Preparing for the Eventual Sale of Your Business:
Pro-Active Preparatory Steps for Success

by

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Preparing your company for a future successful sale to best capture optimal value and to keep your transactional costs modest requires *pro-active preparation*, coupled with a broad general understanding of:

(i) the pre-sale, sale, and post-sale transaction process; and

(ii) the differing roles and motivations of various participants in the process.

Through understanding and taking *pro-active preparatory steps* now, you will be prepared, both psychologically and practically on a real-world level, to make the right choices at the right time regarding if, when, and how to sell your company to capture optimal value while minimizing related transaction expenses.

Without *pro-active preparation*, success in the sale of your company is much less likely, optimal success is extremely unlikely, and the amount of your transaction expenses growing far beyond what they should be is virtually guaranteed (whether during the sale process you become clearly aware of these facts or not).

You have most of your power and time now, not when the pressure, speed, and expense of your actual sale transaction is upon you. After reading this article, and after having any questions you may have with respect to it answered, you will understand why front-loading and taking *pro-active preparatory steps now* to structure an optimal outcome for yourself with respect to the prospective future sale of your company -- *which sale event may be at least 2 to 5 years or more away* -- is and will be one of the smartest business decisions you ever make. Remember, as the adage goes, failing to plan is planning to fail.

I. Pro-active Preparation.

Pro-active preparation is you taking conscious and purposeful preparatory steps *now* -- rather than you just waiting and merely responding at a much less advantageous time -- with

respect to your company and its eventual sale, and with respect to your life and planning what you want for yourself.[1]

Over the last hundred years, and increasingly over recent decades, the lifespan of companies has been dramatically shrinking as the pace of life has quickened. The average lifespan of a family-owned business in recent times is only 24 years.[2] How many large, public, institutional blue-chip companies do you think today are still in the Dow 30 which were there 30 years ago? The answer is only 12 companies, less than half.[3] Industries and business sectors are increasingly being disrupted and forever altered as new business methods and technologies arise and are combined in novel ways, and new companies are formed both in the United States and abroad that alter the competitive landscape. Older companies adapt and change if they can, are sold, or just die and disappear, with shareholder value disappearing with them.

Sometimes a new business method or technology arrives that in just a few years erodes and virtually extinguishes the existence of an older one. An example of this phenomenon is the relatively fast demise of once popular Blu-Ray, DVD, and video rental brick and mortar stores operated by companies such as Blockbuster®. In a few short years these stores were largely driven from the marketplace, mostly due to competition from the Netflix® mail-order home movie service (i.e., the adoption by consumers of a *new business method*) and new video-on-demand online streaming media services (i.e., the adoption by consumers of a *new technology*). Blockbuster® went from its peak in 2004, with over 9,090 store locations, to only 6 years later, in 2010, having only 1,700 store locations when it filed for bankruptcy. As of November 2013, Blockbuster® was defunct.[4] Other examples of new business methods often coupled with new technology swiftly upsetting established patterns of the traditional business order abound.[5]

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[1] See generally, B. Wright, Transcendent Thought and Market Leadership 1.0: How to Lead Any Profession, Anywhere in the World, Publishing-Partners (2016).

[2] See www.businessbewareshow.com/2012/02/20/family-business/, 2012. Family businesses make up about 80-90% of all business enterprises in North America and make up about 35% of Fortune 500 companies.

[3] *See 30 Years of Dow Jones Musical Chairs*, by Income Machine, dated March 8, 2017.

[4] See *Blockbuster, LLC*, Wikipedia (https://en.www.wikipedia.org/wiki/Blockbuster_LLC), 2018.

[5] To illustrate with a small handful of examples, *Purple*,® a new online mattress company "with high tech cushioning ... at an affordable price", is disrupting "the stale [mattress] industry and turning it upside down" and "creating industry shockwaves" with its new "direct-to-consumer ecommerce model". Other industry players never thought selling a mattress online is something that would work. *Uber*® has disrupted the taxicab industry by "allowing people to push a button and have a ride sent to them". *Airbnb*® has put "a big dent in the hotel industry" by allowing owners "to rent out their homes and apartments to short term renters at low prices." See L. Alton, "How Purple, Uber and Airbnb Are Disrupting and Redefining Old Industries", April 11, 2016 (https://www.entrepreneur.com/article/273650).

For a family-owned business, sometimes the next generation is not prepared or does not have an interest in assuming the reins of operation or ownership of the family business.[6] In addition, most owners of family businesses at some point retire, and many have no succession or business continuation plans.[7]

By you being pro-active, attentive, aware, and prepared, you can best evaluate where your company stands in the mix, determine how prospects objectively look for the future, and decide what is best going forward for your business and for your "ideal life and perfect calendar" (which typically includes the lives of your heirs).[8] Well-informed thinking usually leads to wiser choices, actions, and results.

Waiting until you are in the throes of a sale transaction of your company to thoroughly think through and attempt to plan what is right for you, much less to do what is required and necessary for what you perhaps may somewhat naively think is a relatively straight-forward simple legal transaction, is often overwhelming. It can lead at best to sub-optimal results, and at worst to true disaster. Time and again business owners are shocked by the difficulty of operating their businesses in a normal manner while concurrently investing the significant additional hours of time and energy that their company sale transaction requires.[9]

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[6] Although nearly 70% of family businesses would like to pass their business on to the next generation, only 30% will be successful at transitioning to the next generation. See *Peak Family Business Survey*, 2011 (http://www.amserv.com/index.cfm/page/Family-Business-Statistics/pid/10715.html). "Only 30% of all family-owned businesses survive into the second generation. [12%] will still be viable into the third generation, with 3% of all family businesses operating at the fourth-generation level and beyond." See *Family Business Alliance*, June 2014. See also www.Businessweek.com, 2010, which reports that about 40% of U.S. family-owned businesses turn into second generation businesses, about 13% are passed down successfully to a third generation, and 3% to a fourth generation or beyond.

[7] It was estimated in 2007 that by 2017 about 40% of family business owners expect to retire, with less than half of those expecting to retire in 5 years having selected a successor. See *Mass Mutual American Family Business Survey*, 2007 (http://www.massmutual.com/mmfg/pdf/afbs.pdf). That said, in a 2007 survey it was reported that almost one-third of family business owners have no plan to ever retire. See *American Family Business Survey*, 2007. Having no succession plan, also known as a continuing business plan, means an unplanned business transition will create chaos around employees, vendors, and clients, and ultimately the potential ruining of a company that took years of effort to build. Further, although it has been reported that 95% of small business owners acknowledge the importance of succession planning, only one in eight have a written plan for business continuity. See "Family Business, Your Most Important Issue, Successfully Passing It On!", *Forbes*, 2012.

[8] Your "ideal life and perfect calendar" is you, with the help of your business mentor, articulating in an organized written plan what matters most to you, and determining what is the highest and best use of your time and resources, both now and forward into your future. Many people, unfortunately, spend so much of themselves in their businesses that they have little or no time left for the bigger picture of personal success and a balanced fulfilling life. Talking about living your dreams is not enough. It is important to have a written, workable, comprehensive plan that incorporates not only your hopes and dreams, but also the means and methods to achieve them. See B. Wright, The Wright Exit Strategy/ Wealth: How to Create It, Keep It and Use it, Preface (2nd edition, 2006).

[9] Such business sale transaction time commitments involve your regular interaction with your sale transaction professionals (assuming you have already selected them all), such as your business mentor (if you have one),

The *pro-active preparatory steps* described in this article constitute a common-sense plan of action in general, as well as in the context of the overall merger and acquisition ("M&A") transaction process. If you undertake this plan of action *now*, you will empower yourself and be both significantly better informed and better prepared to both succeed in the sale of your company, when you decide the time is right, and to live your "ideal life and perfect calendar".

II. **Barriers to Pro-Active Preparatory Success**.

For many company owners, the thought of the eventual sale of their company is akin to the thought of their own personal mortality, a thought to be avoided. In large part it is a fear of the unknown. No doubt that is why it has been reported that almost one-third of family business owners have no plan to ever retire.[10] Yet virtually every smart and experienced businessperson will acknowledge that every company is or should be available to be sold at the right price at the right time. Indeed, in addition to enriching you, the sale of your company might involve you combining your company with another company in a manner which raises the combined entity to new heights (2+2=7), with an ongoing new challenging opportunity for you in the new combined entity (if you want it).

Another related common barrier to success is rationalized procrastination; putting off to tomorrow what you can and should do today, rationalizing to yourself that it is not necessary to act today, telling yourself that you will deal with it when you must do so, and that somehow your delaying action will save you time and money. *The opposite is almost always true*. Taking *pro-active preparatory steps* now, to get your company in "*sale-order*" now, is typically much less expensive than waiting and delaying until you must act quickly, perhaps at a time not of your

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transaction lawyers, investment banker (if you have one), and accountants, not to mention you periodically interacting with your buyer (assuming your buyer has already been selected by you). Questions about your business will be many, and your sale transaction team will need your input and help, since you are the only one who truly knows about your company, its operating history, and can make important decisions with respect to it. Company-related legal and accounting documents that are incomplete or inaccurate will need to be fixed, and depending on the issue, some matters (such as tax-related matters) may be discovered that are too late to change or repair. Your buyer will be pressuring you to do what your buyer wants and will attempt to push you to move quickly. All the while, your company needs to continue its operations in a normal manner and to perform well. You must continue to run your company and hit your numbers. Any negative change can jeopardize your sale transaction. A drop in your company's financial performance, for example, or a material problem with your company's legal documents, is an invitation for your buyer to attempt to lower the sales price and/or make the deal terms less favorable to you, or to walk away from the sale transaction entirely.

A company sale transaction is the exercise of opportunism in real time, and both sides move to gain position and advantage. Deal participants frequently attempt to gain an advantage over other deal participants by moving faster than their counterparts, pressuring them and purposefully keeping them off balance, forcing them to rush to keep up so they make mistakes along the way. You need to be ready for this fast-paced, grueling, and probably for you once-in-a-lifetime incredibly important process. Most business owners only sell their company once. You can be as ready as possible to achieve optimal success by you taking *pro-active preparatory steps* now.

