



LIFE CARE PLANNERS: STRATEGIES FOR THE DEFENSE

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LIFE CARE PLANNERS

Modern catastrophic injury litigation has seen an explosion in plaintiffs' use of witnesses who purport to calculate the total cost of future care related to the catastrophic injury. Such witnesses are generally termed life care planners.

The term used to describe these witnesses is a misnomer in many ways. Typically they do not and are not qualified to, determine what medical care the injured person needs. Neither will life care planners typically help the injured person or her family plan how to obtain or provide that care. In fact, much of the industry literature states that funding sources for the life care plan are irrelevant and should not be considered in preparing the life care plan. According to one of the fathers of life care planning, Paul M. Deutsch Ph.D., "at no time during the plan development process should budgetary concerns influence care and rehabilitation recommendations." It is not the life care planner's job to figure out if the plan

is feasible.

The reason life care planners have become so common is very simple – they enable plaintiffs to shortcut evidentiary barriers and summarily show the jury large dollar figures for future special damages. It is not uncommon in catastrophic cases, especially those involving minors, to see life care plans totaling tens of millions of dollars. Even in less serious cases, a life care plan can allow the plaintiff to quickly put several million dollars of additional special damages in front of a jury.

Because life care plans have an aura of validity and because it is hard to disprove something that has not yet happened, proper preparation is necessary to defend against them. It is critical to understand how life care planners work and recognize their limitations so they may be exploited. Focusing too strongly on past medical expenses in both the evaluation and strategy can lead to an unexpected and very unwelcome result.

HISTORY OF LIFE CARE PLANNERS

Life care planning did not originate in the medical field. Life care planning was born out of personal injury litigation. It is generally accepted that the first published reference to life care planning was in the 1981 text *Damages in Tort Actions*, written by Paul M. Deutsch Ph.D. and Fred Raffa Ph.D.

In order to lend life care planning an air of acceptability, beginning in 1997 the life care planning industry started certifying life care planners. Today, the primary certifying organizations for life care planners are the International Commission on Healthcare Certification and American Association of Nurse Life Care Planners (AANLCP). Initially, these organizations would certify life care planners simply for paying a fee, but today the main organizations do require a certain amount of training and testing before certification. These organizations also publish publicly available guidelines regarding methodologies for creating a life care plan. These guidelines are

a great resource to review before challenging any life care planner.¹

LACK OF MEDICAL KNOWLEDGE OR QUALIFICATIONS

For many years there was little effort to screen the opinions of self-described experts. Today, Federal Courts and many state courts apply a standard for expert testimony modeled on the decision by the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*² Succinctly, that decision charged trial courts to act as a gatekeeper ensuring the expert's qualifications and methodology were reliable. Often we see lifecare planners push the boundaries of their qualifications in order to maximize the dollar figure presented to a jury.

In most, if not all, venues the plaintiff has to prove to some level of certitude that she is likely to incur future medical expenses, but the vast majority of life care planners are not medical doctors, and very rare is the life care planner who has actually been involved in the plaintiff's medical care. Typically, the life care planner purports to work with the plaintiff's treating physicians to determine what medical care the plaintiff will need in the future, and the life care planner will then put a price tag on this treatment. However, it is often a case of "the tail wagging the dog."

A typical case will see the life care planner preparing a schedule of treatment for the plaintiff, which then will be presented to the treating physician for her review and revision. Most times, the physician will simply sign-off on the treatment needs without any changes. In such cases there is a non-physician, not involved in the plaintiff's care, attempting to testify what future treatment the plaintiff will need and the cost of that treatment. In this manner, the plaintiff tries to shortcut her burden to prove the need for future treatment with competent, medical testimony. In such cases it is critical to first demonstrate the lifecare planner's lack of medical qualification, and then challenge the medical professional's opinions for future medical treatment. An important aspect of this involves probabilities that the injured party will need certain future treatment. Modern statistics and the collection of significant amounts of medical data have led to accurate, science-based, probabilities for patient outcomes based upon injuries and treatment. The life care planner or the supporting medical professional should be confronted on any probability or likelihood

analyses for future treatment. Oftentimes, the medical professional's support of the life care plan will wither under detailed cross-examination.

Another area ripe for attack is the difference between the life care plan and actual experience. Life care planners will usually begin the life care plan from a date soon after the life care planner is retained. As is the nature of litigation, time may pass between when the life care plan begins and when the life care planner testifies. Showing that the amounts recommended by the life care planner differ greatly from the amounts actually incurred by the injured party is powerful evidence and can reveal the true purpose of the life care plan – to create additional damages where none exists.

In most jurisdictions, the amount of compensatory damages, including future medical expenses, must also be shown to be reasonable. This can usually be measured by the usual and customary amount charged for the same procedure by similar providers in the same geographic area. Oftentimes, the life care planner will not attempt to determine the usual and customary costs of "recommended" treatment. Instead the life care planner will purportedly call various providers to determine how much the provider charges. This often leads to vastly inflated numbers.

Finally, there are two specific cost areas that should be addressed due to their regular occurrence and typically high costs: 1) home health care and 2) what we will term as "lifestyle costs." If the defense can demonstrate the absurdity of these costs, the fact-finder may dismiss the entire life care plan as nothing more than greed.

The first, home health care, may consist of in-home nursing care. Sometimes, just the cost of in-home health care can be millions of dollars. The life care plan may ignore the availability of free caretakers, such as public schools and family. The life care plan may also call for around the clock in-home care from a nurse or other medical professional. Rarely will the life care plan include cheaper options such as residential nursing facilities. As is generally the case throughout life care plans, only the most expensive option is presented. Even within the medical and life care planning industries there is significant academic publication suggesting that in-home health care is in most instances NOT appropriate from a medical/economic perspective and should not be included in a life care plan.³

Finally, most life care plans will include many non-medical costs, such as housing, automobiles, gym memberships, and even lawn care. These non-medical costs can also be considerable parts of the life care plan, and are ripe areas to demonstrate to the jury the absurdity of the lifecare plan as a whole. Injured persons should only be put back into the same position they were in had they not been injured. Yet many life care plans actually call for better than what the injured party had prior to the injury – houses where the injured person previously lived in an apartment; new cars where the injured person previously took public transportation; or services that they previously had to do themselves. Pointing out these costs to the jury and comparing them to the life the injured person had pre-injury may communicate to the jury better than anything else the true purpose of the life care plan – to make the plaintiff and her lawyers, as much money as possible.

CONCLUSION

Life care plans have become ubiquitous in catastrophic injury cases. Defending such cases requires attacking the life care plan head on. Understanding the history of life care planners, the goal of life care planners, and the inherent weaknesses in the typical life care plan is the first step.



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¹ <http://www.aanlcp.org/>;

² 113 S.Ct. 2786 (1993).

³ Frank Woodrich and Jeanne Patterson, "Ethical Objectivity in Forensic Rehabilitation," *The Rehabilitation Professional*, July/August/September 2003, 41-47