Succession Planning Part II: Business Succession Is a Team Sport

By Leigh Harter

Leigh Harter discusses the importance of a buy sell agreement in a closely held business and planning considerations involved in creating this agreement.

Review of Part I and Its Connection to Part II

In Part I of the Succession Planning Series I acknowledged that no one is looking for another pundit to reiterate the difficulties of getting clients to move forward with succession planning, a critical part of creating a long term business plan. Concrete suggestions on how to motivate clients to act and suggestions on additional features in a succession or buy/sell plan are the logical next step. In Part II, a number of case studies covering a variety of ways to address the need for succession plans, will be analyzed. These examples highlight the spectrum of alternatives available to meet business, tax and estate planning objectives.

The Journal of Practical Estate Planning focuses on the optimum solutions for estate planning problems that arise based on current tax law as well as prognostications for those changes that might affect planning in the near future. Succession planning might seem to be a topic that strays from this objective. It really isn't. A significant percentage of the gross annual product in the United States derives from businesses with less than 30 employees. On average, these businesses constitute 70 percent to 80 percent[1] of the net worth of their owners and many of them need to be advised on the most tax efficient ways to transfer their wealth and create a succession plan that can aid in the long term success of their closely held businesses.

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A well drafted buy-sell agreement provides a ready market for a business interest in the event of death or disability, can fix the value of the business for estate tax purposes at a reasonable level, and provides for continuity and stability within the business by eliminating the conflicts that can arise if no agreement is in place.[2] If a statistically significant percentage of business owners understood that including simple succession planning elements in their business plan was essential to long-term success, and that dynasties could be both built and enhanced by these basic building blocks, then a paradigm shift could occur that might alter the long-term success and transfer rates of closely held businesses.

What are those strategies? They can be as varied as the businesses they support. As reviewed in part I of this article, the basics are simple, how they are implemented is not. Just as each roll of the dice is a new statistical event for a gambler, each business succession plan has new elements that impact how the succession plan should be designed and implemented. The anomalies create the challenge and the unique approach advisors must take to design a plan that is appropriate for each situation. The legal formats that support these scenarios are more fixed; each plan requires support from seasoned professionals that can tailor a plan and a funding strategy to fit each individual situation. The three basic formats of buy/sell plans create a variety of matrices for the ownership of closely held businesses.

In one scenario, you may be presented with a business that has experienced significant organic

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growth. It is creating revenue, it has owners, but it has not been structured or designed into a form that might be considered corporate or any form that is easily defined in business terms. There may be no documents defining equity positions in the business, plans for dissolution or any valuation inquiries. In these situations, the events that often force planning are those life events that require valuation such as the decision to sell the business, death or disability of the owners, divorce or other developments. This takes us back to the statistic that over 60 percent of the non-farm assets in this country are held within businesses with less than 20 employees.

So, what do you do with a successful business that has "just grown"? Well, it needs direction. Happily, a lot of people have done this before and can provide a history of those strategies that really work, and can include all the details that support the underlying framework to build a functional succession plan. Of course, each business is unique and will require some tweaks and adjustments in order to make it fit their situation in the "best" way.

Succession can be defined in many ways, the essential definition being "the continuation of a business in any form with any subsequent team of owners." This "new team" may include members of the previous team. For each set of owners of a closely held business "succession" will have its own meaning and, to them, may be more or less crucial. Objectively, advisors will realize that some business owners do not care about the future and can only focus on the issues they must deal with to make their business succeed in the present. Those clients will probably be less focused than the clients with closely held businesses that recognize long-term planning may be the watershed between a business that will carry on for generations and one that may remain very successful only for their lifetime.

The major problem or challenge is that no two closely held business planning situations are the same. So, the basic plans fitting within the parameters of the law must be tailored to fit each business. Obviously, creative attorneys and advisors can come up with beautiful solutions for each unique succession quandary; however, not every business owner has that creative attorney or advisor. The best advice is to seek out those individuals with the experience and creativity to create a solution uniquely tailored to this particular business. For most business owners their business assets are the largest part of their portfolio. You might be the creative advisor or belong to the talented set of advisors with the opportunity to build this client's plan. Building a successful business is a talent. Most entrepreneurs are extraordinarily talented at what they do but are probably not the right individual to write their own buy/sell plan.

