



# Perspectives October 2024



## JOINTLY RETAINED VALUATION ENGAGEMENTS: A ROAD MAP FOR TRUST AND COOPERATION

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Although it might appear to be a conflict of interest, valuation professionals can serve both parties of a legal dispute. For the most part, a jointly retained valuation engagement is similar to a valuation performed for a single party, but crucial differences can be found throughout the process. Communication is particularly important to a successful jointly retained engagement.

### Introduction

In a litigation environment where there are business valuation needs, a separate valuation expert is often retained by each side of the dispute. The parties may hire multiple experts, and the experts could be miles apart in their positions. It might be difficult to determine who is most credible and could be costly to litigate.

In a jointly retained, or neutral, engagement, however, a single expert produces a single opinion, which can result in a process that may be quicker—by way of collaboration—and less costly.

Jointly retained engagements, where the valuation professional represents both sides of the litigation, come to fruition when (1) both sides agree at the outset to hire a joint valuation professional, where the client is either both sides' attorneys or both parties involved in the dispute; (2) as the matter progresses, both sides

**Serving Two Adverse Clients Equally:** Why is a neutral engagement okay? The valuation professional is obligated to be intellectually honest and objective in their work. They should not knowingly misrepresent facts or subordinate their judgment. The valuation professional should not mislead or act in a fraudulent manner. Working as a neutral party on behalf of both sides of a dispute reinforces these core tenets of the valuation professional's operating code.

evolve to hiring a joint valuation professional; or (3) even after two experts have weighed in, a third valuation professional is hired as a neutral party. In any of the above scenarios, the client in the neutral valuation engagement could even be a mediator associated with the dispute.



There are pros and cons to working for two parties at once. From the valuation professional's perspective, if the clients are truly in a collaborative mindset, then it should be easier for the valuation professional to gather information. Furthermore, a neutral engagement may promote more transparent dialogues and answers to the valuation professional's due diligence questions.

From the parties' perspective, an obvious positive is the potential for cost savings. A few cost considerations include:

- Can the parties work out their differences paying for only one expert report instead of two? And, in the process, will they settle the matter?
- Can the parties avoid having to litigate the matter, saving further attorney fees and additional costs of the expert beyond submission of the valuation report?
- Are the parties confident that a jointly retained valuation professional will not actually cost more by necessitating the hiring of two more experts later, resulting in at least three experts cumulatively?
- When a neutral path is not taken, a potential bitter pill to swallow for the clients is the following what-if scenario: What if, after two separately hired extremes, the outcome simply ends up split down the middle anyway?

## Setting Up a Neutral Engagement for Success

There should be hope that with agreed-upon boundaries and everyone working together, working jointly with one valuation professional encourages a greater level of transparency and a strong likelihood of providing the right information to dispose of the dispute. But simply retaining a joint valuation professional does not guarantee a great outcome for the engagement.

Counsel and the parties involved should be in tune with how compatible their matter is with this type of engagement. There are certain indications that a jointly retained engagement may be successful.



Counsel and the parties involved should be in tune with how compatible their matter is with a jointly retained valuation engagement.

For example, despite engaging in a disputed matter, there may still be some level of trust and respect between both parties. One such case might be when the more vulnerable party of the two still trusts that the other party, who is in control of the business records, will not file a fraudulent tax return or manipulate financial records. Furthermore, if the parties can act respectfully and fairly toward each other despite their current situation, there is a chance they can work with a neutral expert.

Of course, it is understood that a high degree of trust and respect toward the joint valuation professional is necessary. The valuation professional should have a track record in engaging in a considerable number of such engagements. Furthermore, the valuation professional should be well adept at transparently communicating with multiple parties. Trust in both the valuation professional and how they run their engagement is a solid foundation, without which a neutral engagement might not be appropriate.

The valuation professional gains and should consistently reinforce that trust in how they listen, communicate transparently, and conduct themselves in an impartial tone during all phases of the engagement.

Ideally, as in any engagement, the prospective valuation professional should have experience in the relevant industry or sector of the business to be valued or a plan for acquiring that knowledge to provide a credible opinion. Where the industry or sector fit is less than ideal, perhaps individuals in the same firm or network can be of assistance in bringing the valuation professional up to speed.



