

REQUIRED ELEMENTS FOR NURSE LIFE CARE PLANNING TESTIMONY



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Keywords: Nurse life care planning, testimony, foundation, Federal Rules of Evidence, Daubert, Frye

Introduction

The nurse life care planner (NLCP) should understand the circumstances and requirements for qualifications and plan foundation in litigation.

What is nurse life care planning?

“Nurse life care planners develop long-term or lifetime plans of care, including the costs associated with all of a plan’s components. Care plan development is based on nursing assessment and collaboration with the affected individual, family, community, and care providers.” (AANLCP, 2015).

What is a nurse life care planner expert witness?

In litigation, the nurse life care planner may serve as a testifying expert, providing testimony on disability and function, safety, nursing care, reasonable and necessary future care, and associated costs ... provides evidence regarding the plan’s foundation, contents, recommendations, methodology, and conclusions. (AANLCP, 2015).

All life care planners must practice within the scope of their licensure and/or certification. A LCP who is not qualified to make a given recommendation must provide evidence or foundation for it (Weed, Berens, 2010). For example, only a NLCP may opine on assessment and nursing care for scientifically-validated nursing diagnoses (NANDA-I, 2018). A NLCP is generally not qualified to recommend spinal fusion surgery but may find evidence or foundation for including

it in a plan in authoritative texts, medical records, expert reports, physician deposition testimony, or collaboration with the physician (Shahnasarian, 2017).

The NLCP process will produce both a plan based on principles and evidence, and subsequent testimony to defend it. Each needs to demonstrate foundation.

Qualifications and Methodology

Before testimony, the life care planner will submit a written life care plan, a CV (curriculum vitae), a fee schedule, and a testimony log detailing all cases in which testimony has been provided via deposition, arbitration, and trial in the past four years. A list of all publications in the past ten years may also be required (Albee, Cosby, Beach, 2020).

Federal law has rules or standards specifying what is required when providing testimony. Expert witness rules vary by jurisdiction, and each state has civil procedure rules. If not a federal case, different rules may apply. Always check with the retaining attorney to be sure.

Understanding the federal rules will benefit the NLCP prepare for both federal and state trials. Once the judge determines the NLCP can testify then the jury or other trier of fact will then decide.

These two federal rules generally refer to the life care planner's qualifications and the methodology used in their report to substantiate the plan of care:

- **Rule 26 of the Federal Rules of Evidence** "(2) Disclosure of Expert Testimony. (v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition" (Cornell, 2018).

NLCPs satisfy this rule providing a list all cases in which they have given testimony.

- **Federal Rules of Evidence Rule 702 – Testimony by Expert Witnesses** A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case" (Michigan Legal, 2020).

NLCPs satisfy this rule with reports or testimony showing sufficient facts or data, such as medical records review, expert reports, possible communication with the individual and treating physicians, and other data.

- **Federal Rules of Evidence Rule 703 – Bases of an Expert** "An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect" (Michigan Legal, 2020).

NLCPs satisfy this rule by producing a report or testimony showing supportive methods applied to the facts. The method is described by the American Association of Nurse Life Care Planners (AANLCP, 2013).

Scientific Methodology of Nurses and Nurse Life Care Planners

The nursing process is a recognized scientific methodology. The American Nurses Association defines the nursing process as assessment, diagnosis, outcomes identification, planning, implementation and evaluation of the plan of care (2015).

Assessment:

- reviewing medical records
- interviewing the individual/family if possible
- communicating with providers and/or experts
- researching literature, cost sources, etc.

Be prepared to describe assessment in detail to demonstrate how you followed the generally accepted process for life care planning. Be able to explain any deviation from the standard steps, such as denied permission to interview the plaintiff. Be prepared to explain how costs were obtained and why the sources of these data are reliable.

