

PREFACE

For decades, I have watched aspiring business lawyers enter the legal profession with no concept of the planning process. They have made it through law school and maybe a few years of practice without any real awareness of the strategic challenges that business owners, both large and small, face on a regular basis. They have a grasp of how their legal training helps in resolving disputes and executing transactions, but its role in the process of making strategic decisions that move a business forward often is completely undefined. Many lack any understanding or appreciation of the importance of forward planning and the need to identify and prioritize specific business objections. Others just figure that those challenges are for business people, not lawyers. Many times I have pondered the value of a book that would help law students and young lawyers understand what it takes to become a trusted advisor to business owners and executives. This book, now in its fourth edition, is my attempt at such an effort.

This fourth edition features many new, positive additions. Twelve new student case study problems have been added, bringing the total to 65 problems. New discussions have been added dealing with limited liability traps, undocumented partnership risks, the design and drafting of partnership and LLC operating agreements, capital structure basics, dividend challenges, going public realities, crowdfunding and the JOBS Act of 2012, oppression risks, healthcare reform, and judicial enforcement of buy-sell agreements. Perhaps the most significant addition is a recap (which includes three new student problems) of the statutory basics of limited liability companies and the four types of partnerships, designed for those students (there are many) who never gained a grasp of these core concepts. Of course, all tax discussions have been updated to include the significant changes of the American Taxpayer Relief Act of 2012 and thoughts on what might be coming in the future. Five case study examples have been added to the choice-of-entity “factor” discussion to better illustrate the impacts of various factors. And the discussions relating to securities law exemptions, deferred compensation, and business valuations have been revised, repositioned and substantially shortened. The net result for this fourth edition is only a three percent increase in word count and a reduction of 60 pages (due to a slight increase in page size).

Becoming a trusted advisor to business owners and executives requires training and the development of key skills. The core knowledge prerequisites are substantial. A solid grounding in tax and the ability to read financial statements, while both essential, are not enough. The advisor needs a broad grasp of legal issues that directly affect businesses. Many view this knowledge challenge as an unattractive burden and retreat to a specialty that narrows their focus and their relevance. Others perceive it as an excuse for ignorance and play over their

heads every day. They regularly disappoint. Contrary to what many think, the successful business advisor is not a “generalist” who lacks specific knowledge. It is a person with a broad base of specific knowledge that positively impacts the decision-making process.

But core knowledge alone isn’t enough. Many with deep reservoirs of legal knowledge are useless in the planning process. They lack one or more of three essential skills that a quality advisor must develop: the ability to identify and address business objectives, not just legal issues; the ability to evaluate and apply specific strategic options; and the ability to effectively communicate with non-lawyers. This book attempts to address the development of these three essential skills in the context of a number of common business challenges and the related core knowledge prerequisites.

As regards the first skill, any quality advisor knows that the identification and prioritization of specific business objectives is the threshold challenge in the planning process. Nearly all business owners, even the very brightest, need guidance and direction. From my experience, the best way to develop the ability to provide such guidance is to study examples that illustrate the varying scope of business objectives different types of business owners may have with respect to any planning challenge. For this reason, numerous case studies and examples are presented in text discussions and in the problems that accompany each chapter. The initial focus of each case study and problem is the identification of the client’s business objectives. The names and the collateral facts of the case studies and problems are fictitious, but the underlying business objectives and planning challenges are based on real situations. To help the reader better understand and appreciate the difficulty of indentifying, prioritizing and accomplishing objectives as our nation and the world seeks to crawl out of a painful recession, this edition includes discussions on some of today’s toughest challenges -- the drop in global demand and the associated deleveraging, the causes and affects of chronic unemployment, unprecedented government spending and deficits, the perpetual uncertainty of taxes, tax prospects for the future, and the business challenges of health care reform in the years ahead. There is also a section that provides a primer on basic business concepts and definitions.

