# The Versatile M&A Lawyer: Bridging the Gap Between Courtroom and Boardroom

*By Forrest G. Alogna* and William Savitt***

*Transactional lawyers the world over help their clients prepare for and avoid potential disputes. Disputes are expensive, distracting, and uncertain; meaningfully decreasing the likelihood or intensity of disputes has considerable value. However, to do this effectively in a way that matches the constraints of deals and deal disputes is difficult. One solution is attorneys who are "versatile" in both transactions and disputes (whether through the combination of deal and dispute experience in a single individual lawyer or through a tightly functioning team of transactional lawyers and litigators). In the face of the increasing commodification and specialization of legal advice, of encroachments from other professions and even automation, we believe that the versatile lawyer provides a compelling model for understanding and enhancing the value that all attorneys, irrespective of their area of expertise, provide their clients. This article examines examples of such versatile practices in the context of M&A before considering more generally some of the challenges and available solutions.*

*What, then, is this law business about? It is about the fact that our society is honeycombed with disputes. Disputes actual and potential; disputes to be settled and disputes to be prevented . . . .*

—Karl N. Llewellyn, The Bramble Bush: On Our Law and Its Study 5 (1930)

*You have no inclination to learn the profession of war; you do not apply yourself to it and consequently you will never know it. How then will you be able to command others, and to judge of the rewards which those deserve who do their duty, or punish others who fail of it? You will do nothing, nor judge of anything but by the eyes and help of others, like a young bird that holds up his bill to be fed.*

—Voltaire, 2 The History of Peter the Great 288 (Smollett trans., 1867) (quoting a letter from Peter the Great to his son Alexei Petrovich, Oct. 27, 1715)

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There is a longstanding tradition in continental Europe of preeminent attorneys combining practices as both litigators and deal lawyers. In Amsterdam, Dutch transactional lawyers regularly litigate corporate disputes before the Enterprise Chamber, a special division of the Court of Appeal. In Paris, a handful of French firms continue to emphasize such versatility, beginning with the training of interns and junior associates, who are assigned both to litigation matters and corporate matters. In Germany, the same deal lawyers both negotiate deals and litigate deal-related issues before the courts and securities law regulator.

Strikingly, this tradition has continued at the pinnacle of continental European legal markets despite decades of competition from (primarily American and English) international firms with legal practice models based on increasing specialization. Various factors may contribute to the tradition's continuing vigor, but one key factor appears to be that bringing both transaction and litigation experience to bear on a matter provides clients with additional value. In this respect, the evolution of the modern practice of M&A in the United States, where some firms developed practices of litigators and deal lawyers working closely together, provides some striking parallels to the continental tradition.

Commonsensically, deal lawyers the world over seek to help their clients prepare for and avoid disputes. Disputes are expensive, distracting, and uncertain. Meaningfully decreasing the likelihood or intensity of disputes has considerable value. But in any given case it may be difficult for a non-specialist buyer of legal services to appreciate whether and how an attorney has effectively contributed to avoiding disputes: disputes may arise in connection with even the most well-drafted contract, and conversely the absence of a dispute does not prove that a contract was well-drafted. Recent empirical research confirms as a general matter that "M&A legal services remain a highly opaque and difficult area for even sophisticated clients to police."[1]

This article considers some of the ways in which transactional lawyers help their clients avoid and navigate disputes. In short, the presence of highly capable litigators and either a tradition of successful cooperation between those litigators and the firm's transactional lawyers or the presence of lawyers who successfully straddle those two disciplines (we refer interchangeably to such teams and individuals as "versatile M&A lawyers") appear to be strong indicators of quality. Moreover, in the face of the increasing commodification and specialization of legal advice, of encroachments from other professions and even automation, we believe that the versatile M&A lawyer is a compelling model for understanding and enhancing the value that all attorneys, irrespective of their area of expertise, provide their clients.

In the parts below, we first briefly review the evolution of the English, American, and continental European models of legal advice (limiting ourselves to France, for reasons of space and as it is the continental European example we

1. John C. Coates IV, *Managing Disputes Through Contract: Evidence from M&A*, 2 Harv. Bus. L. Rev. 295, 337 (2012).

know best),[2] before considering concretely how the versatile M&A lawyer model functions and adds value.

## I. History

### A. The English Model

The English market for legal services evolved into a system that distinguished between trial lawyers (barristers) and more advisory-oriented attorneys (solicitors).[3] Barristers were highly trained oral advocates, schooled in an ancient specialized educational system, the Inns of Court, followed by an apprenticeship to a more experienced barrister. Solicitors developed a more relationship-oriented and client-facing role.

Historically, barristers and solicitors were not members of the same firms. Barristers organized themselves in "chambers" for administrative purposes, while nonetheless maintaining independence from each other.[4] Solicitors practiced in firms, subject to conflicts of interest for the entire firm.[5] In the case of solicitors, these firms evolved into the now dominant form of legal service provider, the law firm. When a solicitor's client had a particular complex issue or needed to go to trial, the solicitor (and *not*, until quite recently, the client) would engage the barrister, either for pointed advice or as trial counsel.[6]

In terms of M&A, a consensual and banker and solicitor-oriented tradition continues in the form of the Panel on Takeovers & Mergers, set up in 1968, which regulates takeover bids in the United Kingdom. The Panel is comprised of bankers and a few deal lawyers (solicitors). Notably, the availability of takeover defenses is limited; even violations have historically been dealt with privately and with a "light touch," rather than through the adversarial system of

2. It should be emphasized that although it is tempting to speak of continental Europe as a single homogenous whole, and we cite certain similarities anecdotally in the introduction, each European jurisdiction continues to have its own very distinctive laws, rules, practices, and history, including as regards the "versatile" M&A lawyer.