Nursing Diagnoses: NLCPs address individual/family responses to health problems and life processes. Nursing diagnoses are clinical judgments and may be

- problem-focused, i.e., concerning an undesirable human response
- risk related, i.e., related to an individual/family susceptibility to an undesirable response

- health promotion related, i.e., about the motivation or desire to improve health status

Nursing diagnoses guide the plan of care. The definitive source of lists, definitions, and defining characteristics of scientifically-validated nursing diagnoses is NANDA-I (NANDA-I, 2018). The NLCP should be familiar with this work and its strengths.

Interventions: These are related to achieving optimal outcomes, collaboratively determined by scope of practice. Examples include evaluations, interventions, health maintenance, health promotion, and optimization of physical and psychological abilities by appropriate actions or equipment. (AANLCP, 2015) The NLCP should be prepared to explain the rationales for these.

Implementation and Evaluation: It is unlikely that the full plan of care for the plaintiff will be implemented until after the case settles. Therefore, the implementation and evaluation components of the nursing process will be in the hands of future case managers and the individual/family. (American Nurses Association, 2015). The NLCP will explain that a well-constructed life care plan serves as a roadmap for care.

What Happens When You Testify

Qualifications: An expert witness must demonstrate qualifications to opine. At testimony the retaining attorney may spend 10-15 minutes asking the NLCP to describe relevant education, experience, certifications, and degrees and discussing past employment, including life care planning experience (Bate, 2018). The attorney may ask for a description of publications, professional presentations, and attendance at conferences, service or related committees, and awards or honors (Powell, 2013).

Methodology: Next, the retaining attorney will ask the life care planner about the methodology used in the report. This should include an explanation of what nursing and life care planning are, what processes the life care planner applied in developing the written report, and showing that generally-accepted practices were followed.

Opinions: After the retaining attorney has walked through qualifications and methodology, discussion of the NLCP opinions and conclusions will follow. The NLCP will show how applying qualifications and methodology resulted in a justifiable list of interventions and their costs.

Challenges to the Nurse Life Care Planner's Report and/or Testimony. There may be challenges to the life care planner's report or testimony, before or even during a trial. This may come in a motion in limine, Daubert, or Frye motion (Cornell, 2018) to have all or part of the life care planner's testimony excluded based on deficiencies in qualifications, methodology, or opinions.

Common challenges: The NLCP

- is not qualified or exceeded scope of practice (professional licensure, education, knowledge, training, and skill)
- did not follow a standard methodology or did not follow the methodology described in the life care plan
- relied upon a provider or expert who has now changed opinion
- did not apply the principles and facts in a reliable method
- did not submit the plan timely for discovery or other court deadline

Follow the Rules of Evidence to Rebut Challenges to a Plan

- Include the NLCP's qualifications in the CV and the written plan of care report. Elaborate on specific uncommon qualifications; for example, relevant strong nursing background, additional coursework, or presentations or publishing.
- Describe the general methodology. Adjust it based on the specifics of the case.
- Describe adherence to licensed scope and practice and association(s) standards. Clarify any deviations and explain them, e.g., plaintiff interviews, physician communications, research used, or how costing analysis.
- Use a section called "Opinions and Basis of Opinions" to describe each component in the report and support the opinion. For example, to support a recommendation for domestic services, the NLCP could list medical and nursing diagnoses, assessment data from the plaintiff interview or home visit, and evidence in depositions. For a recommendation for shoulder surgery, the NLCP could describe the injuries, recommendations from physicians, standard pricing methodologies to include surgeon charges, pre- and post-operative care, facility, and anesthesia needs.
- List services, codes and descriptions, reasonable charges, and sources.

Conclusion

Creating a life care plan that will survive challenges to testimony can be challenging yet rewarding. To meet the federal or state rules of evidence and rules, the NLCP must demonstrate adherence to all the required criteria: being qualified, using a validated methodology, reliably applying principles of life care planning, and having an adequate foundation to every recommendation in the life care plan.

Note: The author is not an attorney and this is not legal advice. An NLCP must communicate clearly with the retaining attorney to ensure that all components of the report will meet with state or federal law.

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