REACHING SETTLEMENT

by

Pamela Gershuny, Charles D. McAllister, and Carolyn Rainey*[1]

Disputes arise in business.[2] Approximately 65,000 businesses, including 35-53% of small businesses managers, are involved in a lawsuit in federal court each year.[3] Even when business managers are represented by experienced attorneys, successful managers cannot and should not entirely delegate the final decision to resolve a dispute through trial or through settlement to their attorneys.[4] It is a managerial responsibility to communicate effectively with attorneys[5] to settle disputes quickly and cheaply.[6] Being prepared to settle early can avert a more expensive settlement later[7] and/or a significant and costly loss at trial.[8] As one executive said after a $7.2 billion loss, "The case should have been and could have been settled."[9] In fact, 95% of cases settle.[10] The decision to refuse a settlement offer and proceed to trial is the final decision of the business manager,[11] not the attorney. It is a decision fraught with error.[12] This article suggests that undergraduate business schools can do more to prepare future managers for the responsibility of managing a dispute through to settlement by having students participate in mock trials and jury deliberations. As law students, future attorneys learn to manage and settle cases in clinical programs. As undergraduate business majors take legal environment of business courses, their understanding of the importance of settlement to resolve disputes can be improved through experiential learning.

I. REVIEW OF LITERATURE ON SETTLEMENT AUTHORITY, ERRORS, STRATEGIES, AND ANDRAGOGICAL STRATEGIES

A. Who Makes the Decision to Settle

"A lawyer shall abide by a client's decision whether to settle a matter."[13] The ethical rules for attorneys are clear that the client, and for purposes of this paper, the client is the business manager, is the final decision maker. Courts have imposed liability on attorneys in civil cases who have failed to present settlement offers to clients and allow clients to control the choices.[14] It is the business manager's decision to accept or reject an offer of settlement to resolve a dispute.

Over the last 40 years, the evolving relationship between attorneys and clients has been the subject of a great deal of scholarship.[15] In the past, traditional legal counseling reflected an absence of meaningful interchange between lawyer and business manager.[16] The manager came to the lawyer with some idea about his problem. The lawyer asked questions. At the proper time, the lawyer counseled the manager by essentially conducting a monologue, offering advice and letting the manager decide how to proceed.[17] By contrast, the contemporary client-centered view of the attorney/client relationship expects clients to make significant choices in the course of legal representation, not only because of the clients' interest in autonomy, but because client control is likely to improve the quality of legal representation.[18] In order for a business manager to successfully control legal representation the manager must be well informed. A knowledgeable manager is better able to supervise an attorney's work more carefully.[19] Client control also improves the quality of legal representation because it lessens the effects of attorney-client conflicts of

*Associate Professor of Business Law, Assistant Professor of Quantitative Methods, and Professor Business Education, Southeast Missouri State University

interest that are inherent in most legal representation.[20] In order to be a well informed, responsible manager, negotiation expert Roger Fisher suggests that managers instruct counsel to develop a settlement strategy.[21] Managers and attorneys should discuss the settlement strategy, combined with a litigation decision tree, outlining settlement options over time including a cost-benefit analysis.[22]

B. Erroneous Decisions Refusing Settlement are Costly

The costs of going to trial extend well beyond the amount of compensatory or punitive damages.[23] Managers must consider the costs of attorney's fees, employee time, disruption of the business, and damage to morale and reputation.[24] Learned Hand once wrote, "I must say that as a litigant I should dread a lawsuit beyond almost anything short of sickness and death."[25] The business of business is business, not endless depositions, document reviews, and trial preparation.[26] In a worst case scenario, a manager puts the fate of her company in the hands of a jury with no knowledge of the product, industry, or accounting practices at issue.[27]

If a decides to decline the last settlement proposal offered and risk an uncertain outcome at trial, in 85% of cases studied in California civil cases over the last 40 years, both parties to the dispute achieved a worse outcome than their last settlement position.[28] The study confirms the findings of earlier large-scale empirical studies of settlement decision error in adjudicated cases, demonstrating the extent, costs, and persistence of judgment error by clients and attorneys.[29] In the studies, the parties' settlement positions are compared with the ultimate award or verdict, revealing a high incidence of decision-making error by both plaintiffs and defendants. Plaintiffs erroneously concluded that trial was a superior option in 61.2 percent of the primary set cases, while defendants made an erroneous assessment in 24.3 percent of those cases. The magnitude of defendants' errors, however, vastly exceeded that of plaintiffs' errors. Defendants' behavior "can only be described as risk-seeking. [30] Defendants decision error rates increased if there was a punitive damages claim.[31]

	All Cases Studied		Employment Cases	
Party	Error %	Error Cost	Error %	Error Cost
Plaintiff	62.1%	$43,000	51.1%	$64,800
Defendant	24.3%	$1,140,000	32.4%	$1,420,000

In just 15 percent of all cases, both sides bettered their position by going to trial. [32] In those few cases, the plaintiff was awarded more than the defendant offered and the defendant paid less than the plaintiff demanded. In the remaining 85 percent of cases that went to trial, one or both parties were worse off by rejecting the last settlement proposal.

The presence of an attorney/mediator was associated with lower error rates. The attorney/mediator cases show comparatively low decision error rates that nevertheless would be unacceptable in other high-skill domains like medicine, aeronautics, or structural engineering. If Gross and Syverud are correct in asserting the "real question for any party is whether it would have been better off if it had *not* gone to trial," the answer for a clear majority of plaintiffs and one-quarter of defendants is "Yes." [33]

The California civil cases studied cover a span of 40 years.[34] The historical review of attorney/litigant decision making indicates that the incidence of decision error increased moderately, while the magnitude of decision error increased dramatically. Even though the quality and quantity of information available to litigants pre-trial increased, with the availability of jury verdict information, the frequency of settlement (95 percent plus), and the attention given to risk analysis, decision error rates were *more* frequent in 2004 than in 1964.[35]

C. Rational Choice Theory

The conventional law-and-economics approach to trial and settlement, based on rational choice theory, predicts that, because trials are more costly than out-of-court settlement, lawsuits will settle out of court unless the parties have substantially different predictions about the likely results of trial.[36] Plaintiffs and defendants may reach different predictions about the likely outcome of a trial, but differences in predictions

are presumed to be in both directions. When the predictions of plaintiffs and defendants diverge, half of the time plaintiffs will believe their prospects are worse than defendants anticipate.[37] An implication of this reasoning is that because litigation will be less likely when the parties have more accurate estimates of the likelihood of prevailing, anything that improves those estimates, such as expanded pretrial discovery or better legal representation, is to be favored.[38]

Rational choice theory posits that, "[E]very theory of pretrial bargaining assumes that a negotiated settlement is determined, at least in part, by the parties' predictions of the outcome of the case if it did go to trial."[39] Absent extrinsic motivations, a rational litigant roughly weighs an adversary's settlement proposal against the likely trial outcome, makes some adjustments for attorney fees, court costs, and the possibility of delays and appeals, and either accepts or rejects the adversary's settlement proposal. [40]

D. Behavioral Law and Economics

One possible explanation of the decision error rates is provided by behavioral law and economics. Behavioral law and economics suggests that business managers and attorneys are not entirely rational in evaluating settlement agreements due to the operation of cognitive dissonance and confirmatory bias.[41] Cognitive dissonance refers to the selective perception involved when people discount evidence that contradicts their beliefs.[42] Judgments about the validity, reliability, relevance, and sometimes even the meaning of proffered evidence are biased by the apparent consistency of that evidence with the perceiver's theories and expectations.[43] The operation of cognitive dissonance, in part, could explain why litigants in 2004, with more information than their counterparts in 1964, are making more erroneous decisions.

The “confirmatory” or “self-serving” bias describes the observation that individuals often interpret information in ways that serve their interests or preconceived notions. [44] The operation of this bias may also explain the erroneous refusals to settle in the California civil cases.[45] A series of papers by Loewenstein[46] and Babcock[47] describe the operation of the confirmatory bias in the context of litigation. In an experiment similar to the one described in this paper, a group of law students were provided with factual information about a dispute in litigation.[48] Despite being given identical information, subjects who were told to imagine that they were the attorney representing the plaintiff interpreted the facts as favorable to the plaintiff, while subjects told to imagine that they were the attorney representing the defendant interpreted the facts as favorable to the defendant.[49]

Evidence of the self-serving bias in the analysis of lawsuits suggests that plaintiffs and defendants will overestimate the probability of a successful trial outcome.[50] The consequence of this is more trials than would be predicted by the rational choice model, unless steps are taken to mitigate the parties' evaluative biases.[51] More information provided in the form of expanded pretrial discovery is unlikely to be effective because people use additional evidence to solidify their views, rather than to alter them. [52]

Behavioral law and economics predicts no improvement in the evaluation of trial versus settlement with the provision of additional information to the litigants. However, there is a way to mitigate the parties’ evaluative biases that does show promise. The empirical data from the study of civil cases in California associated the presence of an attorney-mediator with reduced decision error rate.[53] The reduced decision error rate associated with the presence of an attorney mediator supports requiring litigating parties to view the facts of a dispute through the eyes of their opponents by mandating settlement conferences,[54] court-ordered mediation,[55] and nonbinding arbitration[56] in civil litigation. In the theoretical world of rational choice, mandated interaction would merely increase transaction costs for no useful purpose. Instead, it reduces decision error rates.

E. Andragogical Strategies in Law School Clinic Courses, and Social Constructivism

There are numerous psychological, educational and management studies on how adults learn. Experiential learning, the type that occurs in law school clinical courses, is thought to maximize learning experiences for adults.[57] Adults learn best when faced with questions that arise in real-life experiences followed by opportunities to answer and reflect upon those questions.[58] Implementing a mock trial combined with class discussion based upon actual business litigation, allows business students the opportunity to face the same

real questions business managers faced, create answers, and reflect.[59] Like clinical courses in law schools, active teaching methods in business law courses are widely accepted.[60] Mock trials have been employed as teaching methods for over twenty years.[61] Business law professors have been writing scholarly articles about holding mock trials in their classrooms for almost as long.[62] Scholars have discussed the benefits of mock trials as improving critical thinking,[63] increasing long-term retention of material,[64] introducing evaluations of the quality of evidence, promoting searches for cause and effect relationships, and forcing the pursuit of logical consistency.[65]

Clinical law professors support the use of collaborative learning techniques.[66] Collaborative learning is especially important when the "task is complex or conceptual, problem solving is desired, divergent thinking or creativity is desired, quality of performance is expected, and higher reasoning strategies and critical thinking is needed." [67] Much of legal education, including clinical education, can be viewed as transmission-oriented education; however, rounds conversations in law clinics are often sites of dialogic learning[68] in which "emergent knowledge" develops.[69] Through conversation, as students reflect together, they often gain new insights and develop new ideas about what works.[70] As students try to reconcile or assess divergent views, they produce co-constructed knowledge through a dialogue where ideas are shared and built upon.[71]

Support for implementing mock trials and classroom discussions (jury deliberations) can also be found in pedagogical research grounded in social constructivism. Constructivism is a theory based on observation and scientific study about how people learn.[72] It says that people construct their own understanding and knowledge of the world, through experiencing things and reflecting on those experiences. When individuals encounter something new, they have to reconcile it with their previous ideas and experience, either changing their beliefs, or discarding the new information as irrelevant. Individuals are the active creators of their own knowledge. In the classroom, the constructivist view of learning can point towards a number of different teaching practices. In the most general sense, it usually means encouraging students to use active techniques (experiments, real-world problem solving) to create more knowledge and then to reflect on and talk about what they are doing and how their understanding is changing.

