

What Is a Business Valuator's Role in Collaborative Practice?

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Collaborative family law engagements use a team approach to resolve disputes. Lawyers, clients and other experts including Family Professionals and Financial Professionals work together as part of this team. The experts act as 'neutrals' representing both spouses. The collaborative process itself is as important as the resolution reached in the agreement by the team, as the process becomes the model for addressing future disputes which is critical in dealing with families.

The business valuator's role in the collaborative engagement differs significantly from his/her role in a typical family law engagement, as follows:

1. In addition to a business valuator's traditional services (i.e., business valuations, income calculations, etc.), a business valuator may also be there to facilitate a creative financial settlement that meets both of the parties' objectives, which may differ in form or quantum from that stipulated by the law; and,
2. Where there are two experts both valuers must work together on behalf of the parties to protect their clients' respective interests and attempt to meet their objectives in a way that fosters cooperation and promotes resolution. The experts are not there to critique each other's work.

In what capacity is a valuator retained in collaborative practice?

Generally, by way of background, in the litigation process, valuers can be retained in an advisory capacity or an expert capacity. The primary difference between these two roles is that under an expert capacity, the valuator is hired to provide conclusions that are impartial and independent while under an advisory capacity, the valuator is acting as an advisor. The role that the valuator undertakes in a litigation context is clear and generally outlined in an engagement letter. Further, the Canadian Institute of Chartered Business Valuators ("CICBV") has Practice Standards for Advisory and Expert Reports that Chartered Business Valuators must adhere to.

In collaborative practice, while a business valuator may wear many hats (i.e., assist in determining the value of certain assets, assist in determining property or income settlement options to meet the parties' objectives, assist in mediating financial issues, etc.), he or she is retained as a expert pursuant to the CICBV Practice Standards.

The valuator's advice and conclusions need to be impartial, independent and neutral. The owner-spouse should feel comfortable that the valuator will provide conclusions based on the financial realities of the business and the non-owner

spouse should feel comfortable that the valuator (i.e., not the owner-spouse and/or the company's accountant) will be driving the process. The valuator in his or her role as a financial expert should ensure that both parties' needs and objectives are considered and represented; however the final conclusions or recommendations of the valuator are independent.

Does a valuator's role in collaborative practice differ from that in a joint retainer under a family law engagement?

The answer to this question is, it depends. Whether the role of a valuator in a joint retainer is the same as in collaborative practice depends on the instructions provided to the valuator by the lawyers. In a collaborative engagement and in a joint engagement, the lawyers may retain the valuator as an Expert to provide independent conclusions and act as the financial neutral and to provide advice and mediate financial issues while considering the parties' objectives and the joint instructions of the lawyers.

As simple example, consider a case where the business has a cash component. Under the collaborative process and/or a joint retainer, the parties may agree that they do not want the cash component investigated or considered in the valuation or the valuator may be instructed to assume that there is no cash in their determination of value or to determine the cash component based on a reasonable basis/assumption. The valuator's role can therefore be the same under both of these engagements.

The key difference between a valuator's role in a joint engagement and the collaborative process should be, according to the collaborative principles, that there is "No Court". Clients sign a Participation Agreement, which is a contract that should be signed by both clients, both lawyers and the Family and Financial Professionals, wherein they agree among other terms, not to go to court. If settlement is not achieved under the collaborative process and the parties want to go to court, the valuator who has executed the Participation Agreement must withdraw (i.e., the valuator cannot act on behalf of the parties and his or her work product cannot be utilized) unless the parties agree otherwise in writing.

The "No Court" principle is an essential element of the collaborative process that is required to achieve the clients' and lawyers' primary goal of settlement. The benefits of the application of the "No Court" principle to valutors in the collaborative process include:

- If the parties know that the valuator is subject to the "No Court" principle, they are likely to voluntarily produce all financial information as they know that all statements made during, and all documents and reports generated for a collaborative proceeding are confidential and cannot be disclosed in court if the process terminates without resolution;

- Having valuers included in the Participation Agreement assists in keeping the negotiations non-adversarial. If impasse occurs, everyone is motivated to continue negotiating until a solution is reached; and,
- The valuator is viewed by the parties throughout the process as a neutral party because his or her conclusions cannot at some point become the position or conclusions of one of the parties. This perception contributes to the collaborative commitment of settlement.

Some of the drawbacks of the “No Court” principles application to the valuator include:

- If negotiations break down, there is a significant financial cost to the parties of having to retain two financial experts when the work has already been done. This is especially financially onerous if the findings of the collaborative financial expert are accepted by one of the parties;
- The “No Court” principle puts financial pressure on the clients to stay in a process because of the financial costs associated with leaving the process; and,
- Valuers are retained as neutral independent experts so their conclusions should not be impacted by the “No Court” principle. The contribution of the “No Court” principle to the clients’ perception of neutrality is not therefore accurate.

