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ABVE SEATTLE CONFERENCE IS A “WINNER” ON ALL FRONTS

The weather was terrific and the environment was beautiful. The hotel presented a warm and accepting working space and the speakers were right on target..... In other words ABVE’s 2007 Spring Conference in Seattle, Washington, was one of the best yet in terms of attendance, content and financial gains to the ABVE bottom-line.

Session presentations ranged far and wide with subjects that were “hot topics” in our profession. The session titled *How To Deal With Persons With HIV, Undocumented Aliens and Other Non-typical Worker Profiles* (presented by Attorney Sok-Khieng Lim, a member of the American Immigration Lawyers Association, and Betty Kohlenberg, an ABVE Diplomate from the San Francisco region) provided case examples and cited legal case listings that can serve as references for VE’s as they wrestle with the tough decisions that must go into the provision of return to work plans. *Advanced Testimony Skills*, as presented by Attorney Paul Luvera, and *A View From The Bench*, as presented by Judge Michael Trickey (Presiding Judge for the Washington Superior Courts), gave conference attendees and opportunity to hear about the pain and the ecstasy of being an expert witness for the legal community. We heard in *Impressions not Logic* that the most persuasive presentation with the more credible evidence to back it up wins the argument. These two seasoned litigators, in two separate session presentations, provided the listeners with some basic rules, learned and practiced, if growing one’s practice is the intent! We also heard that demeanor and conduct are more than qualifications placed on one’s CV or resume! Confidence, courtesy, cross-examination reaction, knowledge of the facts and names in the case, and not showing a bias or advocacy, are things that jurors pay attention to in evaluating the credibility of an expert witness.

The panel for the session *Report Writing For Different Venues* presented the attendees with more than what to put in and what to leave out of reports. One of the *Blues Brothers* high-jacked Carl Gann and provided a toe-tapping ditty about the “Wrongful Termination Blues.” When “Jake” was finished and sat back down, Marlis Bruns was asked if she was aware that she would be sitting between *Carl Rowe* and *Jake Blues* for the presentation. Following the formal part of this presentation, those in attendance were able to break into small, interactive groups for discussions with the panel of experts (Carl Gann, Marlis Bruns and Larry Sinsabaugh). The groups were able to discuss, first-hand, writing reports in either the marital dispute, personal injury or employment law venue. The experts also provided practice tips.

Other sessions covered topics related to life care plan development guidelines and resources, neuropsychological analysis for employment options, railroad litigation skills for VE’s, and ethical tools – a compare and contrasting look at the new ABVE and the existing CRC codes of ethics. Other topics discussed were specific practice tips for working with litigation attorneys, as presented by a successful plaintiff attorney, and the interface between the case assigned Economist and the Vocational Expert, with emphasis on the important and unique aspects and perceptions of the various case-related facts.

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G. Michael Graham, EdD
San Ramon, CA
<mailto:michael@grahamconsulting.org>
<mailto:pres@abve.net>

President-Elect (2007 - 2009)

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Richmond, VA
<mailto:larry@sinsabaughconsulting.com>
<mailto:preselect@abve.net>

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<mailto:martiev@auburn.edu>

THE VOCATIONAL EXPERT

Editor

Betty Lindsey Hale, MRC
<mailto:blhale@insightbb.com>

STAFF

Executive Director

Glenn Zimmermann
<mailto:glenn@btfenterprises.com>

Account Team

Alan Gale
<mailto:Alan@btfenterprises.com>

Kristie Black

<mailto:Kristie@btfenterprises.com>

National Office

3540 Soquel Avenue, Suite A
Santa Cruz, CA 95062
Phone: (831) 464-4890 FAX: (831) 576-1417
<http://www.abve.net>



President's Message By G. Michael Graham, ABVE President, 2007-2009

Strategic Planning – A Tool To “Get'er Done”!

The members of your new Board of Directors spent several hours on Thursday, March 29, 2007 while in Seattle for the Spring 2007 Conference, wrestling with the results of the recent survey completed by ABVE members.

