

**IADC**

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**Defending Against  
Inflated Life Care Plans**

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# Defending Against Inflated Life Care Plans

If you defend cases that involve catastrophic injuries like spinal cord impairment, traumatic brain injury, severe burns and multiple trauma or birth trauma cases, it is never too early to anticipate the presentation of a seven to eight figure life care plan. “The cost of future health care of an injured person with long-term health care needs is often the largest component of economic damages in a lawsuit.”<sup>1</sup> In catastrophic injury cases, life care plans are a persuasive tool to convince juries to compensate the plaintiff with a large award because it provides needed medical care. Life care plans in the right case provide the basis for large jury awards, even if they bear little or no relationship to the therapy, treatment or accommodations an injured party may truly need.<sup>2</sup> “Life care plans can be unrealistic and exorbitant. As such, the issue for the defense attorney is to determine whether the contents of a life care plan are injured-plaintiff centered or attorney driven.”<sup>3</sup> This may be particularly true in states where non-economic losses are limited by statute, and plaintiffs’ counsel turns to economic loss to drive a large settlement or verdict.<sup>4</sup>

In this paper and its companion presentation, we will try to provide an overview of areas and ideas that should be considered when defending against a life care plan that is inflated, improperly researched and not well grounded for the particular plaintiff, or offered by an unqualified expert. We will also consider potential experts, both testifying and consulting, to be retained to assist your client either in court or behind the scenes to challenge overstated life care plans. Without expert guidance, it can be a daunting task to try and cross exam even the unqualified witness about the damages and expenses they propose for the plaintiff. We’ll discuss strategy and tactics, make some suggestions and share some stories.

## I. The Runaway Train and How to Avoid It

In the past, it may have been common place to begin the initial evaluation a seemingly benign case with little thought of facing a life care plan recommending treatment, therapy and

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<sup>1</sup> Cathlin Vinett Mitchell, Analyzing Life Care Plans, DRI Medical Liability and Health Care Law Seminar 149, (March 2014)(available online at [www.dri.org](http://www.dri.org)).

<sup>2</sup> J. Thaddeus Eckenrode and Dwight A. Vermette, Fighting the Squeeze, For The Defense 68. 72 (Sept. 2012)(“Often with little more documentation than a plaintiff’s medical records and liberally interpreting some physician’s note about the plaintiff’s prognosis and treatment plan, this “expert” will make artistic use of spreadsheets and tables to itemize the surgical needs, physician and psychiatric visits, medical supplies, medications, home improvements, ambulation and movement modalities, special diets, and more that the plaintiff will need and project costs for these items on a per annum or lifetime basis.”).

<sup>3</sup> Gail C. Jenkins and Angela M. Kneeland, Defense Life Care Experts 83, DRI Preeminent Lawyers Seminar (2007)(available at [www.dri.org](http://www.dri.org)).

<sup>4</sup> Catherine M. Sharkey, Unintended Consequences of Medical Malpractice Damages Caps, 80 New York University Law Review 391, 430 (2005)(Describing the “crossover phenomenon”, where “[c]onfronted with caps on noneconomic damages in medical malpractice cases, attorneys may have learned new ways to pitch their arguments about economic damages to juries. In other words, noneconomic damages caps may have triggered innovative ways to increase economic damages.”); see also, Eckenrode and Vermette, *supra* n.2 at 68 (Sept. 2012)(“Those who have chosen to take on cases of any sort, however, have also started looking for every nickel that they could identify as an “economic” loss for which they could seek recovery unimpeded by the cap, pursuing past medical expenses, past wage loss, future diminution of earning capacity, and future medical expenses, among other things...”).

various needs of the Plaintiff totaling multiple millions of dollars.<sup>5</sup> A routine evaluation consisted of analyzing plaintiffs' medical records, medical bills, and the primary diagnosis rendered by the treating physician. The traumatic brain injury syndrome mentioned as one diagnosis in the differential might not have alerted you that the case you were asked to defend could cost your client his or her business or livelihood by driving a large verdict. In this time of high stakes litigation, it is imperative that defense counsel routinely assess whether a catastrophic case may require defending against a life care plan. If so, there is much preparation and work that will need to be completed well in advance of trial and ultimate evaluation of the damages associated with the case.

