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Documenting a Child's Impaired Earnings: The Role of the Vocational Expert

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Vocational experts play an important role in assisting the attorney with documenting damages in cases where a child has been injured and sustained serious permanent injury. Losses in earning capacity over a lifetime can be substantial and should not be overlooked. The experience and expertise brought to a case by a vocational expert will help to ensure thorough case preparation and may enhance the damage award.

Establishing the amount of economic damages in a personal injury case where the client is an injured child has always been difficult. Since children have no preinjury earnings records, how can one project what a child might have earned if not for the injury, or make a determination as to the impact of a child's injury on his or her future potential capacity?

In the past, attorneys relied on the pain and suffering aspects of the damages to place a dollar value on impaired earning capacity. However, with the recent limits in many states on the amount of pain and suffering monies that a jury can award, this methodology no longer works. Several state courts have acknowledged that a permanently injured child will have a reduction in earning capacity over his or her work life.

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This is where the vocational or employability expert comes in. These people are trained and experienced in working with individuals who have sustained congenital or traumatic disabilities and assist them in locating employment and adjusting to their limitations. As part of their practice, they locate employment opportunities that a disabled person can perform despite his or her limitations. Through the use of a vocational expert, an attorney can assess, within a reasonable degree of certainty, the loss of earnings caused by

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a child's physical, psychological, or cognitive impairment.

The vocational expert is not only knowledgeable in the types of employment opportunities open to the disabled person, but also in the earnings of these jobs. The expert's personal knowledge of the local and national labor markets and his or her familiarization with state and federal government wage information is critical for supplying one of the components in the equation for determining the affect of an injury on a child's potential lifetime earning capacity.

Due to their experience, vocational experts have been utilized by lawyers to bridge the gap between the medical evidence (i.e., the disability) and the economic reports that project the damages into the future. The focus of his or her expertise in the areas of rehabilitation, employability, and earning capacity allows the vocational expert to complement the evidence and testimony of the medical and economic experts, and to educate the jury as to the impact of an impairment on the child's ability to earn money in the labor market after reaching maturity.

Retention of a vocational expert precedes that of an economist; the economist formulates economic projections based on the findings of earning capacity made by the vocational expert.

The vocational rehabilitation expert can provide an assessment of impaired earning capacity in cases of noncatastrophic and catastrophic injuries. In the catastrophic case, the expert may also develop a life care plan to document the child's expenses due to the disability over his or her lifetime.

WHEN A VOCATIONAL EXPERT SHOULD BE CALLED IN

A vocational expert can be useful in a personal injury, product liability, or medical malpractice case involving a child where impaired earning capacity resulting from injury forms a component of the damages.

The initial factor to be considered is the permanency of the child's injury. The impairment should be of such severity that, if an adult had the same limitations, it would affect his or her ability to work. This serves as a predicate to performing a vocational assessment and rendering an employability opinion. If no evidence to this fact is provided, the vocational expert's testimony will be invalid and in most cases disallowed by the court, because no proper foundation has been laid to discuss loss of earning capacity issues. A medical determination of permanency and loss of physical capability must be provided to the vocational expert as a foundation for his or her opinion.

The most common injuries to children evaluated by vocational experts are brachial plexus injuries; hand injuries; amputations; severe fractures; head injuries with resultant cognitive, physical, and/or psychological residuals; visual impairments; and spinal cord injuries. Usually such injuries as strains and sprains, as well as common fractures, do not result in permanent residuals that would affect a child's earning capacity.

The other important factor to consider when deciding when to bring in a vocational expert is the amount of policy coverage in the case. Small cases with a policy limit of under $50,000 are not worth establishing a child's impaired earning capacity.

HOW A VOCATIONAL EXPERT CAN ASSEES THE EARNING CAPACITY OF A CHILD

The vocational expert is able to come to conclusions about the extent of earning capacity impairment resulting from an injury, even where there is no preinjury earnings history, by interpreting several kinds of data.

