appeal. Thus they are more willing to talk. These comments were echoed by Mr. Covelli.

I believe the differing views on this question may be attributable to the lexical ambiguity of the term "post-verdict bargaining." On the one hand, it may be bargaining to avoid a "nuisance" appeal--one that is easily winnable but will still be an expense to defend. In this situation, nearly all the attornies agreed that waving costs was a "frequent offer," though maybe not a "standard offer." According to Mr. Armstrong, this occurs in 95% of the cases. But there is another type of bargaining where there is the threat of a real appeal. Here, bargaining is more difficult and probably less frequent, given the attornies responses. This sort of bargaining comes up 10-20% of the time according to Mr. Armstrong.

b. Common Situations in which Post-Verdict Bargaining takes place

Next, I asked "In what kinds of cases does post-verdict bargaining occur?" Mr. Janson stated that it occured in all his cases, which included personal injury and medical malpractice. Mr. Covelli and Mr. McCormick stated that post-verdict bargaining could potentially occur in any case. Mr. Olson, having dealt with products liability cases, personal injury cases, and other cases involving injunctions, stated "It is probable the general rule that (post-verdict bargaining) is more apt to occur in cases where there are money damages than in cases where you are getting an extrordinary writ... because there's more to bargain about." He added it is easier to bargain about money than argue about

injunctions.

A typical case where bargaining happens, according to Mr. Olson, involves a question of liability in which a jury could "go either way." For example, he said that if he lost such a case, he would offer to wave motions if they waved costs, and "We could just stipulate to a dismissal... and that will usually put the case to rest." Other times, he said, "you may hope to bargain to cover same of your client's out of pocket costs."

Mr. Olson stated that bargaining does not occur when the parties are bitter. Areas where this may come up include employment situations and defamation. In these cases, bargaining before the trial is difficult and it continues to be difficult even after the trial. For example, "a defendant may say 'I'm not going to pay that (person) even if a jury says I have to.' These people are never going to voluntarily pay anybody." Further, "Awards must be dragged out of them." The principal matters, not the money. In product liability and personal injury, feelings "run high, but they are not as bitter." Therefore, bargaining becomes more realistic, according to Mr. Olson. Mr. Armstrong noted, however, that if one attorney is angry with the other, this is of little importance. The clients' needs surpass the attornies emotions, he said.

Mr. Riley seems to support Mr. Olson on this point. He said that "If you have a case where each party is at the other's throat all during litigation, it isn't terribly likely that the prevailing party is now going to turn around and give way to anything which they had." This view was repeated by Mr. Armstrong.

Whether anomosity influences bargaining is debated however. Differing from Mr. Olson's view, Mr. McCusker's position was that lawyers can often overcome a client's emotions. Thus anomocity does not control the determination of whether bargaining will take place.

On this point, Mr. Riley said it is important that "... you encourage a client to take a reasonable posture." He then stated that "Most good lawyers pride themselves in having... client control..." which he defined as the ability to persuade clients to accept the lawyer's vantage. Lawyers are good at persuasion. If a lawyer has won a verdict, it should be even easier to sway a client than a jury. Jokingly, though, he said "Sometimes clients are a harder sell (than juries are)." He concluded by saying he had never been involved in a case in which he could not get a client to do what he wanted in terms of post-verdict bargaining. Insurance companies, for example, are almost always willing to wave costs, he said. Mr. Armstrong supported Mr. Riley on this point and added that where attornies in fact lacked client control, or simply were avoiding making a decision, then client emotions would become more determinitive of the outcome of post-verdict negotiation.

Mr. McCusker said that bargaining will not occur when a verdict is solid. Indeed Mr. McCusker's comments seemed to project a "hard-line" stance. Only when a case is problematic is bargaining welcome.

Mr. Riley noted that the change in the statutory interest rate on a verdict has greatly affected bargaining. Plaintiffs

are now less willing to deal since they are receiving a high rate of return on their asset; the verdict. Rates have risen from 6% originally, to 12% now. On the other hand, defendants, who previously dragged their feet to pay a verdict or to ask for some sort of deal, are now quick to do so. In short, "... the shoe is on the other foot now," he said.

