

# Collateral Sources & Life Care Planning: Issues Related to the Life Care Planners Role In the Emerging ACA Climate

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Tim Field  
Tony Choppa  
Cloie Johnson

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## Overview

- Issues in Life Care Planning
- Collateral Source Doctrine & Tort Reform
- Billed, Paid & Reasonable Value
- The Federal Rules & the Affordable Care Act
- Guidelines & Methodologies
- A Review of Cases
- Practical Applications & Suggestions for the Future

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## Life Care Planners

- Standards of Practice
- Consensus and Majority Statements
- Summits
- ABVE, ISLCP, IARP and other Conferences

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### Section IV, Standard 10 (IALCP)

- The LCPer engaging in legal matters:
- Acts as a consultant to legal proceedings related to determining care needs and costs in the role of an advisor to the court.
- May provide expert sworn testimony regarding the development and content of the life care plan.
- Maintains records of research and supporting documentation for content of the life care plan for a period of time consistent with requirements of applicable authoritative jurisdictions.

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### Majority Statements from LCP Summits

**Life care plans shall be:**

- #51 “objective and consistent”
- #52 “lifelong and flexible”
- #82 “be transparent and consistent”

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### Majority Statements from Summits

**Life care planners shall:**

- #86 “assess the reliability, validity and accuracy of data and methods”
- #91 “utilize research that is reasonable, relevant and appropriate”
- #98 “best practices for identifying costs in life care plans include:
  - a. verifiable data from appropriately referenced sources
  - b. geographically specific costs when appropriate and available
  - c. non-discounted/market rates
  - d. more than one cost estimate, when appropriate

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### Standards of Practice and Case Law

- For life care planners the future holds some unknowns with regard to: ACA, Tort Reform, and Collateral Sources.
- **Standards of Practice** are essential, but not the deciding factor.
- **Learning through Conferences** is essential, but not the deciding factor.
- **Networking** is essential, but not the deciding factor.
- **Proper Expert Credentials** are essential, but not the deciding factor.
- But **understanding the unknowns** is . . . really important!

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### Collateral Source Doctrine/Rules

- **Doctrine:** "If an injured party receives compensation for its injuries from a source independent of the tortfeasor, the payment should not be deducted from the damages that the tortfeasor must pay" (*Black's Law Dictionary*).
- **Rules:** State-by-state rules apply on damages in liability cases. More than half of the states have revised the collateral source doctrine through tort reform. (See the *Matlock Chart* for the wide variability of how the rules apply in each state).

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### Arguments Against Tort Reform

- If anyone should benefit from compensation for damages, it should be the plaintiff (not the defendant).
- The traditional "doctrine" on collateral source should remain as a form of punishment (or lack of benefit) to the defendant.
- The traditional "doctrine" helps to reduce future negligence.
- If the traditional "doctrine" is revised through tort reform, the defendant would be less diligent or concerned about punishment and negligence.

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### Arguments For Tort Reform

- The revised rules would allow collateral sources, in various forms, to be deducted from damages.
- Would prevent plaintiffs from “double-dipping.”
- Would allow collateral sources to recover previously paid funds from any damage award.
- Would clarify the differences between what is “invoiced” for medical services versus what is “paid” for those services, and reasonable value.
- Reduce the cost of litigation.

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### Types of Statutes on Collateral Source

- Three major categories:
  - Includes statutes that reduce the verdict solely for collateral source income that has actually been received.
  - Statutes that eliminate the collateral source rule altogether.
  - Statutes that require consideration of collateral source offsets during trial, and statutes that require a hearing after liability has been established.

Source: McCabe (2009). *Introduction to the Economics of Collateral Sources*.

