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This edited panel discussion from the 2019 Business Law Prof Blog symposium, *Business Transactions: Connecting the Threads III*, features three professors from The University of Tennessee College of Law who are going to talk about mergers from different substantive law and practice angles. The panel moderator, Taylor Smith, is a third-year student at The University of Tennessee College of Law. Dixon Babb, also a third-year student at The University of Tennessee College of Law, provides commentary.

Smith: Approximately 10 years ago, three professors at The University of Tennessee College of Law found themselves by a water cooler talking about mergers, equity sales, and asset sales. In their conversation that day, the three professors began to scope out various concepts relating to mergers and acquisitions. Based on the distinct perspectives provided by their respective professional backgrounds, they offered a complex, and sometimes contradictory, picture of these intricate corporate finance transactions, which we will discuss today.[1]

We will start with Professor Heminway. What policy goals underlie your area of legal expertise as they apply to mergers?

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[1] While this panel discussion cannot replicate that moment in full, the edited transcribed discussion that follows attempts to be faithful to the original as much as possible.

Heminway: Thanks, Taylor. That is a great question. I think all of us may have slightly different views on that question. I will get to mine in a moment.

Let me begin by thanking my co-bloggers from the Business Law Prof Blog for coming here to UT Law and regaling us with your knowledge. Also, I offer thanks to my colleagues, including these two guys whom I conscripted into a conversation many moons ago. Finally, I am grateful for our students from the *Transactions* journal, who have been doing a great job in organizing this conference and participating in today's proceedings—including those working with us on this panel, Taylor and Dixon. I also want to acknowledge the extraordinary efforts of Colleen Conboy, who organized this whole day. I do not think we can praise her enough for that.

Having given those expressions of gratitude, one matter is important to note as we begin to talk about policy perspectives—goals and purposes—underlying the laws we will discuss today. All three of the lawyers on this panel are, in principal part, advisors. This is an important predicate to our discussion. Among other things, how we characterize our roles in mergers and acquisitions affects our professional obligations. From the standpoint of the American Bar Association's Model Rules of Professional Conduct, the second paragraph of the Preamble[2] specifically instructs us that our role as advisors is to provide "a client with an informed understanding of the client's legal rights and obligations" and to explain "their practical implications." Each of us takes that responsibility seriously, as will be illustrated today.

Model Rule 2.1[3] offers more guidance, elaborating on the guidance provided in the Preamble. The comments to that rule, specifically comment 2, provide that "[a]dvice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant."[4] The

[2] MODEL RULES OF PROF'L CONDUCT Preamble ¶ 2 (AM . BAR ASS'N 2016).

[3] *See generally* MODEL RULES OF PROF'L CONDUCT r. 2.1 (AM. BAR ASS'N 2016) ("providing what a lawyer shall and may do in the role of an advisor").

[4] *Id.* cmt. 2.

comment goes on to note that "[p]urely technical legal advice, therefore, can sometimes be inadequate."[5]

Understanding the policies underlying the different types of law that we are going to discuss is critical to that advisory capacity. The purposes and objectives of different areas of law help us to interpret and bridge gaps in those areas of law as we determine how to advise our clients. I practice in the area of business finance, more commonly known as corporate finance. That area of practice requires knowledge and skill in the law of business associations and securities regulation. Accordingly, I focus primarily on those two areas of law in my piece of this discussion.

Business associations law exists to facilitate people getting into business with each other, pure and simple.[6] The statutes that govern the different forms of business entities offer distinct off-the-shelf options—rules relating to the structure, ownership, management, control, and operation of a business firm. Within business associations law, the law of mergers anticipates the fact that businesses will want to combine—specifically, that one business may want to take on another during the course of their respective business lifetimes. With that, the law anticipates the need for, and desirability of, business combinations by facilitating those transactions.

Securities regulation exists for different purposes. That area of law focuses on protecting investors, on maintaining fair markets for financial instruments, and on encouraging the formation of capital in businesses.[7] Those

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[5] *Id.*

[6] William Klein, *Criteria for Good Laws of Business Association*, 2 BERKELEY BUS. L.J. 13 (2005) (The law of business associations has many facets covering structure, governance, and finance. Professor Klein collected twenty-eight "criteria for good laws of business association" organized under four general classifications); *id.* at 15 ("The 'laws of business association' contemplated in this paper consist of the statutes, regulations, judicial interpretations and rules, and commonly used legal forms relating to the organization of business entities; relationships among shareholders, managers, and other stakeholders; and securities market regulation.").

[7] *See, e.g.*, Tamar Frankel, *The Internet, Securities Regulation, and Theory of Law*, 73 CHI.-KENT L. REV. 1319, 1324 n.16 (1998) ("Underlying the securities laws are two paramount policies: the policy of protecting investors, designed to entice investors to put their money at risk in the markets, and the policy of facilitating capital formation, designed to

three objectives are effectuated through three basic regulatory tools.[8] One is mandatory disclosure rules—requirements to tell things to the public on a compulsory basis. Another is anti-fraud protections and other liability-driven compliance. The third is substantive regulation of the people and transactions involving financial instruments that non-tax business lawyers call securities.

In terms of mergers, securities regulation can involve things such as regulation of the voting process through proxy regulation, as well as regulation of the exchange, purchase, or sale of shares in business combination transactions. That might include tender offer regulation or going private regulation—taking a firm that has had access to public securities markets and moving it into a different, non-public space for securities trading.

The main lesson to derive from these objectives and purposes is that there is a lot of business associations and securities law to worry about in the mergers and acquisitions context. Consequently, as I reflect on our topic today, I am drawn to think about the attorney competence rules. Our conversation is likely to be bracketed a bit by that aspect of professional responsibility, specifically Model Rule 1.1, which requires legal counsel to be competent—to have "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[9] I have always felt a bit of a burden, albeit a happy one, working on mergers and acquisitions because of that burden of competence.

I look forward to hearing what my colleagues have to say about the purposes of their areas of legal expertise as they

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assist issuers in raising capital."); Lyman Johnson, *Why Register Hedge Fund Advisers—A Comment*, 70 WASH. & LEE L. REV. 713, 719 (2013) ("[I]nvestor protection and capital formation are both key policy goals of federal securities laws."); *see also* 15 U.S.C. §§ 77b(b), 78c(f) (2020) (providing that the Securities and Exchange Commission is statutorily obligated, in its own rulemaking and in reviewing self-regulatory organization rulemaking, to "consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation").

[8] *See* Joan MacLeod Heminway, *Investor and Market Protection in the Crowdfunding Era: Disclosing to and for the "Crowd"*, 38 VT. L. REV. 827, 828 (2014) (providing the three objectives of securities regulation).

[9] MODEL RULES OF PROF'L CONDUCT r. 1.1 (AM . BAR ASS'N 2016).

relate to business combinations and how they may or may not dovetail with the policy objectives of corporate and securities law in a mergers and acquisitions context.

Plank: I understand that corporate law involves a lot of magic, but I don't believe in magic. I'm a property person, and I look at this from the point of view of the purpose of property law. Property law relates to the allocation of resources, whether an efficient or inefficient allocation. One of attributes of a property interest is the right to exclude. The right to exclude I think promotes the more efficient allocation of assets.

Many questions follow from the right to exclude. Who is the property owner excluding? The world. Whoever has an interest in a property has a right to exclude everybody else from exercising those rights inherent in the respective property interest.

Property law, unlike contract law, is not just a relationship between parties to a transaction, or the relationship between an owner of property and the thing itself. Instead, it is the relationship between the parties to the transaction, the property itself, and the rest of the world. This principle raises certain questions from a theoretical perspective. How do people exercise their right to exclude? They have to provide notice to the world that they have a property interest. That is a fundamental policy in property law.

There is also the practical element that follows the policy aspect. The owner of property, or a person contemplating acquiring or transferring property, has a fundamental risk. For a buyer of property, for example, how does the buyer know that they are receiving it bargained for? How does the buyer know that they are receiving a good property interest from the seller? Conversely, if an owner is trying to sell, how does the owner know that they owned that property interest? Additionally, how can they convince others of their ownership and their right to transfer a good property interest, including the right to exclude?

These considerations affect how property lawyers think about the property consequences of a merger, which we can talk about in a minute. Beyond these broader points, there are specific policy considerations with respect to each particular type of a property interest. These considerations also implicate whether or not a property rule should in fact be respected in terms of whether a merger will constitute a transfer or not. I'll stop here and pick up these points later.

