Chapter 2
Prior Research on Attorney-Litigant Decision Making

Nothing is more dangerous to a new truth than an old error.

Johann Wolfgang von Goethe, Proverbs in Prose (1819)

Despite the filing of 15 million new civil cases every year, little attention has been given to the decisions made by attorneys and their clients in initiating, prosecuting, defending and attempting to resolve those cases. The perceived “litigation explosion” has not ignited a commensurate investment in empirical studies to describe the underlying reasons and motivations for filing and maintaining civil actions, the psychological and financial obstacles to conflict resolution, and the economic utility of decisions about settling cases or bringing them to trial. Academicians have analyzed these subjects, but funding for their research is miniscule relative to the impact of litigation on the nation’s economy. As Lela Love, a law professor and the chair of the American Bar Association’s Section of Dispute Resolution, notes, “We really know very little about conflict and its dynamics.”

2.1 The Paradox of Copious Lawyers and Scant Data

The dearth of data about litigation is perplexing in a country with the highest concentration of attorneys per capita and a tradition of giving every citizen her day in court. Although the legal services industry is a major force and business in the American economy, affecting nearly every aspect of risk assessment from automobile design to pharmaceutical research, from kindergarten field trip waivers


to Fortune 500 companies’ earnings guidance, the quality of data regarding one of America’s greatest growth industries is distressingly poor and grossly disproportionate to the industry’s impact on the national economy. Basic information regarding total national legal compliance and net litigation costs, for example, is not available. “The fund of basic information does not exist,” law professor Marc Galanter said in 1994. “It is as if we had a medical establishment,” he adds, “consisting entirely of practicing physicians with no research institutes like the National Institutes of Health and no public health monitoring facilities like the Centers for Disease Control.”

Fourteen years later, little had changed, as law professor Theodore Eisenberg observes: “Policymakers and interest groups regularly debate and assess whether civil problems are best resolved by legislative action, agency action, litigation, alternative dispute resolution, other methods, or some combinations of actions. Yet we lack systematic quantitative knowledge about the primary events in daily life that generate civil justice issues.”

Although the nation cannot track key data regarding the civil justice system and the legal services industry, its expenditures on legal services increase at rates much higher than the nation’s inflation and GDP growth rates. Between 2000 and 2005, total revenue for the legal services industry increased from $161 billion to $222 billion, and average profits per partner in the nation’s 100 top-grossing firms increased from $800,000 to $1,060,000. To place these figures in perspective, in 2005 the total amount spent on legal services exceeded the total amount spent by all American businesses on research and development and was more than twice the total amount the federal government spent on research and development. Americans thus paid more money for legal services than their businesses invested in securing a competitive advantage in the future. Another perspective is that, although 1,400,000 Americans are diagnosed with cancer every year and cancer kills about 560,000 Americans every year, total annual expenditures on legal services are about 50 times the amount the National Institutes of Health spend on cancer research.

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The nation’s expenditures on legal services reflect its relatively large population of attorneys. Nearly one in every 262 Americans is an attorney, and every weekday morning 1,143,358 chairs throughout the nation await indentation behind a lawyer’s desk. By way of contrast, the total number of civil engineers in the United States is 256,000, and the number of physical scientists is 199,600. There are 173,000 law offices around the country, compared with 55,000 engineering services firms and 16,000 scientific research and development establishments. While more than 1.1 million active attorneys provide legal services, medical care is available from only 800,000 active physicians. Indigent citizens can avail themselves of more civil legal aid programs than federally funded community and migrant health care centers.

Despite the large number of attorneys, the high demand for legal services and the intensive legal regulation of modern life, scant data exist regarding the economic benefits of legal services expenditures, the accuracy of attorneys’ advice and judgment and the efficacy of their representation in lawsuits. As law professor Douglas Rosenthal observes, “we ourselves have no reliable information about how competent, in the aggregate, lawyers actually are.” This paradox is evident to economists and psychologists:

The appropriateness of lawyers’ probability judgments has important implications for the quality of their service – decisions about whether to sue, settle out of court, or plead guilty to a lesser charge, all depend on a lawyer’s judgment of the probability of success.

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10United States Bureau of the Census supra note 5, Table 1247, Selected service-related industries – establishments, employees, and payroll by industry: 2003 and 2004.
Surprisingly, then, there is relatively little research assessing the calibration of lawyers’ probability judgments in their day-to-day practice.\textsuperscript{14}

Like medical practice before the advent of national databases recording patient outcomes, the legal services industry generally has eluded quantitative accountability and comparability in outcome assessment and peer benchmark performance standards. Consistent with the profession’s lack of objective performance standards and the absence of comparative quality measurements, the typical fee agreement in a litigation matter contains a clarion disclaimer of responsibility for the primary purpose of the retention: results.

