How To Handle Your Deal Lawyers

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Skillful management of the legal team will pay big dividends in terms of time, efficiency, and cost savings and better relations with the other side.

A SPECTER often haunts deals — the specter of excessive cost, delay, and conflict in M&A transactions. A frequent lament of prominent corporate executives is the attribution of such excessive delay, cost, and conflict to their law department or outside counsel. Delay and cost are often compounded with the high level of conflict and confrontation between the parties. Some of the cost, delay, and conflict is unavoidable. Many deals are complicated. Tax, accounting, environmental, ERISA litigation, human resources, health, safety, warranty claims and similar issues lurk and require analysis, testing, and sober reflection. On the other hand, skillful management of the legal aspects of a transaction can prioritize the importance of these issues, place them in a proper context relative to the transaction, and develop processes for better managing and resolving the issues.

The role of the lawyer throughout this process is to be an executive's tool to navigate the company through the narrow channel of, on the one hand, the Scylla of excessive analysis, testing, and conflict, and, on the other hand, the Charybdis of cursory review. Often, the lawyer's in-

stinct is one of excessive caution, unwillingness to make a decision or even recommendation, demand for all of the facts and polarization and personalization of views between the parties. Many attorneys do not view themselves as a business partner advising on practical business risks and making proper balances between resolving issues or walking away. Therefore, a lawyer often conflates and mistakes "protecting" the client with killing or significantly jeopardizing transactions.

The purpose of this article is to assist the executive in being appreciative of the perspective of his or her attorney during the transaction process and to gain insights in managing counsel to prevent the lawyer from excessive negotiation and imprudent caution.

THE WAY A LAWYER THINKS • From the inception of a lawyer's career, way back in law school, he or she is trained to learn many necessary and useful pieces of information to mold their analytical way of thinking and ultimately pass the Bar examination. Lawyers are seldom warned that this academic instruction is only a starting point and not an ending point in their evolution as successful lawyers. Drummed in their heads from time immemorial is that being the smartest person in the room and commanding the power of their substantive breadth of intellect would sway all but the most immovable of mountains. In the real world, few lawyers or even clients realize that being a "smart" lawyer requires much more than just having a good mind and grasp of the law. Many people have good minds and know the law. Rather, the most successful deal lawyers understand that being "smart" actually requires mastery of two components. Obviously, one component requires basic intelligence and knowledge of the law as well as the many ways the law can be applied, whether it is applied through compromise, use of leverage, or strategic retreat. Perhaps the more important aspect of being a smart deal lawyer, however, is for the lawyer to know how and when to temper his or her vast substantive breadth of knowledge with practical intelligence. The lawyer who combines both substantive and practical intelligence is the truly "smart" lawyer. Having raw intelligence without the second aspect of practical intelligence is analogous to a nation having a Defense Department without a State Department or a person having a brain but not a heart. They are both vital and inextricably linked and one cannot survive without the other.

Below are humbly offered, in no particular order, ideas to manage your lawyer and legal team to keep their egos stay in check, their attention focused and prioritized on what is important, reduce unnecessary conflict with the other side, and act as your tool to effectuate the transaction rather than as a wedge and obstacle. I believe that the alchemy of a lawyer's native intelligence blended with his or her specialized knowledge and experience, together with the temperance described below in applying those skills, will create an indomitable team. These ideas are offered to accomplish two simple yet essential goals: have a lawyer that is a true advisor and keep the transaction moving with a minimum of friction.

