

Stuart Kane LLP

Letters of Intent: A Sometimes Neglected Way to Save Time and Money

"They are slow and cost too much," is how the decision-maker at a long-standing client of mine described the lawyers he used prior to engaging my firm. That was literally the description he used – perhaps a veiled warning to me, but ultimately something I took inspiration from.

In searching for ways to deliver better cost savings and efficiency when negotiating transactions for clients, one aspect that is often neglected but provides an opportunity to achieve both is the letter of intent.

Road Map to Efficiency

Request for proposal, term sheet, letter of intent – when used correctly, they will be a road map to efficiency. When broad strokes are first agreed upon in a letter of intent for a purchase and sale agreement, lease, loan, joint venture or equity investment, the goal is to create a smoother negotiation for the definitive documents that follow.

But beyond broad strokes, when additional effort is made to cover more topics and detail in the letter of intent, there is a value proposition to make further progress in the overall negotiation in a shorter period of time, and with less legal fees incurred.

The math is simple: a few hours of legal fees spent on a 25-point letter of intent will offset the need to spend many more hours negotiating to add or remove those same concepts at the definitive document stage.

Even better, the well-negotiated letter of intent does more than just summarize the broad strokes of the transaction. It clearly states what each party has agreed to honor in the definitive document. Even if the letter of intent is non-binding, having a meeting of the minds reflected in the letter of intent allows for each party to use it as a benchmark during the later stage of negotiation.

Put another way, "front-loading" the negotiation at the letter of intent stage allows the attorneys to negotiate the deal faster, and keep legal fees lower, as compared to transactions that lack a clear mandate at the start due to a letter of intent lacking the enhanced detail and content.

Business Casual or Stuffed Suit

With the non-binding nature of most letters of intent, there should be a less formal, more relaxed frame of mind for the parties engaged in the early stage negotiations. The back-and-forth can be more free-wheeling and creative, and more can be accomplished in a shorter period of time, as compared to the more stressful environment of the later stage definitive document negotiation.

Once the letter of intent is final, the formality and time pressure changes. With greater ramifications stemming from the binding definitive document, negotiating parties are less inclined to compromise. Heightened concern over the gravity of negotiations results in more time being spent on drafts, meaning higher legal fees being incurred over protracted negotiations.

Penny Wise, Pound Foolish

"Penny-wise, pound foolish" is another way to explain the importance of the letter of intent. A client that calls their lawyer only after the letter of intent is signed has missed the opportunity for their lawyer to make sure the letter of intent covers more issues that will ultimately still need to be addressed in the definitive document. That client has also missed the opportunity to save money on the total legal fees to be spent on the transaction, as once the definitive document negotiations begin, it is too late to go back and use the more efficient legal fees that were not spent at the letter of intent stage.

If it is more efficient to load up the non-binding letter of intent with details that will take more time to negotiate in the later stage, the client that involves the attorney at the early letter of intent stage may spend more on legal fees up front, but if done effectively, those early expenditures will result in a cost savings on the backend, with less legal fees being needed to reach the final definitive document.

Of course, it is important to not over-do the letter of intent negotiations. Taken to an extreme, this strategy can balloon into a full negotiation of the definitive

document in disguise. But for clients and attorneys that can find the right balance of quality and quantity in the letter of intent negotiation, there is savings to be achieved.

The aggregate spend on legal fees over both stages should ultimately be less, as compared to a deal when no fees are spent at the letter of intent stage. And when coupled with a more efficient process that gets the deal signed earlier, the result is a faster transaction at a lower legal cost.

Finish What You Started

Perhaps worse than a letter of intent that is too brief, is the letter of intent that is never finished. Parties often curtail or abandon negotiations before the letter of intent is signed, in favor of anxiously moving to the definitive document. Unfortunately, that lack of closure on the letter of intent can doom the definitive document stage to a longer negotiation, incurring more time and legal fees.

When disagreements arise during the definitive document negotiations, being able to point to the precedent-setting letter of intent is a much better position than having to instead argue why your side neglected to raise the issue in the early negotiations. And when the letter of intent was never final or signed, both sides lose that argument of established precedent.

Letters of intent can also be "finished" by including more detail than would usually be included. While the letter of intent should serve primarily as a short-hand summary of the points to be fully realized in the definitive document to come, in more complicated transactions, it is acceptable to have the actual, specific language to be used in the definitive document negotiated and included verbatim in the letter of intent, ready to simply be cut and pasted into the definitive document.

Right Place at the Right Time

They say time kills deals, so if a good letter of intent can achieve efficiency, that should be reason enough for investing the time at the early stage of negotiations. Of course, sometimes there is no substitute for simply being in the right place at the right time. In this context of the letter of intent, that adage applies to how legal fees are spent. Resources allocated to letter of intent negotiations may seem premature to some, but others recognize the benefit of those resources as being used at the right time (early), especially if it ultimately gets the deal done under their legal budget.

Josh C. Grushkin

Josh Grushkin is a founding partner of Stuart Kane LLP. His practice encompasses all aspects of commercial real estate transactions, including leasing, finance, joint ventures, and land acquisitions and dispositions for commercial and residential developers, homebuilders, investors and corporate users. In May 2015, Mr. Grushkin co-authored the pre-cursor to this article, "Early Collaboration for Greater Protection: Don't Wait to Assemble Your Team," with his law partner Javier F. Gutierrez, appearing in Orange County Business Journal Volume 38 Number 19. Mr. Grushkin can be reached at (949)791-5151 or jgrushkin@stuartkane.com.

