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In Transit

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Committee Leadership

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Leadership Note

From the Chair

By Matthew S. Hefflefinger

Fall is upon us, a beautiful time of year. The Trucking Law Committee continues its hard work, and we are already moving forward with planning for 2020.

We have three outstanding articles in this edition of *In Transit*. The articles in this edition reflect the ongoing efforts of many active members of the Committee to remain up to date on the status of the law and best serve the interests of the trucking industry.

As many of you know, we held an incredibly successful Trucking Trial Primer at the Hilton Downtown Nashville on June 26. We have conducted three webinars to date, the most recent of which occurred on September 25, entitled "Gathering, Preserving, and Using Nontraditional Sources of Electronic Data in Your Trucking Case." We look forward to the continued expansion of our Online Programming in 2020, which will include a variety of different recorded programs and the exciting new introduction of podcasts.

We welcome your involvement in the Committee. We are committed to making room for anyone who expresses an interest and wants to get involved. We do expect individuals that have a role in our Committee to undertake work that benefits the Committee, DRI, each of us as lawyers, as well as the trucking industry. If you have any interest in getting involved, please reach out to me—mhefflefinger@heylroyster.com or Committee Vice Chair Steve Pesarchick—spesarchick@sugarmanlaw.com. We will find a place for you.

If you have an interest in writing an article, please communicate with Publications Chair Patrick Foppe at pfoppe@lashlybaer.com. If you have an interest in some of the Online Programming initiatives/opportunities, please contact Online Programming Chair Melody Kiella at kiellam@deflaw.com.

Whether you are new to DRI or have been a member of the Committee waiting to get involved, we welcome you. Please do not be shy.

The DRI Annual Meeting was in New Orleans October 16 – 19. Our Committee's CLE was by Jim Embrey of Hall Booth Smith in Nashville, who discussed "Taking Back Control of Trucking Litigation: Strategic Approach to Evaluating, Settling, or Trying Your Case by Anchoring Value." Kelsey Taylor of Murphy Legal in College Station, Texas discussed "The Ring of Fire: Tips for Defeating the Reptile – Avoiding Low Road Cognition in Depositions." These were followed by our Committee's business meeting and a great dinner at Irene's.

Looking ahead, please calendar the 2020 Trucking Law Seminar, which will be conducted April 29–May 1, 2020 at the J.W. Marriott in Austin, Texas. Austin will be an incredible educational experience for us all. The Seminar is something you will not want to miss. Further details will be coming soon, so keep an eye out.

Lastly, the activity of our Online Community Page has been phenomenal, and I encourage you to continue utilizing the Online Community Page as a platform to communicate with all members of the Committee. We are all here to help each other. We are all in this together.

Matthew S. (Matt) Hefflefinger is a shareholder in the Peoria, Illinois, office of Heyl Royster Voelker & Allen PC and is Chair of the firm's Trucking Practice Group. His practice is devoted primarily to the defense of complex personal injury cases in the trucking and construction industries. Matt is an aggressive advocate who has tried many cases to verdict and is frequently contacted by clients immediately after a catastrophic loss to help develop the facts and case strategy. He is a frequent presenter on a variety of litigation related topics at local and national legal seminars. Matt is the currently the chair of the DRI Trucking Law Committee.

Don't Get Blindsided

An Update on the Renewed Stop Underrides Act

By Nicholas A. Rauch

For weeks, you have prepared your safety director, Tiffany Turner, for the upcoming corporate witness deposition. She has reviewed the discovery responses, corporate documents, employee file, and even reviewed the company's most recent safety policy. Tiffany has a firm grasp of the facts behind the case and shows dedication to preparation. As the safety director for 515 Trucking Co., Tiffany has spent her entire career working in the trucking industry and is familiar with giving deposition testimony. 515 Trucking Co. is a small, family owned trucking corporation with a statewide fleet of heavy duty tractor trailers that perform interstate and intrastate hauling. Preparation goes smoothly, and you present with your witness to the deposition. Tiffany does an exceptional job answering basic background questions, when suddenly she is presented with an obstacle. Tiffany is asked questions regarding the safety standards and requirements for side underride protection on tractor trailers. This question strikes Tiffany as odd, considering the lack of legislation and regulations on this topic. Tiffany does her best to answer the questions, but claims to be unsure about this issue. After all the preparation and time spent with Tiffany, she is caught off guard by questions that may impact 515 Trucking Co.'s liability.

