

Chapter 3

Forming a Team

When you are being engaged in an M&A transaction, an understanding should be reached with the client as to your role. The level of involvement can range widely depending on the client's needs and preferences. At one extreme, a lawyer could manage and oversee the entire transaction, coordinating the work of all the other professionals. This is often the role assumed for a privately held client with little, if any, experience in M&A transactions. At the other extreme, the lawyer's role could be limited simply to preparing and revising documentation as requested by the client. This more limited role might be for a client with an in-house legal staff that is frequently involved in M&A transactions.

What will the role be? Will you lead the transaction team with overall project management responsibility or simply be one member among many professionals on the team? Will you be responsible for all substantive legal areas including tax, antitrust, environmental, labor and employment, or only for the preparation and negotiation of the documentation? Will you have any responsibility for conducting due diligence? What role will you play in the negotiations?

If you are to manage the transaction, you will need to assemble the necessary resources within your firm or law department or elsewhere to make sure the client's needs are satisfied and interests protected. Putting the team together may be quite simple in a smaller transaction for a privately held client. The amount of support required may be limited, perhaps involving at most several other lawyers or non-legal advisors. It is the larger transactions for the more complex businesses that will require more diligence in obtaining the right people for the team and greater management skills to bring the project to a successful conclusion. Whether your role will be that of managing the transaction or a supporting role as a member of the team, it is important to understand the relationships among team members and the dynamics of working together.

The need to assemble a team can occur at various stages of an M&A transaction. It may be that the client is proposing to sell its business and is interested in preparing for a sale with no particular buyer identified. Or the client has already been approached and is in the process of negotiating with a potential buyer. The composition of the team will also depend on the nature of the transaction and whether the lawyer is representing a seller, buyer or target.

BACKGROUND INFORMATION

Whatever the stage or nature of the transaction or the type of representation, the deal lawyer should have a good idea of the client's objectives and have background information on the client's business and industry before assembling the team. It may be that this is a long-time client, in which case its objectives are clear and there may be no need to gain any additional information. Quite often, however, the relationship with the client is new for the firm, the lawyer or both. This will require that the lawyer spend a

considerable amount of time in getting up to speed. Equally important is the need to gather background information on the target or the potential buyer, as the case may be, if it has been identified. Is the target engaged in basic manufacturing with owned facilities throughout the country, or is it a service business, perhaps a financial institution or insurance carrier, that is subject to extensive regulation? This will make a significant difference in determining what legal and other resources may need to be engaged in the project.

For public companies and many private companies, a good deal of information is readily available through their web pages and elsewhere on the Internet.ⁱ

You Never Know What You May Find

A prominent publicly traded company was negotiating a significant control investment in a privately held high-tech company. Our client's engineers had checked out the viability of the technology and the terms of the deal were almost completed. However, when our client followed its standard practice of ordering a background check of the principal owners of the high-tech company, it discovered the SEC was currently investigating them with respect to other transactions unrelated to the high-tech company. Our client terminated all discussions because from a public and investor relations point of view, it could not be associated with anyone even allegedly engaged in questionable practices. Today, with easy access to so much information on the Internet, a preliminary check on the Internet would seem to be a first step in similar situations. Indeed, a background criminal and litigation check on management of the party on the other side of the negotiating table may be something worth considering before getting too far down the road.

The periodic reports of public companies, including their annual and quarterly financial statements and other detailed financial information, can be accessed through the webpage of the SEC and private services.ⁱⁱ For many private companies, it is more difficult to acquire information, but the audited financial statements and related notes, if made available, can be a good start. Often the booksⁱⁱⁱ that are prepared by investment banks to market companies for sale provide a good deal of helpful information, but it is important to remember that these are sales documents.

THE CLIENT TEAM

While life might seem simpler if lawyers could do deals just within their own law firm or law department, reality is that M&A deals involve a number of players, beyond just the lawyers and may involve lawyers from more than one firm. First and foremost, there is the client and the cast of characters within the client's organization.