Studies on increasing the use of student discussion in the classroom both support and are grounded in theories of social constructivism. Participation in group discussion allows students to generalize and transfer their knowledge of classroom learning and builds a strong foundation for communicating ideas orally.[73] Studies find that discussion plays an important role in increasing students' abilities to test their ideas, synthesize the ideas of others, and build a deeper understanding of what they are learning.[74] Large and small group discussion also affords students opportunities to exercise self-regulation, self-determination, and a desire to persevere with tasks.[75] Additionally, discussion increases student motivation, collaborative skills, and the ability to problem solve.[76] Increasing students' opportunity to talk with one another and discuss their ideas increases their ability to support their thinking, develop reasoning skills, and to argue their opinions persuasively and respectfully.[77] Furthermore, the feeling of community and collaboration in classrooms increases through offering more chances for students to talk together.[78]

However, studies have found that students are not regularly accustomed to participating in academic discourse.[79] One author argues that teachers rarely choose classroom discussion as an instructional format. The results of a three year study focusing on 2400 students in 60 different classrooms indicate that the typical classroom teacher spends under three minutes an hour allowing students to talk about ideas with one another and the teacher.[80] Even within those three minutes of discussion, most talk is not true discussion because it depends upon teacher directed questions with predetermined answers.[81] Multiple observations indicate that students in low socioeconomic schools and lower track classrooms are allowed even fewer opportunities for discussion.[82] Discussion elicits sustained responses from students that encourage meaning making through negotiating with the ideas of others. This type of learning "promotes retention and in-depth processing associated with the cognitive manipulation of information."[83]

II. PURPOSE OF THE STUDY

The purpose of this study is to determine whether participation in an experiential learning exercise, a mock trial combined with class discussion (jury deliberation), will alter business students' attitudes about settlement.

III. RESEARCH METHODS AND PROCEDURES

The target population for this sample was all students enrolled in 4 undergraduate Legal Environment of Business classes at Southeast Missouri State University. Prior to the exercise and after the exercise, surveys were distributed in the classroom. Students were not identified in any way in order to preserve their anonymity. A response rate of 100 percent was obtained on the initial survey. A response rate of 87 percent was obtained on the final survey. Students provided additional anecdotal observations after the final survey.

One hundred thirty five students participated in surveys before participating in mock trial and class discussions (jury deliberations). The experiential learning exercise consisted of 12 mock trials conducted by 24 teams of students in 4 classes. Each of the 4 classes had 6 teams and viewed and discussed 3 trials. Each team represented either a plaintiff or a defendant in a reenactment of an injured plaintiff's claims for compensatory and punitive damages against a business. In all 3 cases, plaintiffs argued that the defendants' products caused their injuries. Students who were not the active trial team role played jurors who deliberated and decided the case while the trial teams listened.

The exercise began during the middle of a sixteen week semester. The students were assigned textbook chapters on the court system, the procedures of litigation, ethics, dispute resolution mechanisms, tort, product liability, and strict liability, prior to the exercise. One mock trial and its corresponding jury deliberation lasted the length of one class period, about one hour. The entire exercise, 3 trials with 3 discussions, was completed in three class periods with about two hours of preparation by the student trial teams.

A traditional, valid argument against implementing a mock trial is the amount of time an instructor must expend in developing the cases.[84] The method used in this study eliminated the need for an instructor to develop cases. Outside of class time, each plaintiff and defendant student team, consisting of six to nine students, watched a forty five minute documentary film of a trial. Although team selection was random, at the outset of the exercise instructors have the option of creating homogeneous or heterogeneous groups.[85]

Using the same facts and expert witnesses presented in the condensed film version of the trial, the plaintiff and defendant team re-enact the trial in class.[86] Each pair of student teams watched one of three movies about actual product liability litigation. The first documentary film involved a woman with neurological diseases following breast implants,[87] the second film, a lifelong smoker with lung cancer,[88] and the third, a young man's who dies in a fiery truck crash.[89] Given the fact that the documentary films served as the basis for the student reenactment, there was no need for the instructor to develop scripts. The documentaries provided a brief synopsis of opening statements, direct examinations, cross-examinations, closing statements, and witness testimony. Students were not required to replay the film verbatim.[90] They were able to bring thespian skills and creativity to their roles as they pursued varying trial strategies, created new questions on direct and cross examinations, and closed, based on the facts that came out in their respective trials. At each trial's conclusion, the student jurors deliberated in front of the trial teams and rendered their verdict. During the jury conversations, students voiced their reasons for finding for the plaintiff or defendant. After the verdict was reached, the plaintiff and defendant teams entered the conversation with the jury, explaining the evidence further and disclosing the verdict in the case to the jury.

IV. FINDINGS AND CONCLUSIONS

The data collected through the surveys indicates a statistically significant change in shows a change in students' willingness to settle disputes.[91] Under the ethical rules governing attorneys and consistent with contemporary client-centered lawyering, the students who plan to become business managers will become the final decision makers in dispute resolution. The study of civil cases in California indicates that settling

cases is financially beneficial in approximately 85% of cases.[92] The study does not factor in the costs of attorney's fees, employee time, disruption of the business, and damage to morale and reputation.[93]

In a research finding not measured in the surveys, but recorded by the author, the fact that the business students voted in 10 out of 12 cases for the defendant suggests the presence of a confirmatory bias. The jury of business majors reached verdicts favoring defendant businesses even though the same facts in the 3 actual trials led the real juries to find in favor of the plaintiffs. Business students, in their role as jury members, were far more likely to side with the business defendants, than the injured plaintiffs, despite the fact that the plaintiffs' positions were argued persuasively by the trial team and sometimes a small minority of jury members during deliberations. The often unanimous verdicts for defendant businesses may be explained by cognitive dissonance theory and the overconfidence bias.[94] Researchers have found that when individuals encounter a more difficult judgment task involving ambiguous information and calling for abstract thinking and interpretation, they exhibit a stronger degree of overconfidence bias.[9596] Discussing the contradictory information presented by witnesses and applying a rule of law is a difficult judgment task calling for abstract thinking and interpretation. Students must collaborate to reach a verdict. The trial teams then collaborate with the rest of the class to explain how other individuals heard the same evidence and reached a contrary conclusion. The revelation of the actual verdict to the class caused the class to work as a group to re-evaluate their decisions. After the verdicts are reached through class discussion and negotiation, the efforts by the trial teams to assist the jury in seeing the dispute through the plaintiff's eyes simulates the effect of the presence of a mediator in the California civil cases studied by Kiser et al.

V. RECOMMENDATIONS FOR FUTURE RESEARCH

Several interesting questions remain unanswered for future research. The first question is whether or not the students will retain their experiential learning about settlement so that it assists them in making better decisions as managers. A second interesting area of research would ask whether or not students believe that businesses can commit torts. Last, and perhaps most difficult to measure is whether students learn that ethical business decision making plays a role in completely avoiding civil litigation.[97] While a business always has a common law duty to behave like a reasonable business,[98] oftentimes, a business manager has little or no regulatory guidelines to follow.

During the product liability mock trial, students review 3 managerial decisions to market products in a regulatory vacuum. In the first trial, Dow Corning produced the breast implants at a time when the FDA had no medical devices division, much less any regulations for the safety of the implant envelope. In the second trial, Brown & Williamson marketed cigarettes before the FDA had any regulations. In the third trial, General Motors sold trucks with gas tanks located outside the frame of the vehicle under the driver's door before the NHTSA created regulations. The managerial decisions raise questions about the efficacy of corporate self-regulation and government regulatory agencies. In all 3 cases, the businesses were in full compliance, yet faced civil liability.

VI. IMPLICATIONS FOR PRACTICE

It is not uncommon for managers to defer to their attorneys once litigation is filed.[99] In fact, some research has singled out the attorney's estimate of the probability of success as the most crucial variable shaping decisions whether to litigate or settle a case.[100] However, a recent large scale study of attorneys' ability to predict outcomes found that attorneys are overconfident in their predictions of success.[101] Female attorneys are less overconfident than male attorneys.[102] The problem for clients who rely on the advice of attorneys who are susceptible to an overconfidence bias is that the clients may choose litigation over settlement, or they may allocate valuable resources without securing anticipated objectives.[103] The study recommends that, "[I]nformation about the outcomes of this and similar studies should be included in the relevant curricula in clinical practice courses and in professional and ethical responsibility classes both at law school and bar admission."[104]

The business students who participated in this research have a blind spot that prevents them from assigning any liability in cases where juries have assessed millions of dollars in liability. If the bias is present when they are managers working with an overconfident attorney, a decision to go to trial would be mutually agreeable to both attorney and client.

The research conducted in this author's classroom is not able to predict whether the students' increased appreciation of settlement, rather than trial, as a course of action will persist when they become business managers. Given the probability that, as managers, they will be involved in business litigation, and the importance of their role in making the final decision to settle or litigate, implementing a variety of teaching methods that provide learning experiences about settlement is consistent with the conclusions of the larger scale research studies' recommendations for attorneys.[105] Both the research on undergraduate business students and practicing attorneys indicates that behavioral law and economics has important implications for managers and attorneys in resolving disputes.

