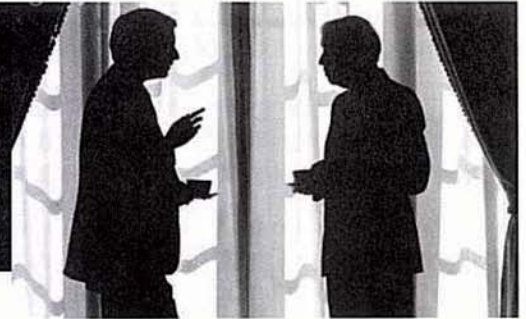


Before You, as a Business Broker, Represent the Seller of a Business

10 Questions To Ask Your Client About Its Lawyer

By Brian P. Kerwin



You work for months on behalf of a shareholder group looking to sell its business for more than \$15 million. You run an auction process, and a private equity fund offers an attractive purchase price. The documents, prepared by sophisticated buyer's counsel, are circulated and negotiations begin. Unfortunately, your client's lawyer is more of a generalist than an M&A specialist, and it looks like the lawyer is going to kill the deal. Red-herring issues are raised. Important issues are negotiated outside of market terms. You want your client to get the best deal possible from a legal perspective, but you do not get paid if the deal does not close. What should you do?

Next time, at the commencement of the engagement, ask your new client to ask its lawyer the following questions to gauge if they have the right counsel in place for the contemplated transaction.

1. How does the lawyer feel about losing a client? You've probably suspected it in the past. Positions are taken or advice is rendered to a seller that appears almost to be given in the hopes of a deal not closing. No one wants to lose a client. A lawyer does have an ethical duty to represent a client zealously. Nevertheless, it may make sense to have your client refer the one-time sale transaction to an experienced lawyer who has no qualms with the loss of a client and no reason to queer the sale.
2. Do they know the private equity players and opposing counsel? The more deals a lawyer does, the more likely his credibility and good reputation. If the buyer's counsel is familiar with the seller's lawyer or is aware of his experience, it may result in a much fairer first draft of a purchase agreement. A one-sided document egregiously in favor of the buyer is less likely to be served up. A great deal of time and money can therefore be saved in the negotiation and revision process. The resulting savings in legal fees to the seller can be meaningful.
3. How many M&A sale transactions do they routinely handle? Some lawyers are generalists. They can draft a will, handle a house closing and litigate a breach of contract claim. Sometimes all in the same day. However, the sale of a company is a rather specialized area of the law with many nuances and complexities. It is often a once-in-a-lifetime matter. It should be handled by a lawyer well-versed in M&A issues. As a client once remarked, "If I had a brain tumor, I wouldn't have my internist perform the surgery."
4. Do they know what legal concepts to raise? Are they familiar with the differences between a "basket," "cap" and "sunset" for indemnification purposes? Anti-assignment clauses versus change-of-control provisions as to whether third-party consent is required? A lawyer cannot get the best legal deal for his or her client unless they know the issues to ask for or identify.
5. Are they up to date on market terms? Some lawyers have wound up killing deals because they fought for issues or terms that simply were not customary or market. Should the basket be one percent or five percent of the purchase price? Should the percentage be solely off of the cash portion? Should the cap be at 20 percent of the purchase price or the purchase price itself? Is an escrow fair if there is an earnout or a seller note? Experienced M&A lawyers should know the answers to these questions.

6. Do they have sophisticated tax counsel? Proper tax advice and structuring can mean the difference between millions of dollars retained by your client or otherwise paid to the federal government. You can be sure that buyer's counsel will have it.
7. Do they have lawyers well-versed in real estate, labor and employment, ERISA and employee benefits, antitrust and intellectual property law? Depending on the specific business, size and assets of the seller, it may need lawyers experienced in a variety of legal fields.
8. Do they have the bench strength to handle the deal? There may be legitimate business reasons why a deal needs to close very quickly. Does the lawyer have an adequate team to support him or her? A client cannot be dependent solely on one lawyer. Numerous documents can fly fast and furious; they may need to be drafted, negotiated and revised concurrently.
9. If the seller is to take back a promissory note, do they have experience with sophisticated commercial finance matters? Do they know about subordination and intercreditor agreements? Fish or cut bait provisions? Second priority lien provisions? Where to file a UCC financing statement? The answers to these questions can sometimes mean the difference between the seller's receiving full payment on the note or not.
10. If the seller is going to roll over a portion of the purchase price and receive equity in the newco buyer, do they know to argue that the seller should obtain its equity on the same price and terms as the equity sponsor? Just in case, do they know about pre-emptive rights, tag along provisions and rights of first refusal? Should the seller be entitled to a seat on the newco buyer's board or at least be offered board observation rights?
11. If management is to be employed by the newco buyer, do they know sophisticated concepts to negotiate into an employment agreement? For example, carve outs to include in non-compete and non-solicitation provisions? Are they familiar with "Good Reason" termination triggers that can provide a unique severance payment? What are the exceptions for a confidentiality restriction?
12. Are they willing to work at night? Over the weekend? Buyer's counsel will. For many deals, time is the enemy. Deals can move at a hectic pace. A seller needs a lawyer who can go toe-to-toe with the professionals on the other side of the table.
13. Do they work well with different types of personalities? Whether the buyer's counsel is a yeller and screamer, old school, brash, dogmatic or antagonistic, seller's counsel needs to be able to work professionally and amicably with all different personality types.
14. Are they cost effective? How many junior lawyers will be on their team? Will the seller be paying to train junior lawyers? On the other hand, if the fee seems rather low, remember the old adage that you get what you pay for.
15. Is the lawyer able to give an estimate or range of the expected total legal fees for the transaction? If provided with the material facts, experienced M&A lawyers will be. An inability to reasonably predict such fees may be indicative of an inexperienced M&A lawyer. A true test may be whether the lawyer will agree to a cap on his fees with certain specified exceptions.
16. Do they know how to deliver additional value over and above what otherwise would be expected? Would they know to inquire (in the context of a sale of 100 percent of the equity of a company) whether the seller personally guaranteed a bank line of credit, such that the guaranty needs to be terminated at closing so the obligation does not survive the sale? Or, for example, furnishing more than 15 meaningful questions when only 10 were expected.

If the answers to the foregoing questions are not answered satisfactorily, it may make sense for you to provide your client with the name and number of at least one sophisticated M&A attorney to consider hiring for the big transaction ahead.

If you have a question regarding any of the foregoing or would like further information, please contact the author at bpkerwin@duanemorris.com. His profile can be found at www.duanemorris.com.

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