In my view, the benefits of including the valuator in the Participation Agreement outweigh any of the potential costs which arise only if the process breaks down. Including the valuator in the Participation Agreement is consistent with the principles of the collaborative practice that make this process so successful.

In cases where the valuator does not sign the Participation Agreement (i.e., the valuator is not part of the team), there can be ambiguity about the application of the “No Court” principle. To avoid ambiguity and any future problems with respect to the terms of their engagement, the Financial Professional should ensure that their engagement letter refers to the Participation Agreement and that the Participation Agreement refers to the Financial Professional specifically or that the Financial Professional is considered under an “Other Professional” section. The engagement letter and/or Participation Agreement should outline that if the parties agree (in writing), the work product of the Financial Professional can be taken to another process (i.e., litigation). However, the Financial Professional cannot be examined or cross examined on his or her work.

How should a valuator be used in collaborative practice and what are some of the options?

A valuator's role in the process should be based on the parties' needs.

One option is for the valuator to be contacted by the lawyers and told to contact the business owner and prepare a valuation report and/or another report as required. The valuator enters into a joint engagement with both spouses. The valuator does his or her due diligence, which may include speaking to the non-business owner spouse, and then issues a draft report. The valuator may then attend a meeting to explain his or her findings or answer any questions. Based on the results of that meeting, additional due diligence may be required before the report is finalized. This approach is appropriate when the lawyers and the clients need specific tasks to be completed by the valuator and the criteria or assumptions in respect of these tasks have already been vetted and agreed to by the collaborative team.

Another option is for the valuator to be more involved in the process and participate as part of the collaborative team. The valuator attends a meeting with the parties before any decisions have been made to discuss the role of the valuator as part of the process. The valuator can then (as part of the team) explore options for resolution and expand the possibilities for problem-solving so that clients can then make rational informed decisions. This approach is appropriate when the lawyers and the clients have not yet agreed to the specific tasks that are to be completed by the valuator and want to discuss and generate options for resolution. This process allows clients the opportunity to bring all information to the table and ensures that both parties understand the finances and other issues at stake. Some of the issues that can be discussed at this first meeting include, objectives of the team, any agreed upon assumptions, the optional levels of due diligence, areas of concern, optional valuation approaches and/or definitions of value.

At such a meeting, for example, the parties may agree that time and costs should not be incurred in verifying personal expenses deducted by the business, but rather, the valuator should use an agreed upon estimate of, say, \$10,000 per annum. As another example, the parties may agree that the value of a book of business should be based on the provisions of the current shareholders' agreement rather than using fair market value as a value definition or the parties may agree to use the provision of the shareholders' agreement in existence as at the Separation Date. Once the role of the valuator is defined, the valuator undertakes his or her due diligence and issues a draft report. The valuator may then attend a meeting with the team to explain his or her findings and answer any questions. Based on the results of that meeting, additional due diligence may be required before the report is finalized. This approach in my view is better aligned with the objectives of the collaborative process wherein options are

discussed and parameters are set based on canvassing the view of the clients and the team.

In some cases, the valuator is asked to review valuation conclusions prepared by the company's accountant or the spouse and comment on the reasonableness of these values. In these cases, the valuator does not undertake any due diligence, but rather provides independent comments on the values prepared by a third party. Generally, there is no report issued by the valuator under these circumstances as the valuator is providing comments without any third party due diligence being undertaken. It is important that the lawyers understand that under these circumstances the valuator is not providing a conclusion on value or any assurances with respect to the third party conclusions being reviewed. A Chartered Business Valuator is only bound to consider the Practice Standards of the CICBV when he or she provides a conclusion on value.

Is there a requirement to provide a written report?

The CICBV defines a report as, "any written communication that provides a conclusion of value." As outlined above, the CICBV has Practice Standards with respect to reports. These guidelines state that any conclusions of value should be accompanied by a written report that outlines at a minimum, the purpose of the report, the valuation date, the conclusions, the scope of review and any limitations, qualifications or restrictions and assumptions. The only time a written communication is not required to accompany calculations is in the case of a draft report. However, a draft report is by its nature a work product that is in the process of being completed, and any conclusions contained in such a work product in progress are potentially subject to changes that could be material. When draft reports are distributed, reasonable steps should be undertaken to prevent reliance on them or use for any purpose other than to obtain comments in respect of errors, omissions, misinterpretations, or other factors including those that could have a material effect on the conclusions to be reached. According to the CICBV, the distribution of a draft report for any purpose or in any manner other than as outlined above is not appropriate.

