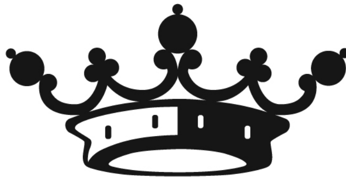
INSIDE THE MINDS

# Business Due Diligence Strategies

*Leading Lawyers on Meeting Client Expectations, Navigating Cross-Border M&A Transactions, and Understanding the Importance of Due Diligence in Today's Economy*

**2010 EDITION**



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# Due Diligence in M&A Transactions: A Conceptual Framework

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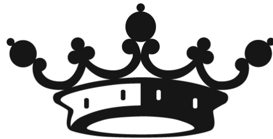

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**Introduction**

Every year for nearly fifteen years, at UCLA's business school's M&A best practices executive education program[1], I have taught "Legal Aspects of Mergers & Acquisitions: Due Diligence, Confidentiality Agreements, Letters of Intent and Acquisition Agreements." Each year brings a different, varied, but always sophisticated and demanding group of business executives from companies around the world, who come to UCLA for nearly an entire week to study all aspects of mergers and acquisitions, and how to do them better.

And every year, at the beginning of my session, I take a little poll. One of the questions I always ask is how many of the executives who have worked with lawyers on M&A transactions were tickled pink with the contributions of their M&A lawyers on their deals. I am pleased to report that but for only one year many years ago, more than half of the executives raise their hands expressing satisfaction with their lawyers.

When dissatisfaction is expressed, and the root causes examined, it is frequently because the lawyer is not brought in at the very beginning of the process or involved deeply enough throughout the process. That is why, as an icebreaker, and knowing what these skeptical business executives must be thinking as they are being asked to listen to the only lawyer taking up their valuable time, I put up as my first slide Shakespeare's famous refrain: "The first thing we do, let's kill all the lawyers." I then tell the now-starting-to-relax executives that it is okay to kill their M&A lawyer, but not until *after* their deal has closed, and that until their deal closes, they should stay very close to their M&A lawyer and feed him or her well.

I urge these executives to be respectful of their M&A lawyers because I ask them to think about what we do in pragmatic business terms—not legal speak. Specifically, my fundamental point is that as lawyers, we are not just working merely on the "legal aspects" of a deal. When we do

[1] Merger and Acquisition Education and Training *available at http://www.anderson.ucla.edu/x26813.xml*

our jobs well, and our clients have the good judgment and confidence to let us do our jobs, we are helping our clients in each deal to:

- Minimize risk
- Allocate risk
- Maximize shareholder value

Minimize risk, allocate risk, and maximize shareholder value—that is the whole enchilada, nothing more, but also nothing less. Everything we do as lawyers on an M&A transaction is all about either minimizing our client's risk, allocating our client's risk (as much to the other side as is reasonably possible), or maximizing shareholder value[2] for our client.

It is important to notice a few things about these three goals. First, they are party neutral—it does not matter whether we are representing the buyer or the seller. No matter which side of the M&A transaction we happen to be working on in any particular deal, our focus is not only primarily but, I would submit, should be purely, on either minimizing risk, allocating risk, or maximizing shareholder value for our client.

Second, for every action we take on a deal, whether it is an area to be investigated or a contractual provision to be drafted, etc., we should be asking ourselves: Will this action (or omission to act) help our client better minimize its risk, allocate risk, or maximize shareholder value? If it will not move the ball

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[2] In using the term "maximizing shareholder value," we intend to be party-neutral, i.e., looking at value from either the buyer's or seller's perspective. The business school literature first looks at the combined returns to bidder and target shareholders, to see whether they are positive or negative. In other words, as Professor Weston puts it, "are mergers positive net present value investments?" J. FRED WESTON, MARK L. MITCHELL, J. HAROLD MULHERIN, TAKEOVERS, RESTRUCTURING, AND CORPORATE GOVERNANCE 195 (Fourth Edition, Pearson Prentice Hall 2004) (hereinafter cited as "Weston"). Target returns are, not surprisingly, nearly always substantially positive. Most critical, however, are the bidder-only returns, which the studies generally find to be slightly negative, including post-merger operating performance. In other words, most mergers either destroy value for the bidder's shareholders or create no incremental value. See Weston 202-210. It is the relatively poor track record of mergers and acquisitions that creates the impetus for trying to do them better and improve one's "hit rate."

forward on at least one of these three dimensions, then in all likelihood it is not worth doing.

Finally, upon reflection, it will be readily apparent that minimizing risk, allocating risk, and maximizing shareholder value are not entirely unrelated. In the UCLA M&A program, we try to explore some of these interrelationships. Further, we also recognize that these three fundamental goals cut across nearly all M&A activities from start to finish, whether we are considering due diligence, confidentiality agreements, letters of intent, or the definitive acquisition agreement.

One of the challenges in almost every deal is how and when to employ each of the tools available to us to advance our client's goals. A full discussion of all of this, however, would require an entire book, and is therefore beyond the scope and subject matter of this chapter. In this chapter, our focus is on due diligence, and developing a conceptual framework for our approach to due diligence. In analyzing the various aspects and components of due diligence, we must of course assess them all through the prism of our three cardinal goals of helping our clients to minimize risk, allocate risk, and maximize shareholder value. Let us proceed then with our first question: *What* is due diligence?

**What is "Due Diligence?"**

"Due diligence" is a term we all know and use, but what does "due diligence" actually mean? Well, as good lawyers, we should first check, of course, *Black's Law Dictionary*, where we find the following definition:

> Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case.

When I put this definition up for the executives in our UCLA program, you can just see the eyes glaze over. I suspect your reaction was not too dissimilar.

Another definition I present comes from Crilly's *Due Diligence Handbook*:

> A process whereby an individual, or an organization, seeks sufficient information about a business entity to reach an informed judgment as to its value for a specific purpose.[3]

This, of course, is a far more useful definition of the term. However, believing that even this good definition can be improved upon, here is our definition:

> A future-oriented super audit to help minimize the risk and maximize the shareholder value of an M&A transaction.

If we parse this single sentence carefully, I believe we will find all of the elements that combine to tell us precisely and completely the meaning of "due diligence."

First, note that what we are doing is "future oriented." It is difficult to imagine why anyone would buy a business for what it did in the past. All that truly matters to our buyer is what it reasonably believes the business can do in the future, based on data obtained from the seller's analysis of that data, as well as from the buyer's own analysis and due diligence. Our time focus, therefore, is necessarily "future oriented" so we are concerned only about the future impact of what we may or may not discover.