Tiffany shares a growing concern with many safety directors. Side underride guards are protective equipment installed on trailers to prevent passenger vehicles from sliding underneath. Similar to rear underride guards, they prevent collisions wherein a passenger vehicle may become crushed underneath the trailer. Unfortunately for Tiffany, neither the Department of Transportation or the Federal Motor Carrier Safety Administration has promulgated rules or regulations for side underride guards. While companies regularly manufacture side underride guards, trucking companies are not required to install the equipment. This presents an issue for safety directors, like Tiffany, who may face questioning or allegations regarding lack of side underride guards on their trailers.

The Federal Motor Carrier Safety Administration currently has regulations that mandate rear underride guards. Specifically, in 2006, Congress passed legislation mandating that all trailers over 10,000 pounds install rear impact or "underride" protection. (*See* 49 CFR §571.224 (West 2006)). However, Congress has yet to pass controlling legislation mandating the installation of side underride guards for similar trailers. While not binding federal law, some cities, such as Boston and New York City, have already passed local ordinances that mandate side underride guards on all city-contracted vehicles or trailers. As this trend continues to grow, it is no coincidence that Congress was presented with the Stop Underrides Act, a bill requiring the installation of side underride guards on all trailers weighing over 10,000 pounds.

While Congress has now seen two versions of the Stop Underrides Act, neither version has passed into law. Therefore, neither the Department of Transportation nor the Federal Motor Carrier Safety Administration have adopted mandatory rules for regulating the installation of side underride guards or protective equipment. However, litigation on this topic came to the forefront in 2006, when a Texas jury returned a $36.9 Million verdict against a trailer manufacturer who failed to install side underride protection on specific trailers. (*See Baker v. Lufkin Indus.*, No. 2004-320, Panola County (TX Cty. Ct. Nov. 17, 2016).)

The unknown future on regulations requiring side underride protection may be alarming to litigants or trucking professionals who are involved in accidents or products liability claims. In preparation for litigation on this topic, or in counseling trucking professionals on regulatory updates, a brief analysis on this issue must involve an identification of the current status of the Stop Underrides Act and how other courts have addressed similar side underride cases.

The Stop Underrides Act

Side underride legislation began in 2017, when U.S. lawmakers introduced a bill into Congress requiring that all tractor trailers, weighing over 10,000 pounds, be equipped with side underride guards. (*See* S.2219 – Stop Underrides Act of 2017, 115th Congress, 2017–2018.) The so called "Stop Underrides Act," was introduced by representatives from NY, FL, TN, and CA. Specifically, the bill attempted to

force the Department of Transportation to issue a final ruling that required the installation of front and side underride guards on all trailers, semi-trailers, and single unit trucks with a gross vehicle weight of more than 10,000 pounds. As this is the first regulatory legislation on this topic, the bill required that underride guards meet certain performance standards prior to installation. Additionally, the bill required a review of all underride standards every five years by the Department of Transportation. After the bill was introduced in 2017, no action was taken until March 2019, when the bill was reintroduced. (Stop Underrides Act of 2019–2020, S. 665, 116th Congr. (March 2019).) Most recently, the bill was read and referred to Committees on Commerce, Science, and Transportation. The bill's referral shows that lawmakers are now taking active procedural steps towards passing the Stop Underrides Act into law. If this bill is passed, the Department of Transportation will issue final rulings on the widespread installation of side underride guards. Eventually, this will force the Federal Motor Carrier Safety Administration to adopt regulations on similar equipment.

As a side note, this requirement may cause some trucking professionals to express concern and opposition. While the legislation is focused on mandatory installation of front and side underride protection, it also imposes a substantial cost for trucking businesses with large, interstate trucking fleets. Essentially, the bill requires that all carriers purchase and install front and side underride guards for every trailer. As the Federal Highway Administration accounted for over 12 million registered trailers in the United States alone, mandatory installation of front and side underride guards presents a hardship for some trucking professionals who will be required to bear the costs. The bill may also present a hurdle for trucking companies, as well as state and federal law makers, as side underride guards currently have no standardized regulations or specifications.

