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16A Journey, Suite 200
Aliso Viejo, CA 92656-3317

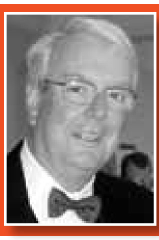
toll-free 877·626·2776
local calls 949·859·4040
fax 949·855·2973

MANAonline.org

THE ART OF THE DEAL

BUYING, SELLING AND MERGING AGENCIES

EDITORIAL | JACK FOSTER



JACK FOSTER

Jack Foster, president of Foster Communications, is the editor of **Agency Sales Magazine**. In addition to his duties in working with MANA, Jack writes for several other major marketing publications. His experience in publishing includes writing, editing, photography, production and printing. This, combined with Jack's understanding of the independent sales rep function, can provide the winning formula for your communication needs. Email: **jfoster@manaonline.org**.

Buying or selling a business can be a stressful event. It is definitely not something that business owners should attempt without professional help from well-qualified advisors. The key to making any transaction a success on both sides of the table is to involve skilled legal and financial advisors early in the process.

There are three parts of a typical buy-sell process: business valuation, transaction structure and the transaction mechanics — making it work. The following are important aspects to all steps of the process.

Documentation

A buy-sell agreement is frequently the key document in a rep firm's business continuation plan. Mel Daskal describes the role of the agreement in more detail. "These agreements establish a fair price for an ownership interest in a closely-held business and ensure an orderly business transition. They usually provide that the business (or a portion thereof in the case of multiple owners) will be sold (or offered for sale) at a specified price; and under certain circumstances, which are detailed in the agreement. The primary circumstances ("triggering events") are: death, disability or retirement (or a sudden uncontrollable desire to prepare tax returns for a living).

"As most readers know, these agreements are designed to protect business owners and investors by providing agreed-upon arrangements not only in the event of death, disability or retirement, but also disagreement, firing, resignation, bankruptcy, dishonesty, divorce, insolvency — or simply the desire to terminate one's interest in the business for any reason. Perhaps the biggest mistake you can make is to not have such an agreement the *moment there is more than one owner!* The second biggest mistake is to not cover *all* of the just-mentioned contingencies." (**ASM | October 2007 | Financial Fax | by Melvin H. Daskal)**

Legal Aspects

There are a number of legal agreements to consider when beginning the buy-sell process. In a recent two-part Agency Sales article, Gerald Newman provides a summary roadmap of the issues, steps, and mechanics involved in the purchase or sale of a sales representative agency. According to Newman, legal aspects to consider include a letter of intent, confidentiality agreements, third-party consents, and a well-thought due diligence plan.

"Most transactions begin with a so-called 'letter of intent.' The purpose of the letter of intent is to set out the basic business terms of the deal, such as whether it will be a sale of stock or assets, the purchase price, and how and when the purchase price will be paid. Letters of intent are typically "non-binding." In other words, they typically are not enforceable in court. Most buyers, even after they sign a letter of intent, are not willing to sign a binding agreement until they have been able to learn more about the target company through the "due diligence" process. While a letter of intent may not have any legal effect, it does have a psychological value. Buyers and sellers should not expect to easily renegotiate the purchase price (or any other significant term) once set forth in a letter of intent."

When it comes to confidentiality, Newman adds these thoughts. "In most cases, buyers and sellers want to keep a potential transaction confidential. Buyers don't want to invite other bidders, and sellers don't want employees, customers, principals, or competitors to know the business is for sale (particularly since the transaction could fall through). Further, as part of the due diligence process, a seller will often have to disclose trade secrets or other sensitive information to the buyer. From the seller's point of view, it is imperative that confidential information be protected from disclosure or improper use by the buyer — particularly if the buyer is a competitor. The need for confidentiality is often covered in a letter of intent. If handled this way, the letter of intent must make clear that the parties intend to be legally bound by its confidentiality provisions. However, where confidentiality is a major issue, it is best handled in a separate written agreement, typically referred to as a 'Confidentiality Agreement.'"

Reiterating the importance of doing your homework, Newman suggests a thorough investigative process. "Due diligence is the investigative process associated with purchasing a business. Some buyers even 'camp out' at the seller to complete the investigation. For the buyer, due diligence is often crucial, as it is the only way to 'look under the hood' of the business and make sure it really works, The key to making any transaction a success on both sides of the table is to **involve skilled legal and financial advisors early in the process**.

is worth the price agreed upon by the parties, and that the business the buyer actually ends up owning is the business the buyer thought he was purchasing.

