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M&A Practice Tips for In-House Counsel, and Outside Counsel Who Work with Them

By Bart Breinin*

- I. **Introduction:** As a corporate lawyer specializing in M&A, with over 33 years of experience working in both law firms and in-house legal departments where I have closely collaborated with outside counsel, I have gained some valuable perspective regarding (a) what is most important for an in-house M&A counsel to focus on; (b) what an in-house M&A counsel's role in a deal should typically entail; and (c) how outside counsel can work effectively with in-house counsel on deals. The purpose of this piece is to share some of my insights, many or all of which may be familiar to experienced M&A practitioners, but may be of use to newer lawyers and a helpful reminder for those who are not.

II. Discussion

A. What is most important for an in-house M&A counsel to focus on?

The following sets forth three key insights for how an in-house deal lawyer can best serve her or his internal clients (e.g., management, the business leads, corporate development)² on a transaction:

1. *Trees are important, but the forest is more so...especially to your clients.* As important as it is for the legal team to be detail-oriented, thorough and diligent in a transaction, what the business team is going to want most from its in-house counsel is an understanding of any important legal issues that might create a substantial impediment to getting a deal done, whether arising from due diligence, regulatory review or the negotiations.
2. *Serve as a liaison between the legal team (in-house and outside) and the business team...be the translator and facilitator.* Typically, many of your clients, no matter how intelligent and knowledgeable, will have neither the time nor the interest to read or listen to lengthy legal analyses of various issues, even if the concerns raised are not only valid but also important. Thus, a key role for in-house counsel is not only to weed out the less important legal issues (with which the legal team should be able to deal on its own) but to identify the more important ones for the business team, to help them understand those that require “translation” and then work together to arrive at an appropriate resolution, and to keep the deal moving.
3. *Identify material risks; come up with practical solutions when possible.* Trite as it may be, it’s worth emphasizing that responding to a client with “Yes, but” is almost always preferable to “no”. But it’s also worth emphasizing that there may be times when a counselor should not be afraid to “just say no”. Business teams value problem solvers and pragmatists above cautious or inflexible naysayers, and striving to be the former should usually be the goal of every good in-house deal lawyer. However, it does neither the counselor nor his clients any good to be a “yes person” in the (hopefully infrequent) circumstances when going forward with a transaction raises serious legal concerns that could cause real economic or reputational damages (or worse) for the business.

Clearly, all three of the foregoing insights are inter-related, and require the right balance of legal acumen, judgment, pragmatism and conviction for an in-house deal counsel to best serve his or her clients.

B. What should an in-house M&A counsel’s role in a deal typically entail?

The following lists key tasks that an in-house deal lawyer should typically undertake in a transaction:

1. *Work with the business and tax teams on structuring the transaction.* Try to get involved in planning deal structure as early as possible. This critical “gating issue” will often involve business and tax considerations for both the buyer and the seller.

2. *Get a non-disclosure agreement (NDA) in place.* This is especially important if you are representing the seller. Often an NDA will include a non-solicit/ non-hire provision. Once an NDA is in place, you may want to consider advising the business team to make disclosures of confidential and proprietary information in stages (postponing the more sensitive disclosures to later in the process, when closing is more assured).
3. *Draft a letter of intent or term sheet (if deal timing allows).* This will create a “floor plan” for the transaction addressing key issues including:
 - a. Deal structure (i.e., as a merger, share or asset acquisition, joint venture, etc.).
 - b. Payment of consideration (up-front vs. over time; if over time, mandatory vs. contingent; if contingent, based on retention vs. earn-out). Be aware there can be different tax consequences.
 - c. Liabilities (definite and contingent, known and unknown). The buyer may not know enough at this stage to structure these provisions, but it is prudent to reserve for the possibility of having:
 - i. Purchase price adjustments (e.g., working capital, net asset value).
 - ii. Holdbacks and escrows (protection against contingent liabilities, paid or released to the seller after an agreed period of time post-closing without the contingency occurring; retained by or released to the buyer to the extent the liability materializes during the period).
 - iii. Special indemnities (often uncapped, or capped at full purchase price) vs. indemnification for most representations and warranties (capped).
 - d. Management and employees (e.g., roles, compensation and benefits).
 - e. Non-competes / non-solicits (the buyer may not want to raise at this stage).
 - f. Key closing conditions (e.g., regulatory approvals (such as possible antitrust clearance); employee sign ups; client consents).
 - g. Expected timing of the deal (this may hinge on resolution of any regulatory issues).
4. *Navigate between internal constituencies.* As critical as it is for in-house counsel to serve as a liaison between the legal and business teams, it’s also important for them to navigate and mediate between various internal constituencies. It is often the case that a company’s management, business leads (i.e., deal sponsors) and corporate development, among other groups, may not see eye to eye on all issues, and in-house counsel can play a key role in bringing them together and helping to

² The ultimate client is, of course, the company or firm for which the in-house lawyer works, but these are its core representatives (i.e., the business team) whom he or she will be advising.

forge a compromise (or otherwise arrive at an agreed outcome).

