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The Effects of Post-Sanchez Hearsay in Life Care Planning

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Abstract

In a legal setting, hearsay is "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated" (Cal. Evid. Code § 1200, 1965) and is generally prohibited. Legal rulings in life care planning regarding hearsay have traditionally allowed life care planners, as experts, to testify about information that is case-specific to individuals with disabilities or chronic illnesses. However, a few recent cases have been using hearsay rules to exclude testimony, leaving only general aggregate data to be used for the purposes of identifying needs of evaluees. This article summarizes pertinent cases regarding hearsay on the admissibility of expert witness testimony. It also provides a discussion about hearsay evidence, namely that the denial of all hearsay evidence amounts to being too restrictive, essentially doing a disservice to evaluees, the practice of life care planning, and the court system. It also argues that a strict denial of hearsay evidence leaves courts without an accurate picture of the medical and ancillary treatment being received by evaluees and the cost of those services.

Keywords: Hearsay, Life Care Planning, Sanchez, case-specific evidence, expert witness

Courts in California have been wrestling with a problem that is now affecting life care planners and the admissibility of hearsay testimony across the country, namely the 2016 case, *The People v. Marcos Arturo Sanchez*, (Sanchez). This case is considered a landmark that denies the use of case-specific hearsay evidence by expert witnesses. While life care planners have been concerned about hearsay affecting core methodologies for some time (Albee & Gordon, 2012), even greater concern comes as these decisions spark a greater debate across the country (*Morales-Hurtado, 2020*) in both criminal and civil courts. While these debates live in the jurisdiction of the courts, experts in several professional specialties are working to understand their methodologies in light of growing concern about the exclusion of hearsay evidence (Simons & Lewis, 2019; Van de Bittner et al., 2019). At present, this issue is primarily affecting life care planners working in California; however it is prudent to continue discussions about best practices that provide services to people with disabilities in a way that is acceptable to the courts.

In recent years, the healthcare delivery system has changed; the legal system has refined its understanding of the use of hearsay; business and technology models have evolved; and scientific progress has been made. It is important that life care planners stay abreast of recent advancements. This does not mean that the fundamental methodology is adapted to accommodate these changes, but that life care plans continue to be "dynamic" (International Academy of Life Care Planner, 2015, pg. 14; Weed, 2018, p. 5; Weed & Field, 2014, p. 152) enough to reflect changes in the environment in which they are written. Before discussing hearsay, it may be helpful to provide a context for how admissibility of evidence has changed over time.

A Brief History of Admissibility for Expert Witnesses

Current discussions surrounding hearsay is not the first time that the US legal system has attempted to deal with the expert witness' role. Nor is it the first time that rehabilitation professionals have had to consider adapting their approach, while maintaining accepted life care planning standards and methodology. As continued refining of the definition and role of the expert witness has taken place, experts have had to adapt their approach to ensure their testimony is admissible in a way that courts approve. Given the current environment, it may be helpful to place the conversation in the context of the evolving legal decisions by which expert witnesses are held. There are several sources, referenced below, that can provide a more thorough understanding of these, as well as many other resources available to the life care planner, to fully understand the requirements of providing a scientific and 'generally accepted' foundation for the life care plan.

Field (2018) and Weed (2012) provide narratives on the development of legal standards for the admissibility of evidence of expert witnesses. They outline various decisions that have worked to define what kind of evidence is acceptable and by whom. What they also do is to clarify the latitude afforded to judges in being the gatekeepers of the courts; meaning they decide the quality of the expert, in order to allow the jury to decide the quality of the evidence. This boils down to two general considerations: Whether the life care plan, or elements within it, are scientific; and whether the life care plan, or elements within it, were established using a reliable methodology.

