

Reaction to Rational Life Care Planning

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Kreuscher (2003) identified 11 points from our article (Woodrich & Patterson, 2003) that he believed could serve as a “road map” for defense attorneys. We agree, but a review of the points indicates that they are applicable equally to defense and plaintiff attorneys.

As we noted in our article, “given the diversity of credentials of professionals working in forensic rehabilitation (e.g., psychiatrists, rehabilitation counselors, nurses, psychologists), the field encompasses a variety of licenses, certifications, and memberships, each with its own code of ethics and standards of practice.” It is noteworthy that changes (e.g., a new section – F: Forensic and Indirect Services) in the recently revised *Code of Professional Ethics for Rehabilitation Counselors* (hereafter referred to as the Code, Commission on Rehabilitation Counselor Certification [CRCC], 2009) support Kreuscher’s statement “the defense lawyer must carefully question the planner’s qualifications, determine precisely the bases for the plan, and look at how it fits with the medical or treating physician’s evidence.” Standard F.2.b of the Code states:

“rehabilitation counselors have an obligation to present to the court, regarding specific matters to which they testify, the boundaries of their competence, the factual bases (knowledge, skill, experience, training, and education) for their qualifications as an expert and the relevance of those factual bases to their qualifications as an expert on the specific matters at issue.” (p. 18)

The issue of qualifications for those providing expert testimony can be troubling. In his discussion of attendant care, Kreuscher cited Elliott, where the court stated that the expert had limited time in the field, “this was his fifth plan and he had never implemented a plan” (p. 58). It appears the real issue was that the defendant’s expert agreed with the plaintiff’s expert. Every professional has had a “fifth” situation (e.g., surgery, hearing, lecture) and few, if any, experts have ever implemented a life care plan. Most have never served as case managers following a settlement or verdict. Their role is to use their unbiased, objective expertise. The Code, Standard F.1.c states: “... rehabilitation counselors do not provide direct services to evaluatees whom they have previously provided forensic services in the past except under the conditions noted in A.5.f, (added: “...changing from a forensic to a primary care role, or vice versa; [or] changing from a non-forensic evaluative role to a rehabilitation or therapeutic role, or vice versa); or government statute” (p. 17).

Another issue related to qualifications is the proliferation of certifications that are used by attorneys to imply that one expert witness is more qualified than another. Or, as Johnson (2009) noted:

I see a wide array of qualified individuals with a multitude of credentials within the Life Care Planning community. I would hate to see the community of life care planners be disrupted by one certifying body competing against another and

ultimately excluding those who do not possess “X” or choose not to add even more letters after their name. I fear this is the direction in which we are going” (p. 155).

A list of acronyms following one’s name may prove impressive to those who lack knowledge of what the certification actually means, but all certifications do not reflect similar standards. For example, CRCC is accredited by the National Commission for Certifying Agencies (NCCA), as is the Commission for Case Management Certification and the Certified Disability Management Specialist. The Institute for Credentialing Excellence (ICE) (2009) includes a number of groups (e.g., agencies, consumer groups, certifying organizations) with an interest in credentialing. However, as ICE notes: “Membership in ICE does not mean that ICE has approved, endorsed, or accredited an organization or its certification program(s). ICE’s accrediting arm, the National Commission for Certifying Agencies (NCCA), is responsible for accreditation of individual certification programs” (p. 1).

Many of the acronyms following a vocational expert’s name reflect a certificate program that has not undergone a review by an accrediting body such as the NCCA. The International Association of Rehabilitation Professionals (2010) lists 54 “certifications”, although there is redundancy in the list, which include certifications, organizations, and occupations (e.g., Career Development Professional, American Board of Professional Counselors, Legal Nurse Consultant Certification). For example the American Board of Vocational Experts (ABVE) (2010) has as its mission “to promote the highest standards of forensic competency and integrity, to promote accountability through standards enforcement, to provide a ‘bench marked’ credentialing process that includes knowledge testing and peer review of forensic work products” (p. 1). ABVE certifies individuals as Associate, Fellow, or Diplomat status, with the primary difference the number of years of documented experience as a vocational expert, after one initially has achieved a passing score on the ABVE examination and submitted forensic work products for review. To be a Diplomat, an individual must have 7 years of experience and demonstrate “distinguished performance or recognition” through publications, leadership positions, presentations at professional conferences, “and/or [emphasis added] sitting on study groups or legislative committees to enhance the professionalism of an organization” (ABVE, 2010). Obviously there is wide variation in what constitutes distinguished performance. NCCA does not list ABVE as a member that has undergone review by an external body. Even the International Commission on Health Care Certification (ICHCC, 2009), which has procedures for an individual to become a “Certified Life Care Planner,” is not listed as a member of NCCA.

A number of universities are embarking on life care planning programs. Minnesota State University – Mankato (2010) offers an on-line graduate certificate program in Forensic Vocational Rehabilitation and George Washington University (2010) will offer a “12 credit online program [that] can be completed in one year and is designed for busy working rehabilitation professionals. The program will provide the forensic training and experience required to become a consultant or expert witness.” Kaplan (2008) advertises the profession of Life Care Planner: “In 12 months or less, you could be on your way to a more rewarding career in life care planning” and “the Life Care Planning Certificate program is designed for registered nurses and other health and human services professionals who would like to pursue a career in life care planning, specifically: occupational therapists, physical therapists, rehabilitation counselors, case managers, social workers, psychologists, medical doctors, chiropractors, nurse practitioners, special education professionals, licensed speech pathologists, and professional counselors” (p. 1). Each of these professional groups has its

own Code of Ethics, which may or may not address forensic issues and though an exam may be provided, the examination has not been rigorously reviewed by an external organization.

Regardless of the profession from which the life care planner comes, years of actual experience in working with people with disabilities is the foundation for understanding and learning how to meet their needs through an ethical and rational plan of care. Such experiences cannot be substituted by a “12 month or less” certificate program in life care planning.