Assessing Physical Limitations

The residuals of the child's injury must ultimately affect his or her ability to earn money in the economy. In order to assess this impact, the vocational expert utilizes information provided in the U.S. Department of Labor's Dictionary of Occupational Titles (DOT), fourth edition, revised 1991. The DOT contains information regarding over 17,000 different occupations found in the local and national labor market.

In the DOT, the federal government has formulated a five-point physical demand scale which is used to classify the exertional requirements of all the occupations in the labor market. The definitions of the five physical demand requirements are the following:

- *Sedentary work* is defined as exerting up to 10 pounds of force occasionally (up to one-third of the time), and/or a negligible amount of force frequently (one-third to two-thirds of the time), or constantly

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(two-thirds or more of the time) to lift, carry, push, pull or otherwise move objects, including the human body. Sedentary work involves sitting most of the time, but may involve walking or standing for brief periods of time. Jobs are sedentary if walking and standing are required only occasionally (up to one-third of the time) and all other sedentary criteria are met.

- *Light work* is defined as exerting up to 20 pounds of force occasionally (up to one-third of the time), and/or up to 10 pounds of force frequently (one-third to two-thirds of the time), and/or a negligible amount of force constantly (*constantly* meaning an activity or condition exists two-thirds or more of the time) to move objects. Physical demand requirements are in excess of those required for sedentary work. Even though the weight lifted may be only a negligible amount, a job would be rated light work (1) when it requires walking or standing to a significant degree, (2) when it requires sitting most of the time but requires pushing and/or pulling of arm or leg controls, and/or (3) when it requires working at a production rate pace entailing constant pushing and/or pulling of materials, even though the weight of those materials is negligible. (Note: The constant stress and strain of maintaining a production rate pace, especially in an industrial setting, can be and is physically demanding of a worker even though the amount of force is negligible.)
- *Medium work* is defined as exerting 20 to 50 pounds of force occasionally (up to one-third of the time), and/or 10 to 25 pounds of force frequently (one-third to two-thirds of the time), and/or greater than negligible up to 10 pounds of force constantly (two-thirds or more of the time) to move objects. Physical demand requirements are in excess of those required for light work.
- *Heavy work* is defined as exerting 50 to 100 pounds of force occasionally (up to one-third of the time), and/or 25 to 50 pounds of force frequently (one-third to two-thirds of the time), and/or 10 to 20 pounds of force constantly (two-thirds or more of the time) to move objects. Physical demand requirements are in excess of those required for medium work.
- *Very heavy work* is defined as exerting in excess of 100 pounds of force occasionally (up to one-third of the time), and/or in excess of 50 pounds of force frequently (one-third to two-thirds of the time), and/or in excess of 20 pounds of force constantly (two-thirds or more of the time) to move objects. Physical demand requirements are in excess of those required for heavy work.

An understanding of the physical limitations imposed by the child's injury will allow the vocational expert to assess the impact of the impairment by placing the child's residual functional capacity into one or more of these physical demand classifications.

The vocational expert does not determine permanent disability, which is a medical diagnosis, but rather examines how the disability affects the handicapped child's functional capacity as it relates to earning capacity and power to earn money.

Determining Intellectual Ability

In addition to delineating the physical requirements of an occupation, the government has analyzed the general learning ability (intellectual level) required by a job and has classified occupations by the reasoning, mathematical development, and language levels (general education development) required. This information is necessary to comprehend the effect of the cognitive limitations imposed by a head injury or psychological limitations on a child. The intelligence level is described on a five-point scale and ranges from the top 10 percent to the bottom 10 percent of the population.

Physical or mental limitations should be established through the attorney's medical witness, who will discuss the damages aspect of the case. The vocational expert relies upon an examination of the pertinent medical and psychological reports in the case for the medical diagnosis of permanent disability and to set up an appropriate test battery which will not overstep the child's physical capabilities. (Note: The vocational expert does not determine permanent disability, which is a medical diagnosis, but rather examines how the disability affects the handicapped child's functional capacity as it relates to earning capacity and power to earn money.)

