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Admissible Expert Testimony
Kenneth Fields v. The State of California

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Introduction

As the field of life care planning expands in scope and becomes the pivotal point in the evaluation of litigated damages, so does the attempt by opposing counsel to disqualify the life care planning testimony. According to Weed's (2006) *Life Care Planning in Light of Daubert & Kumho*:

> Courts are cautious entities and do not quickly accept new ideas. Life care planning is a young profession and one that is unfamiliar to many judges. Thus, before the gatekeeper will allow (a life care planning expert) to testify, he or she must receive enough information to be convinced that (the) testimony satisfies *Daubert, Du Pont* and any local guidelines. (p. 15)

In the matter of *Kenneth Fields v. The State of California*, et al (2011), the defendant continually objected to the life care planning opinions being expressed, based upon an argument of "inadmissible hearsay evidence". The definition of hearsay evidence is "evidence based on what someone has told the witness and not on direct knowledge". (WordNet A Lexical Database for English) The trial judge, in the Fifth Appellate District in the State of California, initially ruled in favor of the opposing counsel's objections; however, he allowed both parties a chance to submit legal briefs on the issue, before completely excluding the testimony.

Plaintiff's attorney, Douglas L. Gordon, of Miles, Sears & Eanni in Fresno, CA, submitted a trial brief regarding "Admissible Expert Testimony", based on published standards of care in life care planning, along with case law, or lack thereof, that successfully overturned the trial judge's initial decision. Thus the life care planning testimony was allowed to proceed.

Personal Injury Summary

On 05/28/08, Mr. Kenneth Fields, in the scope of his employment, was the victim of a motor vehicle accident in which the other party died. The defendant was traveling from an appointment related to her scope of employment for the State of CA when she failed to stop at a stop sign, causing the auto collision. According to the emergency room visit on that date, the plaintiff, Mr. Fields, had a positive loss of consciousness in the field. He was wearing a seatbelt and there was positive airbag deployment. His chief complaints

immediately upon arrival of the paramedics were left rib pain, chest pain, body aches and right knee pain. He was worked up and discharged the same day.

The plaintiff continued to have knee, wrist, shoulder, neck and back pain. Over the next year, Mr. Fields was worked up by several physicians. An MRI of the cervical spine revealed stenosis at C5-6 and C6-7 with compression against nerve roots and the spinal cord. An MRI of the lumbar spine demonstrated mild stenosis with disc herniation at L4-5 and L5-S1. An MRI of the left wrist showed a suspected triangular fibrocartilage tear and bone contusion of the radial styloid. An MRI of the right shoulder, during a fluoroscopic arthrogram, found a moderate distal interior supraspinatus tendinosis-strain.

Mr. Fields was treated with medications, therapy, and several injections and procedures. This was followed by eventual cervical spine fusion from C5 to C7 by a local neurosurgeon. The life care planner became involved in the case in early 2011 with a trial date scheduled in June of that year. Despite the various treatments as well as neck surgery, Mr. Fields continued to have neck, back and shoulder pain that was worse with driving, which he was required to do in the scope of his employment as a foreman for a company that installed high voltage electricity lines. He also had constant headaches. His pain was reported to consistently be a 5 to 7 on the Visual Analog scale and required he make adjustments to both his work and recreational schedules. There were no known cognitive deficits following the injury despite his loss of consciousness at the scene; however, the plaintiff verbalized much anger and frustration in regards to his change in lifestyle that resulted from the date of the accident, his injuries, and his chronic pain.

Before the accident, Mr. Fields worked long days as a general foreman as his job required him to travel throughout Central California. He would return home every night and at the end of the week and he looked forward to enjoying quality time with his daughters, to whom he was a single father. They would spend time at the beach or mountains, often camping and enjoying many vigorous outdoor activities, such as snow skiing, water skiing, boating and fishing. After he sustained the injuries, he had to limit the amount of driving he could do on a weekly basis. He spent weekends resting and recovering from the week long exacerbation of pain, and was no longer able to spend the quality time with his children that they had all become accustomed to.

