

Mastering The Art Of A Corporate Acquisition

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Many endeavors contain elements of both “technical competence” and “artistic skill.” Playing beautiful music requires more than knowing which fingers hit which keys in the proper sequence. Similarly, a race car driver brings much more to the track than knowing how to use the accelerator, brake and steering wheel.

While few would compare practicing law to playing music or car racing, effective legal representation in consummating the sale or acquisition of a company requires much more than knowing the law, being able to draft standard provisions and possessing a reasonable level of general legal competence. Here are some of the things a successful commercial-business transactions attorney needs to have mastered in order to make a deal that’s in his or her client’s best interest:

- 1. **Know the Client.*** Your lawyer must identify early on your company’s priorities, strengths and weaknesses. Assuming for the moment that you are trying to sell a business, your attorney should know how to structure the transaction so that the sale is completed in an efficient manner, ensuring that the owners obtain the maximum after-tax proceeds. In general, this requires conducting a careful analysis of tax considerations, as well as assessing how to minimize the risk that such proceeds will not be realized, either as a result of the indemnification provisions or credit terms.

As the seller, you may have additional objectives beyond securing the highest purchase price. You may be interested in continued employment for senior management or certain key employees. With respect to indemnification provisions, your attorney needs to assess how much risk is tolerable. Does your company have pending

litigation that is a concern? Some of these issues may be potential “deal breakers,” and your lawyer needs to decide what to include--and exclude--from the initial letter of intent. At the letter of intent stage, an astute attorney is always playing a balancing act. He or she needs to make sure there is enough common ground before expending considerably more time and effort, while initially avoiding issues that have a better chance of resolution after the transaction has moved further along.

2. **Know the Other Party to the Transaction.** Identifying the objectives and recognizing the priorities of the other side of the transaction also can be critical to effectively negotiating the terms of the deal. For example, the purchaser’s “hot spot” may not be cost, as much as environmental concerns. Why does the acquirer want to buy the company? How does the target company fit into any overall strategic plan and what is its relative importance? How much risk is the buyer willing to take on to make the acquisition? If the acquirer is in the same industry, it may be willing to take on litigation risk that is industry wide. The answers to these and a host of other questions will be invaluable in working out price, indemnification and other terms.

3. **Don’t Let Bumps in the Road Derail the Transaction – Keep the Momentum Going.** In every transaction, what appear to be significant obstacles and difference of opinion will arise. Most of the time, these differences are not true “deal breakers” and it’s up to the attorneys working with the client to determine and recommend an effective resolution. The timing of when--and how--to approach the “unresolved” issues requires careful consideration. It is always important to guard against anything that could cause the transaction to lose momentum.

4. **Anticipate, Don't Just React.** Much like in chess, your lawyer needs to constantly be thinking a few moves ahead. Identifying future substantive and structural issues that will arise, anticipating the other side's position on those matters, and being prepared to respond, gives any client and his or her advisors the upper hand in negotiations. While all attorneys benefit from having the skill to be able to think on their feet, there is no substitute for adequate preparation. For example, if one of your key customer contracts is about to be terminated, your attorney needs to be prepared to handle the situation well before the acquirer raises the issue.

5. **Be Creative in Fashioning Solutions.** Inevitably, significant issues arise as the parties work through virtually any type of transaction. Attorneys add value when they can bridge the gap between the parties without sacrificing their client's goals. Designing the right solution requires experience, knowing the parties and having a sense of what will work. No two deals are exactly alike, and what works for one may not be appropriate for the transaction at hand. It may mean structuring specific non-standard indemnification limitations that work to protect the seller, but still give adequate assurance to the buyer. Even significant differences in price can be bridged by suitable "earn out" provisions, although these provisions have their own issues and require the utmost care.

6. **Credibility, Credibility, Credibility.** No attorney can be effective if the other side questions what he or she has to say, or questions the veracity of the client. Attorneys need to be zealous in protecting their client's interest. At the same time, it is essential to always be straight forward, adhere to the highest standards of integrity and gain the trust and respect of the other party.

7. **Words Matter.** Think carefully before writing or speaking. Drafting effective documents requires a skill that anticipates and understands how the provisions will actually operate in practice, whether or not there is a future dispute. It means not using “boilerplate” language, when the client’s interests or the peculiarities of the transaction require other verbiage. In face-to-face negotiations, the attorney needs to carefully consider not only the words used, but the tone with which they are delivered. Accommodation, compromise, the velvet glove and a firm response all have their appropriate place. The true skill is knowing what, when and how to effectively get their client’s points across and accepted.

8. **Keep the Big Picture in Mind.** Your attorney was not hired for gamesmanship or to score points with the other party or their attorneys. Rather, he or she has been retained to accomplish your goals in consummating the acquisition. There are many different styles that allow a transaction to move from negotiation to sale. Whichever route is taken, the guiding principle is to always proceed with the plan that will best achieve your goal. Artful planning, negotiating, drafting and thinking are all in the mix and are usually required for a successful transaction.