

# PUBLICATION

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## Rethinking What Is Possible in Mergers and Acquisitions

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### **A Time of Change**

We are in a period of immense change in the legal world as we experience: (i) a flood of new technologies (artificial intelligence, blockchain, smart documents, predictive analytics), (ii) the ability to grab and use data (outcomes, cost), (iii) unprecedented access to cutting-edge forms and key market information, (iv) the application of management approaches to legal services (legal project management, LEAN, Six Sigma), and (v) better ways to partner with clients and other service providers (outsourcing, legal service providers, third-party technology firms, data scientists). A few years ago, the promise of these changes greatly exceeded the reality as technologies failed to measure up to the tried and true ways that law has been practiced for decades, especially by Big Law. But change accelerated, and technologies and the application of management approaches improved consistent with the much-touted exponential growth curve of Moore's Law.

Now we are on the cusp of rethinking what is possible in almost every area of legal practice. What problems can we now solve that we couldn't solve (or were too expensive to solve) before? How can we create competitive advantages for our clients? How can we change the future? This is the first of a series of articles on various aspects of mergers and acquisitions and other corporate areas asking the fundamental question: "When new technologies and approaches are proactively combined with the best of what we already do well, what is now possible?"

### **The Problem with Traditional M&A**

Most law firms are pretty good at M&A. We have experienced, smart deal lawyers, extensive form banks, style guides, deep benches for diligence and research, and an around-the-clock work ethic to attack issues as they emerge and get deals done. But the traditional approach to M&A is still fraught with problems:

- Excessive and uncertain cost – M&A can be expensive, particularly where the diligence is intense and the company to be acquired has challenges (which is increasingly common in this time of COVID). Moreover, cost can be highly unpredictable at the outset (before diligence) and can vary tremendously depending on the behavior of others, including brokers, the company on the other side and its counsel. Efforts to control cost often result in a trade-off between cost and the assumption of risk.
- It takes too long – Studies repeatedly show that the longer it takes, the less likely a deal will close at all and the more expensive it will be.
- "Success" is poorly defined or not defined at all – As far as the legal team is concerned, "success" in most deals means closing the deal, on time, on budget and without taking on any unexpected risk or having the deal repriced to our client's disadvantage. Very little attention is paid to the business reason for the deal in the first place.
- Failure to achieve business objectives – The studies show that most deals (over 50 percent) fail to achieve the business objectives for doing the deal.
- Too much focus on non-critical things – If we don't know what we are trying to achieve (i.e., the business objectives), the tendency is to try and treat everything with equal importance.

- Reinventing the wheel – Too much time is spent generating initial documents and organizing the deal process. This is particularly true where a client changes law firms or a key member of the deal team leaves.
- Too much time searching and compiling – A huge amount of time and effort in any transaction is spent looking for information (e.g., diligence) and compiling it in a form where it can be understood and used (e.g., diligence memo or schedules), rather than analyzing the information, identifying opportunities and risks, and developing strategies to achieve business objectives.
- Lack of knowledge capture – As teams of lawyers pour over diligence materials, their primary focus is on risk. There is typically a lost opportunity to use diligence as a vehicle to gather a broader set of information that will improve the overall operation of the combined entity.
- Too heavily dependent on lead lawyer – Institutional knowledge (e.g., lessons learned, company preferences, negotiating style) too often resides in a lead lawyer either at the company or at its outside firm. When these lawyers are unavailable or change jobs, this knowledge is often lost. Moreover, these repositories of institutional knowledge are often the most expensive lawyers on the team.
- Limited communication – As a rule of thumb, the more sophisticated the transaction, the more resources are devoted to communication among the business and legal teams. Too often though, especially in mid-market M&A (where the company does not have full-time deal and integration teams) this communication can break down, with adverse consequences to the success and cost of the transaction.

## Rethinking What is Possible in M&A

Drawing upon the best of the new advancements in technology and management approaches, and combining them with the best of traditional M&A practice, it is conceivable not only to address these problems, but also to completely redefine what is possible in M&A.

- Solving Better, Faster, and Cheaper – For years clients have asked, "How can we do this better, faster and cheaper?" This is where proactive project management and advancing technologies really shine.
  - Legal process improvement techniques allow us to map the entire M&A process from initial planning pre-LOI, through closing and integration. This allows us to identify relevant data points throughout the life cycle and to break the process into identifiable phases, each of which can then be attacked to make them better, faster, and cheaper.
  - LEAN and Six Sigma (along with a myriad of other approaches) are time-tested ways in which companies outside of the legal industry have improved cost, efficiencies and outcomes. Indeed, the goals of LEAN are: (i) focus on the customer, (ii) eliminate waste, (iii) improve flow, (iv) build in quality, (v) develop people, (vi) continuously improve, and (vi) reduce total cost. These are especially applicable to the legal process.
  - Having the right information at the right time is a game changer. Once we map the process, we can identify the information we need at the perfect time to be most efficient at each phase. For example, we developed a basic external diligence report we run on target companies at the outset of each engagement to identify key issues to make the first meeting of the team more efficient. Knowing up-front the many places in the process where the same information is repeatedly used also allows us to avoid unnecessary time and expense by grabbing the data once and using it throughout the entire process (e.g., to populate diligence memos, create or check schedules to the deal documents, and in post-deal integration).
  - Improving technologies can significantly change the "better, faster and cheaper" equation. For example, due diligence artificial intelligence technologies (like Kira) can significantly reduce the cost of due diligence while increasing speed. They attack the problem of too much time spent