[10] See American Family Business Survey, 2007, and note 8 above.

choosing. As with scheduled vehicle maintenance and repair, delaying such upkeep with respect to your company is typically riskier, more expensive and time-consuming, as well as frequently much more inconvenient, than to do what you should do now for its optimal operation and your personal well-being and security.

Two very different common aspects of human nature often prevent business owners from doing what is necessary to protect their long-term self-interest: *complacency* and *fear of the unknown*.

Complacency often results from success and can put it at great risk. Complacency is the forerunner of mediocrity. Smugness or uncritical satisfaction with oneself or one's achievements should be a bright red flashing danger signal. This article is a clarion call to shrug off any complacency that you may have with respect to your business. It seeks to encourage you to take *pro-active preparatory steps* now for you to live better today and optimize your tomorrow.

Likewise, *fear of the unknown* can cause one to delay taking prudent actions to prepare for an optimal tomorrow. Admittedly, unknowns can be frightening and fraught with danger. And the future is not always clear and contains many unknowns. These unknowns, however, if properly addressed need not be paralyzing[11] and can be lessened to a manageable level. With proper

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[11] A typical seller malady, often thought to occur only post-closing, is "*seller's remorse*" – i.e., a seller's regret or guilt, an unfortunate disorder which often actually afflicts many owners of companies prior to and during their company sale transaction. It can delay the owner of a company from being prepared and truly ready for a sale transaction and can harm a sale transaction in progress insofar as it can delay prudent decision-making as well as cause the owner a significant amount of emotional anguish. Pre-closing "*seller's remorse*" is usually brought about by a lack of understanding of or preparation for the company sale transaction process and current sale market environment, and what post-sale transaction life of the seller might be. It is a type of *fear of the unknown* (i.e., what might or could be harmful that is not understood). *Pro-active preparation* usually removes for an owner any pre-closing and during-the-sale-transaction *seller's remorse*, and greatly increases the odds that any post-closing *seller's remorse* will never occur.

To illustrate, this is the story of Roy. Roy brought this author into his company's already-several-months-in-process over $50 million sale transaction because it was floundering, and there was fear it might crater. The deal was floundering in part because: (i) Roy, the company's founder and sole owner, was unprepared, (ii) the M&A transaction was being managed and handled by Roy's local lawyer, a long-time trusted friend, who had very limited M& A experience, and (iii) Roy had "seller's remorse", unsure if he wanted to proceed with the deal, given that his entire adult working life had been spent building and operating his company. Roy knew nothing else and, despite being a successful entrepreneur and having the near-term prospect of a big payday, his future seemed uncertain. Indeed, Roy asked me more than once, during moments of serious anxiety and doubt: "Man-to-man, Scott, should I do this transaction?". I explained to Roy that it was a "sellers' market", he was being paid a healthy EBITDA multiple for his company, and added that this sellers' market of window of opportunity only lasts so long. I also noted he could always later take the proceeds from his sale and go back into business again. Roy listened, his backbone stiffened, his transaction successfully closed, and Roy received over $50 million in cash and purchased a $5 million vacation home in Florida where he and his relatives all go during the holidays. Roy continued to work at his former company as a consultant. Within 12 months of the closing, however, the Great Recession occurred and closed the sellers' market window for the next several years. The value of Roy's former company went down nearly 50%, and for a time Roy spoke with me about potentially using a portion of his sale proceeds to purchase his company back (although he had no regrets about selling it, and indeed he felt very grateful he took my advice). It was a nice option

guidance and adequate lead time, and you taking *pro-active preparatory steps* now, the unknowns related to the future of your business can be minimized and contained, optimizing your odds of success in terms of significantly increasing your prospective sale transaction returns and reducing your aggregate transaction costs over time.

Only if you have the courage to think about and be ready for the inevitable can you truly be prepared to live your ideal life and perfect calendar and optimize and realize the value you have created in your company.

Through taking *pro-active preparatory steps* you will: (i) throw off the shackle of any complacency you may have, (ii) enable yourself to conquer, control and contain much of any fear you may have, and (iii) break through barriers that today may stand in your way in allowing you to be prepared to optimize success.[12]

III. Key Pro-Active Preparatory Steps.

1. Consider Selecting a Competent, Experienced M&A Lawyer or Business Mentor. Find a competent, experienced M&A lawyer or business mentor with an expertise and significant experience in both business matters in general and M&A transactions in particular.[13]

Have your M&A lawyer or your business mentor help you or find someone to help you build or update in writing your business plan (including your business succession or business continuation plan)[14] for your company now, so you can intelligently grow your company and

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to have, although Roy ultimately decided to just keep what he earned and richly deserved, living his ideal life on his perfect calendar.

[12] Selling a company is in many ways like selling a home: there are often seller emotional issues (or those of seller's family members), market-timing issues, and how best to (i) dress-up and present the home for sale in a manner to achieve its optimal sales price, and (ii) attract a number of capable buyers within a short, but appropriate, amount of time. *Pro-active preparation for success* plays a direct role in addressing these issues.

[13] This author can assist you, if you like, with recommendations for appropriate M&A lawyers or business mentors. You should strongly consider using Google® and attempt to locate the websites of the business mentors you are considering, and carefully read it and any blogs, articles, or books they may have published, to learn about their outlook and philosophy and to determine for yourself if it resonates with you and makes sense. You should interview your prospective business mentors by phone, ask questions, have them answered to your satisfaction, and if all appears good and acceptable to you, you should follow-up by arranging in-person meetings. Naturally, through references and/or referrals, you should learn from others about the actual real-world experiences and results they had with your prospective business mentors, and what thoughts they can share and offer you.

[14] A business succession or business continuation plan for a family-owned business should address the following issues, without limitation: (i) are there any special family circumstances that should be considered and addressed with respect to the future transition of the business; (ii) how is the business ownership and management going to be structured moving forward, and do the family members know the intentions of the business owner and the terms of the business succession plan; (iii) has thought been given to addressing the concerns and needs of key employees of the business, to preclude disgruntlement and potential movement to a competitor following a transition (i.e., gift to one or more heirs) or sale of the business; (iv) is it better to gift the company to the next generation or to sell the business to one or more key employees or to a third party; and (v) has thought been given to how best to account for

optimize it for greater profit and attractiveness for eventual "transition"[15] or sale. Have your M&A lawyer or business mentor recommend to you several seasoned professionals, potentially from several geographic areas (especially if you reside in a smaller city or town),[16] for you to consider meeting and comparing.

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the inheritance of a child that is not involved in the business. Clearly defined goals of the owner or owners of the business are key to the successful implementation of a succession plan. These goals and the succession plan should be sufficiently transparent to attempt to preclude future unhealthy emotions from family members and key employees, whose disappointment, resentment, or lack of alignment can undermine the prospects and value of the business moving forward. Any business succession plan should be reviewed and revised periodically, according to both changing objectives of the owner or owners of the business, as well as changing market conditions. A formal review of the succession plan should occur at least every 2 years, but ideally at least every year.

[15] "Transition" here means a gift by you of your ownership interest in your company to your heirs (who, it should be noted, may or may not later -- sometimes much sooner than you might have imagined -- voluntarily or involuntarily sell the company that you gifted them to either a one or more key employees of the company [i.e., a management buy-out] or a third-party buyer). Indeed, if you intend to gift your ownership in your company to your heirs, lack of early business succession planning and an effective estate plan by you can potentially result in material cash flow issues for your heirs, which can lead to an involuntary forced sale of your company by them at less than fair market value.

[16] *To illustrate, this is <u>the story of Jim</u>. Jim is founder and patriarch of a large family-owned company located just outside of a modest-sized city in California. Jim was convinced that the professionals he knew in this modest-sized city were as knowledgeable and capable as professionals located anywhere else. Jim's company's business mentor made a small, friendly wager with Jim that this was not necessarily the case, and encouraged Jim to consider meeting some professionals outside of Jim's local area. Jim, with the mentor's assistance, conducted a request for proposal (known in M&A parlance as a "beauty contest") and met with several professionals, both local and from outside of the local area. When the beauty contest was complete, during a follow-up lunch Jim looked across the table at his business mentor, smiled, reached out his hand, and handed his mentor the money waged. Jim conceded that across the board, for his company's needs, the professionals Jim met with outside of the local area were more knowledgeable, experienced, and superior value providers compared to those who were local. Although Jim lost his friendly wager, he learned an extremely valuable lesson: it pays to take the time to be open and make comparisons, and to consider candidates not only locally, but also outside the local area, to locate the best value providers.*

Another illustration involves <u>the story of Sam</u>. Based on a referral from Sam's business mentor, this author was invited to travel from Los Angeles to Las Vegas for a one-on-one breakfast meeting with Sam, the sole owner of an electrical components company located in Chicago that was in the process of being sold. Two private equity buyers, one in Texas and the other in New York, had together already agreed to pay Sam an aggregate of nearly $60 million for his company (subject to a satisfactory due diligence review of Sam's company's financial statements and legal documents, of course). The sale process was already 2-3 months old, things were moving slowly, and the two buyers were getting frustrated. Sam had been using his local trusted lawyer of 20 years, with whom he golfed weekly. Unfortunately, Sam's lawyer had only handled a handful of M&A transactions in his career. After speaking with me over breakfast, Sam realized how much more was involved in a sale transaction than he realized, and how much more value a broadly experienced M&A lawyer can provide, even though that lawyer is someone from the outside, located in a different city. After this author was brought into the transaction (and kept Sam's trusted local lawyer on the deal team), the deal pace greatly quickened, significant deal issues were favorably resolved, and the deal closed a few months later for $58 million dollars. In bringing this author into his deal, Sam's transaction fees increased somewhat, but he saved over $2-3 million dollars in his transaction due to deal issues this author spotted and favorably resolved, based on greater experience, that Sam's less experienced local lawyer had missed. As important, Sam successfully closed his deal.

