

### Testimony Preparation for The Advanced Life Care Planner

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### (Conflict of Interest Disclosure)

We all certify that, to the best of our knowledge, no affiliation or relationship of a financial nature with a commercial interest organization has significantly affected our views on this subject.

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### Learning Objectives

- ◆ Life care planners will have a full understanding of what it takes to be qualified as an expert
- ◆ Life care planners will understand the importance of professional documents, CV, Fee Agreement, Disclosure statement, Medical Authorization and authorization for photography
- ◆ Life care planners will understand the necessary components to best prepare for testimony
- ◆ Life care planners will obtain knowledge of how to respond to critiques of their work and challenges
- ◆ Life care planners will be given redacted scenarios and tough/tricky questions for an interactive exercise of deposition and trial testimony

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# Preparing for Deposition and Trial from the Moment of Referral

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## The Basics



- ◆ Is this person in-fact an expert and qualified in his/her field?
- ◆ The reasoning and reliability of the methodology used
- ◆ Will the testimony be helpful to the jury/trier – relevance
- ◆ Avoiding or defending a motion in limine

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## What's a motion *in limine*?

A motion *in limine* is a motion filed by a party to a lawsuit which asks the court for an order or ruling limiting or preventing certain evidence from being presented by the other side at the trial of the case.



*Limine, Latin, "threshold," i.e., at the beginning*

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## The Basics

### Two Example Motions



- ◆ Is this person in-fact an expert and qualified in his/her field
- ◆ The reasoning and reliability of the methodology used
- ◆ Will the testimony be helpful to the jury/trier – relevance
- ◆ Avoiding or defending a motion in limine

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## Referral & Intake

◆ Questions



◆ Phone script




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## First Impression Post-Phone Call

### DOCUMENTS

1. CV
2. Fee Agreement
3. Disclosure statement
4. HIPAA Authorization
5. Photography, audio and/or videography disclosure




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## Developing Professional CV

- ◆ First document to consider in review of expertise
- ◆ Closely scrutinized by OC and possibly opposing LCPlanner
- ◆ Marketing




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## Revealing/Explaining Expertise

- ◆ Qualifications
  - ◆ Education
    - ◆ Training
    - ◆ Academic qualifications
    - ◆ Credentials
  - ◆ Experience
  - ◆ Licenses held
- ◆ Certificates or certifications & work req'd to obtain them/keep them
- ◆ Awards received of a professional nature
- ◆ Research conducted
- ◆ Publications
- ◆ Teaching roles

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**Tpyos**  
and  
**Errors**

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### Online vs. Offline

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### Subjective to Objective

- ◆ Nationally known
- ◆ Well respected
- ◆ Highly skilled
- ◆ Leading expert



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### Proactive



- ◆ Fee Agreements & Contracts
  - ◆ Fee Schedules
  - ◆ Retainers

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## Developing Your Fee Agreement:

**Not all about the money  
Also a way you protect yourself**

### SHOULD INCLUDE

1. Contact information
2. Referrals contact information
3. Type of work product
4. Deadlines
5. Retainer
6. Professional services per hour
7. Expedited rates and what determines those and how they are established
8. Late payments and penalties
9. Travel rates

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## To Begin Work... You'll Need

1. Retainer/Executed Fee Agreement
2. Copy of original complaint and addendums
3. All medical records, invoicing, FCE, psych, neuropsych and/or voc.
4. Expert reports (both sides)
5. Depo transcripts (anyone involved: injured party and family, experts, providers)

**Fee Agreement is Key to Good Business**

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## Fee Agreement

- ◆ What should be contained in your Fee (Retainer) Agreement?
- Will you release your report if they have not paid their bills?
- Establish the venue should they not pay their bills to take them to start claims court
- Language to protect you when there is a challenge (Motion in limine, Daubert or Frye)

**Fee Agreement is Key to Good Business**




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## Invoicing Options

- Retainers
- Monthly
- Completion of Report
- Deposition Invoice
- Trial Invoice
- Travel and Expenses



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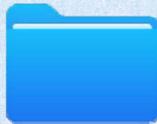
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## Setting up your file

Your organization for deposition is your secret weapon

Consistency is the key

Set up your files the same way every time



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## Key Components to Include

- ◆ Definition of LCP
- ◆ Foundation- your qualifications
- ◆ Explanation of methodology
- ◆ Research, data and guidelines
- ◆ Clinical Impressions – how to add nursing synthesis
- ◆ Complications and collaboration



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## How To Prepare For Deposition & Prepare Attorney

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## Getting Qualified as an Expert

- ◆ Education, skills, expertise
- ◆ Experience in LCP'ing
- ◆ Details in CV that point to collaboration with other professionals, e.g., home health, rehab, case mgmt
- What allows you to make referrals to other provider specialties

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## Preparing

- ◆ For deposition
- ◆ For trial
- ◆ Useful resources



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## Preparing for Trial

1. How does preparing for trial differ from preparing for deposition?
2. What can you take with you?
3. Will there be exhibits?
4. Prep with your attorney
5. Ask about the jury members



