

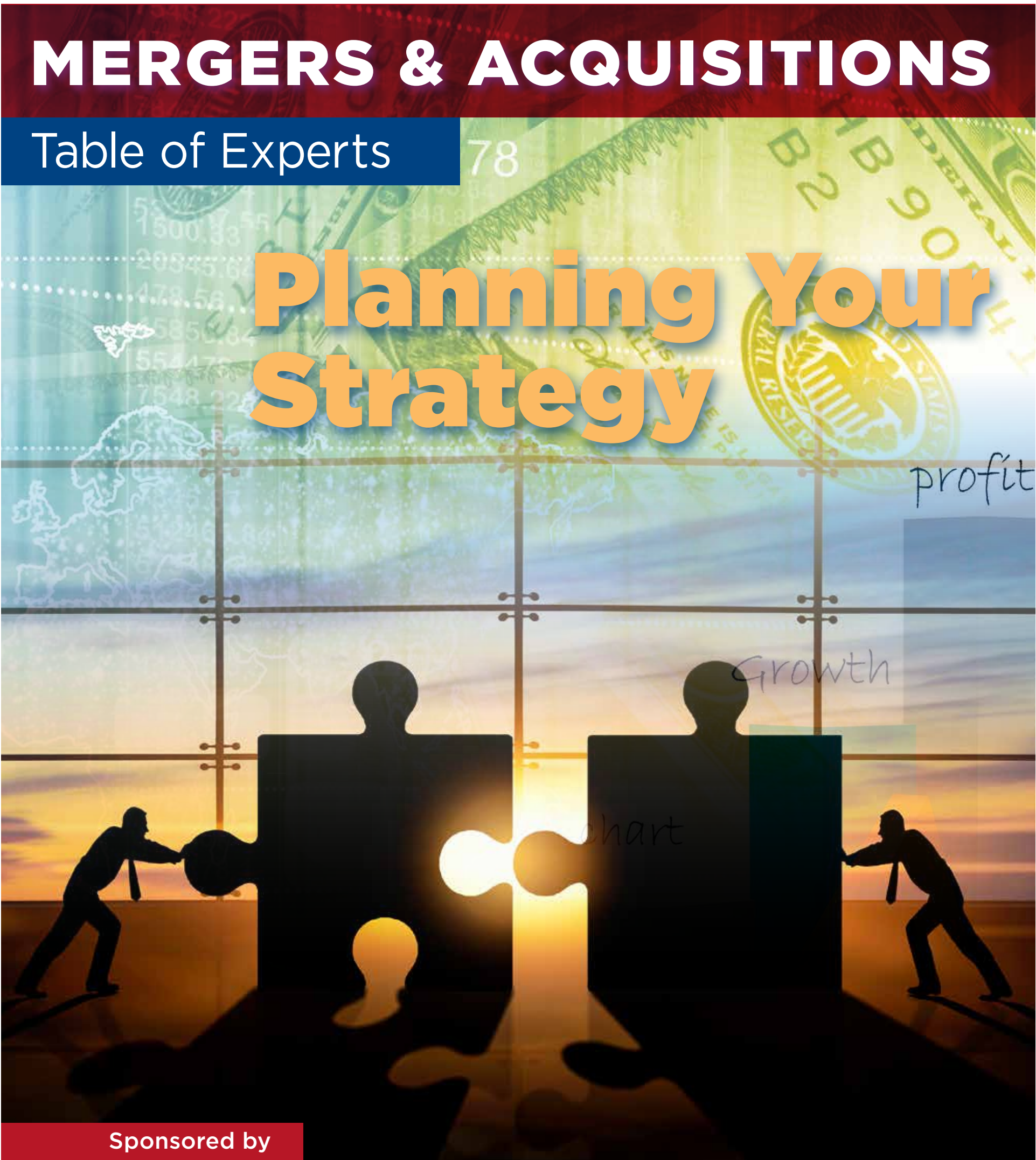
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MERGERS & ACQUISITIONS

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JIM AFINOWICH
Managing Partner
IBG/Fox&Fin

