CADWALADER

FUND FINANCE FRIDAY

Although Change Is Inevitable, Some Basics Remain Timeless

July 15, 2022 | Issue No. 184

By Kurt Oosterhouse
Partner | Fund Finance

With communication avenues evolving and remote options only increasing, we certainly aren't going back to the "good old days" of all-hands page flips and in-person closings. Combine that with Fax Rooms and FedEx deadlines, while certainly "old," were those days even "good"? Arguably, no – traveling across the continent to closings lugging file briefcases while worried that your documents (on disk) might be destroyed by airport metal detectors isn't something I want to go back to.

Don't worry. This isn't a collection of "Back in my day, I walked to the courthouse uphill, both ways – in the snow" stories. I'm not interested in going back to the "good old days." However, that isn't to say that there weren't some positives from those days that we should try and salvage or recreate that may make our jobs easier and even provide a smile later in our careers.

For me, there are a handful of transactions that I keenly remember. However, other than the obvious, big-ticket, multi-foreign jurisdictional deals, it's hard to figure out why certain transactions are easily recallable whereas others are a blur at best. Following a recent visit with a long-time counterpart of mine, I am finally able to put my finger on why certain transactions stand out more than others: it's because "back then," in addition to the documents, transactions had faces, literally and figuratively.

Transactions often had "kick-off" calls where all of the businesspeople and lawyers discussed the process, overall timing schedules, big-picture business points prior to drafting, etc. As lender's counsel, following the initial draft being sent to our client, we would often have in-person "page flips" to go over questions/issues with the draft. After a turn or two of the document with the borrower and counsel, we would almost always have the "all-hands" call where we would knock out the remaining issues – with time often measured by the number of bathroom breaks instead of hours. While the all-hands calls were mostly painful, they were, in their own way, extremely efficient. Within two to three bathroom breaks, real business issues were quickly separated from lawyer-generated business issues, and legal issues were often quickly dispensed with, since “it’s market” and “we get that in every deal” simply wouldn’t work. The businesspeople on the call needed to understand the point, so you needed to concisely explain the issue and why it really mattered to your client (and it really needed to matter, since your client − and your client’s client − were on the call). Further, with everyone on the call, permanent impasses were rare, since as one of my clients once said to me, “At some point, all legal issues end up being business issues,” and since the ultimate decision makers were on the same call (and nobody wanted an encore “all-hands” call), issues were decided sooner rather than later.

After the “all-hands” call, closings were mostly in person, so, ultimately, you would get to meet opposing counsel (and the borrower) face-to-face as the final issues were negotiated. While in-person negotiations presented their own set of challenges, the vast majority of the time, the opposing counsel you may have struggled with during the process didn’t seem so difficult once you were in the same room, eating from the same, picked-over fruit plate at 2:00 a.m., working toward the same goal of closing the transaction before the 9:00 a.m. funding deadline. Whether it was simply misery loving company or the fact that it is inversely harder to be unreasonable the closer in proximity the parties get to each other, I think it would be difficult to argue that these situations made it clear that our business is a relationship business.

I recently made this memorability of transactions correlation during a sit-down meeting with Tom Draper. Tom is a partner at Foley Hoag LLP and, before that, he organized Ropes & Gray’s finance group and was the long-time head of the firm’s finance group. He is a great lawyer and one of the great people in our business.

He called me to let me know he was going to be in town visiting clients and wondered if he could stop by and say hello to me and the team. Tom has done that before and, for those of you who don’t know Tom, you really should.

After making the rounds, we sat down and eventually talked about how long we had known each other and tried to remember our first deal together. We settled on it being around 1998: I represented a bank syndicate providing financing to Tom’s financial sponsor client that was buying an accessory business from its founders.

The point of detailing the transaction is to, admittedly, show off our collective memory of the deal and, more importantly, provide an outline for what I view as an “ideal transaction” – certainly ideal enough for two “adversaries” to not only remember it so well (25 years later), but also to appreciate the experience (and the subsequent professional experiences) enough to have us get together to spend an hour whenever one of us is town.

