Noli IP Newsletter

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Olympic Games: Watch Out for that Cease and Desist Letter

By Mariana Noli and Luciana Noli

This year's Olympic Games in Rio were very special for us as a family. As you know our eyes were on Brazil as athletes from all over the world competed in the summer Olympics. You probably didn't know that what made it even more special to us was our cousin Demian Gonzalez. Demian participated of the world's largest and most complex sporting event as captain of Argentina's male national volleyball team. We are very proud of you, Demi.

As sports fanatics, we recognize the prestige of Olympism as a philosophy of life that places sport at the service of humankind. We view the Olympic Games as one of the most well-known and celebrated sporting, cultural and entertainment events in the world which bring together athletes from every continent. The well-known five interlocking rings represent the coming together of five continents (Asia, America, Europe, Africa, and Oceania) and symbolize the Olympic values: Excellence, Respect and Friendship. People around the world associate them with the fundamental values of

> *"You probably didn't know is that what made it even more special to us was our cousin Demian Gonzalez. Demian participated of the world's largest and most complex sporting event as captain of Argentina's male national volleyball team. We are very proud of you, Demi."*

Federal Litigation Workshop

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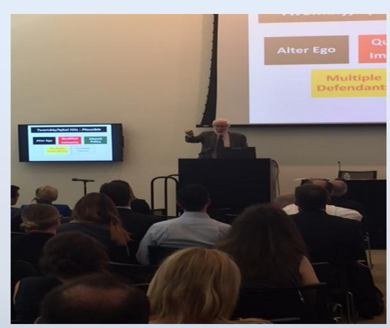
Last week, Mrs. Diane Fischer attended a workshop at the federal courthouse in San Diego regarding the federal litigation practices in the US District Court Southern District of California.

Several district and magistrate judges discussed and shared with the audience many of the nuances of the US federal litigation system and practice.



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sport and of the Olympic Movement.

As international intellectual property practitioners, we recognize the immense value of the Olympic symbol as one of the world's most recognized brands. It is not surprising that while the Olympic Games in Brazil may be over, Olympic lawyers are probably still sending warning letters to businesses tweeting with "official" Olympic hashtags like "#TeamUSA" and "#Rio2016" without authorization.

The codification of the Fundamental Principles of Olympism, Rules and By-Laws adopted by the International Olympic Committee (IOC) is known as the Olympic Charter. According to Rule 7 of the Olympic Charter, **the Olympic properties include the Olympic symbol as well as the Olympic flag, motto, anthem, identifications (such as "Olympic Games" and "Games of the Olympiad"), designations, emblems, the Olympic flame and torches. All rights to any and all Olympic properties belong exclusively to the IOC, including rights to their use in relation to profit-making, commercial or advertising purposes**.

Needless to say these so-called Olympic properties are more than just logos. The economic value of these brands is extremely important, particularly, because the Olympic Games are entirely privately funded. During this time of the year, some companies who are not official partners, will try to associate themselves with the unique and worldwide character of the Olympic Games free of charge. Of course, this is unfair to companies that financially support the Olympic Games as well as the participating athletes. That is the main reason that the IOC takes the implementation of the intellectual property (IP) rights very seriously. The IOC must be able to protect the exclusivity granted to its broadcast and marketing partners, and needs to have the necessary means to prevent third parties from making any unauthorized association with the Olympic Games.

Numerous countries have adopted permanent national legislation protecting the Olympic properties. Such legislation not only concerns the protection of the Olympic properties, but also provides the means to fight against ambush marketing and to regulate advertising, in particular in and around Olympic venues.

Legal actions have become as routine as the games themselves.

In 1993, before Sydney was elected to host the 2000 Olympic Games, a third party sought to register all the names of the candidate cities for the 2000 Olympic Games in numerous countries and then threatened the IOC partners with legal action if they used “Sydney 2000”. Subsequently, IOC took steps to protect the **City+Year** identifiers well before a city is selected to host an edition of the Olympic Games though some court decisions have called into question the distinctive character of a trademark composed of a city and a year. Given the exceptional worldwide interest in, and media coverage of, a city’s election by the IOC, Acquired Distinctiveness results the moment the venue of the Olympic Games is announced.

