

**LETTERS OF INTENT:  
BE CAREFUL YOU DON'T GET MORE THAN YOU BARGAINED FOR**

**By  
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Getting a real estate deal off the ground requires a lot of tire kicking and due diligence. How best to get started?

One of the most common methods is the so-called letter of intent. However -- as with all documents in a deal -- you need to know a few things about letters of intent before jumping in and signing one.

A letter of intent is a written document signed by the parties to a proposed transaction in which they express their basic intent on the important terms of the tentative deal. At the same time, the proposed transaction is not generally intended to be binding or enforceable or to expose the signers to any potential liability.

An LOI can be referred to by any number of other names: memorandum of understanding, letter of understanding, term sheet, transaction outline, agreement in principle, etc. However, since an LOI is normally not intended to establish a binding agreement among the parties to consummate any transaction, it is preferable not to title the document with the term "agreement."

**WHEN TO USE AN LOI**

An LOI serves to focus discussion on the material terms of the proposed transaction. It provides a comfort level for the parties in putting forth additional time, effort, and expense, knowing that they have initially established a basis upon which the proposed transaction can be consummated. An LOI also provides some measure of "ethical glue" -- issues agreed to should not be renegotiated.

But there are times when using an LOI doesn't make sense.

For example, an LOI may become so detailed and over negotiated that it is as expensive and time-consuming as a definitive agreement; but it lacks enforceability. You may get bogged down in negotiating the LOI and lose the window of opportunity for the deal. Simple transactions do not need an LOI -- it's easier to go straight into a definitive agreement.

Some other downsides to using an LOI include the following:

- If the LOI is negotiated only by businesspeople before lawyers are involved, the legal significance of agreed-on points may not be fully realized.
- LOIs generally favor the tenant/buyer. A judge or jury decides questions as to the binding nature of the LOI. But just the threat of litigation as to whether or not a deal is "binding" may adversely influence the landlord's or seller's bargaining position.

The LOI should not establish any agreement as to the terms of the proposed transaction, to consummate any transaction or to enter into any definitive agreement.

The terms of the proposed transaction as detailed in the LOI should be expressly stated to be non-binding. Moreover, the LOI should expressly state that the parties do not intend to be legally bound to consummate any transaction unless and until they execute and deliver a "definitive written agreement."

Be especially careful not to use any words ("agree," "offer," "accept," etc.) in the non-binding provisions of the LOI that state or imply that an offer has been extended or that an acceptance has been solicited or otherwise that an agreement has been (or may be) formed.

The LOI should set for the material proposed business terms of the deal. These include the following:

- Names of buyer and seller
- Property to be purchased
- Price and terms
- Duration of inspection period
- Closing date
- Who pays for title policy, survey, commissions, etc.
- Special "deal points," such as restrictive covenants, reserved easements and the like.

### **MAKING IT WORK**

Although generally thought to be non-binding, the LOI may contain binding agreements as to certain matters on which the parties need agreement before they proceed. Any of these matters could be (and sometimes are) addressed in a separate written agreement apart from the LOI.

Normally, these agreed-on matters will not directly pertain to the terms of the proposed transaction, but to ancillary matters. These might include access for due diligence purposes, inspections and any related indemnity, or exclusive dealing, no-shop and standstill agreements.

To achieve the desired results (no binding agreement as to the terms of the deal), consider the following:

- Name the document and let it refer to itself internally as a "letter of intent."
- Provide a clearly expressed mechanism to end negotiations.
- Follow good rules of draftsmanship, just as you would any other legal document.
- Try to anticipate all deal points and include these in the LOI. A deal point is any point that, if not resolved, will keep the deal from closing.
- Clearly set out and separate in the body of the LOI the binding provisions from the non-binding provisions. Alternatively, put the binding provisions in a separate document.
- Clearly state that the non-binding provisions are not legally binding on the parties and that the parties do not intend to be bound to the proposed transaction unless and until they enter into a definitive agreement wherein they agree to be bound.

- To forestall the other party from trying to say that your client's actions have made the LOI enforceable, advise the client that until the definitive agreement is signed, do not take any actions or make any statements that are inconsistent with the non-binding nature of the LOI.
- Try to keep it reasonably brief and don't get bogged down trying to resolve the specific details of all the foreseeable issues that will have to be eventually resolved. You need to strike a balance. If the parties want to resolve all of the issues necessary for a definitive agreement, you might just as well skip the LOI and go directly to the definitive agreement.
- In some states (Texas, for instance), there is no implied obligation to negotiate in good faith to reach a legally binding agreement. If the parties want such an obligation, it needs to be expressly stated.

Overall, LOIs are useful tools for the conclusion of real estate deals. But careful consideration must be given to clearly enunciating the parties' intentions -- to be bound or not -- in an unambiguous manner.

And in any event, don't let your clients behave under the LOI as if they have a final deal, or -- whether they like it or not -- they may find out that they do.

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