2. Develop a Plan for Your Post-Sale Future. Determine and plan your post-sale future,[17] and build it into your business plan (including your business succession plan or business continuation plan) for your company.[18]

3. Review, Complete, and Organize Your Company's Financial Statements; Determine Financial Trends; Obtain a Valuation Appraisal; Strongly Consider Upgrading Your Company's Financials. Arrange for an informal "audit" of your company's current financial statements and those of the past several years, and determine what is needed so they are complete, current, and organized; prepare a financial trend analysis, including an objective explanation for the trend; obtain an accurate current business appraisal or valuation of your company,[19] and a realistic assessment of the "market" for your company in the event of its sale; and strongly consider potentially upgrading your company's financial statements (assuming they are not already audited financial statements),[20] which if timely upgraded will create a broader group of potential buyers (and related thereto typically a higher price for your company) at the time of your company's eventual sale.[21] Your M&A lawyer or your business mentor should be able to assist you in how best to proceed with the foregoing.

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[17] Your view of and timing with respect to your ideal post-sale life will most likely change somewhat over time as your life changes and other things outside of your control change. Consequently, you should review your written post-sale ideal life periodically to update it. As mentioned earlier in note 8, many people spend so much of themselves in their business that they have little or no time left for the bigger picture of personal success and a balanced fulfilling life.

[18] Steps 1 and 2 should ideally be undertaken together.

[19] Many CPAs are well-versed in valuing businesses and the common methods used in valuing businesses, although of course there are business valuation specialists that you can retain. Please note, however, any such valuation of your business is just a rough estimate, as the real value of your business is what an actual willing buyer will pay for it. It should also be noted that as anyone truly familiar with M&A knows, different willing buyers will typically pay different amounts based on each of their distinctive views and analysis on how your business would benefit each of them. While for some 2+2=5, for others, 2+2=7, and in an auction situation that means a higher price for your company.

[20] If your company does not have audited financial statements, you should consider locating accountants who can convert your company's financial statements into audited financial statements (or at least to a higher level of financial statement quality than your company has now). In upgrading your company's financial statements in this manner, you raise their quality and reduce the risk for others who may consider buying your company (including for their lenders), thereby usually broadening and deepening your potential buyer pool. Having more potential buyers typically drives up the purchase price for your company, thereby easily justifying the expense of upgrading your company's financial statements.

[21] In the United States there are four different "levels" of financial statement quality a company may use (and your company currently uses one of them):

1. *Internally Prepared*. Financial statements that are internally prepared are those in which a company prepares its own books and prepares its own interim and annual financial statements. Even if these statements are prepared internally by a certified public accountant ("CPA"), because these statements are internally prepared they are considered the lowest level of quality of financial statements in the hierarchy of "Generally Accepted Accounting Principles" ("GAAP"). Nearly all lenders will allow internally prepared interim financial statements.

4. Review, Complete, and Organize Your Company's Legal Documents. Arrange now for a "due diligence review" of your company's legal documents, and determine what is needed so they are complete, current, and organized.[22] Since a due diligence review and legal document "clean-up" is typically the most time-consuming and therefore most expensive part of your outside legal counsel's M&A work at the time of a sale transaction, anything and everything you do now to "perfect" your company's legal documents will save you time and money in the long run. Your M&A lawyer or your business mentor should be able to assist you regarding how best to approach handling this due diligence review of your company's legal documents.

5. Obtain Competent Tax Advice for the Optimal Structure of Your Company Today and for a Future Transition or Sales Transaction. Obtain competent tax advice now regarding the optimal tax structure for both your company today and for a future transition or sales transaction. Your M&A lawyer or your business mentor should be able to assist you in how best to systematically compare and select a best value tax service provider. Making appropriate changes to the structure of your company based on current tax laws, which have recently significantly changed, can in the long run save you and your company a significant amount of money. Many changes in company tax structure, however, often take several years to be considered legally valid and accordingly may affect the timing of your future transition or sales transaction (which is in part why early pro-active preparation for success is important). The same is true with determining

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2. *Compiled*. Compiled financial statements are prepared outside the company by a CPA based on information provided by the business client and are prepared mostly in accordance with GAAP. Not all GAAP rules are precisely followed, since a compilation normally does not include footnotes explaining deviations from GAAP. Lenders (including buyer lenders) consider complied financial statements superior to internally prepared financial statements, but not by much.

3. *Reviewed*. Reviewed financial statements involve a CPA performing a more in-depth review and understanding of the business client's financial information through inquiries and analytic procedures. The additional procedures are employed to obtain a basis for reporting whether the company's financial statements are free from any material modifications that need to be made for the statements to be in compliance with GAAP. Lenders (including buyer lenders) generally feel much more comfortable with a review than a compilation.

4. *Audited*. Audited financial statements are the highest level of financial statements that an accountant can prepare, and all companies that are publicly-held are required by law to have them. Many private companies of a decent size have audited financials as well and having them makes sense if you are considering selling your business in the next three years or so. Audited financial statements contain an "opinion" in the "Auditor's Report" as to whether the financial statements are presented in accordance with GAAP.

Generally, the higher the quality of your company's financial statements, the more potential buyers it will attract when you are ready to sell.

[22] Twenty or more years ago, undertaking a due diligence review of your company's legal documents with other than local legal counsel could be an expensive undertaking, often involving you paying for attorney travel, hotels, and meals (in addition to attorney fees, including for travel time, of course) as attorneys camped out at your company for days on end to perform their work. Today, however, with everyone using e-mail, cloud data platforms, and virtual data rooms, such a due diligence review can be performed by attorneys remotely and distance and the related expense of distance is no longer a material issue.

the ideal structure from a tax perspective for the sale of your business. Taking this step can literally eventually save you millions of dollars, and it needs to be done first, arguably before you prepare a draft front-loaded letter of intent for the potential sale of your business.

6. Discuss Your Goals for Yourself and Your Company with Its Other Owners, if Any; Consider Entering into a Legally Binding Agreement Now to Memorialize the Same. Discuss with your company's other shareholders or members, if any, your future goals for yourself and your company (including your business succession or business continuation plan) and obtain early agreement (where necessary and if possible) to effectuate your vision and plans. Your M&A lawyer or your business mentor should be able to assist you in how best to conduct these discussions, and even potentially play an active role in them with you. If you wait, the stakes will only be higher later, and the potential to get an agreement from others, without concessions from you, less likely. This step may involve entering into a formal and legally-binding signed written shareholders' agreement or buy-sell agreement now, so future potential shareholder discord cannot delay and interfere with your business succession or business continuation plans, which plans include the transition or sale of your interests in your company when you believe the time is right.

7. Build Your Legal Value Team.[23] Determine the participants on your legal value team and decide which lawyers/law firms to use for each of your specific legal needs.[24] Your M&A lawyer or your business mentor should be able to assist you in deciding how best to systematically compare and select best value legal service providers. Your *final* selection of all your future legal value team participants need not be made now; you just need to be ready and prepared *now* to be able to promptly make that decision in the future.

8. Build Your Entire M&A Transaction Value Team. Determine the probable participants on your entire M&A transaction value team (i.e., e.g., accountants, investment bankers, lawyers, wealth managers, etc.) and decide which transaction value team participants to use for each of your specific M&A sale transaction needs (even though your M&A sale transaction may be at least 2 to 5 years or more in the future). Your M&A lawyer or your business mentor should be able to assist you in how best to systematically compare and select best value service providers. Your *final* selection of your M&A transaction value team participants (i.e., your M&A lawyer, investment banker, etc.) need not be made now; you just need to be ready and prepared *now* to be able to promptly make that decision in the future.

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[23] Your "legal value team" consists of the various lawyers you will choose and use for handling various legal tasks in implementing your legal *pro-active preparatory steps* now, and potentially for the sale of your company in the future, if and when you deem it appropriate. You need to select experienced lawyers that will be most cost-effective and appropriate for you, given the size of your company and your specific needs. They may, but need not, come from the same law firm.

[24] This item and item 4 should be considered together.

9. Determine Current Marketplace Trends Regarding Your Company. Determine current marketplace trends regarding your company, such as current EBITDA multiples for companies like yours, competitive trends, current M&A market conditions for sellers, etc. This step partially, but not completely, overlaps with step 3 above. Your M&A lawyer or your business mentor should be able to assist you in how best to cost-effectively proceed with the foregoing. The results of this step 9 may also inform you, if you have a family-owned business, regarding whether you want to gift your ownership interest in the company to one or more family members or instead sell it to one or more key employees of your company or a third-party buyer.

10. Prepare Your Draft M&A Non-Disclosure Agreement and Your Draft Front-Loaded Letter of Intent for the Sale of Your Company *Now*.

a. Non-Disclosure Agreement. Have a high-quality "seller-friendly" M&A non-disclosure agreement ("NDA") ready to use.[25] An NDA is usually the first document negotiated and executed between seller and potential buyers. You never know when a prospective buyer may send its NDA to you,[26] and if you are potentially interested and decide to move forward with a discussion and evaluation of any kind, you ideally want to use your NDA, not the buyer's

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[25] There are many "flavors" of NDAs (sometimes called confidentiality agreements). A high-quality pro-seller M&A NDA contains, without limitation, the following provisions: (i) it defines protected information as broadly as possible and includes all information previously shared; (ii) it makes buyer liable for breaches by buyer's representatives; (iii) it limits use to "evaluation of a transaction" or even better "consideration of a negotiated transaction"; (iv) it provides one point of contact for all information requests to restrict information flow and limit employee contact; (v) it includes a narrow exception for sharing information that is required by law, including a request for a determination by counsel (or legal opinion) that any sharing is legally required, and requests advance notice and buyer's cooperation in limiting the extent of the disclosure; (vi) it contains expansive non-solicit and non-hire language; (vii) it allows for seller to discontinue discussions at any time for any reason, and to at any time request buyer return all information and permit destruction of all derivative information, and resists or narrows any request to keep electronically stored data; (viii) it disclaims accuracy and completeness of shared information; (ix) it includes a broad specific performance covenant (i.e., an equitable relief provision) which includes the language "without the need to prove actual damages or for the posting of a bond"; (x) it contains a seller-acceptable governing law and venue provision; and (xi) depending on the nature of the shared information (such as certain types of intellectual property), a perpetual term.

For obvious reasons a seller-friendly M&A NDA addresses not just information disclosures, but also the non-solicitation of employees, as well as, among other things, matters affecting the enforcement of the NDA itself, such as an attorneys' fee clause, and a governing law and venue provision acceptable to you (since it is most likely you as seller who will need to enforce the NDA).

