



Representing the Seller in the Sale of a Business

When selling or transferring a business, sellers have personal and financial goals they want to achieve through the transaction. Lawyers representing these sellers should give careful thought and planning to accomplish their clients' goals, regardless of whether the buyer is a stranger or a family member or whether the transaction is a sale or a transfer by gift.

If you are representing the seller in the sale of a business, here are a few common traps and some tips for how to avoid them:

Choosing the buyer. Consider the characteristics or attributes of the "right" buyer for the business. Your client may already have preferences for the type of buyer that would be a good fit for the transaction. Discuss these preferences with your client ahead of time to reduce the risk of spending unnecessary time and resources negotiating with a buyer who is not the right fit for your client. To avoid your client's surprise or disappointment at what the buyer does with the business, advise your client to thoroughly investigate the buyer's purpose for buying the business, determine the buyer's creditworthiness, and investigate the buyer's business acumen.

Purchase price. Help your client to establish realistic expectations about the value of the business. Sellers want to realize a reasonable return on their investment, but no buyer wants to spend more than the business is worth. Advise your client to engage a professional appraiser to value the business and its assets and to defer to the appraiser's judgment regarding the purchase price. An appraisal is essential if the business

interest is being gifted.

Time. Due diligence, document preparation, analysis of the tax considerations, and negotiations all take time. Be realistic about the amount of time the entire transaction might take and communicate that clearly to your client at the outset of your representation of the matter. If your client pressures you to close the deal quickly, explain to your client that premature closings can create problems later on if something is overlooked or left undone.

Expense. When talking to your client at the beginning of your representation, provide a realistic assessment of the amount of attorney fees and costs involved in the deal. When in doubt, estimate high, and give your client a range of potential fees and costs to expect. Alert your client when events or facts unfold that may change the estimates. Have your client execute a written fee agreement and try to get a retainer from the client up front.

Confidentiality. Before entering into any discussions with a potential buyer, have the buyer sign a confidentiality agreement restricting the disclosure and use of any information learned about the business during the discussions and negotiations. The process of selling a business should not offer a competitor an unrestricted look at the seller's business methods, customer and vendor lists, or other proprietary information.

Tax considerations. Explore all the transaction's tax implications and options as they relate to your client, consulting a tax attorney if necessary. As a part of your research and due diligence, know the

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tax consequences to the buyer. The seller and the buyer often have different and conflicting tax objectives, which may affect the negotiations and the outcome of the sale. One common mistake is to structure the deal as a taxable transaction if a nontaxable reorganization is possible. Another mistake to avoid is structuring a stock sale if an asset sale is the better approach.

Capital gains. Most sellers want to minimize their tax obligations as a result of the sale of their business. To avoid triggering a capital gain on the transaction, consider whether to structure the sale as a charitable remainder trust buyout, in which your client transfers its stock in the business to a charitable remainder trust and the buyer purchases the stock from the trust. Your client receives income from the charitable remainder trust for life, and the charity receives the remainder interest. Keep in mind that this tax structure converts capital gains to ordinary income, so this option will not be appropriate for every transaction.

Noncompetition. Your client may want to preserve the right to work in the same or similar line of business after the sale. The buyer usually wants to limit the seller's ability to compete against the buyer once the transaction is complete. The common solution is to negotiate a noncompetition agreement as part of the sale. As attorney for the seller, you should draft the narrowest possible limitation on engaging in the same or similar business. The agreement should also provide that the noncompete agreement will no longer apply if the new owner changes the business substantially.

Plan B. Negotiations can break down, and sales can fall through. Counsel your client to have a backup plan, and anticipate what series of events would trigger the implementation of the client's Plan B.

Communication. Sellers are understandably anxious to get the deal closed. They want to know that their transaction is being timely moved forward. Discuss the frequency of communication in your initial meeting with the client, confirm in a letter how often the client can expect to hear from you, and then follow through. A good practice is to communicate with clients at least weekly, even if you just confirm that nothing is happening and explain why.

Other professionals. Selling a business often requires the services of other professionals such as accountants, appraisers, and lawyers with special knowledge or expertise in taxation, securities, or business valuation. Be cognizant of the difference between giving legal advice and business

advice. To avoid mistakes or missed opportunities for the client, recognize when you might need assistance from other competent professionals. Discuss these issues with your client before retaining the services of an outside expert.

Objectivity. Sellers are seldom objective about the transaction, since they are financially and usually emotionally invested in their business. As the seller's lawyer, you must be objective to render competent advice about when the client should close the deal, compromise, stand firm on a point of negotiation, or walk away. Maintaining objectivity is critical if you want to help your client realize the most beneficial outcome from the deal.

Other issues. The client often thinks of issues that are of special importance to him or her in the transaction at hand. Your job is to anticipate what the client might not think of. One issue that frequently comes up is the business premises lease. Because it takes time to negotiate the transfer of the premises lease to the new purchaser, you should immediately review the lease and determine the necessary steps to transfer it. Another recurring issue is how to deal with the seller's employees and employee benefits. You should determine early in the engagement what the seller wants regarding the employees and what, if any, obstacles interfere with the implementation of the seller's goals. If unions or executive employment contracts are involved, you may want to consult a labor or employment lawyer.

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