The lack of data about legal services in general and litigation outcomes in particular contrasts sharply with businesses’ rapidly expanding reliance on analytics. For more than two decades, businesses have evolved from subjective evaluations to quantitative analysis, from making decisions based on intuition and hunches to relying on data and algorithms. As Ian Ayres, a law professor and author of \textit{Super Crunchers} notes, “We are in a historic moment of horse-versus-locomotive competition where intuitive and experiential expertise is losing out time and time again to number crunching.”\textsuperscript{15} This shift to quantitative analysis has occurred in virtually every major business sector except law. Even sports teams, as shown in the popular book \textit{Moneyball}, are more likely to employ analytics than law firms.\textsuperscript{16} Companies that are data driven, “from automobiles, to textiles, to computer software, to baseball,” explain Stanford University professors Jeffrey Pfeffer and Robert Sutton in their book \textit{Hard Facts: Dangerous Half-Truths and Total Nonsense}, consistently outperform their competitors: “Organizations can gain competitive advantage if they take the trouble to substitute facts for common lore and to test conventional wisdom against the data.”\textsuperscript{17} The competitive advantage of analytics-driven companies is reiterated by management professor Thomas Davenport in his \textit{Harvard Business Review} article, “Competing on Analytics:” “Virtually all the organizations we identified as aggressive analytics competitors are clear leaders in their fields, and they attribute much of their success to masterful exploitation of data.”\textsuperscript{18}

Apart from comparing gross revenue and profits per partner with competitors, law firms are not competing on analytics. Despite the widespread use of analytics in the business world, law firms are not running horse-versus-locomotive races, as depicted by Ian Ayres, but are still pitting their thoroughbreds against another


firm’s thoroughbreds. Law firm clients, consequently, have become accustomed to working in two different realms. The first realm, outside their lawyer’s office, is increasingly directed by data and requires quantitative justification for decisions and objective evidence of accomplishment within budget. The second realm, inside their lawyer’s office, is characterized by “on the one hand this, on the other hand that” legal advice, lengthy narratives and memoranda, caveats that loom larger than general propositions, and attorneys who submit a total fee projection and then “blow through it in half the time.”\(^{19}\) Law firm clients who would be aghast if their financial institution relied on a personal interview instead of a credit score in making a $100,000 loan decision nevertheless are comfortable turning a $50,000,000 case over to an attorney who will not employ a quantitative analysis to assess case outcome probabilities and whose own record of trial losses, case management, cost control and decision errors is unknown. Clients reluctant to invest $5,000 in a mutual fund without checking its Morningstar rating retain attorneys to purchase buildings, sell businesses, and license patents based simply on a colleague’s recommendation or another lawyer’s referral. This anomaly arises not by client choice but rather by necessity; comparative performance data simply are not available.\(^{20}\)

2.2 Empirical Legal Research on Judge, Jury and Attorney Decision Making

Although many aspects of legal practice remain in a pre-reformation mode – their language cryptic, their rituals opaque and their prefects autonomous – one aspect of the legal system sparked early and earnest quantitative research: decision making by judges, juries and litigation attorneys. One prong of this research focused on judge-jury agreement, i.e., whether judges and juries make similar determinations of guilt, liability and damages. A second prong concentrated on attorney and litigant predictions about case outcomes, i.e., whether attorneys and clients make accurate or over-optimistic assessments of what a judge or jury will decide at trial. As explained below, this research generally shows that judges and juries have similar opinions about how cases should be decided, but attorneys and clients are


\(^{20}\)For the businesses and insurance companies that claim to employ quantitative methods for selecting and evaluating law firms, one may question their usefulness when 54% of corporate counsel report that they fired their primary law firms in the last 18 months and only 31% would recommend their primary law firm to another company. Source: BTI Consulting Group. (2006, March 3). Client Satisfaction with Law Firms Plummets [Press Release]. See also BTI Consulting Group. (2008). The survey of client service: Performance for law firms: The BTI client service A-team (reporting only 34.6% of corporate counsel surveyed in 2007 would recommend their primary firm).
not particularly accurate forecasters of trial results. The neutral roles of judge and jury are associated with relatively consistent and predictable case evaluations; the roles of advocate and litigant, however, are marked by conflicting and inaccurate case assessments.

