letters without seeming "... to gloat over the victory," the lawyers claim. Similarly, after losing, it is difficult to justify why a defendant should pay the plaintiff something anyway. This process may be eased if the attornies are familiar with one another and do not take an offer personally, but abstractly. Conversely, it is more difficult to negotiate if the opposing attorney is unfamiliar. Indeed, you can make a final offer with a familiar attorney while an unfamiliar attorney will take that offer as a bargaining position.

This can be complicated further if for example, the "losing attorney" is fired by the client and replaced with an attorney unknown to the other party. If the new counsel fails to review the trial thoroughly, that new counsel will be sufficiently unfamiliar with the opposing attorney and settlement will thus be different in character.

Negotiations were usually informal. The loser generally sends a letter to initiate the negotiation. Then the parties get together face-to-face, or bargain over the phone. Deals are seldom made through written correspondance. Indeed, negotiations are almost never consumated by a letter. Usually, negotiations are handled by written correspondance only when one attorney lacks confidence in the other's abilities.

All the lawyers felt that the gamesmanship of who called who first was ridiculous. If an attorney has confidence, there is absolutely nothing wrong with going first. Indeed, people are timid when they are not sure of themselves or what they are doing. One attorney went as far to say that not going first may

be a sign of weakness. It may show that an attorney does not know the value of the case or is uncertain of its merits.

Those interviewed claim that lawyers have a better understanding of what a case is worth at this point in the trial. During a trial, lawyers form guesses about how a judge will decide post-verdict motions. For example, a lawyer may be able to predict a judge's decision on a remittitur motion based on prior bargaining and the jury instructions. After speaking with the judge's clerk and the bailiff, litigants may be able to predict how others involved would anticipate the outcome. Thus, by "...keeping your ear to the ground you get a feeling how it's going to turn out (and whether the judge)... is surprised, thinks (a remittitur) is fair, is shocked, or what have you," an attorney commented. Thus, knowledge of others' views may influence each party's stance.

Based upon my interviews, I was surprised at the low level of importance several factors played in the process. These include animosity between litigants, between the attornies themselves, and judge activism. Because of my lack of faith in my small sample earlier, I felt these factors should again be included in a larger survey of lawyers.

Anecdotal stories often revealed that the financial position of one of the parties often was of major importance. Yet it may be that lawyers enjoyed telling me of these simply because they were "memorable," and not becuase they were really typical. Thus in the design of a questionaire these questions should be included.

Cases that have large verdicts may also involve a desire

to avoid publicity about a verdict. Publicity, though not an important factor in most cases, may thus become important as the stakes increase. Thus this factor should also be included in any questionaire.

Several final factors influencing the P-VB process are psychological. Lawyers may feel the need to "save face" with the client if the attorney has lost a case. Thus by gaining some concession even after defeat, the lawyer may be perceivedA by the client as having "won" at least something. Similarly, winning attornies may feel that it is customary for the winning side to grant a concession as a professional courtesy. Admittedly these may seem a bit far fetched. Yet, given the social pressures on lawyers, it will be quite interesting to see just how many attornies believe these pressures to influence the bargaining process.

III. The Original Questionaire

While the interviews proved quite interesting, they are none the less anecdotal accounts about the P-VB process. Thus, we must be careful in generalizing from these accounts. In order to better comprehend situations involving P-VB, a standardized survey of a larger sample size was required. Thus a questionaire was designed to evaluate factors which influence the negotiation process after a verdict.

Due to practical considerations, it was decided that only cases from 1985 in Wisconsin would be studied. A comprehensive listing of the cases is found in "Wisconsin Verdicts."

The proposed original questionaire is shown in Exhibit One. At the top of the questionaire, information provided by "Wisconsin Verdicts" about a particular case was listed. Question one was designed to verify the verdict. Question two asks the exact amount of awarded costs and to which party they were awarded.

