

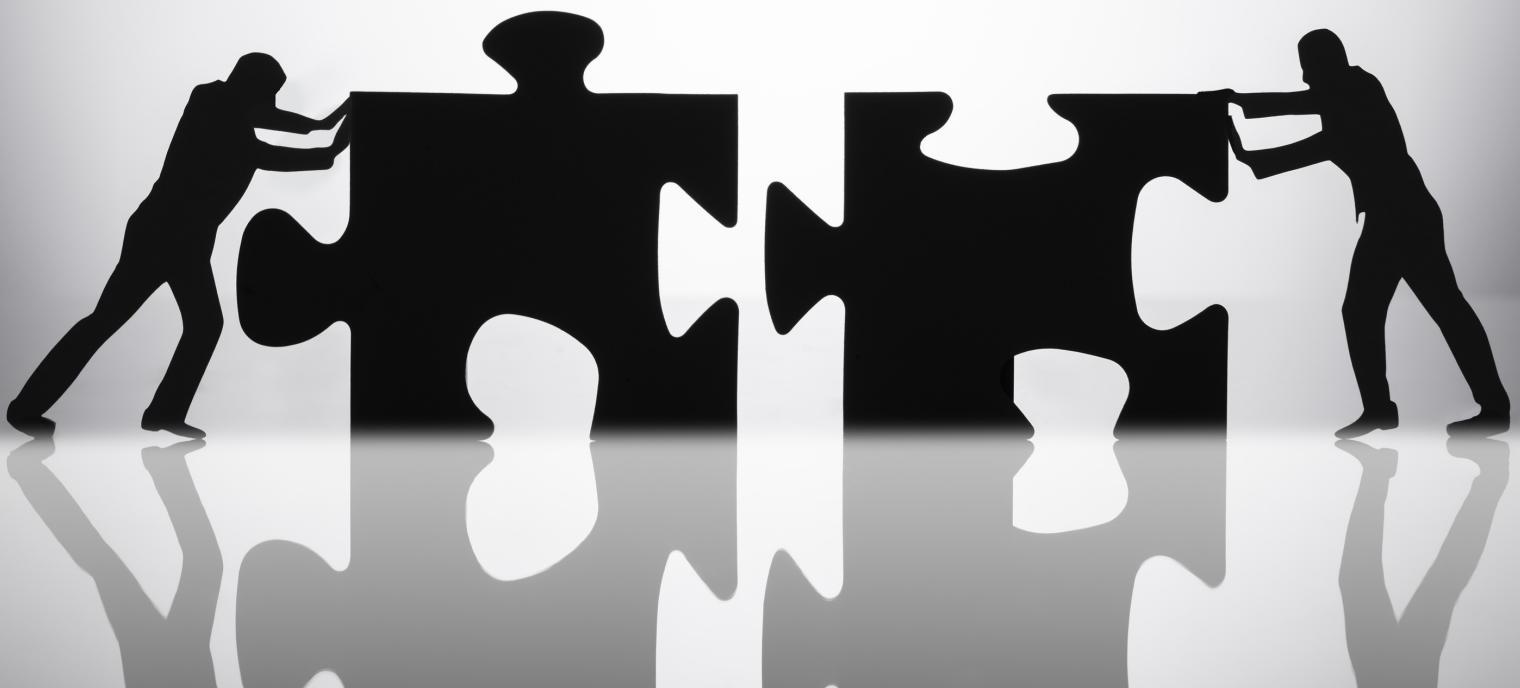


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INSIGHTS

# THE JOINT EXPERT RETAINER – WHAT YOU NEED TO KNOW

*by Yoram Beck and Katie Atkinson*





## THE JOINT EXPERT RETAINER – WHAT YOU NEED TO KNOW

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### ***Preparing a Successful Joint Expert Report: Practical Guidance for Litigation Counsel***

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Expert evidence often plays a pivotal role in the resolution of commercial disputes. Whether the issue involves the valuation of a closely held business, the quantification of economic damages, or the determination of financial loss, expert opinions can significantly influence settlement negotiations and trial outcomes.

Commercial disputes often involve "dueling experts", with each party retaining its own expert. While this approach remains common, courts, arbitrators, and counsel are increasingly recognizing the benefits of joint expert appointments given that when properly structured, among other things, a joint expert process can reduce costs, narrow issues in dispute, and improve the efficiency of litigation.

In fact, the Civil Rules Review Working Group's Final Policy Report has proposed: (i) the presumptive use of joint experts for certain financial issues (relating to personal injury matters and certain real property valuation); and, (ii) that for all other matters, parties be required to consider the use of a joint expert. <sup>[1]</sup>

However, a successful joint expert retainer requires an upfront investment by all parties to ensure that the mandate is clearly defined, creating a transparent process, and ensuring effective communication protocols throughout the engagement.

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[1] Civil Rules Review, Final Policy Report submitted by the CRR Working Group, pg. 178-179.

## Understanding the Purpose of a Joint Expert Report



A joint expert report is designed to provide an independent opinion on issues that require specialized expertise. Unlike a traditional adversarial model, where opposing experts present competing analyses, a joint expert is retained by both parties.

While the report may not necessarily eliminate disagreement, it might identify areas of agreement and focus attention on the issues that genuinely remain in dispute. For that reason, not all joint retainers have a binding impact on the parties involved.

