

Legal Ethical Issues in Mergers & Acquisition Transactions

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The below article first appeared as a column in the July 2018 newsletter for the Midwest Business Brokers and Intermediaries (MBBI), and given current M&A activity, the topic of "Legal Ethical Issues in Mergers & Acquisition Transactions" is still relevant today.

Corporate Partner David Solomon was a featured columnist for the Midwest Business Brokers and Intermediaries (MBBI) July 2018 newsletter on the topic of Legal Ethical Issues in Mergers & Acquisition Transactions.

Owners of a closely-held business typically "wear many hats". It is not uncommon for an entrepreneur who started their business with friends or family members to act as a member of the board of directors and CEO of the business and may perhaps also be the company's landlord. So, when a business owner decides to sell their company and is ready to hire a lawyer, it begs the question, who is the lawyer's client?

Like most legal ethical issues, the answer can be found in the rules governing a lawyer's

professional conduct. For the purpose of this discussion, this author will focus on the rules that are in place in the State of Illinois.

Under Illinois Rule 1.13, a lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents. Based on this rule, the lawyer is obligated to explain to the organization's directors, officers, employees, members, shareholders, or other constituents, who their client actually is when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing. However, under these rules a lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Illinois Rule 1.7.

Illinois Rule 1.7 provides that a conflict of interest like the one described above (i.e. lawyer wants to represent an individual shareholder or director of an organization which is also the lawyer's client) if informed consent to such conflict is provided. So, when the organization's consent to the dual representation is required by Illinois Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented or by all of

the organization's shareholders.

Practical Application of These Rules

So, now that you understand the basics of these ethical rules, let's apply them to typical scenario that arises in an M&A deal. In many transactions, the Company's management team is asked to sign an employment agreement with the Buyer and the CEO of the Company (who is also the majority shareholder and chair of the board of directors) asks the company's lawyer (who will also represent the company and all of the shareholders in connection with the sale transactions) to represent her in negotiating the terms of the employment agreement.

The lawyer and the CEO may not even see this as an ethical problem for the lawyer since it is fair to say that the buyer might not even buy the company if the CEO is not willing to sign an employment agreement. However, on the other hand, the CEO in this case may be in a position to "hold the deal hostage" by making various demands on the buyer that could cause the buyer to walk away from the deal thereby harming the other shareholders who want the deal to go through but are not going to continue employment with the buyer. Therefore, it would behoove the lawyer and the various interested parties at the company to have a frank discussion about these issues

before the CEO hires the lawyer to represent her in connection with negotiating the employment agreement with the buyer and the lawyer should draft a conflict waiver to be signed not only by the CEO but the other shareholders too.

Hopefully the next time a lawyer reading this article gets approached by a client asking for help in executing an M&A transaction will stop and think about the various conflicts of interest associated with their role and consult with the owners and executives of the company before commencing their engagement. The author also hopes this article will help owners of closely-held companies be more sensitive to these issues when they are ready to prepare their company for sale.

For more information, please visit the [Midwest Business Brokers and Intermediaries \(MBBI\)](#).