APPENDIX A: SURVEY QUESTIONS

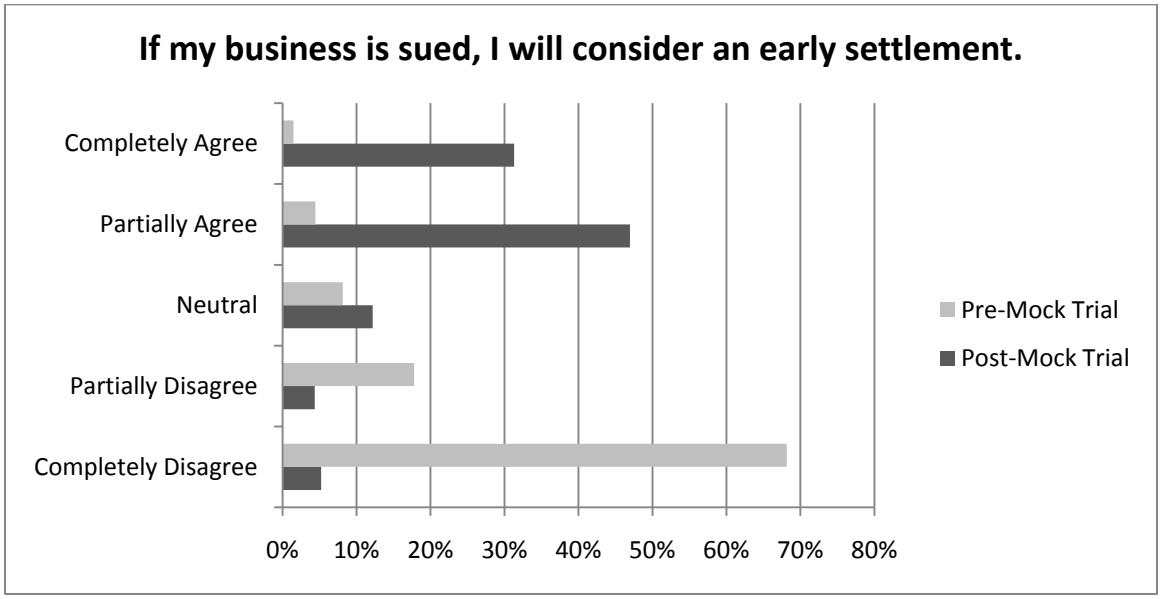
Survey

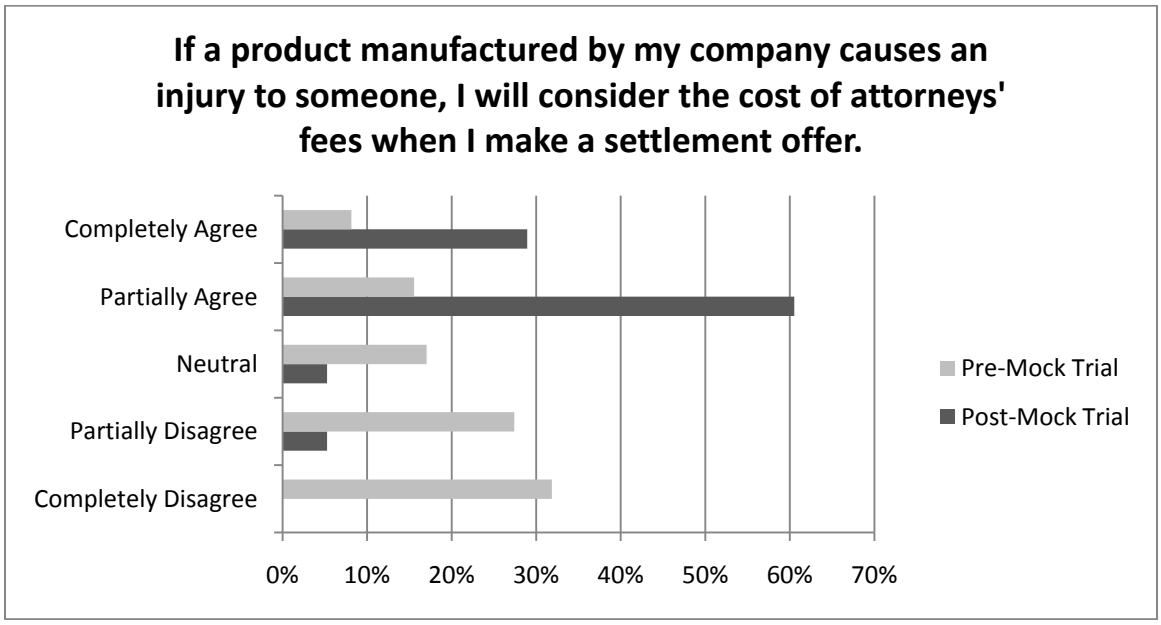
Survey Question	
1	If my business is sued, I will consider an early settlement.
2	If a product manufactured by my company causes an injury to someone, I will consider the cost of attorneys' fees when I make a settlement offer.
3	If I can afford a very long litigation process, I can push for a more favorable settlement.
4	Full compliance with regulatory standards will protect my business and me from being sued.
5	If an injured person claims that a product manufactured by my company caused their injury, but I don't believe that our company's product was responsible, I can count on the truth to emerge through the trial process.
6	Expert witness testimony is very important to winning trials.
7	A skillful attorney is very important in winning a trial.
8	I believe that a jury trial is an effective way to resolve disputes.
9	Business managers should control the amount and timing of settlement offers.
10	Attorneys should control the amount and timing of settlement offers.
11	Frivolous lawsuits against businesses are a problem in the United States
12	It is important for business managers to understand the use of trials for dispute resolution.
13	I understand how effective trials are to resolve disputes against businesses.
14	It is a good idea to pass laws to protect businesses against litigation, like the Cheeseburger Laws.
15	I consider myself a Republican.
16	I consider myself a Democrat.
17	I consider myself independent of any political party.
18	After I graduate, if I become involved in a lawsuit and my attorney advises me to settle the lawsuit, I will take the attorney’s advice.
19	After I graduate, if I become involved in a lawsuit and my attorney advises me to settle the lawsuit, I would prefer to go to trial.
20	Settling a lawsuit is a bad strategy to end the dispute.
21	Settling a lawsuit is a good strategy to end the dispute.

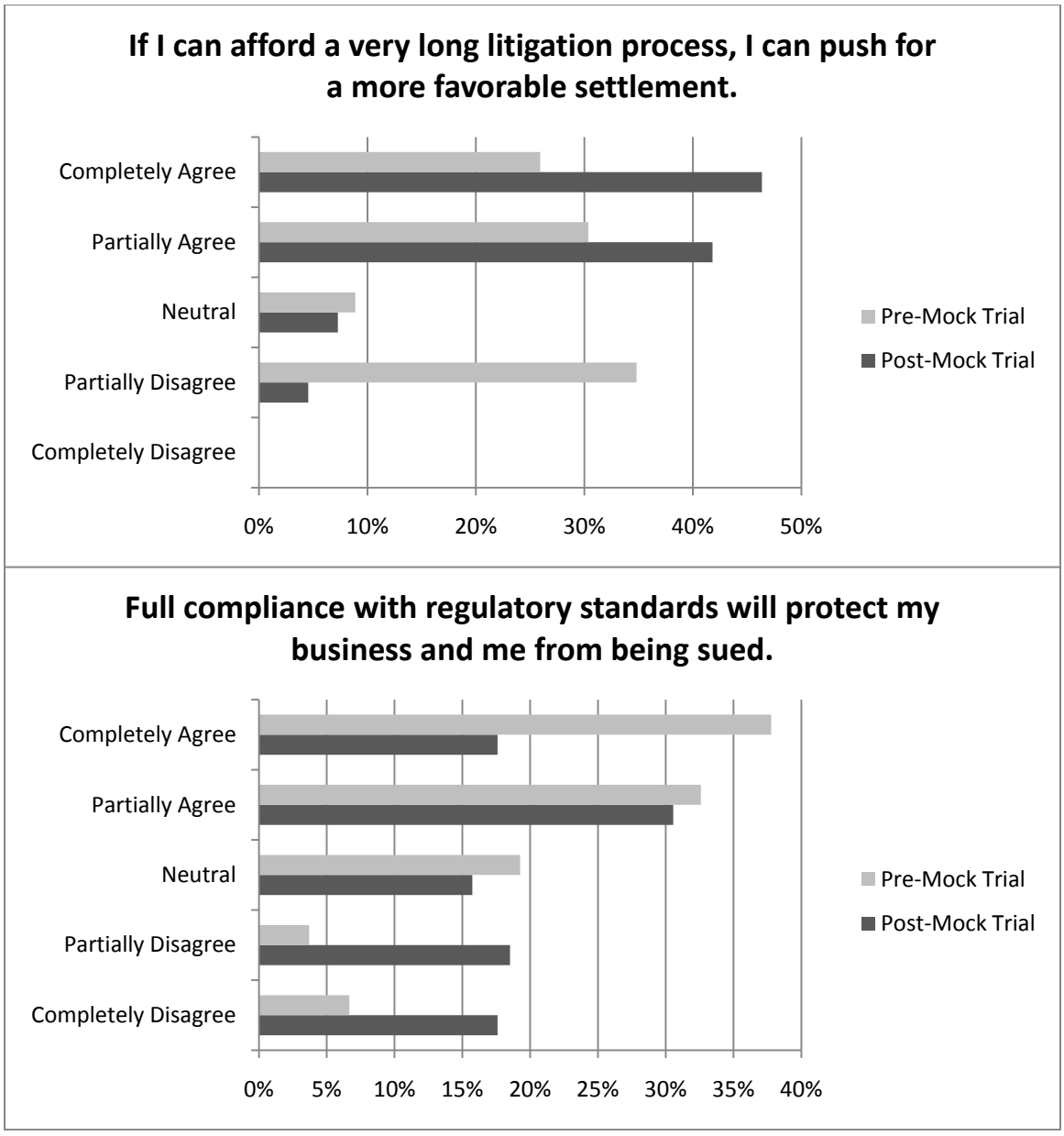
APPENDIX B: AVERAGE AND STANDARD DEVIATION OF STUDENT RESPONSES[106]

Survey Question	Average	StDev	Average	StDev	t statistic for means	df	p value	
1	-270.93	3353.409	-231.04	2467.296	19.27255	230.7655	6.55E-50	Statistically Different
2	-135.65	1156.985	-114.37	851.1099	13.17396	217.5366	1.64E-29	Statistically Different
3	-90.40	610.2396	-73.60	435.1474	6.418894	232.8889	7.66E-10	Statistically Different
4	-67.79	376.6004	-54.34	273.7718	-4.79902	207.8478	3.05E-06	Statistically Different
5	-54.22	275.6305	-36.68	149.1656	2.943482	160.0303	0.003729	Statistically Different
6	-45.19	218.586	-39.10	164.2336	15.98532	204.1708	7.92E-38	Statistically Different
7	-38.75	166.873	-33.80	130.9314	7.178728	199.4518	1.37E-11	Statistically Different
8	-33.91	136.1245	-22.59	69.33302	8.168624	214.2117	2.69E-14	Statistically Different
9	-30.08	109.863	-20.55	59.64516	0.360784	224.9733	0.718601	No change
10	-27.11	97.23194	-19.29	53.84859	11.71393	226.8289	4.45E-25	Statistically Different
11	-24.65	80.27347	-17.93	47.87389	1.323249	216.4511	0.187152	No change
12	-22.27	71.85783	-18.90	52.05796	13.66404	228.2665	1.89E-31	Statistically Different
13	-19.78	57.41517	-17.28	44.97476	5.096923	197.4361	8.07E-07	Statistically Different
14	-18.92	50.98411	-10.94	21.04087	-4.78687	126.7458	4.66E-06	Statistically Different
15	-16.76	43.37806	-14.24	32.82735	2.099691	217.285	0.036912	Marginally Different
16	-15.47	37.10528	-11.85	24.10408	-2.54346	198.664	0.01174	Marginally Different
17	-14.57	33.90933	-11.63	23.3571	-1.32749	216.2998	0.185749	No change
18	-14.18	33.10682	-12.48	26.22506	3.424091	193.7099	0.000753	Statistically Different
19	-13.41	28.39713	-9.53	16.53288	-7.48725	151.8664	5.44E-12	Statistically Different
20	-12.74	26.30722	-9.06	15.09803	-5.67777	148.8017	6.99E-08	Statistically Different
21	-12.13	26.50942	-8.70	14.03069	11.06547	192.8084	2.48E-22	Statistically Different

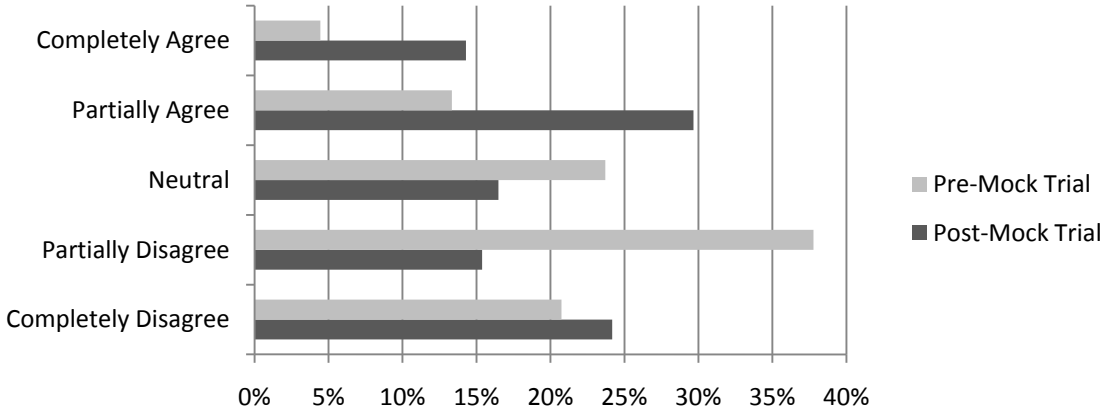
Appendix C: Charts of Pre and Post Trial Survey Results on Settlement Questions



