



The Voice of the  
Defense Bar™

# The Voice

November 20, 2019

Volume 18, Issue 46

[This Week's Feature](#)  
[And The Defense Wins](#)  
[DRI Cares](#)

[Upcoming Seminars](#)  
[Upcoming Webinars](#)  
[DRI Membership—Did You Know...](#)

[New Member Spotlight](#)  
[Quote of the Week](#)

## This Week's Feature



## Counteranchoring: An Important Thought Before Trial

By Nicholas A. Rauch

Before a trial begins, many civil attorneys are faced with the same issue. How can the plaintiff's alleged injury be translated into a quantitative dollar value for the jury to award? To some, the use of an expert or accountant is effective. To others, quantitative factors such as property damages, wage loss, or lost income may provide solid numbers for the jury to compute. However, try as we might, jurors often use their own basic human instincts, along with their past experiences, to compute a dollar value that they believe is fair. The problem is that most jury members have no personal background in valuing injuries, property damages, or expected future income.

*Article continues on page 4.*



---

### And The Defense Wins

- Keep The Defense Wins Coming!
- George Soule and Melissa Stull

[MORE](#)

---

### DRI Cares

- #GoldenCoatDrive: The Need for Warmth
- MDLA Supports Jackson Food Pantry

[MORE](#)

---

### Upcoming Seminars

- Professional Liability, December 5–6, 2019
- Women in the Law, January 22–24, 2020
- Civil Rights and Governmental Tort Liability, January 30–31, 2020
- Product Liability, February 5–7, 2020
- Toxic Torts and Environmental Law, February 19–20, 2020

[MORE](#)

---

### Upcoming Webinars

- Reptile Theory in Jury Selection, December 2, 2019, 12:00 pm–1:00 pm CST
- Medicare Endgame—Applying Predictive Settlement Strategies to Mitigate MSP Exposure, December 5, 2019, 12:00 pm–1:30 pm CST
- Insurance Coverage Issues Arising from Hurricanes Harvey and Irma: Part 2, Hurricane Harvey, December 9, 2019, 12:00 pm–1:00 pm CST
- Brace Yourself—The CCPA Is Coming, December 13, 2019, 12:00 pm–1:00 pm CST

[MORE](#)

---

### DRI Membership—Did You Know...

- DRI Online Events: It's What's for Lunch

[MORE](#)

---

### New Member Spotlight

Zachary S. Anstett, Cranfill Sumner & Hartzog LLP

[MORE](#)

## Win the war for talent.

As a DRI member, you have access to competitive Life, Dental and Vision benefit solutions from MetLife.

**Deliver the coverage employees want while keeping costs in check.**

1. MetLife's 16th Annual U.S. Employee Benefit Trends Study, 2018



# 64%

of employees want a wider array of non-medical benefits.<sup>1</sup>

**LEARN MORE**

Looking for  
**Targeted  
Contacts?**

**Hit the  
Bullseye**  
with **dri**<sup>TM</sup>



Contact Laurie Mokry today at  
[lmokry@dri.org](mailto:lmokry@dri.org) or at **312.698.6259**.

### Quote of the Week

"Let us dedicate ourselves to what the Greeks wrote so many years ago: to tame the savageness of man and make gentle the life of this world."

—[Robert F. Kennedy](#) ([Nov. 20, 1925–June 5, 1968](#)).

## This Week's Feature

## Counteranchoring: An Important Thought Before Trial

By Nicholas A. Rauch



Before a trial begins, many civil attorneys are faced with the same issue. How can the plaintiff's alleged injury be translated into a quantitative dollar value for the jury to award? To some, the use of an expert or accountant is effective. To others, quantitative factors such as property damages, wage loss, or lost income may provide solid numbers for the jury to compute. However, try as we might, jurors often use their own basic human instincts, along with their past experiences, to compute a dollar value that they believe is fair. The problem is that most jury members have no personal background in valuing injuries, property damages, or expected future income.

Knowing this problem, plaintiffs' counsel regularly will request higher dollar value verdicts because they anticipate that a jury will be unfamiliar with valuing an injury or death. In this way, it is difficult to dissuade jurors from rendering a large verdict when advocating to jurors with no perceptions of claim worthiness. Plaintiffs' counsel can elicit large jury verdicts and greatly inflate their overall award by exploiting a juror's lack of experience in valuing injuries. Thus, the concept of "anchoring" was born.