Next, what we are trying to conduct is more akin to a "super audit." It took our auditor colleagues many, many years to realize that most of the rest of the world did *not* understand that an accountant's "audit" was *not* a complete examination of anything, and certainly was not designed to detect fraud. Rather, as the auditors eventually came to articulate after years of losing too many cases, all an "audit" is designed to do is furnish

[3] WILLIAM M. CRILLY, DUE DILIGENCE HANDBOOK (American Management Association, 1998).

a sufficient basis for them to express the opinion that the financial statements of management are presented in accordance with generally accepted accounting principles. An audit, as we all came to learn, involved merely "sampling." About the only area where this was not, and still is not true, concerns inventory, where the audit requires an actual physical observation and complete count of the entire inventory (although sampling is again used to arrive at inventory valuation).

That is why we use the term "super audit" in this definition. Of course, a "super audit" of all aspects of a target company's assets, liabilities, and operating ecosystem would inevitably cost too much money and take too much time—certainly cost more money than the typical client could afford (or would knowingly agree to spend), and take longer than the typical deal time frame would allow. Therefore, the key is for the buyer to have a very clear acquisition strategy, and a very clear understanding of the particular value drivers in any particular deal. With the acquisition strategy and value drivers firmly in our client's mind, it is our job, as the M&A lawyer, to make sure our client has clearly and completely communicated to us its strategy and value drivers. Only if we have in mind this clear and complete understanding of our client's objectives can we best assist our client to achieve its business goals.

Finally, continuing with the parsing of our definition of "due diligence," the reason to perform this "future-oriented super audit" is, as we will discuss in the next section, to "minimize the risk and maximize the shareholder value" of the deal. And so, in this one short sentence, we capture the essence of the meaning of "due diligence" in a functional way that will hopefully guide our due diligence strategy, and perhaps also help us to explain to our clients why due diligence is so important and should be regarded as a critical action item from a business perspective.

Having defined "due diligence" in this way, the next question to consider is, so what?

**Why Perform Due Diligence?**

*Why* do we perform due diligence? Is there a law that mandates due diligence examinations in certain circumstances? Or do buyers or investors simply perform due diligence out of the goodness of their hearts, on a voluntary basis?

While I am not aware of any statute mandating the performance of due diligence (except to take advantage of the "due diligence" defense in securities actions[4]) in an acquisition transaction, we are all familiar with the fiduciary duties of directors. One such basic fiduciary duty is the duty of care. It is clear from a number of court decisions that a buyer's board of directors would be in breach of its fiduciary duty of care if it did not perform due diligence on a target company prior to acquisition, or did not perform an adequate due diligence examination.[5] These cases also make clear, however, that boards are free to delegate the due diligence examination, and thereby discharge their fiduciary duty in this respect, to outside professionals, such as accountants, investment bankers, lawyers, and other experts.

But assume for a moment that your client is 100 percent owned by Jack and Jill, husband and wife, and suppose they are the only directors, as well as the sole joint shareholders. What then? The director fiduciary duty of care in these circumstances is, by hypothesis, essentially a non-issue. While technically even the husband and wife co-directors have the same fiduciary duty as the board of directors of IBM, it would be something of a stretch to equate the two situations. The husband and wife directors, as the sole shareholders of our buyer, are not likely to

[4] Kling & Nugent, *Negotiated Acquisitions of Companies, Subsidiaries and Divisions* (Law Journal Press 2009, hereinafter cited as "Kling"), section 8.02, n. 1. This treatise, by my former Willkie Farr & Gallagher colleague the wonderful Lou Kling, is by far the best book on negotiated deals, and should be in every experienced M&A lawyer's library and called to the attention of every new M&A lawyer as the first source to consult about any question on the legal aspects of deal making.

[5] E.g., *Ash v. McCall,2000* WL 1370341 (Del. Ch. Sept. 15, 2000); *Cede & Co. v.Technicolor,* 634 A.2d 345 (Del. 1993); *County of York Employees Retirement Plan v. Merrill Lynch*, 2008 WL 4824053 (Del. Ch. Oct. 28, 2008). Interestingly, as Lou Kling has noted, there are very few duty of care cases involving buyers, as opposed to sellers. Kling at Section 4.4A.

feel that they must perform due diligence because of the technical legal duty they in effect owe only to themselves.

In the circumstance posed, we must obviously find the impetus for performing due diligence in something other than mere legal obligation. Let us remember, now, where we started: We are all about minimizing risk, allocating risk,[6] and maximizing shareholder value. And, as we have said, "due diligence" is "a future-oriented super audit to help minimize the risk and maximize the shareholder value of an M&A transaction."

Even absent the legal compulsion of a meaningful duty of due care in our husband/wife, sole directors hypothetical, minimizing risk and maximizing shareholder value are, of course, two very good things. After all, who would not want to minimize their risk and maximize their deal value? In mergers and acquisitions, ignorance definitely is *not* bliss—knowledge is power. Therefore, the more knowledge our client, the buyer, can gather about the target, the greater the likelihood that our client, with our assistance and that of the rest of the deal team, will be able to minimize deal risk and maximize deal value. Effective due diligence is how we gather the relevant information to pursue these objectives. Due diligence, however, is not the only tool we can use for this purpose.

Let us consider for a moment the interrelationship between due diligence and the definitive acquisition agreement. Suppose our client, together with our help and the help of a large team of outside experts, could perform the most perfect, complete, and penetrating investigation of the target company imaginable, leaving—literally—no stone unturned. And assume the transaction takes the form of a stock purchase, in which case no conveyancing or other asset transfer documents are necessary to effect the purchase. In this circumstance, would our client need *any* acquisition agreement? Theoretically, probably not, or at least not a very long one. I am reminded of the story, perhaps

[6] We will not speak again of allocating risk. Allocating risk in an M&A transaction is really the primary function of the representations, warranties, and indemnities in the acquisition agreement, not due diligence. Of course, it is our due diligence examination, shaped by our client's strategy and business concerns, that provides the data we must have in order to identify and understand the risks to be allocated.

apocryphal, about Warren Buffet many years ago buying a rather large company using only a one-page stock purchase agreement.

Conversely, suppose we could draft the most complete—indeed, perfect—acquisition agreement, describing in excruciating detail precisely and completely the business and assets our client is buying. Further, suppose this perfect acquisition agreement contains complete and "lifetime" indemnification provisions covering all items of any concern to our client, and that the indemnities are backed either by a giant parent company or a Forbes 100 super-wealthy shareholder. In this situation, would our client need to perform *any* due diligence examination? Again, theoretically, probably not, or at least not a very extensive due diligence investigation.[7]

To illustrate this interrelationship between due diligence and the definitive acquisition agreement, let us take an example that arises in almost every deal—undisclosed liabilities. Representing the buyer, we of course want to investigate the target as thoroughly as possible to make sure our client is aware of any and all liabilities it may be assuming, especially in the case of a stock purchase or merger.[8] This can obviously be a very arduous and costly investigation, going

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[7] Upon reflection, I admit to some exaggeration here to illustrate a point. An experienced investor friend told me, quite rightly, that if the business has fundamental flaws, even my hypothetically perfect acquisition agreement will not save the deal. Of course, that depends on the types of flaws. Clearly, even the perfect agreement would be hard-pressed to address the true quality of management; it is one thing, for example, to craft special representations of the sort not typically found in acquisition agreements but addressed in director and officer questionnaires, relating to legal proceedings and certain other matters going mostly to management integrity. This still would fall far short of providing the buyer with enough data to decide whether the target does, or does not have a team worth betting on. And, to be sure, even the most perfect acquisition agreement will not turn a sow's ear into a silk purse. On the other hand, one certainly can, and indeed typically does, in representations and warranties address such "business" concerns as customer concentration ("list ten largest customers and sales," "no customer accounted for sales of more than ____, etc."). This point highlights the fact that the due diligence necessary is, of course, not limited to legal due diligence.

