

Merrill DataSite and The M&A Advisor Present

# NEGOTIATING, VALUING AND STRUCTURING WINNING DEALS

VALUABLE GUIDANCE FROM THE MOST  
ACTIVE MIDDLE MARKET M&A PRACTITIONERS

BEST PRACTICES  
OF THE BEST  
DEALMAKERS



FIRST EDITION: PART 4



*“A private company seller adamantly refused to complete a very large and favorable buyout transaction because he insisted that the buyer provide him and his spouse with lifetime medical insurance coverage. After all other issues were negotiated and resolved, the seller could not move off this point and “stuck to his guns” believing that if the buyer were truly serious, they would provide this benefit. Keep in mind that this transaction would have made the seller very wealthy and he could easily have bought his own medical insurance many times over. Although the insurance was not a significantly large dollar amount in the context of the overall price being paid for the company, the delay slowed the momentum of the deal and the buyer changed their mind and walked away. So, not only did the seller not get the medical insurance, they didn’t get the exit for the company. The seller lost sight of the forest by focusing on one of the trees, and will probably never realize the value for the company that was available by completing the deal.”*

*James Abbott, Partner, Seward & Kissel LLP*





## Introduction

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rawing on the experience and expertise of the “best in class” dealmakers, The M&A Advisor, together with the leading provider of virtual deal management services, Merrill DataSite®, publishes the quintessential dealmakers guide series - “**The Best Practices of The Best M&A Dealmakers**”.

Profiling the proven strategies and unique experiences of the leading M&A practitioners, “The Best Practices of The Best M&A Dealmakers” series is distributed in regular installments for M&A industry professionals in both print and interactive electronic media. Previously published features and chapters are also available in the online library of Merrill DataSite and The M&A Advisor.

We are pleased to present **Chapter 4 - Negotiating, Valuing and Structuring Winning Deals**. This installment discusses the best negotiating practices for buyers, sellers and their advisors, featuring candid interviews with leading practitioners and analysis of the most current trends.

# Negotiating, Valuing and Structuring Winning Deals

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## Negotiation: the Lifeblood of M&A Dealmaking

**N**o study of successful dealmaking strategies would be complete without discussing the art of negotiation and its impact on the outcome of the deal. It begins from the moment a potential buyer and seller “test the waters” to see if there is a deal to be done, and drives every step of the process from the signing of the letter of intent through to due diligence, valuation, structuring and the completion of the transaction.

Dealmakers, by nature, love to negotiate and “do deals.” This natural inclination is what makes them so effective at their trade. Certainly, they must also thoroughly understand the mechanics of the M&A process and of business in general, but the “best” dealmakers are also acutely attuned to the importance of the human element of an M&A transaction. They are also ever mindful of the impact a seemingly minor negotiation point can have on a deal. They take the negotiation process very seriously and can readily summarize their own personal insights into what they believe makes them successful at their work.

### *Best Negotiators: A Combination of Learned Skills, Inherent Talent and Experience*

How do the best dealmakers come by their negotiation expertise? Some is learned through education and training; some through actual experience. Marshall Sonenshine, Chairman and Managing Partner of investment bank Sonenshine Partners, believes negotiation is a teachable subject, “although that doesn’t mean it is necessarily a learnable subject for everyone,” he said, “While I was at Harvard Law School, I took a fabulous class called ‘Negotiation.’ There is a subject matter there; there are dynamics that can be understood just as there are in the subjects of psychology or sociology. But the simple principals of negotiation are not so simple. They’re much more nuanced. We got tremendous mileage out of really studying the dynamics of negotiation.”

In conjunction with this, the best deal experts also believe that they learn the most by actually doing deals of all kinds - mergers, acquisitions, divestitures, joint ventures, equity raises, debt raises, debt recapitalizations, debt rescheduling and so on. In Sonenshine’s view, one of the most important keys to success is to “being able to survive the changes in the business so that you can stay in the game long enough to see lots of different deals.” This approach affords the best way to learn from personal experience and also learn from the experience of others. “The truth is, what

most practitioners learn in the first five to seven or eight years is for the most part a ‘commodity’ skill set,” he commented, “To become an M&A expert, you need to see a lot of strategic issues get worked through and what happens in the subsequent history of the deals.” The most successful dealmakers are also often natural students of human nature. They genuinely enjoy the process of negotiation and instinctively strive to understand what makes the person on the other side of the table “tick” – and how to use that knowledge to their own advantage. This is, for the best dealmakers, a lifelong curiosity; they never stop learning. Equally as important, these dealmakers view their communications skills as vitally important to their success and continue to push their skills to a higher level. This, they believe, differentiates them from the others.