3. John Flood, *Megalaw in the U.K.: Professionalism or Corporatism? A Preliminary Report*, 64 Ind. L.J. 569, 576 (1989) ("Barristers act as advocates; solicitors are primarily office lawyers.").

4. W. Erskine Williams, *The Barrister and the Solicitor in British Practice: The Desirability of a Similar Distinction in the United States*, 14 Tex. L. Rev. 55, 59 (1935) ("The practice of the barrister is purely a personal one and does not admit of anything resembling a partnership. He can have no partner to divide his labors or his responsibilities. A barrister does not deal directly with his client.").

5. Flood, *supra* note 3, at 476 ("The [barristers] are basically solo practitioners who share office space and expenses; [solicitors] usually form partnerships. . . . [T]he composition of a solicitor's firm is similar to that of an American attorney's.").

6. Judith L. Maute, *Alice's Adventures in Wonderland: Preliminary Reflections on the History of the Split English Legal Profession and the Fusion Debate (1000–1900 A.D.)*, 71 Fordham L. Rev. 1357, 1358 (2003) (noting also that "[s]olicitors—who are directly engaged by clients—are responsible for selecting and retaining the barrister, avoiding the difficulty American legal consumers have in identifying counsel competent to handle their particular types of problems"). More recently, major international English firms have developed arbitration practices, although we understand anecdotally that at least some of these practices are not always deeply integrated into the firm's fabric; perhaps this is a function of the historical cultural distinctions that underlie solicitors' firms.

the courts.[7] This less confrontational approach may reflect the more solicitor (and banker) centric nature of UK deal-making, consistent with the more clubby atmosphere that is sometimes said to prevail in UK corporate circles.[8]

## B. The American Model

Despite its common roots, the American model diverged significantly from the English model. As recently as forty years ago, Chief Justice Burger bemoaned the lack of specialization of American trial and appellate lawyers compared to English barristers, leading him to remark with impatience that "lawyers, like people in other professions, cannot be equally competent for all tasks in our increasingly complex society and increasingly complex legal system in particular."[9] This is not to say that early American corporate lawyers did not flirt with a solicitor-like model. Starting in the late nineteenth century, specialized firms devoted to serving the needs of financial and industrial organizations began to develop in a serious way. These were the original "white shoe" firms. At some of these firms, litigation, with its inherent rough-and-tumble, came to be regarded for many years as relatively low status and even "unseemly."[10] Under this conventional view, "great lawyering was to be done in the conference room, not the courtroom."[11]

7. Brooke Masters, *UK's Takeover Panel Is a Watchdog that Badly Needs Teeth*, Fin. Times (Nov. 6, 2015), https://www.ft.com/content/01c39f86-83b9-11e5-8e80-1574112844fd ("Three highly paid professional firms violated UK takeover rules and all they got was a 'statement of public criticism' four years after the fact. No fine, no ban, no measurable financial consequences."). The rule against frustrating bona fide offers or denying shareholders the opportunity to decide on an offer's merits effectively limit the target's use of litigation as a defense. *See, e.g.*, Takeover Panel, *Consolidated Gold Fields PLC*, 1989/7 (concluding that litigation brought by target directors without shareholder approval "clearly has the effect of frustrating the offer . . . and so is contrary to General Principle 7"); John C. Coates IV, Mergers, Acquisitions & Restructuring: Types, Regulation & Patterns of Practice 35–36 (2014) (unpublished manuscript available at https://ssrn.com/abstract=2463251) (noting that "courts play a background role in M&A" in the UK and that "[c]ontested litigation is rare").

8. The particular English environment is said to be one of the challenges for American activist hedge funds seeking to break into the UK market. *See, e.g.*, Anne-Sylvaine Chassany, *Bramson Fails to Convince Electra Investors*, Fin. Times (Oct. 6, 2014), https://www.ft.com/content/e6fc68de-4d4c-11e4-8f75-00144feab7de (describing failure of New York activist investor to gain board seat at Electra Private Equity, a London-listed trust, despite 20 percent position in the trust "after large institutional investors and members of the City's establishment rushed to critici[z]e the move").

9. Warren E. Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, 83 Fordham L. Rev. 1147, 1149 (2014) (the article was originally delivered as a lecture given by Chief Justice Burger in 1973 at Fordham Law School).

10. Andrew Tutt, *A Fragment on Legal Innovation*, 62 Buff. L. Rev. 1001, 1005–06 (2014) ("After all, these lawyers all came from the same Ivy League schools, went to the same churches, summered at the same vineyards, and considered litigation and contestation in the courts unseemly."); Eli Wald, *The Rise and Fall of the WASP and Jewish Law Firms*, 60 Stan. L. Rev. 1803, 1833 (2008) ("The white-shoe ethos and a desire to distance themselves from the lower ranks of the New York bar led the white-shoe firms to stay clear of low-status and otherwise "unbefitting" practice areas such as litigation, . . . [and] hostile takeover law. . . . Litigation was thought of as necessary only as the result of a failed transaction, not as yet another strategic tool at the hands of corporate clients.").

11. Wald, *supra* note 10 at 1833. As indelicate as it may be to acknowledge, much litigation may also have been less profitable than high-end corporate work.

