WHAT FFIC SHOULD EXPECT FROM MONITORING COUNSEL: *A PROACTIVE WATCHDOG*

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Preparation is the be-all of good trial work. Everything else—felicity of expression, improvisational brilliance—is a satellite around the sun. Thorough preparation is that sun.
Louis Nizer

I. OVERVIEW

The practical reality is that FFIC is not in the driver's seat on those cases in which there is potential exposure to the excess policy – indeed, the excess insurer may be the last to be notified of the claim. However, this does not mean that FFIC is at the mercy of any action or inaction by the primary insurer and their attorneys. By working with monitoring counsel, FFIC can undertake proactive measures to mitigate or eliminate exposure to the excess layer.

The role of monitoring counsel can be grouped into three broad areas:

- Timely, objective and reliable assessment of the claim
- Taking action to remedy any deficiencies in the investigation, discovery and defense of the claim
- Vigorous advocacy of settlement of the claim within the primary limits and creating a paper trail for any potential *bad faith* claims against the primary insurer and/or professional liability claims against their attorneys

Our experience has shown that FFIC and monitoring counsel can work together successfully to fully develop and influence the overall disposition of the claim – whether through early pre-suit investigation and settlement negotiations or through the management of complex litigation that is ultimately decided by a jury.

These materials are not intended as a comprehensive listing of every type of expert, investigation or analysis that will be necessary in handling an excess claim. Rather, they are

presented as a guide in considering various ways in which monitoring counsel can shape the defense of a claim.

II. RETENTION OF MONITORING COUNSEL

A. EARLY IDENTIFICATION OF CLAIMS

Early identification of those claims with the potential to expose or render the excess layer vulnerable is critical to ensure the documentation and preservation of vital evidence, as well as laying the foundation for a solid defense. Monitoring counsel is typically retained on catastrophic injuries with significant pain and suffering components and wrongful death claims with substantial pecuniary loss. There are other factors that may go into the decision to retain monitoring counsel, including: venue of the action; the nature of the injuries or claim (*e.g.*, sensitive claims such as sexual assault); type of insured; the quality and reputations of the attorneys involved; the amount of attention being paid to the handling of the action by primary counsel; and whether the primary insurer is properly funding the litigation.

In recent years, New York appellate courts have sustained incrementally larger pain and suffering verdicts on a monthly basis. New Jersey appellate courts may be the next to raise the bar, as three of its jury awards were among the largest in the United States in 2003[1] and the cases are currently under appellate review. The following are examples of

[1] These verdicts include: Hayes v. Cha (December 8, 2003), in which a federal court jury awarded $15 million to plaintiff who claimed to have sustained disfiguring facial plastic surgery, and $5 million on the husband's loss of consortium claim; and Gomez v. Daneshvar (May 9, 2003), in which an Atlantic County jury awarded $22 million to a plaintiff brain-damaged by a delayed blood transfusion.

pain and suffering awards recently upheld by the courts:

- Brown v. City of New York, 275 A.D.2d 726, 713 N.Y.S.2d 223 (2nd Dep't, June 12, 2000): Plaintiffs were two brothers who were injured after diving from a pier. A Brooklyn jury awarded the first plaintiff, who was rendered paraplegic, $15 million for past pain and suffering and $20 million for future pain and suffering; the second plaintiff, who was rendered a pentaplegic, was awarded $3 million for past pain and suffering and $7 million for future pain and suffering. The First Department reduced each award to $1 million for past pain and suffering and $3 million for future pain and suffering, for a total award of **$4 million** each.

- Desiderio v. Ochs, 294 A.D.2d 241, 741 N.Y.S.2d 865 (1st Dep't, May 23, 2002): Plaintiff was 4-year-old boy who suffered severe brain damage following a procedure for the adjustment of a shunt which had been installed to alleviate a congenital condition. The New York County jury awarded a total verdict of $79.9 million, including $2 million for past pain and suffering, $30 million for future pain and suffering and $40 million for future nursing care. The trial court reduced the award to $1.5 million for past pain and suffering and $3 million for future pain and suffering over 55 years, for a total unstructured award of **$50.1 million**, which was upheld by the First Department and the Court of Appeals.

