

# Avoiding Double Cross: The Unique Role of the Neutral Expert



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## Featuring:

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Valuation in Divorce*

# Brian P. Brinig

## Credentials & Firm Affiliation

- Adjunct Professor, University of San Diego School of Law
- Principal, Brinig & Company, Inc., San Diego, California
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# John R. Johnson

## Credentials & Firm Affiliation

- **John R. Johnson** CPA/ABV/CFF CBA DABFA is the Managing Partner of **BST Valuation & Litigation Advisors, LLC**, with offices in New York City and Albany, NY. He specializes in many financial aspects of litigation, with emphasis on the valuation of closely held businesses and professional practices, as well as forensic accounting services and economic damage analysis. Mr. Johnson is a frequent author and lecturer for many organizations, including the NYS Bar Association, American Bar Association, Law Journal Seminar Press, Practising Law Institute, American Society of Appraisers, NYS Society of Certified Public Accountants and has lectured at many past Judicial Training Programs for The Office of Court Administration and the NYS Judicial Institute. Mr. Johnson is a member of the editorial board of the *New York Family Law Monthly*, published by the *New York Law Journal* and serves as a Special Liaison to the Executive Committee of the Family Law Section of the New York State Bar Association. He has participated in over 1,400 litigation matters as a financial expert. He has served as a NYS Supreme Court appointed forensic and financial expert in approximately 500 matters throughout New York State and has provided expert testimony in support of his findings on over 100 occasions. He was appointed by the Chief Judge of the State of NY to serve on the “Miller Commission” to examine the process of matrimonial litigation in NYS and make recommendations for reform.

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# **William Morrison**

## **Credentials & Firm Affiliation**

- **President and Founder of Morrison & Company, P.A., Paramus New Jersey**
- **25 years as an investigator and accountant**
- **Former Special Agent for the Federal Bureau of Investigation**
- **Expert for the Superior Court and the Supreme Court of New Jersey**
- **CPA/ABV, CFF, DABFA**

# Introduction

- **Opportunities and Pitfalls**

# Introduction

- **Opportunities**

- Clients, Attorneys, Judges increasingly aware of escalating cost of business appraisals and forensic analyses.
- Widely divergent opinions contribute to higher litigation expenses and a reduced chance of settlement

# Introduction

- **Opportunities**

- Jointly retained expert

- Investigates relevant facts
- Performs accounting or appraisal analysis
- Issues “neutral” report

- Hopefully both parties are equally happy with the outcome

- .....**BUT**

# Introduction

- **Pitfalls**

- One or both parties are probably unhappy....usually one more so than the other
- One or both might retain an independent expert to counter the neutral
  - Could end up with 3 experts instead of one
  - Reality of the double cross at trial
  - Potential cost savings go out the window

# Engagement Considerations

## \*\* Jointly Retained Expert\*\*

- Client responsibility to both parties
- Be mindful that contested matters tend to make parties unhappy with the their consultants during the process
- Difficult role of being “in the middle” of the parties

# Engagement Considerations

## \*\*Engagement Letter\*\*

- **a/k/a Retainer Agreement**
- **Expansion of scope**
  - Joint retention – any material change must be agreed to by both parties
  - Court appointments – important not to step outside the parameters of the Court's order of appointment

# Engagement Considerations

## **\*\*Limitation of Liability\*\***

- **Complicated questions regarding professional liability in some jurisdictions**
- **Obligation to perform agreed upon services to contracting party(ies)**
- **Potential liability if services are performed negligently**

# Engagement Considerations

## **\*\*Limitation of Liability\*\***

- **Potential complications when 2 adverse parties are contracting with the same expert**
- **Not possible to satisfy the needs and desires of each party**

# Engagement Considerations

## **\*\*Limitation of Liability\*\***

- **Know the local laws and case statutes**
- **Hold harmless clauses might be considered void because they are against public policy in a given jurisdiction**
- **Consider including a liquidated damages clause in the retainer agreement**

# Procedural Considerations

- **Engagement Letter and Rules of Engagement**
  - Discuss with both counsel at the onset
  - Memorialize in a letter or better yet, include in the retainer/engagement letter itself
    - Discovery, including deadlines for production
    - Client meetings
      - Meet with both parties to avoid a sense of exclusion by the non-titled spouse
    - *Ex parte* communications—what's allowed and what's not
    - Report due date(s)

# Report Issues

- **Draft vs. Final**
  - Consider issuing an initial draft report
  - Provide a 20-30 day comment period for both parties to provide written input to correct misstatements and misunderstandings and confirm facts and representations
  - Take comments and input under consideration
  - Issue Final report

# Expert Testimony

- **Address expert testimony and trial prep in writing....preferably in the retainer/engagement agreement**
- **Not appropriate to do trial preparation with only one side without the acquiescence of both parties and respective counsel**

## Expert Testimony

### \*\* The Double Cross \*\*

- Generally no direct examination, but both sides will cross examine to prove, or disprove, their key points
- Quasi-direct examination will develop naturally – generally by the party that favors the neutral report more than the other

# Opposing the Neutral

- **Be careful when accepting a engagement to oppose a neutral**
  - Perception by the Court as a ‘hired gun’
  - Unlikely to unseat a neutral unless there were material errors or omissions
  - If possible, highlight areas of disagreement and provide the neutral expert an opportunity to reconsider his/her opinion, rather than going head-to-head at trial

## Conclusion

- Increased use of jointly retained experts is expected to increase in the future
- Courts are tiring of the “battle of the experts”
- Jointly retained experts can increase efficiency and cost effectiveness in certain cases
- In the wrong case, it can have the opposite result
- Be prepared for the “Double Cross”

- **Thank You For Your Attention!!**