One thing that Sonenshine and other expert dealmakers are clear on is that there is no “one size fits all” in negotiation strategies. Each deal has its own set of unique attributes and nuances, to which skilled negotiators are constantly adapting their skills. A number of external factors, such as legal and regulatory requirements will dictate some aspects of deal structure and process – and the negotiation process it takes to get to a successful deal for both sides. Other fluid factors such as changing market conditions will have an impact. And then there is the “push-pull” of the buyer’s and seller’s ultimate objectives. The seller wants to sell its asset for the most attractive price. The buyer wants to gain the most value for the lowest price. For negotiators, bridging these opposing motivations and arriving at an acceptable outcome for both parties requires superlative command of business, deal mechanics, and negotiation skills throughout the entire process.

Experienced dealmakers have a supreme command of the negotiation process, whether they are dealing with groups of people or individuals. They have remarkable recall of the deals they have worked on, and can readily convey, in detail, the specific circumstances, specific words that shifted the balance in the negotiations. All of their stories are rich in lessons learned. If this chapter included all of their observations for the myriad deals they’ve worked on, it would be a thousand-page book. While we do not have the room for all of their observations in this chapter, we’ve included some of what they believe are a few of the most important points for any negotiation. We also recognize that deal negotiation is a complex process that often involves many conversations taking place at many different levels at the same time. Rather than attempting to track every point in this multi-threaded process, we’ve organized the advice received from our contributors with the key stages of a deal process:

#### Stages of the Process of Deals:

- I. Starting the process with the buyer/seller
- II. Establishing valuation and negotiating price
- III. Negotiating the letter of intent
- IV. Deal structure and price
- V. Deal completion

## “There is no “one size fits all” in negotiation strategies.”

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The following pages provide insights into how many of the industry’s most experienced negotiators view best practices in negotiation throughout these stages.

### I. Starting Off the Process: Study, Study, Study

**W**hen asked what they attribute their success to, every dealmaker we spoke with immediately responded, “Be prepared.” But what does that really mean? In this context, it means doing the research and studying all parameters of a potential deal from the moment it is presented. These dealmakers make sure they have done their homework on their client’s business, industry, market conditions, competition, as well as the company itself long before they get to the table. They also invest the time to gain a clear understanding of their client’s motivations well before negotiations begin.

Getting to a buyer’s or seller’s true motivation sometimes requires more digging than may be expected, notes David Schafer, Managing Partner and Chair of the Corporate Department, Loeb and Loeb. It may be challenging, but in his experience, it yields the best results. “The conversation will usually start out with the client telling me, ‘I want to sell this company.’ I’ll ask, “Okay, what is your business objective?’ and they’ll reply, “I just told you. I want to sell this company.” And I’ll say, ‘I understand that, but why? What is the issue – do you need to raise cash? Is the business no longer a core part of your company? What problem are you trying to solve by selling the company?’” Sometimes, Schafer says, clients don’t expect probing questions into their decisions. They expect their lawyer to simply handle the mechanics of making the sale happen. “But if I really know what their problem is or what they’re trying to accomplish, I will be a better negotiator on their behalf.”

Getting the time with clients to uncover these key issues can be difficult, according to Jim Hill, Partner and Executive Chairman of the law firm Benesch, Friedlander, Coplan & Aronoff. “Clients like to think 95% of negotiation is legal and 5% is business, which isn’t true at all. I would say 70% is business and 30% is legal,” he said, “You need to understand from your client which points are important to them, what they can live with, what they can’t live with. And you really need to know that before you approach the negotiating table.”

Another critical aspect of deal preparation involves doing the research on the counterparty in the deal. This sounds like a basic practice that any dealmaker would employ, but sadly it is not, notes Schafer. “It is truly amazing to me in this day and age of the Internet how many people come to



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the negotiating table for the first time and have done absolutely no due diligence on the people who are going to be there on the other side,” he said.

Several leading dealmakers have raised this point. Commented Hill, “I’ve been in more negotiations than I care to count where people are completely unprepared and haven’t even read the documents. They’re just kind of winging it through them. They understand some of the key points as they have seen them in the letter of intent, but they don’t understand some of the other points. This is a grave disservice to the client.”

Expert dealmakers such as Schafer and Hill draw on all available resources to gain an understanding of the parties across the table. They’ll query their peers to find out if they’ve dealt with them in the past, and what the outcomes were. They’ll use the Internet to gather information; they’ll talk to the counterparty’s competitors. If their client is buying a company, they may even develop a “back channel” of communications with the investment banker or corporate development leads, within legal limitations.

