

LAWYER'S VALUE IN MERGERS AND ACQUISITIONS UNDER THE NEW
WORLD OF MULTIDISCIPLINARY PRACTICES

By

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ABSTRACT

Lawyers are facing strong competition from accounting firms in mergers and acquisitions. Finance and accounting globalization and multidisciplinary practice makes accounting firms more competent, challenging lawyers' value. However, lawyers create enormous value in mergers and acquisitions, such as structuring the form of transactions, managing due diligence investigation, reducing the costs of acquiring and verifying information, ensuring corporations follow the relevant regulations preventing legal liabilities, and preventing antitrust issues or invoking antitrust challenge.

Teamwork will facilitate mergers and acquisitions transactions. Restricted multidisciplinary practice will not affect lawyers' and accountants' ethics and independence. Legal education should be improved to help lawyers become more competent under the new world of MDPs.

INDEX WORDS: Mergers and acquisitions, Multidisciplinary practices, Ethics and independence, Due diligence, Legal training and practices

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CHAPTER I

INTRODUCTION

Mergers and Acquisitions (“M&A”) are corporate transactions. They are one of the most important and attractive types of work for business lawyers. First, mergers and acquisitions occur frequently, and especially increased when the stock market was established and matured. Acquisitions dramatically altered the U.S. economy in the 1980s. The total value of assets changing hands in this period was \$1.3 trillion. Of the 500 largest industrial corporations in U.S. in 1980, at least 143 or 28% had been acquired by 1989.¹ In 1997, companies in U.S. announced 10,700 transactions at a value of \$919 billion.² Worldwide transaction volume was \$1.63 trillion.³ A developed stock market, advanced technologies, regulatory changes and the desire by companies to do big business significantly increase the merger and acquisition transactions.⁴ Second, mergers and acquisitions are perhaps the most heavily regulated events in all of American law. These events involve five major bodies of rules including tax laws, accounting standards, state

¹ Dale A. Oesterle, *The Law of Mergers, Acquisitions, and Reorganizations*, 1 (1991). [hereinafter Oesterle].

² Charles O’kelley, Robert Thompson, *Corporations and Other Business Associations Cases and Materials*, 675 n.1 (3d. ed. 1999). [Hereinafter O’kelley & Thompson].

³ *Id.*

corporate laws, federal securities regulations and antitrust laws.⁵ Therefore, lawyers play an important role in mergers and acquisitions. Third, many corporations in mergers and acquisitions are large companies, at least the acquiring company is more profitable than the acquired company. So, lawyers can earn a lot of money from assisting these companies in mergers and acquisitions transactions.

Lawyers are facing strong competition because accounting firms are taking the business of assisting mergers and acquisitions from lawyers. Many large mergers and acquisitions are handled by big accounting firms. Accounting firms hire lawyers to help them provide legal service. In the U.S. there is considerable argument on whether lawyers should work with non-lawyer professionals, such as accountants and share a fee with them in providing legal service, which is called Multidisciplinary Practice.

Lawyers' value is being challenged and complaints about their business activities are increasing. Even some articles mention that the legal professional is dead or dying. Businessmen view lawyers as deal killers. Do lawyers create value? I think the answer is affirmative. Lawyers' creation of value in mergers and acquisitions is a persuasive example.

This thesis mainly discusses what value lawyers create in mergers and acquisitions and how lawyers face the current strong competition under the new world of multidisciplinary practice. The first chapter of the paper is an introduction. The second chapter discusses the

⁴ *Id.*

⁵ Oesterle, *supra* note 1, at 1.

competition faced by lawyers. The biggest competitor is the accounting firm. The practice of accounting firms induces fierce debate in the U.S. The third chapter proves that lawyers create important value in mergers and acquisitions. The values created by lawyers are: (1) Lawyers structure the form of mergers and acquisitions; (2) Lawyers manage due diligence investigation and reduce the costs of acquiring and verifying information; (3) Lawyers make sure the corporations follow regulations of mergers and acquisitions and prevent legal liabilities; and (4) Lawyers anticipate and prevent antitrust issues. The fourth chapter is about the role of lawyers, accountants and investment bankers. I will point out that teamwork will facilitate mergers and acquisitions and restricted Multidisciplinary practice will not affect lawyers' ethics, independence and value. The fifth chapter discusses what kind of the legal education will help lawyers create more value and be more competent in the competition. The last chapter is a conclusion.

CHAPTER II

LAWYERS ARE FACING STRONG COMPETITION IN M&A

A. Competition Mainly From Accounting Firms

Laws and regulations dominate mergers and acquisitions because these transactions involve a huge numbers of laws and regulations. Historically, law firms handled all of the mergers and acquisitions. However, in the present stage, large mergers and acquisitions are handled by big accounting firms and thus present lawyers with strong competition.

1. Five Big Accounting Firms and Competition With Law Firms

The big five accounting firms (“Big Five”) have recently taken a considerable amount of work from traditional law firms in countries all over the world. In some countries where mutli-disciplinary practices (“MDPs”) are allowed, accounting firms dominate the legal practice. In some countries where MDPs are prohibited, accounting firms provide tax service or law-related practice by entering into cooperation agreements and alliances with and forming networks with law firms. Accounting firms in the U.S. are permitted to

provide tax services. Certified Public Accountants can represent clients in the tax area before the Internal Revenue Service and other government agencies.⁶

Arthur Andersen has five regions, i.e. Australia, Canada, New York, UK and Thailand. In these regions, except New York, Arthur Andersen provides all kinds of legal services. The website of Arthur Andersen in Australia lists its legal expertise in many different legal areas. In mergers and acquisitions, there is the largest group of legal experts. Arthur Andersen provides legal service in England and Wales called Garrets and in Scotland called Dundas & Wilson. Arthur Andersen's region in New York provides transaction advisory services, including due diligence, acquisition structuring, post-acquisition services and other law-related services. Andersen Legal has merged 36 international law firms into a solid organization of legal specialists.⁷ It has 3,600 lawyers in 36 countries of Europe, Asia Pacific and Latin American.⁸ It was lauded in the latest edition of the White Page Guide to Central and Eastern Europe and the CIS (2001 Edition), which is the guide providing information about law firms in Central and Eastern Europe.⁹ Domanski, Zakrewski, Palinka, the Warsaw Andersen Legal member firm, was noted for experience in

⁶ Gianluca Morello, Big Six Accounting Firms Shop Worldwide for Law Firms: Why Multi-Discipline Practices Should Be Permitted In The United States, 21 Fordham Int'l L.J. 190, 249 (1997). [Hereinafter Morello].

⁷ About us <http://www.andersenlegal.com/websitelegal.nsf/content/marketofferingsLegalservicesaboutus?open> document (last visited Jan. 19, 02)

⁸ A Solid Global Team, A World of Resources, <http://www.andersenlegal.com/websitelegal.nsf/webTop/levelpeople2?open> form (last visited Jan. 19, 20)

⁹ Legal Service, <http://www.andersenlegal.com/websitelegal.nsf/content/MarketOfferingsLegalServices> Med, (last visited Jan. 19, 02)

multiple areas, especially in major international mergers and has represented companies including Gorakzke, Pekao Group, Exbud, Credibank and Concordia.¹⁰

Deloitte Touche Tohmatsu is a leading global professional services organization. It has over 95,000 people in more than 140 countries and is serving nearly 21 percent of the world's largest companies as well as large national enterprises and public institutions.¹¹ It has 30,000 people in more than 100 cities in the U.S. and 1,000 specialists in mergers and acquisitions.¹² It is tied with the following law firms: Brauneis, Klauser & Prandl, Raupach & Wollert-Elmendorff and AKD Prinsen, Van Wijmer.¹³ For the fifth consecutive year, the U.S. practice of Deloitte Touche Tohmatsu has been named in Fortune Magazine's prestigious list of "100 Best Companies to Work For".¹⁴

Ernst & Young International member firms employ over 77,000 people in more than 660 offices in 132 countries.¹⁵ Earnst & Young provides legal services through a global network of firms consisting of more than 1,850 lawyers in over 60 countries.¹⁶ The network includes firms that have close relationship with Ernst & Young and others that are

¹⁰ *Id.*

¹¹ Set Your Internal Clock To Global, <http://careers.deloitte.com>, (last visited Mar. 20, 02).

¹² Firm Overview, <http://www.deloitte.com/vs/0,1151,sid=2119,00.html>, (last visited Jan. 19, 02).

¹³ Legal, <http://www.deloitte.com/vs/0,1010,sid=1003,00.html>, (last visited Jan. 19, 02)

¹⁴ U.S. Practice Named to Fortune® Magazine's "100 Best Companies to Work For" List For Fifth Consecutive Year, <http://www.deloitte.com/vc/0,1029,sid=1015&ar=&cid=3619,000.html>, (last visited Mar. 20, 02)

¹⁵ About Ernst & Young, [http://www.ey.com/global.gcr.nsf/New_Zealand/Welcom_ About_E&Y](http://www.ey.com/global.gcr.nsf/New_Zealand/Welcom_About_E&Y), (last visited Jan. 19, 02)

¹⁶ EY Law Alliance, [http://www.ey.com/global/gcr.nsf/international/welcome__ EY Law__ Tax__ Ernst & Young](http://www.ey.com/global/gcr.nsf/international/welcome__EY_Law__Tax__Ernst_Young), (last visited Jan. 19, 02)

independent. For example, Ernst & Young L.L.P. has several cooperation agreements with Dutch law firms and has legal practices in Switzerland, Spain, Germany and France.¹⁷

KPMG Peat Marwick L.L.P. (“KPMG”) has Klegal International, which is “a global association of law firms, parallel to KPMG’s worldwide network of professional advisory member firms.”¹⁸ KLegal International links 2,500 practicing lawyers worldwide in 50 jurisdictions who offer services such as corporate law, banking and financial services and human resources management. Mergers and acquisitions service is the major service of Klegal International. Its Mergers & Acquisitions practice consists of a worldwide network of experienced M&A tax professionals who help companies engaging in both domestic and cross-broader M&A transactions.¹⁹ KPMG advertises that they will understand client’s business objectives of M&A and design specific focused strategies tailored to client’s individual circumstances.

PricewaterhouseCoopers²⁰ has 150,000 people in more than 150 countries and offers knowledge and value through 6 lines of service and 24 industry-specialized practices.²¹ In 2000, its independent Corporate Finance team had completed over 350 merger and acquisition transactions, totaling more than US\$20 billion.²²

¹⁷ Morello, *supra* note 6, at 202.

¹⁸ Tax & Legal Review, <http://www.kpmg.com/services/content.asp?11id=20&12id=0>, (last visited Jan. 19, 02).

¹⁹ *Id.*

²⁰ PricewaterhouseCooper was merged between Price Waterhouse L.L.P and Coopers & Lybrand L.L.P.

²¹ About Us, <http://www.pwcglobal.com/gx/eng/about/main/index.html>, (last visited Mar. 20, 02).

²² Corporate Finance <http://www.pwcglobal.com/extweb/service/nsf/docid/480028eec201dce580256a07003db310>, (last visited Jan. 19, 02).

In sum, the Big Five provides a significant amount of legal service in many countries throughout the world. A survey of fourth-and fifth-year Polish law students ranked Andersen as the most recognisable brand name among law firms and the other Big Five, and PricewaterhouseCoopers, Ernst & Young, Deloitte & Touche were ranked at No.2, 3, and 6 respectively.²³ In 2000, the Big Five obtained eighty-four percent of the total revenue of the one hundred largest American accounting firms.²⁴ The Big Five expect to grow greatly in the near future. Many of them are planning to sell their consulting practices and trade these services publicly.²⁵ For example, KPMG has set up a separate business for its consulting service and anticipates raising \$1 billion by selling a twenty-percent interest to the public.²⁶ Ernst & Young plans to raise \$11 billion by selling its management consulting business.²⁷ With the huge amount of capital, the firms will be more successful.

At the time this thesis is being prepared, the Enron Corporation collapse is causing a crisis of confidence in the accounting profession, especially in the Andersen accounting firm. On December 2, 2001, Enron Corporation filed bankruptcy, resulting in shareholders' substantial monetary loss and thousands of employees' losing their jobs and pension funds

²³ Media Centre,
<http://www.andersenlegal.com/websitelegal.nsf/content/MediaCentrePolishstudentsurvey01>, (last visited Jan. 19, 02).

²⁴ Randall S. Thomas, Stewart J. Schwab & Robert G. Hansen, Megafirms, 80 N.C.L.Rev. 115, 154 (2001). [Hereinafter Thomas, Schwab & Hansen].

²⁵ Mary C. Daly, What the MDP Debate can Teach Us About Law Practice In The New Millennium And The Need For Curricular Reform, 50 J.Legal Educ. 521, 534 (2000). [Hereinafter Daly].

²⁶ *Id.* at 534.

²⁷ *Id.*

invested in Enron stock.²⁸ Andersen, one of the Big Five, was seriously wounded because it approved Enron's financial statements that overstated Enron's profits and understated its debts resulting in \$103 million of overstated profits.²⁹ Andersen employees shredded and deleted a lot of Enron documents after receiving a subpoena from regulators. Andersen is under congressional investigation, a federal criminal inquiry and the risk of lawsuits from shareholders which might make Andersen pay billions of dollars.³⁰ So, Andersen is considering a merger with one of the other Big Five.³¹ Since this scandal was disclosed, Anderson had been fired by no less than 16 public companies.³² Not only was Anderson hurt, but also the reputation of the other Big Five and the whole accounting industry was damaged. 116 companies replaced their auditors.³³ "Among the other Big Five, 9 companies replaced PricewaterhouseCoopers; 9 replaced KPMG; 7 replaced Ernst & Young; and 6 replaced Deloitte & Touche."³⁴

The eventual impact of these events upon the accounting firms' competitive position with law firms is unclear for several reasons. First, the Enron scandal and Andersen's

²⁸ David S. Hilzenrath, Auditor Hints of "Illegal Acts" at Enron, Washington Post, Dec. 13, 2001, at page E01, <http://www.washingtonpost.com/ac2/wp-dyn/A34904-2001Dec12?> (last visited Feb.27, 2002). [Hereinafter Hilzenrath]

²⁹ *Id.*

³⁰ Alex Berenson, Jonathan d. Glater, A Tattered Andersen Fights for Its Future, The New York Times, Jan. 13, 2002, <http://www.nytimes.com/2002/01/13/business/yourmoney/13ANDE.html?> (last visited Feb.26, 2002). [Hereinafter Berenson & Glater].