Life Care Planning Recommendations

This life care planner, after a thorough review of the medical records and an interview of the plaintiff, consulted with the treating neurosurgeon and the treating physical medicine and rehabilitation/pain management physician in order to obtain a foundation for future medical care recommendations. The future services included physician visits, intermittent physical therapy, a gym program, diagnostic monitoring, long-term use of medications, trigger point injections, epidural injections, and a repeat cervical surgery at an adjacent level. Home care needs were related only to outdoor household and yard maintenance. There was some question as to the need for a lumbar surgery, however, it was determined this was a possibility verses a probability, and therefore was not included in the life care plan. The costs were calculated at approximately $40,000.00 in the first year, $24,500.00 per year thereafter, and a one-time only cost of $87,000.00 to account for the future surgery and occasional invasive pain management procedures. An economist was hired by the plaintiff to provide the present day value of these anticipated life care planning costs. The defendant did not retain a life care planner or an economist to evaluate the plaintiff's damages.

Initial Trial Proceedings

Interestingly, the defense did not notice this life care planner's deposition during the discovery portion of the litigation. It is believed that the entire pre-trial focus was on liability and the State of CA presenting evidence that the woman who caused the accident was not traveling in her scope of employment, and therefore, not directly at fault.

On 06/08/11, this author was presented to the jury to testify as to the life care planning opinions. Due to scheduling conflicts, this life care planning testimony preceded that of the treating physicians. While the testimony often flows best when the physician[s] testify prior to the life care planner, this cannot always be accomplished. Therefore, in this author's experience, it is not unusual for the life care planning testimony to occur prior to the physician(s) testimony.

The direct examination began with qualifying this expert. The plaintiff's attorney led the testimony down the list of education, professional nursing experience, certifications, life care planning work, teaching and publishing in the field of expertise. There were no challenges made by the opposing side as to the qualifications tendered.

Once there was no objection to the expert qualifications, there was testimony as to the general methodology of life care planning, and specifically what was the process followed in this particular case. This author explained to the jury how the report was set up, the meaning behind each column and line-item in the life care planning tables, and how collaboration with the two physicians resulted in the life care plan opinions being set forth.

As the plaintiff's attorney proceeded into the first page of the tables, defense counsel called a side-bar. Following this break in testimony, Mr. Gordon returned and began a line of questioning related to the sources relied upon for the cost of the various services and items in the report. The words "collaboration with physicians" and "the methodology" was verbalized several times in the explanation of how opinions on future care and associated costs are derived.

After completing a review of the first life care planning category, "Routine Medical Care", opposing counsel moved to strike the testimony, based upon "hearsay and lack of foundation". The trial transcript reads as follows:

> **Mr. Gordon:** "She (Albee) is an expert, Your Honor. She can rely on hearsay. She's laid the foundation."
>
> **The Court:** "She can rely on hearsay to form her opinion, but this is for the truth of the matter. So that objection will be sustained."
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> **Mr. Gordon:** "Well, Your Honor, may I be heard?"
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> **The Court:** "Sure."
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> **Mr. Gordon:** "Your Honor, she's allowed to give her opinion. She's an expert. Her opinion is that the costs are going to be $1288. She explained the foundation. She's said where she has gotten this information."
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> **The Court:** "Right. So she's regurgitating information from somebody else. That's different than relying on hearsay to form an opinion. She's basically regurgitating information of $1288 from somewhere else and testifying to it. That's a different issue. That is using that hearsay for the truth of the matter. It's not admissible." (Kenneth Fields, Plaintiff and Appellant v. State of CA, Estate of Linda D. Gadbois, Defendant and Respondent, 2011).

At that point, Mr. Gordon requested a side bar. The discussion was not recorded on the record. At the conclusion of this side bar, the judge excused this author from the court room without an explanation.

Trial Brief

That afternoon, after court was adjourned, Mr. Gordon contacted this life care planner to discuss what had occurred at the side bar. The Judge had preliminarily ruled in favor of the defense objection; however, was allowing both sides to write a trial brief in support of their arguments. This author provided the plaintiff's attorney with all resources on hand, which included, The International Association of Life Care Planning Standards of Practice (Standards of Practice); The International Association of Rehabilitation Professionals Code of Ethics (IARP Code of Ethics, Standards of Practice and Competencies , 2007); and Life Care Planning in Light of Daubert & Kumho (Weed, 2006).