searching and compiling, quickly identifying key contract provisions and organizing them in a fashion where skilled lawyers can efficiently review, address and communicate issues. Smart documents (technology offered by a host of different suppliers) can dramatically cut the time and cost of creating tailored first drafts of the entire suite of deal documents. Moreover, a well-designed questionnaire applied on the front end of the document creation process can serve as an important checklist, allowing more junior (and cost-effective) members of the team to create documents with the benefit of the accumulated knowledge of the firm and client.

- Lastly, setting appropriate deal goals and measuring results keeps the team focused. For example, setting a target closing date at the outset of the transaction (informed by data), tracking progress and success against that goal, and undertaking a post-mortem review to understand why there were variances and to design approaches to mitigate against such situations in the future, will ultimately shorten the time to close.
- Checklists throughout the process are key to maintaining quality while improving efficiency.
- Making Cost More Predictable
  - A thorough process map helps educate the legal team on best practices to avoid waste.
  - Project management and scoping provides a platform for better communication of deal requirements and pricing up front.
  - Data capture allows for improved monitoring, earlier awareness as to where costs may vary from budget, and valuable historical information.
  - Post-mortem reviews with better data allow for better conversations as to the reasons why deals varied from budget (facilitating plans for improved outcomes in the future).
  - Case management technology allows real-time tracking and communication of costs against phase budgets and shared information (templates, timetables and status) with the legal team and client. Simple technologies like budget alerts can allow for better, faster communications, and potential mid-transaction shifts in approaches that can save time and money.
- Rethinking Success – As noted above, from a law firm's perspective, traditional success in an M&A transaction was closing the deal on time, within budget, without taking on unexpected risk or adversely repricing the deal. However, what if the deal process could be used to increase the chances of achieving the business goals of the acquisition? That is an entirely different value equation. Project management approaches and advancing technology (coupled with experience and perspective) make this possible without incurring significant additional cost.
  - Define "business success" at the outset of the deal, identify the key drivers, communicating the same to the business and legal teams, and design the deal process to maximize the chances of success. The simple act of changing the goal from closing the deal to achieving business success is a game changer. It allows the deal teams to focus on the right things (and to not spin their wheels chasing irrelevant things). Problems and opportunities can be identified earlier. Diligence can be sharpened. Integration can begin earlier. Key relationships (e.g., with critical employees, customers, and suppliers) can be built through the deal process itself.
  - Recognize that integration is often more critical to achieving "business success" than simply closing the deal or pricing it correctly. Again, this is where process and technology can help. Designing a deal process to facilitate integration from the outset can change the equation. Moreover, it is now possible (with diligence tools such as Kira) to grab key data that can aid the integration process sooner and at a low cost. For example, while conducting deal diligence, customer and vendor contracts can be compared against standard company terms to create priority lists for future contract negotiations, and contracts can be abstracted to allow for easier integration into the acquiring company's contract management system.
- Rethinking the Deal Process as an Asset, Not an Expense – Technology and approach allow the deal process to exist as a separate entity apart from the smart businesspeople and lawyers who created

and run it. The process itself can capture and incorporate institutional knowledge over time. Moreover, the process can continuously improve with the lessons learned over countless transactions. And, the process can live on if key people leave or are reassigned. Ultimately, the ability to efficiently and effectively acquire and integrate companies (embodied in a process) may become an exceedingly valuable competitive advantage of a company. How is that achieved?

- Use process improvement and technology to capture the process.
- Incorporate legal project management tools to proactively manage the team.
- Develop smart documents, forms and checklists.
- Capture key data.
- Measure results against stated goals.
- Conduct post-mortems on every deal to determine what went well, what did not, why and what can be done to mitigate a similar situation in the future
- Set goals, measuring and rewarding success for the continuous improvement of the deal process itself.

We are only beginning to understand the potential and limitations of the new technologies and the greater application of management approaches to legal services. Many of these have been developed to solve very specific problems, which may be only one small part of the entire deal. Many are difficult to use or are still too expensive. The potential is clearly evident though. The key is to think holistically and to take the best of the new and combine it with the best of traditional practice. Yes, there will always be a running list of areas to be improved. But it is now time to break outside of the box and rethink what is possible.

For more information about this topic, please contact [Bruce C. Doeg](#) or any of our [Baker Donelson's M&A attorneys](#) who advise clients on all aspects of mergers and acquisitions.