Leatherman: A tax lawyer thinks about the policies behind the treatment of a merger a bit differently than a property or non-tax business lawyer. Context matters, as different policies apply to taxable and tax-free mergers. Such policies may be derived from the statute (*i.e.*, the Internal Revenue Code of 1986, as amended, or the "Code"), judicial guidance, or administrative guidance.

Section 368 of the Internal Revenue Code, which defines tax-free reorganizations, charts an uneven path, making it difficult to state with particularity or precision the principles and policies that distinguish taxable and tax-free mergers.[10] In practice, for a merger to be tax free, the target shareholders must receive a significant continuing proprietary interest in the acquiring corporation in exchange for their target stock, and the acquiring corporation must continue the target's historic business or use a significant portion of the target's historic assets in a business.[11] Yet, the statutory requirements for a tax-free reorganization depend vitally on form, and the statutory variations are difficult to justify other than as historical anomalies.[12]

[10] *See* 26 U.S.C § 368(a) (2020).

[11] Treas. Reg. § 1.368-1(d), (e) (1986); *see* 26 U.S.C. § 368(a)(2)(D) (2020) (allowing stock of the controlling parent of the acquiring corporation to be used); Treas. Reg. § 301.7701-2(b)(1) (providing that the combination of corporations by merger must be treated as corporations for federal income tax purposes); Treas. Reg. § 301.7701-2(b)(2) (providing that other entities, such as limited or general partnerships, limited liability partnerships, or limited liability companies may elect to be treated as corporations for federal tax purposes); Treas. Reg. § 301.7701-3(a), (b)(1), (c)(1) (providing the "check-the-box" regulations, which assumes that any corporation is a C corporation). *See generally* 26 U.S.C. § 11 (2020) (providing tax imposition); 26 U.S.C.§§ 301-385 (2020) (providing tax codes for corporations). *Compare* 26 U.S.C. §§ 1361-1378 (2020) (for the S corporation provisions).

[12] *See generally* 26 U.S.C. § 368(a) (2020) (providing that a reorganization can occur in seven different ways).

Those variations can be measured against three broad principles of income taxation: equitability, administrability, and economic efficiency. For an income tax system to be equitable, persons with the same economic income should bear the same tax. That principle, however, is often compromised to try to make the tax law more administrable, that is, easier to understand and simpler to apply for both the government and taxpayers. For many, the ultimate principle, which has gained increasing prominence over the years, is to assure that the tax system promotes economic efficiency. In thinking about corporate acquisitions, a tax is economically efficient if the buyer and seller (or sellers) are indifferent as to the form of the transaction (*i.e.*, whether stock or assets are acquired).

At polar extremes, the tax treatment of corporate acquisitions is relatively efficient. At one extreme, the acquiring corporation transfers solely its voting common stock as the consideration received by the target shareholders. Whether that transaction is structured as a target stock or asset acquisition, it is generally tax free to the target shareholders, target corporation, and acquiring corporation.[13] Under each alternative, however, the target assets retain their historic bases. Further, if the transaction qualifies for tax-free treatment, that treatment is mandatory; the parties cannot elect to treat the transaction in whole or in part as taxable.

At the other extreme, the acquiring corporation transfers solely cash as the consideration ultimately received by the target shareholders. If, for example, the target merges into the acquiring corporation, the target and target shareholders generally recognize gain or loss, and the

[13] 26 U.S.C. § 354(a) (2020) (target shareholders will not recognize gain or loss if stock received is in pursuance of a reorganization, exchanged solely for stock of another corporation party to the reorganization.); 26 U.S.C. § 361(a), (c) (2020) (providing non-recognition for the target corporation on an asset transfer); 26 U.S.C. § 1032 (2020) (providing non-recognition for the acquiring corporation on an asset transfer); *see also* 26 U.S.C. § 368(a) (2020) (defining reorganizations); *cf.* HOWARD E. ABRAMS & DON A. LEATHERMAN, FEDERAL CORPORATE TAXATION 261–322 (8th ed. 2020) [hereinafter ABRAMS & LEATHERMAN] (providing a general discussion of tax-free reorganizations).

acquiring corporation takes a cost (*i.e.*, fair market value) basis in the target assets.[14]

If, however, the acquiring corporation acquires target stock, the acquiring corporation can treat the acquisition for federal income tax purposes either as a stock acquisition or, if it makes a Section 338 election, in many ways as an asset acquisition.[15] If no Section 338 election is made, then form is followed: the target shareholders recognize gain or loss on their disposition of target stock, the target recognizes no gain or loss and retains its historic asset bases, and the acquiring corporation takes a cost basis in the acquired target stock.

If, instead, the acquiring corporation makes a Section 338 election for the acquisition, the target is treated in many ways for federal income tax purposes as if it sold its assets to a newly formed subsidiary of the acquiring corporation and liquidated.[16] On its deemed asset sale, the target recognizes gain or loss and the deemed purchaser takes a cost basis in those assets. Depending on the type of Section 338 election made, a target shareholder is treated either as selling its stock or as receiving a liquidating distribution from the target.[17] Despite these tax fictions, for non-tax purposes, the acquiring corporation simply acquires target stock and the target remains in existence.

[14] 26 U.S.C. § 1001(2020) (providing the general recognition rule); 26 U.S.C. § 1012 (2020) (providing the cost basis rule); 26 U.S.C. § 331(a) (2020) (providing the general tax treatment of target shareholders); *see also* ABRAMS & LEATHERMAN, *supra* note 13, at 207–226 (providing discussion on 26 U.S.C. §§ 331–332). *But see* 26 U.S.C. § 332(a) (2020) (providing non-recognition treatment for a corporate target shareholder that is affiliated with the target before the merger); *see* 26 U.S.C. §§ 368(a)(1)(D), (a)(2)(H) (2020) (providing that if the target shareholders control the acquiring corporation after the merger, the transaction may qualify as a tax-free reorganization). *See generally* ABRAMS & LEATHERMAN, *supra* note 13, at 284 (giving a brief discussion of all-cash D reorganizations).

[15] *See* 26 U.S.C. § 338(d)(3) (2020) (providing that a qualified stock purchase is present when a corporation acquires an affiliated interest in stock over a 12-month period from target shareholders unrelated to the acquiring corporation); *see also* 26 U.S.C. § 338(h)(3)(A) (2020) (defining "purchase").

[16] *See* 26 U.S.C. § 338(a) (2020); *see also* ABRAMS & LEATHERMAN, *supra* note 13 at 233–249 (providing a more extended discussion on § 338 elections).

[17] *See* 26 U.S.C. §§ 332, 1001 (2020) (detailing the tax treatment of target shareholders and corporations).

Note that whether or not a Section 338 election is made, if the acquiring corporation acquires all target stock and then liquidates the target, neither the target nor acquiring corporation recognize gain or loss on the liquidation, and the acquiring corporation succeeds to the target's tax attributes, including its asset bases.[18] Thus, whether the acquiring corporation ultimately retains the target stock or acquires the target assets through liquidation, it can choose whether the target recognizes gain or loss. If the acquiring corporation opts for the recognition route, the target assets will take fair market value bases. If it opts for the non-recognition route, those assets will retain their historic bases. In summary, the acquiring corporation can not only choose to acquire target stock or assets, but also choose whether the target recognizes gain or loss for federal income tax purposes, a freedom that enhances economic efficiency.

Note as well that if the consideration provided by the acquiring corporation is not solely its voting common stock or cash, the federal income tax consequences depend vitally on the facts and defy a brief summary. It is for that reason, among many others, that tax lawyers must be involved at the earliest possible stage in discussions about any corporate acquisition. In almost every deal, tax issues drive the ultimate structure.

Heminway: Of course, in my view, corporate and securities law drive the deal—at least sometimes (although I acknowledge that the structure of a transaction for a large public company issuer is often most sensitive to tax considerations).

Tom, when we were preparing for this panel, you articulated your own view of the purpose—the objective—of tax law. Can you repeat that here?

Plank: Yes. Tax law is all about making sure the king gets enough money to do whatever the king thinks is appropriate to do

[18] *See* Rev. Rul. 90-95, 1990-2 C.B. 67 (treating a qualified stock purchase and liquidation of a target as separate steps for federal income tax purposes); *see also* 26 U.S.C. § 337(a) (2020) (providing non-recognition for the target corporation), 332(a) (providing non-recognition for the acquiring corporation); 26 U.S.C. § 334(b) (2020) (providing the transferred-basis rule); 26 U.S.C. § 381 (2020) (providing that the acquiring corporation succeeds to many target tax attributes in a § 332 liquidation).

for himself and his supporters. That is what tax law is all about. Of course, property law is all about making sure that the rich get richer. But also, about enabling the want-to-be rich to get rich.

