

THE

VOCATIONAL

EXPERT



Winter 1999/2000

Volume 16, No. 4

Official Publication of the
American Board of
Vocational Experts

New Orleans Hosts First ABVE Conference of the New Century By Lindette L. Mayer, Ph.D., ABVE Diplomate

The Hotel Inter•Continental is the headquarters for the 2000 ABVE Spring Conference. New challenges and new opportunities face all Vocational Experts in this new millennium. It is with the trend toward more substantive underpinnings of expert testimony, that ABVE is proud to present a wide plethora of knowledge, and training experiences that focus on systematic processes and data knowledge required within the dynamics of assessment protocols, estimated earnings, and the legal arena.

Featured in this year's meeting is a pre-conference *Value Added Workshop* focusing upon the *Dictionary of Occupational Titles* relative to the *O*NET*. A presentation of a software program, substantiated by studies noting its reliability and validity, but also representative of a paradigm for considering criteria to meet the new emerging legal standards of expert testimony is a focal point of the Workshop (Time 8:30 AM to 12:00 PM, Friday April 7, 2000).

The opening session of the conference at 1:00 PM will feature the "Keynote Address" by Nan A. Amish, MBA, CLU who will focus on the exploration of *Emerging Trends and their Impact on Vocational Experts*. This speaker will be followed by H. Katz, MD who will present on issues involved with the aging process in combination with the affects of acquired disabilities. The first afternoon's meeting concludes with a "Featured Session" (3:25 PM – 5:15 PM) by Dr. Bart Hultine, Michelle Davis and Ron Schmidt who will discuss the dynamics of the *intake, evaluation, and opinion forming processes* relative to the U.S. Supreme Court's *Daubert* (1993) and *Kumho* (1999) decisions.

Saturday's sessions follow a continental breakfast and registration with meetings underway at 8:30 AM. The Saturday morning session features an Admiralty Law panel wherein featured are well-known plaintiff and defense attorneys Lawrence Arcell, Esquire and Randolph Waits, Esquire with a Vocational Expert, Nathaniel Fentress, ABVE Diplomate who will provide testimony in this particular area of expertise. After a brief mid-morning break, Dr. Lindette L. Mayer will present in the area of assessment, standards, knowledge and other focuses of concern for the Vocational Expert witness or consultant within the *Daubert/ Kumho* atmosphere. Emphasis will be placed on understanding various key elements of instruments and opinions proffered in the courtroom under the growing scrutiny of the "gatekeeper" and the increasing demands of raising the standards for expert opinion. Following lunch, the afternoon sessions will begin with a focus on *Transferable Skill Analysis* presented by



Sternwheel Paddleboat on the Mississippi at New Orleans (Courtesy New Orleans C&VB)

Dr. B.J. McCroskey and Nat Fentress. After a brief social and coffee respite, the last session of the day will involve "breakout" groups for guided discussions of the peer review process and actual opportunities to have one's work product peer reviewed. All work products will be coded and the identities of the developers of the work product under discussion will not be known. Richard Baine and Dr. Larry Sinsabaugh, ABVE Diplomates, along with Michael Brethauer, ABVE Fellow, and Cathleen Brethauer, RN-C, WHNP will facilitate the peer review sessions concluding at 5:15 PM. Shortly after that session the Presidential Reception will be held for all attendees.

Immediately following a continental breakfast on Sunday morning, the final sessions will focus on a dual presentation of the *VE Under Cross-Examination* by Drs. David Benjamin and David Stein. The final presentation of the conference will feature the differing perspectives of Donna Abram and Douglas Conway who will explore the effects of changing technology, case law and culture on the ethical aspects of providing Vocational Expert testimony. The Conference will adjourn at 1:15 PM on Sunday, April 8th.

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

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From the Credentials Chair

By G. Michael Graham

One of the major functions of ABVE is the certification of experts in forensic vocational analysis and testimony. No other organization has been established for this unique purpose. The ABVE Board of Directors, relying on the historical development of the certification process, has held open enrollment opportunities for professionals in the field to make application for either the Fellow or the Diplomate certification. An additional level of membership, the Associate Member, was recently introduced and is available to professionals who are beginning to enter the realm of forensic work but who may not have the requisite number of actual work experience years in the forensic field.

Certification by ABVE involves three distinct components:

- A. Completion and submission of the application form, including all required supporting documentation such as school transcripts, résumé, letters of recommendation, and sample work product.
- B. Successfully passing a Peer Review of the application and the supporting documents. Peer review is completed by three members of ABVE who are on the organization's Credentials Committee.
- C. Completion of sitting for the Certification Examination. This examination consists of questions relating to the profession of vocational specialty with emphasis on the knowledge and skills deemed important to the successful practice of a forensic vocational expert.

In addition to the above, the various certification levels require that a specified number of years of forensic work experience be achieved.