"For nearly seven decades the '*Frye* Rule' was the guiding principle in federal courts" (Field & Choppa, 2005, p. 1). Presently, some states are considered to be '*Frye* States', meaning they adopt this standard for accepting expert testimony; however, some are not. The *Frye* Rule refers to any scientific testimony that is *generally accepted* as a well-recognized principle within its scientific community. The

difficulty with this concept is that it does not allow for new scientific discovery and it means that scientific evidence may still be admissible, even if it is not true. It also puts the burden of proof of validation of a scientific principle on the community; essentially relieving courts from the ability to determine admissibility of particular evidence. When the *Daubert* Rule (*Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 1993) emerged, it gave the courts more latitude to determine the quality of the evidence. It provided the court guidance on: a) Whether the theory or technique in question has been or can be tested; b) Whether it has been subject to peer review and publication; c) If there is a known error rate of the method; d) If there are standards controlling it's operation; and e) Whether it is generally accepted by the scientific community. *Daubert* was, in part, an effort to help the courts gate-keep bad science from entering the courtroom. It also gave the jury more flexibility for judging the outcomes of the science, rather than the validity of it. In short, it gave judges more control of admitting certain evidence, while also giving the jury more evidence to consider.

While *Daubert* was originally intended to be flexible and not to be applied to every case, it was also seen as too restrictive. On the spectrum of evidence entering the courtroom, *Frye* opened the doors for too much evidence entering the courtroom while *Daubert* essentially allowed too little. Other cases were then heard that helped clarify the kinds of evidence entering courtrooms, particularly those that needed to consider evidence that was not considered scientific knowledge. *General Electric Company v. Joiner*, 1997 (Joiner) weighed in specifically on whether an expert could rely solely on their qualifications to offer their opinions, essentially stating that experts underlying methodology must be sound as well (Field, 2018). In another case, *Kumho Tire Company v. Carmichael*, 1999 (*Kumho*) pointed out that some knowledge is not scientific and *Daubert* does not apply in all cases. The *Kumho* case emphasized that considerations of admissibility should consider the *type* of knowledge being offered (i.e.., whether it is scientific knowledge or not), which gave judges more latitude to decide which evidence met the overarching credibility standard of reliability and validity.

As it stands today, both judges and the expert community are gatekeepers of knowledge and the quality of knowledge is partially determined by both. In other words, both the expert communities and the courts must work to ensure that the quality of knowledge entering the courts is of the highest possible standard. The current debate over the nature of hearsay appears to be an attempt to clarify a particular kind of evidence that is non-scientific in nature, but that is acquired by a generally accepted methodology in the community. In other words, evidence proposed by generally accepted methods (passing the *Frye* test) that is not scientific (in which *Daubert* does not apply) must still be proven to be valid and reliable. The hearsay rules that have traditionally allowed a great amount of hearsay evidence into the courtroom are now being challenged by the *Sanchez* ruling.

What is Hearsay?

Expert witnesses have generally been granted latitude when acquiring and testifying to hearsay evidence used to develop life care plans. The Federal Rules of Evidence define hearsay evidence as "a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion" (Federal Rules of Evidence 801, 1975). In short, what this means is that if a life care planner relies on the second-hand verbal, non-verbal, or written assertion about the recommendation or cost of a medical procedure, service or product, it is technically considered hearsay. The matters at hand are: 1) Whether those assertions gathered by the life care planner from people outside those available to the courts can be considered admissible parts of a life care plan; 2) Whether the information gathered is case-specific or general knowledge; and 3) Can the life care planner rely upon their education, training and experience to verify the information they obtain as valid?

The hearsay rule was intended to create fairness in the courts. Since there are times when the person who made the statement may not be present in the court to testify about the truth of the statement, the courts cannot judge the "demeanor and credibility of the alleged first-hand witness" (USLegal.com, 2019). As an example, if a life care planner calls a pharmacy to attain the cost of a certain drug needed by an evaluee; they are relying on the pharmacist or technician to accurately relay the cost information. While these statements are technically hearsay there are exceptions to the hearsay rule, and historically judges have allowed this type of evidence in based on legal counsel discretion (Mirne, 2019). This was done as a matter of practicality; namely they were an attempting to allow enough information for the jury to make adequate decisions but not so much that they substantively rely on hearsay which prejudices the jury (Hamilton, 2018). *Sanchez*, discussed in detail below, clarifies some ambiguity in what is allowable and what is not.