[8] In the case of an asset purchase structure, the due diligence inquiry generally may be more narrowly focused on just the liabilities being expressly assumed in the particular deal. This assumes, however, that the nature of the target company's business is such that it has no exposure for potential liabilities of the sort for which the law may impose successor liability on the buyer notwithstanding the buyer's lack of any express or implied assumption. These include the old standards of product liability and

well beyond basic public records searches, especially in a company of any size or complexity.

Alternatively, staying with our "undisclosed liabilities" example, we can insert in the acquisition agreement something like the following:

> "Target has no liabilities whatsoever other than as set forth on Target's balance sheet dated __________, 2010 or incurred thereafter in the Target's ordinary course of business, consistent with past practice, and not exceeding $___ as to any individual item, or $____ as to all such items in the aggregate."

What we have just seen, then, are two very different ways (using due diligence versus using the acquisition agreement) to achieve the same goal—i.e., minimizing risk—and in this case, it is minimizing the risk of undisclosed liabilities. Due diligence and the acquisition agreement are the "ingredients" or tools we use, in the right proportions and at the right times, to help our clients. What we also know is that there is no such thing as "perfect" due diligence or a "perfect" acquisition agreement. Therefore, we must work with our clients to first understand their business objectives and transaction concerns. Once these are understood, we can work collaboratively to achieve the right mix or blend of "due diligence" and "acquisition agreement," to achieve the goal of minimizing the risk of undisclosed liabilities.

Thus, we see that due diligence and the acquisition agreement are tools that we use in tandem to help minimize the various risks inherent in any deal. The interrelationship between these two tools can be illustrated by the following diagram:

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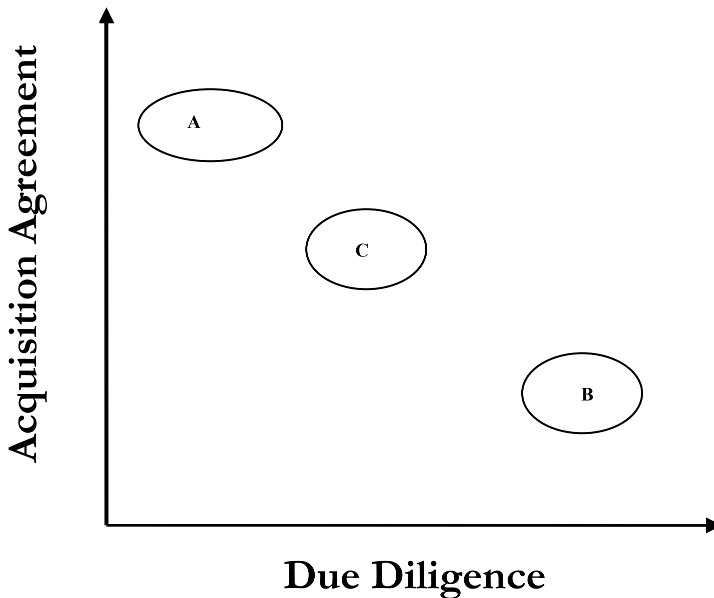
environmental liability (See Kling sections 15.04[c] and 18.07), and more recently, liability under the FCPA (Steptoe & Johnson LLP: International Law Advisory - New Department of Justice FCPA Opinion Procedure Release Establishes a Limited Safe Harbor Against Successor Liability Based on Significant Undertakings by An Acquirer Regarding Its Post-Closing Conduct, *available at* http://www.steptoe.com/publications-5403.html).




Looking at the above diagram, what we are trying to illustrate is the relationship between due diligence and the acquisition agreement. Point A is relatively high on the acquisition agreement axis, meaning that we have a fairly extensive, pro-buyer agreement on which we think we can rely pretty heavily. That is why Point A is showing that the amount of due diligence may be less—i.e., Point A is not very far along the due diligence axis. And note that in this case our due diligence may be less, either of necessity or by design.

At the other extreme, looking at Point B, we see that we have, again either of necessity or by design, performed very extensive due diligence, and therefore we are relying, either of necessity or by design, on "less" of or a weaker—i.e., less protective—acquisition agreement.

What about maximizing shareholder value? Suppose we insert a purchase price adjustment in the acquisition agreement. Assume it provides that if book net worth declines between the balance sheet date and closing, then our buyer/client will receive a dollar-for-dollar price reduction. Now

assume that book net worth in fact declined $1 million, so the purchase price is now reduced by $1 million. That is a nice savings, but is our client happy? Well, as is often the case, that depends. Suppose the reason for the decline in book net worth is that a large customer became unhappy with the target company, and began ordering the same product from a competitor. Suppose further, that upon investigation, it is discovered that the particular customer lost happened to be a key customer the buyer was seeking to acquire as a customer for the buyer's own products. In such a circumstance, it is doubtful that a mere dollar-for-dollar reduction in purchase price fully compensates our client/buyer for this critical customer loss. It is the due diligence exam uncovering the complete story of what is happening behind the numbers that can provide the buyer with the ammunition to seek, hopefully before closing, a substantial reduction in purchase price, far beyond the $1 million yielded by the purchase price adjustment formula alone.

Another example to illustrate the point might be patentable assets. Suppose your client sends its engineers and your patent partner over to the target's plant to review their intellectual property. Since your client and your patent partner are, of course, far more experienced, sophisticated, and better funded than the target's engineers and lawyers, you discover that the target has some proprietary method or product capable of being patented, but which for one reason or another has gone unpatented. Your due diligence report will obviously note this fact, and promptly after closing, your client may engage you to have your patent partner file patent applications for this underappreciated asset. This sort of discovery during pre-closing due diligence, if diligently pursued during integration after closing, can sometimes significantly enhance the value of the deal for the buyer.

