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MORE THAN A FEELIN': USING SMALL GROUP RESEARCH TO INFORM SETTLEMENT DECISIONS IN CIVIL LAWSUITS

Alexis Knutson, Natalie Gordon, and Edie Greene*

INTRODUCTION

We should have seen it coming. Years before the string of recent allegations came to light, Bill Cosby—everyone's favorite TV dad—quietly settled a civil lawsuit brought by a Philadelphia woman and friend of Cosby's who claimed that the entertainer drugged and sexually assaulted her in his home in early 2004.¹ Although the terms of the settlement remain confidential, the 2006 lawsuit revealed the names of at least a dozen other women who claimed that Cosby assaulted them.²

Undoubtedly, this lawsuit followed the chronology of most civil cases: the filing of a complaint, process of discovery, pretrial conferencing, and eventual settlement. Indeed, the vast majority of civil lawsuits are settled outside of court via mutual agreement between the parties³ because engaging in arbitration or going to trial can be costly and time-consuming, and can involve enormous uncertainty about opponents' evidence, jurors' perceptions, and judges' predilections.⁴ So settling cases is a commonplace practice that benefits attorneys and their clients as well as the courts.

Yet settlement can *also* be fraught with complexity and uncertainty because it requires attorneys to calibrate, that is, assess the strengths and weaknesses of their case, evaluate various settlement proposals,

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1. Jennifer Hoar, *Bill Cosby Settles Lawsuit*, CBS NEWS (Nov. 8, 2006, 3:30 PM), www.cbsnews.com/news/bill-cosby-settles-lawsuit/.

2. *Id.*

3. See George Loewenstein et al., *Self-Serving Assessments of Fairness and Pretrial Bargaining*, 22 J. LEGAL STUD. 135, 135 (1993) ("... civil litigation is resolved by settlement in an estimated 95 percent of all disputes ...").

4. Xavier Rodriguez, *The Decline of Civil Jury Trials: A Positive Development, Myth, or the End of Justice as We Now Know It?*, 45 ST. MARY'S L.J. 333, 343, 348 (2014).

and forecast the likely trial outcome.⁵ Attorneys are not particularly skilled at these tasks.⁶ They make predictable reasoning errors—many of which we describe in this article—that impair their ability to gauge when it is in their clients’ interest to resolve the dispute prior to trial and for how much.⁷ Broadly speaking, allegiance to clients, immersion in the minutiae of the law, and attorneys’ own risk behaviors can blind them to the weaknesses in their case, the strengths of their adversaries’ evidence, and the likelihood of winning, thus resulting in difficulties settling lawsuits.⁸ These lapses in logic serve as barriers to settlement.

There are significant costs associated with the unwillingness to accept an adversary’s settlement proposal.⁹ Across several studies that compared final settlement offers with jury awards,¹⁰ researchers have shown that both plaintiffs and defendants err when deciding to proceed to litigation, though their errors are not symmetric: plaintiffs are more likely than defendants to make poor decisions, but the average cost to defendants exceeds the cost to plaintiffs.¹¹

In the most recent study, Kiser, Asher, and McShane analyzed 2,054 California cases in which the parties had engaged, unsuccessfully, in settlement negotiations and proceeded to arbitration or trial between 2002 and 2005.¹² Researchers compared the ultimate verdicts and awards to the parties’ settlement positions to assess whether attorney/client judgments of likely trial outcomes were accurate.¹³ There was a high incidence of decisional errors:

5. Edie Greene & Brian H. Bornstein, *Cloudy Forecasts*, TRIAL, April 2011, at 28, 30 n.3, 31.

6. *Id.* at 31.

7. Jane Goodman-Delahunty et al., *Insightful or Wishful: Lawyers’ Ability to Predict Case Outcomes*, 16 PSYCHOL. PUB. POL’Y & L. 133, 135 (2010).

8. *See id.* at 135.

9. *See* Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319, 320 (1991).

10. *See* Samuel R. Gross & Kent D. Syverud, *Don’t Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 51 (1996); Randall L. Kiser et al., *Let’s Not Make a Deal: An Empirical Study of Decision Making in Unsuccessful Settlement Negotiations*, 5 J. EMPIRICAL LEGAL STUD. 551 (2008); Jeffrey Rachlinski, *Gains, Losses, and the Psychology of Litigation*, 70 S. CAL. L. REV. 113 (1996).

11. Kiser et al., *supra* note 10, at 566–67.

12. *Id.* at 552.

13. *Id.* at 552–53.

sixty-one percent of plaintiffs who passed up a settlement offer and proceeded to trial were awarded less than they had been offered—their average loss was \$43,100.¹⁴ Although defendants were less likely to err (only twenty-four percent would have been better off settling than litigating), they lost considerably more—an average of \$1,140,000—by failing to settle.¹⁵

There are probably several explanations for these poor decisions. It may be that lawyers are not explaining the odds to their clients with sufficient detail or urgency. It may be that clients are unwilling or unable to consider the odds in a rational way. Structural incentives to collect fees and accrue billable hours may play a role. But we focus on a more fundamental behavioral aspect of this decision calculus: we argue that attorneys, given their partisan positions, lack the ability to accurately forecast the probabilities of future outcomes. Lacking clarity on likely resolutions and the realistic odds of success, they may be providing sub-optimal advice to their clients, effectively misguiding them toward the courthouse when settlements would be the better option.

Can these problems be remedied and attorneys' forecasting skills improved? The answer is yes. By procuring feedback from colleagues, considering verdicts in similar cases and most importantly, seeking research-based input from unbiased sources prior to trial, attorneys can begin to combat their forecasting foibles.¹⁶ In particular, by engaging in small group research, including mock trials, focus groups, and shadow juries, attorneys can get valuable insights about their interpretations of the evidence and feedback on the narratives they have constructed and the legal arguments they intend to make.¹⁷

In this article, we explain why attorneys need help in forecasting the outcomes of their cases, including what psychologists have

14. *Id.* at 566–67.

15. *Id.*

16. *See generally* Greene & Bornstein, *supra* note 5, at 31 (reviewing imperfect attorney forecasting and legal remedies to improve forecasting).

17. *Id.*

learned about why attorneys are poor forecasters.¹⁸ In doing so, we focus more on damage award determinations than liability assessments because the former have more inherent variability and uncertainty than the latter and thus, have captured researchers' interest. We also describe the value of conducting small group research to address forecasting errors, reveal the real worth of clients' claims, and pave the road to settlement.¹⁹

I. WHY ATTORNEYS ARE POOR FORECASTERS

A. *Partisan Distortion*

Attorneys are hired to vigorously represent their clients, regardless of their personally held beliefs and intuitions and, as famed defense attorney Alan Dershowitz has said, "right up to the edge of what's ethical."²⁰ This level of partisanship provides ample incentive for attorneys to favor their own perspectives, and is likely to lead to distorted beliefs about the virtues of their case. Psychological concepts can explain why attorneys are partial to the parties they represent and how these biases may have lasting and untoward effects on their work.

1. *Role-Induced Bias*

To the extent that attorneys feel optimistic about their side of the case, they will put increased weight on the evidence in their favor.²¹ People show partisan distortion solely because of the role they are fulfilling—namely, as plaintiffs or defendants.²² This fact extends beyond attorneys to others involved in litigation, and even experts in human behavior are not immune to the effects of role-induced

18. *See infra* Part I.

19. *See infra* Part II.

20. Alan Dershowitz, Remarks during Criminal Law class at Harvard Law School (1994) (memorandum on file with Georgia State University Law Review).