The survey had a response rate of 127 members out of 396 total members (a 32% response rate), not too bad for an open survey. Your Board of Directors took to the results in a big way. The Board spent considerable time analyzing the outcomes of the multiple section survey and then used these outcomes (representing what the members of ABVE felt were important issues) to construct the Strategic Plan for the next two years. Dr. Graham, incoming President, led the Board in developing the subject matter areas, time lines and “accountable” leader for each section. Along with the results of the recent survey, the Board used the three segments of ABVE’s Mission Statement, as stated in the current By-Laws, (see the ABVE website to review the By-Laws and policies manuals) which are: (a) Credentialing, (b) Education and Training and (c) Research & Cooperative Relationships. The four components of the Strategic Plan for operating years 2007-2009 are:

1. ABVE IDENTIFICATION

By **June 30, 2007**, the Board will have adopted a unified statement as to what ABVE represents and what ABVE stands for. This “unity statement” will be concise, descriptive and will encompass the ABVE forensic Mission Statement components. This statement will be used in a **survey to the ABVE membership to assess agreement**. If agreement is achieved, this statement will then be incorporated into all ABVE marketing pieces. (Larry Sinsabaugh & John Williams)

2. MARKETING

(a) By **December 30, 2007**, ABVE’s Marketing Committee, utilizing the marketing pieces developed in number 1 above, will have made presentations to The American Bar Association, five State Bar Associations, and 15 County Bar Associations or segments thereof. (Michael Graham)

(b) By **July 1, 2007**, this Committee will have created and administered a survey to former members of ABVE. The basic tenant of this survey is to determine why former ABVE members chose not to renew ABVE membership (John Williams)

(c) By **August 30, 2007**, this Committee will have created and administered a survey to ABVE potential members to determine what factors have deterred vocational specialists from not becoming ABVE members (John Williams)

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From The Editor's Laptop

By Betty Lindsey Hale, Newsletter Editor

Having recently assumed the role of Ethics Committee Chairperson after Rosalyn Pierce completed her term with the Board, I have considered several areas where we may find ourselves in a dilemma as to our professional responsibilities within the context of the ABVE Code of Ethics. At this time I'd like to draw your attention to Canon 6 of our Code regarding Assessment. The ABVE Code states that:

Vocational Experts shall ensure that the selection, administration and interpretation of assessment measures is done in accordance with the standardization attributed to each test instrument.

The Code further specifies the following Rules of Professional Conduct with regard to Assessment:

R6.2 Vocational Experts will consider carefully the specific validity, reliability, and appropriateness of tests, when selecting them for use in a given situation or with a particular individual. Vocational Experts will be cognizant, when evaluating and interpreting the test results or test performance of people with disabilities, minority groups, or other persons who are not represented in the standardized norm group of the instrument being used.

R6.3 Vocational Experts will ensure that the administration of tests is performed under the same conditions that were established in the standardization process. When tests are not administered under standardization process, as may be necessary to accommodate modifications for individuals with disabilities or when unusual behavior or irregularities occur during the testing session, these conditions must be noted and discussed at the time of interpretation.

R6.7 When a Vocational Expert utilizes the services of an outside evaluation center, it is the responsibility of the vocational expert to determine the functional areas of the evaluatee to be assessed and to determine, with the guidance of the evaluation center staff, the specific standardized assessment instruments to be utilized. It is further the obligation of the Vocational Expert to fully understand the outcome statements and test result interpretations of the evaluation center's staff regarding his/her evaluatee.

Therefore, it is incumbent upon us as Vocational Experts to adhere to these guidelines for professional conduct as mandated by the ABVE Code of Ethics and not blindly accept information provided to us without considering the source and credibility of that information. We are routinely retained to render opinions regarding individuals' employability and earning capacity in a variety of contexts, both forensic and non-forensic, and utilize assessment instruments to provide information upon which to base those opinions. However, as professionals, our opinions must be based upon reliable and defensible data and it is our responsibility to investigate whether those assessment tools fit that description. Given that condition and the body of research questioning the validity, reliability, and efficacy of functional capacity evaluations (FCE), is there sufficient evidence to support their use in their current state as a foundation upon which to base one's opinions regarding sustained functional capacity and, therefore, employability and labor market access? This subject has been a topic of conversation for many years, but at this time I propose that the use of such information may not only be an issue of quality of information and the conclusions resulting from its use. It is potentially an ethical issue not only with regard to ABVE's Code of Ethics, but Certified Rehabilitation Counselor (CRC) and individual state licensure codes as well. As Vocational Experts, we must carefully consider all information provided to us and be able to defend our rationale and methodology accordingly.