Mr. Riley also suggested that bargaining will take place when a verdict exceeds the means of the defendant. Thus solvency is a big issue, although not a procedural one. Where this comes up with insurance companies "... is when insurance companies can be held in excess of their policy limits under the bad faith law." This too will promote bargaining, if the insurance carrier feels there is a risk of being held liable for that amount in excess of the policy limits. Here, insurance companies may be willing to "kick in some extra monies and the plaintiff will be willing to come down" because the plaintiff would realize that it will be difficult to collect from a defendant, and to collect from the insurance company would require proving bad faith, which is a difficult thing to prove, he said.

Mr. Armstrong stated that economics entered the process for verdicts of less than about $ 100,000. He said that if the defense won a verdict, and is thus entitled to receive costs, if the verdict is "solid," and if damages alleged at trial were about equal to or less than the $ 100,000, there will be no bargaining after the trial at all. With a verdict like that, costs become a significant part of the judgment. Conversely, with extremely large verdicts, costs, as a percentage of the total amount, become less significant. When costs are a low

percentage of the total award, the waving of costs functions as an insurance policy to make sure a verdict stands. Thus, Mr. Armstrong ingeniously constructed an analogy. A low dollar value verdict is similar to a decision by the Court of Appeals. It will not pay to appeal a low dollar amount when alleged damages are not over $ 100,000. In similar fashion, only 10-15% of Court of Appeals decisions are taken up by the Supreme Court. Thus, in these small damages claims, a low verdict all but shuts the door to bargaining, in the same manner a proclamation from the Appellate Courts might forclose on future bargaining in a larger case.

Mr. Janson felt there was a formula for determining when post-verdict bargaining would take place. It occurs when "Both sides think that the 'loser' has an argument on appeal." Thus, as Mr. Olson stated, both sides are in a "win-win" situation. The defendant gets a break on damages, and the plaintiff receives certainty of compensation.

Mr. Covelli had a slightly different formula. He said it would occur in two instances. First, bargaining will take place to avoid a "nuisance" appeal. This would mean the waving of costs usually.. The other occurs, as in Mr. Janson's model, when the loser has a strong argument on appeal.

c. The Most Common Issues Before the Court.

Opinions differed once again when asked "What is the most common procedural issue before the court when post-verdict bargaining takes place?"

Mr. Janson claimed that if the issue was damages, then

remittitur is almost always before the court--not the threat of appeal. He reasoned that for an appeal to be successful, it would have to show that not only was the jury wrong, but so was the trial court judge (who turned down post-verdict motions). Since there are presumptions that the "trial court is correct, an appeal begins with two strikes against (it)," stated Mr. Janson. If the problem is liability and not damages, then there is probably some evidentury issue debatable. Thus an appeal would become more attractive. Mr. Janson stated that an aggrieved party will consider all the procedural options available. Yet often, because of the restrictive nature of the rules and the appeals process, the aggrieved party will "... have very few cards." Thus, remittitur is most often used, according to Mr. Janson. Interestingly, Mr. Covelli stated that remittitur did not come up very often in his practise.

Mr. Armstrong stated that he did not feel any one motion in particular was more common than any other. Yet he did state that the additur/remittitur-style question often came up when there was an underlying debate over loss of earning capacity. Because future income and earning capacity are extremely difficult to predict in some cases, there may be a great deal of bargaining even if a jury was persuaded to accept one view.

Mr. Olson added that "... during the course of a trial you get an idea what the judge is going to do with (a remittitur motion) through prior bargaining..." during the course of the trial and during the jury instructions. After speaking with the judge's clerk and the bailiff, "You get a feeling of how the

people around..." feel the case is going, he said. These people "... get interested in the case and like to talk about how it's going to turn out." Thus, by "...keeping your ear to the ground," Mr. Olson says "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."

Mr. McCusker differed from Mr. Olson and Mr. Janson on this point. He stated that no motion was more frequent than any other. He also pointed out the inadequacy of my question, preferring to discuss motions on a case-by-case basis rather than in augmentation. Concluding, he said "One or all may be used."

In divorce cases, Mr. Kortzinsky claimed there were three possible alternative motions that could be before the court in a post-verdict situation. In the Wisconsin statutes, Section 767.32 dealing with the revision of judgment is used most often to change custody and the support of children. This statute "... is used a lot (compared with the others)." The relief from judgment provision, Section 806.07, which includes fraud and mistake, is used quite infrequently. Almost never used, he said, was a motion for reconsideration found in Section 805.17 (3). He speculated that this provision is rarely used because so few attornies are aware of its existence. In sum, however, he again stated that post-verdict bargaining was rare in divorce cases.

