

BAY

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VOCATIONAL

EXPERTS

VOCATIONAL EVALUATION:

STANDARDS of PRACTICE

in

CALIFORNIA FAMILY LAW

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Introduction

Bay Area Vocational Experts (BAVE) is an organization of independent, experienced Northern California vocational evaluators who are committed to promoting the highest standards of vocational evaluation and counseling services through mutual support, education and shared resources.

Aware that there are no published standards for the vocational evaluations performed by mandate of the California Family Law Code, the members of BAVE have created a guide to ensure a consistent vocational evaluation process and provide a basis for understanding vocational evaluation services.

The standards are based on California Law, case law, the input of judges and attorneys, and the collective experience of the members of BAVE.

BAVE members are qualified to evaluate parties in family law cases according to the definition of Vocational Training Counselor in Family Law Code §4331(d) and (e).

BAVE's members are:

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Vocational Evaluation

In California family law proceedings in which either child and/or spousal support is requested, the earning capacity of both the payor and recipient must be considered.¹

The function of the Vocational Evaluation in Family Law is to provide the judges, mediators and/or judicial officers and the parties with objective, verifiable information regarding employment issues for use in determining appropriate support levels. In California, vocational evaluations may be ordered by the court, requested by one party, or agreed to by both parties.

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¹ Family Code §4330

The Role of the Vocational Expert

- 1. To provide objective, verifiable employment information to the triers of fact and the parties, the vocational expert**
 - a. Evaluates relevant individual attributes related to marketable skills,² which may include
 - i. age³
 - ii. education
 - iii. employment history
 - iv. interests and values
 - v. physical and psychological conditions or limitations⁴
 - vi. transferable employment skills and abilities
 - vii. psychosocial factors, such as legal issues, secondary sources of income or special needs of dependent children⁵
 - b. Identifies potential occupations, if appropriate.
 - c. Conducts current, relevant labor market research to determine earning capacity and access to employment opportunities associated with the identified occupations.⁶
 - d. Provides vocational planning, when appropriate, by outlining the steps to achieve a vocational goal, training programs, costs, reasonable timelines, and potential barriers in a vocational plan.⁷
- 2. To maintain objectivity throughout the vocational evaluation process, regardless of the source of the referral, the vocational expert**
 - a. Receives and evaluates information relevant to the vocational evaluation.
 - b. Makes reasonable effort to obtain relevant information needed to form an expert opinion.
 - c. Forms expert opinions and bases conclusions on all relevant information available.
 - d. Discloses the need for information that is unavailable but necessary to form an expert opinion.

² Family Code §4320

³ Family Code §4320(h)

⁴ Family Code §4320(h)

⁵ Family Code §4320(g)

⁶ Family Code §4320

⁷ Family Code §4320(a)(l) and §4320(l)

3. To ensure ethical treatment of the individual being evaluated⁸, the vocational expert

- a. Discloses to the person being evaluated the role of the independent vocational expert as evaluator and not a provider of services.
- b. Discloses the limits of confidentiality to the person being evaluated.
- c. Discloses the potential for a conclusion with which the person being evaluated may not agree.

4. To communicate with all parties consistent with the assigned role as expert, the vocational expert

Communicates with the parties according to the stated arrangements:

- a. When retained by one party, the expert communicates orally and in writing with that party solely, unless otherwise directed.
- b. When both parties jointly request the evaluation, the expert communicates orally and in writing with both parties simultaneously. The expert requires written information offered by either party to be provided simultaneously to the other party.
- c. When appointed as the court's expert according to Evidence Code §730, the expert may contact or request information from either party or attorney directly, or request a joint conference. Neither party may initiate contact with the expert without prior agreement. Neither party may submit written material to the expert without simultaneously submitting a copy to the other party. The expert submits written reports simultaneously to the court and to both attorneys/parties.

⁸ American Board of Vocational Experts Code of Ethics 2003 Canon 2: Vocational experts shall respect the integrity of people with whom they work; namely, individuals or organizations designated as clients. The primary obligation of a vocational expert is to provide a fair and honest assessment of an individual's vocational capacity.
<http://www.abve.net/about.html>

The Responsibilities of the Vocational Expert

5. To gather relevant information relevant to the person being evaluated that is necessary to complete the evaluation, the vocational expert

Follows a standardized vocational evaluation process which may include

- a. Diagnostic interview
- b. Vocational testing⁹
- c. Review of vocational test results with person being evaluated
- d. Other relevant information specific to the case

6. To provide for informed participation in the vocational evaluation, the vocational expert

- a. Considers the issues of diversity including age, gender, sexual orientation, religion, country of origin, disability, language ability, ethnicity and cultural difference.
- b. Explains the influence of individual's motivation and cooperation and the possible consequences on the evaluation.
- c. Explains the option of using the evaluation findings and vocational plan for the individual's personal career planning.
- d. Explains the concept of imputed income that can be determined through the evaluation findings.
- e. Requests the cooperation of the person being evaluated in providing needed information and integrates the individual's feedback in the evaluation.