> After Sanchez, reliability is no longer the sole touchstone of admissibility where expert testimony to hearsay is at issue. Admissibility – at least where 'case-specific hearsay' is concerned – is now more cut-and-dried: If it is a case-specific fact and the witness has no personal knowledge of it, if no hearsay exception applies, and if the expert treats the fact as true, the expert simply may not testify about it. (Dawson, 2019 as cited in *Sanchez*, 2016)

While this does restrain the expert witness from using certain kinds of information, there is still reason to believe that fairness is a guiding factor in developing these limitations. One such justification for clarifying the *Sanchez* motive is that, prior to the ruling, there was potential for abuse in the use of expert witnesses. Namely that untrustworthy information "could be smuggled to the jury

through the expert; or worse, parties may offer expert testimony simply to place such damaging evidence before the fact-finder disguised as expert basis testimony" (Hamilton, 2018, p. 511). The "hired gun" stereotype of expert witnesses has been an open concern in the rehabilitation community (Dunn, 2017; Vierling, 2003), referring to the expert who is "willing to shape their professional opinions to the highest bidder" (Mertes, 2019). The question left to the life care planner is whether the *Sanchez* ruling restricts them from collecting necessary information on evaluees, using the most precise methods of communication about case-specific facts; or whether it creates an opportunity to adapt methodology, such that it increases the scientific standard of data collection and compilation.

Review of Recently-Decided Hearsay Cases

The People v. Sanchez, 63 Cal.4th 665 (2016)

The People v. *Sanchez* is a 2016 California criminal case, where the defendant was charged with gang-related crimes. The key witness was the prosecution's gang expert, who held the opinion that the defendant was a gang member. The foundation for his opinion was laid, based on hearsay statements that were found within the police records that documented former gang contacts. Before this case, the courts would routinely instruct the juries that any hearsay evidence offered by the expert should only be considered as the basis of the expert's opinion, and not for its truth. However, in *Sanchez*, the California Supreme Court held that this 'not for truth' analysis was a legal fiction and would no longer be permitted. (Behar, 2019) The court, in Sanchez, considered this hearsay to be case-specific, rather than general knowledge, as this gang expert did not have firsthand knowledge of what he read in the police reports concerning this particular gang.

> The *Sanchez* court held, 'An expert may still rely on hearsay in forming at opinion and may tell the jury in general terms that he did so. What the expert cannot do is relate as true case-specific facts asserted in hearsay statements, unless they are independently proven by competent evidence or are covered by a hearsay exception. (Sanchez, 2016, p. 24)

The People v. Acuna, 9 Cal.App.5th 1 (2017)

This criminal public nuisance case included eight defendants who engaged in various acts of criminal activity. While an appeal was pending, the *Sanchez* decision stated previously held that an expert's opinion cannot be based on assumed truth of a case-specific fact. Prior to this decision, the California State's Supreme court had been operating under *People v. Montiel* (*People v. Montiel*, 5 Cal. 4th 877, 1993), where the jury could consider hearsay as a basis for an opinion, if it was not considered for the truth, whereby courts could consider hearsay with more flexibility. However, with the changes established by *Sanchez*, "evidentiary rules for expert testimony (Evid. Code, §§ 801-802) applies in civil cases, such as this nuisance lawsuit" (*People v. Acuna,* 9 Cal. App. 5th, 34, 2017). This set the tone in civil cases for the use of hearsay testimony by expert witnesses. (*People v. Acuna*, 9 Cal. App. 5th, 34, 2017)

The People v. Stamps, 9 Cal.5th 16 (2019)

This is another California criminal case involving drug charges. In 2012, Stamps was pulled over by the police on several occasions, where drug paraphernalia, methamphetamine, cocaine, and several pills were found. The pills were white, oblong, and with the words "Watson" and "853" on them. The methamphetamine and cocaine were chemically tested, and were confirmed to be illicit; however, the pills were not chemically tested. A website called "identadrug.com" was used to identify the substances as oxycodone, based on the markings, color, and shape. The use of the website was appealed, as unreliable hearsay, and the charges regarding the pills were dropped. What is important about this case is not that the website was simply a secondary unreliable source, as it was argued; but also, that it was case-specific, and the expert's opinion was not based on general background knowledge (*The People v. Stamps*, 2019). This court decision was in complete conflict with that of *The People v. Veamatahau,* 2018 and was recently overturned by the CA Supreme Court after the *2020 Veamatahau* decision [see below].

