Journal of Life Care Planning, Vol. 4, No. 1, (3-8)

PERSPECTIVE
Medical Foundation – Changing the Structure

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Abstract. *Life care planning has long been recognized as a tool to identify damages within personal injury cases. While the author recognizes that life care planning is of value in many venues, the focus of this article is medical foundation for expert testimony in personal injury cases. As court decisions and federal rules have refined the definition and parameters for expert testimony, the requirements for laying a foundation have changed as well. This perspective provides various options for the development of appropriate foundation for recommendations within a life care plan.*

Key words and concepts: Expert testimony; Federal Rule 702; clinical practice guidelines; evidence-based practice

Introduction

In Roger Weed's book, *Life Care Planning and Case Management Handbook*, 2nd ed., the questions of "medical foundation for opinions established" are posed (*Checklist for Selecting a Life Care Planner*, p. 8, Table 1-2, Weed, 1999/2004):

- Did the life care planner use established, published checklists and forms?
- Did the life care planner routinely consult with a physician as a part of the team?
- Did the life care planner include other health professionals as appropriate?

Dr. Weed further asks, "Have you consulted with and solicited treatment recommendations from appropriate therapeutic team members (if able to do so)?" And, "Did you confirm your projections with treatment team members?" (*Step by Step Procedure for Life Care Planning*, p. 9, Table 1-3, Weed, 1999/2004). Author's note: Similar to the above, this last question also applies to those cases where access to treatment team is allowed.

The Problem

Dr. Weed's questions are important considerations in life care planning practice; however, as managed care expands in health care and as HIPAA (Health Insurance Portability and Accountability Act, 1996) regulations cause a profound impact upon the exchange of information, access to the treatment team has decreased. Confounding the decrease in access to the treatment team are the changing expectations for the individual serving as an expert witness. Consider these definitions:

> "An expert witness is one who by reason of education or specialized experience, possesses superior knowledge respecting a subject about which persons having no particular training are incapable of forming an accurate opinion or deducing correct conclusion." (*Kim Manufacturing v. Superior Metal Treating, 1976*, as cited in Weed, 2004, p. 616).
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> "An expert witness is a person who is a specialist in a subject, often technical, who may present his/her expert opinion without having been a witness to any occurrence relating to the lawsuit or criminal case. It is an exception to the rule against giving an opinion in trial, provided that the expert is qualified by evidence of his/her expertise, training and special knowledge. If the expertise is challenged, the attorney for the party calling the "expert" must make a showing of the necessary background through questions in court, and the trial judge has discretion to qualify the witness or rule he/she is not an expert, or is an expert on limited subjects" (www.dictionary.law.com, 3/17/05).

Both definitions speak to the expert's individual education and special knowledge, underscoring the expert's independent judgment within parameters of expertise. However, Federal Rules of Evidence (1975, as amended in 2004), developed as a result of various court decisions such as Daubert v. Merrell Dow (1993), and the need for a more uniform admissibility standard for expert's testimony, expand the responsibility of the expert, as seen in Federal Rule 702, which reads:

(a) General Rule. If a witness testimony is based on scientific, technical, or other specialized knowledge, the witness may testify in the form of an opinion or otherwise if the court deems the following are satisfied:
   (1) the testimony will assist the trier of fact in understanding evidence or determining a fact in issue;
   (2) the witness is qualified by knowledge, skill, experience, training, or education in the scientific, technical, or other specialized field;
   (3) the testimony is based upon principles or methods that are reasonably reliable, as established under subdivisions (b), (c), (d), or (e);
   (4) the testimony is based upon sufficient and reliable facts or data; and
   (5) the witness has applied the principles or methods reliably to the facts of the case.

(b) Reliability deemed to exist. A principle or method is reasonably reliable if its reliability has been established by controlling legislation or judicial decisions.

(c) Presumption of reliability. A principle or method is presumed to be reasonably reliable if it has substantial acceptance within the relevant scientific, technical, or specialized community. A party may rebut the presumption by proving that it is more probable than not that the principle or method is not reasonably reliable.

(d) Presumption of unreliability. A principle or method is presumed to be not reasonably reliable if it does not have substantial acceptance within the relevant scientific, technical, or specialized community. A party may rebut the presumption by proving that it is more

probable than not that the principle or method is reasonably reliable.

(e) Other reliability factors. In determining the reliability of a principle or method, the court shall consider all relevant additional factors, which may include:

(1) the extent to which the principle has been tested;
(2) the adequacy of the research methods employed in testing the principle or method;
(3) the extent to which the principle or method has been published and subjected to peer review;
(4) the rate of error in the application of the principle or method;
(5) the experience of the witness in the application of the principle or method;
(6) the extent to which the principle or method has gained acceptance within the relevant scientific, technical, or specialized community; and
(7) the extent to which the witness's specialized field of knowledge has gained acceptance within the general scientific, technical, or specialized community.

These admissibility standards represent a framework for the development of foundation for recommendations within a life care plan. Of special interest are the 2003 accepted changes of 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 in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of opinion or otherwise if 1) the testimony is based upon sufficient facts or data, 2) the testimony is the product of reliable principles and methods, and 3) the witness has applied the principles and methods reliably to the facts of the case. (http://www.legalpub.com, 3/17/05).