The second skill—the ability to evaluate and apply specific strategies—requires knowledge of the strategic options and their business and legal limitations. I am continually amazed at how frequently a student studies a technical body of business or tax law without ever gaining any meaningful knowledge of the related options that impact businesses in their strategic planning. This effort attempts to address the issue by focusing on various strategic options for dealing with a number of specific business challenges. Of course, time and page constraints limit the scope of the challenges that can be discussed. The challenges selected were based on my experience, with “client appreciation” being the prime criterion. The key challenges examined include choice of entity, capital and business formation, entity conversion planning, co-owner planning, business valuations, exit and sellout strategies, key executive

incentives, equity sharing, deferred compensation, life insurance planning, competitor collaborations, resource diversification planning, multi-entity estate and asset protection planning, select employee challenges, and business transition planning.

Perhaps the most vital skill is the third—the advisor’s ability to effectively communicate with business owners. It also is the most difficult to develop. The lawyer who refines this skill wins in two big ways—clients respond very favorably, and the lawyer’s understanding of the relevant subject matter is enriched. The best way to master a technical subject is to tackle the challenge of distilling and communicating the essence of the subject to a non-lawyer. It’s not easy; it’s something many don’t even try. This, more than any other factor, explains why only a pitifully low 17 percent of the respondents in a survey of successful business owners (average annual company sales of \$36.5 million) listed a lawyer as their most trusted outside advisor. The simple truth is that, when discussing technical issues, it is much easier to “talk Code” or use legalese that are designed to impress but communicate nearly nothing. Most business owners long for understanding but have little or no patience for legal dissertations that over-complicate and offend their intelligence. It is little wonder that so many turn to other advisors for guidance and, in the process, often become victims of sloppy planning or lost opportunities.

In this work, I attempt to address this all-important communication skill a couple of ways. The first is by example. The bulk of the following pages contain my words, most of which are designed to illustrate how I would discuss the relevant subject matter with an intelligent business owner who has no legal training. Lawyer talk and Code references are minimized. The focus is on planning solutions and potential traps, not abstract legal concepts and exceptions. Some bodies of technical law are distilled into a handful of pages to promote understanding of the relevant planning issues and impacts. Various educational formats are used, including question and answers, case studies, short examples, factor lists, and more. A few times I just tell a story. Beyond these examples, I included Chapter 17 to discuss specific practice techniques that I found helpful in building a practice to serve business owners and executives and to review common ethical challenges encountered in such a practice. The essence of many of the practice techniques discussed in that chapter is effective, value-added client communications.

I thank those lawyers who made direct contributes to this effort, each of whom is identified before his or her written words, the Seattle firm of Foster Pepper PLLC for use of the seven forms included in Chapter 18. Many others lawyers made indirect contributions by helping me with my personal development over the years. Two of these lawyers deserve special mention. Tim McDevitt and Kent Whiteley were superb planning lawyers who I had the privilege to work with for a long time. Beyond our joint efforts as law partners, the three of us for eight years struggled each month to produce a 50-minute audio planning program that was sent via audio cassette to planning professionals

throughout the country. This project, known as “PlainTalk Planning,” was a labor of love that made each of us (and hopefully many others) better advisors to business owners. Tim and Kent could not be part of this effort; their lives tragically were cut short years ago. But the impact of our collective PlainTalk experience will forever burn in me and is manifest throughout this book.

Finally, I want to acknowledge a vitally important group that made this effort possible. It is those business owners and executives who I had the privilege of serving for many years. These clients did much more than just give me a means to earn a living and practice my craft. They taught me; they inspired me. Jack Welch, the renowned former GE chief executive, once explained, “What we are trying relentlessly to do is get that small-company soul inside our big company.” (As quoted in *USA Today*, February 2, 1993) Welch got it right. The happiest, most energetic, most interesting, most effective, most fun-to-be-with people I have ever known are those who build businesses. Many of them regularly experience the endless joy of self-discovery and improvement. They, plain and simple, enjoy life. That is why they are such an excellent career answer for the lawyer who develops the skills to play in their league.

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