COSTS, PROCESSES AND OUTCOMES:

LAWYERS' ATTITUDES TO COURTS

AND OTHER DISPUTE PROCESSING OPTIONS

by

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Abstract

This paper analyzes data from a survey conducted by the Civil Litigation Research Project (CLRIP). CLRIP interviewed lawyers who had brought cases in federal and state courts, and "alternative" institutions including private arbitration and state administrative agencies. Lawyers who considered more than one institutional option for the dispute were asked why they initially preferred one institution and how they evaluated the institution selected. Lawyers prefer institutions that give favorable results at low cost and with relative speed. Other quality or process considerations are much less important, and lawyers report no concern about effects on continuing relations between the parties. Overall, lawyers ranked the "alternative" institutions we studied higher on many process and quality variables than they did the courts, and especially higher on "cost-effectiveness." At the same time, they cite outcome advantages most frequently as a reason for preferring courts over any institutional alternatives they considered. The study suggests that efforts to introduce alternative dispute processing institutions will meet attorney resistance if they are perceived as lowering the chances for favorable outcomes, or as increasing cost and adding to delay.
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The current interest in "alternative dispute processing" has drawn attention to the fact that courts may not be the best way to handle some of the civil disputes that occur in our society. Because some think that institutions like private arbitration and processes like mediation may be more effective than the regular courts, many have called for the expansion of these so-called "alternatives" (Sander, 1976; National Institute for Dispute Resolution, 1983). While a great deal of ink has been spilled on the advantage of "alternatives" over courts, relatively little empirical evidence has been produced on the comparative advantages of various institutions that may be currently available to disputants, or on the factors that influence disputant choice in actual cases where options exist.

A major gap in our knowledge concerns the attitude of practicing attorneys toward dispute processing options. Since attorneys play a major role in determining how most disputes will be processed (Macaulay, 1979), and since many lawyers have substantial experience with the various options currently available, attorneys' attitudes toward courts and "alternatives" are worth further scrutiny. What do lawyers look for in a dispute processing institution? When they do have choices among institutions, what factors influence their choice? How do practicing attorneys evaluate the institutions they appear in, and how do these evaluations differ among courts and "alternatives"?

To explore these questions, we analyzed data collected by the Civil Litigation Research Project (CLRP). As part of a general
study of civil litigation, CLRIP interviewed lawyers in "civil disputes" in five parts of the United States (Trubek, et al., 1983a, 1983b). These disputes included cases in federal and state courts, as well as cases in a variety of other dispute processing institutions. The ten "alternative institutions" we selected were the American Arbitration Association, the Equal Rights Division of the Wisconsin Department of Industry, Labor, and Human Relations, the Green Bay Zoning Board of Appeals, the Green Bay Planning Commission (Wisconsin), the Philadelphia Commission of Human Relations (Pennsylvania); the Occupational Safety and Health Division of the South Carolina Department of Labor, the County Court Arbitration Program Reform Act (South Carolina); the Construction Industries Division of the Commerce and Industry Department of New Mexico, the Employment Services Division of the Human Services Department of New Mexico (New Mexico); Better Business Bureau of Los Angeles and Orange Counties, and the Contractors' State License Board of the Department of Consumer Affairs (California). (For the overall CLRIP design and the method for selecting alternatives, see the Appendix.)

We conducted interviews with 2002 lawyers. All were involved in actual cases that we had selected from court dockets and the files of the "alternative" institutions. Thirteen percent of the attorneys interviewed represented parties in one of the alternative institutions. The rest were involved in civil cases in state and federal courts. These attorneys were contacted by phone and were asked detailed questions about all aspects of their case. Among the questions were a series which explored the attorney's reason for choosing the institution in question (if they had selected the forum) or for preferring some other institution (if they had not made the forum choice). Additionally, the attorneys were asked to evaluate the institution that actually did process the dispute they were involved in. Since not all attorneys indicated they had thought about options, and not all those who had done so answered all the questions, the sample size for the analyses that follow are smaller than the overall sample and the data bases (N's) vary.

This report analyzes some of the major findings of this survey. We focus on three issues:

1. In general, what do attorneys say they look for when they choose a dispute processing institution?

2. What reasons do attorneys cite for preferring alternatives to courts, and vice versa?

3. How do attorneys rate the institution they work in and how do these evaluations vary between courts and "alternatives?"

In general, we found that lawyers take a pragmatic view toward dispute processing institutions. They look for several things in an institution, including such factors as the speed of processing, expertise of the decision maker, and cost. But attorneys faced with choices tend to be especially concerned with the expected outcome of the case: in the attorneys' view, outcome factors rank higher than most "quality" variables. Attorneys who preferred courts over alternatives when a choice is available most frequently cite outcome as the decisive factor. When we compare attorneys' evaluations of
courts and alternatives, we find some preference for the various alternative institutions from which we sampled cases. Thus, when we compare attorneys' evaluations of courts with those of the alternatives, we can find more favorable evaluations of alternatives on quality factors like responsiveness, effectiveness, and competence. Moreover, plaintiffs' lawyers at least report that their experience with alternatives was "worth the cost" more often than do plaintiffs' attorneys in court cases. Despite the fact that alternatives rank higher on process and quality factors, we find that when the attorneys exercise choice they are strongly influenced by outcome considerations. This underscores the pragmatic cast of lawyers' attitudes.

The overall picture that emerges from this analysis suggests that while there may be some quality and cost advantages to some alternative institutions, these factors are not likely to significantly affect attorney choice if the use of alternatives increases the risk of an unfavorable outcome for the client. For the pragmatic attorney concerned with winning for the client, what seems to count most is the result, not the process. Moreover, it is worth noting that fee arrangements may make the attorney as concerned about outcome as the client. Plaintiffs' lawyers are the ones who make the forum choice in most cases; yet it is important to recognize that a large percentage of plaintiffs' lawyers in our study were paid on a contingent fee basis, so that they only got paid if the client won.

(1) WHAT FACTORS DO LAWYERS LOOK FOR IN A DISPUTE RESOLUTION INSTITUTION?

The first question we looked at was what aspects of dispute processing institutions do lawyers say are important when they are considering choices among institutions. Some of the lawyers in our survey had actually considered different dispute processing options, and made a choice among them. For these respondents we obtained information on the nature of the choice and the factors that had influenced it. Another group of lawyers had been bound to a single dispute processing institution because (1) the choice had been made by the opposing party, (2) there was a pre-existing contractual commitment to use a particular institution if a dispute arose, or (3) there were jurisdictional requirements. These lawyers were asked what, if any, choice they would have made if they had been in a position to consider other options; those who indicated some other preference were then asked about the factors influencing that preference. A total of 1003 "choices" were considered by the lawyers in the two groups combined, and for 882 of these we have information on the factors that the lawyer thought about when comparing the institutions. For the purposes of the analysis that we present below, we have used choice as the unit of analysis since some lawyers considered more than one choice or more than one pair of institutions while they were handling the case.