The Resolution

Because of the framework for recommendations as described in Federal Rule 702 and the accepted revisions of 2003, life care planners must meet the requirement for expert testimony.

First, clear evidence can be provided regarding the life care planner's specialized knowledge, experience and education. Secondly, the principles and methodology for life care planning are widely published, accepted in the field and undergoing continual scrutiny and research. Thirdly, application of principles and methods may become the test of credibility. It is the expectation of "testimony based upon sufficient facts or data" that must be clarified.

A life care plan is defined as a dynamic document based upon published standards of practice, comprehensive assessment, data analysis and research, which provides an organized, concise plan for current and future needs with associated costs for individuals who have experienced catastrophic injury or have chronic health care needs (International Academy of Life Care Planners/IALCP, 2000). Based upon published principles and standards of practice, data encompasses medical records, school records, therapeutic evaluations, vocational evaluation, individual assessment, depositions, independent medical examinations, military records (if applicable), and caretaker statements. These documents all provide facts and data upon which to base recommendations.

Examples:

1. Medical records detail the treatment team's current plan of care.
2. Medical records or depositions can provide support regarding the life care planner's assessment of functional status.

Thus, these records serve as medical foundation.

Another Option

Clinical practice guidelines also serve as a critical tool for "medical foundation." Clinical practice guidelines are developed through a rigorous methodological approach that considers available medical literature and research. Practice guidelines define the role of diagnostic and therapeutic options for the diagnosis and management of individuals with various health problems. As evidence-based guidelines, the intention is to assist care providers in clinical decision making, by defining practices that meet the needs of most patients with a particular diagnosis.

The life care planner may combine the use of data gathered through assessment and record review, with research regarding currently acceptable treatment for an individual - clinical practice guidelines - to define projections for future care.

For example, Paralyzed Veterans of America (2000) have created an 80-page clinical practice guideline regarding pressure ulcer prevention and treatment following spinal cord injury. Some guidelines that impact a life care plan for an individual with spinal cord injury include:

Pressure Ulcer Prevention Strategies: Implement pressure ulcer prevention strategies as part of comprehensive management.

- Establish a mechanism to follow-up on equipment performance specific to pressure ulcer prevention (bed and wheelchair).
- Implement an ongoing exercise regimen. . . to promote maintenance of skin integrity.
- Provide individuals with spinal cord injury. . . education on specific strategies for prevention and treatment.
- Refer appropriate individuals with deep stage III or IV ulcers for surgical evaluation.
- Use bed-positioning devices and techniques
- Use pressure-reducing bed support surfaces for individuals who are at risk for or who have pressure ulcers.
- Prescribe wheelchairs and seating systems according to individualized anthropometric, ergonomic and functional principles.
- Use appropriate wheelchair cushions.

Each of the guidelines quoted has a financial impact within the life care plan. The life care planner may not have had the opportunity to discuss this patient with the treatment team, yet the above noted guidelines represent an extensive review and analysis of the available scientific literature and represent the most current understanding of intervention used in clinical practice.

For research purposes, the Internet offers an extensive array of options. Type in "clinical practice guidelines" or go directly to www.guideline.gov. There at the National Guideline Clearinghouse (NGC), you will find the national resource for evidence-based clinical practice

guidelines. The NGC currently contains 1,472 individual summaries of guidelines, all within five years of professional review and approval. Ninety-four practice guidelines are included under "brain injury" and fifty-two under keywords "spinal cord injury." Information is available regarding the developer or issuing organization for particular guidelines. There are also links to the National Library of Medicine (NLM) and the Agency for Healthcare Quality Research (AHQR).

Another resource is Health Services/Technology Assessment Text (HSTAT), http://www.ncbi.nlm.nih.gov/books/bv.fcgi?rid=hstat. HSTAT provides information regarding health and health care decision making, including professionally supported clinical practice guidelines. Where clinical practice guidelines are not available, the researcher can locate "evidence reports and summaries."

Outcomes with Use of Clinical Practice Guidelines in Life Care Planning

Use of clinical practice guidelines in life care planning, as support for recommendations, integrates the life care plan into current evidence-based clinical practice. Guidelines, used as generic tools, improve the comprehensive nature of the plan and reduce the potential for failing to include necessary care within the plan. Further, use of clinical practice guidelines identifies quality of care and appropriate use of resources, while supporting recommendations with current understanding of needed interventions.

Perhaps one of the most far reaching potential outcomes of use of clinical practice guidelines in life care planning is that of demonstration of adherence to an ethical basis for recommendations. Consider this ethical dilemma:

> A life care planner has assessed a young man with brain injury and finds the individual non-interactive with the environment. In discussion with the treating physician, the life care planner is directed to include an environmental control unit (cost: $38,000) in the plan, since "maybe in the future, he could use it."

Combining medical records, assessment and clinical practice guidelines would have allowed this life care planner to identify appropriate needs, rather than recommending equipment that could be questioned in court as "inflating needs."

Summary

As the healthcare arena has become more fragmented and chaotic and as the courts evolve their perspective on expert testimony, the life care planner must seek support for recommendations through alternative sources. Clinical practice guidelines offer a scientific, current and evidence-based method to describe treatment and management for individuals with varying diagnoses. Clinical practice guidelines are readily available to life care planners and should be accessed to promote comprehensive plans and quality support for expert testimony.

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