Introduction: The Lawyer’s Role

Not every deal should be made, and not every deal should be closed. That may seem a strange way to begin a book about closing deals, but it is true. So what is the lawyer’s role in the decision as to whether to proceed with a particular deal? As I noted in the Preface, because I pursued a liberal arts education as an undergraduate and went directly into a law firm after graduating from law school and a year of clerking for a judge, I did not have the business training necessary to advise clients on such a question. What I now have, however, is experience documenting and closing deals and, I hope, some common sense and street-smarts, gleaned from years of practicing law. Still, it is not for the lawyer to veto a deal the client wants to make. It is appropriate for a lawyer, especially one with some business sense, to advise the client on the pitfalls of a particular deal, but the decision must remain with the client. It is, after all, the client’s money that is at risk, not the lawyer’s. If the deal is not a good one, it is the client, not the lawyer, who will lie awake at night. If proceeding with

---

1. The situation may be different if the lawyer partners with, or even invests with, the client. In the case of a partnership, the lawyer is his own client and his judgment, in his capacity as lawyer, may well be compromised. Even if the lawyer is a limited partner or is not directly involved in the decisions of the entity, his judgment may be affected by his investment. I will, however, not deal extensively with the legal and ethical problems inherent in those situations.
the transaction might expose the client to litigation or possible liability, the lawyer must advise the client, at least to protect him- or herself from professional liability. If the client is proposing to do something which violates the law, the lawyer certainly has the obligation to advise against it and, if the client persists, to withdraw rather than to aid and abet the activity. Short of that situation, interference is a certain way to lose a client.

However, if the deal is bad enough, you may lose the client anyway. My former partner represented two young men who were buying a troubled shopping center. They negotiated a securitized loan, which my law partner and I realized was unwise because the transaction costs would be much too high and the loan was not otherwise appropriate under the circumstances, we warned them. We also warned them that, under its terms, the loan could not be prepaid for some time, and that it would then have to be “defeased”, that is, they would have to post government securities to provide for the continuation of the stream of payments for the investors (the equivalent of a large prepayment penalty). But the clients were fixated on the interest rate, and since that was all they cared about, they did the deal. We later found out that they intended all along to resell the property (which they never told us), and they were shocked when they could not do so because of the cost of the defeasance. They probably did not pay the entire legal fee, and they certainly did not use our services again—just as well.

When it comes to documenting and negotiating the deal, the lawyer's advice becomes more appropriate. At this stage, the lawyer has two major concerns: first, that the deal agreed to between the parties is actually incorporated into the documents, and second, that the documents do not contain provisions that impose unacceptable risks on the client. It is also at this stage of the transaction that the lawyer has the most power to kill a deal, and the most influence over his or her client because the lawyer likely will have greater expertise.

---

2. Securitized (or conduit) loans will be discussed more fully on page 76. Suffice it to say that, between the time of the writing of the first edition and this one, securitized loans have lost much of their luster.

3. A situation of concern may arise if the client is also a lawyer or, to put it another way, has a law degree. If that client has not practiced in the lawyer's field, he or she may have less expertise than he or she believes. Inappropriate second guessing may occur, and that can be a major problem for the lawyer. Thankfully, I have found this situation to be rare, but it does occur.
In this connection, it should be borne in mind that there are material differences between deals relating to the purchase and sale of real estate, and those involving leases or mortgages. The principal difference is that purchases and sales, other than installment sales, generally close within a reasonably brief period of time. The parties and the lawyers need not concern themselves with what might happen three or five years down the road. Yes, there are warranties and indemnities in those agreements, but they generally speak of events that occurred before the closing and often will become known within a relatively brief time span. If a problem is discovered during due diligence, or a fire or condemnation occurs, either the parties will work it out under the terms of the contract, or the deal will not close. Of course, the drafters of the contract must provide for those contingencies, but they typically are not great sticking points during the negotiations.

On the other hand, the rights and obligations of the parties to a lease, a mortgage, or even an installment contract continue for years, during which time many unexpected things may happen. In the lease situation, for example, the method of taxation may change, the building may have a fire, the tenant may go bankrupt or otherwise default, the tenant’s use may damage the premises in some unanticipated way, or the tenant’s business may outgrow the space or shrink, making the premises inappropriate for its use. There may even be a financial crisis or a serious recession. One hopes that those things will not occur, but they may. Contingencies must be anticipated and provided for. The same is true for mortgages, which typically go on for at least five or ten years. What is to happen, for example, if the tenant, on whose rent the loan was predicated, defaults, abandons the property, or goes bankrupt? Who will receive the proceeds of fire insurance? Who contests

4. Throughout this book, I will refer to an instrument securing indebtedness and creating a lien on real estate as a “mortgage”, although I know that in many jurisdictions, deeds of trust are used for that purpose. Under a mortgage, the lien holder is the lender, but under a deed of trust, a trustee holds conditional title to the real estate for the benefit of the lender, who may be referred to as the “beneficiary”. Another form of financing is the installment sale, in which the seller retains the title until the purchase price is paid. If the buyer defaults, in the absence of legislation on the subject, the buyer may lose all the money it has already paid. Many states protect buyers and, basically, treat the retention of title as a sort of mortgage and require a sort of foreclosure procedure.
the award if a condemnation occurs, and how will the award be allocated?

The evaluation of the other party to the transaction and its credit is essentially the responsibility of your client and his or her broker, if there is one. On the other hand, it is not inappropriate for the lawyer to remind the client to review financial statements and to confirm that the entity with which it is dealing is the appropriate one from a financial standpoint. Certainly, if the other party is a corporation or other entity registered with a state, it is the lawyer’s duty to determine that the entity exists and is in good standing.

Whose job is it to think of everything bad that could happen and to protect against those contingencies? The lawyer’s, of course. And woe unto that lawyer who thinks of everything that could happen, except the one thing that actually does happen.

It is important to remember that the lawyers documenting, reviewing and negotiating the transaction are also creating the law of the transaction. Except for the proscriptions imposed by public policy (as reflected in court decisions and legislation) and the concept of good faith and fair dealing, the parties are freely able to determine, by their documents, how their agreement is to be implemented and disputes resolved. This makes the persons involved extremely powerful, but power also demands responsibility.

In this book, I will discuss the role of the broker, letters of intent, the problems inherent in documenting deals, and how to review documents, communicate comments, negotiate deals, conduct due diligence, prepare for closing, and conduct the closing itself.