- Bondi v. Bambrick, 308 A.D.2d 330, 764 N.Y.S.2d 674 (1st Dep't, Sept. 11, 2003): Plaintiff was a 35-year-old woman who sustained a below-the-knee amputation in a motorcycle accident. She underwent 9 surgeries prior to trial, including skin grafts and 2 painful procedures for removing and relocating muscle tissue. The First Department upheld the New York County jury award of $2.25 million for past pain and suffering and $7.5 million for future pain and suffering, for a total award of **$9.75 million**.

- Weigl v. Quincy Specialties Co., 1 A.D.3d 132, 766 N.Y.S.2d 428 (1st Dep't, Nov. 6, 2003): Plaintiff was a female laboratory technician who sustained second- and third-degree burns over 17% of her total body area. She suffered extensive burns about her upper torso, hands and limbs; she underwent multiple skin grafting procedures during a one-month hospitalization, and she was in constant pain due to skin contractures. A New York County jury awarded plaintiff $9,130,000 for past pain and suffering and $10 million for future pain and suffering. The trial court reduced the award to $4 million each for past and future pain and suffering, for a total award of **$8 million**, which was upheld by the First Department.

- McRae v. St. Michael's Medical Center, 794 A.2d 219 (N.J. Super., April 8, 2002): Plaintiff was a 36-year-old female who suffered from angulation and discrepant limb length as a result of surgery performed on her, causing her to undergo five subsequent surgeries to re-break the leg and to sustain permanent loss of range

of motion. The Essex County jury awarded plaintiff **$1.1 million** for pain and suffering, which the Appellate Division upheld.

Given the substantial potential jury awards at stake, the importance of early identification of those claims that may render the excess policy vulnerable and the timely retention of monitoring counsel cannot be overstressed.

B. INTERACTION WITH PRIMARY COUNSEL

Immediately following retention, it is imperative that monitoring counsel contact primary counsel to alert them to the representation of FFIC's interests. This enables monitoring counsel to obtain a complete copy of all litigation materials and, ideally, to be kept abreast of all developments.

The dynamics of monitoring counsel's role often lead to a tense and virtually antagonistic relationship with primary counsel and their insurer. If one is performing the monitoring job properly, this cannot be avoided. No trial lawyer or insurer likes to have their every move observed under a veritable microscope and then be subjected to critique. Experience has shown that the best way to approach these situations is to have a candid discussion with primary counsel from the outset and to explain that monitoring counsel is not to be a "good guy" or to remain passive in the litigation but to ensure that every aspect of the claim is considered and that appropriate action is taken to protect the interests of the insured.

It is necessary to maintain constant verbal and written contact with primary counsel in order to make certain that excess insurer is being kept in the proverbial loop. Monitoring

counsel must also cultivate a relationship with primary counsel so that it is involved in litigation strategy. This avoids the "Monday morning quarterbacking" that can take place after a situation has already gone awry. Informed decisions on the adequacy and effectiveness of the handling of the primary defense are made when monitoring counsel takes an active role in the decision-making process.

The parameters of the relationship between monitoring counsel and primary counsel are best laid out in an initial letter, containing the following:

1. Request that monitoring counsel be added to the primary counsel's reporting rider in order to be copied on every future report.

2. Request that monitoring counsel be kept abreast of all settlement discussions – whether formal or informal, oral or in writing – and that every effort be made to resolve the case within primary limits, without exposure to the excess policy.

3. Request that monitoring counsel be given advance notification of any firmly-scheduled depositions so that we may attend, if FFIC deems it necessary.

4. Request that monitoring counsel be given advance notification of any liability and damages experts primary counsel intends to retain so that we may provide input and, potentially, alternative choices.

5. Request that the following be forwarded to us, in draft form, prior to service, for our input: (a) all dispositive and other critical motions; (b) all significant discovery responses; (c) all trial briefs and motions *in limine* to be utilized at trial; (c) all Requests to Charge and Jury Interrogatories; and (d) settlement agreements.