Below is a listing of new ABVE members who have successfully completed all three of the certification components and have been awarded certification status:

- | | |
|-------------------|-----------------------|
| 1. Scott Whitmer | 6. Rodney Benner |
| 2. Herman Axlerod | 7. Bonnie Gladden |
| 3. Sharon Shou | 8. Stephanie Sleister |
| 4. Linda Tanouye | 9. Joanne Latham |
| 5. Maurillo Garza | |

The following members are in the process of becoming certified, with either the Peer Review or the testing process still pending:

- | | |
|------------------------|--------------------|
| 1. Barbara Burk | 6. Daniel Rappucci |
| 2. Doug Conway | 7. Robert Cottle |
| 3. Nancy Hollingsworth | 8. David Patton |
| 4. Jocelyn Jerris | 9. Nancy Hughes |
| 5. Myron Smith | |

The initial application and Peer Review sequence has been strengthened during the past year as there has been a concentrated effort to complete this process within 90 days of the receipt of the full application and all supporting documents. There has been a significant lag in this established time frame if all supporting documents fail to arrive in a timely manner.

Michael Graham, Credentials Committee Chairperson, and the ABVE management office continue to "tighten up what's loose and loosen up what's tight" in an effort to make the certification process efficient and responsive...all has not come under that goal as yet, but it's almost there! Improved communication with applicants so that the status of their application, what elements may not have arrived as yet and when the completed application is sent to the Peer Review Committee has been recently implemented and will cut down on the frustration expressed by some applicants in the past.

New this year is a "Summary of Peer Review Ratings and Comments" report completed by the Credentials Committee Chair and sent directly to the applicant. This provides feedback to the applicant and can be used directly for professional growth guidelines.

The next certification testing date will be Thursday, April 6, 2000, 1:00 – 5:00 PM at the ABVE Spring Conference in New Orleans. If you have not taken this examination to complete your certification, call the ABVE management office at (831) 662-8518 to register.

Information for the Work Place

By Cynthia P. Grimley, MS ABVE Diplomate

President Clinton signed PL 106-170, Ticket to Work and Work Incentives Improvement Act of 1999 (TTW-WIIA) into law on December 17, 1999. This is considered landmark legislation to boost the employment of individuals with disabilities. This landmark legislation makes it possible for millions of Americans with disabilities to join the workforce without fear of losing their Medicaid and Medicare coverage. It also modernizes the employment services system for people with disabilities

Since 1993, the American economy has added over 20 million new jobs. Unemployment is at a 29-year low of 4.1 percent. But the unemployment rate among working-age adults with severe disabilities is nearly 75 percent. While people with disabilities bring tremendous energy and talent to the American workforce, outdated institutional barriers often limit their opportunities to work. Under current law, people with disabilities often become ineligible for Medicaid or Medicare if they work, putting them in an untenable position of choosing between health care coverage and work.

The Ticket to Work and Work Incentives Improvement Act of 1999 will break down barriers and help the nation tap the full talents of the millions of Americans who are disabled. This legislation creates two new options for states to offer a Medicaid buy-in for workers with disabilities. Provided is \$150 million in grants for encouraging states taking advantage of the option. Created also is a \$250 million Medicaid buy-in demonstration to help people whose disability is not yet so severe that they cannot work. Medicare coverage also is provided for an additional four and a half years for people in the disability insurance system who return to work. There are employment-related services for individuals with disabilities through the new "Ticket to Work" Program.

The Work Incentives Improvement Act of 1999 offers improved healthcare alternatives for people with disabilities by removing limits on the Medicaid buy-in option for workers with disabilities. This legislation creates two new options for states that build on a Medicaid buy-in created by the Balanced Budget Act of 1997. (1) It permits states to remove the upper income limit of 250 percent of poverty (about \$21,000), therefore allowing states to set higher limits on income, unearned income, and resources. This important change permits

the individuals to buy into Medicaid when their jobs pay more than low wages but they do not have access to private health insurance. (2) It creates the option to allow people with disabilities to retain Medicaid coverage even though their medical condition has improved as a result of medical coverage. This act also provides \$150 million health care infrastructure grants to states over a five-year period supporting people with disabilities who return to work.

This Act will create a new Medicaid buy-in demonstration to help people who are not yet too disabled to work. It will provide \$250 million to states for a demonstration to assess the effectiveness of providing Medicaid coverage to people whose conditions has not yet deteriorated enough to prevent work but who need health care to prevent that level of deterioration. For example, a person with Parkinson's Disease, muscular dystrophy, or diabetes may be able to function and continue to work with appropriate health care. However, such health care may only be available once an individual's condition has become severe enough to qualify him/her for SSI or SSDI and therefore for Medicaid or Medicare. This demonstration would provide new information on the cost effectiveness of early health care intervention.

Additionally, this legislation will extend Medicare Part A premium coverage for people on Social Security Disability Insurance who return to work for another four and a half years. This means the difference between a monthly premium of nearly \$350 (which is about the cost of purchasing Part A and B coverage) and \$45.50. Although Medicare does not currently provide prescription drugs, which are essential to people with disabilities, this assistance will be available nationwide, even in states that do not take the Medicaid options. The premium-free Medicare Part A coverage for SSDI beneficiaries who return to work does not go into effect until October 1, 2000. It is a requirement that the effectiveness of this change be evaluated five years after enactment.