There are many, many more examples one can cite or imagine, all of which point to the significant conclusion that due diligence, performed well, is the buyer's last chance to avoid a disastrous deal, and *the greatest opportunity to help insure an acquisition's success*. Why the italics you might ask? Because the business school literature and studies, and the anecdotal evidence from business publications describing good deals and bad, is absolutely clear: The chances for maximizing deal value are increased if, prior to closing, the integration plan has already been designed, and is ready to be implemented commencing immediately after closing. And it is the due diligence team that

is gathering the information necessary to design the integration plan; consequently, ideally there should be some overlap between the pre-closing "due diligence" team and the post-closing "integration" team.[9]

Another way of looking at this question of *why* you should perform due diligence is revealed by our due diligence hypothesis, which states:

> IF YOUR M&A TRANSACTION "FAILS," AND THE WORLD HAS NOT MATERIALLY AND UNFORESEEABLY CHANGED, THEN EITHER (1) YOUR CORPORATE AND M&A STRATEGY WAS DEFECTIVE OR DEFECTIVELY EXECUTED, OR (2) YOU HAD A FAILURE OF DUE DILIGENCE.

Let us look at each part of our due diligence hypothesis. First, "[i]f your M&A transaction 'fails'" starts off our hypothesis by reminding us that our client should have, pre-closing, a sufficiently developed strategy so that it can tell us how it plans to measure the "success" or "failure" of the deal.[10] We know from many studies over many years that most M&A transactions, measured by almost any reasonable standard, in fact fail—from the buyer's perspective, of course. And there are various ways to define and measure M&A "success." Like beauty, "success" is sometimes in the eyes of the "beholder," though in the case of public company acquisitions, it is really in the eyes of the "shareholder."

The second prong of our due diligence hypothesis is that the "world has not materially and unforeseeably changed." Clearly, one can perform the world's most perfect due diligence investigation today, but if the world materially and unforeseeably changes tomorrow, then all bets are off. Any resulting deal failure under these circumstances certainly cannot be blamed on faulty due diligence, or a defective M&A strategy, defectively executed or not.

So, if your client's deal "fails," and the world has not materially and unforeseeably changed, then there can be only two possible explanations: Either (1) your client's deal strategy was defective (or defectively executed),

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[9] See sources cited in notes 10, 12, and 18.
[10] For a comprehensive list of why deals fail, see Weston.

or (2) there was a serious due diligence failure.[11] As lawyers, surely we bear little if any responsibility for our client's M&A strategy or its execution. That is really up to the business folks. Due diligence, however, is an entirely different matter. Deal failure due to due diligence failure may or may not be partly or entirely our fault, depending on the nature of what was missed. Hopefully, even a due diligence failure causing deal failure will never be our fault. But even if deal failure occurs due to faulty organizational, operational, financial, or human resources diligence, that is little comfort to our client, or to us. Alas, more M&A failures are probably due to due diligence failures than to anything else.[12]

That is why when I teach annually in the UCLA M&A program, I always encourage the executives attending the program to swap due diligence "war stories." Think of the fool, the ordinary person, and the wise person: The fool never learns from his own mistakes. The ordinary person at least learns from his own mistakes. But it is the wise person who learns not only from his own mistakes, but from the mistakes (and best practices and positive experiences) of others as well. Business publications, business school case studies, and court decisions are replete with tales of deals gone bad, with many of them attributable to due diligence failures of one kind or another. The challenge for us, and our clients, is to learn from the mistakes of others, not just our own mistakes.

Sometimes, it is not clear whether a deal failure is due to a strategy error, a due diligence error, or the world simply changing in an unforeseeable way. For example, there was a transaction involving a target company in the education field where the revenues were dependent largely on student tuition. The company was profitable, growing, and seemed to be relatively well managed. However, a very substantial portion of the students needed loans to finance their tuition. It turned out there were only a very few

[11] In truth, M&A strategy, or at least its execution, including integration of the target company, and due diligence are not entirely unrelated. Obviously, due diligence is all about data, and no successful M&A strategy can be devised or properly executed without the collection and application of the necessary data.

[12] For a very comprehensive and thoughtful discussion of merger and acquisition strategy, success and failure, replete with numerous valuable case studies, as well as a discussion of mergers and acquisitions compared to other forms of business partnering, see G. T. GEIS & G. S. GEIS, DIGITAL DEALS: STRATEGIES FOR SELECTING AND STRUCTURING PARTNERSHIPS (McGraw-Hill 2001).

companies willing to make these loans, and these companies went under with the subprime crisis with no replacement lenders stepping forward. So, not long after the purchase of the company, the tuition lending dried up, leading to students not being able to afford the tuition, leading to a precipitous drop in revenue for the target and its eventual liquidation. Could the subprime crisis have been foreseen, or did the world simply materially and unforeseeably change? Should the existence of only three lenders willing to finance the tuition have been a red flag, and further investigation undertaken as to the financial strength of the lenders and possible alternative tuition-financing sources?

Of course, part of what makes this a bit of a challenge is that we typically deploy relatively junior lawyers to conduct the legal due diligence. Often, these lawyers are lacking in any experience, whether good, bad, or indifferent. It is therefore incumbent on the elders to do a good job in giving the juniors as much of the benefit of our experience as we can convey, so that we are deploying "wise" lawyers on this important task. Otherwise, all we can hope is that the younger lawyer will indeed read what needs to be read, comprehend what needs to be comprehended, and escalate up the chain what should be escalated for a thorough assessment of the risk and possible mitigation measures, and so on.[13] One thought is, that, before sending any young lawyer off on his or her first M&A due diligence assignment, have the lawyer read the complaint filed by the late Milberg Weiss Bershad Hynes & Lerach LLP in the Time Warner/AOL merger debacle.[14]

Due diligence, then, even absent a legal requirement to do it, is clearly a good thing. It is not fattening, so one can almost never do too much due diligence, given enough time and enough money. Nonetheless, there are at

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[13] For an excellent discussion of this, other due diligence issues and indeed the deal process generally, you may wish to consult the wonderful book done by my friends and former law partners DIANE FRANKLE AND STEVE LANDSMAN, THE MERGERS & ACQUISITIONS HANDBOOK/A PRACTICAL GUIDE TO NEGOTIATED TRANSACTIONS (First Edition, Bowne & Co. Inc.)

[14] *Regents of the University of California v. Parsons*, Case No. BC293848, Los Angeles Superior Court, April 14, 2003. This complaint is 181 pages long, and reads almost like a good thriller/detective novel. Interestingly, it also contains a very aggressive copyright notice, stating that it is a "creative work fully protected by all applicable copyright laws" and that the firm will "vigorously defend all of their rights to this writing/publication."

least a few negative aspects of due diligence, especially extensive due diligence investigations. First, a good due diligence investigation takes time, and depending on the size and complexity of the target, and the structure of the deal, the time necessary to perform a complete due diligence investigation can be quite substantial. In a competitive auction situation, for example, adequate time may simply be unavailable.

