
The Expanding Role of the Counselor as a Vocational Expert Witness

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The author examines the expanding role of the counselor as an expert witness in various legal proceedings. Specific recommendations are given regarding the content and process of vocational expert testimony as well as practical tips for the novice witness.

Doctor, assume that I find that the claimant is 53 years old with a 7th-grade education and suffers from chronic lower back pain as a result of an injury to the L-5, S-1 area. Further assume that he has nonexertional impairments. To wit, chronic anxiety with depression that results in crying spells, poor eating, fitful sleep, and occasional suicidal ideation. He has not worked since July 17, 1979. Under these conditions, doctor, do you have an opinion as to whether or not he could return to his former job of construction laborer, which you classified as heavy and unskilled?

Doctor, given the fact that Mrs. Jones, the deceased, was 23 years of age at the time of her unfortunate death and in light of her educational and work history, which you have studied, would you tell the court, based on your education, experience, and knowledge of vocational matters, how her career may have progressed, which jobs she may have held, and the approximate current salaries of the jobs?

Doctor, would you tell the jury how, as a result of the alleged malpractice and subsequent brain damage noted in the testimony of Dr. Doe, neurologist, Mr. Smith's ability to earn a living has been affected?

These three questions are typical of those asked a counselor serving as a vocational expert witness in, respectively, a Social Security disability hearing, a court case held before a jury to determine a financial award in a wrongful death case, and a medical negligence jury trial to determine the amount of financial damages due to the plaintiff. As a counselor and vocational expert witness in part-time private practice, I have encountered these and other such questions in a variety of legal proceedings encompassing approximately 500 cases in the past 8 years. As a result of this rather extensive experience with the legal system, I have developed some knowledge and skills that should prove useful to the novice expert witness or to those desiring to enter this exciting forensic field.

An expert witness is a person called on to testify in federal, state, or local court. Expert status is based on many factors, primarily education, experience, research, and writing. Once an attorney or court has deemed you an "expert," the opposing side is asked to stipulate your expert status. Rarely in my experience has there been a question regarding my credentials, and I have seen very few attorneys question the qualifications of any master's level or higher counseling practitioner with training in medical terminology, rehabilitation, and vocational development.

Although expert status does not necessarily require an advanced degree, most experts used by the courts do possess a

graduate degree in their field. These experts are called on because they possess the knowledge needed by the courts or juries to make a fair informed decision. This knowledge is often of a medical, psychological, technical, or specialized nature, and the expert is expected to translate it into terms that judges and juries can understand. For example, although a claimant with moderate pneumoconiosis (black lung) may be able to perform a wide range of vocational activities, that person, in my opinion, would not be able to return to the coal mines or to work in any setting, such as a factory, where there are damp, dusty, or fumes conditions. Here I translate the medical condition and restriction into vocational terms. I then "bridge the gap" and testify what vocational skills and residual functional capacity this person retains that he or she could transfer to other work settings.

Expert witnesses must possess a solid knowledge base in their field of expertise. For the counselor serving as a vocational expert, this translates into a working knowledge of medical and psychiatric conditions and terminology and a comprehensive understanding of the world of work. Sources such as the *Dictionary of Occupational Titles*, the *Occupational Outlook Handbook*, and state-federal manpower surveys are important, but actual job observations and on-site visits often prove invaluable.

Many vocational experts (VEs) begin as I did, under contract to the Bureau of Hearings and Appeals of the Social Security Administration. Some then branch out to work for insurers or private attorneys in worker's compensation, civil, and other cases. Today, some counselors are also testifying in child custody cases and as part of a psychiatric team in various criminal cases. Such psychiatric teams usually include the counselor with doctorates or clinical psychologists.

In addition to a strong knowledge base, the expert witness must have a solid sense of ethics. In every Social Security hearing, the administrative law judge who is conducting the hearing makes a statement to the VE such as, "Although the government is paying you a fee for your appearance, you are and must be an impartial witness." This is vitally important for expert witnesses to remember in all settings. Regardless of the case or whether they are working for the government (court), plaintiff, or defendant, they must be 100% objective and honest. They are there only to state the facts and can do nothing to "help" the client or attorney who has retained them.