21. Zev J. Eigen & Yair Listokin, *Do Lawyers Really Believe Their Own Hype, and Should They? A Natural Experiment*, 41 J. LEGAL STUD. 239, 239–40 (2012).

22. *Id.* at 241.

biases.²³ For example, given the same case facts, psychological experts who believe they have been hired by the prosecution will assign higher risk scores to criminal defendants than those who believe they have been hired by the defense.²⁴

One study nicely illustrates how role-induced bias can affect attorneys' choices.²⁵ Researchers Eigen and Listokin randomly assigned law students in moot court competitions to represent either the respondent or the petitioner in an appellate court case.²⁶ Eigen and Listokin found that even with random assignment, role-induced bias caused participants to judge the evidence and moral value of their arguments as strongly supporting their assigned side.²⁷ Furthermore, when they compared participants' legal writing and moot court scores as evaluated by law professors, they found that the participants who received lower grades had overestimated the strength of the evidence in their favor, suggesting that overestimation leads to diminished performance on behalf of the client.²⁸

In a related study, researchers Engel and Glockner explored the effects of role-induced bias by asking students attending a graduate research institute to assume the part of either defense counsel or prosecutor in a criminal case.²⁹ They reviewed the case facts from their assigned perspectives, and they were then asked to disentangle themselves from that role and imagine how a judge would decide the case.³⁰ But even when attempting to view the case in a neutral fashion, participants upheld role-induced biases: those previously assigned to act as prosecutors deemed the defendant guilty sixteen percent more often than those previously assigned to act as defense

23. *Id.* at 242; Daniel C. Murrie et al., *Are Forensic Experts Biased by the Side that Retained Them?*, 24 PSYCHOL. SCI. 1889, 1895 (2013).

24. Murrie, *supra* note 23, at 1894–95.

25. See Eigen & Listokin, *supra* note 21.

26. *Id.* at 246 (assigning participants randomly to one side or the other, researchers control for the self-selection bias often present in studies that evaluate practicing attorneys who presumably choose to represent plaintiffs or defendants because they are naturally inclined that way.)

27. *Id.* at 253–54.

28. *Id.* at 261.

29. Christoph Engel & Andreas Glöckner, *Role-Induced Bias in Court: An Experimental Analysis*, 26 J. BEHAV. DECISION MAKING 272, 274 (2013).

30. *Id.* at 275.

counsel.³¹ They retained these biases even when they had a medium (€5 or U.S.D. \$7) or high (€100 or U.S.D. \$140) financial incentive to review the case in an unbiased way.³² And biases remained even when participants were asked to consider the strength of evidence in preparation for a plea bargain, as demonstrated by the fact that they continued to perceive their own arguments as stronger than their opponents'.³³ So even when the sole objective was to attempt to settle the case in a fair way, participants continued to over-value the evidence in support of their initially-assigned role.³⁴

These findings convincingly show that the degree of bias toward one's own side of a case can be considerable. The biases created by assuming a role in a case, whether as defense counsel, prosecutor, or plaintiffs' attorney, can result in a barrier to settlement as each side's evaluation of the evidence and the law favors their clients.

2. Confirmation Bias

Not only are attorneys likely to display biases consistent with the parties they represent, but they are also prone to seek out information which supports their position while ignoring evidence to the contrary.³⁵ Renowned scientists Amos Tversky and Daniel Kahneman initially explored these sorts of distortions in decision making in the mid-1970s to challenge the commonly held belief that human decision making is rational and predictable.³⁶ Tversky and Kahneman coined the term *heuristics* to represent various mental shortcuts that people undertake when making decisions that involve uncertainty.³⁷

31. *Id.*

32. *Id.* at 275, 278.

33. *Id.* at 279.

34. *Id.*

35. Eigen & Listokin, *supra* note 21, at 243.

36. See generally Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCI. 1124 (1974). For their collaboration, Kahneman won the Nobel Prize in Economics six years after Tversky died; Nobel awards are not given posthumously. NOBELPRIZE.ORG, *The Sveriges Riksbank Prize in Economic Sciences in Memory of Alfred Nobel 2002*, http://www.nobelprize.org/nobel_prizes/economic-sciences/laureates/2002/ (last visited Mar. 24, 2015).

37. See DANIEL KAHNEMAN, *THINKING FAST AND SLOW* 98 (2011).

One such heuristic, the confirmation bias, occurs when individuals pay attention to and remember information which tends to support their current position or belief and discount or ignore evidence that contradicts that belief.³⁸ Applied to attorney decision making, the confirmation bias may increase attorneys' certainty that the evidence favors their arguments over those of the opposing party, especially because incentives to win the case increase the search for confirmatory information.³⁹

In a series of studies of confirmation bias in legal settings, Rassin, Eerland, and Kuijpers asked law student participants to make an initial determination of the guilt of a defendant and then to request additional police investigations to supplement their case.⁴⁰ Participants who believed that the defendant was guilty requested information that confirmed the conviction and avoided information that seemed to exculpate the defendant.⁴¹ Specifically, in one study, participants who initially thought the defendant was innocent requested additional incriminating information forty-five percent of the time, whereas those who thought the defendant was guilty requested incriminating information fifty-seven percent of the time.⁴²

In a follow-up study, Eerland and Rassin evaluated both confirmation bias and the feature positive effect on legal judgments.⁴³ The feature positive effect is the process by which individuals place more weight on their *ability* to secure evidence than they do on the *inability* to secure evidence, even though the latter can be as strong an indication of guilt or innocence as the former.⁴⁴ Law student participants read a vignette, which described a fistfight, and then were randomly assigned to read additional case materials in which investigators had sought either incriminating or exculpating evidence,

38. Andrew J. Wistrich & Jeffrey J. Rachlinski, *How Lawyers' Intuitions Prolong Litigation*, 86 S. CAL. L. REV. 571, 595 (2013).

39. *Id.* at 594–95.

40. Eric Rassin et al., *Let's Find the Evidence: An Analogue Study of Confirmation Bias in Criminal Investigations*, 7 J. INVESTIGATIVE PSYCHOL. & OFFENDER PROFILING. 231, 234 (2010).

41. *Id.* at 238.

42. *Id.* at 237–38.

43. Anita Eerland & Eric Rassin, *Biased Evaluation of Incriminating and Exonerating (Non)evidence*, 18 PSYCHOL. CRIME & L. 351, 351 (2012).

44. *See id.* at 351–52.

and the investigators either found this additional evidence or did not.⁴⁵ Confirmation bias was evident in that participants' guilt ratings increased when they were first presented with incriminating evidence and later presented with additional incriminating evidence, and their ratings were unaffected when exculpatory evidence followed incriminating evidence.⁴⁶ Presumably, they ignored the exculpatory evidence because it failed to confirm their preexisting opinions of guilt. In other words, participants gave value to the information that supported their initial position, but ignored information that seemed to refute it. Furthermore, verdicts were more strongly influenced when investigators tried to find additional incriminating information and were successful than when they tried to find this information and were unsuccessful.⁴⁷ Although the absence of evidence should be equally dispositive of guilt and innocence, participants put less weight on the absence of evidence than on its presence.

The confirmation bias can distort the ways in which attorneys collect and evaluate evidence and information, giving supporting evidence additional weight, while ignoring or undervaluing contradictory evidence.⁴⁸ This process can lead to increased and unwarranted certainty in the strength of one's own perspective, and result in unwillingness to negotiate a settlement.⁴⁹ The act of seeking out only that information which confirms one's own position creates an additional barrier to settlement.