Anchoring is a form of psychological manipulation used on jurors to provide momentum for plaintiffs' counsel to urge a jury to award an unjust and irrational verdict. Plaintiffs' counsel will rely on the jurors' inexperience with valuing injuries to suggest that an injury is worth more than is reasonable. Unsurprisingly, this technique is widely used in plaintiffs' jury selection, voir dire, and opening and closing statements. The psychology behind anchoring correlates with our own human perceptions, based on our experiences or "reference points." Cass R. Sunstein et al., *A Behavioral Approach to Law and Economics*, 50 Stan. L. Rev. 1471, 1535 (1998). When a jury is initially confronted by a large damages award, the jurors will use this point as a reference in deciding whether the defendant's following request is similar. As the jurors likely have not quantified an injury or loss to this extent, they lack the reference points or previous experience to make an accurate valuation.

However, the defense attorney is not without hope. Many authors have published articles on the effects of counterstrategies to combat and neutralize plaintiffs' counsel's anchoring techniques. Most importantly, the Campbell

study, first published in the Iowa Law Review, found that the most effective way to neutralize an anchoring attempt from a plaintiff was to counteranchor. John Campbell et al., *Countering the Plaintiff's Anchor: Jury Simulations to Evaluate Damages Arguments*, 101 Iowa L. Rev. 543 (2016). Counteranchoring relies on the same set of psychological effects as a plaintiff's anchor by providing a much lower alternative damages suggestion for jurors to analyze the correct award. It provides the jurors with a different "reference point" on which to base their decision, rather than solely relying on the plaintiff's large damages request. Defense attorneys have been hesitant to use this tactic out of fear that it may concede liability and provide a minimum floor for damages. However, the effect, if any, of conceding liability is greatly outweighed by the potential cost of allowing an unchecked anchor to influence an award. Further, the Campbell study also found that there was no direct correlation between counteranchoring and whether jurors felt that the anchor conceded liability. Campbell, *supra*, at 565. Thus, with no "concession effect," it seems unlikely that a counteranchor can be viewed as setting a "floor" for damages.

Defense attorneys have also been hesitant to anchor due to a regular practice to ignore a plaintiff's enlarged demand. The Campbell study confirmed that countering is significantly more effective than attacking or ignoring a plaintiff's anchor. *Id.* at 563. This point is also supported by the Stein study, which found that countering produced a significantly lower sentence than ignoring the anchoring effect. Christopher Stein & Michelle Drouin, *Cognitive Bias in the Courtroom: Combating the Anchoring Effect Through Tactical Debiasing*, 52 U.S.F. L. Rev. 393, 393 (2018). Overall, studies show that the most effective strategy to combat the anchoring effect is for defense counsel strategically to offer a counteramount to the jury regarding the damages award. Ignoring the damages demand has proved to be ineffective. Similar to an inordinately high anchor, the danger of losing credibility may arise if the counteranchor is exceedingly low. Yet, a low anchor that loses some credibility with a jury still has a greater effect on lowering damages than no counteranchor at all. Thus, suggesting a counteranchor, even if minimal, will often be an effective strategy.

When a plaintiff's proposed damages award is relatively high, defense counsel must provide a counteranchor for the jury to make a fair decision. The Campbell and Stein studies show that using a counteranchor may be the only way to combat a plaintiff's anchoring efforts effectively. Counteranchoring avoids the possibility that a jury will make an imbalanced and inexperienced decision. This is an important, proven, analysis for any party confronted with a trial.

[Nicholas A. Rauch](#) is an attorney with **Lind Jensen Sullivan & Peterson PA** in Minneapolis, Minnesota, where he focuses his practice on professional liability defense, trucking law, personal injury, and wrongful death. He also currently serves on the steering committee of the DRI Litigation Skills Committee.

## And The Defense Wins

### Keep The Defense Wins Coming!

Please send 250–500 word summaries of your “wins,” including the case name, your firm name, your firm position, city of practice, and e-mail address, in Word format,

along with a recent color photo as an attachment (.jpg or .tiff), highest resolution file possible (*minimum* 300 ppi), to [DefenseWins@dri.org](mailto:DefenseWins@dri.org). Please note that DRI membership is a prerequisite to be listed in “And the Defense Wins,” and it may take several weeks for *The Voice* to publish your win.

### George Soule and Melissa Stull



DRI members [George Soule](#) and [Melissa Stull](#) of **Soule & Stull** in Minneapolis, Minnesota, achieved a defense verdict for their client on June 27, 2019, in the United States District Court for the District of Colorado in Denver.

In this case a plaintiff truck driver sustained injuries when he was struck by cargo that fell from his step-deck trailer at the unloading site in Minneapolis. Soule & Stull’s client Immedia had purchased the cargo, and the plaintiff had transported the cargo from the Denver area to Minneapolis. The plaintiff claimed that Immedia failed to prepare the cargo adequately for shipment and was negligent in supervising the unloading process in Minneapolis. Immedia showed during the trial that it was not responsible for how the cargo was loaded, secured, or transported, nor did it have a duty to supervise its independent contractor during unloading.