Cases with brain injury or other catastrophic damages require that you immediately attempt to determine how the Plaintiff's counsel is going to prosecute the case. Will it be prosecuted as a garden variety damages case, or will plaintiffs' counsel invest in the team of experts needed to develop large medical damages, including a life care plan: a doctor, nurse life care planner, psychiatrist and neuro-psychologist. On the defense side, some or all of these which may thus be appropriate either as consulting or testifying experts once you obtain discovery and medical records and, importantly, the prognosis for long term attendant care for the plaintiff. "A life care expert retained by the defense can play different roles as a particular case moves forward towards trial.<sup>6</sup> Whether in the role of consultant to the defense or as an expert witness, the defense life care expert can be a valuable asset who can bolster the defense case, as well as the defense's credibility, while at the same time contradict the plaintiff's suggested damage award."<sup>7</sup>

It is not uncommon for Plaintiff's counsel with a big economic damage cases to present a life care plan to the defendant or its insurance carrier to attempt to obtain a settlement prior to litigation. If you are an attorney that often defends these types of high damage cases, it is assumed you have access to the best experts in the state or region to defend against these types of catastrophic damages. We'll make some suggestions.

Defending catastrophic cases (with even a mention of traumatic brain injury) requires a proactive approach. If the life care plan is presented before litigation, you have to obtain (by

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<sup>5</sup> David R. Lucchese, Treading toward Trial: Defending the Perinatal Brain Injury Lawsuit, For the Defense 65 (Nov. 2007)(available online at [www.dri.org](http://www.dri.org))("Perinatal brain injury cases consistently have the highest verdicts and settlements...").

<sup>6</sup> Caryn L. Lilling and Richard J. Montes, An Appellate Perspective: Early Case Evaluation and Risk Management, In-House Defense Quarterly 16 (Fall 2010)("Defense counsel should be prepared not only to challenge the various items included in the life care plan, but should consider retaining their own life care planner to present to the jury.").

<sup>7</sup> John W. Bell, Handling of the Defense Economist or Life Care Expert, DRI Becoming A Preeminent Trial Lawyer 57 (2005)(available online at [www.dri.org](http://www.dri.org)). In birth trauma cases, "[t]o evaluate the cause of the baby's brain injury, experts in the fields of perinatology, neonatology, pediatric neurology, pediatric neuroradiology, pediatric neuropathologists and pediatricians may be necessary. Then, to prepare a defense analysis of the needs and costs of the disabled child, now and in the future as an adult, it is important to obtain the services of a pediatric neurologist to evaluate the child's condition specifically and opine regarding the child's need; a specialist in nursing, ancillary and residential care of disabled children and adults; a specialist in the evaluation of the life expectancy of disabled children and adults; a specialist in the formation of life care plans for disabled persons; and finally a forensic economist to provide an economic analysis of the per year costs, the gross lifetime care costs, as well as the present cash value of the total, gross numbers." Lucchese, *supra* n.3 at 68. See also, Jane T. Davis, Mission Not Impossible: Finding Niche Medical & Scientific Experts, Rx for the Defense, DRI Drug and Medical Device Newsletter 16 (Winter 2009)(available at [www.dri.org](http://www.dri.org))(Tips on locating experts).

agreement) the plaintiffs' medical records and bills so you can evaluate the accuracy of the plan. If you expect a life care plan in litigation, you have to jump through all the hoops in discovery to make sure you won't be blind-sided with a substantial life care plan intended to inflate economic damages without the factual basis to challenge it. We'll discuss some tips.

## **II. The Basics of What You Must Obtain In Discovery**

### **A. Medical Records and Radiographic Studies**

To effectively defend against an inflated life care plan, it is necessary from the outset to determine the magnitude of the injury and what future treatment may be required for the plaintiff. It is important to obtain **all** of the plaintiff's medical records to give your experts the information they need to determine whether or not a life care plan is even warranted. Likewise, it is imperative to order **all** of the radiographic studies to allow proper analysis to rule out or confirm prior medical conditions unrelated to accident in question.

