

OUTSIDE COUNSEL

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Vocational Experts Help Decide Parties' Ability to Work

Many matrimonial attorneys are missing out on the greatest tool since the forensic accountant: the vocational expert (the “employability expert”). In matrimonial litigation, courts are often called upon to decide issues based on one or both parties’ ability to work and earn money. A party’s actual earnings may not be a true indication of their earning capacity, and it is difficult to quantify a person’s ability to work. Enter the vocational expert.

This oft-overlooked expert witness can present to the court quantifiable, accurate, and current information specific to the litigant regarding prevailing salary or employment standards, that would otherwise be difficult for the court to gather. This information is crucial to the determination of maintenance awards, child-support awards and equitable distribution.

This article acts as a guide to this under-explored field.

When to Hire a Vocational Expert

There are many situations in matrimonial litigation where the court may be required to determine a party’s earning capacity. These situations include: a party is under- or unemployed; a party has had an extended absence from the workforce and they may or may not have marketable skills (putting aside intelligence and education); a party has skills but requires additional training, education, work experience or certification to realize their full earning potential; a party has lost a job and refuses (or claims inability) to find equivalent employment; or a party suddenly retires or otherwise voluntarily reduces their income. Vocational experts are called upon to evaluate all kinds of employment (skilled and unskilled) in the public and private sectors.

Without the assistance of a vocational expert, practitioners are forced to put together numbers regarding a party’s past employment and earnings as best they can based solely on documents produced during the discovery process. The practitioner must then leave it up to the court to arbitrarily make a decision.

The vocational expert, however, takes the docu-



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ments and combines them with research on the party’s abilities and earning potential based on empirical data. It is this labor market research that renders the vocational expert’s opinion invaluable. A practitioner may determine that a party could be earning a certain income with a particular job, but if that job is unavailable, that determination has little practical value and is not useful to the court. The vocational expert will look at the opportunities that are available and then determine if the party qualifies or what it will take for them to attain the requisite skill level.

No longer must a practitioner wonder: “[W]hat is this person going to do?” “How much maintenance is necessary?” or “Are they earning as much as they can?”

Admissibility of Expert’s Opinion

It is within the sound discretion of the court to credit the testimony of a party’s vocational expert. *Aw v. Aw*, 254 AD2d 239, 678 NYS2d 266 (2d Dept. 1998) (citing *Dempster v. Dempster*, 236 AD2d 582, 654 NYS2d 653). In order to be admissible at trial, the vocational expert’s opinion must be based upon the following criteria:

1. *Facts personally known to the expert through observation or examination.* *Hambasch v. New York City Transit Authority*, 63 NY2d 723, 480 NYS2d 195 (1984).

The vocational expert should conduct a personal interview to obtain an extensive review of the party’s work history, education, personal presentation, and other factors impacting their ability to procure employment. This interview should be paired with the party’s completion of questionnaires and/or tests designed to highlight the party’s strengths and weaknesses. Such an evaluation is sanctioned by the New York Court of Appeals. The Court has held that it is proper to direct a party to submit to an evaluation by a vocational expert where capacity to perform

in the workplace is a material issue. *Kavanaugh v. Ogden Allied Maintenance Corp.*, 92 NY2d 952, 683 NYS2d (1998).

2. *Facts in evidence.* *Hambasch*, supra. These facts are garnered from the following documents, which should be demanded by the practitioner:

- The party’s curriculum vitae (current and for the last 15 years or longer if relevant);
- The party’s W-2 forms, annual earnings, 1099s from past employment;
- A schedule of the party’s past employment (including full- and part-time employment and self-employment), including dates and contact information for whom the work was performed;
- A schedule of volunteer experience including dates and contact information for whom the work was performed;
- Job evaluations by the party’s current and past employers including performance citations, employee awards, etc.;
- Evidence of the party’s education (diplomas, certificates, transcripts) and educational achievements (class rank, awards, honors, etc.);
- The party’s medical history, preferably presented to the court by a medical expert;
- Documentation regarding the party’s efforts to obtain employment (such as a diary listing appointments with specific individuals for interviews, correspondence received from prospective employers in response to the party’s solicitations for employment);
- Any other documents requested during discovery.