In most cases, the first step is to evaluate the evidence in the case, including depositions given by other experts. In Social Security hearings, you are not permitted to interview or evaluate the clients but only to observe them before testifying during the actual hearing. In other situations, however, you typically will interview and evaluate clients after examining the evidence. At this point, the attorney who retained you usually requests a confidential report. If the attorney feels that your opinion does not help the case, he or she is not bound to ask you for any

further services. (Remember that counseling and law are professions with different traditions: Behavioral scientists are concerned with the facts and probabilistic predictions; attorneys are obliged to use whatever evidence will help with their clients' cases.)

At this point, the expert's involvement in the case will end. If the attorney decides to take your deposition (i.e., to make your report or opinion a part of the official record of evidence), you should be prepared for the following: At least two attorneys, one or more for each side, will take your testimony with a court recorder, making a written or audiovisual record. You will need a copy of your vita or a resume that stipulates your credentials. Also, you should bring case notes, written reports, surveys or source books, and anything else that pertains to the case. Take notes and write down any questions or hypothetical questions posed to you. Remain cool and calm, and remember you are the expert. Under cross-examination, answer carefully and with assurance. Do not contradict yourself. An expert who impeaches him or herself is of little use. It is perfectly acceptable to meet with the attorney employing you before the proceedings to go over the questions he or she will ask, including the hypothetical ones. In fact, ascertaining those questions early may be useful in guiding evaluations of the client.

Be prepared to justify your sources as well as any standardized tests you may use. Remember that the opposing attorneys are paid to find weaknesses in your testimony and to represent the interests of their client. Answer only the questions asked; do not volunteer additional information. Be firm in your answers and do not be afraid to say "I don't know" if asked something that you cannot answer. Use extreme care not to try to answer questions outside of your domain of expertise. I have frequently been asked questions such as, "Could such a fall at work cause a leg injury of this type?" My only answer must be, "This is a medical question that I am not qualified to answer."

I have also been asked questions regarding psychological conditions. In such cases, I may answer, "Although I am functioning as a vocational expert here today, I feel qualified based on my education to answer this, should the court so desire." Typically, the judge allows and encourages such an answer. As you gain experience, the temptation will be great to answer questions out of your domain of expertise, especially routine

medical questions. To do so will only cause problems and weaken your testimony.

In court cases and jury trials, as in depositions, you will be examined and cross-examined. The judge may also ask you direct questions or ask for a clarification or elaboration. In jury trials, the expert witness typically prepares charts, graphs, and so forth for the benefit of the jury. In most vocationally related proceedings, the heart of your testimony involves classifying the client's past work in terms of exertional demands, skill level, training time, and working conditions. You next consider the client's residual functioning capacity (i.e., what he or she can or cannot do as a result of a physical or psychological condition). Finally, depending on the type of case, you may testify as to (a) how the client's condition has interfered with his or her ability to earn a living, (b) how this condition may limit future earnings and vocational potential, or (c) what skills acquired by the client in past jobs will transfer to new jobs that he or she may still be expected to perform.

I have found my work as an expert witness to be an exciting and financially rewarding adjunct to my teaching and counseling roles. My fees are in line with those of psychologists in private practice but lower than physicians who testify in these cases. My advice to those who are qualified to be expert witnesses is to be well prepared for each case. Remember that you are representing your profession as well as yourself. Experience, especially under cross-examination, will prove the best teacher. Always remember that no matter how rough the cross-examination becomes, the opposing attorney is not carrying out a personal vendetta but merely doing his or her job.

In summary, work as an expert witness is a legitimate function for counselors; however, it is one for which counselors typically have no preparation. The purpose of this brief article was to sensitize readers to some of the issues they may encounter. Those wishing more detailed discussion of the role of expert witnesses should read one of the recent books available on the subject (e.g., Blau, 1984).

REFERENCE

Blau, T.F. (1984). *The psychologist as expert witness*. New York: Wiley Interscience.

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