Smith: These are all good foundations for discussion. Professor Heminway, let's return to you and build from there. From someone with your perspective, in your area of expertise, what is a merger?

Heminway: This is where the gloves really come off. With due respect to both of my colleagues on this panel, and especially on this first point to Professor Plank (given his earlier remark about not believing in magic), for the corporate finance lawyer, the answer to this question is really, really simple. Mergers *are* magic. I must, however, unpack that a little. What, exactly, do I mean by that—that mergers are magic? I will attempt to explain.

Most may think, as Professor Leatherman earlier said (and I will respectfully disagree with him, as well as Professor Plank, on this, from my vantage point) that mergers are really just about one business buying another. Certainly, it all looks like that, in many cases.

In fact, depending on the structure of a business combination transaction, it may *be* just that. A business combination can be accomplished, of course, by buying a business. That is a more commercial type of transaction that can be effectuated by buying the assets or stock of a corporation (or equity units in whatever the business might be, if it is not a corporation).

However, mergers are different. You may have heard that the area of law governing business combinations, is generally termed "mergers and acquisitions," or "M&A." That is because we corporate finance lawyers distinguish acquisitions, which are akin to commercial buy and sell transactions, from mergers, which are statutorily ordained. That is a significant distinction, at least for corporate finance lawyers. Mergers, unlike acquisitions, would not exist absent legislative enactment and intervention.

Under general principles of business entity law, a merger is actually one of several "basic," or what we sometimes also call "fundamental," change transactions that are created, and exist, only by virtue of statutory law. Just like the corporation (and, under current law, the limited partnership and the limited liability company), a merger exists only by legislative grace. This concept should be familiar to anyone who has taken a Business Associations course.

If firms desire to combine, they can follow those statutory rules—the applicable statutory rules for a merger. They involve setting up a specific kind of agreement, a contract, that is provided for by law. They involve certain approval rights, which I will say more about in a minute. They involve filing a certificate of merger, or articles of merger, and various additional things. If transaction participants do everything the statute says to create a merger, then . . . poof! They get a merger. That is magic, right? With a wave of the statutory wand, the businesses are combined by merger!

You cannot meet a merger, or a corporation, walking down the street. Neither is naturally occurring. Legislatures must enact provisions to create them. These statutes also provide, in every state, specifically for the effects of a merger that exist because of these statutory permissions. Under Tennessee law, for example, the applicable provision is Tennessee Code Annotated § 48-21-108, entitled "Effect of Merger or Share Exchange." Subsection (a) of that particular statutory section in Tennessee covers what happens when a merger becomes effective pursuant to the statute. I am not going to read the whole subsection because there are seven different items listed there. But this subsection helps to illustrate why it is useful to have Professors Plank and Leatherman on this panel with me today, even though I must respectfully disagree with their views on what a merger is.

One of the effects of a merger under Tennessee law, for example, is that "[a]ll property owned by, and every contract right possessed by, each corporation, or eligible entity that is merged into the survivor [of the merger] shall be vested in the survivor without reversion or impairment."[19] All liabilities also are vested in the survivor

[19] TENN. CODE ANN. § 48-21-108(a)(2) (2020); *see also* DEL. CODE ANN. tit. 8, § 259(a) (2020) ("[T]he rights, privileges, powers and franchises of each of said

upon the merger.[20] And a proceeding that is pending against any corporation that is a target in a merger transaction and does not survive the transaction becomes the responsibility of the survivor.[21]

The statute also provides that each equity unit–each share of stock in the non-surviving corporation–becomes whatever the merger agreement says it becomes; this typically can be shares in the surviving corporation, assets, or cash. [22] Modern merger statutes allow significant

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[constituent] corporations, and all property, real, personal and mixed, and all debts due to any of said constituent corporations on whatever account, as well for stock subscriptions as all other things in action or belonging to each of such corporations shall be vested in the corporation surviving . . . such merger . . . ; and all property, rights, privileges, powers and franchises, and all and every other interest shall be thereafter as effectually the property of the surviving . . . corporation as they were of the several and respective constituent corporations, and the title to any real estate vested by deed or otherwise, under the laws of this State, in any of such constituent corporations, shall not revert or be in any way impaired by reason of this chapter.").

[20] *See, e.g.*, TENN. CODE ANN. § 48-21-108(a)(3) (2020) ("All liabilities of each corporation or eligible entity that is merged into the survivor shall be vested in the survivor"); DEL. CODE ANN. tit. 8, § 259(a) (2020) ("[A]ll debts, liabilities and duties of the respective constituent corporations shall thenceforth attach to said surviving . . . corporation, and may be enforced against it to the same extent as if said debts, liabilities and duties had been incurred or contracted by it.").

[21] *See, e.g.*, TENN. CODE ANN. § 48-21-108(a)(4) (2020) ("A proceeding pending against any corporation . . . that is a party to the merger may be continued as if the merger did not occur or the name of the survivor may be substituted in the proceeding for any corporation . . . whose existence ceased in the merger"); DEL. CODE ANN. tit. 8, § 261 (2020) ("Any action or proceeding . . . pending by or against any corporation which is a party to a merger . . . shall be prosecuted as if such merger . . . had not taken place, or the corporation surviving . . . such merger . . . may be substituted in such action or proceeding.").

[22] *See, e.g.*, TENN. CODE ANN. § 48-21-102(c)(3) (2020) ("The plan of merger must set forth: . . . [t]he manner and basis of converting the shares of each merging . . . business corporation . . . into shares or other securities, eligible interests, obligations, rights to acquire shares, other securities or eligible interest, cash, other property, or any combination of the foregoing."); DEL. CODE ANN. tit. 8, § 251(b)(4) ("The agreement shall state . . . [t]he manner, if any, of converting the shares of each of the constituent corporations . . . ."); DEL. CODE ANN. tit. 8, § 251(b)(5) (2020) (Delaware law further provides that shares of stock of the constituent corporations may be converted "into shares or other securities of the corporation surviving . . . the merger . . . and, if any shares of any of the constituent corporations are not to remain outstanding, to be converted solely into shares or other securities of the surviving or resulting corporation or to be cancelled, . . . [into] cash, property, rights or securities of any other corporation

freedom of contract in this regard. The merger consideration is really whatever the merger agreement says.

You may have noticed me using the terms "target" and "survivor" in describing a merger. Let me explain the meaning of those terms so that we all are clear on this terminology. In a direct merger that involves two firms (typically referred to as constituent firms), one survives (is the survivor) and the other does not (it ceases to exist), automatically, by operation of law. In a triangular or subsidiary merger, we often refer to a target firm. The target firm is the operating firm that is merged with and into, or that survives, a merger with a subsidiary of another firm. So, there are three firms involved in this type of business combination, hence the use of the term "triangular." A triangular merger results in either (i) the target firm becoming a subsidiary wholly owned by the other operating firm involved in the business combination, or (ii) the target firm's entire business magically vesting in a subsidiary of the other operating firm involved in the business combination.[23]

A few other points are worth mentioning at this juncture. First, under corporate law, which offers the most intricate set of merger rules, a wholly domestic merger is authorized by action of the boards of directors of the combining firms and, typically, at least the shareholders of the non-surviving corporation (even if not the shareholders of the surviving corporation as well).[24] The

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or entity . . . , which cash, property, rights or securities of any other corporation or entity may be in addition to or in lieu of shares or other securities of the surviving or resulting corporation.").

[23] *See, e.g.*, William K. Sjostrom, Jr., *The Truth About Reverse Mergers*, 2 ENTREPRENEURIAL BUS. L.J. 743, 746 (2008) (describing reverse triangular and direct mergers); Samuel C. Thompson, Jr., *Introduction to This Symposium and A Guide to Issues in Mergers and Acquisitions*, 51 U. MIAMI L. REV. 533, 557 (1997) (describing direct and reverse triangular mergers); Elaine D. Ziff, *The Effect of Corporate Acquisitions on the Target Company's License Rights*, 57 BUS. LAW. 767, 783 (2002) (describing forward and reverse mergers to include direct, forward triangular, and reverse triangular mergers).