We do concur with Kreuzscher that expert witnesses for either the plaintiff or defense should base needs and projections on medical evidence. Attorneys are advocates for the clients, but it is up to the expert witness to provide the balanced, unbiased view. Both of us (Woodrich and Patterson) have found ourselves in the position of stating to an attorney, be it plaintiff or defense, “I don’t think you will find my testimony helpful to your case.” The Code (F.3.1) states:

While all rehabilitation counselors have the discretionary right to accept retention in any case or proceed within their area(s) of expertise, they decline involvement in any case when asked to take or support predetermined positions, assume invalid representation of facts, alter their methodology or process without foundation or compelling reasons, or where there are ethical concerns about the nature of the requested assignments” (p. 16).

In conclusion, we approve of Kreuzscher’s title, “Rational Life Care Planning,” but we believe that the ethical component is critical and that life care planners should be held to the highest standards. Moreover, there would be far more agreement between life care plans developed rationally and ethically by professionals actually experienced in evaluating and working with individuals with disabilities, rather than by people seeking certification just “for a more rewarding career.” The result could yield more productive mediation outcomes, reduced litigation, and life care plans that are actually developed to meet the primary needs of the person with a disability and not the attorney’s and expert’s involved in the litigation process.

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AN IRREVERENT LOOK AT LIFE CARE PLANNERS

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Northwest Bank v. K-Mart Corp. Appendix A

1997 U.S. Dist. LEXIS 3426 (N. Dist. Ind. 1997)

AN IRREVERENT LOOK AT LIFE CARE PLANNERS

Why is this look at life care planners “irreverent”? Simply because life care planning suffers from growth pains. Life care planning has been around for a while longer than most personal injury trial lawyers may appreciate. In limited areas of federal litigation, life care planning is not only invited, but required.¹ There are many skilled life care planners, and there are interlopers in an expanding industry who have egos greater than their skills. Life care planning is an industry which craves professional respect, yet repeatedly generates witnesses who think their role is to be an advocate.

Experts are not supposed to be advocates.² The proper role of the expert is to assist the trier of fact to understand—in other words, to educate.³ As the life care planning industry has come of age, many of the individuals who seek to bring uniformity, methodology and respect to the process of life care planning have been overshadowed by a genre of professional witnesses who know little about their science, and even less about the proper role of an expert. Training programs have blossomed around the nation, in a haphazard disorganized way, while the life care industry strives to define itself and what it does. In the process, some individuals have lost objectivity, and have shifted from the role of educator, to advocate.

The shift, seemingly oblivious within the ranks of many life care planners, jeopardizes the integrity of those who appreciate the need for reliable and relevant scientific evidence in the courtroom. While the industry of life care planning struggles, unregulated and undisciplined, to define itself, and to obtain some level of professionalism, this look will somewhat irreverently point out, for the benefit of lawyers on both sides of the bar, just what troubles may be encountered when the life care planner takes the stand.

WHAT IS A LIFE CARE PLAN?

Exactly what is a life care plan? Don't expect a pat answer. If you go to your favorite on-line search engine and plug in the words “life care plan”, you will get responses from many diverse walks of life. Nurses, psychologists, therapists, and rehabilitationists all take great zest in holding themselves out and advertising their services as “life care planners”.

¹ See, National Childhood Vaccine Injury Act. 42 U.S.C. §§§§ 300aa-1 et seq. (2001).

² Tex.R.Evid 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

Tex. R. Evid 702 (2001).

³ Id.

Organizations that purport to train life care planners invite participation by individuals in these professions, and more. People with backgrounds in rehabilitation, nursing, psychology, physical and occupational therapy, speech and language pathology, and, almost incidentally, medicine, are encouraged to supplement their income by becoming life care planners.

A life care plan is generally thought of as a written plan which accounts for an injured individual's **needs** from the day of injury throughout life expectancy. Some life care planners boast that their plans are designed to maximize the individual's well-being, by providing for appropriate treatments and therapies within a prescribed time frame rather than a reactive process which is only implemented after complications arise. Over the last couple of years, a stiff prosaic definition has emerged. You will find repeated references on the internet, and in training brochures which define a life care plan as:

a dynamic document based upon published standards of practice, comprehensive assessment, data analysis and research, which provides 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**.⁴

The careful lawyer should ask himself exactly what the life care plan is designed to measure. Is it designed to capture the products and services necessitated by an individual's injury? Or is it designed to evaluate care needs regardless of whether they are related to the injury that is the subject of litigation? Carefully tailored life care plans may be relevant and useful to a jury. Extravagantly broad plans may be irrelevant to the proper measure of damages.

A fundamental problem that the party offering the testimony of the life care planner must foresee, is that many life care plans do not measure damages; rather most plans measure need, regardless of whether the need is in any manner causally connected to the conduct of an assumed tortfeasor.

WHAT IS A LIFE CARE PLANNER?

The advent of life care planners in personal injury litigation has been largely sponsored by the Plaintiffs' bar. The life care planner is most often perceived as one more expert who can be used to enhance damages. When presented effectively, these individuals can be powerful witnesses, with the capacity to lay groundwork for substantial jury verdicts.

⁴ Emphasis supplied. This definition has been attributed to criteria developed by the American Association of Nurse Life Care Planners, as well as a private organization which provides life care planners' training, in association with the University of Florida. See comments at www.medlegalservices.com.

Just where do life care planners come from? There is no licensure or government-endorsed certification for life care planners in Texas. It appears that very few states in the nation have any statutes or regulations for the life care planning industry. Some private organizations offer certificates for completion of courses in life care planning, although the sanctity of their “certification” remains open to scrutiny. While some life care planners do hold certifications, the source of the certifications is far from uniform. Some life care planners will claim that they are “board certified”, although it would appear that there is no single national board, as we see in the realm of physician specialties. Still others—usually those who thrust themselves into the business without formal training from any source—will claim that there is no such thing as certification.

At the time this paper went to press, we could find references which allude to training programs by the American Association of Nurse Life Care Planners;⁵ by a program sponsored by a private organization which may have an affiliation with the University of Florida;⁶ and by a nonprofit organization known as the Commission for Disability Evaluation.⁷ We also located a reference to “standards of practice” at a website for the International Academy of Life Care Planners.⁸

MEASUREMENT OF FUTURE DAMAGES

In a personal injury case, the Texas Pattern Jury Charges authorizes recovery of damages by use of the following suggested jury question:⁹

What sum of money, if paid now in cash, would fairly and reasonably compensate **Paul Payne** for his injuries, if any, that resulted from the occurrence in question?

