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Life Care Plans—Documenting Damages in Catastrophic Injury Cases

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In a catastrophic injury case, the rehabilitation expert's life care plan can "bridge the gap" between the medical evidence and an economist's projections for damages into the future. The life care plan helps in determining the worth of the case, in moving the case toward settlement, and as a valuable tool at trial.

Most attorneys know when they have a client with a serious injury. The client has sustained a spinal cord injury and cannot move his or her legs or arms or, in some cases, both. The seriously injured person may have had amputations to both legs or both arms or, in rare cases, have no extremities at all. A baby may be severely brain damaged, resulting in impaired mental capability as well as cerebral palsy. An adolescent may have sustained a head injury, resulting in severe cognitive defects as well as physical limitations.

What are the consequences of these multifaceted catastrophic injuries on the client's ability to function? How will these injuries affect the person's education and vocational development? Can the client ever become competitively employed? If so, what will it cost to prepare for that? How much will he or she need for medical care and therapy? What is the cost to renovate the client's home if this is necessary? How much is needed for required nursing services?

All of these questions should be considered when the attorney takes a catastrophic injury case, as the cost of these items make up the damages part of the case.

DOCUMENTING DAMAGES IN A MEANINGFUL WAY

Attorneys know that they have a "substantial" case if the obstacle of liability can be overcome and

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if there are "deep pockets" of coverage. However, few are cognizant of how to document the damages in an objective and meaningful way that illustrates to the defense or the insurance company the reason for the amount of the demand.

An attorney should use a life care plan for three reasons: to determine the worth of the case, to move the case toward settlement by justifying the amount of the demand, and as a tool for trial.

One of the most important experts in these cases is a rehabilitation expert, who will assist the attorney in illustrating the extent and amount of the damages in the case by preparing a life care plan. The cost of future life care makes up a significant part of a catastrophic personal injury case. A life care plan details the damages in medical malpractice, product liability, and motor vehicle accident cases that have resulted in catastrophic injuries.

Due to their experience, rehabilitation experts have been utilized by attorneys to bridge the gap between the medical evidence (i.e., the disability) and the economic reports that project the damages into the future. The focus of his or her expertise in the areas of rehabilitation, employability, and earning capacity allows the rehabilitation expert to complement the evidence and testimony of the medical and economic experts and to educate the jury as to the impact of the severe injuries on the person's lifetime care needs.

Retention of a rehabilitation expert precedes that of an economist, as the economist formulates economic projections based on the costs developed in the life care plan made by the rehabilitation expert.

An attorney should use a life care plan for three reasons: to determine the worth of the case, to move the case toward settlement by justifying the amount of the demand, and as a tool for trial. The life care plan enables the attorney to document the damages of the case to the jury in a clear, demonstrative manner.

SAMPLE CASE

The following is a sample catastrophic injury case in which a life care plan clearly and objectively documented the damages and resulted in a record settlement.

One bright autumn day, a five-year-old boy was playing when his ball bounced through the open gate of a backyard electrical power generator. On reaching for the ball, he was electrocuted, resulting ultimately in bilateral amputations at the right elbow and at the left shoulder. In one brief second, his life was turned upside down. In the course of the trial, he was likened to poor Humpty Dumpty, who also "couldn't be put together again."

The boy was rushed to a local children's hospital, where he received extensive physical and occupational therapy. After an extensive period of rehabilitation, he was released from the hospital and continued therapy on an outpatient basis. With the help of a prosthetist, he was fitted with a myoelectric arm to assist him in his home and school functioning.

Eight months after the accident, the boy's attorney contacted a rehabilitation specialist to develop a life care plan that would detail his medical, prosthetic, equipment, educational, and home care needs, as well as provide the costs of these items. The rehabilitation specialist reviewed the extensive medical records and interviewed the child, the family, and medical and school personnel. Working with the attorney, the specialist coordinated the medical reports to fully document the medical needs and services required throughout the boy's life. This provided a medical foundation on which the detailed life care plan could be developed.