The vocational expert is aided by a copy of the child's school records containing not only the

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actual grades, but standardized test scores. A psychological evaluation may also be helpful in determining the intellectual functioning of a child, and a neuropsychological evaluation is a necessity in head injury cases. Grades by themselves should not be used to determine a child's academic capability, as they are a product of a teacher's assessment of the child's capability and the classroom's academic level.

An example of the danger in relying on grades involved a 14-year-old seventh-grade child who sustained a significant head injury in a motor vehicle accident. Academic testing performed during the vocational evaluation indicated that the child was functioning at three to four grade levels below his actual seventh-grade placement on reading, spelling, and arithmetic. The neuropsychological testing indicated a diminution in intellectual capacity, impaired recent and remote memory, and impaired concentrational ability. A review of the school records indicated that he had achieved all As and Bs on his recent report cards. By contacting the school, I discovered that he was in the "lowest" of the five seventh-grade classrooms. His classroom contained nonacademic students. In a room of "slow learners," he was the "star" of the classroom.

It is most important that the test results be compared to a norm group of children the same age as the client.

Therefore, in determining intellectual ability, it is important to compare the child to children of the same age and not to emphasize school grades. The vocational expert usually administers an appropriately constructed test battery to assess the child's functional vocational capacity, as well as to establish academic capability. This evaluation consists of tasks to measure coordination, dexterity, and physical capacity along with measures of academic achievement. It is most important that the test results be compared to a norm group of children the same age as the client. It is inappropriate to administer evaluation tasks to a child where the only norm group available is one consisting of adults, as there is no meaningful way to interpret the data obtained.

Finally, the vocational expert consults his or her resources on job opportunities and wage data. From an evaluation of the exertional levels and earnings of the occupations the child could perform (or could have performed) *prior* to the accident, given the child's intellectual functioning, and a comparison of this to the occupations the child could perform *after* the accident, given his or her limitations, the vocational expert is able to attach a dollar value to these jobs.

HOW A VOCATIONAL EVALUATION IS CONDUCTED

Document Review and Vocational Interview

The actual evaluation is a four-part procedure, with the initial part of the evaluation consisting of a document review. This is followed by a standard vocational interview conducted with the client to obtain information regarding his or her background, education, and medical condition. If the child is young, a parent is asked to be present during the interview to act as a historian. However, some of the pertinent questions should be asked of the child to assess comprehension, memory, and fund of knowledge as it relates to the child's background and the effect of the condition on his or her day-to-day activities. Observations made during this interview are an important part of the assessment. The child's demeanor and physical appearance are noted.

A history is taken from the parents and siblings to obtain a baseline regarding occupational levels, educational levels, and earnings. Psychological evaluation can be performed on the parents of very young children to establish the child's expected intellectual capacity.

Testing

Based on the record review and the information obtained in the vocational interview, a battery of tests which measure vocational capacity are administered to the child. The purpose of the testing is to assess the child's physical, mental, and academic capability. The test battery consists of tasks that measure abilities and aptitudes which are important in academic performance as well as in the labor market. The older the child is, the greater the variety of tasks available to assess his or her capabilities.

Standardized tests are administered to observe the impact of the child's handicap on his or her potential ability to perform sedentary, light, medium, heavy, and very heavy types of work activities as they exist in the labor market and are defined in

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the DOT. During the evaluation, emphasis is placed on observing such characteristics as the quality and quantity of the performance, tolerance to perform the tasks, ability and reaction to changing tasks, ability to sustain the time pressure inherent in the tasks, ability to comprehend oral and written directions, physical stamina, ability to concentrate, and ability to perform at an even, sustained pace.

Various safeguards are used during the evaluation to assure that the child is performing at the highest level of capability, given the child's educational level and handicap.

A sample test battery for a 15-year-old in high school with a left brachial plexus injury illustrates the contents of the vocational evaluation test battery: the Wide Range Achievement Test measures reading, spelling, and arithmetic level; Purdue Pegboard measures gross movements of the arms, hands, and fingers, as well as fine finger dexterity; the Hand Tool Test measures large tool use as well as gross arm and hand dexterity and coordination; the Crawford Small Parts Test measures small tool usage; the Vocational Aptitude Batteries for Manual Dexterity, Finger Dexterity, and Motor Coordination measure hand and finger usage; the Vocational Aptitude Battery for Form Perception measures ability to perform inspection and mechanical tasks, as well as work requiring attention to fine details; and the Minnesota Clerical Test measures clerical ability.