[24] *See, e.g.*, DEL. CODE ANN. tit. 8, § 251(b)–(c), (f)–(h) (2019); DEL. CODE ANN. tit. 8, § 253 (2019); TENN. CODE ANN. § 48-21-104(1)–(2), (7) (2015); TENN. CODE ANN. § 48-21-105 (2013).

laws that govern unincorporated business associations provide similar approval rules.[25]

Second, there can be mergers between different kinds of business entities. Limited partnerships or limited liability companies can merge with and into corporations and vice versa in most states in the union. In addition, you can have cross-border mergers between entities organized in different U.S. states and between entities organized in U.S. states and entities organized under the laws of other countries, if and as permitted by law. Modern merger statutes are very inclusive in that regard. [26]

Here, concerns emerge again about competence.[27] A corporate finance lawyer must ask herself whether she can represent entities organized in different jurisdictions. She must consider her competence to advise under multiple laws. She must ask herself, "Can I do this under Model Rule 1.1?" Diligence may also be a matter of concern. There is a lot of diligence required in these transactions. Diligence is the subject of Model Rule 1.3, requiring legal counsel to "act with reasonable diligence . . . in representing a client.[28]

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[25] *See, e.g.*, DEL. CODE ANN. tit. 6, § 15-902(b) (2017) (providing for approval of partnership mergers); DEL. CODE ANN. tit. 6, § 17-211(b) (2019) (providing for approval of limited partnership mergers); DEL. CODE ANN. tit. 6, § 18-209(b) (2019) (providing for approval of limited liability company mergers);TENN. CODE ANN. § 48-249-702(c) (2012) (providing for approval of limited liability company mergers); TENN. CODE ANN. § 61-1-905(c) (2002) (providing for approval of partnership mergers); TENN. CODE ANN. § 61-3-1106 (2018) (providing for approval of limited partnership mergers).

[26] In Tennessee, for example, this inclusiveness is accomplished through statutory provisions that allow for mergers to occur between domestic corporations and "eligible entities," as well as other domestic corporations. *See* TENN. CODE ANN. § 48-21-101(2) (2013) (defining "Eligible entity" as "a domestic or foreign unincorporated entity or a domestic or foreign nonprofit corporation"); TENN. CODE ANN. § 48-21-102(a) (2013) ("One (1) or more corporations may merge with one (1) or more domestic or foreign business corporations or eligible entities pursuant to a plan of merger, or two (2) or more foreign business corporations or domestic or foreign eligible entities may merge into a new domestic business corporation to be created in the merger in the manner provided in this chapter."). Delaware handles the different types of merger through different statutory sections. *See generally* DEL. CODE ANN. tit. 8, §§ 251–58.

[27] *See* Heminway, *supra* note 9 and accompanying text.

[28] MODEL RULES OF PROF'L CONDUCT r. 1.3 (AM . BAR ASS'N 2016).

Finally, the securities lawyer in me compels me to recognize that any publicly held firm and any firm that is deemed to be offering, selling, or purchasing securities of any kind (including equity, debt, derivative, and hybrid instruments, among others) must comply with relevant federal and state securities law principles as well. Securities law, unlike business entity law, does not view mergers as magic. Securities law takes a highly technical compliance view of mergers. Depending on the type of merger, what it is designed to achieve, who is participating, and what consideration is being offered, securities law will regulate differently. This also increases the level of complexity for legal advisors, affording them one more reason to assess competence under Model Rule 1.1.

So, in brief, that is what a merger is, to me, in my areas of practice.

Plank: For me, a merger, in terms of the policies that I am worried about, involves a transfer of assets. It may be a transfer by operational law; but if ABC Corporation owns Blackacre, and ABC Corporation has merged into XYZ Corporation, ABC disappears, and now XYZ Corporation owns Blackacre. I do not have any concern about the merger statutes effecting a transfer. But a transfer of property interest raises two important issues. First, do you have an effective transfer? There are all kinds of requirements with normal transfers. For example, in the typical transfer of real estate, do you have a deed? Is it effective? Does it describe the property? There are all kinds of requirements. On top of that, because the property involves a right to exclude, the transferee must perfect the transfer or the purchaser's interest. What does "perfect" mean? Perfect means to make this interest being transferred good against the world.[29] That is done primarily through providing some form of notice.

[29] The requirement for perfection is an important exception to the basic property principle of first in time, first in right, also expressed as *nemo dat*, which is the principle that one cannot give an interest in property that one does not have. *See generally* Thomas E. Plank, *Article 9 of the UCC: Reconciling Fundamental Property Principles and Plain Language*, 68 BUS. LAW. 439, 449–62 (2013) (describing the property principle of *nemo dat* and the extent to which perfection requirements can either strengthen *nemo dat* or provide an exception to this property principle).

So, in property law, there are two things to worry about, effectiveness of the transfer and perfection of the transfer. The merger statutes do not deal with perfection at all, as far as I can tell. This fact does not surprise me because perfection is not really their concern. They do seem to affect a transfer by simply saying that the property of ABC Corporation is now vested in XYZ Corporation. The concept of vesting is really a property loan concept, and the merger statutes should be construed to transfer ABC Corporation's property interests to XYZ Corporation.

Now that there has been a merger, I want to make sure that XYZ Corporation can satisfy the policy concerns of property law. I want to make sure that XYZ's property interest is perfected, and that perfection will vary depending on the type of property item involved.

The term perfection is very prominent in Article 9 of the Uniform Commercial Code which deals with security interests in personal property as well as the sale of receivables,[30] but, in fact, the word is older than that. As far as I understand, it was first used in Bankruptcy Act of 1898.[31] It means making a property interest good against

[30] Since 1962, the concept of perfection has been an essential part of Article 9 of the Uniform Commercial Code, which applies to security interests in personal property (including the sale of receivables). *See* U.C.C. § 9-109(a)(1),(3) (AM. LAW INST. & UNIF. LAW COMM'N 2001) (providing that, with exceptions, Article 9 "applies to (1) a transaction, regardless of its form, that creates a security interest in personal property or fixtures by contract . . . [and] a sale of accounts, chattel paper, payment intangibles, or promissory notes"). Perfection of a security interest provides superiority over subsequent lien creditors, secured parties, and buyers of collateral. *See, e.g.*, U.C.C. § 9-317(a)–(b) (subordinating an unperfected security interest to lien creditors (which includes a bankruptcy trustee under U.C.C. § 9-102(a)(52)(C)), and to certain buyers, lessees and licensees of collateral); U.C.C. § 9-322(a)(2) (subordinating an unperfected security interest to a perfected security interest).

[31] *See* Bankruptcy Act of 1898, 11 U.S.C. § 3 (1898) (amended 1938) (providing that for purposes of determining whether there has been an "act[] of bankruptcy," referencing a transfer being "so far perfected that no bona-fide purchaser from the debtor and no creditor could thereafter have acquired any rights in the property . . . superior to the rights of the transferee or assignee"); 11 U.S.C. § 60(a), (b), & (d) (using the same concept for defining when a transfer has been "perfected" or been "made" for purposes of the avoidance of preferential transfers). The current Bankruptcy Code also contains two different definitions of "perfection" for purposes of avoidance of preferential transfers or fraudulent transfers. *See* 11 U.S.C. §§ 547(e)(1), 548(d)(1). In addition, the Bankruptcy Code uses variations of the word "perfect" in numerous systems. *See, e.g.*, 11

> any subsequent purchaser of such property or a creditor of a person that had transferred a property interest.
>
> So the word "perfect" is used in a broader sense, not just the Article 9 sense. If you want to perfect a transfer of an interest in a real estate, what do you do? Typically, you have to record some instrument in the designated land records office that puts people on notice of the transfer.[32] If you want to perfect an ownership interest in tangible items, such as ordinary goods,[33] or certain payment rights that have been reified into tangible form, such as tangible chattel paper or promissory notes, possession is sufficient to perfect.[34]

U.S.C. § 362(a)(4)–(5) (providing acts to perfect liens on property violate the automatic stay); U.C.C. § 362(b)(3), (18) (excepting from the automatic stay certain acts to perfect or to continue or to maintain perfection of liens); U.C.C. § 544(a)(3) (providing that a bankruptcy trustee has "the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by . . . a bona fide purchaser of real property, other than fixtures, from the debtor, against whom applicable law permits such transfer to be perfected, that obtains the status of a bona fide purchaser and has perfected such transfer at the time of the commencement of the case, whether or not such a purchaser exists"); U.C.C. § 546(b) (providing exceptions to the trustee's avoidance powers for certain interests perfected after the trustee's avoidance power would otherwise accrue).

32 Generally, the two predominant types of systems for perfecting interests in real estate: race-notice and notice. *See, e.g.*, WILLIAM B. STOEBUCK ET AL., LAW OF PROPERTY § 11.9 at 764–74 (4th ed. 2019) (describing the operation of the different types of recording systems). Under a race-notice system, an unrecorded conveyance is void as against a bona-fide purchaser for value without notice if the subsequent purchaser records the second conveyance first. Under a notice system, an unrecorded conveyance is void as against a subsequent bona-fide purchaser for value without notice, even if the subsequent purchaser does not record his or her conveyance. Generally, in either system, if the first transferee records its conveyance, then all subsequent purchasers will have at least constructive notice of the first conveyance.