Some of the respondents cited only one factor as explaining their choice or preference; others cited multiple reasons. Some explained choice or preference just between courts (federal vs.
Table 1: FREQUENCY OF ATTORNEY CITATION OF REASONS FOR PREFERING DISPUTE RESOLUTION OPTION (ALL ATTORNEYS)

<table>
<thead>
<tr>
<th>Reason Cited for Preference</th>
<th>Number of Choices</th>
<th>Percent of Choices for Reason Cited</th>
</tr>
</thead>
<tbody>
<tr>
<td>Speed</td>
<td>169</td>
<td>19</td>
</tr>
<tr>
<td>Cost</td>
<td>145</td>
<td>17</td>
</tr>
<tr>
<td>Favorable Outcome Likely</td>
<td>134</td>
<td>15</td>
</tr>
<tr>
<td>Expertise</td>
<td>14</td>
<td>8</td>
</tr>
<tr>
<td>Power to Settle and Enforce</td>
<td>55</td>
<td>6</td>
</tr>
<tr>
<td>Location/Convenience</td>
<td>41</td>
<td>5</td>
</tr>
<tr>
<td>Fairness</td>
<td>39</td>
<td>5</td>
</tr>
<tr>
<td>Rules and Procedures</td>
<td>34</td>
<td>4</td>
</tr>
</tbody>
</table>

(Total number of choices: 882)

If we assume that frequency of citation measures the relative importance of these institutional characteristics to practicing attorneys, then Table 1 gives us a good general picture of lawyer attitudes. Lawyers are pragmatic. They want an expert, quick, low-cost process that is likely to give their client a favorable result and can make the decision stick. More general process or quality variables like fairness of better rules and procedures are not considered.

Note: Because not all reasons cited are included in the table and respondents could cite multiple reasons, the number of citations does not total 100.
relatively unimportant. About 50% of the attorneys mentioned speed, cost, and outcome. In contrast, only 5% mentioned convenience and fairness, and 4% cited preferable rules and procedures.

The data in Table 1 include information from all lawyers in our sample. But in many of these cases the lawyers were assessing the relative merits of one court over another (e.g., state vs. federal) and were not thinking at all about some "alternative" institution. What happens when we look only at lawyers who compared courts with another type of dispute processing institution? To do this, we excluded those respondents who only made court/court comparisons. This left us with 347 comparisons which included both some court and some other type of dispute processing institution, and in which an attorney had given one or more reasons for a choice/preference between these options. (Note that these comparisons did not necessarily involve the "alternative" institutions from which some of our cases were drawn. Any attorney who considered any dispute processing institution other than a court was asked why s/he preferred it to a court or vice versa. Thus, if a defendant's lawyer in a malpractice case in state court said she would have preferred arbitration, these data are included even though we did not include any medical malpractice arbitration programs in our "alternative institution" sample.)

The results of this second analysis are set forth in Table 1A. What is striking is the similarity between the results here and those set forth in Table 1. Regardless of the type of institutional comparison lawyers are making, lawyers agree that speed, cost outcome, Institutional power and expertise are the five most important factors, and the first three dominate. Moreover, the rank order of the factors listed is similar and some differences relatively easy to explain. Thus, while speed ranks first when all choices are considered, cost moves into first place when attention is limited to the court-alternative choice. This could suggest that there are greater cost differentials between courts and alternatives than among courts.

Table 1A
FREQUENCY OF CITATION: ONLY ATTORNEYS EVALUATING COURTS VERSUS ALTERNATIVES

<table>
<thead>
<tr>
<th>Reasons for Preferences</th>
<th>Number of Choices For Which Reason Was Cited</th>
<th>Rank</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cost</td>
<td>91</td>
<td>1</td>
</tr>
<tr>
<td>Speed</td>
<td>42</td>
<td>2</td>
</tr>
<tr>
<td>Favorable outcome likely</td>
<td>20</td>
<td>3</td>
</tr>
<tr>
<td>Power to settle and enforce</td>
<td>13</td>
<td>4</td>
</tr>
<tr>
<td>Expertise</td>
<td>9</td>
<td>5</td>
</tr>
<tr>
<td>Fairness</td>
<td>8</td>
<td>6</td>
</tr>
<tr>
<td>Would help get negotiation going</td>
<td>7</td>
<td>7</td>
</tr>
<tr>
<td>Forum more appropriate</td>
<td>5</td>
<td>8</td>
</tr>
<tr>
<td>(Number of comparisons)</td>
<td>(347)</td>
<td></td>
</tr>
</tbody>
</table>

a See Table 1.
A somewhat different pattern emerging if we look at those attorneys whose comparisons were limited to choosing one court over another most often federal vs. state courts. When faced with this choice alone, attorneys remain concerned with speed and outcome. Cost, however, fails to fourth place, well behind expertise in frequency of citation (42 vs. 65). This finding confirms the view, suggested above, that cost is less important when lawyers choose among courts than when they compare courts to other institutions. It may well be that the difference in cost between federal or state courts is not as great as that between courts and one of the alternatives our lawyers thought about.

(b) What Do Our Lawyers Want?

It is equally interesting to look at some of the factors that are mentioned frequently by attorneys as well as those that appear more infrequently in their list of reasons for preferring institutions. Note, for example, that only 4% of the attorneys cited better rules and procedures as a reason for preferring a given option. Moreover, this reason was cited almost exclusively by lawyers whose choice or preference was limited to one court over another. One of the most interesting finding in this respect is the

"continuing relations" factor. The literature on alternative dispute resolution has stressed the value of non-adjudicative
expressing a preference) cited this factor and less than 1% of all respondents alluded to it at all. Clearly, the potential effect of a dispute institution on continuing relationships does not play a role in the thinking of most attorneys.

Of course, this finding could mean many things. It might mean that few if any of the disputes we studied involved continuing relationships. To determine this with precision, we would have to conduct a detailed analysis of the data on the relationships among parties to the disputes we studied. We do know that some of the disputants in our sample did indicate that they had continuing relations that they hoped to preserve, but cannot say with certainty how frequently the parties in the disputes being studied here had long-term relationships. If, as we suspect, such relationships do occur in our sample, lawyer unconcern could mean one of four things:

(a) the general idea that institutions really differ in their suitability for handling long-term relations is wrong;
(b) the idea is correct, but in the cases we studied the real options open to the parties did not include important variation on this dimension;
(c) by the time the attorneys we interviewed had come to face actual institutional choice, any continuing relations between the clients had been disrupted by early stages of the dispute so that the factor was no longer relevant; or
(d) while attorneys could have found institutions that would be better suited for the continuing relationship, they were insufficiently sensitive to these considerations.