Jim Afinowich is the former owner of more than 15 businesses in the manufacturing, marketing, publishing, aviation, and international trade sectors. Jim is not just experienced in closing deals – he is experienced in business. Jim has more than a quarter century of successful experience in the M&A industry having sold businesses valued up to 120 million dollars. In 1993 he was a founding principal of Fox & Fin Financial Group, an Arizona based regional M&A firm. Today Jim continues to be a principal in that firm and is also a partner in IBG Business, a national M&A firm with multiple offices across the US that has closed more than 1100 transactions. He is a past president of the International Business Brokers Associational and a Certified Business Intermediary (CBI) and Merger & Acquisition Master Intermediary (M&AMI), the highest levels of accreditation in the industry. Jim also hold several securities licenses.

As a deal maker, to me, the letter of intent is where we really negotiate the transaction. I would call a letter of intent the cliff notes version of the contract, and if the deal is going to blow up, I'd rather it blow up in the letter of intent than at the contract stage.



Table of Experts Panel (L-R) Jim Afinowich, David Beauchamp, Christine Nowaczyk, Clark Porter

Jim: What are the general conditions of the current M&A market in Phoenix, and how does that compare to last year?

Christine: M&A transaction volume has been steady over the last few years, with an uptick in the last twelve months, primarily due to an abundance of capital chasing transactions and upward migration in the valuation of companies. Sellers are looking to take advantage of what is a fairly robust market.

Clark: I also think the election created some uncertainty, and that has been eliminated. There is more optimism, and I think that's leading to an increase in deals.

David: I agree with both Christine and Clark about the significant available capital, and the election slow down in terms of where the market was last September with the uncertainty of the election. After the election there was a significant spurt of activity. In addition to that I think economic conditions right now in Japan, Europe and China, are creating opportunities and certain companies are taking advantage of them.

Jim: I'd like to add a note to what Christine and you said, David, in that there is a lot of money in the market today chasing deals. There is about a trillion and a half dollars in private equity looking for deals. As a deal maker, I see a lot more buyers in the market than I have in a long. Not just the traditional private equity groups, but there are more family offices, there are more pledge funds, there are more high net worth individuals.

Christine: I would agree with that. There is fierce competition for good opportunities, particularly when the transaction is bringing together complimentary businesses where you can realize growth immediately following integration.

Jim: And that additional money in the marketplace is creating a higher multiple in some cases. There is increased demand for what I would call "A deals" - clean transactions with stable earnings and a profitable forecast in the future. In that area, we're seeing substantially more interest, and more competition.

Access to capital is key to putting together a good strategy. What do you think the state of that is in Phoenix, and do you see that changing any time soon?

Christine: To your point earlier, Jim, there is ample capital chasing transactions and it is coming from a lot of different sectors. Traditional private equity, junior debt and to a lesser extent, senior debt financing, because commercial banks are beholden to regulation on the amount of leverage that we can be applied to a transaction. We are also seeing the emergence of family offices and more companies accessing the bond market.

David: There are a number of private equity, private offices, that are opening satellite offices. I know from being on the board of the Arizona Technology Council, that we have directly worked with a number of private equity and other groups to get them to come here for regular meetings, and to participate in certain activities that are going on. Dr. Crow at ASU has been very helpful in getting people on the ground here to see that the business climate here has come a long way, both in changing the perception, but providing additional sources of capital that's available for business here.

Jim: David, you mentioned some private equity groups opening satellite offices here. I've seen them as well, more people bringing capital to town. But Arizona, historically, has been deficient in the availability of funds based locally, and I

think that's starting to change with things like the private equity groups moving here. Another indication of the growth of local based capital is the formation of the Arizona Collaboratory, a local non-profit portal that brings businesses and capital sources together for Arizona companies. Fortunately, we attract a lot of capital from out of town to fill the local void.

David: Jim, I totally agree. We do have a problem trying to convince local investors to not necessarily put the money into real estate, but to put it into businesses. I was very glad that the Arizona legislature reauthorized funding for the Arizona investor tax credit. The Arizona program was actually the program that 43 other states looked at to model their programs after. It had over 1,600% return to the state from the tax credits that were issued, and it stimulated a significant increase of activity and increase of small business through redirecting some real estate capital into businesses.