Each test battery is individually designed based on the child's education and handicap. The evaluation is conducted on a one-to-one basis, with the vocational expert observing the child's performance throughout the evaluation. The information analyzed consists of not only the actual test scores, but also observations regarding the child's behavior while performing the evaluation. The child's scores are compared to norm groups composed of children the same age or grade level.

Various safeguards are used during the evaluation to assure that the child is performing at the highest level of capability, given the child's educational level and handicap. To prevent any "malingering" or "holding back" during the evaluation, several tests are administered which measure the same vocational construct. In addition, constant observation is made during the evaluation. A review of all test battery results is made to assure that they are internally consistent and reliable.

Over the past nine years, I have re-tested about 75 clients within periods of from six months to seven years after the initial evaluation. On administering the exact same test battery to these clients whose condition had not changed, the results were very similar, indicating a high reliability of the vocational evaluation process.

After the evaluation, an interview is conducted with the parents in order to obtain information regarding their backgrounds. This is important, because many children, as they get older, aspire to obtain the level of their parents' educational and work levels. I also obtain information regarding the parents' earnings, what limitations the parents perceive the child to have because of the handicap, as well as anecdotal information. This interview is conducted after the test battery has been administered to correlate observed behaviors in the testing situation with those reported in the child's day-to-day activities.

Formulating the Opinion

The fourth step of the vocational evaluation process is to review and analyze all of the information obtained and render an opinion as to earning capacity. Consideration is given to the test results, school records, observations, and interview results. The vocational expert's experience in job placement and working with similarly injured persons affects his or her ability to formulate an opinion regarding earning capacity within a reasonable degree of probability. All of these factors affect the ultimate opinion.

METHODS FOR EVALUATING IMPAIRED CHILDREN'S EARNING CAPACITY

Vocational experts can perform the analysis of earning capacity loss using several methods, depending on the parameters of the case.

Computer-Aided Assessments

Many use sophisticated computer programs containing U.S. government earnings data to assist in making these determinations. These commercially available programs contain information on all occupations (17,000-plus) listed in the DOT correlated with national wage data from the yearly

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federal government survey conducted by the 503 census categories. Thus, each job is placed in a census category and matched with wage information. This is national, not local, wage data, but these programs also provide local census information regarding employment in each occupational category. Due to our mobile society, however, it is important to use national wage information in assessing the earning capacity of children.

The vocational expert inputs preinjury and postinjury physical and intellectual parameters into the computer, which then calculates the child's preinjury and postinjury earning capacities. The difference between the two figures is the child's loss of earning capacity due to the injury.

Due to our mobile society, it is important to use national wage information in assessing the earning capacity of children.

Two of the most widely used computer programs are QUEST, published by E&J Publications, and the VALE program, published by Vocational Economics. For further reading, see A. Gamboa, "What the Infant or Child Could Have Been—Establishing Proof of Damages," TRIAL, September 1986, pages 76–80. A note of caution about using computer programs: the vocational expert should be aware of the inherent limitations of a program as well as the widely known computer axiom, "Garbage in equals garbage out."

Computer programs allow vocational experts to obtain a child's reduction in "access to the labor market," which is a useful noneconomic statistic. Along with the difference in earnings, these programs provide the number of local or national jobs the child could potentially perform prior to his or her injury and the number of jobs available given the child's postinjury condition. This demonstrates that not only will the child's earnings be reduced, but so will the number of jobs available. Consequently, it will be more difficult for the child to obtain and maintain employment, given the limitations of the injury.

