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## Message from the Chair

*Peter M. Walzer, Chair*

*"There will be no new move-away legislation introduced this year."*

So predicted the Chief Counsel for the Assembly Judiciary Committee last February at *Flexcom*'s annual meeting in Sacramento with counsel for legislators, committees, and lobbyists. We were relieved. Move-away legislation is controversial and, for *Flexcom*, time-consuming. Only two years before, *Flexcom* had prevailed in the hard fight against anti-*La Musga* legislation.

Our relief was diluted when, within a week of Counsel's assurance, Senator Gloria Romero introduced legislation that "would require a parent seeking to restrain a child's relocation to make a prima facie showing, setting forth specific facts, as to the harm the child will suffer as a result of the relocation which necessitates a change in the child's custody." Fortunately, faced with strong opposition from *Flexcom* and other groups, the bill died in its first legislative policy committee without a hearing.

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## Message from the Editor

*George N. Seide, Esq., CFLS, Editor*

It is important for those reading *Family Law News* to extol the value of Family Law Section membership to other family law attorneys. Most are members of their local associations, but do not recognize the impact of the State Bar's Family Law Section on the practice of family law.

Every year members of the Family Law Executive Committee (FLEXCOM) spend two full weekends together going through the hundreds of bills introduced into the California Legislature that affect the practice of family law. Each FLEXCOM member is assigned several bills to shepherd through the process. Each Legislator is then contacted and sometimes so are the sponsor or sponsoring organization. FLEXCOM offers friendly amendments and ultimately takes a position on whether to support or oppose a particular bill.

Letters outlining FLEXCOM's position, pro or con, are forwarded to the Legislator who introduced the bill, to the Judiciary Committee, and to certain other legislative staffers.

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**In This Issue**

# Vocational Expert, the Underutilized Resource

*Lisa Suhonos, M.S., C.D.M.S.*

In California Family Law proceedings where either child and/or spousal support are requested (Fam. Code, § 4330), the earning capacity of both the payer and recipient must be considered. Thus, the function of the vocational expert in family law is to provide the parties, mediators, and/or judicial officers with objective, verifiable information regarding employment issues to determine appropriate support levels and maintenance of standard of living. Vocational evaluations may be ordered by the court (Fam. Code, § 4331, subd. (a)), requested by one party or agreed to by both parties.

Commonly, in Family Law the utilization of a "vocational expert" tends to become a decision of desperation. The parties are often exasperated and entrenched in their legal battles by the time the decision to secure the services of a vocational expert is made or judicially ordered.

Most attorneys assume that vocational experts are expensive and only practical in very high-income marriage dissolution processes. In the balance of cases, the temptation of creating a savings by utilizing an already retained professional expert emerges. For example: an accountant, CPA (or any other professional who is being utilized in financial matters). In turn this individual is asked to expand his/her opinion and encompass the area of "earning capacity." * This clouding of judgment renders ineffective findings.

A couple of weeks ago, this scenario played out in front of me in Superior Court. The case being heard was a contested divorce proceeding, where the couple now divorcing owned several business ventures. The issues of spousal support were debated, and a determination of earning capacity was needed to allow resolution of issues. Not surprisingly, the fact the businesses were either insolvent or approaching bankruptcy status was raised by one of the parties. Hence, the testimony of the CPA was extended to cover the issues of earning capacity in this proceeding. Needless to say, the judge patiently listened to the testimony offered and disallowed this expert's findings of the spouse's earning capacity, which can only be provided by a daly qualified vocational expert. The judge cited his testimony as "anecdotal."

This brief example illustrates not only the need to hire the correct qualified expert, but highlights the legal advantage of having verifiable vocational data to substantiate the legal assertions. Although, Family Code sections 4320-4322 and 4330-4331 address the vocational evaluation process and

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qualifications of the vocational expert, these services are often misunderstood and underutilized.

