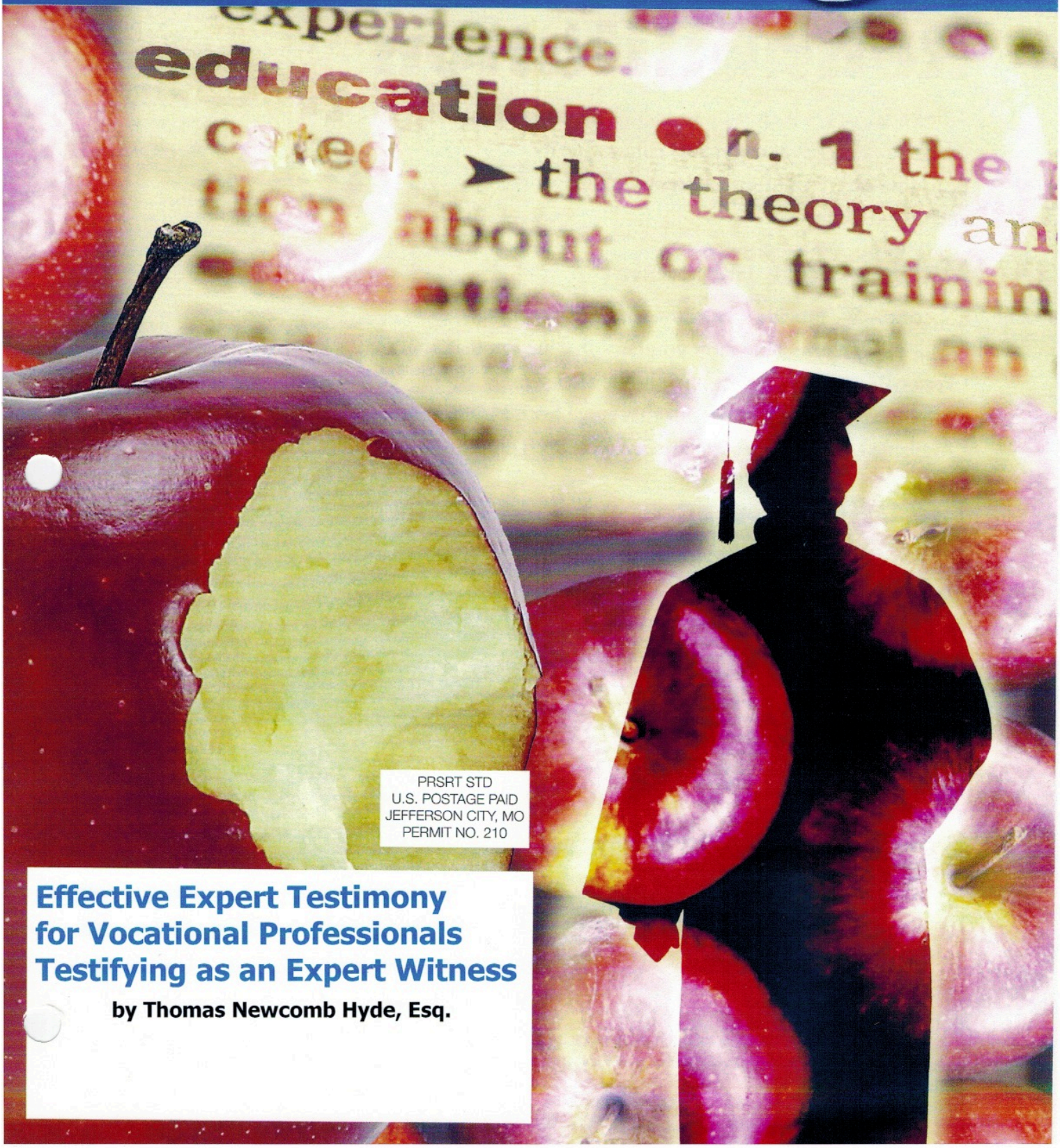
JANUARY/FEBRUARY/MARCH 2006

RehabPro

The Rehabilitation Professional
Vol. 14, No. 1

The International Association of Rehabilitation Professionals – IARP



PRSRT STD
U.S. POSTAGE PAID
JEFFERSON CITY, MO
PERMIT NO. 210

Effective Expert Testimony for Vocational Professionals Testifying as an Expert Witness

by Thomas Newcomb Hyde, Esq.