7. To gather relevant labor market information, the vocational expert

- a. Determines the appropriate sources of information about salaries, wages and job availability.
- b. Conducts research appropriate to the occupation, geographic location, and individual attributes of the person being evaluated.
- c. Provides current accurate information relevant to the occupations.
- d. Weighs the labor market information on the basis of its source, currency, and applicability.

⁹ California Family Code §4331(d), 4331(e)(2) and 4331(e)(3) require that the vocational evaluator have expert knowledge and understanding of test administration, and other factors influencing test validity and reliability.

The Vocational Evaluation Report

8. To report the vocational opinions, conclusions and recommendations, the vocational expert

- a. Determines the ability of the person being evaluated to engage in paid employment.
- b. Identifies the factors influencing vocational outcomes.
- c. Identifies alternative vocational objectives.
- d. Identifies the need for retraining or education to acquire marketable skills and/or employment¹⁰ for each objective. The expert provides a description of the training costs and duration.
- e. Details salary and other earning information and job availability associated with the vocational objectives.
- f. Includes sources and methods of collection of labor market and other information
- g. Evaluates the good faith efforts of the person being evaluated to maximize self-support.¹¹
- h. Recommends a vocational plan, taking into consideration the marital standard of living and the goal that the supported party shall be self-supporting within a reasonable period of time.¹²
- i. Recommends steps to implement the vocational plan.
- j. Provides a written report, as ordered or requested.
- k. Provides testimony on the vocational evaluation process, conclusions and opinions at the request of the attorney(s) or the court.

10 Family Code §4320(a)(1)

11 Family Code §3558, Consistent with Richmond/Morrison Orders

12 Family Code § 4320(l).

APPENDIX A

CALIFORNIA FAMILY CODE

Division 9 Support
Part 3 Spousal Support
FAMILY.CODE
SECTION 4320-4322

[emphases added]

4320. In ordering spousal support under this part, the court shall consider all of the following circumstances:

(a) The extent to which the **earning capacity of each party** is sufficient to maintain the **standard of living** established during the marriage, taking into account all of the following:

(1) **The marketable skills of the supported party; the job market for those skills; the time and expenses required for the supported party to acquire the appropriate education or training to develop those skills; and the possible need for retraining or education to acquire other, more marketable skills or employment.**

(2) **The extent to which the supported party's present or future earning capacity is impaired by periods of unemployment that were incurred during the marriage to permit the supported party to devote time to domestic duties.**

(b) The extent to which the supported party contributed to the attainment of an education, training, a career position, or a license by the supporting party.

(c) The ability of the supporting party to pay spousal support, taking into account the supporting party's earning capacity, earned and unearned income, assets, and standard of living.

(d) The needs of each party based on the standard of living established during the marriage.

(e) The obligations and assets, including the separate property, of each party.

(f) The duration of the marriage.

(g) **The ability of the supported party to engage in gainful employment without unduly interfering with the interests of dependent children in the custody of the party.**

(h) **The age and health of the parties.**

(i) Documented evidence of any history of domestic violence, as defined in Section 6211, between the parties, including, but not limited to, consideration of emotional distress resulting from domestic violence perpetrated against the supported party by the supporting party, and consideration of any history of violence against the supporting party by the supported party.

(j) The immediate and specific tax consequences to each party.

(k) The balance of the hardships to each party.

(l) **The goal that the supported party shall be self-supporting within a reasonable period of time.** Except in the case of a marriage of long duration as described in Section 4336, a "reasonable period of time" for purposes of this section generally shall be one-half the length of the marriage. However, nothing in this section is intended to limit the court's discretion to order support for a greater or

lesser length of time, based on any of the other factors listed in this section, Section 4336, and the circumstances of the parties.

(m) The criminal conviction of an abusive spouse shall be considered in making a reduction or elimination of a spousal support award in accordance with Section 4325.

(n) Any other factors the court determines are just and equitable.

4321. In a judgment of dissolution of marriage or legal separation of the parties, the court may deny support to a party out of the separate property of the other party in any of the following circumstances:

(a) The party has separate property, or **is earning the party's own livelihood**, or there is community property or quasi-community property sufficient to give the party proper support.

(b) The custody of the children has been awarded to the other party, who is supporting them.

4322. In an original or modification proceeding, where there are no children, and a party has or acquires a separate estate, **including income from employment**, sufficient for the party's proper support, no support shall be ordered or continued against the other party.

APPENDIX B

CALIFORNIA FAMILY CODE

Division 9 Support

Part 3 Spousal Support

FAMILY CODE

SECTION 4330-31

[emphases added]

4330. (a) In a judgment of dissolution of marriage or legal separation of the parties, the court may order a party to pay for the support of the other party an amount, for a period of time, that the court determines is just and reasonable, based on the standard of living established during the marriage, taking into consideration the circumstances as provided in Chapter 2 (commencing with Section 4320).

(b) When making an order for spousal support, **the court may advise the recipient of support that he or she should make reasonable efforts to assist in providing for his or her support needs, taking into account the particular circumstances considered by the court pursuant to Section 4320**, unless, in the case of a marriage of long duration as provided for in Section 4336, the court decides this warning is inadvisable.