Building a Team

Succession planning, whether it is done at inception or as part of the documentation process for a more mature business, provides an ideal opportunity to build in "golden handcuffs" for those members of the management team that are critical to the success of the business. This also provides a forum for the business owners to work out unrelated issues that are not crucial to the succession plan but play a part in building the long term harmony that may be necessary to overcome the unavoidable conflicts they will have to address as they build the business together.

Challenges of a Family-Owned Business

Often a business that is ultimately owned by a family begins as the brainchild or "baby" of one individual. No one lives forever and at some point an entrepreneur must either include his or her family to support the enterprise, or develop a hierarchy of key employees. This differs from a business that grows from the combined efforts of a number of unrelated individuals who must acknowledge and cope with conflict from the beginning in order to take advantage of the talents of multiple owners who bring a "menu" of strengths to the table.

When family is involved, equitable distribution of assets is often a key component of both the succession plan and the estate plan. How do you equitably satisfy heirs that have differing levels of involvement in a family owned business? There are a variety of solutions, all requiring a certain level of cooperation or liquidity or both.

A) Cooperation. The heirs may be willing to hold equal ownership interests passively if they are not active participants in the business. From the standpoint of planning ahead this can be either an optimistic view of the future or the ostrich syndrome depending on family dynamics since passive "participation" requires a great deal of trust and may not last forever. A realistic approach to dividing a family owned busi-

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ness will compensate the inactive heirs for their share in order to neutralize any effect they might have on the business as a passive owner at a time when the active heirs have enough turmoil to deal with. How can this be accomplished?

1) Establish the ownership of the business in an entity with general and limited interests so that the non-active participants have no say in the day-to-day operations of the company.
2) Set up a long term plan where the non-participating heirs will be compensated for their share out of corporate profits annually until the full value of their interest has been paid off.
3) Insure the business value in order to pay off the inactive participants and completely remove them from the sphere of influence while satisfying the economic equivalent of their legacy.

Realistically, any of these solutions will require a legitimate appraisal of the value of the business. This may be a simple matter of calculating a multiple or it may require a specialist. The detail required in the valuation will depend on the type of business and whether or not there is a generally accepted standard for valuing that type of entity in the market. Once again, this is not a one time event. In response to market conditions the value of closely held businesses changes. It is hoped that the value increases year to year but that is not always the case. Even the multiples can change if the market's perception of the long term value of that type of business has changed.

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B) Liquidity. In the context of a family owned business this typically addresses the need to equalize value between the inactive heirs and the heirs who are running the business. This is especially important when the balance of assets in the rest of the estate is inadequate to offset the value of the family owned business. This is not an unusual situation given that for many small business owners, a large percentage of their personal wealth is tied up in the business. Giving inactive heirs active interests in the business can be a recipe for disaster. This issue can be more effectively addressed either with insurance to balance the value of the business, a long-term plan to buy out the interests of heirs who can not or do not wish to participate, or division of the stock into participating and non-participating shares. This is where it is critical for advisors to address the combined estate planning needs of the individual with those of the business. What are the key components?

1) A review of the estate tax balance sheet is required to assess the need for personal insurance, liquidity, or a long term buyout plan to equalize with the value of the closely held business interests.
2) In planning for the future it is helpful to determine a growth factor for both the closely held business as well as the other assets of the estate. In this way, the liquidity needs can be assessed and planned for in advance.
3) Reassessment of the equalization needs should occur on a regular basis depending on how much growth was originally planned for and whether or not that anticipated growth has occurred or been exceeded by actual experience.

Challenges of a Business with Unrelated Owners

Succession planning for a business with several unrelated owners has different obstacles that often will involve the unrelated owners, their families and key employees. In order to avoid becoming co-owners with the spouse or family of a former business associate, both documentation and a plan for valuation and funding should be in place before any triggering event occurs. "If the purpose of a buy-sell agreement is to establish a peaceful process for transfer of the business, then perhaps valuation of the business interest is the most critical issue covered by the agreement."[3]

A) Cooperation. The type of buy-sell, whether it be cross purchase, entity purchase or redemption, or the hybrid wait and see variety is the first issue to address. The advantages and disadvantages of these various plans will be discussed later. Agreeing on a means for appraising the value of the business may be even more important than the type of the buy-sell arrangement. Assessing a current value with some means to adjust that value in the future may make the most sense. Depending on an appraisal or multiple appraisals at the time of the triggering event will not only be costly, it will probably be divisive as well. How best to create unity?