The United States Olympic Committee (USOC), the national Olympic Committee for the United States of America, has also been involved in a number of trademark lawsuits over the years. These lawsuits peaked in 2002 when 11 cases were filed, helping the USOC develop a reputation for aggressively defending its intellectual property. From the Greek restaurant in Philadelphia forced to change its name and logo after 30 years in business to a group of knitters from the website Ravelry who were organizing a "Ravelympics", many faced actions by the IOC and/or the USOC.

For each Olympic Games, the USOC has filed trademarks for the "city year" combination of words. There's also some standards it trademarks for every event: "Road to London," "Road to Rio" and "Road to Pyeongchang," the site of the 2018 Winter Games. The IOC/USOC bets on the site of future Olympics and register trademarks for potential sites.

The existence of the Nairobi Treaty, as well as national legislation to protect the Olympic properties and combat ambush marketing in certain territories helps the IOC. **"Ambush marketing" or hashjacking is the unauthorized use of advertising terms to create a misleading commercial association, usually during a big event. The idea is to get some free publicity from people searching "Olympics" or "Rio de Janeiro."**

Under the Olympics' Rule 40, Olympic-related words can't be used by non-official sponsors during the games. Unauthorized use of words for advertising can confuse consumers into thinking brands are associated with the Olympics when they're really not. Meanwhile, the real official sponsors – Coca Cola, GE and McDonald's, to name a few— pay significant amounts of money to be able to say they're "official" sponsors.

Sometimes, ordinary laws are not as effective as the IOC would like, in particular in relation to social media platforms. The IOC has encountered additional challenges with social media platforms in the recent years. While such platforms present fantastic opportunities to engage new audiences, they also increase the possibilities of unauthorized users. The use of the hashtag, for example, draws into question whether the laws we have on the books should be updated for the social media age.

Zerorez, a Minnesota carpet-cleaning company, received a cease and desist letter after sending a series of tweets with wishes to 11 Minnesotans representing the U.S. in Rio. Subsequently, it filed a suit against the USOC in August requesting a declaratory judgement to clarify the law when it comes to public discourse and social media conversations. One could say that there should be some leeway for brands to discuss the games that does not constitute actual trademark infringement.

Through the years, enforcement rules have changed and will continue to change in this arena. We anticipate that much. In the meantime, and while we wait to see those changes, we hope you enjoyed the 2016 summer Olympic Games in Rio as much as we did. It was interesting to see two of our passions, sports and intellectual property law, come together to entertain us during such a special international event.

Nine Steps to a Successful Business Sale

By David Peteler

You've spent years building a profitable business. What's your next step? Are you considering selling your business? You might be thinking, "Sell my business? I know how to sell my product, but have no idea how to sell my business." Estimates are that 70% of privately owned businesses on the market don't sell, particularly businesses valued at less than $5,000,000. How can you sell your business successfully?

These nine steps can help you successfully plan and execute the sale of your business. Conceptually they are simple, but they can be difficult to implement. If you put in the effort and discipline to follow these steps, you'll be better prepared and your sale will go more smoothly.

Step 1. Clarify your Goals.

If you're like most business owners, your main goal for years has been to build the business, without much thought for your exit strategy. It sounds simple, but the first step is to clarify your *business* and *personal* goals.

Do you want to sell? Are you actively looking to sell your business? Are you still getting the personal satisfaction from running it that you did before? Do you see that your industry is contracting, and you don't want to manage the business through yet another tough time?

Did you get an unsolicited offer? Perhaps from a private equity firm, competitor, or strategic partner to buy your business at what looks like a good price? Maybe you haven't thought about selling yet, but the thought intrigues you.

