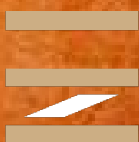


Two wooden mannequins are standing on a wooden floor against a textured orange wall. They are facing each other and shaking hands. The mannequins are made of light-colored wood with visible joints.

M & A LAWYERS

# Deal Makers

not Deal Breakers



HERMAN  
HENRY &  
DOMINIC

## Part I: The Heart of the Matter: Closing the Deal

Few things in the high-stakes world of modern business are as exciting, ambitious, and scrutiny as mergers and acquisitions (M&A). These deals are more than just the exchange of assets; they may be also transformative events that redefine the market landscape, create benefits, and sometimes even give rise to industry giants.

The role of a M&A lawyer goes far beyond mere legal compliance or risk mitigation. The primary mission is to close the deal. This is where the "deal-maker" mentality comes into play. Unlike litigation, where the objective is often to win a zero-sum game, M&A is fundamentally about creating value—value for the buying company, value for the selling company, and value for shareholders.

## Part II: Why Closing is the Objective

### 1. The Economic Imperatives

At first glance, the economic incentives for closing an M&A deal might seem self-evident. Law firms may structure their fees around successful deal closure, sometimes even incorporating performance bonuses tied to the transaction's completion. However, the economic ramifications go far beyond immediate financial gains. Successfully closing a deal often leads to long-term relationships with clients who are likely to return for future transactions. In the competitive landscape of legal services, client retention is not just a bonus; it's a must.

## **2. The Reputational Capital**

In the legal world, reputation is a form of currency that can be as valuable as financial capital. Successfully closing deals contributes to a law firm's track record, which can be a significant differentiator in a crowded market. A strong track record not only attracts new clients but also makes it easier to negotiate favorable terms in future deals. Word-of-mouth referrals, industry rankings, and professional recognitions are often predicated on a history of successful deal closures. In essence, each successful transaction is a building block in the firm's legacy, contributing to its standing and reputation in the industry.

## **3. Aligning with Broader Business Objectives**

It's important to remember that M&A transactions are not isolated events but are often part of a larger business strategy. Whether the goal is market expansion, acquisition of key technologies, or diversification, the M&A deal is a means to an end. Lawyers who focus on closing the deal are aligning themselves with these broader objectives, acting not just as legal experts but as strategic partners in achieving the client's business goals.

## **4. The Cost of Failure**

While the primary objective is to close the deal, it's worth noting that breaking a deal is usually considered a last resort and comes with its own set of costs. These can range from wasted resources in terms of time and money spent on due diligence and negotiations, to reputational damage for both the law firm and the client. The aim is always to identify and mitigate risks early in the process, allowing the deal to proceed to closure rather than collapse.

### **Part III: The Skill Set of a Deal-Closer**

The lawyer's function in Mergers and Acquisitions is not limited to that of a legal advisor who merely interprets statutes and drafts contracts. An effective M&A attorney combines the business savvy of a business strategist with the legal knowledge of a legal scholar and the negotiation skills of a competent negotiator. In this section, we will examine the fundamental skills that enable an M&A attorney to successfully close deals.

#### **1. Legal Knowledge: The Foundation of the Profession**

At the core of any M&A transaction is a complex web of legal requirements and obligations. Understanding corporate law, antitrust regulations, tax implications, and intellectual property rights is fundamental. This legal knowledge functions as the foundation and enables the lawyer to organize the transaction in a way that is not only legal but also beneficial to the client.

#### **2. Business Acumen: Beyond the Law**

While legal knowledge is a must, an understanding of business strategy is just as important. An M&A lawyer needs to understand the bigger business goals behind a deal, such as growing the market, getting better employees, or integrating new technologies. This business knowledge lets the lawyer match the legal parts of the deal with the strategic goals of the client, thereby facilitating a smoother path to deal closure.

### **3. Negotiation Skills: The Art of the Possible**

One of the most critical skills in the M&A toolkit is the ability to negotiate effectively. Negotiation in this context goes beyond haggling over price; it involves a nuanced understanding of the other party's motivations, the skill to navigate around potential deal-breakers, and the creativity to find solutions that are acceptable to all stakeholders. The best negotiators know when to push, when to compromise, and when to walk away— a skill that can only be perfected through years of experience.