Mr. Riley asserted that, other than the cost issue, the most frequent motivating factors were the threat of a new trial and the non-procedural issue of solvency of a defendant. Mr. Covelli also sees a new trial as the most common threat, as did Mr. McCormick. According to Mr. Riley, the winner may be willing

to accept some lump sum of money "... instead of God knows how many payments over a long period of time." A third issue may be the question of bad faith involving an insurance company, Mr. Riley said. Yet solvency and new trial were considered the main motivating factors for settlement.

d. The Manner in which Disputes are Resolved.

Subsequently, I asked "how the issues were solved?" Mr. Janson stated that issues are nearly always solved by bargaining after a post-verdict motion has been made, but before the judge rules on the motion. Non-legal factors like "gaming," prior negotiation, and client participation effect the bargaining process.

After the verdict, there seems to be very little emphasis on the "gaming" that goes on, according to Mr. Covelli. As a matter of course, the Habush firm send a letter to a defendant immediately after a verdict, stating the amount of the verdict, the costs, and an offer of settlement. This occurs win or lose. According to Mr. Janson, this is not as easy as it may seem. If he wins a verdict, he claims it is difficult to write letters without seeming "... to gloat over the victory." Similarly, after losing, it is difficult to justify why a defendant should pay the plaintiff something anyway. This process is eased if the attornies are familiar with one another and know now to take an offer personally, but abstractly, Mr. Janson says. The opposite is also true. It is more difficult to negotiate if the opposing attorney is unfamiliar, he said.

Mr. Riley affirmed this point stating that negotiation takes on a different character when dealing with unknown opponents as opposed to known opponents. Bargaining is often more direct with familiar attornies. "You can make an offer and say that's it (with a familiar attorney)... an unfamiliar attorney will take that (offer) as a bargaining position," Mr. Riley said.

Mr. Janson felt that gamesmanship in negotiation "... is overrated." He added that "All this business of who calls who first" is 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. Mr. Janson 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.

When asked if "The 'winner' was always the first one to pick up the phone to begin negotiations," Mr. Olson stated that in fact it was usually the 'loser' who did. He added, though, that it depends on what the relationship is between the attornies. He said, "I've never been hung up over who invites the negotiations," adding "I don't see it as a weakness, on my part, to begin negotiating.

Mr. McCormick said 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 never consumated by a letter," he said. Building on this, Mr. Armstrong stated that negotiations are

handled by written correspondance only when one attorney lacks confidence in the other's abilities.

Mr. Olson then posed an interesting and revealing problem. He stated that if he has won the verdict, and if he thinks the verdict is solid, the next thing he does is talk to his client. He said "The client is usually disturbed by the fact that you don't get a check after the verdict is read... you try to advise them that the case could still be appealed." By talking to the client, a lawyer learns the client's needs and desires. It is important to inform the client that, for example, 90% of the verdict can be obtained within a month if the client wants it. "If the client says 'Yes I want that instaed of going through the risk of having it set aside,'" according to Mr. Olson, "... then you decide what your bargaining position is going to be..."

Mr. Riley built upon Mr. Olson's view of client participation. "Usually clients who've won are just outraged at the notion that they ought to give something up," he said. He then pointed out that, of course, insurance companies are not like this, since they participate in the process with greater frequency than the average litigant. Yet, "A lot of clients believe that you go into court, you win, and somehow the judge counts out the money," he said. The key thus is trying to talk to the clients before the verdict, conditioning them for the later stages of the trial. Yet, it is also important to inform the client that cases are not overturned on post-verdict motions very often. Most of the time on appeal, "... you're going to win." Still, clients are reluctant to give back what they have

won. They feel they have fought long and hard, and they are now not at all eager to surrender the position they feel has "... been fairly dearly bought," Mr. McCormick said. He added that, "If the verdict is in your favor, you must explain what your reason is for engaging in a process that leads to a compromise." Mr. McCormick concluded that advice from lawyers can be compared with advice from medical doctors. "If a doctor tells you that you need an operation, you may not want it, but (you will have it anyway)," he explained. Thus, clients usually accept the advice of counsel.

Mr. Covelli seems to part from Mr. Riley and Mr. Olson with respect to client participation. Mr. Covelli stated that, "Most clients understand they are avoiding risks by settlement." Thus, Mr. Covelli seems to attribute a higher degree of sophistication to his clients.