These dealmakers know, the better they understand the counterparty’s actions and motivations, the more successful they can be in driving effective negotiations.

### *Understanding Deal Terms and Documents*

Expert dealmakers also make it a priority to thoroughly review all documents pertaining to a transaction well before negotiations begin. They do so to position themselves to drive strong negotiations that are firmly based in knowledge. To achieve this, it is critical to understand the logic behind everything that has been included in the documents so key items can be effectively defended during negotiations. Noted Hill, “It’s very important to understand why you put in the document what you put in the document, and to be able to explain its importance to the other side. The worst answer you could ever give to anybody on the other side is, ‘Because we always get this.’ If you don’t understand why a provision is there or you haven’t really thought it through, you’re ineffective.”

Deal advisors also need to make sure their clients thoroughly understand the deal terms and their implications before they enter into negotiations. This means having a detailed discussion with the client to identify critical components and how they may be impacted in negotiations. Even

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in the best of circumstances, misunderstandings that have serious ramifications to the outcome of the deal can occur. For example, a seller may not thoroughly understand all of the tax implications and opportunities associated with the sale of their company. As a result, they may end up paying far more in taxes than they anticipated. Or they may have a biased opinion regarding the value of their company that exceeds the buyer’s estimation, and may not be prepared to negotiate a compromise that meets both parties’ interests. Expert dealmakers take steps to uncover these potential issues well before negotiations begin. If surprises are encountered during negotiations, they are also careful to call a halt in the process, and curtail discussions until misunderstandings are put to rest.

When the deal has advanced to the due diligence phase, the most successful dealmakers are also experts at using virtual data room technology to accelerate and maximize their research. Rather than assigning junior associates to perform the due diligence, they send their most experienced team members to the data room. They also readily invite third party experts to log in when they uncover an area that needs specialized knowledge beyond their expertise. In this way, deal experts leverage the accessibility of a virtual data room to gain an edge in preparation. As a result, they can go into negotiations with greater assurance that they’ve done their best to ensure no “smoking gun” has been inadvertently overlooked, and they’re as prepared as possible before negotiations begin.

No one can predict and prevent every possible negotiation error from occurring, but the best dealmakers learn from their experience and apply it to future deals. For John Ferrara, Founder and President of investment banking firm Capstone Partners LLC, this meant learning, early in his career, to spend more time with his client to understand what was driving their priorities and making sure they understood the specifics of each term he was negotiating. “The issue here arises when you assume your client understands a term and their priorities are satisfied, when in fact that specific term did not address their objective at all,” he said. To prevent this, he advises, “When you start a negotiation with an end in mind, make sure your client understands the end and everything it takes to get there.”

Ferrara finds that it is very helpful to share his negotiation strategy with the client and walk them through it. “It helps eliminate confusion, and also helps them appreciate the complexities, trade-offs and art of the trade,” he said, “Clients and executive management appreciate that and frankly enjoy it.”

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## “Valuation is not the final component; it is the first component.”

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Being prepared, according to Stephen Toy, Managing Director of WL Ross & Co., and Chairman of the Company’s Investment Committee, has a double meaning. “Not only do you have to be prepared informationally, but you must also be prepared for the unexpected,” he said. “The best deal makers are those who are able to react quickly, assess quickly and come up with solutions quickly. Often times the unexpected happens live, when you’re sitting across the table principal to principal. You don’t have the luxury of saying, ‘I didn’t expect that, let me think about it.’ Instead, you need to be able to say, ‘I didn’t expect that, let me think through the permutations and come up with a solution here and now,’ all while asking yourself how you can make this fit within the context of how you want to see the deal done.”

Another important point, according to Selig Sacks, Co-Chair of the U.S./Greater China Corporate Practice at Foley & Lardner LLP, is that the best dealmakers understand when to take the lead – and when to take a step back. “Advisors need to understand their role and really know their place,” he said, “Sometimes, some of the best meetings take place if the lawyers are not in the room – assuming that they’ve counseled their clients correctly. There is a personal dynamic here – if the CEOs are doing well with each other and reaching understandings; then you have a good chemistry and good negotiation. So I always encourage many of these issues to be resolved at the business level.”



### *Active Listening: The Other Side of Preparation*

Expert dealmakers also emphasize one important point: be prepared to listen. “The best negotiators, in my opinion, are the ones that make the most compelling cases and use persuasion. They don’t try to muscle their way through,” said Schafer, “They listen when other people talk and do not interrupt them when they’re talking, no matter how tempting. That’s what makes a good negotiator.”