On the business side, the sellers were two brothers that started out with a small storefront in Times Square – long before the Disney Store would have been a neighbor. Their business model consisted of obtaining trademark licensing agreements with major league sports, Disney, Warner Brothers, etc. and putting those logos on hats, duffle bags, etc. – basically selling $30 products for what would have been $5, but for Mickey Mouse.

Why memorable? First, it was the uniqueness of the collateral and the process to get to an acceptable closing. Tom and his team understood the collateral concerns of the lenders. They understood that without consents to assignments of the licenses and some ability for the lenders to theoretically liquidate the collateral with the trademarks, the lenders simply had a bunch of $5 generic hats and not $30 Mickey Mouse hats. While on opposite sides of the transaction, we worked as a team to secure as many consents as were possible.

Why memorable? Secondly, the visual aspect of the closing. The closing was in the Ropes & Gray “conference space” in New York – before Ropes had a New York office. At that time, they had three or four dedicated conference rooms (with staffing) for the purpose of closings. The acquisition transaction was in one room and the financing transaction was in another room, each with multiple, aluminum accordion file holders covering the closing tables.

Why memorable? Third, I remember working directly with Tom and his team in the same room. I remember how patient he was with me dealing with the usual 11th hour issues. He could have tried to use his greater experience and large, sponsor client leverage to push me (and the lenders) to get the best possible deal for his client. Instead, he would typically approach a discussion by mentioning what he believed our concerns to be so that there was a general understanding that we each were trying to find the answer that was in the best interests of our clients and the transaction as a whole. A great lesson was learned by me that day: Finding a mutually acceptable solution doesn’t mean that your aren’t getting the best possible deal for your client – often, the mutually acceptable solution is the best solution for your client.

Why memorable? Finally, understanding my role in the big picture of the transaction. After the closing, I was the only person left in the financing room when one of the brothers came in and started taking pictures of the completed accordion files with his disposable camera. He smiled at me and said, “Someday, I want to show my kids what this looked like.” Having prepared the funds flow, I was aware of what he and his brother netted that day. But what has struck with me more was realizing that it wasn’t *our* transaction; we each simply had a role in *his* transaction.

Communication avenues continue to evolve. Now we have remote work options plus who knows what is coming next? It’s hard to say those are negatives, but the same way my mobile phone went from an unexplainable blessing allowing me to break the tether to my literal desk to, years later, becoming an unbreakable tether to my ubiquitous “desk,” increased communication options have their pitfalls.

As communication options have increased, it seems as though that has caused an inverse impact on the ability to make personal connections with clients, opposing counsel, their clients, etc. As I look back, those personal, face-to-face connections over the years have resulted in holiday cards from borrowers (and, in some cases, they have become my clients years later), friendships with great lawyers and people like Tom and, perhaps most importantly, often transforming difficult working relationships with people “on the other side of the table” to more productive, enjoyable working relationships. Improved personal connections not only benefit our respective clients (since we all know those transactions go smoother), but also, they make our jobs easier and more enjoyable. Who doesn’t prefer working opposite people they like?

The costs, the volume of paper and the various other inefficiencies of in-person closings is a history few would want to retain. The “good old days” of all-hands “page flips” have been replaced by phone calls, which have mostly been replaced by e-mails, the same way that in-person closings have been replaced by electronic closings. That is certainly progress, and there is no reason to look back. However, there are some remnants of the “good old days” transactional practice that are worth preserving.

Our business is a relationship business and, to quote my long-time partner and friend Mike Mascia, “Everyone is a potential referral.” With that in mind, instead of emailing, sometimes pick up the phone. If you have a chance at a conference to talk with someone who you have worked opposite but have never met (especially someone who you might think is “difficult”), talk to them, ask them about things other than work. While you might not make a lifelong friend, you actually might. While that person might not become your new favorite person to work opposite, I suspect that, at a minimum, your next transaction with them will be a little smoother − resulting in your work experience being proportionally more enjoyable.