The research regarding decision making in civil cases suggests that judgments about risks and consequences are altered when attorneys and clients assume partisan roles. People whose judgment is otherwise sound and whose predictions are otherwise accurate lose their acuity when they adopt the roles of advocate and litigant. Because judges once acted as attorneys and jurors have been or may become individual plaintiffs and defendants, it appears that attorneys and their clients are not permanently misaligned decision makers but may act that way when they become legal representatives or parties in actual cases. The fact that jurors’ opinions are consistent with experienced judges’ opinions also indicates that jurors’ verdicts are not wildcards but rather predictably reflect the values, rules and decision-making processes judges employ. Judges and juries, in short, seem to agree on what is the “right” result, but attorneys and clients in litigated cases have seriously disparate views of how cases should and will be resolved.

David Donoghue, an intellectual property attorney and partner at Holland & Knight in Chicago, reflects on attorneys’ difficulties in predicting case outcomes and opines that law school education itself may contribute to the gap between attorneys’ predictions and jurors’ verdicts:

As a child, my dad (a criminal defense attorney) routinely asked my family and me to predict the outcomes of his trials. We were usually correct. My dad was not. At some point during law school, I stopped being able to predict his case outcomes. The law changes how you think. Perhaps lawyers become too clouded with burdens of proof and rules of evidence to appreciate how a jury sees a trial. As a federal district court law clerk, I had a similar experience. I saw a number of trials and as we waited for the jury, we would often try to predict the results in chambers. The only people who reliably predicted the results were those without law degrees.²¹

Noting that “legal training hinders your ability to understand, persuade and communicate with juries” and attorneys usually have little in common, socially or economically, with jurors, Patricia Steele, a jury consultant, voices a similar sentiment: “Lawyers are skilled at many things, but understanding and connecting to jurors is generally not one of them.”²²

²²Steele, Patricia. (2006, Summer). To deal better with juries, stop thinking like a lawyer! Defense Comment, 21(2).
2.2.1 Judge-Jury Agreement

The conventional wisdom is that attorneys and their clients cannot accurately predict case outcomes because juries are unpredictable. Media coverage of celebrity trials bolsters this perception and invariably includes references to the O.J. Simpson murder trial and the multi-million dollar verdict in the McDonald’s spilt coffee case. Empirical research, however, does not support the conventional wisdom but rather demonstrates that jurors usually make deliberate, thoughtful, and intelligent decisions that comport with a judge’s opinion of what the verdict should be. “Lawyers entertain longstanding perceptions of the jury as biased and incompetent, relative to the judge,” writes law professor Kevin Clermont. But, after reviewing the extensive research regarding jury decision making, Professor Clermont concludes that lawyers’ perceptions of jurors’ ineptitude are groundless: “There is, however, no actual evidence that juries are relatively biased or incompetent.”

Although the jury system may be a convenient scapegoat when trial strategies and forecasts go awry, it does not deserve the invectives thrown at it. The fact that some attorneys and clients do not comprehend how a jury will decide their cases does not mean that a jury’s methods and decisions are incomprehensible any more than a medieval craftsman’s inability to understand how the Romans built the largest unsupported concrete dome over the Pantheon proves that the Romans, too, had no idea of what they were doing. Although one may conclude that attorneys and clients are often poor forecasters it does not follow that jurors are unpredictable adjudicators.

During the last 40 years, studies consistently demonstrate that jurors understand trial evidence and the applicable law, and judges agree with their verdicts in the large majority of cases. The first major study of judge-jury agreement, The American Jury, was published in 1966 by law professors Harry Kalven and Hans Zeisel. The study was based on questionnaires completed by more than 500 judges in 4,000 civil trials throughout the United States. The judges recorded their opinions of the difficulty of the case and how they thought it should be decided before the jury rendered its verdict, avoiding the possible effects of hindsight bias. In 78% of the cases, the judge agreed with the jury’s verdict. The cases on which they disagreed did not reflect any bias in favor of or against plaintiffs; in 10% of the cases the judge would have issued an award for the plaintiff when the jury’s verdict favored the defendant, and in 12% of the cases the judge would have ruled in favor of the defendant when the jury rendered a verdict for the plaintiff.24

findings from Kalven and Zeisel’s research,” state law professors Neil Vidmar and Valerie Hans, “are that agreement between judge and jury was substantial and that most instances of disagreement could not be ascribed to jury incompetence or unwillingness to follow the law.” The 78% agreement rate between judges and juries is especially impressive when compared with decision making in other fields, explains Kevin Clermont: “this 78% agreement rate proves better than the rate of agreement on dichotomous decisions between scientists doing peer review, employment interviewers ranking applicants, and psychiatrists and physicians diagnosing patients, and almost as good as the 79% or 80% rate of agreement between judges themselves making sentencing decisions on custody or no custody in an experimental setting.”

