

Consult early or suffer later

How involving a business attorney sooner rather than later can vastly improve your deal **Interviewed by Kristen Hampshire**

Business owners take great care when it comes to running their companies, including attending to details to assure everything is running smoothly.

When it comes to selling or purchasing a business, however, too many owners fail to get an experienced transactional attorney involved early enough in the process.

“Acting early, when both sides are more open to negotiation, can lead to a dramatically better result,” says Charles W. Ormsby Jr., chairman of the corporate department of Semanoff Ormsby Greenberg & Torchia, LLC. “During courtship, both parties are more forgiving and flexible, and you can obtain significant benefits early in the process, rather than waiting until each side feels they have a deal. Interject the experienced transactional attorney into the deal-making process early and it will pay huge dividends.

“Clients who wait until the last minute to involve a business attorney (usually to save on fees) ultimately regret that decision. Waiting to negotiate certain terms after both parties have ‘agreed’ to move forward with a deal is more challenging and sometimes even impossible, and oftentimes it causes ill will.”

Smart Business spoke with Ormsby about how a business attorney can improve a deal early on but becomes handcuffed later in the process.

How early in the process should the transactional attorney be brought into the negotiations?

There are several stages in the negotiations of a purchase and sale of a business. The first stage usually involves a term sheet outlining the bare bones of the deal. Prior to putting anything in writing, this is the best time to bring an experienced transactional attorney into the process. Many times, those bare-bones terms can include things that will be quite advantageous to one side or the other.

After a term sheet, the next stage typically is a nonbinding signed letter of intent. Although it is better to have an attorney involved in that document rather than waiting until the last step, I cannot emphasize enough that the best time to involve an attorney is prior to putting terms in writing. Finally, there is the Agreement of Sale. Once that is to be drafted, the negotiations are nearly completed.

What benefits will the parties realize when they bring a transactional attorney into the process at an early stage?

There are many terms that are better dealt



Charles W. Ormsby Jr.

Chairman, corporate department
Semanoff Ormsby Greenberg & Torchia, LLC

with sooner rather than later, that is, before a deal is established. The sooner an attorney is involved to advise on terms and make recommendations, the better the outcome is for either a buyer or seller.

A business owner may do one or two deals, but an experienced transactional business attorney who is deeply involved in these types of transactions on a day-to-day basis probably has done hundreds of deals and that experience is critical for a buyer or seller. The insertion or deletion of a single word can mean the difference of hundreds of thousands, or even millions, of dollars.

What are some examples of terms that can benefit a client when addressed early on in the negotiations?

For one, ensuring there will be no personal guarantees can provide great value, but even limiting the personal guarantees has tremendous value. Purchase price is not everything. A personal guarantee can result in personal assets being subject to execution if the business person is sued.

Along the same lines, the attorney will want to address indemnification and establish parameters of that indemnification such as caps (usually a percentage of the purchase price), thresholds so that claims need to exceed a certain amount before a claim can be made, and joint and several liability of various buyers

or sellers. These terms are hard to negotiate after the business owner sends a deal to the attorney to draft a formal Agreement of Sale.

It is also important to address warranty work. Who is responsible for paying for, or performing, customers' warranty work? Simple employee-related issues are sometimes forgotten. What about accrued sick and vacation time? As a buyer, are these things that you really want to inherit?

Another reason for bringing in an experienced transactional attorney is knowledge of potential problem areas. Federal tax liens, state tax liens, UCC filing statements, judgments, litigation and other claims can disrupt a deal and need to be investigated thoroughly.

What information should a buyer and seller prepare for an attorney?

First, aside from purchase price, an attorney will want to know the reason for buying or selling. Sometimes the reason for doing a deal may result in not doing the deal or structuring it differently. Once, one of my clients called because he wanted to buy a business, but by the time we were done analyzing the transaction, he decided he could achieve the same results he wanted by offering a job to the general manager rather than buying the business. From a buyer's perspective, the attorney will want to know the location of the business to be purchased and its size. What is the ownership structure? How many owners are there?

Also, the timing of the deal is important. How fast do the parties want to close? Is there a reason to delay it to the following fiscal year? Additionally, financing is a key component, whether the buyer will require bank financing or the seller will take back some financing. From the seller's perspective, the questions are similar. Who are you selling to? Where is the buyer located, and does it expect you to take back some financing at closing? Will you be paid over time or in full at the closing?

The role of an attorney during these initial phases of structuring deals is to plant seeds that will germinate later and be beneficial to the buyer or seller down the road. All deals can benefit from an experienced transactional business attorney who is focused on mitigating risks for the client, considering potential pitfalls and obtaining significant advantages beyond purchase price so the client can avoid aggravation and save money in the long run. <<

CHARLES W. ORMSBY JR. is chairman of the corporate department of Semanoff Ormsby Greenberg & Torchia, LLC. Reach him at (215) 887-2045 or cormsby@sogtlaw.com.

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