Jim: Kind of like the "Buy Local" program except for financing. Invest local, like buying local.

So, when we get involved in a deal, in my firm we have a saying, no deal closes until it falls apart three times. That rates to due diligence. So how has due diligence changed in this era of regulation and cyber security?

Christine: For buyers, understanding not only the business model and team that you are acquiring, but also evaluating the technology that supports operations. There is a heightened focus on IT and any gaps that might exist in cybersecurity, protecting confidential client information, and in healthcare, HIPAA compliance.

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**DAVID BEAUCHAMP**

Member

Clark Hill PLC

David practices primarily in the areas of corporate law, securities, venture capital and private equity transactions with an emphasis on financing, acquiring or developing rapid growth companies in the areas of technology, biotechnology, aerospace and other emerging growth industries in the United States and overseas. David represents venture capital and private funds in their efforts to raise funds ranging from a couple million dollars to hundreds of million and in the subsequent investment of those funds. He also represents entrepreneurs and growth companies, and has documented mergers, acquisitions and private offerings for companies to raise funds. David has represented management, investors and financial sources in a wide variety of LBO and MBO acquisitions and ESOP transactions.

I view each transaction kind of like a living, breathing organism, and anything that's not going to support that organism can cause it to die.

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With regard to regulations, there is a renewed focus on fiduciary rules in the area of employer-sponsored retirement plans, and in making sure that the company being acquired has all of the protocols in place, in advance of a sale, to protect from any risk that may arise in this area.

Clark: Any small company involved in healthcare may have HIPAA issues. There are a lot of small companies that are not doing everything they should to be compliant with HIPAA. And they are probably not high-risk targets, but I think that is a big focus. One area that buyers are focusing more attention on is whether the target has been involved with government contracts, primarily federal but also at the state level. There are a lot of potential liabilities associated with qui tam actions (whistleblower actions), and the exposure can be pretty extreme. I think if you have a target that's been involved in government contracts, then that will be much more of an area of focus than it might've been five or ten years ago, because of all the whistleblower potential liability.

David: As everybody has acknowledged, due diligence has significantly changed, and also the requirements for purposes of compliance have changed. As Clark indicated, we've had a number of small healthcare companies who thought they were in perfect compliance, and we've had audits done before the transaction gets underway, and they've had to change internal policies and procedures to get into compliance and the idea was to try to deal with it up front before it became a deal-killer, which it very quickly could have been for them.

Also as far as cyber security, we're fortunate to work with a number of subcontractors to the department of defense, and the cyber security requirements there have increased significantly over the years. The government is putting pressure on the main defense contractors, like Boeing and Lockheed for potential breaches, but it was often the third-party subcontractor that provided all the access. So the smaller companies here in Arizona that do business with the Honeywells and the other major contractors, they've had to significantly upgrade their cyber security protections as part of any contemplation for a future sale or merger.

Jim: The merger and acquisition industry is cyclical. You go back to the last down cycle, and private equity groups took a lot of losses. Now that the market is back up, I see a lot more emphasis on due diligence.

And they want to see a lot deeper due diligence. Historically, people thought of due diligence as financial, reviewing and confirming financial statements. Financial due diligence is now a lot more involved. There is a greater emphasis on quality of earnings. Due diligence also includes legal, IT, environmental, human resources and market due diligence. Those other aspects are equally as

important, and buyers are being a lot more cautious.

Christine: Due Diligence around the team that is being acquired is going further in depth than we have ever seen before. Extensive background screenings for key contributors and leadership teams will intensify as information has become more readily-available.

Jim: As an intermediary, we do due diligence on our potential clients, to a certain extent. There's a really technical tool that's very helpful called Google, and it's amazing what we can find out. We have turned down clients because of the things that we have found on Google about them.

Jim: Alright, so how important is a letter of intent for the sale of a privately held company, and what, if any, are the advantages of a letter of intent?