Pre- and Postinjury Potential Comparison

The second method used in assessing loss of earning capacity is to look at a list of occupations in the local or national economy that the child could potentially perform prior to the accident and the jobs the child can perform given his or her postaccident limitations. For example, a child who sustained an above-knee amputation would be limited to performing sedentary work and be precluded from performing the following types of occupations: carpenter, painter, ironworker, construction laborer, tractor-trailer driver, and heavy truck driver. He could perform such sedentary occupations as assembler, electrical wirer, general clerk, packer, collator, and guard. The mean difference in the earnings of these occupations would represent the loss of earning capacity of the child due to his or her limitations.

In a case of a 10-year-old child with a moderate head injury, I assessed his loss of earning capacity using a computerized program which used national wage information (as mentioned earlier, the nature of our mobile society must take into consideration that a child may well wind up working anywhere in the country). The program's analysis indicated a 40 percent loss of earning capacity due to his limitations. At trial an objection was made by the defense attorney regarding the use of national wage information to assess earning capacity. In response to the judge's ruling, I performed an analysis using all 100 occupations in the state for which wage information was provided by the state department of labor. The reduction of earning capacity was 50 percent using the second methodology, because the state had higher wages than the national average and a much smaller group of occupations were analyzed in the second calculation.

Census Bureau Studies

The third method used in determining loss of earning capacity is based on several studies conducted by the U.S. Census Bureau, which has researched the effect of disability on earnings. The bureau has developed a four-point scale of disability:

- *severely disabled* is defined as "unable to work altogether or unable to work regularly";
- *occupationally disabled* is defined as "able to work regularly but not at the same work as before the onset of disability or unable to work full time";
- *secondary work limitation* is defined as "able to work full time, regularly, and at the same kind of work but with limitation in the kind or amount of work [that can be performed]; persons with reported limitations in keeping house but not in income-producing work are included in this group"; and

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- *nondisabled* is defined as "persons with none of the above limitations."

1978 Survey of Disability and Work, U.S. Department of Health and Human Services, Social Security Administration. Each disability category can be translated into a percentage loss of earning capacity. The initial Census Bureau survey has been successfully replicated in the 1980s and has been correlated with research conducted for the International Center for the Disabled (*The ICD Survey of Disabled Americans: Bringing Disabled Americans into the Mainstream*, conducted by Louis Harris and Associates, Inc., March 1986). The information provided by this research is especially useful in cases of physical and sensory (visual and hearing) impairments. Due to the multiple replication of the parameters of this study and the fact that it was conducted by the federal government, it provides vocational experts with the only comprehensive study regarding the impact of disability on earning capacity.

Salary Comparison Between Educational Levels

The fourth and final method used is in child cases resulting in a diminution of intellectual capacity. Here the vocational expert can utilize U.S. government wage information based on educational attainment. This information is published annually in *Money Income of Households, Families, and Persons in the United States*, published by the Bureau of the Census. The vocational expert can assess the child's preinjury educational attainment based on the child's intellectual level or the parents' achieved academic level. The postinjury educational level is determined by the results of the vocational evaluation. The difference in salaries for the pre- and postinjury educational levels provides the loss in earning capacity.

For example, a male child sustains a head injury that results in a 20-point loss in IQ score, as well as a short-term memory impairment. Prior to the injury, the child had the capability to complete a four-year college degree program. After the accident, at best he could finish high school. The impaired earning capacity would be the difference between the average annual salary for a male four-year college graduate ($41,892) and the average annual salary for a male high school graduate ($26,609), or $15,283 per annum.

It is important to understand that this information relates to the person's ability to earn money *throughout* his or her lifetime. The percentage loss of earning capacity takes into consideration that the child, due to the disability, will be unable to reach his or her full earning capacity potential, have more difficulty obtaining and maintaining employment, have greater periods of unemployability between jobs, and may have his or her work life reduced due to the residuals of the impairment.

An opinion regarding earning capacity serves as a *foundation* for an economist to project the diminution of earnings over the child's work life.

QUALIFICATIONS OF A VOCATIONAL EXPERT

A vocational expert is no different than any other expert retained in a case. He or she should have at least a master's degree in rehabilitation, which is the professional degree in the field. National certification as a rehabilitation counselor is a minimal credential, as many states do not have state licensing.