Even when the time appears to be available, a buyer needs to exercise judgment as to whether to take all the time apparently available, or not. Investment bankers perhaps know better than any other deal participants do, that, in most cases, time is the enemy, not a friend. The longer a deal takes to do, the greater the risk of the deal not getting done. I had one experience where one of the buying group members, who happened to be the person putting up most of the financing, died unexpectedly, which, of course, ended the deal as well. A friend at a private equity firm told me of another situation involving a buyer who was taking an inordinate amount of time to develop a very complicated but supposedly tax-advantaged acquisition structure. While the seller had been very patient over many months, he happened to be an evangelical Christian, who awoke one day while the buyer was still plodding along with structuring, and simply told the buyer that God had told him that it was not a good time to sell the business—abruptly ending about a year of hard work on the buyer's part.

A challenge in due diligence in particular, and perhaps the M&A process in general, is to take neither too much time, nor too little time. As Coach John Wooden put it, "be quick, don't hurry." Former General Electric Company Chairman Jack Welch has very colorfully described seven "pitfalls" to avoid in mergers and acquisitions, all of which can be exacerbated by "deal heat": "[O]nce an acquisition candidate is identified, the top people at the acquirer and their salivating investment bankers join together in a frenzy of panic, overreaching, and paranoia, which intensifies with every additional would-be acquirer on the scene."[15]

One COO told me recently that his CEO is very strong, and has fallen prey to "deal heat" in the past, and so the COO said that his critical and unique job was to say "no" or "slow down" when these words needed to be said.

[15] JACK WELCH, WITH SUZY WELCH, WINNING 221 (HarperCollins 2005)

Of course, if our client's entire senior management becomes infected with deal heat, then sometimes that task falls to us, as outside and hopefully more objective counsel. I recall one experience where the client's management and the seller's team were insisting that we purchase stock, and not assets. The client's outside accountant and I both sensed, based on some very preliminary due diligence, that this was one that "had hair," and truly should not be done as a stock purchase. It was not until due diligence had proceeded further when enough issues had surfaced that we finally were able to convince management that the deal had to be restructured as an asset purchase and certain other deal protections added.

Years ago, I represented a very nice, quite experienced, Caucasian controlling shareholder of a U.S. company that was the U.S. distributor for a Japanese company's products. He was buying out his minority Japanese partner. The key distribution contract I had reviewed allowed the Japanese manufacturer to terminate at any time, without cause, upon thirty days' notice. I repeatedly advised my Caucasian majority owner to apprise the Japanese manufacturer of the proposed transaction and secure an extended distribution agreement. My client told me, "Don't worry—we've had this same contract for years." The deal closed, my client now owned 100 percent of the stock of the distributor, and shortly after the closing he called me to say he had just received the thirty-day notice I had warned him about. All I could do was send him back to the litigation firm that had referred him to me originally, being thankful that after warning him several times pre-closing, I wrote him one final letter pre-closing explaining my concern and urging him not to close without contacting the Japanese manufacturer and modifying the contract. Beware deal heat!

In addition to the substantial amount of time an extensive due diligence investigation can require, since we all know that time is money, an extensive due diligence examination can be very expensive as well. Finally, to the extent that a target begins to become either weary or suspicious of a buyer's true intentions, the more extensive the due diligence, the greater the risk of adversely affecting the buyer's negotiations or relationship with the target.

Having addressed *what* due diligence is, and *why* we do it, perhaps the next big question is *who* does it?

**Who Performs Due Diligence?**

I recently received an e-mail captioned "Applying Military Intelligence Capabilities to Private Equity." The message went on to state that this company "can help private equity firms discover about their targets what they cannot find through more traditional due diligence and research approaches." The clincher was that this company (named "Ivry Intelligence"—"ivry" is a Hebrew word meaning a Jewish person) touted the fact that its investigative personnel were "formerly with Israel's intelligence community," and the company's Web site, to cap it all off, is www.mossad.us. Perhaps our world has gotten to the point where deals—or at least big deals—should not be done without bringing in due diligence professionals trained by Israel's Mossad!

In any event, the "who" of due diligence actually comes in two parts: *Who* performs due diligence, and *on who*? Looking first at the "on who," in all cases a buyer will want, and indeed is required by the fiduciary duty of care to perform, a due diligence examination of the seller. However, if our client is the seller, and our client is receiving any deal consideration other than cash—such as, for example, the buyer's stock or promissory note, or an earn-out—then in these non-cash circumstances, we will also want to be performing at least some sort of due diligence examination on the buyer.

Regarding "who" performs the due diligence examination, we all know the answer: It is a team. We as M&A lawyers are typically the quarterback of the legal team, but we know, and sometimes have a bit of a challenge convincing our clients, that we often need many lawyers on the legal team. The list can sometimes be quite extensive, requiring the deployment of lawyers specializing in tax, intellectual property, benefits, employment, environmental, real estate, immigration, etc. And this assumes the target is *not* in a regulated industry, in which case we will, of course, have a specialist with industry regulatory knowledge.

What about the smaller, very fee-sensitive deal? It can be a luxury to have unlimited due diligence resources to engage as many relevant specialists as ideal. Sometimes, however, our clients lack the resources, or simply will not authorize the expenditures. Priorities must be determined in careful consultation with the client, and whenever the due diligence investigation is to be materially or

perhaps severely curtailed, our first decision is whether to undertake the transaction or not. While the decision to forego certain diligence inquiries may be an entirely justifiable business decision, if it leaves you with an uneasy feeling in your gut, then it is probably wise to consult your firm's general counsel or ethics partner, or at least an experienced and savvy litigator. At a minimum, there should be a clear and complete written communication to the client as to what the lawyer is being instructed by the client *not* to investigate, politely advising the client that we obviously cannot be responsible for some problem that we would have been able to bring to the client's attention but for the particular constraint(s) imposed by the client.

The legal team may or may not be exceeded in numbers by management's due diligence team. But the key point is it truly takes a team to perform an adequate due diligence investigation.

There is a wonderful book about the use of teams and related issues in due diligence and merger integration that I recommend every year to the UCLA M&A program executives, and which we would do well to recommend to our clients. It is called *Five Frogs on a Log: A CEO's Field Guide to Accelerating the Transition in Mergers, Acquisitions, and Gut Wrenching Change* (Mark L. Feldman & Michael F. Spratt, Harper Business 1999). The title is taken from a children's riddle: *Five frogs are sitting on a log. Four decide to jump off. How many are left? ANSWER: Five. Why? Because deciding and doing are not the same thing.*

The larger or more poorly coordinated the due diligence team, the greater the risk of the team merely deciding, and not actually doing, what needs to be done in order to minimize risk and maximize shareholder value.

One aspect of the due diligence team which is sometimes overlooked is that the team members must speak the right "language," and I am not referring to English versus French or Chinese. Rather, the team sometimes needs to be comprised of persons with the right backgrounds or skill sets to make the particular inquiry maximally productive. For example, a due diligence engineering consultant once explained to me that engineers really like to talk to other engineers, and the conversations are simply different when they are engineer to engineer. The special dividend

received by this engineer's client on one aerospace deal was that the consulting engineer spoke with some design engineers employed by one of the target company's major customers, and learned that the particular part being purchased by that customer had been designed out of the next generation of the customer's product. In other words, this major customer was going to stop buying from the target company not long after the anticipated closing. The consulting engineer told me that he did not think a financial or HR person, or any other non-engineer, could have discovered this crucial piece of information because he spoke "engineering" to the customer's engineers.