1) Bring in professional advisors to help create a plan that all owners respect and have agreed upon in advance. This may require some time and preliminary interviews by all owners, unless they are especially easygoing and are willing to go with the decisions of the more administratively inclined of their co-owners.
2) Agree to a deadline to have the agreements in place.

3) Give the advisors latitude to review other business documentation to ensure that the succession planning documents are in agreement with those documents already drafted i.e.: operating agreements and leases or ownership agreements for business owned real estate.
4) If an appraisal of the business is determined to be the appropriate valuation method, agree on the single appraiser process. The appraiser will be chosen at the time the buy-sell agreement is signed and all of the owners agree on that individual or company. The selected appraiser can then reappraise the business periodically in order to keep the buy-sell up to date.[4]

B) Liquidity. Closely held businesses, particularly those with a corporate form frequently act as pass-through entities, since earnings on retained capital will typically be taxed at rates higher than those of each individual owner. This translates into illiquidity for the business entity. This lack of liquidity within the business dictates a need to create liquidity should there be a need for it to buy out an owner that dies, becomes disabled or must be bought out for any other legitimate reason. Some of this liquidity need can be funded with either life or disability insurance. The balance (or the entire amount, should the triggering event not involve either death or disability) will either have to come from the co-owners individually or out of business revenues. What are the best ways to provide funding for succession planning needs?

1) With a current valuation in place determine if the company has adequate liquidity to fulfill the needs of a triggering event. Would using this liquidity to address these needs put the company under undue stress at a time when they have already lost a key player? If so, other means to fund for the buyout must be found.
2) If insurance is part of the funding strategy, that coverage must be underwritten and put in place with appropriate ownership to fulfill the requirements of the buy-sell agreement. This includes disability, lump-sum disability and business overhead coverage if they are included in the agreement and deemed affordable to cover those risks.
3) The formula or method of valuation must be determined and a schedule established for periodic review.

This may seem like a lot of work; however, if the relief team is going to have the tools to "win" and to do their jobs properly then planning is necessary.

Combining Unrelated Owners and Their Families in Succeeding Generations

In most circumstances, this will be a work in process. Stock ownership may simplify matters. For example if the business is divided into real property for some heirs (*i.e.,* the real estate) and business ownership for others then conflicts could arise. *Per stirpes* distribution of business stock or assets can also create conflict when families have differing numbers of heirs. Also, over the long term *per stirpes* distribution can dilute the ownership of the business as it proceeds into successive generations. Once again, limiting ownership to active participants and equalizing with the other heirs can forestall some of these conflicts.

Personnel–Planning for Bench Strength

Since the focus of this article is succession planning, the comments here will be limited (as much as possible) to how the business and its staff relates to the succession plan.

A) Hiring practices. At the managerial and executive levels (should the business grow to that size) the prospect of an ownership interest can both attract and retain key employees. By the same token, these key employees can be part of the talent pool that will help a closely held business defy the odds of passing through successive groups or generations of owners. Once again, the risk of diluting the ownership of the company has to be weighed against the desirable outcomes of motivating and retaining key employees through an ownership incentive.

B) Handling employee challenges. A well aligned group of owners or a family that works as a team can present a more united front when employees create problems. In other words, working towards the same goals and having built the business together should help the business owners address the problems that disaffected employees often create. This can be one of the side benefits of the team building that often occurs in the process of putting together a succession agreement in which all parties have participated and agreed upon.

C) Aligning workforce with business goals. This is another area where careful planning can set the stage for success and should take place before the hiring process begins. The owners of the company should determine what type of administrative structure they want to establish and begin hiring

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to fulfill those goals. Obviously, one of the biggest challenges is to hire within the limits of growth and not create a salary or overhead liabilities that will put profits under pressure. Planning in advance can allow for controlled growth and adequate staffing at the same time. Succession planning generally plays a role at only the highest levels of managerial hiring as an incentive to attract and retain the key employees that can help the business grow to new levels. Adequate business growth should offset the diluting effect of offering additional ownership interests to bring in these key individuals.