Current Litigation

Side underride guards have presented hurdles for litigants with trucking law issues because no legislation or court opinions have established that the equipment is mandatory. Thankfully, recent courts have agreed that testimony regarding side underride protection lacks probative value. For example, a Kentucky federal district court recently held that expert testimony regarding alternative designs for side underride guards was inadmissible because the proposed design lacked any published or peer-reviewed authority and the design was not currently used in the trucking industry. (*See Wilden v. Laury Transp., LLC*, 2016 WL 4522670, at *3 (W.D. Ky. 2016).) In another products liability case, a Louisiana federal court ruled that evidence regarding similar side underride accidents was inadmissible, for purposes of liability, because the accidents were dissimilar. (*See Beane v. Utility Trailer Mfg. Co.*, 2013 WL 837155, at *2–3 (W.D. La. 2013).) However, this same court ruled that competing testimony regarding alternative side underride protection designs was enough to create a factual issue for the trier of fact. (*See Beane v. Utility Trailer Mfg. Co.*, 934 F.Supp.2d 871, 884 (W.D. La. 2013).)

At this time, the Stop Underrides Act is under congressional review. Trucking professionals and safety directors, like Tiffany, must be updated on this issue and the implications of the bill. Further, litigants with claims involving personal injury or products liability must assess the current case law on this topic and understand the unregulated nature of this safety equipment. Without standardized, regulatory rules mandating side underride guards, trucking companies operate without any substantive guidance on this topic. Until Congress votes on the Stop Underrides Act, side underride protection may present difficult territory.

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The Importance of Political Preference

Predicting Jurors' Verdict Leanings in the Trump Era

By Lorie Sicafuse, Melissa Loberg, and George Speckart



In recent years, American politics have become increasingly polarized and the gap between Republicans' and Democrats' political attitudes has widened considerably. The changes in the American political landscape have caused many trial attorneys to express a renewed interest in the ability to predict jurors' verdicts based on their political leanings. Civil defense attorneys are generally wary of liberals, in part due to assumptions that liberal jurors are anti-corporate, predisposed to advocate for underdogs or any purported victim of wrongdoing, and rely on the "heart over the head" when making decisions. Conversely, plaintiff attorneys tend to strike conservatives, often based on the notions that conservatives are "victim blamers" who enthusiastically endorse capitalism and personal responsibility.

In the 1990s and early 2000s, CSI Litigation Psychologists analyzed data collected from mock jurors and actual jurors to assess the extent to which jurors' political leanings predicted their verdict preferences. Results revealed minimal differences between self-professed Republican and Democrat jurors' verdict preferences, with Independent jurors slightly (but not significantly) more likely to side with the plaintiff than their counterparts. However, it is reasonable to expect that jurors' political attitudes may have a stronger impact on their verdict preferences today, given the significant socio-cultural changes that have occurred. In the present article, we explore the current relationship between political leanings and verdict disposition in civil cases.

Comparing Liberal and Conservative Jurors: Are They Really That Different?

Research reveals several differences between liberals and conservatives in terms of their values, beliefs, and personality traits. The results of multiple studies conducted by preeminent scholar Jonathan Haidt indicate that liberals and conservatives differ in terms of their "moral foundations," which subsequently guide their judgements. (Haidt, J. (2012).) The righteous mind: Why good people are divided by politics and religion. *New York: Pantheon.*) Liberals' moral systems are primarily based on promoting well-being, minimizing harm, and on fairness and reciprocity. Conservatives share those values, but also value loyalty, respect, and purity more than their counterparts. (Graham, J., Haidt, J., & Nosek, B. A. (2009).) Liberals and conservatives rely on different sets of moral foundations. (*Journal of Personality and Social Psychology*, 96, 1029-10467.) These inherent differences in moral foundations help explain why liberals are more concerned with achieving

social and economic equality, whereas conservatives tend to be more traditional, more inclined to accept the status quo, and more likely to endorse beliefs in a Just World and the Protestant Work Ethic (respectively, the beliefs that people get what they deserve and that anyone who works hard can achieve success). (Christopher, A. N., Zable, K. L., Jones, J. R., & Marek, P. (2008).) Protestant ethic ideology: Its multifaceted relationships with just world beliefs, social dominance orientation, and right-wing authoritarianism. (*Personality and Individual Differences, 45*, 473-477.) Statistically, conservatives also have a lower tolerance for uncertainty and a higher "need for closure" (*i.e.*, a motivation for a firm answer to a question or resolution to a dispute) compared to liberals. (Jost, J. T., Glaser, J., Kruglanski, A. W., & Sulloway, F. J. (2003).) Political conservatism as motivated social cognition. (*Psychological Bulletin, 129*, 339–375.) Conversely, liberals score higher than conservatives on measures of "openness to new experiences," and are more likely to entertain alternative theories and ideas. There is also some evidence that liberals require more evidence than conservatives before making a judgment or decision. (Carney, D. R., Jost, J. T, Gosling, S. D., & Potter, J. (2008).) The secret lives of liberals and conservatives: Personality profiles, interaction styles, and the things they leave behind. (*Political Psychology, 29*, 807–840.)