3. *Anchoring-and-Adjustment Heuristic*

Attorneys also fall prey to the anchoring-and-adjustment heuristic that occurs when individuals must make a decision about a quantity under conditions of uncertainty.⁵⁰ To manage their uncertainty, people seek some type of tentative initial estimate or anchor, and

45. *Id.* at 353 (explaining that students in the Netherlands study law at both the undergraduate and graduate levels).

46. *Id.* at 355.

47. *Id.* at 356.

48. Wistrich & Rachlinski, *supra* note 38, at 605–06.

49. *Id.* at 611.

50. See Tversky & Kahneman, *supra* note 36, at 1129.

through a process of adjustment, base subsequent decisions on this estimate.⁵¹ But anchors can often be radically off the mark and adjustments are typically insufficient.⁵²

The anchoring-and-adjustment heuristic influences decision making by biasing individuals in the direction of a figure suggested by the anchor.⁵³ Making an adjustment from this anchor is difficult because even if individuals obtain additional information and recognize that the initial estimate is far off target, their subsequent adjustments remain close to the initial anchor point.⁵⁴ To complicate matters further, the choice of anchor is typically self-serving and therefore biased toward a desired, rather than a likely, outcome.⁵⁵

Anchoring-and-adjustment occurs in civil litigation when the amount of money requested in settlement or at trial acts as an anchor, influencing the amount that participants are willing to award.⁵⁶ In a mock jury study, researchers found that when participants were asked to award damages to a plaintiff who developed ovarian cancer from birth control use, the amount requested by the plaintiff, the so-called *ad damnum*, influenced awards.⁵⁷ The plaintiff who requested the exorbitant sum of \$1 billion in damages received more than the plaintiff who requested just \$5 million.⁵⁸

Attorneys are not immune to this shortcut in reasoning and are likely to base judgments of anticipated settlements or jury damage awards on initially calculated or provided figures (anchors) rather than on likely outcomes.⁵⁹ To demonstrate the anchoring-and-adjustment heuristic in attorney decision making, researchers Fox

51. *Id.* at 1128.

52. *Id.* at 1126, 1128.

53. See KAHNEMAN, *supra* note 37, at 119–20.

54. Edie Greene & Leslie Ellis, *Decision Making in Criminal Justice*, in *APPLYING PSYCHOLOGY TO CRIMINAL JUSTICE* 183, 193–94 (David Carson et al. eds., 2007).

55. Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 *HARV. L. REV.* 2463, 2467, 2498 (2004).

56. See Birte English, *Blind or Biased? Justitia's Susceptibility to Anchoring Effects in the Courtroom Based on Given Numerical Representations*, 28 *LAW & POL'Y* 497, 500 (2006) (reviewing the effects of anchoring on participants' perceptions of settlement awards in civil litigation).

57. Gretchen B. Chapman & Brian H. Bornstein, *The More You Ask For, the More You Get: Anchoring in Personal Injury Verdicts*, 10 *APPLIED COGNITIVE PSYCH.* 519, 522 (1996).

58. *Id.* at 525.

59. See Bibas, *supra* note 55, at 2520, 2529.

and Birke had attorneys read a case summary of an automobile accident.⁶⁰ Then the researchers assigned attorneys to one of four groups and asked them to determine the likelihood of a jury verdict within a specified range: group 1: less than \$25,000; group 2: between \$25,000 and \$50,000; group 3: between \$50,000 and \$100,000; group 4: more than \$100,000.⁶¹ If they were reasoning in a completely rational way, attorneys would have determined the value of a case through careful evaluation of the evidence rather than in response to the award ranges provided.⁶² In that way, the probabilities of verdicts falling within the four ranges would sum to 100%.⁶³ Recall that attorneys read the same fact pattern so regardless of the range they were provided, they should generally predict a similar award. Those whose assigned range included that amount should rate the probability of achieving an award within their range as high, while all other participants should rate the likelihood of an award within their range as low.⁶⁴ However, the combined probabilities of the four outcomes added to 178%, indicating that attorneys anchored on the amounts provided and adjusted their responses insufficiently.⁶⁵ Focusing on the figure provided by researchers reduced their ability to adequately consider alternatives.⁶⁶

When attorneys focus inordinately on some preconceived settlement or damages amount and anchor on this goal, it becomes difficult to seriously consider other outcomes and especially difficult to forecast a less desirable outcome—including one that is more realistic.⁶⁷ This bias can create a barrier to settlement, since settlement amounts offered by adversaries will typically seem insufficient when compared with the desired award.

60. Craig R. Fox & Richard Birke, *Forecasting Trial Outcomes: Lawyers Assign Higher Probability to Possibilities that Are Described in Greater Detail*, 26 LAW & HUM. BEHAV. 159, 163 (2002).

61. *Id.* at 164.

62. *See id.* at 169.

63. *Id.* at 164.

64. *See id.* at 169.

65. *Id.* at 164.

66. Fox & Birke, *supra* note 60, at 169.

67. *Id.* at 169.

4. *Endowment Effect*

By now, it should be clear that attorneys' perceptions of "fair" settlements are colored by partisan biases including, for example, whether their clients are plaintiffs or defendants. This phenomenon can be explained in part by the endowment effect. According to this tendency, individuals perceive an item to be worth more if it belongs to them.⁶⁸ For example, the marketing strategy to allow a two-week money-back-guarantee likely works because once the buyer takes ownership of an item, its perceived value increases immediately.⁶⁹ The buyer is then unwilling to return the item for cash, believing the item to be worth more than what was paid.⁷⁰

The endowment effect is relevant to both litigators and their clients who, because they believe in the merits of their case, are likely to have a distorted notion of what the case is worth.⁷¹ This becomes problematic when plaintiffs' overvaluation leads to an unwillingness to settle for a lesser, more reasonable amount and defendants' undervaluation leads to an unwillingness to offer that amount. Rather than taking an evenhanded approach by offering and accepting a compromise award, litigants assume—often incorrectly—that jurors will see things their way.⁷² Hence, they hold out for the preferred but illusory resolution.⁷³

To demonstrate this effect, a group of researchers randomly assigned participants to act as plaintiffs or defendants in an automobile liability case.⁷⁴ Participants who were assigned to act as plaintiffs estimated that judges' settlement awards would be higher and deemed a larger settlement as more fair than participants assigned to act as defendants.⁷⁵ So when individuals perceive something as theirs (i.e., the money they believe they are owed as

68. Barry Goldman, *The Psychology of Settlement*, PRAC. LITIGATOR, Jul. 2006, at 36.

69. Richard Thaler, *Toward a Positive Theory of Consumer Choice*, 1 J. ECON. BEHAV. & ORG. 39, 46 (1980).

70. *Id.*

71. See Loewenstein et al., *supra* note 3, at 138.

72. *Id.* at 138–39.

73. *Id.* at 138.

74. *Id.* at 145.

75. *Id.* at 151.

compensation for *their* injuries), they deem the items as higher in value than if those things had not belonged to them.⁷⁶ This bias can serve as yet another barrier to settlement.

B. Overconfidence

Confidence judgments are a component of any assessment of the chances of winning and losing.⁷⁷ Lawyers consider the probabilities of wins and losses when deciding whether it is wise to enter into settlement negotiations and whether to accept or decline a settlement offer,⁷⁸ and the confidence they attach to their choice is part and parcel of the decision making process. For many of the reasons we have already outlined, lawyers are unable to make good predictions about case outcomes, which hinders their performance in settlement talks and at trial.⁷⁹ Yet their poor performance is rarely accompanied by a crisis in confidence.⁸⁰

Overconfidence impairs attorneys' abilities to forecast case outcomes.⁸¹ In a demonstration of this problem, researcher Goodman-Delahunty and her colleagues recruited nearly 500 civil and criminal attorneys and asked them to predict their chances of achieving a minimum win in a real-life case set for trial.⁸² When researchers contacted the attorneys after the cases were resolved and compared predictions with reality, they found that attorneys who had forecast a high probability of winning were clearly overconfident.⁸³ Among the subset of lawyers who rated their chances of winning as very high, the mean probability-of-a-win estimate was eighty-two

76. *Id.* at 153.