The American Board of Vocational Experts never has and currently does not endorse the use of any specific tests, test batteries, or commercial products.

Strategic Planning Continued...

- (d) By **September 30, 2007**, this Committee will develop the mechanism to report the findings of these surveys to the members of ABVE and the Board of Directors for recommended action items. (John Williams)
- (e) By **August 30, 2007**, ABVE members will have responded to a questionnaire requesting organizations, leadership names, addresses, telephone numbers and emails of persons who should be approached for marketing.

3. COMMUNICATIONS- (Larry Sinsabaugh)

- (a) By **April 15, 2007**, Dr. Graham will designate the Board member rotation that will ensure that a Board member will have authored a newsletter article of their choice and have submitted the article to the Newsletter Editor in a timely manner. (Michael Graham)
- (b) By **June 30, 2007**, a suitable marketing brochure will have been created and duplicated in sufficient quantities to meet initial marketing purposes as per the Strategic Plan activities. (Larry Sinsabaugh)
- (c) By **September 30, 2007**, utilizing the results of the ABVE Membership questionnaire found under MARKETING, the Board of Directors will be presented with a list of the relevant and appropriate organizations and leaders for marketing and strategic alliance development. This list will include the name of the organization, the leadership of the organization with address, telephone and email address if available, and the geographic location of the organization.
- (d) By **September 30, 2007**, this Committee will have created, established and marketed a web-based portal that will allow ABVE members easy access to the Communications Chair and quick response regarding ethics advice, and questions for the consideration of the Board or its Committees.

4. PROFESSIONAL DEVELOPMENT

- (a) By **December 30, 2007**, 3 years of ABVE Journal articles (at least 2 per year) will have been researched, placed on the ABVE Website and appropriate questions for CEU allocation will have been developed and posted on the ABVE eStore for ABVE Membership utilization. (Larry Sinsabaugh)
- (b) By **December 31, 2007**, a mentoring process will be in place and operational for new associate members consisting of matching new associate members with an appropriate regional Diplomate mentor for the purpose of training the associate in the knowledge required to pass the National ABVE Certification Examination. (Michael Graham and Estelle Hutchinson)
- (c) By **June 15, 2008**, four modules of On-Line Training in forensic relevant subject matter will be operational and ready for ABVE members to purchase through the ABVE website eStore and to obtain relevant forensic CEU's. (Michael Graham and Estelle Hutchinson)

In conclusion, the ABVE Board of Directors is committed to the creation, follow through and success of this adopted Strategic Planning Document.

However, in order to make certain that the elements of the Strategic Plan are relevant to the ABVE Membership, the Role and Function of forensic vocational expert witnesses and to provide guidance to your Board of Directors over the next two years, the Committee Chairs really DO need your help. Please review the list of COMMITTEES above and email the listed Chair or responsible party to volunteer your unique perspective and ideas..... **WE NEED YOU** in this important task to keep ABVE Relevant, On Target, Task-Oriented and Responsive to the Forensic field..... Your Board is committed to making the next two years a time of merging all ABVE members into a united group and the American Board of Vocational Experts the one forensic organization that has a meaningful and cutting edge national certification examination, a well-informed membership and a ready supply of knowledgeable and skillful vocational expert witnesses who keep each other at the top of expert witness referrals.....without your active involvement, this goal can not be achieved..... Reach Out Today and make your voice count in YOUR organization, **The American Board of Vocational Experts**.

ABVE Establishes New Board Members and Committee Chairs

Members of The American Board of Vocational Experts voted on the replacements for Board Members who were rotating off the Board. Board members are voted on by the active membership and the winners of that election take their place on the Board of Directors during the Spring Business Meeting. Rotating off the Board at the end of their terms are *Claude Peacock* who also served as the Membership Chairperson, *Harold Kulman*, Past-President and Nominating Chairperson, and *Rosabyn Pierce*, Member-at-Large and Ethics Chairperson

The results of the fall election process by the membership brought the following new Board members from the membership ranks: *Estelle Hutchinson*, Member-at-Large, and *Richard Baine*, Member-at-Large; and *Gray Broughton*, who will complete the term of the office of Treasurer, which was left vacant by a earlier resignation.

Michael Graham, the Seattle Conference Chairperson, was elevated from President-elect to the office of President, and Board member, Larry Sinsabaugh was elected by the Board to the office of President-elect and conference Chairperson. Don Jennings, the organization's President over the past two years, will occupy the Chair of the Past President.