6. Request copies of the following documents:

    - All reports previously sent by primary counsel to the primary insurer;

    - All pleadings, including complaints (amended and supplemental), answers (amended and supplemental), cross-claims/counterclaims and responses thereto, substitution of attorney forms, Notes of Issue or trial notices;

- All discovery demands and discovery responses;

- All Bills of Particulars (amended and supplemental), Interrogatories and Interrogatory Responses;

- All medical records – whether received from plaintiff's counsel, by authorization or pursuant to subpoena – including hospital records, ambulance reports, physician office records and reports, therapist office records and reports, psychiatrist/psychologist office records and reports, and pharmacy records;

- Duplicate copies of all relevant diagnostic films (*i.e.*, CT Scans, MRIs, x-rays, bone scans, etc.) and related reports;

- All death certificate, autopsy report, and toxicology reports, if applicable;

- All expert reports and expert witness exchanges;

- All investigation reports generated by primary's investigators (including attachments and enclosures), and copies of any surveillance film;

- Duplicate, color copies of all photographs of the site, vehicle, parties, etc. obtained from any source (including day in the life films);

- All police records, including where applicable, police accident reports, aided reports, UF-61 Complaint reports, DD-5 Detective Follow-Up reports, Crime Scene Unit reports, Accident Investigation Squad reports, diagrams and photographs;

- Primary insurance policy, including all policy language, declarations, amendments, endorsements and riders;

- All motions, opposition papers, replies, and resultant court orders;

- All scheduling conference orders and compliance conference orders;

- All deposition transcripts – whether party or non-party – including executed signature pages and errata sheets;

- Any statements provided to any municipal or government entities with respect to the occurrence; and

- All criminal court/traffic court files or reports of any investigations performed by administrative or governmental bodies.

The earlier monitoring counsel is able to obtain and review these materials, the greater the likelihood that a comprehensive analysis can be performed and decisive action can be taken to protect the interests of FFIC.

III. ROLE OF MONITORING COUNSEL

Once retained, monitoring counsel must ensure that simultaneous action is undertaken on a number of fronts: investigation of the claim; evaluation of liability, potential defenses and damages; and retention of experts. Although the emphasis on any one of these areas may vary from claim-to-claim, they are equally important to the ultimate disposition of the claim and in affording FFIC the opportunity to intelligently evaluate and reserve the claim.

A. INVESTIGATION, PRESERVATION AND DOCUMENTATION OF EVIDENCE

Being on-site at the earliest possible juncture and preserving evidence for testing are critical to the defense of a claim. Although the necessity of first-hand inspection of a site or testing of a product would appear to be obvious, the primary insurer often fails or refuses to do so. Time and again experts (such as engineers, cause and origin investigators, Code experts and other forensic experts) have proven indispensable to the defense of a claim – especially on pre-suit claims where their on-site presence can literally make certain that no stone is left unturned. Therefore, although it is not an obligation of the excess carrier to do so, it may prove cost-effective to promptly retain investigators and experts to ensure that critical evidence is documented, photographed, inspected and/or tested at the earliest possible time following notice of the claim.

1. Essential Elements of a Comprehensive Investigation

- *Site Inspection – Observe, Measure and Photograph*: This should be performed as soon as possible because necessary actions by emergency personnel may significantly alter the condition and positioning of debris and repair efforts may begin quickly. Even where the condition has been repaired or the defective product has been removed, a site inspection is an invaluable tool for understanding the conditions and manner in which the incident occurred.

  In all circumstances, when reasonably practical, the scene should be thoroughly photographed and videotaped. Overhead and/or aerial photographs taken before debris is disturbed and then again during the removal process are extremely useful. In most investigations, it is beneficial to establish a reference system for recording observations -- consider obtaining the drawings of a structure or location for original reference systems. Long after debris has been cleared and the structure has been demolished or repaired, photographs are available to refresh memories and help form, solidify and support opinions.

- *Procurement, Examination and Testing*: In cases involving a product, building or system failure, the properties of the materials and the behavior of the failed components will be under intensive scrutiny. Obtaining samples from the actual structures and surfaces for examination and testing are crucial. As well, obtaining exemplar samples for destructive testing and reviewing information on prior repairs and modification can prove to yield significant information.

- *Preservation*: Relevant evidence must be taken into custody and preserved in a reasonable fashion.

- *Procure Relevant Documentation:*

  Certified copies of police reports; accident investigation squad reports; witness statements; drawings/diagrams; measurement keys; duplicate original photographs of the site and/or product.

  Statements from all relevant police officers, emergency and medical personnel, and witnesses (party and non-party).

