

THE VOCATIONAL EVALUATOR AS EXPERT WITNESS

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ABSTRACT: Much attention has been focused on the emergence of the private practice of rehabilitation. "Private rehabilitation" as it is commonly called is considered by some to be an impressive growth industry (Lauterbach, 1982). Recent rehabilitation graduates are flocking to private rehabilitation companies for employment in record numbers. Third party payers such as insurance companies, employers and attorneys have recognized the value of rehabilitation and are hiring their own in-house rehabilitation staff. The courts, at long last, seem to be recognizing the value of rehabilitation information in determining employability issues.

Finally, the Bureau of Counselor Certification (previously CRCC) has developed a special certification (CIRS) essentially targeted for private practitioners.

At face value, it would seem that private rehabilitation is well on its way from 10 years of relative obscurity to recognition and acceptance today. Inherent in the above scenario is the fact that a variety of rehabilitation professionals (counselors, job developers, nurses, vocational evaluators, psychologists, etc.) are providing a variety of services in relatively new and diverse settings. Where, in the scheme of private rehabilitation does the vocational evaluator fit? Are the evaluator's distinct skills recognized in the rehabilitation process or litigation? And last, how is the vocational evaluator used as an expert witness? This paper

addresses the major issues of the vocational evaluator in private practice and as an expert witness.

The Evaluator's Role

The vocational evaluator has played a relatively minor role in private rehabilitation, unfortunately, at least as compared to his/her potential contribution. The majority of employees in private rehabilitation are rehabilitation counselors and rehabilitation nurses. The most frequently offered services in private vocational rehabilitation are rehabilitation counseling and job development (Matkin, 1982, p. 32). There seems to be confusion in the legal community about the distinction between vocational evaluation, rehabilitation counselors and job developers, as suggested in a recent survey of attorneys (Brandon, 1983). In private practice, the issues of employability, job compatibility, and labor market are often times the keys issues. Considering that many private rehabilitation clients have experienced a handicapping condition which impacts on their vocational functioning in some way, vocational evaluators, with their special areas of expertise in testing, counseling and job matching, would seem to be an important if not integral part of the process.

Consider the definition of vocational evaluation given the 10th Institute on Rehabilitation Services (1972): "Vocational (work) evaluation is a comprehensive process that systematically utilizes work, real or simulated, as the focal point for assessment and vocational exploration, the purpose of which is to assist individuals in vocational development. Vocational (work) evaluation incorporates medical, psychological, social, vocational, educational, cultural and economic data in the attainment of the goals of the evaluation process." We can only speculate why vocational evaluations as defined above and the vocational evaluators who provide these services

are not more critically involved in private rehabilitation as expert witnesses. Whether it is the evaluator's historical subordination to the rehabilitation counselor as suggested by Mason (1983) or the evaluator's lack of aggressiveness in maintaining their domain in vocational evaluation (Ellis 1983), it is clear that the vocational evaluator has much more to contribute to the private practice of rehabilitation.

Evaluators are interfacing with proprietary rehabilitation in increasing numbers. Some wear two hats, both as evaluators and counselors in private firms. Others work in sheltered workshops, hospitals or proprietary assessment centers where litigated cases are seen for vocational evaluations. Thus the evaluator may be called as an expert witness. Lynch (1983) offers the following definition of the vocational expert: "Vocational experts are responsible for critically reviewing supporting documentation (e.g. medical or psychiatric); performing a vocational diagnostic interview; noting critical work behaviors; translating residual functional capacity into vocationally relevant terminology; selecting, administering, scoring and interpreting the appropriate assessment tools (e.g. tests of intelligence, achievement, aptitude, vocational interest, dexterity); locating, assessing, and integrating rehabilitation research relevant to the type of disability involved; understanding vocational development theory; job requirements, and the world of work; securing labor market and wage information; and presenting logical and substantial conclusions based on objective findings." It is in and around these issues that vocational evaluators can make significant contributions as expert witnesses.

The Nature of Cases

The role of the vocational expert poses a unique set of considerations and challenges in both conducting the vocational evaluation and testifying in a court of law. One of the first considerations is the nature of the

case. The majority of cases are worker compensation, in which a worker has been injured on the job and the injury impacts on the worker's vocational functioning. In these cases, the rehabilitation involvement is directly related to the return to work hierarchy as summarized by Sink (1983).

1. The worker recovers from the injury and returns to work in the same job with the same employer without modifications.
2. The worker can return to work in the same job with the same employer with modifications.
3. The worker can return to work with the same employer on a different job without modifications at equal or better pay.
4. The worker can return to work with the same employer on a different job with modifications at equal or better pay.
5. The worker can return to work with a different employer at the same job without modification at equal or better pay.
6. The worker can return to work with a different employer at the same job with modifications at equal or better pay.
7. The worker can return to work for a different employer on a job in which he or she has never been employed, but for which he or she has transferable skills and formal retraining is not required.
8. The worker can return to work only if formal training is the only feasible alternative available and the worker has the ability to successfully complete the training.
9. The worker does not have potential for competitive employment.