Effective Expert Testimony for Vocational Professionals Testifying as an Expert Witness

Thomas Newcomb Hyde, Esq. earned his Bachelor of Arts in Philosophy from the Seminary of St. Vincent DePaul, his Master's in Education from South Carolina State University, and graduated from the University Of Miami School Of Law. He has taught at the elementary, secondary, and college levels. While in law school, he completed a legal internship at the Miami Dade County State Attorney's Office as a prosecutor.

Tom joined Liberty Mutual Insurance Company in 1975, working as a trial attorney in Miami. After ten years of trying lawsuits there, Tom was named managing attorney for a new legal office in Tampa. He became Director of Training for the Liberty Mutual Legal Department, as well as Regional General Attorney for the Southern Region in 1992 and has been the National Director of Legal Training for Liberty Mutual since 1999. He has been responsible for the design, development, and implementation of Liberty Mutual's Attorney Development Program.

Tom is admitted to practice in Florida, in the United States District Court Middle District of Florida, the United States Eleventh Circuit Court of Appeals, and the United States Supreme Court. Tom has served as an Arbitrator for the American Arbitration Association, the Better Business Bureau, and the Florida Attorney General's Office.

FROM THE EDITOR: Vocational rehabilitation (VR) professionals are men and women of integrity committed to the highest ethical and professional standards. In this article, Mr. Hyde presents criteria for the professional to follow.

Introduction

In order to be an effective expert witness, VR professionals must always tell the truth. They must have an understanding of the difference between an expert witness and a lay witness. They must develop and prepare their résumé properly. They must do the necessary review of the facts, assessment, and testing to enable them to reach an expert opinion. They must apply their expertise to these facts and the test results, and formulate an opinion. Vocational rehabilitation professionals then present their findings in a written report. In the courtroom, a lawyer on direct examination asks questions and elicits answers to bring out the findings and opinions of the VR professionals. Finally, expert rehabilitation professionals defend their opinion on cross-examination by the opposing attorney. These will be described below.

Tell the Truth

To be an effective expert witness, you must tell the truth, the whole truth, and nothing but the truth. You must tell the truth about yourself — who you are. Explain your academic background and professional experience to the judge and jury. You must tell the truth about the vocational evaluation itself, how you followed the standards of your profession and used proper scientific methodology in making your assessment, and how you conducted the appropriate tests before drawing any conclusions. You must tell the truth about the person you are evaluating: how you applied your academic background and professional experience in an objective, thorough review of the medical and employment history; and developed an objective analysis of the test results leading to a well founded, thoughtful conclusion and opinions.

Lay Witness versus Expert Witness

In a courtroom setting, the difference between the lay witness and an expert witness is established by the rules of evidence, either the Federal Rules of Evidence or the evidentiary rules in the jurisdiction where they are testifying.

A lay witness, under Rule 602 (Federal Rules of Evidence, 1975), must have personal knowledge of the facts or the events about which the witness is to testify. With some exceptions, a lay witness is usually not permitted to give opinions.

An expert witness, on the other hand, is called upon to give opinions. Under Rule 702 (Federal Rules of Evidence, 1975), an expert witness is someone who has specialized knowledge to assist the trier of fact (the judge or the jury) in understanding the evidence. Thus, the witness who is qualified as an expert by knowledge, skill, experience, training, or education, may testify in the form of expert opinions. Vocational rehabilitation counselors must be ready to demonstrate that they have that

CONTINUED...

specialized knowledge required by Rule 702 or the state's rules of evidence. They do this by testifying about the truth of their own educational background, their extensive training, and their professional experience. Once they do so, they can testify as vocational expert witnesses.

Preparing Your Résumé

This is your first opportunity to tell the truth of who you are. In preparing a résumé, the VR experts look to Rule 702 to establish their background of specialized knowledge and skills that will enable them to give opinions based upon their education, training, and experience.

In preparing the résumé, experts should highlight and lead with their strengths in education, professional experience, designations and certifications, licenses, publications or honors, as well as affiliations and memberships. If the strength is in academics, such as a Doctorate, rather than a Master's degree, this should be emphasized. On the other hand, if one's qualifications are long on experience and certifications, these should be stressed and explained. Certifications are important because they show that the expert has met the high standards required to achieve them. Certainly, any publications or honors should be listed. Memberships in professional organizations are significant since the American Rehabilitation Counseling Association (ARCA), the American Board of Vocational Experts (ABVE), the Commission on Rehabilitation Counseling Certification (CRCC), and other organizations have high ethical and professional standards, which the VR experts can testify that they adhere to and are committed to.