Once we have our due diligence team put together, what does it do? It collects information, analyzes and evaluates information, and shares the results as appropriate. It should be stressed that each of these three team tasks is critical, and a failure or breakdown on any one task can jeopardize the entire mission. I am aware of situations where, indeed, the right information was collected, but it ended up sitting in a file box, unexamined. In other cases, it does no good to collect and evaluate the information, but not share it, for example, either with the right personnel at the client, or the right lawyer involved in preparing either the definitive agreement or reviewing acquisition agreement disclosure schedules.

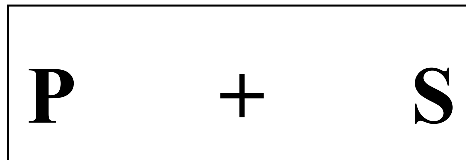
I worked on one deal some years ago for a "fundless sponsor." The sponsor was essentially a partnership comprised of two individuals. Only after closing a very challenging and highly leveraged deal did one of the two partners happen to share with me and his partner that a major customer of the target had put a sizable order on hold, though the seller had assured the partner that this customer had done this before and there was no need for concern. Had we been informed of this event prior to the closing, we would, of course, have investigated further and spoken with the customer—this was an obvious "red flag." Unfortunately, the sizable order put on hold ended up, after closing, being canceled altogether, and in large part due to losing this one major customer and the very high leverage on the deal, within six months the company had to file for bankruptcy and was liquidated.

While our own legal due diligence team may be sizable, it is our job as the M&A lawyer "quarterbacking" this team to make sure that appropriate "finds" or issues get communicated to the right personnel at our client. As

M&A lawyers, we must also make sure that this communication is a two-way street with our client throughout the life of the deal. Once the deal closes, our client's legal rights and remedies, absent fraud, will basically be determined solely by the representations, warranties, covenants, and indemnities that make it into what will virtually always be an integrated agreement. It is, therefore, imperative that our client understands the importance of sharing with us their reason(s) for buying the business—i.e., the investment thesis and the major assumptions underlying the rationale for the deal. Our client must also share with us what they perceive to be the major deal risks. These should be among the most important targets of our due diligence, to the extent they involve any legal issues.

What information do we want? That is easy to state: We want information about everything our client is "buying," both the assets and the liabilities. This means, first, what is inside the company. I use a very complicated formula over at UCLA's business school, which I put up on the whiteboard right about at this point. Every corporation, I tell the executives, can be defined and illustrated as follows:

**ABC CORP.**




In the diagram above, "P" equals "people"—i.e., the company's employees. "S" equals "stuff"—i.e., the company's property and assets—whether real property, personal property, or intangible property. That is it. Every company, I submit, is nothing more than its "people" and its "stuff."

This may sound simple, but, as all of us know who have been there and done that, it is anything but. Depending on the business, or on the buyer's focus, there may be situations where the people have enormous value, even unrelated to the "stuff." These, of course, are the types of companies where, as we say, the real "assets" go home every night, and

will not necessarily stick around after the deal is done, unless they are well treated and well integrated. On the other hand, there are also companies where the people may have relatively little value to the buyer, but the "stuff" has great inherent value independent of whether the target's people stay or leave. For example, a buyer may be interested primarily, or only, in a target company's patent portfolio, or its heavy equipment, or some other tangible or intangible asset. In the third and perhaps most common category, the maximum value of the target company is really a combination of both its people and its stuff, and how and what the people do with all that stuff.

Of course, a complete due diligence examination must look not only at what is inside the company, but also what is outside—i.e., the environment or ecosystem in which the company operates. In nearly every case, this will include the company's customers and vendors, and the industry in which it operates. And, as our federal government swells and affects more and more of our lives and businesses, the due diligence exam may need to look at the effects of current and prospective government regulation. There may also be state and local government issues to be examined as well.

How do we get the information we want? Well, we ask for it, generally by presenting one or more data or due diligence information requests. There are several good examples of these forms in the appendices of the last edition of Aspatore's *Business Due Diligence Strategies*. Another good example comes from the ABA's Committee on Mergers and Acquisitions, available at http://www.abanet.org/abastore/products/books/abstracts/5070488_ModQues.pdf.[16]

Of course, the due diligence that must be performed is not limited solely to legal due diligence. While most of the due diligence/data request forms we lawyers use cover more than purely legal items, there are many other aspects of a target's business that must be reviewed by the appropriate

[16] An excellent discussion of the mechanics of what to look for in each of the major categories of legal due diligence and a complete discussion of the cited questionnaire can be found in the Committee on Mergers and Acquisitions' Manual on Acquisition Review, available at http://www.abanet.org/abastore/index.cfm?section=main&fm=Product.AddToCart&pid=5070284. The Committee's website is a great source of valuable information. See http://www.abanet.org/dch/committee.cfm?com=CL560000

buyer personnel or other outside advisers.[17] Broadly, we can divide due diligence into two parts, from our perspective. There is "legal due diligence," and then there is "business due diligence"—i.e., everything else. One point we should always keep in mind is that the lines between "legal" and "business" due diligence are not always very sharp. More importantly, since the fruits of all due diligence must be evaluated in terms of what should somehow be taken account of in the acquisition agreement, there should be regular and effective communication between the lawyers and the non-lawyers on the due diligence team.[18]

Just as there are many subsets of legal due diligence, there are a number of subsets under business due diligence. These could include management, risk management, accounting, and financial due diligence. One often overlooked, but ultimately vitally important category of "business" due diligence, is what has been called "organizational diligence." Briefly, organizational due diligence focuses on the structures, processes, and systems that comprise the formal organizational arrangements of the target, including its governance structure, the operating environment, and the talent base. "In short, it means taking a long, hard look at the other party's overall organizational strengths and weaknesses. As a result of that process, you can begin to assess the degree of 'fit' between the two organizations. You can identify the gaps, and think about how critical they're likely to be and how difficult they might be to bridge."[19] Over my years of M&A practice and

[17] The best source I have ever seen that "covers the waterfront" on due diligence was Crilly's *Due Diligence Handbook*, cited above, and which unfortunately was out of print for a while. The good news, however, is while preparing this chapter, I discovered that the American Management Association is apparently about to release a new and updated edition of this invaluable book, which I anticipate will be even better than the first edition I have recommended at the UCLA program for years.