Consider the elements of damages listed below and none other. Consider each element separately. Do not include damages for one element in any other element.

- Element a. Physical pain and mental anguish.
- Element b. Loss of earning capacity.
- Element c. Disfigurement.
- Element d. Physical impairment.
- Element e. Medical care.

Do not reduce the amounts, if any, in your answers because of the negligence, if any, of **Paul Payne**.

⁵ See, www.aanlcp.com

⁶ See, www.medlegalservices.com.

⁷ See, www.cdec1.com

⁸ See, www.internationalacademyoflifecareplanners.com

⁹ Tex. Pattern Jury Charges § 80.2 (2000).

Answer in dollars and cents for damages, if any, that

were sustained in the past; Answer: _____

in reasonable probability
will be sustained in the
future Answer: _____

The Texas Pattern Jury Charges suggests the words “medical care” may be replaced when there are other applicable elements of damage. This comment would presumably authorize the submission of “health care” or “custodial care” in lieu of “medical care” in appropriate cases, where the greatest element of damage may be the cost of custodial care for a helpless individual.¹⁰

THE REQUIREMENT OF MEDICAL EXPERT TESTIMONY

What is reasonable?

A doctrine as old as personal injury litigation holds that the plaintiff has the burden of proving that his claims for damage are both reasonable and necessary. Proof of reasonableness and necessity can be made by testimony, or by affidavits.¹¹ The two concepts are distinct and often separable.¹² Many a damage case has failed for want of proof that the charges for needed medical services were reasonable.¹³

Who can testify as to what is reasonable? Anyone who knows, including a life care planner. The groundwork for the permission of non-physician testimony on the issue of reasonableness of medical expenses was laid long ago. For example, in *Guest v. White*,¹⁴ a challenge to a damage finding for hospital expense was rejected where the proof of

¹⁰ See comment following Tex. Pattern Jury Charges § 80.2 (2000):

“Medical care may also be replaced by the specific items (e.g., physicians’ fees, dental fees, chiropractic fees, hospital bills, medicines, nursing services) raised by the evidence. In an appropriate case, the phrase health care may replace medical care.

¹¹ Tex. Civ. Prac. & Rem. Code § 18.001 (2000); see also, *Six Flags Over Texas, Inc. v. Parker*, 759 S.W.2d 758 (Tex. App.–Fort Worth 1988, no writ).

¹² See, e.g., *Transport Concepts, Inc. v. Reeves*, 748 S.W.2d 302 (Tex. App.–Dallas 1988, no writ), where the court held that evidence that medical expenses were reasonable and customary with respect to cost was no evidence that the medical expenses were necessary.

¹³ See, e.g., *Dallas Rwy. & Terminal Co. v. Gossett*, 294 S.W.2d 377 (Tex. 1956); *Wheeler v. Tyler S.E. Rwy. Co.*, 43 S.W. 876 (Tex. 1898); *Houston, E. & W. T. R. Co. v. Jones*, 1 S.W.2d 743 (Tex.Civ.App.–Beaumont 1927, writ ref’d n.r.e.); *Coca Cola Bottling Co. of Plainview v. White*, 545 S.W.2d 279 (Tex. Civ. App.–Waco 1976, no writ); *American Central Ins. Co. v. Melton*, 389 S.W.2d 177 (Tex. Civ. App.–Dallas 1965, writ ref’d n.r.e.); *Texas & Pacific Railway Co. v. Leatherman*, 351 S.W.2d 633 (Tex. Civ. App.–Eastland 1961, writ ref’d n.r.e.); *Davis v. Safeway Stores, Inc.*, 532 F.2d 489 (5th Cir. 1976).

¹⁴ 374 S.W.2d 775 (Tex. Civ. App.–Waco 1957).

reasonableness was made by the testimony of an insurance record clerk at the hospital, and the proof of necessity was made by an attending physician.

What is necessary?

Plaintiffs must prove medical necessity as a predicate to the offer of medical expenses. The proof cannot come from lay witnesses. In *Delta Air Lines, Inc. v. Gibson*,¹⁵ proof of medical expense was made solely on the basis of testimony of family members of the injured plaintiff. Because there was an utter lack of evidence that the treatment reflected by the bills was necessary, the receipt of this evidence created error that resulted in reversal and remand. A simple remittitur could not cure the harm done by the receipt of such evidence without proper predicate.

In some cases, we see a preliminary offer of proof as to the amount of medical expense from lay witnesses. For example, in *Gerland's Food Fair, Inc. v. Hare*,¹⁶ a plaintiff was allowed to testify as to her "understanding" of the total amount of her medical expense. This testimony was never supported with proof of reasonableness or necessity. Absent such proof, the expenses were not recoverable. Likewise, in *Kulms v. Jenkins*,¹⁷ a plaintiff's failure to submit evidence of probative force to show that the treatment rendered was necessary mandated that plaintiff's recovery for medical expenses be disallowed.

Because we all take plaintiffs as we find them, lawyers on both sides of the bar are often confronted with the problem of separating pre-existing conditions from injuries attributable to a tort that forms the basis of a lawsuit. Medical doctors have been held to be competent and qualified to do the necessary picking and choosing, to sort out medical expense claims that relate to a tortious injury and determine what charges were made necessary by virtue of the tort.¹⁸

Who can testify as to what is necessary? In *Theatre Management Group, Inc v. Dalgliesh*,¹⁹ a nurse with rehabilitation experience offered life care plan testimony for an injured theater patron. After the jury returned a verdict of nearly \$1 million, and approximately one-third of the verdict was supported by life care plan testimony, an appeal was taken to challenge the testimony by the nurse. The trial court conducted a painstaking examination to determine the qualification of the nurse to render projections of future medical needs. When the testimony was supported by the recommendations of a treating physician, the trial court allowed the testimony. However, when the projections

¹⁵ 550 S.W.2d 310 (Tex. Civ. App.—El Paso 1977, writ ref'd n.r.e.).