Kalven and Zeisel’s findings have been replicated in many other studies conducted after 1966; and in one study conducted by the University of Chicago Jury Project, the judges disagreed with the jury’s finding of liability in only 1% of the cases. Those other studies also show that a case’s complexity and the amount of expert witness testimony do not affect significantly the extent of judge-jury agreement, indicating that juror comprehension and jury verdict concordance with judges’ opinions do not diminish with case difficultness. Even in the specialized area of child support awards, which are determined by judges, experimental research shows that potential jurors reporting for jury duty “follow a predictable and rational course in their intuitive lawmaking” when presented with hypothetical child support cases. In 89% of the hypothetical child support cases, the jurors’ intuitive opinions about an appropriate amount of child support did not vary from the state guidelines by more than 20% although the jurors were unaware of the guidelines; and their average award in one hypothetical child support case “was coincidently a perfect match” to the amount established by the state guidelines.

26Clermont supra note 23 at 31.
2.2.2 Punitive Damages

Empirical research also challenges the popular conception that juries are more likely to award punitive damages or a higher amount of punitive damages than judges. Comparing judges’ decisions in 101 cases with jury verdicts in 438 cases, law professor Theodore Eisenberg and his colleagues concluded that “juries and judges award punitive damages in approximately the same ratio to compensatory damages.” Although he found some variability in the incidence of punitive damage awards, Eisenberg concluded that “the differences in punitive award rates more likely are a function of case selection than of juror’s relative harshness in bodily injury cases.” Eisenberg’s conclusions are consistent with studies by Thomas Eaton and Jennifer Robbennolt, who found that juries did not award punitive damages more often than judges and made similar decisions about the appropriate amount of damages. The empirical studies on juries’ decisions, in sum, “provide evidence of massive stability and consistency in jury decision making.”

2.2.3 Judges’ Assessments of Juries

Judges not only agree with jurors’ verdicts in the vast majority of cases but they support their deliberative processes as well. Multiple surveys of more than 1,400 state and federal court judges demonstrate that judges respect both jurors’ capacity for objective evaluation and their sound judgment in rendering verdicts. The surveyed judges, report professors Vidmar and Hans, “gave very positive evaluations of the jury for its competence and its fairness” and “generally reported that the juries had made the correct decision and had had no difficulties applying the

In interviews with attorneys representing parties in contested divorce cases, where child support and property division were disputed issues, the attorneys “report that they have difficulty discerning court standards and that they cannot predict the outcomes of court processes ... Even the lawyers in our sample who do think there are set standards and who do say they can predict outcomes differ in their opinion of the content of those court standards; obviously, they cannot all be correct.” Erlanger, Howard S., Chamblis, Elizabeth, and Melli, Marygold S. (1987). Participation and flexibility in informal processes: Cautions from the divorce context. Law & Society Review, 21, 585, 599, cited in Galanter, Marc, and Cahill, Mia. (1994, July). Most cases settle: Judicial promotion and regulation of settlements. Stanford Law Review, 46, 1339, 1385.


31Eisenberg supra note 30 at 293.

32Vidmar and Hans supra note 25 at 311.

appropriate standards to the case.”34 The curious conclusion is that, although attorneys and the public may perceive jurors as impressionable if not wayward, the most authoritative sources – the judges who actually weigh the evidence alongside them – consider their deliberations to be commendable, their verdicts fair.

2.2.4 Attorney-Jury and Attorney-Attorney Agreement

Shifting from the study of judge-jury agreement to attorney-jury and litigant-jury agreement, one finds large disparities between what attorneys and their clients expect to occur in a case and what actually happens at trial. These disparities are evident in experimental studies of hypothetical cases as well as data compiled from actual cases and are directly proportional to attorneys’ confidence levels. Attorneys with the highest level of confidence in their assessments tend to be the most poorly calibrated, i.e., most likely to be wrong in forecasting case outcomes. For cases that are settled rather than tried to verdict, the studies also demonstrate that attorneys have widely divergent views among themselves of what a case is worth and what is the appropriate amount of initial settlement demands and offers. These discordant case evaluations often reflect unrealistic settlement positions and ultimately break the strategic link between skillful bargaining and probable case outcomes. When negotiations collapse because settlement positions have no relation to likely outcomes, clients bear the cost of testing their attorneys’ case assessments at trial. Hence the adage, “Attorneys learn by trial and error – the client’s trial, the attorney’s error.”

