

Legal Strategies for Successful Business Sales and Acquisitions

CONSTANT COUNSEL

October 2024

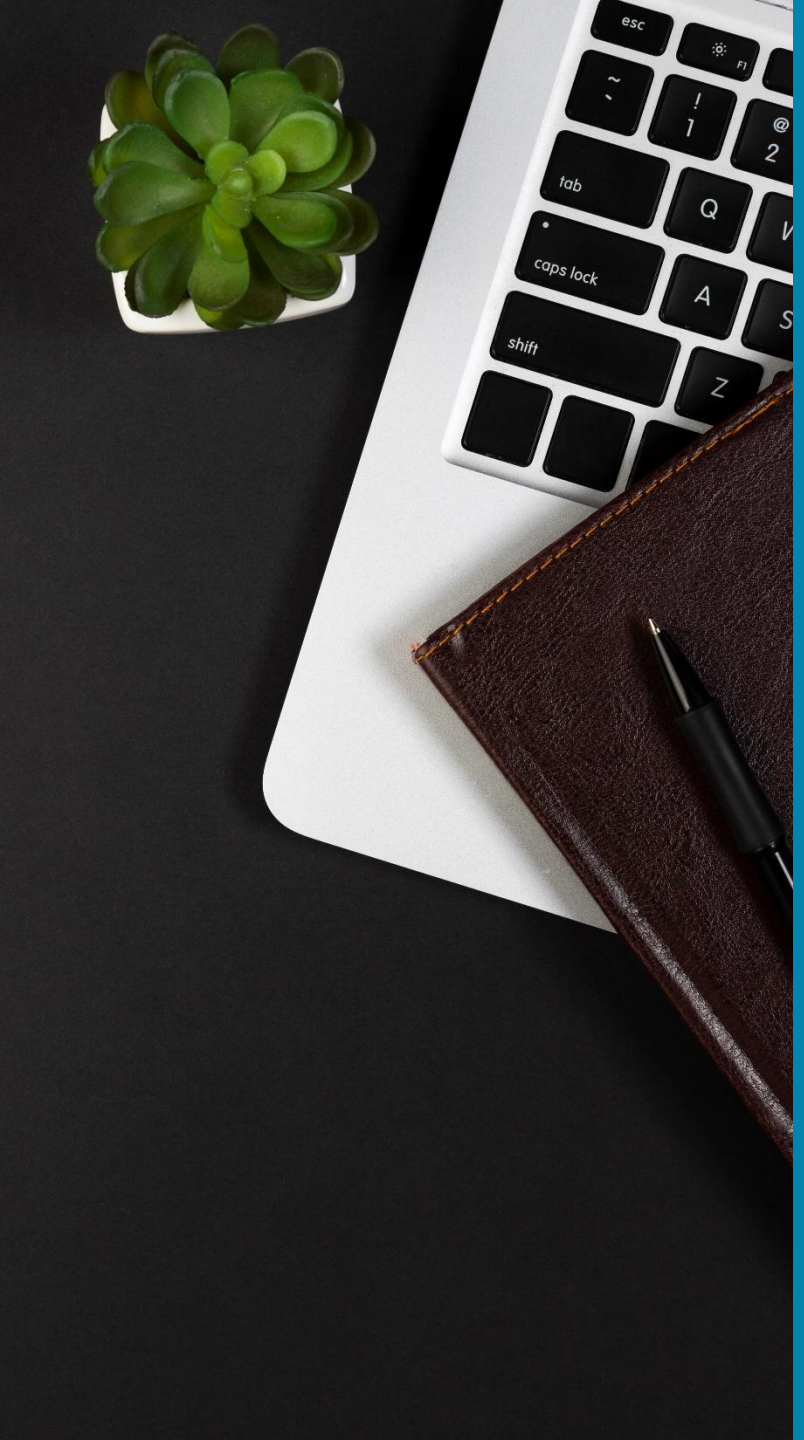


INTRODUCTION

Welcome and Introduction

Isabel Gram, JD has been practicing business law for over 20 years and has represented hundreds of buyers and sellers of businesses with purchase prices ranging from under $250,000 to $60M.

Originally from Ottawa, Canada, Isabel moved to Arizona in 2004 and opened her law practice Constant Counsel in 2018. She specializes in supporting growing companies as “fractional” General Counsel, mergers and acquisitions and general business corporate and commercial legal matters.



Purpose of the Presentation

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01 Understanding Business Sales

02 Pre-Sale Considerations

03 Importance of Letters of Intent (LOIs)

04 Structuring the Deal

05 Due Diligence

06 Retaining Key Employees

07 Impact of Recent Non-Competition Laws on Business Sales

08 Key Legal Documents

09 Closing the Deal

10 Attorney Best Practices



Understanding Business Sales

Types of Business Sale Transactions

- M&A (mergers and acquisitions)
- Acquisitions (Asset Purchase Agreements and Share Purchase Agreements)
- Internal (partner buyout) versus external (3rd party)

Differences Between M&A and Other Business Sales

- Scale/Purchase Price
- Complexity (financial, regulatory, negotiations)
- Level of due diligence
- Purpose: strategic acquisition v. exiting business owner/entrepreneurial buyer

Pre-Sale Considerations



Business Valuation

- Importance of accurate valuation.
- Methods: Asset-based, Market-based, Income-based.



