

# Business Issues Vs Legal Issues

By Joshua Stein, PLLC



Every transaction raises issues. The parties and their lawyers need to resolve them. We traditionally think of some of those issues as “business” issues – economics, major risk allocations, credit support, and so on. Others we consider “legal” issues – unlikely hypotheticals, minor risk allocations, insurance, rights and remedies, factual assurances, procedural requirements, “boilerplate,” etc.

The business people are supposed to resolve the business issues. Then the lawyers are supposed to memorialize those resolutions correctly in the documents, and make sure the documents treat those resolutions consistently throughout. Actually, any need for consistency increases the risk of mistakes. A good set of documents will, to the extent possible, address each issue only once. That way, inconsistency can’t arise. Say it once and say it right. In contrast, the lawyers are supposed to “deal with” the legal issues and get them right, making sure they don’t somehow screw up the transaction.

The line between “business” and “legal” isn’t really as sharp as the last few paragraphs suggest.

When the process works well, lawyers can—and often do—take the lead on some “business” issues. The principals will typically work out fundamental pricing issues, but the lawyers resolve some of the economic issues.

It helps if the lawyers know their clients well and have worked together before. That’s an argument for clients to stick with the same counsel for a series of transactions. Over time, the lawyers learn how the clients think and can act for them in some of the “business” negotiations. That can simplify and speed along the process.

It also helps if the lawyers know how a particular deal issue “usually turns out” – it’s not the first time they’ve negotiated a transaction like this one. So that’s an argument for clients to hire counsel who have not only been around the block before, but have also been around this particular block many times before.

The line between “business” and “legal” issues will vary from deal to deal and from client to client. If a client isn’t in the real estate business – e.g., a space tenant signing a new lease for their second location – they may rely on counsel more than otherwise for business advice and negotiations. Such a client might not even appreciate it if counsel asks “business” questions. Counsel is supposed to know how these deals get negotiated. And counsel shouldn’t be too deferential about checking back with the client on everything.

In contrast, a client who works with real estate transactions all the time will typically have strong ideas about both the “business” issues and many of the “legal” issues. At a certain point, an experienced real estate negotiator becomes indistinguishable from an experienced real estate lawyer negotiating business and legal issues.

In those cases, do the clients still need lawyers? Can’t the clients just write up the deals themselves? Not really. Regardless of where one draws the line between “business” and “legal” issues, the task of memorializing the deal correctly, completely and consistently always falls to the lawyers. Lawyers are supposed to know how to write down for posterity what the parties agreed, in a binding and unambiguous way, taking into account the legal context in which the parties act.

That part of the lawyer’s job is relatively thankless and not much fun. As long as the lawyers get it right and don’t delay the closing, no one notices. Few clients are going to admire how well the lawyer wrote the contract or closing documents, or the fact that, years later, the transaction didn’t go into litigation. Writing the documents is a task that definitely falls on the “legal” side of the line.

If the lawyers can’t work out some purely “legal” issue, then it may often have economic implications, or affect allocations of risk, for the “business” side of the transaction. Then it becomes a “business” issue. But it’s not a “business” issue that anyone on the “business” side likes to hear about.

Often, “legal” issues that become “business” issues involve some convoluted set of circumstances arising from the need for the “legal” side of the transaction to address every eventuality, however remote. Often these issues cost more in legal time to explain than the dollar value of monetary exposure or risk they create, especially when discounted for improbability. When issues like these do arise, it helps to identify them quickly and get rid of them. Otherwise they tend to fester, requiring continued attention and running up even more time to track and discuss.

Business people and their lawyers can benefit from recognizing that the line between “business” and “legal” issues may not be as obvious as they think. And the best attorney-client relationships and deals start with an understanding of where that line falls, adjusting it over time.

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