MASSACHUSETTS LAWYERS WEEKLY Jan 27, 2003

How a Small Firm Pulled Off One of the Year's Biggest Deals

By John O. Cunningham

Some time in the afternoon of Sept. 10 last year, shouts of joy and triumph erupted from the southwest corner of the Boston office of Davis, Malm & D'Agostine.

C. Michael Malm, a lead partner in the 30-lawyer firm, had just announced the successful closing of a blockbuster deal for a longtime client after more than a year of legal toil.

On that day, Braintree's Clean Harbors, Inc. became the largest provider of hazardous waste services in North America when it swallowed the better part of a company known as Safety-Kleen, which was more than twice its size. That big gulp is expected to give Clean Harbors roughly $750 million per year in revenue and make it a vendor for more than half of the Fortune 500.

Some 20 years ago, when Malm had only a small office with a few partners, Clean Harbors was just a one-man operation that cleaned up oil spills and manholes with the use of a pick-up truck and some cleaning equipment owned by founder and CEO Alan S. McKim.

According to William J. Geary, executive vice president and general counsel of Clean Harbors, the story of McKim's success is "really the Horatio Alger story," and the latest chapter in that story was closed — improbably — by a band of lawyers from several small firms who made the considerable deal possible.

Geary says that McKim has always particularly valued the advice and loyalty of Malm as the attorney who first incorporated Clean Harbors in 1980.

So when Clean Harbors decided to compete with other bidders to acquire some 90 parcels of real estate, 21 treatment, storage and disposal facilities, six wastewater treatment facilities, nine landfills and four hazardous waste incinerators belonging to the chemical services division of Safety-Kleen, Geary suggests that "it never crossed our minds to go with a bigger firm."

But mega-firms are the traditional parking place for enormous transactions of great complexity and the Safety-Kleen deal would be a challenge for even the largest firm, as it involved assets and operations in Canada, the United States and Mexico.

Furthermore, Malm had no army of associates to go raking through thousands of corporate disclosure files, real estate documents and environmental records for some 73 targeted subsidiaries, and he was about to enter the fray against the New York office of Skadden, Arps, Slate, Meagher & Flom, a giant in the transactional world.

As if that were not enough, Safety-Kleen was also in bankruptcy, the subject of Superfund litigation and the owner of multiple hazardous waste facilities for which the federal government would require intricate "closure bonds" to cover contingent liabilities arising from any future site abandonment.

Malm also knew that antitrust approvals would be needed from the Department of Justice because of the major markets of the two companies, and he knew that a complex $280 million refinancing would necessitate multiple lenders and swarms of large firm lawyers representing them. He even knew that Safety-Kleen's parent company, Laidlaw, had fired its auditors due to controversies over allegedly fraudulent financial statements.

What he did not know is that the picture would be further complicated by the entry of large firm lawyers representing another suitor for the chemical services division of Safety-Kleen. That suitor was an international water company known as Onyx, a part of the multi-billion-dollar Vivendi Co. empire, and an entity more than 50 times the size of Clean Harbors.

Nonetheless, Malm accepted the challenge of taking a lead role as part of the steering committee that selected, hired and directed a cast of legal, engineering and technical advisors. He also took command of a hand-picked "SWAT team" of lawyers made up of people from his own firm, two other small boutiques, a solo practitioner, some contract lawyers who assisted in due diligence and one attorney from a larger firm in Canada.

Malm led this relatively small, but spirited team of legal warriors through the vines and thickets of a transactional jungle for more than a year, obtaining an order of sale from the U.S. Bankruptcy Court, getting Justice Department approval of the transaction, fending off the attacks of Onyx, procuring multiple layers of financing from various lenders, and finally closing the acquisition of Safety-Kleen's assets on Sept. 10, 2002.

And at the end of it all, Geary says the Clean Harbors legal team was so thorough that no relevant issues went undetected and no material problems arose after closing. What's more, he adds that this group was more responsive and less expensive than what he would expect for a transaction of this size.

Other lawyers on the Clean Harbors team say they thrived on the challenge and some are already diving into the deep

water of acquisitions again. They credit the success of this unusual team approach to systems for full sharing of strategy and communications, a "triage" focus on the key issues, and the cultivation of trust among the professionals at Clean Harbors, the law firms involved and the technical professionals.

Challenging The Team

Almost all of the lawyers on Malm's team, including contract attorneys, had significant large firm experience, so they were not intimidated by the issues of the deal, but they generally agree that the sheer mass of work gave them pause.

