

**The Use of Vocational Rehabilitation Experts
in Forensic Personal Injury Cases**

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August 01, 2025

INTRODUCTION

For years, and in every state of the Union, attorneys who represent employers, individuals involved in work-related injuries, motor vehicle accidents, or accidents involving product liability and medical malpractice have propounded the issues relating to the injured individual's employability and wage-earning capacity.

With greater frequency, both plaintiff and defendant attorneys nationwide seek and retain vocational rehabilitation experts (VREs) to assist the parties and fact finder in understanding and deciding whether physically and/or mentally impaired individuals are totally or partially disabled from work; and in some cases, to what extent these impaired individuals can be vocationally rehabilitated. The VRE has become an integral member of the expert witness lineup in the claims adjudication process on these contentious issues. This article will educate the reader on:

- how to select a vocational rehabilitation expert (VRE) in matters concerning employability, wage earning capacity, job search mitigation, and vocational rehabilitation assessments of physically and/or mentally impaired individuals;
- what to expect from the VE in terms of vocational methodology, prior to reporting and expert witness testimony;
- sources for locating a VRE.

SELECTING A VOCATIONAL EXPERT

Individuals who provide vocational expert witness services typically begin their careers as vocational rehabilitation counselors. In the private sector, these individuals are more commonly known as vocational specialists or vocational consultants. After several years of professional development in the vocational consulting field, some vocational professionals rise to the challenging arena of vocational forensics. Among other requirements, minimally, the VE you select should:

- hold a master's degree in rehabilitation counseling, or related field from an accredited academic program;
- maintain certification in at least one national vocational certifying body or vocational board, and continue their education and training in the vocational domain, including forensics;
- complete coursework and/or training in the administration and interpretation of various vocational assessment instruments;
- demonstrate several years and current work experience in vocationally evaluating individuals who had their lives interrupted by accident or illness;
- have a working knowledge of transferable skill analysis methodology;
- incorporate into their daily practice a working knowledge of current labor market trends, and job placement of people with disabilities;
- have knowledge of vocational disability and employability determinations of total disability threshold and partial disability in various venues;

- have previously been qualified as an expert in local, state, district or federal jurisdictions;
- maintain current knowledge of trends within the vocational rehabilitation field;
- be involved in relevant organizations.

It is recommended that counsel ensure that the potential VRE possesses the aforementioned qualifications and counsel should voir dire this area extensively if there is any uncertainty as to the VRE's education, training and background.

WHAT TO EXPECT FROM YOUR VRE

METHODOLOGY:

There is wide disparity among VREs, (and counsel who retain them) regarding the manner and thoroughness expected at each step of the employability evaluation process. What you and your client deserve is consistent methodology and thoroughness in formulating a VRE's ultimate findings and opinion. Below is an abbreviated and suggested protocol for the vocational evaluation process:

Step 1: Records Review. The case begins with a thorough review of the medical evidence and other related records, including but not limited to: job descriptions, resume, hearing and deposition transcripts, investigative reports, opposing expert's report, complaint, and other collateral evidence. It should be expected the VRE will review these documents and have a

preliminary discussion with the attorney following their review. The VRE should prepare a clear summary of these records to accurately reflect the case events from the mechanism of injury, chronological treatment timelines, disability rating(s), and work capacity opinions of the various medical practitioners and examiners. The record as a whole should be considered along with the VRE's observations of the injured party (if interviewed), as described further below.

Step 2: The Vocational Interview. The vocational interview is designed to obtain data from the injured party on the vocational factors affecting employability. The VRE obtains a thorough educational and work history as well as information related to the injured parties' avocational interests and hobbies, family constellation, daily activities, and past and present social activities. Also important are the household economic status and the individual's efforts to return to work, including their job search methodology and if they have applied or participated in vocational rehabilitation efforts. Vitally important are the VRE's well-documented observations of the injured party including, for example, his or her physical appearance, consistency with reported statements, frequency of breaks and demeanor.

However, it is important to note, on many occasions, VREs do not have access to the plaintiff and cannot conduct an in-person vocational examination. Reliance on the records received to formulate an opinion is consistent with standard vocational methodology.

Step 3: Vocational Testing. If applicable, administering thorough vocational testing during the vocational examination is critical to identifying vocational strengths and areas for occupational

growth of the injured party. Vocational testing adds several dimensions and objectivity to the injured party's profile that can be correlated to what is self-reported and what the VRE uncovers during vocational testing. VREs select from a variety of vocational tests in each case, unique to the person's previous education, work experience and native language. Experienced VREs carefully observe and document the testing session regarding the individual's understanding of the testing instruction and requested task, cooperation level, physical tolerance, pain and avoidance behaviors.

Vocational testing typically follows the vocational interview session or is scheduled over several sessions if the person is experiencing severe pain or medication side effects. With many injured persons reporting post-injury memory and concentration difficulties related to pain, fatigue and medication side effects, the VRE can evaluate this area beyond the interview observations with objective standardized cognitive assessments.