### **B. Academic Records from all Levels Available**

The experts and you will also want to examine the claimant's academic records prior to and after the accident. It is important to examine whether the claimed deficits are truly as a result of the incident for which the brain injury is claimed. The school attendance records will also allow you to glean information concerning the problems that may be attributed to the claim.

### **C. Work Related records from all places of employment**

If the party claiming damages is not currently in school or has graduated and now working, it is critical to obtain all work related records to evaluate performance and work skills since the accident. In catastrophic cases, you will want this information to assess wage loss claims and to confirm the state of their salary at the time of the incident. These files are often full of work related issues that you can use in response to claimed damages by the plaintiff.

### **D. Neuro-Psychological Records and Counseling Records**

Some of the most important documents you will need in assessing alleged damages associated with a life care plan are the neuro-psych and counseling records. The raw data associated with any neuro-psych evaluation will be needed for your expert to review and analyze. It is common for the neuro psychologist to provide significant information related to the cognitive function of the plaintiff and the needs that may exist relative to the extent of the brain injury.

### **E. Current Therapy, Treatment, Counseling, and Medical Goods**

The cornerstone of an effective attack on an overinflated life care plan may well be found in the plaintiff's current therapy, treatment or counseling and in the medical goods being used. Often, plaintiff's counsel and their life care planner fail to evaluate what is actually occurring with the plaintiff once the life care plan has been "published." This is significant for two reasons. First, the life care plan should not "put the plaintiff in a better position than she was in before the accident. For example, the life care plan should not include the cost of modifying a house for a disabled plaintiff if at the time of the accident the plaintiff did not have a house."<sup>8</sup> Second, the recommendations of the life care planner can be compared to the actual care provided, demonstrating that actual, reasonable care does not encompass the "bells and whistles" recommended by the hired life care planner. The person responsible for trying to justify the plan is hard pressed to justify expensive therapy, counseling or medical goods that have not been recommended or prescribed by the plaintiff's treating physician, or those the plaintiff has either summarily rejected or has not sought. Moreover, the life care planner's opinions can be attacked through the testimony of treating physicians who have not made the same recommendations, have never seen the life care plan and often, have never been contacted by the plaintiff's expert. "The defense attorney needs to focus on the foundation of the life care plan: whether the life care planner incorporates information from the plaintiff's medical records into the plan and whether the treating physicians agree with the items contained in the plan."<sup>9</sup> This can be particularly effective where the plaintiff relies on a hired physician expert to testify that the life care plan represents reasonable and necessary care, and his opinion is contradicted by the treating physicians.

#### **F. Investigate Plaintiff's Life Care Planner**

Find out as much as you can about the plaintiff's life care planner. One of the best places to find good cross examination material is to locate as much information as you can find about the expert, including prior depositions and life care plans. There are several sources for these materials, including expert databases maintained by DRI and IADC. Both Westlaw and Lexis (formerly IDEX) have expert data bases. Google and other search engines (Bing, Yahoo, etc.) are also great resources. . You will find that most life care planners will have weighted their testimony either heavily toward plaintiffs or defendants. Inconsistencies may be discovered by reviewing prior testimony for defendants when they normally appear for the plaintiff. In addition, if you are lucky enough to find some of the other plans drafted by the Plaintiff's life care planner, you often will see a "form type approach" that presents a great opportunity to cross examine the expert on a cookie cutter plan. It is important to ask the life care planner whether or not they used any computer software in the preparation of the life care plan. There are a number of programs that will allow you to input some basic data and the software will produce a ready made life care plan. These plans are set up for significant holes to explore during cross examination, and can be shown to bear little relation to the plaintiff's actual condition and situation.

#### **G. Depose all Family Members to obtain Excellent Baseline Testimony**

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<sup>8</sup> Hope Thai Cannon, What's in the Numbers? Effective Use and Cross-Examination of Life Care Planners and Vocational Economic Experts in Product Liability Litigation, DRI Products Liability Seminar (2006)(available at [www.dri.org](http://www.dri.org)).

<sup>9</sup> Allen C. Smith, Experts for Truck Accidents – Who to Expect, Who to Hire, 15 In Transit 3 (Nov. 15, 2012).