Research, Examination and Testing

Expert vocational witnesses can now show that they are true to their profession. Rehabilitation professionals have committed their careers to the science of vocational rehabilitation counseling. They possess specialized knowledge and expertise in the field of vocational counseling because of their academic careers, internships, and professional experience. They now use this specialized knowledge to assess the individual's aptitudes and education through comprehensive examination and testing. Adhering to the standards and principles of VR counseling, rehabilitation professionals conduct an analysis of the facts and issues before formulating any opinion. Their analysis includes a thorough consideration of all of the options the investigation and examinations present.

Formulating Your Opinion

Drawing on their education and experience, vocational experts then reach their own conclusions based upon the scientific investigation that they have accomplished. The conclusions or opinions that the vocational experts form are based upon objective standards established in the area of vocational rehabilitation. Vocational experts appropriately integrate the information they have obtained through their investigation in drawing their own conclusions and forming their opinions.

Presenting Your Opinion — The Written Report

Although there are many possible written reports, only the Vocational Assessment Report is considered here. This report includes a discussion of the methodology and what information the vocational expert obtained in terms of education, work history, and medical background, occupational resources consulted, as well as the interview that the vocational expert has completed. A vocational assessment follows, with testing for vocational interests, work values, work attitudes, and work performance ability.

Findings are stated objectively and the "expert opinions" on any suitable employment options or vocational rehabilitation recommendations are stated clearly. The factual basis for the "expert opinions" must be established with explanations that the tests used were those reasonably relied upon by experts in this area of vocational rehabilitation and that the opinions are in accordance with the standards of vocational rehabilitation. An explanation of the opinion, and the inferences that can be drawn from it, should also be presented.

Presenting Your Opinion — Direct-Examination

This is your big moment: your opportunity to tell your story, to show what you know, the truth about your vocational assessment of the employee. Lawyers are taught to put the spotlight on the witness on direct examination; to ask a series of short simple open-ended questions to elicit the expert's opinions and the basis for those opinions. But first, the lawyer must show the judge and jury that you have that specialized knowledge required by the rules of evidence that enables you to give opinion testimony. So the lawyer begins with reporter type questions (who, what, where, when, why) to draw out your background and establish that you are certainly well qualified to be an expert. There are two reasons for this. One is to meet the legal qualifications of the rules of evidence. And the other is just as important — to persuade the jury that you are someone who should be listened to, that you really know what you are talking about when you give these opinions.

In discussing your qualifications, you should explain your level of education, your practical experience in the field, your level of expertise as shown by certifications you have obtained, and especially, your adherence to the scientific and ethical standards of your profession.

Just listing your degrees and certifications is not enough. It is

far more effective if you detail the steps required in obtaining such degrees and certifications. In a superior article, Eadon and Reardon (n.d.) point out that the Commission on Rehabilitation Counselor Certification (CRCC) requires that the vocational expert obtain a Master's degree in an approved program that includes courses in counseling, medical assessment, case management, vocational assessment, career development, as well as job development and placement. They explain that the VR counselor must also complete an internship and pass the Certified Rehabilitation Counsel exam in order to receive the CRC designation.

By detailing the steps necessary to achieve your certification, you give the judge and jury a better insight into your ability to present your opinions. The judge and the jury will also have confidence that any opinions you give will be reasonable and valid.

The meat of the direct examination is an explanation of your "expert opinions" and the basis of those opinions. Here is your chance to explain how you came to such opinions based upon the information that you obtained, the tests that you performed, and how you applied your expertise in reaching these opinions. Do not be afraid to say that you considered alternative opinions, and that your findings lead you to the positions that you have taken.

Some lawyers will also ask you questions in anticipation of cross-examination. They "take the sting out of cross" by asking the hard questions the opposing lawyer will almost certainly ask on cross-examination. Be prepared to respond to questions about how you are being compensated, your relationship with any parties, and any area which could be construed as showing bias or prejudice.

Defending Your Opinion — Cross-Examination

Although it does not seem like it at first glance, cross-examination is another opportunity for you to persuade the judge and jury of the truth and validity of your opinions. Again, the secret is to be truthful. If the lawyer asks a perfectly good question that should be answered "yes," then give that answer honestly without quibbling about some minor aspect of the question. The trier of fact hears your frank and forthright answers and sees you as reasonable, and therefore, more believable. And if the cross-examiner is unpleasant or impolite, the expert witness should be more polite and cordial in answering.