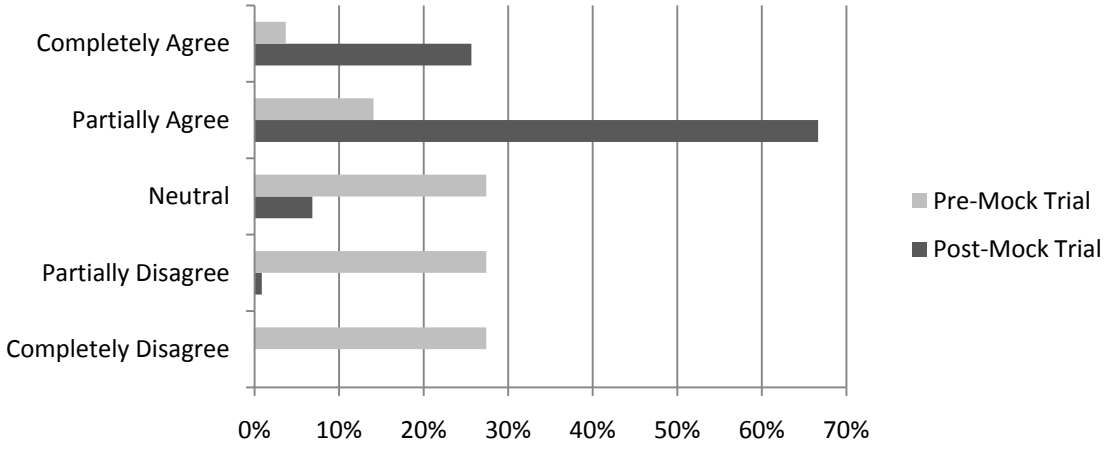


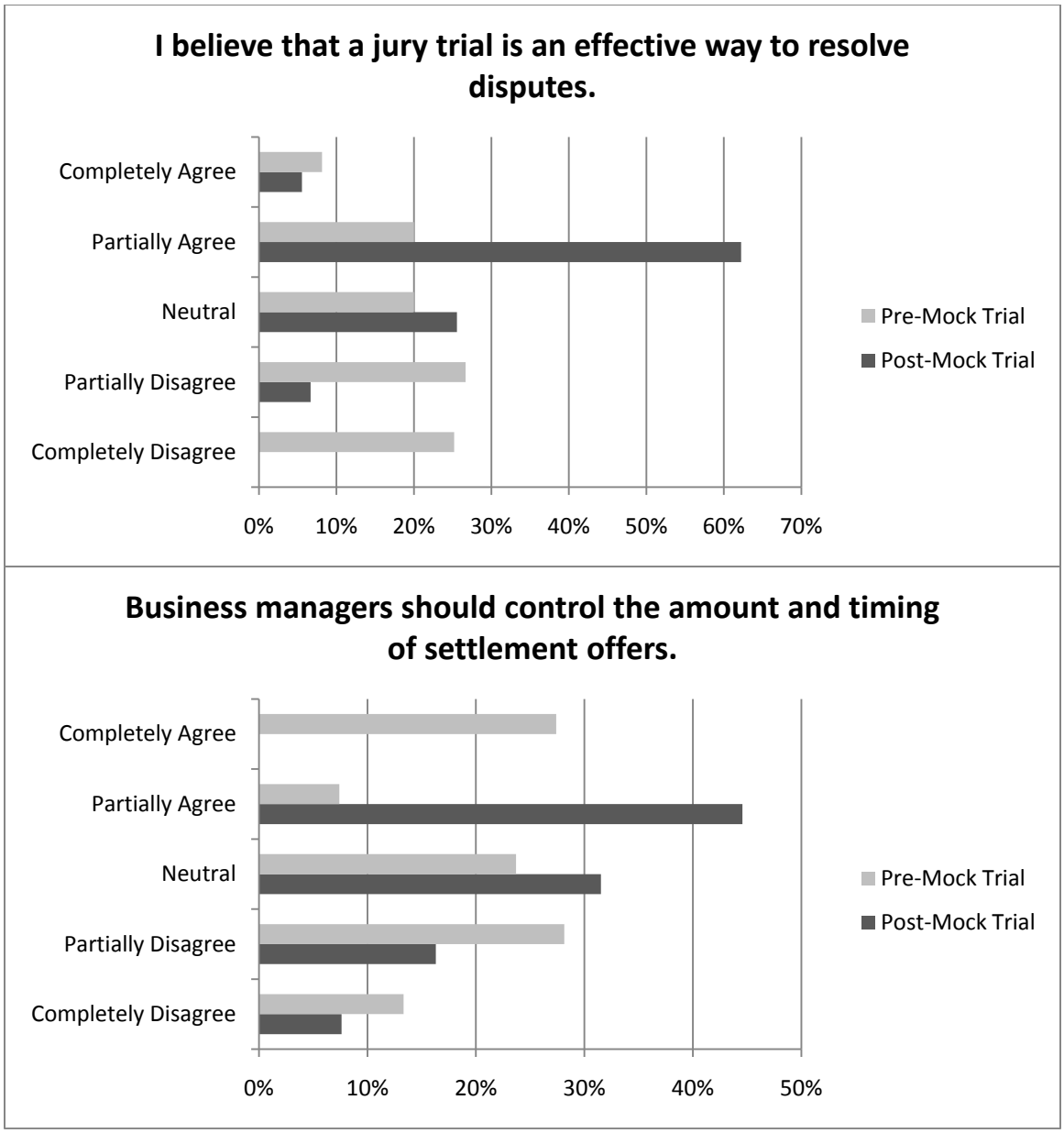

If I can afford a very long litigation process, I can push for a more favorable settlement.
Completely Agree
Partially Agree
Neutral
Partially Disagree
Completely Disagree
0%
10%
20%
30%
40%
50%
Pre-Mock Trial
Post-Mock Trial
Full compliance with regulatory standards will protect my business and me from being sued.
Completely Agree
Partially Agree
Neutral
Partially Disagree
Completely Disagree
0%
5%
10%
15%
20%
25%
30%
35%
40%
Pre-Mock Trial
Post-Mock Trial

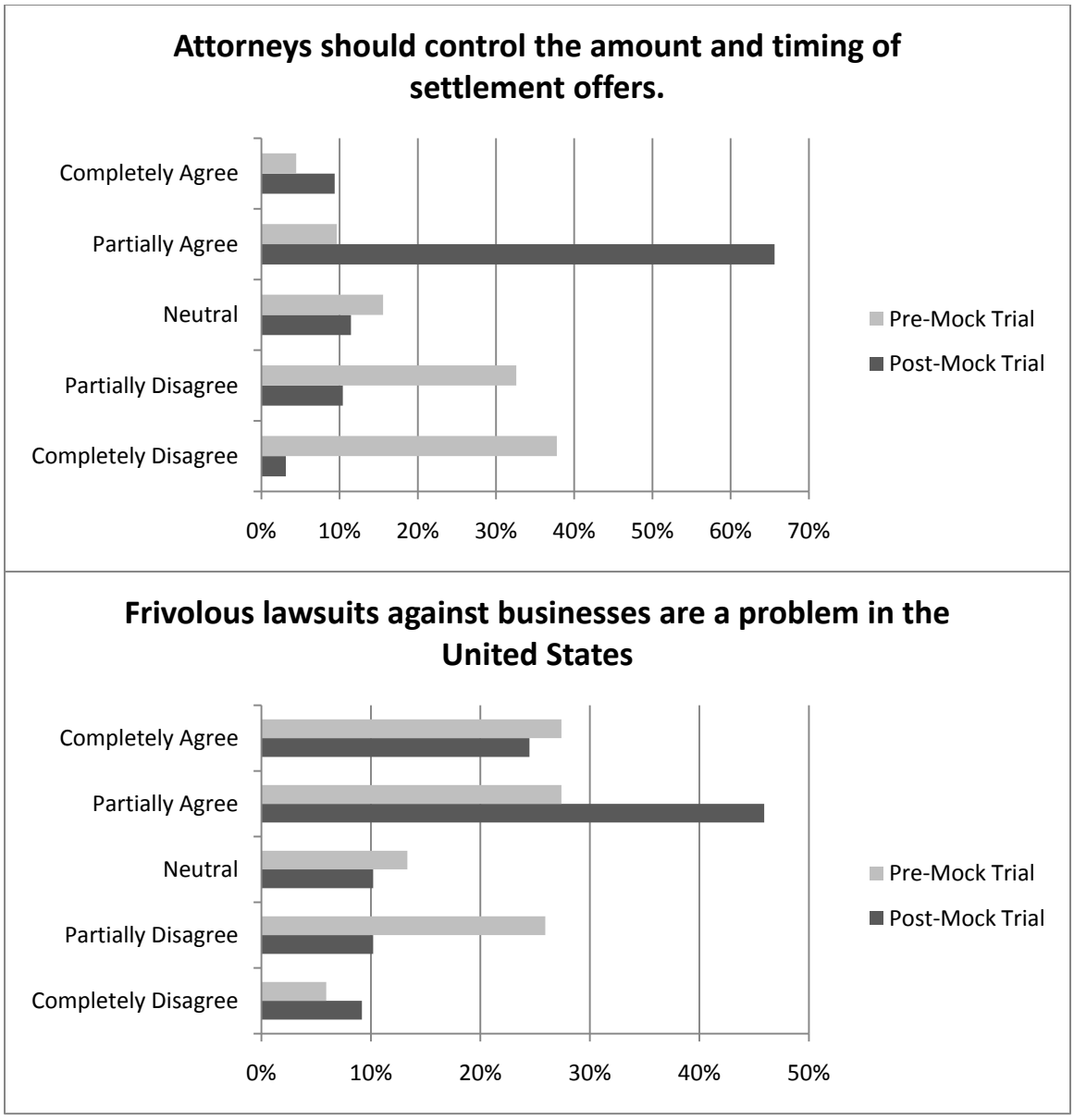
If an injured person claims that a product manufactured by my company caused their injury, but I don't believe that our company's product was responsible, I can count on the truth to emerge through the trial process.