5. *If outside counsel will be used, choose wisely.* Typically, a transaction will require more than just one lawyer for each side, no matter how adept. Part of in-house counsel's role is to make sure that a deal is staffed appropriately. If outside counsel will be used, that does not necessarily mean you should opt for the largest or most expensive firm. The choice can depend on various factors (e.g., size and type of transaction, risk perception, institutional comfort, no conflict with the counterparty).
6. *Legal Due Diligence.* The buyer's counsel should make sure to highlight any material issues for the business team as soon as possible, and coordinate review of disclosure schedules. Specialists (e.g., tax, employment, benefits, intellectual property, real estate, environmental, litigation, regulatory) should be involved as necessary. Diligence should cover not only the target but also its key personnel.
7. *Documentation process.* It's important to draft or review and comment on deal documents, but (as previously noted) it's critical to focus the business team on key issues. The business team may not read all/ some/ any of the documents, so in-house counsel needs to be their conduit, but only for material items unless they want to know everything. In addition, often the seller's counsel will need to assist with preparation of the disclosure and "mutual" schedules, and the buyer's counsel will need to assist with the preparation of buyer's and "mutual" schedules.
8. *Integration issues.* Often, the issues that arise are not legal but operational, but legal questions may arise in connection with the proposed integration of the two businesses (e.g., competition/anti-trust, employment). For example, in the anti-trust area, you may need to advise on constraints on coordination of the businesses pre-signing and pre-closing, and in some deals arrange for a Hart-Scott-Rodino filing and foreign clearances. Getting integration right is key to whether a deal will be successful, so make sure the appropriate people are focused on it.
9. *Get the deal closed!* Your company is going to be more appreciative if the deal is closed on time and efficiently than if minor t's are crossed and i's dotted. For example, you may determine to advise your company to waive a non-fundamental closing condition at least partially, such as requiring the counterparty to obtain certain contractual consents from third parties.
10. *Post-Closing Assistance.* Once the deal is closed, you may need to help address various items that can arise after closing like purchase price adjustments; indemnification claims; interpretation and enforcement of restrictive covenants; and if you advise the buyer resolution of certain "inherited" legal matters assumed in the deal such as pending

litigation or regulatory investigations. A best practice for in-house counsel is to maintain an electronic database of the company's transactions and all related documents, for easy access by the company's legal and business teams when needed.

As noted, some of these items are more relevant for the buyer's or seller's counsel, but most are important for counsel in either role.

- C. For deals where outside counsel are engaged, how can they work effectively with in-house counsel?

It is important for outside counsel to recognize that at many companies, in-house counsel's role has evolved over the years to become much more central to the business and management, including in connection with M&A transactions. This means that:

1. *Outside counsel should make sure they understand their role in a given transaction.* Consideration should be given at the outset to the following questions:
 - a. Who will be outside counsel's primary contact? Will it be in-house counsel, or the business team?
 - b. What is the division of labor between outside and in-house counsel?
 - i. Will in-house or outside counsel take the lead on the legal negotiations with the counterparty?
 - ii. No matter the answer to (i), outside counsel will likely have primary responsibility for drafting.
 - iii. Will specialist areas (e.g., tax, employment, benefits, intellectual property, real estate, environmental, litigation, regulatory) require outside counsel support or be addressed by in-house specialists?

Answers to these questions vary depending on the client, including the size and sophistication of its legal department, the department's modus operandi, and both the business team's and legal department's comfort with the outside counsel.

2. *Outside counsel should keep in-house counsel informed.* As a trusted adviser, in-house counsel should be kept in the loop on key aspects of M&A. Even when outside counsel takes the lead on a deal and reports directly to the business team, outside counsel should make sure to let in-house counsel know what's going on. This is important not only to maintain a good relationship with in-house counsel, but because:
 - a. In-house counsel is often the repository of important legal information for reasons including: (i) the company does not become overly dependent on any outside firm; (ii) the company may want in-house counsel to handle

certain deals in the future; and (iii) outside counsel may have a future conflict of interest preventing the firm from representing the company on a given deal.

- b. In-house counsel may have critical institutional knowledge that it can impart to outside counsel when there are open lines of communication.

Outside counsel should also make sure its billing is up-to-date, to avoid unpleasant surprises. It is often a good idea to agree on an estimated budget for a deal up front, and then to keep in-house counsel updated on costs.

III. **Conclusion**

Whether you are acting as in-house or outside M&A counsel, key ingredients to a successful transaction are (1) understanding your role in the deal; (2) clear and effective communication with your clients (whether they are the business team or in-house counsel); and (3) provision of excellent, timely and relevant advice and effective execution of your role. Following the practice tips in this piece should help you to achieve client satisfaction and career longevity.

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