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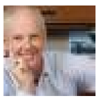

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I use my experience to help save business owners a headache or two.

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What If A Business Owner Loses Cognitive Ability?

Sumner Redstone (L) and Sydney Holland attend The Hollywood Reporter's Annual Nominees Night Party at Spago on February 10, 2014 in Beverly Hills, California. (Photo by Frederick M. Brown/Getty Images)

I saw it, but the business owner didn't – or didn't want to. His dad, still a partial owner of the business, was becoming a liability to the company. He would show up to meetings and make confusing comments. His remarks turned into war stories; his speech began to ramble. And he was costing the firm new business.

Recent news is replete with stories of successful business owners whose competency has been challenged. Sumner Redstone's battle over Viacom and CBS Corp is the current example, but we don't have to look too far back to be reminded of Tom Benson's family fight over control of the New Orleans Saints and Donald Sterling's loss of the L.A. Clippers.

Mental competency issues often arise when a family is concerned about undue influence causing the loss of an estate. Whether because of elder abuse or simply addled judgement, the family fears the owner is squandering assets. These concerns are compounded when the asset in question is a business. Mom doesn't realize she's letting her business slide; Dad is running off clients. It's not just a concern of who the owner eventually leaves the business to, but whether the business will even survive.

Discovering the problem

Cognitive impairment is insidious, and sometimes the family is slow to notice a business owner's mental decline. In many cases, the professional advisors are first pick up on the subtle clues. The challenge is that they are often conflicted on how to deal with what they see. They have a fiduciary duty to their client. But does that duty mean reporting their concern to the business and family, or is their duty to protect the business owner's privacy by staying silent?

Sometimes the employees are the first to notice the owner's diminished capacity. But how do they deal with their concerns? A direct confrontation with the owner risks termination, and reporting concerns to the family feels like disloyalty.

And if it is the family that sees the problem, the issues can really become muddled, particularly if the children are active in the business. They're not just dealing with "Dad's losing it and we should help" concerns. They are also questioning the mental capacity of their employer, their source of income, and their future inheritance.

Dealing with the problem

No one has come up with the magic formula for dealing with the concerns over a business owner's diminished capacity. The one certain thing is that the most common step taken is also the least likely to work – ignoring the concern. At a minimum, if a stakeholder in the business (family member, employee, client or advisor) is concerned that the owner has a cognitive impairment, that stakeholder should ask others if they share the concern. We're not therapists, and we may be misreading the signals. But if others are noticing the same signals, there is likely a legitimate concern.

Once the concern is recognized, a course of action must be determined. Obviously a direct confrontation of the business owner is something the stakeholders want to avoid, but subtlety may not work either. The worried parties have to get together and sort through what is the best of many unpleasant options. What's best for the business owner, the business and the family? At some point, the owner needs to hear their concerns. Some possible starters to the conversation include

- *a business approach*, for example a "new business" item raised by the Board of Directors

- *a personal encounter*, for example a family intervention, or

- *a professional confrontation*, for example a meeting with the owner's doctor or lawyer

Avoiding the problem

It's not inevitable that the business owner will have a cognitive decline. The owner may sell, retire, die, become disabled or otherwise leave the business long before mental capacity is an issue. But the risk is nonetheless real and, as recent headlines have shown, it's an ugly business issue to wrestle with.

One approach is to build the contingency of cognitive inability into the buy-sell agreement. In addition to triggers such as death, disability and retirement, the document can state that mental incompetence activates the sales process. The buy-sell could mandate a professional evaluation of an owner's competency if, say, two of the co-owners request it in writing. Or, if the business is to stay inside the family, the company stock could be put in a trust. The trust document would define the terms under which the owner would be stripped of ownership or management rights.

A less confrontational approach is to have a family discussion and agreement on the topic before it has become an issue. Even though a legal agreement may not be the result, the meeting should at least include a letter or statement of intent as to what will happen when the owner's mental faculties are in question.

Another approach is to delegate (but not abdicate) the issue to a trusted advisor. The owner may be willing to agree, even if just in principle, that if a trusted attorney, doctor, or best friend says there's problem – there's a problem. In advance, the family would collectively commit to require a mental evaluation of the owner if a designated trusted advisor deems it appropriate.

Too many quality businesses have foundered because the owner became mentally incompetent and there was no good way to deal with the situation. This problem is particularly pronounced when the owner has become elderly. Whether the asset is CBS Corp or the corner grocery store, good risk management should include the possibility of an owner's cognitive decline.