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## Presentation & Demeanor

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*Know legal terms and how  
to respond in courtroom or  
in depo*

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## Common Reasons for Challenge

- ◆ **Methodology/Lack of Foundation**
- ◆ Recommendations for goods/services outside area of practice
- ◆ Failure to collaborate with treating providers
- ◆ Lack of supporting literature
- ◆ Delegated the development of the plan
- ◆ Plan not individualized and does not pertain to individual

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## Motions & Dauberts

Goal to demonstrate you have knowledge, skill, experience, training & education in field of LCP & specifically for patients with XYZ condition or injury

- ◆ Degree, licensures, certifications
- ◆ Involvement in industry
- ◆ Experience in LCP
- ◆ Leadership roles in the LCP and nursing community
- ◆ Testimony based on sufficient facts or data
  - ◆ Deposition clear that you are relying on facts/data
  - ◆ Extensive list of material/information received & reviewed
  - ◆ "...The fact that Ms. Smith has no personal knowledge of such facts and data she is relying on is not a reason to exclude her testimony..." (no hands-one experience)

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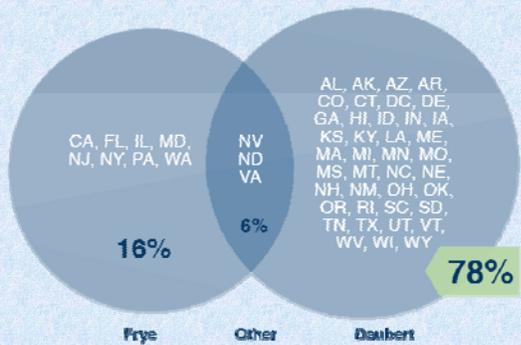
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## Desired Findings

- ◆ Testimony is the product of reliable principles & methods
  - ◆ Reasonably reliable, peer-reviewed principles & methods
  - ◆ Consistent with methodology recognized in reliable texts in LCP, AANLCP & IALCP

Opposing counsel has not presented any expert evidence in their criticisms of your application of principles & methodology to the facts that are well founded..."

- ◆ Defendants have not designated their own expert to contradict your testimony

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## Methodology Challenges

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## Standard methodology

- ◆ Standard (nursing) assessment
- ◆ Standard methodology
- ◆ All clients and all settings




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## Methodology Motion REBUTTALS

### Methodology is not reliable

- ◆ Complexity of case – treatment is ongoing
- ◆ Updating LCP prior to trial – as mentioned in deposition
- ◆ Methodology peer reviewed, published, well-accepted in LCP/NLCP community
  - ◆ AANLCP
  - ◆ IALCP
  - ◆ Life Care Planning & Case Management Handbook

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## Potential Methodology Rebuttals

### Has not applied reliable principles & methods to facts of case

- ◆ Cost estimates / methods well accepted & reliable in LCP industry
- ◆ Collaborated (verbal, writing, face-to-face) with over half of treating physicians
- ◆ LCP report forwarded to treating physicians – no disagreement
- ◆ No significant changes in LCP to date

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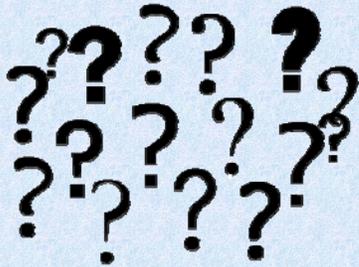
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## Methodology not scientific?

*Has anyone had to write a brief to the court to support our Life Care Planning Methodology?*



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## Qualified?

- As a threshold matter, witness must be qualified as an expert to present expert opinion testimony.
- An expert needs more than proper credentials, whether grounded in "skill, experience, training or education" as set forth in Rule 702 of the Federal Rules of Evidence.
- A proposed expert must also have "knowledge."

◆ Reference Manual on Scientific Evidence; 3rd edition

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## If you are limited/stricken...

- ◆ Keep record of all matters on which your testimony has been stricken or limited;
- ◆ Keep record of all matters where motions were filed attempting to challenge your qualifications or methodology where the Court overruled the motion;
- ◆ Inform your retaining attorney of such matters.

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## When did you last work as a nurse?



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RN practice is the delivery of health care services which require assessment, diagnosis, planning, intervention, and evaluation. The performance for compensation of any acts involving:

- observation, care and counsel of the ill, injured, or infirm
- the maintenance of health of prevention of illness of others
- the supervision and teaching of other personnel
- the delegation of certain nursing practices to others
- administration of medications and treatments

where such acts require substantial specialized judgment and skill based on the knowledge of biological, physical and social sciences. ACA 17-87-102 (6) (A-E)

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**“In my clinical experience, ...”**

“...past rehab setting experience qualifies me to make rehabilitation assessments and recommendations...”

“... as a case manager working with persons with this condition...”

“...having cared for over persons with burns in my clinical career...”

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**Prohibited Collaboration**  
 ...things are not always as they appear

> [Lewis v. Ethicon, Inc. \(2014\)](#): Vaginal Mesh Mass Tort (MDL Bellwether Case), W. VA.