The last possibility is especially intriguing, given other results of our study. For there is some indication, looking at the data overall, that attorneys focus on what we might call the "hard" factors of speed, cost, and outcome, and pay less attention to the "soft" process variables which proponents of alternative dispute processing want to direct our attention to. While one might speculate that lawyers' pragmatic concerns with quick, cheap victories render them relatively insensitive to factors like the importance of preserving continuing relations, we must caution that no direct conclusion on this issue can be drawn from our analysis to date.

(2) WHEN LAWYERS PICK ALTERNATIVES OVER COURTS, WHAT FACTORS DO THEY CITE?

In addition to securing general views from the lawyers about what they looked for in a dispute resolution institution, we also looked at the factors that seemed most salient to those who had made a comparison between specific institutions. In this analysis, we collapsed the various reasons into three basic factors, which we call convenience, quality, and outcome. Convenience includes geographic location and the lawyers' familiarity with the institution. Quality includes speed and economy in processing, expertise and quality of the decision makers, and similar factors. Outcome combines two dimensions: the likelihood of winning and the ability of the institution to enforce its decisions.
(a) Overall

We looked at all the comparisons that lawyers might have made. Since we studied state courts, federal courts, and alternative institutions, there were nine possible preference combinations. However, for this analysis we focus only on those involving a comparison of courts and alternative institutions. We looked to see if the preference was connected with likelihood of citing one of these general categories of reasons. The results are set forth in Table 2.

Table 2

<table>
<thead>
<tr>
<th>Factors Considered by Lawyers Expressing Specific Preferences</th>
<th>% of Lawyers Mentioning</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alternatives preferred to courts</td>
<td>Convenience Quality Outcome</td>
</tr>
<tr>
<td>Courts preferred to alternatives</td>
<td>0 48 6</td>
</tr>
<tr>
<td>Alternatives preferred to courts</td>
<td>2 21 36</td>
</tr>
</tbody>
</table>

Although these figures are merely suggestive, they do indicate that Quality looms high in the preference for alternatives. Thus 48% of the lawyers who preferred alternatives over courts mentioned the quality factors as reasons for the choice—and few mentioned any other. This seems to confirm the view, held by many, that some alternative processes can often offer faster, cheaper, and more expert dispute resolution services than courts.

On the other hand, those lawyers who chose courts over alternatives were more concerned with outcome factors than with quality variables: 30% of those choosing courts gave outcome as a reason for the choice, compared with only 6% of those who chose alternatives. The lawyers who chose courts were concerned with quality as well, but this factor was mentioned by only 21% of these attorneys.

Note that convenience seems to play almost no role in the courts/alternative choice. While lawyers who made choices between courts mentioned these factors relatively often, it did not figure in the court/alternative evaluation.

(b) What Explains Variation in Lawyer Preferences?

Having observed that lawyers preferring courts are more likely to stress outcome, while those favoring some alternative institution cite quality variables most frequently, we sought to account for those preferences by more detailed analysis. The strategy we chose for this analysis was to see if differences in preference could be explained by such factors as case characteristics (including stakes and complexity), the number of events in the case, party configuration, area of law, attorney characteristics, fee arrangements, and so on.

The method of analysis was as follows. We looked at lawyers who chose: (1) state or federal courts over an alternative institution, or (2) alternative institutions over federal or state courts. We then looked at the reasons they gave for their preference and determined if any of our explanatory variables might
account for differences in the patterns of reasons cited. Most of
this analysis, although laborious, failed to contribute much to our
understanding of lawyer attitudes. Although we did detect some
relationship between preferences and a few variables, most relations
were weak or non-existent. Three variables, however, deserve
specific mention.

(1) **Complexity of Case and Number of Events**

We analyzed the effect of case complexity and the number of
events on lawyers' attitudes toward disputing alternatives. Case
complexity reflected the lawyers' own evaluation of how complex the
case was; the number of events reflected the number of procedural
steps recorded in the record (for a detailed description of the
variables, see Trubek et al., 1983b, 94-99). What we found was that
among the lawyers who said they had a choice and preferred
alternatives, quality factors were more likely to be cited in the
less complex cases with few events. The effects are strongest when
alternatives were compared to state courts. Thus, of the lawyers
who expressed a preference for alternatives over state courts, 62%
of those in simple cases cited quality reasons while only 21% in
complex cases gave quality as a reason for the choice. Similarly,
lawyers expressing a preference for alternatives were more likely to
cite quality for the preference when the case involved few events
(67%) than if it involved many procedural steps (20%). On the other
hand, the more complex the case is, the more likely lawyers choosing
courts over alternatives will give outcome as a reason for
preference. Thus, lawyers choosing state courts over alternatives
cited outcome more frequently in the multi-event cases than in the
procedurally simple ones.

This pattern could support the argument that attorneys pay more
attention to quality when the cases are small and simple, and thus
are more willing to consider alternatives in these situations than
when they are dealing with more complex situations and (presumably)
more important cases. This conclusion is confirmed by the parallel
finding that attorneys preferring state courts over alternatives do
so more frequently in cases involving stakes over $50,000 than in
cases involving lesser amounts. It is also interesting to note that
lawyers who used alternatives were more likely to say that this came
about because they had no choice (i.e., there was a pre-existing
contractual agreement to go to arbitration) when the case was
complex (50%) than when it was simple (19%). One could argue that
in these circumstances the lawyers in the more complex cases might
have preferred a court if this choice had been available.

(2) **Specialization**

There is some evidence that more specialized lawyers are less
likely to mention quality as a reason for preferring alternative
institutions. In giving reasons why they preferred alternatives
over courts, 58% of the least specialized lawyers cited quality
factors, while only 32% of the most specialized ones mentioned these
items. One might expect that part of "specialization" could be
greater familiarity with courts, so that this may be a proxy for
such familiarity.
The lawyers were asked to rate the institutions they had appeared in on the basis of their experience in the particular case. The eleven questions focused on four basic dimensions:

(A) Institutional Performance
   Was the Institution:
   (1) fast
   (2) effective
   (3) well suited to the problem
   (4) responsive
   (5) fair

(B) Decision Maker (Judge, arbitrator, etc.)
   Was he/she:
   (6) knowledgeable
   (7) competent

(C) Hearings + Decisions
   Were the:
   (8) hearings understandable
   (9) decisions consistent with prior cases

(D) Overall Assessment of Experience
   For those who initiated the action, was it:
   (10) useful
   (11) worth the cost

(E) Overall
   To see how lawyer evaluations of courts and alternatives differ, we compared rankings on these questions. The statistic used
for this comparison was the percent of lawyers who assigned the lowest score to the institution on each question. This data is set forth in Table 4.