With the waves of takeovers in the last quarter of the twentieth century, the New York legal practice model needed to evolve. The speed, stakes, and players involved in takeover and takeover defense practice resulted in a variety of changes to the traditional corporate law firm model, including an unprecedented primacy for litigation in what were otherwise corporate transactions. Gentlemanly or not, zealous advocacy of the client's interests prevailed, and in the no-holds barred battle for corporate control, resort to the courts was fair game.[12] Competing theories of the rights and interests of different stakeholders bred new conflicts between newly diverging interests.[13]

As the new legal technologies of takeover techniques, financing sources, and defenses were put into practice, they were often tested in the furnace of litigation. Thus, to take a prominent example, it is well known that Martin Lipton created the shareholder rights plan (or "poison pill") takeover defense.[14] What is sometimes less highlighted—but just as crucial to the pill's success—was the vindication of board-authorized shareholder rights plans before the Delaware Supreme Court by Mr. Lipton's litigation partners.[15]

Takeover litigation was (and remains) different than other commercial litigation. For example, it is marked by shorter deadlines that play out on a deal calendar of days and weeks rather than the usual litigation calendar of years.[16] Because the results are so critical to major strategic considerations of the client, the

12. *See, e.g.*, Felix Rohatyn, Dealings: A Political & Financial Life 165 (2010) ("Until the 1960s, nearly all mergers or acquisitions were negotiated on a friendly basis. . . . But in the 1970s, this unwritten 'social contract' was ripped up . . . .").

13. Were corporate boards gatekeepers or obstacles to a free market for corporate control? Were corporate managers entrenched rent-seeking agents or responsible stewards of the corporate project? *See, e.g.*, Robert Teitelman, Bloodsport 5 (2016) ("Raising the issue of self-interest, or conflict, or agency costs in regard to managers led to the same suspicion over the motives of shareholders, workers, bankers, lawyers, the media, politicians, and policymakers—nearly everyone with a hand in the game.").

14. Martin Lipton, *Twenty-five Years After Takeover Bids in the Target's Boardroom: Old Battles, New Attacks and the Continuing War*, 60 Bus. Law. 1369, 1372 n.9 (2005) (citing Martin Lipton, Discussion Memorandum: Warrant Dividend Plan (Sept. 15, 1982)).

15. *See* Moran v. Household Int'l, Inc., 500 A.2d 1346, 1355 (Del. 1985) (concluding that adoption of a poison pill is "within the authority of the Directors").

16. *See, e.g.*, Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 176 n.2 (Del. 1986) (The Delaware Supreme Court accepted appeal on a Friday, received opening briefs on the following Monday, reply briefs on Tuesday, and heard arguments on Thursday, rendering their decision the next day, i.e., briefing through decision in a single week.). As Herb Wachtell wrote in *The Business Lawyer* regarding tender litigation tactics:

> You have to commence litigation immediately. . . . You have to set up your teams for taking what could be two or three sets of simultaneous depositions, often in different cities. You have to be prepared to flow all the information you're getting from depositions and documents into affidavits and briefs almost simultaneously with the taking of the depositions and the review of the documents. You have to be scheduling your applications for temporary restraining orders, stays, preliminary injunctions and the like. You are essentially compressing into a span of four, five or six days what would normally be months and months, if not years, of typical big case litigation, including analysis of antitrust ramifications, industry studies, competitive lines of products and the like. It is unique.

Herbert M. Wachtell, *Special Tender Offer Litigation Tactics*, 32 Bus. Law. 1433, 1433 (1977).

corporate lawyer's customary stock in trade of close client contact takes on outsized importance compared to more traditional litigation.

A key to success in the emerging modern takeover practice was close collaboration between corporate lawyers and litigators. At its most successful this cooperation evolved to the point that corporate lawyers and litigators comprised a single deal team. This unified deal team model extended well before trial to the planning stage, as litigators became involved in the details of corporate transactions before a dispute arose, reviewing transaction terms for potential weaknesses, and contributing to the advice given to the board in anticipation of its decision.[17]

## C. The Continental Model

In certain continental jurisdictions, by contrast, the licensed practice of law evolved around litigators.

In France for example, *avocats* (attorneys) argued cases as well as provided advice. *Avocats* had a specific, recognized, and protected legal status. Similar to attorneys in the United States, *avocats* had an effective monopoly on the practice of law before major courts (accompanied in certain cases by appellate procedural specialists, the *avoués* (who have since disappeared[18])). In contrast to barristers in England, *avocats* had direct relationships with clients, counseling them in addition to litigating.

Until the two professions were merged in 1991, other legal advisors, the *conseils juridiques*, existed with some relatively light regulation after 1971, but without the same legal status.[19] While only French nationals could originally be *avocats*, anyone (irrespective of training or nationality) could "proclaim himself a *conseil fiscal* and give tax advice, or a *conseil juridique* and give general legal advice; no training in the law [was] required."[20] By 1971, access to the ranks of *conseils juridiques* by foreigners was limited to foreign attorneys already admitted

17. Teitelman, *supra* note 13, at 52 (observing regarding the methodology of Wachtell, Lipton to overcome these challenges in the 1980s, "[t]hey established . . . a way of working that deemphasized individual practice for firm-wide efforts; this worked effectively in M&A and other transactional situations"). In a slightly different context, Steve Friedman of Goldman Sachs, commenting on how the firm built its M&A practice in advance of its involvement in major M&A transactions in the 1980s, noted that "'[w]e came to the conclusion that if we could improve our cross-stovepipe communications, we would be far more formidable than anyone else. . . . We worked real hard to persuade people that their careers depended on cooperating with each other. . . . M&A was a catalyst for the whole firm's teamwork.'" Brett Cole, M&A Titans: The Pioneers Who Shaped Wall Street's Mergers and Acquisitions Industry 95 (2008).