3. *Professionally reliable hearsay (statistics correlated by the U.S. Bureau of Labor Statistics, [BLS], the principal fact-finding agency for the federal government in the field of labor economics and statistics).* *Omar B. v. Diane S.*, 175 AD2d 834, 573 NYS2d 301 (2d Dept. 1991).

To establish the admissibility of the vocational expert’s opinion, a practitioner must demonstrate that their opinion relates to a subject matter which concerns “scientific, technical, or other specialized knowledge that is beyond the understanding of the trier of fact, . . . thereby helping the trier of fact understand the evidence or to determine a fact in issue.” *People v. Taylor*, 75 NY2d 277, 552 NYS2d 883 (1990). The vocational expert’s opinion should be issued with a “reasonable degree of certainty” and, as discussed above, based upon personal facts, facts in evidence and professionally reliable hearsay. *Mattot*

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v. *Ward*, 48 NY2d 455, 423 NYS2d 643 (1979). Objectiveness is essential to the admissibility and credibility of the vocational expert's opinion.

Necessary Qualifications

As with all experts, the vocational expert should have the requisite skill, training, education, knowledge, expertise or experience which the court, in its discretion, feels enables the expert witness to provide a reliable opinion.

Specifically, this expert should have:

- A master's or doctorate degree in psychology, counseling psychology, vocational evaluation or vocational rehabilitation counseling. The expert may be certified as a career counselor, school counselor, vocational evaluator or vocational rehabilitation counselor.¹
- Experience.
- Demonstrated ability to interview clients to assess marketable skills.
- Demonstrated knowledge of and ability to conduct vocational, educational and psychometric testing and assessment.
- Demonstrated knowledge of and access to occupational employment conditions (job market) and wages in a geographical area.
- Knowledge of community resources for obtaining employment and the knowledge of the skills necessary for an effective job search.

As when selecting any expert witness, the expert's history of demonstrated knowledge and experience is critical. In selecting a vocational expert, practitioners should also consider the expert's:

- Experience in producing objective reports based on data, scientific methodology and assessment.
- Knowledge of specific job markets.
- Recognition in their profession (publications, lectures, etc.)
- Involvement in their professional organizations demonstrating peer recognition.

Vocational Expert's Report

In accordance with the New York Court Rules and Regulations governing expert witnesses, vocational experts shall file a written report to be exchanged and submitted to the court no later than 60 days before the trial date. 22 NYCRR 202.16(g)(2).

This report should include an analysis of the party's skills, education, strengths and weaknesses to determine the party's current qualifications and possibility of transferring those qualifications to new employment. The report should also include a determination of the feasibility of obtaining employment after education or training (taking into consideration the time and costs associated with completing this education or training) and what earnings can be expected with such improvement. This includes local labor market research regarding job demand and wages. The report should also contain a determination by the expert of whether any medical and/or psychological conditions may (and to what extent) or may not represent obstacles to employment.

As noted above, a vocational expert should provide objective information required by the court that is valid and reliable when tested using scientific methods. These methods may include administering and interpreting standardized tests to assess learning ability, specific aptitudes, vocational interests or

temperaments. Further, vocational experts are able to determine transferability of job skills.

In addition to the information provided by the party, the vocational expert will use quantifiable data and apply it to each case to determine an individual's current and future earning capacity. This can include data from: the U.S. Bureau of Labor Statistics (BLS), compensation surveys from professional organizations, recruiters, and employers or employment agencies relevant to the litigant's employment. It is the scientific methodology and objective data as well as the expert's experience in employment assessment that increases the vocational expert's credibility to the court.