Table 4
PERCENT OF LAWYERS IN EACH INSTITUTION THAT RANKED INSTITUTION NEGATIVELY

<table>
<thead>
<tr>
<th>Negative Evaluation:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Percent Responding by Institution</td>
</tr>
<tr>
<td>---</td>
</tr>
<tr>
<td><strong>A. Performance</strong></td>
</tr>
<tr>
<td>(1) slow*</td>
</tr>
<tr>
<td>(2) ineffective</td>
</tr>
<tr>
<td>(3) unsuitable</td>
</tr>
<tr>
<td>(4) unresponsive*</td>
</tr>
<tr>
<td>(5) unfair</td>
</tr>
<tr>
<td><strong>B. Decision Maker</strong></td>
</tr>
<tr>
<td>(6) not knowledgeable</td>
</tr>
<tr>
<td>(7) incompetent*</td>
</tr>
<tr>
<td><strong>C. Hearings and Decisions</strong></td>
</tr>
<tr>
<td>(8) hearings not understandable</td>
</tr>
<tr>
<td>(9) decisions not consistent</td>
</tr>
<tr>
<td><strong>D. Overall Assessment</strong></td>
</tr>
<tr>
<td>(10) not useful</td>
</tr>
<tr>
<td>(11) not worth the cost*</td>
</tr>
</tbody>
</table>

* Statistically significant at the .05 level.

a Plaintiffs only.

b N's vary for each item.

The overall pattern suggests that lawyers are somewhat more likely to assess their experience with alternatives favorably than their experience with courts. The negative ranking for alternatives are lower than for any courts on eight of the eleven factors. In only one case are alternatives graded below both federal and state courts (suitability), while in two, alternatives received lower ranks than one type of court (slowness; usefulness).

While the overall pattern shows that alternatives received low "grades" less frequently than courts and alternatives, the differences are often small and for six of the questions not statistically significant. The striking exception is item 11. Note that plaintiffs’ lawyers evaluating courts were much more likely to say it was "not worth the cost" than their counterparts in alternatives.

(b) Specific Factors

In this section we look at some of the most interesting results in more detail.

(1) Performance

Lawyers in courts were more likely to say that these fora are ineffective and unresponsive than did lawyers in our ten alternatives. The differences on the effectiveness rating are not great, however. The "spread" for responsiveness between federal courts and alternatives is a little larger: 50% more lawyers gave low marks on this factor to courts than to alternatives. On the other hand, alternatives scored worse on speed than federal courts, although better than state courts.
(1) decision makers

A smaller percentage of the evaluating lawyers ranked the
decision makers in alternatives "not knowledgeable" (4.2%) than did
those who ranked federal judges (11.4%) and state judges (12.5%) in
this category. But these results are not statistically
significant. The results on the "incompetence" scale are
significant, although the difference is not too great. Thus fewer
lawyers thought the decision makers in alternatives were incompetent
(6.9% v. s. 7.9% for federal judges and 10.0% for state judges).

(11) plaintiffs' overall assessment of the experience

We only asked plaintiffs' lawyers to give us an overall
assessment of the experience. (We felt that it would be harder to
evaluate the overall reaction of defendants' lawyers.) Two
questions were asked: was going to court or an alternative useful,
and was it worth the cost? 372 lawyers answered the first question;
363 responded to the second. There were differences between the
court sample and the alternatives sample on the usefulness question,
but they were not large or statistically significant. The cost
question, however, yielded very substantial differences.

Plaintiffs' lawyers are much more likely to say that going to court
is not worth the cost than are the lawyers of clients who initiated
cases in alternative institutions. Three times as many lawyers
reached this negative conclusion about federal courts than did those
who felt alternatives were "worth less than the cost."

Because of the interesting nature of this finding, we report
the responses to this question in full (Table 5).

<table>
<thead>
<tr>
<th>Experience was:</th>
<th>Federal Courts</th>
<th>State Courts</th>
<th>Alternatives</th>
</tr>
</thead>
<tbody>
<tr>
<td>Worth less than cost</td>
<td>33.1</td>
<td>25.2</td>
<td>11.7</td>
</tr>
<tr>
<td>Just about worth the cost</td>
<td>23.4</td>
<td>33.3</td>
<td>27.3</td>
</tr>
<tr>
<td>Worth more than it cost</td>
<td>43.4</td>
<td>41.4</td>
<td>61.0</td>
</tr>
</tbody>
</table>

\[ \chi^2 = 16.4, df = 4, p < .01 \]

These results are striking, especially given the weak
relationship we have generally observed in this analysis. Sixty-one
percent (61%) of the plaintiffs' lawyers in alternative institutions
thought the experience was worth more than its cost, and less than
12% thought it was worth less than its cost. In contrast, only 43%
of the plaintiffs' lawyers in federal courts thought the experience
worth more than its cost and 33% said it was worth less than the
cost. The state figures are roughly similar to the federal figures.

What do these data suggest? While in general lawyers react
rather similarly to courts and alternatives, those who used
alternatives are much more likely to conclude that their experience
was "cost-effective." Does this mean that these plaintiffs' attorneys
win more in these fora or that alternatives are
significantly cheaper to use than courts? The fact that plaintiffs
did not rank alternatives as more "useful" than courts cuts against
the argument that they are doing better. The other
explanation—that the monetary cost of using alternatives is lower, although plausible, is not completely consistent with other findings from the CIRP data. (Kritzer and Anderson, 1983). One possible explanation is that attorneys in alternatives actually get something from the forum, while for most the court is just a bargaining arena. Thus, while most cases in alternatives actually lead to a third party decision, most cases in court are terminated without any authoritative resolution (Trubek, et al., 1983b). One might speculate that attorneys' reactions reflect the fact they are more likely to get a resolution in the alternatives we studied. But this conclusion is admittedly speculative.

It is clear that the attorneys look somewhat more favorably on the particular alternative institutions from which we selected cases than they do on courts, and that they are especially likely to say their experience in these alternatives was worth the cost. Exactly what accounts for these views is hard to say without more detailed analysis.

(4) CONCLUSION

The results of this analysis suggest a few conclusions that policymakers in general, and those concerned with alternative dispute processing in particular, should pay attention to. We have found that lawyers care more about results, speed, and costs than they do about general process or quality variables. Yet, at the same time we see that lawyers have a favorable view of the process qualities of some institutions that may serve as alternatives to the courts. It seems clear that any effort to increase the use of institutions that offer non-adjudicative processes must take into account the lawyer's pragmatic concerns. Few lawyers will be enthusiastic about using new institutions if they think that this will reduce their chances of receiving a favorable outcome for their clients (and often for themselves where contingent fees are used). Few will welcome processes that delay the dispute or raise overall costs. While the findings of our comparison of institutional evaluations suggest that attorneys who actually work with institutions other than courts emerge with a favorable impression of the speed and cost-effectiveness of these institutions, it is not clear that these views are shared by practicing attorneys as a whole.
References


Appendix

Chapter 3

DESIGNING THE STUDY

With the general theoretical framework presented in chapter 2 as our guide, our next task was to develop the insights thus gained into operational features of a feasible study design. This chapter describes how our decision to focus on disputes as our unit of analysis shaped specific design decisions.