Many lawyers treat NDAs as simple boilerplate documents, when in fact they are nuanced and complex and can greatly help or harm you. If a transaction goes badly, you will thank yourself for having the foresight and wisdom of having used an appropriately drafted and negotiated high-quality pro-seller M&A NDA.

[26] An unsolicited purchase offer with an attractive purchase price for your company is flattering, of course. In part, this is where your prior preparation in particular by having an appraisal (as mentioned in step 3), as well as your prior preparation in general by having taken *pro-active preparatory steps for success*, as this author recommends, comes into play. Still, even if you are tempted, you have learned that the optimal price and deal terms for your company is best achieved by competition among a number of potential buyers. If you decide to go that route, you will be in a position to do so and to move quickly, because you earlier took *pro-active preparatory steps for success* for the sale of your company and planned out your ideal life and perfect calendar.

NDA (which may be "buyer-friendly" and tilted against you).[27] Of course, if necessary, you can attempt to negotiate revisions to the buyer's NDA.

b. Front-Loaded Letter of Intent. Build your draft front-loaded letter of intent ("LOI") for the sale of your company *now*, even though you may not elect to sell your company for many years, if at all. In it you can put in hard brackets a blank for purchase price, and in separate hard brackets your suggested seller-friendly or at least current market cap, basket and survival period.[28] You can also provide, and should provide, your ideal transaction structure (based on your prior tax law homework) and all the other deal points that are material to you.[29] Tell your prospective buyer upfront what *you* want and need.

You are in your strongest position *now*, before you are heavily invested in your actual sale transaction both timewise and moneywise and subject to an exclusivity agreement with only one potential buyer. Consider *now* if you sold your company in the future whether or not you might want to: (i) be an employee or consultant for the buyer after the sale of your business (including for how long, at what compensation, at what location, etc.); (ii) make a "rollover" investment[30] in your company's buyer (which may be a recently created subsidiary of a much

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[27] See note 36 below. An NDA received from buyer may be a "buyer-friendly" NDA tilted against a seller by it providing, directly or by implication through silence, that without limitation: (i) confidential information (evaluation material) is only (x) written information (i.e., does not include your oral disclosures) or items marked "confidential", and (y) future information shared (i.e., it excludes all information you may have shared, whether verbal and non-verbal, prior to signing the NDA); (ii) the definition of "representatives" is expansive, and includes buyer debt financing sources if financing is contemplated; (iii) buyer is not liable for breaches by its representatives (i.e., you would need to pursue them separately for damages you sustain); (iv) for restrictions on use of the disclosed information a narrow restriction such as "will keep confidential"; (v) expand permitted uses of the disclosed information to include financing (in which case buyer's potential financing sources (of which buyer may approach many potential financing sources) will all have access to your confidential information, instead of you knowing who they are, entering into your own NDA with each of them, and having better control over the information flow and deal process); (vi) the standard for cooperation for disclosures required by law be "commercially reasonable efforts" and be at your expense; (vii) buyer not precluded from contacting your suppliers and customers, especially if buyer is in the same industry (in which case your suppliers and customers may figure out you may be selling your company, which may cause them to "jump ship"); (viii) buyer limiting the non-solicitation of your employees to only senior-level employees or employees first-introduced by you as part of the evaluation process (in which case all your other employees are "up for grabs"); and (ix) the NDA has a fixed term of one to three years.

[28] See notes 40, 41, and 42 below.

[29] Other deal points may include, without limitation, specific indemnification language, employment agreement terms, and consulting agreement terms.

[30] A "*rollover investment*" is a non-control, post-closing equity participation by seller's owner(s)/management team of acquiring typically 10-40% of the equity of the purchasing buyer (which may, for example, be the subsidiary of another much larger entity). M&A participants use a rollover investment in M&A transactions to (i) bridge finance and valuation gaps, (ii) incentivize on-going management, (iii) provide seller's management with participation in potential future appreciation (e.g., a subsequent private equity exit, an initial public offering, or a sale), and (iv) aligns seller's management with buyer. Rollover investment provisions in M&A transactions have advantages and disadvantages, and the wisdom of a seller agreeing to a rollover investment request by buyer depends on many circumstances.

larger company), and if so for how long (all of which, of course, will eventually be dependent on who the buyer is and any number of related matters); (iii) have an "earn-out"[31] as part of the sale consideration from your company's buyer (in which case you would continue to operate your business post-closing during the earn-out period to achieve targets to attempt to earn a further pay-out if in the future you hit the targets); and (iv) numerous other issues too lengthy to list in this article.[32]

The M&A lawyer you select, with the potential assistance of your M&A lawyer or your business mentor, should be able to assist you with these matters.

IV. **The Pre-Sale, Sale and Post-Sale M&A Transaction Process: Seller's Goals and Buyer's Goals.**

1. Seller's Goals (i.e., Goals for You and Your Company).

a. Pre-Sale Goals. Pre-sale goals for you and your company involve (or should involve) your taking early and timely appropriate *pro-active preparation steps*, as earlier generally discussed in this article, to prepare for the future (whatever it may be), so as to keep your company operating efficiently and at its best, and to best capture optimal value while keeping your transactional costs modest at the time you determine is right for the sale of your business, whenever that may be. Your goals should also include you, with the assistance of your M&A lawyer or your business mentor, preparing a written plan of your ideal life and perfect calendar. Taking such pre-sale steps *now* should greatly enhance your ability to make the right choice regarding if, when, and

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[31] An "*earnout*" is a payment for performance after the sale transaction has closed. "It is a contractual arrangement in which if the business, after its sale, reaches or exceeds a certain agreed-upon financial target or other milestone during a specified period, buyer will pay seller additional consideration pursuant to the agreed upon formula." See S. Lochner, "*EARN-OUTS: A Useful Tool in M&A Transactions for Bridging Gaps in Perceptions of Business Value*", VC Expert's Encyclopedia of Private Equity and Venture Capital, January 2009 (https://www.vcexperts.com/buzz_articles/636). Earnout provisions in M&A transactions have advantages and disadvantages, and the wisdom of a seller agreeing to an earnout provision request by buyer depends on many circumstances.

[32] For example, in your front-loaded LOI, you should tie the length of buyer's exclusivity period (often called a "no shop" period) to the length of buyer's due diligence review period. This is important to you as seller because you will: (i) incentivize buyer to complete buyer's due diligence review of your company and sign and close the definitive agreement and your M&A sale transaction sooner; (ii) obtain better transaction terms (by limiting the time buyer has to find more flaws with your business, to attempt to extract better transaction terms from you, and hold down your transaction expenses, which typically occurs when a transaction proceeds faster. See S. Lochner, "Create Your Ideal Custom Letter of Intent: Why You, the Prospective Seller of a Privately-Held Business, Want and Need Your Own Customized Letter of Intent ("LOI")", Macro Strategic Design, Inc., September 24, 2014 (http://www.macrostrategicdesign.com/videos--articles/create-your-ideal-custom-letter-of-intent). Of course, for this to "work", your due diligence documents need to be correct, complete, organized, and ready for buyer review prior to and no later than at the beginning of buyer's due diligence review period and concomitant exclusivity period. Otherwise, the buyer will at some point with good cause be able to require you to extend both the buyer's due diligence review period and concomitant exclusivity period, thereby lengthen the deal and increase your risks and transaction expenses.

how to sell your company, and enable you to overcome any fear of the future or other obstacles which may inhibit your greater success in your business and in your quality of life.

b. Sale Goals. After pre-sale preparation, your "sale goals" involve your deciding, based on all you know about your company as well as your personal plans based upon your current written ideal life and perfect calendar:

(i) If you want to entertain an unsolicited offer from a potential buyer to purchase your business; and

(ii) If and when you want to enter the marketplace and test the waters for the sale of your business.

Based on your previously having taken *pro-active preparation steps for success* (which you will now thank yourself for having taken), you are in a position to intelligently and with confidence make these important decisions in an informed, prudent, and timely manner. If you decide to move forward, you will be ready to do so quickly.

You and your company already will have a pre-prepared seller-friendly NDA,[33] as well as a draft front-loaded LOI. You will have current interim financial statements for your company, and for the prior few years complete, and perhaps even audited, company financial statements. You will know who you want to use on your M&A value transaction team. You will know the *minimum* sale price you need in order to prudently justify the sale of your company and to live your ideal life on your perfect calendar. Your company will already be "*sale ready*" and value optimized. Indeed, you and your company will be ready to move forward swiftly, before market conditions change or buyer impatience dampens purchase interest.

With the assistance of your M&A lawyer or your business mentor together with appropriate members of your M&A value transaction team, you can decide whether to conduct an auction for your company's sale (which this author recommends), in which ideally multiple interested potential buyers' mark-up your draft front-loaded LOI, each competing with the others to be your exclusive buyer.[34] An auction is the best way to obtain the highest sale price and best

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[33] Before signing an NDA with a buyer and disclosing your company information, please be aware that strategic buyers who are your competitors may approach you as a buyer to have you, in M&A parlance, "open your kimono", just so they can see your company financial and legal due diligence materials solely to learn what they can about their competition. You have to decide if a competitor is a serious buyer and whether you really want to share your company information with them.

[34] See Article III 10(b) [*Front-Loaded Letter of Intent*] at page 15 above. The extent of the mark-up and types of revisions of your draft front-loaded LOI by each potential buyer can be very informative as to how difficult that buyer will be in negotiations if selected by you to be the exclusive buyer of your company.

deal terms,[35] which overall fundamentally consist of the price,[36] cap,[37] basket,[38] and survival period.[39] A buyer auction also provides you with a potential back-up buyer in case for some reason the first selected buyer "falls out of bed".