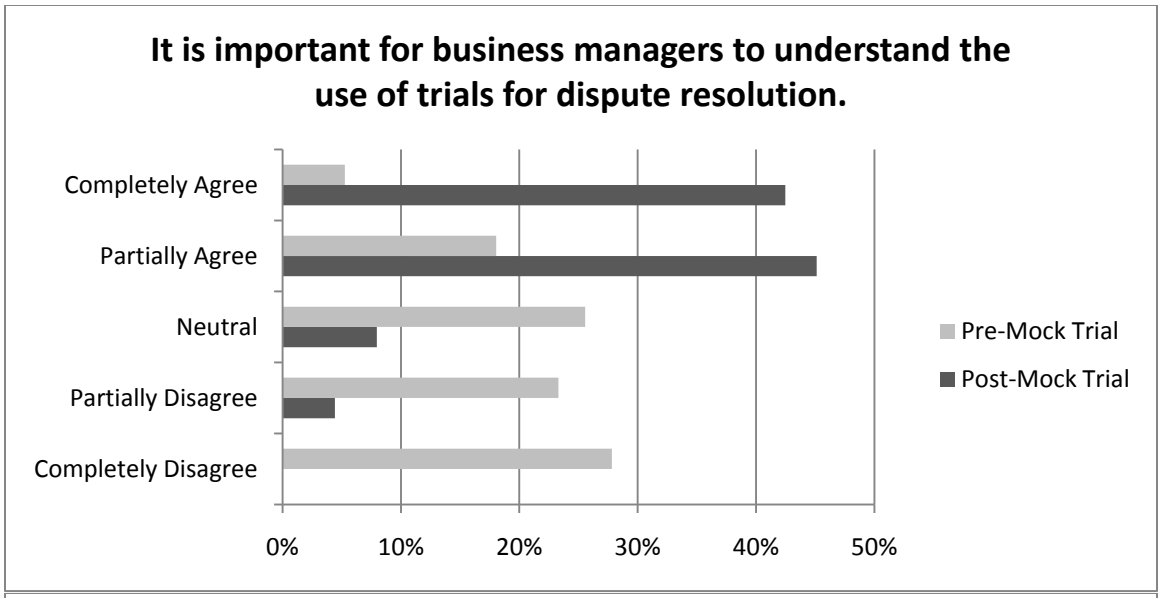


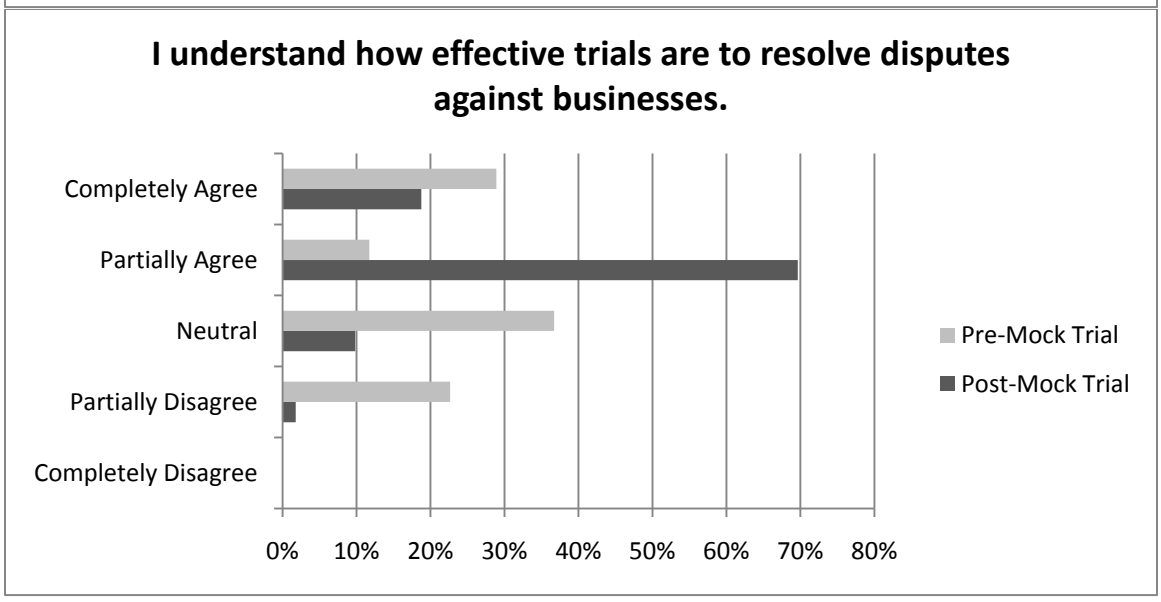
Expert witness testimony is very important to winning trials.

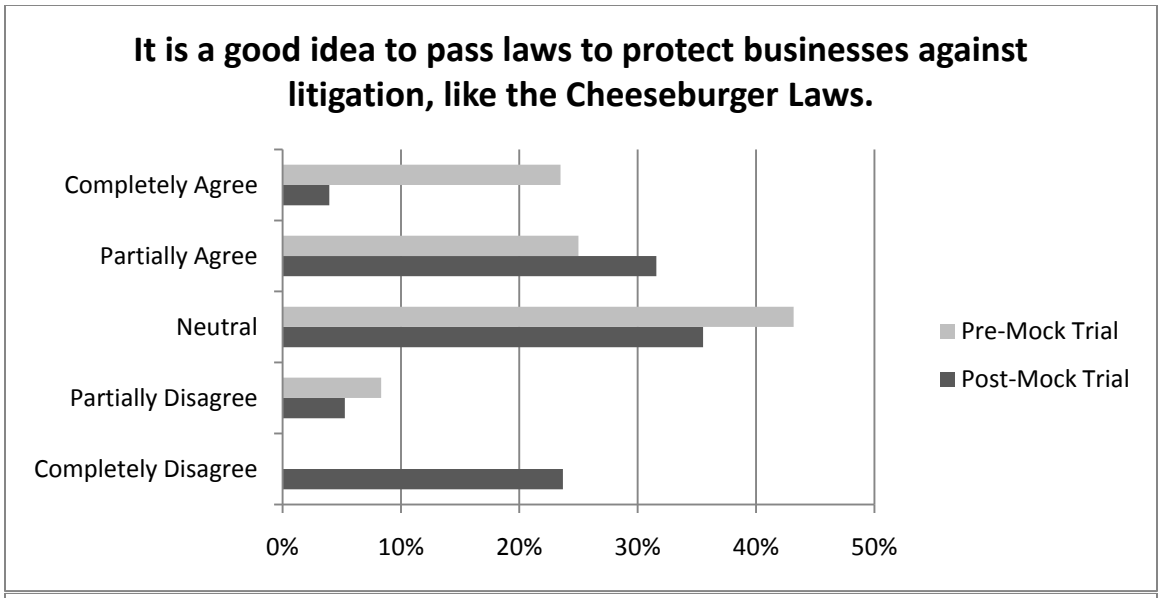


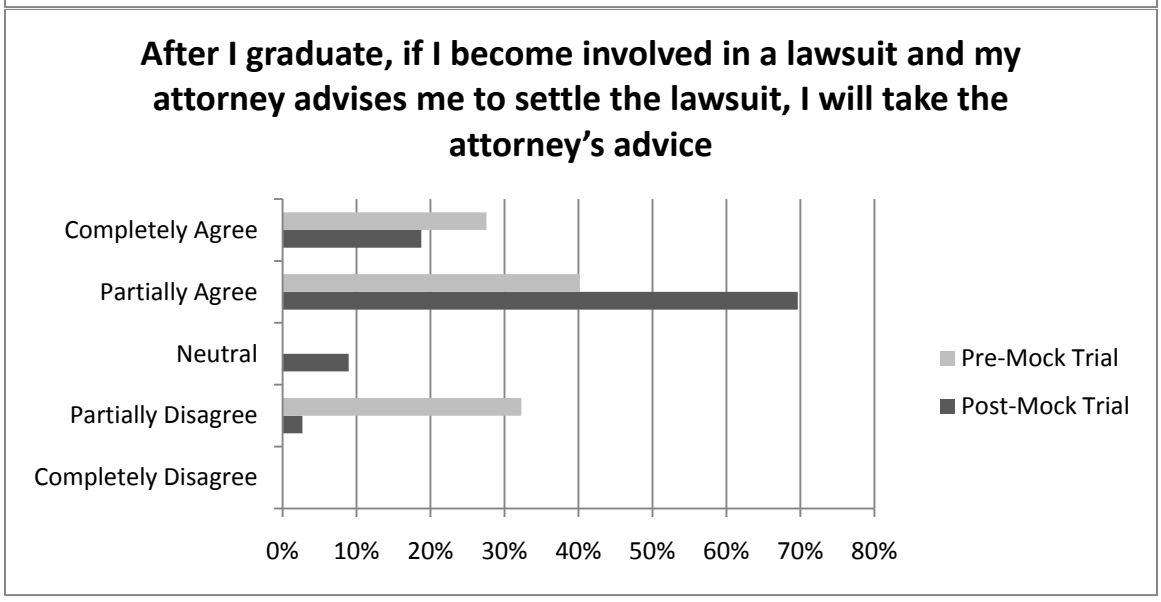

I believe that a jury trial is an effective way to resolve disputes.
Completely Agree
Partially Agree
Neutral
Partially Disagree
Completely Disagree
0%
10%
20%
30%
40%
50%
60%
70%
Pre-Mock Trial
Post-Mock Trial
Business managers should control the amount and timing of settlement offers.
Completely Agree
Partially Agree
Neutral
Partially Disagree
Completely Disagree
0%
10%
20%
30%
40%
50%
Pre-Mock Trial
Post-Mock Trial

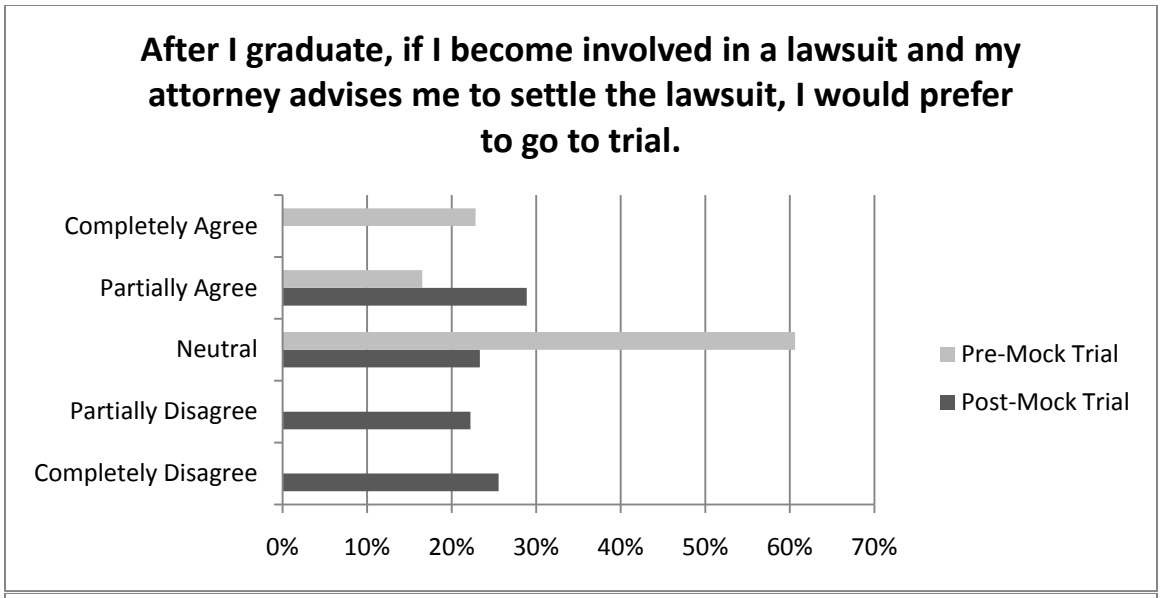

Attorneys should control the amount and timing of settlement offers.
Completely Agree
Partially Agree
Neutral
Partially Disagree
Completely Disagree
0%
10%
20%
30%
40%
50%
60%
70%
Pre-Mock Trial
Post-Mock Trial
Frivolous lawsuits against businesses are a problem in the United States
Completely Agree
Partially Agree
Neutral
Partially Disagree
Completely Disagree
0%
10%
20%
30%
40%
50%
Pre-Mock Trial
Post-Mock Trial