The Board positions, with the exception of the officers, are three year terms. Incoming President, Michael Graham, announced the following active Chairpersons for the next two-years:

- ◆ **Publications** – Larry Sinsabaugh
- ◆ **Certification Test** – John Williams
- ◆ **Continuing Education (CEU's)**- Estelle Hutchinson
- ◆ **Credential Process** – Richard Baine
- ◆ **Ethics** – Betty Lindsey Hale
- ◆ **Nominations** – Don Jennings

Other Committees associated with the Strategic Planning Outcomes include:

- ◆ **Legal Community Education** – Michael Graham
(ABA, State & Local Bar Associations)
- ◆ **Survey Development** – John Williams
- ◆ **Brochure Development** – Larry Sinsabaugh
- ◆ **Developing Lists Of Political Leaders Who Can Influence
ABVE Mission Statement Outcomes** - Larry Sinsabaugh
- ◆ **Mentor Project For Associate Members** - Michael Graham
- ◆ **On-Line Educational/Training
Programs For CEU's** –Michael Graham & Estelle Hutchingson

Members are urged to **sign up** with the listed committee chairpersons to help *develop the guidelines, content and activities* of the above committees. This is your chance to “**step-up**” and help steer your organization to the premier and top spot for forensic “**Go-To**” groups; one that is on the referral-mind of attorneys across the county..... let the committee chairs hear from you!! You can communicate with these persons by accessing the member directory on-line at the ABVE Website by typing in www.abve.net and go to the membership directory and look up the name of the Chairperson wanted.

Welcome to the Following New Members

The American Board of Vocational Experts would like congratulate the following new members. Continue to watch us grow!

Desiree Marziali – Fellow
Eileen Linicome – Diplomate
Alberto Felix – Fellow
Lynne Tracy –upgraded status from Fellow to Diplomate
Victoria Rayner – Associate
Jack Fitzgerald – Associate
Enrique Vega – Associate
Donald Kegler – Associate
Gregory Gusha – Associate
W. Brad Hale – Associate
Brian Hawrelak – Associate
Gabrielle David – Associate
Walt Lierman – Associate
Joshua Shannon – Associate

ABVE members who refer a qualified candidate who becomes a certified member will receive a \$100 “finder’s fee credit” to be applied towards their next conference registration. So get out there and spread the word!!

Advertising In The Newsletter

The ABVE Newsletter now accepts selected advertisements. Although ABVE does not endorse any product or service from our advertisers, advertising sales benefit our entire membership. If you work with a professional or organization who’s products or services would benefit others in our membership, please encourage the business or individual to contact Betty Lindsey Hale at blhale@insightbb.com about advertising in the Newsletter.

Reflection: Purposes & Uses of Tests

Larry L. Sinsabaugh, Ph.D., Diplomate ABVE

Ethical vocational expert (VE) practitioners *think-in-action*. The term *thinking-in-action* was first coined by Schön (1983) to conceptually describe a bounded-rational way of knowing what is central to professional competence (p. 19). This is especially true for VEs who must respond quickly under oath and on-the-spot in depositions, hearings, and trials. Schön also calls *thinking-in-action*, a tacit and artful on-the-spot “*knowing-in-action*.” A VE who *thinks and knows in action* enhances his/her professional image. *Thinking and knowing –in-action* comes from reflection.

A VE is often asked on-the-spot about a variety of concepts and the questions do not always come within a logical contextual sequence. One such concept is psychological testing.

According to Aiken (2003), today and for most of the 20th Century, the main purpose of psychological testing was to evaluate behavior, cognitive abilities, personality traits and other individual and group characteristics for the purpose of assisting in making judgments, predictions and decisions. Generally speaking, having reflected upon the purposes of testing increases the likelihood of VEs making correct and succinct responses correct under stress.

