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LEGALLY SPEAKING

How do I know I will get paid? Securing the purchase price when selling your rep agency

In almost every purchase and sale of a rep agency, all or a substantial part of the purchase price is to be paid to the seller over time. Not surprisingly then, the seller's most typical concern is how to make sure s/he gets paid. We often hear statements from sellers like, "I need to be in control until I get all of my money," or, "If they don't pay me, I get to take the company back."

Staying in control

Most sellers have controlled their company for most or all of their careers, and giving up control can be the biggest hurdle they face when selling the business. Once a seller has sold the business, s/he will never have the degree of control s/he had before. Nevertheless, there is some control that the seller can maintain. For example, the agreement with the buyer can provide that the seller has the right to consent to the addition of a new line or to the buyer resigning an existing line. Similarly, it may be appropriate for the buyer to agree to limit how much money s/he take out of the business, or to require the seller to consent to an increase in the amount the buyer takes out of the business. Another approach is for the seller to retain one seat on a two-person board of directors. This effectively gives him/her the same sort of "negative control" that a right to consent gives. To avoid disputes, we recommend that the agreement between the parties spell out the types of decisions that require board approval, such as decisions regarding lines and compensation.

The seller must be careful, however, not to try to micro-manage the business for the buyer. We recently represented a buyer in a stock sale in which the seller initially demanded that he keep control of the company's checkbook and that his wife write all of the checks. This is simply unreasonable. While the seller can expect to have some input in respect to major decisions that could affect whether s/he gets paid, s/he can no longer expect to be able to run the business.

Taking the company back

A common way to secure the payment of

the purchase price is for the seller to take a lien on the assets or stock sold. While this approach works well for the seller of a manufacturing business that has a substantial investment in real estate or equipment, it does not work very well for a rep agency whose only assets are its relationships with principals and customers. Except for a rep agency's receivables, there is very little that a secured party can realize upon in a lien foreclosure. So while the seller may well succeed in getting the company back, it's not likely to do him/her very much good.

Getting a guaranty

One of the most common ways to secure the purchase price is through a guaranty from a related party. For example, if the transaction is structured as a sale of assets, the purchase price can be guaranteed by the shareholder(s) of the buyer. Where one or more individuals are buying stock, the guaranty can come from the company itself. If an individual guarantor is married, the spouse should also sign the guaranty. Otherwise, a guarantor can readily make himself judgement-proof by transferring most or all of his/her assets to his/her spouse. Generally, such a transfer is fraudulent as to creditors only if there is an existing creditor claim or if the transfer would render the guarantor insolvent.

But while a guaranty gives the seller the advantage of having more than one party to look to for payment, it is not a sure thing. In the case where the company has guaranteed the buyer's obligations, if the buyer is unable to pay, chances are that the company will also be unable to pay. After all, if the company was making money for the buyer, he would probably be able to pay the seller. The situation where the individual buyer has guaranteed the company's obligation to pay may not be much better. Again, if the company is not making any money for its owner, its owner may not be able to, or may not wish to, pay the seller the purchase price.

Life insurance

Life insurance can offer some security. It

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works best in the situation where shareholders in the same company have an obligation to purchase the stock of a deceased shareholder. Here, life insurance can be an affective and inexpensive way to fund the buy-out. But in the case of the sale of a rep agency by an older seller to a younger buyer, insuring the life of the younger buyer may not be very useful.

Doing your homework

As usual, the best way to stay out of trouble is to avoid getting in it in the first place. Here, information is the key. It is perfectly appropriate for the seller to ask the buyer for financial statements and tax returns. These should be provided not only in connection with the negotiation of the deal, but on a regular basis until the purchase price had been paid in full. The seller should also take the time to find out what his/her principals and key customers will think about a sale of the company, and their opinion of the buyer. Often, the buyer is someone who is already part of the organization, and is someone whom the seller knows and trusts. But it is not always easy for a seller to figure out how other key people in the organization will react to such a sale. The best prepared sellers begin years in advance by grooming the right people to take over and by building an organization where other key personnel will have an incentive to stay on after the sale.

Staying flexible

Sometimes, despite doing everything right, something goes wrong. In this case, unless you have the good fortune of having some deep-pocketed person to sue, because of the cost and uncertainty of litigation, it is probably in your best interest to be flexible and work things out. If you agreed to be paid over five years, maybe the term must be increased to seven. If you agreed to a fixed purchase price, perhaps you can agree to accept a percentage of commissions going forward. By being flexible, you may even have the opportunity to increase the amount of money you are paid over time. The most important thing, however, is to be willing to accept terms that will keep the business alive, because if the business remains a going concern, your chances of being paid are greatly improved.

BETTER REPPING

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lems; do not give me canned solutions.

- Tell me clearly how their products benefit my company.
- Know my business, listen to me, react to what I am saying, and take full responsibility for their products when there is a problem.
- Explain their products clearly, undersell rather than oversell.
- Provide solutions to my problems, even unrelated to their products; go out of their way to meet deliveries and be my representative in their company.

Customer comments on objectionable traits in salespeople

The salespeople I find most objectionable are those who:

- Are only concerned with how much commission they are going to make.
- Come in unprepared and uninformed; ask for my home address.
- Try to find out what the competition is quoting.
- Forget who the customer is; work for their agenda instead of mine.
- Distance themselves when there is a problem.
- Inconsiderate of my time.
- Insist on seeing me when I do not have time.
- Whine about how much money they are not making.
- Go through the "back door" to other people in my company.
- Knock their competitors, especially the ones I am buying from.
- Won't take "no" for an answer.
- Don't show or call when they are late.

Sales Aerobic Exercise

Ask your salespeople to list the 10 traits of salespeople that buyers like the most, and 10 they dislike the most. Then give them copies of this column and compare their lists to the customers' answers in the survey. It will make them think and sharpen their empathy for customers.

The actual survey report is available to members of Berman Information Services at www.bermaninformation.com. For more information, call Jack Berman at 310-472-4039, fax to 310-472-4839, or send e-mail to bermanpub@att.net.