- ◊ Attorney prohibited collaboration of experts, in that he wouldn't allow conversation without his team present and would not assist in making those arrangements.
- ◊ Plan was pending medical foundation of IME to meet the discovery deadline, with foundation established through medical records, deposition transcripts of provider and research from peer reviewed articles.
- ◊ Partial exclusion on the items the specialist did not discuss in his deposition, such as housekeeping, lawn care and part of the counseling services. All plaintiff experts had partial to full exclusion.
- ◊ The case was dismissed at the beginning of trial after the judge had made decisions on the exclusions.

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### Sample Motion in Limine – Facts of Case

- ◆ Case – pediatric, burns (15% TBSA - face / upper body / hands)
- ◆ Life Care Plan completed with collaboration & research
- ◆ Deposition – questions focused on experience & collaboration




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### Opposing counsel reasoning

- ◆ Lacks requisite special knowledge, skill, experience, training & education – defers to MDs on all medical issues
- ◆ Require reconstructive surgeries over life – without support
- ◆ Require psychological counseling as result of psychological complications & diagnoses – without support
- ◆ Defendants requested testimony to be excluded on reconstructive surgeries & psychological counseling

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### Opposing Counsel Reasoning

- ◆ MD testified reconstructive surgeries are 'patient's choice' & could not predict need for future surgeries
- ◆ MD testified not psychologist or psychiatrist & had not seen evidence of psychological problems to date




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### Opposing Counsel Reasoning

- ◆ NLCP'er – not MD, PhD, psychiatrist, nor licensed counselor
- ◆ "...though she is a nurse, she has not practiced nursing in quite some time..."
- ◆ NLCP'er relies on MD for medical issues in the LCP (i.e., surgeries)
- ◆ NLCP'er acknowledged no expertise in medical diagnoses & no current psychological diagnoses
- ◆ NLCP'er acknowledged potential psychological complications & collaboration with MDs to support psychological counseling in LCP recommendations

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### Retaining Counsel Rebuttal

- ◆ Voir dire on stand – plaintiff, defense & judge
- ◆ CV – degrees, licensure, certification, training, & background
- ◆ Methodology
- ◆ LCP industry / resources
- ◆ Reconstructive surgeries – relied on MD
- ◆ Psychological counseling – relied on CRC certification & CM background




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### Court ruling - partial exclusion

- ◆ Court ruled able to testify as to MD recommended reconstructive surgeries
- ◆ Court ruled unable to testify as to counseling/support therapy – unable to mention line item in LCP report OR testify MD recommended psychological care
- ◆ Court ruled able to testify regarding psychological symptoms, limitations, outcomes, concerns & potential diagnoses – based on CRC certification & CM experience

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## Services Have Not Been Implemented

A New Line of Attack



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## Refute Allegation of Hearsay

**Experts are entitled to rely on records to form opinions**

*Rule 803. Exceptions to the Rule Against Hearsay*

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## Treating Providers & Consulting Experts – *when this can mess you up*

- ◆ You need reliable resources
- ◆ Relying on nonqualified providers and experts for items outside their scope of expertise - e.g. neuropsych for neurology f/u when treating neurologist failed to do so.
- ◆ MD inconsistent – keeps changing their mind (reliability)
- ◆ Not all expert opinions shared with you
- ◆ Ignoring treating providers opinions

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## Nurse Practice Act

Your State's NPA

Read it  
Know it  
Use it!



California: "It is the legislative intent also to recognize the existence of overlapping functions between physicians and registered nurses and to permit additional sharing of functions within organized health care systems that provide for collaboration between physicians and registered nurses."

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## Advanced Tips & Resources

- ◆ Juries – research
- ◆ Narratives, cost tables, reports not entered into evidence
- ◆ Loss of household services
- ◆ Defense attack strategy: "death by a thousand paper cuts"
- ◆ Exhibits
- ◆ Day in the Life Videos

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## Don't forget ...

- ◆ Judge and jury won't always see narrative part of your report
- ◆ Repeat foundational bases in grid, especially for costly items
- ◆ Other suggestions/approaches?

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### Practice – tactics for responding to opposing attorney at depo and trial

- ◆ Video depositions
- ◆ Commenting on opposing LCP'er
- ◆ Hypotheticals
- ◆ Your credibility
- ◆ What is unacceptable, inappropriate or abusive behavior

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### Preparing Critiques & Rebuttal reports

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### Deposition & Trial

*Sharing of Experiences and  
Lessons Learned*

*(Open Forum)*

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Survey of Women Expert Witnesses

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Answering Tough & Trick Questions

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Share Your Experiences With Us!

- ◆ Sherry Latham RN BSN CLNC CLCP MSCC CNLCP
- ◆ Victoria Powell RN, CCM, LNCC, CNLCP, CLCP, MSCC, CBIS, CEAS
- ◆ Evelyn Robert, BSN, RN, CCM, CRP, CLCP, MSCC
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