2.2.5 Attorney-Litigant Negotiation Positions, Assessments and Outcomes

Two of the earliest studies of pre-trial negotiations and case evaluations were completed in the 1960s. In the first study, entitled “Predicting Verdicts in Personal Injury Cases,” Philip Hermann analyzed cases where the parties exchanged settlement offers and demands, failed to settle the cases, and proceeded to trial. Comparing the plaintiff’s last settlement demand and the defendant’s last offer with the actual trial verdict in 443 personal injury cases, they discovered that the attorney’s settlement posture bore little relation to the actual trial value of the cases. Only one-sixth of the demands and offers were within 25% of the verdict. The attorneys and the insurance companies, Hermann observed, were “equally wild” in guessing the value of their cases.35

34Vidmar and Hans supra note 25 at 151.
35Galanter supra note 33 at 83.
In the second experiment, conducted by Douglas Rosenthal, the settlement amount negotiated by attorneys in pre-trial settlements was compared with the settlement valuation prepared by an independent panel of experts. The panel was comprised of two lawyers who usually represented plaintiffs, two claims agents for insurance companies, and one lawyer who was experienced in representing plaintiffs and insurance companies. Rosenthal thought that “a comparison of the actual recoveries with the mean panel evaluation would provide one relatively ‘objective’ empirical measure of the competence of professional service received by personal injury claimants.” He found that 40% of the cases were settled for less than two-thirds of the case’s settlement value, as determined by the expert panel, and overall the settlement amounts varied from one-sixth of the panel’s valuation to twice their valuation. Rosenthal concludes, “In 77% of the cases (44 of 57) clients did worse than they should have according to the arithmetic means of the values assigned to their claims by each of the five panelists.”

2.2.6 Disparities In “Same Case” Evaluations and Outcomes

Following Hermann and Rosenthal’s studies in the 1960s, empirical research continued to demonstrate high variability among attorneys in evaluating cases and negotiating settlements. Professor Gerald Williams’ experiment with practicing attorneys, published in 1983, is regarded as one of the early and noteworthy attempts to use the “same case” method to simulate actual settlement negotiations among attorneys. In that experiment, designed to replicate pre-trial negotiations between practicing attorneys in a personal injury case, Williams assigned 40 practicing lawyers to 20 teams and randomly designated the attorneys on each team as the attorney for the plaintiff or the defendant. All attorneys read the same case facts, were informed that the case would be tried to a jury in Des Moines, Iowa, and were notified that the results of their negotiations, along with their names, would be published. Each attorney, moreover, received copies of jury awards in comparable cases tried to verdict in the Des Moines area.

Despite the fact that all attorneys received identical case information and could have learned the outcomes in similar cases, their negotiation positions and settlements were astonishingly dissimilar. Attorneys assigned the plaintiff’s attorney role initiated settlement negotiations with demands ranging from $32,000 to $675,000, and attorneys in the defense role made opening offers ranging from $3,000 to $50,000. The amount of the ultimate settlement negotiated for their hypothetical clients varied from a low of $15,000 to a high of $95,000 – all for the same injuries in the same case in the same jurisdiction.

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37 Galanter supra note 33 at 81–83.
38 Galanter supra note 33 at 81–83.
2.2.7 Comparisons of Predictions and Outcomes

Five years after the publication of Williams’ results, psychology professors Elizabeth Loftus and Willem Wagenaar studied actual predictions attorneys made regarding civil cases they expected to proceed to trial. They asked attorneys to record what they thought would be a good result for their client and the probability of obtaining the desired result. After the cases were resolved – and in many cases after considerable prodding – the attorneys reported the actual results to Loftus and Wagenaar. Comparing the attorneys’ goals and levels of confidence with the actual outcomes, Loftus and Wagenaar concluded that attorneys’ forecasts were poorly calibrated and “in general lawyers were overconfident in their chances of winning, especially so in cases in which they had been highly confident to begin with.”

Loftus and Wagenaar observed that forecasting accuracy is particularly important for attorneys and clients because “we are concerned here with the possibility that erroneous predictions about an uncertain future might lead a lawyer to make the wrong decision about whether to proceed with further litigation or to settle.”