Is it the right time to sell? It's been said that a good time to sell your business is when you have a buyer, and a better time is when you have two buyers. Not all business owners have that luxury.

Have you just started a new sales initiative that may take two years but will result in a much higher company valuation? Are you just about to close a big contract that will improve revenues for the next five years? Could you improve value by cleaning up some issues with the business that might take a year or two? These factors might mean you want to postpone the sale. On the other hand, if you postpone the sale, the market may have reduced the EBITDA multiple it's willing to give your business, so your overall valuation may be lower when you want to sell.

What is your Next Act? Are you ready to retire? Do you want to move to the Bahamas and buy a sailboat? Or do you have a great idea for a new business, and you want to sell this one to finance your Next Act?

Do you want to hand your business down to your children? Many family businesses are handed down from one generation to the next. If this is your goal, you'd want to consider if the next generation is really interested in running the business or not. Do they have the skills and experience they need? What do you need to do to prepare them in order to pass the business on successfully? Succession planning is a big topic that is outside the scope of this article. Consider your goals, options and the timing of the sale. Talk with your board members and other owners. For many business owners, a discussion with a spouse is critical. Review your goals. Do some soul-searching. Then make your decision.

Step 2. Understand the Process.

The process of selling a business is pretty straightforward, though the sale of each business will have its unique aspects. The typical business sale process goes like this:

Initial Discussions between the seller and one or more proposed buyers, leading to a *Term Sheet or Letter of Intent*, that will lay out the basic terms and conditions of the deal; followed by the *Due Diligence Period,* when the buyer and seller will exchange requested due diligence documents and other items, collect and analyze this due diligence information, and assess risks and issues it raises.

Negotiations will be conducted, usually in parallel with the due diligence process. Depending on the complexity of the transaction and other factors, there may be several rounds of negotiations between the term sheet and the purchase agreement.

Negotiations will lead to a *Purchase Agreement*. A draft purchase agreement may be circulated during the Due Diligence Period. When all terms and details are agreed, the purchase agreement is completed and signed. In small acquisitions, the signing of the purchase agreement and the closing of the deal may be simultaneous. In more complicated acquisitions, the purchase agreement provides for signing on one date, creating a binding agreement that is subject to closing at a future date, when a list of agreed conditions, including obtaining financing, is satisfied.

Pre-Closing Discussions usually occur

after signing the Purchase Agreement, but before closing. This stage is typically when problems involving last-minute discoveries, the closing conditions and financing are discussed and resolved. This is also the time the Transition Plan can be prepared (see Step 8), and a good time to announce the deal to your employees and other stakeholders (see Step 6).

Closing. Once all the closing conditions are met, the transaction closes.

Post-Closing. There may be post-closing obligations, such as completing transfers of assets, managing post-closing obligations under service agreements, collecting receivables, determining and paying amounts due under an earn-out provision, etc.

This process is usually heavily document-driven, as the goal is a signed purchase agreement and related contracts that cover all the terms and contingencies. Your attorney will typically coordinate the process, working with your management and other professional team members to document and close the transaction. Be patient, and take your lead from your attorney and professional team.

Step 3. Planning. Lots of it.

Exit planning involves many factors. Once you decide to sell, you'll want to prepare a plan as to the business issues involved in the sale, and the impact on your personal life.

Who Is Your Buyer? There is likely only a limited number of serious buyer candidates for your business, and you likely know many of them. If you are looking for a buyer, how do you find a good one? For a company valued at over $5,000,000, a private equity firm may be a good candidate. For smaller companies, buyer candidates may include business competitors, strategic partners, strategic investors, key vendors or customers, or your management group. If you can identify these buyers, you can plan how to best to approach them. You may want to engage an investment banker to market your company to a group of qualified buyers.

If you have received an offer to buy your company, what do you know about the buyer? Some preliminary due diligence on the buyer can save you time and troubles later on.