18. Loi no 2011-94 du 25 janvier 2011 portant réforme de la représentation devant les cours d'appel.

19. *See, e.g.*, Virginia Kays Veenswijk, Coudert Brothers: A Legacy in Law 368 (1994) ("A milestone for practitioners of transnational law was the enactment of France's *Conseils Juridiques* Law of December 30, 1971, which raised these commercial law advisors to a regulated—and, therefore, more prestigious and recognized—status, like that of the *avocats* and *notaires* . . . ."). International firms such as Coudert Frères had lobbied for the *conseil juridique* law. *Id.* at 391.

20. Note, *Foreign Branches of Law Firms: The Development of Lawyers Equipped to Handle International Practice*, 80 Harv. L. Rev. 1284, 1294 (1967).

to practice law elsewhere in the world,[21] and the communications of *conseils juridique* with their clients were covered by the protections of the French equivalent of privilege.[22]

Many foreign practitioners residing in Paris adopted the status of *conseil juridique*, as did native French advisors whose practice was exclusively devoted to providing legal advice and negotiating transactions rather than litigation. *Conseils juridiques* were only permitted to partner with other *conseils juridiques* and *avocats* only with *avocats*, maintaining the independence of the various professions. This meant that French *avocats* had to resign from the Paris bar (and give up the right to appear in court) when they joined the local offices of American or English firms, which were comprised of *conseils juridiques*.[23]

As the French takeover market took off in the 1980s, *conseils juridiques* and a very few business-oriented *avocats* negotiated deals. Although many of the firms with international deal know-how were comprised of *conseils juridiques*, a handful of the local French firms comprised of *avocats* also became active as deal advisors. And as compared to their international competitors, the *avocats* enjoyed the advantage of being in a position to also litigate disputes before the French courts. For potentially contentious or actively hostile matters, *avocats* had a significant regulatory advantage.

As takeovers became more common, this headstart turned into a huge first mover advantage. Before the reform of French takeover law in 1989, each French takeover reinvented the wheel, without a coherent or consistent approach, leading to considerable conflict and litigation.[24] Much like the United States, contested takeovers played a key role in the market for corporate control in France. The highly litigious nature of these early takeovers provided the handful of *avocats* who were also business lawyers with the head start that they needed in the still young field. The ablest and most ambitious of them became references in takeovers. And so it is that lions of the French bar and legendary dealmakers like Jean-Michel Darrois, Jean-Pierre Martel, Jean-François Prat, and Thierry Vassogne built their reputations on a combination of their eloquence in the

21. Specifically, foreign lawyers could access the status of *conseils juridique* provided that the foreign lawyer's jurisdiction provided a similar courtesy permitting French lawyers to practice on a similar basis. *See, e.g.*, VEENSWIJK, *supra* note 19, at 369 (noting in this respect the successful lobbying by New York law firms with offices in Paris to amend New York's judiciary law to create the role of "foreign legal consultant" at this time).

22. *See, e.g.*, Décret n°72-670 du 13 juillet 1972 relatif à l'usage du titre de conseil juridique, article 58 (« *le conseil juridique ne doit commettre aucune divulgation contrevenant au secret professionnel* »). This can be contrasted with in-house legal advisors (*juriste conseil d'entreprise*) who to this day do not enjoy such protections in France.

23. *See, e.g.*, Richard Abel, *Transnational Law Practice*, 44 CASE W. RES. L. REV. 737, 782 (1994).

24. *See, e.g.*, PHILIPPE MERLE, AVEC ANNE FAUCHON, DROIT COMMERCIAL: SOCIÉTÉS COMMERCIALES 853 (2017) (« La multiplication des contestations engendrés par la complexité de la réglementation et ses lacunes face à la diversité des opérations, aucune OPA ne ressemblant à une autre, avait provoqué la réforme de 1989. ») (transl. by the authors: "The 1989 reform was motivated by the proliferation of disputes resulting from the complexity of the regulatory regime and its shortcomings in the face of the variety of transactions, no takeover bid resembling another.").

courtroom and before securities regulators *in addition* to their judgment and counsel in negotiations.

Notwithstanding decades of vigorous competition with the American and English firms, a handful of traditional French firms at the top of the Paris market have maintained the singular practice of combining litigation and transactional expertise for M&A lawyers. At these firms, from junior associates to senior partners, there is no inviolable demarcation between litigators and corporate lawyers. This is not to say that there are not many lawyers who specialize exclusively in one practice or the other, whether through aptitude, predilection, or expertise. But there is a tradition of and respect for dual competence which is unknown in the corridors of many international firms.

What remains striking in view of the strict boundaries between transactional lawyers and litigators found elsewhere in the world is that there continue to be individuals who manage to blur these lines at the highest level of certain continental legal markets and select firms that continue to support this tradition. One might attribute some of this to the relatively smaller size of these continental markets, lessening some of the commercial pressure to specialize. Continental European legal procedure may also be less technical and less complex than American litigation (and generally without the massive exercise of American-style discovery), facilitating litigation by corporate generalists. But it is also a legacy of the continental tradition of extraordinary lawyers who combine these two practices in ways that are highly effective for their clients, as discussed below.