Creating the "Ticket to Work Program" enhances the employment services system. This new system will enable SSI or SSDI beneficiaries to obtain vocational rehabilitation and employment services from their choice of participating public or private providers. If the beneficiary goes to work and achieves substantial earnings, providers would be paid a portion of the benefits saved. The specifics and details like a reimbursement schedule, a referral mechanism, etc. still need to be worked out by the Advisory Panel. SSA will establish

phase-in sites nationally, but must have the program implemented as soon as possible but no later than three years after passage.

The Far-reaching Effects of Daubert and Kumho Tire

By Lindette L. Mayer, PhD ABVE Diplomate

In a most recent case, *Patti S. Kinnaman vs. Ford Motor Company* (U.S. District Court for the Eastern District of Missouri, Eastern Division January 10, 2000), the defendant's motion to strike the testimony of the Plaintiff's expert rehabilitation witness was taken under consideration. Following the motion to strike, it was found necessary to conduct a Daubert hearing wherein it appeared that the hearing would be required not only to consider the motion to strike the expert's testimony but whether the plaintiff witness could qualify as an expert and give opinions.

The analysis of the case noted the Defendant's challenge of the admissibility of the expert witness based on the Federal Rules of Evidence 702 is related to the "gatekeeping" obligation of the trial judge. Noting also *Kumho Tire Co., Ltd., et al, v. Carmichael et al* (1999), the Court in the *Kinnaman vs. Ford* decision cited not only *Daubert* that sets forth the trial's judge's general "gatekeeping" obligation applicable to testimony based on scientific knowledge, but also extended it to testimony based on technical and other specialized knowledge (*Kumho vs. Carmichael*). The Court in this instance specifically noted that even though the expert's testimony was not based on scientific knowledge, it is based on technical or other specialized knowledge. The decision in the *Kinnaman vs. Ford Motor Co.* proffers that the "gatekeeping" function applies to all expert testimony. [In this particular instance, the expert's credentials were not rejected; however, the testimony was considered to be unacceptable.] The court stated that although the expert may be considered a specialist in his/her field, it is the methodology applied that is subject to questions. In this instance, there had been no evidence to support that the theory or technique used by the expert witness had been tested or subjected to peer review and publication. Nor was there information in the record that the technique has a known or knowable rate of error even though the expert testified that his/her analysis was accepted by others in the field. The Court further explained that there are two ways the propo-

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ment of expert testimony can show that the evidence satisfies the first prong of Rule 702 and that is from pre-litigation research by the expert or that the expert's research has been subjected to peer review. However, when such evidence is unavailable, the proponents of expert scientific testimony may attempt to satisfy its burden through the testimony of its own experts. For such a showing to be sufficient, the experts must explain precisely how they went about reaching their conclusion and point to some objective source – a learned treatise, the policy statement of a professional association, a published article in a reputable scientific journal or the like—to show that they have followed the scientific method, as it is practiced by (at least) a recognized minority of scientists in their field. (Research must be described “in sufficient detail that the district court [can] determine if the research was scientifically valid”).

(This 2000 decision went on to state: For the court in *Daubert*, the “Plaintiffs have made no such showing as the foregoing.” As noted, plaintiffs rely entirely on the experts’ unadorned assertions that the methodology they employed comports with standard scientific procedure. In support of these assertions, plaintiffs offer only the trials and deposition testimony of these experts in other cases. We’ve been presented with only the experts’ qualifications, their conclusions and their assurance of reliability. Under *Daubert*, that’s not enough”) Thus, it is the same situation facing the Court in the instance of *Kinnaman vs. Ford* wherein the Court has been presented only with the qualifications of the expert witness, the conclusions of the expert and only the expert’s assurance of reliability. Thus the Court in *Kinnaman vs. Ford* finds that under *Daubert* that is not enough and the Defendant’s motion to strike should be granted, thus disallowing the expert’s testimony.

In an additional case, a vocational rehabilitation expert’s worklife expectancy testimony was disavowed in a recent Nebraska Supreme Court (*Phillips v. Industrial Machine, et. al.*, Neb. July 16, 1999) who decided that a trial judge did not commit error due to the expert’s testimony lacking proper foundation for admissibility. This decision becomes significant in light of the fact that the Nebraska courts appear to be moving away from the *Frye* “general acceptance” principle for reliability of expert testimony and into the *Daubert/Kumho* direction. This is a direction taken not only by the U.S. Supreme Court but also by many of the states.

There are many other court cases occurring in the milieu and direction of the *Daubert/Kumho* decisions, and as lawyers and judges become more educated to this realm of expert testimony, this directional trend for considering expert foundation for proffered opinions will be continued.

Journal Guidelines Available

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

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