"Soft" Qualifications. Many sellers add "soft" qualifications for their buyers, such as a buyer who will continue the seller's commitments of quality and service to customers, treatment of employees and stakeholders, commitment to charity, or other important aspect of the seller's business culture. Some sellers don't care about the character of the buyer, so long as the price is right. Each seller must make their own decision as to which, if any, "soft" qualifications are important.

Assemble your Professional Team. Select your team of experienced professionals. Establish a plan for how your team will work together efficiently. Your team should include:

Attorney. The sales planning process involves a wide range of legal issues. You'll need an attorney with experience in business acquisitions to help you.

Investment Banker. An investment banker can be critical to the sale of a business. For some small businesses, owners may be tempted to sell the business themselves to save the fees. Consider the advantages of an investment banker before deciding to sell the business yourself.

Accountant. You'll also need an accountant with experience in the accounting and tax issues of selling a business.

Valuation Expert. If you don't hire an investment banker, you'll likely need an independent valuation expert.

Estate Planning. Selling your business may be the biggest financial event of your life. You'll want to minimize your personal tax exposure. If you don't have a formal estate plan, now is the time to create one.

Financial Advisor. With luck, you'll have a lot of cash after closing. A financial advisor can help you plan how to invest the proceeds of the sale to meet your personal financial goals. If you don't have a financial advisor, find a good one now.

Communications Planning. You'll want to plan your communications strategy for your employees and customers, at least. This is described in greater detail in Step 6.

Plan to Allocate Management Time and Resources. The sale of the business will take a lot of time and attention from management, possible for an extended period of time. These same managers will be needed to keep the business operating. These conflicting demands can be balanced with some advance planning.

Create a Sense of Urgency and Competition. A sense of urgency can increase the purchase price and move the sale more quickly. A drawn-out sales process can lead to a lower purchase price, or failure to close the deal. Anecdotal evidence from many acquisition professionals indicates that as the sales process becomes longer, the chances of a successful closing are reduced.

Step 4. Clean Up Your Act.

Due Diligence. Perform an internal due diligence review. This includes business, legal and accounting due diligence. Assemble all your legal documents and all your financial statements. This will help define problem areas, and help you focus on how to resolve them. Pay special attention to due diligence issues affecting key vendors and suppliers, strategic partners, key contracts and key intangible assets, such as intellectual property. This internal due diligence review is done in advance of the Due Diligence Period discussed in Step 2. During the Due Diligence Period, the buyer will perform their own rigorous due diligence review. They'll want to talk to your vendors, customers, and strategic partners. Doing an internal review in advance of the Due Diligence Period allows you to preview what the buyer will see. It also gives you time to prepare for the inevitable buyer's due diligence request.

Clean Up Your Financial Statements. The buyer will scrutinize your financial statements to analyze the financial performance of your company over time. Be sure your financials are cleaned up before the buyer requests them at the Due Diligence Period. Consult with your professional advisors as to what financial information the buyer will request, so you can be prepared.

Clean House. Your due diligence review will likely unearth some problem issues, such as contract disputes, a threatened or pending lawsuit, corporate law problems, a regulatory compliance issue, or employee problems. Take the time and spend the money to settle these issues, so as not to jeopardize a sale.

Get Out In Front of Problems. If there are problems you can't fix, be sure to tell the buyer about them early on, before the buyer finds them for him or herself. Failure to disclose important business problems will at least undermine your credibility with the buyer, and may kill your deal.

Consider Improving your Value. Improved company value usually (but not always) equates to a higher purchase price. Improving the value may include many things. It may be as simple as resolving the problems you found during your due diligence clean-up. It may also mean making some overdue cuts in personnel, overhead, or other expense items.
Be aware, however, that some spending cuts may increase EBITDA, but actually reduce the valuation. Similarly, postponing the sale to increase revenue may not increase the overall valuation. More on this in Step 5.

