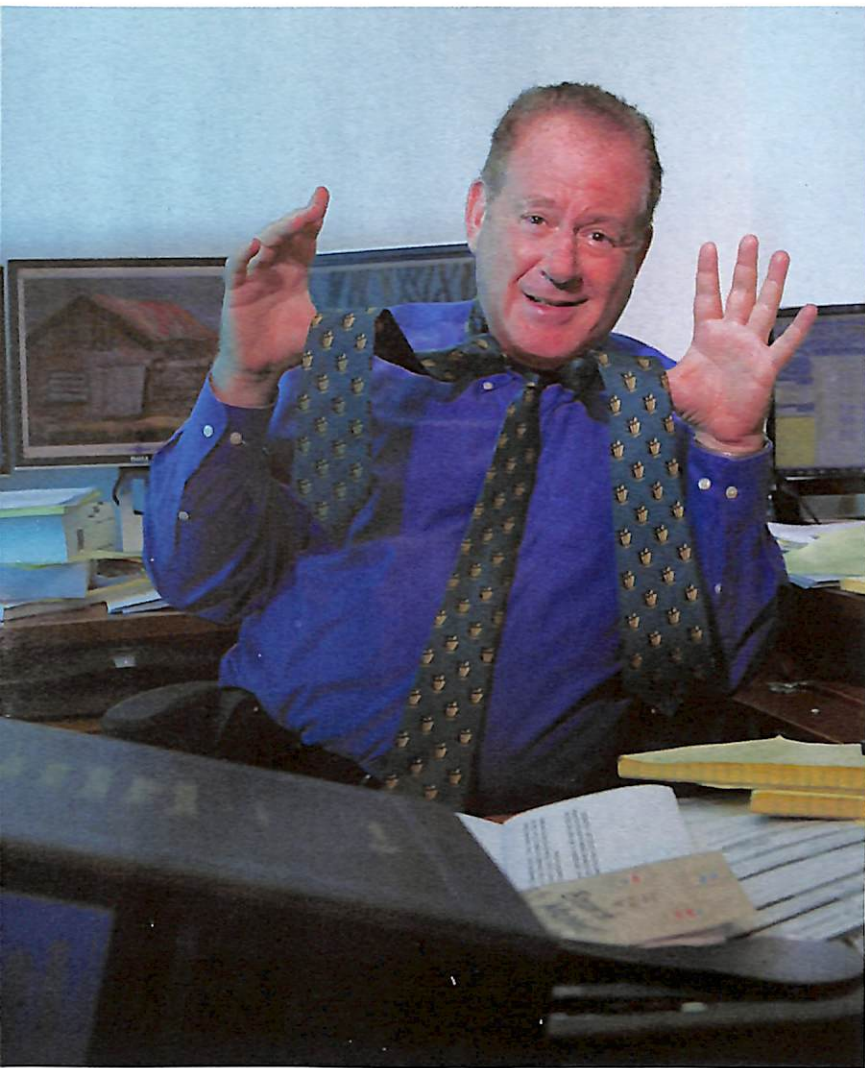


Making Deals at the Speed of Light

By Joshua Stein



Why is Joshua Stein wearing three ties in this photo? He ordered 500 ties from China, all with his law firm's logo. Although he's now given most of them away to clients and friends, he still has a few dozen for his own use. It's the only tie he ever wears, except when he wears three for the Mann Report's photographer.

"Just this one time we are really in a hurry." There's another bidder. Or it's the end of the quarter. Or someone is leaving town. Or someone, maybe an unreasonable third party calling the shots, announced a deadline. Or an approval is about to expire. Or it's crunch time to meet a tax-free exchange deadline because someone didn't pay enough attention earlier. Or in some other way we've already lost a month and now it's really got to get done quickly. Or the other side is just crazy.

Every time we face an extreme deadline, we meet it. So the next deadline is even shorter. In a frenetic market like today's, every buyer negotiating a purchase or developer negotiating a ground lease wants to show how fast they are—whether to beat out the competition, to show how committed they are or for some other reason (see above)—so they move heaven and earth to set an "aggressive" timeline and then "manage expectations" to meet the timeline.

Real estate players do this even if it requires cutting corners, making "the team" work all night, distributing documents before they're ready, or having emergency conference calls that are technological ordeals because of the limits of cellphones, VOIP and speakerphones. We accept this frenzy and nonstop urgency as just an inevitable part of modern dealmaking. It's just how we do business.