Political Affiliation and Verdict Disposition: A Current Empirical Exploration

CSI Litigation Psychologists maintain and continually add to databases containing information regarding jurors' reported demographics, beliefs, personality traits, and experiences. This data allows us to identify relationships between individual jurors' characteristics and their verdict orientation. To explore jurors' recent political preferences, a sample of 742 jurors who participated in mock trial or focus group research across 28 different civil cases in the years 2016-2018 were analyzed. The jurors were drawn from multiple locations nationally, representing 11 different states and 23 different counties. The lawsuits jurors evaluated involved allegations of negligence including trucking and medical malpractice cases, product and premises liability matters, and discrimination disputes. As shown below, jurors who identified as Democrat were more inclined to favor the plaintiff, and those who identified as Republican were more inclined to favor the defense. Surprisingly, jurors who identified as Independent were also more likely to side with the defense.

Importantly, the relationships outlined above were present in all types of cases included in our sample; the patterns were generally the same regardless of whether the jurors were considering a trucking matter, a premises liability matter, a product liability matter, allegations of discrimination, or other types of civil disputes.

Understanding the Results

The current findings provide some support for the pervasive notions that conservative jurors are favorable for the defense, whereas liberal jurors are favorable for plaintiffs. Given the size and variability of our sample coupled with our statistical results, we do advise counsel that jurors' political preferences can indeed make a difference. However, counsel should consider the limitations of using jurors' political affiliation as an indicator of verdict disposition.

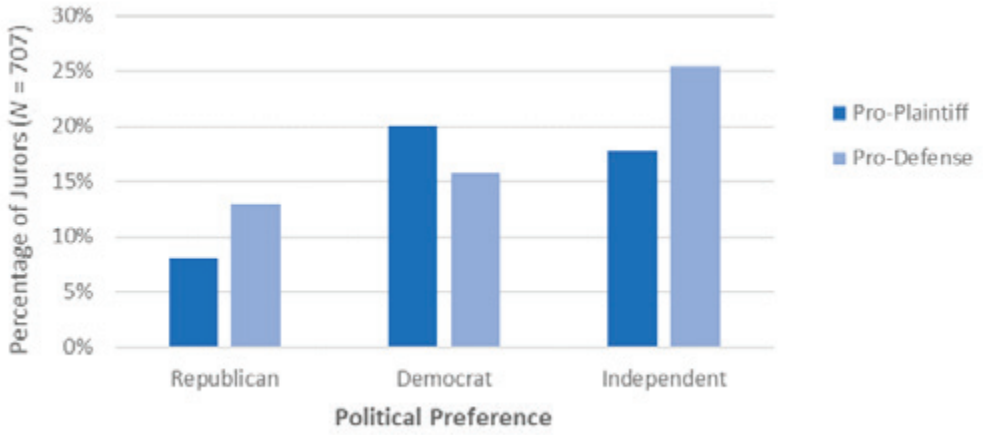

Figure 1. Relationship between juror political preference and verdict disposition.

Although a slight majority of Republican jurors favored the defense, over one-third favored the plaintiff, and over one-third of Democrat jurors favored the defense.

Thus, rather than relying on jurors' political affiliations alone, we recommend learning how strongly jurors feel about their political preferences, the extent to which they are active in politics through advertising, volunteering, or protesting, or why they lean towards one side or the other. Some jurors may self-identify as "Republican" or "Democrat" without a full understanding of the basic policy positions characterizing these parties. Some jurors are single-issue voters (*e.g.*, abortion, gun control, taxation) and support a particular party although they do not psychologically align with that party.