While not specific to life care planning, these recent decision are a reflection of how hearsay decisions are trending.

Lo v. Southern Edison (2019)

In this relatively recent case, the plaintiff's life care planner relied on FAIR Health data to determine costs of medical care. The defense objection was that the life care planner was simply copying cost figures without personal knowledge about how the data was compiled or verified. The plaintiff then argued that hearsay exceptions apply under California evidence code section 1340, which allows evidence "of a statement, other than an opinion, contained in a tabulation, list, directory, register or other published compilation [is admissible if] the compilation is generally used and relied upon as accurate in the course of a business" (California Law, 1965). The plaintiff also relied upon *People v. Mooring* (2017) to argue that the proffered statements must be contained in a compilation; the compilation must be published; the compilation must be 'generally used… in the course of business''; it must be generally relied upon as accurate; and the statement must be relied upon as fact rather than opinion. After a review of the briefs and the testimony of the plaintiff's life care planner, the judge ruled in favor of the evidence on the costs of care from FAIR Health and this information was allowed in and could be considered by the jury (Behar, 2019).

The People v. Veamatahau, 9 Cal.5th 16 (2020)

This case from the Supreme Court of California involved

the use of a pill identification database to identify illegal possession of drugs. The expert told the jury that he identified a controlled substance which the defendant was charged with possessing by comparing the visual characteristics of the pills seized against a database containing descriptions of pharmaceuticals. The expert testified that this procedure was the generally accepted method of testing for his kind of substance in the scientific community, and his search on the database led him to the conclusion that the pills contained alprazolam, the generic name of Xanax. The evidence introduced regarding the use of the drug identification database was allowed in by the judge. The court found that the evidence regarding the pill identification was not case-specific. "Testimony about the database, while hearsay, was not case-specific, but the type of general background information which has always been admissible when related by an expert" (*People v. Veamatahau*, 2020, p. 3). The reasoning here is that the information obtained from the database was considered general knowledge and not about the exact pills obtained from the defendant. Although it was deemed hearsay "to reject a professional physician or mathematician because the fact or some facts to which he testifies are known to him only upon the authority of others would be to ignore the accepted methods of professional work and to insist on… impossible standards" (2020, p.7). The court here is acknowledging that it is impossible to reject all evidence that is hearsay, but that it is restricted to case-specific hearsay (*The People v. Veamatahau*, 2020). The defendants appealed this case and in 2020 the ruling was stayed.

Rosa Brito-Mojica v. Orthopedic and Spine Institute (2020)

This is a 2020 California case involving a life care planner who submitted opinions related to the plaintiff's future care needs and the associated costs of those needs following a spinal cord injury. The defense filed a brief with a motion to exclude the expert on the grounds that the plaintiff's life care planner was required to rely on hearsay in the form of medical records, doctor's reports, and doctors depositions, to arrive at the opinions she detailed in her life care plan. The argument by the defense was that these were not opinions based on personal knowledge, and thus, not within her field of expertise. The defense attorney also argued that the cost of future care was outside the life care planner's expertise and should be excluded. The authors contacted this life care planner, who explained that the judge allowed her to testify, but narrowed her testimony to the costs associated with durable medical equipment, which she had obtained through various vendor sources; personal knowledge; and professional experience. The physicians were asked to testify to their opinions on the future cost of care they would provide. The plaintiff's attorney brought in a representative from a home health agency to testify to the cost of future attendant care. In the end, the testimony was let in, but not all of it was allowed in by the life care planner alone in this particular case ruling. This demonstrates inconsistencies in how different judges view the hearsay rules (*Rosa Brito-Mojica v. Orthopedic and Spine Institute, 2020*).