A Typology of Approaches

There are three approaches to collecting data about dispute processing: the case, the institution, and the participant. Although each has its own advantages and weaknesses, our theoretical framework dictated the use of a case approach, somewhat modified as discussed below.

The case approach, obviously enough, selects the "case" as its sampling unit. One or more cases (i.e., disputes) are selected for study and data are then collected about them. The data might include information on the issues in dispute, the attitudes and behavior of the participants, and the response of any dispute processing institutions involved in the case. However, all data collected relate directly or indirectly to understanding what happened in a specific case or case sample. In a certain sense, the case approach is the most fully articulated of the approaches because it is the traditional approach of the anthropologists who pioneered the "generic" study of dispute processing (Kritzer, et al., 1981).

The institutional approach looks at dispute processing institutions as institutions. It selects a set of institutions for intensive examination. In a general sense, the institutional approach is a process approach: It seeks to understand how different institutions shape the process through which disputes pass, as well as the disputes themselves. In using this approach, one seeks to explain the workings and/or effect of the selected institutions by observing them in action, interviewing staff and examining the records. The approach has the advantage of providing an in-depth view of the activities and workings of the institution(s).

The participant approach involves studying actual and potential disputants, including individuals, groups, organizations, and government, plus representatives of disputants (e.g., lawyers) handling the disputes. This approach usually entails surveys of dispute participants (e.g., Best and Andreasen, 1977; Rosenthal, 1974; Gurran, 1977), in which respondents are asked about their disputing resources, the nature of actual dispute processing decisions (Rosenthal, 1974; Sarat, 1974), or the frequency of actual disputing experience. Past studies applying the participant approach are limited in what they can tell us about the disputing process because their focus has either been on one type of dispute or one category of participant.

The RFP Approach: A Mixed Strategy

That each approach has advantages and disadvantages might suggest that the way to obtain a general picture of disputing in the
United States would be to use all three approaches simultaneously. The original RFP from which the final design evolved envisioned such a "mixed" approach. The dispute processing role of the courts was to be examined primarily through a case approach; a sample of cases from a set of ten courts was to be drawn and intensively examined. The bilateral dispute processing and the general experiences of actual and potential disputants was to be examined through a participant approach; surveys of both the general population and organizations were to be undertaken. Finally, a sample of noncourt third-party dispute processors was to be studied through an institutional approach.

In order to make comparisons among dispute processing institutions, participants, and disputes, however, we needed a common unit of observation. Two of the approaches described above had deficiencies in this respect. First, while it is possible to define the concept of an "institution" broadly enough to include noninstitutions and alternatives such as "jumping it" (Festinier, 1974, 1975) or bilateral negotiations (Gulliver, 1973; Ross, 1970), one cannot collect data on those noninstitutions using the institution as the data collection focus. Thus, since we specifically wanted to look at bilateral negotiations, we decided against the institutional approach. Second, with respect to the participant approach, since a large number of disputants are organizational entities, it was unclear what it would mean to study the "disputing experience" of, say, General Motors. Who would one talk to? What would one include within "General Motors"? More importantly, how would one compare the participant studies of individuals with those of organizations?

The "Dispute-Focused" Approach

Settling upon the "dispute" as the common unit of observation allowed us to create a single, "dispute-focused" data set. Information centered on "cases," in the sense of focused conflicts, would be collected regardless of whether those "cases" went to court, went to an alternative third party, or were handled "bilateral." It was also consistent with our theoretical focus.

A "dispute-focused" data set can be viewed two ways. Ideally, it would comprise case studies, in the anthropological tradition. Any existing case file (institutional records produced by the case) would be examined and all disputants and lawyers who represented disputants would be interviewed. Unfortunately, this image of the final data set fails in two respects. First, if we were true to the anthropological model we would need to interview not only the immediate participants but also collateral participants: members of the disputants' families, "witnesses" to the precipitating event(s), observers of the disputing process, and third-party participants in the disputing process (e.g., the judge, arbitrator, or mediator). Second, given even a very high interviewee response rate, say 80%, and a norm of four participants, we would expect to talk with all direct participants in only 4% of the cases; the more realistic assumptions of five participants and a response rate of 70%, would give us a complete picture in only 17% of the cases. 8
The other, and more realistic image of the data set, is that the "case" is both the sampling unit and the response unit: the institutions, participants, and dispute processing can be looked at through the same prism of cases. There is, however, a technical problem in this design. While the case approach produces samples of the various types of dispute participants, those participant samples do not constitute "independent random samples" since the actual sampling unit is the dispute. Each dispute yields a number of participants; but the participants from a particular dispute are not selected independently of one another. The implications of this problem will be discussed in more detail in a later section of this volume.

The Survey Design

The sample of cases included in a case-focused data set is designed to permit institutional comparisons among the various types of participants. In the survey researchers' ideal world, all disputes would be registered with a central "disputes registry"; the registry would include information on the substance of the dispute, the nature of the disputants, and what dispute processing institutions were used. Such a registry would make it a simple process to design and select a sample stratified to accommodate the researchers' specific interests. In the real world, one needs to design a sampling strategy that approximates this ideal as well as possible.

The first step in designing our sampling scheme to do this was to identify the principal dimensions of stratification, and the specific categories within each dimension. The two most obvious lines of stratification, of course, are type of disputant and type of dispute processing institution. A plausible set of categories for disputants consists of individuals, unorganized groups, organizations, and governments. These four types then yield ten possible configurations of opposing parties (e.g., individual versus individual, individual versus organizations, etc.). To simplify this, we collapsed the categories into individuals (all situations in which individuals are acting as private persons) and organizations (all formal organizations including business and professional organizations and governmental bodies). This produced three disputant configurations: individual versus individual, individual versus organization, and organization versus organization (including government). The second dimension, type of institution, can be categorized in various ways. For our purposes, we used as categories courts, noncourt third parties ("alternative" institutions), and no third party (bilateral dispute processing).

Combining these dimensions yields the three-by-three matrix shown in Figure 3. But note that this figure omits a third important dimension: what is at stake in the dispute. Because definition of "stakes" presents some thorny definitional problems not relevant to our research design, we postpone a closer look until later in this volume. For the present discussion, it suffices to use stakes to mean either the dollar amount as indicated in the initial
pleadings (for court processing) or the amount disputants said was involved in alternative third party or bilateral dispute processing.

The principal problem of sample design is to guarantee a sufficient number of observations in each cell to permit both intracell and intercell analyses. A random sample survey of the general population at feasible budget levels, for instance, would be unlikely to produce sufficient numbers of court cases, since only a small fraction of disputes ever reach court. Furthermore, a population survey would not readily uncover disputes between organizations. In theory, we could start with a sample of disputes from institutional records to fill the second and third columns of Figure 3, and then use the participants in those disputes to create a "snowball" sample (Leege and Francis, 1974: 120) of bilateral disputes. The problem with this approach is the converse of the population survey problem. The snowball sample does not permit us to generalize to all bilateral disputes because the sample would pick up only those disputes that have used third parties.

