

Effectuating a Successful Sale Process

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**PREPARE YOUR
COMPANY FOR
SALE EVEN
BEFORE YOU
PLAN TO SELL IT.**

Preparing for a Sale

A successful business sale hinges on realistic expectations and seller preparation, both of which are typically molded well in advance of the start of any process and require thoughts and planning on behalf of the seller.

Setting seller expectation starts with a self-exploration process; are you, as the seller, looking for a clean exit and fresh start or retirement, or do you want to remain as an active participant in the selling company post-sale, or possibly part-time, in more of a consultant role? If the answer is that the seller does want a role with the company post-sale, how much control are you considering? Are you looking to retain current staff post-sale? Do you want to be involved in decision-making authority? These post-closing elements of a transaction can make or break a deal and are often times not discussed until well into a sale process. Oftentimes I see sellers not really having a moment of truth until the middle of a diligence process, when deal documents are already flowing, and a tremendous amount of time and energy have already been expended toward the goal of a successful transaction. When this happens, a realization that the planned change of control and authority is not desired by the seller, a real wrench can be thrown in the sale process, and a seller can feel a letdown. In many instances, not having the opportunity to flush through details of post-sale engagement does not actually stop a deal from happening because of deal fatigue. Deal fatigue is when you walk down a path of a transaction, and we will detail that path below, and you get so far in, so invested in the process, you emotionally do not feel you have any other choice than to close, despite a sense that the deal may not be right for you. Unfortunately, this happens a lot. The best way to combat regret in a decision is to be truthful at the start of where you see yourself and your company post-sale, and to spend time with the prospective buyer to ensure an aligned

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A main component in preparing for sale is organizing your company in preparation for outside eyes to peer into the inner workings – a full colonoscopy. A key component here is organizing client contracts, which in the sale of an RCM company, is the key asset you will be transferring, since client contracts are the revenue stream for the business. One of the first questions a buyer will focus on is whether your client contracts are assignable in a sale; meaning, whether the buyer will be able to take over your client contract without notice to the client, or on notice, but not requiring the client to sign a new contract or consent to the transfer. A buyer will also look to confirm your existing client contract form has market protections for the service provider. To the extent a buyer is not comfortable with assignability or contract terms in your client contracts, potential purchase price or the viability of the deal itself may be in jeopardy. To correct a client contract issue, a buyer may require that you have clients re-sign an agreed-upon contract form prior to purchase, or subsequent to purchase but with a “hold back” of purchase price built into the deal. Rather than focus more time on this hypothetical requirement, let’s move on to attracting and catching a buyer.

Attracting and Catching a Buyer

Once you decide it’s time to sell, the next question is, how do you market your business? There are two “most frequent” sources to find a buyer. The first source for a buyer is procuring a buyer on your own, which may be effectuated by approaching a competitor to see if there is any interest in a buy-out, or perhaps taking a recommendation from a

colleague on interested buyers in the marketplace. The second source for a buyer is engaging an experienced broker in the space to market and identify a purchaser. A broker’s job is not only to identify a buyer, but to help package your business to market to a buyer. Your broker should be an industry experienced broker who can assist in valuing and marketing your company to achieve a market value purchase price. Your broker is paid to be your advocate and intermediary with potential buyers; be sure you select a broker you can easily communicate with and trust.

Once a buyer is identified, in the initial packaging, they will typically request financials in the form of the past three years of tax returns. From the basic package provided, the buyer may fashion a term sheet, indication of interest or letter of intent that may detail a purchase price, which in many instances, is fashioned well before a larger diligence process is undergone. Oftentimes, when that “bottom line” purchase price is unveiled, a seller gets excited. Hold on, now – the purchase price is only “good” once received, and the devil for receipt of purchase price is in the details. Too frequently, the total purchase price will be conditioned on payout conditions precedent and there may be many other components to the deal documents that have to be finalized in order for a sale to be culminated, including, additional diligence. This may be news to you, but preparing for a sale diligence process commences the day you start your business; every contract, every exchange and interaction will potentially be requested for discovery by a buyer as they look to evaluate your business. Financial records will be a primary concern to justify a potential purchase price and will be 80% of the focus. However, potential exposure areas, including, customer payment history, customer contracts, vendor relationships, your employees and their

employment records, your insurance, and all other operational items may be of interest by a buyer. In fact, many buyers will conduct an in-depth compliance review during the diligence process, to ensure HIPAA compliance, documentation compliance, and kickback compliance; you should anticipate chart and CPT code auditing, and a deep dive into questions around third party payor interactions. Notably, each of your staff members will likely be screened for any federal payor exclusions – be prepared for background checks.

In addition to an operational and compliance deep dive, buyers will likely want to know everything about your company, including how it was formed, when it was formed, whether it's in good standing, and especially if you have your assets liened. Meaning, if you have any debt that has caused encumbrances to be filed against your assets or whether others have claims to ownership of your assets such as your accounts receivable. It is customary in every deal for a buyer to only purchase what you have 100% control and ownership of, so a big part of the process for many sellers is to collect payoff letters from their bank. Coordinating loan payoffs and lien removal can be an arduous process; sellers may have a specific form payoff that their counsel requires. Be sure to start requests for payoffs early on in the sale process so your deal is not delayed waiting for acceptable payoffs.

