

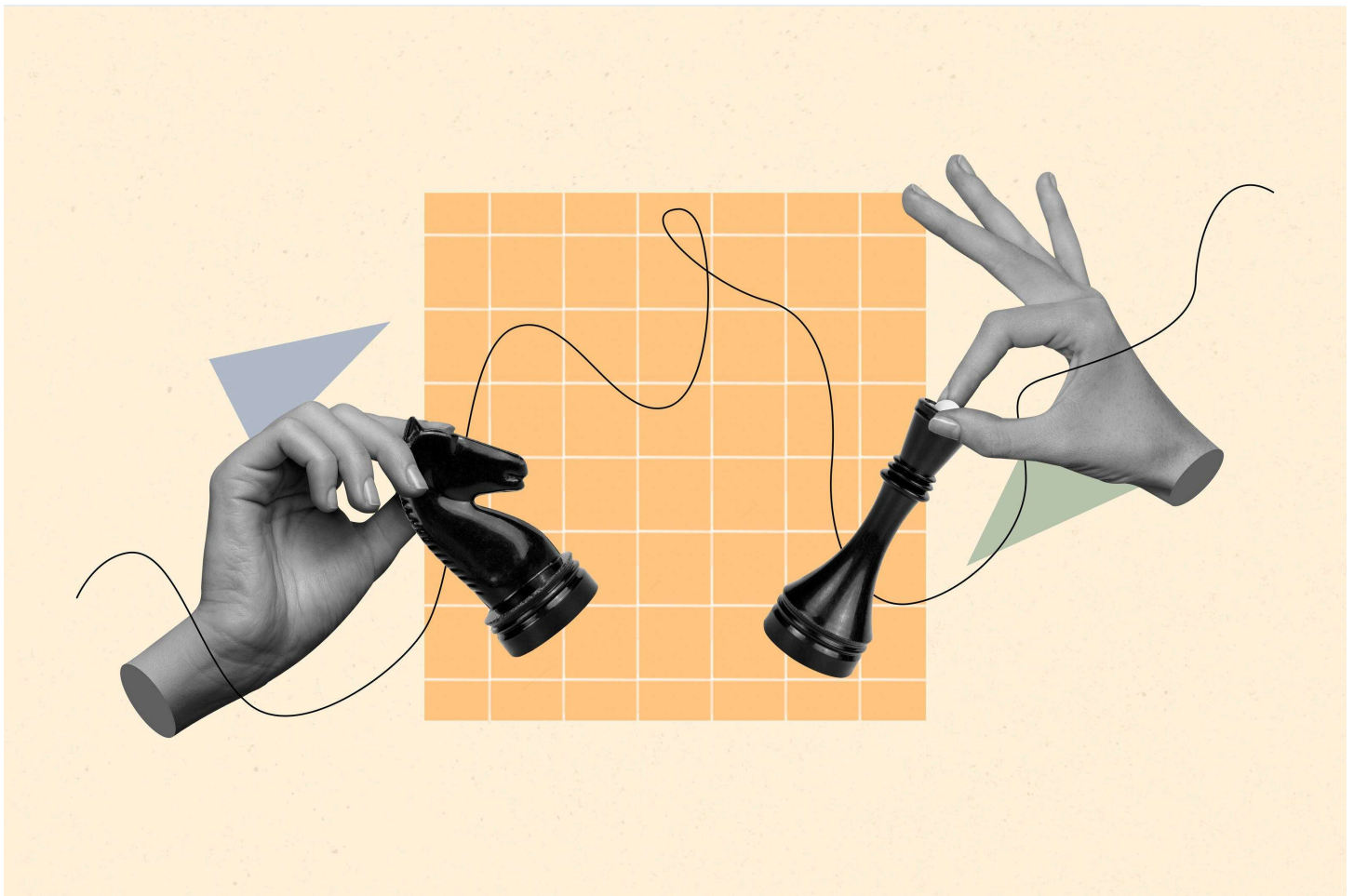


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## Playing chess — not checkers — when preparing to transact

By **Adam D. Ott & Tyler Fang** // July 31, 2025

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The number and variety of problems that emerge throughout the lifecycle of a business are seemingly unending. It should come as no surprise, then, that problems that may not immediately appear to hinder or otherwise disrupt the day-to-day operations of a business are often deprioritized, completely unnoticed or even forgotten entirely by business owners and operators until they surface during the crucible of a transaction.