Interactions Between Facets of Political Orientation and Case Characteristics

Additionally, counsel should consider the case context. The extent to which the plaintiff has some comparative fault for an injury can have different effects on liberal and conservative jurors' decision-making. Studies show that liberal and conservative participants provide similar amounts of compensation to an injured individual when that individual is described as blameless for their condition. When the injured individual is described as partially responsible for their own condition—even if an external party is *mostly* responsible—liberal participants provide significantly higher compensation than conservatives. (Farwell, L., & Weiner, B. (2000).) Bleeding hearts and the heartless: Popular perceptions of liberal and conservative ideologies. (*Personality and Social Psychology Bulletin, 26*, 845–852.) Counsel should be aware of such findings and their implications for cases when they plan to implicate a plaintiff as partially responsible, and when they plan to frame the case as "a tragic event" that is "no one's fault."

As previously discussed, liberals tend to score higher on measures of openness to new experiences and need for cognition compared to conservatives. These two characteristics are often favorable for defendants in litigation. Openness to new experiences can increase the likelihood that jurors will consider and internalize alternate defense theories, particularly in cases involving more complex evidence and testimony and "battles of the experts." Jurors with higher need for cognition require more information before reaching a conclusion. Not only are liberals less likely than jurors lower in need for cognition to make up their minds after opening statements or the plaintiff's case presentation, but they also require more evidence to determine that the plaintiff has met the burden of proof. Conversely, conservatives' lower tolerance of uncertainty (on average) and greater need for closure may make them risky jurors for cases in which the only possibility is to blame the defendant and/or accept that a tragic injury or death was completely unpredictable and unavoidable. Research suggests that conservatives are more likely than liberals to experience psychological discomfort in response to such events, (Jost, J. T., Napier, J. L., Thorisdottir, H., Gosling, S. D., Palfai, T. P., & Ostafin, B. (2007).) Are needs to manage uncertainty and threat associated with political conservatism or ideological extremity? (*Personality and Social Psychology Bulletin, 33*, 989–1007) and may be motivated to side with the plaintiff and award high damages in an effort to resolve the situation.

None of these observations should be interpreted as rules for counsel in jury selection. Rather, they are intended to illustrate the nuances and complexities involved in evaluating jurors based on their political beliefs and behaviors. For each specific case, there are unique juror experiences, attitudes, and beliefs that are particularly strong predictors of juror decisions. At CSI, we have collected and analyzed case-specific data to identify the questions that should be answered (either via oral *voir dire*, juror questionnaires, or background investigations) with regard to a variety of matters. The most efficacious predictors of verdict orientation may not be self-evident. Pre-trial research projects such as focus groups and mock trials can often illuminate unexpected predictors of verdict orientation.

Ultimately, identifying unfavorable jurors is often a complex task. Jurors' voter registration or self-identified political preference are inadequate predictors of verdict orientation. The strength and dimension of jurors' political beliefs, the extent to which they engage in political-related behaviors and activities, and the reasons *why* a juror favors a particular party can be significant predictors of verdict orientation. Yet, this knowledge still must be considered within the context of particular case issues and a multitude of other indicators that can signal a risky juror. Effective juror selection strategies typically require a talented team of professionals. The attorney conducting *voir dire* must focus on connecting with the jury, asking the right questions, and framing strategic follow-up questions to maximize the potential for identifying unfavorable jurors, and—more importantly—pursuing strikes for cause. Other members of the trial team should be occupied recording questionable or alarming juror responses that may be grounds for cause strikes, as well as identifying any risky jurors from their perspective and their rationale

for identifying these jurors as such. A qualified litigation psychologist, as an extension of the trial team, can help you ask the questions that will yield the most predictive information, guide you towards achieving strikes for cause, and quickly analyze all juror responses so that you make jury selection decisions grounded in scientific research that produces *real results.*

Lorie Sicafuse, Ph.D., is a litigation psychologist at Courtroom Sciences, Inc. (CSI). Dr. Sicafuse has a proven track record using her extensive knowledge of psycho-legal research, rigorous methodological and statistical training, and analytical skills to dramatically reduce anticipated litigation costs and to protect—or even enhance—the reputations of corporations and counsel facing high-stakes litigation.

Melissa Loberg is a litigation consultant with CSI. Dr. Loberg provides witness training in anticipation of deposition and trial; plans and implements focus group and mock trial research; and assists with jury selection. Dr. Loberg provides witness training in anticipation of deposition and trial; plans and implements focus group and mock trial research; and assists with jury selection.

George Speckart, also with CSI, is the only litigation psychologist in the country with experience spanning four decades; a Ph. D. in psychological measurement; and internationally recognized publications on the prediction of behavior. Since the early 1980s, he has worked in four different consulting firms, compiling the best "tricks of the trade" from each one in research design, witness training and juror profiling.