77. See Lisa K. Son & Bennett L. Schwartz, *The Relation Between Metacognitive Monitoring and Control*, in APPLIED METACOGNITION 15, 29–30 (Timothy J. Perfect & Bennett L. Schwartz, eds., 2002).

78. Goodman-Delahunty et al., *supra* note 7, at 134 (“Attorneys make decisions about future courses of action, such as whether to take on a new client, the value of a case, whether to advise the client to enter into settlement negotiations, and whether to accept a settlement offer or proceed to trial.”).

79. *Id.* at 135.

80. *Id.* at 133.

81. *Id.* at 135.

82. *Id.* at 138–39.

83. Greene & Bornstein, *supra* note 5, at 30.

percent, yet only sixty-two percent achieved their goal.⁸⁴ Not only did predictions not match reality, but the most biased predictions were associated with the most overconfidence, a finding consistent with previous research showing overconfidence in a range of judgments.⁸⁵

Surprisingly, researchers also found that more experienced attorneys were not better calibrated—meaning they were not better able to assess the likelihood of future outcomes—than less experienced attorneys.⁸⁶ There are a number of reasons why: first, more experienced lawyers may handle more complex and ambiguous cases than their less experienced counterparts,⁸⁷ and overconfidence is greater in more challenging situations.⁸⁸ The differences in case complexity present an apples and oranges problem in that more and less experienced attorneys may be predicting the outcomes of different sorts of lawsuits.⁸⁹ Second, the desire to portray a highly confident professional persona may incline lawyers to become overconfident over time.⁹⁰ In addition, lawyers receive relatively little feedback in actual adversarial settings.⁹¹ Even senior partners in litigation firms, typically the most confident litigators, are not often subject to third-party review or feedback during their years of practice.⁹² Lacking any rigorous critique, litigators become overly confident of their positions, which prevents them from accurately assessing the likelihood of winning their cases, monitoring their predictions, or deciding whether to continue to invest resources in a case or to settle.⁹³

84. *Id.*

85. See Gigerenzer et al., *Probabilistic Mental Models: A Brunswikian Theory of Confidence*, 98 PSYCHOL. REV. 506 (1991); Don A. Moore & Paul J. Healy, *The Trouble with Overconfidence*, 115 PSYCHOL. REV. 502 (2008).

86. Goodman-Delahunty et al., *supra* note 7, at 149.

87. *Id.*

88. See Moore & Healy, *supra* note 85, at 504.

89. See Goodman-Delahunty et al., *supra* note 7, at 149, 153.

90. *Id.* at 149.

91. Greene & Bornstein, *supra* note 5, at 31.

92. Goodman-Delahunty et al., *supra* note 7, at 152.

93. *Id.*

When attorneys are asked to provide reasons as to why they might not achieve their desired outcomes, they sometimes, though not always, show improved calibration.⁹⁴ They seem to be able to rein in their confidence when making judgments about simulated cases but cannot do so when predicting outcomes of their own cases.⁹⁵ Apparently the greater the investment that attorneys have in a case, the less successful are interventions intended to aid their judgments.⁹⁶

1. *Self-Serving Biases in Confidence Judgments*

Other factors underlie attorneys' overconfidence. In making predictions about case outcomes, attorneys can fall victim to a self-serving bias—the tendency for people to see what benefits them as what is also most fair.⁹⁷ This bias can be produced by attorneys' allegiances to their clients and commitment to their case⁹⁸ and, in a litigation setting, can be a strong predictor of the decision to proceed to trial rather than settle.⁹⁹

One result of the self-serving bias is that lawyers engage in wishful thinking: believing that a certain outcome is more probable because of the desire to achieve it.¹⁰⁰ Such over-optimism can also result in an inability to see viable alternatives.¹⁰¹ As we have noted, when lawyers judge the probability of achieving particular trial outcomes, they tend to focus on the outcome they desire most and ignore

94. Linda Babcock & George Loewenstein, *Explaining Bargaining Impasse: The Role of Self-Serving Biases*, J. ECON. PERSP., Winter 1997, at 109, 115.

95. See Goodman-Delahunty et al., *supra* note 7, at 151.

96. See *id.* (“The discrepancy between our finding and the previous finding may be due to the fact that the participants in our study made judgments about their own cases rather than simulated cases assigned to them in an experimental setting. A more profound investment in the outcome in real-life cases may increase resistance to debiasing interventions.”).

97. See Babcock & Loewenstein, *supra* note 94, at 110 (“This is the tendency for parties to arrive at judgments that reflect a self-serving bias—to conflate what is fair with what benefits oneself.”).

98. See Goodman-Delahunty et al., *supra* note 7, at 151 (“A lawyer’s commitment to the client and the case may induce a self-serving bias.”).

99. See Loewenstein et al., *supra* note 3, at 138.

100. See Elisha Babad et al., *Factors Influencing Wishful Thinking and Predictions of Election Outcomes*, 13 BASIC & APPLIED SOC. PSYCHOL. 461, 461 (1992); Ziva Kunda, *The Case for Motivated Reasoning*, 108 PSYCHOL. BULL. 480, 480 (1990).

101. Goodman-Delahunty et al., *supra* note 7, at 150–51 (“Generation of a particular mental scenario may have hindered the later generation of alternative, incompatible scenarios.”).

undesirable outcomes.¹⁰² A study we mentioned earlier, in which attorneys were asked to judge the probability of a particular jury verdict in a simulated automobile negligence case, demonstrated this phenomenon.¹⁰³ Lawyers overestimated the probability of a specific outcome because the award range they were provided weakened their ability to examine alternatives.¹⁰⁴ Ignoring alternatives can obviously cause lawyers to give their clients poor advice, such as accepting “an unreasonably lower amount in settlement than is warranted.”¹⁰⁵

2. *Perceptions of Control and Desires for Self-Esteem*

Events that are perceived as more controllable are likely to be associated with overconfidence.¹⁰⁶ Lawyers often feel that trial outcomes are under their control—that the outcome is a function of their hard work, knowledge of the law, and skill.¹⁰⁷ Many external factors, however, affect how a case winds up.¹⁰⁸ The inability to appreciate the extent to which these factors—including biased judges, unreliable or unimpressive witnesses, unrepresentative or unpredictable jurors—can affect trial outcomes will cause attorneys to inappropriately value their own abilities.¹⁰⁹ This illusion of control results in errant judgments of the likelihood of success.¹¹⁰

Human beings also tend to hold overly positive views of their personal characteristics and motivations.¹¹¹ Negotiators believe

102. See discussion *supra* Part I.A.2.

103. Fox & Birke, *supra* note 60, at 163; see also discussion *supra* Part I.A.3.

104. See Fox & Birke, *supra* note 60, at 163–64.

105. Goodman-Delahunty et al., *supra* note 7, at 135.

106. See Neil D. Weinstein, *Reducing Unrealistic Optimism About Illness Susceptibility*, 2 HEALTH PSYCHOL. 11, 14 (1983); Neil D. Weinstein, *Unrealistic Optimism About Future Life Events*, 39 J. PERSONALITY & SOC. PSYCHOL. 806, 808, 814 (1980); Neil D. Weinstein, *Unrealistic Optimism About Susceptibility for Health Problems*, 5 J. BEHAV. MED. 441, 443, 450 (1982).

