

# Episode Transcript

Specialized Legal Counsel – A Make-or-Break Factor in Consumer Health



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## Episode Transcript

**Rusty Ray** (00:06):

Hi, I am Rusty Ray with Alantra, I head up the US healthcare investment banking team here in New York, and you are listening to Crossroads by Alantra. On this episode, I'm joined by two guests, Chris Harley-Martin, who spent 30 years at GSK, and Matthew Appleton, a partner with Allen & Overy, focusing on life sciences and consumer healthcare. I've worked with both of these gentlemen on a number of deals, and I can say they are some of the leading experts in transacting across consumer health.

In previous episodes, we've discussed M&A from a commercial, financial, and operational perspective. But we don't want to neglect the importance of having the right legal advice in these transactions. As we all know, it can make or break deals. Matthew has sat in the middle of dozens of transactions with major pharmaceutical and consumer health companies as their counsel. While Chris and I have never been siloed away from the lawyers within a transaction, we wanted to get Matthew's perspective on where he has seen clients get into trouble, now and in the past, and what companies can do to mitigate the risk of transactions falling over due to legal hurdles.

**Chris Harley-Martin** (01:09):

Matthew, thanks for spending some time with us talking about transacting in healthcare. I'm curious, you and I have been in the industry transacting for some time, but when you look back, what has changed? What are the big themes that you pick through that have really impacted the way you do your business?

**Matthew Appleton** (01:26):

When you look back, consumer healthcare was a sub-sector within the pharmaceutical industry for the most part. The players were pharma players for whom it was cash generative sideline to the innovative R&D, in many cases, that people were doing. That led to a perhaps more limited transactional nature. The evolution, obviously, over the last 15 to 20 years, has been to a much more FMCG-like business model, the move away from big pharma, having their consumer healthcare divisions to go to either standalone pure-play players or people for whom it sits alongside wider FMCG. Then the other big evolution, obviously, alongside that, has been the introduction of private equity into the industry in a way that didn't previously exist. The migration from PE away from healthcare services and consumer into consumer healthcare products, and obviously, on that journey into pharmaceutical products beyond as well, meaning prescription products.

**Rusty Ray** (02:30):

PE's interest in the space and the broader space of healthcare has been a big change. Processes are just becoming more and more competitive as there's more and more buyers. The other thing that I've noticed over the last couple years is that the level of diligence has changed. Before when transacting with a strategic, we might have thought about diligence as commercial diligence, regulatory, claims, et cetera, to come back to Matthew's comment on consumer health or pharma. Now we're seeing, especially with private equity buyers, they're relying on so many different third parties to complete their diligence, which we need to be careful about because many of these third parties can kill a deal based on their opinion. These services range from, not only financial, but they are clinical, they're regulatory, they're commercial, they're really broad reaching, and can be really, really important to getting a transaction consummated. They've certainly extended the diligence timelines, but certainly create some watch-outs in terms of what we've seen in transactions.

**Chris Harley-Martin** (03:30):

Matthew, do you think there are new themes that have emerged, specific issues that raise legal content problems, I suppose? So, what I'm thinking is, there are some things that when I started, I really didn't spend much time on that now feature quite heavily in legal diligence, maybe ESG, maybe data, sort of new and emerging themes, which bring new issues onto the table. Has that been your experience?

**Matthew Appleton** (03:57):

The longer running trend has been, as part of that move to FMCG-type players in the industry and also the advance of technology DTC platforms, marketplaces, pushing things much more on a personal data-driven aspect for individual industry players that didn't exist previously. Yes, you wanted lots of information in the past, but people would do relatively high gross margin bricks and mortar channels. Consumer healthcare companies didn't interact with data, personal data in the same way that they do now. I think there's also been, as part of the nearer term impacts, this shift to robustness of supply chain in a way that didn't exist previously. People were prepared in the past to have dual sources of supply available to them, for example, even though that brought greater costs through more limited volumes to individual CMOs.

(04:56):

You're now seeing much more of a focus on the impact of a deal on supply chain, the robustness of it, whether that be single source, consent to transfer, stock outs, price changes, all of that a focus that 18 months to two years ago, people would've waved away, and they've become much more into sharp focus. And particularly, for any buyer, but particularly, for those financial sponsors on a 3, 5, 7 year time horizon, worried about the angle of that and how that plays into the robustness of the supply chain today, tomorrow, and however many years into the future.

**Chris Harley-Martin** (05:32):

I think one other thing that I noticed, and again, I'm curious whether I'm seeing this through rose-tinted spectacles, is much more intervention from regulators, which again changes the kind of environment in which people are operating. Am I right? Historically, was there less? Is there now more?

**Matthew Appleton** (05:47):

We're seeing a lot more occurring across antitrust, foreign direct investment much more than there was previously. Now, it's considered relevant on pretty much every transaction. Whether you're a buyer or seller, one of the first questions is going to be, what's the landscape / what are the approvals / what's the timeline impact as well on the execution risk?