Euan Rellie, Senior Managing Director and Co- Founder of investment banking firm Business Development Asia (BDA) emphasizes the value of this attribute when describing his stewardship of U.S. participants in international transactions. “Being sensitive and listening is the first rule and does not always come naturally to Americans,” he said. Rellie believes that active listening is very important, particularly when cross-border deals are being contemplated to ensure that the cultural nuances of the transaction, the companies and the parties involved will be revealed.

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## II. Establishing Deal Valuation and Negotiating Price

**W**hat is the deal worth?” No sooner have a potential buyer and seller entered into discussions and the value of the deal begins to take shape. Rarely, at this early stage, do the seller and the buyer have the same figure in mind. Rather, the parties come to agreement after some combination of financial analysis and business judgment is applied.

Valuation experts rely on a variety of financial methodologies to calculate an asset’s value – discounted cash flow analysis, comparable company valuations and comparable M&A transactions. But experiential knowledge also plays an important role in valuation. Addressing the qualitative factors that also come into consideration. A buyer may be pursuing a specific target to satisfy long-term objectives that are not readily clear to the outside observer. In these cases, a firm’s true value also depends on what buyers are willing to pay at a given point in time. This can be influenced by subjective factors such as the buyer’s resources, the firm’s competitive positioning, industry dynamics, deal terms, etc. Thus, analytic methods can only approximate the outcome of the sale process.

This is the point at which expert dealmakers shine. They have both business experience and the mental discipline to objectively assess deal parameters and conduct negotiations in the best interests of their client. The best negotiating position to be in, according to Ferrara, takes place when you are at the table with the real decision makers. “When you are able to listen, you are able to pick up on ‘what people are not saying.’ If you are able to understand what is most important to the other party, solutions will typically make themselves available,” he said, “All that said, experience matters most – the ability to read a situation, understand personalities, interpret body language (or inflection) and selectively use instinct to dictate the bolder moves.”

## III. Negotiating the Letter of Intent

**G**ranted, in certain situations such as a transaction involving a public company, a letter of intent (LOI) is a required document. But in transactions involving private companies, it is considered optional and is not always used in the deal process. Some dealmakers contend that because the letter of intent may or may not be legally binding, it may be more efficient to go “straight to documents.” This is particularly true in situations where

time constraints are tight. For example, the death of the company's owner, divorce or end-of-year tax planning could be examples of why a deal may have to close more quickly. In these situations, in order for the seller to feel comfortable that everyone is on the "same page," the LOI may serve as an understanding of what generally will be done and who'll be paying for transaction expenses. For the buyer/investor, a LOI may have a no-shop/exclusivity provision that will prevent the seller from speaking to anyone else during the expensive due diligence process.

Other dealmakers, however, believe that the letter of intent plays a pivotal role in the early stages of deal negotiations. A letter of intent can be especially valuable in complex transactions where it is important for the parties to determine early in the negotiations whether they agree on the transaction's price and fundamental structure so that time and effort is not wasted in drafting lengthy documents.

The exercise of drafting the letter can serve as a benchmark to assess whether the buyer and seller are working in the same direction and with the same end-goal in mind. The actual process of putting words on paper will force the discussion and negotiation of critical items. The end result has the potential to be a well-defined document that clearly outlines each party's expectations as the deal moves forward.

For example, deal team members for private equity firm WL Ross & Co. use the letter of intent to begin discussions in virtually any transaction of interest, says Toy. "We like to have a letter of intent phase so that, with limited information, we can get a sense of 'are we in the same ballpark or are we just talking about different sports,'" he said. "If we move to the next round, as a practice we like to see a full mark up of the agreement early in the process so that we can identify potential show stoppers and determine fairly quickly if we can deal with them or if we are not going to be able to come to a meeting of the minds over them."

#### **HONING IN ON VALUE:**

Adopting a broader perspective enhanced shareholder value for the Cingular Wireless-AT&T Wireless transaction in 2004, the largest all-cash acquisition in US history at the time. Although some questioned whether Cingular was paying too much—because AT&T Wireless was underperforming and had strained relationships with its customer base as a result of technology-migration issues—management at Cingular Wireless focused on broader industry trends and the need for enhanced scale to remain competitive with Verizon Wireless. Despite the issues at AT&T Wireless, ecosystem trends supported the economics of the transaction, which was borne out by subsequent performance.

Expert dealmakers also understand that valuation and price are not the only factors by which a deal is decided. All dealmakers can point to deals where the buyer with the highest price was not necessarily the one who won the deal. In Ferrara's view, when dealing with sellers, "Valuation is typically the most critical term, but not always. We have had clients select acquirers that were not the highest bidder because they felt it was a better fit for the customers, employees and management team. Valuation is not the final component; it is the first component."

