Tricky business 'divorcing' a business partner

By Denice Gierach – *As published in the Naperville Sun – July 15, 2007*

When a business is new and the prospect of potential success is in the air, life looks and feels good. Just as in a marriage, partners do not go into a partnership assuming that either the partnership will fail or they will need to "divorce" their partner. If the parties follow their attorney's advice, they may have a written partnership agreement to guide and control the termination of the departing partner's interest in the partnership.

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Even if the partnership has such a written agreement, many of these partnership agreements will not cover the situation where the parties cannot stand each other and cannot agree. This may be caused by dashed hopes of success, differences in lifestyles, or decisions on employees. As in the case of a marriage, it may be caused by one partner working outside of the partnership relationship or disagreements on spending or revenue producing in the business. Sometimes one partner brings in all the income and the other partner does all the work. This can be a source of friction between the parties where the parties just want to split. How is this done, though, when neither party wants to leave?

One way is to have one partner make an offer to the other partner which is at a price that he or she can be bought out and conveying to the other partner he or she is willing to be either a buyer or seller and then allowing the other partner decide which he or she would prefer. Such offer can contain terms such as installment payments (if the offer is not for cash), interest rate or amount on the obligation, security for the loan, to name a few.

Other considerations may include whether the departing partner should sign a non-compete agreement to preclude the departing partner from starting the same business again and going after the partnership's customers. This type of agreement must be reasonable in scope and time frame, but may provide that the departing partner may not call on or sell to the partnership's customers and prospects where written quotes were sent out by the partnership for a period of one or two years. It may also be written to preclude the departing partner from operating or working for a business in the immediate geographic vicinity as the partnership is located. The type of business, the permanency of the customer and the amount of time and money that the partnership invests to obtain the customers will dictate what type of agreement is appropriate.

Then, there is the debt. Many times the partners obtain a loan from the bank and have to sign a personal guaranty. Any offer should include a method whereby the departing partner is released by the bank from this debt. The offer should also include an indemnity, whereby the departing partner will no longer be liable for the debt of the partnership after the date of split. A "hold harmless" provision would also be beneficial so that in the event that a creditor was successful in obtaining a judgment against the departing partner, that the remaining partner would pay the amount of any such judgment and make the departing partner "whole."

If the offer is accepted, it should be drafted in the form of a contract where all of the relevant provisions are set forth. If the offer is not responded to, the other partner cannot force the offering partner to later be a buyer or a seller. If the matter later ends up in court as the partners have not resolved their partnership breakup, a court would probably look at this offer as a positive position and may even use the offer to establish a benchmark for the appropriate price of the interest in the partnership.

Hopefully, the use of this technique will allow a smooth separation and divorce which will allow the departing partner to pursue a new business future. This result is certainly preferable over years of constant conflict which can adversely affect the long term value of the business.

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