Vocational evaluations may be indicated in level four (4) and levels seven through nine (7 - 9). In such instances the evaluator may be asked to determine the worker's ability to perform a new job with the employer, in which case a tailored evaluation specific to measuring the job requirements for a particular job is in order.

Often evaluators can play a critical role in the return to work with the employer by conducting an on-site visit to the employer, determining the hypothetical jobs the worker could perform, and evaluating the employee against these criteria. It is not uncommon for an employer to stereotype an employee as skilled only in the job he/she performed at time of injury. A good evaluator can point out alternative job slots the employer may not have considered. It is unlikely such a case would reach the courts on the issue of employability.

Most often, however, the evaluator will be asked to determine employment potential for new job or training areas. In these cases, consideration must be given to not only prior work history/skills but aptitudes, interests, temperaments, general educational development and physical capacities as they relate to generic job competencies and labor market opportunities. Since the evaluation offers an opportunity for extensive behavioral observations, information about the worker's functional work tolerances, return to work attitude and general work habits are important. Finally, for what jobs does the worker seem to be employable? Is the pay rate comparable to that at time of injury? If not, is the worker a candidate for training and what is the expected pay rate upon completion of training? Since each state has its own worker compensation laws, these issues may vary. Depending upon the law, evaluators may also be asked to calculate a vocational disability rating, determining advancement potential in an occupation or consider roll back wages.

Although worker compensation is the primary area for vocational evaluators as expert witnesses, there is a growing demand in the areas of personal injury, divorce, social security and long-term disability. Social security cases are distinctive in that employability opinions are based upon the availability of jobs in the national, not local, economy. Personal injury cases, although varied in referral

purpose, generally focus on what the client's employability was before the injury, current employment options, and the impact of this over the life expectancy. These cases, by nature, tend to be more hypothetical and frequently are done in conjunction with an economist.

An emerging area of practice for the vocational evaluator is divorce. Since alimony is somewhat dependent on the spouse's present and future earning capacity, vocational evaluations are extremely helpful in determining vocational potentials for spouses who have never worked or who claims he/she cannot work. Often times the results of the vocational evaluation serve as the rehabilitation plan which is then awarded as part of the divorce settlement with anticipated earnings offset against alimony.

With an increase in litigation and use of vocational experts in general, there is a trend to use vocational experts for independent evaluations, trial consultation or rebuttal witnesses. Since the legal system is by nature an adversary one, opposing attorneys may find need to obtain an opinion about the rationale for a particular vocational evaluation, interpretation of test results, or conclusions and recommendations. This may range from simple review of records to conducting an independent evaluation followed by formal testimony. Although this concept is somewhat foreign in the vocational rehabilitation system, this is frequently seen, for example, in presenting medical evidence, where doctors called by each side present their opinions as to the reason for the onset of disability, differing recommendations for treatment, degree of disability, etc.

Conducting the Vocational Evaluation

In conducting vocational evaluation, the following guidelines will be helpful if a court appearance is anticipated or required:

1. Develop a sound evaluation plan and rationale. As simple as this sounds, it is the single most overlooked aspect in a vocational evaluation. The purpose of the vocational evaluation should be to answer the referral questions which have been posed by the referral source. If no referral questions accompany the case, the evaluator should contact the referring party and determine the referral issues. The evaluation plan should reflect the most effective strategy for answering referral questions by collaborating existing information or discovering unknown information about the client. Avoid redundant testing or over testing as it gives the appearance of being undirected.
2. Thoroughly review referral material. Usually medical reports constitute the bulk of referral data. Since the vocational evaluator must consider the client's current and/or anticipated restrictions, request that some type of physical functioning form be filled out by the physician. Check that the medical information is current and ask the referral source to provide the date of the last examination. Nothing is more frustrating than to complete the evaluation report only to find out that a more recent medical examination defines different restrictions than those used in your evaluation.
3. Be thoroughly familiar with evaluation instruments. If norm reference tests are used, be certain the norms are appropriate. Know when to use performance based instruments such as work samples as opposed to paper-pencil instruments. Carefully screen your assessment instruments to assure that test content correlates with evaluation objectives and accepted psychometric standards for validity and reliability. It is not uncommon to be asked questions about validity and reliability coefficients of testing instruments.
4. Become familiar with the labor market. Vocational evaluation results are virtually useless if testing data is not linked realistically with vocational objectives. The Dictionary of Occupational Titles, the Occupational Outlook Handbook and state and local labor market publications provide a starting point for linking evaluation data to vocational objectives. The evaluator can be certain he/she will be asked how recommendations for jobs were made. These publications are the most widely accepted. Most effective, however, is first hand knowledge of the local labor market which can be obtained from job placement experience, visiting local employers or schools, reviewing the want ads and/or visiting the employment office. This area is one of the weakest skill areas in most evaluation programs (Ellis, 1983). Computerized job bank and job match programs make the job immeasurably easier.
5. Write every report as if it were going to court. In litigated cases one can be sure that reports will be scrutinized by one or more attorneys if not a judge, jury and/or arbitrator. Records can also be and often times are subpoenaed, including case notes and raw data. Take care not to write subjective comments, non-case relevant notes or "doodles" on any case records. It can be embarrassing to have one's artwork displayed before judge and jury. Reports themselves should be as objective, accurate and clear as possible. Remember that the reader will probably have the greatest opportunity to clinically observe the client during the evaluation process than other professionals. Therefore, objective and carefully recorded observations about motivation, functional vocational tolerances, learning ability and

work style are unique contributions from the evaluator.

