

# **Strategies For Selecting or Being Selected as the Life Care Planner Expert –*The Two Way Street***

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**Abstract.** *The role of a life care planner is viewed differently from an attorney's perspective. This article considers the life care planner's role in litigation support, as seen by an attorney experienced in the use of a life care plan in catastrophic cases.*

## **Introduction**

### **Purpose of Engaging a Life Care Planner**

Whether a life care planner is experienced or not, it is important to review basics. What is the role? What is the goal?

The Life Care Plan identifies all of the needs for present and future medical care related to the injury or disability, addresses goals for rehabilitation, assesses current needs, and projects future needs (Deutsch & Sawyer, 2002; Weed, 1999). This lends structure to the future and provides a coordinated approach for providers and consultants in creating a foundation for the best possible care—care that will minimize medical complications and maximize the person's functional potential and self-sufficiency.

When an attorney calls and asks a life care planner to become involved in any way as an expert, the role may ultimately include providing testimony, whether in deposition or at trial. Beyond being an expert, the life care planner becomes involved in the overall presentation of proof regarding the nature, extent, and consequences of the injury to a person and the impact on their life.

The life care planner's role is to create a global and realistic view of the person's future. The Life Care Plan becomes the document which summarizes the medical, psychosocial, educational, vocational, and daily living needs of the person and of those who will be providing familial support to them. In addition, the Plan may provide a foundation for or may assist an attorney in distinguishing pain and suffering, loss of the enjoyment of life, and other non-economic aspects of the claim. It presents better depth and coloration of the person's condition and the impact of injuries, limitations, and disabilities.

### **The “Whether and When” to hiring a Life Care Planner**

In most cases involving catastrophic injury, the sooner the life care planner expert is hired,

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the better. At a minimum, even if the individual has not experienced a catastrophic injury and may not have currently known long-term care needs, the life care planner can assist in confirming that an actual Life Care Plan is not needed, and perhaps a projected medical cost report would be more appropriate.

In cases involving long-term care needs, the life care planner expert may assist in retaining other professionals, and may coordinate and oversee those professionals providing health care services. Early involvement with each of the primary providers helps the Plan come together sooner and more thoroughly. The decision regarding depth of involvement and a role in testifying may often be delayed. Even so, the life care planner's overall qualification and qualities as even a potential testimonial witness needs to be considered whenever litigation is pending or contemplated. Ultimately, an attorney must recognize that the jury is the group which must be impressed with the Life Care Planning expert.

### **Educating the Attorney**

A life care planner is a skilled advisor. Often the life care planner will be educating the attorney and various of other participants — patient, family members, and healthcare team. The Life Care Plan also becomes a checklist for the attorney and a template for other testimony at trial. A properly prepared, complete Life Care Plan highlights the individual nature of the injuries and presents the specifics of the person's needs to all decision makers. It will be viewed and considered by insurance adjusters, case managers, lawyers, judges, and jurors. The Plan assists these individuals in evaluating the damage aspects of the case, and it should provide a rational, objective basis for any discussions of resolution of a pending claim.

### **Consulting or Testifying Expert**

The courts distinguish consulting experts from testifying experts. An expert can be both consulting and testifying (Deutsch & Sawyer, 2002; Weed, 1999). The Life Care Planning expert may first be hired as a consultant, and later declared as a testifying expert. A *consulting expert* is retained to assist the attorney in preparation of the case, including discovery and trial. A *testifying expert* is an expert planned to be used to testify in the case, either through live testimony, video testimony or through what is called *de bene esse* deposition for trial. However presented, the goal is to present evidence.

From the very beginning, the life care planner should discuss the expected role in the case.

### **Concerns**

#### *Qualifications.*

The court determines whether the life care planner is qualified to offer expert testimony. Qualifications are important. The court is not involved in the decision of whomever elects to hire the life care planner, so this "gateway" is faced much farther downstream. It can be dangerous for the individual's case if the life care planner is ultimately found to lack the qualifications to offer expert testimony and the Life Care Plan consequently does not come into evidence.

The members of the jury look through a different lens than a judge; they reflect a bit differently upon the qualifications. The personal training and education in long-term care

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planning, background and experience in working with individuals with catastrophic injuries, and the very individual *persona* of the life care planner are of great importance to the jury. They size up the expert.

#### *Objectivity.*

In every case, there is also a reality to “sponsorship.” What is the life care planner saying about this case, and why? The members of a jury are going to *identify* the life care planner with the party calling this witness to testify — the person who stands to benefit — and need to come away appreciating the role, the underlying rationale and activities in creating the Life Care Plan.

All through the life care planner’s involvement, from consideration of being hired, the actual selection and hiring process, and throughout the course of each contact in building the Life Care Plan — the finished product — and continuing through its actual presentation, each item and proposal must ring true. Each element must be not only justified, but reasonable.