It is surprising how often the brother that lives across town will turn out to be your best damage witness. Family witnesses often come to the deposition with no intention of giving testimony that will gut the highly inflated life care plan. Their honesty can be used to chip away at the life care plan on things that the Plaintiff is able to do now and that are inconsistent with the recommended life care plan. Often the life care planner has not reviewed these seemingly peripheral depositions and they can effectively be used demonstrate the planner's lack of knowledge of what the Plaintiff actually does on a daily basis.

#### **H. Obtain all Pricing data from the Life Care Planner Prior to His or Her Deposition**

One group of documents to obtain that may be taken for granted is the pricing information used by the life care planner in formulating the plan. It is critical to know how the planner came up with the pricing data and how they applied it to the plan. For example, did the planner consider any long term pricing contracts? Most planners run these prices up by looking at an inflationary rate. How often are goods replaced and how are they priced? Are there "free services" that are readily available in the market that the Plaintiff is currently receiving or that will always be available to the Plaintiff should they decide to take advantage of the services. There are a number of brain injury groups that provide free services to brain injured parties offered by the state and local governments. A word of caution: in some states you will draw a collateral source objection so be sure to be prepared for whether or not it you will be able to question the planner with the information. The planner's response to this inquiry is always that they do not consider any services "that may not be available" for the duration of the Plaintiff's life expectancy. These objections can be easily thwarted by showing that the services have been around for multiple decades and will be here in the future.

### **III. The Qualifications of the Life Care Planner are of Paramount Importance in Determining the Validity and Admissibility of the Plan**

#### **A. Inconsistencies in Certification**

When a person is in a catastrophic state due to injuries sustained in an incident, medical costs, care and other expenses increase dramatically. Often, life care plans are prepared in order to help determine an appropriate amount to cover the present and future expenses the Plaintiff will incur in order to maintain quality of life. Life care plans are routinely defined as "dynamic documents based upon published standards of practice, comprehensive assessment, data analysis, and research, which provide an organized, concise plan for current and future needs with associated costs for individuals who have experienced catastrophic injury or have chronic health care needs."<sup>10</sup> Although helpful tools for the plaintiff, some plans estimate costs much higher than necessary which provides opposing counsel grounds to contest the proposed plans under multiple grounds. The motive is not to escape providing care, but to establish the difference between the costs that insure plaintiff's quality of life and other costs that are unnecessary, or far overreaching. When defending against a plan, defense counsel may look to the life care planner and his qualifications, as well as the plan and each delineated cost for areas of weakness.

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<sup>10</sup> STANDARDS OF PRACTICE FOR LIFE CARE PLANNERS §I(A) (INT'L ASS'N OF REHABILITATION PROF'LS 2015)

The first step is to determine whether the plaintiff's life care planner is qualified, for if not, he or she will not be accepted as an expert. If a qualification challenge is successful, the life care planner's testimony and potentially the entire life care plan may be excluded from the jury in their consideration of damages. To be admitted as an expert to present a life care plan, one must be generally qualified in the area of life care planning, and must also be qualified to substantiate the need for each element of care included in the plan to the degree required by the jurisdiction.<sup>11</sup> According to the Standards of Practice for Life Care Planners, a Life Care Planners must have an educational background in the areas of health or rehabilitation; maintain required licensure or certification to practice a professional rehabilitation or health care discipline suitable for life care planning; and act ethically within his professional scope.<sup>12</sup> Further, a Life Care Planner must be consistent, objective, and methodical in his or her planning.<sup>13</sup> This includes relying on appropriate medical and health related resources, and not assuming decision-making responsibility beyond the scope of his or her own discipline.