Historically, the function of psychological tests has been to measure differences between individuals or between the reactions of the same individual on different occasions (Anastasi, 1988, p. 3). Later Anastasi and Urbina (1997, p. 3) found psychological tests to be employed in the solution of a wide range of practical problems where the collection of data about individuals is important. The best sound bite phrase comes from Goldman (1961, p. 12) who essentially perceived the purpose of tests with clients was for the purpose of “*choosing or changing*.” Powers (2000) writes, testing (i.e., rehabilitation assessment) is primarily used to *plan a course of action*. Zuker & Osborn (2002, pp. 3-4) found appraisal (i.e., assessment and testing) to have four categorical applications: *diagnostic, predictive, comparative, and developmental*. Perhaps more helpful to VEs and for those who like lists, are Aiken’s seven reasons to test individuals:

- 1) To screen applicants for jobs in educational and training programs
- 2) To classify and place people in educational and employment context
- 3) To counsel and guide individuals for educational, vocational and personal counseling purposes
- 4) To retain and dismiss, promote or rotate students or employees in general educational and training programs and in on-the-job situations
- 5) To diagnose and prescribe psychological and physical treatments in clinics, hospitals and in vocational rehabilitation settings
- 6) To evaluate cognitive, intrapersonal and interpersonal changes due to educational, psychotherapeutic and other behavioral intervention programs
- 7) To conduct research on changes in behavior over time and to evaluate the effectiveness of new programs and techniques.

Reflecting about the reasons tests are used increases the VE’s *thinking and knowing-in-action*. As a result of this reflection the VE will demonstrate a high degree of knowledge and professionalism.

References

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- Power, P. W. (2000). *A guide to vocational assessment* (3rd ed.). Austin, TX: Pro-ed.
- Schön, D. A. (1983). *The reflective practitioner: How professionals think in action*. New York: Basic Book/Harper Torchbooks.
- Zunker, V. G. & Osborn, D. S. (2002). *Using assessment results for career development* (6th ed.). Pacific Grove, CA: Brooks/Cole Thomson Learning.

International Classification of Functioning Disability and Health (ICF)

As a new member of WHO Family of International Classifications, ICF describes how people live with their health condition. ICF is a classification of health and health related domains that describe body functions and structures, activities and participation. The domains are classified from body, individual and societal perspectives. Since an individual's functioning and disability occurs in a context, ICF also includes a list of environmental factors.

ICF is useful to understand and measure health outcomes. It can be used in clinical settings, health services or surveys at the individual or population level. Thus ICF complements ICD-10 , The International Statistical Classification of Diseases and Related Health Problems and therefore is looking beyond mortality and disease.

Additional information regarding the International Classification of Functioning, Disability and Health (ICF), including ordering and download options are available via the World Health Organization (WHO) website - <http://www.who.int/classifications/icf/en/>

Knowledge Enhancement Seminar

The ABVE Knowledge Enhancement Seminar (KES) is now available for purchase on CD by contacting ABVE Headquarters directly or through the website. The cost is \$300. Fellow and Diplomate applicants who have purchased this CD and taken the KES Seminar, which is held at the beginning of every ABVE conference, have increased their test scores by an average of 40%! Additionally, current members have the opportunity to receive 14 ABVE continuing education units (CEUs) by completing the test section included at the end of the seminar CD. The KES CD contains in-depth coverage of the 16 Test Content Areas measured by the ABVE National Certification Test (NCT) including:

Psychological Testing and/or Psychology	Statistics
Vocational Testing & Work Sampling	Occupational Information Network (ONet)
Physical Capacities	Transferable Skills Analysis
Handbook for Analyzing Jobs	ABVE Standards & Ethics
Job Placement	Life Care Planning
Dictionary of Occupational Titles (DOT)	Pain & Pain Management
Testimony & Legislation	Occupational Density
Theory	
Research	

The Knowledge Enhancement Seminar CD is designed to provide a standardized presentation of this body of information. The KES is divided into the following three sections for ease of use:

- The Purpose/History of the ABVE Certification Exam
- Recent Changes Made to the 1998 3rd Edition of the ABVE Exam
- All 16 Exam Content Areas with Sample Questions

The addition of the KES in CD format is certainly a valuable tool for our current members, as well as prospective members, to enhance their knowledge base and refresh their memories both pre- and post-certification. Thanks to Dr. McCroskey and the ABVE Test Committee for making this a reality.

Journal Guidelines Available

Those interested in submitting manuscripts for ***The Journal of Forensic Vocational Assessment*** can request specific guidelines from:

E. Davis Martin, Jr.
Phone: (334) 844-2083
email: martiev@auburn.edu.



Future ABVE Conferences

Mark Your Calendars Now!