The earning capacity section of the life care plan provided various options, detailing the loss of earning capacity under three outcomes dictated by the medical findings, as well as the cost of equipment and training to implement each option. Based on a psychiatric assessment which opined that the boy would be so severely depressed that he would be unemployable, a total loss of earning capacity was concluded. The other end of the continuum indicated that, if college educated and with various assistive devices, he would be employable, but with some diminution of earning capacity. The defense's vocational expert opined that the boy could perform all types of employment, that "he had no vocational limitations," and that he would lead a "normal" life.

The case quickly moved toward trial. A conference with the trial judge pushed the case toward settlement when the judge established a multimillion-dollar settlement goal based on viewing the "day in the life" videotape, the videotaped settlement brochure, and the life care plan. The

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case settled for $25.3 million in cash. To the end, the defense contended they just wanted to put the boy "back together again"—like Humpty Dumpty!

A CLOSER LOOK AT THE LIFE CARE PLAN

Life care plans provide detailed documentation in catastrophic injury cases for pediatric and adult clients who have sustained paraplegia, quadriplegia, brain damage, kidney damage, severe burns, sensory loss, severe seizure disorders, mental retardation, or multiple amputations. This rehabilitation service is for cases with serious injuries.

Until recently, physicians, nurses, therapists, teachers, and pharmacists would be brought in to testify as to the cost of maintaining a catastrophically injured client over his or her life expectancy. However, this information is more effectively provided through the development of a life care plan, in which detailed documentation indicates the actual local cost of expected long-term care, maximum vocational potential, and the cost of enhancing the client's quality of life.

The development of the life care plan begins with a comprehensive review of all medical records. Along with interviewing the client and the family, an extensive home assessment is made. During this evaluation, a rehabilitation counselor performs a home care and equipment evaluation, as well as evaluates the client's vocational and educational potential. In addition, meetings may be held with the treating physicians, therapists, and educational institution staff.

Based on the above information, a plan for future life care is developed. Detailed yearly costs are provided in the following areas: home care or facility care; future medical care; transportation; architectural renovations; therapeutic evaluations and modalities, such as physical and occupational therapy; medical equipment and/or wheelchair needs; orthotics and/or prosthetics; home furnishings; leisure time and recreational equipment; drug and supply needs; and the cost of potential medical complications. An accompanying narrative report details the results of the home assessment and review of the medical records.

The life care plan is presented in an easy-to-read chart format that details the cost of each and every service required to maintain the catastrophically impaired person to his or her maximum physical, educational, and vocational level. It is the objective method to document the total cost of damages in catastrophic injury cases.

The plan developed should be preventive, not reactive. It should be designed to prevent any complications, not cause them.

The life care plan is developed by a rehabilitation professional trained and experienced in working with severely disabled persons. It should be developed as if this professional is going to manage the case. The plan developed should be preventive, not reactive. It should be designed to prevent any complications, not cause them. For this reason, there are various evaluative processes built into the plan to prevent complications. The cost of complications are therefore not part of the life care plan, as their frequency cannot be determined with any degree of certainty. The costs are noted and presented in the plan for informative purposes only. The plan should contain the realistic costs of services that the client will require over his or her lifetime.

LOCATING REHABILITATION EXPERTS

There are only about 15,000 rehabilitation counselors in the United States, so it is a small area of expertise. Many are employed by the state rehabilitation agency and, thus, are discouraged from performing work in the forensic area. However, there are usually at least several rehabilitation experts in a particular geographic area who are capable of performing forensic evaluations. Local legal publications provide listings of various types of experts in their experts services sections, as does *TRIAL* magazine. Several directories are published that list vocational experts; two of them are the *Forensic Services Directory, Lawyers Desk Reference*, H. Philo, Lawyers Cooperative Publishing Company, 1987, and *The National Directory of Expert Consultants and Advisors*, Experts-at-Law, 1989.

An attorney can use a forensic expert service, such as the Technical Advisory Services for Attorneys (TASA), a national organization based in Blue Bell, Pennsylvania, or he or she can contact the local university that offers a rehabilitation counseling program and ask one of the professors. However, one of the best ways to locate a rehabilitation expert is to ask a colleague who has a personal injury practice.

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For a more in-depth look at finding a qualified rehabilitation expert, *see* "Documenting a Child's Impaired Earnings: The Role of the Vocational Expert," 15 Trial Diplomacy J. 19, 25–27 (January/February 1992).