33 *See, e.g.*, U.C.C. § 2-401(2) (providing that "[u]nless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods" as well as exceptions for relating good subject to a bill of lading); U.C.C. § 2-403(1) (providing that a "purchaser of goods acquires all title which his transferor had or had power to transfer except that a purchaser of a limited interest acquires rights only to the extent of the interest purchased");

34 *See, e.g.*, U.C.C. § 9-313(a) (providing that "[e]xcept as otherwise provided in subsection (b), a secured party may perfect a security interest in negotiable documents, goods, instruments, money, or tangible chattel paper by taking possession of the collateral").

So, if you merge ABC Corporation into XYZ Corporation, Blackacre is now owned by XYZ Corporation but record title is in ABC Corporation. There are implications involved in not recording some kind of record in the land records to demonstrate that there was in fact a transfer. There are different ways to do that depending, I think, upon the state law. This issue then always raises the question of choice of law.[35] For instance, a Delaware statute may be governing the merger, but Blackacre is located in Tennessee. What does Tennessee require or permit XYZ Corporation to record in the land records? Would a certificate of merger be sufficient? Does XYZ Corporation have to do a deed? Can XYZ Corporation record a memorandum?[36] I do not know the specific practice in Tennessee on these questions.

For personal property, if ABC owned and had possession of tangible goods, and those tangible goods are now owned and possessed by XYZ Corporation. So XYZ is thus perfected, and to show that it has title, XYZ Corporation can always point to the merger statue and say, "Yes, we acquired this property interest through the merger." So, what additional steps may be needed to perfect a transfer of any property interest will depend on the specific property items that are being transferred.

Intellectual property is a whole different area with a lot of complexity. In this area, a lot of things have to be done. What about the typical rights to payment under a contract, that is, ordinary rights to payment? Well, Article 9 of the Uniform Commercial Code governs the sale of rights of payment.[37] However, in the case of a merger, Article 9

[35] N.Y. BUS. CORP. LAW § 904 (McKinney 1998).

[36] Section 66-24-101(a) of the Tennessee Code Annotated lists the writings that may be "registered," which means recording the writing in the register's office. The first item listed is "[a]ll agreements and bonds for the conveyance of real and personal property." TENN. CODE. ANN. § 66-24-101(a)(1) (2016). There does not appear to be any other specific item listed that would apply in the case of real estate transferred as a result of a merger. *But see* TENN. CODE ANN. § 64-4-409.

[37] Article 9 incorporates the sale of receivables, which consist of accounts, chattel paper, payment intangibles, and promissory notes, through misleading definitions that use terms of security to reflect the sale transaction. *See* U.C.C. § 9-109(a)(3) (AM. LAW INST. & UNIF. LAW COMM'N 2010); *see, e.g.*, U.C.C. 1-201(a)(35) (defining the term "security interest" to include "any interest of . . . a buyer of accounts, chattel paper, a

does not apply to the sale of certain rights of payment when you are transferring a whole business.[38] If Article 9 does not apply, then the parties must comply with the common law rules for perfecting an assignment of a right to payment. In some states, a right to payment is automatically perfected upon assignment.[39]

Now, does a merger statue, or a merger agreement pursuant to the statute, qualify as "an assignment" for purposes of those common laws rules? Is something else needed, such as a separate written assignment? In other jurisdictions, perfecting an assignment under common law rules, in addition to a written assignment, requires notification to the obligor of the assignment, which

payment intangible, or a promissory note in a transaction that is subject to Article 9"); U.C.C. § 9-102(a)(12)(b) (defining "collateral" to include "accounts, chattel paper, payment intangibles, and promissory notes that have been sold"); U.C.C. § 9-102(a)(28)(b) (defining a "debtor" to include "a seller of accounts, chattel paper, payment intangibles, or promissory notes"); U.C.C. § 9-102(a)(73) (defining a "secured party" to include "a person to which accounts, chattel paper, payment intangibles, or promissory notes have been sold"); U.C.C. § 9-102(a)(74) (defining a "security agreement" as "an agreement that creates or provides for a security interest" which, because a security agreement includes the interest of a buyer of receivables, includes a sale agreement for receivables).

[38] *See* U.C.C. § 9-109(d)(4),(6) (providing that "[t]his article does not apply to . . . a sale of accounts, chattel paper, payment intangibles, or promissory notes as part of a sale of the business out of which they arose [or] . . . an assignment of a right to payment under a contract to an assignee that is also obligated to perform under the contract"); *see also* Health All. Network v. Cont'l Cas. Co., 354 F.Supp.2d 411 (S.D.N.Y 2005); Marsh Advantage Am. v. Orleans Par. Sch. Bd., 995 So. 2d 52 (La. Ct. App. 2008).

[39] If ABC Corporation owns rights to payment governed by Article 9, that is, rights to payment that did not arise out of the business or for which the owner has no future performance obligations, the effectiveness and perfection of the sale of the rights to payment will depend on complying with the requirements of Article 9. For rights to payment that are "accounts", defined as rights to payment for property that has been sold or services that have been performed under U.C.C. § 9-102(a)(2), an effective sale of the account requires the authentication of a written sale agreement that describes the accounts to be sold. *See* U.C.C. § 9-203(b)(3)(A) (providing that a "security interest [which includes a buyer's interest] is enforceable against the debtor [which includes a seller] and third parties with respect to the collateral [(the accounts to be sold)] only if [among other requirements] . . . the debtor [(seller)] has authenticated a security agreement [(sale agreement)] that provides a description of the collateral [(the sold accounts)]"). To perfect the security interest, that is the buyer's interest. in the accounts, a financing statement describing the accounts must be filed. *See* U.C.C. § 9-310(a) (providing that, with exceptions not relevant for accounts, "a financing statement must be filed to perfect all security interests").

typically will happen. If XYZ Corporation now owns a right to payment that was owed to ABC Corporation and wants to ensure that it will be paid,[40] XYZ Corporation will send the obligors notice that states "Pay XYZ Corporation instead of paying ABC Corporation, because XYZ Corporation now owns this right to payment pursuant to the merger of ABC Corporation into XYZ Corporation."

Many of the requirements for perfection will be taken care of, but it will be necessary to look at the varying requirements for each type of property item. So, for example, I would feel very competent to analyze the requirement for the types of property items, other than the IP. I have dealt some with patents, but there is all kinds of IP. How do you transfer each of these different kinds of IP? How do you perfect such transfers?[41] I have not had to deal with the different kinds of IP. Therefore, I would want to get an IP specialist involved in analyzing the requirements to ensure an effective and perfected transfer of IP.

There are other considerations. Assume you have a lease, and the lessee cannot assign the lease without the consent of a lessor. There are jurisdictions that would say, "Well, but a merger is not a transfer, and a lease is 'assigned' for purposes of the restriction on assignment." I would suggest that this conclusion actually probably violates some of the subsidiary policy reasons why, notwithstanding the long standing and pervasive principle of free alienation of property, to allow a lessor prevent alienation of the lessee's interests in a leasehold interest.

Then there are other circumstances where XYZ Corporation will want the merger to be treated as a transfer. For example, if Blackacre is being transferred from ABC Corporation to XYZ Corporation pursuant to

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[40] U.C.C. 9-406(a); RESTATEMENT OF CONTRACTS (SECOND) § 338 (1981).

[41] *See, e.g.*, 35 U.S.C. § 261 (providing that applications for patents or interests in patents are assignable by a written instrument but that "an interest that constitutes as an assignment, grant or conveyance shall be void as against any subsequent purchaser or mortgagee for a valuable consideration, without notice, unless it is recorded in the Patent and Trademark Office within three months from its date or prior to the date of such subsequent purchase or mortgage").

a merger, XYZ Corporation will want to be bona fide purchaser for value in its own right for purposes of the applicable real estate recording act. Can XYZ Corporation record evidence of this transfer under the applicable real estate recording act? If so, in those jurisdictions that have enacted race-notice real estate recording acts, XYZ Corporation would take priority over an unperfected transfer by ABC Corporation before the merger.[42]

In the case of a promissory note[43] that is payable to ABC Corporation, it is now in the possession of XYZ Corporation. Under Article 3 of the U.C.C., XYZ Corporation is not the holder of that note[44] and cannot enforce the note, unless it is a non-holder in possession of the rights of a holder.[45] XYZ Corporation can become

[42] Under a race notice recording act, if ABC Corporation had transferred an interest in Blackacre to a third party for value who does not immediately record the document evidencing this transfer, and then ABC Corporation merged into XYZ Corporation, if XYZ Corporation was a bona fide purchaser, within the meaning of the recording act, for value without notice of the third party transfer, XYZ Corporation would take priority over the third party if XYZ recorded evidence of the transfer of Blackacre from ABC Corporation to XYZ Corporation before the third party recorded the document evidencing the transfer to it. *See* STOEBUCK ET AL., *supra* note 32, at 767-68.