Clark: You do have clients who are sellers who are sometimes really anxious to sign an LOI, even though it is barebones with almost no details. I tend to think that's a mistake. On the buyer's side, it may not be a bad idea. You get the seller enthusiastic, and you get them subject to a lockup, and your negotiation leverage may be increased by that. And so issues the seller would have pushed back harder against at the LOI stage, they may end up being less aggressive at the deal document stage. From a seller's perspective, I think you should try to have a detailed term sheet or LOI that gets into the details of the non-competes that are going to be expected, how long they're going to be expected, as much of the escrow and indemnification issues that you can nail down, whether there is going to be joint and several liability of the owners, and the extent to which liability will be capped. All of those details are easier to negotiate at the LOI stage than they are when the deal documents come through.

Also you're going to end up paying a lot more in legal fees if you don't have a detailed term sheet, because you're going end up negotiating business terms through legal documents, which is a lot more expensive and time consuming.

Jim: David, I remember a transaction years ago that we did with you, and you were very aggressive and strong in negotiating a letter of intent for your client. I think you'd probably echo some of the things Clark said, but maybe add to that. I was impressed with what you did in the letter of intent stage.

David:
Once

the letter of intent is signed, and you get into legal documents, then the seller is really opening their checkbook to pay legal fees. Like Clark indicated, they're paying significant third party costs to respond, prepare due diligence for the buyer, etc. At some point in time the leverage shifts to the buyer because the seller has so much sunk cost into the transaction they want to go through with it, and the costs involve not just the dollars and cents, but the amount of management time and focus that is put into the transaction.

Christine: I would add that a detailed term sheet clarifies expectations on both sides, and so I very much agree with what Clark said. It ensures that interests are aligned very early on in the process, and a better term sheet or letter of intent improves the certainty to close.

Jim: As a deal maker, to me, the letter of intent is where we really negotiate the transaction. I would call a letter of intent the cliff notes version of the contract, and if the deal is going to blow up, I'd rather it blow up in the letter of intent than at the contract stage.

David: I view each transaction kind of like a living, breathing organism, and anything that's not going to support that organism can cause it to die.

Jim: All right, for owners who may now be leaning toward selling, what should they be doing? What sort of preparation should they be undertaking, and how long will it take?

David: When we get the opportunity to sit down with a potential seller, we try to go through a detailed checklist. We try to make sure the parties of interest are totally aligned in terms of the outcome of the sale, but also in terms of the process for the sale.

But more important, it's that we



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really do our due diligence of the company. When you're dealing with a privately held company, there's a number of structural things that you can do that provide tax advantages to the owners. You can set up a separate company to own equipment and lease it to the company and get accelerated depreciation, which is beneficial. At the sale, you want that equipment in the company when you're going to sell it and not to have multiple parties or get into a situation where the buyers, the day before the closing, announces, "Okay, we're going to pay the leasing company 50 cents on the dollar going forward or we're not doing the deal."

The same thing with leasing the buildings and R&D functions. We've spun off R&D functions for various companies to take advantage of the R&D tax credits, and to control the intellectual property, but that obviously needs to be owned by the company prior to the sale.

Jim: Absolutely correct, tax planning is essential in a deal. Our sellers only care about how much money they get after tax, and the buyer only cares how big the cheque is they have to write. If you can bridge that tax gap between the two you've got a better chance of bringing a deal together.

Christine: Upgrading the quality of a seller's financial statements or validating the numbers through an independent review is important to anyone that is going to make an investment in the business. Making sure that contracts are in order, insurance and regulatory items are well documented,

and helping the buyer to understand what the recurring cash flow of the business will be post-sale are key. For many small business owners, their company serves to fund a portion of their lifestyle, however this trend may not continue under the new ownership. To maximize value, it is important to paint a clear picture of what cash flow will be available going forward.

Jim: That's something that we run into all the time. We'll have a seller that will take deductions for things that maybe are legitimate deductions, but aren't necessary to the business. The advice I like to give sellers is to run the financials as cleanly as possible, in a manner that will reflect how a new owner might run the business. For every dollar an owner deducts in personal benefits they will save 30 or 40 cents in tax, because we may sell their business for five times earnings, you've given up \$5 in the sale price. Giving up \$5 in sales price to save 30 cents isn't a good move.