USING REHABILITATION EXPERTS EARLY IN THE CASE

The attorney can no longer rely on the premise, "The case will settle, so why spend the money on experts?" This type of thinking will inversely affect the dollar value of the settlement received.

Some attorneys wait until the last minute to retain experts—just as the case is going to trial or as the discovery period is to close—with the hope that the case will settle. Other times, experts will be retained to counteract or rebut an opposition expert. This is being penny wise and dollar foolish.

Discussions with attorneys indicate that if the value of the case has been calculated, early case preparation leads to early case resolution. Several attorneys send their clients for a rehabilitation expert's evaluation to assess the case worth and to move the case toward settlement or trial.

If liability has been admitted by the defendant, the question then becomes one of case worth. The development of the life care plan can provide the parameters of settlement in such circumstances.

Defense attorneys are more likely to settle a case if they know the opposing attorney is ready, willing, and able to go to trial. One way of signaling this to the opposition is to demonstrate that your rehabilitation expert has been retained and has provided a detailed life care plan.

THE LIFE CARE PLANNING PROCESS

Once you have selected a rehabilitation expert, you should forward a retainer letter confirming the fee arrangements, which involves an hourly rate or estimate as to the cost of developing the life care plan.

It is necessary to forward to the rehabilitation expert all of the documentation in the case. This should include all hospital records, treating and consultative physician reports, therapy records, educational records (depending on the client's age), employment records, and income tax statements.

A good rehabilitation expert will compile these materials in files. Placing these records in indexed binders allows the expert to organize voluminous records and have them ready for instant retrieval. Not only is this an aid in preparing the life care plan itself, but it becomes very important when a rehabilitation expert is on the stand and opposing counsel in cross-examination refers to a particular doctor's report.

The next step in developing the life care plan is to schedule a home or institutional visit to evaluate the severely disabled client. A standard informational interview is conducted with the client and family. Information in the areas of background, education, past work experience, medical history, psychological condition, activities of daily living, and functional capacity is obtained. An assessment of architectural renovations of the home is also conducted. A treatment history of hospitals, doctors, and therapies is compiled, and the local treating hospital is noted. If the client is a child, a visit to the school to talk to the teacher and therapists may be conducted. The treating sources may be contacted if the medical documentation is unclear.

If liability has been admitted by the defendant, the question then becomes one of case worth. The development of the life care plan can provide the parameters of settlement in such circumstances.

Once this information is obtained, the rehabilitation expert outlines the components of the life care plan. This serves as a basis for performing cost research in the client's geographical area. At least three service providers should be contacted to obtain a range of the cost of the service. For example, if the client requires physical therapy, three local agencies which provide this type of therapy should be contacted to determine the prevailing rate for this service.

One of the most important areas to research is nursing agencies, as a particular level of nursing service may not be available in the client's locality. For example, this author had a case in a large Midwestern city where the client required the assistance of a live-in attendant. After contacting all 20 nursing agencies in the locality, we found that not one offered this service. This was noted, and the cost of hourly attendant care was incorporated into the life care plan.

The rehabilitation expert should consider only one collateral source—Public Law 4-142,

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which provides for educational services for the handicapped. This law provides for the cost of some therapies to be borne by the school of the disabled person. However, this law only provides for a minimal amount of therapy, and many times its provision has to be supplemented by other funding sources. In most localities, the rehabilitation expert should not consider any other funding sources.

The rehabilitation expert may conduct follow-up services for the client after the plan has been completed. For example, as a case gets close to trial, he or she may return to visit the client or observe the client at school. This allows the expert to update the information in the plan and better prepare to discuss the case in front of the jury.

LIFE CARE PLAN METHODOLOGY

A comprehensive life care plan involves the consideration of the many areas that impact on the life of a catastrophically injured person.