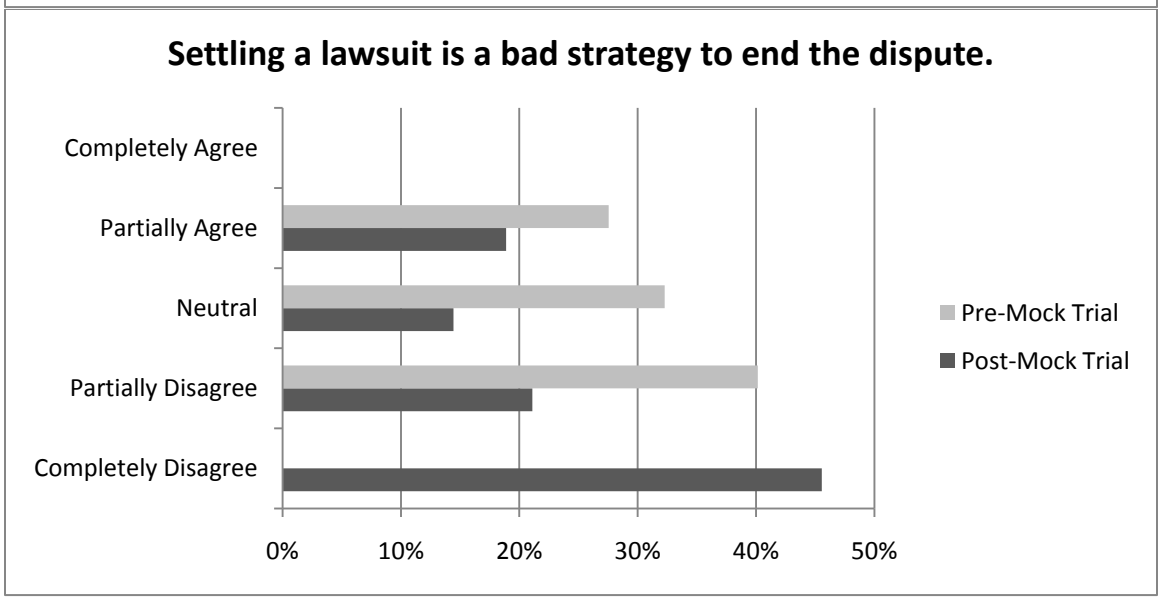

It is important for business managers to understand the use of trials for dispute resolution.
Completely Agree
Partially Agree
Neutral
Partially Disagree
Completely Disagree
0%
10%
20%
30%
40%
50%
Pre-Mock Trial
Post-Mock Trial

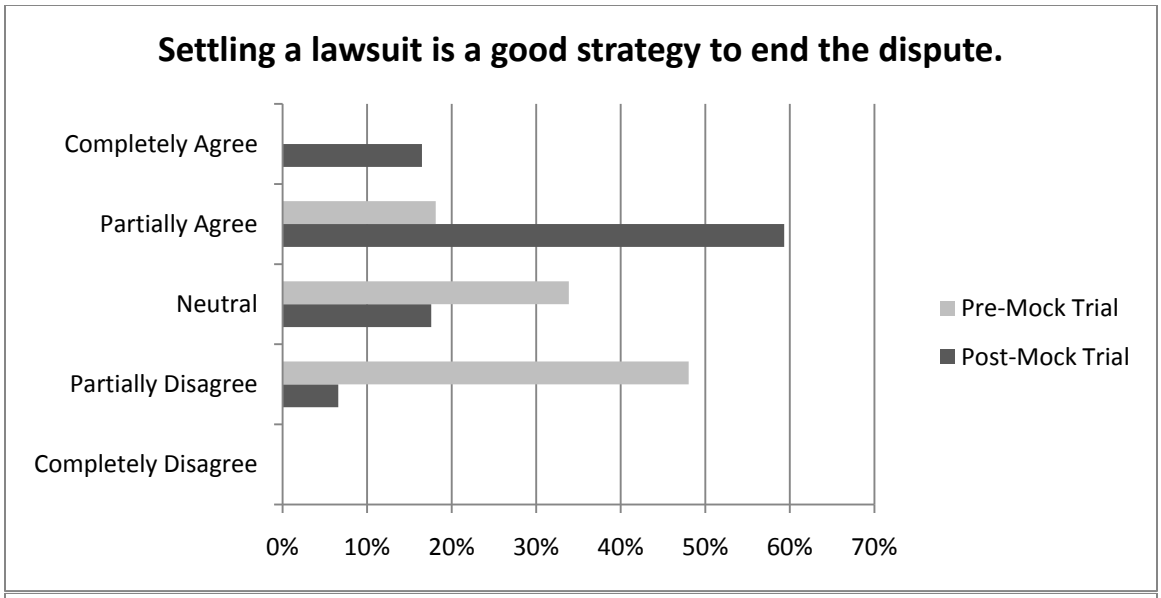

I understand how effective trials are to resolve disputes against businesses.
Completely Agree
Partially Agree
Neutral
Partially Disagree
Completely Disagree
0%
10%
20%
30%
40%
50%
60%
70%
80%
Pre-Mock Trial
Post-Mock Trial

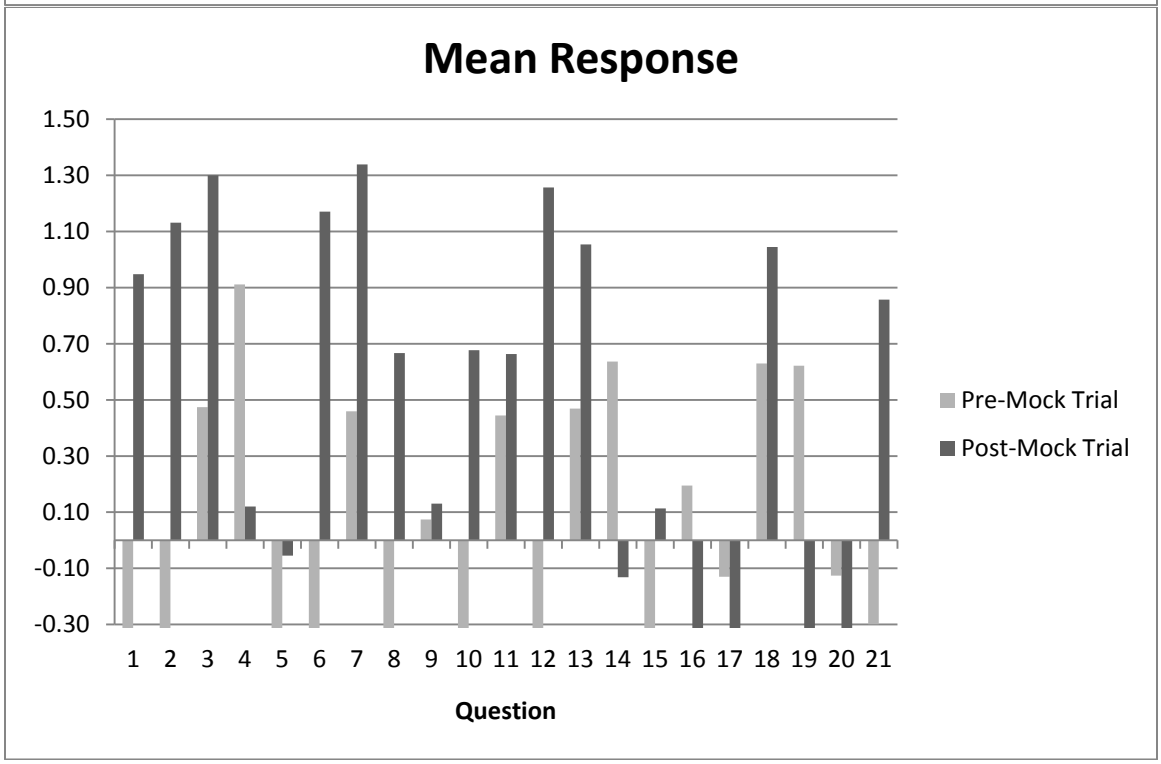

It is a good idea to pass laws to protect businesses against litigation, like the Cheeseburger Laws.
Completely Agree
Partially Agree
Neutral
Partially Disagree
Completely Disagree
0%
10%
20%
30%
40%
50%
Pre-Mock Trial
Post-Mock Trial


After I graduate, if I become involved in a lawsuit and my attorney advises me to settle the lawsuit, I will take the attorney's advice
Completely Agree
Partially Agree
Neutral
Partially Disagree
Completely Disagree
0%
10%
20%
30%
40%
50%
60%
70%
80%
Pre-Mock Trial
Post-Mock Trial


After I graduate, if I become involved in a lawsuit and my attorney advises me to settle the lawsuit, I would prefer to go to trial.
Completely Agree
Partially Agree
Neutral
Partially Disagree
Completely Disagree
0%
10%
20%
30%
40%
50%
60%
70%
Pre-Mock Trial
Post-Mock Trial


Settling a lawsuit is a bad strategy to end the dispute.
Completely Agree
Partially Agree
Neutral
Partially Disagree
Completely Disagree
0%
10%
20%
30%
40%
50%
Pre-Mock Trial
Post-Mock Trial





Footnotes

[1] *Associate Professor of Business Law, Assistant Professor of Quantitative Methods, and Professor Business Education, Southeast Missouri State University

[2] CONSTANCE E. BAGLEY, WINNING LEGALLY: USING THE LAW TO CREATE VALUE, MARSHAL RESOURCES, AND MANAGE RISK, 9-806-138 (Harvard Business School ed., Aug. 4, 2006) [hereinafter BAGLEY, WINNING LEGALLY**];** see also Constance E. Bagley, *Winning Legally**: The Value of Legal Astuteness*, 33 ACAD. MGMT. REV. 378 (2008).

[3] "Approximately 300,000 cases are filed in U.S. District Courts annually, approximately 45,000 cases (14.8% of cases) involve a business and approximately 65,000 businesses (1.4 firms per 45,000 cases involving a business) are involved in these cases. The research team believes it is problematic to estimate

reliably the percent of firms involved in filed civil cases that have fewer than 50 employees from this initial study. The evidence obtained during the execution of this study (described above) suggests that the estimate falls within a range of from 36 to 53 percent. This would then generate an estimate of approximately 30,000 small firms (between 36 and 53 percent of 65,000 businesses) being involved each year in litigation." Impact of Litigation on Small Business, Klemm Analysis Group, 1-35, 22, 2005, http://www.sba.gov/advo/research/rs265tot.pdf.

[4] ". . . legally astute managers never just sit back and let the lawyers run the show." BAGLEY, WINNING LEGALLY**,** *supra* note 1 at 203.

[5] Carol J. Miller, *Mock Jury Trial: A Model for Business Law I Courses*, 6 J. LEGAL STUD. EDUC. 91, 91-94 (1987) (In fact, not only do students lack even a tepid desire for the knowledge their instructors find fascinating, "most students have a downright animosity . . ." for legal education.)(Miller cites a 1978 Elliott-Wolfe Survey in which businesspeople, 78% of whom were CEO's, rated knowing how to prepare before consulting their attorney and how to work most effectively with lawyers as very import topics to be covered in a business law class.); Shirley M. Rand, *The "Mini-Trial": An Innovative Approach to the Study of Corporations*, 1 J. LEGAL STUD. EDUC. 46 (1983); Arthur Gross Schaefer, *Mock Trials: A Valuable Teaching Tool*, 8 J. LEGAL STUD. EDUC. 199 (1989/90). See also: Marc Lampe, *A New Paradigm for the Teaching of Business Law and Legal Environment Classes*, 23 JLSE 1 (2006) and Lucien Dhooge, *Appellate Argumentation in the Business Law Classroom: Three Modest Examples*, 17 JLSE 253 (1999).