The plaintiff’s injuries were largely undisputed. He claimed traumatic brain injury; paralysis of his left arm; fractures to his cervical spine, jaw, ribs, knee, tibia, and

ankle; pulmonary contusion; cervical nerve avulsion and torticollis of his neck; and post-traumatic stress disorder. The plaintiff was 27 years old at the time of his accident and argued that he required 24-hour, live-in care for the remainder of his life.

The trial court denied Immedia’s motion for summary judgment; denied Immedia’s Daubert challenges to three of the plaintiff’s experts; granted the plaintiff’s motion to allow punitive damages; and denied Immedia’s request for bifurcation of punitive damages.

The plaintiff requested that the jury award over \$15 million in economic losses, claiming permanent injuries and disability, past and future medical expenses, and past and future wage loss. In addition, the plaintiff sought pain and suffering damages and punitive damages.

During the two-week trial, the parties presented 39 witnesses, including 18 experts. After four hours of deliberation, the jury returned a unanimous defense verdict, finding against the plaintiff’s claims that Immedia was negligent and vicariously liable for the alleged negligence of its contractor.



## DRI Cares

### #GoldenCoatDrive: The Need for Warmth

#DRICares is hosting its second annual **SLDO Golden Coat Drive Competition!** From December 1 to December 31, SLDOs are encourage to collect coats to donate to a local shelter, elder care center, veterans' center, or women's center. Collecting coats saves lives, as the health effects of extreme cold can be life threatening, ranging from

heart attacks to pneumonia. In 2018, the SLDOs collected over 2,000 coats, with **Washington Defense Trial Lawyers** collecting over 1,200 coats! Which SLDO will win this year? The Golden Coat trophy will be announced and presented at the 2020 leadership meeting in Chicago. Let the collecting and race for bragging rights begin!



## DRI Cares

### MDLA Supports Jackson Food Pantry

During the October 31 joint seminar of Mississippi Claims Association and **Mississippi Defense Lawyers Association (MDLA)**, over 110 canned goods were collected for [Stewpot Community Services](#) in downtown Jackson. On November 5, the items were delivered to Stewpot, where

MDLA volunteers also assisted the food pantry workers by stocking the shelves.

Stewpot provides thousands of Jackson-area men, women, and children with hot meals, groceries, clothing, shelter, childcare, mentoring, and other programs to nurture them and help them get back on their feet.





## Upcoming Seminars

### Professional Liability, December 5–6, 2019

dri	Professional Liability Seminar
	<p>December 5–6, 2019 New York</p> <p><a href="#">REGISTER TODAY</a></p>

The life of a professional can be hard. Client demands, complex and ever-evolving technology, and the stress of maintaining current relationships while developing new ones can strain most professionals. Add a lawsuit against the professional, and the strain can rise to a potential danger. The 2019 DRI Professional Liability Seminar addresses these stressors, offering solutions for handling current claims and practical tips to avoid the next one. Join our preeminent faculty for two days of stress relief, claims mitigation, and networking with clients and colleagues. Click [here](#) to view the brochure and to register for the program.

### Women in the Law, January 22–24, 2020

dri	Women in the Law Seminar
	<p>January 22–24, 2020 Scottsdale, AZ</p> <p><a href="#">REGISTER TODAY</a></p>

This is a seminar unlike any other. It is the best networking event for women lawyers. We gather outstanding women from law firms and corporate legal departments around the country to provide you with practical advice, excellent programming on aspects of the law that span all substantive areas, and the opportunity to build lasting relationships with the women you encounter. If you have attended this seminar in the past, you know this to be true. If you have never attended, we encourage you to join this amazing group of women as we strive to inspire and support each other. We sincerely hope that you will consider attending this year's DRI Women in the Law Seminar as we celebrate our history and look forward to our very bright future. Click [here](#) to view the brochure and to register for the program.

### Civil Rights and Governmental Tort Liability, January 30–31, 2020

dri	Civil Rights and Governmental Tort Liability Seminar
	<p>January 30–31, 2020 San Diego</p> <p><a href="#">REGISTER TODAY</a></p>

DRI's 33rd annual Civil Rights and Governmental Tort Liability Seminar will provide you with the tools to represent governmental entities from pre-claim through trial. Among this year's faculty are a renowned Supreme Court advocate, experts on municipal issues, insurance claims professionals, in-house counsel, defense attorneys, and risk management professionals. The speakers will cover trends from across the country and address timely topics relevant to your practice, including matters related to prison intake, the First Amendment, and Title IX. Attendees will also learn practical tips for addressing issues in the areas of qualified immunity, *Monell* claims, Rule 68 offers of judgment, and more. Attendees will be offered opportunities to network and exchange ideas on the topics and techniques presented with experienced litigators and claims professionals. Click [here](#) to view the brochure and to register for the program.