"In fact, buyers who fail to adequately conduct due diligence may be barred by a court from claiming after the sale that something about the sale was improper.

"On the other hand, due diligence can be quite burdensome for the seller. Sellers will often spend weeks digging materials out of files for the buyer to review, and making its offices, staff and records available to the buyer. At the end of the process, each party should know everything about the business. For the well-organized seller, the process is not too painful. For less sophisticated sellers, the due diligence process often involves getting the company into the shape it should have been in the first place."
(**ASM | May and June 2008 | A Roadmap to Success | by Gerald M. Newman)**

Available Resources

The bottom line is preparation. Utilize the available resources, retain appropriate counsel, and do your homework. If you follow these steps, you are that much closer to a successful transaction.

In addition to mapping out and fine-tuning a thorough plan, there are a number of resources available to assist you in many steps of the way. First and foremost, MANA Members have access to MANA's executive team, including Bryan Shirley, who prior to becoming MANA's president and CEO, spent considerable time consulting businesses on rep firm mergers and acquisitions. In addition, there's a list of qualified MANA attorneys who are well-versed in the culture of the rep business and specifically in rep firm buy-sell transactions. MANA Members can access a multitude of online resources including special reports and article reprints. Non-members can also purchase these reports at MANAonline.org. Remember, due-diligence is a key part of any sale, purchase or merger plan.

Be sure to read the inputs provided in Bryan Shirley's editorial (page 3) and in Jay Ownby's column (page 7). And when questions remain, call MANA for additional guidance.

The following is a summary of available online resources that can be found at MANAonline.org. Special Reports are available for free to MANA Members in the Member Area of the site. Non-members can purchase reports by clicking on the Publications link at the top of MANAonline.org.

MANA Special Reports

Valuing the Rep Firm
How do I place a value on my firm? MANA addresses the issue from a variety of viewpoints in this nine-chapter report with inputs from accountants, attorneys, financial consultants, and industry experts. Includes case studies of actual rep firm sales. This report is an excellent companion to either of the following reports.

The Valuation and Sale of an Entire Manufacturers' Sales Agency
This timely report contains the latest information available from the rep profession's leading experts on the valuation and sale of an agency. It addresses valuing the rep firm from the standpoint of both buyers and sellers, selling to the family, divorce, and the Internal Revenue Service. It also addresses advance planning, mergers, acquisitions, joint ventures, competing lines, payment options, and more. This report is an excellent companion to MANA's Valuing the Rep Firm Report.

Selling Part of Your Rep Firm To Your Employees or Partners
This report addresses the issues unique to selling your rep firm to your employees or partners. It is a companion report to The Valuation and Sale of an Entire Manufacturers' Sales Agency and Valuing the Rep Firm.

Financial Fax Article Reprints

From buy/sell guru Mel Daskal, these articles are available to Members in the Member Area of the MANA website:

- Selling or Buying a Business
- Buy-Sell Agreements
- C Corporations
- S Corporations
- Limited Liability Companies

Special Agency Sales Magazine Article Reprints

A Roadmap to Success
Legal Aspects of Buying or Selling a Rep Firm — Part I
by Gerald M. Newman, Esq.
ASM | May 2008

A Roadmap to Success
Legal Aspects of Buying or Selling a Rep Firm — Part II
by Gerald M. Newman, Esq.
ASM | June 2008

ANOTHER VIEW | WHEN MANUFACTURERS MERGE

Do you think that your principals look at your line card before acquiring a new company that may end up being a top competitor of one of your lines? **When manufacturers merge, consolidate or otherwise effect a major organizational change, it's hardly unusual for manufacturers' representatives to get lost in the undertow.**

Not so when **Kanthal Heating Systems of North America** acquired and combined several U.S. OEMs of industrial heating elements/equipment and their distribution networks. What resulted was a rep-friendly environment that has seen a maximization of the manufacturer's sales efforts, continued sales growth and increased business.

At least that's the way **Chris Clowes**, who heads Kanthal's North American operations, describes what transpired.

In the mid and late 1990s Kanthal acquired and combined several U.S. OEMs of industrial heating elements/equipment and their distribution networks to create Kanthal Heating Systems North America. These products are used in high-temperature furnaces and ovens found in captive and commercial heat-treat operations, primary and secondary metals processing, glass manufacturing, research laboratories and similar operations.