³¹ *Id.*

³² Jonathan D. Glater, As Andersen's Overseer, Volcker Won't Settle For Nominal Change, The New York Times, Feb. 26, 2002, www.nytimes.com/2002/02/26/business/26AUDI.html? (last visited Feb. 26, 2002).

³³ *Id.*

³⁴ *Id.*

serious behavior are still under investigation. Andersen argued that audit rules did not allow its accountants to alert the public to the Enron's financial condition unless the accepted accounting principles were clearly violated,³⁵ and Andersen has vowed to take all necessary steps to reassure that "their backbone is firm and their judgment is clear."³⁶ For example, Andersen will set up a new ethics office that will investigate questionable audit reviews when there are concerns about the integrity or independence of an accountant.³⁷ Second, although the other members of the Big Five were hurt also, it is easier for them to regain the trust because they are not the parties to the Enron scandal. They are doing everything possible to rebuild the reputation of the accounting profession. For instance, Ernst & Young and KPMG have spun off their consulting businesses in order to prevent foreseeable conflicts of interest.³⁸ PricewaterhouseCoopers and Andersen have stated that "they would not provide certain technology consulting services to clients they audit and would stop providing internal and external audit functions at the same company."³⁹ On February 6, 2002, Deloitte Touche Tohmatsu announced that it intends to separate Deloitte consulting so that audit clients can continue to get the services from Deloitte Consulting

³⁵ Peter Spiegel, Andersen Chief Shifts Blame in Enron Debacle, Feb. 5, 02, <http://news.ft.com/ft/gx.cgi/ftc?> (last visited Mar. 3, 2002). [Hereinafter Spiegel].

³⁶ Hilzenrath, *supra* note 28.

³⁷ Spiegel, *supra* note 35.

³⁸ Jonathan D. Glater, Audit Firms Are Set to Alter Some Practices, The New York Times, Feb. 1, 2002, www.nytimes.com/2002/02/01/business/01CONS.html? (last visited Feb. 26, 2002).

³⁹ *Id.*

without worrying about auditor independence.⁴⁰ In sum, the Big Five remain strong competitors of law firms.

2. Finance and Accounting Globalization Makes Accounting Firms More Competent

a. What Is Finance And Accounting Globalization?

“Globalization” is something adopted on a global scale.⁴¹ Finance means “the control of money and the business or art of managing the monetary resources of an organization, country or individual”.⁴² Accounting means the activity of maintaining the business records of an individual or organization and preparing reports for any financial purposes.⁴³ Finance is based on accounting records.

International standards of finance and accounting are established primarily by the International Accounting Standards Committee (“IASC”) in London with the International Accounting Standards, and the Financial Accounting Standards Board in Washington, D.C., with the Generally Accepted Accounting Principles.⁴⁴

⁴⁰ Deloitte Touche Tohmatsu Announces Separation of Deloitte Consulting, <http://www.deloitte.com/vc/0,1029,sid=1018&cid=3658,000.html>, (last visited Mar. 20, 02).

⁴¹ Anne H.Soukhanov, Microsoft Encarta College Dictionary, 610 (1st, ed., 2001).

⁴² *Id.* at 535.

⁴³ *Id.* at 9.

⁴⁴ The IASC is a private-sector organization created in 1973 by major professional accountancy bodies. Today, it includes 133 professional accountancy bodies, representing 103 countries. See Bernhard Grossfeld, Global Accounting: Where Internet Meets Geography, 48 Am.J.Comp.L. 261, 275 (2000). [Hereinafter

b. The Reasons of Finance and Accounting Globalization

With the advent of the Internet and other new technologies, many things are in the process of significant change. “The loss of distance”, “The shrinking of time” and “No boundaries” are the most distinctive characteristics. The Internet creates global communication networks that transmit all kinds of information at a very high speed, for low cost and to everywhere in the world. These networks open new means of implicit cooperation through markets and make economic flows globalized. Therefore, financial transactions occur more and more across borders. The capital market is becoming globalized.

In order to gather more profits, a corporation may expand its business in other countries to have more markets and consumers. The Internet helps the corporation establish its subsidiaries and affiliates and manage the business through easy and fast communication. Global corporations are the big “players” in the global field.⁴⁵ There are more and more multinational corporations, such as Microsoft, General Electric, Worldcom, Royal Dutch, Sony or Daimler/Chrysler.⁴⁶

Globalized financial transactions involving the capital markets and multinational corporations, need globalized finance and accounting standards. If all companies use similar international accounting criteria, risks would be diminished because it would save costs and time, increase the global diffusion of financial information and diminish the

Grossfeld 1]

⁴⁵ *Id.* at 264.

information disadvantages that investors meet when buying shares of foreign corporations.⁴⁷ Globalized financial transactions are traded on the web. Semiotic systems become the prime basis of trust. What counts when buying shares from the corporation in such transactions are the numbers presented in their financial statements, certified by a reputable accounting firm. “People trade in rubber-stamped certificates of numbers and rely on a kind of “WebTrust Seals” for shares.”⁴⁸ Therefore, globalization in finance and accounting standards are crucial to such transactions. Without international standards of accounting, people can not trade their shares because no one will understand or trust what the value of their shares are. In order to increase international comparability and achieve a high quality basis for worldwide reporting, investors demand international accounting standards.⁴⁹ On the other hand, international corporations require globalized finance and accounting standards. Even though the subsidiaries and affiliates of the international corporations are independent companies in different countries and areas, they still belong to the parent corporation. The parent corporation needs to have a total picture of the performance of the entire international corporation and make the business development plans for all of its corporations. In addition, under certain circumstances, for the purpose of calculating the income tax of the parent corporation or designing a better structure and transaction to have tax advantages, the parent corporation needs to understand and merge

⁴⁶ *Id.* at 264.

⁴⁷ *Id.* at 269.

⁴⁸ Bernhard Grossfeld, Lawyers and Accountants: A Semiotic Competition, 36 Wake Forest L. Rev. 167, 183 (2001).[Hereinafter Grossfeld 2].

the finance and accounting statements of its subsidiaries and affiliates. Therefore, delocalization in the financial transaction and corporation makes international standards of accounting a necessity.

c. The Effect of Finance and Accounting Globalization

The nature and characteristics of finance and accounting make its globalization easier, and globalization in turn makes accounting firms more competent. The common basic components of finance and accounting are numbers. The balance sheet, profit and loss statement, and any other financial statements are made up of numbers. Numbers have universal meaning all over the world. However, lawyers deal with words. Words are not universal because a same word in different areas may have different meanings. Therefore, it is easier to establish globalized financial and accounting standards. So, accountants can use this advantage when they handle transactions or matters across the border. Conversely, lawyers are still restricted to their local laws and regulations.

Since accountants can provide all kinds of services to businessmen except appearing in court or legal service that is prohibited in some countries, “they have grown dramatically in size and international reach, leaving lawyers far behind.”⁵⁰ The international accounting firms have announced that they intend to play an important role in the legal service market

⁴⁹ Grossfeld 1, *supra* note 44, at 275.

⁵⁰ Grossfeld 2, *supra* note 48, at 170, n.19.

all over the world.⁵¹ They call their legal service “multidisciplinary practices”. Lawyers are now a significant component of their staffs, but unfortunately they are not partners.

In sum, accountants take advantage of universal numbers to make finance and accounting globalization happen, and finance and accounting globalization makes accountants more competent than lawyers and accounting firms more successful than law firms. Since mergers and acquisitions are one of the most frequent and important business transactions and these transactions are normally international, accounting firms are the service providers of choice.

3. Multidisciplinary Practice

Multidisciplinary Practices (“MDPs”) are areas where lawyers and nonlawyer professionals work together and share fees in delivering both legal and nonlegal professional services. They are allowed or not prohibited in many countries in Europe, such as France, Canada, Germany and the United Kingdom, but are severely restricted or prohibited in the U.S. except in the District of Columbia.⁵²

In the United States, the critical restraint on MDPs is that 5.4 (a) (b) (c) (d) of the Model Code of Professional Responsibility (“Model Rule”) prohibits a lawyer from 1) sharing fees with a nonlawyer, 2) establishing a partnership with a nonlawyer, if the partnership conducts any activity in the area of law, and 3) practicing in a corporation or association

⁵¹ Feature, Background Paper on Multidisciplinary Practice: Issues and Developments, Professional Lawyer, 10 No.1 Prof. Law.1, 5 (1998).

where a nonlawyer is director or officer or controls the performance of the lawyer.⁵³

However, a lawyer is not prohibited from working with a nonlawyer under these rules if it is necessary for such cooperation in order to meet the client's needs.⁵⁴

There are fierce debates on whether MDPs should be permitted in U.S. The proponents of MDPs argue that restrictions on lawyer and nonlawyer partnerships and the sharing of legal fees are outdated and a relaxing of the restrictions will deliver efficient, reasonably priced and innovative professional services. They believe that dangers with confidentiality and conflicts of interests are adequately protected by professional rules.⁵⁵ The opponents of this "one-stop shopping" argue that restrictions are necessary to preserve a lawyers' independent professional judgment and to protect client rights of confidentiality and loyalty. They believe that allowing nonlawyers to dominate MDPs will undermine the lawyer-employee's duty to exercise independent professional judgment.⁵⁶ They do not think the MDP model for delivering legal services will increase the efficiency and decrease the price. Further, they believe that clients may prefer the MDP model in the short run, but in the long run, the independent law firm will survive if its lawyers work hard and skillfully.⁵⁷

⁵² *Id.* at 7.

⁵³ *Id.* at 6.

⁵⁴ *Id.*

⁵⁵ Morello, *supra* note 6, at 8.

⁵⁶ Legal News-Notable News Developments in the Law, The United States Law Week, 68 USLW 2020, 68 (1999).

⁵⁷ James Moore, Lawyers and Accountants: Is the Delivery of Legal Services Through Multidisciplinary Practice In The Best Interests of Clients and The Public? 20 Pace L. Rev. 33, 40 (1999).

The problems confronting the Andersen accounting & consulting partnership after the bankruptcy of Enron seem to give credence to their arguments. Currently, the large accounting firms provide consulting services in addition to auditing. These services include consulting on technology systems, outsourcing of financial management duties, risk management, tax consulting and advising on mergers and acquisitions. Most of the firm profits come from these lucrative consulting services, but the auditing services provide the relationship to facilitate the sale of consulting services. This pairing of services to a client can easily lure accountants to be easy-going on an audit and not to challenge the client's questionable accounting practices because they worry about impairing their consulting business.⁵⁸ In sum, this inherent conflict of interest can easily affect the ethics and independence of the accounting firms. The opponents of MDPs will thus argue that MDPs may similarly affect lawyers' ethics and independence.

Because of the complexity of the debate on MDPs, the American Bar Association ("ABA") appointed a Commission on Multidisciplinary Practice. The Commission issued a report to the House of Delegates that recommends permitting lawyers to share fees and work with nonlawyers in an organization that offers both legal and nonlegal services under the condition that lawyers have the control and authority sufficient to assure their independence in the work.⁵⁹ However, several state bar associations submitted a recommendation to ABA that the present relevant law should not be revised because it

⁵⁸ Berenson & Glater, *supra* note 30.

⁵⁹ American Bar Association Commission on Multidisciplinary Practice Report To The House of Delegates,

conflicts with the core value of the legal profession to permit a lawyer to share fees with nonlawyers and allow nonlawyers to own and control the practice of law.⁶⁰

B. Lawyers' Value Is Being Challenged

1. Complaints About Lawyers

Dissatisfaction with lawyers is well documented. One article mentioned that the public seems increasingly convinced that lawyers are simply a plague on society,⁶¹ while others feel the legal profession is dead or dying.⁶² 27% of Americans gave lawyers high ratings for the lawyers' honesty and ethics in 1985, while only 17% of American did so in 1994.⁶³ Some writers suggest that "lawyers are merely parasitic rent seekers who enrich themselves without adding value."⁶⁴ Others note that business executives may regard lawyers as deal killers who continue to raise problems and obstacles without any effort to find solutions, and finally causing transactions to fail.⁶⁵

2000. <http://www.abanet.org/cpr/mdpfinalrep2000.html>, (last visited Dec. 19, 2001).

⁶⁰ American Bar Association, Illinois State Bar Association, New Jersey State Bar Association, New York State Bar Association, The Florida Bar, Ohio State Bar Association, Bar Association of Erie County, Cuyahoga County Bar Association, Recommendation, <http://www.abanet.org/cpr/mdprecom10F.html>, (last visited Dec. 19, 2001). [Hereinafter Recommendation].

⁶¹ Geoffrey Hazard, The Future of Legal Ethics, 100 YLJ 1239, 1240 (1991). [Hereinafter Hazard].

⁶² Carl T. Bogus, The Death of An Honorable Profession, 71 Ind.L.J. 911, 911 (1996). [Hereinafter Bogus].

⁶³ *Id.* at 911, Fn11.

⁶⁴ Peter C. Kostant, Paradigm Regained: How Competition From Accounting Firms May Help Corporate Attorneys to Recapture The Ethical High Ground, 20 PaceL.Rev. 43, 56 (1999). [Hereinafter Kostant].

⁶⁵ Ronald J. Gilson, Value Creation By Business Lawyers: Legal Skills And Asset Pricing, 94 Yale L.J. 239, 242 (1984). [Hereinafter Gilson].

2. The Reasons For the Complaints

There are many reasons that lawyers' value is being challenged. First, people set a very high criteria and expectation on lawyers' ethics, profession and value. When law practice transforms from a profession to a business, lawyers can lose public respect, especially if they appear to turn their backs on earlier ethical standards. For example, under the concept of professionalism articulated in 1950, lawyers were not to advertise. The Canons of Professional Ethics said that: "It is unprofessional to solicit professional employment by circulars, advertisements, through tutors or by personal communications..."⁶⁶ Moreover, lawyers were encouraged to work alone and not organize in corporations. Under the professionalism paradigm, "the invisible hand of reputation governed the market for legal services."⁶⁷ Finally, the concept of professionalism suggested that it should be only "incidental" for lawyers to earn money from their services with respect to their strong commitment to their clients and the public.⁶⁸ Today, the legal profession has clearly abandoned all these principles. Since 1977 the decision of the U.S. Supreme Court in *Bates v. State Bar of Arizona*⁶⁹ justified striking down the advertising restrictions, succeeding cases removed almost all restrictions on advertising.⁷⁰ Lawyers and their law firms advertise their services like any other business people and organizations. Therefore, it is

⁶⁶ Detlev F. Vagts, Professional Responsibility in Transborder Practice: Conflict And Resolution, 13 Geo.J.Legal Ethics 677, 678 (2000) [Hereinafter Vagts].

