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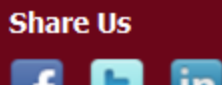
Michael J. Mard

CPA/ABV/CFF, ASA

Michael J. Mard is a principal of The Financial Valuation Group of Florida, Inc. Mr. Mard has been a full-time business appraiser and expert witness for over 25 years, specializing in intangible assets, specifically intellectual property. He has developed analyses that have been reviewed and accepted by the Securities and Exchange Commission, major accounting firms, the IRS and the courts. Mr. Mard has provided expert testimony approximately 125 times related to intangible assets, intellectual property, business damages, marital dissolution, shareholder disputes and IRS matters. [Full Bio \[PDF\]](#)



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Michael J. Mard

CPA/ABV/CFF, ASA

The Financial Valuation Group of Florida, Inc.
8074 North 56th Street
Tampa, FL 33617

Phone: +1 813.985.2232
Email: m.mard@FVGFL.com



Michael J. Mard

Transparency in Collaboration

Principles of Transparency Specific to Financial Analyses

Part 1 of 7 in a Series

By

Michael J. Mard, CPA/ABV/CFF, ASA

Collaboration in litigation requires transparency, but what is transparency? This is the first of a series of articles discussing and setting forth principles of transparency related to business valuations and financial analyses performed in a collaborative process setting. This first article will propose principles for transparency. Subsequent articles will provide tools and guidance related to directly implementing those principles.

Collaborative Law

Collaborative law is a process of alternative dispute resolution in which the opposing parties:

- Agree to the voluntary and free exchange of information;
- Pledge to avoid traditional litigation in the court room; and
- Commit to shared solutions and final resolutions.

The collaborative process is a focused settlement process and is framed by an upfront written Collaborative Law Agreement that sets forth the process and goals. It is similar to mediation with one key difference—there is often mediator. Collaborative law (and the collaborative process) is applicable to all manner of disputes, including family law (perhaps the most frequent), shareholder disputes, commercial damages, contract disputes, lost profit disputes, intellectual property disputes (patents, trademarks and copyrights), personal injury, employment disputes, eminent domain, malpractice, and many other types.

Many web sites and articles related to the collaborative process reference an ubiquitous "open communication and information sharing" mantra in some form or another; yet this mantra is rarely if ever defined. This brings me back to my original question—what is transparency?

Transparency

Transparency is defined at BusinessDictionary.com as:

Lack of hidden agendas and conditions, accompanied by the availability of full information required for collaboration, cooperation, and collective decision making. [1]

Simply stated, a process is transparent if it can be seen through easily, "just as one can see easily through a clean window." [2] The transparent process must be readily understandable, and the scope of its derivative rights and obligations must be easy to assess for each party. [3] Otherwise, it is opaque. [4] As Dr. Zoellner points out:

...transparency guarantees that concerned parties can easily acquire the information they need in order to realistically estimate the effect of other parties' actions on their own positions and planned undertakings. [5]

How is this openness to be accomplished? What are the guidelines assuring such openness? What specific processes can the parties follow to confirm transparency?

Grant Thornton, an international accounting firm, recently conducted a survey about transparency among business executives. The firm [6]:

...asked survey respondents to define transparency for government financial and performance information. Here are their chief principles for such transparency, which apply to both the public and government users:

- Have a process for ensuring that data you disclose are accurate and reliable, and show that process to users.
- Understand the information that people want, and deliver it. They may not be sure what they need, so help them define it. Along with the information you provide, show them how to get more.
- Be as open as possible without creating risk. The default setting for disclosure is anything that does not violate security or the law.
- Provide information that helps make decisions.
- Do not just react to requests – active outreach is important.
- Give context to data: show goals, benchmarks and other information with which to compare them.
- Take action yourself based on the information, and tell people what you did. This includes using it to make policy and budget decisions and to manage and improve operations.
- Be conscious of the dollar cost of transparency, and invest wisely in it. Set priorities for disclosure, and strive for the best return on investment.

How can these eight transparency principles be applied to the collaborative process? What are the specific principles of transparency related to business valuations and financial analyses performed in a collaborative process setting?

General Principles

While financial analyses and business valuations may be performed by non-Certified Public Accountants, the CPA General Standards should be adopted as part of any Collaborative Law Agreement Supplemental where financial analyses are required. In fact, these principles are properly applicable to all collaborative professionals. These general principles are:

- Undertake only those services that the practitioner can reasonably expect to be completed with professional competence.
- Exercise due professional care in the performance of services.
- Adequately plan and supervise the performance of services.
- Obtain sufficient relevant data to afford a reasonable basis for conclusions and findings. [7]

Professional competence means the practitioner can exhibit the education, skill and experience specific to the matter and apply it with reasonable care and diligence. It is particularly relevant that a financial expert has specific training related to the matter but, more importantly, specific experiences similar to the matter. For instance, a valuation practitioner could have satisfactory experience valuing closely held businesses for tax purposes. That practitioner, however, may have no experience with such valuations in a marital dissolution or shareholder dispute. Accordingly, that practitioner may not be familiar with constraining case law affecting methodologies, such as applicable discounts and allowances for professional (non-transferable) goodwill. If the practitioner is unable to remedy this deficiency, he or she should reject the assignment.