[6] BAGLEY, WINNING LEGALLY**,** *supra* note 1 at 216.

[7] John Parauda & Jathan Janove, *Settle for Less*, 40 HR MAGAZINE 11, (November 2004).

[8] In the final outcome of the litigation brought by Pennzoil against Texaco for tortious influence with Pennzoil's agreement to buy Getty Oil, the jury's verdict was $7.5 billion. BAGLEY, WINNING LEGALLY**,** *supra* note 1 at 205.

[9] *Id*. at 205.

[10] Robert B. McKay, *Rule 16 and Alternate Dispute Resolution*, 63 Notre DAME L. REV. 818, 820 (1988) (noting that an estimated ninety-five percent of all civil cases are settled before trial); Marc Galanter, *Worlds of Deals: Using Negotiation to Teach About Legal Process*, 34 J. LEGAL EDUC. 268, 269 (1984) ("Something like 90 percent of civil cases are settled . . . ."); Samuel Issacharoff, *The Content of Our Casebooks: Why Do Cases Get Litigated*?, 29 FLA. ST. U. L. REV. 1265, 1266 (2002).

[11] American Bar Association Model Rules of Professional Conduct, Rule 1.2.

[12] Randall L. Kiser, Martin A. Asher, and Blakeley B. McShane, *Let's Not Make a Deal: An Empirical Study of Decision Making in Unsuccessful Settlement Negotiations*, 5 JOURNAL OF EMPIRICAL LEGAL STUDIES 3, pp. 551-591, (2008).

[13] American Bar Association Model Rules of Professional Conduct, Rule 1.2.

[14] Whiteaker v. State, 382 N.W.2d 112 (Iowa 1986); Joos v. Auto-owners Ins. Co., 94 Mich. App. 419, 288 N.W.2d 443,445 (1979), *later appealed*, Joos v. Drillock, 127 Mich. App. 99, 338 N.W.2d 736 (1983) (". . . an attorney has, as a matter of law, a duty to disclose and discuss with his or her client good faith offers to settle."); Rubenstein v. Rubenstein, 31 A.D.2d 615, 615, 295 N.Y.S.2d 876, 877 (1968) *aff'd*, 25 N.Y.2d 751, 250 N.E.2d 570, 303 N.Y.S.2d 508 (1969) ("failure to disclose an offer of settlement and submit to the client's judgment for acceptance or rejection is improper practice"); Rizzo v. Haines, 520 Pa. 484, 555 A.2d 58 (1989)

[15] Reed, *The Lawyer-Client: A Managed Relationship?*, 12 ACAD. MGMT. J. 67, 76 (1969) (survey of civil lawyers in which majority believed clients were generally unhelpful in generating solutions to legal problems); Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L. REV. 501, (1990); Robert F. Cochran, Jr., *Legal Representation and the Next Steps Toward Client Control: Attorney Malpractice For the Failure to Allow the client to Control Negotiation and Pursue Alternatives to Litigation*, 47 WASH. & LEE L. REV. 819, 822-823, (1990); ROSENTHAL, LAWYER AND CLIENT: WHO'S IN CHARGE? 125 (1974)("[F]or all but the largest claims, an attorney makes less money by thoroughly preparing a case and not settling it early."); Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41, 72-73 (1979) (advocates requiring lawyers "to obtain informed consent when client values or lawyer conflicts of interest are involved"); Strauss, *Toward a Revised Model of Attorney-Client Relationship: The Argument for Autonomy*, 65 N.C.L. REV. 315, 349 (1987) (advocates attorney liability for failure to provide client with adequate information, but does not

advocate specific standards)(Attorneys concern about their "time, profit, and other personal interests affect, perhaps subconsciously, the choices [they make] for the client.").
[16]Reed, *supra* note __
[17]Dinerstein, *supra* note .
[18] Cochran, *supra* note .
[19] *Id*.
[20] ROSENTHAL, *supra* note .
[21] BAGLEY, WINNING LEGALLY**,** *supra* note 1 at 216.
[22] *Id.*
[23] BAGLEY, WINNING LEGALLY**,** *supra* note 1 at 214.
[24] *Id.*
[25] Learned Hand, The Deficiencies of Trials to Reach the Heart of the Matter, in 3 LECTURES ON LEGAL TOPICS 89, 105 (1926), quoted in FRED R. SHAPIRO, THE OXFORD DICTIONARY OF AMERICAN LEGAL QUOTATIONS 304 (1993).
[26] BAGLEY, WINNING LEGALLY**,** *supra* note 1 204, 221.
[27] *Id.*
[28] Kiser et al *supra* note __ at 551-591, (2008).
[29] Samuel Gross & Kent Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICHIGAN L. REV. 319 (1991).
[30] Gross and Syverud (1991), *supra* note __, at 381
[31] Kiser et al *supra* note __ at 586.
[32] *But see*, Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984). As opposed to Gross and Syverud's statement that a trial is a failure of settlement, Fiss argues that settlement is less desirable than litigation.
[33] Samuel Gross & Kent Syverud, *Don't Try: Civil Jury Verdicts in a System Geared To Settlement*, 44 UCLA L. REV. 51 (1996).
[34] Kiser et al *supra* note __ at 569.
[35] Id. at 569.
[36] Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 Cal. L. Rev. 1051 (2000) (suggesting that a law-and-behavioral-science perspective may provide a more nuanced understanding of human behavior). This perspective is alternatively referred to as "behavioral law and economics." See, e.g., Behavioral Law and Economics (Cass R. Sunstein ed., 2000); Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 Stan. L. Rev. 1471 (1998).
[37] *See* Priest & Klein, *supra* note 164, at 10-11 & fig.3; Babcock et al., *Biased Judgments*, *supra* note ___, at 1337.
[38] *Id.*
[39] Samuel Gross & Kent Syverud, *Don't Try: Civil Jury Verdicts in a System Geared To Settlement*, 44 UCLA L. REV. 51 (1996); Samuel Gross & Kent Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICHIGAN L. REV. 319 (1991)[hereinafter Gross et al, Getting to No].
[40] Randall L. Kiser, Martin A. Asher, and Blakeley B. McShane, *Let's Not Make a Deal: An Empirical Study of Decision Making in Unsuccessful Settlement Negotiations*, 5 JOURNAL OF EMPIRICAL LEGAL STUDIES 3, pp. 551-591, (2008).
[41] Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1093, (2000) (suggesting that a law-and-behavioral-science perspective may provide a more nuanced understanding of human behavior). This perspective is alternatively referred to as "behavioral law and economics."
[42] See LEON FESTINGER, A THEORY OF COGNITIVE DISSONANCE 32-47 (1957) (positing that the pressure to reduce inevitable postdecision dissonance will be manifested in efforts to focus on the merits of the alternative selected and to increase cognitive overlap of the various alternatives)(Cognitive dissonance is a form of selective perception in which actors give greater weight to evidence that confirms beliefs they already hold and lesser weight to contradictory evidence.) PLOUS, *supra* note __, at 22-30. See COOTER

& ULEN, *supra* note __, at 377-84 and 390-94; George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 12 (1984).

[43] See, e.g., Charles G. Lord et al., *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. PERSONALITY & SOC. PSYCHOL. 2098, 2105-07 (1979); Lee Ross, Mark R. Lepper & Michael Hubbard, *Perseverance in Self-Perception and Social Perception: Biased Attributional Processes in the Debriefing Paradigm*, 32 J. PERSONALITY & SOC. PSYCHOL. 880 (1975).

[44] Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1093, (2000) (suggesting that a law-and-behavioral-science perspective may provide a more nuanced understanding of human behavior). This perspective is alternatively referred to as "behavioral law and economics."

[45] Gross et al., Kiser et al, *supra* note ___.

[46] See generally George Loewenstein et al, *Self-Serving Assessments of Fairness and Pretrial Bargaining*, 22 J. LEGAL STUD. 135 (1993).

[47] See generally Linda Babcock et al., *Biased Judgments of Fairness in Bargaining*, 85 AM. ECON. REV. 1337 (1995) [hereinafter Babcock et al., Biased Judgments]; see also Linda Babcock et al., *Choosing the Wrong Pond: Social Comparisons in Negotiations that Reflect a Self-Serving Bias*, 111 Q.J. ECON. 1 (1996) [hereinafter Babcock et al., Choosing the Wrong Pond].

[48] See also Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998); Cass Sunstein, *Behavioral Law and Economics: A Progress Report*, 1 AM. L. & ECON. REV. 115 (1999).

[49] See Loewenstein et al., *supra* note __, at 151-52; Babcock et al., *Biased Judgments*, *supra* note 161, at 1340 For an excellent review of the literature, see Robert D. Cooter & Daniel Rubinfeld, Economic Analysis of Legal Disputes and Their Resolution, 3 J. ECON. LITERATURE 1067 (1989).

[50] *Id.*

[51] *Id.*

[52] *See* Charles G. Lord et al., *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. PERSONALITY & SOC. PSYCHOL. 2098, 2102 (1979).

[53] Kiser et al, *supra* note __ at 587.

[54] *See, e.g.*, FLA. STAT. ANN. § 766.108 (West 1987) (requiring a mandatory settlement conference in all medical malpractice actions); CAL. R. CT. 222 (West 1996) (requiring a mandatory settlement conference in all "long cause matters"); HAW. ST. USDCT CIV., RULE 235 (Michie 1995) (requiring a mandatory settlement conference in every civil action); MICH. RULE 3 CIR., RULE 2.401 (West 1998) (requiring a mandatory settlement conference in all civil actions).

[55] *See, e.g.*, U.S. DIST. CT. RULES E.D. PA., CIVIL RULE 53.2.1 (West 1998) (ordering all odd-numbered cases to participate in an experimental mediation program).

[56] *See, e.g.*, FLA. STAT. ANN. § 44.103 (1993) (allowing courts to refer certain civil actions to nonbinding arbitration); HAW. REV. STAT. § 601-20 (1998) (establishing a program of mandatory nonbinding arbitration for all civil matters under $150,000); NEV. REV. STAT. § 38.250 (1999) (requiring mandatory nonbinding arbitration for all civil actions under $40,000).

[57] Frank S. Bloch, *The Andragogical Basis of Clinical Legal Education*, 35 VAND. L. REV. 321, 328 (1982)(In this article, Bloch introduced the clinical community to the idea that teaching adults, "andragogy," was different from teaching children, "pedagogy," and provided the theoretical justification for the learning that takes place in clinical courses.)

[58] Bloch *supra* ___; Jordan H. Leibman, *In Defense of the Legal Case Method and the Use of Integrative Multi-Issue Cases in Graduate Business Law Courses*, 12 J. LEG.STUD. EDUC. 171, 174 (1994). *But see*, Debra Dobray & David Steinman, *The Application of Case Method Teaching to Graduate Business Law Courses*, 11 J. LEG.STUD. EDUC. 81 (1993); Anne Lawton, *Using a Management Driven Model to Teach Business Law*, 15 J. LEG.STUD. EDUC. 211, 212 (1997)[Lawton calls the litigation-driven model of teaching undergraduate business law an anachronism].

[59] *See* Fran Quigley, *Seizing the Disorienting Moment: Adult Learning Theory and the Teaching of Social Justice in Law School Clinics*, 2 CLINICAL L. REV. 37 (1995).

[60] Paul Sukys, *Business Law, Effective Methods of Teaching Business Education, in* NATIONAL BUSINESS EDUCATION ASSOCIATION YEARBOOK, 48, 201-202 (2008).