“The worst negotiators are the people who are just lunatics in the negotiating room.”

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Other deal experts advocate creating a detailed letter of intent to prevent potentially damaging misunderstandings and surprises from arising after the buyer and seller have entered into an exclusive arrangement. This can be particularly damaging for sellers, who face the prospect of a failed deal and being labeled as damaged goods. For this reason, Hill advises, “If you’re a seller, don’t ever sign a letter of intent until you’ve got a tremendous amount of detail from the proposed buyer about all of the aspects of the transaction.”

Ultimately, the process of negotiating the terms included in the letter of intent can also help buyers and sellers determine if they are well-suited. If they find that they are not – and choose to walk away from the deal earlier, it will be for a much lower cost than would be incurred by going “straight to documents” and through a formal due diligence process.

Once the letter of intent is signed and due diligence has begun, best dealmakers are in close communication with the due diligence team. (For detailed discussion on best practices in due diligence as a value creation tool, see our earlier chapter: “Mitigating Risk and Creating Value: A Focused Approach to Due Diligence”)

#### IV. Determining Deal Structure

**T**o pass the torch of ownership, three things must happen: Buyers and sellers must agree on a price – the number of dollars or amount of other considerations the sellers will receive, and they must agree on the nature and timing of terms – cash, debt, and/or stock; now or later; and under what conditions. Finally, they must agree on the “structure” of the transaction – the legal, accounting and tax form by which the transfer of ownership will take effect, and the documentation of that transfer.

The range of available forms (asset sales, stock transfers, mergers of a variety of types, tender offers and so on,) coupled with the variety of relevant factors (legal, accounting, tax, etc.) gives dealmakers both tools to use and traps to avoid as they respond to the many and often conflicting goals of buyers, sellers, investors, lenders and taxing authorities.

Expert dealmakers have both a thorough understanding of the structural elements of the deal and the creative ability to put them together in the manner that best befits the situation. As noted by James Abbott, “Deal structure is all about achieving, as much as possible, the objectives of both parties while also eliminating or reducing legal, regulatory and third party impediments to deal

certainty.” In his experience, the questions that must be answered and analyzed to devise an appropriate deal structure include:

- The tax situation of the parties;
- Any regulatory approval requirements and the impact of deal structure on such approvals;
- Any third party consent requirements or defaults of contracts that would be triggered by a transaction and the impact of deal structure on such consents or defaults;
- The likelihood that contingent or unknown liabilities relating to the target business will be a material future exposure for the buyers.

The answers to these questions will help to define basic structure issues such as the decision to proceed with a stock or an asset purchase. Beyond these foundational questions, expert dealmakers start with understanding their client’s objectives in either buying or selling their company, and then help them devise a strategy that will deliver the most value, however value is defined. There is no standard checklist or formula that applies to all M&A transactions. Questions related to structure vary greatly, depending upon the industry, the countries in which the companies are located, buyers and sellers preferences, etc.

When asked which questions to pose to sellers that best help him understand his clients’ objectives and prepare for the negotiations and structuring process, John Ferrara of Capstone Partners offered the following:

- What is your ideal profile of a transaction?
- What are your top 5-10 personal and business objectives in this transaction?
- How much do the “Three Ps” mean to you? (A business can be a source of Power, Prestige and Persona for an owner.)
- What role do you want to play in the business, post-transaction?
- Do you have a sophisticated estate strategy with the appropriate tax structure?
- Do you want to maintain a minority ownership position in the company going forward?
- Have you talked to your lawyer regarding all the various terms that are going to come up?
- How important is current liquidity to you versus the risk of performance- based payments?
- How are you going to celebrate when we close this transaction?

As buyers, leading dealmakers tend to assess a potential target in term of its “fit” with their organizational and investment goals. Deal structure tends to vary situation by situation. “We have, as most other institutions have, our own set of ‘hot buttons’ in terms of the way we want the deal struck,” says Toy, “But both on the buy-side and the sell-side, we tend to look at structure on a case-by-case basis. If this is a ‘must own’ business, we exercise more flexibility in terms of structuring the deal; whereas if the target carries more risk, we exercise less flexibility in terms of how the deal can come together.”



## How to Win the Auction

Auctions are often characterized as “cut and dried” transactions with a much more compressed time frame in which the highest bidder most often wins the deal. Buyers often note that they have limited time for due diligence, limited access to the seller’s management team and limited room for negotiation.

Expert dealmakers acknowledge these challenges, but also look for opportunities to shift the seller’s decision in their favor, whether or not their bid is the highest. One of the most important actions the buyer should take is to strive to build a positive relationship with the seller, because the seller’s perception of a potential buyer often helps or harms their chances of winning the auction.

