went on to say that it "... wouldn't be right to say (to an attorney) you bring your demand down or I'll grant a remittitur... That offends me." Mr. Olson noted that in federal courts, the magistrate's office handles most of the bargaining instead of the judges. Further, federal judges do not like to involve themselves in any negotiation usually, unless the parties ask them to, according to Mr. Olson.

Mr. McCusker said that there is generally no participation by judges. Yet he suggested that it could occur "... on a case-by-case basis in extreme situations." Mr. Riley concurred with this viewpoint.

In divorce law cases, Mr. Koritzinsky said judges "... do not get involved at all." A Family Court Commissioner may mediate disputes over property. Alternatively, The Family Court Counseling Service may mediate any custody conflict.

The only case of judge participation among the attornies was recounted by Mr. Armstrong. Here the judge's role was more practical than activist though. The judge asked if one side could wave costs so that they all could be done with the case. According to Mr. Armstrong, the judge was "... stating the obvious," and not trying to sway negotiation.

f. Who has the advantage?

All the attornies agree that the winner in the verdict has a distinct advantage when asked "Who has the upper hand in post-verdict bargaining?" Mr. Janson stated that there are "... very few issues that can result in a trial de novo." Thus the winner

"... has a big upper hand," he said, "... because the standard of review is so tight." Without hesitation, Mr. Olson stated that the person who has won the verdict has an advantage. Mr. McCusker also concurred, noting the interest rules which take affect after a verdict has been rendered, and that "... the rules are all in favor of the jury verdict winner." This holds true in divorce as well, according to Mr. Koritzinsky. He said "The winner is in the driver's seat."

"I think the winner has the advantage two ways," Mr. Riley said. Procedurally, "Everybody knows that most verdicts get upheld... so they know (the winner) is likely to win (again)," he said. Second, there is a psychological uplift after winning at trial. This too will affect negotiation.

Mr. Armstrong confirmed that the verdict winner has the advantage after a verdict. "They have room to do some things," he said. The second most powerful position after a verdict is to be a losing insurance company, he said. Insurance companies have greater bargaining power than other participants because, after losing a case, they have the capacity to pay in full immediately or to drag out the process. Mr. Armstrong stated that a losing plaintiff has "the least leverage."

g. Creativity in Post-Verdit Bargaining.

When asked about "the potential for creativity in post-verdict bargaining," the group felt that this would not occur often. Mr. Janson said that "Although it would not be inconceivable that a plaintiff may wish to convert a cash award into a non-cash award, this is usually done at the pre-trial

stage... at this point, it has all been reduced to dollars." He also stated that in product liability cases, defendants are usually solvent and the award has already been reduced to cash terms. Thus, the many difficulties found at other points in the negotiation process are absent after the verdict. Creativity is "... just not done," according to Mr. Janson.

Mr. Olson stated, "Once a jury has come back with a verdict, and let's assume a good verdict (for the plaintiff), then we evaluate the liklihood that the verdict is going to stand up on appeal." Further, "The time period involved and how badly my client needs the money determine whether we need to discount," he said.

Creativity with remedies is seldom done at this stage, according to Mr. Armstrong. He stated, "Somebody has got a verdict... and if somebody likes it, that verdict is almost home." Yet he did acknowledge the potential for creativity at this point.

In divorce cases, however, creativity in "fashioning a verdict" is quite popular, according to Mr. Kortzinsky. This enables an outcome to be "... more suitable to both parties," he said. Thus, both parties can be better off by tailoring the verdict to their personal tastes. This is the "win-win" scenario.

V. Examples.

It is one thing to research an issue which is an intellectual curiosity. And it is quite another to discover a

matter applicable to everyday life. Thus I felt it was important to find examples of actual cases to see how bargaining after the verdict took place. I have chosen to divide this section into two parts; ordinary cases and the two extremes.

a. Ordinary Cases

Mr. Janson provided an interesting example in the medical malpractice field. He had a case which he told the defense attorney he would settle for $ 50,000. The defendant made a counter-offer of $ 15,000. Unable to agree, the case marched on to the medical malpractice board which reviews cases in Wisconsin. There, the panel awarded the plaintiff $ 65,000. At this point, the two attornies got together. The defense attorney argued that, while the plaintiff attorney had made a very good case in front of the board, a jury would not be nearly as sympathetic. He then offered to accept the plaintiff's earlier offer of $ 50,000. At this point, Mr. Janson accepted the $ 50,000 settlement. Indeed it would have been difficult to ask for anything more since that was his original value he had given the case in earlier negotiations.