[43] I use the term "promissory note" to refer to a negotiable instrument that satisfies the requirement of Article 3 of the Uniform Commercial Code. The discussion in the text also applies to a "draft," which includes a "check". *See* U.C.C. § 3-104(a) (2002) (providing that a negotiable instrument is an unconditional promise or order to pay a fixed amount of money if it is payable to bearer or to order at the time it is issued or first comes into possession of a holder; it is payable on demand or at a definite time and it does not state any other undertakings or instructions other than the payment of money); *Id.* § 104(e) (providing that a negotiable instrument is a "note if it is a promise to pay and a "draft" if it is an order). *Id.* § 104(f) (providing that a "check" is a a draft, other than a documentary draft, payable on demand and drawn on a bank). A note or a draft that is a negotiable instrument must be in writing. *Id.* § 103(a)(8), (12). Many rights to payment, however, are called "notes" or "promissory notes" that are not negotiable instruments but ordinary contract rights to payment.

[44] *See* U.C.C. § 1-201(b)(21)(A) (2002) (defining a holder of a negotiable instrument as "the person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession").

[45] *See* U.C.C. § 3-301 (2002) (providing that "person entitled to enforce" an instrument is "(i) the holder of the instrument, (ii) a nonholder in possession of the instrument who has the rights of a holder" or (iii) in limited circumstances, a person that previously was one of the foregoing but who is not in possession because the instrument was lost or stolen).

person with the rights of a holder if it is a "transferee."[46] If the merger does not transfer the promissory note, XYZ Corporation would not be a transferee under Article 3 of the U.C.C., and XYZ Corporation would not be a person entitled to enforce the note unless the merger statute itself would be interpreted as giving XYZ Corporation all of the rights of ABC Corporation as a holder. Although latter interpretation is the most likely to be applicable, if there was any doubt whether a merger either constitutes a transfer under Article 3 of the U.C.C. or gives the XYZ Corporation the rights of ABC Corporation as a holder, the lawyers might require that every note payable to ABC Corporation be endorsed and payable to XYZ Corporation as part of the merger.

Those are all the kinds of considerations that lawyers have to take into account, and again, each particular type of property item is going to present different kinds of issues that have to be looked at in the transaction.

Leatherman: The tax law model for a merger is similar to the property law model that Tom discussed. In a merger of a target corporation into the acquiring corporation, under the applicable merger statute by operation of law, the acquiring corporation succeeds to the target corporation's assets and liabilities. The target corporation ceases to exist, and the target shareholders relinquish their target stock receiving consideration for that stock, typically provided by the acquiring corporation. The tax law must in some way explain how those events occur, and, barring legerdemain or divine intervention, there are two likely models that could be adopted. First, the acquiring corporation could be treated as acquiring the target stock from the target shareholders, and the target could then be deemed to liquidate into the acquiring corporation with the acquiring corporation succeeding to the target's assets and liabilities. Second, the target could be treated as

[46] *See id.* § 3-203(a) (providing that an "instrument is transferred when it is delivered by a person other than its issuer for the purpose of giving to the person receiving delivery the right to enforce the instrument"); *id.* § 3-203(b) ("Transfer of an instrument, whether or not the transfer is a negotiation, vests in the transferee any right of the transferor to enforce the instrument, including any right as a holder in due course [except in the case of a transferee that engaged in fraud or illegality affecting the instrument]").

transferring its assets to the acquiring corporation in exchange for the assumption of the target's liabilities and the consideration ultimately received by the target shareholders. The target could then be deemed to liquidate, distributing that consideration to the shareholders. Despite strong arguments that may favor the first model,[47] it is the second model that the Internal Revenue Service and Congress (by implication) have adopted.[48] Thus, in the merger of a target into an acquiring corporation, there are two tax significant events – the transfer of the target assets to the target corporation and the target's liquidation. The federal income tax consequences of a merger are determined by applying the applicable Code provisions to those two events.[49]

Smith: Professor Leatherman, what factors should be taken into account in choosing the form of a transaction?

Leatherman: In the merger of a target into the acquiring corporation, the overall goal is to maximize the collective economic after-tax benefits for the target shareholders and the acquiring corporation. These parties often have adverse interests, so that if the target shareholders receive more after tax, the surviving corporation is going to have to pay more.

Note, however, that although the interests of the parties may in many ways be adverse, that is not necessarily true with respect to tax issues. This is one reason that I really enjoy structuring transactions as a tax lawyer. The reason why the acquiring corporation and target shareholders may be able to reach a common tax ground is as follows: there are three parties vitally interested in tax consequences of the merger – the target shareholders, the acquiring corporation, and the Internal Revenue Service. One of the parties (the Internal Revenue Service) is not at the table. This means that the other two can take advantage of the

[47] *See* Jeffrey L. Kwall, *What is a Merger?: The Case for Taxing Cash Mergers Like Stock Sales*, 32 J. CORP. L. 1, at 10-11 (2006).

[48] *See* Rev. Rul. 69-6, 1969-1 C.B. 104 (adopting the second model for a taxable merger); I.R.C. § 361(a) and (c) (by implication adopting the second model for reorganizations).

[49] *See supra* notes 11–12 (for relevant Code sections for taxable and tax-free mergers).

absent party. Often, the tax consequences can be managed to maximize the values for the two parties at the table, and the only people who pay are all the rest of us.

Consequently, the predominant determinant in structuring a merger may be the federal income tax treatment of the parties. By properly structuring the transaction to achieve the optimal tax result, the parties may be able maximize the aggregate after-tax economic benefits they receive.

Other steps in structuring a transaction include the following: first, the acquiring corporation must perform due diligence.[50] For example, it should determine the scope of the target's liabilities, a process that can take some time. It should also determine whether there are any limitations on the use of target assets (or assets of the acquiring corporation) because of the merger. Second, it may be necessary to secure the approval of not only the target shareholders but also the shareholders of the acquiring corporation. Third, the parties must negotiate representations and warranties to be given by the acquiring corporation or target shareholders. Fourth, the merger will likely occasion filing fees and may result in e-taxes, in addition to federal income taxes, including state taxes, local taxes, foreign taxes, real property transfer taxes, and even excise taxes. Fifth, almost every transaction requires some paperwork in addition to the merger agreement. For example, intellectual property (for example, patents) may have to be re-registered, and if either the target or acquiring corporation is a consolidated group member, a tax sharing agreement may have to be negotiated and prepared. Further, in a public deal, a registration statement must be prepared which is a costly step. The sad part, at least from my vantage point, is that attorney's fees are more like rounding errors in those transactions, paling in comparison to investment banker fees.

Plank: I was just going to say, investment bankers have to eat too.

Leatherman: Yes, but does it have to be caviar?

[50] Thankfully, this drudgery is not typically imposed on the tax lawyers. That work in a large firm is generally borne by corporate associates, no doubt to atone for their many sins.

Smith: Is it possible for a single person to act as a lawyer for a merger or other business combination transaction? Or is a team of lawyers required?

Heminway: I am going to go last on this one. Tom, do you want to go first?

Plank: Well, I think it depends on how complicated the transaction is. Obviously if you have a small transaction with two lawyers are involved instead of one lawyer, such as a lawyer for the deal, there is a lot of costs involved. But then the other question is, does the one lawyer have the expertise to address all of the issues? For instance, I can handle the property issues, but I could not handle the mergers and acquisitions issues. I could not do the corporate compliance tasks, but I could certainly do almost all of the property law matters, except the IP. If there was IP involved, I would have to get somebody else involved. I could not do the tax issues.

So, I think it all just depends. I just think that, to the extent possible, even though the costs go up, it is always better to have two lawyers looking at a transaction to make sure that the deal is structured properly.

Heminway: Don, you told us a story yesterday that might be relevant here.

Leatherman: As Tom said, it's really difficult to know everything about the transaction, and for small deals, it may practically be impossible. However, in a small deal, the parties may lack significant financial resources; for example, motivating two persons forming a corporation to use the same attorney. That use raises real ethical issues, because the parties typically have different interests, raising obvious conflicts.