### **4. Emotional Intelligence: Reading the Room**

Emotional intelligence is often overlooked, but it is very important in the high-stakes, high-pressure world of M&A. If you can read the room, figure out how people are feeling, and change your approach accordingly, you might be able to make the difference between a deal that goes through and one that falls apart. Emotional intelligence also helps build relationships, not just with clients but also with opposing counsel, which can be invaluable in reaching a mutually beneficial agreement.

### **5. Risk Assessment: Balancing Reward and Risk**

Every deal comes with its own set of risks, from regulatory hurdles to potential financial pitfalls. An effective M&A lawyer must be adept at risk assessment—weighing the potential rewards against the risks and advising the client accordingly. This skill is especially important during the due diligence phase, where hidden liabilities often exist.

## 6. Adaptability: The Only Constant

The landscape of business and law is constantly shifting, as a result of economic conditions, technological advances, and regulatory adjustments. Adaptability is, therefore, a key talent for any M&A lawyer. To bring a transaction to a successful conclusion, it is essential to be able to adjust to new information, alter strategies mid-course, and adapt to the ever-changing dynamics of the situation.

## 7. The Psychology of Negotiation

In the complicated dance of Mergers and Acquisitions, where legal knowledge, business sense, and negotiating skills are often the stars of the show, psychology is a quiet player in the background. Psychological strategies used by experienced M&A lawyers can be just as important to making a deal happen as any legal case or financial model. In this part, we'll dive into a few negotiation psychology and look at a few of subtle tactics that can tip the scales in favor of a successful deal.

a) Building Trust and Credibility: Building trust is one of the most important parts of negotiation psychology. M&A lawyers with a lot of experience know that people are more likely to deal well with people they trust and respect. From the first handshake to the tone of voice and words used, every encounter is a chance to get to know someone better. For example, a lawyer with a lot of experience might start a negotiation by talking about shared interests or people they know in common. This creates a subtle feeling of connection before getting into the details of the deal.

b) Laying the Groundwork for Negotiation: Anchoring is a psychological strategy in which the first offer acts as a point of reference for all subsequent talks. Experienced lawyers frequently employ anchoring strategically, establishing a first offer that is favorable to their client while remaining reasonable. This sets the stage for negotiations, subtly influencing the other party's perception of what constitutes a "fair" deal.

c) Shaping Choices and Preferences: The decoy effect is a psychological phenomenon where the presence of a third option can influence the choice between two main options. In the context of M&A, a lawyer might introduce a less attractive term as a decoy to make the primary offer seem more appealing.

d) Give a Little, Get a Lot: The idea of reciprocity is deeply embedded in the way people think and act. We have a natural tendency to return favors and keep a balance between giving and getting in our relationships. Skilled M&A lawyers use this concept to their advantage by making calculated concessions that make the other side more likely to make concessions as well. For instance, using the principle of reciprocity, a lawyer who agrees to more lenient payment terms might anticipate a discount on the purchase price in return, thereby guiding the negotiation toward a mutually beneficial outcome.

## **8. The Symphony of Skills**

In the complicated world of M&A, closing a deal is like directing a symphony, where each skill plays a different but connected role. From legal knowledge to business sense, negotiation skills to emotional intelligence, assessing risks to the ability to change, all of these skills add to the end goal of closing the deal. As we talk about other parts of M&A law, keep in mind that these skills are not separate, stand-alone things. Instead, they are all part of what makes a good deal.

#### **Part IV: Flexibility in negotiations is a balancing act**

In the high-stakes chess game of Mergers and Acquisitions, negotiation serves as the board upon which strategies are played out and victories are secured. While legal expertise provides the groundwork and due diligence establishes the parameters, deals are often made or broken during the negotiation phase. Flexibility is one of the most important aspects of this phase, including the ability to adapt, pivot, and find inventive solutions.

Experienced M&A lawyers often bring a wealth of experience to the negotiation table, having navigated the complexities of numerous M&A deals over the years. This experience equips them with a nuanced understanding of when to hold firm and when to bend. They recognize that not all deal terms are created equal; some are non-negotiable, while others offer room for creative compromise.

For example, an experienced M&A lawyer might be willing to be flexible on payment terms if it means securing a more favorable valuation for their client. They understand that the art of negotiation is not about winning every point but about securing the most important ones.

In contrast, inexperienced M&A lawyers, often eager to prove their mettle, may approach negotiations with a more rigid mindset. While this rigidity can sometimes be an asset—demonstrating a strong stance can be a powerful negotiating tactic—it can also be a liability. A lack of flexibility can lead to deadlocks and may result in lost opportunities for both parties.

