

Preparing Your Business For Strategic Acquisition

Key Legal Strategies For Maximizing The Value Of A Future Business Sale

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This article lists key legal strategies and practices for business owners considering a company sale as a potential short- or long-term exit strategy. These practices are intended to minimize red flags that may derail or adversely impact a company sale. Whether or not a sale is achieved, these practices will create a strong legal foundation for sustainable business growth.

- **Incorporate Properly.** When handled properly, incorporation of the business protects owners from uncertainty and potential disputes about basic matters such as ownership of the business, company management and decision-making, the transferability of stock, and buy-sell arrangements in the event of intractable shareholder disputes. Effective incorporation also helps ensure that assets and other contributions of the company's founders are effectively vested in the company. Finally, incorporation may help owners realize more favorable tax treatment in an eventual company sale.

- **Exercise Caution When Raising Capital.** Outside investment introduces substantial risk and complexity into a business. Matters such as the economic and governance rights of the investors need to be carefully considered. Failure to comply with securities laws creates substantial legal risks that raise red flags for potential buyers. Companies raising capital, whether from friends and family or professional investors, should ensure the offering is handled properly and in compliance with applicable federal and state securities laws.

- **Perfect Title In Key Assets.** Buyers want to know they are getting good title to a seller's business assets. Companies should take care to clear up uncertainty in chain-of-title and liens or other encumbrances on company assets, including real properties, proprietary software or other intellectual property, and other tangible assets. The presence of such factors erodes confidence.

- **Protect Your Intellectual Property.** If a company's value is tied to its intellectual property, owners should take steps early on to establish sound IP portfolio practices. Valuable IP may include a recognizable brand or trademark, patentable inventions, copyrighted content, or proprietary formulas, business methods or customer or supplier lists. In each of these cases, a company should establish clear ownership to

(or rights in) all core IP assets and maintain the value of those assets through appropriate monitoring and enforcement activities.

- **Establish Reliable Finance, Accounting and Reporting Systems.** Apart from their value to business decision-making, reliable metrics facilitate the due diligence process and often enhance the sale price of the business. Verification of financial data is a principal buyer concern, and reliable metrics help greatly with that.

- **Establish Standard Agreements That Protect Your Company.** Recurring contracts in a business, such as standard customer agreements, represent an opportunity to enhance value and minimize risk. Provisions addressing express or implied warranties, term and termination, changes to the agreement, damage limitations or dispute resolution processes, all can minimize liability exposure and impact a company's risk profile and bottom line.

- **Use Well-Drafted Employment and Consultant Agreements.** Proper employment and consulting agreements used organization-wide help protect the company's intellectual property and business secrets, secure the company's clients against improper solicitation, and create valuable certainty around the scope and duration of employment and consulting arrangements.

- **Maintain Good Employment and HR Practices.** Given the prevalence of wage and hour and other class actions in today's business climate, it is important that growing businesses introduce sound employment policies and practices to ensure compliance with basic legal requirements.

- **Maintain Adequate Insurance Coverage.** A clear track record of appropriate coverage against risk is good business and reassuring to buyers.

- **Keep Up With Compliance and Regulatory Matters.** Maintain corporate books and records and required business licenses and permits. Keep up with regulatory and compliance issues. Don't let the small stuff accumulate through neglect.

- **Long-Term Contracts.** Long-term business arrangements should be drafted with a possible company sale in mind. Such agreements will ideally give owners flexibility to pursue a sale without triggering additional legal or consent requirements or other adverse consequences.

This list is by no means exclusive but it represents a basic set of sound legal practices that, if implemented consistently, will help owners build sustainable organizations well-positioned for strategic exit.

About The Author

Francesco Barbera, a Harvard Law graduate, is a veteran corporate attorney focused on representing family-owned and middle market companies in Southern California. For over a decade, Francesco has represented development-stage companies and established corporations in a wide range of industries and has counseled business owners and investors on the full range of their business activities, from formation through raising capital, growth and acquisition.

Francesco handles organizational, structuring and operational matters, as well as angel, venture capital and other private placements. He has both company-side and investor experience, and has represented the National Broadcasting Corporation, the Grammy Museum, Ares Capital Management, Credit Suisse First Boston, as well as privately held businesses in internet, media and technology, mobile applications, consumer products, professional sports, film and television production, among others.

Francesco has also founded and represented non-profit initiatives. He has served as outside counsel to the Los Angeles Leadership Academy, a charter school dedicated to training the next generation of social and political leaders, and the Freedom to Choose Foundation, a non-profit organization delivering personal development education to prisoners and administrators in the California criminal justice system. He is the founder and former Executive Director of SpiritWalk, a non-profit fundraiser created to benefit the University of Santa Monica.

A lifelong student of psychology and personal development, Francesco holds a Master's Degree in Spiritual Psychology from the University of Santa Monica and has been trained and mentored by numerous luminaries in the field of personal development. He lectures regularly on topics relating to career, work, peak performance and leadership development.

Francesco's writing has appeared in numerous publications, including *The American Lawyer*, *California Lawyer*, *Slate*, and others. He served as the Supreme Court columnist and Executive Editor of the *Harvard Law Record* and was the founder and editor-in-chief of the first Ivy League journal in the country dedicated to the publication of undergraduate historical research.

Francesco began his legal career at two large, international law firms in Los Angeles, where he represented large and small enterprises in a broad range of transactions, from mergers and acquisitions to public and private securities offerings to the formation of partnerships and joint ventures.

Francesco is an honors graduate of Harvard Law School, *cum laude*, and the University of Pennsylvania, *summa cum laude* and Phi Beta Kappa.

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