⁶⁷ Russell G. Pearce, The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve The Conduct And Reputation Of The Bar, 70 N.Y.U.L.Rev. 1229, 1232 (1995).

⁶⁸ *Id.* at 1231.

⁶⁹ 433 U.S. 350, 380 (1977).

only reasonable for people to believe that “money or prestige provides the only instrumental reason for lawyers to pursue a legal career.”⁷¹

Second, some practices by lawyers make the public reconsider lawyers’ value. Lawyers might not provide legal service based on business needs. In addition, some lawyers may be excessively cautious, identifying all possible problems without providing the requisite solutions. Finally, lawyers may be overly judgmental about a client’s actions. Today, clients are able to select favorable legal services based on their own needs.⁷² They are looking for a lawyer who can protect and help them in their business activities, but not make the deal impossible. Many companies are beginning to require that their in-house lawyers and outside lawyers should work efficiently and productively.⁷³ There is a big gap between lawyers’ service and the expectation of their clients. Thus, lawyers’ value is being challenged.

⁷⁰ Vagts, *supra* note 66, at 681.

⁷¹ David B. Wilkins, Practical Wisdom For Practicing Lawyers: Separating Ideals From Ideology In Legal Ethics, 108 Harv.L.Rev.458, 463 (1994). [Hereinafter Wilkins].

⁷² Kostant, *supra* note 64, at 72

⁷³ Martin Lipton, A Businessman’s View of Lawyers, 33 Bus.Law. 817, 823 (1978). [Hereinafter Lipton].

CHAPTER III

LAWYERS CREATE VALUE IN M&A

Do lawyers create value, especially in mergers and acquisitions that are the most frequent and important business transactions? The answer is clearly yes in light of the fact that accounting firms hire thousands of lawyers, especially lawyers who are good at M&A.

A. Introduction of Mergers and Acquisitions

“A statutory merger is a transaction in which two or more corporations are combined into one of the corporations, usually referred to as the surviving corporation.”⁷⁴ When the merger becomes effective, all constituent corporations disappear in the legal point of view except the surviving corporation.⁷⁵ The surviving firm assumes the assets and liabilities of all constituent corporations, and the acquired corporations’ outstanding stocks are cancelled.⁷⁶ These are the main legal changes that happen in merger.

Mergers have many different forms. For example, a cash-out merger or call freeze-out merger is a merger in which shareholders of the target company must accept cash for their

⁷⁴ O’kelley & Thompson, *Supra* note 2, at 677.

⁷⁵ *Id.* at 678

shares. Also, there are statutory and de facto mergers. A statutory merger is a merger provided by and conducted according to statutory requirements. A de facto merger is a transaction that has the economic effect of a statutory merger, but it is cast in the form of an acquisition or sale of assets or voting stock. Although this later transaction does not meet the statutory requirements for a merger, a court will generally treat it as a statutory merger for the purpose of the appraisal remedy, discussed in a later section. Mergers are also straight or triangular mergers. A straight merger is an ordinary merger running between the acquired and acquiring corporation. In a triangular merger, the acquiring parent transfers the merger consideration to a wholly owned subsidiary corporation.⁷⁷ The merger takes place between the acquired corporation and the acquiring subsidiary. The triangular merger has two basic forms: a forward subsidiary merger and a reverse subsidiary merger.⁷⁸ A forward subsidiary merger means that the acquired corporation merges into the acquiring subsidiary, and a reverse subsidiary merger means that the acquiring subsidiary merges into the acquired corporation.⁷⁹ The merger also has the form of conglomerate merger, which is “a merger between unrelated businesses that are neither competitors nor customers or suppliers of each other.”⁸⁰

⁷⁶ *Id.*

⁷⁷ *Id.* at 684.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ Bryan Garner, Black’s Law Dictionary, 1002 (7th ed. 1999). [Hereinafter Garner].

Corporation acquisition means that one corporation gains or controls over another corporation's stock or assets.⁸¹ Acquisition includes stock acquisition and assets acquisition. Acquisition is a purchase of shares and assets. Unlike a merger, the acquired corporation may not disappear.

In sum, mergers and acquisitions are transactions whereby control over a corporation or its assets is transferred to another corporation or a new controlling shareholder.⁸² Almost all of the mergers and acquisitions transactions are friendly control transactions, which is called a friendly takeover. However, some transactions are hostile, which is called a hostile takeover. Takeover means the acquisition of ownership or control of a corporation. A takeover is typically accomplished by a merger, a purchase of shares or assets, or a tender offer. "A tender offer is a public offer to buy a minimum number of shares directly from a corporation's shareholders at a fixed price, usually at a substantial premium over the market price, for the purpose of taking control of the corporation."⁸³ Finally, mergers and acquisitions are heavily regulated by federal and state laws and regulations in the U.S., and these laws and regulations significantly shape the transactions.

⁸¹ *Id.* at 24

⁸² O'kelley & Thompson, *supra* note 2, at 675.

B. Lawyers' Value Created in M&A

1. Structure of the Forms of Mergers and Acquisitions

Based on the laws and regulations, different forms of mergers and acquisitions have different regulation requirements, tax and accounting rules and results, and liability requirements. A lawyer can help a businessman to choose a proper form that has the best advantage to the businessman and is also suitable for his situation.

a. Structure upon Different Situations

First, in the market, there are different situations in the target companies and the companies that want to acquire the target. For instance, some target companies do not try to prevent being acquired. Under this situation, it is suitable to choose the negotiated merger form. However, if the target company does not want to be acquired, and there are many companies that want to acquire the target company, a cash tender offer⁸⁴ form of acquisition may be used. Cash tender offers may also be used in the following instances, such as: (1) when a majority of the board of director of the target does not want to initiate a merger; or (2) when a company is in trouble and there is not enough time for a merger.⁸⁵ However, since the parties to M&A transactions may have to pay tax on cash tender offers

⁸³ Garner, *supra* note 80, at 1480.

⁸⁴ "A cash tender offer is a tender offer in which the bidder offers to pay cash for the shares of the target company instead of offering other corporate shares in exchange. Most tender offers involve cash." *Id.* at 1480.

⁸⁵ Martin Lipton, Erica H. Steinberger, *Takeovers & Freezeouts*, Law Journal, Seminars-Ress, Inc., 3 (1978). [Hereinafter Lipton & Steinberger].

and may not be allowed to use pooling of interests for accounting purposes (this will be discussed later), in all other situations, they prefer to choose a traditional merger, acquisition or exchange of securities.⁸⁶

If many companies are interested in a target company, in order to increase the likelihood of success, lawyers may advise the acquiring companies to choose multi-step transactions instead of a traditional one-single step merger. Under the one-step approach, the acquiring company may not achieve the goal within a certain period of time. If a third party gives a better offer to the target company, their board has the obligation to consider it.⁸⁷ The acquiring company will lose the deal unless they are willing to increase the bid.⁸⁸ Therefore, the multi-step transaction has developed as a highly practical alternative to the conventional one-step merger transaction for negotiated acquisitions of public companies. The first step is that the acquiring company, from a private negotiation, purchases a substantial block of stock of the target company from a controlling shareholder, or from a large but non-controlling holder such as institutional investors, usually for cash.⁸⁹ When they sign the agreement, they issue a press release to announce that the acquiring company has signed a binding agreement to purchase the block of the stock and is bound to make a

⁸⁶ *Id.* at 3.

⁸⁷ James C. Freund, Edward F. Greene, Substance Over Form S-14: A Proposal to Reform Regulation of Negotiated Acquisitions, *The Business Lawyer*, 36 *Bus.Law.* 1483, 1483 (1981). [Hereinafter Freund & Greene].

⁸⁸ *Id.* at 1483.

⁸⁹ *Id.* at 1501.

tender offer on similar terms to all other shareholders of the target immediately⁹⁰ The second step is a “friendly” tender offer directed to all other shareholders of the sellers on the comparable terms.⁹¹ The tender offer must commence within five days after the announcement.⁹² The final step is a normal merger transaction between the acquiring company and target company.⁹³ The result is that the acquiring company will own 100 percent of the target. Since the acquiring company has purchased any prior block and enough shares through the tender offer in order to approve the merger, once the shareholder vote’s threshold is reached, the target’s remaining shareholders have no power to disapprove the merger.⁹⁴ So, the multi-step transactions increase the chance of success for the purchaser. In addition, this approach is adaptable to other situations. For example, if there is no large single block and substantial quantities of shares are available in the open market, the purchaser may buy the shares in the market to accumulate an initial stake before starting his tender offer.⁹⁵ Under certain circumstances, the purchaser might skip the tender offer. For instance, if the purchaser feels confident that no competing bid will be offered because a sufficiently large block may have been purchased, a tender offer may be skipped.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* at 1502

⁹⁵ *Id.* at 1502.

Second, different markets have different situations. Lawyers can choose a proper form that has less regulatory challenge based on antitrust law. For instance, if one market is very concentrated, lawyers may advise businessmen that a conglomerate merger is suitable in that situation. As I mentioned in Chapter III A, a conglomerate merger is a merger between corporations that are not related, not competitors, customers or suppliers of each other. This form of merger will decrease the risk of an antitrust challenge. The conglomerate merger is also the non-horizontal merger. The non-horizontal merger involves firms that do not operate in the same market. Therefore, such mergers do not immediately increase the level of concentration in any relevant market.⁹⁶ Although non-horizontal mergers are not invariably innocuous, they are less likely than horizontal mergers to create competitive problems. In addition, a conglomerate merger is not a vertical integration and will not have the concern of facilitating collusion in a vertical chain.

b. Structure Under Regulation Concerns

Mergers and acquisitions are heavily regulated by different laws and regulations. Some laws and regulations may distinguish different forms of mergers and acquisitions and have different requirements for different forms of mergers and acquisitions. For instance, Subchapter C of the Internal Revenue Code distinguishes a statutory merger from a sale of assets, and many state corporation laws also has a similar distinction.⁹⁷ Different forms of

⁹⁶ Merger Guidelines, U.S. Dept. of Justice § 4.0 (1984).

⁹⁷ Gilson, *supra* note 65, at 297.

mergers and acquisitions may be regulated by different laws and regulations. For example, transactions requiring the seller's shareholder action is under the proxy rule of Security Exchange Act of 1934. This is designed for one-step merger deals or traditional merger transactions. On the other hand, transactions through tender offers are regulated under the tender offer rules, such as the Williams Act. This is designed for hostile takeovers. The Williams Act amends the Securities Exchange Act of 1934 by adding sections 13(d) to (g) and 14(d) and (e).

Therefore, the regulatory system gives an incentive to the companies to structure transactions so that their transactions can be outside of the scope of the regulation or have a lower regulatory cost or regulatory benefit.⁹⁸ In fact, as long as actual cash flows are not changed, the formal transaction can be adjusted without altering its financial substance. Thus, lawyers, and only lawyers, who understand all of the laws and regulations on mergers and acquisitions can structure the transactions to meet the objectives of the companies, such as achieving the lowest regulatory cost or regulatory benefit. For example, lawyers may design the structure of the mergers and acquisitions upon the regulatory concerns in the following areas: disclosure requirements in securities and stock exchange rules and regulations, voting and appraisal rights in corporate codes, successor liabilities, and tax and accounting rules and results.

(1) Disclosure Requirements

Mergers and acquisitions are regulated by the securities acts. They are mainly the Securities Act of 1933 (“Securities Act”), the Securities Exchange Act of 1934 (“Exchange Act”) and its amendment the Williams Act. These securities rules and regulations mainly require a mandatory disclosure system and stipulate the procedure of the mergers and acquisitions. These rules regulate the “solicitation” of proxies, requiring that a “proxy statement” contain all solicitations and requirements on the content and form of executed proxies. Even if a registered firm does not solicit proxies for a shareholder meeting, the Exchange Act requires a firm to mail an “information statement” that is substantially the same as a proxy statement.⁹⁹

Different rules of these acts are applicable to different forms of mergers and acquisitions that then have different disclosure requirements. For instance, Rule 145 of the Securities Act requires a registration statement by filing Form S-14 or Form S-1 or Form S-7. Rule 145 is applicable to mergers and asset acquisitions by shareholder vote. Rule 145 applies to an asset purchase transaction in which the seller plans for its dissolution or distribution of the securities received.¹⁰⁰ However, if the transaction occurs voluntarily and directly between the buyer and the shareholders of the seller, Rule 145 does not apply to the transaction.¹⁰¹ If it is a cash purchase of securities, the federal or state tender offer laws

⁹⁸ *Id.* at 297.

⁹⁹ Securities Exchange Act, 15 U.S.C. § 78 n (c) (1934)

¹⁰⁰ Jere D. McGaffey, *Buying, Selling, and Merging Businesses*, 223 (1979).

¹⁰¹ *id.* at 222

apply.¹⁰² If Rule 145 applies, a Form S-14 registration statement is “only required to include the information contained in proxy statement.”¹⁰³ So, if the acquired company is registered under the Exchange Act, it needs to follow proxy rule. Then, a S-14 registration statement will not be an additional burden. However, if the acquired company is closely held corporation, the registration statement requirement will be a high burden to the company.¹⁰⁴ Rule 147 of Securities Act provides an exemption for transactions in a private offering. But, it has strict requirements for a private offering, such as “the manner of offering, the nature of the offerees and their access to information, the number of purchasers, and the limitations upon the disposition of the shares.”¹⁰⁵ The acquiring company aims to reduce the effort, cost and expense of the transaction so that they prefer to meet the conditions of the exemption and then proceed with the transaction without registration. With respect to the number of the purchasers required under Rule 505 and 506 of Regulation D of Securities Act, the acquiring company can meet the number requirement of 35 purchasers by purchasing the stock from some shareholders of the acquired company for cash rather than for shares.¹⁰⁶

In a cash merger, the main source of disclosure is the merger proxy statement, which contains information about the seller and the transactions. But, the proxy statement is not furnished until many weeks after the initial, probably skimpy, press release. Internal

¹⁰² *id.* at 222

¹⁰³ *id.* at 223

¹⁰⁴ *id.* at 224

¹⁰⁵ *id.* at 226

disclosure and market analysis is discouraged by staff interpretations regarding what constitutes a solicitation and confidential treatment of proxy statements; and “there is no time period required from the initial announcement by which the solicitation must begin.”¹⁰⁷ However, with regard to a negotiated any-and-all cash tender offer, it is assumed that there will be an active market after the initial press release, so, the information must be furnished within five days, and tender offer must commence within five days after the announcement.¹⁰⁸ In a cash tender offer, there is much less information about the seller than in a cash merger proxy statement. Lawyers should help the clients balance the advantages and disadvantages of these forms of mergers and acquisitions in order to choose a proper form of the mergers and regulations that lower the regulatory cost and also fit the objective situation.

