

BUSINESS PLANNING

SECOND EDITION

FRANKLIN A. GEVURTZ

University

BUSINESS PLANNING

By

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SECOND EDITION

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To Carmen, Sara, Marvin and Many

*

PREFACE TO SECOND EDITION

As stated in the preface to the first edition, the object of this book is to provide an up-to-date text for teaching this advanced course. Given this goal, it seems appropriate to introduce a second edition sooner rather than later. The area of business planning continues to experience rapid change. The limited liability company has emerged from obscurity to become an increasingly important business entity. There is now a Revised Uniform Partnership Act. The merit of a stable tax law seems to be a foreign concept to both Congress and the Treasury (and, one suspects after November of 1994, even more sweeping changes in tax laws may lie ahead). So rapid has been the change, that I must thank Jim Coates of Foundation Press for his patience in dealing with alterations to the manuscript after it reached his hands. Also, thanks to Sharleen Driver and the other secretaries who worked on this edition.

*

PREFACE TO FIRST EDITION

The essence of business planning (from a business as opposed to a legal standpoint) is identifying a need in the market and filling it. Simply put, that is what this book is all about. It seeks to provide an up-to-date text for use in teaching this advanced elective course.

There are two facets to providing an up-to-date text. The more obvious is the need to incorporate the constant changes in statutory, regulatory and case law governing the applicable field. This is particularly challenging in the area of business planning. For one thing, the course involves a cross-section of substantive areas, which multiplies the number of relevant changes. Moreover, Congress and the administration seem to have become addicted to the notion that the tax code ought to change every year.

An equally, if not more important, aspect to providing an up-to-date text is to incorporate new thinking, both in matters of substance and pedagogy. For example, changes in the tax law necessitate a reconsideration of what this course should cover. When Professor Herwitz and the Harvard Law School originated the business planning course in the 1960s, a corporation was generally the vehicle of choice for all but professional firms and the unsophisticated. The current tax laws make this no longer true. Accordingly, this book provides careful consideration of the choice of entity question and a comprehensive exploration of both the tax and general aspects of forming partnerships and limited partnerships. The chapters dealing with forming partnerships, limited partnerships and corporations follow a four-part parallel structure so that students can make comparisons between the entities.

A relatively recent (or recently revived) stream of thought is that law schools should do more to develop their students into professionals. This means different things to different people and there is substantial debate as to what extent law schools can (or even should try to) produce graduates who immediately possess the skills of a practitioner. Still, it may be highly appropriate to encourage law students to reflect upon the various demands they will soon face as members of the profession, and a course in business planning seems a particularly good vehicle for this task. Accordingly, this book provides materials addressing the role of the business attorney in various transactions and the ethical issues he or she faces. Also, the problem set accompanying the book seeks to raise such questions at every opportunity.

Modern financial and economic theories also make their demands. By and large, the book deliberately attempts to avoid the use of economics jargon; at the same time, the text seeks to have the students understand the basic business and economic aspects of various transactions. One area of this course heavily impacted by changing financial theory is

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valuation. The subject has become increasingly mathematical and hence more intimidating to most law students. In response, the book disperses the valuation materials throughout its chapters in the hope that returning to the subject from slightly different angles, or in an increasingly more sophisticated manner, will prevent the "sensory overload" students might otherwise experience if they must deal with the subject of valuation all at once.

While making these changes, this book retains the central idea of the business planning course; that is, to provide a problem method, planning oriented course which will cross traditional legal subject matter boundaries. Indeed, the book attempts to build upon this foundation with several evolutionary steps. The chapters follow a structure which seeks to more closely integrate considerations of corporate, tax, securities, general business and other considerations together as the text guides the reader step-by-step through various transactions. Also, both the text (particularly through case selection) and the problem set try to have students appreciate the human, as opposed to just the technical, aspects of planning business transactions. In addition, the problem set follows the same business through various stages—specifically, forming a partnership at the start-up, incorporating and financing the business facing significant money needs, a corporate buy-out, recapitalization and split-off, and finally, the sale of a mature business. Following the same business in this manner can often provide interesting opportunities for students to "experience" the impact of their earlier planning decisions.

Of course, a primary business objective is to satisfy the needs of as many users of one's product as possible. Hence, this book is designed with the idea of flexibility. Business planning courses in different law schools run from 30 to 80 hours long. Some schools require as a prerequisite for taking business planning that students have completed a course in corporate income tax and even Federal securities regulation; others merely require completion of basic corporate law and individual income tax courses. Different instructors prefer to emphasize different aspects of the subject matter: Some focus more on tax; others emphasize securities and financing issues; still others give more attention to general business considerations. Many instructors (this writer included) believe the heart of the course lies in the small business formation and financing issues which are the "bread and butter" of most business attorneys' (especially new attorneys') practices. Many others, however, find the sophisticated downstream corporate transactions to hold greater interest. Given these parameters, the best the writer can do is to provide treatment of all aspects of the subject (within reasonable page limitations), and leave it to each individual instructor to cover the material which fits his or her situation.

Finally, some words of gratitude are in order. The late F. Hodge O'Neal, Andrew Demetriou, of Jones, Day, Reavis and Pogue in Los

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