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### Billed vs. Paid Medical Expenses

- Court cases and legislatures are beginning to alter how states determine the use of various collateral sources and write-offs.
- Examples:
 

• Colorado	Simply uses “billed” charges
• Texas	Simply uses the “paid” approach
• Alaska	“Billed” with post-verdict reduction for both insurance and Medicare/Medicaid
• Louisiana	“Billed,” but Medicaid is “paid;” Medicare is “billed”
• Delaware	“Billed” except post-verdict reduction with MedMal

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### Billed v. Paid v. Hybrid by States

(Matlock, 2013)

- Max Recovery – Insurance
- Max Recovery – Medicare/caid
- 19 states **Billed** evidence only
- 19 states **Billed** evidence
- 4 states **Paid** evidence only
- 4 states **Paid** evidence
- 17 state **Hybrid** approach
- 17 states **Hybrid** approach
- **States that vary** between Insurance & M/M: DE, FL, LA, MT, NE, NV, NJ, RI, & VA

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### Reasonable Value

Past and Future Medical Expenses

- Defined as:
  - Amounts originally billed
  - Amounts actually paid
  - Or some mix of the amounts

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### Reasonable Value

• In *Briant v. Seattle Children* (WA, 2013,), regarding past and future medical services, the court ruled under *WPI 30.07-02* that "plaintiffs in negligence cases are permitted to recover the reasonable value of medical services they receive, not the total of all bills paid. And the amount actually billed or paid is not itself Determinative."

• The problem is that state rules will vary greatly in the meaning of "reasonable value," or fail to define it at all – leaving the decision to the jury or the court.

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### Reasonable Valued Defined (sort of)

**Dodmon v. Continental Airlines, US Dist Ct, CO, # 13-cv-0005-WJM-NYW (2016)**

- Court made distinction between the collateral source rule (which bars evidence of payments) and evidence of paid medical services as proof of reasonable value (conclusion: the CSR trumps).
- It would (in Colorado) “appear that amounts billed would continue to qualify as ‘some evidence’ of reasonable value.”
- The Court stipulated, however, defendants “remain free to attack [plaintiff’s] reliance on medical bills, such as eliciting testimony from relevant witnesses that, in their experience, amounts billed often bear little relation to what the provider is willing to accept in satisfaction of that bill.”

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### Adjustment & Discounted Awards

- A discounted amount is a result of negotiations between a healthcare provider and a collateral source (i.e. insurance, Medicare).
- Some courts admit only undiscounted rates as a basis for a damage award; other courts may allow for post-verdict discounted rates.
- In *Stanley v. Walker* (2009), the plaintiff billed medical rates were \$11,570, but discounted to \$6,820. The trial court disallowed the discounted sum at the request of the defendant, but was reversed by the ID Sup Court – indicating that the defendant should have been allowed to use the discounted rates.

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### Discounting

- What a medical provider **bills** may not be what is **paid**.
- Example: In *Mortinez v. Milburn* (2005), the court relied on research showing that the charge-to-cost ration (i.e. **mark-up**) of 4000 hospitals revealed an average 244.37%, and the ratio of the medical center in this case was 400%.
- The medical center had billed \$70,496.15, but accepted as final payment \$5,310 (private insurance, plus co-pay); \$65,186.15 was written off by center.

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### Reasonable Value & Collateral Sources

• In *Strayton v. Delaware Health Corp.* (2015), a severe burn patient was billed for medical services in the amount of \$3,683,797, but Medicare paid \$262,550. The Court ruled that the collateral source rule does not apply to amounts written off by Medicare (State of Delaware).

• This issue will likely vary by state.

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### Reasonable Value & Collateral Sources

• In *Scott v. Garfield* (Mass., 2009), the Court did not allow information on paid bills to the health care providers; to show that information would have been a violation of the collateral source rule – unless the amounts paid were redacted.

• In *Swanson v. Brewster* (MN, 2010), the court found that the negotiated discounts in the billed amounts are collateral sources – under MN collateral source statute.

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### Reasonable Value & Collateral Sources

• In *Melo v. Allstate Insurance* (VT, 2011), the court ruled that collateral source payments are not admissible to establish the reasonable value of part and future medical services.

• In *Jacques v. Manton* (OH, 2010), the court ruled that determining reasonable value is neither what was billed or paid, but rather, the task is to be decided by the jury based on all relevant evidence (i.e. FRE 402).