(2) Voting and Appraisal Rights

Voting and appraisal rights are regulated by federal and state corporate codes. If a shareholder dissents to a merger or other covered transaction, and if the transaction nonetheless obtains the requisite shareholder approval, the dissenting shareholder may demand that his shares be repurchased by the corporation at a fair price. If the dissenting shareholder and corporation cannot reach a price with the time limit and procedures outlined by the appraisal statute, then fair value will be determined in a judicial proceeding.

¹⁰⁶ *id.* at 231-232

¹⁰⁷ Freund & Greene, *supra* note 87, at 1499.

These rights are called “dissenter’s rights” or “appraisal rights”.¹⁰⁹ In most states, the only shareholders entitled to the voting and appraisal rights are the shareholders of the actual parties to the merger. In a straight merger, the parties of merger are the acquiring company and the acquired company. Shareholders of the acquiring company have the appraisal rights protection. However, in a triangular merger, as I mentioned in Chapter III A, the parties are the acquiring subsidiary (a wholly owned company by the acquiring parent) and the acquired company. Thus, the acquiring parent receives the voting and appraisal rights belonging to the acquiring subsidiary, which are exercised by the acquiring parent’s board, which obviously will not dissent from the transaction. The shareholders of the parent corporation will not receive dissenter’s rights protection. Therefore, lawyers may structure many corporate combinations as “triangular mergers”¹¹⁰ to avoid shareholders’ appraisal rights protection. In addition, a compulsory share exchange, just like “reverse triangular merger”, permits a corporation to acquire all the shares of another while the acquired corporation exists. This transfer can be approved by a simple majority vote of shareholders of the acquired corporation, but only needs board approval of the acquiring corporation. Dissenting shareholders of the acquired corporation are forced to give up their shares but they receive appraisal rights. The acquiring corporation’s shareholders do not have appraisal rights.¹¹¹ However, the American Law Institute (ALI) creates an approach

¹⁰⁸ *Id.* at 1499

¹⁰⁹ Model Bus. Corp. Act, § 13.02 (1979).

¹¹⁰ O’kelley & Thompson, *supra* note 2, at 684.

¹¹¹ *Id.* at 685

advanced in California that tries to reduce the magnitude of the dependence of shareholder appraisal rights on the transaction form, and offers the appraisal rights to the shareholders of the parent corporation in a triangular merger if the parent corporation is a direct participant in the merger.¹¹²

On the other hand, lawyers may help the parties to the merger and acquisition to avoid the appraisal rights of shareholders by structuring a transaction as a “sale of assets” instead of a “merger”. However, the ALI restricts this method. The ALI principles of Corporate Governance Section 7.21 states that if a corporation uses its own stock to acquire a significant portion of the assets of the target and if the original acquiring corporation’s shareholders own less than 60 percent of the outstanding stock shortly after the transaction is completed, its shareholders get appraisal rights.¹¹³

In addition, if shareholders were denied appraisal rights, they may ask the courts to use de facto merger doctrine to re-characterize the transactions as a merger¹¹⁴ *Farris v. Glen Alden Corp.*¹¹⁵ is a classic case illustrating judicial use of the de facto merger doctrine. In *Farris*, the form of the transaction was a sale by List Corp. of substantially all of its assets to Glen Alden Corp. The governing Pennsylvania statute granted appraisal right to shareholders of both the acquiring and acquired company in a merger, but only to the shareholders of the selling corporation in a transfer of substantially all of a corporation’s

¹¹² *Id.* at 693.

¹¹³ *Id.*

¹¹⁴ *Id.* at 686.

¹¹⁵ 143 A.2d 25 (Pa. 1958).

assets. Therefore, the form of the transaction in *Farris* would deny appraisal rights to Glen Alden shareholders. However, The Pennsylvania Supreme Court granted appraisal rights to the dissenting Glen Alden shareholders under the de facto merger doctrine. The court believed that even though the combination provided in the reorganization agreement is a “sale of assets”, in the transaction in *Farris*, one corporation dissolves, its liabilities are assumed by the survivor, its executives and directors take over the management and control of the survivor and its stockholders acquire a majority of the shares of the survivor, then the transaction is not simply a purchase of assets, but a merger. Therefore, the dissenting Glen Alden shareholders should have the appraisal rights protection.

Therefore, the de factor merger is also called the “substance over form” doctrine that is a means to ensure that shareholders are treated fairly. Nonetheless, the Delaware courts have supported a competing doctrine, in which each provision of the corporation code has independent legal significance and is entitled to equal judicial respect.¹¹⁶ The Delaware Supreme Court in *Hariton v. Arco Electronics, Inc.*¹¹⁷ held that a sale of assets that is affected in consideration of shares of stock of the purchasing corporation is legal, although it has the same result as a merger of the seller into the purchaser. The Court found that the framers might choose a form of the reorganization to achieve the desired result “because the sale-of-assets statute and the merger statute are independent of each other.”¹¹⁸

¹¹⁶ O’kelley & Thompson, *supra* note 2, at 688.

¹¹⁷ 188 A.2d 123 (1963).

¹¹⁸ *Id.* at 690.

Therefore, lawyers may design a proper form of merger and acquisition transaction based on different rules and regulations in different jurisdictions to achieve the objectives of their clients. Also, lawyers may evaluate the risks of the application of de facto merger doctrine in a potential lawsuit initiated by the dissenting shareholders of the parties to the transaction.

(3) Successor's Liabilities

The law imposes different successor's liabilities in different forms of mergers and acquisitions. All state codes stipulate that in a statutory merger, as a general matter, the surviving company assumes all rights and obligations of the constituent parties.¹¹⁹ Nonetheless, state codes have no specific rules governing the effect of asset or stock acquisition on the preexisting rights and obligations of the target firm. A buyer can choose not to assume selected obligations of the seller. In stock acquisitions, courts consider all contracts with the surviving firm since the status of a target's shareholders does not affect the entity itself. Therefore, lawyers may choose a proper form that allows the acquiring company to avoid the obligations of the seller, such as an asset acquisition.

In the asset acquisition, lawyers may use the following strategies to help the acquiring company avoid the liability of the target company: First, lawyers may structure the sale to avoid the indicia of continuity because the continuity of the corporations between buyer

¹¹⁹ Oesterle, *supra* note 1, at 162.

and seller may result in expanded successor liability¹²⁰ Indicia of continuity are the critical factors that a court applies in the de facto merger doctrine. The court in *Keller v. Clark Equipment Co.*¹²¹ states that the following elements must be present in order to find a de facto merger: (1) there is a continuation of the enterprise of the seller corporation, including “a continuity of management, personnel, physical location, assets and general business operations”¹²²; (2) there is a continuity of shareholders resulting from the payment for the acquired assets with the buyer’s own stock;¹²³ (3) the seller stops its ordinary business operations, liquidates and dissolves once it is lawful and practical to do so;¹²⁴ and (4) the buyer undertakes the ordinary liabilities of the seller occurred in the continued normal business operations of the seller.¹²⁵

Thus, referring to the above factors for finding a de facto merger, lawyers may consider all of the following ways to help the buyer avoid liability of the seller in the asset acquisitions. First, the seller should remain a practical operating enterprise.¹²⁶ For example, the buyer could purchase the assets that have the most effective use, avoid purchasing all of the assets so that the seller will have enough assets to continue an ongoing operation, and release key managers or even ordinary employees of the seller.¹²⁷ Second, the buyer should

¹²⁰ *Id.* at 294.

¹²¹ 715 F.2d 1280 (1983).

¹²² Oesterle, *supra* note 1, at 280.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.* at 294.

¹²⁷ *Id.* at 295.

avoid the continuity in Seller's "Product Line", meaning that the buyer should change the seller's product lines after the asset acquisition.¹²⁸ Third, the buyer should omit from the contract of sale all reference to goodwill and related assets including trademarks, customer lists and trade names. Then, the buyer can prevent the possibility that the buyer is regarded trading on the seller's goodwill.¹²⁹ Fourth, the buyer should purchase assets for cash instead of stock.¹³⁰ Payment in stock which has close connection with the de facto merger prevents the buyer from avoiding the liability. Also, payment in stock may constitute an important indicium of continuity under the tests of successor's liability. Fifth, the buying corporation should not pay directly to the sellers' shareholders, or a transaction contract should not include as one of its terms a requirement that consideration be paid to the seller's shareholders.¹³¹ Payment to the seller's shareholders would constitute a critical indication of continuity because such a transaction shows a continuing interest on the part of those shareholders in the successor company. Sixth, the buyer should not require, as part of the transaction agreement, that the seller dissolve, or participates in such dissolution if it actually happens.¹³² Successor liability is created because of the elimination by the successor of the selling corporation.

Since a parent company generally is not held directly responsible for any liabilities incurred by a subsidiary, lawyers may advise the buyer to form a subsidiary for the purpose

¹²⁸ *Id.* at 295.

¹²⁹ *Id.* at 295.

¹³⁰ *Id.* at 295.

¹³¹ *Id.* at 295.

of purchasing assets. However, it should be noted that parent corporation will still be liable for successor liability against the subsidiary under the “piercing the corporate veil” doctrine used in *United States v. Kayser-Roth Corp.*¹³³ In *Kayser*, the court held that the Kayser Corp. was responsible for the liability of its wholly owned subsidiary (Stamina Mills) because it exercised pervasive control over Stamina Mills, such as total monetary and operation control and placement of Kayser personnel in almost all of Stamina Mill’s director and officer positions. So, in order to avoid the piercing, the corporate formalities of the subsidiary should be preserved so that there is genuine substance to the subsidiary’s separate existence as a profit oriented business.¹³⁴

(4) Tax Treatment

Tax lawyers are very important in mergers and acquisitions transactions because they can help the parties of the transactions to structure a proper form that has the lowest tax liabilities and the best tax benefit. The appropriate maxim is that “there is nothing sinister in so arranging one’s affairs as to keep taxes as low as possible.”¹³⁵ Therefore, it is ethical for tax lawyers to structure a proper form of mergers and acquisitions to gain the lowest tax liabilities for the clients.

¹³² *Id.*

¹³³ 910 F.2d 24. (1st, 1990)

¹³⁴ Oesterle, *supra* note 1, at 297

¹³⁵ *Id.* at 441.

One party may get tax benefits from certain forms of a transaction, but others may have more tax burden.¹³⁶ Under such circumstances, lawyers can negotiate the form of the transaction by adjusting terms of the transaction including purchase price consideration.¹³⁷ Under other circumstances, a particular form of transaction may have obvious benefits for one or more of the parties and is not a disadvantage to the others.¹³⁸ However, even in this situation, tax advisors are still important in the negotiation because the parties may view the transaction matters differently.¹³⁹

The key tax concerns by the parties of the transactions are whether the transaction will be taxable or tax-free to the target's shareholders and whether the acquiring company can also get the tax benefits following the transaction.¹⁴⁰ The important function of tax lawyers is based on the fact that different forms of mergers and acquisitions have different tax treatments. The federal income tax code taxes gains and losses on held property only when they are "gains derived from dealings in property."¹⁴¹ Under this rule, tax law determines different tax treatments on a merger and acquisition. In a merger, a shareholder continues her investment in the same firm so that there is no tax imposition. In a stock sale, a selling shareholder holds gain or loss, so the stock sale is taxable. In an asset sale, the selling firm must recognize and pay a tax on the proceeds gained for its assets, and if these proceeds are

¹³⁶ Lipton & Steinberger, *supra* note 85, at 493.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 493.

¹⁴¹ Internal Revenue Code, 26 U.S.C. § 61(a)(3) (1954).

distributed to the selling firm's shareholders, those shareholders also need to pay tax on the gain and loss.

The Internal Revenue Code of 1954 includes some pertinent sections about tax-free reorganizations. Section 354(a)(1) offers, with some limitations, the tax-free treatment if investors exchange stock of one corporation for that of another corporation and if both corporations meet the definition in section 368.¹⁴² Section 368 is a critical stipulation for getting tax-free treatment because if the detailed requirements of section 368 are met by mergers and acquisitions transactions, the parties can avoid a tax at both the corporate and the shareholder level. The fundamental requirement of this section is "continuity of interest", meaning that tax can be avoided, only if, after the transaction, the form of the investment held by the shareholders in both selling and buying company in the surviving firm is substantially similar to the form of their pre-transaction investments.¹⁴³ Section 368 covers four groups of reorganizations: "(1) acquisitive or amalgamating reorganizations in which two or more corporations are combined, (2) divisive reorganizations in which a single corporation subdivides, (3) single-party reorganizations in which a firm changes its capital structure or its place of incorporation, and (4) bankruptcy reorganizations."¹⁴⁴ Summarizing the stipulations of section 368, the following forms of transactions are tax-free: a straight merger, a triangular merger, a reverse triangular merger, a stock-for-stock merger and a stock-for-assets merger. Some forms of

¹⁴² Oesterle, *supra* note 1, at 922

¹⁴³ *Id.*

mergers and acquisitions are partially taxable transactions. For example, in a cash option merger, if shareholders of the target choose receiving cash for their shares, they may need to pay tax, but if they choose exchanging the stock in target for acquirer stock, they may get tax-free treatment.¹⁴⁵ There is generally a limitation on cash consideration to ensure the requisite continuity of interest on the part of target's shareholders in order to qualify as tax-free to those shareholders receiving stock. The limitation is 45% -49% of the target's total outstanding stock.¹⁴⁶ On the other hand, the following transactions are taxable: asset acquisition, stock acquisition, installment sale and freezeout.