Gatekeepers

An important agenda item at the first meeting with the client is to identify the key contact person who is to interface with the senior outside counsel. Depending on the working relationship with the client, consider suggesting to the client the need for a funnel with a senior, respected client manager to act as gatekeeper. On most successful

deals, both from a timing and cost point of view, having the right client contact who understands and plays the gatekeeper role is critical. Just which individual is chosen will depend on the size and importance of the deal to the client, the client's deal experience, the client's management style, and the scope of authority given outside counsel.

The key specifications for a gatekeeper are:

- authority to make most decisions or quick access to the decision-maker;
- enough clout to cause necessary specialists and custodians of data within the company to be responsive;
- availability; and
- a good working relationship with the lawyer-side contact.

While other specialists at the law firm and the client will often have their own channels of communication, the point persons on the law team and client team need to be kept current on all developments and issues. The client's choice, depending on its organization and the nature of the deal, could be the CEO, CFO, general counsel, a head of corporate development, a manager of the business unit or other managers, depending on the situation. The title is less important than meeting the specifications listed above.

Chief executive officer. In larger companies, the CEO usually delegates the gatekeeper role to another person. It can be useful to keep the CEO distanced from the day-to-day issues of the deal so that when sticky issues arise, the CEO can deal with a counterpart on the other side. Just as important, the CEO needs to continue to run the business. In smaller companies or when the CEO is a key owner or there are a small number of executives, this is harder to do. Impress upon the CEO that he will be the problem solver ultimately, and arrange for briefings as often as he would like. Sometimes a daily five-minute call is all that is needed. On the other hand, in family-owned businesses, the CEO is often the gatekeeper and is very much a hands-on participant in most aspects of the transaction.

General counsel. There has to be a good working relationship and frequent communication between outside counsel and, where one exists, in-house counsel for a deal to get done properly, on time and within budget. The general counsel is often the gatekeeper and, if experienced in M&A activity, this could be a great advantage or a significant problem. An experienced, deal-savvy general counsel with extensive knowledge of the client and a willingness to partner with outside counsel can be an enormous asset to a deal.

An Outside Counsel Testimonial to In-House Counsel

My best experience with a general counsel was on a late Friday afternoon during the summer on a large acquisition. I had never met her. She was an experienced general counsel. She convened a meeting of the senior department heads of her company to meet with me and some of my firm's

key lawyers representing the company in the acquisition. She acted as chair of the meeting. In her opening remarks she summarized the deal, gave the anticipated time schedule explaining regulatory delays, and quickly said, "I am now introducing lead outside counsel who will be in charge of the acquisition from this point forward." Within a half hour, the members of the client team knew what was expected of them and who they would be working with from the outside, established a weekly meeting schedule for the whole group, and knew exactly to whom trouble or issues should be reported.

At the other extreme, a "know it all," "been there, done that" general counsel can be a Monday morning quarterback, blocking all messages, concerns, questions, and other communications to and from other business people.

In some companies, the general counsel may not have M&A experience and will prefer to continue to run the day-to-day legal aspects of the business and happily leave management of the deal to outside M&A counsel. In this situation, particularly with a target, the general counsel remains a valuable resource and a needed facilitator but is less involved in the M&A process.

At the other end of the spectrum, for some buyers and sellers, a general counsel with extensive M&A experience and a staff with broad experience may lead the transaction with little involvement from outside counsel.

Chief financial officer. In many deals, the CFO is the client gatekeeper. On the buy side, the CFO often will oversee, if not direct, the due diligence of the target's financials and their underpinnings and provide insight into the financial impact of due diligence and other discoveries. Even if not the gatekeeper, the CFO will usually keep in close contact with the process, especially where there are financial issues or disclosures that have to be explained, or where the CFO feels a need to know the target's business to ensure proper financing is obtained or integration achieved. The target's CFO will often serve as point in providing financial due diligence, fielding any number questions and preparing the schedules.

Head of corporate development. In recent years, many large companies have created corporate development officers and staffs that are responsible for divesting and acquiring businesses and product lines that coincide with the corporate strategy. They are often quite experienced in the acquisition process, many having come from financial or investment banking backgrounds, and are usually heavily involved in the negotiation, due diligence, and documentation of all the divestitures and acquisitions. Where present, the head of corporate development or other members of the staff can be very helpful as gatekeepers.