Perspective

"The deal is not about pension plans," an eminent lawyer once commented, "it is about curtains." Many lawyers sometimes lose sight of the big picture in transactions. Lawyers focus on their "comfort zone," the milieu and technical way-station in which lawyers feel most comfortable. Too often, a discussion over an important but nonetheless secondary issue can overwhelm the entire transaction and divert attention, focus, and emotions from what is truly important. For example, lawyers will often fiercely contest an employee benefits representation in one transaction. This discussion probably involves more subject matter experts and more discussion of arcane rules than any other topic or series of topics combined in that deal. The

stakes in the wars between classic Athens and Sparta could hardly seem higher than how this battle would be won. However, if the parties took a step back, reigned in the lawyers and their egos extolling their vast knowledge of ERISA and put things in perspective, they would see that the company is purchasing the assets of a business, and there were no successor liability issues, the scope of the representation had nothing to do with risk shifting, but merely with actual factual disclosure. The lawyer on the other side, a distinguished member of the New York Bar and eminence grise of his venerable law firm, in sheer exasperation, uttered the above quote about the curtains. Needless to say, this quote profoundly inspired the parties to reach resolution of this less-than-earth-shattering item. This is the metaphor I suggest using to remind lawyers to evaluate whether they have lost sight of the forest for the trees in negotiating any provision too thoroughly and missing its true significance in the context of the overall transaction. Implore your counsel to take a step back from the trenches and evaluate the context and significance of what is being contested.

Proper Focus

Just as lawyers need to put the substance of the deal in proper perspective, they need to remember that the deal is about their clients and the business and not about themselves personally or the lawyer on the other side. What Professors Fischer and Ury said many years ago in a different context is still true today : Lawyers need to be controlled and reminded to separate their and their adversary's personalities from the issues. Too many times lawyers try to get 30 or 40 meaningless points from the other side just because they could or just to flatter themselves about the profound value they may have added to the transaction. Just as transactions are not about pension representations, they are not about the lawyers, as charming and engaging as they may feel they are and their personalities and intellects may be. Lawyers need to be reminded that their role is to make their clients look good, protect them as best as possible, sometimes run interference when necessary, but, in the final analysis, lawyers are there to facilitate as smooth a result for the person that pays the bill. Their ego should be gratified by accomplishing those goals, not in getting 30 or 40 meaningless points in a document just to demonstrate your intellectual superiority or further evince the dominance of your negotiating leverage. Your lawyer should be asked to ask of him- or herself: "If you were the client, would you want to pay for the time it is taking to negotiate these issues?" When you hear your lawyer complaining about the intractability and intransigence of counsel on the other side, trust but verify the source of both the major issues and the unwillingness to bend.

Timing On Concessions

Both Kenny Rogers and Ecclesiastes expressed keen sensitivity to timing, whether in song ("You gotta know when to hold 'em and know when to fold 'em") or verse ("There is a time…"). Implementing this immutable principle, however, is easier said (or sung) than done. This short article cannot extend beyond generalities since each negotiation is different and proper timing will vary with the nuances of each deal. However, a few guiding principles transcend virtually all deals.

First, lawyers should try not to concede points too early or too late. Some try to make early concessions to set the stage to make the opponent think that you are magnanimous and encourage corresponding concessions. Rarely, however, are the laws of Newtonian thermodynamics applied in this context. One early concession does not often foster an equal and opposite one. The other side normally seizes on this as a sign of weakness. On the other hand, if the concession is offered too late, the parties may have become so entrenched and polarized by then that the concession is perceived as woefully inadequate to assuage any ill feelings. Or it may be viewed as insincere and gratuitous.

Second, many lawyers fail to realize concessions may be postured as a sign of strength and not a sign of weakness. Making concessions in the right way in the right amount at the right time helps build trust and rapport with the other side and can hopefully eliminate minute stumbling blocks to consummating a deal.

Third, many highly educated lawyers actually take the view that every point is ultimately a business point and therefore defer to the client to make the concession. While technically speaking this may be correct, most clients will defer to lawyers on most of the arcane aspects of documentation when concessions are made and actually resent being swirled into a milieu in which it is self-evident that the lawyer is just passing the buck. Make sure your lawyer is empowered to make appropriate concessions on minor items and circles back with you for your guidance on the major items. On top of that make sure your lawyer knows the difference.