If you can enter with your preferred buyer into a signed final version of an LOI with a price, cap, basket and survival period that is acceptable to you, your company sale transaction is arguably about seventy percent (70%) complete. Why about seventy percent (70%) complete? The reason is because your definitive sale agreement should contain each of the deal points and terms agreed upon in your signed front-loaded LOI. That is the entire reason the parties to the LOI (you/your company and buyer) negotiated and signed it.[40] The many representations and warranties and other standard provisions in the definitive sale agreement, while important, are mostly "push-pull" items that are ultimately dependent upon your pre-agreed price, cap, basket, and survival period.[41]

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[35] You, as seller, need to always remember that *it is not what you get that counts, but what you get to keep*. It is a mistake to look at price alone, and instead you need to consider the overall "purchase offer package", meaning the price and deal terms and conditions together.

[36] You need the offer of a high enough consideration/price (including working capital issues) to justify the sale of your business.

[37] The "cap" or "liability cap" or "indemnification cap" is a limit (absent fraud) on the percentage of the total purchase price that buyer can potentially "claw back" in the event of a breach by you of any of the representations and warranties in your definitive sales agreement. In other words, it is a maximum liability provision that limits seller's maximum liability (absent fraud) for damages relating to seller's indemnification obligations in the sale contract, although buyer may attempt to carve out certain exceptions from the limitation of liabilities clause. The lower the cap percentage, the better for you, as a seller, although the actual cap percentage you will be able to receive will vary in part based on your industry, current market conditions, your negotiating strength, and the skill and experience of your "exit strategy team".

[38] The "basket" is the aggregate dollar amount of indemnification claims that buyer must accrue, based on alleged breaches by you of your representations and warranties to buyer in the definitive sale agreement, before buyer can request indemnification from you for damages buyer allegedly sustained (i.e., a "claw-back" of a portion of the purchase price you received). The higher the basket, the better for you, since in part the basket exists so you are not "nickeled and dimed" down on price.

[39] The "survival period" is how long your representations and warranties in the definitive sale agreement last, after which time buyer cannot make a claim against you for an alleged breach of those representations and warranties in an effort to potentially "claw-back" a portion of the purchase price. It should be noted that a sophisticated buyer will "slice and dice" survival periods, negotiating shorter or longer survival periods for different representations and warranties based on their perceived importance in general and to the instant transaction in particular.

[40] To not include pre-agreed LOI terms in the definitive agreement is an act of bad faith that absent special circumstances usually craters a deal.

[41] That said, as seller you want to make fewer representations and warranties, not more, and have them qualified where appropriate by *knowledge*, *materiality*, *material adverse effect*, and *material adverse change* qualifiers to shift the allocation of risk to buyer. Seller should include an express disclaimer in the definitive agreement which is

Once you have a signed LOI, your sale goal as seller should be to move forward to close your sale transaction as quickly as possible. Again, this is where you will thank yourself for having earlier taken *pro-active steps for your success*, and your prior preparation and readiness should allow you to proceed quickly and confidently.

If possible, your team should control the drafting of the definitive agreement and other peripheral transaction documents,[42] although typically buyer will want to take the lead in this regard. The negotiation of the definitive agreement and the due diligence review of your company's financial documents and legal documents typically take place concurrently. A time clock is running based on the due diligence review period and exclusivity for buyer/"no shop" period contained in the signed LOI (assuming there is one). Buyer does not want your "no shop" period to expire and for you to potentially start talking with another potential buyer. You already should be able to see how organization and speed is critical.

Someone at your company and/or on your deal team will need to prepare the "disclosure schedule" to the definitive agreement.[43] The disclosure schedule consists of individual schedules which correspond to each representation and warranty in the definitive agreement for which there is one or more exceptions, and the schedule will list and describe those one or more exceptions.[44] If you disclose an exception to a representation and warranty in a corresponding schedule, buyer has been made aware of it and cannot allege lack of knowledge or surprise with respect to it.[45] Accordingly, buyer can no longer claim seller breached that representation and warranty with respect to the items properly disclosed on the corresponding schedule. Hence, the

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acknowledged by buyer, that seller is only making to buyer, and buyer is only relying upon, the particular representations and warranties set forth in the definitive agreement. Also, seller should disclaim making any representations and warranties as to projections, forecasts, or possible future operating results. Seller should also have buyer expressly acknowledge in the definitive agreement that buyer has conducted its own investigation of the business of seller and is not relying on any representation of seller (or any of its owners, officers, employees or advisors) other than those specifically set forth in the definitive agreement. Such provisions help to mitigate the risk of a post-closing fraud claim by a buyer who has "*buyer's remorse*". Although fraud is very difficult to prove, it is very easy to allege.

[42] Peripheral documents would include, without limitation, documents such as a non-competition agreement, escrow agreement, employment agreement, and consulting agreement.

[43] This task is very important, very time consuming if done properly, and can only be performed by someone familiar with your company's financial and legal documents. Making a mistake with a schedule disclosure can lead to an indemnification claw-back by buyer of a portion of the company purchase price post-closing.

[44] For example, if a representation and warranty states "The Company has no active litigation", if the Company has active litigation those litigation cases would be listed on a schedule of disclosure that corresponds to that specific representation and warranty. The key for seller is for the disclosure schedule to be precise, but fully responsive. A representation and warranty and its corresponding schedule of disclosure should fit together like a "hand in glove".

[45] Buyer should be aware in advance what representations and warranties exceptions will be listed on your disclosure schedule because buyer will have performed due diligence on your company's financial statements and legal documents.

mantra for seller with respect to accurately and thoroughly completing disclosure schedules should be "*disclose, disclose, disclose*"!

Your biggest challenge will be in getting all of the members of your M&A transaction value team to cooperative with each other and timely execute their specific responsibilities in alignment with the original intent and collaborative objective of your sale transaction. Someone needs to keep them on time, in sync, on budget, and accountable for their work product. As recommended earlier, your M&A lawyer or your business mentor should be able to manage your team for you to ensure it functions in a timely, coordinated, and cost-effective manner in achieving your sale goals. Contact with you to make necessary major transaction decisions and to keep you informed of deal status should generally only be through your business mentor at scheduled periodic intervals, so you can focus on running your business and hitting your numbers.

c. Post-Sale Goals. Post-sale goals for you and your company involve:

(i) Allocating and investing your sale proceeds *immediately* following your deal closing based on plans and arrangements you earlier made. Again, because you earlier took *pro-active steps for your success* you should be in a position to do this;

(ii) Timely complying with any covenants made by you or your company in the signed definitive agreement and related peripheral documents;

(iii) Resolving any buyer indemnification claims made during the relevant survival period as promptly and inexpensively as possible;

(iv) Keeping an eye on the expiration date of (x) any purchase price holdback or escrow agreement, so you are timely paid the remaining consideration for the sale of your company in the appropriate amount, (y) your non-competition agreement[46], and (z) the survival period for your representations and warranties in the definitive agreement.

(v) Beginning to live post-closing your ideal life and perfect calendar.

[46] There will typically be a non-competition agreement (also known as a "covenant not to compete") applicable to you as the seller of your company, so that post-closing you cannot legally compete with the buyer of your company with respect to the business of your former company. Your M&A lawyer should negotiate it to be as narrow as possible with as short a term as possible and ensure that in scope it only covers the business of your company (not the business of buyer's company) at the time of your company's sale.

2. Buyer's Goals.

a. Pre-Sale Goals. Pre-sale goals for buyer, be it a strategic buyer (i.e., a buyer in your industry, possibly a competitor) or a financial buyer (such as a private equity fund), involve:

(i) Identifying a potentially suitable acquisition target, where 2+2=5 or maybe even 7, and to "win the deal" without overpaying, which in part means that proper valuation from buyer's perspective is key, which in turn means patience and thoroughness with the due diligence review of target company.

(ii) If buyer is not financing the sale transaction itself or does not already have an adequate line of third-party financing in place, buyer should begin making arrangements to obtain third-party financing for its potential M&A sale transaction.

(iii) Buyer should consider its ideal M&A transaction structure from a tax, liability, and post-closing operations perspective, and in a broad sense consider various business integration issues.

(iv) Buyer should prepare a bid letter for seller and attempt to avoid a seller's letter of intent (whether front-loaded or otherwise) and/or seller conducting a buyer auction, if at all possible. Buyer may argue to seller that it is and will be faster and cheaper to move straight to negotiating a definitive agreement (with no letter of intent), which no doubt will be a very buyer-friendly document which buyer will typically be ready to provide. Alternatively, buyer will attempt to get seller to sign a buyer-friendly short letter of intent with a binding exclusivity provision (thereby getting rid of any potential competition early).

(v) Buyer may suggest to seller there is no need for seller to retain an investment banker (to attempt to preclude a potential buyer auction and the addition of a more business-sophisticated and market-aware participant on seller's M&A team).

(vi) Buyer may put price consideration terms such as an earn-out into its price bid (e.g., $20 million in cash, plus a $50 million earn-out), or attempt to request a rollover provision to make its price offer look more attractive (e.g., $25 million in cash, but a required $10 million roll-over).[47]

b. Sale Goals. After pre-sale preparation, buyer "sale goals" involve:

(i) Performing as much due diligence for as long as necessary to locate as many target company "problems" pre-signing and closing of the definitive agreement as

[47] Earn-out provisions and roll-over provisions can in part help a buyer from not overpaying, but only if a competing buyer does not offer superior terms.

possible, thereby reducing the risk buyer is overpaying and lessening the need for potential indemnification claims and related purchase price claw-backs;

(ii) Having seller timely cure any curable target company problems identified in buyer's due diligence review or have seller agree to a purchase price reduction and/or an alteration of deal terms more in buyer's favor;

(iii) Assuming an LOI has not been signed and that a definitive agreement is being negotiated, tilt price, cap, basket, and survival period, as well as indemnification provisions and holdback/third-party escrow amounts, among numerous other terms, as much in buyer's favor as possible, and in no event overpay (taking all of the foregoing into consideration as well as buyer's internal calculation of the maximum sale price for the target company). *Negotiations over these matters, and others matters in the definitive agreement, are all about shifting allocation of risk.*

(iv) Adding as many representations and warranties in the definitive agreement as possible to better protect buyer, and using the representations and warranties to confirm buyer's due diligence review findings;

(v) Limiting in the definitive agreement seller's materiality qualifiers, knowledge qualifiers, and thresholds for disclosure, so that as many violations as possible result in a breach by seller of the signed definitive agreement and a potential claw-back by buyer of purchase price consideration.