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### Expert Disallowed on Conflict with Reasonable Value & Collateral Source

- *Williams v. Manitowoc*, MS, 2016)
- Economic expert was disallowed.
- Testimony “for determining reasonable value of medical care circumvents MS’s collateral source rule.”
- Court determined that methodology represented a “backdoor attempt to give defendants the benefit of any type of write-off.”
- Court “is of the opinion that [expert] employed methodology that violates MS collateral source rule.”

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### Federal Rule 702

- “If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact at 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 fact 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.”
- See *Ancar & Ancar v. Brown & TNE Trucking*, No. 3:11-ev-595-DPJ-FKB, US Dist Ct for So Dist MS (2014).

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### Federal Rule 401

- “Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”

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### Federal Rule 402

- "All relevant evidence is admissible . . . . Evidence which is not relevant is not admissible."

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### Federal Rule 403

- In *Crowther v. Consolidated Railroad* the court, in response to a plaintiff's objection, allowed collateral source information from the defense (\$3000/mo. of disability benefits) as evidence during trial – citing FRE 403:

- *"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."* (FRE 403)

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### Federal Rule of Civil Procedure 26

- Testimony by an expert shall:
- "be accompanied by a written report and signed by the witness;
- Contain a complete statement of all opinions to be expressed and the reasons therefore;
- The data or other information considered by the witness in forming the opinions;
- The qualifications of the witness, a list of publications....over ten years; compensation paid for study and testimony, and a listing of cases in which the expert has testified in trial or deposition within the preceding four years."

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### Affordable Care Act

- Enacted , March 23, 2010 by Act of US Congress, taking effect on January 1, 2014.
- Upheld as “Constitutional” by US Supreme Court on June 28, 2012
- Upheld 2<sup>nd</sup> time by US Supreme Court on June 25, 2015 by establishing that both state and federal exchanges were the same; subsidies allowed by federal exchanges.

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### ACA – Major Elements

- Is not a health insurance program, but regulates the health care industry by expanding health care to all Americans. Generally referred to as the “individual mandate.”
- Pre-existing conditions are not allowed as a reason for denying insurance.
- Persons age 26 or less can stay on parent’s policy.
- Eliminates such practices as: denying coverage, dropping a person from a plan, preventing unjustifiable rate hikes
- Expanding Medicaid to people within state programs, and providing tax breaks for small businesses.

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### Implications of ACA, Collateral Sources, and Tort Reform for Life Care Planners

- Continue to complete life care plans in your usual and customary manner.
- Know the law, rules and regulations of the state or venue in which the case resides.
- Work within your area of skill as defined by your credentials and experience.
- Follow the guidelines of your profession by adhering to standards of practice and ethics.
- Assume that you may be asked to respond to two or more scenarios with regard to the life care plan.

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### What to do when . . . .

- Questions arise about the ACA?
- A hiring attorney requests two or more scenarios?
  - On different rates.
  - On one or more collateral sources.
- The court requests additional scenarios post-trial?
- One or more collateral sources are allowed?
- A Life Care Planner receives an “*in limine* motion to exclude” the life care plan because of a failure to include collateral sources and/or different rates on medical services?

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### Standards of Practice and Case Law

- For life care planners the future holds some unknowns with regard to: ACA, Tort Reform, and Collateral Sources.
  - **Standards of Practice** are essential, but not the deciding factor.
  - **Learning through Conferences** is essential, but not the deciding factor.
  - **Networking** is essential, but not the deciding factor.
  - **Proper Expert Credentials** are essential, but not the deciding factor.
- But Case Law is . . . really important!**

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### Guidelines, Standards & Ethics

- In *Adams v. Laboratory Corp. of America* (2014), an expert’s “standards of practice” of a relevant professional association of which the expert is a member can be self-serving and an abuse of discretion. The Appeals Court opined that “guidelines are not objective, scientific findings (this case was related to science).
- The court also noted that professional guidelines cannot define or limit evidence through expert testimony.
- Admissibility is defined by FRE 702 (reliability), 402 & 403 (relevance), methodology (Daubert & Kumho), and discretion by the court (Joiner).

