

FINDING AND KEEPING A STRATEGIC PARTNER*

PROLOG BY MEG: Many times the Consultant is asked to provide assistance to a Client who desires to locate a joint venture, licensee, acquisition, or investor partner – all of which are identified as “strategic partners” for purposes of this column. The related case of selling or buying a company or technology is similar, but quite different in that there is no obligation to “live” with the relationship results of the deal unless there is an extended pay-out based on future profits. In a license, joint venture, acquisition, or marketing arrangement, there are many years of daily, weekly, monthly, and yearly organizational and personal interaction and that relationship will be profoundly affected by the factors listed below. The old adage of “wed in haste and repent in leisure” is never truer than in the case of setting up a strategic partnership, personal or corporate.

I. PLAN AHEAD – ESTABLISH CRITERIA FOR “IDEAL” PARTNER

- A. Lay out the basic Term Sheet from the perspective of the Client
 - 1. Establishes the minimum (“walk-away”) criteria and don’t change it without significant consideration
 - 2. Identifies the scope and goals of the deal for the Client
 - 3. Identifies unknowns or areas of flexibility to be determined and update them as opportunities arise during meetings
 - 4. Add in areas of “like to haves” to be part of discussions
 - 5. Establish the “Team” and the roles of the parties, which can be multiple but no more than two roles per person
 - a. One Team member will be designated “Leader” to assure minimum of “mis-speaks” during negotiations
 - b. One Team member will be designated “writer” to assure consistent style and content
 - c. One Team member will be designated as “spokesman” to assure continuity in contacts
 - d. One Team member will be designated as “note-keeper” to assure that subsequent reviews will be useful and realistic
- B. Lay out a sample Term Sheet from the perspective for the Target in several variations based on market, type of company, relative development and update based on actual input from each Target

1. Establishes the “like to have” from perspective of Target
 2. Establishes the scope and goals expected from the Target
 3. Identifies areas of inflexibility on part of Target
 4. Identifies areas of flexibility on part of Target
- C. Prepare the Client’s “story” as to the why, what, and value of the proposed relationship
1. The business plan must be effective whether it is aimed at market, technology, product, or services – must be compatible with Client’s minimum Term Sheet goals
 2. A less than one-page proposal summary must be carried by every Team member and consistently used – must be compatible with Client’s minimum Term Sheet goals

II. SEARCH FOR PARTNER ON BASIS OF CURRENT TECHNOLOGY AND/OR BUSINESS POSITION

- A. Match various Target Term Sheets against prospective customers, vendors, subcontractors, industry players, market players, and third party companies
1. Competitors – Leader, No. 2, “Wannabe,” “Entrant”
 2. Industry – Customers, Manufacturers, Distribution Channels, Financial 3rd Parties
 3. Technology – Current, Up-Coming, Obsolete, New Players
- B. Perform market search for Targets based on Term Sheet criteria
1. Personally known contacts (i.e. friends who are customers, vendors, manufacturers, distribution, etc.)
 2. Casually know contacts (i.e. business dealings with, or director listings for, key executives of market/industry companies)
 3. Blind contacts generated by search efforts
- C. Make intelligent decision about sequence and priority of contacts
1. Current status of Client against Market, Industry, Technology

2. Priority of Client needs
 3. Perceived attractiveness of offering
 4. Role of Team in making contacts & script for contacts
- D. Make contacts at all levels of the prospective Target chain
1. Establish which Target contacts are willing to talk
 2. Evaluate reasons for each Target's interest
 3. Evaluate strength of the contact (i.e. friend, industry, blind)
- E. Select primary and as many back-up Targets as seems realistic
1. Schedule meetings and NDA exchanges with all of the selected Targets
 2. Vigorously pursue Targets to see if one or more will "go to the table"

III. GET TO KNOW YOUR PARTNER PROSPECT – DUE DILIGENCE

- A. During every contact (i.e. phone, in person, in groups) seek out as much information as possible about background, experience, current status, and goals of the Target companies and the key executives at three levels (i.e. Executive, Middle Management, & Technology)
1. Work responsibilities & experience – current organization, prior assignments, education
 2. Personality traits and relationship traits displayed with other Target team members and subordinates
 3. Industry "talk" about the Target's organization, morale, culture, competences/weaknesses
- B. Exercise all of Client's personal and industry contacts to verify and identify motives, experience, goals, background of the principals in the Target(s)
1. Trade/Industry associations
 2. Personal contacts
- C. Be direct in asking for background information, relationship information, organizational status, potential turmoil/problems, goals and objectives – treat

every “evasion” or “no comment” or blithe “ignoring of facts” as a warning flag to be thoroughly investigated