4331. (a) In a proceeding for dissolution of marriage or for legal separation of the parties, **the court may order a party to submit to an examination by a vocational training counselor. The examination shall include an assessment of the party's ability to obtain employment based upon the party's age, health, education, marketable skills, employment history, and the current availability of employment opportunities. The focus of the examination shall be on an assessment of the party's ability to obtain employment that would allow the party to maintain herself or himself at the marital standard of living.**

(b) The order may be made only on motion, for good cause, and on notice to the party to be examined and to all parties. The order shall specify the time, place, manner, conditions, scope of the examination, and the person or persons by whom it is to be made.

(c) A party who does not comply with an order under this section is subject to the same consequences provided for failure to comply with an examination ordered pursuant to Section 2032 of the Code of Civil Procedure.

(d) "Vocational training counselor" for the purpose of this section means an individual with sufficient knowledge, skill, experience, training, or education in interviewing, administering, and interpreting tests for analysis of marketable skills, formulating career goals, planning courses of training and study, and assessing the job market, to qualify as an expert in vocational training under Section 720 of the Evidence Code.

(e) A vocational training counselor shall have at least the following qualifications:

(1) A master's degree in the behavioral sciences.

(2) Be qualified to administer and interpret inventories for assessing career potential.

(3) Demonstrated ability in interviewing clients and assessing marketable skills with understanding of age constraints, physical and mental health, previous education and experience, and time and geographic mobility constraints.

(4) Knowledge of current employment conditions, job market, and wages in the indicated geographic area.

(5) Knowledge of education and training programs in the area with costs and time plans for these programs.

(f) The court may order the supporting spouse to pay, in addition to spousal support, the necessary expenses and costs of the counseling, retraining, or education.

Division 9. Support

Part 1. Definitions And General Provisions

Chapter 2. General Provisions

FAMILY CODE

SECTION 3558 [emphases added]

3558. In a proceeding involving child or family support, a court may require either parent to attend job training, job placement and vocational rehabilitation, and work programs, as designated by the court, at regular intervals and times and for durations specified by the court, and **provide documentation of participation in the programs**, in a format that is acceptable to the court, in order **to enable the court to make a finding that good faith attempts at job training and placement** have been undertaken by the parent.

Division 9. Support

Part 2. Child Support

Chapter 2. Court-Ordered Child Support

Article 2. Statewide Uniform Guideline

FAMILY CODE

SECTION 4058 [emphases added]

4058. (a) The annual gross income of each parent means income from whatever source derived...includes, but is not limited to, the following:

(3) In the discretion of the court, employee benefits or self-employment benefits, taking into consideration the benefit to the employee, any corresponding reduction in living expenses, and other relevant facts.

(b) **The court may, in its discretion, consider the earning capacity of a parent in lieu of the parent's income**, consistent with the best interests of the children.

APPENDIX C Case Law re earning capacity

Morrison, In re Marriage of (1978)
20 C3d 437, 143 CR 139, 573 P2d 41, 1978 CFLR 1038,
CFLP §N.76.

The California Supreme Court held that a court may not terminate jurisdiction over spousal support in a marriage of long duration absent evidence that the supported spouse will be self-supporting by the date of termination.

Richmond, In re Marriage of (1980)
105 CA3d 352, 164 CR 381, 1980 CFLR 1357, CFLP §N.72.

The First District held that the trial court may order spousal support to terminate on a date certain, unless the payee brings a motion prior to the termination date requesting that support continue.

Regnery, In re Marriage of (1989)
214 Cal.App.3d 1367, 263 Cal.Rptr. 243

[Fourth Appellate District, Division One] held that the [Agnos] Act with previous decisional law creates a three-prong test: Earning capacity is composed of (1) the ability to work, including such factors as age, occupation, skills, education, health, background, work experience and qualifications; (2) the willingness to work exemplified through good faith efforts, due diligence and meaningful attempts to secure employment; and (3) an opportunity to work which means an employer who is willing to hire. (14 Words and Phrases (1952) Earning Capacity, pp. 27-28; West v. Industrial Acc. Com. (1947) [79 Cal.App.2d 711](#), 722 [180 P.2d 972].)

When the payor is unwilling to pay and the other two factors are present, the court may apply the earnings capacity standard to deter the shirking of one's family obligations.

Smith, In re Marriage of (2001)
90 Cal.App.4th 74, 108 Cal.Rptr.2d 537

The "opportunity to work" exists when there is substantial evidence of a reasonable "likelihood that a party could, with reasonable effort, apply his or her education, skills and training to produce income." (*In re Marriage of Cohn* (1998) [65 Cal.App.4th 923](#), 930 [76 Cal.Rptr.2d 866].) "[F]igures for earning capacity cannot be drawn from thin air; they must have some tangible evidentiary foundation." (*Id.* at p. 931.)

The Fifth District held that the determination [of earning capacity] must be based on the parent's *current* circumstances.

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