

# Letters of Intent – To Do or Not To Do

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Business people involved in mergers, acquisitions and divestitures love them, their lawyers dislike and fear them. What are they? They are letters of intent. The legal issue with a letter of intent is whether it is a legally binding document or just an expression of the parties' intent to try to make a deal. When drafted by the inexperienced, a letter of intent which is intended to be only an expression of ideas to guide people to reach a future agreement can end up in costly litigation and be found to be a wholly or partially legally binding contract.

Business people seem to love letters of intent. Each party feels that putting something on paper makes the deal more likely to happen. Each side erroneously believes (or wants to believe) that the letter of intent morally commits the other side, but is less of a commitment to them because the letter is "nonbinding."

Over the years a lot of litigation has involved the binding effect of letters of intent. Even some letters of intent that say they are **not binding** end up being held by a court to be binding in whole or in part for a variety of reasons. Deal lawyers tend to dislike letters of intent because they are aware of the litigation risks and the uncertainty even when the letter says "**This is not a legally binding document.**"

A properly written letter of intent dealing with the merger acquisition or divestiture of a business, is usually partially binding and partially non-binding and sometimes serves a useful purpose. The usual binding provisions concern the preservation of confidentiality, exclusivity of negotiations, expense allocation and due diligence procedures. During a buyer's due diligence, the parties negotiate the definitive purchase/sale agreement containing details of the transaction, such as, the exact purchase price, price adjustments, and payment terms, representations and warranties, closing contingencies and a host of other matters that need to be covered as facts become known through due diligence.

If you can use letters of intent for any transaction, use them carefully with the help of experienced counsel.