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Words from the Wise

*"Men acquire a particular  
quality by constantly  
acting in a particular  
way."*

- Aristotle

## Should I Stay or Should I Go?

■ [Printer Friendly](#)

By Andrew M. Apfelberg, Esq

(Second in a two-part series)

At some point in almost every transaction, business professionals ask themselves whether they should stay involved in a proposed deal or walk away. One of the most effective ways to decide is for executives to learn to trust their instincts; to engage in an honest dialogue with hired professionals; and to carefully evaluate the other party's verbal and non-verbal cues [[See Just Walk Away, Business Edge January 2007 issue.](#)]

Being influenced by the momentum of a negotiation or the adrenaline rush of closing a deal may result in either a transaction that does not deliver the desired opportunity or benefits, or a transaction that has to be aborted at the 11th hour and leaves you stuck with the related costs. Every deal develops at its own pace. This is true whether the deal is an acquisition, a lease or a contract with a vendor. It is important to maintain the pace in order to effectively take the transaction from concept to signed agreement. However, when the parties to the deal focus almost exclusively on maintaining momentum, they tend to ignore the red flags that will appear from time to time, as well as their own inherent reaction to the warnings.

### Real Life Example

I had a client who wanted to acquire substantially all of the assets and real estate of a business. The price was extremely attractive and the seller's investment banker assured my client that this was a rare opportunity. The seller delivered a skimpy purchase agreement and put significant pressure on my client to review and sign the document within 24 hours. After a rather frank late-night discussion with me, my client did not sign the document and asked for a short no-shop period within which she could conduct additional due diligence. The seller refused the no-shop restriction. So my client still decided to proceed to negotiate the transaction.

A day or two into the due diligence period, it came to light that the employee who generated a majority of the seller's revenue did not hold a necessary license and had, instead, worked out a side deal with the seller. My client instructed me to draft an indemnification provision into the purchase agreement. The seller then provided some self-prepared financial statements, but would not give my client access to the backup data or the seller's previously filed tax returns.

My client felt she could trust the seller and took him and his financials at his word. In the meantime, I revised the purchase agreement and prepared the balance of the missing documents that are typically associated with this type of transaction. The seller refused to accept any of my proposed language changes and was hesitant to agree to the terms of the other documents. He insisted that the sale be accepted “as is” and indicated that if my client did not like it, there was another eager buyer waiting in the wings who had offered more money. My client requested that I trim down the documents to appease the seller.

In the 11th hour, the transaction wound up not closing. After all the documents were laboriously negotiated and revised, one of the members of the seller’s group refused to sign his non-compete agreement. My client was livid. She invested four months in the deal and had incurred significant legal, accounting and other fees. She felt cheated and looked for someone to blame. My client ultimately concluded that the blame fell squarely on her shoulders because she was so eager to close the deal that she had ignored some obvious warning signs. She failed to investigate when red flags popped up and refused to be guided by her “gut” instinct, which told her that this deal did not feel right.

Warning signs and red flags pop up in most transactions. The existence of such a blemish does not mean that a potential deal is not a good one. Instead, it means that the individual and his or her team of professionals should take some time to gather more information and carefully analyze it before proceeding with the deal.

Some tools and approaches to consider:

- Additional due diligence request(s)
- Requirement that the other side prepare a disclosure schedule
- Interviews with key employees working on or related to the transaction
- Honest discussions with the professionals or bankers/brokers who have a relationship with the other side
- Time spent on the premises of the other side to observe and listen

Individuals or their trusted CPA or attorney can employ each of these tools. These inquiries can be very general to mask areas of concern; can be a very specific request; or can be series of requests on the troubling items. The key is not to stop asking questions until they are answered. Until then, you cannot accurately decide whether you should stay or if you should go.

#### **About the Author**

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