Lawyers often attempt to impeach witnesses by showing a perceived bias, prejudice, or interest. Bias is an irrational predisposition in favor of someone. Prejudice is an irrational predisposition against someone. Interest is a stake in the outcome of the case (Younger, 1976). Typical interest or bias questions that experts should be prepared to answer candidly might be: "Isn't it true that you only testify for plaintiffs?," "You receive all of your referrals from insurance companies, don't you?," or "You are being paid to testify here today, are you not?."

Finally, cross-examination can become a great opportunity for the expert vocational witness if the lawyer asks any open ended questions. Here the expert witness can restate the testimony given on direct examination or give further explanations.

Exercise: Qualities Of A Good/Bad Expert Witness — Self Assessment

Here is a self assessment exercise that you can complete the next time you are called to testify as an expert witness in the courtroom or at a deposition. It will help you remember the qualities that you wish to demonstrate when you testify. During your career you have established yourself as a Vocational Rehabilitation Professional. Over time, you have witnessed a variety of characteristics and qualities of Vocational Rehabilitation Expert witnesses. Some of those whom you have observed exhibited superior qualities as an expert witness. Others displayed less effective traits. On the left hand side of a sheet of paper list all of those good qualities that you have seen in a capable Vocational Expert Witnesses. On the right hand side list those characteristics that demonstrated bad qualities for a Vocational Expert Witness.

Factors Affecting Persuasiveness

Speckart (2003), senior litigation analyst for Courtroom Sciences, Inc. in Irving, Texas, presents an analysis of the persuasiveness of expert witnesses, with consideration given to the effects of the jury's knowledge of the expert's compensation and the frequency of testimony in similar cases. Speckart's three dimensional theory of persuasiveness rests on the expert's expertise, objectivity, and communicativeness.

Expertise is seen in the expert's academic credentials and experience of course, but also in the jury's perception of the witness' diligence, perceptiveness, accuracy, and consistency. According to Speckart, the jury looks to see how well the witness demonstrates thoroughness in completing his job, if he has an awareness of the problems, and if he uses precision in his analysis. Finally, the persuasive expert witness is one who uses all of these qualities consistently in a variety of situations.

For a witness to be perceived as truly objective, the witness must also be judged to be honest, as someone who tells the truth. Speckart (2003) explains that juries expect a credible witness to acknowledge that there can be more than one side to an issue. The objective expert is one who is looking for the

CONTINUED...

DOs and DON'Ts of Expert Testimony

DO	DON'T
I. Tell the truth. This is the single most important way to be an effective witness.	I. Don't be an advocate. Defend your opinion once you take it, but do not overstate it.
II. Speak slowly and carefully. It does no good if you can not be understood.	II. Don't give any opinion that is outside the scope of your professional expertise.
III. Be a teacher. Give examples. Create interest in what you have to say.	III. Don't answer any question that you do not clearly understand.
IV. Explain complex concepts in simple laymen's terms. Use plain language.	IV. Don't be afraid to say that you do not know or do not understand the question.
V. Concentrate on clarity and simplicity.	V. Don't be cute or flippant or engage the other attorney in sharp repartee.
VI. Give the attorney a chance to object.	VI. Don't get angry or argue with the other attorney.
VII. Arrive early. You need time to collect your thoughts and be composed.	VII. Don't look for answers from the attorney who called you as a witness.
VIII. Act with courtesy and professionalism at all times.	VIII. Don't be condescending; it offends the jury and stops the flow of information.
IX. Wear appropriate attire. Let the jury see you as the professional that you are.	IX. Don't use acronyms. DUA
X. Tell the truth, the whole truth and nothing but the scientific truth.	X. Don't forget to tell the truth. Your integrity is your most powerful asset.

truth, the scientific truth; one who is able to show that all of the information obtained has been carefully considered; and that all the appropriate tests were conducted before reaching a conclusion. Only then does the effective expert apply the necessary expertise to reach objective opinions that the expert has come to share with the judge or jury.

Communicativeness encompasses the ability to clarify complicated matters so that they are understandable. The learned language of the expert may be foreign to the untrained ear. Expert witnesses must show that they care whether others understand. This is reflected in the choice of terminology, the analogies made, and the use of visual aids. It is reflected in eye contact, speech rate, volume, inflections, and even posture. This must also be true on cross-examination when the expert witness must continue to communicate in a confident, articulate, and non-defensive manner.