Morales-Hurtado v. Reinoso et al (Appellate 2020)

This New Jersey case describes a hearsay objection on several points. First, the life care planner interviewed the evaluee and their spouse. This was objected to on the basis that interviews were hearsay. Second, the life care planner interviewed the treating physician and developed a summary of care needs using a questionnaire. This questionnaire was turned into a summary document that was then sent to the physician for approval and signature. Even though the physician signed the document, the signature was deemed illegible and thus an unreliable source of evidence. Also, the physician was not deposed on the issue of the recommendations being expressed within a reasonable degree of medical probability. The physician was not able to testify prior to the life care planner at trial regarding the signature, or the opinions of medical probability; therefore, the defense argued that the life care plan was inadmissible on the grounds of hearsay. Finally, the recommendations verbally expressed by the treating physician and included in the life care plan were not included in the medical records, thus not establishing certification of the opinions. The trial court found that the life care planner's opinion was based on unreliable sources of information and excluded her testimony. The jury ruled the case with a defense-verdict (*Morales-Hurtado v. Reinoso, et al., 2018*).

The case went up on appeal to the New Jersey Supreme Court based on plaintiff's contention that the cumulative effect of *many errors* deprived the plaintiff of a fair trial (*Morales-Hurtado v. Reinoso, 2020*). One of those errors included the exclusion of the life care planning opinions on behalf of the plaintiff. The Appellate Division held that the trial court's decision to bar the expert testimony constituted error. (Id. At 202-4) It stated that "[e]ven if some of the underlying information was somehow improperly considered by [the life care planner], such was not a basis for the wholesale exclusion of her entire opinion." (Id. At 203-04). The Appellate Division did not rule on the admissibility of the life care planner's opinion, leaving the ultimate determination to the trial court (Id. At 204).

The judgment of the Appellate Division is affirmed substantially for the reasons expressed in that court's opinion. The Court comments briefly on the Appellate Division's reversal of the trial court's decision to exclude the opinion of the life care planner and offered guidance for the trial court on remand in its role under N.J.R.E. 702 and N.J.R.E. 703 as the gatekeeper of expert witness testimony.

Dawn Verci v. Michael High and International Union of Operating Engineers (2020)

While this case is not specifically about hearsay or future cost estimates, it is relevant to demonstrate the complexity that hearsay objections are presenting to life care planners. This case involved a retrospective bill review for past medical care and argued the use of non-case-specific cost data acquired from sources such as FAIR Health, Optum National Fee Analyzer, and The American Hospital Directory. The defendant's medical billing expert chose not to pursue direct costs from other specific providers in the plaintiff's geographical data, thus avoiding case-specific hearsay objections. However, since her deposition testimony demonstrated that the billing expert did not have access to knowledge about the specific statistical analysis that these data sources use to arrive at their final calculations, she was assuming that they were performed accurately. She testified on the general methodology available to FAIR Health users and to the generally accepted practice of using the 75th percentile to determine usual, reasonable, and customary charges for medical services. This expert was allowed to testify regarding cost data acquired from her sources. However, what this case demonstrates is that expert witnesses are being increasingly challenged on their direct knowledge of the scientific foundations of data analysis of information gathered by sources attempting to understand the cost of medical services, as well as the methods used to gather evidence regarding medical costs.

How hearsay affects the expert witness life care planner

Van de Bittner, et al. (2019) state:

> While a life care planner can argue that the results of research through this method [relying on telephone calls directly to providers of goods or services] will be considered in the context of the life care planner's training, skills, and experience, a safer approach would be to rely on published sources of cost data that are not case-specific. (p. 15)

However, as we see in the cases above, objections come in a variety of forms, including the use of published sources of cost data and the general scope of a planner's training and experience. While the courts are challenged with issuing appropriate rulings to balance the need to provide adequate information to the courts and juries versus the need to gatekeep poor and potentially damaging evidence from polluting the courts, the need for some guidelines to handle hearsay objections may be helpful.