Revenue and market share had eroded following the combination of the acquired organizations and the company's management decided a change in direction was called for. Clowes, who at that time was in charge of heating element sales worldwide for Kanthal, was appointed to run and grow Kanthal Heating Systems in North America. "Given the way people buy today, coupled with existing logistics, we found it was no longer necessary to have stocking distributors — which is the way we did it in the past. Now we can get product into the hands of customers in just a couple of days." For those reasons Clowes decided to investigate the use of reps to provide his company with an alternative distribution method.

Reps Provide a Presence

To overcome the company's market erosion, "We decided that we had to have a greater market presence. We had three salesmen who were handling the entire United States. They had relatively few customers who were purchasing tons of materials. To effectively market our products, we needed people in the field and regularly knocking on doors. What wasn't working was someone flying in for a fleeting visit and then not returning for several months. Sure, we could have placed 20 of our own people to do the job, but then we'd have to live through a long gestation period as they settled in and got to know the territory and the customers. Then it might take as long as a year for business to develop. Considering all those points and the expense of supporting a direct sales staff, we decided the most efficient business model was to work with independent manufacturers' reps." Given the time and effort that would be needed to find and establish a nationwide rep network, Clowes contacted MANA member **Koch Group, Inc.**, located in Addison, Illinois, an industrial marketing consulting firm that specializes in manufacturers' agent recruitment. According to Clowes, "Looking at the time and the experience needed to get the job done properly, we decided to look outside our organization."

Clowes appears to have partnered with a like-minded organization when he chose Koch Group, owned by partners **Mike Hannigan** and **Bob Groble**. According to Bob Groble, senior partner, "When we were in our formative years in the late 1960s, we decided to focus on assisting the smaller- and mid-sized manufacturers of engineered products or components. That is, manufacturers with annual sales from a few million dollars up to $40-$50 million. The smaller the annual sales, the less likely a manufacturer was able to afford to man, train and support a direct sales force."

Prior to beginning work with Koch Group, Clowes explains, "We did some work on our own in order to determine how best we should proceed. Using SIC codes, we mapped out our potential customer base."

MANA Resources

In assisting clients such as Kanthal to set up its rep network, Koch Group's partners explain that their company uses a variety of sources — including MANA — in lieu of any type of "old-boy network" to identify prospective reps. "The 'old-boy networks' are just that, older reps that someone knows or has some knowledge of. The 'old-boy network' may never find the available rep who truly offers a better fit for what a client requires to effectively sell their product or service. We use a wide variety of proprietary methods to attempt to identify all the agencies in a specific territory that may meet our clients' needs. We use a combination of electronic data sources, SIC code searches, hard copy data sources and specialized tools to allow us to identify agencies that are truly good potential fits for our client before we contact them."

Included in those sources is the **MANA Online Directory** that is available to members and associates. (The Directory is accessible by visiting the MANA website at **MANAonline.org.**)

Koch Group worked with Kanthal to identify and prioritize high-potential territories for agent recruitment to ensure territories that had the most potential value to Kanthal were filled first.

Koch Group personnel counseled Kanthal on the need to treat manufacturers' agents as "valued sales partners." This approach encompasses:

- Providing exclusive sales territories.
- Transferring existing business to selected agents (i.e., no house accounts).
- Providing product and application training.
- Conducting joint sales calls with the agents on a scheduled basis.
- Developing and honoring a fair and equitable agent contract.
- Generating and providing leads for the agents.
- Communicating openly and frequently with agents.

While all of the above practices/philosophies are of critical interest to principals and reps, a few of them stand out a bit more than others. When asked to comment on some of the subjects, Clowes and Koch Group's partners were hardly shy:

House accounts — According to Clowes, "Shortly after deciding we would be best served by working with a network of manufacturers' representatives, we attended a MANA manufacturers' seminar. It would be arrogant of me to say we didn't learn anything as a result of our participation in that session. One of the things we learned was that when it comes to house accounts, our goal is always to create a 'win-win' scenario. And that was something we couldn't achieve by holding on to house accounts."

According to **Mike Hannigan**, managing partner, "We counsel our principals to turn over all house accounts, as that is always a source of contention between principal and rep. Usually, it is fairly easy to get that done. Once in a

Conducting the Recruitment Process

Most of the more than 150 agencies interviewed for this assignment commented to Kanthal that in their agent experiences they had never been through such a thorough and well-organized agent selection process.

