It's Time to Rethink
The Lawyer's Role in Dealmaking

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Many lawyers no longer add real value to dealmaking. That's perhaps a startling and somewhat harsh allegation—especially from a couple of M&A lawyers—but we're afraid it's true. Let us explain…

Although the investment banks, private equity players, and M&A boutiques have kept pace with the fundamental technological and corporate governance changes in dealmaking, most deal lawyers have played the game in form but not in substance. Most of us are doing things much the same way we did back in the days when M&A was a decidedly more genteel affair.

Look at all the representations, closing certificates, and due diligence documents prepared for the banks that wrote more than $6 billion in checks to get out of the Enron securities class actions—and don't forget all that carefully worded "we-never-depart-from-it" indemnity boilerplate. Those documents really didn't come in handy at all. Think about it—there was very little in what the deal lawyers did that ultimately protected the secondary defendants in the Enron class action cases.

Plainly, merger papers for public company deals have become the intellectual equivalents of deeds in a real estate deal. Half of the words merely repeat what has been said somewhere else. Really now, has anything bad ever happened because all the Form 5500s weren't filed? Half of the remaining paperwork is boilerplate, leaving only a handful of provisions that are important: the money, closing, social, and fiduciary provisions.

COME TO TERMS WITH THE NEW REALITIES OF DEALMAKING

Our corner of the profession must come to terms with the new realities of dealmaking. We've got to see that the deal documents themselves are no longer the primary focus. The basic forms of merger, divestiture, and similar transaction documents haven't changed in decades. Once the absolute domain of the big law firms, deal document creation has become a decidedly commoditized process. Deal documentation thus can be done just as easily from Nebraska as from New York. The Internet has made this so—"flattening the world," in Tom Friedman's words. So while the process of documenting deals has remained unchanged, the business world these documents describe has been turned upside-down. Today, the emphasis is on risk, and the language of risk is a language in which deal lawyers must become fluent. That is where we can, and should, best add value.

In not many years, M&A activity has gone from a focus on arcane drafting points, legal opinions, good standing, and incumbency certificates—a sort of capital markets high tea—to the boardroom equivalent of a NASCAR race, bump-drafting and all. Beginning with the rash of hostile takeover bids in the 1980s, M&A timelines have been squeezed from months to weeks. They have been pressed further as the Internet (again, the catalyst) has aggravated the risk of leaks; Wall Street has tuned into deal dynamics; private equity and hedge funds have swarmed the stage, and the risks of losing a bid at the last moment have escalated as competition has soared.

RETHINK OUR VALUE PROPOSITION AS DEAL DOERS

The upshot is that we have to rethink our value proposition as deal doers—ultimately changing what we do and how we do it. Let's highlight a few of the areas that need an overhaul.

We'll start with some of the silly stuff. The way golden parachutes are drafted today misses the changes in the last decade. They're written as if the main risk were the hostile cash tender offer. Those deals still happen, of course, but the real risks today are much more varied and parachutes often don't work at all in private equity deals. And poison pills, once such effective repellents against raiders? Well, they no longer subdue today's greatest risk—hedge funds—unless they are radically redesigned (as we did in a recent deal by recommending a pill with a five percent ownership trigger).

REASSESS OUR ROLES REGARDING CORE GOVERNANCE

We've also got to reassess our roles regarding the core governance processes. Board members are under enormous pressure to demonstrate not only that they act expeditiously, but that they act with "such level of care as a reasonable person would have exercised in similar circumstances." So it's incumbent on us as legal advisors to develop a board deliberative process sufficient for the directors to satisfy their legal duties—and to feel they had sufficient information to make reasonable decisions within today's tight M&A timelines.

And what about due diligence? Has anyone ever really had a problem over whether they were in "good standing" in a particular state? Then there are the "due diligence" representations requiring lists of customer contracts, benefit plans, leases, and the like. They should be relegated to where they belong: the due diligence process. Likewise, the repetitive "specialist reps"—including their redefined terms—ought to be jettisoned.

TAKE A PAGE FROM THE PRIVATE EQUITY PLAYBOOK

Rather than staying mired in the world of cookbook dealmaking, we need to take a page from the private equity playbook. Our clients need to assess risk. They don't want or need summaries of pending litigation; that doesn't help them. They do need seasoned litigators knowledgeable about the pending or threatened cases to estimate, fairly, the dollar cost either of settlement or of taking the case to trial. They need regulatory lawyers who can give them real insight into where the laws are going, not where they have been. They need labor lawyers who can assess the potential competitive import of a neutrality clause in a union contract in the context of an exit. In short, the private equity players and corporates alike need globalized, trans-jurisdictional insight with real substance—not paper. And the dealmakers who understand that the real value they add is in mobilizing and managing multidisciplinary risk assessment teams, not in shuffling reams of paper, will be the dealmakers who provide the greatest service to their clients.

CLEAR THE WAY FOR THE STUFF THAT'S REALLY IMPORTANT

In sum, we think of it this way: The old legal rituals should not be permitted to obscure actual thinking and foresight. We need to clear the way for the stuff that's really important.

At Jones Day, we have started moving in this direction already. We are spearheading an initiative to rethink deal documentation fundamentally, and we intend to invite other leading firms to join our effort. Our goal is to come up with an entirely new documentation regime—a regime that builds on the realities of today's environment and requires that people think through what clients really need. Our goal is to come up with standardized base documents, and common language, that can be used in any transaction, whether it's a merger, a loan, or a capital markets event. That way, we'll free ourselves to think about the business purpose of a deal, rather than its paper trail.

And by doing so, we will completely deconstruct what it is we do. We will reevaluate how we should staff our deals, what expertise our firms really need, how we serve our clients, and how we bill for our services. By rigorously rethinking our current role in deals, we will set in motion a process by which we ultimately will rethink entirely the composition of our M&A team; work to develop highly specialized documents, due diligence, and support groups; and even rethink our training, promotion, and demographic requirements for the long term.

We don't purport to have all the answers, of course, or even necessarily to know all the questions to ask, but we're making a start. It's the least we can do if we expect to contribute meaningfully to the deals of tomorrow. We can drive the market, or we can let the market drive us. We know in which position we'd rather be. Do you?

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