Remember to assess owner compensation from a buyer's point of view. Many privately-held businesses have owner perks, such as cars, airplanes, club memberships, travel perks, etc. Consider reducing or removing these items in advance of the sale. You don't want to have to explain to the buyer how these items can be added back into cash flow.

Your Second Decision Point. After performing the due diligence review and cleaning house, you have a chance to review your decision to sell. You may decide, after this review and cleanup, that you'd rather keep your business, and implement some new initiatives, and perhaps sell in the future. That decision in itself might be the best result from going through this process.

Step 5. Manage the Terms.

If you can manage the terms of the sale, you will be able to better control the outcome. If you're using an investment banker, one of their important functions is to manage the terms. Otherwise, your transaction attorney typically will perform this function.

Early in the sales process a term sheet or letter of intent will be prepared and circulated, listing the price and terms, as the initial negotiating document. Critical terms include:

Price. Probably the single biggest reason that sales of businesses fail is that the sellers have an unrealistic view of the value of their business, and thus an unrealistic expectation of the purchase price.
One common way to determine the value of your business is to multiply the EBITDA times the current industry multiple. EBITDA means "Earnings before Interest, Taxes, Depreciation and Amortization." Each industry has a range of commonly used multiples. For example, in one industry the current accepted multiples may be 2-3, whereas in another industry the current accepted multiples are 8-9. If your company has an EBITDA of $1,000,000, and your industry multiple is 8-9, your company valuation will likely be in the range of $8,000,000 – $9,000,000. "Likely" is the operative word, as calculations of EBITDA and choice of multiple are often subject to discussion and negotiation.

Some sellers may be tempted to make cuts in critical spending areas, such as advertising or key personnel, to increase EBITDA, with the idea that increased EBITDA will result in a higher valuation, at least short-term. An experienced buyer will realize that these items must be added back to make the business viable, and thus will propose a reduced EBITDA number.

The accepted multiples in the market change over time. Currently the market values companies relatively highly, with relatively high multiples. So a seller who wants to wait for a year to sell the business, hoping he or she can increase EBITDA in that time, may find that the multiples have dropped when it is time to sell. For this reason, postponing the sale and working to increase EBITDA may, or may not, result in an overall purchase price increase.

Business valuation is a complex subject, and is outside the scope of this article. It is also outside the expertise of many accountants. It's a good idea to consult with an investment banker or other valuation expert well in advance of beginning any price negotiations.

Structure. Sales of companies are generally structured as either (i) stock (or LLC interests in the case of an LLC) sales, or (ii) asset sales. The structure of the transaction is a critical issue. Consult with your attorneys and accountants before agreeing on the structure.
Stock Sale. In a stock sale, the buyer purchases all (or a controlling interest) of the stock (or other equity). Sellers may prefer stock sales, for a number of corporate, contract and tax reasons.
Asset Sale. In an asset sale, the buyer buys specific assets and assumes specific liabilities, with the seller retaining the "unwanted" assets and liabilities. Many buyers prefer asset purchases, as they may allow for reduced exposure to unknown liabilities. Key contracts may not be assignable in an asset sale, however, so the contracts must be reviewed carefully.
*Tax Treatment***.** A stock sale is basically taxed at

one level, i.e. the seller pays tax on the gain on the sale of the stock. An asset sale is taxed at two levels: the gain on the sale of assets is taxed to the company, and the distribution of the cash to the shareholders is taxed to the shareholders. How asset sales are taxed to the company depends on the type of assets, whether they qualify for capital gains or ordinary income treatment, depreciation recapture, and other factors.

Merger. A merger is a legal combining of two companies into one company. In a simple merger, Company A (the acquirer) will issue shares of its stock to Company T (the target). The former T shareholders become A shareholders. T is merged into A, meaning all of the assets and liabilities of T are transferred into A, and T disappears as a separate legal entity. Mergers have advantages and complexities that are outside the scope of this article. Mergers can be advantageous to selling owners, particularly if they are structured as a tax-free reorganization, and the stock the owners receive is publicly traded and can easily be sold for cash. Discuss with your attorney if a merger might be the right structure for your situation.