107. See Greene & Bornstein, *supra* note 5, at 31.

108. See, e.g., Goodman-Delahunty et al., *supra* note 7, at 153.

109. See David Dunning et al., *The Overconfidence Effect in Social Predictions*, 58 J. PERSONALITY & SOC. PSYCHOL. 568, 569 (1990).

110. Ellen J. Langer, *The Illusion of Control*, 32 J. PERSONALITY & SOC. PSYCHOL. 311, 327 (1975) (“This illusion [of control] may be induced by introducing competition, choice, stimulus or response familiarity, or passive or active involvement into a chance situation. When these factors are present, people are more confident and are more likely to take risks.”).

111. Roderick M. Kramer et al., *Self-Enhancement Biases and Negotiator Judgment: Effects of Self-Esteem and Mood*, 56 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 110, 112 (1993).

themselves to be more reasonable, competent, honest, and flexible, among other things, than their counterparts.¹¹² Self-enhancing biases of this sort can cause attorneys to believe that because they have more skills than their adversary, they should hold out for a more favorable case outcome.¹¹³

C. *Mistaken Beliefs About Allocating Resources*

1. *Under-Resourcing*

Like other busy professionals, litigators make strategic decisions about how to invest their time and other resources, and opt to focus attention on some cases rather than others. This choice is colored by a variety of factors, including attorneys' perceptions of the complexity of the issues, the likelihood of settlement (distorted though it may be), clients' insistence, and their current workload.¹¹⁴ Obviously, there are consequences to these choices, and attorneys may have difficulty forecasting case outcomes as a function of their familiarity or lack thereof, with the evidence and relevant law in a particular case.¹¹⁵

Attorneys sometimes delay settling a case because they have not adequately familiarized themselves with the facts and legal issues.¹¹⁶ Such disengagement from the process means that these attorneys will not know whether to invest their time or effort in preparing for settlement negotiations or a trial.¹¹⁷ This scenario can cause cases to drag on for years, which also means that expenses will increase unnecessarily.¹¹⁸

112. *Id.* at 120.

113. *Id.* at 114.

114. See Goodman-Delahunty et al., *supra* note 7, at 149, 152.

115. See Langer, *supra* note 110, at 323.

116. Ken Broda-Bahm, *Break Through the Barriers: The Settlement Series, Part One*, PERSUASIVE LITIGATOR (June 4, 2012), <http://www.persuasivelitigator.com/2012/06/break-through-the-barriers-settlement-series-part-one.html>.

117. *Id.*

118. *Id.*

2. *Over-Resourcing and the Sunk-Cost Fallacy*

At the other extreme, lawyers become too invested in a case and may succumb to what is known as the sunk-cost fallacy—the tendency to continue pursuit of a goal after time, money, or effort has been invested—even if it would be advisable to abandon pursuit of that goal.¹¹⁹ Pouring resources into any enterprise, particularly those that involve ambiguity and alternative interpretations, has the effect of blurring reality in the direction that one favors.¹²⁰ Attorneys who invest indiscriminately in their adversarial positions are likely to fall prey to this process.¹²¹

When making decisions about resource investments in a particular case, a fully rational attorney should take into account only future costs and benefits and not consider past costs, which, cannot be recouped.¹²² The expenses of litigation, including fees paid to investigators, paralegals, and experts, as well as attorneys' own time are sunk costs which, for most litigants, can never be recovered.¹²³ But these expenditures lead inexorably to a reduced likelihood of settlement, as settling would entail admitting that mistakes were made and resources were squandered.¹²⁴ At this point, it simply becomes easier to adhere to the original plan and to devote yet more time and money in the hopes of succeeding, even though the probability of winning may be low.¹²⁵

119. See Hal R. Arkes & Catherine Blumer, *The Psychology of Sunk Cost*, 35 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 124, 124 (1985).

120. *Id.* at 137.

121. See, e.g., Wistrich & Rachlinski, *supra* note 38, at 602.

122. See Hal R. Arkes & Laura Hutzler, *The Role of Probability of Success Estimates in the Sunk Cost Effect*, 13 J. BEHAV. DECISION MAKING 295, 295 (2000).

123. See *id.*

124. See Jay Folberg et al., *Use of ADR in California Courts: Findings and Proposals*, 26 U.S.F. L. REV. 343, 369 (1992) (“[A]s a case progresses, ‘sunk costs’ and emotional preparation for trial make settlement more difficult.”); Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 113–14 (1990).

125. See Daniel Friedman et al., *Searching for the Sunk Cost Fallacy*, 10 EXPERIMENTAL ECON. 79, 83 (2007) (“Self-justification (or cognitive dissonance) induces people who have sunk resources into an unprofitable activity to irrationally revise their beliefs about the profitability of an additional investment, in order to avoid the unpleasant acknowledgement that they made a mistake and wasted the sunk resources. Loss aversion (with respect to a reference point fixed before the costs were sunk) might induce people to choose an additional investment whose incremental return has negative expected value but still has some chance of allowing a positive return on the overall investment.”).

In one study of the sunk-cost fallacy, insurance lawyers were told that they were representing the plaintiff in a simulated breach-of-contract case involving the delivery of defective machines used in fabricating semiconductors.¹²⁶ They were informed that the defendant had offered to settle the case for \$480,000.¹²⁷ Half of the participants were then informed that they had already “spent” \$90,000 in costs and fees litigating the case, and the other half were told that they had “spent” \$420,000 to date.¹²⁸ Given that the defendant’s offer was \$50,000 higher than the expected value of a jury’s verdict, a rational choice would be to settle, regardless of the extent of sunk costs.¹²⁹ The data showed otherwise: seventy-six percent of lawyers who had “spent” \$90,000 recommended settling, whereas only forty-five percent of those who had “spent” \$420,000 recommended settling.¹³⁰ Their assessments of the case were influenced by the amount of money they had already spent on litigation.¹³¹

D. Other Barriers to Settlement

1. Managing Clients’ Preferences and Expectations

Attorneys obviously play a crucial role in advising clients about when to settle, when to proceed to trial, and whether a better settlement offer might be forthcoming or should be offered to settle the case.¹³² However, clients are the ultimate arbiters of whether to accept or reject proposed settlements and whether to offer more or to stand firm.¹³³ Therefore, it is imperative that attorneys be able to

126. See Wistrich & Rachlinski, *supra* note 38, at 616.

127. *Id.*

128. *Id.* at 617.

129. *Id.* at 616–17.

130. *Id.* at 617.

131. *Id.*

132. See Geoffrey P. Miller, *Some Agency Problems in Settlement*, 16 J. LEGAL STUD. 189, 213–14 (1987) (examining attorney knowledge of case, which clients may not understand or possess, making attorney advice especially important in client decision making); William H. Simon, *Lawyer Advice and Client Autonomy: Mrs. Jones’s Case*, 50 MD. L. REV. 213, 213 (1991) (discussing attorney influence over client decision making).

133. See Wistrich & Rachlinski, *supra* note 38, at 578.

provide unbiased perspectives to their clients, especially in cases that are highly emotional, hotly contested, or financially valuable.

