



THE LAWYERS ARE GETTING IN THE WAY OF THE DEAL

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When a deal takes longer or requires more effort or more iterations of redrafted documents than it probably should, we often hear that the lawyers are getting in the way of the deal. The clients want to do the deal, but the lawyers are making it impossible—either all the lawyers or sometimes just one or two or some other subset of them.

Taking blame is one of the things lawyers get paid to do. In most cases, though, the clients control the lawyers. If the clients don't like what the lawyers are doing—for example, if the lawyers are getting in the way of the deal—their clients are quite capable of solving the problem. Lawyers are not independent actors, off on their own, destroying deals. They do what their clients want them to do. And, in a remarkable number of cases, their negotiating style and approach turn out to pretty much match those of their clients.

If the clients on both sides want a deal to get done quickly and easily, but the lawyers are getting in the way, then both clients need to give their lawyers some strategic instructions. Typically those instructions will start with a request to focus on important business issues, and devote less attention to minor hypothetical eventualities that don't happen very often. That means, of course, that as a result the document might not handle those hypothetical eventualities in a perfect or perfectly favorable manner.

A client can make the decision to take that risk. In exchange for a quicker, simpler, and cheaper negotiation and closing, the client is willing to take the risk that something won't be perfect. For outside counsel, it's harder to make that decision. The outside lawyer worries that if the documents are not perfect in any way, the facts will inevitably play out in whatever way discloses the imperfection. And then the client will blame the attorney for it.

If clients are willing to live with the possibility of imperfection—and have their lawyers focus on the more important and more likely issues—they need to instruct and train counsel accordingly, and then remember those instructions when something turns out to be imperfect.

Without such instructions, an endless parade of lesser issues can distract the lawyers and, in some cases, lead to endless marginal improvements in sections that just don't matter very much.

One can look more critically at the dynamic by comparing the cost of these minor improvements against the benefit they create. That cost includes not only legal fees, but also sometimes lost income from delay in closing a favorable deal, lost staff time, and sometimes even lost deals. Endless editing of documents also creates a meaningful risk of introducing new errors and inconsistencies.

In comparison, the likely benefit of having perfect documents if some unlikely problem arises is often hard to quantify. One should discount it by its improbability of occurrence. In other words, if the lawyers spend weeks sculpting the perfect clause to deal with some hypothetical eventuality that never actually occurs in the real world, and their handiwork would save \$100,000 if the eventuality ever arose, you have to discount the \$100,000 savings by the improbability that the savings will ever become relevant. Against that you need to consider the real dollars paid now for legal fees and time lost now as a result of delay.

If one approaches issues that way, it may be somewhat easier to justify telling the lawyers to just stop. It works best if the client and counsel work together as a team on a series of transactions, so they understand how each other think and what they care about.

Whether it's a new relationship or a long-standing one, the key from the client's perspective consists of paying attention to the legal work and not just leaving it to the lawyers. Decisions about how to handle the legal work do affect risk levels in the real world, though, and hence ultimately become a business decision.

Investors new to the New York market, particularly from overseas, seem to have a particular propensity toward "leaving it to the lawyers," meaning that the clients are less likely than local players to control their counsel. In some cases, clients of this type essentially unleash counsel to do anything and everything that can possibly be done toward achieving perfection. The client in these cases may lack the comfort level necessary to tell counsel to keep issues and concerns in proportion. The result can be extraordinarily long and tedious negotiations in which even the smallest issue becomes and remains a large issue. The difficulty of such negotiations might reasonably be considered as an impediment to execution of a deal, and a reason to prefer a more practical local counterparty—if their business deal otherwise makes sense.