## II. A Dual Practice and the Particular Nature of M&A

The conventional wisdom has long been that increased specialization is the key to attorneys' professional development. The commercial advantages of specialization are well known. As a publication of the American Bar Association puts it, "refining your firm's focus and narrowing in on a specialized area of practice can help you gain a competitive edge along with greater efficiencies and credibility."[25] Lawyers who hone in on a specific area of law are more likely to be seen as experts, leading among other things to increased referrals.

Putting aside the possible commercial advantage, lawyers who specialize may be more likely to develop actual substantive expertise, translating into greater competence and better results for clients. In a legal market as large, competitive, and sophisticated as the United States, some degree of specialization is a professional imperative for most practicing lawyers.

What then of the versatile M&A lawyer? If increased specialization results in better marketing and greater expertise, what added value does the traditional continental approach of select individuals combining transactional and dispute resolution expertise in a single person or closely knit team bring?

25. Steven M. Gursten, *Niche Specialization for Lawyers*, L. Prac. Today (Mar. 2011), http://www.americanbar.org/content/dam/aba/publications/law_practice_today/niche_specialization_for_lawyers.authcheckdam.pdf.

As discussed in the introduction, anticipating and then minimizing disputes—or, alternatively, increasing the odds of delivering success efficiently—is of considerable value to clients. If a core function of transactional lawyers is to help avoid potential disputes, then expertise in dispute resolution would appear to be essential to performing that function effectively. To be effective, this dispute resolution expertise should include an understanding of the most common sources and causes of disputes and how disputes play out in practice.

The particularly contentious nature of M&A further highlights the importance of the deal lawyer's dispute-minimizing function. Based on this insight, the versatile M&A lawyer may simply reflect a different (and more relevant) solution to the problem of specialization. We explore these questions, as well as the specific ways in which lawyers help their clients prevent or minimize disputes throughout the life of a transaction, in more detail below.

## A. M&A Is Rife with Conflict

M&A has been characterized as a "bloodsport."[26] In a strategic transaction, the stakes are high for all concerned: careers, reputations, and business and financial fortunes and are on the line. In addition to the high stakes, the one-off relationship between a typical seller and buyer in an M&A transaction may particularly lend itself to disputes. Opportunities and incentives to resolve disputes or even to be reasonable in deference to the greater relationship are often absent in M&A, with the calculus changing (and the incentives to cooperate often declining) after each successive step of a transaction, from signature through closing to the end of the survival period for indemnification rights.

Consistent with the foregoing, it has been estimated that as many as one third of all private M&A transactions give rise to a dispute between the parties.[27] And based on one survey sample, as many as two thirds of all claims in M&A disputes exceed 10 million.[28] Public transactions can if anything be even more litigious.[29] Disputes create uncertainty and even aside from the resulting damages, litigation itself is often distracting for management and expensive. Given the stakes and the high probability of a dispute in M&A deals, minimizing disputes has significant value.

26. *See, e.g.*, Teitelman, *supra* note 13.

27. Gregory Wolski, *The Answer (Not the Devil) Is in the Details, Mitigating Risks of Post-transaction M&A Disputes*, 17 Bus. L. Today, Nov./Dec. 2007, 53, 53 ("[I]n our estimation, about one-third of all closed transactions end up in a dispute between the parties."). In the U.S. market, moreover, the spectre of class action stockholder litigation substantially increases the frequency of deal litigation.

28. Accuracy, An Autopsy of Cross-Border M&A Disputes 5 (2015) [hereinafter Accuracy].

29. *See, e.g.*, Frank Aquila & Melissa Sawyer, *The Way Way Back: 2013 in Review and What to Expect in 2014*, M&A Law., Nov./Dec. 2003, at 1, 1 ("Deal litigation continued to be 'business as usual' in 2013, with the percentage of public deals subjected to lawsuits being in the high 90th percentile and climbing.").

### B. A Core Function of Deal Lawyers Is to Avoid Disputes and to Do So They Draw on Dispute Resolution Expertise

A core function of deal lawyers seems to be to assist their clients in averting or at least seeking to minimize potential disputes.[30] This is consistent with transactional lawyers' common sense view about what they actually do: in deal lawyers' own words, one of their primary functions is to "protect" their clients.[31] This includes vis-à-vis the other parties to a transaction, third parties, and relevant regulators.

A review of what effective M&A lawyers actually do confirms deal lawyers' role in minimizing disputes. For example, academic studies consider the application of litigation lessons to corporate deals as one of the hallmarks of the quality of M&A law firms, with some firms performing markedly better than others.[32] Consistent with this, client memos and seminars by prominent practicing M&A lawyers show a significant focus on recent case law, from the latest major decisions affecting public transactions to courts' interpretations of common contract terms.[33] Similarly, a best practice is for deal lawyers to involve litigators at an early stage in their deal teams to anticipate and prepare for post-deal disputes.[34]

Are there other ways for lawyers to efficiently combine the dealmakers' knowledge and experience of what is commercially possible with the litigator's insight into risks?

One way to combine deal and deal dispute expertise is for law firms to train deal lawyers in deal litigation. A handful of U.S. M&A shops expose their young deal lawyers to deal litigation. This practice recognizes that no matter its utility, specialization also carries inefficiencies, and that providing young lawyers with some general experience in other areas of the law makes them better lawyers. This training method can be compared to the application of industrial organizational methods to the professional sphere starting in the first half of the twentieth century (for ex-

30. *See, e.g.*, Coates, *supra* note 1, at 296 ("[C]ore to the [transactional lawyer's role as an advisor] is the anticipation of disputes.").