  Certified copies of summonses issued in traffic court, criminal court records, etc.

All pedigree, employment and financial data on claimant through sources such as credit reports, Dunn & Bradstreet, Internet searches and investigator's confidential sources.

- *Surveillance: Sub rosa* surveillance is often appropriate for bodily injury claims and has the potential for seriously mitigating or even vitiating a plaintiff's claimed residuals.

  It may be beneficial to have an investigator present when plaintiff appears either for a deposition or a physical examination so plaintiff may be discreetly identified before undertaking surveillance. This ensures that the wrong person will not be surveilled, a costly and dangerous mistake.

  Monitoring counsel must be familiar with the local requirements for the contents and disclosure of any surveillance materials. For example, in New York, CPLR § 3101(i) mandates "full disclosure of any films, photographs, video tapes or audio tapes." This has been interpreted as requiring disclosure of the investigator's complete records, including all outtake recordings and notes. As well, any surveillance materials that were obtained in advance of the plaintiff's deposition must be made available to the plaintiff before he testifies at deposition. Tran v. New Rochelle Hosp., 99 N.Y.2d 383, 756 N.Y.S.2d 509, 786 N.E.2d 444 (2003). Therefore, care must be taken when interfacing with the investigator. Specifically, the investigator must be told to contact counsel once positive identification is made in order to discuss their observations of the claimant. Counsel must then decide whether it is worthwhile to videotape or film the claimant.

B. STEERING PRIMARY COUNSEL

Monitoring counsel must thoroughly review the records produced by primary counsel. The primary purpose in doing this is to ensure that the appropriate Affirmative Defenses and Cross-Claims/Counterclaims have been asserted, that the necessary discovery demands have been served and that all essential documentation has been received.

1. Particular attention should be paid to the following discovery:

- *Demands for authorizations to obtain case-specific critical records (especially HIPAA-compliant authorizations) and receipt of authorizations responsive to these demands.*

  For example, in traumatic brain injury cases, the plaintiff's complete school records should be obtained from kindergarten through the highest level of education, including attendance records, medical/dental/vision records, achievement/aptitude test results (*e.g.*, IQ, PSAT, SAT, LSAT, NCAT, GMAT, etc.). Education records can be very helpful in determining whether certain conditions pre-date the injury or are congenital. Although these records are vital to a proper Neuropsychological examination of plaintiff, they are often overlooked by claims and primary counsel.

  If primary counsel fails to obtain such authorizations, motion practice to obtain same should be recommended, if necessary.

- *Ensuring primary counsel processed authorizations and received complete, certified copies for the records of all treating sources.*

  These should include all types of treating sources, including physicians, therapists, psychiatrists, psychologists, social workers, pharmacies, birth records, childhood pediatrician records, treatment for relevant or related pre-incident injuries, diagnostic testing. For any diagnostic procedures, ensure that actual copies of the films or tapes are obtained. As to any claims of aggravated or exacerbated conditions, complete records of all prior treating sources should be obtained.

Primary counsel should be encouraged to maintain a flow chart with the plaintiff's complete medical history, including names and addresses of the treating sources, the dates of treatment and the type of treatment rendered.

Primary counsel should also be encouraged to refrain from conducting any depositions without all relevant records available so that an intelligent deposition may be conducted.

- *Demands for authorizations to obtain records on collateral sources, employment and lost earnings*.

  These should include authorizations to obtain complete, certified copies of the plaintiff's tax returns (including W-2s and 1099s), employment records (including earnings/payroll, performance reviews, medical records and attendance information), Workers' Compensation Board and workers' compensation carrier records, No-Fault records, Social Security Disability records, private disability records, and Medicare records.

  If plaintiff has any prior suits, disability claims, workers' compensation claims, No-Fault claims, primary counsel should obtain authorizations for and complete copies of any pertinent records.

  Primary counsel should be encouraged to maintain a flow chart with the plaintiff's education and employment history.

- *Meeting with experts retained by primary counsel.*

  With regard to experts retained by primary counsel, monitoring counsel should recommend that primary counsel meet with their liability and medical experts *prior to* any site inspections or physical examinations so the objectives are clear to all participants. Meetings should also take place before any reports are rendered.