Clark: Having the sellers know in advance what the tax implications are in a stock sale, merger versus an asset sale, really a detailed review with tax counsel is important. I see a lot of deals where they have not done that analysis. They don't know how hard to push back - what the difference in purchase price should be for them to accept.

As far as time, I recommend two years ahead if you know you want to sell the company. We've taken some clients and gone through a mini due diligence review with them. We have them collect all their



contracts. We have them go through, kind of a shortened due diligence list that you would expect to get from a banker and we check through all these items and see where they might be weak.

With small clients one thing I see all the time is, unless they have in-house counsel or outside counsel who review everything, they usually have signed a lot of bad contracts where they think they own everything that their outside consultants or web designers have built, but they don't. You end up having to clean all that up. It's better to clean it up a year or two in advance than wait until you're in the middle of a deal and the buyer is pointing out all these problems.
















Jim: Another reason to plan well in advance is that a lot of some buyers require

the business to have signed employment contracts, non-compete agreements and confidentiality agreements with key employees. The time to go to your employee and ask them to sign these agreements is not when you have a deal on the table.

Clark: That kind of cleanup is doable in Arizona. You cannot add post-employment non-competes in every state, but you can have your employees sign new, updated IP confidentiality agreements generally anytime and that's also part of the due diligence. Make sure those agreements work, are enforceable and are transferrable in connection with the sale of assets. A lot

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 IGC ► Informative Graphics Corporation Acquired by OpenText™ (NASDAQ: OTEX, TSX: OTC)	 Capital Canyon Club ► Capital Canyon Club, LLC acquisition of the former Hassayampa Golf Club	 Arcadia Biosciences ► Series D Preferred Stock Financing led by Mandala Capital Limited	 Heska ► Acquisition of Cuatro Veterinary, LLC

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**CHRISTINE NOWACZYK**Corporate Banking
Executive**Bank of Arizona**

Christine serves on the Bank of Arizona executive leadership team and oversees the corporate banking line of business. She joined BOK Financial in 2006, after nearly two decades with JPMorgan Chase, to help build its Bank of Arizona subsidiary. Christine is president emeritus of the Association for Corporate Growth – Arizona Chapter and is a member of Arizona Business Leadership. Her philanthropic roles have centered-around improving the lives of Arizona's most vulnerable children and their families. She is board chairman for Educare Arizona, part of a national network of high-quality early learning programs, and held an appointment by former Arizona Gov. Janet Napolitano to serve on the state's P-20 Education Council.

For most business owners, the sale of their company is a once-in-a-lifetime opportunity. Being clear about what your objectives are from the start, finding an advisor to help you reach those goals and to address other shareholder needs, is where to start.

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of them aren't - especially ones that you just pulled off the Internet.

David: To the extent that you get an employee to agree to a non-compete or to an IP assignment to the company, there can still be challenges down the road to consider, unless you're doing it as part of an annual review, coming off probation, a bonus, something of that nature.

Jim: My take away from this is to consult with your legal counsel in advance so it's all correct and transferrable.

All right, during a merger most buyers do not push back very hard when the seller asks for protective language connected to work product. In those situations, what precautionary steps should be taken?

Clark: This has come up a few times. Typically, in a merger deal, unless you contract out of it, the buyer is going to have access to all of your legal communications, all of your email communications including all of the deal negotiation that you've done during the year or two prior to the sale. I don't think a lot of companies focus on that, and we have seen buyers absolutely refuse to give the typical contract clause where the seller, even though it's a merger, preserves and keeps the right to all of the attorney client communication. I think it's a fascinating issue and people didn't talk about it 10-15 years ago. It seems to have become a hotter issue over the last five years.

Jim: One thing we caution our clients about, is that after they turn over their business to the new buyer, the new buyer is going to have all their IT systems, they're going to have all that data.

Clark: All the emails.