Another way to assess whether a joint valuation professional is appropriate is to consider the level of forensic analysis each party believes is warranted. Going through the records to “find the dirt” could take a collaborative, neutral valuation engagement into more adversarial territory. If at the outset of the jointly retained engagement, the case lacks any significant necessity for forensic analysis, then it increases the odds that a collaboration of two sides will stay on the rails. This is not to say that two parties cannot or should not agree that some detailed forensic work is necessary to produce an accurate valuation. It is merely one more consideration to work through.

Finally, counsel and the parties involved might consider what willingness they have to stand by the joint valuation professional’s opinion after it is issued, absent issues of material factual disagreement or errors in the valuation professional’s work. The parties should know in advance that neither side likely will see a final opinion of value that is exactly what they hoped for.

## A THOROUGH PRESENTATION OF THE ANALYSIS AND VALUATION CONCLUSION CAN REINFORCE THE TRANSPARENCY, NEUTRALITY, AND UNWAVERING PROFESSIONALISM OF A WELL-EXECUTED JOINTLY RETAINED ENGAGEMENT.

### Defining the Valuation Process

The process of a jointly retained business valuation is nearly identical to a valuation ordered by just one party, with some small modifications to accommodate potential extra meetings and communication protocols.

For example, it is useful to establish communication ground rules and boundaries that will be acceptable to both parties, without restricting the ability of the valuation professional to properly work through their analysis. Several important questions to answer include:

- Is there any party the valuation professional can or cannot communicate with?
- Are there certain communications where all parties must be copied or in attendance?
- Is it acceptable if the feuding parties individually initiate phone calls, emails, or other communication with the valuation professional directly?
- Who is or is not welcome to attend the management interviews and site visits?
- Will both parties be interviewed or just one?
- How and with whom will the valuation professional go through the report at the end of the process?

Another protocol for jointly retained engagements comes about at the conclusion of the valuation analysis. It typically is helpful for the valuation professional to present the report in a meeting with both sides, either with counsel and the parties present or, at the very least, just counsel. If the parties cannot be at the same meeting and want to participate, the valuation professional might, with permission, hold two separate meetings back-to-back on the same day, with no party receiving the information substantially ahead of the other.

During such a meeting, a thorough presentation of the analysis and valuation conclusion can reinforce the transparency, neutrality, and unwavering professionalism of a well-executed jointly retained engagement. Presenting should be concise, yet thorough, and focus on credible, factual information. When judgment needs to be applied—as it so often is in this profession—a cumulative view of those judgments, going one way and then another, should demonstrate the valuation professional’s neutrality.

Follow-up meetings (either jointly or separately with permission) may be helpful for counsel and parties to ask further questions about the work product after they have had a chance to digest its contents. Counsel also might ask questions or otherwise seek guidance that helps them work collaboratively through a settlement.

### The Jointly Retained Engagement Timeline

A straightforward and efficient jointly retained



engagement might be measured in a timeline of five to eight weeks, although unique circumstances and complexities can adjust that range.

However, the difference between that tight timeline and reality can vary significantly. So, it is important in a jointly retained engagement to know how both parties can work together to maintain the timeline.

For this purpose, the parties must be aware that the major holdbacks to the valuation professional's process timeline generally fall into the following buckets:

- Document production: delays, dysfunctions, and a need for micromanagement of the parties' efforts
- Misaligned calendars: scheduling site visits, interviews, meetings, presentations, and so forth. The more flexibility counsel and the parties provide on scheduling, the better off the process timeline will be.
- Valuation date moving target: updating financial information, which drives additional due diligence and the time that comes with changing to a fresher (i.e., more recent) valuation date.



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## Parting Thoughts

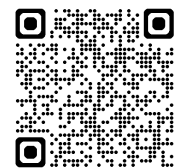
No two litigations are exactly alike, and no two-party engagement is likely to proceed in the same way. The idea of a less costly, more efficient, and highly objective jointly retained valuation engagement will no doubt appeal to some, but it is important for all involved—the valuation professional, counsel, and the feuding parties—to proceed with caution.

It is imperative to assess the fit of the parties with a jointly retained engagement just as much as it is to assess the valuation professional's skills and abilities to manage such an engagement. In order to accomplish this, it is recommended for counsel and the valuation professional to have thorough dialog on this front before moving forward.

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