D) Using succession planning activities to motivate management. In the same sense that the prospect of an ownership interest can attract key individuals it can also help to retain them. Often stock is offered with a rolling vesting schedule. At any given time, were the employee to take a new job with another company, they would be giving up future allocations of shares. The other positive effect of offering stock to key employees is that it motivates them to put the performance of the company as their highest priority.

Building a Succession Plan

A) The advisors

a. Attorney. An experienced business attorney, with an estate and business planning background will draft the appropriate documents.
b. Accountant. A licensed CPA is necessary to advise and monitor the activities of the business. Review of the process being established in the succession plan is essential to the business's reporting responsibilities.
c. Insurance advisors. Consultation with an experienced insurance advisor is essential for business planning. The advisor should be a specialist in life, health and disability. Possibly a second specialist in property and casualty coverage should be selected to provide property, casualty and liability umbrella coverage for the business.
d. Valuation expert. If the business is in an industry where standard formulas are easily applied to determine value, this may not be necessary. Otherwise, it makes sense at some point once the business has been established to provide a baseline for the valuation in the buy/sell agreement.
e. Business psychologist. This professional may or may not be necessary depending on the ease with which the owners are able to agree on corporate agreements and buy/sell documentation.
f. Family business consultant. This is not a generic "professional" category, it is more of a catch-all for advisors who provide valuable input to closely held businesses but may come from a variety of backgrounds. For example, if the business has achieved both momentum and a certain level of capitalization (perhaps something north of $50,000,000) this individual might manage the family office or be part of a multi-family office team. This position may be filled by a talented CPA, attorney or insurance consultant who provides a soup to nuts estate plan that is designed to analyze many aspects of the business. This plan should also give the owners a synopsis of the planning they have done as well as a summary of what they still need to accomplish in order to adequately provide for the continuation of the business. Included in this study should be an estimate of what will be needed to replace the value of the business interest and revenue for their family should something happen to them.
g. Family systems expert. This would be a more analytic version of the catchall consultant described in section f. Information technology (IT) as well as organizational expertise might fall into the repertoire of this individual. This type of consultant could also be of value within the framework of a closely held business owned by unrelated owners.
h. Additional consultants as appropriate to each specific industry.

B) The types of succession plans that are available:

Based on an assessment of the needs of the business, the owners will have to work with their advisors to design the appropriate buy/sell arrangement and determine how it will be funded. The three types of agreements and their advantages and disadvantages are as follows:

a. Cross Purchase. In this plan, the owners individually agree to buy back the ownership interests of any departed co-owner.
   i. Advantage: stepped up basis for those owners buying out
   ii. Disadvantage: each co-owner is individually responsible to provide their share of the buy-out price if they have not set up some sort of a funding arrangement in advance
b. Redemption: Where the company buys back the ownership interest of a departed owner

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i. Advantage: A solvent company should have the funds available to make the purchase
ii. Disadvantage: Tax issues—no step up in basis for the interest that is acquired as well as potential exposure to the alternative minimum tax

c. Wait and See: The most flexible alternative—To the extent that the co-owners do not buy back the ownership interest of a departed owner the company must redeem either all of that interest or the balance that has not been purchased by the co-owners. This alternative is the most advantageous, although a little more complex, since it allows for the owners to choose exactly how they want to treat the reacquisition of the ownership interest from a co-owner who has left the company for whatever reason.

C) Funding the plan—How should each type of plan be funded? What are the possible outcomes if funding is either inadequate or incorrectly documented? In each circumstance the "plan" is funded, even if a written plan does not exist and funding was never agreed upon. If no formal funding method has been chosen then funding will have to come from either the assets of the owners, the assets of the company, out of annual cash-flow, or new debt from loans negotiated on the behalf of either the company or the individual owners.

