

USING A BROKER OR INTERMEDIARY TO HELP YOU SELL YOUR BUSINESS

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If you ready to get serious about selling your business, then you should consider retaining an intermediary to help out. Whether they are a business broker, a lawyer or an accountant experienced in buying and selling privately-owned businesses, there is a lot they can bring to the process, including:

- _ Confidentiality;
- _ Experience;
- _ Expertise;
- _ Objectivity; and
- _ Determination to make a deal happen.

The Benefits of Using an Intermediary to Help You Sell Your Business

There are a number of great reasons to use an intermediary to help you sell your business:

- _ You can benefit from the experience of someone who has done this before.
- _ You can obtain an objective assessment of what you have to sell and what it might be worth.
- _ You can obtain useful ideas on how to improve the value or marketability of your business.
- _ An intermediary can help you assess when the best time would be to sell your business.
- _ An intermediary can approach potential buyers while keeping your identity hidden.
- _ An intermediary can qualify potential buyers, so you don't waste your time with scavengers, tire-kickers or curiosity-seekers.
- _ An intermediary can develop and implement a plan to bring enthusiastic, multiple buyers to the table.
- _ An intermediary can deal with multiple potential buyers at the same time.
- _ An intermediary can leave you free to run the business.
- _ An intermediary can let you play “good cop, bad cop” in the negotiating process, or stay in completely the background if you prefer.
- _ An intermediary can ask questions that may be difficult for you to ask.
- _ An intermediary will be experienced in negotiating business terms, including price, non-competition covenants, deal structure, payment terms, management contracts, security and other critical matters.

- _ An intermediary can bring other necessary professionals into the process, including accountants, lawyers, business valuers and other consultants.
- _ An intermediary will keep driving the deal forward, and will work to hold a deal together if it makes sense.
- _ An intermediary can work with the lawyers and accountants to ensure the deal gets done as quickly and efficiently as possible.

Using An Intermediary to Help You Sell Your Business

Every intermediary has their own way of doing things. However, a typical process could include:

Retaining the intermediary: This is usually done by way of an exclusive, written agreement for a fixed listing period, often six to twelve months. Fees are usually structured on a commission basis, but may include:

- _ A non-refundable and minimum fee up-front to be credited against the commission (if any), which pays for the consulting services and value you will receive even if you ultimately decide not to sell; and
- _ A commitment or understanding of how expenses will be covered, including advertising, travel, printing and similar third party payments or disbursements.

Commissions: Commissions are usually based on a percentage of the consideration received, usually 5% to 10% (including any non-refundable deposit), and are usually calculated on the total purchase price to be received by the vendor no matter how it is paid, including debt assumed, consulting fees and similar forms of vendor compensation.

Commissions are usually paid on closing and in cash equivalent funds. However, in some deals commissions are paid:

- _ As and when the vendor gets paid; or
- _ In the same kind of property the vendor receives, which could be shares or stock in the buyer; or
- _ Some combination of both.

Included and excluded buyers: Listing agreements will also address who the business can be offered to, and whether commissions are paid on all buyers or not. If the vendor has already had discussions with some potential buyers, those buyers might be excluded from the agreement altogether, or might result in lower commissions. The same is true of special parties such as existing partners or senior management members. On the other hand, the intermediary might argue that all intermediary activities which generate sales activity justify payment of full commission.

Carry-over provisions: The listing agreement will also address transactions completed after the listing has expired with parties introduced during the listing period. After all, the intermediary may find a potential buyer late in the listing, or someone could come back to the table. In those cases it is fair for the intermediary to get paid during some reasonable period following the expiry of the original listing, usually three to twelve months. This also prevents a vendor or

potential buyer from orchestrating a postponement of a deal until after the listing period just to deprive the intermediary of his or her commission.

Completing a business review: After your listing or representation agreement is in place, your intermediary can work with you to complete a review of the business opportunity you have to sell, including what you are selling, why, how valuable it might be, who likely buyers might be, and what can be done to improve the value or marketability of the business. This review can include a financial review, inspection and cataloguing of assets, and assessing and summarizing important assets or relationships which are valuable to a potential buyer.

Preparing Briefing Materials: You and your intermediary are also likely to work together preparing briefing materials for potential buyers. These materials often include:

- _ A very short (1-2 page) Opportunity Summary that can be distributed to potential buyers, sometimes called a “teaser”, which keeps your identity anonymous;
- _ A ten to twenty page Opportunity Brief that provides more detail to qualified buyers after they sign a confidentiality agreement; and
- _ A preliminary due diligence package, which will include the core information a buyer needs to develop a price, financing and due diligence strategy, but does not contain the level of detail which will be required for final due diligence to verify the assumptions which form the basis of the initial deal.

Preparing a Marketing Plan: At the same time you will probably work with your intermediary to prepare a marketing plan. This will include a sales process and time line, marketing strategies (advertising, anonymous solicitation by the intermediary, non-anonymous solicitation of key potential buyers), and a list of potential buyers to be contacted. This plan is often reduced to writing. The goal of the plan is usually to locate multiple, enthusiastic buyers for your business, although sometimes it is targeted at a few very select and key potential buyers.