Thomas A. Mackie of Boston was charged with supervising the work of the Roy F. Weston environmental engineers, translating and quantifying the environmental exposures, and transferring more than 300 state and federal hazardous waste permits associated with the $500 million per year operating target.

The former in-house lawyer for a Fortune 500 manufacturer recalls that his first reaction after examining data sheets for the seller was, "Oh my God, what are we in for?" Mackie's eight-lawyer firm, Moehrke, Mackie & Shea, had not tackled a deal of this magnitude, which he says was particularly complicated by the bankruptcy process.

But Malm says his client made a habit of "putting trust in people and placing them in roles where they have to stretch."

Malm's partner, John D. Chambliss, says there was just no time to "overlawyer" anything as the team had to sift through priorities and attend only the "truly important issues."

Chambliss, a former Gaston Snow partner, was tackling letters of intent, drafts of the acquisition agreement, financing documents and SEC filings, and needed the support of contract lawyers like Jacqueline A. Weisman of Easton just to keep pace.

In fact, he claims that "Weisman was one of the true heroes of the deal," noting that she had moved home to Massachusetts without a job after seven years of experience at the Washington, D.C. office of large-firm Willkie, Farr & Gallagher.

And Mackie also brought in three contract lawyers who he says were "incredibly experienced" and suited for due diligence work on any playing field with larger firms.

The piecework assembly of the team was never an issue for Stephen H. Moynihan, a senior vice president of planning and development for Clean Harbors, who had to work closely with Chambliss, Malm and Mackie.

"We trust the choices Michael [Malm] makes because we have a different relationship with him than most attorneys — he's a part of our company, and he has never steered us wrong," Moynihan comments.

But that confidence was not always shared by lawyers for other parties in the deal, according to bankruptcy counsel Whitton E. Norris III of Boston. "We had to overcome the Skadden, Arps image of dealing with Davis, Malm," he says of certain lawyers for the seller.

"They kept deleting our revisions regarding environmental liabilities in the purchase agreement and claiming that the Bankruptcy Court would not accept them, but we pointed out that [megafirm] Weil Gotshal had done the same thing in another deal years before," Norris recalls.

Norris also had to contend with lawyers for Onyx, who were arguing to the bankruptcy judge and government regulators that Clean Harbors could not assume $265 million in environmental liabilities associated with the target because those liabilities could really be more than $1 billion.

Those kind of arguments did not make it any easier to deal with the lenders, recalls Norris, who notes that "we were not IBM to begin with, and they didn't need us as much as we needed them."

Moynihan says that "banks generally don't like environmental issues and they don't look to finance smaller companies taking over larger ones, especially those in bankruptcy." That meant the lenders had to be very impressed that the team had done its homework and properly quantified and revealed the risks and financial exposures.

Enter Jonathan Black of Hingham, a former Clean Harbors lawyer and sole practitioner doing work as a general counsel for hire. He had a background in environmental work and understood the hazardous waste exposures of Superfund sites, so he was tapped to examine contingent liabilities associated with environmental litigation involving the target.

Black says the deal was further complicated by clean-up agreements among the target, the EPA and certain state agencies, some of which had to be assumed and quantified by Clean Harbors. He adds that some real estate exposures were moving targets because "Safety-Kleen had been through a recent acquisition and still didn't know what it owned."

Weisman affirms that Safety-Kleen's data room and disclosure documents in Columbia, S.C., were "totally disorganized" and missing much basic information.

She also found that corporate organizational charts did not reveal who was knowledgeable about a given subject based on title alone, and says that it was often necessary to speak with field operators to learn the truth about a property or a waste operation.

According to Malm, Weisman had to learn the target's business to find the critical disclosure information. "Jackie knows more about the $500 million business we acquired than anyone who has worked in that organization for 10 years," he remarks.

He says the hand-picked due diligence team kept the other side hopping and allowed his partners, William F. Griffin Jr. and Judith Ashton, to focus on other "details" like devising ways to avoid prepayment penalties on refinancing and analyzing Canadian labor contracts that were often written in French.

But "the real fun of the deal," says Robert Lipstein of Washington, D.C., was "the substantive review of the merger by DOJ and the FTC."

Lipstein is a partner in a three-lawyer firm that specializes in antitrust and his small firm is beginning to see more frequent inclusion in major deals at the request of in-house counsel. He came highly recommended by a college friend of Malm's, former general counsel for Newton's Cahners Business Information Co., Michael Feirstein.

Lipstein says that Clean Harbors had to deal with issues that could be raised by both competitors and customers, as well as government economists.