Client Specialists

Depending on the nature of the transaction and the parties, there often will be additional members of the client team who will be responsible for particular aspects of the deal. These may include specialists in employment law and benefits, risk management, and

information technology/MIS, as well as in tax, environmental, or real estate matters, and those who will be responsible for integration of the target's business and operations.

Employment and benefits. A senior human resource/benefits specialist from the client is often an important part of the team. In a multi-jurisdiction transaction, laws governing severance and termination vary widely. How do different benefit plans equate? How to handle a pension surplus, or worse, an under-funded pension plan for transferring employees? How to deal with post-retirement benefits for retired employees of the target when the seller wants to close up shop or there are collective bargaining issues? Personnel issues are often the thorniest to deal with in an M&A setting. On transitional issues, having a human resource/benefits specialist is very helpful.

Risk manager. The client, particularly a strategic buyer, should know the "hot button" risk issues. Someone familiar with insurance issues, how to meld coverages, and how to address uninsurable risks will be critical to both sides, particularly in asset deals.

Information technology/MIS. One of the most perplexing management issues for most companies is the selection, implementation, and operation of the information technology/management information systems. In the context of an acquisition, this becomes even more difficult. Even if the target is to continue as a stand-alone operation with its own internal systems, its operations often will need to be integrated with the financial reporting systems of a buyer. Specialists can evaluate the adequacy of a target's systems and, if necessary, compatibility with the buyer's systems. In some cases, the target's systems will be phased out, so that arrangements will have to be made for conversion and for running parallel systems until the conversion is successfully completed.

Implementation leader. Numerous transitional and implementation issues will have to be discussed between representatives of the seller and buyer who know the business and industry better than any lawyer involved in the transaction. In some deals, a separate implementation team is set up to bring out the points to be covered in the transitional or implementation agreements. These agreements often provide for continuation of certain services, such as information systems, human resources and employee benefits, accounting and tax, sales support and marketing and insurance and risk management.^{iv} Key to the team are people knowledgeable about both the target and the buyer, so that closing of the deal will be as seamless as possible to customers and suppliers of the target's business.

THE LAW FIRM OR LAW DEPARTMENT TEAM

Because the transaction involves the purchase or sale of a business, all legal aspects that could pertain to that business are appropriate fodder. Exactly how they might be applicable to a particular transaction is tremendously variable. Normally the team, on either the buy or sell side, is comprised of an experienced M&A lawyer assisted by other lawyers playing various roles, divided between the supporting cast and the specialists. The process for assigning and delegating duties to other corporate/M&A lawyers who are members of the supporting cast is not unlike any other transactional matter handled by

the firm or law department. It is the involvement and coordination of specialists that will require the most attention.

Legal Specialists

Types of specialists needed. The legal specialists required and the extent of their involvement depends on numerous factors, such as the profile of the target (type of industry and whether regulated), the risk tolerance of the buyer and the significance and form of the transaction. The possible permutations and combinations with respect to legal specialists are daunting. The following are some of the areas of specialization that may be required:

- tax
- securities
- ERISA/benefits
- litigation
- environmental
- antitrust and Hart-Scott-Rodino
- labor/employment law
- immigration
- intellectual property
- lending/financing
- real estate
- regulatory
- estate planning
- foreign or local counsel

While it would be unusual to have all of these specialists on any deal, involving a half dozen or more would not be unusual. There seems to be a need for benefits, environmental, employment, tax and, increasingly, intellectual property lawyers in most every deal. Particular client needs, often in regulated industries, may require additional specialists. The greatest concern will be buy-side representation, but often specialists interact with their counterpart specialists on the sell-side as well.

These specialists could come from the same law firm, but they are frequently drawn from various outside firms representing a buyer in particular areas, from the

buyer's own internal legal staff, and from non-legal advisors providing specialty services, such as tax advice from accounting firms. Larger transactions tend to require more specialists (and lawyers in general).

Increasingly, larger corporations handle the entirety of an M&A transaction in-house, particularly on the sell-side, but often on the buy-side as well. The following observations remain applicable whether addressed to an outside or inside team.