One deal advisor suggested the following questions to help sellers assess potential buyers:

- Will the buyer be difficult to negotiate with?
- Does the buyer have a history of busted deals?
- Is the buyer typically successful in obtaining financing based on the financing letters delivered with its bid?
- Does the buyer have a history of renegotiating won auctions?
- Is the buyer aggressive after closing deals? (Purchase price adjustments and indemnification claims)
- How has the buyer treated the management teams of their other portfolio companies?
- Have the buyer’s prior investments been successful?

As these questions indicate, the ultimate decision is based on far more than the highest bid. Expert dealmakers are well aware of this, and strive to position their company well throughout the process. As noted Marshall Sonenshine, “The reality is if you think you’re just running an auction and you think your only job is to, as though you were working in a bakery, take a number and we’ll take your bid, you’re not adding a whole lot of value to your client. You’re also missing a lot of the meat and the juice that is the opportunity set for a great M&A practitioner. Auctions are not the full story; they are part of the story. But negotiation, persuasion and nuance of understanding and communication are very important to the resolution of an auction. All auctions really devolve into a negotiation where you say to someone, ‘Look, you are one of our favorite bidders. But in order for us to do a deal with you, we have to work out the following 14 issues,’ and now you’re negotiating.”



Ultimately, certainty of close plays an important role in determining if a deal is good. Consideration of any opportunity requires a significant investment in human and financial capital, so expert dealmakers are careful to consider this issue. Notes Toy, “What are the priorities of the other entities on the other side? It is not always price. Rather it is often a long list of items that can be top priorities. So therefore, what is the likelihood of getting a transaction done?”

In addition to having an in-depth understanding of deal structure and mechanics, the most successful dealmakers are creative thinkers who know how to use the business mechanics to drive value and do not let emotions sway their strategy. By combining these strengths with creative thinking, dealmakers such as Sonenshine have excelled in delivering value for their clients. “We often achieve values no one thought were achievable for clients we sell,” Sonenshine said, “In one case we were recently the debtor’s advisor in one of the most controversial media restructurings – Philadelphia Newspapers. This was a paradigm-busting transaction because we achieved the highest price paid for an American newspaper during the newspaper restructuring years by creating the only competitive cash auction for a newspaper at that time. This process was not what some of the hedge funds wanted, but it was what the debtor was able to ensure for the business.”

“In another deal,” he added, “We sold loss making telecom infrastructure Riverstone Networks for a shockingly high price in a section 363 case by creating a bidding war between Lucent, which distributed the product, and Ericsson, which wanted to supplant Lucent. We used bankruptcy to sell the business even though it had restatement issues that would have precluded it from doing a proper merger proxy – and achieved a price about 10x greater than the stock price. Last year, we sold Drugstore.com to Walgreens for a premium over 100% and a multiple over 50x in a deal in which there was no auction. We simply negotiated well,” he said.

Dealmakers know that is not unusual for the structure of a deal to change dramatically from the first draft to the structure to the version that is defined in the final agreement. Expert dealmakers don’t let structural issues derail the deal. They are able to draw on their experience from past transactions and identify other alternatives that will enable both parties to achieve their desired outcome.

## V. Deal Completion: Negotiation Tips to Facilitate a Smooth Close

**D**eals need to progress through a series of steps before they get to completion, but in truth, the best dealmakers are always mindful of moving the transaction to a smooth close. They strive to manage every aspect of the negotiation process to eliminate the risk of surprises that may put a promising deal in jeopardy.

Here are some of the best practices that our contributors recommend to get both sides to the closing table:

Create an environment of collaboration. “If you can develop an early rapport for being a solutions-driven professional and empower the broader team from both sides to embrace the outstanding issues and work together to develop answers, you win in the long run. In that situation, people generally tend to be more creative, more open and less emotional. When you lock horns in negotiations, all the walls go up and creativity shuts down. You can typically point to the precise moment when this occurs.” John Ferrara

Prioritize. “One of the most important aspects of any negotiation is prioritizing, and really understanding what are the key issues that you need to deal with. It is also important to understand what will have the most lead time. It’s one thing to have a negotiation where you and I can control what the subject matters are, but it’s an entirely different situation where you have to add in lead time for regulatory or other third party approvals. So, the most important thing is to understand going in, what issues are within your control? What are those issues that will require third party consent?” Selig Sacks