[Figure 3 about here]

To overcome these problems, we devised a mixed sampling procedure. We sampled from the institutional records of both courts and alternative institutions to obtain most of the cases in cells B, C, E, and F of Figure 3, and all of the cases in cells H and I. We conducted a survey of households (using random digit dialing techniques) to screen for disputing experiences in order to obtain cases for cells A and D, plus some additional cases for cells B, C, E, and F. We then selected no more than one dispute per household for inclusion in our sample. We obtained disputes for cell G by using a random digit dialing technique to survey nongovernment organizations, selecting only one dispute from each organization reporting "eligible" disputes.

To summarize: In order to include in our sample dispute cases involving a wide variety of dispute processing institutions and dispute participants, we adopted a multifaceted sampling scheme.
designed to insure that (1) we would have a substantial number of
court cases in the sample, and (2) we would have a substantial
number of disputes that did not go to court, involving both
individuals and organizations. A data set with both these features
makes possible a wide range of analyses that are both theoretically
interesting and relevant for policy.

The next sections consider the practical problems we encountered
in carrying out the survey design.

Choosing the Research Sites

Our contract with the Department of Justice, as we have seen,
called for a survey of litigants and lawyers in middle range cases
in both federal and state courts. The RFP specified a sample of
about 300 cases, half in the federal courts and half in the state
courts, in each of five federal judicial districts. The federal
districts we selected were the Eastern District of Wisconsin
(Milwaukee), the Eastern District of Pennsylvania (Philadelphia),
South Carolina (Columbia), the Central District of California (Los
Angeles), and New Mexico (Albuquerque). We chose as our state
courts, respectively, the Milwaukee County Circuit Court, the
Philadelphia Court of Common Pleas, the Richland County Court of
Common Plea in Columbia, the Los Angeles County Superior Court
(Downtown Branch), and the District Court from the Second Judicial
District (Albuquerque). To provide additional demographic balance
in the two most diverse districts, we also sampled a small number of
cases from two outlying state trial courts: Dodge County,
Wisconsin, and Chester County, Pennsylvania.

Our choice of courts was guided by several considerations. We
sought substantial variation among the districts so that our sample
would be as representative as possible. We considered a probability
sample of federal judicial districts, but decided against it for two
reasons. First, no sample restricted to only five districts could
reflect adequately the diversity of 95 federal districts. Second,
even if it could have, the need for efficient access to court
records dictated by our limited resources counseled concentration on
a small number of locations.

We attempted to guard against the danger of making unwarranted
generalizations from our limited sampling areas by selecting them on
the basis of variations along the following characteristics:
geographic location, demographic composition of the district,
economic characteristics of the district, court structure, caseload,
procedural rules, and (although this is not relevant for the current
study) the availability of noncourt alternative dispute processing
institutions. Since several of these characteristics were obviously
interrelated, priority was given to some characteristics over
others. Our final selection included two metropolitan area
districts, two districts in smaller urban areas, and one
predominantly rural district. No two districts were selected from
the same region. Table 1 suggests the range of variation in the
districts we chose, and compares those districts to the national
average.

[Table 1 about here]
<table>
<thead>
<tr>
<th>Characteristic</th>
<th>Eastern</th>
<th>South</th>
<th>Western</th>
<th>Mexico</th>
<th>Central</th>
<th>National</th>
</tr>
</thead>
<tbody>
<tr>
<td>Average Carload</td>
<td>62.8</td>
<td>35.1</td>
<td>33.4</td>
<td>27.4</td>
<td>43.9</td>
<td>44.7</td>
</tr>
<tr>
<td>Percent of Labor Force in Blue</td>
<td>4.3%</td>
<td>4.9%</td>
<td>3.1%</td>
<td>3.2%</td>
<td>3.4%</td>
<td>3.4%</td>
</tr>
<tr>
<td>Percent of Land Area in Forest</td>
<td>55.6%</td>
<td>52.1%</td>
<td>53.3%</td>
<td>54.0%</td>
<td>52.9%</td>
<td>55.8%</td>
</tr>
<tr>
<td>Number of Farms Over 10 Acres</td>
<td>1,112</td>
<td>1,112</td>
<td>1,104</td>
<td>1,117</td>
<td>1,105</td>
<td>1,115</td>
</tr>
<tr>
<td>Median Years of Education</td>
<td>12.2</td>
<td>12.2</td>
<td>12.1</td>
<td>12.2</td>
<td>12.2</td>
<td>12.2</td>
</tr>
<tr>
<td>Urban Population 1970 (in 1,000s)</td>
<td>4,969</td>
<td>3,917</td>
<td>1,444</td>
<td>865</td>
<td>1,592</td>
<td>1,790</td>
</tr>
<tr>
<td>Percent of Population Hispanic</td>
<td>11.1</td>
<td>11.1</td>
<td>11.2</td>
<td>11.2</td>
<td>11.2</td>
<td>11.2</td>
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<tr>
<td>Percent of Population Asian</td>
<td>2.4</td>
<td>2.3</td>
<td>2.2</td>
<td>2.2</td>
<td>2.2</td>
<td>2.2</td>
</tr>
<tr>
<td>Percent of Population Black</td>
<td>2.2</td>
<td>2.2</td>
<td>2.2</td>
<td>2.2</td>
<td>2.2</td>
<td>2.2</td>
</tr>
<tr>
<td>Percent of Population Non-Hispanic White</td>
<td>82.4%</td>
<td>82.4%</td>
<td>82.4%</td>
<td>82.4%</td>
<td>82.4%</td>
<td>82.4%</td>
</tr>
<tr>
<td>Percent of Population Non-Hispanic Asian</td>
<td>2.3%</td>
<td>2.3%</td>
<td>2.3%</td>
<td>2.3%</td>
<td>2.3%</td>
<td>2.3%</td>
</tr>
<tr>
<td>Percent of Population Non-Hispanic Black</td>
<td>2.2%</td>
<td>2.2%</td>
<td>2.2%</td>
<td>2.2%</td>
<td>2.2%</td>
<td>2.2%</td>
</tr>
</tbody>
</table>

Table 1 Continued
Notes to Table 1

a Unless otherwise noted, these are the averages of the values of our five federal districts.

b Figures reported in this table are from the federal court data set compiled by Herbert M. Kritzer. In preparing that data set Kritzer compared some of his figures to those compiled by other scholars and shared with him, including Carroll Seron. Also see Seron (1978), and Heydebrand (1977).

c From National Survey of Court Organization (LEAA, 1973), and supplements.

d From personal inquiries.


g These are values for the country as a whole.

Which Cases Should be Studied?

With respect to case selection, we devised a set of rules designed to yield a sample that best met our overall study objectives.

