

by J. David Hawkins, Esq.

What follows is a concise set of problems and issues that arise in nearly every sale of a business. It is theoretically possible to reverse engineer these problems into planning opportunities prior to the sale, but no transactional lawyer who has ever been called at home on Sunday night by an anxious client will give any odds on the likelihood of this occurring.

1.HAMLET AS SELLER. It is preferable to have reached a firm decision to sell before signing the contract. Seller's remorse is very real and can be very expensive. In a family business, the second guess forces can be powerful, particularly when your spouse figures out that his favorite son may have to get a job with regular hours.

2.VALUATION. Most people don't know what their business is worth. Many sellers think that the value is the amount needed to provide or continue a certain lifestyle. Some sellers pick a number ("the Number") which has no identifiable origin. "The Number" is usually rounded up to the next million. Before meeting with a buyer, know what your business is worth and why.

3.CALL THE ACCOUNTANT. Many factors determine the seller's net proceeds. Taxes, liabilities and shifts in working capital before closing may work to shrink the proceeds. Hard numbers usually clarify thinking. Some structures work better than others. Your accountant is the best place to start.

4.C CORPORATION. The sale of the business of a regular corporation will usually mean taxation at the corporate and shareholder levels. The impact of double taxation may be avoided by finding a buyer who will purchase your stock (good luck!) or reduced by carefully structuring payments for consulting, rents and the like which will only be taxed at the shareholder level.

5.PENANCE. Aggressive tax strategies in past years have a way of coming home when the company is sold. If profits have been greatly reduced by tax strategies, the company may look like a loser to potential buyers who, for whatever reason, do not have their gardener and ex-wife on the payroll. Sellers and their advisors should be very sensitive to tax liability for open years and in particular avoid producing schedules for potential buyers which adjust historical income to account for prior tax positions.

6.BROKERS. Hire a lawyer to draft or review any contract which gives anyone the right to sell your company. Key points: total clarity about what it takes to earn a fee, the marketing methods which may be used and the broker's role once a candidate is found. Review everything a broker prepares and retain the right to pre-approve any contacts, especially these involving competitors.

7.SECRETS. Assume that everyone in the company will learn about your plans to sell in a few days. The competition will know shortly thereafter.

8.IS THE BUYER FOR REAL? The process of selling a business is expensive and distracting. Make sure the buyer has the capability to perform before the process starts. A weak buyer can waste a lot of time while he struggles to put a deal together.

9.NO CREDIT. A seller should never finance the sale of the business. Well, hardly ever. In any case, the business assets should never be the primary collateral. Never.

10.EMPLOYEE SHAREHOLDERS. Making employees stockholders should be done with great care. Selling the company can upset old relationships and spoil expectations. Uncooperative small shareholders can destabilize a sale and run up legal bills. A simple “drag-along” agreement insures that minority shareholders follow the leader.

11.PROTECTING YOUR PEOPLE. It is a rare buyer who will guaranty the employment of the seller's employees for very long. Assume the buyer will give your people a fair chance. You cannot control the business after closing.

12.THIRD PARTIES. Many closings are snarled up by the inability to obtain necessary consents from landlords, vendors, and others with a contractual hook in the company or the owner. Address consents early. The human condition being what it is, last minute requests for consents sometimes result in extortion.

13.FAMILIES. Problems with succession planning in a family business sometimes lead to the decision to sell. A fair assessment of the next generation generally takes more time than the elders have. Before selling to an outsider, families are well advised to seriously explore how the business may be kept in the family.