Based on the above, a Chartered Business Valuator cannot provide calculations only, while still adhering to the Practice Standards of the CICBV.

Lawyers and clients often prefer calculations only (i.e., no accompanying reporting letter) as they believe these engagements are more cost effective. Some valutors will enter into engagement letters wherein they will contract themselves out of the Practice Standards of the CICBV to be able to provide calculations only. While I do not want to comment on the appropriateness of such actions, I note that in my view, the benefits of a written report to both counsel and the clients outweigh any additional costs of such a report. Some of the benefits of a written accompanying report, are as follows:

- The assumptions, restrictions and qualifications made by the valuator that impact his or her findings are outlined in writing for the clients and the lawyers to review and understand. Typically, at a meeting when draft calculations are presented, the valuator will outline the assumptions that have been made and the lawyers and/or clients may take notes in this regard. However, there is so much information provided at such meetings that at times, the assumptions are not properly noted or addressed;
- The scope of review and any limitations therein are outlined in writing for the clients and the lawyers to review and understand. This documentation is critical to any file;
- Without the accompanying written report, lawyers and clients are relying on draft calculations for their settlements without understanding their limitations;
- When written draft reports are distributed prior to a meeting it allows the parties the opportunity to review the report and obtain an understanding of how value was determined, the assumptions made, the documents reviewed, etc. Any meeting can then be more productive and any concerns or issues raised can be addressed at that time;
- The assumptions made in arriving at conclusions, the scope of review, the methodology used, etc. need to be documented. Why should one of the lawyers take notes and summarize these crucial issues in meeting notes when it is more efficient and accurate to have the valuator do so in a written report?; and,
- Lawyers who rely on and allow their clients to rely on these draft reports may be at risk from a liability point of view.

As the collaborative process continues to grow and attract more divorcing couples, my view is that the highest level of professional standards should be adhered to and lawyers should insist that valutors provide written reports¹ in accordance with the Practice Standards of the CICBV.

What type of report should the valuator issue?

Lawyers and their clients should understand the three forms of reports a valuator may provide:

- i) a Comprehensive Valuation Report
- ii) an Estimate Valuation Report; or,

¹ The written reports contemplated herein do not have to be comprehensive documents but must at a minimum include the purpose of the report, the valuation date, a scope of review, a list of assumptions made and any restrictions or qualifications that impact the findings therein.

iii) a Calculation Valuation Report.

Generally, the valuation reports are categorized by the type of conclusion they provide.

A Comprehensive Valuation Report provides the highest level of assurance. Accordingly, it includes the highest level of analysis, investigation and independent corroboration. This report is best for trials or high risk matters. Typically this type of report is not required in a collaborative process.

An Estimate Valuation Report provides moderate but well considered conclusions. Accordingly, it includes a moderate level of analysis and investigation and some independent corroboration. This report is best if a strong report is required but the matter is not likely to go to trial. This report is best for negotiations, settlements, situations where there is mistrust between the parties, a lack of shared understanding, and significant value at stake or complex issues to be considered. This report is appropriate in the collaborative process if the parties are concerned that the information provided by the owner-spouse and or his accountant may not be reliable.

A Calculation Valuation Report provides the lowest level of assurance. Accordingly, the analysis and investigation is limited and there is little or no independent corroboration. This report is best for situations where the valuator can rely on the documents and information provided by the owner-spouse and his team. This report is typically used in the collaborative process.

A Calculation Valuation Report under most circumstances is not much different than the due diligence undertaken for purposes of preparing draft calculations only (i.e., no written report). However, the Calculation Valuation Report is generally provided prior to a meeting and provides the spouses an opportunity to understand the valuation approach undertaken, the assumptions made and the scope of review. In my view, the preparation of a written report provides the parties with a better understanding of the conclusions therein which assists the parties in meeting their objectives from a knowledgeable perspective. Further, the parties can review the Calculation Valuation Report and identify areas that require further due diligence and agree on the level of further due diligence required to bridge the gap between the parties in connection with the differences discussed. The Calculation Valuation Report in these cases may then become an Estimate Valuation Report which, as noted above, includes more due diligence and provides more assurance as to the conclusions therein.

Conclusion

The role of a business valuator in each collaborative case will vary and depend primarily on the specifics of each case which includes the needs and objectives of the parties. Further, the role of the business valuator may change as the

collaborative engagement process unfolds. However, at a minimum, at the beginning of the engagement and throughout the engagement the team must map out a plan for the valuator's role which includes consideration of the issues discussed above related to how the valuator will be used in the process and what type of reporting is required.