It appears simple for lawyers to choose a tax-free form of the transaction based on the regulations stated above. However, the drafters of tax laws and regulations aim to prevent tax avoidance by adding and amending relevant rules and regulations, so the professional planners, primarily lawyers, need to work hard to be one step ahead of the drafters. For example, the Secretary of the Treasury was authorized to disallow deductions, credits, or other allowances following an acquisition of control of a corporation or a tax-free acquisition of a corporation's assets if the principal purpose of the acquisition was tax avoidance.¹⁴⁷ "If the acquisition of assets has an aggregate basis that is materially greater than their value, coupled with the utilization of the basis to create tax-reducing losses, the

¹⁴⁴ *Id.*

¹⁴⁵ Lipton & Steinberger, *supra* note 85, at 498

¹⁴⁶ *Id.*

¹⁴⁷ Internal Revenue Code, 26 U.S.C. § 269 (a) (1954).

tax-avoidance motive is evident.”¹⁴⁸ Another example is the fact that New York has become the first state to pass its own legislation for the purpose of reducing the tax benefits from corporate takeovers.¹⁴⁹ Other states will probably follow New York’s model. New York’s legislation states that if the debt of the parties to an acquisition increases, it is not allowed to deduct the portion of the interest that may be otherwise available and the previous investment tax reductions are recollected.¹⁵⁰ Also, even though there is no increase in the parties’ debt, if there is an acquisition, certain sales of target stock are taxable, regardless of the normal state rule that the tax on the gains from the sale of subsidiaries’ stocks are exempted.¹⁵¹

(5) Accounting Treatment

Different forms of mergers and acquisitions receive different accounting treatments. Lawyers may help the clients to design a form of merger and acquisition to achieve the client’s goal. In fact, accountants may contribute greatly to the design of the structure. Accounting Principles Board Opinion 16 stipulates two alternative accounting treatments for mergers and acquisitions, purchase accounting and pooling of interests accounting.¹⁵² These two accounting methods are based on the nature of the transaction. A company is not

¹⁴⁸ Oesterle, *supra* note 1, at 945.

¹⁴⁹ *Id.* at 961.

¹⁵⁰ *Id.* at 961.

¹⁵¹ *Id.* at 961.

¹⁵² Oesterle, *supra* note 1, at 901.

allowed to choose the method to be used. But, a company can structure the transaction so that it obtains the desired accounting result.

If the transaction is an acquisition between independent parties, the purchase accounting can be used. On the other hand, if the transaction is a combination of the separate parties, the pooling accounting can be adopted.¹⁵³ The parties to mergers and acquisitions generally prefer pooling accounting because there are more advantages in the pooling accounting method. For example, first, the goodwill of a target is recognized in a purchase accounting rather than a pooling accounting.¹⁵⁴ The acquiring company must depreciate the goodwill of the target by using the straight-line method over forty years like any other asset.¹⁵⁵ The net earning of the acquired company is reduced by this requisite depreciation of goodwill, compared with a transaction using the pooling accounting.¹⁵⁶ Thus, the recognition of goodwill in purchase is a substantial disadvantage for the acquiring firm. Second, “an acquisition using the pooling method of accounting is often a tax-free transaction, and an acquisition using the purchase method of accounting is usually (but not always) a taxable transaction.”¹⁵⁷ Third, pooling accounting permits the acquiring corporation to carry over existing asset values as previously shown on the acquired corporation’s balance sheet.¹⁵⁸ However, purchase accounting requires that each asset be

¹⁵³ *Id.* at 901.

¹⁵⁴ *Id.* at 906.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 911.

¹⁵⁸ *Id.* at 907.

assigned a cost basis equal to its fair market value and its increase in asset values be depreciated, and then the amortization charges decrease the acquiring corporation's income in its financial statement.¹⁵⁹

The Financial Accounting Standards Board recognized that parties in an acquisition prefer to use the pooling method of accounting. So, they regulate the conditions on qualifying for pooling accounting treatment. These conditions include the requirement that each of the combination corporations should be autonomous and independent. Either of the combination corporations cannot have been a subsidiary or division of another corporation within two years before they plan to combine, and either of them cannot own more than 10% of the stock of another corporation.¹⁶⁰ Also, pooling treatment requires that the target shareholders, after the acquisition, hold stock in the surviving firm. Therefore, lawyers and accountants should understand and take use of these requirements to structure a form of transaction that can qualify for pooling accounting treatment.

(6) Balance all of the Concerns

Lawyers may help the clients to pick up a form of merger and acquisition based on all of the concerns mentioned above, instead of only considering one or more of the conditions. However, it frequently happens that one form of the transaction can get a benefit in one area, but cannot achieve the goal in another area. Therefore, lawyers and their clients need

¹⁵⁹ Lipton & Steinberger, *supra* note 85, at 516.

¹⁶⁰ *Id.* at 517.

to balance all of the advantages and disadvantages to choose the relatively best form. For example, in order to get tax benefit, which is the most important objective of the parties to merger and acquisition, the structure of the transaction must meet the requirement of “continuity of interest”, that is participating shareholders in both constituent firms shall continue to hold their investments in the surviving firm after the transaction. However, if a transaction can meet this requirement, the surviving firm cannot avoid assuming liabilities and obligations of the seller. So, lawyers and clients have to balance the advantage and disadvantage. Fortunately, there are other ways to manage the liability problem. For instance, the acquiring firm can adjust the price of the assets to reflect the estimated risk and magnitude of successor liability, or arrange with the seller to maintain the seller’s products liability insurance, or require indemnification by seller.¹⁶¹ Therefore, lawyers may advise clients to choose the form that has tax benefits and use other ways to manage the liability issue.

2. Manage Due Diligence Investigation and Reduce The Costs of Acquiring And Verifying Information

a. Manage Due Diligence Investigation

Due diligence is substantially important in mergers and acquisitions. Due diligence investigation is a process of acquiring and verifying information of the target company.

¹⁶¹ Oesterle, *supra* note 1, at 296-297. If the seller will survive the acquisition, the seller can directly indemnify the buyer. If the seller is planned to dissolve after the transaction, the buyer may get

The purpose of a due diligence investigation is to make sure that the buyer can acquire non-misleading, adequate and complete information with respect to the seller, investigate whether the seller complies with all relevant laws, rules and regulations and whether the seller has any possible or potential obligations and liabilities, and help the buyer to evaluate the value of the seller and make an informed investment decision. For example, if the bargaining agreement between the seller and its unionized workers expires right after the closing, when the buyer determines the purchase price, the buyer needs to measure the risks of disturbance of manufacture and additional labor costs in the future.¹⁶²

Lawyers take the lead in due diligence investigation. They form a due diligence multidisciplinary team including a finance and accounting expert, tax consultant, risk management expert, human resource expert, business expert, environment specialist and so forth.¹⁶³ Under the assistance of these non-lawyer professionals, lawyers can conduct due diligence investigations, such as reviewing target company's records, interviewing directors, officers or shareholders of a target company, summarizing due diligence findings and submitting legal opinions. Lawyers not only manage the due diligence team to fulfill the investigation, but also play a major role in the investigation. For instance, lawyers need to review tons of corporate records. Most of these corporate records are legal documents¹⁶⁴,

indemnification from the seller's principals, its corporate parent, or another party related to the seller.

¹⁶² Gary M. Lawrence, Due Diligence in Business Transactions, *Law Journal Press*, 1-9 (2nd, ed., 1999). [Hereinafter Lawrence].

¹⁶³ *Id.* at 3-2.

¹⁶⁴ Corporate records also include non-legal document, such as financial statements, audit reports, marketing document. These non-legal document need to be reviewed by the non-lawyer professionals, the members of

including the company charters (articles of association or by-laws), material agreements and contracts, litigation information, environmental documents, permits, licenses, document about tax, insurance, intellectual property matter, ownership, real estate, employee matter, etc. Only lawyers can understand these documents and acquire information from them and find issues about the target company. Through corporate record review, lawyers can ensure that: (1) the target company has been incorporated and formed legally; (2) all equity securities of the seller are offered or sold in compliance with the security laws and regulations; and (3) there is no any procedural irregularity and any unusual or troublesome commitment in the acquiring company's records.¹⁶⁵ Both the target company and acquiring company can identify potential legal and contractual obstacles to completing the deal and ensure that the information contained in the purchase and sale agreement is complete and consistent. Then, the acquiring company can make a sound investment decision based on the complete, consistent and true information. Thereby, the goal of due diligence investigation is achieved.

b. Reduce the Cost of Acquiring and Verifying Information

The reason why due diligence investigation is so important in mergers and acquisitions is that the information discovered is very important. Information is data that can change

due diligence team.

¹⁶⁵*Id.* at 7-3.

one's beliefs about the proper price of an asset and stock.¹⁶⁶ "Information includes the 'hard' information of known facts, and the 'soft' information of forecasts and estimates."¹⁶⁷ Investors need to have reliable and adequate information about the issuer's business and financial condition so that they can make a sound decision on buying or selling a security.¹⁶⁸ Based on the hard information of the known facts, investors estimate and forecast the future earnings for a security. So, securities prices ultimately turn on expectations about future earnings. Mergers and acquisitions are the transactions of assets and stocks. Therefore, information is crucial in mergers and acquisitions transactions. Information, such as financial situation, business status and operation, product and market, competition, regulatory system, rights and obligations of the seller corporation, is the base of determining the transaction price in mergers and acquisitions.

Professor Ronald J. Gilson believes that information cost mainly consists of three categories. The first one is information acquisition cost. "This cost depends on whether the party is the originator of the information or only the recipient."¹⁶⁹ In a merger and acquisition transaction, the seller is the originator of the information, and the buyer is the recipient. The buyer has a higher acquisition cost because he needs to obtain the information under the cooperation of the seller or purchase the information through a third

¹⁶⁶ Ronald J. Gilson, Reinier H. Kraakman, *The Mechanisms Of Market Efficiency*, 70 *Va.L.Rev.* 549, 561 (1984). [Hereinafter Gilson & Kraakman].

¹⁶⁷ *Id.* at 561.

¹⁶⁸ James D. Cox, Robert W. Hillman, Donald C. Langevoort, *Securities Regulation Cases and Materials*, 1 (3rd ed. 2001). [Hereinafter Cox, Hillman & Langevoort].

¹⁶⁹ Gilson & Kraakman, *supra* note 166, at 594.

party. Sometimes, the complexity of the status of the seller corporation will increase the buyer's cost of information acquisition. For instance, The Infinion Corporation advertises itself as a company on the SWX Swiss Exchange, but, its domicile is in Switzerland and its operative headquarters are in Syracuse, New York.¹⁷⁰ So, it is difficult to find out the accurate information about this company at a reasonable cost. The second category is the verification of information. In mergers and acquisitions transactions, once the buyer acquires the information about the seller, he should verify whether the information is true and accurate. Verification techniques include determining the honesty of the seller or conducting a due diligence investigation. The third category is the cost of processing information after it is acquired. This is the evaluation process. In a merger and acquisition deal, once the buyer acquires and verifies the information about the seller, he needs to evaluate the information to determine the total value of the seller. We need skills in accounting, finance and the legal area in this process.¹⁷¹ Normally, as I mentioned above, in due diligence process, mainly lawyers are responsible for analyzing and evaluating the information by submitting the due diligence final finding reports.

Under perfect market assumptions, information is immediately and costlessly available to all investors in the capital market. But this assumption is "absolutely accurate and totally useless."¹⁷² In fact, information cost in merger and acquisition transactions is pretty high.

¹⁷⁰ Grossfeld 2, *supra* note 48, at 182.

¹⁷¹ Gilson & Kraakman, *supra* note 166, at 594.

¹⁷² *Id.* at 552.

Lawyers can reduce the information cost by negotiating and preparing the acquisition agreement.

In the information acquisition process, lawyers can remedy conditions of asymmetrical information in the least-cost manner, which is a typical acquisition agreement with representations and warranties.¹⁷³ In the negotiation of a merger and acquisition transaction, there is an obvious information asymmetry between the buyer and seller. The buyer may well have collected all the available public information about the seller. However, this information does not include the detailed information about the seller's business which is not required to be disclosed to the security market and is in the interest of the buyer. Both of the parties have the incentive to reduce the asymmetry so that the cost of acquiring information is low.

Representations and warranties in the transaction agreement is the most effective way to reduce the information acquiring cost. First, the agreement will speed up the information flow from the seller to the buyer.¹⁷⁴ The negotiation of representations and warranties is the most time-consuming aspect of the transaction. The document of "Representations and Warranties" is also the largest part in the agreement. Seller's lawyers can negotiate to keep the document short so that they can make the information transfer fast and at a lower cost. Second, the acquisition agreement would allocate the responsibility of producing

¹⁷³ Gilson, *supra* note 65, at 269.

¹⁷⁴ *Id.* at 271.

information so that parties can control the information acquiring costs.¹⁷⁵ The acquisition agreement can state clearly which party is responsible for the production of the certain information based on the cost effectiveness. So, another party will not try to acquire the same information. Third, the agreement can clarify the type of the information that should be obtained and the money that should be spent on its acquisition so that the parties can avoid overspending.¹⁷⁶ Even though the buyer may require the seller provide attached schedule lists including all agreements, contracts, leases and other commitments to which the seller is a party or by which any of its property is bound, it is beneficial to both parties to limit the scope of the seller's search. If the seller is a large or an international company, his search is extremely high because he needs to search in many departments or in many countries. Also, the buyer needs to spend a great deal of time reviewing these documents, as I mentioned in the due diligence investigation. In international transactions, the documents are in different languages. Thus, in order to reduce the cost, both parties may focus on the material contract containing a significant monetary amount, a long period of time or substantial rights and obligations. The search process, i.e. the due diligent process mentioned above, is a focus on the diligence of the seller. In addition, for the purpose of specifying the extent of the search, the acquisition agreement may state the following

¹⁷⁵ *Id.* at 271.

