

CPAExpert

THE CPA AS A COURT-APPOINTED EXPERT: OPPORTUNITIES AND CHALLENGES

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Litigation involving financial matters often requires hiring a CPA as an expert witness. One side or both in a dispute may hire their own experts to separately gather the facts, formulate conclusions, and present their opinion before a judge or jury. However, with the high costs and administrative logjams of today's legal proceedings, the use of a joint or a court-appointed expert is becoming more accepted. The parties in dispute can decide to use a joint expert or the court can appoint a joint expert. Before accepting an appointment to act in this capacity, the CPA should consider the pros and cons of becoming a neutral expert.

A court appointed expert is usually designated under the state rules that are the equivalent of Federal Rule 706 of the Rules of Evidence. Similarly, the state equivalent of Rule 53 of the Federal Rules of Civil Procedure deals with court-appointed special masters or magistrates. Some jurisdictions have specific local rules governing these appointments.

The role of a special master or magistrate may be the same as that of the neutral expert, but it usually also has the judge's powers delegated to it in deciding certain generally narrow issues.

When the expert accepts the appointment, the engagement letter or court order should describe specifically what the court or litigants have asked the expert to do. It is essential that the parties have a clear understanding of what the

expert is to do and how it is to be done to prevent expectations being unmet or fees being perceived as excessive. When the court order is written in broad terms, the expert should consider supplementing it with an engagement letter developed after an initial meeting with the lawyers and, sometimes, the appointing judge (see sidebar "Ten Engagement Letter Tips for the Court-Appointed Expert").

BENEFITS OF USING A JOINT OR COURT-APPOINTED EXPERT

Both the parties and the trier of fact generally benefit from using a joint or court-appointed expert. The benefits include:

Narrowing of issues. Accounting is the language of business, and many times the parties and the trier of fact need help in understanding this language. For example, CPAs are often appointed by the court to render opinions in divorce cases involving business valuations, child support, alimony, and characterization of separate and community property. CPAs are generally better qualified to analyze tax returns and financial statements than are attorneys, the judge, or the jury. CPAs may also be appointed in commercial litigation matters including shareholder-partner disputes, contractual disputes, and certain issues tried in tax court. CPAs can help to identify, narrow, and simplify the financial issues so that they are better understood by all parties to the dispute.

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Reduced costs. When both parties are comfortable with the joint or court-appointed expert and the process, the use of one expert can reduce the time required for information analysis, report preparation, meetings, discussions, depositions, and testimony. Costs may also be reduced if the expert's engagement is structured in phases. For example, an initial phase may be designed to provide the parties with the expert's preliminary opinions on the issues. After the expert communicates the findings at a joint meeting with the parties and their attorneys, the parties may settle the issues or instruct the expert to go forward with an in-depth investigation or an investigation of limited scope with narrower issues. As would be expected, deposition, preparation and planning, and testifying are far more costly when they involve two or more experts rather than one.

Access to both sides. An expert hired by one side of the case may be perceived as biased only because he or she is given limited or one-sided information rather than all the facts. An expert for one side of the case may also have direct access to information that an opposing expert must obtain through formal discovery processes. As the court's expert or the agreed-upon expert, the CPA more readily obtains information from both sides. The expert should consider withdrawing from the appointment if either side is unwilling to be entirely forthcoming with the pertinent information requested or is untruthful about documents or explanations.

A level playing field. The adversarial system of justice presumes that each side of the case will be adequately represented, but not necessarily equally represented. Situations arise in which one side may be unable to pay for its own expert or to pay the expert to do as in depth an analysis as may be warranted,

thereby giving an advantage to the side with the money. The use of a neutral expert may help level the playing field in terms of financial resources. Whoever pays, the court appointed expert's responsibility is to be fair and impartial.

Right to a second opinion. When the neutral expert has rendered an opinion, each party may still have a right to challenge the expert's views. This might occur at an informal hearing of all parties and may result in new or clarified information and corrected misunderstandings. A party's perceptions may change or the expert's investigation may be reopened or expanded. If still not satisfied, either side can hire its own expert. The newly hired expert can discuss his or her observations with the court and additional information and corrected misunderstanding may resolve the matter, albeit with more time and costs incurred. If still unresolved, the new expert may ultimately testify on the client's behalf.