¹⁶ 611 S.W.2d 113 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.).

¹⁷ 557 S.W.2d 149 (Tex. Civ. App.—Amarillo 1977, writ ref'd n.r.e.).

¹⁸ See, e.g., *Buckner v. Allen*, 289 S.W.2d 387 (Tex. App.—Austin 1956, no writ).

¹⁹ 765 A.2d 986 (Dist. Col. Ct. App. 2001).

extended into areas involving need for psychiatric care, the trial judge restricted the non-physician life care planner. Additional restrictions were placed on unsupported recommendations for medications that had not been prescribed by medical doctors.

The predicate and qualifications requirements for proof of future medical needs may differ from the proof requirements for past needs. If the need for future medical care is established by the evidence, it may be considered even if there is no evidence of the exact dollar amount of the future care.²⁰

DAUBERT: THE TWO R'S

The two "R's" are reliability and relevance. This year marks the eight year anniversary of ***Daubert v. Merrell Dow Pharmaceuticals, Inc.***²¹ In ***Daubert***, the United States Supreme Court held that Federal Rule of Evidence 702²² requires scientific expert testimony to be (1) reliable and (2) relevant.²³ In the wake of the thousands of cases generated since ***Daubert***, many commentators, including those who author comments to the Federal Rules of Evidence, have observed that rejection of expert testimony is the exception rather than the rule.²⁴

In ***E.I. du Pont de Nemours & Company v. Robinson***,²⁵ we saw the holding of ***Daubert*** applied in a manner that has pertinence to problems encountered with life care planners. There are two prongs to the ***Daubert*** test. The expert testimony must be:

- Scientific knowledge (i.e., reliable)
- Which will assist the trier of fact to understand the evidence or to determine

²⁰ See, e.g., ***Keller Industries, Inc. v. Reeves***, 656 S.W.2d 221 (Tex. App.—Austin 1983, writ ref'd n.r.e.) (general medical testimony that plaintiff would require followup office visits and may require therapy and medication was sufficient to justify a specific jury award for future medical expenses); see also, ***Hughett v. Dwyre***, 624 S.W.2d 401 (Tex. App.—Amarillo 1981, writ ref'd n.r.e.); ***City of Houston v. Moore***, 389 S.W.2d 545 (Tex. Civ. App.—Houston 1965, writ ref'd n.r.e.).

²¹ 113 S.Ct. 2786 (1993).

²² The full text of FED. R. EVID. 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise, *if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.*

FED R. EVID. 702 (2001) [italicized portion added by amendment in 2000].

²³ 113 S.Ct. 2786, 2785 (1993).

²⁴ See, Comments to 2000 Amendments, Advisory Committee Notes, following Fed. R. Civ. P. 702 (2001).

²⁵ 923 S.W.2d 549 (Tex. 1995).

a fact in issue (i.e., relevant).²⁶

Scientific evidence is relevant when there is a "valid scientific connection to the pertinent inquiry as a pre-condition to admissibility."²⁷

E.I. du Pont de Nemours & Company v. Robinson,²⁸ arose from the fumes of an allegedly contaminated fungicide in a plaintiff's pecan orchard. The plaintiffs offered one expert witness on causation. After the deposition of the expert witness, the defendant filed a motion to exclude his testimony because his opinions were speculative and unreliable. The Texas Supreme Court set forth a now well-known list of non-exclusive factors which trial courts should consider to evaluate reliability.²⁹ The Court recognized that professional expert witnesses are available to render an opinion on almost any theory, regardless of its merit. In addition, the Court recognized that a witness permitted to testify by the trial court as an expert often appears inherently more credible to the jury than does a lay witness and, thus, trial judges have a heightened responsibility to ensure that expert testimony shows some indicia of reliability. Texas Rule of Evidence 702,³⁰ which was identical to Federal Rule of Evidence 702 before the 2000 amendments, states three requirements for the admission of expert testimony:

- The witness must be qualified;
- The proposed testimony must be "scientific knowledge;" and

²⁶ Id. at 2795.

²⁷ Id. at 2796.

²⁸ 923 S.W.2d 549 (Tex. 1995).

²⁹ The six factors are:

- (1) The extent to which the theory has been or can be tested;
- (2) Whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community;
- (3) Whether the theory has been subjected to peer review and/or publication;
- (4) The technique's potential rate of error;
- (5) The extent to which the techniques relies upon the subjective interpretation of the expert; and
- (6) The non-judicial uses which have been made of the theory or technique.

³⁰ The full text of TEX. R. EVID. 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

TEX. R. EVID. 702 (2001).

- The testimony must "assist the trier of fact to understand the evidence or to determine a fact in issue."

The court held that Texas Rule of Civil Evidence 702 requires that expert testimony be relevant to the issues in the case and is based upon a reliable foundation.³¹ The trial court is responsible for making the preliminary determination of whether the proffered testimony is relevant and reliable. To be relevant, the proposed testimony must be sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute. If the trial court determines that the proper testimony is relevant and reliable, it must then determine whether to exclude the evidence because its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury or by considerations of undue delay or needless presentation of cumulative evidence under Tex. R. Evid. 403.

In *Merrell Dow Pharmaceuticals, Inc. v. Havner*,³² the Texas Supreme Court underscored the correctness of the two-prong analysis, which must always consider whether the expert's opinion is reliable and relevant. The Court evaluated the reliability of an expert witness's opinion regarding the cause of an infant's birth defects and whether such birth defects were related to the mother's use of an anti-nausea medication during pregnancy. The Court stated that the expert opinion upon which the jury must base its decision on causation must amount to more than irrelevant suspicion:

[T]o say that the expert's testimony is some evidence under our standard of review simply because the expert testified that the underlying technique or methodology supporting his or her opinion is generally accepted by the scientific community is putting the cart before the horse. As we said in *Robinson*, an expert's bald assurance of validity is not enough . . . [T]here must be objective, independent validation of the expert's methodology. . . .³³

To get around the onerous requirements of *Daubert/Robinson*, many lawyers began to create distinctions between "hard science" and "soft science." The craftsmanship of clever lawyers envisioned that there should be a difference in the application of *Daubert/Robinson* to sciences such as physics or chemistry, where natural laws were unwavering and not subject to interpretation, and soft science, such as clinical medicine, where knowledge depends upon skill and subjective experience. Over time, we have learned that *Daubert/Robinson* applies to "soft science" in the same manner as it applies to "hard science." The distinction between so-called soft science and hard science began to emerge as trial lawyers on both sides of the bar looked for loopholes to protect their witnesses from rigid *Daubert* scrutiny. While the progeny of *Daubert* propagates

³¹ Id.