**Chris Harley-Martin** (06:06):

That's one thing, I'm curious, Rusty, whether we see the disciplines collaborating here. Whether as a banker, you see the same issues and you are trying to highlight them early to your clients', antitrust regulation, et cetera, or whether actually you leave it to the lawyers.

**Rusty Ray** (06:23):

Absolutely not. We try to tell clients that we really work hand in hand and collaborate with the legal team. I think it's essential. More and more often, points are not legal or business, they're intertwined, and so you've got to find a common ground solution. We do try to work with clients on the front end through a diligence process to highlight issues that we think are going to be sticky points in negotiation or things we just know that are going to come up and make sure that we educate folks on that. Whether it's engaging with lawyers sooner or other outside third-party consultants, be it regulatory or clinical, that can help to develop some point of view or perspective or material to help mitigate some of those points once we get into a

transaction. We've worked with a lot of lawyers that are more concerned about a legal point than the overall commercial nature of the deal, and I think having that collaboration with a good law firm that's commercially minded helps tackle some of these deals because they don't fall into just one camp.



**Chris Harley-Martin** (07:25):

I think as a client and practitioner, I'd say that finding the right law firm, developing a relationship over time rather than perhaps just throwing out a request for proposal and taking the best price, all of these things have mattered to me, but Matthew, I'm really curious about that point about the legal team, because it isn't just one person here, is it? The world has got a lot more complicated, so you're having to bring a lot of disciplines to play, and I guess that's true for more or less every transaction these days.



**Matthew Appleton** (07:54):

Often, the five key focus areas are going to be, when you are shaping at the outset, intellectual property, regulatory, increasingly ESG, antitrust, and then effectively that wider separation piece, particularly if it's coming out of a corporate. You can just tell when you look at those factors, the number of people you need to bring, the number of specialists' expertise you need to bring to bear right from the outset. You've got to have people who know what they're doing in this space.



**Chris Harley-Martin** (08:21):

One thing I'm curious about, Matthew, is whether those five things you mentioned are consistent across both private equity and strategics?



**Matthew Appleton** (08:29):

I think the factors remain relevant regardless, but I think how people view them and their understanding of them can vary wildly. I think it goes back to the point Rusty made around the knowledge and understanding within a financial sponsor will vary much more wildly than a strategic or a trade buyer who's already in the industry. Also, some of their own history and their own scars on their back in terms of what they've experienced on prior transactions.



**Chris Harley-Martin** (08:55):

It might be useful to give a couple of examples. I had a buyer from the US who was buying assets in various European jurisdictions, but particularly the UK, who couldn't accept that there were no contracts between us and the retailers. That basically, there was nothing to buy, and the negotiations almost fell apart because they just fundamentally didn't understand that it wasn't our lack of discipline or even rigor in not having contracts, that they just didn't exist.



**Rusty Ray** (09:24):

It's the little things, as Matthew pointed out, with a strategic. You have someone who's already either in the market, very capable, or is market savvy around a particular asset, for example, and therefore isn't getting hung up on the little things. Their concerns tend to be much more operational around, "Okay, is this a good product? How does it fit? What does integration look like? How do we grow it?" That's where I feel like many of the strategics press down. Whereas the financial buyers, maybe depending on their experience, can get hung up on some of the smaller things that can be frustrating, and sometimes it can take a long time to help them overcome those obstacles, which always delays the conversation and can add time to transacting, and frustration and some risk, because we've seen transactions blow up on smaller things, things that maybe in hindsight seem very, very silly.

**Chris Harley-Martin** (10:13):

I think one thing that is evident is the obligation on the advisors and particularly the lawyers to educate. In this case, I think educating strategics on what private equity will be looking for and vice versa can be a really important role. Again, Matthew, maybe you could comment on that, because certainly in my experience as a strategic, I didn't really understand what private equity looking for. New concepts turned up like the locked box and things that I hadn't seen before.

**Matthew Appleton** (10:41):

I think absolutely, and I think it's critical at the outset. Do you understand where the other side's coming from or likely to be coming from? As a well-informed seller, you want to be clearly maximizing the likely bidder universe, the lightly number of counterparties, and some of that requires quite a reasonable lead time at the start. And what you don't want to do is find yourself several months down the track and go, "Well, actually we've inadvertently excluded a wide portion of the community as a result." And similarly on the buy side is coming into it saying, "Do I really understand my counterparty? Where are they coming from? Where can I push and test? Where is it going to be a red line?" I think that goes to counterparties, and also Chris, goes back to your point about helping people understand different markets, working as a cross border advisor to explain that if you're coming to the UK, for example, there won't be customer contracts. People will use JBPs and they'll have arrangements, and it's done on a PO basis. Educating and bringing the parties together, I think it's a crucial component.

**Chris Harley-Martin** (11:40):

There's lots of nuance to educating. I think the other thing I found myself doing over time, was asking a very straight question, but a difficult question of my advisors, which is, how do I become a great client?

