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PERSPECTIVE

CHICKEN & THE EGG:

Should you hire an M&A attorney or an investment banker first to sell your business?



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By Zachary Turke

You have decided to sell your business or find a financial partner. That was a tough decision.

Now you have to maximize your chances of concluding a successful transaction. You need a team to make that happen: a lawyer experienced in mergers and acquisitions and an investment banker. Choosing the right professionals is key and you absolutely need *both!* Which of these advisors should you hire first, though? I believe that you will best be served by hiring a lawyer and then retaining an investment banker.

What Roles Does Each Play?

An investment banker's main duties center on creating a market for your business and negotiating the best deal. Keep in mind that there is a lot of work to get to that point. They locate potential buyers and bring them into the sale process, keeping multiple bidders at the bargaining table for as long as they can to help get you the best price for your business. Investment bankers are compensated using a graduated fee structure in which they take an increasing percentage of the eventual sales price of a business. In the event that transaction does not close, they are generally not compensated (other than reimbursement of expenses).

An M&A attorney's main duties, on the other hand, focus on structuring, negotiating and

documenting your deal once a purchaser and sales price are agreed upon. Making sure that you get the best sale terms (as opposed to sale price), pay as little taxes as possible and do not lose portions of the sale proceeds to indemnity claims. M&A attorneys are generally compensated using a per hour fee.

Why Hire an M&A Attorney First?

Let's explore why I believe that it makes sense to hire your lawyer before your investment banker.

Lawyers Know Bankers Better than Anyone

Finding the right investment banker to sell your business is one of the biggest decisions

you will face in your sales process. You want someone who knows your industry, the players in it and what it takes to get deals done in that space. But how do you find someone like that?

One of the main sources for finding bankers will be your fellow business owners who have sold businesses using an investment banker in the past. But a successful entrepreneur will do one, two, maybe three M&A transactions in his or her lifetime. A successful M&A attorney, on the other hand, does 10-20 deals *a year*. This deal flow gives them a frame of reference that cannot be matched in identifying and introducing you to bankers that would be best fit for you and your goals.

Another referral source may be your wealth manager or your accountant. These professionals are invaluable at stewarding your assets in the wake of a closing of a transaction. However, they are not as involved in the deal process itself prior to that point. No one works closer with investment bankers as part of a deal than M&A attorneys do. A good investment banker gets you a great price for your business. A great investment banker gets you a great price for your business *and* is with you every step of the deal process from identifying buyers to the closing wires. M&A attorneys truly have the knowledge from being in the trenches to help you determine which investment banker is the best match for you.

Lawyers Know the Right Questions to Ask

When you are selecting your investment banker, you will likely interview a number of firms. If this is your first time going through a sale process, you may not know the right questions to ask. Sure, every seller knows enough to ask bankers what deals they have done in their space and what they think the eventual sales price for their business will be (both of which are, admittedly, very important questions). But what about how they will position the company to buyers and what the main themes of their pitch will be? Or how this deal compares in size to other deals they have worked on (which is a particularly useful question for determining whether you will be getting senior-level attention at the bank)? A good M&A attorney can help you develop a question list and interpret the results so that you make the decision about which banker to hire.

Confidentiality Is Key

One of the primary concerns you will have as you go through your sale process is maintaining confidentiality about the deal. As many of your colleagues in your industry who have sold their businesses can attest, it can be very awkward when news of a transaction leaks out to your clients, competitors and/or employees before you and the buyer are ready to issue press releases. Maintaining confidentiality from the outset is paramount. Lawyers, even lawyers you only interview

but do not ultimately engage, are bound by confidentiality restrictions under their applicable state laws and ethics rules. Investment bankers, however, are *not* bound by similar legal obligations. Your lawyer will be able to negotiate confidentiality agreements with the bankers you interview (many of whom will not ultimately be retained) before you start divulging intimate details about your business gives you the best protection available to minimize potential leaks.

You Need a Lawyer to Negotiate a Banker's Engagement Letter

One of the main areas where M&A attorneys deliver value for you in a company sale is in negotiation of the banker engagement letter when you have selected a banker to bring onboard.

As discussed above, bankers are compensated based on a graduated percentage that increases based on the ultimate sales price of your business. For instance, a banker may get X% of consideration up to \$75mm and Y% of consideration in excess of this bogey. You and your lawyer will negotiate the “bogey” with your investment banker based upon the input you get on value from multiple investment bankers. Based on the large number of deals they do, M&A attorneys can provide market insight as to what market banker fees are to help you negotiate these splits. Perhaps more importantly, deal lawyers are integral in defining what consideration paid counts

for purposes of determining the sales price. Examples of this include determining how earnouts and other contingent consideration will be treated, what debt payoffs and assumption will be treated as consideration paid and how assets distributed out of the target affect the fee payable.

If you take nothing else away from this article, *please remember that you need to have an M&A attorney by the time you are negotiating a banker engagement letter*. Proceed at your peril if you try to do this yourself.

So Why Do Some Business Owners Hire Bankers First?

So given the above, why is it that some business owners still engage investment bankers before hiring their deal counsel? One of the primary drivers for this tendency is the fact that investment bankers are often first on the scene. As they perform a sales role, investment bankers reach out to business owners and get you to think about the prospects of selling your business. Business owners think their long-standing lawyer will just to the “paperwork.” Big mistake! M&A is a specialty and experience really matters.

Perhaps the most significant reason that bankers continue to be engaged before lawyers is trying to minimize costs. Many business owners delay too long in hiring attorneys for fear of their lawyer “turning the meter on” when it is not clear that there will be a deal. While it is of course important to be cost

conscious, this is penny wise and pound foolish. The amount of value that an M&A attorney can deliver for you in making sure you are with the right investment banker and negotiating their fee *far* outweighs their costs.

To get the best price and terms for your business, you should engage the services of both an M&A attorney and an investment banker as part of your sales process. As you will find, however, like anything else in a deal, the timing and order of your hiring decisions can make a world of difference in the outcome. M&A attorneys are legally obligated to act in your best interests and nobody knows more about investment bankers than they do. Accordingly, you are putting yourself at a disadvantage in your sale process if you are not taking advantage of this resource to help you in selecting the broker that will be the public face of selling the business that you have spent your life building. ■

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