The vocational expert also helps the party being evaluated on a personal level. He provides a means of accountability, the knowledge that they can be self-sufficient. In matrimonial proceedings this gives the individual the ability to move on.

If medical and/or psychological conditions are presented as limitations to the litigant's employment capability, the case will require the involvement of a medical and/or psychological expert. The vocational expert will consult with this second expert as part of the assessment. Certified Vocational Evaluators and Vocational Rehabilitation Counselors can credibly evaluate medical records as part of the evaluation process. *LaFontaine ex rel. Currie v. Franzese*, 282 AD2d 935, 724 NYS2d 514 (3d Dept. 2001).

New York Is Missing Out

There is a noticeable shortfall in the use of vocational experts by matrimonial practitioners in New York. The formidable tool offered by these experts is in regular use virtually all over the country, with the glaring exception of New York. For example, in Washington, D.C., a court qualified a vocational expert to establish the husband's earning capacity. The vocational expert, basing her opinion on the husband's education, work experience and past earnings, and research, testified that his wage-earning capacity was \$1.82 million. The court then properly imputed income to the husband. *Tennille v. Tennille*, 791 A2d 79 (D.C. 2002).

In Oregon, a vocational expert testified that the wife's specific work experience limited her employability but with a master's degree she could successfully re-enter the job market within five years. The court imputed a reasonable amount of income to the wife and thereby arrived at a fair alimony award. *Helm v. Helm*, 107 Ore.App. 556, 813 P.2d 521 (1991).

A vocational expert in Florida found that although the wife's intelligence was slightly below average she was capable of obtaining full-time employment. The expert was able to give example of jobs she could attain with and without further education. The court used this information to impute income to the wife and ultimately formulate an award of alimony. *Moorehead v. Moorehead*, 745 So.2d 549 (Fla. 1999).

In Delaware, a vocational expert was called in to dispute the wife's contention that she could not

work. *GMA v. SR*, 2005 Del. Fam. Ct. The wife in another Delaware case, claimed that she was only capable of earning \$17,000. A vocational expert testified that she has a work history of earning \$12 per hour in a clerical position, and \$30,000 as a massage therapist. Based on this testimony the court imputed an annual income of \$25,307. *MAM v. MSM*, 2004 Del. Fam. Ct.

In the Ohio case of *Marquardt v. Marquardt*, 1993 Ohio App. (Ohio Ct. App. 1993), the husband earned \$50,000 until he became unemployed. A vocational expert testified that he could readily obtain employment paying between \$30,000 and \$35,000 if he worked harder at obtaining employment and/or reduced his requested salary figure. The court used this testimony to impute a salary of \$30,000 to the husband.

A vocational expert is as helpful in high-income cases that are common in New York. For example, in a case that went to arbitration, a vocational expert was called in to evaluate an unemployed attorney and to rebut a report from the husband's expert, a legal recruiter. The recruiter reported that although the wife had limited employment experience plus a 12-year absence from the workforce, she could still earn compensation comparable to peers who had graduated at the same time and were employed in top-tier firms (approximately \$300,000). The vocational expert contacted numerous recruiters specializing in the wife's area of expertise. It was found that her absence from the workforce would impact her employability and reduce her earning capacity. This assessment helped the court reach a decision on maintenance.

Conclusion

While the vocational expert provides a valuable service to the practitioner and litigant on a professional level, they also help the party being evaluated on a personal level. The vocational expert provides a means of accountability to the party, the knowledge that they have the ability to be self-sufficient. In matrimonial proceedings this gives the individual the ability to move on, which will help them move forward with their life and consequently the litigation.

The vocational expert should be added to every matrimonial attorney's roster of experts.



1. A vocational rehabilitation counselor is a specialized form of counselor who deals with the vocational capacity of persons with permanent losses of functional ability due to a medically defined impairment that has affected their ability to engage in their chosen career.

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