Speckart (2003) argues persuasively that an expert witness who is perceived as being knowledgeable, whose opinions are objective, and who is able to communicate well, will probably not be negatively affected by information on how much he is being paid, or how often he has testified for one side or the other. Thus, to the extent that the perceptions of expertise, objectivity, and communicativeness are high, the witness will be effective and persuasive regardless of the compensation.

Exercise: Persuasion through Credentials and Standards

Here is another exercise that will be helpful in preparing you to testify as an expert witness. Review your résumé. Then make columns for your Academic Background, your Professional Designations and Certifications, your Professional Experience, and any Affiliations and Memberships which qualify you to testify as a vocational expert witness. Under each topic write an explanation of the accomplishments and the standards you were required to meet in order to achieve those degrees, designations, and certifications. Finally, note the standards that you must continue to meet in order to remain in good standing for such designations and memberships.

Ethics For Vocational Rehabilitation Expert Witnesses

Independence and Objectivity

The common thread that must run through dealings between attorneys and vocational rehabilitation experts is an understanding of the relationship between the attorney and the expert. The expert is not the client of the attorney. The expert is not a party to the case. The expert is not part of the litigation team. The expert must be independent and objective. Lubet (1999) writes, "The entire system of expert testimony rests upon the assumption that expert witnesses are independent of retaining counsel and that they testify sincerely (p. 465). The objectivity and independence of the vocational expert witness is critical. You must look at facts and information dispassionately. You must tell the truth, the scientific truth, and be committed to the highest ethical standards of your profession.

Primary Obligation

In its Preamble, the *Code of Professional Ethics for Rehabilitation Counselors* (Code) (2001) provides that "...the primary obligation of rehabilitation counselors is to their clients, defined in the Code as individuals with disabilities who are receiving services from rehabilitation counselors." It is important for vocational expert witnesses to understand this and be able to respond appropriately when asked about this on cross examination. However, the Code further states that "...when providing forensic evaluations, the primary obligation of rehabilitation counselors will be to produce objective findings that can be substantiated based upon information and techniques appropriate to the evaluation." The evaluation may include an examination of the individual with a disability and/or a review of records.

Duty to Provide Unbiased Objective Opinions

Vocational experts should also explain their duty under the Code (2001) to be unbiased and objective. The Code states that "…when serving as case consultants or expert witnesses, rehabilitation counselors will provide unbiased, objective opinions."

Prohibition on Exaggerating Credentials

Vocational rehabilitation experts must not exaggerate their qualifications. "Rehabilitation counselors will claim or will imply only professional credentials possessed and are responsible for correcting any known misrepresentations or their credentials by others" (Code, 2001). Exaggerating your qualifications is not only unethical; it is also foolhardy, completely ineffective, and could be considered perjury.

Expert Witness Fees

Unlike a lay witness, a vocational expert witness can be paid a reasonable fee for the witness' services as an expert, including for the time that the witness testifies on behalf of one of the parties. However, it is improper to pay an expert witness fee which is contingent on the content of the testimony or the outcome of the case (*Model Rules of Professional Conduct*, 2003).

Conclusion

Vocational rehabilitation professionals are men and women of integrity, committed to the highest ethical and professional standards. They understand their obligations as found in their codes of ethics and standards of practice. They are true to themselves and tell the truth about their science objectively, and in doing so, they are far more effective vocational expert witness. ■

REFERENCES

American Bar Association. (2003). Model Rules of Professional Conduct. (Rule 3.4 (b), Comment [3]). Chicago, IL: Author.

Commission on Rehabilitation Counselor Certification. (2001) Code of Professional Ethics for Rehabilitation Counselors. (2001). Rohlwing, IL: Author.

Eadon, S., Reardon, G., with Fowler, H. (n.d.) Cross-examination of a vocational expert. Retrieved from www.leiplaw.com/resourses/_vocational_expert.html

Federal Rules of Evidence, Public Law 93-595 (1975).

Lubet, S. (1999). Expert witnesses: ethics and professionalism. Georgetown Journal of Legal Ethics, 12, 465-488.

Speckart, G. (2003). Factors affecting persuasiveness of expert witnesses. For the Defense, 45(7), 20-23.

Younger, I. (1976). The art of cross-examination. Chicago, IL: American Bar Association.