[18] For an interesting but likely not-ever-to-be-repeated example of the one situation in which the buyer may be able to be less rigorous in making sure that the due diligence material received that needs to be accounted for in the acquisition agreement is in fact so accounted, see *Merrill Lynch v. Allegheny Energy*, 500 F. 3d 171 (2d Cir. 2007). In that case, the seller in the acquisition agreement represented and warranted to the buyer, rather remarkably, that the information it provided to the buyer in due diligence "in the aggregate, includes all information known to the Sellers which, in their reasonable judgment exercised in good faith, is appropriate for the Purchasers to evaluate [the target company's] trading positions and trading operations." Id. at 177.

[19] Creating and Leading Strategic Combinations, 1998 Mercer Delta Consulting LLC, *available at* http://www.managementplace.com/fr/mmc/combin.pdf. I am grateful to a

collecting interesting material for the executives attending the UCLA M&A program, I have come to appreciate the importance of such things as cultural due diligence, and have many articles on this and other special due diligence subjects.[20]

While the ideal due diligence examination is both very broad and very deep, there are, in many instances, a number of legal and practical limitations on the scope of what information may be collected. First, the buyer may have a legitimate interest in certain seller information that may be covered by the attorney-client privilege. Neither party wishes to destroy the protection afforded by this privilege, whether the deal closes or does not close. Examples might be the seller's patent counsel's opinion of the patentability of a significant piece of seller intellectual property, or the seller's litigation counsel's evaluation of a pending or threatened claim. These present very difficult issues that must be resolved on a case-by-case basis.[21]

If the buyer and seller are competitors, then the antitrust laws may limit what information the seller may disclose to the buyer, and vice versa, during pre-closing due diligence, or may at least restrict which personnel of the buyer may receive competitively sensitive information prior to closing.[22] Last year, in the *Omnicare Inc. v. UnitedHealth Group, Inc.* case, the court discussed at length how competitors may properly share sensitive information.[23] Displaying great understanding of the desire and sometimes necessity for companies seeking to combine to share information, the court reviewed in great detail the types of information shared, the personnel of each party with whom the information was shared, and the stage of the transaction at which the information was shared. What enabled the court to conclude that the highly sensitive information exchanges by PacifiCare and UnitedHealth were proper was that the parties had entered into two separate confidentiality agreements. "Confidential information" was to be shared only by members of the buyer's

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leading management consultant in organizational development for having called this article to my attention. I encourage each of you to read the article, and share it with your clients before they embark on any acquisition—I think they will thank you for doing so.

[20] For a very recent and useful discussion of a number of current non-legal business due diligence issues, see Sharon Bromberg and Michael Katz, Due Diligence For Add-On Acquisitions, available at http://www.jhcohn.com/Repository/Files/PE_DueDiligence.pdf

[21] Compare *Hewlett-Packard Co. v. Bausch & Lomb Inc.*, 115 F.R.D. 308 (N.D. Cal 1987) with *Libbey Glass Inc. v. Oneida, Ltd.*, 197 F.R.D. 342 (N.D. Ohio 1999).

[22] See Kling section 9.03.

[23] *Omnicare, Inc. v. UnitedHealth Group, Inc.* 594 F. Supp. 2d 945 (N.D. Ill. Jan. 16, 2009).

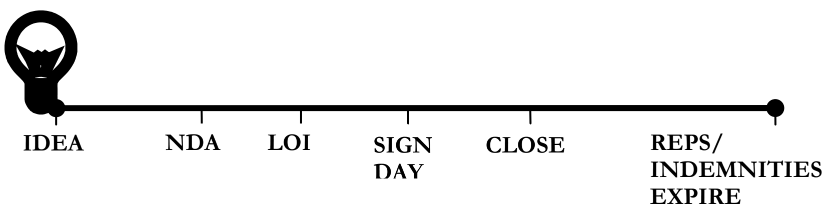
due diligence team, and not shared outside this group. "Highly confidential information" was governed by another confidentiality agreement setting up a "clean room" for this even more sensitive information. Only members of the buyer's "clean team" were allowed to see these materials. The "clean team" was a smaller subset of the buyer's due diligence team. An excellent discussion of why and how to create and manage "clean teams" may be found in Mercer's "Capturing the Value of the Deal: Leveraging a Clean Team to Enhance Integration Effectiveness."[24]

One final point regarding the scope of information disclosure, of course, relates to any seller trade secrets. Whether the buyer is or is not a current competitor, many sellers are reluctant, purely as a business matter, to reveal material trade secrets unless and until closing is virtually assured. While the confidentiality agreement technically should protect this disclosure, many sellers simply are unwilling to reveal any of their "crown jewels" until the very last minute.

**When Do We Perform Due Diligence?**

The final aspect of our conceptual framework for M&A due diligence is the "when." When do we perform due diligence? Here is the due diligence timeline I put up every session at our UCLA program:

**DUE DILIGENCE TIMELINE**




As the above diagram illustrates, if the buyer is doing its job, due diligence is really an ongoing data collection and assessment process that spans the entire continuum from conception of the deal, through the closing date, and really

[24] "Capturing the Value of the Deal: Leveraging a Clean Team to Enhance Integration Effectiveness," *available at* http://www.mercer.com/referencecontent.htm?idContent=1261305

running to the expiration of the survival period of the definitive agreement's representations and warranties and indemnities. What information is sought and reviewed and when along this timeline is, of course, a function of many factors. These include whether the target is private or public, when the confidentiality agreement or nondisclosure agreement is signed, how the seller responds to the initial information request(s), antitrust or other competitive concerns, etc. Also, just because the deal is closed, and we as lawyers may no longer hear from our client (unless and until a problem arises, as is sometimes the case), the buyer should be advised to continue to look closely at what it has bought, recognizing that, depending on how good the seller was in negotiating its side, once the survival period expires, no further claims may be brought.

While it may seem odd to think of doing post-closing "due diligence" since the buyer is now in control and operating the seller's business, it remains prudent to chase down any "red flags" or suspicious or questionable documents or events, just to make sure there is no surprise lurking that could be made the subject of a purchase price adjustment or post-closing indemnity claim, if timely asserted. Further, pursuing timely integration and addressing certain difficulties that may be encountered along the way may also provide the basis for a timely purchase price adjustment or indemnity claim.

**The Seller's Perspective**

Our discussion to this point has focused primarily on due diligence from the buyer's perspective. Many aspects of due diligence from the buyer's perspective, however, may be equally applicable from the seller's perspective. If the seller is accepting any consideration other than cash from the buyer, then the seller will want to perform some amount of due diligence on the buyer, and all of the issues and approaches discussed above will be potentially relevant to the seller, depending on the circumstances of the deal, and how extensive an examination ought to be performed by the seller on the buyer.

