

MANAGING DEAL FATIGUE AND EXPECTATIONS IN SMALL BUSINESS DEALS

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ATTORNEYS

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Whether exiting their life's work or looking for a turnkey business to acquire, clients in small business M&A transactions present unique challenges for their lawyers. Many small business owners and first-time acquirers have limited experience with attorneys or the intricacies of selling a business. This inexperience can lead to deal fatigue and the misunderstanding of concepts that can cloud the judgment of even the savviest of small business owners. Emotional elements can also contribute to the frustration: a client's excitement over a big payday, eagerness to grow an acquired business, or even simple anxiety over "retirement. Setting appropriate expectations from the outset, based on transparent and clear information, will help limit client frustration and promote a productive attorney/client relationship.

For a new client, transparency starts with the pitch and the engagement letter. Establishing realistic expectations regarding transaction timing and expense builds your credibility and can prevent fatigue later in the deal process. It is essential for the attorney to create an informed timeline and budget and to identify items that may cause deviation from those initial expectations (e.g., delays in obtaining regulatory approvals or third-party consents). Identifying potential road bumps early in the process— thereby limiting what may constitute a "surprise" to a client—can avoid client frustration and potential conflict. Counsel should also advise the client to be prepared to walk away from the transaction if the counterparty presents unreasonable terms or if other insurmountable issues arise.

Managing Deal Fatigue and Expectations in Small Business Deals

Working with the client to negotiate the letter of intent (LOI), to the extent possible, is another way to educate the client on transaction details and minimize client disappointment and fatigue. On the sell-side, counsel is often handed a signed LOI with little detail beyond the purchase price and an aggressive anticipated closing date. In these situations, counsel should identify and discuss with the client material issues that will need to be addressed in the course of drafting and negotiating the definitive agreements, particularly those buyer-friendly provisions not covered in the LOI but sure to be included in the buyer's drafts (e.g., indemnification obligations, restrictive covenants, setoffs/escrows). When counsel is engaged at the LOI stage, it is important to negotiate comprehensive terms that draw out the counterparty's position on items that are likely "dealbreakers" for your client. For example, if your client is opposed to seller financing, learning that a buyer requires it is far less frustrating at the LOI stage than after having expended time and resources responding to due diligence requests while awaiting draft agreements. The more robust the negotiations at the LOI stage, the fewer points of friction will exist as the transaction progresses.

For buyers and sellers alike, deal fatigue and frustration often begin during the due diligence process. Counsel must make clear to the client from the outset that responding to due diligence requests and reviewing responses will be tedious and time-consuming, even in a small transaction. Counsel, however, cannot downplay the critical importance of the process. The due diligence process in a small business transaction is likely counsel's first opportunity to fully grasp the depth and breadth of potential issues to be addressed in the definitive documents. The unique diligence issues that often arise in small business transactions include: (i) a lack of written contracts with customers and suppliers, (ii) informal employment and contractor arrangements that may run afoul of applicable regulations, and (iii) a lack of GAAP accounting practices or sophisticated financial statements. As due diligence progresses and issues come into narrower focus, counsel is presented with another opportunity to provide clarity and transparency on potential delays or unfavorable asks that the counterparty is likely to present and to manage client expectations accordingly.

Managing deal fatigue is perhaps most challenging as the parties approach closing. Counsel should frequently, and in clear terms that highlight adverse effects, advise the client of the risks of accepting unfavorable terms in exchange for an earlier closing. Frequently remind the client that certain items should be considered "dealbreakers," particularly if those items were discussed early on in the process as materially important to the client. M&A inexperienced clients looking at closing date payouts or excited about their acquisition often underestimate the gravity of the issues being negotiated at the eleventh hour. Clear explanations of the practical and economic ramifications from overeager concessions can help avoid later client disappointment and encourage patience when deal fatigue is at its highest levels.

Lastly, counsel should set their own realistic expectations of a client's sophistication and manage their own frustrations with a particular transaction. M&A-inexperienced clients are likely to mimic the messaging of a trusted advisor. Treating issues that arise as "par for the course" is a great way to gain a client's confidence in your ability to navigate their life-changing transaction.