They posit five possible explanations why attorneys are confident yet inaccurate forecasters: (1) few attorneys keep a record of their actual forecasting accuracy or their trial win rates; (2) the few attorneys who do keep track of their performance “might record how often they lose, but fail to fully analyze what went wrong;” (3) attorneys may systematically neglect important predictors, relevant law precedents and the personality of the judge; (4) lawyers may “need to feel and display overconfidence in order to attract clients, and, later, to keep those clients convinced that their interests are well served;” and (5) lawyers may tend to recall “a similar case in which a favorable verdict was achieved and ignore “similar cases in which unfavorable verdicts were achieved.”

Overconfidence, Loftus and Wagenaar hypothesize, may help lawyers maximize their courtroom performance and persuasiveness but adversely affects their settlement evaluations and negotiations.

A later study, also conducted by Loftus and her colleagues, tested the accuracy of lawyers’ predictions about whether their client would prevail at trial. She found that the lawyers’ judgments “showed no predictive validity” and were “hardly above chance.” The attorneys generally exhibited a marked “overextremity bias (underprediction of success for low probabilities and overprediction of success for

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40Id. at 441.
41Id. at 450.
high probabilities).” When she specifically analyzed the predictions of lawyers retained on a contingency basis, she observed that their predictions of success were especially biased by over-optimism. Although the contingency fee lawyers exhibited the same level of confidence about case outcomes as other lawyers, the contingency fee attorneys in her study won only 42% of their cases compared with an overall 56% win rate.

2.2.8 Damages Award Predictions

When researchers focus on projected damages awards instead of win/lose predictions, they discover that jurors’ opinions about damages are a close match with judges’ opinions and, in some instances, jurors’ collective judgment is less variable than the opinions of individual judges and attorneys. In two experiments conducted by Neil Vidmar the same hypothetical case facts were presented to lawyers, judges and citizens who had reported for jury duty, and they were asked to estimate the appropriate amount of damages to award to the plaintiff. (Liability was admitted in the hypothetical case). In both experiments, the jurors’ average estimated award was less variable than the individual judges’ estimated awards. Overall, Vidmar reports, “the findings show variability among legal professionals and hint that juries may produce more stable estimates of the community’s evaluation of the injury than a single judge acting alone.”

About four years after the publication of Vidmar’s research regarding damages awards, Roselle Wissler and her colleagues completed a large-scale study designed to determine the degree of variability among judges, jurors and lawyers in assessing liability and awarding damages. In Wissler’s study, 1,060 judges, jurors and lawyers in two different states were presented with 62 case summaries based on actual personal injury cases. After hearing the case summary, the survey respondents were asked to state the amount of money they would award to the plaintiff, the amount of the award they thought an average juror would award, and their rating of the plaintiff’s injury in five aspects, e.g., overall severity. Reviewing the data, Wissler states, the “dominant theme of these findings is one of considerable similarity across the various groups of decisionmakers in the structure of thinking about injury severity and awards. Most importantly, an impressive similarity exists in the injury attributes that drive their decisions, the weight given to those attributes, and the shared sense of vertical equity held by jurors, judges, plaintiffs’ lawyers, and defense lawyers alike.”

43 Id.
44 Vidmar and Hans supra note 25 at 301.
Wissler’s study found that the most significant deviation in opinions about the severity of plaintiffs’ injuries was not between juries and judges but between defendants’ lawyers and the other respondents:

Indeed, if any one group emerges as being out of step with all of the others, it is defense lawyers. This has somewhat paradoxical implications. When members of the defense bar evaluate the performance of jurors, and gauge them to be off the mark, these lawyers no doubt reach that assessment by comparing the jurors’ conclusions to their own. But their own impressions of injuries are the ones that depart most from the pattern shown by the other decisionmaking groups, at least in regards to judgments of injury severity.46

She notes that the severity of injury is consistently one of the strongest predictors of monetary awards, and defense lawyers’ opinions about the amount of awards may be “less responsive to case details” and “more mechanical.”47

### 2.2.9 Overview of Judge, Jury and Attorney Decision Making

The research regarding the decisions of judges, jurors and lawyers does not substantiate the strong criticisms frequently leveled at jurors – that, in Jerome Frank’s accusation, jurors are “uncertain, capricious, and unpredictable, ignorant and prejudiced, poor factfinders, gullible and incapable of following complex legal rules, thus making ‘the orderly administration of justice virtually impossible.’”48

