Leonard Lee Podair, Esq., discusses five things a client and transactional counsel should discuss at the start of a deal (and at least one thing that they should discuss at the end).

"The single biggest problem with communication is the illusion that it has taken place."

— George Bernard Shaw

As many a self-help book has confirmed, effective communication is a building block for the success of any relationship. Although the interaction between lawyer and client does not mirror other more intimate relationships (e.g., teacher and student, married couples and partners, parent and child), it too is a collaboration that can flourish if the parties understand the needs and expectations of the other and can flounder if communication is inadequate. Set forth below are some of the most important issues to be discussed by counsel and financial institution client, particularly at the inception of a transaction.

1. *Identify the players*: Sounds simple, but the parties give short shrift to this issue at their peril. Upon the engagement of counsel, the client should identify (i) the borrower; (ii) all subsidiaries and affiliates of the borrower; (iii) the owners of the borrower; (iv) the existing lender to the borrower; and (v) in an acquisition financing, the name of the target, the seller(s) of the stock or assets of the target and the existing lender to the target. The purpose is two-fold. First, the lawyer uses this information to run conflict checks. Even in the absence of a true "ethical" conflict, clients may require "relationship" conflict waivers if one of their existing law firms may be adverse to them in a deal. In addition to its use in a conflict search, the foregoing information may be utilized by the client to ensure compliance with regulatory and internal policies regarding the Patriot Act, customer identification and anti-money laundering.
2. *Communication Issues:* Who is on the client's deal team? Is there a "point person" at the client through whom inquiries and information should flow? Who at the client should receive drafts of all documents, certain documents or just "heads up" communications with no documents attached? What is the client's preferred method of communication? Emails with detailed explanation of issues, or the telephone? How will distributions and other communications be handled with borrower's counsel? Will the lawyer be expected to deliver documents directly or will they be posted to "intralinks" or a similar website? What is the expected level of involvement of in-house counsel in the transaction? Does the client require that an internal billing number be assigned to the lawyer's engagement or that an engagement letter be executed between lawyer and client (note that an increasing number of financial institutions have adopted global engagement guidelines for their external counsel, designed to apply in each circumstance).
3. *Getting Out of the Gate—Client-Specific Requirements: D*oes the financial institution require or suggest the use of a particular form of loan document(s)? If so, does outside counsel have the most up-to-date form? Is there a required vendor to be used for lien searches and/or title searches? Is there a need for local counsel and, if so, does the client have preferred local counsel? Does the client wish to take the lead in raising material issues for discussion with the borrower, or will that be the responsibility of counsel?
4. *Getting Out of the Gate—Deal-Specific Requirements:* How "collateral-dependent" will the transaction be (e.g., ABL-lite deals may require a different approach than core-ABL deals)? Will the loan be syndicated? Is there a term sheet, proposal letter, or commitment letter in circulation? Does the client have a draft credit approval or other background information available for the lawyer to review? What time-consuming issues may arise? Is this an acquisition (does the client have a copy of the purchase agreement)? Is the deal a multi-jurisdictional financing? Will the lender be taking real property mortgages on either the fee interests or leasehold interests of the borrower group? What does the capital structure look like (e.g., is there subordinated debt or other junior capital, for which an intercreditor agreement may be necessary)? Are there potential regulatory issues looming (e.g., is the borrower a liquor distributor or a healthcare operator)? Does the client wish to use document precedent from a previous deal with the same borrower or sponsor group?

To whom should the lawyer send the due diligence questionnaire for completion by the borrower group?

5. *Billing Issues:* Do the financial institution and the lawyer's firm have any special billing arrangements in place? Does the client have an expense reimbursement letter signed by the borrower group and/or a deposit for transaction costs? Will the matter be billed periodically, at closing or in the ordinary course, and will the bill be delivered electronically or the old-fashioned way?
6. *Closing and Post-Closing:* What kind of review of the client's credit approval is required of the lawyer? Will the client be submitting a "pre-closing" memo as a modification of the original credit approval and, if so, should the lawyer review it as well? Who will be responsible for tracking post-closing items (in any event, the client should be provided with a copy of the applicable post-closing schedule)? Does the client require that UCCs, mortgages and other perfection instruments be recorded via an approved vendor? Does the client intend to conduct post-closing searches to confirm proper filing/recordation of perfection documents or is the lawyer expected to be responsible for this? **TSL**

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