The entire team tackled everything from antitrust to Superfund issues, but it consisted of only one lawyer at a major firm, and that was Doug Thomson of McCarthy Tetrault in Toronto.

According to Geary, "It was in our best interest to go with a group of nimble, smaller firms because trust, history and experience were more important to us than sheer size or numbers."

Keys To Success

Team members agreed that having the right people with the right experience allowed Clean Harbors to use the surgical strike force in lieu of a large and layered army.

The team was heavily weighted with experienced partners, but even among the associates and contract lawyers the experience was generally relevant and deep.

Chambliss says that "two or three of the right people can do the same work as 30 randomly selected individuals looking for every document they can find, regardless of relevance."

He notes that his firm rarely hires people just out of law school, and adds that most of the people on the strike force had an institutional understanding of the client and its specific industry.

Mackie agrees, noting that his firm averages more than 11 years of legal experience and that even the three contract lawyers he hired had more than 10 years each.

"Our team had environmental litigators and people with relevant experience at the EPA or the Office of the Attorney General — there were no second-year associates who never drafted a complaint or settlement," he asserts.

He adds that "you can't afford intellectual or physical clutter in a deal this size, so you have to focus on what's important."

Black notes that some less experienced lawyers for other bidders "were looking at hundreds of pages of irrelevant stuff in the data rooms," and he wonders "whether some clients got any useful information at all" from the process.

Amy L. Fracassini, a Davis, Malm associate with 10 years of transactional experience, also noticed some other parties rushing around and making frantic requests for information that was marginally relevant or duplicative.

She says that lawyers for one of the many lenders "kept asking us to re-send the same documents over and over to different people until we finally told them they already have what they need."

That confusion was particularly bothersome to Geary as a client. "Some people were just saying 'give us all your documents' instead of focusing on what's material," he recalls.

He adds that lawyers for one lender "were fixated on whether a process was patented. We had to keep explaining why there was no patentable process when that should not have been an issue."

Other members of the strike force noted that certain large-firm teams were very well organized, but they noticed that others had trouble communicating between offices or even between floors.

Meanwhile, Weisman says that the seller was having particular trouble with its communications, as different employees and representatives kept disagreeing over which assets were part of the divesting division and which would remain with the seller.

"Sometimes you had to call the plant manager to find out that the corporate high hats had no idea what they owned or what belonged in the deal," she says.

"We had to be flexible and communicate regularly because the deal and the deadlines kept changing and there were so many pieces to track," she adds.

In fact, all of the lawyers credit Malm and the steering committee for establishing clear systems and lines of communication early in the process when bidders were all scrutinizing the target division before bidding.

Malm says the steering group met twice a week for up to four hours, once to discuss all of the environmental issues and once to discuss all of the financial and transactional issues.

That group pushed information out to the lawyers and other professionals working on the deal and took information in from all directions, while answering questions as needed.

Fracassini says communication also worked well in her group because all of the top partners were focused on the deal and very accessible. "Partners were always in the trenches late at night with the associates, and if not, you could call them at home at 10:30 at night," she emphasizes.

Some also say that the smaller, nimbler team facilitated communication because there were fewer people to coordinate. They note that Clean Harbors usually had just a few representatives on a conference call while other parties had as many as 20 people on the line, some of whom were being introduced to each other for the first time.

"Sometimes we were just laughing at how many people were on the line at one time," Weisman says.

She believes that "because everyone had a big piece and not just a little piece of this deal, we also took more pride in our roles. I really felt like this was my project."

But technology played a role in communication as well. Mackie points out that his group worked with an outside consultant to develop a database system for rapid tracking, analysis and dissemination of information to key members of the strike force.

They also developed a secure website for sharing and posting due diligence information that lawyers and others needed for constant access. "We had to be prepared for nightly calls with the engineers, weekly team meetings and getting up to 100 e-mails an hour at one point in the deal," he recalls.

Those involved in the deal say that Malm and his client, McKim, developed a model of inclusive communication and attention to important details that enabled professionals to work so seamlessly with each other.

Moynihan recalls a critical episode prior to the bidding when the lawyers worked out a deal to allow McKinsey Consulting, a Clean Harbors management consultant, to assess summaries of information about the seller without ever actually revealing the details.

"The seller was very concerned about us seeing certain information, such as customer lists, and there were antitrust concerns too," Moynihan says, noting that the McKinsey agreement allowed the due diligence process to go forward.

And the antitrust lawyers and others contend that early inclusion made the work of the smaller team possible.

Lipstein says that the "client was very helpful and responsive in developing the data early on so that we could anticipate the anti-trust arguments and respond to them."

