

## GETTING THE DEAL BACKWARDS

by

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Business owners who are selling their business or persons looking to buy a business sometimes treat the legal services as an “add on,” a simple implementation to “document” the deal which the buyer and seller have already worked out between themselves. In this paradigm the lawyer is but a necessary evil to be sure the terms are transcribed properly. If you will forgive my exaggeration to make a point, nothing could be further from the truth. While it is true that obviously the parties would not have a deal to purchase and sell the business without reaching agreement on the “dickered terms,” to quote myself: “It is not the business and its assets, i.e. what you see when you look at the business that determines what you get what you get when you buy the business, but what the legal documents say you get,” whether you get what you pay for or sell. By analogy it is like the candy jar on our conference room table. Buying a business can be like looking at the candy jar. It is crystal with Kit Kat bars and other delicious chocolate bars inside it. That is the like business in this example. But, for example, if the seller does not warrant that he or she owns the assets, including software and intellectual property, with free and clear title, free of claims, and that the financial statements provided prior to the sale for the buyer’s review and due diligence are and were true and complete, then the buyer may get little or nothing for the purchase price. Conversely, if the seller does not get paid in cash but must carry some of the debt, then the seller’s collateral security in the tangible and intangible assets becomes paramount. And, a “reverse non-compete” - where the buyer covenants not to do business with the clients on the client list transferred with the business (if it is the kind of business where there is one) may be necessary.

The point here is that the business owner and buyer may have it backwards in their understanding of the deal. Again, to exaggerate: It is not the “tables and chairs” and cash flow of the business that you are buying, but what the purchase-sale documents prepared by the lawyer say about the tables and chairs and cash flow of the business that is preeminent. Without the right documentation either the buyer or seller may get little or nothing – in any case much less than expected – from the transaction.

A quick note on business brokers: Business brokers are usually knowledgeable about business, and know how to value your business. They also may have an established market for the business you want to buy or sell. But, by “all that you hold holy,” do not use the business broker’s purchase-sale documents. The reason is that the business broker’s job for the seller – and most importantly, the broker’s *incentive* is structured for him or her to close the deal as soon as possible so that the brokerage firm gets its, typically, 12% commission. And, as part of the representation the business broker will always have you sign a disclaimer stating that you did not rely on anything the broker said because the information all came from the seller - or sometimes the buyer. Whether or not that disclaimer is true – probably not- my point is that the broker agreement typically is designed to sell the business and close the deal; not to protect the buyer or the seller. Often this firm will receive calls for representation from the buyer or seller, sometimes both, seeking to remedy flaws in the deal, which issues should have been

competently dealt with prior to the close, not after. This is not to say the broker does not care what happens, but that the incentive structure is not designed to reward the broker for caring; the broker could lose the deal by raising issues. In contrast, the lawyer has no stake in the deal, so has no incentive to make the deal close before or until the common business and legal issues have been discussed and negotiated to the parties' satisfaction.

To close, the "moral of this story" is that you are not buying or selling the business or its assets – you are not buying the crystal candy jar with the delicious candy inside of my example; you are buying or selling – you get -- what the legal documents say you are buying or getting.