ISSUES TO ADDRESS

Some CPAs avoid taking on the role of the joint or court appointed expert because they perceive that dealing with all the parties will require increased communications and that their responsibilities will increase as well. CPAs may encounter problems when they become joint or court-appointed experts, but they can address these problems and successfully provide services. The situations they may encounter are related primarily to the following issues:

Maintaining integrity and objectivity. From the acceptance of the role of court-appointed expert through the entire engagement, the CPA must comply with the requirement to maintain integrity and objectivity as defined in Rule 102 of the AICPA Code of

Professional Conduct. Before accepting the appointment, the CPA determines whether any conflict of interest exists and deals with any perceptions of such conflict that may exist. Nonauthoritative guidance on this issue is provided in Consulting Services Special Report 93-2, *Conflicts of Interest in Litigation Services Engagements* (New York: AICPA, 1993).

It is harder to be a court-appointed expert than an expert for one party in the dispute. Being required to make binding judgments may heighten anxiety. However, the stress of making judgments should decrease as the expert gains experience. To gain confidence and thereby decrease anxiety, the CPA should consider volunteering in less adversarial situations that require making judgments. In addition, courses and publications on negotiation, mediation, and arbitration can be helpful.

Lack of in-depth analysis. Often one side is suspicious about certain financial aspects of the case and wants an in-depth analysis to be performed. For example, in a divorce case, one party may push for a major effort to find hidden assets or unrecorded revenues and overstated expenses. The concerned party may not be confident that a court appointed expert will share the concern and conduct as thorough an analysis as a separately selected expert. Such concerns can be avoided through planning meetings, giving fee estimates, and obtaining the parties' or the court's agreement about the scope of the appointment.

Attorney loss of control. As advocates for their clients, lawyers on both sides would naturally want to gain and maintain control and advantage. Joint or court-appointed experts can reduce the attempts to manage their work process by showing the lawyers that they are well organized, impartial, and in control by managing the engagement effectively and observing the ground rules established for communication. Written correspondence should be copied to all parties, especially if originated by the expert.

Judges' preference for the adversarial system. Some judges prefer the adversarial system because it places responsibility for presentation of evidence on the parties and their lawyers and rests the ultimate decision with the fact finder. However, overloaded court dockets and high litigation costs are forcing some litigants, attorneys, and judges to seek other solutions

Ten Engagement Letter Tips for the Court-Appointed Expert

1. Reference the case number, the date of the court order, and the exact language in the order that describes the tasks to be performed by the expert.
2. Define the as-of date for an opinion of value or damages that is requested.
3. Include an initial checklist of documents needed and name the parties responsible for providing these documents. Also, suggest a time line indicating when the initial tasks will be completed by the experts and by parties given assignments. If the parties are unwilling to provide information, inform the attorneys that the issue may go before the court.
4. Make clear that information needs and a deliverables time line can change based on evolving circumstances.
5. Set the ground rules for communicating with the parties and their lawyers.
6. Put the parties on notice that the expert has the right to resign the appointment if one or both parties are still unwilling to provide information, or the parties are not being truthful in the information they are providing in writing orally.
7. If the expert is selected by the parties without a court order, include indemnification provisions.
8. Describe the form of the final report (for example, written, oral, or both).
9. Define who will pay, the hourly fee rates or a fee range, and the expected billing methods (for example, retainers, progress billings, balance due when the final report is issued).
10. Consider a follow-up engagement letter and seek court approval should the scope of work change significantly during the course of the engagement:

to traditional litigation methods. Competent performance by neutral experts who assist in the adversarial system will favorably influence the perception judges and lawyers have regarding court appointed experts.

Fee collection problems. A neutral expert is often appointed in cases that are small and in which the parties have limited financial resources. In these instances, the scope of the work is often vaguely defined, and the expectations of the parties and their lawyers are high. To avoid problems in collecting fees, the joint or court-appointed expert clarifies fee arrangements at the outset, not the end of the engagement. Furthermore, the expert should try to obtain a retainer and bill the parties as the work progresses.

The use of joint or court-appointed experts may increase as litigants and courts come to recognize the benefits and accept the disadvantages. Being a court-appointed expert in a specific case may prove inappropriate if the CPA's qualifications, training, experience, and skills do not fit the case requirements. However, in the right circumstances, the neutral expert's role can provide the CPA with a gratifying experience by playing an integral part in resolving a dispute in an efficient and cost-effective manner. E1

Note: Future issues of CPA Expert will address various aspects of alternative dispute resolution and the CPA's role in providing related services.