CSI is a corporate member of DRI.

What Did This Life Care Plan Just Do to My Trucking Case?

Deposition Strategies for Attacking Plaintiff's Life Care Planner

By James Embrey and Asya Morgan


Foreword

So there you sit at your desk, sipping on your third Diet Coke (and it's only 6:24 a.m.), dutifully defending your trucking cases. You think you have it all figured out. You know the value of your cases based on the strengths and weakness of each one. You've advised your client of your thoughts and impressions and you soldier on. DING! Your email notification sounds for your 22nd email of the day (you'll top out at around 104). You look up and read the preview pane. It's from plaintiff's counsel in one of your trucking cases which you thought you had nailed down on liability and damages. **SUBJECT LINE**: *"Plaintiff's Life Care Plan."* Huh? You click on the attachment and see the Life Care Plan was prepared by "Dr." Stick-It-To-Ya and when you scroll down to get to the punchline you see an additional claim for damages of $1.4 million. The beads of sweat form on your brow and a few make their way down to drop onto the latest edition of *In Transit*. By the time you've processed this latest move by opposing counsel, you are halfway through your fourth Diet Coke of the day and you've heard the telltale DING! another 16 times. Do not fret! We've got your back…read on…

Introduction

Utilization of a life care plan (LCP) in trucking litigation is a popular tool for plaintiffs to attempt to achieve higher settlement and jury verdict values based on theoretical treatment needs. Paul Deutsch and Frederick Raffa introduced the term "life care plan" into the legal literature in 1981 in the publication *Damages in Tort Actions*. Since then, the LCP has become an effective means for plaintiff's attorneys to anchor juries, mediators, and their clients to an inflated valuation of a case. A strong, fact-based attack of the LCP through a deposition of the life care planner is one of the most efficient strategies for lowering the purported damages in a case involving catastrophic injury.

Attacking the Life Care Planner's Credibility

When deposing a life care planner, the credibility of the deponent should be evaluated and questioned based upon the following factors: the individual's certification and experience with creating LCPs, the individual's retention as a quintessential plaintiff's expert for hire, the individual's reliance on the records, and the individual's interviews with the plaintiff and other witnesses involved in the treatment of the plaintiff.

Certifications and Experience

Litigators are familiar with the basic research required to attack an expert, however, deposing a life care planner requires a deeper look into the exact credentialing associated with the expert. There are a number of organizations that offer "certification" in life care planning; however, many times these organizations are a pay-for-play type of certification. Highlighting the lack of uniformity and ease of certification can assist in creating doubt in a jury's mind as to the numerical data being offered by the life care planner. For example, the International Commission on Health Care Certification (ICHCC) requires one-hundred and twenty (120) hours of experience "in life care planning or in areas that can be applied to the development of a life care plan or pertain to the service delivery applied to life care planning."(International Commission Health Care Certifications, ICHCC (2019), https://www.ichcc.org/certified-life-care-planner-clcp.html (last visited Sep 8, 2019).) The ICHCC's certification program is available online and is obtainable in approximately five (5) days, which can be used to suggest to a trier of fact that a LCP is not an industry rooted in reliable data or facts.

Review of Available Records and the Interview Process

Establishing an expert's lack of familiarity with the plaintiff's claimed medical issues is another beneficial tactic in deposing a life care planner. Many of these cases, involving catastrophic injuries, contain voluminous medical records. Many times a life care planner is directed to specific issues concerning future care of a person by the treating physicians and/or the plaintiff's counsel. Highlighting an expert's lack of familiarity with the available records is a quick and effective way to capitalize on the flimsy standards associated with life care planning. Moreover, LCPs are "not developed by a single practitioner, but [are] collaborative in nature and informed by the opinions and insights of members of an individual's treatment team and other professionals," and a failure to consult with the treating physicians can create serious doubt regarding the accuracy of the LCP. (9 Damages in Tort Actions §106.05 (2019).)