## Upcoming Seminars

### Product Liability, February 5-7, 2020

dri	<b>Product Liability Conference</b> Ready, Set, Geaux in NOLA
	February 5-7, 2020 New Orleans <a href="#">REGISTER TODAY</a>

Join us for Products 2020 in New Orleans, a city known for food, more food, music, and fun! Once again, we will have lots of opportunities for networking in great spots throughout this wonderful city. Combined with presentations on the development and use of virtual reality, improving your PowerPoint presentations, and the usual diverse and interesting sessions from our specialized litigation groups, this is a program that you will not want to miss! Click [here](#) to view the brochure and to register for the program.

### Toxic Torts and Environmental Law, February 19-20, 2020

dri	<b>Toxic Torts and Environmental Law Seminar</b>
	February 19-21, 2020 Phoenix <a href="#">REGISTER TODAY</a>

DRI heads west with the latest in toxic torts and environmental law to keep your practice on the cutting edge. Come to Phoenix to learn about the latest updates and changes in toxic torts and environmental law with the best lawyers, judges, and experts across the country. This is the premier gathering for the defense bar, focusing on litigation strategies and regulatory updates, presented in beautiful Arizona. Click [here](#) to view the brochure and to register for the program.

## Upcoming Webinars

### Reptile Theory in Jury Selection, December 2, 2019, 12:00 pm–1:00 pm CST



Plaintiff attorneys are implementing reptile theory in a broad range of cases, such as health care, employment, bad faith, and personal injury. This theory invokes the jurors' sense of danger and invokes their primal instincts for safety and self-preservation. Learn how to identify reptile theory strategies and questions used during voir dire and how to combat them. Click [here](#) to register.

### Medicare Endgame—Applying Predictive Settlement Strategies to Mitigate MSP Exposure, December 5, 2019, 12:00 pm–1:30 pm CST



to register.

John V. Cattie Jr. and Bruce A. Cranner, expert legal scholars, will walk attendees through the process of using an arbitration (as opposed to mediation) to obtain a judicial allocation on the merits, which can be used to address MSP reimbursement obligations, as well as how to protect Medicare's interests when closing the file through adjudication on the merits before the Board/Industrial Commission. Click [here](#)

### Insurance Coverage Issues Arising from Hurricanes Harvey and Irma: Part 2, Hurricane Harvey, December 9, 2019, 12:00 pm–1:00 pm CST



The second half of this two-part webinar will address the insurance coverage issues that have arisen after Hurricane Harvey in Texas. The presentation will address the types of issues that insurers and coverage attorneys have dealt with following the influx of claims arising from the hurricane-related damages arising from the storm. Click [here](#) to register.

### Brace Yourself—The CCPA Is Coming, December 13, 2019, 12:00 pm–1:00 pm CST



noncompliance, no one wants to stumble. Click [here](#) to register.

The clock is ticking! The California Consumer Privacy Act (CCPA) has a compliance date of January 1, 2020. Yet many businesses still don't know what they need to do to comply—or worse, they don't realize that they are covered by the law. But no need to panic! This webinar will prepare both in-house and outside counsel for the inevitability of this new, broad privacy law. Given the CCPA's potential penalties for

## DRI Membership—Did You Know...

---

### DRI Online Events: It's What's for Lunch

You work every day to be a productive defense attorney, juggling phone calls, clients, depositions, interrogatories, and billable hours and landing new clients. On top of that, you must keep current in your profession. Did you know that DRI can make your life much easier? Take advantage of DRI's online, live events and learn from top-notch defense legal counsel and authorities. Many of these DRI

online, live events are held during the lunch hour, and you and your colleagues can take advantage of them while you eat. And CLE credits are available for many states.

Remember, it's one reasonable price per site, not per individual, and some DRI online, live events are complimentary to DRI members. [DRI online](#), live events: it's what's for lunch.

## New Member Spotlight

---

### Zachary S. Anstett, Cranfill Sumner & Hartzog LLP



[Zachary S. Anstett](#) is an associate attorney in **Cranfill Sumner & Hartzog LLP**'s Raleigh, North Carolina, office. He is licensed to practice in the North Carolina state courts, and his primary practice area is workers' compensation.

Mr. Anstett received his undergraduate degree from the University of Maryland in 2015 and his law degree from Campbell University School of Law, where he graduated cum laude in 2018. He enjoys playing tennis, volunteering and spending time outside with his wife, and cooking with his Persian in-laws.

---

### Quote of the Week

"Let us dedicate ourselves to what the Greeks wrote so many years ago: to tame the savageness of man and make gentle the life of this world."

—[Robert F. Kennedy](#) ([Nov. 20, 1925–June 5, 1968](#)).