It is the intent of this author to generate a better understanding of the scope of services offered by a vocational expert, specifically in family law matters. Consequently, I will start by defining a vocational expert. A vocational expert is a professional whose education, training, and experience includes: knowledge of client vocational evaluation methodologies, transferable skills analysis, labor market research, academic and vocational programs, determination of earning capacity, as well as effective oral and written communication. Additionally, such expert is required to meet the criteria outlined in Evidence Code sections 702, 720, 730.

Published vocational literature also offers the following description: "Vocational Experts possess specialized training and knowledge in the field of trades, professions and occupations, and serve in assessment and/or testimony in a litigious forum." (Havraneck 1995). Very often in California, vocational experts are also vocational rehabilitation counselors, exercising extensive knowledge and experience in the medical/psychological implications of disability in training and employment matters. Therefore, these individuals not only assess earning capacity, but they can also render opinions/recommendations regarding the suitability of employment and reasonable accommodations in situations regarding disabilities.

The vocational expert has a dual role in the provision of services: 1) The consulting relationship with the client; and

2) consultation in litigation and education in the courtroom. In the first part the vocational expert must relay the primary and secondary purposes of the referral and the vocational evaluation. This requires disclosing the role of the vocational expert, as an evaluator and not as a provider of services (counselor), and discloses the potential for a conclusion with which the client may not agree. In the second part, the vocational expert communicates orally and in written format with the parties and the court. The vocational expert provides testimony on the vocational evaluation process, conclusions, and opinions.

Vocational expert services in Family Law consist of:

1) Evaluation – evaluate individual's attributes and marketable skills (Fam. Code, § 4320, subd. (h)), for example; age, physical/psychological conditions, transferable skills, special needs of dependent children (Fam. Code, § 4320, subd. (g)).

2) Labor Market Research – assess labor demand, access employment opportunities, determine wage levels, and gather statistical data.

3) Vocational Planning – provide vocational planning, outline steps to achieve vocational goal, identify training programs and costs, establish reasonable time lines, identify potential barriers to employment in the vocational plan (Fam. Code, §§ 4320, subd. (a), 4320, subd. (l)).

4) Vocational Expert Opinion – determine earning capacity, evaluate the client's good faith effort to maximize self-support (Fam. Code, § 3558), provide findings in a report, testify on the vocational evaluation process, and render opinion(s).

The world of work, although apparently simple, tends to generate confusion and bewilder most individuals, especially when it comes to job requirements and prevailing wages. It is an evolving and rapidly changing world, requiring constant observation and communication. The vocational expert is academically trained to master these concepts. When medical/psychological impairments exist, the vocational expert evaluates the impact of the impairments on vocational issues and assesses the individual's ability to engage in vocational/academic training and subsequent gainful employment.

Aside from family law code adherence, why utilize the services of a vocational expert? Several reasons come to mind, the first being to establish "reality" in earnings. Often attorneys pose the question, why can't the spouse earn more than $10.00 per hour? Wages tend to be seen in a subjective context; therefore, the facts of each situation must be assessed to reveal the objective data, which require careful and thorough vocational evaluation by the vocational expert. As a vocational expert, the most common factors in earning low wages are: 1) a result of underselling one's skills, more commonly referred to as underemployment"; 2) lacking the training required for the position which reduces the worker to entry-level wages; 3) transportation issues, inabilities to commute, and non-adherence to specific work schedules (whether self-imposed or not) render lower wages; 4) geographical limitations that impact employment demand and offer lower wages; and 5) length of time out of the labor market.

Education and skills are often confused in employment search and prediction of employment outlook. Again, the vocational expert can clarify these issues. So, why is it that some of the more apparently qualified individuals do not obtain employment? For example: often individuals with advanced academic degrees are expected to be good wage earners. Although an individual may not have been active in the labor force, the fact that he or she possesses a college degree fosters the impression of being able to secure a career. It is not uncommon for the vocational expert to find the individual's degree is not competitive in the present labor market, transferable skills are non-existent, job search efforts are insufficient and/or job search organization is missing.