(vi) Determining which key employees of target company need to be retained post-closing, as employees or consultants, and for how long;

(vii) Interviewing key employees of the target company as well as target company customers as early as possible in the due diligence review process to learn as much as possible about the target company and potential "issues" (financial, legal, and operational) that arose in the past or may presently exist.

c. Post-Sale Goals.

(i) Integrate the purchased company into buyer's operations as quickly as possible;

(ii) Identify issues with the purchased target company as soon as possible post-closing, and promptly make indemnification purchase price "claw-back" demands

based on seller/owner breaches of representations and warranties contained in the signed definitive sales agreement (or otherwise)[48]; and

(iii) Monitor seller's/owner/s compliance with the covenants and other agreements made in the signed definitive agreement and related peripheral documents.

V. Important M&A Transactional Matters to Carefully Consider.

1. The Due Diligence Review/ Legal Document "Clean-Up" and Organization. A key component in any sale of a company is known as the "due diligence" review, in which buyer and buyer's representatives request and review the financial and legal documents of your company. The prospective buyer wants, and is of course justified in obtaining, an accurate "snapshot" of what it intends to purchase.

Frequently, a sale transaction begins before appropriate "housekeeping" is undertaken by seller with respect to the target company's legal documents, which metaphorically are the steel girders of the building that constitute the company and its business. These documents[49] are often missing, incomplete, outdated, and/or in disarray. Competent outside legal counsel for the seller will tell the seller that for the seller's protection the company's legal documents need to be reviewed and "perfected" before they are given to the prospective buyer's lawyers for review, to create a "halo effect" to give buyer confidence and to have the deal proceed in a positive and timely manner. Usually, seller's outside legal counsel assumes responsibility for reviewing and

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[48] See note 44 above. Again, in part, Seller should include an express disclaimer in the definitive agreement which is acknowledged by buyer, that seller is only making to buyer, and buyer is only relying upon, the particular representations and warranties set forth in the definitive agreement. Seller should also have buyer expressly acknowledge in the definitive agreement that buyer has conducted its own investigation of the business of seller and is not relying on any representation of seller (or any of its owners, officers, employees or advisors) other than those specifically set forth in the definitive agreement. Such provisions help to mitigate the risk of a post-closing fraud claim by a buyer who has "buyer's remorse". Although fraud is very difficult to prove, it is very easy to allege.

[49] These legal documents include those found on a typical due diligence review request list for the type of company being sold, and include without detail or limitation: (i) corporate documents (e.g., formation and governing documents of the company, such as Bylaws or the operating agreement, all actions of the board of directors/managers and equity holders of the company since inception, including any minutes and actions by written consent, a list of each jurisdiction [domestic and foreign] in which the company does business, a management and organization chat of the company and each of its subsidiaries, with a list of officers, directors and key employees); (ii) equity holder information and securities matters (e.g., equity ledger, equity transfer book and capitalization table, including all options, warrants and convertible securities of the company, copies of all instruments or agreements (written or oral) regarding stock, options, warrants, stock appreciation rights or other rights to acquire stock or an ownership interest, copies of all purchase agreements, private placement memoranda, or other agreements related to sales or equity or debt services of the company, all stockholder agreements, voting trusts, buy-sell agreements, or valid proxies affecting the right of any stockholder to freely sell or vote shares, all entities in which the company has any equity or convertible debt investment or any direct or indirect interest; (iii) products and services (e.g., product and marketing brochures, sales and marketing literature used by the company in the last 5 years, details of principal products or services); (iv) material contracts (non-intellectual property); (v) litigation; (vi) government regulation; (vii) real and personal property; environmental; (viii) intellectual property; (ix) outstanding debt obligations; (x) mergers, acquisitions or dispositions; (xi) insurance; (xii) tax matters; (xiii) labor-personnel-human resources; (xiv) employee benefit plans; (xiv) financial statements, accountants and other reports; and (xv) miscellaneous.

perfecting seller's legal documents, although occasionally, in smaller transactions and where seller is willing to assume more legal risk, seller limits seller's outside legal counsel to reviewing and perfecting only a fixed number of seller's legal documents specifically designated by seller.

Such advice from seller's outside legal counsel is generally well-founded and typical advice. That said, the problem with this all-too-typical scenario is as follows:

The due diligence review is usually the most time-consuming and therefore the most expensive part of the sale transaction. It is typically performed by junior attorneys whose work, when reviewed by a senior attorney, has a very high blended fee rate. Your goal as owner of the selling company, assuming you have signed a letter of intent acceptable to you, is to close your sale transaction as quickly as possible. Any delay in due diligence review matters gets in the way of your goal, increases transaction risk, and drives up your transaction expenses.

To the extent business "housekeeping" matters are being performed by expensive outside M&A legal counsel (especially by junior attorneys being supervised, and often trained, by senior attorneys), your legal bill increases quickly. To the extent there are legal issues discovered that need time to be resolved (which is almost always the case), the deal delay can cause concerns for buyer. Also, there is always the risk of a "9/11 event" (a risk beyond the control of the transaction parties that can "crater" the deal)[50], or target company having a very poor financial quarter for whatever reason (which can "spook" the buyer and cause the buyer to walk away), or "*buyer fatigue*" (buyer getting impatient and losing interest in the deal due to lack of forward momentum), etc.

2. M&A Definitive Agreement Covenants re Maintaining or Obtaining Additional Insurance Coverage on Your Business. Although most companies maintain basic levels of insurance in the ordinary course of business, you as a seller may need to obtain additional coverage to cover transaction-related liabilities. Many M&A definitive agreements include covenants requiring you as a seller to maintain specific levels of insurance coverage to: (i) mitigate an obligor's financial exposure to the risk of a specified liability by shifting the risk to an insurer; or (ii) limit an obligee's risk that the obligor does not have the financial capacity to cover its financial liabilities under the contract. Some insurance covenants are general, simply affirming that the party has and will continue to have sufficient insurance coverage to cover its contractual liabilities. Other insurance covenants specify the type of coverage a party agrees to maintain. Negotiating

[50] This author once represented the seller of a target company in such a transaction. In September 2008, after months of work, with only 2 weeks or less away from a concurrent signing and closing of the definitive sale agreement in a $44 million deal, Lehman Brothers filed for bankruptcy, and given the resulting turmoil in U.S. money markets buyer's bank refused to loan buyer the funds for the acquisition, causing buyer to withdraw from the deal. This is the type of "9/11 event" in which all participants that have invested time, money, and effort in a M&A transaction fear, as it generally results in a "lose-lose" outcome.

expanded coverage with an insurer can complicate a transaction but may be wise and should be evaluated.[51]

3. Representations and Warranties Insurance. In the definitive agreement for the sale of your company, you and its other owners, if any, will be making numerous *representations and warranties*[52] to buyer regarding your company. In another section of the definitive agreement, you and the other owners, if any, will indemnify seller for breaches of your representations and warranties, subject to the limitation of the indemnification basket, cap, and survival period (all earlier discussed).

Within the past few years, an insurance product known as "*representation and warranty insurance*" ("RWI") has increasingly and more commonly been used in certain M&A transactions,[53] and it is probably without question the biggest change in M&A transaction practice in past fifteen (15) years.

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[51] When contemplating the inclusion of an insurance covenant, you should consult with risk management and insurance specialists to assess: (i) the need for transaction-related insurance coverage beyond existing coverage; (ii) the scope of acceptable contractual insurance obligations; (iii) the optimal and minimal contractual insurance requirements for buyer; and (iv) whether the covenant should be mutual or unilateral. Knowing the risk management and insurance specialists you wish to potentially work with early will be beneficial to you. Your business mentor should be able to provide you with assistance in that regard.

[52] A "representation" is an assertion of fact given by one party (the maker) to induce another party (the recipient) to enter into a contract or take other action. A "warranty" is a promise that a representation is true, supported by an implied promise of indemnity if the representation is false. Representations and warranties are used in M&A definitive agreements to: (i) apportion exposure to potential losses and shift risk from one party to another, (ii) create a direct claim against the maker if the representations are inaccurate or warranties breached; and (iii) serve as a basis for the parties' indemnification obligations. As a seller, you as the maker of representations and warranties will want to attempt to limit or qualify the effect of your representations or warranties by: (i) narrowing their scope; (ii) adding materiality and knowledge qualifiers, and disclosing exceptions on the definitive agreement's Disclosure Schedule; (iii) limiting their survival period; (iv) including an anti-sandbagging clause; (v) making indemnification the exclusive remedy for inaccuracy; (vi) including contractual limitations on liabilities, such as caps and baskets; (vii) disclaim representations and warranties not expressly in the written contract and include acknowledgement of non-reliance on any extra-contractual representations and warranties; and (viii) ensure consistency of representations and warranties with other contract provisions, particularly product warranties, termination rights, and indemnification provisions. A buyer, as a recipient of seller representations and warranties in M&A definitive agreements will want to attempt to: (i) maximize the effect of the representations and warranties by (x) retaining broadly worded representations and warranties and resisting those that are overly qualified or limited, and (y) negotiating a longer survival period; (ii) resist including disclaimers and acknowledgements of non-reliance; (iii) preserve the right to rely on representations and warranties known to be inaccurate by (x) resisting the inclusion of an anti-sandbagging clause, and (y) trying to include a sandbagging provision.

[53] The purported "sweet spots" for representations and warranties insurance are deals between $20 million and $2 billion, and it has been reported that 61% of private transaction M&A deals using representations and warranty insurance are between $100 and $500 million in transaction size.

Who pays the premium -- in the United States typically in the price range of 2.5% to 4% of the coverage limits[54] -- is generally a function of the deal and depends to some extent upon who is deriving the benefit from the insurance. Buy-side policies make up the majority of policies issued in the United States. They allow a buyer to recover directly from the insurer without making a claim against seller. Consequently, RWI may reduce or eliminate a buyer's reliance on seller funding indemnification payments for breaches of representations and warranties.

For seller, a sell-side policy may be beneficial even when buyer does not insist on RWI coverage, where indemnification liability exposure is beyond a seller's comfort level.

Since RWI policy periods generally exceed indemnity survival periods for general representations and warranties and applicable statute of limitation periods for fundamental representations and warranties, it is one less issue for seller to have to negotiate with buyer.