Other Terms. Some other important terms that should be considered in your term sheet or letter of intent include:

Non-Disclosure Agreements. Before you send material information about your business to a potential purchaser, they should sign a non-disclosure agreement to protect your information.

Deposit. The seller will want a deposit paid into an escrow or similar account. A typical deposit might be between 10% and 25% of the purchase price. The conditions of the return of the deposit if the sale doesn't close are subject to negotiation.

Seller-Retained Assets and Liabilities. The buyer may want the seller to retain specific assets and liabilities. The seller will want to retain his or her personal property, and may want to retain the cash in bank accounts or other company assets. These items should be spelled out in detail to avoid dispute.

Licenses and Permits. The buyer will want to be sure that licenses and permits stay in effect in the new business. This may require consents of licensors, etc. which should be delivered at closing. If a change of ownership requires new licenses, whether that is done at closing or post-closing is a matter for negotiation.

Key Contracts. The buyer will want to be sure key contracts stay in place. A change of ownership may terminate contracts automatically without the consent of the contracting party, in which case the consent should be delivered at closing.

Purchase Price Adjustments. In certain cases, it may be appropriate to adjust the purchase price post-closing.

Earn-Out. An earn-out can bridge the gap between the seller's asking price, and the amount the buyer is willing to pay. Basically, in an earn-out, the buyer says, "I'll pay the extra $X you want, if the business does what you say it will." In an earn-out, the buyer pays a certain amount at closing, and agrees to pay more over time if certain financial projections are achieved or other conditions are met. The extra amount may be a fixed amount, or may be subject to a formula based on earnings or other factors. Pay careful attention to the details of any earn-out clause. An earn-out adds risk to the seller, but may be necessary to close the deal.

Closing Financial Statements. The buyer will typically want to see financial statements as of the closing date, to confirm that there has been no reduction in assets, and no unexpected liabilities, between the date the purchase agreement was signed and the closing date.

No-Shop Clause. The buyer will want the seller to agree not to sell, or even discuss sale, of the business with any third party until the closing has occurred.

Announcements. Typically, there will be clause that neither party can make a public announcement about the deal without the consent of the other.

Indemnification. Buyers typically ask for Seller indemnification of key representations, warranties and liabilities. The buyer may want to withhold a portion of the purchase price for a period of time to be held as a reserve to cover indemnified claims. The seller will want to negotiate limitations and a "cap" on the indemnification obligations.

*Resignations***.** The exiting owner(s) who serve as employees, officers and directors, and any others designated by the buyer, will resign from their positions effective as of closing.

Step 6. Communicate with your Employees, Customers and Other Stakeholders

Managing communication with your employees about the sales process is critical. You want to keep morale and productivity high, avoid key employees from leaving, and prepare the team for the ownership transition. When should you tell your employees about the proposed purchase?

Management. Key management will play an important role in the planning and due diligence, as well as running the business during the acquisition process. They will have to do extra work and put up with more stress. So you'd want to bring them in early in the process. Management will generally be concerned with at least two things:

(i) Will They Stay or Go? You may already have had discussions with the buyer to determine which managers the buyer wants to retain, and which if any the buyer plans to replace. If you know that, this is a time to negotiate long-term employment contracts with the ones who will stay, subject to buyer approval, to keep them in place. If no decision has been made yet, you can offer management a "stay" bonus at closing, to keep them motivated and keep them from leaving to work for competitors.

(ii) Can They Offer to Buy the Company? This is more complicated. Managers can be a good buyer, as they know the business and are already invested in it. A management buyout is a classic exit strategy, with its own special issues. If, on the other hand, your managers are bidding against the buyer, they

may find themselves in a conflict of interest. Before committing to offer your managers the chance to buy the company, it's a good idea to see if they as a group can qualify for the necessary purchase financing.