Selection of specialists. The actual selection will depend on the exigencies of the situation. What specialists are needed? Are the regular specialists working for a client available? What is the role to be played—advisor, negotiator, or other? What is the timeframe for a particular deal?

Numerous factors affect the selection of specialists. An experienced buyer will usually have its own in-house team. A long-standing client may have specialists that it has relied upon within the same law firm and who would be most appropriate to be involved in the transaction, particularly where knowledge of existing client practices is important, such as in the benefits area. More difficulty arises when a client uses specialists from other firms because determining whether and how these other specialists will be involved is less certain. Clients often understand that using a specialist from the lead lawyer's firm may allow greater responsiveness. For example, a client may use a boutique intellectual property firm to resolve key IP issues, but may be willing to allow the lead firm to do IP due diligence and negotiate the IP representations.

Role of specialists. The roles of specialists vary. For example, a litigator would almost always be used to help a buyer understand the risk of pending or potential litigation, but in a particular transaction, such as a public deal, litigators may be asked to advise on the legal risk associated with certain actions or perhaps just to stand by if there is litigation. In other instances, a specialist may be asked to take responsibility for negotiating particular provisions of the acquisition agreement or of various ancillary agreements.

Some clients will rely on non-legal specialists, such as accountants, for tax planning. In these circumstances, it is appropriate to have an understanding with the client as to the respective roles to be played between the accountants and the tax lawyers. Are the tax lawyers and the accountants part of a combined team? Do the tax lawyers have any role at all (or are they relegated to reviewing the tax representations)? Even when an accounting firm has been given complete responsibility over tax issues, some lawyers will still want the reasonableness of the position confirmed, informally, by tax lawyers in their firms. It may be appropriate, as part of the engagement letter, or separately once the roles have been defined, to prepare a letter to the client specifying the roles of the lawyer's firm and the accounting firm.

A number of practices are followed in the actual negotiation of an acquisition agreement. Sometimes the assignment for negotiating all deal terms and the precise form goes to the lead M&A lawyer. Sometimes the M&A lawyer's role becomes more

limited—deal terms are negotiated by others, with the legal aspects (such as representations and covenants) being negotiated by the lawyer. But the legal aspects are often divided among the lawyers. Specialty lawyers, such as those engaged in tax, benefits and environmental law, may negotiate the representations (and related indemnification) with their counterparts on the other side. The problem with the handoff is that too often those provisions are negotiated in a vacuum, without an understanding of client objectives and risk profile or conventions used in the acquisition agreement. On the other hand, some specialists (such as in the executive compensation areas of some law firms) are devoted to the M&A aspects of their specialty and understand precisely what needs to be done on a particular matter.⁹

Even with an extremely experienced specialist, there is risk that things head in the wrong direction. A discussion between the lead M&A lawyer and the specialist is always important to set common objectives and the lead M&A lawyer should generally understand the specialist issues and keep informed as to the related negotiations. An exception to this might be where the specialist works directly with the client and the client has a set way of doing things, such as an experienced buyer that always handles its benefits matters in a particular way. The key is that the lead M&A lawyer needs to understand that these are the ground rules.

When to Involve Team Members (Generally Earlier, Not Later)

The process of assembling the legal team and involving team members is a complicated process. Most buy-side deals are tentative. Of possible deals that a potential buyer might be interested in pursuing, only one of dozens usually gets very far in the process. If a lawyer's first involvement is the review of a proposed confidentiality agreement, it usually would be foolish to try to assemble and engage a full blown team at that time. Even for sell-side representation, trying to find team members, when the role and seller's counsel and timing is unknown, is often not productive. For most law firms, trying to reserve other lawyers for some indefinite time period just does not work. Nevertheless, it is usually worth the effort to attempt to identify team members and establish their availability even before there is work for them to do.

Despite the difficulties, it is highly desirable to organize the team as soon as appropriate, particularly as the pace of a deal accelerates and certain bridges have been crossed. The lead lawyer should ideally attempt to organize the team once some level of probability has been achieved. It is not necessary to identify the precise role to be played by each person. The beginning exercise is usually to find the needed expertise with time availability. How the roles play out will depend on how the transaction unfolds. Having a team in place early on enhances client service and better assures that the legal issues are surfaced and addressed at an appropriate time.