## When Does a Joint Expert Process Make Sense?

Joint expert appointments are not appropriate for every case. For example, if liability remains heavily contested, or where the parties fundamentally disagree on the underlying facts, a traditional single-party expert engagement may be more appropriate. Similarly, highly complex disputes involving novel issues may not lend themselves to a joint process.

That said, joint appointments can be highly effective in cases involving:

- Shareholder buyouts;
- Oppression remedy disputes;
- Partnership and corporate divorces;
- Estate litigation involving business interests;
- Matrimonial cases involving business interests;
- Commercial arbitrations; and,
- Certain damages quantification assignments.

In these matters, the dispute often centres on the application of financial principles rather than the determination of liability. A joint expert can help the parties focus on the financial issues without becoming entangled in broader litigation.

## The Benefits & Costs of a Joint Expert Report

The most obvious advantage of a joint expert engagement is reducing costs. Rather than retaining separate experts and potentially engaging in multiple rounds of reports and critiques, the parties share the cost of a single expert process. This can be particularly attractive in disputes where the cost of competing experts may be disproportionate to the amount at issue.

Joint expert reports often help narrow the issues in dispute, allowing counsel to focus their efforts on the matters that genuinely affect the outcome of the case. The process also tends to be less adversarial, which can improve the prospects of settlement and reduce the likelihood of a lengthy trial or arbitration.



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In many cases, a well-prepared joint report provides both parties with a clearer understanding of the strengths and weaknesses of their respective positions. This often facilitates meaningful settlement discussions.

In contrast, some of the disadvantages of a joint retainer can include, but not limited to: (i) increased costs if either party decides to retain their own consulting experts (i.e., shadow experts); (ii) requirement to follow a stricter process; and, (iii) increased difficulty of challenging the expert's conclusion if the report is binding.



## The Importance of Defining the Mandate

One of the most common reasons joint expert engagements encounter difficulties stems from a poorly defined mandate. At the outset of the engagement, the parties should reach agreement on fundamental questions such as:

- What is being valued or what loss is being quantified?
- What is the correct valuation date, effective date, or loss period?
- What standard or definition of value is to be used? Are any discounts to be considered for minority interests?
- What factual and legal assumptions are to be adopted?
- Are there any limitations on the scope of the engagement?
- How will costs be shared between the parties?
- Will a draft report be provided to the parties prior to finalization (whether in full or with conclusions redacted)?

While these questions may appear straightforward, ambiguity at the beginning of the process often leads to disagreement later.



For example, in a shareholder dispute, the outcome may vary significantly depending on whether the expert is instructed to determine fair market value, fair value, or some other standard of value. If these issues are not resolved in advance, the expert may face conflicting expectations from the parties.

For that reason, a carefully drafted engagement mandate can prevent many of these problems before they arise.

## Establishing a Clear Process

Equally important is the establishment of a process that all parties understand and accept.

The process should address practical matters such as:

- Communication protocols between the parties and the expert;
- Timing and form of submissions to the expert;
- How information requests will be addressed by the parties and who will be responsible for providing the expert with access to documents and records;
- Treatment of conflicting factual and legal assumptions or other information that cannot be reconciled by the expert;
- Review procedures for draft reports, if any;
- Finalization of the report; and,
- Timelines for each step of the engagement (and the process to amend the timeline, if required).

Without a defined process, disputes can arise regarding document production, deadlines, and the handling of competing factual assertions. For that reason, successful engagements are characterized by transparency and procedural clarity. When the parties understand their roles and responsibilities, as well as the role of the expert at the outset of the joint expert engagement, this minimizes the risk of procedural disputes overshadowing the substantive issues.

## Communication Is Critical

A clearly defined communication protocol is critical for joint expert engagements. This ensures that both parties have confidence that the established process is being followed and the mandate is being completed in a way that is fair, transparent, and independent. This often requires careful consideration of:

- Whether all parties are included on all communications with the expert;
- Who attends meetings with the expert;
- How information is shared;
- Whether draft reports will be circulated, and in what format;
- How questions from the parties will be addressed;
- How questions from the expert will be addressed; and,
- How disagreements regarding information will be managed.

Transparency helps preserve the expert's independence and reduces the likelihood that one party will later challenge the integrity of the process. Importantly, communication protocols should be established at the outset rather than developed on an *ad hoc* basis as issues arise.

## Anticipating Challenges Before They Become Problems

Even the most carefully planned engagements may encounter unexpected issues. Questions frequently arise regarding out-of-scope work, requests for additional analysis, scenario testing, and the potential role of the expert if the matter proceeds to trial. Addressing these issues early can help avoid delays and disagreements later in the engagement.

Counsel should also consider how the parties will respond if additional work becomes necessary or if significant new information emerges after the engagement has commenced.



## Conclusion

Joint expert reports can be a highly effective tool in commercial litigation and arbitration. When properly structured, they reduce costs, narrow issues, improve settlement prospects, and provide the trier of fact with focused and independent expert evidence.

The key to success lies not simply in selecting the right expert, but in designing the right process. A clearly defined mandate, a clear and transparent process for completing the mandate, and well established communication protocols can significantly improve the value of a joint expert engagement.

For litigation counsel, investing time at the outset to establish these foundations can ultimately save substantial time, cost, and uncertainty as the matter progresses toward resolution.

# The Joint Expert Retainer – What you Need to Know

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