The insured's actual (and in some cases constructive) knowledge of a breach of a representation and warranty is typically excluded from RWI coverage. Also, RWI policies almost always have a "self-insured retention" (i.e., a deductible), and while its size varies from deal to deal, it typically ranges from 1%-3% of the transaction value.

A more detailed and in-depth discussion of RWI policies and their uses is beyond the scope of this article, but you should generally be aware of their existence and increasing use by parties in certain M&A transactions.

VI. <u>Other Thoughts for Your Consideration</u>.

1. <u>The Importance of Team Loyalty, and Control of Communications During the Deal</u>. Participating in an M&A sale transaction is a bit like being involved in a competitive sporting event, such as American football, where there are two opposing teams, each pushing in the opposite direction to try to gain yardage as the game clock ticks. Each team has its specialty players, each with their own unique function, that push against each other. You are the owner or leader of your team, the target company team, with the CEO of buyer or other designated deal head the leader of buyer's team. Having the loyalty of your team's players, and controlled and disciplined communication by and among them is key, <u>so that</u>:

[54] Hence, a representations and warranties insurance policy with a $20 million-dollar limit on liability on a moderately complicated deal might cost $650,000. Also, many carriers require payment of an up-front underwriting fee, which typically can run from $25,000 to $50,000, and are typically used by the carrier to hire outside legal counsel to advise it during the underwriting process.

a. Your company's key employees, who may or will end up working for buyer post-deal closing, do not switch loyalties during your M&A deal, harming you by providing buyer with sensitive information about your company to curry favor with their future new employer; [55]

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[55] Buyer will want to interview your company's key employees as part of buyer's due diligence review process, and you should put access to your key employees at the very end of that process. The same is true will allowing buyer to speak with any of your key customers or clients.

One way to attempt to maintain the loyalty of your company's key employees, especially those who will be aware of and participate in assisting you with the sale of your business, is to consider offering one or more of them a "special bonus agreement" to reward them for their loyalty to and extra effort on behalf of both your company and you, assuming your transaction for the sale of your company is successful and closes. The "special bonus agreement" consideration can be a fixed dollar amount, a percentage of the sale consideration, different dollar amounts based on minimum levels of sale consideration achieved, or any other formula you like, but all conditioned expressly upon: (i) a successful closing of the sale of your company by a specified date; (ii) their assistance in the company sale process while continuing to diligently perform their key employee role in your business; (iii) their continued employment with your company through the closing of its sale; (iv) their honoring a special confidentiality agreement with respect to your company and its sales process through and for a reasonable period post-closing (which special confidentiality agreement can be part of the "special bonus agreement"); (v) their agreeing to a non-disparagement provision with respect to your company, its owners, directors and officers, which will continue through and for a reasonable period post-closing; and (vi) their maintaining the confidentiality of the existence of the special bonus agreement, which will continue through and for a reasonable period post-closing. Any breach of any of these conditions prior to the closing should result in a forfeiture consideration under the agreement, and if there is a breach post-closing there should be a claw-back provision providing for monetary forfeiture of all of paid out under the agreement as well as for other monetary damages caused by the breach. The goal is to incentivize loyalty, reward above-and-beyond-the-call-of-duty hard work during the M&A transaction (and perhaps for prior years of loyal service) and to protect certain key employees from economic harm by providing some economic security for him or her if post-closing he or she is terminated. The "special bonus agreement" can be structured so there is a payout if, and only if, the key employee is terminated, and the payout can be limited to, for example, monthly payments ending upon the key employee locating new employment.

This is the story of Ed. Ed was the sole owner and sole director of a pay day lending company located primarily in California. This author was co-lead counsel in representing Ed's company in its over $70 million sale to a large publicly-held company located in Seattle, Washington. During negotiations in buyer's legal counsel's 51st floor Seattle offices, overlooking beautiful Puget Sound, hard-won progress on various transaction issues was being achieved daily by seller's team, as each side's respective legal teams negotiated corporate, tax, and other transaction issues, often concurrently in separate conference rooms. During periodic breaks in the negotiations, each side's deal team would regroup, compare notes, being sure everyone on the team was moving forward with a clear overall picture of the status of the transaction. Having everyone on seller's team in sync in near real-time was important, since, as is virtually always the case, one deal point had repercussions on other deal points, making coordination essential. Each night our team had a working dinner together, taking stock of the overall progress of the day and strategizing how best to proceed in the morning -- what new terms to propose, what buyer-side terms to accept or reject, and how best to negotiate to achieve the desired results. The next day, however, opposing counsel backpedaled on the positive gains our team felt it made the prior day. Also, opposing counsel had ready "push-back" for our new proposed terms, as if they knew in advance what we were going to propose. After this happened two days in a row, and after noticing the President of Ed's company meeting with the other side late in the evening after our working dinners, this author concluded we probably had "a leaker". Suspecting that the President was leaking information from our dinners to buyer in hopes of buyer keeping him in his job post-closing and ingratiating favor from his new prospective employer, this author called Ed, shared with him what appeared to be happening, and obtained permission to plant some "disinformation". During the next working dinner this author informed our deal team that the owner sole director, Ed, had decided that negotiations were taking too long, were not going well, and that if the next day the other side did not change course and accept certain deal points we should promptly walk away from the deal. The next morning, interestingly, the other side changed direction and acceded to all our deal point requests. Negotiations went well the remainder of the day. The strategy worked and, despite's the President's disloyalty to his company and Ed, the deal

b. Your company's key employees do not leave their employment with your company prior to the closing of your company's sale, which could slow and harm your deal process and allow buyer to attempt lower your purchase price by arguing that with that one or more key employees gone the transaction value to buyer is less;[56]

c. Your deal team members are all on the same page and are consistent in terms of tactics and messaging in dealing with each other and their counterparts on the other team, to best efficiently achieve your desired results.[57] Your business mentor should play a key role in acting as the day-to-day manager of your team, ensuring that work is executed in a coordinated and timely manner, and delivered when promised, with all team members accountable for their performance.

Your M&A lawyer or your business mentor should generally be your main point of contact. This contact should not be haphazard, but at arranged periodic intervals, to allow you to focus on running your business and hitting your numbers as your M&A deal moves forward.

Last, "hiccups" sometimes (dare I say often) occur in M&A deals. Lawyers sometimes fight with other lawyers, and sometimes contentious business issues can result in deal paralysis. These are situations in which "back-channels" of communication become important, and where team communication discipline is paramount. A buyer may attempt to employ a divide-and-conquer tactic, whereby a deal participant on buyer's team, gets the business leader of buyer's

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ultimately successfully closed. If Ed had provided his President with a special bonus agreement (which Ed earlier declined to do), perhaps the President would have shown more loyalty to the company and Ed instead of fearing becoming unemployed and financially harmed upon the successful closing of its sale, incentivizing him to wrongly and illegally betray the company and Ed to attempt to protect himself and his family.

[56] *<u>This is the story of a significant health-care company transaction in which this author was on a small team representing the selling entity</u>. Seller and buyer were each public companies and direct competitors in a $2.2 billion merger transaction. Given the large dollar size of the transaction, a Hart-Scott-Rodino Antitrust Act filing with the federal government was required and U.S. Department of Justice ("DOJ") approval was necessary before the transaction could close. While anti-trust approval was pending (which DOJ review of the transaction had evolved into what is known in as second request, which is much more detailed and takes months). While this was all happening, the CEO of buyer in a front-page Wall Street Journal story stated that to the extent there were employee redundancies following the closing of the merger transaction, he would be keeping his own people. While perhaps understandable, it was a foolish thing to say. During the next few months, literally one-third of the work force for seller left employment with seller and were replaced by seller with temporary workers. Now the outcome of DOJ's decision if to allow the merger transaction had big-time monetary consequences: if DOJ did not allow the deal to proceed, seller would be left with a shell of its former self; if DOJ gave thumbs up, buyer would through it acquisition merger acquire a shell of the company it thought it buying only a few months before (although some of seller's employees would have been terminated by buyer in any event). DOJ gave thumbs up. The post-closing results for buyer in the not-that-distant-future were not good.*

[57] This disciplined and consistent team communication is especially important since about one out of three deals "fall out of bed" at some point, typically for only a few days, as one side tests the other side's resolve over one material transaction issue or another. The outcome of such a test of will can often determine the tenor of the rest of the entire sale transaction.

team to contact you directly to complain about someone on your team, or to attempt to overcome a difficult deal issue.[58] Before responding, you need to interact with the members of your team, clearly determine "what is what", and come up with a unified team response. Only by proceeding in this disciplined manner can you protect and promote your best interests.

2. Publicly-Held Company Buyers and Their Public Disclosure Obligations That Benefit You. Although usually publicly-held companies are big and have all the financial and other advantages that come with being big, in certain ways they are at a disadvantage in purchasing a privately-held company. By law, under the Securities Act of 1934, as amended, they are required to make public disclosures about themselves as to prior material acquisitions of other companies they make. Hence, you can have access to and can review legal provisions they have agreed to in other M&A transactions. This information be very useful for you as you select in an auction who should be your exclusive buyer or as you negotiate the terms of your M&A sales transaction with a public company buyer.[59]

3. Benefits to You of Consulting with a Wealth Advisor Now. Wealth advisors hope that upon the someday sale of your business that you will come to them for assistance in investing much, if not most, of your sale proceeds. Indeed, that is their business and what they get paid to do: providing you, a person of liquid wealth post-sale-closing of your M&A transaction,[60] with

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[58] It should be noted that under legal rules of ethics, a lawyer for one side that is aware that the party on the other side is represented by legal counsel may not contact the other party directly, going around that party's legal counsel.