Question three is the transition question, as we move from the judicially proscribed verdict to the realm of negotiation. It attempted to verify that cases did involve P-VB. An alternative version of the same question, i.e. "Was verdict equal to settlement?" would result in some cases being eliminated in which there was P-VB but the verdict was paid in full. In the interest of thoroughness, question three required a more complex formulation.

Question four tries to identify factors influencing P-VB based on the initial interviews. The first four subquestions under question four attempt to discover when in the process P-VB is most likely to occur. The procedural questions attempt to discover which issues promote settlement. The next three subquestions of question four cover common offers such as waiving of interest or awarded costs that are typical of nuisance bargaining. Several sub-questions attemp to discover what procedural motion is most effective in inducing P-VB. Other sub-questions attempt to determine the effect of animosity, financial position of parties, judge activism, the desire to avoid publicity, interest rates, and psychological influences on attornies.

Question five attempts to determine the difference between actual settlement value--either in a lump sum payment or extended over a period of time--to the actual verdict, to determine the extent of discounting. Perceived present value was used here over actual present value for two reasons. First, rather than asking for rates of interest and payment schedules, this manner of framing the question proved much more practical. Second, and perhaps more importantly, lawyers themselves often do not understand the formulation of present value, but rather have a vague notion of present value. However, lawyers will bargain based upon what they think is the present value regardless of whether their impression is accurate. Thus the preferred version of question five appears superior to a more complicated question which would require further computation to determine present value. The questionaire is a statement of gratitude for completing the survey.

Also designed at the time of the initial draft was a cover letter to be sent out with the questionaire. Ideally, the letter could be sent out on Law School or some other formal organizational letterhead. Dates listed in the letter were placed there only for the sake of example. Further, the name of a Law School contact person, my name and address and phone numbers would also be specified. The letter states that the attornies should return the completed form in a provided envelope by a given date. The letter is presented in Exhibit Two.

IV. The Pre-Testing and Modifications of the Questionaire

As recommended, the questionaire was pretested by five

Madison area attornies who regularly participate in litigation. Participants included Mr. James Janson of Habush, Habush & Davis, Mr. Ken McCormick and Mr. Mark W. Pernitz of Boardman, Suhr, Curry & Field, and Mr. Lee Atturbury and Mr. Mike Riley of Johnson, Swingen, Atterbury, Riley & Luebke.

In general, none of the attornies pretested found the questionaire difficult. All finished it in a few minutes. In addition, they felt that the questionaire was straight-forward and direct. Criticisms were generally minor and no single criticism was repeated by more than two participants. Yet there were a number of views expressed which could improve the questionaire.

Although only one lawyer expressed concern over confidentiality, this was determined to be a sufficiently serious problem to warrent altering the format of both the questionaire and the cover letter, since this could be done with relative ease. The questionaire results may be less candid than expected, given that attornies will be afraid of lack of confidentiality. For example, if an attorney checked that a party engaged in P-VB to "save face," that lawyer might be worried that his opposition might find out about his answer, since Madison is such a small community. To resolve this, "case," "date of case," "count of," and "case number" could be placed on the cover letter and leave the verdict amount on the top of the questionaire. This would mitigate some of the fear over confidentiality while still allowing us to compare the verdict to the amount in question five. Yet the case can still be identified, since a verdict amount may be unique within the universe of cases. Thus the

confidence problem cannot be eliminated. The only other way to increase respondants' faith in the questionaire would be to underline and/or print in bold on the cover letter that all provided information will be kept in confidence.

Regarding qustions one and two, a potential ambiguity was noted. Verdicts can be "gross verdicts" or "negligence split verdicts" in negligence cases. For example, if a plaintiff won a gross verdict of $ 100,000 on the question of damages, but on the question of liability the defendant was found 60% at fault, the negligence split would be $ 60,000. To answer the first question, the questionaire would have to be more specific on this point in order to avoid any potential ambiguity.