**Matthew Appleton** (11:53):

I think undoubtedly, the best client brings the advisors in early. When the idea is germinating of a transaction, what do you need to focus on to deliver success? The earlier you do that, before people set a particular position or set a course of events in motion, that challenge and that dialogue collaboratively from the outset makes a real difference. I had a transaction last year where we came in relatively early, but there had been some points that had been set effectively before we had been brought in. Actually, it turned out those needed to be tested and revised and a lot of work, reworked, that actually, if we had come in much earlier, we'd have been able to avoid the unnecessary time, cost, and effort.

**Rusty Ray** (12:37):

I would echo Matthew's sentiment. What all too often happens is, we get called a little bit later into the process and it's, "Well, here's the asset" or "here's the business, go sell it." Had we maybe started six, eight weeks prior, we would've said, "Well, we might shape the asset like this." Well, the horse has left the barn. That's no longer possible. So, we're dealing with some of the hair that we're given. Now, that's okay. Maybe it's a tough transaction to begin with and there is no alternative, but there are opportunities to shape that and improve the situation and at least identify what the buyers are going to be concerned with well before we ever get to market. We do that in diligence, but if we could do that even earlier, it might help shape some of the thinking that goes into the transaction in the first place. We're happy to do that and do that in a kind of, no strings attached way so the outcome gets better.

**Chris Harley-Martin** (13:32):

We forget entrepreneurs and owners in this conversation, and maybe that's a mistake, Matthew, I guess for people who are owners of their own businesses, and there are quite a few in this industry, it's not unusual to find families owning businesses and then wanting to transact. Does that create its own unique set of challenges?

**Matthew Appleton** (13:52):

It absolutely does. I think you walk into a situation where there is a much greater emotional attachment, usually, to what's being sold, and often a much less developed transactional experience - that requires you to operate differently, to bring someone along the curve, to recognize that some of the things that you would expect to find in a multinational large consumer healthcare business might not exist in quite the same way in that founder operated business because they've been running at a hundred miles an hour often to grow as quickly as they can. Then you need to come in with a really proportionate view of risk. If you are a larger, more well established corporate, for example, that sensitivity to the drivers on the other side and how you approach that deal needs to be much more managed than if you were a counterparty with someone much more similar to yourselves.

**Chris Harley-Martin** (14:48):

Yeah, I see that. I'm also minded that at the other end of the scale, if you're transacting with boards across multiple geographies, you've got a variety of stakeholders that might even include governments. Having advisors surround you that know about the different types of transactions and the different types of environments with the different players is really important. I wanted to finish on looking towards the future. How is legal practice changing in this environment? What do clients need to know about law firms and their services and the discipline that will inform them on how to think about transacting in consumer healthcare?

**Matthew Appleton** (15:32):

I think there's probably two or three big factors you'd want to know about someone. First of all is understanding their sector depth and expertise. It goes back to all the things we've been discussing. This isn't something where you can take a generalist who is doing a healthcare or consumer healthcare deal one day, and the next day is operating in the mining industry, or energy or infrastructure. Is the team you are looking at, are they deep into the sector? And they really know what they're doing? Secondly, combined with that is the geographical element. Do they have the true spread internally to be able to navigate those issues in real must-win markets, be that the US, China, India, et cetera. Have they got the ability to do that? And crucially thirdly is, are they evolving as a legal practice? Have they doubled down into legal tech and AI and deal management in a way that cuts through the churn, to allow people to focus on the real issues quickly?

**Chris Harley-Martin** (16:34):

I think one other thing I would observe as a client is being realistic as a client as to what your own capability looks like. To use an example, I see a trend towards in-house lawyers facing more into the business with the skills to do that, more than the legal skills to transact. And that's not to be critical, just that they become more capable of outsourcing than they are of actually doing the transactions themselves. And if you can be honest about where your real core capability is, that changes the nature of the interaction and what you need from advisors.

**Rusty Ray** (17:07):

Getting the deal done, as Matthew said, is difficult, especially with smaller companies or founder owners where there's so much emotion tied up into this, and having the right expertise can make or break a deal. Often, we've seen people make very poor choices in their counsel, going with someone that they've known for 30 years and does all their contracts. It's a terrible choice. It extends the deal timelines, causes all kinds of problems. When you're looking at a law firm or an advisor, really think about the value that they can add and the track record that they have because that will pay you back in spades. It's never a good idea to just focus on cost outside of expertise.

**Rusty Ray** (17:49):

Well, that wraps up our discussion with Chris and Matthew, as I've said before, it's critical in a sector like consumer health to be working with experts across all phases in a transaction. Negotiating and closing transactions has become much more complicated than it used to be, and you really need an advisory team that is mutually experienced from a commercial and legal front, ideally bringing them together in advance of going to market. If you'd like to hear more about Alantra's thoughts on the space, please feel free to reach out to us.