Ultimately, whether an individual qualifies as an expert is left up to the trial court. Few decisions addressing qualifications of life care planners exist; and those that do vary greatly in their acceptance of qualifications. One court has found that attending two seminars and compiling 25 plans was not sufficient to qualify one as an expert.<sup>14</sup> Another found that a rehabilitation counselor who prepared over 200 life care plans annually who had a bachelor's in psychology, a master's in rehabilitation counseling and minor in behavioral psychology, a PhD in counseling psychology, and a minor in rehabilitation counseling with a subspecialty in severe orthopedic disabilities was qualified as an expert in both his education and practical experience.<sup>15</sup>

Similarly, few states have implemented standard regulations for life care plan experts, and case law is also limited. In Arizona, a life care planner with twenty years' experience relying on her own observations, experience, input from doctors, and readily-available pricing constituted a proper foundation of expertise.<sup>16</sup> A Connecticut court held that the testimony of a certified life care planner was admissible even though he was not a medical doctor because he was an experienced expert in the care needed by the plaintiff, and reviewed his report with medical doctors and sought approval of patient's health care providers.<sup>17</sup> In Indiana, courts allowed a certified nurse to testify to what rehabilitation expert told her when she prepared the life care plan in question because as a life care planner, it is expected to rely upon experts in preparing their plans.<sup>18</sup> A Montana court held that admission of a rehabilitation consultant's expert testimony was not an abuse of discretion, despite his reliance on medical records, transcripts, interviews, and evaluations.<sup>19</sup> In Missouri an

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<sup>11</sup> Jean-Paul Marat, *A Defense Attorney's Perspective on Life Care Planning*, Heath Tips (Sept. 11, 2011)(available online at <http://tipsdiscover.com>).

<sup>12</sup> STANDARDS OF PRACTICE FOR LIFE CARE PLANNERS §III(1),(2) (INT'L ASS'N OF REHABILITATION PROF'LS 2015)

<sup>13</sup> STANDARDS OF PRACTICE FOR LIFE CARE PLANNERS §III (INT'L ASS'N OF REHABILITATION PROF'LS 2015)

<sup>14</sup> Jean-Paul Marat, *A Defense Attorney's Perspective on Life Care Planning*, Heath Tips (Sept. 11, 2011) <http://tipsdiscover.com>

<sup>15</sup> Jean-Paul Marat, *A Defense Attorney's Perspective on Life Care Planning*, Heath Tips (Sept. 11, 2011) <http://tipsdiscover.com>

<sup>16</sup> *Sandretto v. Payson Healthcare Management, Inc.* (App. Div.2 2014) 234 Ariz. 351, 322 P.3d 168

<sup>17</sup> *Oram v. deCholnoky*, (2008) 2008 WL 4984752

<sup>18</sup> *Dan Cristiani Excavating Co., Inc. v. Money*, App.2011, 941 N.E.2d 1072

<sup>19</sup> *Midway Nat. Bank of St. Paul v. Estate of Bollmeier*, App.1993, 504 N.W.2d 59

expert witness who was a doctor, board certified in physical medicine and rehabilitation, sub-board certified in spinal cord injury medicine, was a wound care specialist, and a certified by disability evaluation commission as a life care planner was qualified to testify that the life care plan in question was based upon a reasonable degree of medical certainty.<sup>20</sup> In New York, a court found a vocational rehabilitation specialist retained to prepare life care plan for claimant was not qualified to make an information assessment for cost of future medical procedures.<sup>21</sup> In Ohio, the appellate court found that the trial court did not abuse its discretion in determining that a physician with forty-five years experience in treating patients with similar injuries to the plaintiff's was qualified to give an expert opinion regarding the life-care plans admitted into evidence.<sup>22</sup> In Texas, a doctor's expert testimony on damages regarding sufficiently and efficacy of life care plan prepared by another doctor was reliable based on training and experience in the field.<sup>23</sup> Nevada has enacted a statute to ensure the duties of insurer who accepts a claim for catastrophic injury regarding life care plans.<sup>24</sup> This sampling of case law demonstrates the variation in discretion regarding the determinations of the qualifications life care plan experts across the nation.

## **B. Know your State's Law as to Life Care Planner's Qualifications and Prepare a Strong *Daubert* Challenge**

Of interest is a response to a frequently asked question section of a well-known life care planner. In the response, Paul Deutsch provides a roadmap for life care planners related to Daubert and F.R.E. 702 challenges. In summary fashion, Deutsch explains the following (1) always expect a challenge and be prepared to educate all parties; (2) Educating the referral source is a first line of defense according to him; (3) Deutsch believes it is important to have the testimony proffered in order to give the life care planner an opportunity to obtain answers; (4) Deutsch suggests that the life care planner come armed with extensive documentations including clinical practice guidelines, research literature, home health practice act for the state, Home Health Practices or the Centers for Medicaid and Medicare standards. In short, he suggests the life care planner bring the documents with them to Court; (5) Deutsch encourages the life care planners to prepare bullet point documents for the Court; (6) Document the acceptance of the life care plan; and (7) finally Deutsch encourages all life care planners to be well prepared.<sup>25</sup> It is these factors that many life care planners do not prepare for and do not follow in the defense of their plan. The qualifications of the planner are often the lynchpin of destroying the life care plan.