a. Death—Funding can be formally established through the purchase of either term insurance, cash value insurance (whole life or universal life), or by the creation of a sinking fund.
i. Term life insurance: Benefit payable at the death of the insured. Typically chosen for a limited need and guaranteed for a certain number of years (*i.e.*, 10, 15, 20 or 30). The longer the guarantee, the more expensive the coverage. Term is more economical in the short run than cash value insurance and is generally convertible to cash value coverage should that be deemed necessary. If the owners plan to sell the company, or go public at a time in the near future this alternative could make sense.
ii. Cash value coverage: This coverage is available in several forms, the most basic being either universal life or whole life. Each of these types can be divided into numerous sub-types. This coverage is initially more expensive than term, but can be kept in force for the life of the insured. Typically these policies accumulate cash that can be used for other purposes, for example to pay the initial deposit on a buyout at retirement of an owner. Universal life is generally less expensive and somewhat more flexible than whole life but might not build cash values as rapidly depending on how the policies are designed.
iii. Sinking fund: A separate cash account or fund that is invested and managed in order to provide funding for succession planning needs. These funds can either be accumulated within the company or by each owner on an individual basis. Generally, unlike cash value life insurance, the earnings on these funds will be taxable on an annual basis and, upon the sale of the underlying assets to utilize the funds, additional taxes will be due. Should a triggering event occur in the near term accumulated cash may be insufficient to meet the immediate needs of the business.

b. Disability—Funding can be provided through insurance covering income, overhead expense, or lump-sum buy out. If the company and the individual owners choose not to insure this risk they can choose to fulfill the requirements of the buy/sell out of cash flow or from a sinking fund that would have been established for the purpose of self insuring.
i. Disability Income Coverage: Pays the individual a maximum, typically 60 percent, of his or her annual income. Often the coverage is limited to a maximum of $10,000 per month, the amount that would cover $200,000 of income at 60 percent. More coverage may be available from specialty insurance carriers. Limits on disability income are imposed to encourage people to work since they should be making more from their employment than if they were disabled. In certain circumstances this coverage could be used to make installment payments on a buy/sell; however, it is definitely not intended to be used for that purpose.
ii. Lump-Sum Disability Coverage: This is the type of policy appropriate for the partial buy out of the ownership interest of one owner of a closely held business. Generally, these policies do not pay out immediately following the disabling trigger event. The lump sum is usually paid out either 12, 18 or 24 months following the trigger event. The longer the waiting period is, the less expensive the coverage will be. The financial underwriting for this type of coverage is fairly stringent and requires a lot of documentation to determine

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the value of the ownership interests. The total coverage will not equal the full value of the business and some type of supplemental payment will have to be worked out should the disabled individual want to sell his or her entire interest in the company.

iii. Overhead Expense Coverage: This provides supplemental income to cover overhead expenses when a key individual becomes disabled. This is somewhat unrelated to succession planning; however, it can shore up the financial situation of the company to make the necessary planning easier to accomplish following a disabling trigger event to an owner.

c. Retirement—This requires funding either through a sinking fund or to be paid out of profits. If cash value life insurance policies are being utilized to fund the buy/sell, funds can be withdrawn on a tax favored basis from those policies to partially fund the buyout of a retiring owner.

d. Departure—Friendly or Antagonistic—When one owner decides he or she no longer wants to remain involved in the business problems can arise. If an agreement exists, it should dictate the terms of a departure and exactly how the departing owner will be compensated. Compensation terms will apply to any remaining income owed to the individual as well as to the purchase or transfer of their ownership interest in the company.

e. Sale—Unilaterally Agreed on or not—This is a similar circumstance to "Departure," above. In this case, a co-owner may or may not be leaving but has decided to dispose of his or her ownership interest in the company. If an agreement exists, it should dictate the terms of a sale and by what means the selling owner will be compensated. Compensation terms will apply to the purchase or transfer of their ownership interest in the company. If the sale has not been unilaterally agreed upon by all owners the compensation terms will not be as favorable. If an agreement cannot be reached between the departing owner and those who are remaining, it may be impossible to complete the sale. Most agreements include a mandatory right of first refusal for purchase by the company as well as the co-owners. The sticky situations arise when no agreement is in place, or the price for the company is no longer appropriate and there exists no means to update it.