Whether taking on investors, engaging in a joint venture or partnership, conducting strategic M&A, or participating in an exit or other form of control transaction, there is perhaps no more isolated scenario, where unchecked and seemingly inconsequential problems can lead directly to significant and consequential disruptions and costs, than when a business is dealmaking. In this article, we will highlight some common problems we as deal lawyers often see surface over the course of a transaction and offer some thoughts on solutions centered around sound transaction planning.

## **Contracting with an eye toward exit**

Contracts are the legal foundation underlying many of a business's most important relationships. Prospective buyers and investors in a business are typically keenly interested in a target, because they want to get the benefit of the target's relationships with its customers, vendors and partners, often devoting a significant part of their diligence efforts in evaluating these relationships and their written agreements in detail.

The most common issues we see in this arena are instances where:

- No written agreement governing the relationship exists
- The written agreement contains unfair or out-of-spec material terms (e.g. liquidated damages provisions, unwarranted guarantees, indemnification obligations, warranties, confidentiality provisions, etc.)
- The written agreement lacks standard language contemplating a potential transaction, making the agreement effectively nontransferable
- The agreement contains a transfer/change of control provision, but does not require the counterparty to act reasonably in consenting to the transaction (enabling them to re-trade on agreement terms in exchange for their consent)
- The agreement does not appreciate the difference between an asset and equity deal, which eliminates the availability of certain transaction structures
- The agreement imposes transfer fees or triggers for other unintended consequences

In addition to helping your business secure favorable terms and minimize general legal risks, competent legal counsel can also help mitigate and avoid the foregoing issues in your template agreements.

## **Keeping your corporate organization clean**

Corporate organization is an often-neglected part of running a business. There are some good reasons for this. After all, customers and vendors typically don't care whether your board members have been properly appointed or that your cap table ties out. In a transaction, however, it's an entirely different story. A prospective buyer or investor will be keenly aware of any issues with your corporate organization. In a minority investment, investors will scrutinize the business's existing capital structure and governance to understand their rights vis-à-vis other investors. In a control deal, the buyer will closely examine the target to ensure that all outstanding equity is acquired or extinguished. Even buyers in asset acquisitions will want to ensure that all necessary approvals or other steps needed to consummate the transaction are identified early. Outside legal counsel can be immensely helpful in evaluating and ensuring that your corporate organizational matters are well-documented, have been adhered to and are up to date.

## **Centralized filing system for faster and easier due diligence**

Due diligence is an essential part of any transaction process. This phase involves a thorough investigation into the target business with the goal of uncovering any risks, liabilities or potential issues that may affect the value or integrity of the transaction. In practice, due diligence starts with the buyer or investor sending due diligence requests to the target business. The target business is asked to populate a virtual data room (i.e. cloud storage system) with documents responsive to those due diligence requests. A well-organized, centralized filing system is one of the best ways to streamline the due diligence process. A centralized filing system serves as a single repository for all critical documents, such as corporate records, financial statements, important contracts and employee documentation, ensuring that all the necessary documentation is readily available and reducing the risk of missing critical documents or information.

When you have a clear, organized system in place, the target business can quickly gather the necessary materials to respond to due diligence requests, saving valuable time and billable hours and otherwise preserving efficiency in a transaction.

The foregoing represents just a glimpse into some of the often-overlooked issues where an ounce of prevention is worth a pound of cure. Parsons Behle & Latimer is a full-service law firm uniquely prepared to help businesses identify and solve these issues when it is time to transact.

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*Adam D. Ott is an experienced and trusted advisor to a diverse group of clients ranging from multinational corporations to closely held private businesses and family offices on a myriad of issues ranging from general outside legal counsel matters to complex dealmaking. Email: [aott@parsonsbehle.com](mailto:aott@parsonsbehle.com). Tyler Fang is a member of Parsons Behle & Latimer's corporate practice. He works with clients on a variety of corporate and securities matters and enjoys helping his clients navigate complex business, legal and regulatory issues. Email: [tfang@parsonsbehle.com](mailto:tfang@parsonsbehle.com).*

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