

## How To Explain Complex Capital Markets Issues To A Client

By Jeff Zalesin

*Law360, New York (January 7, 2016, 6:03 PM ET)* -- The best capital markets attorneys are the ones who understand the legal landscape and effectively explain it to clients, finding a happy medium between information overload and "because I said so" curtness, experts say.

Companies involved in initial public offerings and similar deals want lawyers who will keep them in the loop about pertinent issues, not just hand down instructions. But many company representatives are too busy to sit through a law school-style lecture on the finer points of securities regulation, capital markets attorneys told Law360.

"You have to think about things from the business perspective," Baker Botts LLP corporate partner Mollie Duckworth said. "It's one thing to summarize a piece of securities law and say, 'Well, here's what the requirement is.' But what our clients are really looking for is for us to apply it to their situation as much as we can."

Here, capital markets lawyers share their advice on how to ensure clients get the information they really need.

### Know Your Audience

Your client may technically be a corporation, but when you pick up the phone for a client conference call, there's a human being on the other end of the line. You need to know who that person is before deciding how to present legal information, according to Duckworth.

"A lot of our role as outside counsel is translating the requirement into something that the person at the client understands," she said. "It is very much tailored to who the client is and how much detail they want."

One important factor to consider is the person's role within the client company, according to Duckworth. The general counsel might be open to a detailed legal explanation quoting the U.S. Securities and Exchange Commission rules, but a business executive will likely have less patience for legal citations, she said.

Even so, Duckworth added, it's generally unnecessary to water down the legal issues for a listener without a law degree. She said she has been surprised by how much detail her clients, including nonattorneys, will welcome.

"I think sometimes as lawyers, we underestimate how sophisticated our nonlawyer clients are in understanding how the rules apply, particularly on the financial side," she said. "Your chief financial and chief accounting officers understand a lot of the legal background when it comes to securities issues."

Randy Katz, a partner at BakerHostetler, said he agreed that client representatives without legal training are perfectly capable of understanding the issues at play. He said that his communications with business executives are similar to his communications with in-house counsel, although the level of legal detail differs somewhat.

"If I'm talking to the business folks, clearly they and I will walk through the technical stuff, but if the conversation is between me and the GC, not only will we walk through the technical stuff, but also we will go two or three layers below that," Katz said.

### **Beware of Oversharing**

Outside attorneys should remember that in the runup to an IPO or other capital markets transaction, clients still have their normal business operations to contend with, experts say. With so much on their plates, clients may have a limited appetite for the legal minutiae that can proliferate in a major deal.

"During a complex transaction like an IPO, there are thousands of details," Goodwin Procter LLP partner Rezwan Pavri said. "Trying to keep the company focused on the ones that really matter while also running their business successfully can be a challenge. You really have to try to narrow it down to the substance, rather than all the mechanics."

Cooley LLP partner Charles S. Kim said that he has seen lawyers burden clients with "superlong, detailed emails" while preparing for capital markets deals.

"It's almost like lecturing your kids too much," Kim said. "You get to the point where you're flooding them with so much data that you're actually keeping them from focusing on what really matters."

### **Don't Get Cagey**

As counterproductive as it is to overload the client with information, providing too little explanation for your legal advice can be even worse, experts say. If an outside lawyer has concerns about potential pitfalls for the transaction, the client needs to understand not only what those issues are but also why they exist and how to minimize the risk.

"Outside counsel needs to be fully forthright with the client," Katz said. "Even if it's going to be potentially a bad result or a bad situation, you've got to talk all the way through it. Playing hide the ball does not help — it hurts."

Even with clients who largely defer to their attorneys on legal questions, it's important for the attorneys to alert the clients about key issues and explain those issues thoroughly, Kim said. Otherwise, an under-informed client could end up damaging the transaction or stumbling into a new source of liability.

For example, Kim said he makes a point of speaking with clients about any plan to meet with private investors about a potential pre-IPO mezzanine financing deal.

"Every one of those clients, regardless of how sophisticated they are or what their disposition is, I'm going to sit with them and talk to them in detail about what information they're supplying to those investors and how they're supplying it, because what they do there can have a material impact on their IPO that's coming down the road," Kim said.

Of course, it's one thing to identify an important topic to explain to a client and another to determine just how far to go on the nuts and bolts of the legal issue.

Duckworth said that the right level of detail depends on the situation, but that lawyers should aim to help their clients understand the issues well enough to apply them to the facts at hand.

"I think it's really important to provide enough detail so they can do some of their own analysis," Duckworth said. "Just write it in a way that is easy for a nonlawyer to understand."

### **Involve the Client in Your Thought Process**

Outside lawyers may be the ones with the greatest knowledge about capital markets law, but company insiders are the real experts when it comes to the client's operations. That's one reason why capital markets lawyers' client communications should be a dialogue rather than a lecture, attorneys say.

Duckworth said that it's important to listen to the information that clients bring up and adjust your legal advice accordingly. Otherwise, you could give a flawed legal opinion based on a misunderstanding of the facts.

"I might assume that a particular answer is the right answer, but because I'm not inside the client, I don't know every in and out of their business," Duckworth said. "I might not realize that one of the triggers for a particular rule is going to be tripped up in our particular case."

Pavri also said that insiders' institutional knowledge is essential for a successful IPO. For example, he said, if a pre-IPO company is the defendant in a patent infringement lawsuit, then the capital markets lawyers will need help from company personnel to understand the magnitude of the litigation risk and give good advice on how to write any related disclosure.

"How you manage a patent lawsuit during an IPO often is informed by what the company knows and can tell you about its business," Pavri said.

### **Take Advantage of SEC Guidance**

In addition to making formal rules, the SEC publishes guidance, sends comment letters and responds to inquiries about corporate finance regulation. All of that material forms the backdrop for capital markets lawyers' work, and it should be reflected in their advice to clients, according to Kim.

"We routinely have conversations where we say, 'The SEC wants this. We know the SEC is focused on this. They're concerned about this,'" Kim said.

Duckworth said that when a capital markets client raises a tough legal question, it makes sense to check whether the SEC has already published a response addressing a similar situation.

"Oftentimes, you can find one that is either similar or almost identical to your facts," Duckworth said.

"That's an easy way to get both you and your client comfortable that that's the way the SEC would view it."

Even if the SEC hasn't addressed the exact scenario your client faces, you may be able to find guidance involving some important analogous facts, Duckworth said.

In that case, she said, you should show the SEC document itself to your client and start a conversation on how it applies or doesn't apply to the case at hand. Your client might respond by bringing up facts that distinguish the present situation from the one the SEC encountered, causing you to rethink the amount of weight you place on the guidance.

If your client has lingering doubts after you've consulted the relevant SEC guidance and interpretations, it may be worthwhile to contact the SEC directly, Duckworth said. She said that in her experience, the agency often responds efficiently to questions about how its rules operate.

"They realize that there's this whole body of law out there that can be very confusing to apply to a particular company's circumstances," Duckworth said.

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