

Acquisitions Professionals and In-house Attorneys are a Team

- Steven A. Lauer

To compete successfully in today's real estate market, you **must be nimble**. The best properties don't stay on the market very long and the better they are, the less you'll be able to negotiate concessions by the seller. To be as flexible as necessary, the team that identifies candidate properties and then secures them for the portfolio must be very adept and flexible.

The working relationship between a company's in-house legal staff and its acquisitions team should be close and well structured to have that **flexibility**. Each member of the team must know in advance what his or her responsibilities will be and how those responsibilities will relate to those of all the other team members. If a potential deal is brought to the in-house legal staff only after negotiations are complete, those lawyers will need time to learn the details of the proposed transaction. Even with that, they might not appreciate the various concessions and other specifics of the arrangement in order to accurately document and complete the transaction.

Accordingly, it is increasingly important that the attorneys and business unit personnel function as a **coordinated team**. The attorneys need a fully developed understanding of the different negotiating preferences of the business unit. They need to be completely conversant with the issues that are most important to doing the deal, both positive and negative. To spend time during negotiations educating one's counsel as to what point can not be negotiated away is to risk losing the deal or starting from an inferior negotiating position.

For example, if you represent an institutional investor that has an extremely low appetite for risk, the attorneys and business negotiators must understand that implicitly **prior to starting any negotiations** - in fact, before even commencing the search for properties. In that way, you will be able to make that criterion an integral part of any discussions you might have with possible sellers. If risks of certain types are acceptable, a common understanding of the terms under which they are is vital to a fruitful negotiation.

For seven years, I was the in-house environmental attorney for the commercial real estate investment units of a large institutional investor. As such, I was intimately familiar with the company's positions on those issues. I advised the units' executives and professionals on those issues on a day-to-day basis. In order to address those issues most effectively in the transaction context, we worked out **preferred contractual provisions** for the more significant ones. Those preferred provisions were then circulated among the in-house transactional attorneys in the regional offices of the business units. Periodic discussions of the relevant concerns and the associated issues reinforced the company's position. On occasion and as necessary, the field staff asked me to participate in the negotiations of environmental issues that came to the fore of various acquisitions. In that way, we maximized the impact of my specialization without requiring that the attorneys who negotiated the transaction become expert in environmental law.

Coordination between attorneys and business negotiators is also critical to success in respect of due diligence. Make sure that all are on the same page in terms of the types of information you will need to examine, as well as the sequence in which that the information will be needed, to complete your transaction. The significance of each type of data should be clear to all, in order to assure that everyone on the team appreciates its relationship to the other parts of the deal. They also need to understand their **respective responsibilities** in terms of completing that due diligence. Will the attorneys participate in the examination of physical plant, in order to document accurately the condition of the property? If so, they will need to factor that activity into their anticipated workflow. If they will not, who will be responsible for documenting that condition and relating that information to the attorneys who will need to prepare the necessary documents to complete the deal?

Another example from my in-house environmental tenure may illustrate this point. I worked with the company's in-house environmental engineer to develop a standard for the environmental investigation that

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would be needed to satisfy the company's investment criteria for an acquisition. We distributed that protocol among the investment professionals and the in-house real estate attorneys. We also communicated it to the outside environmental consultants on whom the company relied to perform the investigations. We went so far as to **conduct joint meetings** with outside environmental consultants and outside attorneys to discuss issues relative to environmental investigations in respect of Prudential's real estate investments.

A real estate acquisition is a complicated transaction. There are physical assets involved. There are also assets, such as trade names or marketing and advertising campaigns (for a rental property). The rights of the buyer and seller can be significantly impacted in the course of negotiations, positively or negatively, even though inadvertence. **Careful coordination** among the business and legal members of the acquisitions team should increase the chances that the company will acquire the property it wants, with the appropriate rights and responsibilities, at the price it is willing to pay. Fewer unwelcome surprises will appear after closing.

It's advisable to attend to the teamwork aspects of the process in a context that is removed from actually doing a deal. It's far easier to discuss respective responsibilities **during quiet time** rather than when everyone has urgent tasks to accomplish in order to meet the deadline of a transaction. That expenditure of time will be repaid through more efficient and effective completion of the deal with minimal redundant actions and possibly miscommunication.

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IN THIS ISSUE...we have an article from Steve Lauer, former corporate counsel for Prudential Insurance Company. He talks about the ideal relationship between general counsel and the institutional "transaction catalyst". Enclosed is the acquisition criteria from one of my clients, Boston Financial. This is a firm positioned to do well in today's environment – equity already raised, coupled with moderate leverage bank debt. I have also taken the liberty to reprint a "commercial" for my capital markets activity.

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