



## CUTTING IT DOWN TO SIZE: STRATEGIES FOR HANDLING LIFE CARE PLANS

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### **Cutting it Down to Size: Strategies for Handling Life Care Plans**

*Joshua G. Keller*

There is a difference between the real world and the courtroom world. In the courtroom world, the plaintiff's evidentiary burden of proving future medical costs has given birth to life care plans and created the need for experts in life care planning. Both are children of personal injury litigation. Both have grown into stalwarts of mediation and trial. Both can be influenced by a plaintiff lawyer's desire to inflate the value of a personal injury claim. Neither has any real existence or purpose in the real world. Absent litigation, no orthopedic surgeon or neuropsychologist requires a life care plan or refers a patient to a life care planner. And that may be the real challenge for defendants and defense counsel. How do we explain the rise and role of life care plans and life care planners to the jury who just met them?

Defense lawyers may not be capable of articulating a "brief history of time," but we are more than capable of summarizing the brief history of life care planning. In 1981, one of the first discussions and use of the term "life care plan" appeared in a publication entitled, *Damages in Tort Actions* (Deutsch & Raffa, 1981). That publication analyzed damages in personal injury cases and provided "lessons" on how to maximize recovery for future medical expenses. By 1985, life care plans were formally introduced to the healthcare industry in *Guide to Rehabilitation* (Deutsch & Sawyer, 1985). During the 1990s, the profession started developing standards of practice, formal training programs, and subspecialty professional associations. In 1996, the Commission on Disability Examiner Certification (now known as the

Commission on Health Care Certification or CHCC) offered the first life care planner certification and the American Association of Nurse Life Care Planners was formed.

Today, the profession created by trial lawyers is organized and experienced. These are not your father's life care planners. They attend CLEs and share their strategies for crafting, explaining, and defending their life care plans. They have more experience being deposed than the lawyers deposing them, and they have more experience in the courtroom than the trial lawyer examining them. They know what questions we are going to ask before we ask them. They are creatures of the courtroom, and every defense attorney needs a plan for cutting their life care plans down to size.

Attorneys should always start by thoroughly investigating the credentialing process itself for an opposing life care planner. Interestingly, life care planners are not limited to the healthcare industry. Virtually anyone can become certified. In the last fifteen years, it has become even easier to do so. In 2001, both the University of Florida and Kaplan Universities successfully launched online certification programs. More are on the way. With easier certification, comes the potential for unqualified experts and opinions. Therefore, it is critically important in every case to fully vet the life care planner's background, education, training, and experience in both life care planning and with respect to his/her knowledge of the underlying injuries and treatment for same.

Attorneys should always ask a life care planner what they "physically" did to become certified. By establishing that a plaintiff's life care planner did nothing more than read

a few books or complete a handful of online classes, you can limit their effect on the jury. Some of the relevant questions that should be asked of any life care planner include:

- Have you authored any articles or peer reviewed studies on life care planning?
- Do you have firsthand knowledge and experience treating a patient with similar injuries to that of the claimant?
- Have you conducted any research in the field of life care planning?
- Do you follow your past clients to ensure they are following your life care plans?

If a life care planner answers “no” to any of these questions, the court may not recognize the life care planner as an expert or the jury may not give the life care planner’s testimony much weight.

A physician should be involved in every aspect of the life care plan’s medical opinions and recommendations for future treatment. Courts have held that it is not enough for the life care planner to send a “fill in the blank” letter asking the physician for his/her opinions on future treatment. See *Fairchild v. United States*, 769 F.Supp. 964, 968, (W.D. La. 1991)(recognizing each treatment element recommended by the life care planner must have independent record support.); see also *First National Bank v. Kansas City Southern Railway Co.*, 865 S.W.2d 719, 738 (M.O. App. 1993)(holding that a life care planner’s testimony regarding the need for and costs of future attendant care should have been excluded due to the lack of medical doctor’s testimony establishing the need for such care on a medical basis.) In every case, life care planners should meet face to face with the claimant’s primary treating physician so they can discuss his/her long term healthcare needs. Life care planners should send a draft plan to the treating physician for final comment and revisions before finalizing.

