THOMPSON COBURN LLP

insights

If you have seen one health care deal you have seen … One health care deal

This will seem like an odd admission for a legal blog, but the success of a negotiation does not depend solely upon the legal acumen of the parties involved. It depends upon the ability of the parties, including their negotiators, to understand each other, establish a rapport, build a relationship, and nurture trust. While I have seen transactions occur in the absence of these factors, I have never seen one work well over time under those circumstances. Keep in mind that law affects businesses and humans, but with respect to most law-abiding people, except in rare circumstances, it should not, in and of itself, dictate business plans or determine how humans relate.

Most articles about health care transactions focus upon different structures and actors as well as regulatory and financial concerns. Parties to a transaction tend to focus upon what they bring to the table and what they want. Lost in the mix can be the psychology and mindset of the participants. Often, the party initiating a transaction has created a model and structure that meets its needs and has determined what it believes is a successful outcome based upon those needs. Nonetheless, it is crucial to keep in mind the viewpoints and needs of all parties to a transaction in order to successfully negotiate an outcome.

Most readers already appreciate that different actors in a transaction will have different outlooks. For example, the mindset of a retiring foreign-born physician in a major metropolitan area is very different than that of a middle-aged health care executive who has been brought into a rural critical access hospital to effectuate a turnaround. Private equity actors have a very different focus than that of many not-for-profit health care executives. Negotiations with large companies often involve input from many different constituencies such as finance, human resources, internal audit, operations, and IT, and many of these participants may wield a significant influence on any outcome despite having no direct participation in the negotiations.

On the other hand, the owner of a small health care enterprise may have concerns related to family and employees that weigh heavily on any decisions that are made. Negotiations with a not-for-profit health system may involve a resolution of concerns raised by volunteer board members that appear entirely unrelated to the economics of the transaction at hand. Sellers of distressed businesses have very different concerns and behaviors than those of highly profitable enterprises. Faith-based organizations may desire to have certain legacy components remain (e.g., Catholic ethical and religious directives.) A seller in a medically underserved community may desire ongoing commitments towards health care equity. The number of permutations is almost endless.

As health care transactions inherently involve multiple parties, achieving agreement can be uncoupled from legal models or the financial wherewithal of the parties. Instead, successful negotiations may depend upon the ability of each party to identify and resolve the needs and wants of the other party, even where those needs and wants are not articulated and do not lend themselves to financial modeling or legal PowerPoint presentations. This concept can be easily overlooked by the parties in their enthusiasm to chase a new deal.

Although many people think corporate America is run according to detailed financial analytics and business models that are subject to rigorous analysis, they fail to take into account the fact that transactions are initiated and conducted by, and subject to the whims of, human beings. In other words, popular literature and society appear to often underweight the role of individual background and emotions in deal making.

A Little Psychology

Keeping in mind some basic psychology can also be important. For example, in behavioral economics, there is a term called “endowment effect” – the idea that people are more likely to retain an object that they already own than to acquire that same object when they don’t own it. While it might appear common sense to many that a hospital would partner with a third party to develop a new ambulatory service line, it might also raise concerns around loss of control within its service area as well as the fear that it might “compete with itself” or even introduce a future competitor to its market. Simply stated, be cognizant of the fact that there could be a drive to continue to own 100% of a declining market rather than giving up control in hopes of achieving a larger, less immediate gain. Endowment effect can be further affected by the personal position of the decision-makers for a party, particularly if they do not couple their personal economic interests with the long term financial and other prospects for that party (for example, if they expect to retire or move on to a new employer).

Endowment effect may also have other consequences, including the danger that a party may overpay or make concessions that were unthinkable at the outset of negotiations out of fear of losing a deal. As the parties to a potential transaction interact and invest time and effort in negotiations, they can lose sight of their original expectations. Similarly, the seller of a private enterprise who has spent a significant part of her life building it may also overvalue her business due to endowment effect, and achieving a successful outcome with her may require repeated, delicate discussions that do not belittle her sense of worth. Developing an understanding of endowment effect and some ways to address it can be invaluable at the outset of any negotiation.

Negotiating Tips

Putting these insights into practice is easier said than done. Nonetheless, a few potentially helpful steps are as follows:

Listen, Listen, Listen. You gain relatively little from hearing yourself speak, and chances are, the other party does likewise. Don't avoid talking out of a desire to keep a poker face or intimidate anyone, but generally, take every opportunity to gain further insights into the other party and their concerns. You can't resolve someone else's issues until you know what they are.