- D. Whenever possible, have a 3rd party verification of essential facts
 - 1. Role of CPA / Business consultant – specific fact-finding about finances, organization, sales/distribution, warranties, labor issues, economic factors
 - 2. Role of Team Members – specific fact-finding about technology and product/service related issues and marketing
 - 3. Role of Attorney – laws/regulations, disclosures, legal relationships, business liabilities, environmental issues, lawsuits, IP protection, licenses and sub-licenses

IV. MEMORIALIZE ALL MEETINGS AS TO FACTS & EMOTIONS

- A. Client vs. Target Term Sheets gradually merged with each party protecting its “walk-away” items and signaling areas of flexibility
 - 1. Every review session should compare the notes/minutes against the Client’s Term Sheet to make sure no fatal concessions were made and to identify unexpected opportunities based on comments from the Target
 - 2. The Team Leader must clearly communicate the latest status of the Client’s Term Sheet before every session with the Target
- B. Meeting notes and minutes – usually a good idea to distribute to both sides immediately or during each session so that misunderstandings or areas of disagreement will be immediately noted
 - 1. If there are Client-specific (i.e. proprietary or confidential) comments or notes from a session, they should be attached as a separate page so that both sides always are working from the same set of notes.
 - 2. Binders, notes, laptop computers, floppy disks, CD-R/W disks, etc. must always accompany Client Team members or be locked up – never left out in the open - not insulting, just shows a serious, professional, and careful approach to a very important transaction
 - 3. Prior to initialing or agreeing to a final Term Sheet between the Client and Target, there should be frequent and thorough communications between the Team Leader, the Client Attorney, CPA, and Business Consultant to make sure that few surprises will occur during the formal due diligence

- C. The Agreed-To Term Sheet between the Client and the Target is the basis for the Attorneys on both sides to draft the implementing agreements and documents required for closing.
 - 1. Business, organizational, and financial terms
 - 2. Legal responsibilities accepted and left behind
 - 3. Due diligence agreement and timing
 - 4. Closing target date
- D. Implementing Documents and Agreements, as drafted by one side and reviewed by the other are the “nuts & bolts” of the strategic relationship
 - 1. Every document should be reviewed against the Term Sheet and any deviations should be rejected unless there has been mutual agreement
 - 2. Don’t try to “slip in” changes that are afterthoughts when the documents are drafted – every significant deviation from an agreed-to Term Sheet should be met with dismay – it is a breach of trust and could be a sign of an unhealthy relationship in the future.
 - 3. Team members must maintain straight-forward, clear-cut, and honest communications with the Target and must insist on the same approach from them

V. SELECT PARTNER BASED ON TRUST, NOT GREED

- A. Pay particular attention to personal traits of trustworthiness, loyalty, honesty, integrity, and honor (i.e. not “words” but “actions”) since those will be the determinants of the relationship’s success or failure over time
- B. Pay attention to the corporate and personal culture of the Target as it “fits” or not with the Client (i.e. work habits, pace, formality, appearance, housekeeping, attitude, customer service, vendor relations, HR policies, morale, etc.)
- C. If possible, talk to 3rd parties who have dealt with Target (i.e. ex-managers, sales personnel, customers, vendors, etc.)
- D. Do not be blinded by the amount of potential pay-off or by the current desperation to find a partner (“any partner”) based on current problems and be realistic about the benefit to be gained

1. If desperation is driving the deal, recognize it and identify to what extent the Team will turn a blind eye to potential relationship problems to “live to play another day”
 2. If one of the Team members is obsessed with maximizing the financial return to the exclusions of all other aspects of the deal, the other Team members must be prepared to live with disaster if they remain silent
- E. Include organizational and personal milestones as well as financial and product/market milestones as measuring blocks against which the strategic relationship will be evaluated