It may not be necessary to put together a full blown team in one fell swoop. Some specialists, such as tax advisors, may be brought into the picture at the talking stage, when structure may be more important than the details. Others may become involved when a letter of intent is being negotiated, depending on the elements of the deal being

discussed. Some need not be involved until the acquisition agreement is being drafted or negotiated (or even later), particularly on the sell-side.

But once a deal has expanded to due diligence (at least on the buy-side), it is appropriate to put a full team in place. The need for specialty lawyers continues in the documentation phase. The trick is determining when a broad-based effort may be required. Sometimes there is no warning—a client may announce that it is interested in buying a particular company and wants a team on the ground in a distant city the following day. In deals where the letter of intent precedes due diligence, sending out the letter of intent is often the point when the lead lawyer goes to work in putting the team together. At other times, the client may simply signal needed assistance in the due diligence process, as for example, participation in an auction. But if the client is the most logical buyer of a particular business, developing the team even at an early stage may be appropriate.

On the sell-side, just when the team is assembled may very well depend on the role of the lawyers. Depending upon the sophistication of the seller and its other advisors, some sellers feel that lawyers need not be involved in putting together a data room or in otherwise assisting the client in determining which documents will be provided.

Obstacles to Working with the Legal Team

Your own law firm (or law department). The difficulty of providing effective, quality client service in an M&A context cannot be overstated. In virtually any transaction, the client (in addition to any internal legal staff) will have a number of business persons working on the matter, from top executives on down. The client will also have a number of external advisors, such as investment banks and accountants. The legal team may be only one of several sets of advisors. Unlike the well-oiled professional football team, the client team and advisors will have been pulled together on the fly, may not even know each other and may not have had M&A experience. Often knowing the assignments is difficult, compounded when they are to be carried out by people having differing relationships.

Even in the happy circumstance where the legal team members are all from the same outside law firm (or in-house department), there can be difficulties in serving the client.

First, team members will always have a differing knowledge about the client. Some members may never have worked for the client. Others, while working for the client extensively, may only have a vague idea of the strategic imperative for a particular deal. There are always differences in what is important to the client and what sends the client over the edge.

Second, team members will always have differing understandings of how to approach the deal. Often team members look at transactions through the prism of their own practices, so that some specialists can view an isolated matter as a terrible legal problem. While no one would advocate sloppy practice, most experienced M&A

practitioners realize that there are often trade-offs and it is impossible to button down all of the loose ends in a transaction. An M&A lawyer who can participate in the specialist negotiations may bring special value to the representation.

Third, team members have differing experiences and styles. There is no one best practice that applies to each element of an M&A deal. Lawyers working on a matter will have their own unique experiences, and based on those experiences, will approach tasks in differing ways. While no one would suggest that M&A practitioners must be stamped out of the same mold, it may be necessary to attenuate some behaviors in the interest of best serving the client. For example, some lawyers are not always good at meeting deadlines. When working one-on-one, deadlines may not be as meaningful and the eccentricities of a lawyer can be worked around. In a deal context, the lawyer late in making a required contribution to a document becomes the weakest link, affecting the entire team.

Fourth, team members have differing norms of timing and service. Other than perhaps a hearing on a temporary restraining order, there are few areas of law practice that involve such time pressures as an M&A deal. Often team members are drawn from other disciplines, where deadlines come with long lead times and where legal work is focused on a regulatory scheme rather than negotiated language.

Some of these factors may be less applicable to an in-house legal department, but there is an element of truth in each. For example, the first factor talks about differing knowledge of the client—in-house law department members have an inherent advantage in understanding the company they work for. But there are always differing understandings of how a particular deal fits the needs of the company.