A defense life care planner is always at a disadvantage when it comes to preparing a life care plan. Whereas a plaintiff attorney can always arrange a meeting or a telephone conference between the plaintiff’s life care planner and the plaintiff’s treating physicians, a defense attorney does not have the same ability. Both the defense attorney and the defense expert are prohibited from speaking to the plaintiff and their treating physicians without a signed HIPAA authorization. That is why a defense attorney should always request (and, if necessary, move the court to compel) the claimant to submit to a physical exam or clinical interview with the defense life care planner. Unless the claimant’s condition has plateaued, the timing of that exam/interview can

be critical. Jurors are not going to give greater weight to the opinion of a defense life care planner who has not examined/interviewed the plaintiff for three years, especially if the plaintiff’s life care planner saw the plaintiff the week before the trial.

Unfortunately, some states do not have statutory or jurisprudential authority requiring claimants to submit to an exam/interview with the defense life care planner. Without that critical meeting, defense life care plans may be susceptible to Daubert motions or (if they survive a Daubert challenge) damning cross-examination. In those states, it is absolutely imperative for the defense attorney well in advance of the deadline for the defense life care plan to: (a) obtain independent medical examinations; (b) complete the depositions of treating physicians; and (c) provide the life care planner with every medical record and receipt. If plaintiff’s counsel is going to paint the picture of your life care planner sitting at a desk and writing a life care plan without ever meeting the plaintiff, make sure you piled as much on that desk as possible.

When there is a battle of life care planners, jurors want to know where the two roads diverged in the yellow wood. During cross-examination and direct examination, an attorney should always start by soliciting and highlighting the areas of agreement between the life care plans. Then, after establishing what is not in dispute, an attorney should solicit and address any areas of disagreement.

There are ways for defense life care planners to distinguish themselves from the plaintiff’s life care planner, even though they met with the plaintiff fewer times and less recently. One excellent way for defense life care planners to distinguish themselves is to “get in their car and go.” For example, in a traumatic brain injury case, a defense life care planner whose life care plan includes a less expensive service or facility, should “get in the car and go” to the facility and speak with the staff. On direct examination, nothing is better than hearing a defense life care planner testifying that “I drove to the facility and met with Sharon who supervises all of the nurses. Their schedule includes.... They provide.... I was impressed by the rooms and the people they had there.”

There are also ways for life care planners to lose credibility with the jury. Most life care planners now include a summary of the medical evidence (often in chronological order). Defense attorneys should scour that summary or timeline to determine whether the life care planner:

1. Omitted any important facts (i.e., no loss of consciousness, normal MRI, 15/15 GCS score);
2. Omitted any unfavorable expert testimony (i.e., not diagnosed in ER with concussion);

3. Ignored positive developments (i.e., performed better during defense neuropsychological testing);
4. Ignored or never requested/provided defense expert reports (i.e., no mention of defense neurologist's opinion);
5. Assumed plaintiff's version or plaintiff's expert opinions are true;
6. Cut and paste from another expert's report; or
7. Made an assumption at request or suggestion of counsel.

Defense attorneys can sometimes reduce life care planners to "bargain shoppers." When a life care planner tries to minimize their role in the process by emphasizing that every item in the life care plan was "approved" or "signed off" by a medical doctor or healthcare giver, let them do it. Let them. Let them say that they just "priced" the items, like a discount or bargain shopper. Let them minimize their role like an economist who testifies that they are "just a calculator." That allows you to argue "garbage in, garbage out." It eliminates any chance of the jury concluding that the life care planner's opinion is important. In effect, it reduces the plaintiff's expert witnesses by one. Which is always a very, very good thing.

Defense attorneys should always provide a life care planner with the pre-morbid or pre-accident medical records. Without prior medical records, it will be impossible for the defense life care planner to distinguish which elements of the plan are related to the subject injury versus those that are pre-existing medical conditions. In addition, the defense life care planner should obtain all employment records, tax records and school records if there are vocational issues included in the claimant's life care plan.

For catastrophic injuries, an attorney should either retain a life care planner with independent expertise in the relevant field of medicine or pair their ("non-medical") life care planner with an expert in that field. Often, that means hiring a board-certified psychiatrist to prepare a life care plan. A psychiatrist primarily deals with patients who suffered serious traumatic injuries. They are trained to anticipate the long-term needs of their patients who suffered life changing injuries. They can address functional problems as well as occupational issues and limitations. For the defense, a psychiatrist is equally as useful as an expert or consultant. They can help frame important issues, point out shortcomings in the claimant's life care plan and assist with cross examinations.