In the most basic sense, calling a pharmacy for cost, a DME provider for price or for replacement schedules, or verbally confirming a recommendation from a provider that does not exist in a formal case note or evaluation supplied to the court, are all technically considered hearsay. The early life care planning training programs encouraged life care planners to acquire accurate cost information by obtaining three or more costs within the applicable region of purchase and then either providing that range of future costs or averaging those costs that the evaluee is likely going to have to pay. The 2017 Life Care Planning Summit issued a Consensus Statement noting "Best practices for identifying costs in life care plans include: …costs identified are geographically specific when appropriate and available; non-discounted/ market rate prices; more than one cost estimate, when appropriate" (Albee, Gamez & Johnson, 2017). As technological advancement provides data collection and analysis tools to provide alternate forms of cost information, some life care planners have included these in their life care planning costing methodology. Tools such as FAIR Health, Context4Health, and other nationally collected datasets are available to find information on price, cost, and charge based on aggregated data provided from various sources. What appears to be happening is that since evidence from these data-aggregated sources apply statistical analysis, they appear to pass all the litmus tests for admissible evidence under the Federal Rules of Evidence 702. They are also not being considered as hearsay, because they are not case-specific and rely upon regional data. As a result, life care planners are seeing more challenges to evidence from direct contact to providers of services that are specific to the evaluee. It may be argued that collecting information about costs in the region that an evaluee anticipates seeking care is considered general knowledge and not specific to the evaluee. Those costs are the same to anyone who would seek care in the area. However, if special circumstances suggest case-specific pricing, then the cost would be case-specific hearsay and thus inadmissible, unless it were a general reduction applied to all like-evaluees.

There is also some argument regarding the use of information collected from websites, such as described above in the *People v. Stamps* summary. There appears to be general skepticism regarding the reliability of data taken from the internet on the grounds that "the Court continues to warily and wearily view it [internet] largely as one large catalyst for rumor, innuendo, and misinformation" (Leagle.com, 1999). This may be largely due to the unregulated nature of the internet and the possibility of hackers adulterating content. As data becomes more robust and is derived from reliable sources (i.e., government and industry databases) this may be changing. However, it does put the burden of proof on the expert to verify the "compilation and veracity" (Dawson, 2019) of the data.

Methodological standards of life care planner testimony

Life care planners spend much of their time explaining, as well as testifying under oath, to their methodologies and how the standards of practice support their methodologies. The life care plan, by definition, is 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 (Weed, 2018, p. 5).

This task of "data analysis and research", which is the issue of most hearsay arguments currently being brought forth to the courts in the way of motions and arguments, is guided further by the Standards of Practice for Life Care Planners and by the Consensus and Majority Statements, developed by life care planners over the course of the Life Care Planning Summits, which have been held on ten occasions since the year-2000 in the United States and Canada.

The Standards of Practice, Section IV: Standard 4 (Standards of Practice for Life Care Planners, 2015, p. 9), guides the life care planning practice as a whole, and this includes the work performed to obtain future cost of care estimates. The Standard states, "The life care planner uses a consistent, valid and reliable approach to research, data collection, analysis, and planning." The Measurement Criteria are as follows:

a. Identifies current standards of care, clinical practice guidelines, services and products from reliable sources, such as current literature or other published sources, collaborations with other professions, education programs, and personal clinic practice.

b. Researches appropriate options and charges for recommendations, using sources that are reasonably available to the evaluee. (Bolding for emphasis)

c. Considers appropriate criteria for care options such as admission criteria, treatment indications or contraindications, program goals and outcomes, whether recommended care is consistent with standards of care, duration of care, replacement frequency, ability of the evaluee to appropriately use services and products, and whether care is reasonably available.

d. Uses a consistent method to determine available choices and charges.

e. Uses classification systems to correlate care recommendations and charges when these systems are available or helpful in providing clarity.

f. Uses and relies upon relevant research that should be readily available for review and reflected within the life care plan.

Applying this section of the Standards of Practice (2015) is important in demonstrating that the life care planner's methodology is not case-specific, but rather is applied to all of the work that is done in the field. In addition, it is important to understand that a variety of costing resources may be appropriate within any given report, so as to account for all of the various healthcare needs that are included within the dynamic document. There is not one database that provides all of the information across all of the categories of care that are considered in a life care plan. There is not just one, or even three, sources that can be called and interviewed in order to obtain the costs for all of the life care planning recommendations. Physician visit costs are obtained differently from durable medical equipment, supplies, medications, hospitalizations, and so forth. Life care planners following the standards of practice have many tools in their toolbox for getting the job done. That is exactly what makes the life care planner an expert in their field.

