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## The Top Five Issues in Startup Co-Founder Separations

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Most businesses start with a group of dedicated people identifying a problem, coming up with a solution and then figuring out how to share their solution with the world. Launching a business takes vision, vulnerability, grit, agility, and trust, as well as plenty of coffee. It's not easy. Which is why people start businesses with colleagues, friends and family—those with whom they share a bond.

Despite a shared vision and community, co-founders often disagree about how to operate and grow. Relationships break down. Sometimes the union can be salvaged, but more often, co-founders opt to go their separate ways. If this sounds more like a divorce than a business or employment dispute, that's because it is and the company is their baby.

To help you navigate these waters, here are the top five issues alternative dispute resolution professionals see in co-founder separation disputes (or, in other words, what you need to look out for in a business divorce).

## 1. Valuing Each Co-Founder's Relative Contributions

Each co-founder brings something distinct and unique to the venture. One may offer economic capital and resources. Another may bring subject matter expertise and sweat equity. A third may share followers on a social media platform. A fourth may have business contacts. How do you quantify non-economic contributions like subject matter expertise or a robust network? In disagreements about valuation, mediators tend to see:

- **A bias toward maximizing your client's valuation and minimizing the contributions of others.** This common tactic may be less effective when the parties have

personal relationships separate from their business dealings. Minimizing someone's contributions can feel more "personal" and stall or even undo progress.

- **Disagreements about how to value uncompensated contributions.** Should we just quantify time spent on the endeavor? Or calculate what similarly situated co-founders receive? Or explore the value they created as evidenced by growth and/or profits? What if the company continues to benefit from their contributions after the separation?

## 2. **Determining the Value of Shares Now and in the Future**

Since co-founders may have divergent visions for the future of the company, they may not agree on a model for the valuation of their shares. Recall that we're talking about private startups for whose shares there is not a market. Unless there has been a recent funding round, the price has yet to be determined. And everyone agrees that a 409A valuation does not represent the true value of the shares. A departing co-founder will invariably value the current shares substantially higher than the remaining members will. What will the shares be worth in one year or three? For the purposes of a settlement or buyout, how far into the future should we look? Should the departing member share in future upside that they did not directly generate?

## 3. **Addressing Branding and Social Media**

Business divorce agreements tackle the return of company property, from devices to passwords. Attorneys need to address the outward projection of the company in terms of its branding and media presence. Some companies have a brand that mirrors a founder's values. Take Elon Musk, for example. He's an international personality with over 60 million Twitter followers, versus just 11 million for Tesla. Is the brand the product, or is it the founder?

What should be the timeline for transitioning social media account messaging? Should the exiting co-founder post a message? Should businesses have the opportunity to appeal to the co-founder's network, and vice versa? Should the exiting co-founder agree to prospective brand promotion, such as a minimum number of positive comments or promotions?

## 4. **Navigating Noncompetes**

When a co-founder leaves, what should be their future involvement? Is it a clean break (termination and repurchase of shares), or will they remain an investor or consultant? Will they have the right to participate in future funding rounds equal to other co-founders and investors? Can they participate in pivotal company decisions like approving a new funding source? Can they keep their board seat? Do they have a say in how their intellectual property will be used? Can they create a new startup or join a competitor?

## 5. Crafting Messaging

How should a company and a departing co-founder talk about what happened? What should be covered in the non-disparagement clause? What should be shared with the press? With customers? Since these co-founders had a relationship before the business, how should they communicate what happened to their mutual friends or other common communities? What can the departing co-founder say on their LinkedIn bio? And if they were the inventor of patents that might be challenged in the future, what steps will they take to ensure the patents survive scrutiny?

Hopefully, you can see that when co-founders decide to go their separate ways, it is not a simple endeavor and many key issues must be ironed out. It's not just any employee leaving, but a shareholder/member who might have special rights and who cannot completely be forced out of the company. With the prospect of a shareholder suit in the future, the departing co-founder should be treated with respect on their way out.

An experienced neutral can identify even more issues while keeping a potentially explosive negotiation on track to resolution.

*\*Genesis Fisher is currently a JAMS Diversity Fellow and the founder of and principal attorney at Fisher Law Practice, where she provides on-site conflict resolution to help families and businesses. Through her practice, Ms. Fisher has conducted or supervised over 200 mediations. In addition to her practice, she teaches the fall mediation clinic at New York Law School and a class on mediation at Rutgers Law School.*

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