Often a transaction starts with a very ambitious deadline based perhaps on someone's reason du jour for "very aggressive timing." Before long, the players recognize the transaction will take the time it takes. You can move all the heaven and all the earth you want. But a complex transaction with lots of moving pieces, players and conservative lenders just takes time. In these cases, the sooner the parties accept that, the more cost-efficient and time-efficient the transaction will actually be. And it will probably still get closed.

Sometimes an emergency transaction does close on an emergency schedule. Then before too long, the parties find some problem in the intricate documents negotiated in the middle of the night. In the case of a

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ground lease, they will have to live with the issue for, e.g., 99 years unless the other side decides to help fix it. As a practical matter, the other side often will cooperate, because it's a round world, but it's better not to have to find out.

Can we reasonably expect deals to slow down? Not really, at least as long as our markets are full of people looking for deals and willing to do whatever it takes to get those deals under contract and then closed. Technology lets us move ever faster, so the market expects everyone to move ever faster. That's life in deal-land. So what can real estate players do to better manage deals at the speed of light? Here are a few suggestions.

Try to keep it simple when possible. We lawyers tend to take small issues and small elements of deal structures and inflate them into convoluted edifices of creative drafting and special measures. They might represent 1% of the practical value of the deal but end up consuming 50% of the brainpower and negotiating effort. Along the way they create exquisitely complex issues that require further explanation, analysis and consideration by all concerned. Often these pearls of complexity arise from grains of sand that one could remove from the deal simply by paying money. It's often worth doing just that.

Try to focus negotiations on things that matter. In the case of loan documents, this primarily means the nonrecourse carveouts—the circumstances that make the borrower's principals personally obligated to repay the loan; the pricing (typically requiring only minor attention in the grand scheme of things in the world of loan documents); and the borrower's practical ability to go ahead with its actual plans for the property as opposed to dealing with complex hypothetical eventualities such as partial condemnation.

Try to work with the same counterparties for multiple deals. The first deal with a new counterparty is often clunky. It's way more work and less graceful than the second or third deal. That applies not only to deal counterparties but also to consultants and professionals like lawyers and environmental consultants.

Try to get to what the issues are. Identify them and resolve them. The longer they fester the longer it's going to take to close. If you leave them to the lawyers, they are often unreasonably likely to fester. If you ask the lawyers to resolve issues that have monetary or significant risk implications, it probably won't happen. So make decisions, trade horses, and move on.

Have someone run the transaction, keeping the pieces moving and making sure that as problems arise, someone owns them and handles them. This person can be a lawyer, if they know how their principals think and can play a managerial role in making

decisions, as opposed to always taking whatever path is the safest and most conservative.

Plan ahead. If you see an "emergency" transaction coming up, identify long lead time items and try to get them started early, even before the actual "emergency" begins. For example, one can easily order title updates and other searches in advance, or even form entities, ideally with generic names so they will work for other transactions instead if this one doesn't materialize.

As counterintuitive as it may sound, sometimes the best way to move the deal forward is to call a meeting—a real in person meeting with everyone in one room pursuing discussions to resolution. It can beat volleys of emails, tedious daily conference calls and endless distributions of documents and redlines. Meetings work best to either "kick off" a deal or only once the parties are far enough down the road to have identified all the unresolved issues.

The same technology that has helped drive the current frenzy may also eventually help make it work better—and probably faster still. To be more specific, we have come to rely on email as the all-purpose communication and control mechanism for complex transactions and the documents they entail. That mechanism leads to a huge

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number of narrow and ultimately chaotic communications, which rapidly become overwhelming. We are starting to see the use of websites to organize this deluge of information and details.

So far, the best example of this has consisted of "deal rooms" for sharing documents, already commonplace for many years in any substantial transaction. Collaboration within a team has also started to find its way onto the web, at least outside the law business. It is only a matter of time before lawyers start to collaborate internally and with their clients through project management websites rather than through endless emails. And it will only be a little more time after that before opposing sides in the same transaction start doing the same thing, once someone comes up with a high quality online service targeted toward exactly that function.

Measures like these can help prevent an emergency timeline from creating a nonstop emergency and perhaps even a disaster. They may even help close deals at the speed of light without being blinded by it.

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