Employees. How much, and when, you tell other employees depends on your company culture. If you have a culture of transparency, your instinct will be to tell them early. If you do, be ready to deal with employee nervousness, possible overreaction, and lack of productivity as their focus is diverted during a potentially long sales process. If employees don't like the buyer, they may try to derail the deal. If the deal doesn't close, you may have demoralized employees, and have to do a lot of work to rebuild trust. For these reasons, management may choose not to tell employees about the deal until it is firm, and the company is ready to announce the deal to the world. Keeping the deal secret can be difficult to do, particularly if there are on-site due diligence visits from the buyer, repeated meetings with management, and other activities the employees see as unusual. In any case, treat the employees well, be careful, and be ready to handle any leaks.

Impact on Employee Agreements. Consider any employment agreements, stock option plans, or other documents that provide for acceleration of stock vesting or other benefits on a sale of the company. Employees with stock options or other benefits will want to know the impact of the sale on their positions.

Customers and Other Stakeholders. You'll want to have a strategy for telling your key customers and other important stakeholders. You may want to approach key stakeholders in advance to get their buy-in; but consider the downside if the deal doesn't close. You may decide to tailor the strategy for each stakeholder. Proceed carefully and be prepared to handle leaks and negative reactions.

Step 7. Seller Financing

The failure of the buyer to get the necessary financing is perhaps the second most important reason acquisitions don't close. Financing is the buyer's problem, right? Yes … until the buyer asks for some seller financing.

Estimates are that about 50% of all acquisitions of businesses with an enterprise value of less than $25,000,000 require some form of seller financing. The reason? It may be difficult to get bank financing for an acquisition of a business with relatively small annual revenues. The lending bank may be unwilling to lend the full purchase price, which means you'll either need new equity, a third-party subordinated debt lender, or the seller will need to finance the shortfall.

Seller financing usually involves the seller "carrying" all or part of the purchase price through a promissory note with the company, so the company pays the note to the seller over a period of time. The note may be interest only, or may require amortized payments of both principal and interest, depending on the circumstances. The note may have provisions for pre-payments or additional payments if certain revenue levels are met. The seller may retain a portion of the company stock subject to a mandatory purchase at some future date.

The seller will need to coordinate with any bank lender as to the relative priority and collateral of the seller carry-back financing. The seller financing note will almost certainly be subordinated to bank debt, which causes additional risk and may result in payment delay for the seller. Seller retention of an equity interest will likely disqualify the buyer from SBA loans.

All of these issues aside, the seller runs the risk that the buyer can run the business and pay the seller financing on schedule. Good drafting of the contract and note provisions is critical. Perhaps even more important is that the seller have the trust and confidence in the buyer's ability to operate the business.

Step 8. Plan and Manage the Transition

The buyer wants to have a smooth transition of the business from the old owner to the buyer, with minimal disruption in sales. The buyer may want to keep the entire management team, or only certain key managers. The buyer may want to retain the exiting owner for a period of time, to train a new management team and to help transition the existing customers to the new management team. The seller may be particularly motivated to help with the transition if an earn-out is involved.

It's a good idea for the buyer and seller, working together, to establish a Transition Plan in advance of closing. This is often prepared during the period between signing the Purchase Agreement and closing the transaction. Share it with management and employees, at the right time, so that they know what to expect. Establish a Transition Committee to manage the Transition Plan after the closing.

Step 9. Don't Scrimp on Professional Advisors.

The sale of your business may be the most important event in your business life. Treat it with the care it deserves. For many small businesses, the attorneys and accountants they use for daily work are not experienced in business sales. Assemble a good team of transaction attorneys, investment bankers, and accountants who have a track record in selling businesses.

Once you hire your team, use them to your advantage. Take the time and effort to bring your professional advisors in early to help you plan. Refrain from communicating term sheets or proposals of any kind to potential buyers, or communicating with employees, before you've consulted with your team. Be sure to keep your team fully informed of all material information regarding your company and your business. Let them help you get the best result in the sale of your business.