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**Tucker v. Cascade General**  
**US Dist Ct for Dist of OR, 2014.**

- A “traditional’ case
- Billed data
- MSA expert included, but not part of evidence
- No collateral sources
- No ACA

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**Jones v. Metrohealth Medical Ct**  
**Ct of Common Pleas, Cuyahoga Cty, OH, 2015\***

- Post-verdict hearing on prejudgment interest, statutory damage caps, and set-offs.
- Jury awards as follows:
  - \$500,000 for past economic damages; set-off in its entirety.
  - \$8,000,000 for future economic damages; reduced to \$2,951,291.\*
  - \$5,000,000 for non-economic damages; capped at \$250,000.
  - \$1,000,000 for loss of consortium; reduced to \$250,000.
  - Prejudgment interest claimed denied; plaintiff failed to meet deadline.
  - Reduced by insurance under ACA, 80% by Medicare.
- Currently on appeal.

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**Howell v. Hamilton Meats**  
**Sup Ct of CA, 2011**

- Court noted that this ruling does not modify or change the existing collateral source rule “because the plaintiff does not incur liability in the amount of the negotiated rate differential” . . . .
- The issue specifically deals with the victim’s right to collect at a market rate for medical bills already paid.
- Example: A \$100,000 medical bill discounted to \$60,000 (paid by **insurance**) will result in a \$60,000 settlement to plaintiff.

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**Luttrell v. Island Pacific Supermarkets CA**  
**Ct of Appl, 2013**

- Following the Howell ruling (2011), the court determined that the Howell rule should likewise apply in this case where the plaintiff's billed medical expenses would be reduced to the amount that Medicare paid.
- Medical expenses:
  - Billed healthcare costs were \$690,548.93, reduced to \$138,082.25.

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**Sanchez v. Brooke**  
**CA Ct of Appl, 2012**

- Howell was extended to include workers' compensation with a \$200,000 award reduced to \$60,000.

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**Leung v. Verdugo Hills Hospital**  
**CA Ct of Appl, 2013**

- Primary issue involved Civil Sec. Code 3333.1 of the *Medical Injury Compensation Fund Act of 1975*, stipulating that the "defendant may introduce evidence of any amount payable as a benefit to the plaintiff as a result of personal injury pursuant to such things as health insurance or state or federal disability payments."
- 3333.1 permits evidence not simply of insurance benefits already paid, but also of benefits likely to be received in the future.
- 3333.1 also allows a defendant to introduce evidence of future insurance benefits that the plaintiff is reasonably certain to receive.

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**Leung v. Verdugo con't.**

**Testimony of a Life Care Planner - Plaintiff**

Presented three different plans using retail prices in "today's healthcare costs":

- 1. Enhanced care – all contingencies would occur cited by physicians
- 2. Limited – some contingencies would occur
- 3. None – assuming none would occur

On future health care costs, LCP'er indicated that she used "the current schedule of benefits" and explained that insurance benefits change each year, and what items would be covered in the future.

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**Problems with Insurance**

(Cited in Leung case)

- Not knowing what insurance will allow
- Insurance company could go out of business
- Insurance company has right to cancel policy (not anymore under ACA)
- Benefits vary from year to year
- Pure speculation to reference future health coverage with insurance
- Insurance as a collateral source could vary by jurisdiction

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**Leung v. Verdugo con't**

**Testimony of a Life Care Planner - Defendant**

- "Plan covered essentially the same categories of treatment and care as Plaintiff's plan."
- Offered no testimony on future insurance coverage of costs.

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### Leung Decision

- The court ruled that the jury “must not consider whether any of the parties in this case had insurance. The presence or absence of insurance is totally irrelevant.”
- Court also explained that it “had excluded evidence of future insurance because it’s too speculative” and because of the court’s reading of Sec. 3333.1 suggested that such evidence was not admissible, especially because of its speculative nature.
- Jury awarded future medical costs of \$82,782,000, at a present value of \$14,000,000.