Desirable Certifications

Certified rehabilitation counselors have been accredited by the National Commission on Rehabilitation Certification. The requirements of certification consist of completing a master's degree in rehabilitation counseling from an accredited university, one year of supervised experience by a certified counselor, professional references, and successful completion of a written examination. Most rehabilitation counselors are certified.

A second desirable certification for a vocational expert is approval by the Board of Vocational Experts. This organization was formed in the mid-1980s and consists of rehabilitation professionals involved in forensic rehabilitation. There are less than 500 vocational experts in the country approved by the board. Due to their interest in forensic rehabilitation, these people are probably the most knowledgeable in assessing impaired earning capacity.

Professional Background

The National Association of Rehabilitation Professionals in the Private Sector consists of individuals who are active in performing private rehabilitation services, usually for insurance companies. The organization has a division for

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professionals interested in forensic rehabilitation issues. Because of their background, vocational experts who are members of this group may be defense oriented.

The vocational expert must be a practitioner and have actual "hands-on" experience in working with physically disabled people. He or she should have experience in placing a wide range of disabled people in jobs, and should be knowledgeable about the local and national job market and salaries for particular occupations in the region. Certainly, one should avoid an individual who has no practical rehabilitation experience, as theory and reality in the placement of the disabled are two different concepts.

In order to obtain an objective evaluation of a child's loss of earning capacity, one should use an expert who works for both sides.

The Office of Hearings and Appeals, Social Security Disability, contracts with many local vocational experts to testify in disability hearings. This serves as an important training ground for potential vocational experts in personal injury cases. These experts have years of experience in participating in court-related proceedings where the only issue presented to them is one of employability of the disabled claimant. They have undergone extensive cross-examination by attorneys regarding their opinions. These individuals should be able to make the transition to a more formal forensic area and are good experts to use in personal injury cases.

Is the Expert Right for *Your* Case?

In selecting a vocational expert, one should consider how the individual will relate to the client. Selection of the expert reflects on the attorney's competence in the mind of the client. It is important to consider how the expert will interact with the client, establish rapport, and respect the client and his or her limitations, as well as objectively perform the role as an expert witness.

Another factor in selecting an expert is whether he or she has experience in cases similar to the one at hand. Many rehabilitation professionals specialize in working with psychological impairments or mental retardation. If the child has a spinal cord injury, a spinal cord injury expert should not be retained, but rather one with experience working with the severely physically disabled. A recent case of a child with severe burns secondary to electrocution was referred to me because I had several similar cases. Retaining an expert with experience in similar cases will save an attorney time as well as money. He or she will not be paying for the expert to learn on the case. In the mentioned case, the opposing expert charged the attorney for 250 hours of work at $250 per hour.

Another area to pay close attention to is the forensic orientation of the expert. Does he or she perform mainly plaintiff or defense work? One vocational expert "specializes" in only defense cases. If an expert's work is dramatically skewed toward one group or the other, his or her assessment of a client's earning capacity may not be objective. A recent case of a young child who sustained an above-knee amputation was evaluated by a defense-oriented vocational expert who concluded that the child would sustain "no loss of earning capacity." Unfortunately, he performed this evaluation for the plaintiff's attorney. In order to obtain an objective evaluation of a child's loss of earning capacity, one should use an expert who works for both sides.

Advantages of the Experienced Expert

One of the major dilemmas facing the attorney in selecting an expert is whether to use a "virgin" witness or an experienced one. It is my opinion, having performed expert testimony work since 1977 as part of my rehabilitation practice, that the attorney should avoid the inexperienced vocational witness as it will only cost time and money, and may adversely affect the case as well. An experienced vocational expert witness will probably have evaluated cases similar to yours and will know how to handle your case in a cost-effective manner, providing you with the documentation you require in a form useful in your court case. The vocational expert will be able to guide you through the process of direct examination if your case goes to court. In addition, the experienced vocational expert will know how to communicate and educate the jury as to the results of the vocational evaluation, as well as to the impaired earning capacity opinions and the basis for such opinions.