Jim: Every email. So we often have them set up separate email accounts from their company server email accounts just for the transaction communications. David, can you imagine if a buyer read all your correspondence with one of your seller clients after the fact?

David: While we always try, just as you indicated, to have separate emails set up or in separate email accounts so that we can clearly deal with the sellers and the senior officers of the company privately - where that information is not going to get turned over. However, we've had some private equity companies really push to get all that information, particularly anything involving due diligence. We then have to go to the next step and bifurcate the information in such a way to determine what involves due diligence and can be disclosed.

Jim: In asset deals where dozens of employees will move over to the buyer, do you prefer a sign and close or sign a contract and have a close subsequent to that - contingent upon certain things happening in between?

David: From a buyer's standpoint, it's always preferential to do the sign at close all at once because you're not in agreement with anything until you have all your items taken care of. And the buyers tend to be much more organized for a closing than the sellers because most of the buyers that I've dealt with have been private equity in more sophisticated companies.

To the extent that the contract can be done in advance, I feel that's advantageous to the seller knowing what are the conditions for the closing. That's beneficial. Most closings are done as a

sign and close when you get to a certain level.

Clark: One of the things I see in deals is both the buyer and seller want to do a simultaneous sign and close in an asset deal without thinking through everything, and not even debating it very much. They really want a sign and close rather than a delayed close. And there's a lot of pressure to structure it that way. You can do that in almost any deal by using a somewhat complicated transition services agreement, where you make the economic impact be the same as of the closing date, but all of the transition of the business happens through a complicated pattern post-closing. You gradually rehire all the employees by the buyer, you gradually transfer all of the plans, and you transfer all of the contracts. I'm kind of surprised at how many buyers and sellers don't anticipate the problem of a sign and close with an asset sale, and just don't think these things through.

Christine: I would add that it's important to plan in advance for the closing, but to always anticipate changes and to rely on the experience of your attorneys to help ensure that as a seller, your business objectives are protected.

Jim: I've seen too many times, you're planning a sign and close, and you've scheduled an hour for the closing and eight hours later you still have attorneys negotiating deals at the last minute. That comes back to having a proper letter of intent and the right advisors.

So, who should be on the advisory team, and how do you choose the advisors?

I'll start - then I'll go to my colleagues here. I think your primary people involved are going to be your attorney,

M&A Deal-breakers

Potential liability discovered during due diligence.

We don't see that as much anymore, but for years, pension liability was the number one killer of transactions in the US. You also have potential employment problems. We were representing a buyer, and after due diligence found out that the seller had been very discriminatory in terms of how they were treating women employees, and we viewed that as probably a 10 to 15 million dollar lawsuit settlement at a minimum. It wasn't worth buying a business for 30 million dollars if you're going to have that kind of significant potential liability.

— David Beauchamp | Clark Hill PLC

Regulatory Uncertainty

You may have a target company making impressive profits, and they may seem like an attractive buy or investment to a PE firm, but one of the reasons they're so profitable is they're operating in a high-risk area in terms of regulatory uncertainty. I've seen deals where after due diligence, investors realize the entire business model could be

eliminated with a change in the FDA regs - and not a crazy change, but an incremental change

— Clark Porter | Osborn Maledon

Differing Motivations

Are they truly motivated? We've had a number of issues where the motivations of different family members are different. They're not aligned.

— Jim Afinowich | IBG/FOX&FIN

Culture Clash

The fear of not being able to assimilate the cultures can prevent a transaction from closing. Once consummated, culture drives the success of the business and how teams work together so it should always be top of mind.

— Christine Nowaczyk | BANK OF ARIZONA

Deal Fatigue

Time kills deals - deal fatigue. We talk about due diligence being a lot deeper than it used to be, and that equates to time stretching out, and a lot of individual owners just grow weary of the process.

— Jim Afinowich | IBG/FOX&FIN

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your accountant, your financial planner and, to a lot of extent, your banker. Your banker's going to be more important on the buyer side than the seller side because generally with the seller the banking relationship is winding down, with the buyer it's just starting.