¹⁷⁶ *Id.* at 271.

variations: “to seller’s knowledge”; “to the best of seller’s knowledge”; “to the best of seller’s knowledge and after diligent investigation.”¹⁷⁷

Lawyers play an important role in reducing the cost of verifying information. Verification of the information provided by the seller is very important and costly in the transaction. The seller will often offer the information to overvalue his business, asset, security, product and market or not disclose any adverse information resulting in negative value on him. Since the buyer has to assume that the information on the value provided by the seller is lower than represented and the seller might keep something secret, the seller has no incentive to provide better information, because ‘it won’t be believed anyway.’¹⁷⁸ So, the buyer should put a lot of effort into verifying the validity of the information concerning the seller.

Lawyers may insert an indemnification clause into the seller’s representations and warranties in the acquisition agreement. If the seller provides any inaccurate information or keeps any material information secret, and the buyer suffers damages or losses from the seller’s behavior, the seller shall indemnify the buyer. This technique can ensure the seller provide information at a high quality. However, this method is normally used for a seller that is a private company, but not a public company.¹⁷⁹ Unlike the private company, the public company separates the ownership and management. A post-acquisition employment contract is important for the managers. So, managers, as employees, are not encouraged to

¹⁷⁷ *Id.* at 277.

¹⁷⁸ Gilson & Kraakman, *supra* note 166, at 602.

misrepresent or omit the information. In addition, under the Exchange Act, the misrepresentations or omissions in disclosure by the public held company subject both a company and its management to potential civil and criminal penalties. So, this technique may not be effective for the public company. In this situation, lawyers can act as reputational intermediary to reduce the information verification cost.¹⁸⁰ For example, the buyer's lawyer may check the identity of the seller's lawyer because there is an assumption that "a reputable lawyer will not risk his reputation by representing an untrustworthy client."¹⁸¹ Also, seller's lawyers may issue a counsel's opinion to the buyer to prove that the information provided by the seller is true and accurate.¹⁸² Lawyers, independent individuals and also under the professional ethics supervision, have too little incentive to lie for the seller¹⁸³. In addition, only lawyers can examine the agreements, contracts and any other legal documents submitted by the seller and advise the buyer as to the invalidity and accuracy of the information. Finally, lawyers can also tell the buyer what all of these legal documents from the seller mean. So, in the process of information, the buyer can evaluate the seller's current and future rights and obligations under the assistance of lawyers.

¹⁷⁹ Gilson, *supra* note 65, at 282.

¹⁸⁰ *Id.* at 290.

¹⁸¹ *Id.* at 291.

¹⁸² *Id.* at 291.

3. Ensure the Clients Follow the Laws and Regulations and Prevent Legal Liabilities

Mergers and acquisitions are heavily regulated by laws and regulations, especially for capital market transactions. Many securities rules and regulations regulate the transaction. Lawyers may make sure their clients understand and follow all of these laws, rules and regulations and then prevent any potential legal liabilities.

The purchasers of securities in public offerings are protected by the Securities Act of 1933.¹⁸⁴ The act regulates an acquisition taking the form of an exchange tender offer. The main requirement is that the seller must register the distribution with the Securities and Exchange Commission (“SEC”). The registration statement must contain specified information in form S-1 or form S-4. An exchange tender offer can begin only after a registration statement has become effective. The buyer must supply information about the target in the registration materials if reasonably available. “Section 14(a) of the Securities Exchange Act of 1934 requires the target fully disclose the details of the transaction and regulate the form of the proxy (if the target is publicly held) and the disclosure statement.”¹⁸⁵ Form S-4 is also required by section 14(a). If there is a change in control, the acquisition or disposition of a significant amount of assets, Form 8-K must be filed within five to fifteen days of the occurrence of the change.¹⁸⁶ The William Act regulates the form and timing of tender offers. For example, if a buyer acquires more than 5% of a seller’s

¹⁸³ *Id.* at 291.

¹⁸⁴ Oesterle, *supra* note 1, at 728.

¹⁸⁵ *Id.* at 735.

¹⁸⁶ Cox, Hillman & Langevoort, *supra* note 168, at 9.

equity, the buyer shall file a schedule 13D to report the transaction within ten days.¹⁸⁷ This mandatory filing requires the purchaser to disclose the reasons for the purchase and whether or not the purchaser intends to seek control. Therefore, there are a lot of regulatory requirements on the procedure, such as registration, filing many forms, providing a huge amount of specified information, within many different specific time limits. So, lawyers can help the parties to the merger and acquisition transaction to comply with these rules and regulations. In addition, lawyers may help the parties to avoid liability under these rules. For instance, if the buyer does not want to assume liability for the seller's representation in its proxy statement, the buyer can register the transaction on form S-1 instead of a form S-4 because a form S-4 consists of the seller's proxy or information statement enclosed in the buyer's prospectus cover.¹⁸⁸ Also, if a bidder failed to file a proper schedule 13D according to the William Act, shareholders who sold stock will have a private cause of action for damages. This implied private cause of action has been recognized by most of lower federal courts.¹⁸⁹ Lawyers can help the parties to prevent any possible liability.

Lawyers' function is more obvious in ensuring the clients follow all of the relevant anti-fraud provisions of the federal securities laws regarding mergers and acquisitions. Each of the federal securities regulatory system has general rules or provisions prohibiting the use of false or misleading statements in documents sent to the public or filed with the

¹⁸⁷ Oesterle, *supra* note 1, at 869.

¹⁸⁸ *Id.* at 737.

SEC. First, these provisions prohibit false statements in the requisite registration statements and public disclosure documents.¹⁹⁰ Second, these rules prohibit the omission of any material statement or any misleading statement, no matter whether the statement is correct or not.¹⁹¹ If the parties to the transactions fail to comply with these rules, the corporation and its management will incur criminal or civil liabilities. Thus, it is important for the parties to be familiar with these rules and regulations and also follow them. For instance, the Securities Act of 1933 provides both private and public remedies to assure compliance with its provisions. Section 11 imposes liability on any person who prepares a materially fraudulent registration statement and Section 12 provides a private right of action against the seller of any security in a public offering who has announced false statements in certain defined document or communication.¹⁹² In addition, the courts have recognized a private cause of action under Rules 10b-5 and 14a-9 of Exchange Act as long as the private plaintiffs can prove proper standing, materiality of the improper statements, scienter, causation and damages.¹⁹³ Each of these elements is legally complex. So, only lawyers can help the parties to understand the rules and make sure they follow the rules and prevent any liabilities. For example, lawyers may advise the parties that the materiality of the improper statements means “there is a substantial likelihood that a reasonable

¹⁸⁹ *Id.* at 339.

¹⁹⁰ *Id.* at 742.

¹⁹¹ *Id.* at 743.

¹⁹² Cox, Hillman & Langevoort, *supra* note 168, at 5.

¹⁹³ Oesterle, *supra* note 1, at 743.

shareholder would consider it important in deciding how to vote.”¹⁹⁴ So, if the information is material, the party should not omit it in the publicized information.

4. Anticipate and Prevent Antitrust Issue or Invoke Antitrust Challenge

a. Brief Introduction of Antitrust Concerns

Mergers and acquisitions might reduce cost, promote efficiency and create value to the parties. However, some combinations are usually a means to avoid competition or reduce competition. Once competition is lessened, consumers are injured because the combined-corporation will have strong market power to conduct monopolistic or oligopolistic pricing behavior. Antitrust laws including the federal antitrust statute known as the Clayton Act and state antitrust statutes are designed to deter such combinations and protect consumers’ benefits.

Before Congress passed section 7 of the Clayton Act in 1914, the courts applied the Sherman Act on the antitrust issue present in problematic combinations. Section 1 of the Sherman Act states that “Every... combination in the form of trust ... in restraint of trade or commerce among the several states ... is declared to be illegal.” Also, section 2 of the Sherman Act states that “Every person who shall... combine or conspire with any other person or persons, to monopolize any part of the trade or commerce ... shall be deemed guilty of a felony, ...” Currently, Section 7 of the Clayton Act is the main antitrust statute in challenging mergers and acquisitions. It prohibits mergers that “may... substantially ...

¹⁹⁴ O’kelley & Thompson, *supra* note 2, at 976.

lessen competition.”¹⁹⁵ The United States Department of Justice and the Federal Trade Commission are responsible for prosecuting violations of the Clayton Act. The “Department of Justice has issued Merger Guidelines outlining instances when it will prosecute violations of the act.”¹⁹⁶ The Merger Guidelines are very useful to determine when the Department is likely to challenge the merger and what other factors can help the parties to the merger to defend the challenge. The principal objective of merger analysis is to determine the probable competitive impact of the merger.¹⁹⁷ In addition, Congress passed the Hart-Scott-Rodino Antitrust Improvements Act. If a merger is over a certain threshold size, it is required to be reported.¹⁹⁸ If the merger is reportable, the parties must file a notification form along with the information requested by the form. The parties must wait thirty days (fifteen days for cash tender offers). During the waiting period the government may require further information and extend the waiting period for twenty days from the time of compliance (ten days for cash tender offers). The government may sue and move for preliminary relief if they find the merger may substantially lessen the competition.

Antitrust is influenced by political policy. In the decades since the 1980s, even though the number of mergers has increased dramatically, the federal government has challenged

¹⁹⁵ Clayton Act, 15 U.S.C. § 18 (1914).

¹⁹⁶ Oesterle, *supra* note 1, at 980.

¹⁹⁷ Eleanor M. Fox, Lawrence A. Sullivan, *Cases and Materials on Antitrust*, 750 (1st ed., 1989). [Hereinafter Fox & Sullivan].

¹⁹⁸ *Id.* at 857.

only a few mergers each year.¹⁹⁹ The pace of the enforcement is slowed down. However, it is still important to anticipate and prevent antitrust issues at the planning stage of mergers and acquisitions. Also, it is important to follow the pre-merger notification procedure carefully, even in the case of negotiated or friendly acquisition posing little antitrust problems. Only lawyers, who know the antitrust laws and regulations and understand the nature and extent of any substantive antitrust problems, can help the parties to the merger.

b. When and How to Anticipate and Prevent Antitrust Issue

At the planning stage of mergers and acquisitions, lawyers for the acquiring company will anticipate the antitrust problem in the transaction in order to avoid the government deterring the merger due to antitrust problem.

First, lawyers may calculate the Herfindahl-Hirshman Index (“HHI”), which is an important factor for the measurement of concentration. “HHI is computed by squaring the market share of each firm in the market and then adding up the resulting number.”²⁰⁰ If the post-merger HHI is above a certain number and the merger produces an increase in the HHI of a certain number, the government is likely to challenge the merger. So, market share is an important factor. Lawyers may advise the acquiring company to enlarge the relevant market in order to decrease the market share. The relevant market includes the product market, geographic market and production line or distribution line market. With respect to

¹⁹⁹ *Id.* at 789.

²⁰⁰ *Id.* at 785.

a product market, “its outer boundaries are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it.”²⁰¹ For example, the court in the *Du Pont* case²⁰² held that the relevant market is all flexible packaging material instead of cellophane only. Du Pont had 75% shares in the cellophane market. However, cellophane constituted less than 20% of all flexible packaging material sales. So, Du Pont argued that the relevant market should be all flexible packaging material. The court agreed with Du Pont because they believed that cellophane’s interchangeability with other materials is sufficient to make it a part of the flexible packaging material market. There is a considerable degree of functional interchangeability between cellophane and the flexible packaging material and also a cross-elasticity of demand between these products. The cross-elasticity of demand between these products existed because there was great sensitivity of customers in the flexible packaging markets to price or quality changes. The court held that Du Pont did not possess power to monopoly the market and did not violate antitrust law.

Second, lawyers may examine the other factors in the Merger Guidelines to see whether the government will ultimately challenge the merger or if the government does so, whether the acquiring company can defend the challenge. Lawyers may argue that the merger will not substantially lessen the competition by using the other factors in the Merger Guidelines. For example, lawyers may argue that (1) entry into a market is so easy that the surviving

²⁰¹ *Id.* at 754.

²⁰² *United States v. E.I. Du Pont De Nemours & Co.*, 351 U.S. 377 (1956).

firm cannot succeed in monopolizing the market, or (2) the merger will create extraordinary efficiencies, or (3) financial difficulties of a firm reflects an underlying structural weakness of the firm, and “the firm’s current market share may overstate its likely future competitive significance.”²⁰³

In addition, as I mentioned in part III. B.1.b., lawyers may structure a proper form that can prevent antitrust problems, such as a conglomerate merger. It has less antitrust problems.

c. When and How to Use Antitrust Defense

Under certain circumstances, lawyers may invoke an antitrust violation challenge to protect their clients. For instance, in a hostile takeover attempt, lawyers for the target company may claim an antitrust violation of the acquiring company in order to prevent the target company from being taken over. This is commonly used as a defense by the target company against raiders who intend to take over the company. Lawyers may invoke an antitrust violation challenge by arguing in the opposite way of that mentioned in the previous part. The ultimate objective is to prove that the acquisition may substantially lessen the competition causing the government to deter the acquisition. First, lawyers may also need to calculate the HHI factor. This time, lawyers may narrow the relevant market in order to have a higher market share for both of the acquiring and target company. Second, lawyers may anticipate the likelihood of success of the challenge by determining whether

²⁰³ Fox & Sullivan, *supra* note 197, at 908.

or not to overturn the argument of the raider. For instance, in order to overturn the argument of the raider, lawyers may argue that (1) entry into market is so difficult that the surviving firm has substantial market power to raise price for a long time, or (2) the efficiencies resulting from the acquisition can reasonably be achieved by the parties through other means, or (3) the financial difficulties of a firm is only the business cycle.²⁰⁴

²⁰⁴ *Id.* at 908.

CHAPTER IV

TEAM WORK WILL FACILITATE M&A

A. Complexity of M&A needs team work

The complexity of mergers and acquisitions requires teamwork for a number of reasons. First, mergers and acquisitions are business transactions, which are the transactions of buying, selling and merging business. Business is complicated, which is affected not only by the regulatory system, but also the market, competition and any commercial matters. “Few things in the business world are more complicated than understanding the organization, markets, products, strategy, and pricing of a target company”.²⁰⁵ Recently, globalization and the Internet have made “law and economics” change to “economics and law”.²⁰⁶ So, without the assistance of finance and accounting specialists and commercial specialists, lawyers may not fully understand the business and economics, and then cannot manage the due diligence investigation and operate business transaction successfully. In addition, business includes different kinds of industries. Some industries are special, such as Intercom, insurance and banking. They need respective specialists in these areas.