2. Trial Considerations

Trial is the time when all of the preparations pay off. Some considerations to keep in mind include:

- During jury selection and trial, monitoring counsel should receive daily verbal and, if possible, written updates from primary trial counsel.

- Monitoring counsel should not sit in on jury selection as this makes an obvious point of discussion for the jurors. However, primary counsel must copy monitoring counsel immediately on a jury composition report.

- In most serious matters, the excess insurer will want monitoring counsel to sit in on the trial to both accurately report the proceedings and to assist primary counsel, where necessary.

- Presence during the trial also becomes relevant if settlement negotiations are being conducted, either independently or with the assistant of the Trial Judge. Depending upon the circumstances, monitoring counsel may need to maintain a low profile.

- After verdict, regardless of whether the award reaches the excess layer, primary counsel must keep monitoring counsel informed of all post-trial motions, proceedings, and appeals and seek the input of monitoring counsel with regard to such motions, appeals, etc.

3. Duties of Excess Insurer and Primary Insurer

a. Excess Insurer's Defense Obligations

An excess insurer typically has no duty to defend its insured until the limits of underlying coverage are exhausted or until the insured's SIR is exhausted. However, an excess insurer may elect to participate in its insured's defense where its policy limits are implicated and the primary insurer is not mounting a strong defense. See Am. Home Assur. Co. v. Int'l Ins. Co., 90 N.Y.2d 433, 661 N.Y.S.2d 584, 684 N.E.2d 14, 18 (1997)(Held that excess insurers have the right to investigate claims, to participate in settlement negotiations, and to make their own settlement decisions). This right is contractual and arises from the language in the policy. For example, an excess policy may provide as follows:

> The Company shall not be obligated to investigate, defend or settle any claim or suit against the Insured, but the company shall have the right and shall be given the opportunity to associate with the Insured or its underlying insurer, or both, in the investigation, defense or settlement of any claim or

> suit which, in the opinion of the Company, involves or appears reasonably to involve the Company.

The majority of courts hold that even where an excess policy gives the insurer the right and option to defend, such language does not create a duty to defend. See, e.g., Fireman's Fund Ins. Co. v. TIG Ins. Co., 14 S.W.3d 230, 232 (Mo. Ct. App. 2000); FMC Corp. v. Plaisted & Cos., 72 Cal. Reptr.2d 467, 508-510 (Ct. App. 1998).

New York, however, takes the minority position that the excess insurer may owe a duty of good faith to the insured to actively investigate, defend or settle the underlying case despite any policy language exempting the insurer from these activities. In Yonkers Contracting Co., Inc. v. General Star Nat. Ins. Co., 14 F. Supp. 2d 365 (S.D.N.Y. 1998), the insured alleged breach of duty by one of its four primary insurers and an excess insurer in connection with its defense and indemnification in an underlying personal injury action. The insured sought a declaration that the primary and excess insurer were obligated to contribute to the underlying settlement and pay damages arising out of handling of the claim during settlement negotiations in the underlying action. The Court decided that fact issues precluded dismissal of the action against the excess insurer based on allegations of bad faith and misleading conduct in the settlement of the underlying action. "Every insurance contract contains a contractual duty of good faith owed by an insurer to its insured." 14 F. Supp. 2d at 373. The insured conceded that the excess carrier had no independent duty to investigate, defend or settle the underlying action, but argued that such a duty arises once the primary insurer tenders its limits. The Court held that the plaintiff's allegations, though bordering on conclusory, were

sufficient to avoid dismissal, because the contract language may have been ambiguous, and the facts could possibly establish a duty on the part of the excess insurer. 14 F. Supp. 2d at 374.

All insurance policies contain an implied duty of good faith and fair dealing. Thus, regardless of whether the jurisdiction in which the claim is venued will impose upon an excess insurer the duty to defend the underlying action – and it is important to determine whether this is applicable – practical consideration should be given to whether the excess insurer should become involved in the defense, investigation and settlement of the underlying claim.

b. Bad Faith Claim Against Primary Insurer

Just as the primary insurer and the insured owe each other the duty of good faith and fair dealing, in the minority of jurisdictions, the primary insurer owes the excess insurer a duty of good faith in its dealings with an insured's claims and lawsuits. For example, according to New York law, a primary insurer's duty of good faith runs not only to its insured, but also to an excess insurer. Hartford Accident and Indemn. Co. v. Michigan Mutual Ins. Co., 61 N.Y.2d 569, 475 N.Y.S.2d 267, 463 N.E.2d 608 (1984).