> Mr. Gordon's trial brief was well researched, with use of the above references as well as case law or lack thereof. The key issue in the trial brief, based on the court's ruling, was to explicate in detail how the Life Care Planner was providing1 expert opinion testimony, and the costs cited in her report were the bases for her opinions. This was particularly true given the court's apparent reluctance to accept this as a legitimate area of expert testimony, believing instead that the Life Care Planner was "being paid a lot of money to simply repeat numbers she got from somewhere else." (Kenneth Fields, Plaintiff and Appellant v. State of CA, Estate of Linda D. Gadbois, Defendant and Respondent, 2011)
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> There is no question the law permits such testimony. The brief initially quotes Evidence Code § 802, which states:
> "A witness testifying in the form of an opinion may state on direct examination the reasons for his opinion and the matter (including, in the case of an expert, his special knowledge, skill, experience, training, and education) upon which it is based, unless he is precluded by law from using such reasons or matter as a basis for his opinion. The court in its discretion may require that a witness before testifying in the form of an opinion be first examined concerning the matter upon which his opinion is based." (Deering's California Desktop Code Series, 2012)
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> 1"An economist or similar professional who is shown to have special knowledge, skill, experience, training, or education on the subject of medical costs can testify about the probable costs of described medical services and supplies in the future or about overall price trends in medical expenses, indicating the present sum of money that will pay the equivalent of projected future expenses." (Wiss (2006), citing Rodriguez v. McDonnell Douglas Corp., 87 Cal. App. 3d 626 (1978).

Because of the court's initial ruling to exclude the cost figures as hearsay, it had to be emphasized that those costs were given in support of the Life Care Planner's opinions, and not for the truth of the matter asserted therein, which would arguably make them inadmissible hearsay statements. The defense was arguing, and the court was agreeing, that while an expert may rely on hearsay, she may not repeat that hearsay information in front of the jury. But this is not really an accurate statement of California law. The confusion comes from cases which have held that an expert may not recite extensive details of the statements or opinions of persons not present in court. "1The rule rests on the rationale that while an expert may give reasons on direct examination for his opinions, including the matters he considered in forming them, he may not, under the guise of reasons, bring before the jury

incompetent hearsay evidence… Ordinarily, the use of a limiting instruction that matters on which an expert based his opinion are admitted only to show the basis of the opinion and not for the truth of the matter cures any hearsay problem involved, but in aggravated situations, where hearsay evidence is recited in detail, a limiting instruction may not remedy the problem."(People v. Coleman, 38 Cal. 3d 69 (1985) [emphasis added].)

Thus, the rule in California is that an expert can rely on, and recite, out-of-court information, as long as it is not excessively detailed to the point that it effectively becomes the testimony of a non-present witness. Even fairly extensive recitations may be permitted, at the court's discretion, and then covered by an instruction to the jury that they are to use such out-of-court information only as the basis for the expert's opinions

For this case then, California law does not prevent the life care planner from specifying costs, but permits those costs to be stated as part of the expert's overall opinion testimony. Real estate appraisers, economists, actuaries, and accountants are just a few examples of experts who are commonly permitted to testify on the basis of statistical reports or other published quantifications of value of services or property, much in the same manner as a life care planner. This is certainly not a suggestion that the cost figures themselves should be ignored or discounted by the jury – they are the underlying basis for the expert's opinions - but rather to recognize that the life care plan is, by definition, a professional estimate of costs expected to be expended in the future.

A ruling prohibiting the life care plan expert from testifying regarding her researched cost figures would require plaintiff to bring in billing-office personnel from each of the various healthcare providers, from which the plaintiff is expected to seek treatment over his lifetime – as many as 10-15 additional witnesses. Such a ruling would also presumably prohibit plaintiff's economist from testifying regarding the bases for her present value calculations, since it would prohibit her from explaining the statistics on which her discount rates and growth rates are based.

New Ruling

Upon submission of the trial briefs, the trial court judge changed his ruling and allowed the life care planning testimony to go forward. The court's ruling focused less on issues of hearsay and more on the need to have the life care expert explain, in detail, the nature and reliability of her sources of information. Specifically, the court required additional detail regarding the American Hospital Directory website and the Physicians' Guide and Coding Fees publication, both of which were the source of many of the cost figures. Once these were explained to the satisfaction of the court (see below), all testimony was allowed to proceed unimpeded, and the numerous objections by opposing counsel were all overruled.