I've also seen some small transactions in recent years, where the lawyers don't really understand significant tax issues involved in the transaction. Sometimes, those transactions are structured assuming a tax result based on a mistaken understanding (or even an ignorance) of relatively technical tax rules.

Oddly, at the end of the day, I'm not sure how much it matters for this reason. The Internal Revenue Service agents who may examine those small transactions may also not understand those technical tax rules and may just question whether the transaction, as reported, "appears" to reach a fair tax result. In other words, if those tax results seem fair, they may not be challenged. Nevertheless, a lawyer cannot count on that sort of generosity from the Internal Revenue Service. Further, it is much more likely that the bigger deals, where the representatives are more sophisticated, will be examined with more care. I'm afraid I'm taking too long to tell the story.

Heminway: No, I think that is a good summary. I agree with everything that Tom and Don have said about the sophistication of business combination transactions and the lawyers that may be representing people involved in them. Experience tells me that it is really hard to do mergers and acquisitions well—to be fully compliant with, even for a small deal, Model Rule 1.1, if a person is a solo practitioner. Some of the challenges can be overcome by diligence—by going in and asking other experts to share their wisdom, which requires having instrumental connections in the local, regional, or national bar. Having said that, as I reflect on Don's remarks about taxation, I believe he has wonderfully summarized what are incredibly complex rules relating to mergers.

Leatherman: Complex and elegant.

Heminway: Complex, yes, indeed. And I will let you characterize them as elegant! I certainly am of the view that the merger rules are an elegant part of business associations law, but perhaps you would not agree.

In listening to Tom talk about the effects of mergers on different forms of property, property-related filings, and the assignment and anti-assignment provisions in contracts, it struck me that it might be important to note that the effects of anti-assignment provisions depend on the type of transaction and the way that it is structured. Courts also play a leading role in this area. We see a lot of different judicial opinions in that area, construing specific language in different contexts.[51]

That is also true for licenses and permits. Depending on the applicable license or permit and the structure of the transaction, a merger or acquisition may trigger the need for a transfer or other action. My first deal as an M&A lawyer involved an asset purchase transaction in which individual restaurant liquor licenses needed to be re-applied for, and we needed to get fingerprints and photographs from each restaurant location's manager. This was for a burger and beer place, so if the beer part was not there, it would be a significant problem for the acquiror.

We had to make sure that the new liquor licenses were all in place by the time that acquisition closed. That meant that we needed local counsel in each state to argue for the assignment of those permits in front of the local liquor permitting authority. The junior lawyer on the transactional team or an experienced legal assistant gets assigned that task, which involves reviewing all of the permits and registrations and making sure that each local counsel is doing its job. That was my job, in some part, for my first few months as a lawyer.

In an asset purchase, the legal team also must decide whether the entire business or substantially all of the assets of that business will be, is being, or has been purchased and must determine the effect of that judgment on property assignments and filings. Also at issue: different jurisdictions' choice of law issues. The M&A lawyer also must consider the assumption of liabilities—which liabilities the combined business intends to be subject to as a result of the transaction—and the effect of pending

[51] *See, e.g.*, Meso Scale Diagnostics, LLC v. Roche Diagnostics GmbH, 62 A.3d 62, 82 (Del. Ch. 2013) ("Generally, mergers do not result in an assignment by operation of law of assets that began as property of the surviving entity and continued to be such after the merger."); Star Cellular Tel. Co. v. Baton Rouge CGSA, Inc., No. CIV. A. 12507, 1993 WL 294847, at *11 (Del. Ch. Aug. 2, 1993), *aff'd*, 647 A.2d 382 (Del. 1994) ("The drafters of the Agreement could have provided that the antitransfer clause of Section 13.1 would apply to all transfers, including those . . . arising by operation of law. They did not. . . . In these circumstances, the Court will not attribute to the contracting parties an intent to prohibit the Merger where the transaction did not materially increase the risks to or otherwise harm the limited partners.").

or threatened litigation. All of this is what kept me up at night when I was actively working on mergers and acquisitions.

The M&A lawyer is not only in charge of doing that diligence but also, as the deal progresses, working with other lawyers who understand other compliance pieces of the puzzle. I am not an expert in every area of law needed to fully vet a merger or acquisition structure or agreement. I need a "Don Leatherman" for tax compliance. I need a "Tom Plank" for property law issues, supplemented by a "Gary Pulsinelli"[52] for intellectual property law expertise. I might need, depending on the transaction, someone who knows about environmental law because of toxic spills or Superfund litigation.[53] You know, there is just a whole bunch of law involved in mergers and acquisitions.

Then, there are the legal issues I have to worry about as a business lawyer—things like the need for stockholder

[52] Gary Pulsinelli teaches intellectual property law courses at The University of Tennessee College of Law. For information about him and his teaching, see his faculty web page on the College if Law's Directory, Gary Pulsinelli, https://law.utk.edu/directory/gary-pulsinelli/.

[53] *See* Sara Beth Watson & Kristina M. Woods, *Environmental Issues in Transactions: Old Swamps and New Bridges*, NAT. RESOURCES & ENV'T, FALL 2000, at 75, 124 (offering that "the environmental lawyer's challenge in these transactions is . . . to identify the potential risks, work with the technical advisors to scope out the magnitude and likelihood of the risks, point out the problems that may arise if issues are left to chance and ambiguous drafting, and ensure the client understands risks and alternatives so that reasonable business decisions are possible."). One commentator explained the demand for environmental counsel in this context almost thirty years ago:

> Transactional environmental law has grown rapidly since the passage of CERCLA in 1980. CERCLA did not create environmental risk in business transactions, but it did increase it multifold. "[S]ophisticated purchasers are turning increasingly to environmental lawyers to help them avoid this risk." Basically, this requires the negotiation of contractual provisions that pertain to environmental liabilities. These contracts may involve the sale of real property, corporate assets, or even a stock purchase. In any case, some amount of environmental risk will pass with the transaction. Determining liability and how it will be contained or transferred is the job of a transactional environmental attorney."

John C. Buckley, *Considering Environmental Law*, 1 U. BALT. J. ENVTL. L. 1, 18 (1991) (footnote omitted).

approval, appraisal rights, and proxy statements, as well as responding to SEC comments on a registration statement if a non-exempt offer and sale of stock is involved. Merger and acquisitions involve a lot of legal questions arising under many different areas of law, and as a result, I am painfully aware that work in this field always implicates *Model Rules* 1.1 and 1.3[54] in one way or another. For example, given the attention to detail involved in mergers and acquisitions, I always have been mindful of one of the less frequently cited comments to Model Rule 1.3 that ties it in with Model Rule 1.1: "A lawyer's workload must be controlled so that each matter can be handled competently."[55]

I will just leave it at that; I think I have said enough about those professional responsibility concerns. In all honesty, however, there is a lot of other content in the *Model Rules* that may give us pause in considering engaging in a mergers and acquisitions practice as an individual person—a solo practitioner. I have been involved in transactions where the other side was single-lawyered. Although I can tell you that I would not stand up in front of the bar and testify that there was a lack of competence, sometimes I needed to bring the other lawyer along a little bit and offer some help. Mostly, I would ask questions. "Have you asked this of your client? Have you asked that? Have you thought about this?" While you may regard me as a little bit of a Debbie Downer, I am hesitant to say that a single lawyer can actually provide competent legal services in all but the simplest business combinations.[56]

Plank: I just wanted to add one thing in terms of the property. There is a complete range of properties interests and different kinds of property items. I was fortunate since I had done real estate, real estate development, real estate finance, and then commercial finance. So, I'm familiar with real estate, real estate development and finance and

[54] MODEL RULES OF PROF'L CONDUCT r.1.1, 1.3 (AM . BAR ASS'N 2016).

[55] *Id.* at r.1.3 cmt. 2.

[56] *See* Ed Finkel, *The Rise of the Freelance Lawyer*, 102 ILL. B.J. 576, 578 (2014) (observing, in regard to a freelance lawyer's ability to practice competently, that "real estate closings can easily be done as piece-work and scheduled around other obligations. . . . Mergers and acquisitions are another matter.").

commercial finance. In the commercial finance area in particular, I developed a specialty in receivables finance, which is totally different than financing equipment.

So, I can cover a lot of those areas, but there are a lot of lawyers who've spent their time dealing with real estate and who know real estate, but they just do not know commercial finance. There are a lot of commercial finance lawyers who don't really know much about real estate. So, if you have just one person who knows a lot about commercial finance, but doesn't know real estate, well that could be a problem just in the context of solving only the property related aspects of a merger.[57]

Heminway: And they are separate classes in law school.