Mr. Janson had another recent experience in a non-medical malpractice case. In that situation, there were numerous defendants. One of the defendants was able to come away with a jury verdict stating it had no liability. Yet, that same defendant made an offer to pay the plaintiff not to appeal. Mr. Janson refused the offer and took the appeal anyway. This offer occured over a year and a half ago and the case is still on appeal.

Mr. Janson came up with a still more interesting case. Here a medical malpractice case was brought before the panel. After the panel announced their verdict, bargaining commenced. The defendant in the end paid more than the verdict amount, "eventhough they won at trial, (because) they were afraid of the evidence..." Thus the defendants were willing to settle at this point.

Mr. Olson also provided an example. Several years ago he recieved a "...very large award in a personal injury case." He added that on review, "You don't look at punitive damages as dollars that are as hard (as compensatory damages)... because the judge feels he has a great deal more discretion in reducing punative damages than in reducing other damages. Here, compensatory damages were over $ 100,000 and punitive damages were $ 500,000. The client was still out of work after the verdict. So, the client needed and wanted the money. An appeal would have meant that the client would have to wait two years. Mr. Olson thought the compensatory award would be upheld, but the punitive award might be "knocked down," he said. Since this case involved multiple defendants, only one which was responsible for the punitive damages, Mr. Olson made a deal with the other defendants (who were 20% at fault) for 20% of the compensatory damages. This in turn gave the client "...enough to live on a strengthened the bargaining position..." with respect to the other defendant, because the client was not under any pressure to settle cheaply. On remittitur, "The judge did knock down the punitive damages from 500 to 300," Mr. Olson said. Eventually

there was further discounting before settlement.

As a side note, I asked Mr. McCusker if he felt that punitive damage awards were "softer" than ones for compensatory damages. He responded that although "huge damages" may be softer, "...there is little difference between punitive and compensatory damages." The only way to determine if a punitive award was "soft," he said, would be to "... look at it on a case-by-case basis."

Mr. Olson had one case in which he accepted only 50% of the jury verdict. In that case, the judge set aside the verdict. Representing the plaintiff, Mr. Olson appealed to the Supreme Court concerning the question of abuse of discretion of the trial court judge. With the treat of this appeal, the case was settled.

Mr. McCusker's example, the Puisto case, involved a retrial. The first trial, in which the judge erred by allowing prejudicial evidence to be introduced, resulted in a verdict of $ 8,000 for the plaintiff. On retrial, the second verdict was $ 27,000. After the second trial the defense offered to pay the second verdict if Mr. McCusker would wave costs. He refused the offer which lead to post-verdict motions by the defendants. The court denied the motions and in the end the defendants were obligated to pay everything, including the 12% interest.

Mr. Riley had what he referred to as a very typical insurance case a few years ago involving post-verdict bargaining. The plaintiff was 85 years old, "a nice fellow," and the defendant came over a hill in a car and hit him. The old man fractured his femur. Remarkably the old man recovered well, but

still had some impairment. The parties tried the case and made offers to settle. Yet, they could not agree on a bargain. The verdict "... came down 100--0 our favor (for the defendant)," Mr. Riley said. He estimated that the plaintiff had three or four thousand dollars in costs, after depositions and doctors' testimonies. The old man and his wife owned a farm, but did not have a lot of equity in it. They had little income. In short, they were in a tight financial position. So, after the verdict, the plaintiff's attorney called Mr. Riley and said they would wave motions if the defense waved costs. Mr. Riley called the insurance company about the offer. But the insurers were reluctant to accept, having gone through a number of expenses of their own. Mr. Riley did however persuade them to accept, reasoning that eventhough the plaintiffs did not have a solid argument on appeal, it will still cost the insurers about $ 1,500 to defend the verdict. Further, if the insurers took a judgment against the old man, Mr. Riley was uncertain whether the debt was even collectable. Between the wife and the husband, the pair could qualify for a $ 50,000 homestead exemption from creditors, and their farm may not have been worth even that much. Finally, Mr. Riley argued that "These folks are good folks and I don't want to pillary them... I don't think that's the right thing to do."