Practical Realities

Perhaps an analogue of the prior point is to remember Mick Jagger's guiding principle: "You can't always get what you want but you get what you need." While all lawyers try their best to extract as many concessions as possible for their client, a fine line exists between being a zealous advocate and a reckless obstacle. The key is to prioritize which points are truly significant business or legal issues and which are just nice to have but not what you need. If the issues fall into the latter category, then a lawyer should recognize that the only times you will obtain all of the items you requested are when you have not asked for any, the other side is totally desperate or incompetent, or your client is overpaying so much that it can dictate virtually every term. These conditions rarely occur. Lawyers should be encouraged to just make a judgment regarding which of their points are really necessary for the deal, which are necessary for trading, and which are desirable but not necessary. And then just move on.

Face Saving

While most lawyers quickly grasp that the other side does not have a monopoly of wisdom, seldom are those same lawyers as reflective about their own positions. It is theoretically possible that lawyers are not always correct on every issue or that there may be a patina of credibility in the other side's view. Even if that is not the case, and the other side is just plain wrong on many if not all of the issues, lawyers should nonetheless let the other side win something. Everyone likes to think that he or she added value and made a substantial contribution to the client's effort. If your lawyer knows that he or she is not letting you down, and in fact is helping you by sprinkling a few concessions to the adversary, provided their munificence is relatively meaningless, then everyone wins. The adversary has received satisfaction that he or she has performed his or her role. He or she also feels better about your lawyer and therefore may be more compliant in the future. Many successful clients relate that they believe they see more than their fair share of deal flow and successful consummation of deals because they always let their adversaries win as much as possible without jeopardizing the integrity and value of the deal. The other side considers the client a pleasure to deal with (or possibly even an easy mark) and is more than happy to oblige in their sentiment. Conversely, many younger or inexperienced lawyers feel they always need to win. They should learn that each issue does not rise or fall on its own merits and is part of a larger equation. Part of that equation is letting the other side win occasionally, as painful as it might be. You never know when you may meet again. It's a nine-inning ball game. It truly can be a win-win.

Proper Role

Lawyers need to be managed to realize that a deal is not a contest to see who can find the most issues. Get the deal done. Most lawyers are very smart people. Most smart people can analyze any-

thing and find a myriad of issues. You can look at a painting in the museum and find a hundred aspects to it just as you can read a contract and find a hundred ways to improve it or get an edge for your client. While a lawyer's job is to improve the contract, his role is more overarchingly to get the deal done. While clients know that you, their lawyer, is smart, diminishing returns set in on counsel's erudition. In most deals, the 80-20 rule applies. 80 percent of the value is brought to the client is in 20 percent or so of the items. Consistent with the rule discussed above, the remaining 80 percent of the issues can be fertile ground for concessions, capitulation, or compromise. Lawyers are not paid by the number of issues they spot or the number of points they win. They are paid based on spotting the main issues and helping the client extract as much protection on those issues as possible. Use the other issues as bait for winning the main ones. This principle is true not just in contract negotiation but in almost anything that is being negotiated. Due diligence reviews frequently create fertile ground for issue spotting and call for restraint and judgment. While a lawyer's job is foremost to protect the client from risk, there are many risks that are embodied in the nature of buying any business. Due diligence reviews often find issues with the target company which either have little risk of surfacing or, if they do manifest themselves, little economic substance.

Risk Assessment

Risk aversion is a salient genetic predisposition of lawyers. However, no aspect of life or transactions can be devoid of risk. Some lawyers try to avoid making any decisions about any issue remotely related to risk and pass that off to the client as a "business decision." Some lawyers discern that any peccadillo or deviation from full technical compliance with legal requirements is worthy of a purchase price adjustment, remedy before closing, extraordinary holdback, or significant magnification. Even the most beautiful mansions have at least one door with a nick on it.