Fall 2007
October 19 - 21
Francis Marion
Charleston, SC

Spring 2008
San Diego, CA

Fall 2008
San Antonio, TX

Marketing Brief:

Marketing Your Professional Services is Not Optional

Sometimes professionals say, “I don’t market my services; I rely on word-of-mouth to get business.” They don’t seem to realize these two statements are contradictory - if they are getting plenty of referral business, they have marketed their services quite well! The issue is not a decision of whether or not to market your services, but is instead a decision of whether to assume responsibility for it and become more effective at it.

Actions you might not realize are marketing decisions:

- What you name your business
- What information you print on your business card
- How you let people know you are available
- How your resume/CV or company brochure looks
- Who answers the telephone and how
- How you dress for encounters with prospective clients
- How you respond when someone asks what you do
- How you treat not only clients and prospects but also employees, associates and competitors

All of these factors contribute to the image people form of you and are far more critical to the success of your business than you might realize.

For instance, does your business name indicate what services your business performs? If it doesn’t, is your business name accompanied by a tagline that states your field of work?

Does your business card provide all necessary data such as the type of work performed and your complete contact information? As a marketing consultant reviewing and analyzing professionals’ marketing materials, I see cards with important information omitted, such as the email address and even telephone area codes. I’ve seen two cards with no zip code after the address. What do these cards say about the professionals, i.e., what impression does their marketing create?

Particularly if you have chosen not to advertise your services, how did you announce that you had opened a business or practice? However you did it, and whether you did it effectively or not, it was a marketing action.

- You’re Not Alone

Fortunately, you’re not expected to already be knowledgeable about marketing, any more than you would expect people in other professions to be proficient in your discipline. Marketing help is available from books, magazines, the Internet, knowledgeable friends and marketing professionals. The key point is to realize that the decisions and actions that create others’ perception of you should be planned and well thought-out, as they constitute your marketing.

Prospective clients have no way of knowing what quality of service you will provide, so they must take clues from the appearance of your business card, stationery, resume or brochure and other materials; your physical appearance and grooming; your manners and communication on the telephone; and even your promptness in returning phone calls.

The quality of your materials influences the perceived value of your services. Printed materials, whether produced professionally or on your personal computer, don’t have to be costly, but they should be error-free. Typographical, spelling, punctuation and grammatical errors in printed materials are inexcusable. We all make mistakes as we compose, but correcting, editing and proofreading are the second half of the job.

It is critical to have someone else proofread your writing and composition, because we all have difficulty finding our own mistakes. I frequently notice errors in professional brochures, even some that are quite expensively prepared. I have to conclude that not enough people proofread them.

CONTINUED ON NEXT PAGE

Marketing Continued...

- Your Office Talks

Often the initial impression you make on a prospective client results from the phone response in your office. If the phone rings several times before being answered by a person or a recording, the caller feels that his time has been disrespected. If the person answering is flippant, cold or, worse, rude, your image has been tarnished, perhaps permanently.

The time it takes you to return calls received by someone else, on your voice mail or through an answering service is also a factor in the prospect's view of your services. An inquirer can't help but associate your promptness or tardiness with your perceived work ethic and respect for deadlines.

In addition, if you determine that you can't or won't accept the engagement, are you as polite and as helpful as possible under the circumstances? You may not want this case, but you do want this person as a referral source — the most effective kind of marketing.

- Appearance DOES Matter

“Dressing for success” doesn't necessarily mean wearing a suit, or stockings and low heels for a woman if her suit has a skirt. What it does mean is deliberately deciding what to wear for encounters with prospective clients, keeping your impression in mind.

Whether the most effective look would be a business suit or other attire representing your profession or trade is an individual decision, but make it a conscious decision, because it matters. Perhaps a person could be sloppy or careless in appearance and yet be meticulous in work performance, but the prospective client has no way of knowing that — he can only conclude by what he sees and hears.

- Does Your Dry Cleaner Know What You Do?

When asked what services your company provides, do you respond briefly, completely and smoothly or do you stammer, give a terse, incomplete description or ramble?

Articulating your area of expertise and services is the core of marketing. Compose a brief statement that explains your work, using words people outside your profession will understand, and practice saying it aloud.

Business owners don't always realize that their services are publicized, either positively or negatively, by individuals they might not consider referral sources or detractors. Employees discuss their work with others. Competitors speak either respectfully or resentfully about you, based, at least in part, on your attitude and actions toward them.