Pay attention to body language (if in person). There is plenty to learn from simply watching the other participants in a negotiation, and there certainly are any number of books talking about how to interpret posture and other aspects of body language. But also don't forget to watch where participants look during significant moments of the negotiation and how they respond to tense moments so that you can modulate the discussions accordingly.

Understand the roles of the people in the room. Determine the background of the negotiators and the nature of their relationship with the party they represent. Remember that the interest of the other party to a transaction are seldom completely aligned to those of the person negotiating on their behalf. For example, day-to-day negotiations may be delegated to a company's second in command, who is far from retirement and who might not view a transaction as being in his career interests, even if he does not articulate those concerns. Outside representatives may raise concerns that are of little or no concern to the business they represent because they lack familiarity with their client's business operations and its risk tolerance. It is not unheard of for negotiations to be led by someone without authority to agree to a deal, while the key negotiator sits silently observing the conversation until their involvement is absolutely necessary. Taking time to understand everyone's roles can help you smooth the negotiation process.

Money isn't everything. Determine the non-monetary factors that may affect the negotiations. These are far too numerous to enumerate; however, an understanding of the nature of the other party and its operations can often provide valuable insights. A physician with years of work ahead of her facing professional life as an employee for the first time will have very different concerns than those of an entrepreneur selling his business and sailing off into the sunset.

Try to walk in their shoes. Pretend you are in the other party's shoes and try to articulate what you are trying to accomplish and why. What scares you about the transaction? Continue doing this periodically throughout the negotiations. Be particularly cognizant of the subtle hints that may indicate unspoken drivers or dynamics affecting the negotiations. In this regard, it can be valuable to engage the other party in conversations unrelated to the transaction at hand to elicit background information or themes that enable you to address their unarticulated desires and concerns proactively.

Remember why you are there. Keep in mind what your objectives were at the outset of negotiations to try to minimize the possibility of endowment effect. This isn't always possible, because organizations sometimes enter into open-ended negotiations to find ways to work together (e.g., there is no roadmap to start with); however, it can be a good idea to write out a few broad objectives and identify a few "red light" issues early on, so that you can refer to them later. Think long and hard if the negotiations switch away from your original goals or if your team is being asked to concede its original "red light" issues.

Understand the negotiation dynamic. If you are dealing with a 10,000 employee organization, understand that they will often have a number of internal departments that must be consulted and approval processes and policies that affect the negotiations. Maneuvering the different interests of those departments can be challenging, particularly since the desires of one group (for example, strategy departments that love doing deals) may not be aligned with others (for example, finance departments, which often seem to assume a defensive posture vis a vis their strategize departments). Companies with a large number of shareholders will naturally approach negotiations differently than a closely held, family-owned company, which will differ from the behavior of a not-for-profit company. It is generally prudent to adjust your expectations to accord with this dynamic.

Be reasonably honest. Keep in mind that negotiations are about relationships – nothing is more frustrating to a negotiator than a counterparty that they believe is dissembling or hiding information that they think is important, or worse yet, lying. While you don't necessarily want to tip your hand, an appropriate level of candor and openness can go a long way to helping the parties get over the finish line.

It's not about you. For many people, transactions elicit strong emotions due to the high personal and professional stakes and lack of familiarity with transactions. When viewed through the framework of developing relationships, some emotions can actually be beneficial to furthering the transaction by engendering feelings of camaraderie and familiarity. Dealing with an emotionless counterpart who is playing the role of Dr. Spock can be an unsettling feeling and actually hinder progress, particularly where the transaction at hand would involve an ongoing relationship between the parties. On the other hand, negative emotions can engender corresponding negative feelings from the other party, and hence they can be detrimental to the ultimate purpose of aligning the parties. There are certainly people who believe that posturing, emotional outbursts and other disruptive behavior benefits them, and at times (rarely) there can be reasons to engage in such behavior. In general, however, the author believes uncontrolled volatility engenders mistrust, can jeopardize otherwise positive transactions and can have adverse personal and professional consequences. The takeaway from this is to remember that deals can be an emotional roller coaster and it is important to control your emotions.

Conclusion

At the end of the day, no two deals are exactly alike, just as no two people are exactly alike. There is no denying that legal and financial considerations do, and should, play a major role in structuring transactions. However, at their core, deals are about relationships – whether those are fleeting or long-lasting, but regardless, few people will agree to a transaction unless they see something in it for them.

authorsTest