For instance, a junior lawyer might insist on stringent indemnification clauses without recognizing that this could be a deal-breaker for the other side. While indemnification is undoubtedly important, an experienced lawyer might find a middle ground that offers adequate protection without risking the deal.



## Part V: Balancing Flexibility and Client Interests

As stated previously, in the dynamic world of Mergers and Acquisitions, flexibility is frequently praised. The ability to adapt, pivot, and discover innovative solutions can determine the success or failure of a deal. This flexibility, however, is not without constraints. A fiduciary duty to safeguard the client's best interests lies at the core of every M&A transaction. So, how can an M&A lawyer balance the requirement for flexibility with the imperative to protect the client's objectives? Let's take a closer look at this delicate balancing act.

### 1. The Fine Line: When Flexibility Meets Fiduciary Duty

Negotiation flexibility is not a license to compromise on issues that are crucial to the client's interests. From the client's perspective, certain aspects of the transaction may be non-negotiable, including the valuation of the target company, the structure of the payment terms, and the scope of indemnification clauses. Understanding this thin boundary is essential. This is where the lawyer's duty of loyalty comes into play, as a governing principle that establishes the limits of flexibility.

### 2. The Concept of 'Red Lines': Setting Boundaries

One practical approach to balancing flexibility and client interests is the concept of 'red lines'—pre-defined boundaries beyond which negotiations will not go. These red lines are usually established in consultation with the client and serve as a framework within which the lawyer can exercise flexibility.

For example, the client may specify that they are not willing to go above a certain price or that certain assets must be excluded from the deal. These become the red lines that guide the lawyer's negotiations, allowing for creative problem-solving within those parameters.

### **3. The Power of Conditional Flexibility: If-Then Scenarios**

Another strategy for maintaining this balance is the use of conditional flexibility, often framed as 'if-then' scenarios. This involves making certain concessions contingent upon receiving specific benefits in return.

For instance, in a situation where the seller is demanding a higher upfront payment, a seasoned M&A lawyer might propose a milestone-based payment strategy. This allows the buyer to make smaller initial payments, with additional payments triggered by the achievement of specific milestones. This strategy offers flexibility to the seller while safeguarding the buyer's interest by tying payments to performance.

### **4. The Deal Breakers: When to Walk Away**

There are instances when the most prudent course of action is to do the unthinkable: walk away. This is the polar opposite of the M&A lawyer's mission, a scenario that no one enters a negotiation room wanting to face. But recognizing when to abandon a deal is as important as knowing how to close one.

Every deal has its challenges, but not all challenges can be resolved. Certain red flags serve as non-negotiable deal breakers, signaling that it's time to exit the negotiation table. These could range from unsolvable and unacceptable legal issues, such as antitrust violations, to financial discrepancies that can't be reconciled.

Another scenario where walking away might be the best option is when the cost of closing the deal—be it financial, reputational, or emotional—outweighs the potential benefits. This is often a complex calculation, involving not just quantitative metrics but also qualitative judgments.

On the other hand, it is important to understand that the decision to walk away from a deal should never be taken unilaterally by the lawyer. It's the client's decision, made in close consultation with the lawyer. Thus, effective communication is crucial here, as the lawyer must clearly explain the risks and potential downsides, enabling the client to make an informed decision.

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While the journey to closing a deal is replete with challenges that require flexibility, strategic concessions, and sometimes even the courage to walk away, the endgame remains constant. The M&A lawyer is not in the business of breaking deals; they are in the business of making them happen.

At Herman, Henry & Dominic, our experienced team of M&A lawyers is trained to be deal-makers, not deal-breakers. If you're looking for a law firm that can bring to the table the kind of combination of legal expertise, business acumen, and psychological insight we've discussed in this article, we'd be honored to talk with you about how we can help. Contact us at [info@ezlawfirm.org](mailto:info@ezlawfirm.org).



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HERMAN, HENRY & DOMINIC (EZLAW) specializes in corporate matters, especially M&A, financing, banking, land, labor, tax and commercial matters, contract drafting and negotiation, and arbitration and litigation. The firm also maintains permanent good working relations with various governmental bodies in Vietnam to enable them to access the resources necessary to produce timely and effective results for their clients.

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