

THE USE OF JOINTLY RETAINED BUSINESS APPRAISERS

by Brian P. Brinig, JD, CPA

The increasing use of jointly retained experts in business valuation matters presents unique opportunities for qualified CPAs who are aware of the procedures *and pitfalls* of jointly retained business appraisals.

Clients, attorneys and judges are increasingly aware of the escalating cost of business appraisals in contested matters. Unfortunately, it frequently appears that these appraisals are adversarial because of their wide-ranging results. In addition to the high appraisal fees, the parties are often forced to incur significant legal fees to litigate these business appraisals.

In recent years, there has been a trend toward the use of a "joint" business appraiser to solve these perceived problems. The joint appraiser's role is to investigate relevant facts, perform the business appraisal and produce a "neutral" appraisal report that will presumably make everyone happy (or equally unhappy, as the case may be). It goes without saying that competent practitioners would agree that the CPA appraiser's role is to always produce a "neutral" report, but common experience tells us that this is not always the case.

In San Diego County, the court has gone so far as to adopt local Rules of Court that require the parties to first retain a joint appraiser in cases involving closely-held businesses or professional practices. The procedure is well-thought-out and it appears to be working in the vast majority of cases where it is followed. In California, there is proposed legislation that will require a jointly retained business appraiser in family law matters, although it is unclear if this proposal will become law.

The CPA appraiser should be aware of important differences in his or her procedures when being retained by stipulation of the parties. There are several considerations of which all practitioners should be aware.

First, the engagement letter should clearly spell out the scope of the assignment. Remember, since the scope is being agreed to by both sides, any material change in the scope should be approved by both sides. If one party wants to expand the scope to include work that was not called for in the initial engagement, there could be a problem because the scope is not jointly agreed to by both sides.

At the outset of the engagement, the CPA appraiser should obtain an understanding of whether or not all the documents will be shared with both sides. Legally, both sides probably have a right to obtain all documents provided to the CPA appraiser in a jointly-retained engagement, but obtaining the acknowledgment that both sides are to receive all documents is helpful when defining the scope of the engagement.

Be sure to seek input, both oral and written, from both sides. In some cases, this may appear to be unnecessary, however, it is critical for the successful completion of the appraisal. There are

many situations where the "out spouse" has important information about the operation of the business and the appraiser may only learn this information through an interview with the "out spouse." In cases where the "out spouse" does not possess relevant information, it is still helpful to meet with the spouse to assure him or her that the appraiser is neutral and interested in uncovering all relevant underlying facts. Of course, a meeting with the "in spouse" is necessary to obtain significant information about the business.

The CPA appraiser should consider issuing the appraisal report in draft form, seeking the review and comment of both sides. This procedure can be an important step in the process that allows each side one more opportunity to review the CPA's conclusions. If this step is undertaken, it is suggested that the parties' review comments be sought in writing, so there are no surprises later on.

There are complicated questions about the CPA's professional liability in jointly retained assignments. Contractually, the CPA has an obligation to perform the agreed-upon services to the contracting party(ies). The CPA could also have liability if services are performed negligently. The complications arise when two potentially adverse parties are contracting with the CPA for services. Almost by definition, it is not possible to satisfy the needs and desires of each party, so a concern about liability arises.

One of the ways to possibly limit the CPA appraiser's liability is to invoke the provisions of Evidence Code §730, a statute that relates to the appointment of experts by the court. Since the parties are agreeing to a single appraiser, they could also agree to having this appraiser appointed by the court under Evidence Code §730, thereby possibly shrouding the CPA in some level of immunity as an appointee of the court.

A thorough discussion and analysis of the potential liability of the jointly retained appraiser is beyond the scope of this brief discussion, but it warrants consideration by the practitioner.

The use of jointly retained experts has increased in recent years and it appears that it will continue to increase in the future. Courts are tiring of what appears to be a "battle of the experts" and the use of jointly retained experts seems to provide some resolution to the perceived problem. While jointly retained experts should not be considered a resolution to all the problems of litigation, their use provides some relief in certain situations. The CPA appraiser can assist in streamlining the "battle of the experts" problem, but he or she must be mindful of the procedures and pitfalls in this area of practice.

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