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### Christy Guardian v. Humility of Mary

Ct of Common Pleas, Trumble Cty, OH, 2015

- *Motion in Limine* to preclude evidence or reference to *Medicaid* or the *Affordable Care Act*.
- “the Court finds it cannot restrict reference to the *Affordable Care Act* as it is the law of the land.”

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### Pannacciulli v. Beloff

Superior Ct of NJ, Bergen Div., #: BER-L-845-12, 2016

- Defendants contended that Plaintiff would “receive contributions and reimbursement of the majority of medical cost through the ACA.”
- Defendants “have not shown that there is a reasonable certainty that [plaintiff would] be covered by the ACA or private health insurance.”
- NJ law (2A:15-97) holds that “future collateral benefits are deductible only to the extent that they can be determined with reasonable certainty.”
- Defendant relied on court decisions from other jurisdictions (i.e. CA) which do not have any precedential value [to] interpret NJ law. Motion denied.

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**Donaldson v. Advantage Health Physicians**

**Cir Ct of City of Kent, Michigan, (undated, probably @ 2014)**

- “*Motion in limine* to preclude Defendants from referencing the *Affordable Care Act* and the plaintiff’s potential coverage under the *Act*.”
- “Denied. The court finds that health insurance provided under the *Affordable Care Act* is reasonably likely to continue into the future and its discussion before the jury is not precluded by *MCLA 600.630(1)*. Accordingly, what medical care and therapies would be provided by insurance through the *ACA* can be discussed/argued at trial.”

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**Reed v. City of Modesto**

**US Dist Ct for E Dist of CA, 2015**

- Involving conflict over which rates were used in life care plan for future medical care.
- Two motions *in limine* by defendant to exclude:
  - #4 – to exclude any reference to the life care plan for basically not taking into account the differences between the “billed” amount v. “Medicare rates.”
  - #7 – to exclude a supplemental report “which used the alternate figures including Medicare payment rates.”

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**Reed v. City of Modesto**

**US Dist Ct for E Dist of CA, 2015**

- **Defendant’s Motion in Limine #4**
- LCPer “used estimates of what healthcare providers would bill.”
- However, “plaintiff’s medical expenses have been covered by Medicare – only pays providers a reduced rate.”
- Plaintiff was limited “to recovering projections of what would actually be paid in the future as opposed to full billed rates.”
- Defendants motion allowed.

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### Reed v. City of Modesto

US Dist Ct for E Dist of CA, 2015

- Defendant's **Motion in Limine #7**
- LCPer submitted a second report which was based on Medicare rates and customary rates for medical services not covered by Medicare.
- A third report was produced reflecting, with objective to reverse the ruling on the 4<sup>th</sup> motion, based on non-Medicare rates (unspecified).
- The Court denied defendant's motion based on the second LCPer's report which used both Medicare rates and customary rates.

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### Guidelines and Conclusions

- **Summary Statements** by relevant Professional Associations are important.
- **Standards of Practice** by Associations are important.
- **Standards of Ethics** by Associations are important.
- Knowledge, skill, experience, training, and education (i.e. FRE 702) - **credentials** are important.
- **Case law** (precedents) is important.

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### Methodology

Roach & Roach v. Hughes, et al., US Dist Ct of W Dist of KY, 2015.

- *In limine* motion to exclude Life Care Planner.
- Reg. nurse, degrees and certifications.
- Offered opinions on future care and costs with excellent foundation data.
- On **Relevance**: Defendant argued that LCPer didn't qualify differences between costs related to accident and costs unrelated to accident.
- On **Reliability**: Defendant's argued that LCPer did not meet the four scientific criteria of Daubert (testing, peer review, general acceptance, and standard error).

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### Methodology con't.

- Plaintiff pointed out that the *Daubert* factors were meant to be helpful, that the test for reliability was flexible, and not definitive.
- The court allowed that the principles and methodology of the life care planning field are reasonable measures of reliability.
- The court referenced the LCPPer's work, followed the standards of practice for LCPers, that the plan was based on sufficient facts and data, and as the Plaintiff noted, consistent with the *Kumho* ruling (criteria must be relevant).
- Motion denied.