²⁰⁵ Lawrence, *supra* note 162, at 3-2.

²⁰⁶ Grossfeld 2, *supra* note 48, at 168.

Otherwise, it is impossible to assess the value of these industries and buy, sell or merge these industries.

Second, mergers and acquisitions are also the activities of buying and selling stocks. The securities market is also very complex. “Securities are not inherently valuable.”²⁰⁷ Their value depends on a security holder’s rights on the assets and earnings of the issuer as an owner or the holder’s voting power that contains in that security.²⁰⁸ In order to decide whether to buy or sell a security, an investor needs to acquire and understand all the material information about issuer’s financial condition, products and markets, management, and regulatory environment.²⁰⁹ The mandatory disclosure information includes a lot of financial statement and management analysis of the financial situation of the issuer. So, without the assistance of finance and accounting specialists and commercial specialists, lawyers cannot understand the disclosure information, and then cannot assess the value of the stocks and trade on the stocks.

Third, corporations are the parties of mergers and acquisitions and are complicated entities. Corporations take part in variety of commercial and other activities. Successful corporations can adapt to their economic and regulatory environment, but not the unsuccessful corporations.²¹⁰ There are accounting, employment, tax, banking, product liability and risk management issues in every corporation. Corporations are more

²⁰⁷ Cox, Hillman & Langevoort, *supra* note 168, at 1.

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ Lawrance, *supra* note 162, at 3-2.

complicated when they are international corporations. Not only are the relevant laws different, but also the geographic market situations, politics and economic environment, finance and accounting are different. Without the assistance of a respective specialist, lawyers cannot understand the business and the value of the corporations, and in turn cannot provide satisfactory services to these corporations in mergers and acquisitions.

Fourth, the success of the Big Five in mergers and acquisitions is persuasive evidence favoring the need of teamwork in mergers and acquisitions. In the Big Five, they include attorneys, finance and accounting specialists and commercial specialists in the merger and acquisition team. They advocate their understanding of the business need of the clients and the legal and economic environment at local, regional and global levels, and provide integrated professional services in mergers and acquisitions. In addition, there are successful and unsuccessful examples of mergers and acquisitions transactions in many editions in *The Wall Street Journal* or any legal, accounting or investment banking trade publications.²¹¹ The successful transactions always involve lawyers, accountants and other professionals, but not the failed ones.²¹² Finally, based on my personal experience, mergers and acquisitions are handled by a team. When I worked in an international company, all of the merger and acquisition projects, no matter if they were in local, regional or global areas, were handled by a team, which included a business manager, finance and accounting manager, treasure manager, tax consultant and in-house legal counsel.

²¹¹ *Id.* at 3-3.

²¹² *Id.* at 3-3.

B. Members of the Team and Their Roles

The team that handles mergers and acquisitions mainly includes lawyers, accountants and commercial specialists such as investment bankers and other professionals. In Chapter III, I discussed the value of lawyers in mergers and acquisitions. The lawyers' role is to design the structure of merger and acquisition transactions and make sure the transactions go through successfully. Now, I mainly discuss the role of accountants and investment bankers.

Accountants play an important role in the design of the structure of mergers and acquisitions and are helpful in the operating process of mergers and acquisitions.²¹³ In Chapter III.B.1, I mentioned that lawyers structure the proper form of the merger and acquisition upon different situations and regulatory requirements such as tax, accounting regulations, etc. It is obvious that accountants play an important role in structuring the form of merger and acquisition transactions based on accounting concerns. Accountants are the best professionals who understand which accounting rules and results are the best choice for the clients in merger and acquisition transactions. In addition, tax is closely related to accounting. The federal income tax code taxes gains and losses on held property only when they are "gains derived from dealings in property."²¹⁴ The gains or losses of the corporations are important for calculating their payable income tax. Accountants can

²¹³ Gilson, *supra* note 65, at 299.

²¹⁴ Internal Revenue Code, 26 U.S.C. § 61(a)(3) (1954).

calculate the gains and losses in order to analyze the tax obligation. Also, accountants may adjust some of the components such as total sales and cost to adjust the gains or losses. Sometimes, through different accounting standards or methods, accountants formulate different financial results for a corporation. For example, they may make a profit in the financial statement become a smaller profit or even a loss without violating any rules and regulations. Therefore, accountants are important in the tax area. So, in my company, the tax group is under the finance and accounting department.

Accountants are also helpful in the operating process of mergers and acquisitions. First, the due diligence investigation, i.e. information acquiring and verifying is important in the process of M&A transactions. At the planning stage, the acquiring company needs to look for a target. The common way is to acquire information of all potential target companies from the information disclosed in the security market or purchase and get information from a third party. Most of the information acquired is financial and accounting information. Without accountants, no one will understand what the information means and implies. The acquiring company not only needs to understand the business of the target through the information, but also needs to “have a better knowledge of the underlying profitability of the business than his competitors or uncover how to achieve value that others have not identified.”²¹⁵ This requires an accounting specialist. After locating the target company, the acquiring company needs to determine the deal, such as price or other conditions by

²¹⁵ Simon Creedy Smith & Iqbal Dharamsi, Deloitte & Touche, *Beyond Number Crunching... A New Paradigm For Due Diligence*, 1 (2001). [Hereinafter Smith & Dharamsi].

evaluating the value of the target through the information. Accountants can help the client to determine the value of the target because they can understand all of the financial statements contained in the information.

Accountants also play important role in the verification of the information. Again, accountants can examine the information provided by the target company to check whether it is fake or misleading. They may find the fake or misleading financial and accounting reports through inconsistency of the reports. In addition, accountants play the role of reputation intermediary, just like lawyers. A reputable auditor will not represent a dishonest client that may result in ruining his reputation.

Finally, accountants can even help lawyers to anticipate antitrust issues or invoke an antitrust violation challenge. For instance, it needs a lot of financial and accounting data and calculation to work out the market share of each business players in the market in order to calculate HHI factor. In addition, whether a merger will generate efficiency is a critical factor in making a defense in an antitrust challenging case. In order to prove that a merger, only through the merger, will generate extraordinary efficiency, the party needs to show a lot of accounting data and financial analysis data. Without the assistance of accountants, lawyers will make arguments without a strong basis. In *FTC v. Heinz*²¹⁶, the court rejects the argument by Heinz that the merger creates extraordinary efficiencies. The Court found that the data presented by Heinz was about the reduction of “variable conversion cost”. But using the company’s overall variable manufacturing cost as a measure will cut the cost

savings from 43% to 22.3%. This does not prove a significant cost advantage to the merger. The Court found that the cost reductions should be measured across the new entity's combined production, not just across the pre-merger output of Beech-Nut. Thus, accounting data and analysis is important in the antitrust case in certain circumstances.

Investment bankers can also act as a reputation intermediary in the information verification process.²¹⁷ Investment bankers, just like lawyers and accountants, need to continue their service in the market so that they will not risk representing a dishonest client and providing misrepresentations and omitting material information. Investment bankers can represent to the market that they have evaluated the seller's product and good faith, which can help the buyer to verify the information of seller. In addition, the investment banker may help the sellers to make capital investments in their brand name or reputation. The sellers' investment in their reputation assures that sellers will not misrepresent their information and build the buyers' belief in the information provided by the sellers.²¹⁸ Finally, the most important role of the investment bankers is to design innovative financial arrangements. In mergers and acquisitions transactions, the investment bankers can help the buyers design how to effectively use their investment in the buying transaction at a lower risk or how to get the money that the buyers need in the transactions.

²¹⁶ 246 F.3d 708 (2001).

²¹⁷ Gilson, *supra* note 65, at 299.

²¹⁸ Gilson & Kraakman, *supra* note 166, at 619.

Besides lawyers, accountants and investment bankers, the team may need other professionals, such as industry specialists and employee benefit consultants, and etc.²¹⁹ For example, since many industries, such as intercom, insurance and banking, are specially complicated, the transactions involving these industries needs the assistance of industry experts. Otherwise, no one can understand or better understand the business, market, product and value of the corporations in these industries, and then cannot structure and manage the buying, selling and merging of the corporations properly and effectively.

C. Restricted Multidisciplinary Practice Will Not Affect Lawyers' and Accountants' Ethics, Independence and Value

Teamwork encourages different professionals to work together. Then, MDPs issue may appear. As I mentioned in Chapter II.3, the Mode Rule allows lawyers to work with nonlawyer professionals in a team if it is necessary to meet the needs of the clients. However, if lawyers share fees with nonlawyers in the team, MDP problems exist, i.e. the Mode Rule prohibits a lawyer from sharing fees with a nonlawyer, except under limited circumstances, and from forming a partnership with a nonlawyer in delivering both legal and non-legal professional services. Of course, it is good for lawyers to hire nonlawyer professionals. But, lawyers may not always afford to do so. Under the fierce competitive environment, lawyers may need to have more choices to structure their firm in order to establish a large, integrated and competitive firm, such as forming a partnership, or sharing

²¹⁹ Smith & Dharamsi, *supra* note 215, at 3.

fees with nonlawyers, or lawyers may need to establish a network with other professional firms by contracts, similar to the current practice of the accounting firms. Thus, I have to revisit the MDPs issues.

There are three kinds of opinions that deal with MDPs. The first belief is that MDPs should be totally prohibited. For instance, several state bar associations, mentioned in Chapter II. 3, “resolved that lawyers shall be prohibited from sharing legal fees with nonlawyers and from directly or indirectly transferring to nonlawyers ownership or control over entities practicing law.”²²⁰ Second, others believe that MDPs should be allowed. Third is the opinion that MDPs should be allowed under limited circumstances. For example, the American Bar Association Commission (“Commission”) recommend that lawyers should be permitted to share fees and join with nonlawyer professionals in delivering both legal and non-legal professional services provided that lawyers have the control and authority necessary to assure lawyer independence in the legal services.

I believe that we should have a uniform rule on MDPs. Currently in the U.S., only the District of Columbia permits MDPs. Law firms may set up headquarters in this district and then establish branches or offices in other states. So, law firms can eventually have multidisciplinary practices in the states where MDPs are prohibited. I prefer Commission’s direction as to a uniform rule on MDPs. First, MDPs should not be prohibited totally. The major reason for full prohibition is that MDPs might affect lawyers’ independence, ethics and value. Also, due to Enron and Andersen scandal, people fear that MDPs may also

affect accountants' independence and ethics. However, if we can find a way to make sure MDPs will not have these kinds of adverse effects, such as imposing certain limitations that I will discuss later, MDPs should be allowed because the practices have a lot of benefits in society. I already discussed the complicated mergers and acquisitions that need teamwork. In fact, other business activities also need teamwork. Complexity of modern society makes it impossible to separate the lawyers from nonlawyer professionals, such as accountants, financial planners, and social work specialists.²²¹ MDPs, sharing fees and establishing partnerships between lawyers and nonlawyer professionals, may make the teamwork more efficient and effective and improve the competitive competence of the firm in MDPs. The success of the Big Five is the strong evidence. "MDPs are about choices for clients, the public and professionals."²²² Futures Committee under the Texas State Bar Board of Directors believed that clients would need MDPs soon.²²³ Demand determines supply, and if clients demand MDP practices, MDPs will exist or even flourish any way, even though laws or regulations prohibit it. Suppose, we can manage the adverse effect of MDPs, but we still prohibit MDPs, the prohibition is a kind of monopolistic way to protect lawyers and their business, which is not ethical and harmful to the public and also to the lawyers. Lack of the competition in the market is not good for the consumers and the players as well.

²²⁰ Recommendation, *supra* note 60.

²²¹ Daly, *supra* note 25, at 522.

²²² Margaret Milner Richardson, Changes, Choices, and Challenges for The Legal Profession, 50 J. Legal Educ. 477, 478 (2000).

²²³ Herb D. Vest, Felling The Giant: Breaking The ABA's Stranglehold On Legal Education, 50 J. Legal Educ. 494, 494 (2000) [Hereinafter Vest].

Second, MDPs should not be permitted if there is not any limitation on MDPs. If MDPs are allowed without any restrictions, nonlawyers may have ownership of law firms, lawyers' professional independence may be interfered, and lawyers' ethics and value may be damaged. For example, "nonlawyer managers or owners will be more willing than lawyers to interfere with the professional relationships of employed lawyers when it is profitable to do so."²²⁴ Lawyers should be independent in providing legal advice to the client based on the professional rules and Model Code. However, if their managers or owners who are nonlawyer professionals have different opinions for the purpose of self-interest of the firm, lawyers have to be influenced or compromise with them. Thus, lawyers lose their independence and may become unethical. Also, under the control and supervision of nonlawyer professionals, lawyers will become draftsman. Their value will be decreased. Proponents of MDPs may argue that lawyers' ethics and professional can be governed by Model Rule and Professional law. I think this is impractical because employee-lawyers have no power to comply with these rules under certain circumstances if employer-nonlawyers disagree to do so for their self-interest. It is unfair to leave employee-lawyers to deal with this kind of conflict. For instance, lawyers have a duty not to disclose client confidences to the public. A lawyer in an MDP may regard the information about his client as confidential, but his accountant manager or partner may feel obliged to disclose it publicly. The lawyer may compromise with his manager or partner. Again, based on my personal experience in working as an in-house legal counsel, one of

²²⁴ Morello, *supra* note 6, at 206.

my previous bosses, who is a finance and accounting manager, does not have any legal background and legal knowledge. Although he did not interfere with my detailed legal work, he directed me to consider more non-legal elements in dealing with legal matters. Sometimes, he influenced me to make an improper solution based on extralegal factors rather than a legal basis. Also, he could not evaluate my legal performance. It is very bad to have a nonlawyer professional to be a manager of a lawyer. So, MDPs should not be permitted without any limitations.

The critical point in the Commission's direction is the definition of "Restricted Multidisciplinary Practices". I agree with Commission that restricted MDPs mean that lawyers shall have the "control and authority" in MDPs to assure lawyers' independence, ethics and value. In its recommendation, although the Commission mentions that percentage of ownership may be a factor in certain circumstances, it believes that the control and authority is based upon the substance not the form. For instance, in a small-size MDP, the lawyer member might or might not hold a majority ownership interest. In a large-size MDP, the firm should structure the MDP so that lawyers who provides legal services to the clients are organized and supervised separately from other functions in the MDP, and the firm shall establish a chain-of-command in which lawyers report to a lawyer-supervisor who is responsible for firing, fixing the lawyers' compensation and terms of service, and managing all legal matters involved in lawyer-subordinate's work.

