

Upcoming
Events

**Broker and Private Equity
Networking Exchange**
September 20, 2016
4:30 PM to 7:00 PM
RAM Restaurant & Brewery
Schaumburg, IL

**What Management Team Are
You Partnering With?**
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4:30 PM to 7:00 PM
Surg on the Water, Milwaukee, WI

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MBBI Newsletter September 2016 Advisor Fit is a Key to Transaction Success

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Contributing Editor: Ray Horn is a Member with Meltzer, Purtill & Stelle LLC, a law firm with offices in Schaumburg and Chicago and is also Executive Vice President and a member of the Board of Directors of MBBI. Ray can be reached by phone at (847) 330-2430, and by email at RHorn@MPSLaw.com.

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Success in an M&A transaction is dependent on many factors, including two willing parties, access to capital and financing and a relatively clean business. However, sellers and buyers should also carefully consider the value of a capable attorney with a background in M&A. Unfortunately, ill-fitting choices in legal counsel occur more regularly than one would think, resulting in adding material and unnecessary challenges to transactions, and sometimes producing disastrous effects. I recall representing a buyer when the seller was represented, successively and in the same transaction, by an estate planning attorney and then by a civil trial attorney – with the second attorney hired when the seller lost confidence in the first attorney, and with the first attorney having represented that seller when he purchased the business. The deal somehow closed (avoiding a fully disastrous result), but the deal took far longer and the parties spent far more on fees than would have been the case otherwise.

Certainly, the reasons for these ill-fitting choices are understandable. First, take a seller engaging in a sale transaction for the first (and possibly the only) time, attempting both to run a business and complete an emotionally-charged and complex transaction. Then, mix in the very human tendency to seek out the known and comfortable, particularly when experiencing an uncomfortable and stressful event. In those circumstances, sellers and buyers often focus on loyalty and trust rather than on relevant experience, proper attitude and access to resources. However, the choice is arguably similar to one seeking out a knee surgeon for a skin condition. Of course, your estate planning attorney, commercial litigator, real estate attorney, or personal injury lawyer may lawfully represent you in the transaction, but there are some key factors which should be considered and which might lead to a different choice.

First, factor in the level of familiarity with what are commonly referred to as “market” negotiating positions. In 2016, the practice of law, as is true for many other professions and industries, is very complex, with many nuances and subtle “rules of the game.” Practicing comfortably within those nuances and limits requires a fairly constant immersion. Deals without a transaction attorney can easily develop a “stop and start” motion, resulting in a less efficient and more costly and time-consuming process – and, I should add, taking too much time is a prime component of failed transactions. Also, don’t forget to factor in that stressed out client engaging in his first and only transaction and seeking out guidance and reassurance. That client is likely to simply pick up on the advisor’s uncertainty and hesitancy, even mistaking them to perceive unreasonable transaction risk where none might exist.

Second, think about the possible absence of basic protections, whether on the buyer and the seller side. Is that buy-side legal advisor skilled in spotting due diligence issues, laying out key seller representations, and drafting key protections in indemnification and restrictive covenant provisions?

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Is that sell-side legal advisor comfortable with responding to due diligence issues raised by a buyer, tightening up vague representation language, and adding limits and procedures to indemnification provisions? Attorneys regularly practicing in the M&A world have a good feel for what should, and should not, be present in typical transaction documents.

Third, what about the appropriate deal “mindset”? Transaction work involves two willing parties who are trying to find reasons to come together and close a deal, not engage in a contest to find a clear winner and loser. If your attorney is regularly engaged in an adversarial arena, it can be very challenging to switch gears. Obviously, you want your attorney to protect you, but not necessarily at the expense of the entire transaction (outside of unreasonable risk). The appropriate “mindset” should be focused on “win/win,” not “win/lose,” and on finding a compromise within the right circumstances. Transaction work is not the right place for an overly-aggressive attorney simply to add another notch to a belt.

Fourth, does your law firm’s resources fit the needs of your particular transaction? A small firm with limited resources and counsel occupied with many commitments can easily slow down the pace. Without constant attention, consistent dialogue, and a proactive approach, deals can lose momentum, resulting in deal fatigue. However, too much in the way of resources can also produce challenges. Larger firms working on smaller deals often, and necessarily, use less experienced counsel given billing rate considerations. However, less experience results in the market perception issue described earlier. Also, if that larger firm normally works on sizeable transactions, can it “moderate” that experience within a smaller transaction? If not, you risk over-lawyering and an attempt at protection that overwhelms and drowns out the underlying business transaction. I recall a transaction some years back where buyer’s counsel was experienced in M&A, but with at least a fair portion of that experience in deals whose size far exceeded the deal at hand (at least as indicated by counsel’s website biography). That formidable experience showed in the 60+ page purchase agreement that arrived for a deal slightly larger than \$10 million, but unfortunately, was also one of the factors that arguably helped to capsize the transaction.

I cannot stress enough the adverse impact that poor advisor choice can have on a transaction – and add that you should also consider poor advisor choice by the other party in your transaction when choosing the right deal for you. One obvious adverse impact is that the parties will pay additional and unnecessary legal fees. Even more importantly, however, is the lost opportunity cost of buyers who become disenchanted with the process, and the consequences for a seller who ends up waiting just a bit too long given an ill-fitting advisor. If, while waiting, that seller suffers a major customer loss or a sudden industry downturn, or a serious health issue, the seller may well find that the window of opportunity has permanently closed. With many companies valued in the millions of dollars and the product of years of dedicated time, talent and resources, the impact can be devastating.

In the end, a buyer or seller should treat the choice of a legal advisor as a key factor for success in a transaction and carefully consider engaging a legal professional who has focused his or her practice in M&A transactions in a size range comparable to the deal at hand.

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