Although this is the minority view in terms of the duty running from a primary insurer to an excess insurer, most courts have adopted the theory of equitable subrogation. Under the theory of equitable subrogation, an excess insurer's claims against the primary insurer are subject to any defenses the primary insurer could assert against the insured, including for

example, a refusal to settle or failure to cooperate. Great American Ins. Co. v. United States, 575 F.2d 1031 (2d Cir. 1978); 8B Appleman, Insurance Law and Practice 4941.

Monitoring counsel is therefore responsible for documenting and creating a *"paper trail"* in the event of non-cooperation by primary counsel or the primary insurer. If primary counsel fails to comply with the request to obtain their files, for reports and updates or to take the steps necessary to properly and effectively defend the case, monitoring counsel should consider drafting a letter to be sent by the excess insurer to the primary carrier and the insured suggesting that such non-cooperation may result in vitiating the insured's rights under the excess policy. If all else fails, and the primary insurer and their counsel are not protecting the excess interests, monitoring counsel should be prepared to forward a *bad faith* letter as a last resort.

c. Malpractice Actions Against Primary Defense Counsel

Although an excess insurer has no direct relationship with the primary defense counsel, it may still maintain an action for malpractice against defense counsel when a verdict exceeds the primary limits. A majority of court have held that the excess insurer is equitably subrogated to the insured's rights against the attorneys. See, e.g., Great Atlantic Ins. Co. v. Weinstein, 125 A.D.2d 214, 509 N.Y.S.2d 325 (1st Dep't 1986); American Centennial Ins. Co. v. Canal Ins. Co., 843 S.W.2d 480 (Tex. 1992).

C. SELECTION OF EXPERTS

FFIC and monitoring counsel have the opportunity to exert the strongest influence over the defense of liability and damages through the selection and recommendation of experts. From conducting an inspection of the site or product, examining causation on a toxicology issue or performing an independent medication examination, the importance of obtaining the right experts to assist in the defense of a case should not be underestimated.

The following experts typically seen in catastrophic injury cases bear some discussion:

1. Structured Settlement Broker

If excess money is required to close a case, serious consideration should be given to the retention of a structured settlement broker. This is especially true in cases involving infants, relatively young claimants with families, wrongful death and cases with significant future damages.

Structured settlements are settlement tools that provide clear benefits to all parties:

- Offer favorable tax treatment to claimants and insurers
- Permit payment schedules to anticipate a claimant's future needs
- Lower the cost to insurers of compensating claimants
- Help foster more timely settlement of litigation
- Both claimants and insurers benefit by avoiding the risk of an adverse result after a lengthy and costly trial

A trusted structured settlement broker can assist in formulating reliable Tort Reform and damage analysis. The numbers generated by structure guarantees and projections often are the key to case closure.

2. Life Care Plan Expert

These experts are typically used in cases involving spinal cord injuries, acute brain injuries, burns and amputations. Life care planners determine the present and future care needs of a person and the costs associated with both the medical and non-medical needs over that person's lifetime, such as nursing, rehabilitation, supplies, equipment, medical consultations and ongoing care. The costs are projected at *present-day* value (the amount of money that, properly invested, will yield enough income to cover the health and medical costs that will accrue over the plaintiff's lifetime) -- not the projected future value.

A Life Care Plan is generated to address those areas of a person's life which can be affected by a disability, including:

- Home health care (*e.g.*, nursing care)
- Medical care/supplies
- Regular medical evaluations
- Acute medical treatment
- Therapeutic services and equipment (*e.g.*, physical therapy, adjustment counseling)
- Mobility needs and accessories (*e.g.*, wheelchair, ramps)
- Aids for independent function (*e.g.*, specialized bed, remote environmental control unit)
- Transportation (*e.g.*, van with lift and ties downs, adaptive driving aids)
- Vocational/educational equipment (*e.g.*, adapted computer, software, desk)
- Architecture (*e.g.*, home accessibility features, lift system, intercom, alarm)

In recommending or evaluating a defense life care plan expert, monitoring counsel should pay close attention to the following:

> *Qualifications*: Only those persons who provide *"hands-on"* medical care should be used as experts. Obviously, a physician will be the person most qualified to render an opinion on the needs of a catastrophically injured person. If a physician is unavailable, a nurse care manager would be the person most able to address those needs. The expert must be knowledgeable about all of the possible physical, cognitive, psychological and social problems related to the catastrophic injury at issue. The expert must also be familiar with the long-term care needs and the cost and availability of a wide range of medical and therapeutic services.
>
> *Data Required for Review by Expert*: The defense life care plan expert must be provided with all of the plaintiff's medical records and the reports of any defense examination by a physiatrist or equivalent physician.
>
> *Report Contents*: Any report issued by the defense life care plan expert (a) should include a summary chart; (b) must assume an appropriate longevity; and (c) must be updated shortly before trial.

3. Vocational Rehabilitation Expert

A vocational rehabilitation expert offers opinions about the non-medical consequences of an impairment, such as lost earning capacity or the ability to continue employment in a pre-accident position or other type of employment. In arriving at an opinion, a vocational rehabilitation expert compares the physical strength and intelligence of the plaintiff prior and subsequent to an injury and determines whether such an injury prevents or diminishes an individual's employability. This expert will also be able to advise on important factors impacting the testing and the interpretation, constraints, and presentation of test results in the plaintiff's expert witness report. It is recommended that the vocational rehabilitation expert personally examine and test the plaintiff.

In recommending or evaluating a defense vocational rehabilitation expert, monitoring counsel should pay close attention to the following:

> *Qualifications*: Vocational rehabilitation experts typically have a bachelor's degree in vocational rehabilitation, social work, psychology or special education, as well as a master's degree and certification in rehabilitation counseling. The expert should have demonstrable experience working with catastrophically- injured individuals, as well as specific experience with the injury alleged in the particular case (*i.e.,* quadriplegia, brain injury).
>
> *Data Required for Review by Expert*: The defense vocational rehabilitation expert must be provided with complete copies of the plaintiff's medical, education and employment records (both pre- and post-incident), as well as the plaintiff's deposition transcript.
>
> *Report Contents*: Any report issued by the defense vocational rehabilitation expert should address: (a) the plaintiff's vocational interests; aptitude; educational background; analytical, mathematical and communicative abilities; employment training; temperament; employment history; vocational skills; physical abilities and functional limitations; cognitive abilities; transferable skills; and earning capacity; and (b) a review of labor market surveys.

A general overview on the role of a vocational rehabilitation expert is annexed as **Exhibit A.**

4. Economist

An economist is an invaluable tool to assist primary counsel in preparing for a meaningful cross-examination of the plaintiff's economic expert. The economist can identify assumptions made by the plaintiff's expert (*e.g.*, only good things would have occurred in the plaintiff's future, there would be no recession, plaintiff would have continued to receive job promotions and salary increases) and assumptions that were not made (*e.g.*, plaintiff could be fired or his employer could go out of business, plaintiff could have an accident at home or work).

Of course, this economist will not be presented as a defense expert witness on the plaintiff's loss of earnings claim because it would permit plaintiff's counsel in closing arguments to submit the defense expert's numbers "as a floor" or base amount for recovery. The economist could be used at trial for testimony on the plaintiff's future medical damage projections and for post-verdict testimony on collateral source off-sets and reductions.

In recommending or evaluating a defense economist, monitoring counsel should pay close attention to the following:

> *Qualifications*: The economist must be comfortable in presenting information to a jury, including the rate of real medical cost increase, overall inflation and the growth in value produced by sound investment with various investment vehicles (*e.g.*, T-bills, CDs, bonds).
>
> *Data Required for Review by Expert*: The defense economist must be provided with complete copies of the plaintiff's tax records (both pre- and post-incident) and the reports of plaintiff's life care plan and any economic experts.

A general overview on the role of an economic expert is annexed as **Exhibit B.**

IV. CONCLUSION

By actively overseeing every element of the primary case – from reviewing the pleadings and discovery exchanged, to the involvement in the selection of experts, to the development of defense strategy and to controlling settlement negotiations – monitoring counsel is able to ensure that the case is thoroughly and properly handled to reduce the exposure to the excess layer.

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