Do not be surprised for a buyer to require certain key employees to become a requirement for a deal. Depending on how your company is constituted, if you have a number of significant key employees, a buyer may come in and say that the deal is contingent upon those employees who are critical to the operations to remain post-close. If this does happen, you, as the seller, may be placed in a problematic situation; timing announcing a sale to key persons, and the company as a whole, is critical. Best practices dictate that you keep news of a sale confidential until the ink is dry and a deal finalized. However, a buyer may place penalties on a deal should certain employees not continue post-closing, which may give certain employees leverage. Such a precondition as retained employees will be handled in the deal documents, which leads us to our discussion on papering the deal.

Papering the Deal

Typically, there are several stages of paper as you consummate a deal. Initially, you may sign a broker agreement at the time

you engage your broker, which should be reviewed by your attorney, because the fee that you will be charged by the broker at the end of the deal will be set at the start of the process. Once a buyer is identified, it is standard for the parties to enter into a non-disclosure agreement or confidentiality agreement to protect the seller's confidential information that will be shared for diligence purposes. Once basic diligence has occurred, and often times, prior to a diligence deep dive, the basic financial terms of a deal are memorialized by a letter of intent. The letter of intent should not be taken lightly; even though this document is negotiated prior to a deep diligence dive, the terms of the letter of intent will certainly be sought to be enforced by a buyer, to the extent such terms benefit the buyer. The letter of intent should be reviewed by your counsel and negotiated, to the extent that it is not correct or against your interest. Following the execution of a letter of intent, diligence will likely become more serious, and the deal will then progress to a purchase agreement and accompanying ancillary documents, which may include a lease assignment or new direct lease depending on whether you hold real estate and the buyer seeks to step into your shoes, and how you hold such real estate (as tenant or owner).

Most deals are “asset” deals – the purchase of assets of a company, as opposed to an equity purchase. Reason being, an asset deal allows a clean start with the assets, fresh from the closing date, whereas an equity purchase moves the ownership and all liabilities from one party to another (liabilities may be limited by contract, but the new owners, by contract, step into the ownership stream by taking on the tax ID of the existing entity). The following will address the more common deal form, an asset deal. An asset purchase agreement is exactly what it sounds like – it is a purchase agreement for assets of the company, which shall be defined in the agreement, likely, with specificity. Since your most valuable asset will be client contracts, in the asset purchase agreement or its corresponding schedules, the seller will likely be required to list with specificity all clients of the seller. Other assets for purchase may be the right to employ those individuals working for the company, the right to real estate or vehicles utilized by the company, rights to software or any vendor contracts in effect. The asset purchase agreement will also detail what assets of the company are not being purchased. In addition, the bulk of

the asset purchase agreement will devote energy towards the promises (representations, warranties and covenants) a seller is making of the assets, as well as how the seller will protect the buyer from exposures following the sale for exposures accruing prior to sale (indemnification). The buyer will also be contractually required to indemnify the seller for exposures following the sale in the purchase agreement, with, likely, additional legalize to be finalized.

A key component to an asset purchase agreement is securing the purchase price. Sellers want to know how and when they will be paid. The answer to “How” is typically by wire transfer. The answer to “When” can be more complicated. The purchase

senting RCM companies in the past and the legal team's understanding of your goals. The RCM industry, clients, and contracts are extremely nuanced, and it is in the nuances that the details of a sale will have a lasting, long-term impact on the deal being struck. Selecting a law firm that does not operate in this space may severely impact the attorney's ability to effectively represent you. Another critical factor when selecting counsel is the ability to close the transaction and effectuate your desired result. Unfortunately, many attorneys bring their ego to the table and make the process about themselves and the lawyer “winning.” Your attorney is your trusted advisor tasked in this context with a simple

The process begins with self-exploration.

price in a RCM company deal is often paid in varying components, with, when representing a seller, hopefully the majority component paid at closing. It is standard for a seller to have to accept holdbacks and potential offsets from purchase price as part of making and consummating a deal. Such holdbacks and potential set offs will be crafted to provide a buyer security for any number of reasons, including lower than expected revenue or potential higher client attrition. The terms of any holdback or set off rights must be clearly and unambiguously documented to avoid a fight down the road. Typically, any holdback amount is held in escrow. Escrow is typically held with an independent third-party with contractually agreed upon, explicit instructions on how and when to release escrow funds.

Talking through the elements of papering the deal, it may be obvious why there is a need for legal counsel – you are looking to sell one of your most prized assets – a business you may have spent a good portion of your adult life developing. Exiting with limited liability and a preferential deal is critical. The parties you select to assist you in the process will very much dictate your outcome, which brings us to tips on selecting legal counsel.

Selecting Legal Counsel

Sometimes, or, if I'm honest, frequently, the lawyers complicate and frustrate the deal process. So, a critical decision as you enter the deal process is selecting competent and efficient counsel. Competent counsel will depend on experience repre-

mandate – effectuate the transaction while protecting the client (you) from unknown exposures. Attorneys are expected to effectuate this aim by giving you, the client, an informed consent. Perhaps you can live with certain provisions we discuss that smell a bit off; fine, it is my job to hold my nose, so long as you understand associated risks.

Conclusion

Effectuating a successful sale process starts with reasonable expectations and preparation, progresses with experienced and effective key professionals (perhaps your broker and your legal team), and concludes with executed deal documents, which, hopefully, meet your expectations. As you proceed through the sale process, keep in mind Larry David's sage advice, that “a good compromise is when both parties are dissatisfied;” hopefully, the buyer is slightly less dissatisfied than you, my client, the seller. ■



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