31. *See, e.g.*, Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 Yale L.J. 239, 242 (1984) ("When my question—what does a business lawyer really do—is put to business lawyers, the familiar response is that they 'protect' their clients, that they get their clients the 'best' deal.").

32. *See, e.g.*, Coates, *supra* note 1 (empirical study of litigation lessons in M&A contracts demonstrating that the quality of lawyering varies significantly among advisers and taking as a hallmark of quality a firm's taking into account of litigation lessons); John C. Coates IV, Allocating Risk Through Contract: Evidence from M&A and Policy Implications 38 (2015) (unpublished manuscript available at https:ssrn.com/abstract=2133343) (noting significant empirical variations in M&A risk allocation clauses based on law firm experience).

33. *See, e.g.*, Practicing Law Inst., Seminar, Mergers & Acquisitions 2017: Advanced Trends & Developments (Jan. 26, 2017) ("This program will help you stay up-to-date on M&A activity and cutting edge topics and developments regarding . . . important developments affecting M&A litigation in Delaware."); John Dodsworth, *Macfarlanes M&A Weekly Update* 11–17 (Nov. 2016); Martin Lipton, Daniel A. Neff, David A. Katz & Mark Gordon, Memorandum: "Just Say No"—The Long-Term Value of the Poison Pill (Dec. 17, 2015) (on file with *The Business Lawyer*); Daniel E. Wolf, David B. Feirstein, Laura A. Sullivan & Elizabeth A. Freechack, *Divorce, Wall Street Style*, Kirkland M&A Update (May 23, 2016), https://www.kirkland.com/siteFiles/Publications/Divorce%20_Wall_Street_Style.pdf.

34. Accuracy, *supra* note 28, at 6 (suggesting that "purchasers would be wise to include forensic, litigation and arbitration professionals in the financial due diligence team and ask them to identify and address potential areas of post-deal disputes before the deal").

ample, through rotating young lawyers among different corporate practice areas, with the intention of creating a "better lawyer faster").[35]

There are different ways that this can be done in the American context. One is for the transactional lawyers to stick around when a deal they were involved in goes into litigation. Given the highly technical nature of American procedure and the formalized traditions of American oral advocacy, deal lawyers will generally be most effective when they do so as participants behind the scenes.

Well versed in the technical legal issues that underlie M&A disputes, deal lawyers can bring to bear their experience and insights to assist in the crafting of substantive arguments. Deal lawyers can also serve as fact experts, providing litigators with insights into the negotiations and background of the dispute (as well as learning from the dispute and reflecting upon how they might do things differently). More generally, given some litigators' relative ignorance of the real issues driving M&A transactions, M&A lawyers make great internal experts in M&A disputes, guiding their litigation colleagues in navigating the more global issues of the equities of the dispute, asking questions and even digging into the record, as well as participating in the preparation of witnesses and cross-examinations. Finally, deal lawyers' skill as negotiators and strategists can be invaluable in settlement negotiations.

In the following sections, we briefly consider how lawyers effectively merge transactional and litigation advice in practice in an M&A transaction.

### i. Diligence, Drafting, and Negotiation

Applying dispute wisdom in a negotiation means taking into account the latest deal technology and case law. It means doing the work of coordinating a team with different areas of expertise, and drawing on and applying the know-how of different experts, including litigators, for purposes of diligence, drafting, and informing negotiating positions. This includes a sensitivity to issues that arise in diligence and seeking to negotiate representations that reflect the business risks relevant to the business. More specific to the public deal context (although not exclusively so), it means anticipating and preparing for possible conflicts with shareholders or third parties (such as regulators or other bidders).

But it also means focusing on what really matters, by discerning between what can be conceded and what to fight for.[36] It is all well and fine to have a three-page representation on intellectual property in seller's initial draft of the SPA, but at a certain point it may be necessary to concede certain points. As a few prominent deal lawyers put it in a classic M&A treatise, "a Buyer can insist on obtaining as many and as extensive representations in . . . [a] case [with a highly com-

35. William D. Henderson, Symposium, *Three Generations of U.S. Lawyers: Generalists, Specialists, Project Managers*, 70 Md. L. Rev. 373, 376 (2011) (citing Robert T. Swaine, 2 The Cravath Firm and Its Predecessors 1819–1948: The Cravath Firm Since 1906, at 4–5 (1948)).

36. Great transactional lawyers also provide business advice about price, about price mechanisms, and about negotiating leverage. But that is for another article about the line between corporate lawyers and business people or bankers.

petitive and time-sensitive auction process] as in [an uncompetitive process where the Buyer is paying a premium], but it would probably be a mistake to do so if the Buyer is seriously interested in signing and closing the deal."[37] From a purely transactional perspective, this exercise of judgment can be distilled to the art of proposing solutions that further one's client's interests while being commercially acceptable to the other side and adapted to the deal context.