In cases involving vocational rehabilitation and re-training assessments, intelligence, vocational aptitude, interest and personality preference testing are added to the vocational testing protocol by VREs; useful in mitigation and "packaging" lump sum settlements for the injured party's attorney and in helping mitigate future lost earning potential.

Step 4: Transferable Skills Analysis. Transferable skills are often loosely defined in courts by VEs. Transferable skills analysis is described as, "...the process by which similar, related, or new jobs are identified for a person following an injury or disability. These jobs are both consistent and

compatible with previous work experience and fall within the range of residual post-injury functioning...” (Weed & Field, 2012). Subjectively analyzing just the individual’s educational and work history is not entirely sufficient. Many people engage in daily activities, hobbies, or community organization involvement with skill-set applications to other work. For instance, computer navigation skills, such internet browsing or keyboarding, may demonstrate the vocational capacity to operate or quickly adapt to learning computer programs through on-the-job training, useful in appointment-scheduler or receptionist positions. Other unrepresented individuals have handled their initial claim communications and correspondence, demonstrating clerical aptitude, transferable to office work settings. In the absence of a face-to-face vocational interview and testing, the VRE should have access to and review records from all collateral sources in their vocational analysis. This information will aid the VRE in identifying skills that can be applied to other work, consistent with their age, education, past work experience, transferable skills and residual functional capacity.

Prior work and other vocationally relevant activities in the person’s life have a broader scope than just the physical requirements of lifting, carrying, climbing and the like. VREs identify probable vocational areas where past work and work-like experiences can be utilized in other work settings. For example, if an individual was employed as a material handler, they may have been involved in their children’s sports as a coach, or on the board of a sports team. Depending on their role and level of involvement, they may have additional skills such as keyboarding, knowledge of MS Office products (i.e. Word, Excel, PowerPoint, etc.), leadership, etc. Such avocational activities

can provide the individual with additional skills that may be transferable to other suitable employment.

However, if the full job duties of the impaired individual are in question, VREs may view the job description to gain a better understanding of the full range of duties, skills and aptitudes not gleaned from an employee. The VRE will also rely on the *Dictionary of Occupational Titles* in addition to their clinical knowledge of how such jobs are performed in the local, regional and national labor economies.

VREs then proceed to analyze and correlate past vocational and extracurricular activities along with the medical and other collateral evidence in addition to the information gleaned from the vocational interview and testing results. The VRE then prepares a preliminary listing of jobs the individual can perform, if any. For example, in the case of the material handler, if the individual sustained a back injury resulting in light duty work restrictions, he could not perform all the essential functions of his past job. The individual has vocational access to lighter stock clerk positions, retail inventory clerk and dispatch work. However, with extensive vocational testing, the VRE could find the person has such serious memory and attention deficits, thereby reducing that person's vocational capacity for work to entry level or part-time, lower paying jobs in the economy, or worse, a total destruction of his or her occupational base.

Step 5: Labor Market Analysis. Labor market analysis is the study and examination of a labor economy in the individual's geographical area, jobs and work situations where someone, similarly

situated, can be employed, in the opinion of the VRE. This process is akin to job-placing a disabled individual, a core method in which experienced VREs are well grounded. In practice, the VRE may contact employers, to inquire about the essential job functions and ask specific questions pertaining to the medical and vocational profile of the individual.

Labor market analysis should incorporate state and federal governmental labor market data to augment findings. Exclusive reliance upon dated vocational treatises or references are trumped by a VRE's years of broad and timely direct experience. The conclusions benefit both sides and address the effort and diligence proffered by either the plaintiff or defendant VRE on the ultimate question of total or partial disability.

SOURCES FOR LOCATING A VRE

In the courtroom, the VRE is often only as effective as the attorney who retains him or her. Preparation with a pre-hearing conference and effective redirection during testimony is essential. It is recommended that attorneys seek a VRE with a strong professional reputation in the vocational rehabilitation field and one who maintains current knowledge of vocational rehabilitation trends and job placement techniques. Experienced VREs demonstrate a working and current knowledge of their practice, by any combination of vocationally rehabilitating others, involving themselves in vocational mentoring relationships with academic institutions, speaking

on relevant vocational seminars, participating in continuing education programs linked to vocational forensics and serving in leadership roles in relevant organizations.

Consider retaining VREs who have experience evaluating cases for both the plaintiff and defendant bar. View with caution VREs possessing unrelated academic credentials, who administer limited or no vocational testing when they interview the party. Choose a VRE with leadership and educational qualities, someone who will educate both you and the fact finder on the rationale of his or her vocational methodology and conclusions. Work with the VRE to properly prepare your case and to tip the scale in favor of your client.

VREs can be identified from a number of sources such as the American Board of Vocational Experts at www.abve.net, SEAK National Directory of Non-Medical Experts at www.seakexperts.com, JurisPro.com and the Forensic section of the International Association of Rehabilitation Professionals at www.rehabpro.org.

Additionally, ask around; word of mouth referral is where the most qualified and successful VREs are identified and located. Your office colleagues, someone they know, and yes, now more commonly, your courtroom opponent, will have first-hand observation of a case where a sharp VRE was utilized.

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