But picking your advisors in advance is very important. As a deal maker, I like to meet with all of the advisors well in advance to put together a plan in ahead of the sale of the company so the plans are coordinated.

Christine: For most business owners, the sale of their company is a once-in-a-lifetime opportunity. Being clear about what your objectives are from the start, finding an advisor to help you reach those goals and to address other shareholder needs, is where to start.

Pick your sell-side advisors based on their experience in your industry, with your size of transaction, and not necessarily who your buddies just used. Individual sellers should also contemplate using a personal wealth advisor to help with financial and tax planning. As a buyer selecting a bank to provide financing, you should look for a partner that can provide capital not only for the immediate transaction, but that is poised to support your growth capital needs.

Clark: Well, I would just reiterate that doing the tax analysis in advance is so essential. If you're thinking of selling your company for around 20 million, you should know what price you'd be willing to sell at in a stock deal, and what price you'd be willing to sell at in an asset deal, and what the difference is ahead of time.

There are also some nightmare regulatory schemes out there, where even a 25-30% change in control of the company may trigger filing requirements. Knowing the difference between an asset sale or a stock sale is a good thing to have figured out in advance.

Jim: Not only picking advisors you feel comfortable with, but picking the advisors that have experience for the size transaction you're working on, for the type of transaction, and the regulations

involved.

Jim: For people selling businesses, what is your best advice, and how would you summarize what we've talked about today?

Clark: My first piece of advice is don't sign contracts without reading them, and if it's a contract that's going to last more than a year or two and have ongoing implications, have somebody review it and give you advice.

Christine: For sellers, start the process early. We heard that theme throughout our comments today. Be clear on your

objectives for the transaction and understand what is driving you to want to pursue an exit of the business now. Is it because of fatigue, health or succession issues, an industry shift or to take advantage of a hot market?

David: I think the suggestion that Christine gave, it is an excellent suggestion. I think once the seller clearly understands why they want to sell the business, why it fits into their plans for themselves personally and for the business, then you can put the deal team together, you can do the analysis, and you can do the preparation that's required for purposes of the sale.

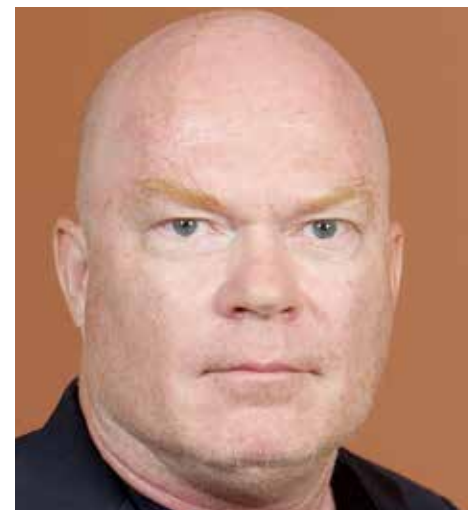
Jim: And for my summary, I think it all comes down to timing. And there's timing of three factors:

There's timing of the market. What's the trend in your industry? Is it the right time in the market? You want to sell when your business is going up, not when it's coming down.

What is the right timing for the business itself? And that relates to market timing. Have you reached a level in the growth of the business where it needs to be institutionalized to take it to the next level? Where it needs capital that the owner can't afford?

And finally, what's the right timing for the seller? Is the seller mentally ready and capable of going to the next step?

Timing of market, business, and owner are all critical.

**CLARK PORTER**

Partner
Osborn Maledon

Clark Porter represents technology and other entrepreneurial clients, often in connection with the firm's outside general counsel practice. He focuses a majority of his practice on intellectual property and technology-related matters such as licensing, distribution, and procurement, and representing companies in business transactions and corporate governance matters, including M&A and private equity financing. Clark rejoined Osborn Maledon in 2006 after a five-year stint as Vice President and General Counsel of Cyclone Commerce, Inc. Before joining Cyclone, Clark's practice included representing many of the larger software companies then headquartered in Arizona.

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My first piece of advice is don't sign contracts without reading them, and if it's a contract that's going to last more than a year or two and have ongoing implications, have somebody review it and give you advice.