- The initial area assessed is the *projected evaluations* required for the injured person. To repeat, the life care plan is preventive, not reactive. It is developed to prevent complications, not cause them. Each evaluative area is selected based on the client's needs that have arisen from the impairment. Rehabilitation, physical, occupational, educational, psychological, vocational, speech, music, hearing, and visual evaluations are considered in the development of the life care plan. The frequency of each evaluation is noted, and the base cost of each required area is researched.
- Considered next are the *projected therapeutic modalities* the person will require over his or her life expectancy. These are divided into long- and short-term goals. Therapeutic modalities considered are rehabilitation counseling or case management, physical therapy, occupational therapy, speech therapy, individual counseling, family counseling, group counseling, marital counseling, sexual therapy, visual perception therapy, music therapy, recreation therapy, audiological training, cognitive training, and behavioral therapy remediation. The rehabilitation expert considers the frequency of the therapy, the age at which it should begin, and the base cost of each modality.
- The next area of the life care plan is an assessment of *education and development programs*. This involves such areas as infant stimulation, early childhood education, preschool education, special education needs (both public school and residential facility), tutoring, prevocational training, vocational training, educational games and toys, and work activity center and sheltered workshop participation. The frequency of these modalities, the age at which they are to begin, and the base cost of each modality is considered.
- *Drugs and supply needs* are an integral part of the life care plan. Drugs in the plan are based on the client's current regime. Supply needs are ascertained during the visit to the client's home and can include such items as catheters, Attends, sterile gloves, leg bags, and K-Y jelly. The frequency of use, amount, and average cost per year is considered.

The rehabilitation expert may conduct follow-up services for the client after the plan has been completed. For example, as a case gets close to trial, he or she may return to visit the client or observe the client at school.

- The frequency and cost of evaluation or treatment by an orthopedist, neurologist, urologist, internist, psychiatrist, family physician, pediatrician, or dentist is included in the *future medical care* section of the life care plan. Also considered are in-hospital evaluations and needed future surgery.
- There is a variety of *equipment* that can assist the catastrophically disabled person to be more independent. The life care plan contains cost and replacement schedules for wheelchairs, orthopedic equipment, transportation, and home furnishings and accessories.
- Due to the severity of impairments and resulting limitations, many individuals require *architectural renovations* to their homes to make them wheelchair accessible. This involves itemizing the cost of such items as widening doorways, ramping, bathroom modifications, attendant bedrooms,

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and floor coverings. At times, the cost of these modifications may be more than purchasing a wheelchair-accessible home. When this occurs, a new home is recommended.

- One of the most important areas of the life care plan is the *home care/facility care* section. The home care area considers the need for attendant or nursing services to assist the client in his or her daily activities. This makes up the largest dollar amount in the life care plan. As an alternative to home care, residential facility care must be considered. Such facilities as head injury institutions, residential schools, and nursing homes should be considered when appropriate for the client.
- The last part of the life care plan is an itemization of the *potential complications*. This is provided for informational purposes only to educate the jury about the costs that would incur if the life care plan is not put into effect.

An attorney should be cognizant of the fact that the loss of earning capacity is the second largest dollar amount *in the life care plan.*

ASSESSMENT OF IMPAIRED EARNING CAPACITY

An attorney should be cognizant of the fact that the loss of earning capacity is the *second largest dollar amount* in the life care plan. Therefore, an expert knowledgeable in rehabilitation, as well as the vocational implications catastrophic injuries have on employability and earning capacity, should be retained.

Impaired Earning Capacity of Adults

The vocational evaluation of an adult in a life care plan consists of an assessment of the effects of a person's physical, psychological, and/or cognitive limitations on his or her work capacity. This is performed through a standardized interview, review of educational and work records, and, in some cases, by administering a battery of vocational tests.

To assess impaired earning capacity, the rehabilitation expert utilizes information provided in the U.S. Department of Labor's *Dictionary of Occupational Titles* (DOT), fourth edition, revised 1991. The DOT contains information regarding more than 17,000 different occupations found in the local and national labor market. In this publication, the federal government has formulated a five-point physical demand scale which is used to classify the exertional requirements of all occupations in the labor market. The brief definitions of the five physical demand requirements are the following:

- *Sedentary work* is defined as exerting up to 10 pounds of force occasionally and/or a negligible amount of force frequently. Sedentary work involves sitting most of the time, but may involve walking or standing for brief periods of time.
- *Light work* is defined as exerting up to 20 pounds of force occasionally and/or up to 10 pounds of force frequently. This category of work requires walking or standing to a significant degree.
- *Medium work* is defined as exerting 20 to 50 pounds of force occasionally and/or 10 to 25 pounds of force frequently.
- *Heavy work* is defined as exerting 50 to 100 pounds of force occasionally and/or 25 to 50 pounds of force frequently.
- *Very heavy work* is defined as exerting in excess of 100 pounds of force occasionally and/or in excess of 50 pounds of force frequently.

