

The Role of the Joint and Neutral Experts In Matrimonial Cases

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One of the main issues involved in a divorce is the division of marital assets. To divide the assets, the court must identify and

then determine the value of each marital asset. Assets may include a home; a family business; or, in New York, a degree or license obtained during the marriage. In most venues, a common practice is for each spouse to retain his or her own expert, either a forensic accountant or another valuation professional, to value the property accumulated during the marriage.

However, a current trend in matrimonial actions is for both parties to the case to jointly retain forensic accountants and valuation experts or for the court to appoint them. Experts in this situation are often referred to as *neutrals* because they are not working for one side in the litigation.

Joint experts are retained for several reasons. The joint experts' neutrality often helps to create a perception of greater credibility. Therefore, the parties may be more forthcoming with discovery requests necessary for the expert to value the asset. According to Brett Turner, "disputes regarding [the joint expert's] methodology or data base are typically few in number and easily resolved to everyone's satisfaction".¹ Moreover, using one expert may eliminate the "battle of the experts" wherein one takes a position diametrically opposed to the other; this may reduce the cost and level of contentiousness in the case. It may also save time to use one expert rather than two.

The court may also choose to appoint an expert after each party produces its own expert report,

as a way to bridge and resolve differences in the opinions of the other experts.

Working With a Neutral Expert

The process of working with a joint expert may differ in some cases and jurisdictions. Information may freely flow from counsel and clients to the expert, or the judge may specifically prohibit *ex parte* communications with the expert. In either case, the expert should ensure that both attorneys are kept in the loop on correspondence during the course of the case. The court may or may not require oral or written updates about the status of the case from the expert. The expert's report is often sent simultaneously to the court and counsel for the parties.

Although the monied spouse usually pays the expert's fees, each party may pay a portion of the fees based on their relative level of assets and income. Fees are usually set at the onset of the litigation. The payment of the fees is often subject to reallocation at the end of the divorce proceedings if new information regarding the parties' assets or income comes to light. The expert may have assistance from the court in getting paid, but not necessarily. One should be careful to remember that the court will not act as a collection agent for the expert.

In an effort to control costs, the parties and counsel may initially agree to limit the type of expert work product to summary schedules, a brief presentation or summary report, or even just a number regarding the valuation result. The goal is to determine if the case can be resolved before the expert takes time to complete a written "trial ready" report, which is often more labor intensive (and costly) than a more abbreviated work product. This is permitted under the "Reporting Exemption" of SSVS. No. 1. Often, but not always, those findings are first communicated on a preliminary basis. Later, if necessary, the

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¹ Turner, Brett R. *Equitable Distribution of Property*, 3rd ed. (Columbus, OH: McGraw-Hill, 2009).

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conclusions of value or calculations may be finalized.

In some venues, counsel may gain more information about the neutral expert's conclusions or calculations by taking his or her deposition. However, this is not always done. Some states, such as New York, do not typically depose financial experts, and even in states where it is permitted, it can be expensive and time consuming.

Each party has the right to call the neutral expert for purposes of cross-examination at trial. The court is not bound to follow the expert's report and, in fact, must make an independent determination.²

Issues With the Joint Expert

Although using a joint expert can benefit everyone, doing so sometimes causes problems. Some cases are so contentious that a significant disconnect can arise in expectations between the two parties. Differences in the perceived scope of the assignment may continue throughout the course of the case. Clearly defining the scope of the expert's engagement in a letter may alleviate this issue, but not necessarily.

One or both attorneys may have concerns that the expert's report seems to contradict reports submitted by other neutral experts in cases with similar facts. An attorney may question whether a neutral expert has put in the time and due diligence necessary to discover all the facts necessary to forming an opinion. This is a disadvantage to having the expert do a "quick and dirty" analysis or calculation of value rather than a valuation that necessitates a broader scope of work.

Although it may work to have the expert provide a calculation of value or an abbreviated work product to save money, this approach can have potential disadvantages. The parties and their attorneys may have ongoing questions about the extent of the information the expert considered, the extent of the analysis, and how the expert arrived at his or her calculations. In

addition, some experts may be forthcoming about how they arrived at their calculations but others less so. Understanding the expert's calculations may be a particular issue in states, such as New York, where expert depositions are not customary.

A neutral expert's opinion may disappoint both parties in a matrimonial case, especially if each has strong preconceived notions of the findings. An unfortunate outcome is that counsel for those clients may have difficulty convincing them to go along with the neutral expert's calculations. As a result, one or both parties may ultimately hire his or her own expert to analyze the neutral expert's findings or rebut them. This can result in retaining not one or two experts but three. So using a neutral expert can sometimes be more expensive, time consuming, and contentious than using two experts from the start.

In cases that go to trial, the joint expert may not even provide any direct testimony, other than what is in writing in the expert report. Oral testimony may simply consist of two cross-examinations by counsel to both parties. This might challenge the expert to get his or her view fully across to the trier of fact.

Working with, and as, a jointly retained or court appointed "neutral" expert may be a win-win situation for everyone involved. However, it is not always successful, and in some cases, the level of contentiousness or other factors may indicate using one expert may not be feasible. ■

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The Legal Community Answers Questions on Rule 26 Discovery Transition

CPAs who serve as testifying experts in federal court are subject to Rule 26 of the Federal Rules of Civil Procedure. On December 1, 2010, modifications to Rule 26 took effect that will apply to any new suit filed. As practitioners transition to the new form of Rule 26, it is unclear how discovery will proceed for cases filed before December 1, 2010. Specifically, district courts are permitted to determine that "applying (amended Rule 26) in a particular action would be infeasible or work an injustice". F.R.C.P. 86(a)(2)(B). To help members better understand implementation considerations, the AICPA FVS team consulted with attorneys to develop practical tips and recommendations. [Click here](#) to read the related Q&A.

² See, for example, *Johnson v. Johnson*, 303 A.D.2d 641, 757 N.Y.S.2d 87 (2nd Dept. 2003).