Since knowledge truly is power, especially in M&A transactions, certain sellers in certain circumstances will simply refuse to disclose certain information or allow certain queries by a buyer unless and until the deal has closed. I represented a regional retail chain selling its business to a private equity fund's platform company that was already retailing and

wholesaling the same type of equipment. Much of the equipment sold by both companies came from a common manufacturer. Our seller client was very concerned about what might happen if the manufacturer was informed about the deal pre-closing, and then the deal did not close. For this reason, and also because we believed our pricing was better than the buyer's from the same manufacturer, we told the buyer that they could neither see our contract with the manufacturer nor discuss our pending deal with the manufacturer until after closing. To my surprise, the buyer agreed to these conditions and proceeded with the closing. Fortunately, the buyer was correct in betting that their independent relationship with the manufacturer would facilitate a smooth transition.

From the seller's perspective, an entirely different diligence issue concerns readiness for sale. I have long advocated that, ideally, every business should be operated as if it were going to be sold or taken public, and for two reasons. First, should a decision be made to sell a company or take it public, if it has not been operated with a view to a sale or an IPO, then there will likely be varying degrees of "deferred maintenance" needing attending before the sale or IPO can occur, or indeed, before the process should even begin in earnest. The second reason, however, is that operating your company as if you were going to sell it or take it public inevitably forces a degree of self-examination of the business, and discipline about various business decisions and processes that is likely to be advantageous even if you have no intention ever to sell your company or take it public.

The process of preparing a business for sale, especially if it is a founder-owned and operated company, can be quite involved. Over the years I have always told sellers that selling your business, if you want to do it right, is like starting an entirely new business—i.e., the "sell my business" business that must be operated on a parallel path with the operating business. That, coupled with the poor economy and the heightened scrutiny given to sale candidates by buyers, has caused many to recommend that sellers engage a firm to perform due

diligence on themselves, for the purpose of helping them prepare for sale, and to maximize the selling price.[25]

Many investment bankers will meet with companies that have no intention of selling in the near future, seeking only to establish a trusted relationship with the hope of getting the nod if and when the seller decides to sell. I always encourage sellers to take these meetings, because a good investment banker will also be able, based upon their current market knowledge and superior crystal ball, to provide invaluable advice as to what changes the seller should try to make to enhance the ultimate valuation of the business. These recommendations may be as generic as installing the basic systems and controls the seller would need to have in place to be eligible for purchase by a public company buyer, so that if the purchase is "material" to the buyer, timely Sarbanes-Oxley compliance post-closing would not be a problem[26]

Investment bankers may advise companies to do such other things as reduce customer concentration, focus on a particular segment that is being valued more highly than other segments, hire a more sophisticated CFO, etc. Some investment bankers will not even represent a seller that does not have audited financial statements, so in certain cases, engaging an accounting firm to commence auditing the financials may widen the universe of potential buyers and investment bankers available to the company as and when it ultimately decides to pursue a sale. The principal point is that selling a business is a process, and if whenever a seller decides to sell, the seller is really not yet "ready for sale" for any of a variety of reasons, including the ones discussed above, then the sale process inevitably becomes much longer, more complicated, and generally more expensive. Worse, if a company is not ready to be "marketed" when the owner is ready to sell, the opportunity to sell at an attractive price or perhaps at all can be lost. As is the case with operating the business, planning and preparation for a sale are essential to a timely and successful sale. Self-examination of

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[25] E.g., Claudine Cohen, Mendy Kwestel and Andrew Finkle, *Defensive Due Diligence*, MERGERS & ACQUISTIONS 38 (January 2010); *Buyer Beware, Seller Beware—Best Practices in Due Diligence that Yield Long-Term Success*, available at http://img.en25.com/Web/MerrillCorporation/BESTPRACDUEDIL.pdf.

[26] For an excellent discussion of the various SOX compliance issues in a mergers and acquisitions context, see Kling section 8.04[4][a].

the sort provided by performing some due diligence on oneself can be an indispensable tool to achieving this goal.

**Conclusion**

Two years ago, my wife's best friend Esther invited us to join her, her husband, and her parents for a nice quiet dinner with Esther's "Uncle John," more widely known as John Kluge. For those too young to recognize the name, John Kluge is the billionaire legendary dealmaker who built the Metrodmedia empire and was, in 1989, No. 1 on the Forbes 400 list. During dessert, sitting in his small private dining room at his Palm Beach estate, I simply could not resist the opportunity, so I asked this living legend the $64,000 question: "In all of your many years of legendary deal making, what's the most important lesson you learned?"

"Uncle John," with a twinkle in his eye, responded without any hesitation: "I never bought anything until I had first figured out who I would sell it to, at a profit."

For the rest of us mere mortals, eternal vigilance is more likely to be the price of successful deal making, and performing adequate, if not excellent, due diligence—the path to salvation.

**Key Takeaways**

- The goals in an M&A deal should be to minimize risk, allocate risk, and maximize shareholder value for the client. This is done in large part through an effective due diligence process.
- You need to have a clear and complete understanding of the client's objectives in order to assist the client in achieving its business goals in an M&A deal.
- While our own legal due diligence team may be sizable, it is our job as the M&A lawyer "quarterbacking" this team to make sure that appropriate "finds" or issues get communicated to the right personnel at our client; similarly, our client's business due diligence team must make sure to keep us in the loop.

- Sellers should consider engaging a firm to perform due diligence on themselves, for the purpose of helping them prepare for sale, and to maximize the selling price.

*Jeffrey M. Weiner is a corporate partner in the Century City office of Steptoe & Johnson LLP. Mr. Weiner represents companies and individuals in mergers and acquisitions, business financing and technology transactions, and general business and securities law matters. In merger and acquisition transactions, he represents acquiring companies, target companies, investment bankers, special board committees, and investors. He is listed in Southern California* Super Lawyers *for mergers and acquisitions, ranking him among the top 5 percent of all attorneys in Southern California in peer surveys conducted jointly by* Law & Politics *and* Los Angeles *magazines. He teaches legal aspects of mergers and acquisitions in the Mergers and Acquisitions Executive Education Program at UCLA's graduate school of management, The Anderson School. Mr. Weiner is a member of the Committee on Mergers and Acquisitions of the ABA's Business Law Section.*

*In business financing and technology transactions, Mr. Weiner has represented investors and companies in venture capital and other private equity transactions, as well as in public offerings and technology outsourcing and licensing transactions. Mr. Weiner has authored or co-authored several articles on securities law and general business subjects, and was a member of the Editorial Board of the* California Business Law News *between 1990 and 1992.*

**Dedication**: *I would like to thank the late and truly remarkable Professor J. Fred Weston, and Professor Carla Hayn, the founders of The Anderson School M&A program, who first invited me to join them in teaching this program every year, as well as Professor George Geis, the program's current leader, for the opportunity they have given me to develop, refine, defend, and hopefully improve much of what I have for the first time assembled in this chapter. And to George, Chris and Cathy, many thanks for making the time to give me your comments on my earlier draft manuscript.*

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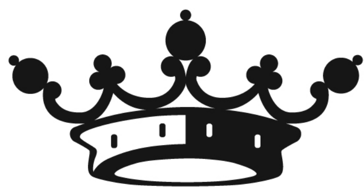

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