In one case Mr. Riley handled, a defendant faked the robbery of his own car. The verdict came back for the insurance carrier for $ 2,500. The defendant was able to come up with about $ 1,800 immediately. Because it would cost more money to

try to collect the difference through garnishment and other means, the insurance company accepted the $ 1,800 offer. "This type of case, and the (case of the old man who was hit by a car) are probably the most common types of post verdict bargaining," Mr. Riley said.

Mr. Riley also represented an insurance company which lost a verdict for $ 65,000. The policy limit was $ 25,000 and there were allegations of bad faith. By the time negotiations took place, with the interest, the amount due had risen to $ 70,000. Since the defendants already received the first twenty five thousand, an amount equal to the policy limit, and since the plaintiffs began an action for bad faith, bargaining excellerated. The company ultimately paid another $ 23,000. "This is a hybrid case," Mr. Riley said, "...in the sense that it is post-verdict with respect to the first case. Yet they did commence a separate action." Also, as an aside, he noted that when insurance companies lose, but the verdict is less than the policy limits, they have very little bargaining power.

Mr. Armstrong provided an illustration where clients choice to not wave costs was followed. In this case, Mr. Armstrong represented a plaintiff who won a verdict of $32,000 plus interest and costs. All during the trial the defense was very "hard nosed" and refused to compromise. After the verdict, the defense then wanted to get together and agree to a waiver of coasts. Against Mr. Armstrong's advice, his client refused the offer. The defendants then began an appeal. After filings, the defendants offered to split costs, one half each. The plaintiffs, still angered by the defendant's earlier conduct,

refused. Later, the defense attornay called Mr. Armstrong with the defendants' "final offer" to pay two-thirds of the costs. Again the plaintiffs turned it down. The next day, the plaintiffs received a check for 100% of the costs. Given the complexities of that particular case, Mr. Armstrong said, "What they (his clients) did was dumb, but they did it and won."

Ken McCormick has a very interesting story of a post-verdict settlement. Mr. McCormick represented a young boy who had been hit by a car while walking in the cross-walk of a street. The boy was just over the statutory age to be considered possibly contributorilly negligent. The woman driving the car claimed she had heard a siren and was looking around for an emergancy vehicle when she acciently struck the boy. The jury found no negligence on anyone's part. The lawyers were dumbfounded by the result and could not understand how the jury arrived at that result. Thus bargaining commenced and they settled in order to avoid a new trial.

Mr. McCormick stated that he found out much later why the jury had been so far out of line. Prior to the trial, there was a large crowd in front of the court house. This crowd included some jurors. The boy who had been injured, was also standing in the crowd, asking his father how to reply to specific questions. The jurors, having heard this, were convinced that the trial was being stage-managed and refused to give any damages.

b. Two Extremes

In this section I hope to establish the extreme boundaries

of post-verdict bargaining. Further, I believe this section probably contains the most interesting material, although probably the least usefull, given that the cases are extremes.

The first case involves Mr. McCormick and Mr. Olson. Mr. McCormick represented a man who had fallen down in an accicent and was now paraplegic. Counsel for the primary insurance carrier "... appropriately tried the first case," Mr. McCormik said. At the trial, the verdict came back for $ 1.66 million. That verdict exceeded the policy limit so post-verdict bargaining commenced. Mr. Olson now represented the insurance carrier. Since Mr. McCormick and Mr. Olson both knew each other very well, they agreed to get together at a local tavern near Mr. Olson's office, and talk things over while having a beer. Mr. Olson arrived with a newly hired attorney to meet with Mr. McCormick. Right off the bat, Mr. Olson asked for Mr. McCormick's "final offer." Mr. McCormick replied $ 1.4 million. Again Mr. Olson aked if that was the final offer to which Mr. McCormick affirmed that it was. At this, the deal was struck, before they had even drank their beers, according to Mr. McCormick.

The new attorney asked Mr. Olson why he had not bargained. "You could have got him to come down another $ 100,000" the young attorney reportedly said. According to Mr. McCormick, Mr. Olson replied, "Yes, but if I'd have bargained, he could have got me to go up $ 100,000."

If the bargaining between Mr. McCormick and Mr. Olson went fairly easy, then Mr. Riley's case certainly must lay at the other end of the negotiation spectrum. As Mr. Riley tells it,

six months ago a corn alcohol processing facility went under when the price of corn went up and the price of gas went down. The clients Mike Riley represented, having gone into bankrupcy, placed the facility on the market for sale. A group of investors from Madison and Chicago offered to buy the place. As it turns out they did not have the money they said they had and so they tried to go back on the offer. This lead to a law suit. "We ended up getting a judgment against two of the investors personally for $ 350,000," he said. Yet the investor defendants did not have the cash. They did however have "... a very expensive home on the lake shore in Michigan."