³² 953 S.W.2d 706 (Tex. 1997).

³³ Id. at 712.

exponentially, it seems clear that the loophole for “soft science” is ill-founded. The rules are the same for all experts. The lead case is *Kumho Tire Co. v. Carmichael*,³⁴ where the U.S. Supreme Court held that *Daubert* applies to all expert testimony based on scientific technical or other specialized principles, not just testimony derived from novel scientific evidence. One would think that a U.S. Supreme Court case would put the matter to rest and firmly entrench *Daubert* as the rule which all experts must satisfy. But the arguments continue in state cases, and we still find state courts applying a variety of tests, including *Daubert* across the board, *Daubert* on a piece meal basis, and even the disapproved rule of *Frye v. United States*.³⁵

How closely will Texas follow *Kumho*? We get some insight from *Gammill v. Jack Williams Chevrolet, Inc.*,³⁶ where a seatbelt expert’s testimony was excluded by the trial court. Looking for a loophole on appeal, plaintiffs’ counsel argued that their expert should not be subject to *Daubert* because he had relied upon his skill and personal experience and had not invoked any novel scientific principles. The Texas Supreme Court rejected the argument, and confirmed that *Daubert* applies regardless of whether the scientific evidence is novel or conventional. The Court further held that reliance upon “experience and training” is not a way to circumvent the *Daubert/Robinson* rule. Even where the list of *Daubert/Robinson* factors do not precisely fit the testimony, the trial court still has a responsibility to evaluate the reliability of testimony in determining its admissibility.³⁷

³⁴ 119 S. Ct. 1167 (1999).

³⁵ 293 F. 1013 (D.C. Cir. 1923). *Frye* stood for the proposition that expert opinion is admissible if it meets the test of general acceptance in its field. *Frye* was expressly rejected by the U.S. Supreme Court in *Daubert*.

³⁶ 972 S.W.2d 713 (Tex. 1998).

³⁷ There are more factors. 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 (9th 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) (noting that in some cases a trial court “may conclude that there simply too great an analytical gap between the data and the opinion proffered”).
- (3) Whether the expert has adequately accounted for obvious alternative explanations. See *Claar V. Burlington N.R.R.*, 29 F3d 499 (9th Cir. 1994) (testimony excluded where the expert failed to consider other obvious causes for the plaintiff’s condition). Compare *Ambrosini v. Labarague*, 101 F.3d 129 (D.C. Cir. 1996) (the possibility of some uneliminated causes presents a question of weight, so long as the most obvious causes have been considered and reasonably ruled out by the expert).
- (4) Whether the expert “is being as careful as he would be in his regular professional work outside his paid litigation consulting.” *Sheehan v. Daily Racing Form, Inc.*, 104 F.3d 940, 942 (7th Cir. 1997). See *Kumho Tire Co. v. Carmichael*, 119 S. Ct. 1167, 1176 (1999) (*Daubert* requires the trial court to assure itself that the expert “employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.”).
- (5) Whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give. See *Kumho Tire Co. v. Carmichael*, 119 S. Ct. 1167, 1176 (1999) (*Daubert*’s general acceptance factor does not “help show that an expert’s testimony is reliable where the discipline itself lacks reliability, as for example, do theories grounded in any so-called generally accepted principles of astrology or necromancy), *Moore v. Ashland*

It is difficult, but not impossible to find reported cases which deal with the application of **Daubert** to life care planners. **St. Elizabeth Hospital v. Graham**³⁸ is the only Texas case known which addresses even indirectly, a challenge to a life care planner. The challenge was made on relevance grounds and TEX. R. EVID 702. The appeals court accepted the life care planners' testimony, but completely sidestepped an analysis under **Daubert**. Instead, the appeals court ruled that the defendant did not bring forward sufficient authority or support in the record to demonstrate that the admission of the life care planner's testimony probably caused the rendition of an improper judgment.³⁹ **St. Elizabeth** can be cited for authority on the need to preserve error for appeal, but the case does not represent precedent for the survival of life care planners' testimony after a **Daubert** challenge.

A CASE STUDY: DAUBERT RULES APPLIED TO LIFE CARE PLANNERS

In **Northwest Bank v. K-Mart Corp.**,⁴⁰ a life care planner was enlisted to prove future care needs for a slip-and-fall plaintiff. K-Mart moved to exclude the life care planner's testimony. A specific challenge was raised to the education, training, and experience of the life care planner in question. The court acknowledged that the non-physician life care planner might be qualified to testify concerning medical costs, but reasoned that he was not qualified to provide medical evidence of the need for treatment:

[T]he court is unaware of any instance in which a witness with no education or licensure in medicine, osteopathy, dentistry, chiropractic, or nursing has been found qualified, regardless of experience, to give an opinion on a person's medical condition and medical future based on a review of medical records and an interview with the patient⁴¹

The court went on to conduct a detailed **Daubert** analysis, including an initial evaluation of whether the life care planner's soft science should be subject to the **Daubert** rules of reliability and relevance. The court concluded that there are no escape routes for social scientists. The **Daubert** framework for assessing expert testimony is applicable to social

Chemical, Inc., 151 F.3d 269 (5th Cir 1998) (en banc) (clinical doctor was properly precluded from testifying to the toxicological cause of the plaintiff's respiratory problem, where the opinion was not sufficiently grounded in scientific methodology); **Sterling v. Velsicol Chem. Corp.**, 855 F.2d 1188 (6th Cir. 1988) (rejecting testimony based on "clinical ecology" as unfounded and unreliable).