Remember that when you interact with another person, regardless of who the person is, you are marketing yourself and your services. You are enhancing his picture of you, or you are diminishing it.

Performing marketing is NOT optional. Marketing is the actions, whether deliberately strategized or unplanned, that communicate the availability, quality and value of your services. Marketing shapes the image people hold of you and your business and reflects your judgment, thoroughness and professionalism. You can take charge of this message and make it contribute to your success.

This information is excerpted from The Expert Witness Marketing website with permission of the author, Rosalie Hamilton.

From The Attorney's Perspective

by The Honorable R. Michael Booker, Attorney At Law
Social Security Claims Representative
R. Michael Booker, P.C.
Sylacauga, Alabama

THERE IS NO SUCH THING AS A STUPID QUESTION—AND OTHER MYTHS

Vocational expert testimony is vital, if not essential, to even the garden variety Social Security disability case. Regrettably, most of my peers are unaware of the value of vocational expert testimony in the overall disability equation. Equally regrettable is the fact (an unfortunate fact) that when questions to the vocational expert are attempted, they are frequently absurd, ridiculous, inane, illogical, or just plain stupid.

Some questions posed to vocational experts remind me of my favorite law school examination question—”Define the Universe” followed by “Give two examples”. Some questions remind me of medieval torture—if, buts and whys. When the vocational expert attempts to answer, it resembles torture. Some questions are impersonal, irrelevant to the disability issues at hand and, truth be know, asked only to impress the client of the fact (and it may not be a fact) that the lawyer is surely fighting the disability claim to the death through vigorous cross examination of the vocation expert—a witness summoned and paid for by the government (negative connotation)—not the Social Security Administration—the evil government. You know—good versus evil.

To tell the truth, in over 30 years of representing the disabled, I may have asked one or two questions that fall into the above category. But, there are some questions that, at first blush, may seem stupid, but on second blush may have a purpose in determining disability within the meaning of Social Security Law. Three examples are appropriate:

First, questions may seem stupid and irrelevant to the case at hand, but may actually be field plowing for a case in the future. A disability claimant may have the residuals of multiple back surgeries, including severe pain, that will carry the day and result in a favorable decision from an Administrative Law Judge. As an aside, this claimant’s major depressive disorder, recurrent, moderate, with a GAF of 51, may not need to be addressed to establish the claimant’s disability claim. However, the negative vocational impact of the global assessment of functioning of 51 might be important to determining disability in another case where the evidence of physical disability is not so strong. It is important to know whether a particular vocational expert will confirm that the vocational implications of a global assessment of 51 would be inconsistent with the ability to engage in substantial gainful activity or not.

Second, establish the prima facie showing of disability through vocational expert testimony even in the impossible case. If you have come this far (to the hearing before the Administrative Law Judge), and presumably you have since you are asking vocational expert questions, ask the vocational expert to assume the veracity of the testimony of the claimant in all respects and to state whether jobs exist that this hypothetical individual could perform. With a negative response from the vocational expert, there is at least a fighting chance of establishing eligibility for disability benefits. Stranger things have happened toward the end of the month/year when there is a crush to get out as many decisions as possible when it is much easier to write a fully favorable decision than to write a denial.

Third, the numbers. An Administrative Law Judge must decide under Step 5 of the Sequential Evaluation that jobs exist within the claimant’s residual functional capacity in significant numbers in order to deny the disability claim. What exactly constitutes “significant numbers”? The law in this area remains unsettled. Would five hundred, five thousand, or fifty thousand jobs represent significant numbers? If “significant numbers” is an issue or a potential issue, the attorney, through the examination of the vocational expert, should establish certain facts—the total number of jobs in the United States economy, the total number of jobs in the regional or state economy, and the total number of jobs within the disability claimant’s residual functional capacity to the total number of jobs in the national, state, or regional economy. The comparison should demonstrate just how “insignificant” the number of jobs within the claimant’s residual functional capacity really is.

Stupid questions? Not really—just planning (or panning) for future cross examinations. However, there are many really stupid questions that are asked vocational experts—like, are you being paid by the Social Security Administration for answering these questions? How many cases have you provided similar testimony on in favor of the denial of disability benefits? Are you sure? If the attorney asks these questions, he might as well ask how much wood would a woodchuck chuck if a woodchuck could chuck wood? The response to this question would be about as helpful as the response to the other three questions posed.