Law department (when team leader is an outside lawyer). The relationship between an outside team leader and an in-house lawyer can be complex. Inside lawyers, quite naturally, will have a reporting responsibility elsewhere and will look first to that relationship in providing guidance. An in-house lawyer may not have particular deal experience, so being the keeper of the keys to a particular area may mean that the negotiating process is delayed as the in-house lawyer gets up to speed or gets internal direction. On the other hand, an experienced in-house lawyer who knows how the company always does deals can be an immense resource. Finally, the distraction of other responsibilities cannot be overlooked. The internal benefits specialist asked to work on a deal will still have a day job requiring attention. Sometimes, the general counsel or other lawyer designated to manage the internal legal role will interface with these in-house specialists, which may help in terms of setting priorities. The tone of cooperation set by general counsel will go a long way in assuring a good working relationship between the team leader and in-house lawyers.

Managing the Legal Team

Given the obstacles, the barriers to success in managing the legal team are formidable. Not only will some team members not have worked together or worked for the client, but

they will bring varying levels of experience to the team and their methods of practice and service may differ considerably.

Management approaches, as would be expected, vary, from letting the chips fall where they may to an active team building process. Some practitioners may simply nominate other lawyers for team membership, their names go on the distribution list and all are expected to exhibit appropriate professional behavior. Alternative approaches involve immersing all team members in client objectives, communicating what the deal is all about and noting appropriate service objectives, such as standards of timeliness. For example, the “chicken little” lawyer may be misunderstood by some clients, either because the client understands the risks or because the hue and cry overwhelm normal expectations.

Applying management approaches when some team members are outside the law firm or law department can be even more difficult, particularly if other law firms are involved. In those circumstances there is even greater need to adopt appropriate practices to make sure that all team members are on the same page.

The handoff versus the consulting approach. It may not be necessary to have a team at all—tasks in a deal could be carried out through individual handoffs of particular assignments with the team leader providing enough information for the assignee to complete the task. For some limited assignments this may be the preferable approach, but for larger transactions this has some drawbacks—it is inefficient, it denies the benefit of interaction, and it is ultimately less satisfying as a way to practice law. Unless the team leader has superhero attributes, the deal can often bog down if, for whatever reason, the leader is overwhelmed, distracted, or otherwise unavailable.

How do seniors and juniors, specialists and M&A lawyers, insiders and outsiders work together? There are as many approaches as there are personalities. Lawyers, particularly experienced specialists who may have a preexisting relationship with a client, may chafe when it is suggested that they are working for the lead M&A lawyer. Working as part of a team may only mean that a specialist does his own thing in connection with a transaction. For junior lawyers, handing off an important area of unsupervised work is fraught with peril. In those circumstances, the lead lawyer would normally expect the junior to continue to work under his supervision. But even the deepest of specialties should not be operating in a vacuum. Issues that concern particular specialists may be tradeoffs in other areas. The input of specialists may affect overall design and structure. It is usually more fun to be part of a team rather than isolated in your office working on a narrow sliver of a deal. The consultative approach to M&A has its own rewards.

Team meetings. Some believe that an initial team meeting is important. They can foster a sense of commitment and camaraderie to a deal. Because there will be a discussion and an opportunity to ask questions, they provide the best assurance that client demands will be understood. The team leader might explain the overall process and what is expected of the team. For those team members new to the client, some explanation of the business and overall objectives can be helpful. An explanation of the need for timelines would be explored—team members are more likely to deal with what appear to

be unreasonable demands if they understand the need. The downside is the cost to the client of wide participation at an hourly time charge. While there are benefits to in-person meetings, conference calls can be effectively used, particularly when team members may not be in the same physical location.

Organizational techniques. A key to effective team behavior is an understanding of the tasks to be accomplished. Team leaders often rely on some of these techniques:

- Working group lists, so that everyone understands who is on the team and how to make contact.
- Time and responsibility (T&R) schedules, in which various tasks are specified and the date for completion and name of the responsible team member is listed—in other words, who needs to do what by when. These lists are reviewed and updated as the deal progresses. Regular updates are a reminder of the objectives and help align the team. An example of a T&R schedule is attached as Appendix 3-A.
- Issue lists, which may be observations and concerns arising out of due diligence or the negotiation of an acquisition agreement.
- Standard formats for due diligence reports, to better assure that all concerns are addressed and decision makers have the information they need in the format they desire.
 - Standing dates and times for meetings or conference calls.