[61] The American Mock Trial Association began intercollegiate competitions twenty-three years ago American Mock Trial Association, http://www.collegemocktrial.org (last visited May 28, 2008). Student participation is not limited to students enrolled in Legal Environment of Business classes. Topics in the competition are not limited to business law.

[62] Lampe, (2006), *supra* note 1; William J. McDevitt, *Three Ready-to-Use Mock Jury Trials for the Classroom*, 16 J. LEGAL STUD. EDUC. 149 (1998); Robert B. Bennett, Jr. et al., *Using a Jury Simulation as a Classroom Exercise*, 15 J. LEGAL STUD. EDUC. 191 (1997); Dhooge, (1997) *supra* note 1; Stanley K. Mann, *A Simulated Hearing Modified for Teaching Business Law to Graduate Business Students*, 13 J. LEG.STUD. EDUC. 311 (1995); Schaefer, (1989), *supra* note 1; Miller, (1987), *supra* note 1. *See also*, Anne M. Lawton & Lynda J. Oswald, *The Use of Simulated Hearings in Business Law Courses*, 11 J. LEG. STUD. EDUC. 103 (1993).

[63] *See* Lawton & Oswald, *supra* note __.

[64] Meg Wilkes Karraker, *Mock Trials and Critical Thinking*, 41 C. TEACHING, 134, 134-137 (1993) ("Critical thinking requires the ability to clarify meaning, weigh the adequacy of evidence, determine causes and effects, and identify assumptions based on values."). *See* Schaefer, *supra* note __.

[65] *Id.* at 7

[66] ELIZABETH BARKLEY, K. PATRICIA CROSS & CLAIRE HOWELL MAJOR, THE CASE FOR COLLABORATIVE LEARNING, IN COLLABORATIVE LEARNING TECHNIQUES: A HANDBOOK FOR COLLEGE FACULTY 18 (2005); Clifford S. Zimmerman, "*Thinking Beyond My Own Interpretation:" Reflections on Collaborative and Cooperative Learning Theory in the Law School Curriculum*, 31 ARIZ. ST.L.J. 957, 961 (1999).

[67] *Id*.

[68] Christopher M. Clark & Susan Florio-Ruane, *Conversation as Support for Teaching in New Ways, in Talking Shop: Authentic Conversation and Teacher Learning* 6, 10-12 (D. Jean Clandinin & Christopher M. Clark eds., 2001). The authors posit that conversation-based learning (dialogic) meets the needs of adult professionals for "remembering, reinterpreting and reorganizing knowledge and skills." This method permits professionals to work together to solve problems and this constitutes a "powerful kind of learning." It is, therefore, preferred over a "transmission-oriented approach." *Id*. at 10.

[69] "Emergent knowledge," a term that comes from the collaborative learning literature, means ideas that are more than just a collection of the ideas of the group. The term describes the potential of a group of learners to develop insight and knowledge through a synthesis of the individual ideas. Bryant, Collaboration in Law Practice, *supra* note __, at 460.

[70] Katherine R. Kruse, *Biting Off More Than They Can Chew*, 8 CLIN. L. REV. 405, 438 (2002). Kruse notes that collaboration is especially useful in problem-solving when solution generation is needed as multiple perspectives bring more ideas about possible solutions.

[71] Constance Barlow, Gayla Rogers & Heather Coleman, *Peer Collaboration: A Model for Field Instructor Development and Support*, 22 CLINICAL SUPERVISOR 173, 178-79 (2003). The authors describe a project where field instructors of social workers meet to discuss field instruction practices and problems. The authors identify self-reflective skills as including aligning behaviors with values, contributing to the learning of others, seeking alternative perspectives and reflecting upon and learning from experience.

[72] http://www.thirteen.org/edonline/concept2class/constructivism/index.html

[73] Alina Reznitskaya, Richard C. Anderson & Li-Jen Kuo, 107 THE ELEMENTARY SCHOOL JOURNAL Number 5, The University of Chicago, (2007), http://www.journals.uchicago.edu/doi/abs/10.1086/518623?journalCode=esj [hereinafter Reznitskaya et al].

[74] R. E. Corden,. *Group discussion and the importance of a shared perspective: Learning from collaborative research,* Qualitative Research, 1(3), 347-367, (2001) [hereinafter Corden]; M. NYSTRAND, OPENING DIALOGUE: UNDERSTANDING THE DYNAMICS OF LANGUAGE AND LEARNING IN THE ENGLISH CLASSROOM. New York: Teachers College Press, (1996)[hereinafter Nystrand]; Mark McMahon,Social Constructivism and the World Wide Web, http://www.ascilite.org.au/conferences/perth97/papers/Mcmahon/Mcmahon.html (1997); K. Weber, C. Maher, A. Powell, & H.S. Lee, H.S., *Learning opportunities from group discussions: Warrants become the objects of debate*, 68 EDUCATIONAL STUDIES IN MATHEMATICS 3, 247-261, (2008)[hereinafter Weber et al.].

[75] L.C. Matsumura, S.C. Slater, & A. Crosson, *Classroom climate, rigorous instruction and curriculum, and students' interactions in urban middle schools*, 108 THE ELEMENTARY SCHOOL JOURNAL 4, 294-312, (2008)[hereinafter Matsumura et al.].

[76] A.H. Dyson, *Writing and the sea of voices: Oral language in, around, and about writing* in THEORETICAL MODELS AND PROCESSES OF READING, 146–162 (.R.B. Ruddell, & N.J. Unrau Eds. Newark, DE: International Reading Association 2004)[hereinafter Dyson]; Matsumura et al;and Nystrand.

[77] Reznitskaya et al.

[78] S.Barab, T. Dodge, M.K. Thomas, C. Jackson, & H. Tuzun, *Our designs and the social agendas they carry* 16 JOURNAL OF THE LEARNING SCIENCES 2, 263-305 (2007); M.S. Hale & E.A. City, "*But how do you do that?" Decision making for the seminar facilitator*, in J. Holden & J.S. Schmit, *Inquiry and the literary text: Constructing discussions in the English classroom*, in 32 CLASSROOM PRACTICES IN TEACHING ENGLISH, (Urbana, IL: National Council of Teachers of English 2002); and Weber et al.

[79] Corden *supra* __ and Nystrand *supra* __.
[80] Nystrand *supra* __.
[81]Corden *supra* __ and Nystrand *supra* __.
[82] Corden *supra* __, Weber et al *supra* __ and Nystrand *supra* __.
[83] Nystrand *supra* __.
[84] Although, several excellent trial packages are available. Bennett, *supra* note __; McDevitt, *supra* note __; Miller, *supra* note __. In agreement with the aforementioned authors, it seems best to dispense with "drafting of pleadings, discovery proceeding and pre-trial motion practice." McDevitt, *supra* note __, at 150. No script is required for the exercise in this article. The facts of the case, the witness names, and brief examples of opening, closing, direct, and cross are presented in each of the documentary films.
[85] *See* Joan E. Camara, B. Nathaniel Carr, and Barbara L. Grota, *One Approach to Formulating and Evaluating Student Work Groups in Legal Environment of Business Courses*, 24 JLSE 1 (2007).
[86] For instructors using Cengage books, several excellent documentary films are available free at http://www.swlearning.com/blaw/video_library/topics.htm (last visited July 16, 2008). For instructors who do not adopt the text, the films may be purchased for $65.00 each.
[87] MAHLUM V. DOW CHEMICAL: SILICONE BREAST IMPLANTS ON TRIAL (South-Western Thomson Learning 2003).
[88] CARTER VS. BROWN AND WILLIAMSON TOBACCO ON TRIAL, (West Legal Studies in Business Thomson Learning 1999).
[89] MOSELEY VS. GENERAL MOTORS A SON'S DEATH: IS GM AT FAULT? (South-western Thomson Learning 2003).
[90] Students are instructed that they may view readily available written definitions and examples of opening, closing, direct, and cross examinations on the internet. .
[91] Appendices A. B. and C provide the analysis of questions about settlement 1, 18, 19, 20, and 21.
[92] Kiser et al *supra* note __ at 551-591, (2008).
[93] BAGLEY, WINNING LEGALLY**,** *supra* note 1 at 214.
[94] Cynthia McPherson Frantz, *I AM Being Fair: The Bias Blind Spot as a Stumbling Block to Seeing Both Sides*, 28 BASIC & APPLIED SOC. PSYCHOL. 157, 166 (2006); Cassandra Burke Robertson, *Judgment, Identity, and Independence*, 42 CONN. L. REV. 1, 10-11 (2009).
[95] Carol A. Needham, *Listening to Cassandra: The Difficulty of Recognizing Risks and Taking Action*, 78 FORDHAM L. REV. 23-29,(2009)..
[96] Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630, 648 (1999) (noting that a decision maker's need to view incoming data as being consistent with his preexisting beliefs can strongly influence the person's assessment of that data as supporting the expected result (citing Dennis L. Jennings et al., *Informal Covariation Assessment: Data-Based Versus Theory-Based Judgments, in Judgment Under Uncertainty*, *supra* note 92, at 211, 227-30)); see also Matthew Rabin, *Psychology and Economics*, 36 J. ECON. LITERATURE 11, 29 (1998); Jean R.

Sternlight & Jennifer Robbennolt, *Good Lawyers Should Be Good Psychologists: Insights for Interviewing and Counseling Clients*, 23 OHIO ST. J. ON DISP. RESOL. 437, 454 (2008) ("[P]eople unconsciously tend to seek out additional information that confirms their already existing views and disregard conflicting information, rather than attempting to systematically gather accurate information." (citing Nickerson, *supra* note __)); Gideon Keren, *On the Ability of Monitoring Non-veridical Perceptions and Uncertain Knowledge: Some Calibration Studies*, 67 ACTA PSYCHOLOGICA 95, 115-18 (1988).

[97] BAGLEY, WINNING LEGALLY**,** *supra* note 1 at 49-54.

[98] An unreasonable business aims for profit at-any-cost. A reasonable business says, "We recognize companies' responsibilities to employees, citizens, and their communities because failure to perform adequately on regulatory and social processes puts at risk the company's ability to operate, grow and deliver future value to shareholders. Even more important, many companies believe that achieving excellence in such processes enhances long-term shareholder value." *Id.* at 49, 54.

[99] BAGLEY, WINNING LEGALLY**,** *supra* note 1 at 221.

[100] D. Wittman, *Dispute resolution, bargaining, and the selection of cases for trial: A study of biased and unbiased data*, XVII THE JOURNAL OF LEGAL STUDIES 313–352, (1988).

[101] Jane Goodman-Delahunty, Maria Hartwig Pa¨r, Anders Granhag, Elizabeth F. Loftus, *INSIGHTFUL OR WISHFUL: Lawyers' Ability to Predict Case Outcomes,* Vol. 16, No. 2 PSYCHOLOGY, PUBLIC POLICY, AND LAW 133–157 *at* http://www.apa.org/pubs/journals/releases/law-16-2-133.pdf. (Participants were 481 litigating attorneys, including new graduates and seasoned practitioners, from 44 states across the United States.)

[102] *Id.* at 133.

[103] *Id.* at 153.

[104] *Id.*

[105] *Id.* at 138.(Participants were 481 litigating attorneys, including new graduates and seasoned practitioners, from 44 states across the United States.)

[106] The categories were numerically coded as: Completely Agree = 2, Partially Agree = 1, Neutral = 0, Partially Disagree = -1, and Completely Disagree = -2. Therefore, a positive mean indicates overall agreement, and the strength of agreement increases with magnitude.