³⁸ 883 S.W2d 433 (Tex. App.—Beaumont 1994, writ denied).

³⁹ *Id.* at 439.

⁴⁰ 1997 U.S. Dist. LEXIS 3426 (N. Dist. Ind. 1997) (Copy Attached, Appendix A).

⁴¹ *Id.*

science experts, just as it applies to experts in the hard sciences.⁴² Even the most esteemed and experienced expert must establish a nexus between his opinion and established scientific principle and methodology.⁴³

So how does the life care planner fare when he asserts that he can acquire an understanding of an impaired person's medical condition from review of the medical records? The analysis of the court in the **Northwest Bank** case just very well may be one of first impression, with respect to the application of **Daubert** to life care planners. The industry definition⁴⁴ of a life care plan insists on adherence to life care planners' standards of care. But when the expert cannot demonstrate that his theory or method is based on a scientific principle that amounts to anything more than mere subjective opinion, he walks on very thin ice. In **Northwest Bank**, the proffered life care planner failed to demonstrate adherence to a scientific method that is practiced by at least a recognized minority of scientists in the field. The life care plan, without medical support, failed to satisfy the reliability prong of the **Daubert** test.⁴⁵

PROBLEMS WITH THE REPORT

Hearsay.

Plaintiffs would like nothing better than for the work product of the life care planner to become a tangible piece of admitted evidence. Regardless of whether the life care planner's report is admitted, other plaintiffs' witnesses, such as treating physicians, independent medical experts, and economists, may find themselves obliged to refer to and rely upon it. If admitted, the report becomes the centerpiece of a table laden with support designed to maximize damages.

Clearly the life care plan is founded on hearsay. The life care planner conducts interviews; he or she prepares notes; he reads hearsay documents; he or she consults out-of-court sources to determine the costs of various items of care; he or she prepares a report and makes statements which are offered to prove the truth of the matter asserted.⁴⁶

⁴² *Tyus v. Urban Search Management*, 102 F.2d 256 (7th Cir. 1996).

⁴³ *Rosen v. Ciba-Geigy Corp.*, 78 F.3d 316, 319 (7th Cir.), *cert den'd* 117 S. Ct. 73 (1996).

⁴⁴ Definition quoted, *supra* at Note 2.

⁴⁵ *Northwest Bank v. K-Mart Corp.*, 1997 U.S. Dist. LEXIS 3426 (N. Dist. Ind. 1997).

⁴⁶ TEX. R. EVID. 801 (d) defines hearsay:

"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

No cases have been found which deal with the question of whether a life care planner's report can satisfy an exception to the hearsay rule. The obvious exception which plaintiffs may seek to invoke would be the business records exception, TEX. R. EVID. 803 (6).⁴⁷

Equally obvious should be the inadequacy of Rule 803 (6) to establish a hearsay exception to permit the admission of a life care planner's report, which almost always consists of data compiled in multiple layers of hearsay. What happens when the so-called business record contains, not records generated by the life care planner, but rather information supplied by others? In *GT & MC, Inc. v. Texas City Ref., Inc.*,⁴⁸ we find an analogy and perhaps an answer. The business record in question contained invoices created by an another entity and sent to the defendant. The act of delivery to the defendant made the invoices a part of the defendant's primary record of information about the underlying transaction, and therefore, admissible under Rule 803 (6).

In the typical scenario, the life care planner does not receive records via direct delivery from health care providers, but by some indirect route, such as through the attorney's office. In addition, the focus of the life care planner's report is to prove damages in a lawsuit. The focus inherently suggests bias. The elements of personal knowledge, generation in a regular activity, and advocacy-free trustworthiness would seem to be lacking.

Reliance Upon Hearsay.

Experts can rely upon hearsay.⁴⁹ They can offer testimony that is based upon hearsay, if the hearsay is of a type that is reasonably relied upon by experts in the particular field.⁵⁰ But can a testifying expert broadcast otherwise inadmissible hearsay to the jury by referencing it in his report, or relying upon it in live testimony? The answer to that query

⁴⁷ TEX. R. EVID. 803 (6) provides:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(6) Records of Regularly Conducted Activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by affidavit that complies with Rule 902 (1), unless the source of information or method or circumstances of preparation indicate lack of trustworthiness. "Business" as used in this paragraph includes any and every kind of regular organized activity whether conducted for profit or not.

⁴⁸ 822 S.W.2d 252 (Tex. App.—Hou [1st Dist.] 1991, writ denied).

⁴⁹ TEX. R. EVID. 703 (2001).

⁵⁰ *Id.*

should be a resounding “No!” In *Birchfield v. Texarkana Mem. Hosp.*,⁵¹ the Texas Supreme Court held that an expert witness should not be permitted to recount a hearsay conversation with a third person, even if that conversation forms part of the basis of his opinion.

Attorneys sponsoring a life care planner must consider the impact of TEX. R. EVID. 705 (a),⁵² which is the rule that authorizes disclosure of underlying opinions of experts. The current version of the Rule would seem to invite the raw dumping of hearsay into the record. If the life care planner will testify that he relied upon inadmissible hearsay, and is invited by the attorney who sponsors him to disclose the hearsay, Rule 705 (a) would appear on its face to permit the disclosure. Rule 705 (a) was amended in 1984, to add the phrases which permit disclosure of the underlying data “on direct examination” as well as “on cross examination.”⁵³ After the amendment, case law has developed to forbid opening the door to wholesale admission of otherwise inadmissible hearsay.⁵⁴ Additional amendments to Rule 705 in 1998 did not affect the provisions related to disclosure of the bases for expert opinions. Overzealous attorneys may wish to use Rule 705 as a tool to abolish all hearsay limitations. But the courts have reasoned differently. In *First Southwest Lloyds Ins. Co. v. MacDowell*,⁵⁵ the court held:

[T]he use of the permissive word *may* in indicating that the expert ‘may in any event disclose . . . the underlying facts or data’ does not indicate an absolute right of the expert to disclose all of the facts and underlying data under all circumstances. We conclude that the better judicial position is

⁵¹ 747 S.W.2d 361 (Tex. 1987).