That allowed Lipstein to procure the right economist for the job, a man named Frederick Bolton, who was a former chief economist at the Antitrust Division of the Department of Justice.

Because of the early integration of such professionals with the lawyers, the small team successfully anticipated and countered every issue raised by swarms of lawyers on all sides around them, according to Geary.

Norris sums up the small team advantage with these words: "We got in early and had the right people, and we never had lower-level people clearing decisions with mid-level and then higher."

By contrast, he says, "the Onyx team was a behemoth and I think it just never got going because of its weight."

Attorneys Recount Lessons Learned In The 'Big Deal'

Stephen H. Moynihan, a senior vice president of planning and development for Clean Harbors, says that this "once in a lifetime deal" affirmed for his company "an institutional emphasis on being lean."

He suggests that the legal team for Clean Harbors was "like a PT boat racing past an aircraft carrier," and in the end "it was a cheaper and more nimble approach."

But lawyers say there were many other lessons they learned along the way.

Despite the effectiveness of the smaller team, all of the lawyers acknowledge that they could have used a little more help.

"I would think hard about getting more staffing for this kind of deal, especially in this economy when so many good lawyers are looking for work," says John D. Chambliss of Boston.

Thomas A. Mackie of Boston agrees, saying that "it is an employer's market and good people are available."

He adds that he does not believe in "overstaffing," but cautions that "a deal like this can be nine stressful months of your life." Mackie also says it is hard to bring more people in halfway through the deal.

Those lawyers who made a significant commitment of time to this deal also warn that small firms must have a way to attend to their other clients when a deal swallows up weeks of time.

"You really have to clear your decks, get a lot of lead time and have a plan to manage your practice," says Mackie.

But everyone affirmed that it was a positive learning experience to conquer such a challenge, and they each learned something of practical value.

Several other lawyers comment that they would look carefully and skeptically at the records of any company that has recently been through an acquisition of its own, and they note that some companies have little corporate knowledge of field operations.

Jacqueline Weisman of Easton says she learned not to take disclosures and assertions at face value. She points out that corporate managers and lawyers may not agree with each other or with people in the field, and she suggests that lawyers really learn how a target company works to figure out where key information may be hidden.

Lawyers should get an early jump on identifying target properties and making sure that surveys, title policy descriptions and deeds give matching information, Weisman adds.

Amy L. Fracassini of Boston agrees, noting that many deeds to target properties were not properly recorded or remained in the name of an older entity from which they were acquired.

In one instance, Clean Harbors asked its surveyors to walk a property with operational people from Safety-Kleen; the surveyors were told that the divesting division also owned an adjoining parcel that was not disclosed in the corporate data rooms.

"More than once, we discovered we were getting more property than we thought," says Weisman.

Jonathan Black of Hingham learned how valuable his experience as a general counsel was to an acquisition team. Black says he knew what to look for, who to talk with and where to find information. In short, he knew where the bones were buried on environmental issues.

Black specifically suggests that lawyers get out of the data rooms and talk to the counsel for each "potentially responsible party" at a Superfund site. They should also check with operators and engineers, predecessor owners and sometimes surrounding landowners. That gave him a very thorough picture for assessing liability.

Others, like William J. Geary, executive vice president and general counsel for Clean Harbors, say that lawyers should focus on what will be necessary to clean up post-closing issues and assimilate legal records.

"We are continually stumbling on post-closing issues that are not a big problem, but they add up to a lot of time," says Geary.

He adds that it has taken months to clean up and assimilate vital records, and that he now faces the daunting task of reviewing and cutting back on inherited cases, outside law firms and experts.

One thing a number of lawyers say is that this deal taught them that having "beauty contests" to bid out the professional services on a deal does not adequately take into account the value of institutional history with a client or the knowledge of its industry.

Lawyers say that both of those components were major factors in the success of the deal.

"There is a certain momentum to a deal, and if it bogs down because someone doesn't trust the parties or their lawyers, then it can fall apart," says Chambliss.

He thinks it is particularly important that the senior lender's lawyers at Brown, Rudnick, Berlack, Israels had a working history with and trust for lawyers at Davis, Malm & D'Agostine. This history, he suggests, expedited and reduced the cost of legal work for all involved.

But one of the unexpected dividends, according to Whitton E. Norris III of Boston, was the forming of new friendships with previously unknown lawyers from prestigious New York firms.

"Some of them obviously didn't think we could do this, and now they defer to what we are saying on the same side of another deal. That's a great feeling," says Norris.

Questions or comments may be directed to the writer at jcunningham@lawyers-weekly.com. MLW