Self-employment is not always considered to be the best option for self-sufficiency. However, an evaluation by the vocational expert in conjunction with a business consultant may present a viable option that enables the individual to keep their standard of living and to secure an earning capacity. It is my experience that abandoning an existing business due to a divorce proceeding is often contemplated for a job in the open labor market. A vocational expert evaluation can effectively solve this predicament and provide the economic data as well as community resources enabling the parties to make an informed decision as to the viability of the options.

In determining spousal support issues, the vocational expert assesses the individual's employability, immediate earning potential, and future earning capacity. In the event of employment barriers, the vocational expert identifies vocational barriers as well as medical/psychological factors preventing participation in the labor market. Recommendations for external support systems and/or services are rendered. The use of a vocational expert takes the "guess work" and speculation out of the divorce proceed-

ings. It provides well researched, quantifiable employment data needed to allow the court to issue a support order.

In the event the immediate labor market access is nil, the vocational expert provides a thorough evaluation with a vocational plan to enable development of competitive skills and a world of work re-entry within a reasonable time frame. The cost factors are detailed; and a road map has been prepared to allow the parties to negotiate or assist the court in employment and earnings issues. This is particularly relevant for marriages with a duration of 10 years or more.

In conclusion, a family law practitioner need not procure vocational expert services in desperation or to merely meet the Family Code mandates. These services are multi-faceted in value and allow the parties to reach informed decisions, whether in collaborative divorce agreements, mediation efforts or in court vocational expert testimony. The vocational expert not only provides services through a) evaluation; b) consulting; c) research; and d) testimony, but he or she is also a great resource to services offered in the community. The skills of listening, communicating, educating and motivating are not only the essence in conflict resolution, but they in fact make up the core elements of the vocational expert. Thus, the legal community in Family Law has access to a very versatile and cost-effective resource. ■

* *Earning Capacity – A person's ability or power to earn money, given the person's talent, skills, training and experience. Earning capacity is one element considered when measuring the damages recoverable in a personal-injury lawsuit. And in family law, earning capacity is considered when awarding child support and spousal maintenance (or alimony) and in dividing property between spouses upon divorce. Also termed earning power. (Black's Law Dict. (7th ed. 1999).*

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## ESOP's in Divorce Court

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These examples are greatly simplified; in the real world it takes experience and skill, not to mention access to reliable data, for an appraiser to assess and weight the factors that cause profits to fluctuate from year to year in nearly every business, and to put numbers to such factors as "reasonable rate of return," "comparable risk," "potential for growth," etc.

But the contending parties in a divorce have even more reason to put their faith in the result. Since an ESOP is an employee benefit plan[7] similar to a pension, federal law stipulates that the trustees of an ESOP have a fiduciary duty to act in the best interests of the plan's participants[8]—"participants" meaning the company's employees, not the divorcing spouses—and the U.S. Department of Labor and the Internal Revenue Service stand ready to see that they do so. Thus when divorcing spouses call in a professional business appraiser to derive a value for the company's stock, the law makes it highly unlikely that the appraiser will deliver a number unfairly favoring one or the other party. Indeed, the appraiser's duty is to derive a value in such fashion that the plan trustees can meet their fiduciary duty to be fair to the company's employees.

Once an ESOP is established and funded by a domestic corporation,[9] the ESOP buys the interest of the selling spouse,[10] who may defer capital gains taxation on the proceeds of the sale under IRC § 1042 so long as two primary conditions prevail:

- The ESOP must end up owning at least 30% of each class of outstanding stock or of the total value of all outstanding stock, with the exception of nonconvertible, nonvoting preferred stock;[11] and

- The selling spouse must roll over proceeds from the sale into "qualified replacement property," which can include stocks or bonds of domestic operating companies, within one year of the sale.[12]

The result? The departing spouse walks away with $5