
M&A ATTORNEYS THE RIGHT QUESTIONS TO ASK

How much experience does the lawyer have?

To better understand the experience of a lawyer, ask how many M&A transactions they handle regularly. While education levels and the firm's prestige are important, relevant experience is most critical because M&A transactions tend to be different from routine business transactions. Also ask how many transactions they've done in your industry specifically – especially if you are in a tightly regulated industry like insurance or oil & gas.

“People pay me to make money, and you can never forget that,” said Robert Wall, a partner at Winston & Strawn. “They don't pay you to see how brilliant you are in negotiating an A+ paper. It's more important to get the transaction done rather than win every point for your side. Some points have to be negotiated away, and you focus on the stuff that's important. You don't need to be a genius. You just need to get the job done and give everybody an opportunity to profit.”

Can the lawyer represent me well in front of the opposing board of directors?

“Advising the board is one of the most important aspects of what we do. The M&A lawyer is the face of the outside firm with the board, and they need timely and thorough advice in a confident manner,” Scott Falk from Kirkland & Ellis said. “The board is key. There are going to be risks and complexities, a fork in the road where you either go forward or terminate discussions. The M&A lawyer has to get them through the impasse.”

Can they give you an estimate or range of expected fees?

Brian Kerwin of Duane Morris emphasized that, “If provided with the material facts, experienced M&A lawyers will be [able to give an estimate]. An inability to reasonably predict such fees may be indicative of an inexperienced M&A lawyer. A true test may be whether the lawyer will agree to a cap on his fees with certain specified exceptions.”

How emotional is the lawyer? Will they help you keep your cool during negotiations?

“Having your emotions under control is critical,” said Chip Mulaney, a partner at Skadden, Arps, Slate, Meagher & Flom in an article in Chicago Lawyer. “Emotions cloud people's ability to compromise, to see that a lot of issues aren't personal but simply economic. You have to keep people focused on their common interests. To do that, you can never lose your head.” Asking about experience and/or for references can offer good evidence of a lawyer's emotional stoicism.

Do they know which legal concepts to raise? Do they understand current market terms?

As Brian Kerwin of Duane Morris asked in a 2008 article, “Are they familiar with the differences between a ‘basket,’ ‘cap’ and ‘sunset’ for indemnification purposes? Anti-assignment clauses versus change-of-control provisions as to whether third-party consent is required? Should the basket be one percent or five percent of the purchase price? Should the percentage be solely off of the cash portion? Should the cap be at 20 percent of the purchase price or the purchase price itself? Is an escrow fair if there is an earnout or a seller note? Experienced M&A lawyers should know the answers to these questions.”

Does the lawyer understand the soft issues involved in the transaction – your employees and their families, pensions, benefits, etc?

“These deals affect countless employees and their families. We have to make sure they get a good deal, too, with their pensions and benefits,” explained William Kunkel of Skadden, Arps. “M&A deals are challenging, demanding and put you in the same room with major decision makers. You have to balance a lot of interests, but hopefully you can fashion a deal that satisfies everyone to a certain extent. That’s what makes our job tough.”

Are they familiar with sophisticated commercial finance agreements?

As Brian Kerwin challenged, “Do they know about subordination and intercreditor agreements? Fish or cut bait provisions? Second priority lien provisions? Where to file a UCC financing statement? The answers to these questions can sometimes mean the difference between the seller’s receiving full payment on the note or not.”

Are the partners who pitched you going to be the partners working on your deal?

Don’t hire the ‘C’ team if they pitched you the ‘A’ team. This is a particular problem for the middle market business. Most of the larger law firms are built with a pyramid structure involving few partners at the top and lots of junior associates at the bottom. The bigger the firm, the bigger the fees generated by the transaction need to be in order to keep the attention of that top partner that you spoke to in the pitch meeting. Although the junior to mid-level associate who may lead your deal is very ‘smart,’ there is no substitute for experience. Your transaction may not go as smoothly as you hoped, and your fees may ultimately be significantly higher.”

How is the team structured? Can the other issues be dealt with in-house (ERISA, taxes, IP, etc)?

“An M&A lawyer is wholly dependent on his team. You’re the point guard, but everybody has to shoot,” Mark Gerstein of Latham & Watkins explained. “At Latham, we try to spread the name recognition around. The tax lawyers, the finance, ERISA, and IP lawyers have to be top notch, and you have to have people you trust, from the associates on up.”

Are they focused on getting any deal done or the right deal done?

“First you have to master the nuts and bolts, but then you need to turn it into a broader vision and understand what the company really wants. You’re constantly looking for ways to add value to that process,” Bob Osborne of Jenner & Block said. “You have to develop a kind of empathy. As M&A lawyers, we’re trying to understand the company’s business, how it operates, how it gets things done. That enables us to be more than just technicians. We’re strategic problem solvers. Our work can be the difference between a merger’s success or its failure.”

Is my company ready to sell?

If you are selling a company, you will need to present every aspect of the company for all would-be buyers to evaluate. There are many technical legal matters that may or may not have made a difference to the company’s operations that you must now address. Failure to address these items (or at least to recognize them) ahead of time can cost you time and money and potentially result in litigation. Even as a buyer, you need an understanding of how your existing organization’s structure functions and how you want to fit in the new acquisition. Moreover, if you are planning on issuing securities to the sellers as consideration, unless you are a public company, you should expect that the sellers would want to take a close look at your company before they will close a transaction. The right legal representation will guide you through the right moves to make before you go looking for your transaction partner.

Should a deal even be done?

As Lawler explained, “nothing (outside of litigation) is worse than spending hundreds of thousands of dollars on a deal that should never have been attempted. Sometimes, the biggest value add from the timely engagement of the right lawyer is identification of deal killing issues before a client becomes committed to an ill fated transaction. A good lawyer will be very clear about whether an issue will not be able to be resolved. Your lawyer should be a problem solver, but not a ‘yes man.’”

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