Quintessential Expert for Hire

A majority of life care planners are routinely retained by either plaintiffs or defendants, and the weight of their testimony can be weaponized against them if researched and implemented. For example, reviewing prior testimony can reveal inconsistencies in the approach of the life care planner in creating and implementing LCPs. (Thomas J. Hurney, Jr., and Stuart P. Miller, *Defending Against Inflated Life Care Plans*, IADC Mid-Year Summer Meeting (2016) (http://www.iadcmeetings.mobi/assets/1/7/14.1-_Stuart-_Defending_Against_Inflated_Life_Care_Plans.pdf).) Further, the use of prior deposition testimony can reveal the fees associated with the life care planner's services as well as the frequency of the expert's testimony. Analyzing the amount of income a life care planner generates from their expert testimony services can establish a correlation between their testimony offered in the LCP and a financial incentive to inflate LCPs in an effort to secure future employment.. The life care planner's frequent retention by plaintiff's counsel should be explored in the deposition in an effort to minimize the effect of the LCP in contemplation of future damages in catastrophic injury cases.

Attack Each Element of the Life Care Plan

LCPs are based on the future medical needs of the plaintiff, however, many of the elements included in the plans are speculative and inflated to include unnecessary treatment, therapies, and recommendations. Each item identified in the LCP should be challenged in the deposition by comparing the records, prior treating physician testimony, and available expert testimony that forms the basis for the recommendations. For example, LCPs involving catastrophic injury require "qualified rehabilitation professionals [to] support plan recommendations regarding areas such as home care, supplies, equipment and transportation." (9 Damages in Tort Actions §106.06 (2019).)

A study on life care planning in catastrophic injury cases showed that the supervision/ personal care element of a LCP is the single most expensive recommendation. (Jamie Pomeranz *et al.*, *Consensus Among Life Care Planners Regarding Activities to Consider When Recommending Personal Attendant Care Services for Individuals with Spinal Cord Injuries: A Delphi Study*, 5 Journal of Life Care Planning 7–22 (2006).) Attacking the validity of the recommendation for a personal care assistant can drastically reduce the valuation of a LCP. The type of supervision recommended as well as the time requirements, level of care required, and the frequency provide a greater insight into the recommendation that an individual with catastrophic injuries needs constant monitoring. For example, is the service of a sitter, certified nursing assistant (CNA), or in-home nurse being recommended and why? Sitters and CNAs are substantially cheaper than that of a nurse. Taking the time to explore exactly what is recommended in the LCP, item by item, will decrease the overall amount of the

LCP and will create an alternative anchor number that the defense can better justify in a mediation or at trial.

Advocate for Reasonable Alternatives

Finally, when deposing a life care planner look for opportunities to introduce a more reasonable alternative to the recommendations contained within the LCP. An attack of an LCP should clearly advocate for "maintenance offsets to future medical care… when future care includes life necessities which would have been required by the injured individual, pre-tort… such [as] food, clothing, and shelter." (George A. Barrett, Personal Maintenance Expenditure Offsets in Life Care Valuations, 11 J. Legal Econ. 49, 58 (2001).) Further, the availability of health insurance has been used to combat inflated LCPs by showing that a plaintiff would not incur the full cost of future medical treatment under the ACA, Medicaid/Medicare or private pay insurance.

Retaining an insurance expert can assist in illustrating that once a plaintiff reaches their deductible under a health insurance policy that the actual cost of annual services is drastically reduced. However, be advised that courts are split as to the admissibility of health insurance on future medical damages under the collateral source rule. Also, offering new medical treatments, therapies, and/ or technologies that assist an individual with a catastrophic injury can provide another basis for challenging an inflated LCP. Suggesting reasonable alternatives during a deposition of a life care planner can elicit desired testimony from a plaintiff's life care planner that highlights the availability of different, more cost-effective alternatives to the treatment originally recommend under the LCP.

Conclusion

A LCP works to anchor a jury to the damage valuations proffered by the plaintiff and his or her counsel, and the nature of the injuries involved in trucking litigation often involves the creation of a LCP. A thoughtful attack of a life care planner via deposition can have significant impacts on the damages recovered against a trucking client by challenging the validity of the LCP, the credibility of the life care planner, and the spurious nature of the inflated recommendations contained within a plaintiff's LCP. A good LCP can be beneficial for a plaintiff's case, however, it can be detrimental when the proper attack is mounted against the life care planner by locking a plaintiff into unreasonable and unnecessary recommendations that evidence a financial incentive to increase the damages.

Epilogue

Feeling better, and actually emboldened by the realization that you can turn this newly submitted LCP against the plaintiff through a thoughtful and pointed deposition, you lean back in your chair and take one of the last remaining bites of the taquito you bought from the Shell station on your way in this morning. You think to yourself as you wipe the processed cheese from your chin, "Oh, yeah…this is going to be fun…" After all, isn't that why we do what we do?

DING!

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