The more successful lawyers, however, recognize the pervasiveness of risk and the lawyer's role to analyze it, put it in context, try to minimize it, but ultimately deal with it. The most successful approach to dealing with risk that I have witnessed is to accept it, be responsible to make a recommendation to the client to address it (or handle it if the client defers to the lawyer on the subject), and not be rigid or dogmatic about it. The best synthesis of this statement is to weigh the magnitude of the risk times the probability of it being realized. For example, in a transaction involving a $100 million purchase of a chain of one hundred retail stores where both sides are equally represented, have equal bargaining power and the price is fair, and one of the retail sites has not properly disposed of all of its hazardous waste, there are several practical ways to handle this issue short of escrowing the entire purchase price until the waste is removed or actually walking away from the deal. Unfortunately, I have been in situations where the other side took these positions due to their inability to assess the size of the risk in proportion to and in the context of the deal and against the many ways to fairly and conservatively quantify and deal with the risk without such a dramatic and draconian response. Lawyers need to weigh probabilities in rendering their advice, otherwise they will just say "no" or insist on an ironclad guarantee from the side that will be sure to be met with stiff resistance, re-trades and delays. Just as you weigh probabilities and risks in everything you do, whether to bring an umbrella to work or have that extra slice of pie, the successful lawyer will do so in rendering advice. Even saying "no" or requiring the most black-and-white approach to an item of concern in due diligence is risky. The other side could just say "no," walk out, and cost your client the deal.

Empower The Lawyer To Be A Business Advisor Who Happens To Have A Law Degree

As a young associate, a billionaire client once thanked me for giving a fine legal answer to an issue. However, he stated, "I can get a fine legal answer from anyone. What I expect of my lawyers is an understanding of the financial, tax, accounting, sales, marketing, business, manufacturing, human relations, government relations, and other non-legal aspects of the particular problem." In other words, the legal tail does not always wag the dog of the larger issue at hand. The more successful lawyers synthesize their knowledge of the law in the context of the issue at hand. Homogenization of the legal issues with the many other disciplines involved in any deal or business is consistent with the deal being about curtains, not about a materiality qualifier on a pension representation. While the latter may be crucial, it is not always so. This is consistent with the one retail store with some possible contamination in a 100-store chain in contrast to just buying as single site that is contaminated. The business advisor is not afraid to make a recommendation on these and other issues. One of the best compliments a lawyer can receive will come from a client who observes that the lawyers on the other side of a hotly contest M&A transaction were just good lawyers, but that their own lawyer was a businessperson who happened to have a law degree. There is a reason that 99 percent of lawyers give the rest a bad name.

Speak Concisely And Without Legalese

Lawyers pride themselves on their eloquence and believe that everyone and everything hinges on each and every word of their carefully crafted paragraphs of the Queen's English. The reality in most deals is that the only words people wait for or actually hear are "yes," "no" or "may I suggest here's how we can resolve this." Rarely are people swayed by orations of Ciceronian proportion. In fact, most people tend to tune out such bombastic outbursts. Further, lawyers are often tempted to display to their supposed acolytes the depths and breadths of their substantive knowledge on the most arcane topics. The most impressive lawyers are those confident enough in themselves to simply tell the client that the matter can get done and here is how to do so instead of explaining how a certain tax code section creates a certain exception which fosters the result. The client knows that the lawyer can build the watch; but the client just wants to know the time. Clients also want to conserve their own time. In other words, the lawyer should be admonished to either communicate clearly and effectively, or just shut up.

Accommodation

Accommodating an adversary on items he or she may need to save face or give the client a decent deal is not a sign of weakness but rather of strength. It will build trust and build long-term relationships. Many lawyers' first impulse, especially when they have superior bargaining power, is to just say "no." Instead, the lawyer should try to find out why the other side needs something and see if it can be accommodated without disrupting their client's needs. This view is consistent with the importance of face saving discussed above. It is also a logical outgrowth of creating win-win situations. Further, accommodation should win reciprocal good turns and facilitate the transaction.