Koch Group's personnel completed a number of specialized activities to help ensure the success of the Kanthal agent recruitment assignment that included:

- Sending out the custom agent mailings to inform them about Kanthal's representation opportunity.
- Screening responding agents by telephone to determine their fit for Kanthal's needs.
- Requesting and receiving back from responding agents principal and customer information and available agency background information.
- Agreeing upon and prioritizing agencies to schedule for interview in each MANA territory.
- Structuring, scheduling, managing and participating in the agent interviews.
- Providing a comparison for agencies of interest and discussing the comparison with Kanthal.
- Working with Kanthal to select and contract with one agency in each selected territory.
- Providing Kanthal with a list of target accounts for use by the newly contracted with agents.

Koch Group, Inc. is an industrial marketing consulting company assisting smaller and mid-sized manufacturers and industrial service providers for more than 40 years, providing results-oriented assistance specializing in market research, planning, implementation, target marketing, manufacturers' agents, and industrial website development. Phone: 800·470·7845; website: **kochgroup.com**.

> "A rep that is treated fairly usually will make that up to the principal **with increased and incremental sales."**

while, however, a house account is so important to a principal that they can't just turn it over outright as it would cause a real problem for the company if the account was not handled properly or, worse yet, lost. We then arrange to have the principal turn over the house account after six months or a year of effective selling efforts by the rep at other accounts. By following this course of action, the rep knows he will get a house account eventually based on his performance. Generally he is okay with that, as he believes he will perform well and gain the account. When the door is totally closed, reps remain upset."

He adds, "Sometimes manufacturers maintain house accounts and never change. Unless some very good reason for this is communicated to the rep, it will remain as a bone of contention between the rep and principal."

Incentives for reps — Clowes explains, "While we initiated an effort at shared territorial development fees with some reps, I can't say that was the most effective means of incenting them. In those cases, what we did was to commit to a flat monthly fee for a period of a year. This fee structure was put in place to assist the rep in getting comfortable with our line and establishing relationships with prospective customers. What worked better for us than the fees, however, was to provide our reps with a great deal of training and support. We started that way with them and continue to work very closely with them."

Weighing in on the subject of shared territorial development fees, Groble says, "For Koch Group this subject cropped up about five years ago. Here's how we approach it. If a territory has little or no business, we counsel our principals to provide a 'pioneering commission' for the first five to 12 months in order to get an agent going. That seems to work well for the agents. The principals need a little coaxing but they understand if the rep succeeds, they will benefit directly from those efforts. With rising fuel and other costs, it is not an unreasonable situation for the rep to ask for some up-front assistance to develop a territory. Sometimes the principal will refuse and then the results are what they are — but maybe not what they could have been. We never believe a 'pioneering commission' is needed in a viable territory, but in a poor territory it can make good business sense for all involved."

Conducting joint sales calls — "In line with working closely with our reps, our regional sales managers have regular weekly dialogues with our reps," notes Clowes. "In the context of those dialogues, we review what we've done and what needs to be done in the future. From there if we feel a joint sales call is going to be effective, we always notify the rep well in advance. We give him plenty of advance warning."

Communication — "Communication remains the key to a successful relationship between reps and their principals," explains Clowes. "However, we never demand visit reports or call sheets. Sure, they're nice, but what we really need is information when something important is happening."

Exclusive sales territories — On this subject Mike Hannigan maintains, "Most principals would love to have multiple agencies serving the same geographic area — if they could. If Agent A doesn't call on this target, perhaps Agent B will. If we are talking about reps calling on similar or same market segments, this is a very bad idea. It really makes reps unhappy, and you need a happy rep to want to work with/for you.

"As a result, we educate our principal clients concerning the value of an exclusive territory, all the while recognizing they can be uncomfortable 'giving away' commissions to someone they perceive has not earned them. However, a rep that is treated fairly usually will make that up to the principal with increased and incremental sales.

"So principals would love to have multiple reps, and the reps are violently opposed to that practice. Reps want exclusive territories. If you have an excellent rep, keep him happy. It is possible to have agents in the same territory calling on totally different market segments, however. One rep calls exclusively on automotive and the other wants nothing to do with automotive. It can work, but the arrangement must be understood and agreed to by all involved parties and spelled out clearly in each agent's contract. Obviously Koch Group's agent support and management philosophy is very "pro agent."

Having explained that, the question has to be asked: How has the entire process worked out for the manufacturer?

From the sound of it, Clowes is certainly satisfied. "Like anything in business, it's easy to get sidetracked. But with our effort to communicate with our reps and completely involve them in our operation, we've been able to stay on track. All things considered, however, we've realized our goal of increasing business. It has worked so well with reps that we plan on adding more to our team in the future."