It is not uncommon to receive a life care plan from a "planner" that advertises his or her services and does not discriminate in the areas they produce or prepare reports. Although a horrible disservice to a plaintiff and his or her counsel, it is not unheard of to have a life care plan from a professional that is credentialed way out side the area of expertise needed to properly create and defend a life care plan. The creation of a life care plan is expensive and even more so if the plan will not sustain a challenge from the defendant's counsel. Unlike many areas of law and medicine, this really isn't a turf battle. Nurses, lawyers, social workers, physicians, vocational rehabilitation

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<sup>20</sup> *Mitchem v. Gabbert*, (App. S.D. 2000) 31 S.W.3d 538

<sup>21</sup> *Donaldson v. Ryder Truck Rental & Leasing*, 2001, 189 Misc.2d 750, 737 N.Y.S.2d 783.

<sup>22</sup> *Adae v. State*, (Ohio App. 10 Dist., Franklin, 01-08-2013) No. 12AP-406, 2013-Ohio-23, 2013 WL 85200

<sup>23</sup> *Taylor v. American Fabritech, Inc.* (App. 14 Dist. 2004) 132 S.W.3d 613

<sup>24</sup> Nev. Rev. Stat. Ann. § 616C.700 (West)

<sup>25</sup> See Life Care Planning – FAQ's [www.paulmdeutsch.com](http://www.paulmdeutsch.com); Question 17



specialist and a number of other professionals have taken their shot at creating and testifying about life care plans. The defense counsel can use a number of standards to completely destroy a plan and planner that are outside of his or her area of expertise.

One of the tough issues for plaintiff's life care planner to overcome is the necessity and length of proposed treatment and rehabilitation services. In a Colorado case, the court examined the qualifications of a nurse with rehabilitation experience that gave life care plan testimony for an injured theater patron. The jury returned a verdict of almost seven figures and approximately one-third of the verdict was supported by life care plan testimony. It was noted that the trial court conducted painstaking examination to determine the qualifications of the nurse and the life care planner's ability to render projection of future medical needs. Testimony supported by the recommendations of the treating physician, the trial court allowed the testimony. However, when the projections extended into things such as psychiatric care, the trial judge restricted the non-physician life care planner's testimony. The court went further in restricting unsupported recommendations by the planner for medications not prescribed by a doctor.<sup>26</sup>

This paper will not attempt to discuss the thousands of cases that have been issued on the requirements of *Daubert* or its state counterparts. However, many of these cases have observed that the rejection of expert testimony is the exception rather than the rule. In short, the defense has to chip away at the qualifications of the life care planner and in turn it will lead to fertile cross examination of various portions of the life care plan due to the lack of qualifications. It is important that once you receive the life care plan submitted by the plaintiff to keep mindful of the need to ask treating physicians about the plan, particularly if you believe they have not been furnished the plan (and often they have not). This is a slippery slope since the treating physician's endorsement of the plan will go a long way to helping the plan's contents be allowed. Even when the *Daubert* factors don't precisely fit the testimony that is being proffered, the trial court still has the responsibility to evaluate the reliability of testimony to determine its admissibility.<sup>27</sup>

### C. Issues with the Life Care Plan Report

Counsel for the Plaintiff would prefer nothing better than for the life care planner's work product to become a piece of admitted evidence. Irrespective of whether or not the life care planner's report is ultimately admitted, other plaintiff witnesses, such as treating physicians, independent medical experts and the economists, may find themselves referring and relying on the

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<sup>26</sup> *Theater Management Group, Inc. v. Dalgliesh* 765 A.2d 986 (Dist. Col.Ct. App.2001)