VI. ESTABLISH CHAIN OF COMMITMENT AT MULTIPLE LEVELS OF BOTH ORGANIZATIONS

- A. Avoid deals found, negotiated, and done by a single person on either side since they can (and often do) come unglued when difficulties arise
1. Role of Team is to sell the relationship within their respective organizations as well as to the other side
 2. Team Leader must immediately begin to train an associate or another Team member to supplement his/her role in the resulting strategic relationship
- B. Long-term strategic alliances that are successful survive acquisitions, market changes, personnel turn-over, executive changes, financial hard times, and growth spurts based on more than one person or level of the Client and Target organizations understanding and being committed to the concept and goals of the strategic relationship (i.e. there should be executive, manager, professional level “champions” in place by the time the deal is finished)
- C. Clearly define “success producing” roles and responsibilities in the resulting strategic relationship in terms of the Client and the Target
1. The support required to influence markets, make technical changes, protect investments, develop personnel, and implement all aspects of the strategic relationship (i.e. joint venture, license, acquisition, marketing) that will produce maximum profits, royalties, career opportunities, and sales volumes – respectively
 2. Address merging the cultures of the Client and the Target as much as the products, technologies, and markets.

VII. MURPHY'S LAW LIVES – STUFF HAPPENS – SET UP PROBLEM SOLVING MECHANISM

- A. During the various meetings and due diligence, often explore and discuss how each organization (i.e. Client and Target) resolve differences and disputes internally and with outsiders.
 - 1. Team members must understand the differences between negotiated settlements, mediation, arbitration, and lawsuits
 - 2. The Attorney must be in agreement with (but should not determine) the Client's selection of the dispute settlement mechanism to be suggested
 - 3. Team members must be diligent in seeking out the problem resolution mechanics of the Target

- B. Address disputes and "no-fault" termination clauses at the early or mid-point stages of the due diligence and negotiations so that it is not the "end game" for both parties.
 - 1. Team members begin, carry out and end the strategic partner selection process
 - 2. CPA's, Attorneys, and Business Consultants are to facilitate the strategic partner selection process and are not to take over the process with legalisms, financial roadblocks, or organizational/market squeeze points except to advise the Team members
 - 3. Where possible, include the requirement of frequent status and problem-solving meetings with at least two levels of management participating
 - a. Have meetings at both facilities and at an off-site location to allow for different logistics and situations
 - b. Have the original executive Team members concentrate on relationships and delegate day-to-day activities and coordination to others – reserve the serious problem solving for the key people who put the strategic relationship together by having others do the details
 - 4. Agree on the frequency and form of status reports (i.e. financial, sales, organizational, and expense items) but include some way to evaluate the relationship
 - 5. Agree on the terms of "success" for both the Client and Target organizations in the resulting relationship

VIII. WHEN ALL GOES WRONG – WALK AWAY

- A. Unlike a project or a fixed price sale, there is no end to a relationship while it is working so the time to walk away is before it becomes legal
1. If things go wrong during due diligence or negotiations, don't wait to "fix" them until after the deal is done – fix them now or recognize that is the way it is going to be
 2. If a situation, personality, culture, terms or any other significant parameter go significantly wrong or seem unfair and that situation is not able to be resolved, give serious consideration to walking away
 3. Never burn the bridges to other potential strategic partners, including this one if it is decided to "walk away," by unprofessional, personally vindictive or mean-spirited conduct and do not allow Team members to do so in any circumstance. The ultimate resolution is to politely walk away – once the deal is done, it is too late – but circumstances (and organizations) change and closed doors can be reopened if they were not slammed shut and double locked by bad conduct.
- B. If and when the Client Team members contact and begin working with the alternate Target, never pass along or say anything about the previous Target company or personnel. Each deal must stand on its own and it is a small world.

CONCLUSION: The care and feeding of a strategic relationship, whether a license, joint venture, acquisition, or marketing partnership is very much like a marriage and common sense, honor, honesty, loyalty, and integrity are the primary virtues that assure success in the relationships (sometimes even in the face of a failure in accomplishing the goals of what the relationship set out to accomplish).

The preparation and care in the selection and establishment of a strategic relationship becomes all the more important when the Client is seeking "break-through" financing, market penetration, manufacturing support, or management resources from a larger or more established company.

The more important that the results of the strategic relationship are to the Client, the more care must be taken to do it right – where "right" means the accomplishment of the goals of the strategic relationship over time in a manner and within a culture that allows the Client's principals to grow and prosper personally, professionally, and financially.

* **Summary of Presentation at LES Philadelphia Seminar 10/06/04** ; (Paraphrase, Reorganization, & Additional Comments by Martin Gilligan, MARTIN & ASSOCIATES); **"10 Commandments of Finding & Keeping a Strategic Partner;"** By: Ms. Gerianne Tringali DiPiano, President & CEO, FemmePharma, Inc. & Ms. Manya S. Deehr, Partner, Morgan, Lewis, & Bockius, LLP