



# Practical Advice for Managing the Deal Process

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# Managing Deal Costs =



# Legal Fees are a Significant Component of Overall Costs of:

- M&A
  - Buying or selling a business or assets
- Bank Financing
  - Working capital, refinance or to fund strategic acquisition
- Capital Raising
  - Working capital, refinance or to fund short or long term strategic plan



# Other Costs:

- Broker Fees
- Placement Agent/Underwriter
- Third Party Advisors/Consultants
- Filing Fees
- Printing/Mailing Costs
- Taxes



# What Drives Deal Costs?

- Complexity of the structure of the transaction
  - e.g., cash, equity, mezzanine financing, etc.
- Complexity of the organizations involved
  - e.g., regulated industry, multi-tier company, multi-state presence, etc.
- Efficiency of the overall process
  - e.g., due diligence, negotiation of definitive agreements, disclosures and closing matters



# Where Can You Provide Max Value to Your Organization?

- By ensuring an efficient deal process (the other two cost drivers are typically beyond your control)
- How do you ensure an efficient deal process?
  - Good Housekeeping
  - Strong Process Management



# Housekeeping

- Single most important thing you can do to save your organization time and costs
- Should be done well in advance of a transaction (Do this now!)
- In essence, it is taking inventory and conducting due diligence on your own organization to ensure that requests for information can be satisfied promptly and completely



# Benefits of Good Housekeeping

- Allows you to spot potential issues/documentation deficiencies pre-transaction, so that they can be addressed ahead of time
- Builds credibility with your counterparty
- Makes you a more knowledgeable and better advocate for your organization
  - Reps and warranties; disclosure schedules





# Housekeeping Checklist

- Things you should either be intimately familiar with and be able to speak intelligently about, or have at your fingertips (or be able to get your hands on quickly)
  - Documents listed should be in electronic format to facilitate information sharing with counterparty



# Corporate Documents

- Corporate organization chart
- Organizational documents (articles of incorporation, bylaws, shareholders' agreement, operating agreement, etc.)
- Minute books
- Stock register and transfer books
- Proxy statements
- Options/other rights to acquire equity
- List of current directors



# Employees

- Management organization chart
- List of employees (FT/PT, exempt/nonexempt, comp and title)
- Employee and director benefit plans
  - Retirement plans
  - Deferred comp agreements
  - Cash and equity incentive plans
  - Medical/dental/vision coverages



# Employees

- Employee handbook
- Vacation, sick leave and severance policy
- Employment/severance agreements
- Change in control agreements
- Key employee life insurance policies/plans



# Real Property and Equipment

- List of owned and leased real property
- Leases (rent amount, term, renewal)
- Mortgages/encumbrances
- Significant/critical personal property/equipment leases



# Financials

- Annual financial statements
- Quarterly financials/earnings releases
- Loan/Credit agreements
- Transactions with affiliates
- Tax returns
- Auditor inquiry letters/attorney responses
- External and internal audit reports



# Material Contracts

- Anything material to the company in terms of duration, amount or substance
- Ask yourself: If you were buying your organization, would you want to see this contract?



# Material Contracts – Examples:

- Non-disclosure agreements
- Non-routine purchase or sale agreements (e.g., buying/selling a business/significant amount of assets)
- Material due to costs or revenues
- Non-competes/non-solicits
- Exclusivity arrangements





# Regulatory

- Permits and licenses
- Communications with regulators
- Evidence of compliance with law (where applicable)
  - Policies and procedures



# Intellectual Property

- Trademarks
- Patents
- Licenses



# Litigation

- Plaintiff or defendant
- Pending or threatened



# Insurance

- Summary of policies
  - Coverages and amounts
- Know where the actual policies are
- Any denials of claims or pending claims



# Financial/Strategic Planning

- Current plans for additional financing
- Most recent budget
- Strategic plan (with projections)
- Capital spending projections



# Other

- Anything that is unique to your business that you would want to know or see if you were buying your organization



# Process Management

- Know your team and the role that each person (inside and outside) should play
- Assign responsibilities/tasks
- What do you want/need from outside counsel? Communicate this up front.
  - Lead the process/quarterback the transaction?
  - Supporting actor?



# Key Items to Take the Lead On (Save \$\$\$)

- Due Diligence, Reps and Warranties and Disclosure Schedules
  - Outside counsel lacks institutional knowledge and access to documents
- Review of Reps and Warranties
  - Can we make these? Do we need exceptions/carve outs?
- Preparation of Disclosure Schedules
  - If you have done your housekeeping, you'll be able to prepare these in short order





# Due Diligence

- Manage the internal team in making requested information available (to both the counterparty and outside counsel) while outside counsel works on the definitive agreement(s)



# Communication

- Very important to managing deal costs
- Keep outside counsel in the loop
- All communications to the counterparty reflecting changes to deal documents should occur through one lawyer per side



# Ethical Issues that Commonly Arise in the Deal Context

- Negotiations – impasses; puffery v. misstatements
- Disclosure Schedules - fraud
- Conflicting Duties
  - Entity v. Constituents



# Pa. R.P.C. Rule 8.4 – Misconduct

- It is professional misconduct for a lawyer to:
  - violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another; or
  - engage in conduct involving dishonesty, fraud, deceit or misrepresentation.



# Impasse

- Where A Corp and B Corp have reached an impasse on a deal point, can A Corp's lawyer advise the CEO of A Corp to contact B Corp's CEO to attempt to resolve the impasse if A Corp's lawyer knows that B Corp's lawyer is unavailable to advise B Corp?



# Impasse Concern

- A Corp's lawyer could not directly contact B Corp's CEO to attempt to resolve the impasse. Is this a means of circumventing Pa. R.P.C. Rule 4.2 (communications with persons represented by counsel)?



# Negotiating: Puffery or Misstatements?

- Pa. R.C.P. Rule 4.1 – Truthfulness in Statements to Others:
  - In the course of representing a client a lawyer shall not knowingly:
    - make a false statement of material fact or law to a third person; or
    - fail to disclose a material fact to a third person when disclosure is necessary to avoid aiding and abetting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.



# Puffery v. Misstatements

- Puffery – permitted
  - Generally, opinion exaggerating or overemphasizing certain facts (e.g., value of the assets being purchased)
- Misstatement – not permitted
  - Representations and warranties – statements of historical fact





# Disclosure Schedules

- Must we disclose this bad fact?
  - If it is something that you would want to know if you were the other party, the answer is generally yes
  - In addition to Rule 4.1, substantive law may require affirmative disclosure



# Organization as Client

- Pa. R.C.P. Rule 1.13 – Organization as Client
  - Represent the organization, but may represent constituents subject to Rule 1.7
  - If lawyer knows that an officer/employee intends to act in a manner that is a violation of law that could be imputed to the organization, the lawyer shall “proceed as is reasonably necessary in the best interest of the organization”



# Conflicting Duties – Dual Representation

- Can a lawyer represent A Corp in negotiating a sale of A Corp to B Corp while also negotiating the employment agreement for A Corp's CEO to become EVP of B Corp, effective immediately post-closing?
  - Maybe. A key concern is if the successful negotiation of the employment agreement is a condition to the overall transaction.



# Key Takeaways

- Take Inventory
  - Use the checklist and get your house in order
  - Convert files to electronic format
- Manage the Process
  - Assign roles and responsibilities
  - Communicate clearly
- Be Mindful of Your Ethical Obligations



# Questions?

