automatic imputation and disqualification of the new firm, lawyers hiring the nonlawyer can implement screening measures to protect any client confidences that the nonlawyer gained from prior employment.15

The Georgia Supreme Court opted for the majority approach. It said that this decision was justified by considerations such as the differences in financial incentives and training for nonlawyers and lawyers, hardships to the new firm’s client that would result from disqualification, restrictions on nonlawyer employment that would attend disqualification, and the effectiveness of screening to protect client confidences.16

A comment to the ABA Model Rules of Professional Conduct suggests that screening could be a solution to the “Typhoid Mary” problem in the nonlawyer context. Referring to the basic rule of imputed disqualification set forth in Model Rule 1.10(a), the comment states:

> The rule in paragraph (a) also does not prohibit representation by others in the law firm where the person prohibited from involvement in a matter is a nonlawyer, such as a paralegal or legal secretary. Nor does paragraph (a) prohibit representation if the lawyer is prohibited from acting because of events before the person became a lawyer, for example, work that the person did while a law student. Such persons, however, ordinarily must be screened from any personal participation in the matter to avoid communication to others in the firm of confidential information that both the nonlawyers and the firm have a legal duty to protect.17

However, there is another way to look at this. The authors of a well-known treatise on professional responsibility have said:

> [I]t might plausibly be argued that because nonlawyer assistants do not have the training and professional commitment of lawyers and are not subject to sanctions under professional conduct rules, they are less to be trusted with client secrets than migratory lawyers, and the imputation rules should accordingly be applied especially stringently to their situation, or at least no less stringently than if only lawyers were involved.18

On the other hand, these authors observe that:

> most authorities hold that the differences between lawyers and their
nonlawyer assistants instead justify a relaxation of the imputation rules. Under this approach, timely screening of the migratory personnel will be recognized as sufficient to remove the imputation and resulting disqualification that would have applied if the lateral hires had been lawyers.\textsuperscript{19}

They also note that, in light of the 2009 changes to Model Rule 1.10(a)(2), which permit screening in the case of migratory lawyers, and the prevalence of pre-2009 screening rules in many jurisdictions:

the right to screen nonlawyers to avoid the imputed disqualification of the lawyers they work for should no longer be subject to serious question, so long as screening protocols roughly the equivalent of what would be required in the case of a moving lawyer are promptly put in place, and appropriate notice is given to the old firm and the affected clients it served.\textsuperscript{20}

Perhaps the right to screen nonlawyers should not be subject to serious questions in most jurisdictions, but there appears to be some question about this in Louisiana. The Louisiana Supreme Court has not, at least so far, adopted the ABA’s pro-screening changes to Rule 1.10(a). The \textit{T.S.L. v. G.L.} case indicated that the solution to the “Typhoid Mary” problem in the migratory nonlawyer context is informed consent. It did not mention screening. While it is true that a comment to the Model Rules speaks in favor of a screening rule for migratory lawyers, the Louisiana Supreme Court did not adopt the ABA’s comments when it promulgated the Louisiana Rules of Professional Conduct.\textsuperscript{21} Absent some further development, a Louisiana lawyer cannot be sure that screening alone will handle the problem.

However, whether screening is or should be available to avoid imputed disqualification in a migratory nonlawyer situation is something of a sideshow, at least in the present context. The main event is whether there is an imputed disqualification issue in the first place. Stated another way, in jurisdictions that permit screening, timely implementation of a screen can avoid imputed disqualification. In jurisdictions that do not permit screening, the new firm can seek to avoid imputed disqualification by obtaining the informed consent of the affected client. In both types of jurisdictions, however, the new law firm can face an imputed disqualification issue when it hires a migratory nonlawyer.

Inquiries

The best time to deal with the “Typhoid Mary” problem is before the migratory nonlawyer starts working at the new firm. Before it brings the nonlawyer employee on board, the new firm should make some inquiries. It should try to determine whether there is any “typhoid” to worry about. If the firm discovers it would have a “Typhoid Mary” situation, it can take appropriate action. It might decide not to hire the nonlawyer. Or it might attempt to engage with the nonlawyer’s current or former employer in an effort to obtain the consent of the affected client. Or, if a screening remedy were to be approved for Louisiana in this situation, the firm might initiate appropriate screening procedures. But until it knows about the “typhoid,” it won’t know whether it needs to take action.

Rule 1.6 of the Louisiana Rules of Professional Conduct was amended to facilitate some pre-employment inquiries in the case of migratory lawyers. The pertinent part of the rule states:

A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary . . . to detect and resolve conflicts of interest between lawyers in different firms, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.\textsuperscript{22}

Although this language does not refer to nonlawyers, if it is appropriate for the hiring law firm to explore potential conflicts of interest with a prospective lawyer employee, it should be permissible to do the same with a prospective nonlawyer employee. Indeed, a practice of engaging in communications of this type might be considered to be one of those Rule 5.3(a) supervisory “measures giving reasonable assurance that the person’s conduct is compatible with the professional obligations of the lawyer.”