An understanding of the physical limitations imposed by the client's injury will allow the rehabilitation expert to assess the impact of the impairment by placing the person's residual functional capacity into one or more of these physical demand classifications. The rehabilitation expert then considers the client's preinjury vocational earning capacity and contrasts it with the person's postinjury earning capacity, if any. Usually, a severely disabled person has sustained a total loss of earning capacity due to the significant limitations posed by the injuries.

Impaired Earning Capacity of Children

There are four methods for assessing the impaired earning capacity of severely disabled children as part of the life care plan, depending on the parameters of the case. First, some rehabilitation experts use sophisticated computer programs containing U.S. government earnings data to assist

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in making these determinations. The second method is to look at a list of occupations in the local or national economy that the child could potentially perform prior to the accident, and then look at the jobs he or she can perform given his or her postaccident limitations. The mean difference in the earnings of these occupations would represent the loss of earning capacity of the child due to his or her limitations. The third method places the child in the appropriate category on the U.S. Census Bureau's four-point scale of disability. Each disability category can be translated into a percentage loss of earning capacity. The fourth method used is in child cases resulting in a diminution of intellectual capacity. Here, the vocational expert assesses the child's preinjury educational attainment and postinjury educational level. The difference in salaries for the preinjury and postinjury educational levels provides the loss in earning capacity.

For more in-depth information on assessing the impaired earning capacity of children, *see* "Documenting a Child's Impaired Earnings: The Role of the Vocational Expert," 15 Trial Diplomacy J. 19, 23–25 (January/February 1992).

CASE ILLUSTRATIONS

Spinal Cord Injury

Sam Martin was a 21-year-old college graduate trained in personnel management. He was employed by an insurance company. Mr. Martin was riding his motorcycle when he was hit by a moving van, resulting in a fractured back and paraplegia. This meant that he suffered from not only paralysis in the lower extremities but upper-back pain as well. He was incontinent and experienced psychological adjustment problems.

A comprehensive life care plan was developed by a rehabilitation expert, complete with a full vocational evaluation that included testing. Each item of the life care plan was clearly detailed in chart format so that both defense and jury could comprehend the costs that Mr. Martin would incur over his lifetime. The severity of the injuries with resultant pain precluded Mr. Martin from sitting more than two to three hours at one time without lying down. He had been rendered unemployable due to his paraplegia.

When the case went to trial, the rehabilitation expert testified, educating the jury as to the types of services that Mr. Martin would require over his lifetime. The jury was able to comprehend the cost of these services and reached a verdict of $24 million in favor of Mr. Martin.

Brain-Damaged Baby

Jane Williams was deprived of oxygen at birth, resulting in brain damage, cerebral palsy, and a respiratory deficiency. Due to the severity of her problems, 24-hour nursing care was required because of her dependency on a ventilator.

After the completion of the life care plan, the self-insured hospital tendered $3 million to be used in a structured settlement.

A comprehensive life care plan was developed, with the cost of services researched in the local area. This included a loss-of-earning-capacity assessment of the child based on the educational and vocational trends in her family.

After the completion of the life care plan, the self-insured hospital tendered $3 million to be used in a structured settlement.

Severe Head Injury

Linda Diamond was a passenger in an automobile that rolled over due to a defect in an expressway. She sustained a head injury that resulted in severe cognitive limitations and hemiparesis. She was seen one year postaccident, still in an acute-care head injury facility. The rehabilitation expert met with the client, her family, and the staff of the facility. This served as a basis for the development of the life care plan. As part of the plan, the expert suggested placement in a long-term comprehensive residential head injury facility, contrasting this with the cost of returning her home.

The insurance company for the municipality agreed with this recommendation, structuring the settlement so that the client's costs for this residential facility could be covered.

Multiple Amputations

Bill Stewart was thrown from a subway platform, causing him to be run over by a train. This resulted in bilateral lower-extremity amputations at the hip. The height of the amputations precluded him from using prosthetic devices. He was rendered wheelchair bound. Due to his limitations, he was unable to live independently and so required the assistance of his family. Due to limited funds,

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Mr. Stewart had to reside with his relatives in a nonwheelchair environment.