First, we decided to focus exclusively on cases terminated in calendar 1978, the last full year before the study began. The reason for this choice was essentially practical: the more recent the year, the greater likelihood that court records would be available and the better the chance that litigants and attorneys whom we would be contacting would have substantial and still relatively good recall of the cases and the original disputes that led to the initial filing of a lawsuit. We expected, and found, that a substantial minority of cases terminated in 1978 had begun as much as six to eight years earlier; and we were mindful of the serious recall and self-reporting problems of the crime victimization studies.9

Second, we sought cases that offered some basis of comparison both between federal and state courts, and between courts and alternative dispute processing institutions. Thus, we sought cases that potentially could have been litigated in either the federal district courts or state trial courts of general jurisdiction. Some states have jurisdictional minima, whereas others have either legal or administrative distinctions between small claims cases and others (Milwaukee, Los Angeles, and Albuquerque all have small claims courts). Some types of small claims can be litigated in the federal courts (e.g., under the federal Tort Claims Act), but such cases
make up a small part of the case load of the federal courts (except, of course, for routine, nonadversarial government collections cases).

Consequently, we excluded from the study all cases involving only a monetary issue in which the amount in dispute was less than $1,000. Including such "small" cases would have undermined our efforts at comparison since, by the sheer weight of numbers, they would have overwhelmed other cases and obscured differences among those normally handled in courts of general jurisdiction. Small cases involve the kinds of disputes least likely to go to court and most likely to be handled in a small claims court if they do go to court. Any dollar cutoff, of course, risks the loss of variation of income in dispute resolution strategies. Our data base, therefore, almost certainly underrepresents some lower income claimants. We believe that the level of stakes in a dispute is associated with the mode of dispute processing which is employed. Modest claims, such as those involving routine consumer purchases (Ladinsky and Sussmilch, 1980), will result in a different array of dispute processing institutions than disputes arising out of accidents or large consumer purchases. Our cutoff strategy, therefore, has lost us something in generalizability. However, we believe that the $1,000 cutoff is sufficiently low to have minimized this problem. In addition, we did not apply the dollar cutoff to cases involving race or gender discrimination, since the importance of such cases often transcends the dollar claims.

Very large cases were eliminated because they would have swamped our research capability given our budget. Our best efforts to define such cases in advance failed, but there turned out to be a natural break, easily recognized in the field between cases with voluminous case files and many thousands of hours of attorney time and the rest. Thirty-seven such cases were excluded by case coding supervisors. The result is a sample of what we call "middle range" disputes, i.e., those which involve initial claims over $1,000, excluding a few "mega cases" in federal and state courts.

Within these size boundaries, we considered two possible strategies to guide our selection of cases—inclusion and exclusion. A strategy of inclusion implied selection of certain types of cases (e.g., torts, contracts, property disputes) and the exclusion of all others. We rejected this strategy as too limiting; in any case, it was not clear to us how a relevant typology of case types could be constructed for sampling purposes. A strategy of exclusion was chosen instead, because it provided a broader representation of civil court dockets and the potential of greater variance for analysis.

We excluded: (a) collections cases in which no response from the defendant was found in the file and which resulted in a judgment (e.g., "no party participation"); (b) probate cases, unless inspection of the file indicated that the dispute was adversarial; (c) bankruptcy cases; (d) cases in which one unit of government was suing another—excluded as "sui generis"; (e) cases of judicial review of administrative decisions where the review was of an appellate nature and did not involve a trial de novo (with the exception of federal court reviews under the Administrative Procedure Act);
(f) prisoner petitions, deportations, and NARA, Title II, cases; and
g) labor law cases if they arose out of grievance procedures
normally covered by collective bargaining agreements (e.g., appeals
from the decisions of arbitrators). In addition, (h) we limited
domestic relations cases to no more than 20 percent of the sample of
cases in any state court. Without this limitation, such cases would
have dominated our state samples and significantly reduced our
ability to compare federal and state courts.

**Sampling Strategies Problems**

Samples of approximately 150 cases were drawn from each of the
five federal and five state court units (counting Milwaukee County
and Dodge County, and Philadelphia Common Pleas and Chester County
as single units). Two basic sampling procedures were employed,
depending on the nature of the information available to us on the
filing systems of the respective courts. For the five federal
courts, and the state courts in Wisconsin, New Mexico and South
Carolina, it was possible to obtain (or to construct ourselves from
the docket books) a list of all cases terminated in calendar 1978.
A random sample of cases from these lists, taking account of our
exclusions, was easily generated.

For the state courts in Pennsylvania and Los Angeles, there were
no lists to sample from, because the case records were organized by
filing date. We therefore sought to construct a sample of cases
that approximated the filing pattern of the universe of cases
terminated in 1978. To achieve this goal, a sample was drawn of
cases filed in each year between 1970 and 1978. Counting the cases
from each year's sample that were terminated in 1978 enabled us to
construct an "aging profile," defined as that proportion of cases
terminated in 1978 filed in each year from 1970 through 1978,
respectively. Using this aging profile we were able to calculate
the probability that a case terminated in 1978 had been filed in
each of the years between 1970 and 1978. Individual cases were
selected by randomly choosing a docket volume (calculating the
probability of selection from the aging profile) and then randomly
generating a "search start point" in the volume. From that point we
looked for the first case terminated in 1978. To expedite the
process, five start points were generated for each volume selected.
These procedures resulted in a cluster sample for each of the two
courts which, we believe, closely approximates the simple random
sample 10 we could have drawn had we had a case list classified by
termination date.

**The Selection of "Alternatives"**

Our contract also called for drawing a sample of disputes from
"alternative" dispute processing institutions. We defined
"alternative" as institutions or facilities that provide dispute
processing services including hearings other than as a required step
in litigation that has been already initiated (and thus a part of
litigation rather than an alternative to it). This definition
covered the American Arbitration Association, Industry-organized
arbitration, marriage counseling services, government administrative
agencies, trade associations, consumer action panels, union review boards, and similar institutions that regularly provide dispute processing services. We excluded ad hoc mediation and arbitration services because they were not, from a reform perspective, feasible alternatives to litigation. We also excluded intermediaries such as officeholders, media action lines, and those government agencies that do not provide the opportunity for disputants to hear each other's arguments directly. This was because, given the limits of our research, it made sense to restrict the exploration of alternatives to those that employ due process approximately equivalent to that found in the courts. Since our research was for realistic alternatives to the courts, alternatives that acted primarily as the advocate for one party, or whose role was limited to informal ex parte negotiation with the parties, without the possibility of a hearing, were less relevant.