The ambiguity regarding the verdict amount can be resolved fairly easily. The data source contains the gross verdict and percentages. Thus, the negligence split can be easily calculated. Therefore, the top of the questionaire could read "Our records indicate that the verdict (or negligence split if a negligence case) was $_____.00" Similarly, question one would likewise be altered.

There were no reported problems with question three.

Regarding question four, some additional factors were suggested. The first would be the cost of litigation. This would cover added expenses for a potential appeal or new trial. A second "catchall" question requesting "other factors contributing to or against post-verdict negotiations" was suggested. For example, there could be a case in which a victorious plaintiff found out he had six months to live after a

verdict was handed down. This fact greatly influenced bargaining but would not be covered by the survey instrument. Under question four, it was suggested that periodic payments may be an item affecting negotiation.

Under question five, two attornies preferred a formulation asking for the "present value of the cost of the settlement arrangement." Lawyers who use consultant services are often quoted an exact amount for the "cost of settlement." Other attornies compute present values themselves. While the cost of settlement and present value may not be exactly the same in all cases, the figures should be close enough to approximate each other. Thus adding the "cost of settlement" alternative would make completing the questionaire a bit easier.

In conclusion, the pretest was quite informative. While reassuring that the questionaire met its fundamental purpose, it also provided an opportunity to fine tune the questionaire. Modifications are incorporated into the final questionaire found in Exhibit Three, and the final cover letter found in Exhibit Four.

VI. Proposed Implementation Methods and Analysis

The final versions of the cover letter and questionaire will be sent to all defense lawyers for cases which went to a verdict in 1985 in Wisconsin. This will include a group of approximately 200 lawyers of which about 50% are expected to respond, based upon past experience with legal surveys at the

University of Wisconsin. Attornies will be allowed four weeks in which to respond, although the cover letter will state that only two weeks will be allowed.

Question one will be used to determine the verdict amount. If YES is circled, the amount provided above question one will be presumed to be accurate. If NO is circled, the amount written in by the subject will be considered to be the correct figure. From this an average verdict can be computed.

Question two allows several calculations. First, average cost will be computed. Second, total awards, defined as verdict plus cost, will be determined. This in turn will allow a finding of average total award.

Under question three, it will be assumed that P-VB occured if one of two responses are provided by the subject. The first of these results when the subject has circled SETTLEMENT. The second results when the subject has circled PAID IN FULL and YES. If PAID IN FULL and NO are circled, it will be presumed that no P-VB occured. At this point, the percentage of cases involving P-VB will be computed. Using a T statistic, the relationship between the size of the total award and the probability of P-VB will be evaluated. It is expected that the probability of P-VB will rise as verdicts rise.

Only cases verified for P-VB will be included in subsequent calculations in question four. Each sub-question will be assigned a letter (a,b,c, etc.). These questions are all frequency claculations to determine which statements are more likely to be true during P-VB. Sub-questions a through d try to determine the timing of P-VB. Sub-questions e,f and g suggest

alternative common offers to see how common they really are. Sub-questions h and i address animosity, j and k look to the parties' financial status, l addresses judge activism, and l and m analyse influence of periodic payments and litigation costs. Sub-questions o,p,q and r try to uncover which motion most frequently induces P-VB. Sub-question s deals with the influence of publicity, t examines the interest rate wile u and v look to psychological influences on attornies.

Responses to question four will be usefull and can be easily analysed. The data will be converted to find percentage response to each sub-question. This will provide a rank ordering of typical characteristics associated with P-VB.

Question five will be used to determine the discount. This will be computed by taking the total award minus the value of settlement provided by the subject. This in turn will allow other computations. Average discount and percent of average discount will be determined. Finally, the relationship between the percentage of discount and the verdict as the verdict is increased will be examined. This will be measured by a Pearson "r" correlation coefficient.

Results of the investigation will be tabulated early next autumn. These will be used as the basis for a semester paper and hopefully a publishable work.