Be hard on the issues, not the people. “The worst negotiators are the people who are just lunatics in the negotiating room. There is a time and place for theatrics as a tactic – I can rant and rave too, and I’ve done it when I’ve needed to. But in truth, negotiation is not really about intimidating people. Negotiation is really about understanding the issues and negotiating the issues. This is particularly true if you’re dealing with other highly trained intelligent professional people. You are not going to win a negotiation by being tougher than them on an interpersonal level.” Marshall Sonenshine

Eliminate surprises. “Nothing will derail a deal more permanently than a surprise that one side knew about and didn’t divulge, even though it inevitably had to come out. The loss of credibility in those situations is often irreparable. If you want good execution, be prepared to be honest about what you can and cannot do at that point. You should invite that from your counterparty as well.” David Schafer

Don’t rely solely on email and conference calls. “There’s a danger if people over-rely on communications via video conference, teleconference or e-mail exchange. More face-to-face negotiation should be taking place. It’s a lot easier for people to hide behind certain positions if they are not meeting in person and really talking the issues through. If not at the lawyer’s level, then certainly at the businessperson’s level, as much time as possible should be spent ‘on the ground’ with your counterpart to understand their company, their culture, technology, and their issues.” Selig Sacks

Make sure the true decision makers are at the table. “It can be a potentially fatal error if one side’s ultimate decision maker agrees to attend a negotiating session when the other side’s decision

### **A View Towards the Future of Dealmaking: What's Changed, for Better or Worse?**

I. Global nature of dealmaking is forcing everyone to become more knowledgeable on a wider array of deal requirements. As companies increasingly seek investment opportunities in the international arena they are facing a deal environment that requires expert understanding of the cultural, governmental and financial environment. It's fast becoming a world where M&A generalists are obsolete. More and more, deal advisors are specializing in country specific, industry specific, product specific niches.

II. Pressure on dealmakers to drive more deals at the same time is limiting their ability to build deeper rapport with clients – possibly resulting in “less effective” negotiations. Deals are still done, but what gets left on the table? Expert dealmakers know that by investing the time to develop deeper relationships with their clients and understand their priorities beyond the immediacy of the deal at hand, they are able to serve them better in the long-term. To these dealmakers, it is not necessarily the best practice to trade off quality for quantity.

III. Technology is making it easier to get access to information. Virtual data rooms have certainly streamlined the due diligence process by replacing paper with electronic documents that can be accessed by deal team members via the Internet. This has helped to accelerate the process and reduced the need for deal teams to have to travel as extensively as before.

IV. Third party advisors are seeing more competition from corporate in-house dealmakers. More M&A is now being done in-house; this means less business for deal advisors. As the competition increases, it becomes more important than ever for dealmakers to find ways to differentiate themselves from everyone else who is competing for the same clients.

maker is not also there. Points can be conceded by the one side while the other side suggests it may be able to compromise but must consult with people outside the room.” Jim Abbott

Even the experts bring in experts. “You have to have a little bit of humility, you know. No one person owns or has a monopoly on all knowledge. So if it's a tax question, get a few law firms on the phone and make sure you've covered all your bases. If it's a securities matter or a structuring matter, you may need to get the securities lawyers and the accountants on the phone. Know who your best experts are and get in a room or on a phone with them. These are not emails – these are conversations.” Marshall Sonenshine.

Don't personalize anything. "You never want to get to a point in any negotiation where you are personalizing what the other person is saying. I've seen lawyers in negotiations become really annoyed at a lawyer on the other side who is arrogant, interrupts all the time, etc. It becomes kind of a personal vendetta, a 'who's smarter than the other person.' First of all it's a very ineffective way to negotiate. Secondly, clients don't like it. They don't want to turn this into an individual revenge motive – they want you to get through the negotiations and get the transaction closed." James Hill

“Prices is what you pay. Value is what you get.”  
~ Warren Buffett

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## SUMMARY

In the M&A world, you are measured on your ability to bring winning deals to fruition. The best dealmakers know how to bring the right combination of knowledge, experience and interpersonal skills together to drive the results they want. They are expert negotiators who love to “do deals.” They are also lifelong students of the art and science of M&A dealmaking. They’ve amassed an arsenal of transactional experience, yet they do not rest on their laurels. Rather, they constantly challenge themselves to improve their skills. They are well aware that change is a constant in their line of work and they enhance their skills, and increase their knowledge to stand out in a competitive arena. The most successful continually evaluate what is taking place in their environment and adapt accordingly, to differentiate themselves from the commodity players.