The life care plan was developed. Recommendations for vocational rehabilitation and psychological services were made. The case settled based on the findings of the plan.

Mentally Retarded Child

Sara Burns was an 18-year-old mentally retarded child with an IQ of 55. She had contracted meningitis, which was misdiagnosed by the local hospital. Ms. Burns required many types of therapies, as well as placement in a work activity center. The cost of residential placement was also considered.

The rehabilitation expert educated the judge and jury as to Ms. Burns' needs over her lifetime. The jury rendered a verdict of $28 million based on the life care plan projections.

USING THE LIFE CARE PLAN IN COURT TESTIMONY

The life care plan includes easy-to-read charts that detail the cost of each and every service, supply, and renovation required over the injured person's lifetime. The attorney should have the charts blown up and utilized as exhibits during trial. The costs of each item should be covered up and used throughout the trial by the medical witness to lay a medical foundation for the life care plan.

At trial, the rehabilitation expert will use the life care plan charts to illustrate how the severe injury will affect the person's lifetime needs. While giving testimony, the expert leaves the witness stand and uses the charts as a guide to educate the jury regarding the client's needs. The dollar amount of each item is uncovered as each item of the plan is discussed. Many times after the testimony is completed, the charts are entered as exhibits and are thus permitted into the jury room during deliberations.

The attorney should make sure that the rehabilitation expert is ready for a rigorous cross-examination by the opposing attorney. If the expert is experienced and prepared, he or she should be able to handle any questions asked regarding the life care plan.

THE USE OF A REHABILITATION EXPERT BY DEFENDANTS

Rehabilitation experts can assist the defense attorney in determining the amount of the case damages by preparing a life care plan to establish the lifetime care costs as a result of the plaintiff's injuries, as well as for an assessment of employability and earning capacity. This information assists the attorney in establishing the economic damages of the case and may play a role in settling the case.

At times, the use of a rehabilitation expert is more important to the defense than to the plaintiff.

The defense should retain a rehabilitation expert at the earliest possible time when it appears that the plaintiff's injury is permanent and severe. Many times, access to the plaintiff is denied to the rehabilitation expert by the plaintiff's attorney or the court. Thus, it is extremely important that the defense obtain proper medical and deposition information which can be used by the rehabilitation expert to develop his or her own life care plan from the available records. Unfortunately, insurance companies, in an effort to reduce case costs, usually retain the rehabilitation expert at the end stages of the case and sometimes in response to the plaintiff retaining a rehabilitation expert. The results of not properly preparing the case may result in an inability to render opinions regarding the plaintiff's lifetime care needs.

The rehabilitation expert can help the defense in case preparation; provide an objective assessment of the plaintiff's lifetime care requirements and the costs thereof, employability, and earning capacity; and assist in the cross-examination of the plaintiff's rehabilitation expert. At times, the use of a rehabilitation expert is more important to the defense than to the plaintiff. Many defense attorneys are using rehabilitation evaluations and life care plans to obtain an objective assessment as to the economic damages in cases.

CONCLUSION

Rehabilitation experts play an important role in assisting the attorney in documenting damages in cases of catastrophic injuries of both adults and children. The lifetime costs of care are substantial in cases involving severely disabled persons, and their documentation by a comprehensive life care plan that includes loss of earning capacity should not be overlooked. The experience and expertise brought to a case by a rehabilitation expert will help to ensure thorough case preparation and may enhance the damage award.

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Life Care Planning Checklist

- ___ Does the client have a *severe catastrophic permanent* injury?
- ___ Are the consequences of the injury *permanent?*
- ___ Obtain all records
  - ___ hospitals
  - ___ doctors
  - ___ schools
  - ___ employment
  - ___ tax
  - ___ depositions
- ___ Discuss case with a rehabilitation expert
- ___ Retain rehabilitation expert; agree on fee in writing
- ___ Schedule appointment for home visit to client with rehabilitation expert
- ___ Forward all records to rehabilitation expert
- ___ Receive life care plan
- ___ Retain economist
- ___ Receive economist's report
- ___ Rehabilitation expert follow-up prior to trial
- ___ Prepare experts for deposition or trial testimony