Conclusion

Even though the authorities dealing with the “Typhoid Mary” problem do not all speak with one voice on how to resolve it, they do seem to speak with one voice on the existence of the problem itself—a migratory nonlawyer can bring a disqualifying conflict of interest to his or her new law firm. A nonlawyer can be a “Typhoid Mary.”
ciation with a prior firm; and
(b) and arises out of the disqualified lawyer’s asso-

of the client by the remaining lawyers in the firm; or

significant risk of materially limiting the representation

of them shall knowingly represent a client when any


Prof’l Conduct, R. 1.0(k).

Louisiana has the same provision. See.

lawyer is unlikely to be significant or material).

v. TIAA, 717 N.E.2d 674 (N.Y . 1999) (screening

three-tiered analysis, including screening); Kassis

Sch. Dist., 662 N.W.2d 125 (Minn. 2003) (adopts

screening permitted in some situations involving

former government lawyers).

(II) the prohibition is based upon Rule 1.9(a) or

(b) and arises out of the disqualified lawyer’s asso-

association with a prior firm, and

(i) the disqualified lawyer is timely screened

from any participation in the matter and is apportioned

no part of the fee therefrom;

(ii) written notice is promptly given to any af-

fected former client to enable the former client to

ascertain compliance with the provisions of this

Rule, which shall include a description of the screen-

ing procedures employed; a statement of the firm’s

and of the screened lawyer’s compliance with these

Rules; a statement that review may be available be-

fore a tribunal; and an agreement by the firm to re-

spond promptly to any written inquiries or objections

by the former client about the screening procedures;

and

(iii) certifications of compliance with these Rules

and with the screening procedures are provided to

the former client by the screened lawyer and by a

partner of the firm, at reasonable intervals upon the

former client’s written request and upon termination

of the screening procedures.

7. Cf. La. Rules of Prof’l Conduct, R. 1.11

(screening permitted in some situations involving

former government lawyers).

8. See. La. Rules of Prof’l Conduct, R. 1.10(c).

9. Additional information about the topic

may be found in a number of publications. See.

e.g., 1 Geoffrey C. Hazard, Jr., et al., The Law of

Lawyering, §§ 15.11-15.12 (4th ed. 2018); Frank

L. Maraist, et al., Louisiana Lawyering, 21 La. Civil


10. Louisiana Rule 5.3 is titled “Responsibilities Regarding Nonlawyer Assistance.” It states:

With respect to a nonlawyer employed or re-
tained by or associated with a lawyer:

(a) a partner, and a lawyer who individually or

together with other lawyers possesses comparable

managerial authority in a law firm, shall make rea-

sonable efforts to ensure that the firm has in effect

measures giving reasonable assurance that the per-

son’s conduct is compatible with the professional

obligations of the lawyer;

(b) a lawyer having direct supervisory authority

over the nonlawyer shall make reasonable efforts to

ensure that the person’s conduct is compatible with

the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of

such a person that would be a violation of the Rules

of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of

the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable

managerial authority in the law firm in which the

person is employed, or has direct supervisory author-

ity over the person, and knows of the conduct at a
time when its consequences can be avoided or miti-
gated but fails to take reasonable remedial action.

11. 2007-01552 (La. App. 3 Cir. 2/6/08), 976

So.2d 793.

12. Id.

13. See, e.g., First Miami Sec., Inc. v. Sylvia,

780 So.2d 250 (Fla. Dist. Ct. App. 2001); Hodge

v. URFA-Sexton, L.P., 758 S.E.2d 314 (Ga. 2014);

Zimmerman v. Mahaska Bottling Co., 19 P.3d 784

(Kan. 2001); Leibowitz v. Eighth Jud. Dist. Ct., 78

P.3d 515 (Nev. 2003); In re Johnston, 872 N.W.2d

300 (N.D. 2015).


15. Id. at 319 (citations omitted).

16. See id. at 319-321.

17. Model Rules of Professional Conduct, R.

1.10, cmt. [4].

18. 1 Geoffrey C. Hazard, Jr., et al., The Law

of Lawyering, § 15.16 (4th ed. 2018) (emphasis in

original).

19. See id. (emphasis in original).

20. Id.

21. However, the Louisiana Supreme Court has

sometimes referred to comments to the ABA Model

Rules for guidance in applying the Louisiana Rules

of Professional Conduct. See, e.g., Walker v. State

Dep’t of Transp. & Dev., 2001-CC-2078, 2001-CC-

2079 (La. 5/14/02), 817 So.2d 57, 63; Farrington v.

Sessions, Fishman, et al., 96-CC-1486 (La. 2/25/97),

687 So.2d 997, 999.

22. La. Rules of Prof’l Conduct, R. 1.6(b) (7).

N. Gregory Smith is

the Professional Ethics

Professor of Law and

G. Frank and Winston

Purvis Professor of Law

at Louisiana State University

Paul M. Hebert Law

Center. He completed his

undergraduate work at

Yale University and re-

cieved his JD degree from

Brigham Young University.

Following law school, he served as a law clerk to

Judge Monroe G. McKay of the U.S. 10th Circuit

Court of Appeals. He practiced law for 11 years in

Phoenix, Ariz., before joining the LSU law faculty in

1991. (nsmith3@lsu.edu; LSU Paul M. Hebert Law

Center, 1 East Campus Dr., Baton Rouge, La 70803)