Preparing for Sale

- Cleaning up financials.
- Resolving outstanding legal issues.
- Preparing documentation.



Confidentiality Concerns

- Non-disclosure agreements (NDAs).

Importance of Letters of Intent (LOIs)

Purpose of LOIs

Preliminary, (mostly) non-binding document that outlines the main terms and conditions

Benefits

- Roadmap and foundation for agreement
- Pre-negotiate potential dealbreakers
- Avoid surprise
- Expedite drafting process
- Demonstrate commitment

Key Components

- Price and Structure, Earnest Money, Exclusivity
- Target closing date and due diligence period
- Conditions for closing (financing, lease assignments, satisfaction of due diligence)
- Binding vs. non-binding provisions.



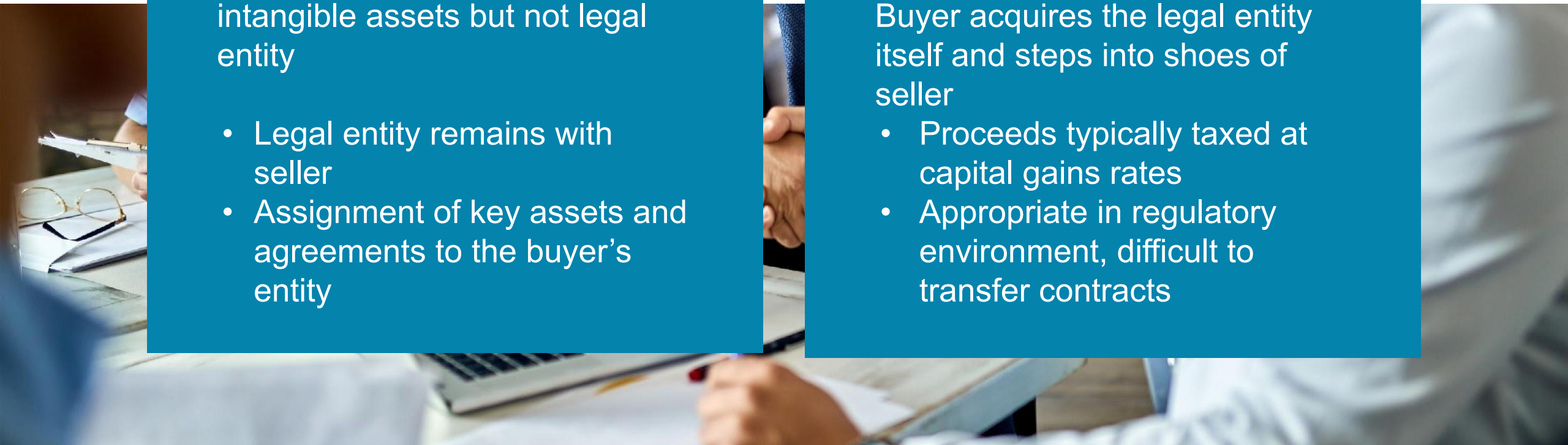
Structuring the Deal (APAs versus SPAs)

Asset Sale (Asset Purchase Agreement)
Buyer acquires tangible and intangible assets but not legal entity

- Legal entity remains with seller
- Assignment of key assets and agreements to the buyer's entity

Stock Sale (Share Purchase Agreement, Membership Interest Purchase Agreement)
Buyer acquires the legal entity itself and steps into shoes of seller

- Proceeds typically taxed at capital gains rates
- Appropriate in regulatory environment, difficult to transfer contracts



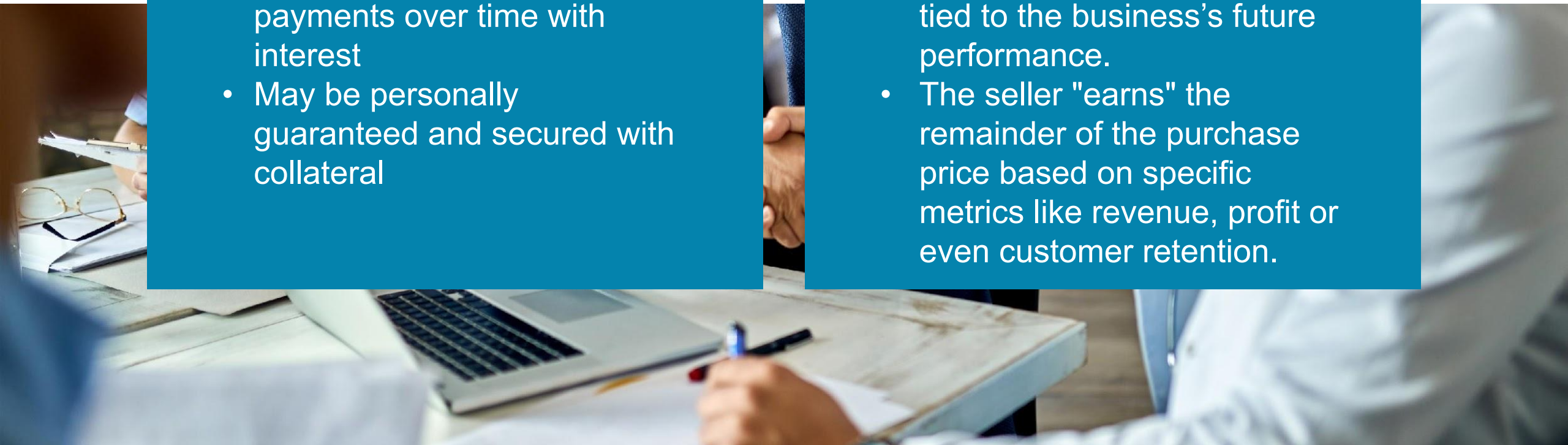
Structuring the Deal (Deferred Payments)