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### Methodology con't.

- Factors to remember in LCPing Methodology/Opinion:
  - **Relevance:** FRE 403, Knowledge is Specialized and/or Technical (not Scientific); opinion must relate to the facts of the case.
  - **Reliability:** FRE 702, *Kumho* applies guidance for appropriate criteria is assessing methodology (not so much *Daubert*, or scientific knowledge), and the criteria for judging methodology must relate both to the facts of the case and the specialized knowledge of life care planning.

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### What to do when . . . .

- Questions arise about the ACA?
- A hiring attorney requests two or more scenarios?
  - On different rates.
  - On one or more collateral sources.
- The court requests additional scenarios post-trial?
- One or more collateral sources are allowed?
- A Life Care Planner receives an "*in limine* motion to exclude" the life care plan because of a failure to include collateral sources and/or different rates on medical services?

Practical Application

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### Practical Application #1

There is nothing in the Standards of Practice or Consensus and Majority Statements indicating we can not provide a **variety of information** regarding costs and collateral sources if requested.

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### Practical Application #2

- **Life Care Planning is a tool** of Case Management.
- **Life Care Planners are permitted to provide useful information to the parties as requested.**
- **Jurisdictional variations should be noted.**

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### Practical Application #3

- We are not making a statement about what is the **“right” cost** to use, or who should pay.
- The jury and/or judge will do that.
- However, relating to costs, the issue of “reasonably available to the evaluatee” (SOP 4B) cannot be ignored. This includes **“reasonably available”** now and in the future.

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### Example

ITEM	PURPOSE	PROVIDER	AGE INITIATED/AGE SUSPENDED	REPLACEMENT RATE	COST
PM&R Evaluation, Treatment, and Monitoring	Ongoing evaluation, monitoring and treatment of paraplegia and associated complications of neurogenic bowel and bladder, neuropathic pain, autonomic dysfunction, pressure sores, overuse syndrome of upper extremities and cerebrovascular disease. Provide future medical and rehabilitation referrals.	Dr. PM&R or Local Provider	Current Age to Life Expectancy	Average 2 times per year	\$236.00 per visit  Per evaluatee's current healthcare policy this item is covered with a \$20.00 co-pay

\*Current health insurance coverage must be renewed annually and is subject to changes and exclusions in the future.

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### Example

ITEM	PURPOSE	PROVIDER	AGE INITIATED/AGE SUSPENDED	REPLACEMENT RATE	COST
Occupational/Physical Therapy Evaluation, Monitoring and Treatment	Provide therapy with focus on treatment of upper extremity complications of wheel chair use, wheel chair seating evaluations, increase strength of upper extremities secondary to effects of aging, and train caregivers. Develop individualized structured exercise program to be implemented by evaluatee and caregivers.	Local Provider	Current Age to Life Expectancy	Home Evaluation followed by an average of 3 times per week for 12 visits.  Then annual evaluation plus average 2-3 visits per year	Evaluation: \$256.00  Follow-up: \$106.00 Per Visit  Per evaluatee's current healthcare policy this item is covered at 80% for the first 30 visits each year.

\* Current health insurance coverage must be renewed annually and is subject to changes and exclusions in the future.

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### Suggestions for Future Practice

- 1. Be familiar with
  - Standards of Practice,
  - Consensus and Majority Statements
  - Rulings,
  - Ethics,
  - Scope of practice, etc.
- 2. Continue to practice as usual; consider preparing different scenarios if requested.
- 3. Remain active and involved in conferences, journals, etc.

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**Suggestions for Future Practice, con't.**

- 4. Be familiar with collateral source rules (in the state in which the case resides), including tort reform, if any.
- 5. Be familiar with rules and regulations of the ACA (and insurance generally).
- 6. Be familiar with payment strategies (paid, actual, billed, Medicare/Medicaid rates, VA rates, etc.) and how they would apply in the specific venue (state/federal court).

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**Thank you for attending our session!**

*Tim, Tony, & Cloie*

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