Case Studies

Three Brothers and a Nephew—The Cross Purchase Plan. A talented insurance agent came to us for help with a client. This client was a large privately held company in Milwaukee that both imported and manufactured products for the plumbing industry. They have, over the last several years, had numerous lines of business running very profitably. A few years prior to our introduction they had very successfully spun off one of the businesses to a new owner and, at the same time, bought out one of the second generation siblings. The business now consisted of the two remaining brothers who were active in the business and their nephew, the son of the brother they had bought out. As far as they were concerned, everything was going well and their business plan called for a sale of the balance of the business for roughly three times the amount they had negotiated for the first spinoff.

We were given the opportunity to review their buy/sell and help them put some limited term funding in place to provide for any contingencies should something happen before they divested themselves of the balance of the business. The buy/sell required a few adjustments as it stood, if one of them were to die, the family of the deceased would have become the owner of the buy/sell policies controlled by the deceased shareholder. This is a less than desirable outcome and simple to adjust.

Today, we are four years into the new funding and re-writing of the succession plan. The clients have bought out their nephew and replaced his interest with debt. This allows them to maintain the same total amount of insurance since the net value of the company has remained the same; an asset has been replaced with a liability. For simplicity's sake, their plan was established as a cross purchase and has remained so. When their nephew left, he chose to retain his insurance policies and has taken them with—a simple change of owner and beneficiary. This was accomplished without a transfer for value through the IRS exceptions for owners of closely held businesses. The business value has remained roughly static due to the vagaries of the economy and the market for building supplies over the last few years. The brothers still plan to sell the business and are pleased that no significant changes in their plan are required at the moment.

Hospitality Partners—The Partnership Plan. Hospitality Partners has numerous owners throughout several companies. When we began working with them a number of years ago we suggested that the complexity of their holding structure would make

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a simple cross purchase arrangement challenging and that owning insurance within the various companies would not make sense if we were to take their long-term tax planning into account. It would be fine if they never built a profitable business but, face it, no business owner starts out thinking that they won't make a profit. Happily, they built a number of very successful businesses. How did they address the needs of their buy sell with multiple business entities and a number of different owners?

They put in place an LLC to own all of the insurance that would fund their complicated structure of multiple business interests and buy/sell agreements as well as provide collateral for the financing they needed to run the various lines of business. When I asked Eddie Eisenberg, one of the principals of Hospitality Partners, how he felt about his buy sell he responded that he was not sure since he had not had to use it yet.[5] Generally he has been very happy with the structure that was established. The attorneys love it because they can just point new entities at the same LLC without having to redraft the agreements. The bank likes it because they can easily access collateral assignments to support corporate debt. And, the owners like it because it requires a minimum of maintenance and provides a step up in basis should they have to acquire the shares of a departing owner. In general, as a CPA, Eddie feels that if you have more than two owners and certainly if you have more than two entities "this is the only way to go."[6]

I have not discussed two (and probably more than that) significant means to transfer closely held business assets. The two that immediately come to mind are the key-person buy-out and the ESOP. These stray a little from the multiple owner premise developed here and cannot be properly addressed within this article.

The real message is that a solid agreement is crucial in holding together any succession plan. It must provide for mandatory buy-out provisions with the funding for those requirements established well in advance. This is vital for both family held businesses as well as businesses that are owned by unrelated owners. Beyond these basics the variety of agreements and the ways they can be funded is almost infinite. So, build a great business and make certain that you have documented the ways in which you want to pass it along to successive tiers of owners. You will be funding for succession and providing a framework for the business whether you choose to document it or not. Proper planning and documentation will save time and money and ensures that the business will continue to grow and prosper into the future.

Endnotes

1. U.S. Census Bureau, 2000 Census.
2. Robert A. Esperti and Renno Peterson, Wealth Enhancement & Preservation (Esperti Peterson Institute, Inc.: 1997), at 90.
3. Stephen Leimberg, *Reviewing the Buy-sell Agreement: A Checklist Approach for the Non-attorney Professional,* Think About It, *www.leimbergservices.com,* June 2008, at 1.
4. Z. Christopher Mercer, *Your Client's Buy-Sell Agreement—Ticking Time Bomb or Reasonable Resolution,* Weatlth Management Business, Apr. 2008, at 25.
5. Interview with Edward Eisenberg, CPA, Aug. 18, 2008.
6. *Id.* at 5.

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