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Mediating business dissolutions has advantages over litigation

When long-term business partners face off in court, it's not usually because the business is struggling to make a profit. It's far more likely that the partners have lost trust in each other or simply no longer share the same vision for the future of the partnership.

When one or both partners believe they can no longer continue the business together, the pleadings will include a count for judicial dissolution pursuant to 805 ILCS 180/35-1(a)(4) along with other associated claims. Unfortunately, litigating these disputes often inflicts crippling costs and inefficiencies on the business, which means that neither side will realize their litigation or business goals.

Seen in this light, litigation may be the nuclear option that, once employed, leaves no winners in its aftermath. Considering these realities, it makes sense for the parties to consider mediation as an alternative.

Emotionally charged disputes

There's a good reason why business dissolutions are colloquially referred to as "business divorces." The disputing partners often feel strong emotions, including anger and betrayal. Litigation will only inflame those feelings and make the dispute harder to resolve because emotional thinking often overcomes rational decision-making. This can drive years of litigation, hindering business operations and draining capital from the business.

When partners and employees are spending time in meetings with lawyers and attending depositions, and when the customers are receiving subpoenas, the business inevitably suffers. Money spent litigating is money not being invested in the business to drive profits.

Worse, the court may be forced to enter injunctions that may freeze bank accounts or prevent the completion of certain business transactions, further damaging the business. Parties to business dissolution disputes can minimize damage to themselves and their business, however, by mediating the dispute.

In order to find the most rational and cost-effective solution, the parties must focus on the value of the business and what is the most advantageous scenario for both sides moving forward.

Mediation provides a more conducive environment for such rational, constructive decision-making — and at a lower cost because further discovery costs and trial expenses are removed from the equation. Whereas litigating the dispute would further enflame emotions, mediation allows the parties to seek strategic common ground at their own pace, on their own terms.

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Importantly, before they're ready to think rationally about a resolution, the parties also need the ability to tell their side of the story, whether directly to their business partner, or to the mediator or both. In sum, they need to fully air their grievances to someone who will listen. Giving the parties the chance to be heard is one of the strengths of mediation.

The mediator will review the mediation statements and documents provided by each side and then discuss the strengths and weaknesses of the claims in confidential caucus sessions with each side. Through this process, the substantive points of the parties' case will be thoroughly discussed — just as they would at trial — while at the same time allowing the parties to vent their grievances.

An experienced mediator can simultaneously deal with the parties' claims while managing the dissolution process. By contrast, in litigation, the court can enter monetary relief to address the parties' claims, but the actual process of dissolving or winding down the business will be delegated by the court to a receiver pursuant to 805 ILCS 180/35-4(e).

Maximizing business value

While a court-appointed receiver will be a qualified individual with proven business acumen, no receiver can ever know the business as well as the partners themselves. The receiver will simply dismantle the business by selling off assets and paying liabilities. As the business will no longer exist after dissolution, the valuable good will which the business built up over years will be lost.

A receiver lacks the flexibility to propose more creative solutions for winding down or even salvaging the business. In addition, the receiver must be compensated for their time, and the court's supervision of the receiver will require regular court appearances by the receiver and the parties, further increasing costs and attorney fees.

Finally, business assets will be sold on a timetable dictated by the court and the receiver, but that timetable might not be the most conducive to maximizing the value of those assets.

By contrast, the most critical task in the mediation is to help the parties focus on what needs to happen to the business going forward. Does it make economic sense for the business to continue to operate? If so, who will own and manage the business? Will the parties re-envision the business model and move forward together, or will they sell the business as a going concern to a third party? Does it make more sense for one partner to buy the other partner out?

The answers to these questions should be determined by the parties, and mediation allows them to do so on their own terms.

It's also important to keep in mind that the very process of litigating business dissolutions can harm the value of the business. Customers or clients can lose confidence when they have a front row seat to litigation that displays the less seemly side of the dealings between the partners. Mediation, however, is completely confidential, and parties can gain further privacy by negotiating mutual non-disparagement language in the ultimate settlement agreement. Mediation gives the parties options that litigation does not.

Conclusion

Mediating a business dissolution will save the parties substantial time and money, give them control of the outcome of the process, and keep it confidential. At the conclusion of the mediation, the parties should have a detailed plan for moving forward with whatever business transition makes the most sense, as well as an agreement to dismiss all pending claims in the litigation with mutual releases of liability.

Frequently, both sides are more comfortable heading into a transition period when they build in a process for the mediator to resolve disputes that may arise during the transition. Having such a provision in place makes it less likely that the process will be derailed.

At the end of the day, a successful mediation can put the partners on track to resolve their disputes while also maintaining the value of the business.