Mr. Armstrong posed the attorney-client relationship a bit differently than the other attornies. He said, "If the bargaining is over costs, I'm more easily swayed to the client's view." Yet, "If I have a verdict and I am concerned that there's something from the trial to appeal, I instruct my clients what they should do with regards to cost," he said. He added that clients usually listen and accept the advice. In short, he said he tries to persuade winning plaintiffs to give in on non-compensatory damages to secure a large verdict.

Mr. Riley did not feel the "gaming" process was very important, although "There are always conflicting views on this." He stated, "You have to know what your case is worth, obviously, and you have to know what your bargaining position is." The next

step is to choose a reasonable amount which "... you feel is above the amount they are willing to pay." Alternatively, he said some people try to make one offer and then stick by it, refusing to compromise. Yet, Mr. Riley said this does not seem to work very well.

Mr. Armstrong stated that there was little difference between bargaining with familiar and unfamiliar lawyers. Dealing with familiar attornies, he said, may be "quicker and less sparring." Yet, at this point, both sides know each other fairly well anyway. Each knows the other's strengths and weaknesses--- after a trial has been completed. Thus, bargaining after the verdict is quite distinct from bargaining in any other point during the trial. This however, can be altered 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, or fails to "do his homework," then that new counsel will be sufficiently unfamiliar with the opposing attorney and settlement will thus be different in character.

Mr. Janson stated that prior negotiation will be a major factor setting the parameters for post-verdict bargaining. Earlier negotiation established the boundaries that parties can agree to. Similarly, in medical malpractice cases, the award given by the review board has an influence on the later jury trial, since evidence of the board's findings can be introduced as evidence before a jury in many instances. Yet, Mr. Janson affirmed that, because a jury "gets a free shot" at a separate

determination, new uncertainties are interjected into the bargaining process in medical malpractice cases.

Mr. Riley and Mr. McCusker both stated that there was no "standard offer" during post-verdict bargaining. Mr. McCusker insisted on a case-by-case approach to determine what an offer would be. Similarly, Mr. Riley said there could be any number of possible offers. Yet, Mr. Riley did say it was commonplace to see an offer to wave costs if there is a stipulated settlement. Here, Mr. Riley appears to distinguish between what Mr. Covelli referred to as "nuisance settlements" offering to wave costs, and other negotiations. He further noted that this offer is usually made by the losing party. "If you win, you don't generally call up and just say 'I'll wave costs,'" he said. The side that has lost usually makes the offer, foregoing any right to appeal.

There seems to be a lack of consensus over what a common offer in post-verdict bargaining may be. Mr. Janson said that the winner often might offer to take the verdict but wave costs, if the defendant agrees to wave rights to appeal. "This is common." he said. Further, he added that often the defendants would, after the verdict, "... almost always look for some kind of break." He speculated that in some personal injury cases, the winner may not have as strong a hand and thus the offer would reflect this.

Mr. McCormick stated there was only one "common offer." This occurs when the plaintiff loses to "... a deep pocket defendant." Then the plaintiff will look to avoid costs, in a way similar to what was described by Mr. Riley.

Mr. Olson stated that there was no common or frequent offer

after a verdict. In this respect, he is in agreement with Mr. McCusker and Mr. Covelli. Mr. Olson stated that the value comes back to "... what you think your chances are on appeal." He then cited cases of negotiated settlements after a verdict where as low as 50% of the verdict was accepted, and as high as the entire verdict, less costs.

e. Judge Participation

Next, I asked attornies "Does the judge participate in the post-verdict bargaining process? (and if so, how?)" The general answer was "no." Indeed both Mr. McCormick and Mr. Covelli responded with flat "no" answers to this question.

Mr. Janson claimed that most judges will not participate in any negotiations at this point. However, judges do engage in pre-trial conferences to promote settlement. It is in these conferences that the litigants get an idea of the judge's valuation of a case. This will effect post-verdict bargaining. Mr. Janson added that he felt it was not fair for a judge to become involved at this stage of the process. If a judge did become involved, Mr. Janson feels that lawyers would become angry. He lamented though that judges often know a lawyer's view after having heard bargaining in the pre-trial conference. This can be used against a plaintiff's attorney if a remittitur question arises later.

Mr. Olson repeted Mr. Janson's comments. He said, "I would prefer the judge to stay aloof... the judge has an issue before him which he has to decide and I don't really see how he can participate in the bargaining and also write a decision." He