However, I don't think these criteria are sufficient for "Control and Authority". A law firm is just like a corporation. A person who has basic knowledge of corporations will

believe that “Control and Authority” means substantial percentage of ownership. Many statutes about corporations also reflect that knowledge. It is simply because many important decisions of the corporation shall be only made by majority of the shareholders or directors who are elected by shareholders. Therefore, only a shareholder or a group of shareholder owns over 51% of the share of the company, and he or they can be the majority and have the control and authority. If a non-lawyer professional has the majority in percentage of the ownership, no matter how the firm structures the MDP, the lawyer, as a minority partner, will not have the control and authority eventually, just like the minority shareholder has no control and authority in a company. If the lawyer partner has no control and authority, the chain-of-command method recommended by the Commission is useless because the lawyer-supervisor will not have control and authority because the powerful owners are nonlawyer professionals. If nonlawyers directly or indirectly control the law firm and lawyers’ activities, work and judgment, lawyers’ independence will be impaired.²²⁵ Therefore, “Control and Authority” refers to a substantial percentage of ownership, meaning that lawyers should have at least 51% of the MDP. Of course, this restriction may still prohibit the Big Five current multidisciplinary practices in the U.S. because lawyers have no “control and authority” defined here in these firms.

I believe that restricted Multidisciplinary Practice will not affect lawyers’ ethics, independence and value. Independence is the most important factor. As long as lawyers have independence, lawyers can comply with all relevant professional rules on ethics and

²²⁵ Ramon Mullerat, *The Multidisciplinary Practice of Law In Europe*, 50 *J.Legal Educ.* 481, 482 (2000).

ensure their value in the delivery of the service. Independence of lawyers means that lawyers have autonomy and control over their work, i.e. lawyers can make their own choices in delivering legal services. An independent lawyer can freely decide whether to serve a particular client, how to allocate his or her time, and what strategies and skills to use in meeting the client's needs and etc.²²⁶ There are many conditions of independence, such as strong norms, organization of practice, market position, long-term continuing relations with clients, social influence over clients, financial base and so forth.²²⁷ In MDPs, independence refers to lawyers' independence from nonlawyer professionals. So, organization of practice is what we need to consider. If MDPs are restricted and lawyers have the majority percentage of the ownership, then they have the control and authority, and they can be independent in delivering the service. Therefore, lawyers' independence will not be impaired, and lawyers' ethics and value will not be harmed.

On the other hand, in order to ensure the quality and credibility of auditing and prevent an Enron-type scandal, accounting firms and MDP firms should be prohibited from offering consulting services including law-related services to the company they audit because there are inherent conflict of interest as I mentioned in Chapter II A.3. In fact, the SEC proposed this rule before, but the SEC did not adopt it because of the lobbies by Andersen, KPMG and Deloitte.²²⁸ The SEC compromised to adopt two approaches on

²²⁶ Robert W. Gordon, The Independence of Lawyers, 68 B.U.L.Rev. 1, 7-8 (1988). [Hereinafter Gordon].

²²⁷ *Id.* at 33-40.

²²⁸ Berenson & Glater, *supra* note 30.

auditor independence.²²⁹ First, “the SEC set up a general standard of independence that a fully informed reasonable investor would decide the accountant is capable of independent judgment on all issues.”²³⁰ Second, the SEC listed several specific situations in which auditor independence is inherently damaged.²³¹ The SEC declared that an accountant is not independent if he or she provides information technology or other consulting services or legal services to the audit client during an audit period.²³² It was recommended that auditors should be prohibited from offering any non-audit service to the clients they audit all over the world.²³³ In addition, the firms should be banned from offering both internal and external audit services to the same company. Otherwise, Andersen’s behavior in the Enron scandal will happen again.

²²⁹ Thomas, Schwab & Hansen, *supra* note 24, at 169.

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.*

²³³ Reporter, Honest Numbers Require Robust Rules and Policing, *Financial Times*, March 1, 2002, <http://specials.ft.com/afr2002/FT3GXQORQOXC.html>, (last visited Mar. 1, 2002).

CHAPTER V

WHAT KIND OF LEGAL EDUCATION WILL HELP LAWYERS CREATE MORE VALUE IN BUSINESS TRANSACTIONS

As I mentioned in Chapter III, lawyers create a lot of value in mergers and acquisitions. However, the Big Five are getting more and more work, especially in the business transactions, from lawyers. Also, lawyer's value is being challenged. If restricted MDPs in which lawyers have the Control and Authority could be allowed, law firms may become more competent in the competition with accounting firms or other professional service firms in providing legal service. However, lawyers have to attract other professionals to join their business. Therefore, in the current strong competition environment, the critical problems are those inherent to lawyers, and how lawyers deal with these problems so that they can become more competent and serve society as well in the future as they have in the past, rather than whether or not MDPs should be permitted or not. Lawyers must try to convince clients and the public that the strategies and techniques they use in their work are

valuable.²³⁴ So, we need to first find out what are the problems for lawyers themselves in providing legal service in business transaction area, and then look for the solutions.

A. Self-problems of Lawyers

Lawyers might lack business sense. Businessmen believe that today it is difficult to find a lawyer who has the expansive knowledge of commercial laws and also has the common sense to utilize.²³⁵ Businessman try to find a lawyer who is a specialist in the field most important in the transaction, but who can overcome his scholarship and can apply common sense and sound judgment.²³⁶ However, businessmen feel that it is difficult to find these kinds of lawyers. I think common sense mentioned by the businessmen refer to business sense because he is talking about the business transaction. Business sense means that the knowledge and understanding of the business, specifically the client's business and the target company's business in merger and acquisition transactions, such as product and market, competition, business strategy and operation and so on. Business sense is important in a merger and acquisition and any other business transaction. If lawyers do not have enough business sense, lawyers cannot understand the business need of the client and cannot structure the merger and acquisition properly by applying their legal knowledge. Even though lawyers may have some courses on economic and business and corporate finance, they still lack business sense or cannot apply what they have learned, or they even

²³⁴ Wilkins, *supra* note 71, at 473.

²³⁵ Lipton, *supra* note 73, at 835.

care little about business sense. “Big law firms have lost more of their old Fortune 500 company business to in-house counsel.”²³⁷ One of the main reasons is that in-house legal counsel has a better business sense about his client, i.e. his company. It is easier for in-house legal counsel to have business sense about their company than outside lawyers about their clients. However, in my personal experience, even for in-house legal counsel, business managers still criticize them because they lack business sense and do not understand the business need. Almost all of our in-house legal counsel in the company got the same comments from business managers that we should build business sense and understand the business better and provide better legal service.

Lawyers may be too academic. A businessman believes that “lawyers tend to engage in overkill”.²³⁸ For example, lawyers do too much research in giving relatively small legal points.²³⁹ Since law schools train lawyers to see how many issues and problems lawyers can find in a particular transaction, they are good at finding out issues and problems, but are not good at figuring out solutions or finding opportunities. However, a business client normally is looking for solutions and opportunities instead of problems and issues. For instance, lawyers normally only advice their clients on whether the law forbids particular acts, and do not create various alternatives to the interests of the clients.²⁴⁰

²³⁶ *Id.* at 836.

²³⁷ Gordon, *supra* note 226, at 66.

²³⁸ Lipton, *supra* note 73, at 836.

²³⁹ *Id.* at 836.

²⁴⁰ Gordon, *supra* note 226, at 5.

Lawyers may also lack risk assessment skills. Many business clients need lawyers to assess the legal risk when lawyers tell them there may be a legal risk in the business transaction. Risk assessment is essential to business clients.²⁴¹ For instance, since clients do not have legal knowledge, they need to know what is the risk of a minority shareholder suit and what is the risk of a tax recapture, such as 70-30 or 50-50.²⁴² In my company, legal counsel are required to assess the legal risk if they mention that there will be legal risk in a business project. Management will normally go ahead if the legal risk is below 30%, but will withdrawal the project if the legal risk is over 50%. Of course, there is no need to assess the risk only by percentage. We often distinguish the legal risk as manageable or non-manageable. This is more useful for management to make a business decision. In fact, legal assessment is very difficult because laws, rules and regulations are often ambiguous, and inconsistent and we normally do not have a legal risk assessment course in the legal education.

Lawyers may also lack management skills. Business lawyers are good at reviewing and drafting documents and negotiating with the opposing party, but may not be good at managing people and directing a team. In my company, the leaders of all of the teams that handle merger and acquisition projects are usually a finance and accounting manager. In-house legal counsels have never become team leaders. To be a manager or leader, lawyers must have not only legal knowledge, but also understanding of the total picture of

²⁴¹ Lipton, *supra* note 73, at 836.

²⁴² *Id.* at 836.

the assignment and the business needs of the clients. Lawyers may usually be too academic to fully understand the business needs, as I mentioned above.

B. Improved Legal Education May Build Lawyers' Necessary Skills

There may be many solutions to solve those self-problems of lawyers. I think legal education is the critical one because lawyers are highly influenced by their education. Supply is dependent upon demand. So, what legal education should be improved is based on what the requirements from society and market for lawyers and what is the gap between the needs and lawyers' competency and skills.

Clients become more sophisticated in evaluating the value and productivity of lawyers. Clients are no longer loyal to particular firms. If clients feel unsatisfied with the advice they get, they will look for the most favorable advice, the most beneficial solutions, or the most skillful strategies toward regulators.²⁴³ More specifically, businessmen regard that in most business transactions, the best lawyer is the one who is proficient at dealing in the gray areas. That lawyer should know whether an issue is critical to the task or not, what a possible solution is and how to involve all parties in the transaction.²⁴⁴ Also, clients look for a lawyer who combines his technical skill and practical understanding so that he can protect them. Clients do not like any lawyer who makes the deal impossible. Thus, clients are looking for legal service that can help them to meet their business needs and maximize

²⁴³ Gordon, *supra* note 226, at 54.

²⁴⁴ Lipton, *supra* note 73, at 840.

their business earnings. Understanding a client's business is the most important tasks for the contemporary lawyers.²⁴⁵ "The more lawyers know about science, technology economics, management and other matters influencing their client's interests, the more value lawyers will create."²⁴⁶ However, as I mentioned previously, lawyers are not good at understanding business needs, transcending law school education and experience to the work and helping the clients to achieve their goals.

Therefore, legal education may be improved in the following aspects: First, law school may educate and encourage law students, who are planning to become business lawyers, to establish the belief that it is important to develop business and market sense and understand business needs of clients and achieving clients objectives. Of course, this does not mean that lawyers do not need to uphold the rule of law and obey the regulations of the bar. Clients are important, but self-respect is even more important. In order to build more common sense in the business area, current relevant finance and accounting courses and economic courses may be expanded and more specialized. These courses can be taught by the colleagues in other schools of the university.²⁴⁷ Also, students shall get the chance to go deeper into the field of accountancy and to get more of a sense of it. For instance, graduate students and law students can form a mixed team to work on the problem-solving tasks and mimic the real world environment.²⁴⁸ Second, the courses may be designed to improve the

²⁴⁵ Daly, *supra* note 25, at 544.

²⁴⁶ *Id.* at 544.

²⁴⁷ *Id.* at 522.

²⁴⁸ *Id.* at 545.

students' problem solving skills besides educating them in finding problems. This does not mean setting a separate course called problem solving. The knowledge of problem solving skills and other skills needs to be incorporated into many legal courses. Third, law schools may also incorporate risk assessment knowledge into some of the legal courses. When students are dealing with legal problems, they are requested not only to find out the different results, but also assess the possibilities of these results. Forth, legal trainings and practice may be further expanded. Although law schools are offering students more chances to develop their practical skills, it may not be sufficient.²⁴⁹ Also, law school curricula now include courses in developing legal skills of students, such as factual investigation, communication, drafting, negotiation and in managing legal work.²⁵⁰ Some law schools incorporate real experiences and field placements into a course so that students may have more practical sense of the knowledge.²⁵¹ But, clinical, practical skills and externship courses still are lacking in law school curricula. ABA believes that these legal trainings are still not enough and need to be expanded.²⁵² Legal training is important. Most employers believe that the degree is exactly equal to two or three years of on-job training.²⁵³ I agree with professor Gilson's idea that a traditional three-year course of study

²⁴⁹ Vest, *supra* note 223, at 496.

²⁵⁰ Bogus, *supra* note 62, at 942.

²⁵¹ Deborah Maranville, *Infusing Passion And Contest Into The Traditional Law Curriculum Through Experiential Learning*, 51 J.Legal Educ. 51, 66 (2001).

²⁵² *Id.* at 943.

²⁵³ *Id.* at 943.

can be reduced to two and leave one year for practitioners to begin their on-job training.²⁵⁴

In China, four-year course of legal education includes three-year course of study, half of a year legal practice and half of year preparation of thesis. Chinese law schools arrange the practice places for students, such as law firms, courts or large corporations. Law schools keep contact with these units to get information about the performance of the students during the practice period. The student practice is graded. So, the practice arrangement and system is pretty good in China. But, I think half of a year may be still not enough. Legal practice is very helpful because it can link theory directly to practice, especially when the practice unit is the one that the student will work for after graduation.

²⁵⁴ Gilson, *supra* note 65, at 304.

CHAPTER VI

CONCLUSION

“Lawyers have made exceptional contributions throughout the history of the country.”²⁵⁵ Although lawyers are facing strong competition with accounting firms and lawyers’ value is being challenged in the present day, lawyers create a lot of value in merger and acquisition transactions, the most important and significant business transactions. On the other hand, lawyers should recognize the competition and challenge and resolve the self-problems. In order to create more value and become more competent in the competition, lawyers should work with other professionals. Restricted Multidisciplinary Practice will help lawyers to be more productive. In addition, lawyers should establish and develop their business sense, management skills, risk assessment skills and any other skills necessary in delivering better legal service. Lawyers should understand the business needs of the clients and take use of all the knowledge and skills to help clients to achieve their legitimate business goals. In the end, lawyers will best

²⁵⁵ Bogus, *supra* note 62, at 946.

accountants with service, quality and performance and not by implementing a lot of monopolistic “professional” rules protecting lawyers.²⁵⁶

²⁵⁶ Morello, *supra* note 6, at 190

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