Another important Standard of Practice is Section IV: Standard 10 (Standards of Practice for Life Care Planners, 2015, p. 10). This standard covers the concept of the life care planner engaging in forensic applications. The Measurement Criteria states, "If the life care planner engages in practice that includes participation in legal matters, the life care planner:

a. Acts as a consultant to legal proceedings related to determining care needs and costs in the role of an impartial advisor to the court.

b. May provide expert sworn testimony regarding development and content of the life care plan.

c. 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.

In the role as a consultant to legal proceedings, life care planners must educate the attorneys who retain them, the attorneys opposing them, and the judges / triers of fact, as to how the cost research is best obtained for each category of care to assure valid and reliable data. A review of the Consensus and Majority Statements, developed by life care planners, for life care planners, is also helpful in guiding the profession on cost research methodologies. The most recent list of Consensus and Majority Statements was published following the 2018 Life Care Planning Summit (Johnson, 2018). The following statements appears to be the most relevant in helping to support that when life care planning costs are obtained, they are not simply based upon the hearsay of others:

5. Life Care Planners shall understand the definition of reliability and consistently practice in such a manner.

7. Life Care Planners shall have knowledge of relevant laws and regulations we well as local and national care standards.

33. Standards of Practice shall allow for individual judgment and expertise.

49. Life Care Plans shall be individualized.

50. Life Care Plans shall be objective and consistent.

54. Life Care Planners shall utilize research (including identifying relevant literature to provide a foundation for recommendations, costing for equipment and services, etc.) in Life Care Plan that is reasonable, relevant and appropriate.

55. Life Care Planners shall consider the integrity of data.

56. Life Care Planners shall depend on data

collection, analysis and synthesis.

63. Life Care Planners shall utilize a reliable, consistent method for reaching conclusions.

74. Life Care Planners shall utilize protocols for cost research.

75. Life Care Planners shall gather geographically relevant and representative prices.

76. Life Care Planners shall utilize protocols for using local versus national resources.

93. Best practices for identifying costs in Life Care Plans include:

a. Verifiable data from appropriately references sources.

b. Costs identified are geographically specific when appropriate and available.

c. Non-discounted / market rate prices.

d. More than one cost estimate, when appropriate. (p. 44-46)

It is hopeful that the above Consensus Statements will be used to further educate the courts on how life care planners complete their work in a consistent and reliable manner, regardless of how many sources are required and in what forms these costs are derived.

Arguments Against Recent Trends to Exclude Life Care Planner Testimony

There are two main arguments regarding the recent hearsay challenges to life care planners. The first is regarding the challenges to case-specific information. One of the tools available to the life care planner in developing plans is relying upon specific contacts with those serving the individuals, such as specific providers of services or products to be used by the evaluee. This comes in the form of phone calls and web-searches. Another general tool is the use of aggregated databases that provide 'general knowledge' for such things as national and regional costs for services and global costs for equipment and medications, to name a few. The first is case-specific and the second is general. While some courts have deemed the former method as unacceptable hearsay and the latter method acceptable hearsay under the legal definition, they are both tools necessary for developing life care plans. The reason they are considered necessary is due to the inherent complication of medical cost development in the modern healthcare industry.

Pertinent information comes from numerous sources including medical records, hospital directories, word-of-mouth recommendations for adequate services nationwide, multiple billing and coding schemes, and more. There are also the issues of new technologies which are now available to acquire and analyze data in innovative ways that leverage the use of tools previously unknown by the general population. In order to develop the most current and state-of-the art plans, one must have access to multiple available resources. For example, contacting a provider directly for information unique to the individual may be seen as using case-specific information. As each evaluee lives in a specific town or city and will have access to a select number of providers, acquiring information from them directly is pinpointing the sources that they will likely use. This pinpointing of services that are unique to the individual given their specific circumstances would warrant a hearsay objection under *Sanchez*; however, this type of information does greater justice to the unique needs of that individual. Alternately, using an aggregate dataset to acquire information from many sources that are similar to the evaluee can provide information that is useful in understanding a specific condition as it compares to other variable correlates or samples. These sources might include information on insurance payouts, academic research on costs, government research on provider charges and other information, and other sources of cost, charge, and price. These sources can view potential costs of service by comparing local community-level sources to regional and national data. Using both of these tools has the added benefits of being scientifically analyzed and allows options for life care planners given the cultural purchasing habits of evaluees in the age of global internet access and medical tourism. If the hearsay rule denies life care planners the ability to use case-specific information as a tool for discovery, it limits the scope of evidence supplied to the court based on a technicality and does not reflect all of the adequate methods to acquire information.