⁵² Tex. R. Evid. 705 (a) currently provides:

(a) Disclosure of Facts or Data. The expert may testify in terms of opinion or inference and give the expert’s reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event disclose on direct examination, or be required to disclose on cross-examination, the underlying facts or data.

Tex. R. Evid. 705 (a) (2001).

⁵³ Prior to the 1984 amendments this is how TEX. R. EVID 705 (a) read:

(a) Disclosure of Facts or Data. The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event disclose on direct examination, or be required to disclose on cross-examination, the underlying facts or data.

Authority: Historical Notes, O’Connor’s Texas Rules (2001) following Tex. R. Evid. 705.

⁵⁴ See, e.g., *Beavers v. Northrop Worldwide Aircraft Services, Inc.*, 821 S.W.2d 669 (Tex. App.—Amarillo 1991, writ denied), where the court held that inadmissible hearsay found in an expert’s report could not come into evidence when timely objected to.

⁵⁵ 769 S.W.2d 954 (Tex. App.—Texarkana 1989, writ den’d).

to not allow the affirmative admission of otherwise inadmissible matters merely because such matters happen to be underlying data upon which an expert relies.⁵⁶

Additional protections will be found in the sections of Rule 705 (b), which permit voir dire examination of the expert outside the presence of the jury to determine whether the underlying facts or data should be disclosed before the jury. Further, the court is directed to perform a balancing test and to consider limiting instructions in Rule 705 (d).

These rules have significant impact on both the admissibility and persuasiveness of the life care planner's testimony. Sponsors of life care planners should be prepared for hearsay battles under Rule 803 and Rule 705. Those who seek to rebut the life care planner should use the rules to forbid the offer of hearsay testimony.

PROBLEMS WITH THE WITNESS

Best Background, Plaintiffs' Perspective.

The very best life care planner a plaintiff can get just might be a medical doctor with appropriate credentials in assessing future care needs. A sterling example of the medical doctor's invulnerability is found in *Mitchem v. Gabbert*,⁵⁷ where a plaintiff in automobile collision litigation used a life care planner who was (a) a medical doctor; (b) board certified in physical medicine and rehabilitation; (c) a wound care specialist; and (d) certified by the Commission on Disability Evaluations as a Life Care Planner. An objection to the testimony was summarily dismissed without merit.

Physicians who have the patience and penchant for detail required by life care planning are rare and hard to find. Other specialists who make generally good witnesses include vocational rehabilitationists, who were the original life care planners. If you get a vocational rehabilitationist who is skilled in confirming disability for employment, you may find that your witness is attentive to detail, and capable of impressing a jury with the discipline required by a field which pre-dates the modern onslaught of life care planners. Even if your case involves a person who is not capable of working, consider consulting with a vocational rehabilitationist. Most rehabilitationists are quite skilled at taking the next step, and they frequently do it in conjunction with medical providers. These witnesses maintain credibility and professionalism to a high degree.

If you decide to go forward with a life care planner who has a background in one of the other health care professions, you can still find some excellent choices. But you should

⁵⁶ Id. at 958.

⁵⁷ 31 S.W.3d 538 (Ct. App. Mo. 2000).

also use caution in your selection. Regardless of the witness's background, watch out for the patient advocate, and seek out the jury educator.

Best Background, Defense Perspective.

Pick the right tool for the right job. If your case involves issue of loss of earning capacity, you cannot do better than a vocational rehabilitationist, who has the skill and resources to find the reluctant plaintiff a job whether he wants it or not. If your case involves a debate as to what kind of custodial care is needed (e.g., nurse v. aide), consider having a physician play a key role in the review of the life care recommendations. It is very persuasive when a jury hears that a nurse is neither necessary nor appropriate for routine custodial tasks.

In many cases, the best choice for the defense is to use no life care planning expert at all. This is particularly true when the plaintiff's plan is characterized with grotesque extravagance. A better strategy to combat overkill is often to simply enlist plaintiff's other experts, including treaters, to lead the imaginative planner out of wonderland.

The best strategy for the defense is to eliminate the plaintiff's life care planner from the case on *Daubert*, or similar motions. Failing that, the best strategy may be to expose the planner's frivolity. If the defense declares a life care planner, that declaration tends to lend credibility to a process that is fraught with speculation. There are no easy answers. The decision about whether to call a life care planner for the defense is one that only excess insurance carriers would have the incredible bad judgment to second guess.

POINTS FOR CROSS EXAMINATION

What qualifies the life care planner to be an expert?

Some life care planners will testify that there is no such thing as a certification in life care planners. Scrutinize these individuals carefully. Many may be seeking to conceal their lack of formal education or training.

The soft spot in the armor of most life care planners is the genre-wide penchant to play doctor. Invariably, the egos of these individuals lead them into the path of temptation to testify about medical need. Some have indulged in hypertechical word games to avoid criticism for practicing medicine. They do not make prognoses, but rather "forecasts" of medical need.⁵⁸ These fine distinctions should seldom make a difference in a carefully applied *Daubert* analysis. A medical prognosis is a forecast of the future medical

⁵⁸ *Northwest Bank v. K-Mart Corp.*, 1997 U.S. Dist. LEXIS 3426 (N. Dist. Ind. 1997).

condition of the patient.⁵⁹ To call the life care planner's work product a forecast rather than a prognosis is to merely disguise the non-physician's effort to practice medicine with a synonym. The life care planner who says that he can forecast without the benefit or input of skilled medical evaluation becomes vulnerable to the first rule of **Daubert**, namely that his work must be shown to be scientifically reliable.

What has the life care planner done to prepare?

Did the life care planner conduct an interview with the plaintiff or family members? Who was there? What was done? Was the interview recorded in any way? What are the sources of history upon which the life care planner has relied? Did the planner have any consultation with health care providers, to get a blessing for the plan?