Another critical element of the life care plan is life expectancy. All life care plans should consider the long term implications of care, including preventing secondary

complications, enhancing functional outcome, reducing suffering and improving quality of life. There is very little in terms of medical literature that projects life expectancy for individuals with catastrophic injuries based on the level of care outlined in a life care plan. For all intents and purposes, the claimant's primary treating physician is in the best position to provide a prediction on life expectancy based on future treatment needs. In doing so, both the planner and the treating physician should consider how the current healthcare provision and technological advances will affect the total value of the plan.

For example, there have been significant improvements in prosthesis, motorized wheelchairs, environmental control systems and other adaptive medical equipment and assistive technology, and replacing medical devices occurs less frequently with the new advancements. With better products comes longer life. Therefore, the total cost of the life care plan could decrease significantly depending on the number of times a piece of durable medical equipment has to be replaced or maintained.

Another issue affecting the bottom line of most life care plans is the availability of alternative funding sources. Life care planners should be intimately familiar with public benefit programs or special needs trusts, Medicare and Medicaid, state rehabilitation services and various waiver programs. Rarely will the plaintiff's expert contact an insurer or public assistance program to determine if the client qualifies for secondary funding. Such a line of inquiry can be most effective where an insurer, public school system or other resource has provided a medical case manager who has not recommended the various therapies or other aspects included in the plaintiff's life care plan. Of course, if a treating physician disagrees with any element of the life care plan, the defense would be best served by fully exposing his/her position on cross examination. But beware. Pointing out all of the potential pitfalls in the claimant's life care plan before trial will likely trigger a supplemental report addressing and revising all of the shortcomings in the original life care plan. Choose wisely when trying to determine whether to depose the plaintiff's life care planner and when that deposition will take place. It may be best to wait until all expert report deadlines have passed.

Finally, defense attorneys should always consider the discoverability of the expert's work and opinions if they hire their own planner. The cost of disclosing materials that outline a defense theory may outweigh the benefit of having the defense life care planner testify at trial. If the defense does not want to validate any portion of the life care plan or turn over any sensitive documents, they can always move forward with a life care planner as a consultant only. Under this arrangement, most

of the documents and materials to and from counsel are protected from disclosure under the attorney work product doctrine/privilege.

### **Conclusion**

Life care plans were born out of and remain an integral part of personal injury litigation. They are no longer reserved for catastrophic injuries only. Claimants submit life care plans for everything from broken arms to minimally invasive back surgeries. In all cases, life care planners do not service patients, they service clients. This is an important distinction. The life care planner is not providing any healthcare services whatsoever. This

means the life care plan is not the same as a physician's order. It is also not a formal written contract. At the end of the day, the client does not have to undergo any of the future treatment set forth in the plan. In fact, most claimants never actually see or review their own life care plan!

Special consideration should be given to the method and timing of attacking plans and planners. In most cases, the defense would be best suited by retaining a consultant to help with cross examination. Choose wisely as there are many so-called "certified life care planners" on the market. Make certain that your life care planner has value in the courtroom world and the real world.



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Josh Keller sees everyday as an opportunity to meet new people and learn more about their interests. He enjoys spending time with his clients discussing important details behind tragic accidents and working with them to solve their legal problems.

As a defense litigator, Josh understands the importance of choosing proper experts and preparing thorough cross examinations.

Josh works hard to understand his clients' expectations in litigation. He enjoys learning about different personalities, lifestyles and perspectives. He uses this information to help solve complex legal problems in the most cost effective way possible. His work involves defending individuals and corporations against a wide variety of claims from auto accidents to defamation and business interruption claims, and products liability matters.

As a New Orleans native, Josh is married with three children and devotes his leisure time to reading, coaching youth baseball, playing golf and fishing.

"With my clients, I take pride in being responsive, open-minded and honest. With my colleagues, I try to be honest, deliberate and candid."

### **Practices**

- Commercial Transportation
- Insurance Coverage
- Premises Liability
- Manufacturer's Liability and Products Liability

### **Industries**

- Insurance
- Manufacturing
- Retail and Restaurant
- Transportation

### **Accolades**

- AV Preeminent Martindale-Hubbell® Peer Review Rating™
- Louisiana Rising Stars List, 2017, 2018
- New Orleans CityBusiness Ones to Watch: Law, 2015, 2017

### **Education**

- J.D., Loyola University of New Orleans, 2004
- B.A., University of Southern Mississippi, 2000
- Jesuit High School, 1996