Carryback Notes

- Seller holds promissory note
- Buyer makes regular payments over time with interest
- May be personally guaranteed and secured with collateral

Earnouts

- A portion of the purchase price paid after closing and tied to the business's future performance.
- The seller "earns" the remainder of the purchase price based on specific metrics like revenue, profit or even customer retention.



Due Diligence



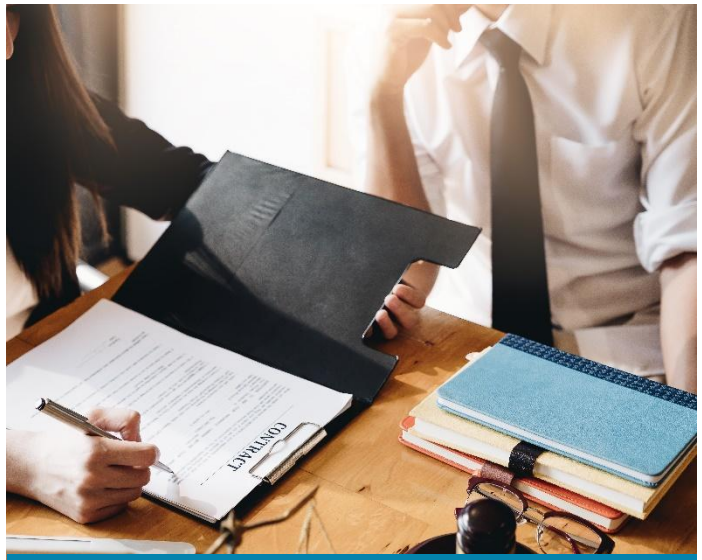
Purpose of Due Diligence

Process of investigating and evaluating a target company before a deal is finalized.



Benefits

Buyer can verify seller's claims and uncover potential risks.
Seller can justify asking price and reduce post-sale exposure.



Types of Due Diligence

Legal
Financial
Commercial
Operational

Retaining Key Employees



Importance of Key Employees

- Value to the business.

Strategies for Retention

- Early involvement
- Retention Agreements
- Equity incentives
- Benefits (same or better)

Legal Considerations

- Employment agreements
- Non-compete clauses



Impact of Recent Non-Competition Laws on Business Sales

01. **Overview of Recent Changes**
- FTC Rule April 2024 Nationwide Ban
- (As of date of this presentation, enjoined in federal court)

02. **Exceptions if Reinstated**
- Sale of Business
- Senior Executives

03. **For now: State law + Prep for FTC Rule Reinstatement + Non Solicit/Confidentiality**
- State law compliance/earnings thresholds
- Federal prep
- Non-solicitation agreements
- Confidentiality agreements

Key Legal Documents

Purchase Agreement

- Main components: Representations, warranties, covenants.

Ancillary Agreements

- Non-compete agreements
- Employment agreements
- Lease assignments
- Contract and IP assignments
- Carryback Notes/Guaranty/Security Agreement
- Tax Clearance
- Bill of Sale
- UCC Financing Statement

Disclosure Schedules

- Exceptions to reps and warranties





Closing the Deal

Pre closing

- Escrow choice
- Virtual/in person
- Settlement statement and wiring instructions
- Agreements, exhibits etc finalized and distributed

Closing

- Signatures
- Funds transferred
- Keys handed over

Post-Closing Considerations

- Post-closing adjustments
- Owner transitional support



Best Practices for Attorneys in Business Sales

Prepare the client emotionally

- Explanation of the roadmap, seller clients in particular can feel like there is a ‘doubling down’ effect with the legal documents when they’ve already participated in DD

Attorney communications

- Friendly, open communication
- Problem-solving, working with other attorneys in same field

Responsiveness, Sensitivity to deadlines

- Flurry of activity and individuals on deal team
- Necessitates high level responsiveness and adherence to deadlines