Personal Observations: The Human Factor

In addition to the nine steps discussed above, be alert for personality dynamics that can break a deal.

In my practice, I've handled many business mergers and acquisitions. Most were successful. Some failed. In every transaction, we encountered problems in most, if not all, of the nine steps discussed in this article. That's just part of business. Generally, we were able to get people to communicate, work through issues rationally, be realistic, and come to an agreement.

There are a few common reasons the other transactions failed. First, there are "concrete" reasons. These include;

(i) An unrealistic purchase price;
(ii) After the due diligence review, the buyer decides the target business won't fit the buyer's business plan or goals;
(iii) The due diligence review uncovers problems that are either expensive, hard to fix, or both; or
(iv) the buyer fails to get the necessary financing.

Another reason for failure is more amorphous. It's the "human factor." Sometimes the seller or buyer had second thoughts during the process, for reasons unrelated to the "concrete" reasons discussed above. Sometimes it's fatigue. After extended talks, parties get tired of arguing, or get angry with each other. Maybe one party's risk tolerance is too low, the fear factor is too high, and the nerves are too on edge to come to an agreement.

Greed is a great deal killer. If one party tries to negotiate the last dollar out of the purchase price, it can break the other party's patience. Or senior executives disrupt the deal because they don't like the terms of the contracts they are offered to stay with the company. Or there is someone whose consent is needed for the deal to close, who holds out until the last minute, hoping to be paid more money to get their consent.

Pride, too, is a good deal killer. Good business owners put a lot of their time, energy, blood, sweat and tears into their business, and are justifiably proud of their accomplishments. But sometimes business owners allow a bruised ego to bring the deal to a halt. In one case, the deal breaker was that the buyer wouldn't agree to the seller's requirements for handling a particular aspect of the business in the future.

There are ways to deal with the "human factor." An important way is developing a level of trust. This requires good communications. Getting all the important terms out on the table, and being open and forthcoming with disclosure, is critical. Trust breaks down quickly if one party appears to be hiding problems or bad news, or seems to have a hidden agenda.

Sometimes an apparently unreasonable demand is a sign of confusion. Sometimes it is a mask for a "real" issue that hasn't been stated yet. It can require people skills and finesse to figure out what the confusion or "real" issue is, and address it directly. This requires people skills and finesse. Patience and empathy are good tools to use to find the "real" issue.

Keep the "hotheads" out of the negotiations, and choose the "cool heads" to do the talking. Let your attorneys handle most of the negotiations. Attorneys deal with big egos and hidden agendas all the time, and can generally keep a cool head in the process. Sometimes the principals need someone to blame to save face in negotiations.

Attorneys are used to getting blamed; it's one of the reasons we get paid the big bucks.

Putting It All Together

This article covers several of the most important issues in selling your business. Each business is unique, and each seller and buyer have their own special needs and concerns. So each acquisition will be different.

The acquisition process requires planning. It is highly detailed and document-driven. It requires balancing a range of issues, from valuation and financing, to risk allocation and communication.

Ultimately the balance must accommodate the real needs of both buyer and seller, as well as the requirements of the lender and other financiers. All of this balance has to be captured and documented, then brought through to closing, and sometimes beyond.

If you follow these nine steps, and are alert to the "human factor," the sale of your business should be successful.

You can then turn your focus and business acumen to starting up your Next Act. Or move to the Bahamas and buy that sailboat…

WORKING WITH OUR COMMUNITY

From our attendance of the "Celebrando Latinas" Conference (08/06) in support of our clients and friends, to our participation at the San Diego Inventors Annual Competition and Forum at Coleman University (08/11), from the Small Business Development Center workshops to SD Small Business Expo 2016 (08/25). We believe in our community and we invest our time in what we believe. Please contact us at mail@noli-ipsolutions.com, if you want to know how we can help your business grow.