Communication devices. Communication is imperative for team effectiveness. Information must be communicated in such a way as to permit an entire team to do its job most productively. Communication is two way, not merely a broadcast. While general distribution of information and expectations is necessary, it is the communication coming back up the chain that establishes superior performance.

To most effectively serve the client, the lead lawyer must know, at least in general terms, what is going on and should be kept apprised of significant issues and decisions. When team members are negotiating matters with the other side, the status and positions taken need to be communicated to the lead lawyer. To be sure, there are some areas where an expert or a team is just given the mandate to accomplish a particular task and nothing else is expected.

It will not be appropriate to provide an open forum for discussion of all aspects of a particular deal. That would be inefficient. Similarly, it is probably not necessary for all of the specialty lawyers to understand all of the details of a particular transaction. There will always be a need for communications among team members on a one-to-one basis. Generally the efficiency of communication and the desirability of assuring that everyone is on the same page need to be balanced against the costs and delay of mass communications. The team leader must appropriately manage the communications to

make sure that pertinent information is available, but that excessive resources are not being consumed.

Sometimes the situation can be dealt with by adding the law team members to part of a larger communications network established for the entire team, either formally or informally. At the risk of a client perception (often correct) that many team members means higher costs, it is relatively easy to contribute the names of team members to distribution lists, e-mail groups, and extranet sites.

It is relatively easy for a law team to create internal e-mail distribution lists, to make sure that all team members are included in memos, or to utilize a wide variety of electronic tools that are available for collaboration. But, make sure that these devices are used appropriately. Everyone does not need to know everything. It is important for everyone who can access a communication network to understand what is appropriate behavior and the importance of avoiding flip comments and locker-room language.

Recently, electronic means of communications have become available, such as extranet sites maintained by a law firm, company, or financial printer where information may be stored and accessible to team members (or to everyone working on a particular deal). Often these are used for due diligence, where a number of people may need access to some of the same documents. The existence of these sites compounds the need for effective team interaction and communication. It was easier when documents existed only in tangible form; when new documents were made available, those documents were directed to the appropriate person and directions were given (e.g., "Review these documents to determine whether there are change-in-control clauses that could impact our deal."). When new documents are posted on an extranet site, the implication of that posting needs to be implicitly understood by each of the team members, often not an easy task, or one designated person needs to assure that there is follow-through.^{vi}

Any circulation of information, either by old fashioned or electronic means, involves considerations of security, control, and contractual obligations. As many have unhappily learned, it is all too easy to distribute information through an e-mail to unintended recipients.

E-Mail Discloses Confidential Information

In the April 10, 2002 issue of *The New York Times*, it was reported that, while more than 50 companies expressed confidential interest in acquiring Global Crossing, their identities were no longer secret to one another. According to the story, an e-mail message had been sent to the potential bidders by an employee of the law firm that was serving as Global Crossing's counsel in its bankruptcy proceedings. Although the message included only routine information on bidding procedures, it inadvertently named each of the more than 50 recipients by copying their e-mail addresses at the top of the message.

It was reported that all the companies included in the message had signed confidentiality agreements in the last two months with Global Crossing's financial advisor, expressing their interest in studying a bid. The companies that signed confidentiality agreements were identified

by the e-mail addresses of their representatives listed in the message.

While the story indicated that only a handful of the companies mentioned in the message were expected to submit serious offers for Global Crossing, many of the companies whose names were included were surprised by the mistake, their representatives said. Others were reported to have played down their inclusion, pointing out that it did not necessarily mean they were preparing a bid.

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- i It is often amazing the amount of information that can be obtained by simply searching for references to a company's name or product names through a search engine on the Internet.
 - ii The periodic reports filed by reporting companies with the SEC are available at www.sec.gov under Filings and Forms (EDGAR).
 - iii *See* discussion of such books in Chapter 5.
 - iv *See* discussion of transition agreements in Chapter 11.
 - v *See* Chapter 8 regarding negotiating the deal.
 - vi *See* Chapter 3 for discussion of extranet sites.