[59] *This is the story of Mary. This author represented Mary, the sole owner of her company, in its sale to a publicly-held company. During the negotiation of the indemnification provision, buyer's general counsel, Jack, alleged firmly that he never, ever, had agreed to give any seller the indemnification language this author requested for Mary, and that accordingly he never would. This author went to www.sec.gov/edgar (which is free) and located this publicly-held company's annual 10-K filings on EDGAR (the commonly used abbreviation for Electronic Data Gathering, Analysis and Retrieval). Publicly-held companies such as buyer are required to attach copies of their material acquisitions of other companies to their 10K filings (although sometimes certain information is redacted). In this case, this author found a copy of an acquisition by buyer that contained virtually the exact indemnification language that this author was requesting buyer provide. Ironically, the acquisition document was signed by Jack, the very general counsel who alleged firmly that he never, ever, had agreed to give any seller the indemnification language this author requested. After showing Mary the document, this author had Mary lead the next conference call with Jack. Mary asked Jack if he remembered informing us that he said he never, ever, had agreed to give any seller the indemnification language this author requested. Jack replied, "yes, absolutely". Mary then asked Jack to explain why his signature was on an acquisition document attached to one of Jack's company's 10K with virtually the exact indemnification language Jack just said he never grants. Jack's silence was deafening. Jack's credibility was gone. Deals often crater over less. Jack, humiliated, in a halting voice said he did not specifically remember the transaction (although he conceded his signature was on it), apologized, agreed to the language we requested, and was a "pussycat" and very cooperative throughout the remainder of the deal, which successfully closed. Again, publicly-held companies in certain ways are at a disadvantage based on their legal public disclosure requirements and, if relevant, you and your M&A legal counsel should make use of this fact.*

[60] That you, post-closing, are a person of "liquid wealth" assumes, of course, that the consideration for the sale of your business was paid primarily in cash (subject to a typical percentage of company sale consideration being retained for

asset management services your money (for which wealth advisors typically earn annual commissions on the amount of funds you bring into their firm through them for their firm to invest and manage on your behalf) and related financial advice. Accordingly, after being provided with limited information about your business and its valuation, they usually are happy to meet with you for typically an hour or so at no charge to educate you to generate goodwill with you for themselves, so that post-closing of your eventual company sale transaction you consider working with them to invest and manage your M&A sale proceeds. They will explain to you what your investment cash flow will look like, within a probable range, assuming different M&A purchase price outcomes, different amounts of risk tolerance, and different investment allocations over different time horizons. Such information is useful for you in contemplating your ideal life and perfect calendar, both today and in the future, in part helping you to decide if you are psychologically and financially prepared to sell your company if the right sale opportunity -- either created by you or offered to you -- were to present itself now or in the future.

4. Large Law Firms: The *Walled Garden*. Large law firms are large for one primary reason: they want to attempt to capture all the legal business of (and corresponding profits from) each client that comes to them for any kind of legal need. Like a supermarket, law firms in BIGLAW want to be one-stop shops, and like a supermarket earn all the different profit margins that come with the sale of each of the various "products" they have to offer under their brand name in their "*walled garden*". Indeed, partners at large law firms are financially incentivized by their firms to refer legal work internally within their firm. The referring partner typically receives a percentage of all legal fees collected from legal work performed by each other lawyer in that law firm that came from a referral by that partner (the client originating partner). The larger the number of attorneys in the law firm, the more opportunities for internal referrals by the client originating partner in the *walled garden*.

Many of those same "products", however, if obtained separately elsewhere may be superior to and less expensive than those same products purchased together found in the single big brand supermarket/large law firm. You may want the convenience of one-stop shopping and obtaining everything under one roof, within one brand name, in one *walled garden*, or you may conclude that your specific legal needs and your pocket book can be better served and satisfied if you take the time to value shop, choosing which specific lawyers at which firms you would like to select for each task.[61]

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a specified period, unusually tied to your indemnification survival period, as a holdback by buyer or, better for you, in a third-party escrow account) and is not held by you as (i) buyer's or buyer's affiliate's stock (i.e., the result of a stock-for-stock, or assets-for-stock M&A transaction, or pursuant to a rollover, in which you invested a healthy portion of your cash sale proceeds in buyer or buyer's affiliate as part of your M&A transaction deal terms), or (ii) an earn-out contractual right (which may or may not result in a future pay-out for you).

[61] Many supermarkets chains offer brand loyalty cards (and the price discounts that come with them) for a reason. They want to capture for their brand all your business and the various profit margins on all the various products you purchase from them and lure you with a price discount to stay in their walled garden. Large law firms, unless you are

As value shoppers know, finding the best quality at an acceptable price takes time and effort, but the results in both performance and savings are often worth the effort. *Pro-active preparation* gives you, assuming you are or would like to be a value shopper, time to find the right legal resource for each of your specific legal needs (which may or may not be under the same brand name). Lack of preparation and avoidance until a company sale transaction is near will most likely force you to rush to "the supermarket" to quickly purchase all that you need, regardless of quality and price, and forgo the value choices you could have made had you earlier taken the time for *pro-active preparation for success*.

VII. CONCLUSION.

Each of us gets to choose his or her own level of competency or complacency. We all get to choose our own path, and we are the ones who live with the outcomes produced by our own mindset and choices.

This article's purpose has been to explain why you should take *pro-active preparatory steps* now for you to better enable yourself to achieve a future successful sale of your business, and in doing so best capture optimal value while keeping your transactional costs modest.

This article has been inspired by decades of direct participation by this author in his capacity representing clients as a M&A lawyer in scores of all types of M&A transactions, and in observing, recognizing, and advising on what succeeds and what fails for business sellers firsthand. It is this author's sincere hope that after you read (and ideally re-read) and carefully consider this article's content, and have all of your questions answered with respect to it, that you will enjoy the benefit of an elevated understanding of (i) the pre-sale, sale, and post-sale M&A transaction process, and (ii) the differing roles and motivations of various participants in the M&A sale process, and consequently the importance and necessity of taking the *pro-active preparatory steps* you need to take *now*, in order for you to help yourself achieve a greater and better outcome for both the future of your business and the quality of your life.

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The views in this article express the personal views of the author and do not represent the views of any other person or entity and do not constitute legal advice. This article only touches on

a large institutional client willing to guarantee a significant minimum dollar amount of legal services, generally do not offer such fee discounts for you giving all your legal business to their brand. Your only potential leverage as a client is to conduct a law firm "beauty contest" to create competition in which you may be able to reach an agreement with the law firm you select for an aggregate fixed fee for your overall transaction (with caveats for "change orders", etc.). You should be aware, however, that large law firms generally only agree to non-binding general fee estimates and not fixed fees. Indeed, most law firms will only accept fixed fees that exceed their aggregate hourly estimate for your project, since a law firm agreeing to accept your project on a fixed fee basis is taking a business risk along with you, and accordingly wants a reward for assuming the additional risk.

some of the complexities of how best for sellers, such as you at some point will most likely be, to achieve optimal results for themselves while keeping transaction costs modest by pro-actively preparing for and knowledgably participating in their M&A sale transaction.

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Scott was raised in Pennsylvania and received his J.D. degree from the New York University School of Law, where he was an Articles Editor on the Journal of International Law and Politics. Scott received his B.A. degree with high honors, Phi Beta Kappa, from Lehigh University, and spent his junior year abroad at the London School of Economics. He is admitted to practice law in California, New York,* Massachusetts,* and the District of Columbia.* Scott's background includes over 20 years of practicing both business and transactional intellectual property law in Los Angeles as a Partner and Special Counsel at two large prominent national law firms, each headquartered in Los Angeles. In addition, he also at times has served clients as temporary in-house general counsel for several public and private companies. In his law firms Scott advised clients ranging from family-owned businesses to multi-national corporations headquartered in the United States, Asia, and Europe in a broad variety of industries. In addition to general business counseling, Scott has specialized in: (i) domestic and international merger and acquisition transactions, having represented primarily privately-held middle-market companies (and/or their owners) as sellers, and privately-held or publicly-held companies as buyers, in over 150 transactions, generally ranging in transaction dollar value from $10 million to over $1 billion, and (ii) transactional intellectual property ("IP") matters, predominantly with respect to identifying, protecting, and commercializing IP for both high tech and consumer product and service companies. The IP legal projects have generally consisted of assigning, licensing, and otherwise monetizing patents, copyrights (including software), trademarks, service marks, domain names, and trade secrets, as well as the sale and distribution of consumer products and services, and the building, extending (into other product/service categories), and expanding (both nationally and internationally) of consumer brands. Scott also is a successful inventor who through his company, Lochner Technologies, LLC, has successfully monetized his U.S. patents through agreements with nearly 30 large technology companies, including Apple, IBM, HP, Dell, Sony, LG, and Blackberry Limited, among others. From 2008 to 2012 Scott served on the Corporations Committee of the Business Law Section of the State Bar of California (and on the Subcommittee on Mergers and Acquisitions), and since 2017 he has been a member and has served as a senior officer of the Executive Committee of the Los Angeles County Bar Association Business Law Section.

*Inactive member.

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Scott has been a frequent author and speaker. Selected published articles by him that you may find to be of interest include:

1. S. Lochner, *Create Your Ideal Custom Letter of Intent: Why You, the Prospective Seller of a Privately-Held Business, Want and Need Your Own Customized Letter of Intent ("LOI")*, Macro Strategic Design, Inc., September 24, 2014 (http://www.macrostrategicdesign.com/videos--articles/create-your-ideal-custom-letter-of-intent).

2. S. Lochner, *Build an Experienced, High-Quality M&A Team and Prepare Early: How to Best Improve One's M&A Transaction Outcome (aka "The Early Bird Catches the Worm")*, Macro Strategic Design, Inc., August 19, 2014 (http://www.macrostrategicdesign.com/videos--articles/build-an-experienced-high-quality-m&a-team-and-prepare-early).

3. S. Lochner, *Sell-Side and Buy-Side Transaction Tips for Today's M&A Deals: Leading Lawyers on Understanding Recent Legal Developments, Handling Cross-border M&A Deals, and Navigating the Current Economic Climate*, at 77-89, Advising Clients in Mergers and Acquisitions (Inside the Minds®), Thomson Reuters/Aspatore, May 2011.

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Selected speaking engagements by Scott have included:

Mergers and Acquisitions Basics, Presentation to the California State Bar Annual Meeting.

Acquisition Agreements: Critical Issues You Need to Know, Nat'l Constitutional Center Conferences.

*Drafting Copyright and Trademark Licenses: The Dos and Don'ts*, Nat'l Constitutional Center Conferences.

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