

The present outlines the reasons why a written Mandate is necessary if you are serious about selling your business. Our recommendations and comments are based on our experience with hundreds of cases, large and small.

1. SERVICE AGREEMENT

An M&A Advisory engagement is an agreement for the provision of services. In industry jargon it is usually referred to as a “Mandate”, because Shareholders or Business Owners delegate specific tasks to the Advisor and authorize him to perform these tasks on their behalf. In plain language, the Engagement, or Mandate, tells the Advisor clearly what he is expected to achieve, in what manner he may represent his clients, for how long he/she is authorized to do so and finally, how he is to be remunerated.

2. IS IT NEEDED?

- a. Fear of loss of control:** Many clients think that if they sign a Mandate, they will lose control. Actually, it’s the other way round. If you don’t sign a Mandate, you are giving someone the right to approach whoever he wants, say whatever he likes and possibly mis-represent you – willingly, or not. You are much safer if you “tie down” your M&A Advisor with a written Mandate in which you clearly specify what he/she is authorized to do.
- b. Keeping your options open:** Maybe you are not too sure if you want to sell and just want to see what kind of offers you can get. In this case, it’s unlikely that a serious M&A Advisor would take on your case, unless he is paid a fee for services rendered under a retainer or a per hour basis, regardless of the outcome. No serious M&A Advisor will undertake to do free “market research” on your behalf and if one does, it’s unlikely that he will devote too much time on your case. You get what you pay for!

Another possibility is that you may not want to rely on one intermediary and would like to be able to sell your business on your own, or engage other intermediaries. As long as you don’t overdo it with too many intermediaries, this may be acceptable as long as “non-exclusivity” terms of are clearly stated in the Mandate.

- c. Confidentiality:** If there is one issue that need not be explained it’s Confidentiality. A written Mandate always incorporates suitable confidentiality clauses and in some cases can even specify what information the M&A Advisor is authorized to disclose and at which stage of the process. A verbal “mandate” leaves everything wide open.
- d. Motivation:** A professional needs to know that you are committed to a sale and that you are willing to put this in writing. Informal, verbal agreements give us the message that you are not ready to sell. Also, since most (if not all) of our reward comes upon closing a transaction, this also means that you want us to do a lot of work without any formal commitment on your part that our fees will be paid.

Under such circumstances, nobody can be expected to make a serious effort. And it takes a lot of effort and a lot of time to sell a business.

- e. **Show me the Buyer....** : Some prospective clients tell us that if we present a buyer, then they will sign a Mandate.

First of all, if we had a buyer for the specific type of business, we would not ask for a Mandate from the business owners – simply because we already have a Mandate from the buyer. We cannot act on behalf of both sides in a transaction.

Second, this attitude shows a total lack of understanding about what we do. Simply put, we don't wait for an investor to materialize – we do market research, we shortlist possible buyers, we check them out, we approach them, we present the basics of the transaction and if they are seriously interested, then we assist you in negotiations. But before even starting on this process, we study your business in-depth, perform a valuation, advise you on how to prepare your business for a sale, prepare an introductory memo and any other presentation material needed. This is the main difference between a commission agent and an M&A Advisor. A commission agent does not require a mandate because all he does is make a few phone calls to people he knows. If it “sticks” then he gets a mandate to cover his commission. If it does not, he moves on to the next case. We are “on your case” from the preparatory stage, until a buyer is found and the sale closes. Which is why we need a Mandate before we start.

- f. **Credibility:** When we approach serious investors they always ask us if we have a Mandate from our clients. They know from experience that many “agents” are acting on a verbal understanding with the owners. Or, even worse, have no such understanding at all, since they got the information from another “agent”, who got it from a friend, who heard it at a party.. etc, etc. You get the message. Investors know that dealing with unauthorized “agents” is a waste of time. So, when we go to them, we need to be able to say with full responsibility that we have a written Mandate from the owners of the business.
- g. **It's NOT real estate:** Inexperienced Shareholders or Corporate Executives sometimes think that selling a business is similar to selling real estate. After all, everyone has some experience with selling or buying real estate and selling a business could not be that much different, right? Wrong! Selling a business is a much more complicated task, simply because the value of a business is mostly in things intangible – and in many cases, not measurable. Things such as competitive positioning, brand value, repeat clients, experience and caliber of key employees, relationship with suppliers, etc., the list is endless. In addition, selling a business is, in most cases, a very sensitive and confidential matter. You want to reach as many likely investors as possible, but you cannot advertise, or in any other way openly promote a sale. To put it in military terms, if selling real estate is like an infantry attack in broad daylight, selling a business is like a commando operation behind enemy lines.