All during the trial, the opposition refused to bargain with Mr. Riley. After the verdict, "I no more than got back to the office when the phone is ringing and it's one of those fellows (the investors)," Mr. Riley said. The defendants wanted to meet immediately with Mr. Riley. After being assured that their counsel was present, Mr. Riley agreed to meet with them a half hour later. So Mr. Riley, the principal involved, and the lawyer who referred the case all went over to meet the defendants.

They all met in a conference room at the defendant attorney's office to commence post-verdict negotiation. The main defendant, in his sixties, came with his son, also a defendant in the action. The elder defendant was a big man who had been a salesman for a number of years, and to paraphrase Mr. Riley, this man "could lay it on thick." According to Mr Riley:

> He went into a big song and dance about how he was part Irish, and that gave him a big temper, and he was part

> English, and that made him stubborn, and he was part French, and that gave him a hair-trigger temper... He went through all these different characteristics, and then he said, 'Now I've got this collection of guns. I've got a Weatherby. I've got a 44 Magnum...' And he went through about eight guns. The man then repeated 'I've got all those guns and I know how to use them'.

Continuing, the "salesman-type" defendant said, "I just want to tell you all now that either we're going to settle this case right now for five thousand dollars or I'm going to go home and blow my brains out," according to Mr. Riley. There was stunned silence in the room. So the defendant repeated the statement, adding "And I mean it! I'm not going to lose that house. It's been in the family for fifty years." Commenting on the statement, Mr. Riley stated that the "... action went on from there. It was really kind of funny." He reflected, "I'm not so certain at the time that he wasn't serious," given that the defendant "... had been stricken with the verdict," as he put it. "This is truely the iron fist approach to bargaining," concluded Mr. Riley.

At the meeting, even after assurances that the defendant never misses, Mr. Riley still refused the offer. Several other "proposals" were also made and refused. The defendant finally "... traumped off into the day and we didn't solve anything," said Mr. Riley. Later, the opposing counsel confessed, "I had no idea he was going to say that," Mr. Riley reported. Indeed, the defendant's lawyer was stunned too.

Mr. Riley stated the bargaining could have been more effective. The defendant could have brought out the guns on the spot. Alternatively, "If you would have had to have been faced

with the prospect of cleaning up your conference room, the offer would have been even more persuasive," affirmed Mr. Riley.

Over the next several weeks, Mr. Riley and the defense attorney met and discussed the case. Mr. Riley kept asking if the other attorney had been reading the obituaries. "We'd laugh about it," said Mr. Riley. Evidently the man has not killed himself yet. In sum, Mr. Riley said, "That was the most original post-verdict bargaining I've ever had... I've never even heard of anything like that before." Truely between this case and the prior one involving Mr. Olson and Mr. McCormick, the parameters of post-verdict bargaining are established.

VI. Conclusion.

Mr. Janson stated that post-verdict bargaining was a neglected area of the Law. He lamented that although post-verdict negotiation "... comes up in almost every case," there is precious little written specifically on the subject. Jokingly, he noted, "Yes, but there's a million articles on how to write an opening speach.

Procedurally, there are many rules which effect "bargaining in the shadow of the Law." These include motions for new trial, Judgment notwithstanding the verdict, remittitur, additur, and appeal. These post-verdict jury control devices will frame subsequent negotiation.

Post-verdict bargaining can be divided into two categories. The first is the "nuisance settlement" in which there is no strong, appealable issue. Here the winning party very often will wave costs and interest to secure immediate payment of a verdict.

The second type involves bargaining over an important, substantive and appealable issue. This is less frequent, appearing in a minority of cases, yet alters the verdict to a greater degree than the first type of post-verdict bargaining.

All the attornies agreed that bargaining is done between lawyers themselves with little gamesmanship. Bargaining is straight forward. It is often accomplished faster and with less sparring when the two opposing attornies are both familiar with each other and have a solid respect for each other.

Finally, perhaps not surprisingly, the verdict winner has the advantage in post-verdict situations. The rules of civil procedure are bias towards supporting jury verdicts and trial court decisions. Despite all the many options potentially available, few post-verdict motions are successful and most losers will have to pay.