

Mergers and Acquisitions as a Niche Area of Law

BY KRISANNE S. CUNNINGHAM, ESQ., AND HAILEY C. NICKLIN, ESQ.

Mergers and Acquisitions (M&A) is an area of law where attorneys represent the buyers and sellers of businesses in transactions that often result in a change in the ownership and control of the business. The selling business (the “target”) might merge with or into the buyer or its subsidiary (a merger). Or, alternatively, a buyer might acquire the assets or equity of the target business (an acquisition).

M&A deals can be time-sensitive transactions with significant financial implications utilizing multiple disciplines of the law.

Specialized Expertise, Structuring, and Deal Management


A “sell-side” M&A attorney represents the seller of a business, while a “buy-side” M&A attorney represents the buyer of a business – commonly each side has quite different objectives and perspectives, and each M&A attorney helps its client integrate these objectives and perspectives into the overall structure

of the deal and the corresponding deal documents.

For example, an equity sale might be better from the seller/business owner’s perspective to transfer ownership of the entity, including both the assets and liabilities of a business (unless otherwise negotiated), to the buyer. Also, in an equity sale, the selling owner(s) may recognize capital gains instead of ordinary income on the transaction for tax purposes, resulting in tax efficiencies for the seller(s). In addition, sellers may want to limit the representations and warranties they make in the deal documents and narrow the indemnification provisions, including through caps and baskets on liability.

On the other hand, an asset sale might be better from a buyer’s perspective so that the buyer only purchases the assets of the business, and not the entity and corresponding liabilities (unless otherwise negotiated). And, in an asset sale, the buyer may get a “stepped up” basis in the purchased assets for tax purposes, resulting in tax efficiencies for the buyer. In addition, buyers may want comprehensive representations and warranties, broad indemnification, and certain “buyer-friendly” provisions such as earn-outs, materiality scrapes, set-off rights, and pro-sandbagging provisions.





In other words, M&A attorneys have specialized expertise in corporate and contract law, specifically merger and purchase agreements, and structuring. However, complex M&A transactions can touch on many areas of law such as tax, antitrust, securities, employment, employee benefits, intellectual property, real property, healthcare, and environmental. Accordingly, an M&A attorney should be able to integrate and manage colleagues and/or co-counsel in multiple legal disciplines, as needed, over the course of a deal.

Collaboration

Beyond legal proficiency, M&A attorneys commonly understand corporate finance and lending, accounting, investment banking, business strategy, and market trends. M&A attorneys may regularly work with accountants, investment bankers/business brokers, lender's counsel, and other tax professionals during all phases of the deal.

As noted above, M&A transactions also typically involve interdisciplinary collaboration within the legal field.

Some examples of interdisciplinary collaboration include:

- **Real Estate:** When real property is sold as part of an overarching M&A transaction, real estate counsel may be utilized to review leases and/or review and address title issues.
- **State and Local Tax:** A state and local tax expert might be engaged, for example, to analyze whether a seller has correctly calculated and paid state and local sales and use tax liabilities in multiple jurisdictions. If there is potential

liability from a pre-closing period, the parties may need to negotiate purchase price holdbacks, tax escrows, indemnities, and/or adjustments to keep the deal moving forward.

- **Employment:** Certain of the seller's key employees may be hired by buyer for a period of time post-closing. Employment and benefits attorneys may advise on employment agreements and benefits plans, ensuring compliance with applicable laws while minimizing disruption to the business post-closing.

M&A transactions take place in virtually every industry, including technology, healthcare, transportation, communications, and professional services.

Deal Documentation and Due Diligence

M&A deals often involve intricate legal issues and voluminous/specialized documentation, including letters of intent, nondisclosure agreements, purchase/merger agreements, bills of sale, escrow agreements, and IP assignments, as well as

detailed disclosure schedules.

Depending on the deal and client request, buy-side M&A attorneys may also play a role in the overall due diligence in an M&A deal, reviewing the target company's material contracts and compliance history to identify required consents, potential litigation risks, and compliance issues.

Industry-Specific Knowledge

M&A transactions take place in virtually every industry, including technology, healthcare, transportation, communications, and professional services. Therefore, M&A attorneys can add value if they understand sector-specific regulations and market trends within the specific industry at hand. Also, whether a particular industry is regulated or not may have a significant impact on the overall deal and its timing.

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For example, if the seller operates within a regulated industry or franchise, government or franchisor approvals may be needed before the deal closes, and the parties may need to sign the definitive documents prior to closing (a “sign now, close later” deal) with closing contingent on obtaining those approvals. In addition, the buyer will want to ensure that the seller and/or buyer (depending on the structure) has all the licenses and permits required to operate within its industry in place before closing.

M&A law offers a fast-paced, challenging – yet rewarding – niche practice within the legal profession. M&A deals require lawyers to strike an important balance advocating for their clients while maintaining deal momentum to accomplish the common goal of deal closing.

KRISANNE CUNNINGHAM is a managing partner at Rice Reuther Sullivan & Carroll, LLP, where she leads the firm’s corporate and M&A practice groups. She graduated from the University of Virginia School of Law (J.D.) and the Georgetown Law Center (L.L.M., Tax).



HAILEY NICKLIN is an associate at Rice Reuther Sullivan & Carroll, LLP, in the firm’s corporate and M&A practice groups. She graduated from William S. Boyd School of Law at UNLV, with a concentration in business, along with a dual MBA degree from the Lee School of Business at UNLV.



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