There are a number of reasons why clients would hesitate to contemplate settling. They may fear that changing one's mind or considering less desirable (but realistic) outcomes will be perceived as a sign of weakness.¹³⁴ They may possess a desire for vindication, aim to hold the other party responsible, believe that they have done no wrong, or suspect that the complaining party has over-reached.¹³⁵ They may have had certain expectations for how litigation would proceed, and deviations from this plan can be difficult to accept.¹³⁶ These hesitations and personal desires, whether warranted or not, can serve as obstacles to settlement that must be navigated carefully by counsel.

Ideally, attorneys would be aware of their own decision making limitations and able to manage clients' expectations so that collectively, they could consider alternative outcomes and make the best choices possible as to how to proceed. But the biases we have described are difficult to overcome. To remedy these problems, attorneys can use outside resources, such as small group research conducted by trial consultants, to assist them in overcoming forecasting errors and make better-calibrated settlement decisions.¹³⁷

II. USING SMALL GROUP RESEARCH TO REMEDY IMPERFECT FORECASTING

Attorneys are not immune to the age-old adage that two heads are better than one. Collaboration, particularly with unbiased others, can provide the information necessary to make smart decisions. Attorneys can garner these insights through small group research (SGR), conducted either in-house or by litigation consultants, which

134. See Eigen & Listokin, *supra* note 21, at 243; Kenneth P. Nolan, *Settlement Negotiations*, LITIGATION, Summer 1985, at 17 (noting that lawyers also suffer from this fear).

135. See, e.g., Gross & Syverud, *supra* note 9, at 366 (discussing the disparities between going to trial and settling in malpractice cases).

136. *Id.*

137. See discussion *infra* Part II.

allows them to preview cases before ever stepping into a courtroom.¹³⁸ Plaintiffs and defendants use litigation consultants and SGR for different reasons: the former need to know how much their case is worth and whether to settle, and the latter should know the risks associated with going to trial versus settling.¹³⁹ Although SGR does not provide crystal-ball-like predictions, these exercises can shed light on the strengths and weaknesses of a case and move the lawsuit closer to resolution.¹⁴⁰

A. *Types of Small Group Research*

1. *Mock Trials*

Mock trials are similar to actual trials in that they include opening statements and closing arguments as well as direct- and cross-examination of plaintiffs, defendants, lay and expert witnesses, though most of these are abbreviated.¹⁴¹ Surrogate jurors, representative of the actual jury pool, hear a subset of relevant jury instructions and deliberate to a verdict.¹⁴² Their deliberations typically occur behind a one-way mirror or in a room with filming capabilities to allow interested parties to watch the process in real-time, ask questions, and give suggestions.¹⁴³ Budgetary and time constraints often dictate that these steps be condensed, so full-blown mock trials are reserved primarily for high profile and high stakes cases that justify the costs.¹⁴⁴

138. Diane F. Wyzga, *Small Group Research from Recruit to Report*, AM. ASS'N FOR JUST., <https://www.justice.org/sections/newsletters/articles/small-group-research-recruit-report> (last visited Mar. 26, 2015).

139. Jay M. Finkelman, *Litigation Consulting: Expanding Beyond Jury Selection to Trial Strategy and Tactics*, 62 CONSULTING PSYCH. J. 12, 13 (2010) (“Plaintiffs typically want to know how much their case is worth, in part to determine whether it is worth taking but also to gauge how much is prudent to expend (in both time and money) in its prosecution. Defendants are more likely to want to determine the risk of litigation and, by inference, the utility of settlement.”).

140. See Wyzga, *supra* note 138.

141. Finkelman, *supra* note 139, at 16.

142. *Id.*

143. *Id.*

144. *Id.*

Mock trials can be exploratory or confirmatory.¹⁴⁵ Exploratory mock trials give insight into jurors' evaluations of the evidence and perceptions of witnesses, and information about which themes, exhibits, and arguments are most persuasive.¹⁴⁶ Typically only twenty-four to thirty-six surrogate jurors are involved in an exploratory mock trial, making this exercise less than ideal for determining case outcomes.¹⁴⁷ Confirmatory mock trials, on the other hand, fill this role.¹⁴⁸

Confirmatory mock trials have two objectives: provide insight into the process that jurors will use, given the evidence and the relevant law, to make their decisions, and suggest the likely trial outcome.¹⁴⁹ They also help assess jurors' receptivity to contemplated case themes or theories and give the first clues about how certain types of jurors will respond, suggesting potential strategies for voir dire.¹⁵⁰ This type of mock trial involves more surrogate jurors than an exploratory mock trial (i.e., thirty-six or more across multiple sessions) and better simulates an actual trial.¹⁵¹

Both varieties enable the parties to evaluate jurors' use of demonstrative evidence and provide opportunities for attorneys to practice multimedia presentations.¹⁵² In general, the value of a mock trial is directly related to how well (or poorly) the mock jurors match the actual jurors on certain key features,¹⁵³ a point to which we will return.¹⁵⁴

145. See CINDY K. ANDREWS, BENEFITS, RISKS AND MISPERCEPTIONS OF MOCK TRIALS AND MIRROR JURIES 1, available at <http://www.thefederation.org/documents/15.-Benefits%20Risks%20Mock%20Trials.pdf> (last visited May 13, 2015).

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. ANDREWS, *supra* note 145, at 1.

152. *Id.* at 4.

153. Barry Richard, *Corporate Litigation: Mock Jury Exercises*, 26 NAT. L. J., Mar. 1, 2004, available at <http://www2.gtlaw.com/pub/articles/2004/richardb04a.pdf>.

154. See *infra* Part II.B.3.

2. *Focus Groups*

In contrast to mock trials that test all facets of a particular case, focus groups are intended to test jurors' reactions to specific issues or witnesses in a case.¹⁵⁵ These also come in two varieties: concept focus groups and structured focus groups.¹⁵⁶ Concept focus groups are used early in the development of a case to assist attorneys in constructing a narrative of the evidence, developing trial themes, learning about potential biases that may arise during trial, and gleaning insights into areas of discovery that are deserving of further attention.¹⁵⁷ Informal in nature, they involve trial consultants or attorneys telling the group a bit about the dispute, evaluating their reactions, and asking what questions arose regarding the evidence.¹⁵⁸

Structured focus groups, by contrast, involve more formal presentations of the facts and arguments.¹⁵⁹ They can also test the "staying power" of themes or strategies that may be offered by the other side.¹⁶⁰ Typically, they start with the trial consultant explaining the objective of the session and establishing group confidentiality.¹⁶¹ Trial counsel then make abbreviated presentations of the evidence, sometimes in the form of a "clopening" (a brief opening statement combined with an equally brief closing argument), and the trial consultant acts as moderator.¹⁶² Structured focus groups can also include deliberations, moderator-led discussions, or both.¹⁶³

3. *Shadow Juries*

A shadow jury involves surrogate jurors responding in real time to the evidence actually presented during a trial and deliberating as if

155. Douglas L. Keene, *The "Why" and "How" of Focus Group Research*, JURY EXPERT, Aug. 2013, at 16, 16.

156. *Id.* at 17.

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. Keene, *supra* note 155, at 17.

162. *Id.* at 17–18.