To the extent that studies compare the decisions of jurors with judges and attorneys, the studies show “considerable similarity” in overall case assessments or, in some instances, higher variability among attorneys than judges and jurors. When studies compare attorneys’ case outcome predictions with actual trial results, attorneys appear to be over-confident, inaccurate forecasters; and when attorneys’ negotiation positions and settlement amounts are compared with those of other attorneys, the variances are broad in scope and deep in implications. “What,” asks law professor Marc Galanter, “are we to make of this persistent and sizable variability and error in lawyers’ readings of potential outcomes?”49

### 2.2.10 Attorney-Litigant Decision Making in Actual Cases

Professor Galanter’s question is both answered and amplified by three studies comparing trial awards with rejected settlement proposals to determine whether litigants recovered more money at trial than they were offered in settlement

46 *Id.* at 805.
47 *Id.* at 758, 794.
48 *Id.* at 753.
49 Galanter *supra* note 33 at 83.
negotiations. These studies assess whether, in deciding to try cases instead of settling them, attorneys and their clients are making financially advantageous decisions, and if not, what factors influence their decision to forego settlement. The three studies are reported in law professors Samuel Gross and Kent Syverud’s 1991 article, “Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial,” their 1996 study, “Don’t Try: Civil Jury Verdicts in a System Geared to Settlement;” and law professor Jeffrey Rachlinski’s 1996 study, “Gains, Losses and the Psychology of Litigation.”

In these three studies the authors analyzed settlement behavior in actual civil cases and concluded that the conventional model of rational decisions leading to optimal economic outcomes is inapplicable, misleading, or inaccurate. Noting that “the absence of data on pretrial negotiations has handicapped development of this topic,” law professors Gross and Syverud first studied a nonrandom sample of 529 cases between June 1985 and June 1986. Their data showed that “the main systemic determinants of success at trial and in pretrial bargaining are contextual and relational [e.g., litigants’ resources, reputations, insurance, fee arrangements, repeat litigants]” and that prior theoretical models of attorney/litigant settlement behavior were “quite alien to actual litigation.”

Gross and Syverud found, were not rational, utility-maximizing actors and “win-win” trials were rare. Only 15% of the trials they studied resulted in an award for a plaintiff that was greater than defendant’s settlement offer but less than plaintiff’s demand, “and in some of these cases the entire gain for one side, or both, will have been consumed by the trial costs.”

Gross and Syverud’s study directly challenged a prior theoretical model of litigation posited by law professors George Priest and Benjamin Klein: “the fifty percent implication.” According to Priest and Klein’s theory, trials occur primarily in “close cases,” plaintiffs and defendants are equally adept in predicting trial outcomes, plaintiffs will win about 50% of the cases that proceed to trial, and “mistakes” about outcomes will be evenly distributed between plaintiffs and defendants. Priest and Klein’s hypothesis, however, turns out to be inconsistent with the data compiled by Gross and Seyverud:

Economic theories of trial and pretrial bargaining call to mind the standard image of a competitive market: numerous individuals intelligently pursuing independent self-interests.
Social reality, as usual, is inconsiderate of global theories. In this case it provides a competing image that is less susceptible to statistical prediction: stragglers picking their way in the dark, trying to avoid an occasional land mine.54

Presaging a broader application of behavioral economics theories (discussed in Chapter 4) to attorney-litigant settlement behavior, Gross and Syverud observed that plaintiffs usually are more risk averse than defendants; plaintiffs and defendants attach “separate values to each possible outcome;” and “their stakes may be unequal (or equal) with respect to victories, or defeats or both.”55

In their second study, Gross and Syverud added a sample of 359 cases reported between 1990 and 1991. Their results again conflicted with the Priest-Klein litigation model. Instead of a 50/50 distribution of “mistakes,” Gross and Syverud found that plaintiffs were more likely than defendants to make a decision-making mistake, that is, rejecting a settlement proposal which turned out to be the same as or more favorable than the actual trial award. Plaintiffs were “clear losers” in 61% of the cases in their first sample (1985–1986) and 65% of the cases in their second sample (1990–1991). The defendants, in contrast, made mistakes in only 25% and 26%, respectively, of the cases in the two samples.