#### *Life Expectancy.*

Foundational to this effort is life expectancy. Depending upon the nature of the injury, the life care planner may use normal life expectancy, or that which will be introduced in testimony by an attending physician or other qualified expert when actual life expectancy might be impaired.

#### *Communication.*

The life care planner must talk with members of the health care treatment team. They can best respond to the life care planner’s enquiries and affirm the individualized needs and items. Those items determined “more likely than not” to be needed can be identified in the Plan.

#### *Report Format.*

The Life Care Plan must follow the process published and accepted in peer review journals, describing information regarding recommendations, purpose, frequency and costs. The content and method are the responsibility of the life care planner. Since these project over future years, it is best left to the economist to determine the net present value of the Plan after being given such projection.

### **The Foundation: What is NECESSARY to accomplish the goal?**

There is a process, supplemented or facilitated in a fashion through every conversation, each meeting, and each contact with the attorney, of fleshing out one or more of the following areas, each individually important to preparing the Life Care Plan. In some instances the life care planner will be formulating opinions; in others, learning the opinions of various providers, vocational and rehabilitation experts, or others upon whom the life care planner would normally rely in matters of this kind. A checklist, of sorts, is as follows:

- Become familiar with the nature and extent of the person’s injury and recovery.
  - Review all records regarding the person’s medical care to date.
  - Review all records relevant to the person’s work history.
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- Assess the person's ability to work and to hold a job.
- Administer such tests as may be relevant in assessing the ability to return to work.
- Consider the medical aspects of the person's disability.
- Consider the psychological aspects of the person's disability.
- Consider the work history of the individual.
- Consider the educational history of the individual.
- Consider all other skills of the individual.
- Assess the persons' ability to function in the area of previous employment.
- Consider the physical injuries and whether, and to what degree, they affect the ability to return to work in the area of prior employment.
- Identify each injury and be prepared to deal specifically with any effect upon working created by that injury.
- Identify any psychological, emotional or cognitive problems and deal specifically with any effect upon working created by each area of limitation.
- Become familiar with the workplace and studies to consider other types of work for which the person may be qualified.
- Become familiar with the pay scales of jobs for which the person is qualified.
- Determine (reach an opinion on) the work-life expectancy of the person taking into consideration the existing health status.
- Project the wages the person is likely to earn based upon the jobs for which the person is qualified and the existing pay scales for such employment.
- Consider the current health status of the individual, determine future medical and rehabilitative needs.
- Address each area of future need in the Life Care Plan so that the Plan can be offered into evidence at a trial.
- Review again – each recommendation, its purpose, the proposed frequency and cost.
- Remove any items which might seem frivolous to the jury.
- Take the Plan through a final review to confirm necessity and reasonableness of each item and each price.
- Recalculate and confirm all totals.

### **What I Expect of a Life Care Planner**

Tell the story! I expect the life care planner to go a long way toward putting the damages part of the case together in a coherent, understandable package.

In trial, a primary role of the life care planner expert is to clearly describe the purpose of each item of treatment and care described in the Plan. The jurors need to understand what it is, how it works, where and by whom it is performed, why it is needed, how it will help and what will happen if it is not provided. A fortified and well-presented Life Care Plan helps present this part of the case in a simple, appealing way that strengthens everyone's understanding of what happened, and the real impact of what happened.

### **Deposition and Trial**

The opinions offered must be based on facts, proved or assumed, sufficient to form a basis for an opinion. The basis must suffice to support a reasonably accurate conclusion, as distinguished from mere conjecture or guess. A right without a remedy is merely a suggestion.

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Having an opinion, and knowing and being able to articulate the underpinnings of each opinion is what it's all about - being "the expert."

That opinion may be comprised of facts of which the expert has first-hand knowledge; however, experts are excepted from the requirement that a witness have first-hand knowledge. An expert may testify on hypothetical data alone, and even use facts contained in reports or examinations made by third persons, provided such reports are relied on by the expert in the practice of his or her profession. Further, experts may rely on opinion evidence, based in part on reports, writings, articles, treatises, books of others, which are not in evidence, but which the expert customarily relies upon in professional practice.

It takes the very specific and defined opinion of the expert to establish the connection between the injury, the limitations or disability and how each item of future need is necessary. With the well-presented opinions of a life care planner, the jury can comprehend the extent of the harm, and how the medications, therapies, psychiatric care, rehabilitation equipment, all other past and future treatments, and assistance in daily tasks and other parts of the Plan can (or did) help.