The approach of finding mutually acceptable solutions can be in tension with other aspects of the advice a client expects, including the deal lawyer's function of anticipating and limiting the risk of a dispute. It is not enough that the solution is commercially acceptable to the client in terms of getting the deal done; the client also needs to rely on the attorney's judgment with respect to the scale and likelihood of the risk. To get this calculus right—the art of conceding points taking into account the real risks while adapting that calculus to the realities of the deal (the leverage of the parties, deal timing, etc.)—requires a highly nuanced understanding of the litigation risks.[38]

As for a deal lawyer's incentives to underestimate risks, as a highly experienced M&A practitioner acknowledged, "when you're under pressure to get a deal done, no one is anxious to raise the additional issue of how to resolve a potential lawsuit—especially when it relates to something that hasn't yet occurred and that everyone is hard at work to prevent from happening."[39] As he acknowledged, this is not an optimal result: "that's just where deal lawyers go wrong—it is their problem, and they shouldn't duck it."[40]

Applying dispute know-how effectively to a deal is an art; if the deal lawyer is too inflexible, it can be an impediment to getting the deal done, but if the deal lawyer is too yielding, the client will bear unnecessary risks. Lawyers with first-

37. Lou R. Kling & Eileen T. Nugent, 2 Negotiated Acquisitions of Companies, Subsidiaries & Divisions § 11.02[2], at 11-9 (2006).

38. For example, empirical studies show that "[m]ore experienced bidder law firms are *less*—not more—likely to use [risk allocation provisions], and the deals on which they work exhibit less variation in [risk allocation provision] use than deals staffed by less experienced lawyers." Coates, *supra* note 32, at 38. This may be explained by "less expert [law firms] . . . produc[ing] inefficiently (overly) complex or extensive [risk allocation provisions], for the same 'grand-standing' reasons that lead them to use [risk allocation provisions] that are inefficient." *Id.* at 9. In contrast, "more expert [lawyers] . . . may better be able to advise clients on how to assign a value to [risk allocation provisions], and to the disputes that complex or extensive [risk allocation provisions] may generate, which may make simpler or less extensive [risk allocation provisions] more efficient." *Id.*

As an example of how cross-practice exchanges can improve M&A results, deal lawyers can be usefully counseled by litigators based on the relevant tribunal provided for in the contract, i.e., who will resolve the dispute if one arises—lay jury, generalist judge, specialist judge. or arbitral panel. This variable will determine in turn whether a party (or the party's lawyers) should negotiate hard changes of technical language that may be meaningful to experts but not to a lay juror. Using such a filter can also lead deal lawyers to greater use of simple illustrative exhibits for complicated price adjustments, etc.

39. James C. Freund, *Calling All Deal Lawyers—Try Your Hand at Resolving Disputes*, 62 Bus. Law. 37, 43 (2006); *see also* Coates, *supra* note 32, at 9 (noting that an alternative hypothesis for why experienced deal lawyers may negotiate simpler and less extensive risk allocation provisions is "shirking").

40. Freund, *supra* note 39, at 43.

hand litigation experience bring a more complete toolkit to this task, giving them and their clients an advantage in getting the calculus right.

### ii. Renegotiations Between Signing and Closing and Post-closing Disputes

Before a transaction is signed—if it is to be signed—the parties and their advisors are typically all in relatively good humor and all pulling in the same direction. There may be some sharp elbows as the parties fight for various terms or the lawyers defend their clients' interests but the ambiance is generally positive and constructive. After a deal is signed, that equilibrium can change. The target's management may begin to shift allegiances to the buyer. Key constituencies such as customers or equity markets may react poorly. Or the market environment can change. Buyer's or seller's remorse may set in, and the parties may regret some of what they negotiated. Or worse yet, realize that they did not both have the same understanding of the agreement they signed.

This is not as uncommon as one might expect, particularly where management of both companies will continue to work together in a significant way. Although such disputes are often resolved without litigation, such disagreements and the resulting renegotiation of the transaction are generally extremely delicate, as they call into question the deal that was just very publicly announced. A strong dispute resolution practice that is able to work rapidly and efficiently with the corporate team is essential to effectively resolving such tensions. For example, the deal team must be sensitive to the leverage of the dispute (and know how to use that threat in a way that is not counterproductive).[41] Finally, having deal lawyers with good dispute judgment and deal-trained litigators can also play an important signaling function in such negotiations.

Many of the same issues apply to post-deal disputes as to disputes between signing and closing, with the difference that the leverage of actually getting the deal done is no longer present. The parties may have fewer disincentives to litigation as a result.

At any phase of a transaction, litigation may become advisable or simply unavoidable. It is at this point that the preparatory work often matters most, as the cooperation between litigators and deal lawyers enters a new phase.

## III. Conclusion

It has been suggested that the division between barristers and solicitors was largely the result of "historical accident, driven by class distinctions and economic turf protection,"[42] rather than for example any assurance of greater quality. Similarly, the worldwide trend towards certain forms of attorney specializa-

41. Howard J. Aibel, *Transnational Transaction Commercial Dispute Resolution*, 89 Am. Soc'y Int'l L. Proc. 563, 563 (1995) (concluding that involving deal lawyers is key "if what you want is a business solution to a business dispute, a solution or resolution that permits continuation of commercial relations, rather than a settlement of what can become a rancorous and expensive quarrel").

42. Maute, *supra* note 6, at 1358.

tion appears in some cases to be driven by commercial imperatives, economic incentives created by various law firm business models, habit and cultural prejudices, and a path of least resistance, independent of any necessary correlation with improved quality.

As a result, in the rush to specialization, outside counsel has at times forsaken the role of trusted advisor.[43] A broad understanding of the legal and business landscape or even a given practice area provides attorneys with greater insight into strategy, multiplying opportunities to add value. Great transactional lawyers bring more than just a litigation perspective; they are generalists, providing insight into and identifying issues relative to tax, general risk management, business issues, securities law, and a variety of other subjects. In many cases counsel at firms with a minimum critical mass of deal and litigation flow has access to a trove of wisdom in his or her area of expertise—the firm's litigation practice.