In the third major empirical study of attorney-litigant decision making in adjudicated cases, Rachlinski compared final settlement offers with jury awards in 656 cases. His data showed decision error by plaintiffs in 56.1% of the cases, contrasted with defendants’ decision error rate of 23%. Although plaintiffs’ decision error rate was markedly higher than defendants’ decision error rate, the average cost of plaintiffs’ decision error ($27,687) was dramatically lower than defendants’ mean cost of error ($354,900). Observing that litigants’ decisions are “suboptimal” and “may not comport with rational theories of behavior,” Rachlinski found that the “consistently divergent risk preferences between plaintiff and defendant” could be explained by behavioral economics’ framing theories.56 Litigants’ “risk preferences depend upon characterizing a decision as a gain or loss” and “vary systematically depending upon whether they are in the role of plaintiff or defendant.”57 Plaintiffs are consistently risk averse, while defendants are risk taking. Consequently, plaintiffs generally benefited from litigation and “defendants as a class paid heavily for their decision” to litigate: “When settlement negotiations failed, the plaintiffs were unwittingly forced to undertake a risk that, on average, benefited them and cost the defendants dearly.”58

54Gross & Syverud (1991) supra note 50 at 385.
55Gross & Syverud (1991) supra note 50 at 381.
56Rachlinski supra note 50 at 114, 118, 120, 142.
57Rachlinski supra note 50 at 119.
58Rachlinski supra note 50 at 160.
2.2.11 Kiser, Asher and McShane Study of Attorney-Litigant Decision Making

The continuing viability of the Gross and Syverud and Rachlinski studies was tested in 2008 by a large-scale analysis of attorney-litigant decision making. The results of that analysis appear in an article entitled, “Let’s Not Make A Deal: An Empirical Study Of Decision Making In Unsuccessful Settlement Negotiations,” co-authored by Randall Kiser of the decision services company DecisionSet™ and Martin Asher and Blakeley McShane of The Wharton School. The article, which describes the results of the largest multivariate analysis of attorney-litigant decision making, was published on behalf of Cornell Law School and The Society for Empirical Legal Studies in the Journal of Empirical Legal Studies, Vol. 5, No. 3 (September 2008).

Six key findings of this study of 4,532 actual cases are: (1) 61% of plaintiffs and 24% of defendants obtained a result at trial that was the same as or worse than the result that could have been obtained through a pre-trial settlement; (2) the average cost of these decision errors was $43,100 for plaintiffs and $1,140,000 for defendants during the 2002–2005 period; (3) the incidence of decision errors increased and the cost of these errors soared between 1964 and 2004; (4) “Context” variables (systemic factors like case type) are more predictive of adverse trial outcomes than “Actor” variables (personal factors like attorney experience and law school ranking); (5) statutory cost-shifting procedures, intended to encourage settlement by financially penalizing parties whose trial result is worse than the settlement offer made by an adversary, may provoke rather than deter risk-taking behavior; and (6) parties who are represented by attorneys with mediation training experienced a lower incidence of decision error. The results of the Kiser, Asher and McShane study are remarkably consistent with the earlier results reported by Gross and Syervud and Rachlinski, evidencing consistent patterns of high plaintiff decision error rates and high costs of defendant decision error.

2.3 Chapter Capsule

Although the legal services industry assumes a large role in the American economy, scant data exists regarding the economic benefits of legal services expenditures, the accuracy of attorneys’ advice and the effectiveness of their representation in lawsuits. The legal industry has lagged behind other businesses and professions in establishing metrics to measure costs and assess performance.

Limited research regarding attorney-litigant decision making indicates that attorneys and clients are over-optimistic in evaluating their cases and predicting trial outcomes. Four studies by three independent research teams found that, when cases proceed to trial, most plaintiffs obtain an award that is less than the defendant’s settlement offer. Defendants, for their part, obtain a worse result at trial than could have been achieved by accepting a plaintiff’s settlement demand in
23% – 26% of their cases. Although plaintiffs exhibit a higher incidence of adverse trial outcomes, the average cost of defendants’ adverse outcomes is dramatically higher than plaintiffs’ average cost.

Adverse trial outcomes often are blamed on unpredictable and erratic jurors, but empirical research demonstrates that jurors generally discharge their duties faithfully, responsibly and intelligently. Although attorneys may hold widely divergent ideas about case settlement values and likely trial outcomes, judges and juries have similar opinions about how cases should be decided. The high degree of judge-jury agreement suggests that case evaluation may be clouded when clients and attorneys assume partisan roles.59

59Some sentences in this chapter are excerpted with permission from the author’s article, “Let’s not make a deal: An empirical study of decision making in unsuccessful settlement negotiations” (co-authored with Martin Asher and Blakeley McShane), Journal of Empirical Legal Studies, 5(3), 551–591, published by Wiley Periodicals, Inc.
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