Carefully examine the life care planner about what the plaintiff needed before the injury in your case. Seek admissions from the life care planner, either that the needs in the life care plan existed before the injury-producing event, or alternatively that the life care planner does not know about the condition of the plaintiff before the injury in your case. Then take these admissions to the plaintiff's other experts, and get them to evaluate what the life care planner has measured. Seek concessions that the plan does not measure damages, but rather need. After you get the concessions, file a **Daubert** motion. Or, if the witness now looks just a bit absurd after having been exposed by other witnesses, don't file a **Daubert** motion. Take delight in the fun you will have in trial cross examination, instead.

Has the life care planner acted alone?

Get a thorough understanding of exactly what material the life care planner has reviewed. Many times, when there are issues of pre-existing conditions, the life care planner will not have reviewed the medical evidence which supports the pre-existing condition. In such cases, what the life care plan measures very well may include needs which pre-date the claim in your case.

Effective cross examination often results when one expert disagrees with another expert for the same party. Does the life care planner diagnose or forecast medical needs without the aid of a medical degree? After you have challenged the witness's qualifications, give the egotistical expert some rope. In deposition, invite the life care planner to prognosticate future medical needs in great detail. Then take the prognoses and review them with

⁵⁹ See, e.g., *Stedman's Medical Dictionary*, 27th Edition (2000)
Prog-nosis: A forecast of the probable course and/or outcome of a disease.

See also, *Webster's Seventh New Collegiate Dictionary* (1967):
Prog-no-sis: 1: the prospect of recovery as anticipated from the usual course of disease or peculiarities of the case
 2: FORECAST, PROGNOSTICATION.

treating physicians. While the degree to which individual life care planners advocate will vary, one glittering generality emerges: life care planners are proud of what they do, and they do it with great zest and enthusiasm. Often, the life care planner's advocacy overrides common sense. When treating physicians encounter extravagant plans, many are astonished. The offended treating physician will often become the defendant's best weapon to deflate an over-embellished life care plan.

DEFUSE THE CROSS EXAMINATION: POINTS FOR PLAINTIFFS' ATTORNEYS

Get Medical Support.

Every case has its peculiarities; there are no absolutes. But you should carefully evaluate the pros and cons of keeping your life care planner isolated from your other experts. It may be a strategic error to allow your life care planner to form his opinions in a vacuum. The more you isolate this valuable damages expert, the more you increase the possibility that the expert's opinions will be perceived as lacking in reliability and relevance. If at all possible, encourage a dialogue between the life care planner and one or more treating physicians. If the treating physician says there is a medical need, and the life care planner develops a plan to implement the medical need, your evidence will survive a **Daubert** challenge, and will be far more persuasive.

Tailor the Plan.

You want an off-the-rack plan because it's cheaper? Fine. You get what you pay for. A skilled defense lawyer may hack your plan to pieces and dispose of your life care planner before the evidence starts.

The single greatest problem with life care plans is that they are often too ambitious. In many cases, the plans measure need, and say nothing at all about the differences in needs after the tort, as opposed to before the tort.

In the early going, you should encourage your life care planning consultant to measure damage in this case. Ask the planner to evaluate need only insofar as it relates to extraordinary expenses that would not have been required, but for the injury producing event.

Prepare the Witness.

Nothing is less persuasive than an ignorant witness. Get your life care planner to read the

depositions of the medical treaters. Get him to read pre-existing medical records that have been discovered by the other side. Teach the witness to anticipate the anticipated thrust of the defense, which almost invariably will involve a **Daubert** challenge, or an attempt to discredit the witness for lack of qualifications, or both.

It is critical to demonstrate that your planner has a method, and that it is accepted in his or her field. Let the planner explain at length the components of life care planning procedure, from assessment, through planning and implementation. If at all possible, choose a witness who has enough professionalism to admit that he or she cannot diagnose or prognose. Prepare the witness to explain that the plan is based upon the diagnoses and prognoses of health care providers who can and do agree to the necessity and reasonableness of the recommended medical interventions.

THE LIFE CARE PLANNER AS A DEFENSE WITNESS

Occasionally, defendants will use life care planners as witnesses to limit damages. The obvious deterrent to the use of any damages witness for the defense is the problem of whether the defense is willing to concede that there is some damage. In cases of catastrophic injury, that point is often conceded. In such cases, a conservative life care planner can provide reasonable options for the jury to consider.

A case in point is **Vienne v. American Honda Motor Co.**,⁶⁰ a products action where plaintiffs' counsel took the initiative and moved to strike defense witnesses, including a vocational rehabilitationist who offered life care plan testimony for the defense. The discussion in this opinion deals with qualifications, and touches lightly on FED. R. EVID. 702.

When plaintiffs and defense experts on life care planning differ dramatically, the judicial solution is predictable: the court lets the jury decide. In **Duncan v. Kansas City Southern Railway Co.**,⁶¹ the Louisiana Supreme Court was confronted by two grossly disparate plans. The primary area of disagreement lay in recommendations for attendant care. Plaintiffs' planner advocated around-the-clock care by a licensed nurse; the defense sponsored a plan which recommended 16 hours per day by an aide. The jury returned a verdict which seemed to accept the plaintiffs' plan. Significantly, plaintiffs supported their life care planner with testimony from a medical doctor who specialized in physical medicine and rehabilitation. The court let the more ambitious plan stand.

A novel approach to the use of a life care planner for defense purposes arose in **Exxon**

⁶⁰ 2001 U.S. Dist. LEXIS 606 (E.D. La. 2001).

⁶¹ 773 So. 2d 670 (S. Ct. La. 2000).

Corp. v. Starr.⁶² A plaintiff's life care plan was prepared by a psychologist, who projected the need for continuous neuropsychological and psychiatric treatment. The projection became the basis for a successful motion by the defense to have the plaintiff submit to an independent mental examination.

CONCLUSION

This talk has been about plans. Unlike the life care planner, you have a responsibility to advocate. You should make no little plans. They have no magic to stir men's blood.

And you should try to emulate the wisdom of a famous general, who once said: "In preparing for battle I have always found that plans are useless, but planning is indispensable."⁶³

⁶² 790 S.W.2d 883 (Tex. App.–Tyler, orig. proceeding).

⁶³ Attributed to Dwight D. Eisenhower, as quoted by Richard Nixon in *Six Crises* (1962).