A second argument for the use of both case-specific evidence and generally acquired scientific data comes not from the acquisition of specific items of a plan but from the methods of modern health care delivery. Many years ago, medical care was basically relegated to the work of either a single doctor or a spiritual leader. As medicine advanced, so did the need for professionals to specialize in a particular practice area. However, the need to collaborate to provide care based on the holistic needs of all areas of a person's life did not leave the focus of medical professionals. As more 'silos' of specialty arose, based on the specific expertise needed to treat evaluees, challenges rose in providing coordinated care. It is now common practice for treating providers to communicate amongst each other to provide both a lateral collaboration across various specialties at a given time, as well as vertical collaboration over time to address the developing needs evaluees have, as they are treated throughout their lifetime. This collaborative process is fundamental to the provision of adequate care and is a major concern of all people in the medical industry.

However, the hearsay rulings suggest a slippery slope away from this collaborative process. The slippery slope in this case refers to the potential need to subpoena and verify the recommendations and costs relating to every single item in the life care plan. By its nature, the life care plan is in many ways a collection tool from many sources and an extremely complex organization of service and products. The life care planner is an expert in acquiring this information among the extremely complex nature of care coordination and cost

establishment. It is important to note also that while many life care planners are trained in a specific discipline, their primary role as a life care planner is to accumulate information from multiple sources. This requires special knowledge and skills unique to the life care planner which supersede discipline-specific training. This is why life care planning was developed as a "transdisciplinary practice" (Standards of Practice for Life Care Planners, 2015, p. 5) and trains professionals from multiple disciplines to acquire the skills necessary to communicate and collaborate across various specialties in the medical and allied health fields. If the burden of proof is laid upon only primary sources of information verifiable to the court, it removes the credibility of care coordinators, plan developers, and collaborative care in general, at least for legal decision-making.

The need to see evaluees as a single, whole person, will likely not change, even among the expanding specialties among medical professionals; however if the courts decide to deemphasize efforts to treat evaluees as such, it will be doing a disservice to the justice of the medical process. In terms of the hearsay rulings, it may dismiss valuable medical information based on a technicality, which shifts the pendulum of fairness in another direction. It may also increase the burden on courts to hear multiple experts regarding information the life care planner is trained to acquire.

There is argument that the hearsay rule was established for very good reason. What is in question is whether the hearsay ruling is being used to deny usual, customary, and reasonable evidence from being introduced. All stakeholders in life care planning have a desire to promote scientifically accurate, relevant and reliable information to be used in a way that promotes justice and fairness for both payers and consumers. Of course, judges are simply following hearsay laws and the life care planning community has the opportunity to adjust consensus-established methodologies to conservatively adhere to hearsay implications. Or, the community may choose to comment on the risks and potential inaccuracy of limiting data collection in development of a complex life care plan. The question for the life care planning community is whether taking a conservative approach to hearsay ultimately limits flexibility of life care planners to exhaust all possible avenues for data collection on the needs of people with disabilities?

Conclusion

The life care plan was developed as an innovative way to address the life-long needs of a person with a disability. While hospitals and other treating providers are using technology to share records, establish consistency among diagnoses, establishing consistent fees for service, and generally communicating amongst each other; the need for long-term care planning is still a challenge for the industry. Life care planners serve an important role in delivering a service to future physicians regarding care recommendations of past providers, to the evaluee to plan for future needs, for case managers to follow an evidence-based plan, and for the courts to ensure that the life-long continuum of care is established to have the best data possible to determine responsibility for meeting the costs of care. Life care planners serve an important and unique role in specializing in the collection and organization of medical recommendations and costs for individuals with long-term disabilities and chronic illnesses. It is a niche specialty practice that enhances the services to the medical industry, the courts, and ultimately the individuals themselves. While the legal community continues to work to solve the problem of what evidence is allowable, the life care planning community can continue to innovate ways to acquire it.

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