We wanted to make this comparison because, in many cases, a written engagement is deemed unnecessary in real estate sales. Also, to stress that not anybody can sell a business, as it requires very specialized knowhow and extensive experience.

3. BASIC TERMS

We outline below the basic terms of a Mandate. Some terms are mandatory, others are optional and are written in *italics*. Note that we include only terms with commercial significance and have left out many general/legal terms.

- a. **What is on offer for sale?** This may sound obvious, but when it comes to business sales you need to be very specific. You may be selling all the shares in a company or a majority of the shares. Or, you may be selling business assets. You may want to take out of the company certain assets before selling. Or, a Trade Name which is now registered on the company. In this paragraph, it's also important to include the physical location(s) of the business and, if it's a company, it's registration number, registered address, etc.
- b. **Who is selling?** The person(s) signing the Mandate needs to be the owner(s) of the business (or an authorized officer(s), if it's a company) or a representative of the owners/shareholders under power of attorney. If it's a company it's very important for all shareholders to be in agreement, as a minority may be able to block a sale.
- c. **Terms of Sale:** We need to specify an Asking Price and a Reserve Price. Also, whether the business is for sale clean of any debt or liabilities (very common with small to medium-sized businesses). In most cases, we also need to specify what constitutes acceptable *Consideration*. For example, are you only willing to accept cash, or also listed shares, bonds, real estate or other property. Another advisable addition, are the acceptable *Terms of Payment*: Do you want the whole consideration to be paid upon closing? Are you willing to accept payment in installments and with what guarantees?
- d. **Who is the Advisor?** Obviously, the Advisor needs to be named, with full contact details. If the Advisor is a company, then the person signing needs to make a representation that he/she is authorized to sign legally binding documents on behalf of the company.
- e. **What is the task of the Advisor?** It's crucial for both parties to specify clearly what the Advisor is expected and authorized to do. For example, the Mandate may state that the Advisor may only identify potential buyers, present the business to them on a "no-names" basis and if there is interest, then introduce them to the owners. On the other extreme, the Advisor may be given the authority to negotiate a sale within the terms of the Mandate and present an LOI or Term Sheet to the owners. You may also want to include a *Not-to-Contact List*, i.e. persons/companies that you do not want the Advisor to approach. You may also want to *specify the exact procedures*,

e.g. if Proof of Funds is required, if interested parties need to sign an NDA and at what stage, etc.

- f. Exclusivity:** We do our best when we work exclusively on a transaction for a reasonable time period. If we know that the owners may at any time sell the business themselves, or that they have other advisors working in parallel with us, we will not try harder! On the contrary, it's a disincentive for many reasons, the main one being that too often it may not be clear who brought the buyer to the table: us, another advisor or the owners? In any case, the Mandate should clearly state whether any exclusivity is granted to the Advisor and for how long.
- g. Confidentiality:** Needless to say, the Mandate should include a Confidentiality clause, binding both parties.
- h. Remuneration of Advisor:** Depending on the nature and scope of the assignment, an M&A Advisor may be remunerated in many ways: Success Fee, monthly Retainer, Fees against specific deliverables (e.g. Investment Memorandum), expense reimbursement, per-hour fees. Whatever the case may be the Mandate should clearly state under what conditions fees become payable and when they are disbursed.
- i. Term, Termination, Withdrawal :** Term is the duration for which the Mandate is valid, including the conditions for any renewals or extensions. The conditions under which the Mandate can be terminated before its expiry must also be stated. There is no point in signing a Mandate if any party can terminate without serious cause. One valid cause is if (in a non-exclusive Mandate) the owners sell the business themselves. A Withdrawal is a special type of Termination as it refers to the case when the owners change their mind and do not want to sell. Usually, there is a Withdrawal fee.
- j. Survival:** There are two clauses which usually "survive " the termination of a Mandate: The Confidentiality Clause which may survive from three to five years after termination. And the Success Fee clause which may survive from one to two years after termination. The survival of the Success Fee clause ensures that if an investor is introduced by the Advisor prior to termination and the transaction closes after termination, the Success Fee is still payable. It is not unusual for due diligence and negotiations to last several months, therefore the survival of the Success Fee entitlement is crucial for the Advisor.