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ADR Insights on Business Divorces: Hit Me With Your Best Shot (Part 5 of 9)

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Hit me with your best shot,
Why don't you hit me with your best shot,
Hit me with your best shot,
Fire away.
(Pat Benatar's Hit Me With Your Best Shot)
(Written by Eddie Schwartz)

This is the fifth in the "*Breaking Up is Hard to Do*" nine-part series exploring dispute resolution for business divorces.

When interpersonal relations sour among co-owners, often the "gloves come off" and aggressive tactics are prevalent. In arbitration, this may take the form of a party engaging in constant motion practice, serving abusive discovery requests, obstructing discovery compliance, or delaying simply for the sake of delay. In mediation, aggressive tactics often include bullying, stonewalling, weaponizing time, and deputizing someone with inadequate authority.

As a party, you can take steps to mitigate these challenges. First, know the applicable procedural rules. In some instances, the rules provide guidance or specify relief for these situations. Second, focus on the problem, not the person, when considering your options and if seeking intervention. Third, keep your eyes on the prize (the ultimate outcome), and do not get drawn into time-consuming and expensive skirmishes. Fourth, instead of fighting fire with fire, find the areas of agreement. Find the common ground and build on that. Nothing deflates an antagonist faster than agreeing with them.

As a neutral (mediator or arbitrator), our job is to establish guardrails. On the roadways, guardrails are designed to protect motorists from straying into dangerous territory. In dispute resolution, guardrails are intended to safeguard the process leading to resolution.

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Arbitrators use a variety of guardrails to keep an arbitration on track. For example, discovery costs are often the biggest expense in litigation and, in some cases, an area ripe for abuse. Arbitrators may establish strict discovery schedules narrowly tailored to the needs of that specific dispute. Similarly, motion practice may be limited, or a briefing and hearing schedule may be established early on to address preliminary matters, discovery, and other pre-hearing disputes. At the preliminary scheduling conference, arbitrators typically set the final hearing date and provide that the date can only be changed upon good cause shown. While each of these tools is useful in many arbitrations, they may be particularly helpful to establish guardrails in "gloves are off" litigation.

Mediators also utilize guardrails to keep the process on track. Active listening and empathy are used by mediators to help parties process their emotions without derailing the process. Listening sessions can be used when a party comes in "hot" at the start of the mediation. A listening session is when the mediator begins the mediation by simply listening to each of the parties, separately, without any discussion of settlement or the sharing of information. Reframing is often used to help a party pivot from provocative or incendiary commentary to more productive dialog. Technology may help address limited authority.

Whether mediation or arbitration, parties in a business divorce may start out ready to "fire away," but a skilled neutral can implement various guardrails to safeguard the process leading to resolution.

Disclaimer: "You're So Vain, You Probably Think This Song is About You" (written and sung by Clary Simon). Please note that this series is drawn from over 30 years of experience as counsel or neutral in business separations, reconciliations, and divorces. Nothing in this series is based on any specific dispute in which I have been involved. In addition, nothing contained herein constitutes legal advice nor does it create a professional relationship.