Deal lawyers with dual experience and firms with integrated practices bring to the table the ability to consider and propose litigation-limiting solutions in the heat of a negotiation that are tailored to the transaction. Deal lawyers whose vision is informed by dispute experience naturally test proposed solutions against their judgment of possible interpretations (including by a court) in the event of a dispute. Such a deal lawyer has an informed view of due diligence risks. Finally, such a deal lawyer also may have more realistic expectations regarding the probability and potentially negative outcome of a dispute and how to minimize potential sources of friction. Put differently, a deal lawyer with first-hand experience of deal failure (for present purposes, deal disputes) has invaluable insight into how to better manage that risk going forward.[44] A deal lawyer who has had the opportunity to devote some time to litigation gains other skills and insights as well. The confrontation and competition of litigation sharpen deal lawyers' technical skills and rigor.[45] As one senior litigator of our acquaintance was

43. Specialization involves sacrificing a larger frame of reference. In the United States, a true generalist vision and bird's eye perspective of legal practice in some cases increasingly belongs to the American in-house general counsel, whose role is to manage outside lawyers in a given legal matter. *See generally* John C. Coates, Michele M. DeStefano, Ashish Nanda & David B. Wilkins, Symposium, *Hiring Teams, Firms, and Lawyers: Evidence of the Evolving Relationships in the Corporate Legal Market*, 36 L. & Soc. Inquiry 999 (2011). Concomitant with the increasing specialization of outside legal counsel, in-house counsel has continued to gain in prestige and power. In many areas of the American legal market, the general counsel's transversal view has eroded outside counsel's role as trusted advisor to that of a "mere" service provider. Henderson, *supra* note 35, at 379 ("With the rise of the general counsel position in the 1970s, in-house lawyers assumed the position of trusted advisors to the company's owners or senior executives while outside law firms were called upon for their specialized skills and technical experience."). As such, the outside lawyer has become far more subject to commodification and pricing pressure. *Id.* at 381 ("The end of the specialist era is marked by general counsel's use of the overcapacity of specialists to drive down overall costs to their corporation.").

44. *Cf.* Robert F. Bruner, Deals from Hell 13 (2005) ("[T]he study of failure is the source of thoughtful advances, Medicine began with the study of pathology. Engineers study mechanical and structural failures. . . . To my knowledge, this book is the first focused study of failure in mergers and acquisitions.").

45. *Cf.* Alex Bhattacharji, *Die Antwoord: The Real Zef Rappers of Beverly Hills*, N.Y. Times (Nov. 29, 2016), https://www.nytimes.com/2016/11/29/t-magazine/entertainment/die-antwoord-zef-rap-hollywood.html?_r=0 ("'There's a Zulu saying that goes, 'Spear sharpens spear,' says Ninja. 'The competition was ill.'").

wont to remark, you're "not a real litigator until you have lost a case"; in the same vein, you're not a real deal lawyer until one of your deals has been litigated.

The value proposition for clients of integrated litigation and transactional practices, particularly as regards technical or litigious practice areas, such as M&A, is clear. Disputes are expensive, distracting, and uncertain. Outside of (or at least less directly (apparently) associated with) the bottom line or professional advancement, but perhaps of equal importance, our experience is that an expansive practice, providing a 360° perspective on our areas of expertise, is more engaging for the lawyers.

To be clear, we are not suggesting that it is necessary or always advisable in today's legal market for a single person to simultaneously litigate and do deals—in any event those individuals are few and far between even in continental jurisdictions, and their training is resource-intensive. Tightly functioning teams may be equally (or more) effective at providing high quality legal advice.[46] Our experience of the combination of these practices has been at the top of our respective legal markets. But we have reason to suspect that these lessons may be equally relevant outside of the M&A context and throughout the profession.[47]

We are not calling into question the reality that for the vast majority of attorneys, specialization is very clearly the present and future of the (outside) legal market. In an increasingly complex legal and regulatory environment, attorney specialization is necessary and inevitable, and contributes to quality. The more precise and compelling question may rather be how best to "carve" specialization: what is the combination of skills and aptitudes, whether within a single individual or through teams of lawyers, that fosters the best outcomes in the highest-stakes situations? The versatile deal lawyers of the French model, and multi-disciplinary deal teams of some U.S. shops, are in some sense no less specialized than other lawyers; their specialization is just of a different nature, bridging the gap between boardroom and courtroom, and joining the skills of deal lawyers and litigators.

46. A variety of other questions are essential to evaluating the effectiveness of such teams, including the firm's economic model, its structure, its culture, and its history. Litigators and deal lawyers are not always cut from the same cloth, and bridging the distance between them is not simply a matter of recognizing that it would be a good thing to do. Similarly, teams bridging different areas of expertise may be even more effective if their work is structured in such a way that they work routinely but not exclusively with each other.

47. *See, e.g.*, Sally Harlow, *Why Solicitors Remain the Best at Delivering Uncontested Probate*, Boodle Hatfield (Dec. 9, 2016), http://www.boodlehatfield.com/the-firm/articles/why-solicitors-remain-the-best-at-delivering-uncontested-probate/ (noting the potential for disputes even in the most straightforward uncontested probate, and arguing for an attorney's usefulness in advising on "the options available to the beneficiaries and ways to prevent the potential conflict from escalating").