Plank: That's right.

Heminway: Let's turn the program over to Dixon, and then do questions.[58]

* * *

Smith: So, do we have any questions?

Audience: I would like to ask about solo practitioners. I always think there's a reason why a lot of your solo practitioners are litigators, and you don't see a lot of solo practitioners doing transactional work. I wonder, what do we tell our law students, many of whom want to go hang up the shingle on their own, in this regard? Based on y'all's comments, practicing mergers and acquisitions law as a solo practitioner may be dangerous. The inability to know when to engage others with expertise can often get one into trouble. It's like you've got blinders on and you don't

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[57] In addition, a real estate lawyer would not normally be expected to know that Article 9 of the UCC, which is entitled "Security Interests," also governs the sale of receivables, especially since and Article 9 terms of security to incorporate such sales. *See supra* note 30. Accordingly, the real estate lawyer—and indeed many commercial finance lawyer who specialize in financing inventory or other goods or assets other than accounts—would not know that Article 9 applies to the sale of accounts and therefore that the filing of a financing statement is necessary to perfect such sales. *Id.*

[58] Dixon Babb's commentary is published in the article immediately following this one. *See* 21 TENN. J. BUS. L. 357 (2020).

know what you might see if they were removed. I guess I'm just asking, what advice do we have for law students who want to go out on their own and handle business combinations? Do we tell them that's a terrible idea? Do we tell them that you have to go in with others? What do we tell them?

Heminway: Do you want to talk about this, Tom?

Plank: I will. First of all, I think that when law students come to law school, most of what they know about the law is litigation. Before coming to law school, students read about litigation, can read about constitutional law issues and tort law issues. Rarely does one read in the newspaper about how a person will finance the new shopping center that's going to be located at Turkey Creek. Students don't read about that kind of stuff.

Then, I think they come to law school and realize, well, it's not just about litigation, there's other areas. My understanding is—and I do not think that over time the numbers have changed all that much—litigation only makes up about a third of a legal practice. I do think going out by yourself would be scary as a transactional lawyer, unless the lawyer just basically developed a particular specialty and then developed a reputation in that particular specialty. Then, if some other issue comes along, the lawyer has to get somebody else in there.

I do know of people who've done that, but it's usually a fairly, maybe a technical type of specialty. Maybe an IP type of specialty.

Leatherman: I think the practice of law has changed a lot. When I first started practicing many, many years ago, my sense was that there was more of a sense of community in the practicing bar. Older lawyers would help younger lawyers who were coming into practice. So, in some ways it was easier to start out as a solo practitioner. If I were thinking about advising a student who wanted to go out and do transactional work, I would tell the student to try to find some mentors. Maybe associate with a good accountant who's going to understand a lot of the issues; good accountants often have seen a lot of the issues that are likely to come up regularly. But there are often traps for the inexperienced that are really frightening. When I am an attorney on a deal, I am frightened that I am going to miss something. It's just, the law is just really complex, and transactional law is difficult to practice by oneself.

Heminway: I agree with both of those things.

First of all, to a point that Tom made, I notice that my colleague Professor Eric Amarante walked in. He and I will be teaching a first-year class next semester that does introduce first year law students to the concept of transactional business lawyering. Through this course, we hope to correct some of the problem of people coming to law school, going through their whole first year, and seeing mostly litigation—maybe seeing a bit of transactional business work in a context where that was not the focus. The University of Tennessee College of Law is trying to overcome that litigation bias in the first-year curriculum.

I also agree with Don about the sense of community and reaching out to mentors in certain areas, and maybe in M&A, depending on what the knowledge base of the student is. If, for example, Dixon wanted to go out and hang his own shingle, I would sit down with him and say, "Okay, so you've had these courses that help prepare you for an M&A practice. But what are you taking your last semester of law school?" I would ask if he is a student member of the Tennessee Bar Association and whether he planned to participate in programs that focus on starting a solo practice. I also would ask if he was meeting with other people in the M&A field who are senior people—people he could then use as mentors. Those are all potentially powerful actions for law students to take.

Having said that, we also must tell our students that we each need to use our own conscience when we make these determinations about how and whether to engage in specific types of practice and that we also should seek the counsel and approval of our peers.[59] That's important. If

[59] MODEL RULES OF PROF'L CONDUCT Preamble ¶7 (AM. BAR ASS'N 2016) ("[A] lawyer is . . . guided by personal conscience and the approbation of professional peers.").

your peers tell you, "I think you have the knowledge to do this," if you honestly believe you have the knowledge after searching your conscience, then you may ethically determine to take on a matter. And if you take on that client matter, then you must zealously advocate on behalf of that client.[60] Which may mean (among other things) reaching out to other people for advice, doing more diligence, and staying up at night to resolve legal issues.

But you also should tell students that they have the right to refuse the client. Legal counsel may do that and undertake to find an expert firm to represent the client. Much larger firms, not just single person shops, advise their clients to take on specialty counsel for particularly specialized or sophisticated transactions. In my practice, I often was the beneficiary of those kinds of referrals. So, you may want to take my advice on this with a grain of salt. However, I do think that a solo practitioner can make a decision, even if it is financially disadvantageous to that practitioner, from an ethical perspective, to refuse a client matter in an area where the complexity is too great. That is hard because the lawyer still needs to put food on the table. But the lawyer can find other work, develop practice networks, etc. so there will be enough work absent those complex transactions to be able to make a living. Don't overextend yourself—that would be my advice.

Plank: I just had one more comment as a corollary to the question. The other side of that coin is, if a relatively new law school graduate starts law practice with a firm or government agency, the new lawyer will find that there's tremendous pressure to start specializing right away. That early specialization can lead to not developing as broad an understanding of issues and areas of the law.

I was very fortunate. I joined the best law firm in the state of Maryland out of law school. I got to work in the "general department," and there was some real estate finance, government law and finance, administrative law, legislation, and litigation, but it was only because there

[60] *Id.* Preamble ¶9 (noting that principles underlying the *Model Rules of Professional Conduct* "include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law").

were two partners in the general department who had a very wide and varied practice.

So I was the beneficiary. I had to do it all. I ended up spending my first seven years with this law firm and the Maryland Attorney General's office doing almost every different kind of law, other than criminal law and family law, and it was terrific, but it was hard. I worked hard, and I learned a lot about different areas of the law.

Then finally I said, you know, I've got to figure out what I want to be when I grow up, and I finally decided to specialize in commercial law. But that experience helped me a tremendous amount. I had several trials, including one jury trial. Every business lawyer should have a least one jury trial, but it's very hard for those associates to get that kind of practice. You go to the corporate department, you're going to do corporate. That is all you're going to do. You're not going to do property, you're not going to do tax. I mean, you'll run into issues in those areas and I do think that it is important to understand the other areas. How do you avoid that specialization that's going to restrict your ability to see things in new and different ways?

Heminway: Actually, Tom, your comment raises one more thing. I think we maybe have one other question, too, so I will just handle this briefly. I consider summer associate, or summer job positions, and work during law school to be a way of developing, rather than narrowing, expertise. That was my experience. I developed an interest, passion, and foundational aptitude in corporate finance law through employment outside (but during) law school.

In the beginning of law school, I did not know what corporate finance law was. I did not take any undergraduate classes that were in the business area. It was a job that I got in the second semester of my first year of law school, working as a legal assistant for a private firm, that turned me on to this field and gave me some experience. By the time I started full-time work in a law firm, I could already do things like draft board resolutions with confidence. I also knew what an indenture was, even though that had not been covered in any law school class. As a result, I firmly believe that out-of-law-school learning can be powerful as a foundation to a specialized law practice.

Audience: Really more of a comment than a question, but some of the firms that I interviewed with when I was coming out of law school had a program where you rotated departments, not just during the summer, but actually during your first two years after law school. I didn't go to one of those firms, but looking back, I think that would be interesting. I was an M&A lawyer, and so many of my fellow associates went in-house. They then were tasked with running the whole deal themselves. They would call me, and they'd say: "We're used to having a tax person on the deal, and a property person, and an ERISA person." Now they are told: "You do it."

Heminway: The in-house version of the solo practitioner, right?

Audience: Yes. It would have been helpful, I think, if they had rotated through different areas of practice in a private firm before they went in-house. They would have at least known a little bit better what they didn't know—where they really, really do need help—and maybe even know better how to do some of the more simple stuff on their own. So, for the law students, that might be a program that they would find interesting to help prepare them for a well-rounded transactional business law practice later.