In two recent cases in which I participated, the judges made rulings from the bench that caused a change in the parameters underlying my initial opinions as to the earning capacity of the client. This resulted in a reformulation of my opinions to correspond to the judges' rulings while I sat on the stand. Only an experienced witness can be aware

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of the interactions in court proceedings and be flexible to respond to any changes.

FINDING VOCATIONAL REHABILITATION EXPERTS

Vocational rehabilitation is a small area of expertise, with about 15,000 practitioners in the United States. Many rehabilitation counselors are employed by the state rehabilitation agency and, thus, are discouraged from performing work in the forensic area. However, there are usually at least two or three vocational experts in a particular geographic area who are capable of performing forensic vocational evaluations. Local legal publications, such as the *New Jersey Law Journal* and *Massachusetts Lawyers Weekly*, provide listings of various types of experts in their expert services sections, as does *TRIAL* magazine. Several directories are published that list vocational experts; two of them are the *Forensic Services Directory, Lawyers Desk Reference*, H. Philo, Lawyers Cooperative Publishing Company, 1987, and *The National Directory of Expert Consultants and Advisors*, Experts-at-Law, 1989.

One of the best ways to locate a vocational expert is to ask a colleague who has a personal injury practice.

An attorney can use a forensic expert service, such as Technical Advisory Services for Attorneys (TASA), a national organization based in Blue Bell, Pennsylvania, or he or she can contact the local university that offers a rehabilitation counseling program and ask one of the professors. However, one of the best ways to locate a vocational expert is to ask a colleague who has a personal injury practice.

STEP-BY-STEP GUIDELINES FOR ATTORNEYS

In cases where policy coverage exceeds $50,000, once it has been established that a child's injury is permanent and serious enough to reduce the child's physical or mental capacity as well as diminish his or her power to earn, it is time to retain a vocational expert to perform an evaluation as to loss of earning capacity.

The vocational expert will request that the pertinent case documents be forwarded prior to the evaluation. Among the requested documents are all pertinent medical reports and hospital records (usually only discharge summaries are needed), depositions that relate to the client's medical condition or earning capacity, entire school records, and psychological test results. The vocational expert will thoroughly review these records to understand the background of the child and his or her treatment. It is extremely important to note that vocational experts are not physicians and *cannot* interpret medical records and, thus, cannot render an opinion *based* on their own interpretation of the medical records. This being the case, residual functional capacity evaluation forms may be sent to the attorney to be filled out by the client's physician and/or psychiatrist. These quantify the client's physical or mental condition in a manner which can be used by the vocational expert.

Once retained, the vocational expert will schedule an appointment to perform an evaluation. Many vocational experts can perform the evaluation at the attorney's office, which will eliminate the need for the injured client to travel great

Child's Impaired Earnings Checklist

- ___ Does the child have a *permanent* injury?
- ___ Is the injury *serious*? (If an adult had this injury, would it affect his ability to work?)
- ___ Have physician/psychiatrist complete residual functional capacity form to quantify physical/mental condition
- ___ Obtain all records
  - ___ hospitals
  - ___ doctors
  - ___ schools
  - ___ depositions
- ___ Discuss case with a vocational expert
- ___ Retain vocational expert
- ___ Schedule appointment for client with vocational expert
- ___ Forward all records to vocational expert
- ___ Receive vocational evaluation
- ___ Retain economist
- ___ Receive economist's report
- Prepare experts for deposition or trial testimony

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distances. It is customary to request that the attorney not be present during the evaluation. The attorney who chooses to be present may not interfere with the evaluation by influencing what the client says.

The evaluation lasts for several hours and is followed up by a detailed written report containing the vocational expert's conclusions as to earning capacity. At this point, it is necessary to retain the services of an economist, who can make determinations as to the projected total loss of earning capacity based upon the conclusions of the vocational expert.

As soon as a trial date in the case has been set and scheduling of the deposition or testimony of all expert witnesses has been arranged, the attorney should consult with the vocational expert as to the best way to present the expert's conclusions to the court. The experienced vocational expert will be able, in layman's terms, to educate the jury as to the vocational evaluation results and amount of diminution in earning capacity.