Implementing the Marketing Plan: Your intermediary will then implement your marketing plan. All expressions of interest are usually referred to the intermediary, who will then work to bring the most likely qualified buyers for you to meet and consider.

Negotiating the Deal: In the end, you and your team will identify the most likely buyers and the intermediary will assist you in negotiating a deal. This part of the transaction will include making sure you have a buyer who is “for real”, turning over the preliminary due diligence package and answering questions arising from it, and getting an agreement on all the main business points (including price, financing, terms, conditions and restrictive covenants). The intermediary will very involved in this stage of the transaction and should be your primary advisor.

Initial Deal Document: The essential deal points are typically negotiated in the course of drafting and redrafting a proposed term sheet or letter of intent. Some of this document is binding – confidentiality provisions, disclosure provisions and lock-up terms, for example. However, most of the document is non-binding until final due diligence is completed – including price, payment terms, special conditions and third party approvals. The intermediary is normally very involved in working on this document, and may even be the party responsible for drafting, presenting and redrafting the document as required. Your lawyer and accountant may be involved too.

Due Diligence and Definitive Agreement: After the “hand shake” document, the lawyers usually put together a definitive agreement of purchase and sale and closing documents and work on legal due diligence, while the parties and their other advisors, including accountants, work on completing all business and financial related due diligence.

In most deals, the agreement of purchase and sale is not signed until the actual closing date. However, on some deals – smaller ones or deals with special circumstances – the agreement of purchase and sale can be done instead of the letter of intent, or will be done right away after the deal memo or letter of intent are completed, but before closing.

In any event, the intermediary is usually not very involved in the details of process, although they have an important role to play and can add significant value in assisting with communications and helping to mediate if difficult issues arise.

Closing: By the time you get to closing, the intermediary generally does not have a significant role to play, except to make sure the other professional advisors remain focused and on track, and to smooth over those last minute issues which are inevitable in every deal. Intermediaries should be invited to your closing, since it represents the completion of a project which they started months earlier and had a significant role in putting together and pushing through to conclusion.

A Note On Licensed Brokers and Unlicensed Intermediaries

Business brokers are regulated under statute in most jurisdictions. Under this legislation, and with only a few exceptions, only a broker licensed under the statute can act on a business transaction or legally collect a commission or success fee in helping you sell your business. The purpose of this legislation is to protect consumers by making sure that only qualified individuals take on roles of such importance and trust.

In practice, many unlicensed persons offer to act or act as intermediaries on the purchase and sale of businesses. Many of them are competent and professional. Some of them are not. Some differences between licensed business brokers and unlicensed intermediaries for you to consider include the following:

Licensed Broker	Unlicensed Intermediary
Regulated by government appointed body and registrar.	Unregulated.
Mandatory training to become licensed.	No mandatory training.
Mandatory continuing education requirements to stay licensed.	No mandatory continuing education.
Member of local, provincial and national association of brokers – may be member of international association as well.	Not a member of any professional association of brokers
Able to offer to share commissions with brokers representing interested buyers.	Not legally allowed to participate in commissions with licensed brokerage community.
Required to follow provincial, state or national	No mandatory ethical compliance.

Licensed Broker	Unlicensed Intermediary
codes of ethics.	
Able to use and manage regulated trust account, including deposits.	No regulation on handling deposits, trust funds or third party money.
Formal statutory complaints procedure leading ultimately to loss of license for breach of regulation or ethics.	No statutory accountability at all.
Lawfully entitled to charge a commission on a deal and enforce payment of that commission.	Can contract on a commission basis, but may not be entitled at law to sue to recover payment of a commission.

In some cases real estate brokers, lawyers or accountants can act as intermediaries without being licensed specifically as business brokers, but that is not always the case.

It is important to note that many licensed buyer intermediaries will not do business with unlicensed seller intermediaries. They don't want to encourage people to act as intermediaries without being licensed, and are often prohibited by their own governing body from working with unlicensed intermediaries. Also, licensed buyer intermediaries are not guaranteed to be paid a commission if the seller's intermediary is practicing outside the statutory scheme. All of this can impair a seller's ability to market their business for sale, as most licensed intermediaries have a network of buyer prospects who might never hear about the seller's business.

Closing Thoughts

Buying or selling a business is not like buying or selling a house. There is no database of comparable transactions to research. There is no Multiple Listing Service to access. You cannot simply put a sign out front, or drive around the neighborhood looking for "For Sale" signs. Both buyers and sellers are very concerned about confidentiality. The deals themselves are much more complicated and full of risks that are not that obvious to people who have not done it before. Very few professionals have any real experience in handling such transactions.

Buying or selling a business is not something you should try to do by yourself. Most owner managers only buy or a sell a business once or twice in their careers. Working with an experienced professional who buys or sells businesses every month and who can protect your confidentiality can improve your chances of success and reduce the risk of something going terribly wrong.