163. *Id.* at 18.

they were the real jury.¹⁶⁴ Like mock trials, shadow jury studies can be expensive so are usually reserved for high profile or high stakes cases.¹⁶⁵ However, when costs are an issue, they can also be used strategically during certain portions of a trial, such as during the presentation of key witnesses or after opening statements.¹⁶⁶

One method of organizing a shadow jury is to have the shadow jurors, who are representative of the pool of prospective jurors like mock jurors, sit in the audience during a trial.¹⁶⁷ This arrangement enables shadow jurors to see and hear almost exactly what the actual jury is seeing and hearing.¹⁶⁸ After each court session, “shadow jurors are brought together by the consultant away from the courtroom and asked a variety of questions about the day’s proceedings.”¹⁶⁹ Attorneys can watch the consultant question the shadow jurors through a one-way mirror or via video; in some instances, attorneys are present in the room with the jurors and trial consultant.¹⁷⁰

Consultants will typically ask the shadow jurors about their leanings toward the plaintiff or defendant at the end of each day.¹⁷¹ This information suggests what strategic tweaks should be made in the following day’s session and can be highly useful for monitoring the progress of a trial.¹⁷² Because shadow jurors are often unaware of which side has employed them, their feedback can be relatively unbiased.¹⁷³

164. See Finkelman, *supra* note 139, at 16.

165. *Id.*

166. Diana G. Ratcliff, *Using Trial Consultants: What Practitioners Need to Know*, 4 J. LEGAL ADVOC. & PRAC. 32, 42 (2002).

167. See Finkelman, *supra* note 139, at 16.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. See ANDREWS, *supra* note 145, at 10.

B. Rigorous Methodology Enhances the Value of Small Group Research

An attorney or consultant can conduct weeks or months of SGR, but the results will be of little value if the research is flawed. As researchers say, garbage in, garbage out. To be effective, the studies must be well designed and the results should be interpreted with caution.¹⁷⁴

Although attorneys and their staff can conduct in-house studies, some research has shown that attorneys give less weight to a second opinion from another attorney than they give to their own opinions.¹⁷⁵ So hiring unbiased, experienced professionals to evaluate the strengths and weaknesses of a case may be wise as they can provide nuanced insights not gleaned from other sources.

The American Society of Trial Consultants (ASTC) has established guiding principles for conducting SGR.¹⁷⁶ The goal is to follow the rules of sound research methodology, common to all scientific endeavors.¹⁷⁷ Typically, this includes identifying adequate or representative participant samples, ensuring that participants are unaware of the purpose of the study, and presenting uniform or comparable information to all participants.¹⁷⁸ When applying these general prerequisites to pending litigation, additional factors should also be considered.¹⁷⁹ It is here that litigation consultants can be most valuable because they can ensure that the research meets these specific requirements and therefore, that attorneys can appropriately rely on the research's conclusions to inform decisions about settlements and trials.¹⁸⁰

174. *See id.* at 2.

175. Jonas Jacobson et al., *Predicting Civil Jury Verdicts: How Attorneys Use (and Misuse) a Second Opinion*, 8 J. EMPIRICAL LEGAL STUD. 99, 113 (2011).

176. AM. SOC'Y OF TRIAL CONSULTANTS, THE PROFESSIONAL CODE OF THE AMERICAN SOCIETY OF TRIAL CONSULTANTS 36–40 (2013), available at <https://astcweb.org/Resources/Pictures/ASTCFullCodeFINAL20131.pdf>.

177. ANDREWS, *supra* note 145, at 8.

178. *See id.* at 10–11; *see also* Finkelman, *supra* note 139, at 16.

179. *See* ANDREWS, *supra* note 145, at 2 (noting that attorneys should also consider consultants' training in psychometrics and statistics in the hiring process to ensure SGR is conducted appropriately).

180. *Id.*

1. *Equal Weight Should Be Given to Both Sides of the Case*

In high-quality SGR, both sides of the case are represented as strongly as possible.¹⁸¹ It would be of little use for an attorney to present her best evidence, and then lackadaisically construct a counterargument.¹⁸² This would be akin to the New York Yankees hosting a home run derby against the local little league team. Rather than setting themselves up for a “home run,” attorneys should hope that participants recognize the virtues of the opponent’s case.¹⁸³ This will allow them to anticipate and respond to the strongest possible case presentation that the opponent can muster.

2. *Participants Should Not Know Which Side Is Conducting the Research*

For the results of SGR to be meaningful, it is imperative that participants be unaware of (or, in research parlance, “blind to”) which party is conducting the research.¹⁸⁴ If participants are able to identify which side is presenting the information and seeking their opinions, their responses may be biased toward that side in an effort to be agreeable “colleagues.”¹⁸⁵ Researchers should make every effort to keep confidential the identity of the research conveners in order to increase the likelihood that participants will respond in a neutral fashion.¹⁸⁶ Participants who feel free to give open and honest feedback provide more useful information than do those who try to appease the researchers.

181. Carolyn S. Koch, *Improving the Odds: Using Mock Trials to Hone Strategies*, 24 TRIAL LAW. 116, 117 (2001).

182. Theodore O. Prorise & Craig C. New, *Ten Key Questions: Evaluating the Quality of Mock Trial Research*, FOR THE DEFENSE, Aug. 2007, at 10, 12. (“If the goal is to get a more accurate assessment of settlement value, then balance is essential.”).

183. See Koch, *supra* note 181, at 117. In fact, the third author recently worked with an attorney who asked for, indeed *hoped for*, the harshest possible criticism of his case from SGR participants.

184. See Prorise & New, *supra* note 182, at 13.

185. *Id.* (“If the research participants know whom they are ‘working for,’ the ‘good subjects’ phenomenon—the phenomenon of research participants attempting to give the answers they think the researcher wants to hear—could color the ultimate outcome.”).

186. *Cf. id.* (explaining that when participants know which side the researchers align with, the participants are more likely to give the answers they think the researchers want to hear).

3. *Participants Should Be Representative of Prospective Jurors*

It is also important that researchers draw participants from the pool of jurors who are eligible to sit on the jury.¹⁸⁷ If this key component is lacking, the opinions expressed by the group may not match those of jurors in the courtroom.¹⁸⁸ Attorneys or consultants should become familiar with the demographics of the community and the jury pool and select research participants that will closely mirror the races, ages, socioeconomic statuses, and employment backgrounds of prospective jurors.¹⁸⁹ Careful selection of participants will increase confidence that the results of the research can be trusted and relied on in formulating ongoing litigation strategy.¹⁹⁰

Along this vein, people should not participate in SGR if they would be excluded from the actual jury.¹⁹¹ For instance, individuals who have their morning coffee with one of the parties involved and those with specialized knowledge about a key issue in the case would be unlikely to survive jury selection and should not be used to gauge community opinion in any pretrial research. Creating an environment that parallels reality is key to creating trustworthy results.¹⁹²

C. *How Small Group Research Can Improve Forecasting*

One trial consultant has written that “[o]nly a mock trial can arm an attorney with the kind of information that can make the difference between a ringing victory and a devastating loss.”¹⁹³ Although we believe that research projects short of full-blown mock trials also have value, there is little dispute that the more an attorney is able to invest, financially and otherwise, in SGR, the better the chances for improved forecasting.¹⁹⁴ These exercises can challenge attorneys’

187. Ryan J. Winter & Timothy Robicheaux, *Questions About the Jury: What Trial Consultants Should Know About Jury Decision Making*, in HANDBOOK OF TRIAL CONSULTING 63, 70 (Richard L. Wiener & Brian H. Bornstein eds., 2011).

188. *Id.*

189. *See* Prorise & New, *supra* note 182, at 12.

190. *Id.*

191. *Id.* (“Participants who would be obvious cause challenges . . . should be excluded.”).

192. *Id.*

193. *See* Koch, *supra* note 181, at 122.