Courtroom Survival Techniques

Very few individuals relish the prospect of taking the witness stand, situated as it is between two opponents, an imposing looking judge and in some cases a jury of thirteen fellow citizens. However, in this increasingly litigious society, vocational evaluators can expect to find themselves in court either as a result of expanded areas of practice or subpoenas. Since this is a relatively new terrain for rehabilitation providers, especially vocational evaluators, the following tips may help in surviving and even enjoying the experience.

1. Never blame attorneys for being attorneys. One must recognize the legal system for what it is--an adversarial one. When a case goes to court it is because there is a dispute. Attorneys are representing each side of the dispute, advocating the greatest degree possible for their client. It is just as much the opposing attorney's responsibility to point out the weakness of the expert's testimony as it is the expert's attorney to draw out the strong points. That is their job, just as it is the expert's job to impart his/her expertise. It is critical to understand this and to not take the courtroom experience personally.
2. You are the expert. The Vocational Expert is being called because he/she possesses a special body of knowledge. It is important that the retaining attorney understand your area of expertise as well as your limitations. For this reason it is highly recommended to meet before the trial to explain the vocational evaluation, conclusions, recommendations, etc. It is also helpful to ask for an overview of the questions that will be asked on direct examination and anticipated questions on cross examination.

When speaking to the judge and/or jury, remember they are probably not familiar with vocational evaluation. It is your responsibility to communicate in understandable terms your procedures and findings and, if necessary, to educate them about your profession. As one arbitrator once related, "You know, we didn't understand x-rays when they first came out either."

3. Be prepared. Preparation begins with the day the case is received, starting with developing the evaluation plan, through testing, report writing and testimony. Although it is not necessary to memorize the report and all test manuals (it is usually permissible to refer to notes) there is no substitute for being thoroughly familiar with case data, general test content/technical information, significant data, and most of all, rationale for findings. Equally important is to be aware of what areas are out of your expertise. It is not uncommon for the opposing attorney to ask leading questions to entice the rehabilitation specialist to answer questions out of their area, mainly along medical lines. Expert witnesses who fall prey to this technique appear less credible. It is preferable to respond that you don't know the answer to a question or that it is not in your areas of expertise.
4. Qualifications are important. Prior to giving testimony the witness will be asked to give qualifications to demonstrate that he/she actually is a vocational expert. Questions about education, special training, relevant employment history, professional affiliations, presentations and publications will be asked. Since the vocational expert is a relatively new witness in the legal system, those vocational evaluators planning to enter this field should maintain certifications such as CVE, CRC, attend seminars and workshops, and maintain relevant

professional affiliations. A curriculum vitae is necessary and may be placed into evidence in view of verbal qualifications. However, it is often preferable, in jury trials especially, for the jury to hear qualifications verbally, as it creates a core credible atmosphere.

5. Appearance makes a difference.

As is true in most situations, first impressions are important in court proceedings. Almost without exception, witnesses should wear a business suit of a conservative nature. The same applies to make-up, hair style and accessories. An air of confidence and poise communicates competence. Pretrial jitters are normal and can be diminished by being well prepared. Good eye contact with the judge, hearing officer or jury is important. Remember, they are the recipient of the evidence. It is the evaluator's responsibility to present the information clearly, competently and sincerely. Following this, the judge or jury weighs the evidence in consideration of all other testimony and they make the decision.

6. Take the time to learn about the legal system.

As evaluators, we are relatively isolated from the proceedings in a court of law, whether it be an arbitrator's room, a judge's chambers or a court room. If evaluators are to appear in these settings it is imperative to understand the basic dynamics such as direct and cross examination, re-direct and re-cross as well as the distinct roles of the witnesses, attorneys, and judge or hearing officer. Although space does not allow an elaboration of these points, a basic law book, or better yet, an inservice from a local trial attorney would be very beneficial in learning about the trial system.

Summary

It is this writer's opinion that the vocational evaluator has a great

deal to contribute as an expert vocational witness. Our unique skills in behavioral observations, vocational diagnostics, and job matching meet the needs that are most frequently required of a vocational witness--determining employability issues. However, up until this point, evaluators have had their heads in the sand regarding the advocacy and marketing of our profession to new referral sources, sources such as the insurance industry and those requiring expert vocational witnesses. Furthermore, vocational evaluators have shown deference at best, if not apathy, towards other professions which have adopted the term "vocational evaluation" to describe services such as a transferability of skills analysis, a rehabilitation interview, or even a simple file review. There is also a trend for professionals such as occupational therapists and, to a more limited degree, rehabilitation counselors, to perform vocational evaluations. In this writer's opinion, such use of evaluation will serve only to dilute the profession. Evaluators need to take a much more aggressive stand in educating, marketing and protecting the domain of our discipline. Otherwise, we run the risk of becoming an endangered species.

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