<sup>27</sup> See e.g., the comments of the Advisory Panel, following F.R.C.P. 702, which encourage the trial court to consider:

- (1) Whether experts are "proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying. *Daubert v. Merrell Dow Pharmaceuticals, Inc.* 43 F.3d 1311, 1317 (9<sup>th</sup> Cir. 1995)
- (2) Whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion. See *General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997)
- (3) Whether the expert has adequately accounted for obvious alternative explanations. See *Claar v. Burlington N.R.R.* 29 F3d 499 (9<sup>th</sup> Cir. 1994)

life care plan. If admitted, the report becomes the centerpiece of the plaintiff's damage claim that will be referred to throughout the trial.

At the outset, the written life care plan is premised and based on hearsay. Simple analysis demonstrates many of the pieces of the plan are solely based on out of court sources used to determine the costs of the various items of care, therapy or medical goods. The life care planner is preparing a report to prove the truth of the matter asserted. This is basic evidentiary foundation that the life care plan itself should not be able to overcome.

In addition to the hearsay issues, there are other areas of attack open to a savvy defense lawyer. The planner's cost valuations and the length the treatment open the planner to significant cross examination about the speculative nature of the plan. In addition, if the life care planner is not a medical physician, the plaintiff runs the risk of not having the plan supported by medical testimony from a treating physician.

Life care projections involving a vocational rehabilitation specialist's future medical costs projections were found to be clearly speculative because the treating surgeon's affidavit did not address the need for future medical procedures and their costs. "At the least, plaintiff should have submitted an affidavit from the [orthopedic surgeon] or other admissible evidence covering those subjects." The court went on to find that the vocational rehabilitation specialist projections were beyond his qualifications.<sup>28</sup>

It is critical that the defense pin down the medical basis of the life care projections. If speculative or not supported, many of the projections and the expenses may be excluded as speculative. The life expectancy routinely used by life care planners is often open to challenge as being speculative as well. Plaintiff's experts will often use standard tables that do not consider studies showing that certain injuries or disabilities reduce life expectancy for the specific plaintiff involved in your case.

A well-recognized and often quoted article related to the ethical issues associated with a proper life care plan is *Ethical Objectivity in Forensic Rehabilitation*, a by Frank Woodrich and Jeanne Patterson. The authors outline a number of issues associated with the proper life care plan. Several are instructive for the defense attorney to consider in defending against an inflated life care plan. Although not exhaustive, some of the issues raised by the article are: (1) Life Care Plans should have a factual basis and be within the provider's area of expertise and discipline (citing the International Association of Rehabilitation Professionals (IARP, n.d.); (2) Plans should focus on both assets and barriers created by the injury or disability; (3) Plans should include rehabilitation services or interventions attempting to restore the individual to a productive post-injury or post-illness lifestyle; (4) Plans should avoid, when possible, excessive use of home care services, based on the medical model of nursing care; (5) Plans should use service costs for the location where the individual will receive services; (6) Plans should not project higher costs to accommodate for settlements; (7) Plans should not state possibilities and probabilities or make predictions that are contrary to accepted fact and literature; (8) Plans should exclude physician visits, diagnostic

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<sup>28</sup> *Donaldson v. Ryder Truck Rental & Leasing*, 737 N.Y.S.2d 783 (2001)

procedures, and medication costs for conditions predating the disability in question; (9) Plans should not differ greatly from similar individuals with the same disability.<sup>29</sup>

#### **IV. Conclusion**

The areas of attack are numerous and diverse when challenging a life care plan. It starts with the qualifications of the life care planner and moves quickly to the lack of specificity of the plan. It is clear that there are numerous life care planners that stay within the parameters of developing a plan that is suited for the injured party and hard to attack. There are professionals that are licensed and certified in the area of life care plans that come loaded for bear in the defense of the plan and all aspects of the costs associated with the plan. Hopefully, this paper will give you some ideas to consider when you are faced with a plan that is inflated and unsupported by the medical testimony and needs of the injured party.

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<sup>29</sup> Ethical Objectivity in Forensic Rehabilitation, *The Rehabilitation Professional*, Frank Woodrich and Jeanne Patterson (2003)