Subsequent Trial Proceedings

On 06/14/11, this life care planner returned to trial to complete the testimony. Expert qualifications were repeated for the sake of the jury. Time was spent explaining how the background, training and experience of a Registered Nurse lend to an expertise in researching medical services and the costs of such services. More detail was provided as to the methodology of the work and importance of analyzing the data beyond that of what a lay person might do. Attention was given to the coding procedures used in order to obtain costs. As the life care planning categories and line items were described in depth, the opposing counsel continued to move to strike based on "lack of foundation" and the judge overruled every objection. The cross examination that followed was short and was limited to some

clarification of process, but in no way was harmful to the expert's credibility or the facts as presented.

Conclusion

This article summarizes only one of many documented challenges that life care planners have faced in the civil litigation arena. In this case, the plaintiff submitted that it would be improper to preclude the life care planning testimony necessary to establish for the jury the foundation of such opinions. Furthermore, it would be unfair and severely prejudicial to hamper the plaintiff's proof of future damages by a ruling which essentially wiped out a realistic means of proof of the future health care costs.

Based on prior publications supporting the work of life care planners, along with pre-existing case law, and case law history that continues to be recorded, the credibility and legitimacy of the damages evaluations are supported by scientific peer review and the justice system.

It is recommended that life care planners prepare themselves to defend their work should they be challenged by the courts. As this author learned, when it does occur, it can be a stressful situation for both the expert and the retaining attorney. First, the IALCP Standards of Practice is the foundation of life care planning methodology. Second, each professional must be knowledgeable about their own scope of practice and what he or she are qualified to opine within their own licensure or certification. Third, perform a review of the literature and be familiar with the case law of the past that effects the decisions that will be made by the courts in the future. Several examples of past case law are included on the reference page to this publication. Finally, as professionals in our field are challenged, we have a responsibility to expand the quantity of literature on this subject, so that others may learn and rely upon it as life care planning moves forward.

References

Allen Bultema, et at. v. Caterpillar, et al., 95 C 2282 (United States District Court for the Northern District of Illinois, Eastern Division, U.S. Dist Lexis 6310 1999).

Cindy Taylor, Individually and as Guardian Ad Litem for Brody Patrick Wright and Arthur M. Taylor v. Speedway Motorsports Inc. and Charlotte Motor Speedway, LLC, doing business as Lowe's Motor Speedway; Tindal Corportaion and Anti-Hydro International, 01-CVS-12107 (Mecklenburg Country Superior Court, N.C. March 2003).

Cynthia Higgins Fairchild v. United States of America, 89-0423 (United States District Court, Shreveport, LA July 25, 1991).

Deering's California Desktop Code Series. (2012). San Francisco, CA: Lexis-Nexis.

IARP Code of Ethics, Standards of Practice and Competencies (2007). Retrieved from the International Association of Rehabilitation Professionals: http://www.rehabpro.org/standards-ethics/12.2007.pdf/view

Kenneth Fields, Plaintiff and Appellant v. State of CA, Estate of Linda D. Gadbois, Defendant and Respondent, 09 CD CG 04687 (Fresno Superior Court June 8, 2011).

Reports, C. A. (1978). Rodriguez v. McDonnell Douglas Corp. *87, 3rd Series*, 626 & 661.

Reports, C. S. (1985). People v. Coleman. *38, 3rd Series*, 69 & 92.

Ruby Kay Ballance, et al. v. Wal-Mart, 98-1702 (U.S. Court of Appeals for the 4th Circuit, U.S., App. Lexis 7663 1999).

Standards of Practice (n.d.). Retrieved from the International Association of Rehabilitation Professionals: http://www.rehabpro.org/sections/ialcp/focus/standards

Washington, A. (2010, Spring). Attacking The Life Care Plan - A Common Sense Approach. *Products, General Liability and Concumer Law Committee Newsletter*, 4-6.

Weed, R. A. (2006). *Life Care Planning in Light of Daubert & Kumho.* Athens, GA: Elliott & Fitzpatrick, Inc.

Wiss, M. A. (2006). *California Tort Damages* (2 ed.). Berkeley, CA: California Continuing Education of the Bar.

WordNet A Lexical Databse for English. (n.d.). Retrieved from WordNet Princeton University: http://wordnetweb.princeton.edu/perl/webwn?s=hearsay%20evidence

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