Exercising due care is the application of competence. It is the practitioner's quest for excellence in rendering careful and thorough services with the diligent observation of appropriate technical and ethical standards. This includes enhanced reporting (verbally or written) of contextual information relevant to risks of litigation.

Further the practitioner must *adequately plan and supervise* staff activity related to the assignment and *obtain sufficient relevant data* consistent with acceptable industry practice to render a reasonable basis for conclusions and findings.

In essence it is the practitioner's duty to complete the services in the best interest of the public (duty to protect society) and, in collaborative law, as an aid to the parties and the parties through the satisfactory completion of the Collaborative Law Agreement.

Specific Principles

In addition to the general principles outlined above, specific principles of transparency applicable to a financial analyst (including a business valuator) working in a collaborative process should be adopted. These specific principles are designed to allow the verification, reproduction, and evaluation of findings and conclusions and are summarized here:

- Clarity of scope of roles, responsibilities, and objectives;
- Open process for formulating reporting;
- Public availability of information;
- Accountability and assurance of integrity;
- Shared vocabulary;
- Benchmarking or verification of work performed; and
- Fees based on time and materials.

First, clarity of scope of roles, responsibilities, and objectives should be codified in a collaborative engagement letter signed either by both of the parties or their counsel. The engagement letter must be specific as to the nature of the work to be performed, including the fact that the work is collaborative. The work will vary depending on the nature of the matter and might be a traditional valuation, a damage assessment, a standard of living analysis, or a forensic fraud investigation, for example. Specific applicable dates should be stated. If a business valuation is required, the standard of value should be clearly presented as well as appropriate standards to follow (such as the AICPA's Statement on Standards for Valuation Services No. 1). The expected deliverable should be clearly stated, whether it is schedules only or a full narrative report. Finally, the engagement should be consistent with the Collaborative Law Agreement and that agreement should be attached as a supplement to the engagement letter.

An open process for formulating reporting means the practitioner and the practitioner's work product will be accessible by either party at any time. All significant communication will include all parties and no ex parte communication will be permitted without the permission of the excluded party.

All information used as source documentation should be provided by the parties or be publicly available. There should be no proprietary data relied upon to develop an opinion without making that data available.

The practitioner should encourage accountability and assurance of integrity by providing reasonable means for the parties, who are generally lay people, to make informed decisions based upon the work provided. This means having tools available to verify the work provided, including work product, is clearly and concisely presented without reliance upon hidden formulas or "black box" methodologies.

The practitioner should communicate and share the relevant technical vocabulary in a clear manner. This means the practitioner should make a concerted effort to communicate in layman's everyday language technical issues that indeed may be complex. It serves no purpose for the practitioner to develop a finding based on technical methodologies, jargon, and regulations unless the bases for the findings can be successfully and satisfactorily communicated to the parties.

The parties should also have available a means of benchmarking or verifying the work performed. This objective verification can be provided in the practitioner's findings (such as selection of market comparables or validation of transactions in bank statements) in a way that is easily understandable and supported by the parties.

Finally, the practitioner's fees should not be contingent upon a predisposed specified finding or result. Fees should be charged in the traditional "Lodestar" manner, which is a function of time and materials. The time charged should be reasonable and allow periodic reviews to assure the parties agree that the benefits are worth the cost. The hourly rates charged should be consistent with the practitioner's skill, education, experience and reputation, as well as geographic expectations.

Conclusion

General and specific principles must be adopted to assure transparency of the work performed by a financial expert in a collaborative process. There has been much talk about transparency, but the time for general discussion must come to an end. While the principles I've outlined are preliminary, they are intended to form a basis for specific discussion and development.

Author's Note: This series of articles will focus specifically on the application of Collaborative Law Principles to a financial expert performing a business valuation. Future articles will address:

- The valuation process
- The asset based (or cost) approach
- The market approach
- The income approach
- Applicable discounts and premiums
- Suggested checklists for use by non-appraisers

Endnotes:

- [1] [Business Dictionary Link](#)
- [2] Zoellner, Carl-Sebastian, Student Note: An analysis of an Evolving Fundamental Principle in International Economic Law, [Link](#), page 583
- [3] [Ibid](#)
- [4] [Ibid](#)
- [5] [Ibid](#), page 584
- [6] [Grant Thornton link](#) - page 7
- [7] [AICPA link](#)