This is the time for "show and tell." Trial attorneys have the pleasure of doing in the courtroom precisely what they did in kindergarten – "show and tell." That is how it should play out in a courtroom. Use pictures, videos, and the actual implements—the things which help. Show these to the jury. Tell them what they are and how they help. Pass them around. Bring them to life. Show how they are part of the Life Care Plan.

### **Direct Examination**

Before the life care planner is called upon to provide testimony, it is necessary to meet with the attorney to discuss the types of questions to expect, the exhibits which will be used during the course of testimony, and the particular goals of testimony. There is no "script." The life care planner has been actively involved in all of the areas described above. It is the attorney's job to elicit from the life care planner the information from within.

This will usually involve simple questions. The life care planner will be asked why they were hired, and qualifications for being involved in this matter will be reviewed. The life care planner will be asked the work performed and materials used in forming opinions. And the life care planner will be asked opinions and how they reached those opinions. It is important to appreciate that a real expert is a master at explaining circumstantial evidence, and how one arrives at conclusions is almost more important than the result. The expert must rely on training and experience and be confident once an opinion is formulated and confirmed.

The goal is to present the Life Care Plan carefully and concretely. Great care must be taken to teach the jury the purpose of each item, the specific injury it relates to and what will happen if the item is not provided.

### **Cross Examination**

As a life care planner, do not be afraid of cross examination! You know this stuff! This is your sandbox. These are your opinions. In preparation for being questioned by opposing counsel, in what is called cross examination, the attorney will want to explore each weakness in the case, asking pointed questions regarding opinions. This is also a time to again discuss any damaging theories which the opposition might use.

Ah, questions! The question is the doorway to the mind. Welcome each question as if they

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were asked by a member of the jury. Actively listen to each question and mentally reframe these questions as opportunities. The judge and jury are the audience; view these questions from their perspective. What do they need to know. Some of the life care planner's best points will be the spontaneous answers given in response to questions on cross-examination.

The jury looks to the life care planner for valid and sound responses, which fit in with the facts of the case. Facts have logic. Everything said grows out of, or relates to, facts. The facts of this case are key to every opinion and the basis of opinions expressed. Use short words. Use simple sentences. Look at and speak to the jurors. Speak in language the jurors will understand. It is the expert's role to make the unfamiliar familiar to the jury.

The facts of the case are important – know them. It is critical that the life care planner has clear in mind those facts which are foundational to opinions. Upon these facts, each item of the Plan is built. Treat each important item of the Life Care Plan as such, and defend it to the jury. Knowing the Life Care Plan is key; answering questions directly and persuasively, the goal.

### **The Ideal**

Early involvement, complete records, and open access to the person, to the family, and to the treating healthcare team members is the ideal. This early engagement greatly enhances the development of an organized, concise Plan for current and future needs, with associated costs and allows time for further review by an economist.

Trial consultant David Ball, in his book *David Ball on Damages* (National Institute for Trial Advocacy, 2001), advises that jurors are willing to provide money to heal and help, and will usually fund the entire Life Care Plan if it is well crafted and well presented. He charges life care planners and attorneys with their joint responsibility to the jurors: "Making up for harms that cannot be fixed or helped is a major part of their job, and you have to teach them how to do that job."

A life care planner, with appropriate background, training and experience (usually evidenced by education at the Masters or Ph.D. level, or a R.N. with B.S.N. and extensive rehabilitation experience, and physicians with the specialty of rehabilitation and/or life care planning as added training and experience) may express an opinion regarding goals for rehabilitation, current needs and projected future needs of the person. Depending upon individual backgrounds and qualifications, they may even be qualified to render opinions regarding the employability and the work-life expectancy of the person considering the existing health status.

The Life Care Plan is a major component of the damages, or compensation, part of the case. It is the life care planner's Plan and it must be protected. If the life care planner worked through the edits and reviews to validate each item and assure the legitimacy of each price, and is prepared to show the members of the jury the practical consequences of taking away any part of the Plan – the life care planner has done well and that is ideal.

### ***Editor's Note:***

Two other checklists that have been published in the life care planning literature and may have relevance to this article are Checklist for Selecting a Life Care Planner (Weed, 1999) and Step-by Step Procedures for Life Care Planning (Weed & Field, 2001).

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**References**

- Ball, D. (2001). *David Ball on damages: A plaintiff's attorney's guide for personal injury and wrongful death cases*. Notre Dame, IN: National Institute for Trial Advocacy.
- Deutsch, P.M. & Sawyer, H.W. (2002). *A guide to rehabilitation*. White Plains, NY: AHAB Press, Inc.
- Weed, R. (1999). *Life care planning and case management handbook*. Boca Raton, FL: CRC Press.
- Weed, R. & Field, T. (2001). *Rehabilitation consultant's handbook*. Athens, GA: Elliott & Fitzpatrick, Inc.

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