194. *Id.*

biases and improve their forecasting abilities, allowing them to develop and test case themes, identify jurors of interest, determine whether it is advisable to settle or proceed to trial, and approximate the value of the case.¹⁹⁵ With results of SGR in mind, attorneys can gauge how much time, money, and other resources to invest in a case and can begin to align themselves and their decisions with the likely resolution of the dispute.¹⁹⁶

When is the ideal time to undertake the research that will lead to these outcomes? Although SGR can be conducted at any point prior to trial, there is reason to collect data early and continue to adapt trial strategies throughout the litigation process.¹⁹⁷ There are several ways that research conducted early in the process can enhance litigation practices.¹⁹⁸

1. *Developing Trial Strategies*

Different strategies can be tested with different groups of research participants to determine whether one version presents the evidence in a more persuasive manner than others.¹⁹⁹ It is not uncommon for a consultant to conduct one version of a focus group at Time 1 and a variant with a different emphasis, altered chronology, or novel arrangement of witnesses at Time 2.²⁰⁰ One consultant tells the story of an attorney who wanted to focus on the “sexy issue,” a whistleblower’s claim, and downplay the “boring issue,” the breach of implied contract claim.²⁰¹ However, mock trial research showed that jurors favored the client on the breach of contract claim because the evidence was clearly in his favor.²⁰² Using this information, the attorney was able to restructure the case to focus on the issue best

195. See, e.g., *id.*; Winter & Robicheaux, *supra* note 187, at 84.

196. See, e.g., Prosser & New, *supra* note 182, at 82; Winter & Robicheaux, *supra* note 187, at 71.

197. See Koch, *supra* note 181, at 117.

198. See discussion *infra* Part II.C.1–3.

199. See Juliana Reno, *A Lawyer’s View of Trial Consulting*, in HANDBOOK OF TRIAL CONSULTING 393, 405 (Richard L. Wiener & Brian H. Bornstein eds., 2011).

200. See *id.*

201. See Koch, *supra* note 181, at 120.

202. *Id.*

supported by the evidence.²⁰³ Clients are often better served when attorneys undertake the opportunity to learn what mock jurors have to say about their plans for presenting the case.²⁰⁴

2. *Evaluating Case Themes*

A well-organized case theme gives jurors a foundation from which to evaluate information and make decisions.²⁰⁵ While attorneys often develop a cursory case narrative without really knowing its value, researchers will be familiar with the story model of juror decision making.²⁰⁶ Based on a variety of supporting research, the story model posits that jurors organize evidence into a comprehensive narrative format, which includes confirmatory information and disregards disconfirming evidence.²⁰⁷ Knowing how to fit the case theme into a story that resonates with jurors will improve the odds of securing a favorable verdict.²⁰⁸

Attorneys can and should use SGR to evaluate how jurors respond to intended case narratives and adjust their planned presentations based on the feedback they receive.²⁰⁹ By testing case themes before trial, attorneys can determine whether they are comprehensible, believable, and memorable enough for jurors to rely on and refer to during deliberations.²¹⁰ An added benefit of using trial consultants is that they can help to brainstorm alternative organizing frameworks and then gather empirical data to test which themes work best.²¹¹

203. *Id.*

204. *Id.* at 117 (“[M]ock jurors should be questioned throughout the proceeding. Written juror questionnaires should assess mock jurors’ pre-existing attitudes and experiences, as well as their specific feelings about the issues and parties.”).

205. See Winter & Robicheaux, *supra* note 187, at 69–70.

206. See Nancy Pennington & Reid Hastie, *Evidence Evaluation in Complex Decision Making*, 51 J. PERSONALITY & SOC. PSYCHOL. 242, 243 (1986) [hereinafter Pennington & Hastie, *Evidence*]; Nancy Pennington & Reid Hastie, *Explanation-Based Decision Making: Effects of Memory Structure on Judgment*, 14 J. EXPERIMENTAL PSYCHOL.: LEARNING, MEMORY & COGNITION 521, 522 (1988).

207. See Pennington & Hastie, *Evidence*, *supra* note 206, at 245; Pennington & Hastie, *Explanation-Based*, *supra* note 206, at 522.

208. See Reno, *supra* note 199, at 405.

209. *Id.* at 393–409.

210. *Id.* at 407.

211. *Id.* at 405.

Another factor to consider is what story the opponent will tell. If attorneys are able, via SGR, to anticipate their opponents' case narratives, they can prepare to counter these arguments with a convincing and memorable story of their own.

3. *Assisting in Determining Damages*

With respect to damage awards, litigation consultants can assist attorneys with three tasks: (a) determining the value of a plaintiff's injury, (b) engaging and preparing expert witnesses who can testify about the nature and extent of the plaintiff's injuries, and (c) helping attorneys create persuasive arguments regarding damages.²¹² Perhaps the most important role of the consultant is in helping litigants determine approximately how much their case is worth.²¹³

Assessing damages is problematic for both lawyers and jurors. Although attorneys can provide schedules or examples of typical awards to assist jurors in compensating for physical harms and economic losses,²¹⁴ there is little they can do to quantify non-economic damages such as pain and suffering and emotional distress which comprise approximately fifty percent of all compensation awarded in civil cases.²¹⁵ Furthermore, though attorneys often use jurors' demographic features to guide decisions about jury selection, such information is not a good predictor of damage awards.²¹⁶ Rather, jurors' preconceptions about injury impact and recovery from injury can be useful in predicting how they will quantify plaintiffs' suffering and defendants' obligations to compensate for those harms.²¹⁷

212. Brian H. Bornstein & Edie Greene, *Consulting on Damage Awards*, in HANDBOOK OF TRIAL CONSULTING 281, 281–82 (Richard L. Wiener & Brian H. Bornstein eds., 2011).

213. *Id.* at 289.

214. See Randall R. Bovbjerg et al., *Valuing Life and Limb in Tort: Scheduling "Pain and Suffering"*, 83 NW. U. L. REV. 908, 914 (1989); Michael J. Saks et al., *Reducing Variability in Civil Jury Awards*, 21 LAW & HUMAN BEHAV. 243, 246 (1997).

215. Neil Vidmar et al., *Jury Awards for Medical Malpractice and Post-Verdict Adjustments of Those Awards*, 48 DEPAUL L. REV. 265, 270 (1998).

216. See Winter & Robichaux, *supra* note 187, at 79–80 (noting "[m]ore often than not, demographic variables have low predictive value in jury research.>").

217. *Id.* at 80–81; Katherine V. Vinson et al., *Predictors of Verdict and Punitive Damages in High-Stakes Civil Litigation*, 26 BEHAV. SCI. & L. 167, 168 (2008).

Consultants can assist litigants with all of these issues. They can help attorneys discern how much a plaintiff is likely to recover in a jury trial and whether it would be advisable to settle.²¹⁸ They can also assess what aspects of a plaintiff's injury elicit the greatest amount of sympathy and skepticism, which can then be highlighted by the plaintiff or discounted by the defendant during trial.²¹⁹

III. CONCLUSION

Given his high profile and the volatile nature of the claims, it is likely that Bill Cosby and his team of attorneys engaged the assistance of a litigation consultant prior to settling his 2006 lawsuit. In light of the nearly two-dozen claims of sexual assault and a related defamation lawsuit now pending, it behooves Cosby to have consultants close at hand. As we have shown, litigation consultants can be exceedingly helpful in pointing out blind spots that bias attorneys' judgments of likely values and victors in lawsuits.²²⁰ Consultants' insights allow litigants to overcome predictable limitations in forecasting and inform their decisions about which claims to settle, when to settle, and for how much to settle.²²¹

218. See Winter & Robichaux, *supra* note 187, at 72.

219. See Bornstein & Greene, *supra* note 212, at 283.

220. See *supra* Part II.C.

221. See *supra* Part II.C.