# Contributor Biographies



**James E. Abbott** is a partner in the Business Transactions Group within the Corporate Finance Department at Seward & Kissel. Jim has practiced law since 1984. He joined Seward & Kissel as a partner in 2007. He represents public and private companies, private investment funds, investment management firms, financial institutions, business owners and managers in connection with a variety of business transactions, financings and general corporate matters. Representative transactions include mergers and acquisitions, private equity, debt and venture capital transactions, seed capital arrangements, joint ventures, strategic alliances, PIPEs and related alternative investment transactions involving SPACs and reverse mergers with shell companies, and other public and private securities offerings. His general corporate work includes the formation and organization of various businesses.



**John Ferrara** is the founder of Capstone Partners, has diligently spent the last 20 years of his career specializing in mergers and acquisitions, venture capital and management consulting. Along with founding Capstone Partners, Ferrara is also a founding member of Rodman & Renshaw. Throughout his career in M&A he has advised companies and complete over 100 transactions in cities all over the globe such as London, Riyadh, and New York. Before starting his successful career at Lehman Brothers' M&A group, Ferrara was offered to compete in Australia's semi-professional baseball league.



**James M. Hill** is Partner and Executive Chairman of Benesch Law. He is active in many different aspects of the firm including the Executive Committee and has served as Benesch's managing partner from 1999 – 2007. Mr. Hill specializes in mergers and acquisitions, public and private offerings of equity, as well as offerings of debt. He has won various awards and has been recognized for numerous accolades, including one of The Best Lawyers in America. Mr. Hill has published several articles and is a regular key note speaker on subjects of mergers and acquisitions.



**Selig Sacks** is co-chair of the U.S./Greater China Corporate Practice at Foley & Lardner LLP and a member of the firm's Transactional & Securities, International, and Private Equity & Venture Capital Practices. He focuses his practice on representing U.S. clients doing business in China and Chinese companies accessing U.S. capital markets and technology transfers as well as expanding their presence in the U.S. Sacks' clients span a broad cross section of industries, including energy, agriculture, pharmaceuticals, green technology, consumer products, new media, real estate and infrastructure. He also represents private equity sponsors and investors. Sacks regularly counsels public and private entities in general corporate and governance issues and participates in defending U.S. publicly traded China-based companies in class action lawsuits, SEC investigations and crisis management. Sacks has an active private equity practice on behalf of financial sponsors and investors. In 2010, his transaction, the ESOP Buy-Out of International Intimates, Inc., was honored as Acquisition Financing Deal of the Year by The M&A Advisor.





**David S. Schaefer** is New York Managing Partner and Chair of the Corporate Department at Loeb & Loeb LLP, a multi-service law firm with more than 300 attorneys across six offices in the United States and Beijing, China. Schaefer is one of the country's foremost dealmakers, concentrating his practice in the areas of mergers and acquisitions, corporate finance, private investment fund formation, corporate restructurings and other strategic transactions. His clients range from multinational corporations to closely held companies and include strategic and financial investors, as well as boards of directors and special committees. Many are active in the following industries: financial services, including investment banks and private investment funds; entertainment and media; and information technology. Schaefer specializes in finding solutions to complex problems, shaping strategies and tactics to realize those solutions and forging consensus among stakeholders with divergent interests. In 2012 he honoured at the 2012 ACG NY and M&A Advisor's Champion's Awards as a finalist for the "Dealmaker of the Year" award. He earned his J.D. from New York University School of Law and his B.S. from Massachusetts Institute of Technology.



**Marshall Sonenshine** is currently the Chairman and Managing Partner of Sonenshine Partners. Mr. Sonenshine began his pursuit of the M&A middle market industry at Solomon Brothers where he handled M&A and corporate finance assignments. In 1996, he joined BT Wolfensohn as a partner handling media and transportation M&A. He is known for advising transactions for some of the largest companies in the nation. Sonenshine has lead teams closing deals as large as \$20 billion. In addition to Sonenshine Partners, Marshall dedicates his time to educating the future leaders of M&A at Columbia Business School. He is also Vice Chairman of the Board of Arts Connection, and trustee and member of the Executive of the International Center of Photography.



**Stephen J. Toy** is a Managing Director of WL Ross & Co. LLC. He is currently the Chair of the firm's Investment Committee and a member of the Office of the Chairman. Toy primary focuses on global distressed private equity investments with recent platform companies including: International Automotive Components Group NA LLC, Plascar SA, VTG AG, 360networks Corp. and Kansai Sawayaka Bank Ltd. Toy currently serves on the Board of International Automotive Components Group NA LLC and Amalgamated Bank. He has been with WL Ross & Co. LLC since its founding in 2000. Prior to that, his background includes mergers & acquisitions and corporate restructuring advisory at Rothschild Inc., and public finance advisory at O'Brien Partners Inc. Toy holds a B.S. in Business Administration from the State University of New York at Albany.



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