Nothing Is Impossible; "Yes" Is Always An Answer

When a client request seems impossible or ill-considered, you can deal with it in a simple way: tell the client how to accomplish the goal and then let the client figure out that the answer is "no." "No" is always an easy answer since it does not require any risk taking and if the advice is followed, the lawyer can never be proven wrong. Dissecting the multitude of problems with any request is also

something at which we lawyers excel. Offering the client a discourse on "here are the problems" with the client's goal may evoke admiration of the lawyer's problem-spotting skills but concomitant aversion to counsel's problem-solving ones. Any lawyer can say "no." Good lawyers should point out ways for clients to accomplish their goals. A lawyer who identifies a problem should not complete the sentence until he solves the problem. If the lawyer cannot solve the problem, then a particularly skilled lawyer can point out to the client in an artful way the tortuous steps necessary to accomplish his goal. The client will thereby reach the same conclusion. I once observed this art when a senior partner at a behemoth firm, who went on to become the general counsel and then the chief executive officer of a Fortune 50 company, responded to our mutual client's query regarding launching possible litigation. The lawyer agreed that the lawsuit was easy to research and file, and costly to win but could be won, provided that they could prove a multitude of facts, which all but the most naïve would know were impossible to prove. The lawyer demonstrated to the client that he was a can-do partner of the client and could craft a strategy to achieve the desired goal. At the same time, the lawyer conveyed in no uncertain terms that the client's goal was virtually unattainable.

Separate Important From Meaningless Requests

As an outgrowth on the discussions regarding the proportionality of a response, prioritization, and face saving, lawyers should still try to temper their normal antipathy to the other lawyer's revisions of their documents with the practical assessment of whether the changes are for the better, substantive, purely wordsmithing, ego-driven with little substance, or a desire to feel like they have added something. If you answer affirmatively to Shakespeare's question whether the proposed changes are merely "the sound and the fury of a tale told by an idiot, signifying nothing," then just accept the changes, move on, and get the deal done.

These lessons are much easier to espouse than to apply. We are all humans, all have frailties and all have a desire to win. Candidly, I frequently catch myself straying from these principles and descending back into the miasma of pettiness, insensitivity, and lack of perspective. Sometimes I catch myself in time. Other times it is too late. Just as my clients expect me to keep knowing the law, however, they also expect me to keep practicing these lessons. While I will never know all of the law, I will never be able to apply all of these skills. Both are journeys worth pursuing.

Lawyers Should Relish And Not Shirk From The Opportunity To Give Business Advice

Clients will occasionally ask their lawyers, "What do you think?" The most helpful lawyers will relish this opportunity to give business advice and not be tempted to hide behind the shield of not making a recommendation to the client due to the issue being a "business decision." Many lawyers, however, shirk this basic responsibility. True, every word, comma, and clause ultimately has an economic impact on a transaction and therefore in the final analysis is a "business decision." Based on that logic, some lawyers feel they have done their duty by identifying the issue, trying to get the other side to cave in, but, if they fail to do that, putting the onus on the client to do resolve the issue. This frequently arises in structuring indemnification clauses and limitations. The unwillingness to take a stand, and thus relegate the problem to the vast nether land of the "business decision" is putting too much caution ahead of due diligence. Additionally, lawyers will often (too frequently) also insist that even the most minor legal problems must be fixed first. This will often make it difficult if not impossible for the client to rein in the lawyer because the client will not want to risk encroaching on the legal realm. A successful lawyer

will let the client know that the risk is small or that the cost of remedy smaller still and advise the client accordingly.

CONCLUSION • The above thoughts attempt to provide insights into the way lawyers think and how this process, if unchecked and unrecognized, can throw a transaction off its tracks. The common thread throughout these ideas is for the lawyer to suppress or at least balance his or her emotional powers and hold them in check under the intellectual ones. The proper balance between these conflicting sides of the brain can either make or break any transaction.