**Locating Alternatives**

The research design specified a sample of 34 disputes from each of the three alternatives in each of the five districts. Because of time and budgetary constraints, the extent of our search for alternatives varied among the districts. Our most extensive effort was in the Eastern District of Wisconsin (confined almost exclusively to the Milwaukee area). Substantial efforts to find suitable alternatives were also made in New Mexico and South Carolina. Less time was expended in Los Angeles, where we had the advantage of previous work done by CUPP staff and other researchers at the University of Southern California. In the Eastern District of Pennsylvania the search was concluded after locating only two alternatives, the third being the district branch of the American Arbitration Association.

Locating alternatives meant contacting various types of people in each community. We talked with academicians (in law, business, political science, sociology, and urban planning), court personnel (including judges, court clerks, district attorneys, and city and county attorneys), lawyers (from bar associations, legal services programs, public interest law firms, and lawyers in general practice or with predominantly business or consumer practices), government officials (including state and local elected officials and their staffs, administrative agency personnel, attorneys, and administrative law judges), and representatives of business (including chambers of commerce, business associations, and representatives from major local industries and businesses).

**Alternatives Used**

The specific alternatives included in our study are the American Arbitration Association, the Equal Rights Division of the Wisconsin Department of Industry, Labor, and Human Relations, the Green Bay Zoning Board of Appeals, the Green Bay Planning Commission (Wisconsin); the Philadelphia Commission of Human Relations (Pennsylvania); the Occupational Safety and Health Division of the South Carolina Department of Labor, the County Court Arbitration Program Reform Act (South Carolina); the Construction Industries
Division of the Commerce and Industry Department of New Mexico, the Employment Services Division of the Human Services Department of New Mexico (New Mexico); Better Business Bureau of Los Angeles and Orange Counties, and the Contractors' State License Board of the Department of Consumer Affairs (California).

Collecting and Coding the Case Records Data

The collection of data from court records was carried out by teams composed mainly of law students (with a few lawyers and paralegals) supervised by two members of the project staff. Coding began in Milwaukee in June, 1979, in Los Angeles and Philadelphia in September, 1979, and in Columbia and Albuquerque in January, 1980.

We devised a coding schedule that became known as a General Information Form, a series of "events" schedules on which events in the life of each case—motions, depositions, court rulings and the like—were recorded, and a coding manual. The General Information Form included the names, addresses and telephone numbers of the litigants and lawyers involved in the case plus information about certain characteristics of the case as a whole.

Our coding experience was more difficult, expensive and complex than any member of our staff anticipated. These difficulties were partly due to our decision to "full code" each case rather than simply extract the information we would need to contact the parties and attorneys to administer our survey instruments—a decision made in order to capitalize on the opportunity to acquire this kind of full data set even if not all the data were central to the immediate goals of the study. Problems of training law students (recruited in each city from local law schools) and obtaining adequate work space in often crowded and antiquated courthouses need only be mentioned for the record. The real problem was case record comparability. Our supervisors found significant differences in local practices among the federal courts, and even greater disparities in state procedures and jurisdictional rules. They resolved inconsistencies by coding consistent with the nomenclature of the documents found in a case file and keeping extensive records of coding problems. When the field coding phase ended, discrepancies were resolved where necessary. Establishing when a case began, and when it ended, offers a good example of the inconsistencies we faced and how we dealt with them.

The beginning of a case was coded as the date of the document formally initiating the action in court. Almost always, this was the date of the complaint (or similar document such as a petition for judicial review, petition for a writ of mandamus, etc.).

The termination of a case was generally coded as the date of the document formally disposing of the legal issues raised in the pleadings. This was typically the date of the last court order or judgment on the cause of action, but it could also include a voluntary note of dismissal. Where a case was substantively reopened (either on motion of a party or by order of an appellate court) and the issues were decided, termination was coded as the date of the final determination of the legal issue. There were few such cases.
Several state courts had local rules and procedures for administratively terminating cases: for example, where parties informally notified the court and the clerk or judge could issue a terminating order or document. Time lengths varied among jurisdictions, and at least one had no formal rules or guidelines for the use of such terminating documents. Appropriate coding rules for dealing with ad hoc terminating documents were developed at each research site and standardized after review in Madison.

Similar difficulties were encountered in coding the parties and the area of law designation that best defined what the case was all about. Under what circumstances, for example, would multiple named parties (either plaintiffs or defendants) be treated as a single coding unit, and when would they be counted as individuals? The coding team was alerted to the following indicators of possible common interest among two or more parties: Where they married? Did they have the same counsel? Could they be coded similarly under our "nature of the party" or "role of the party" designations? Were they requesting a common remedy (or were they subject of the same remedy request)?

"Area of law" was a multiple response data item to answer the question, "What are the legal issues of this case?" Coders were instructed to record the legal causes of action of the case, and not the dispute which led to the filing of a lawsuit. A 100-item response list was provided, and up to four codes were possible for each case.

Cases in the Sample

Our sampling procedures turned up a total of 1,649 cases in state and federal courts divided as follows: 361 in Eastern Wisconsin, 316 in Central California, 298 in Eastern Pennsylvania, 305 in South Carolina, and 369 in New Mexico.

As Table 2 shows, in four of the five state courts the plaintiffs were individuals most of the time; organizations were plaintiffs from one-third to one-fifth as often. In New Mexico

[Table 2 about here]

individual and organizational plaintiffs were somewhat more evenly balanced. Financial institutions constituted the largest single subcategory of organizational plaintiffs, ranging (not shown) from nearly 5 percent in Philadelphia to 23 percent in New Mexico. In the federal courts the picture, not unexpectedly, is different. In all courts but Milwaukee between 55 and 65 percent of the plaintiffs were individuals. But the most obvious difference between state and federal courts lies, not surprisingly, in the latter's greater proportion of cases brought by government.

We also examined the configuration of the parties in each case in our sample (shown in Table 3). In four of the state courts, the largest single category consisted of disputes between individuals. This is probably also true for Milwaukee, since insurance claims in Wisconsin do not formally name the individual tortfeasor as a defendant. The picture is quite different, of course, where there are relatively few disputes between individuals, and substantially more between individuals and government.
### Table 2

**Nature of Plaintiffs and Defendants in Federal and State Courts**  
(Percent)

<table>
<thead>
<tr>
<th></th>
<th>Federal Courts (Milw LA Phl So Car N Mex)</th>
<th>State Courts (Milw LA Phl So Car N Mex)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Plaintiffs</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Individuals</td>
<td>37 57 60 63 65</td>
<td>68 73 83 77 53</td>
</tr>
<tr>
<td>Organizations</td>
<td>27 27 28 25 24</td>
<td>25 16 16 20 30</td>
</tr>
<tr>
<td>Governments</td>
<td>26 11 6 10 6</td>
<td>3 9 2 2 12</td>
</tr>
<tr>
<td>Mixed&lt;sup&gt;a&lt;/sup&gt;</td>
<td>5 4 5 1 5</td>
<td>3 3 0 1 5</td>
</tr>
<tr>
<td>Other</td>
<td>5 1 0 1 0</td>
<td>2 0 0 0 0</td>
</tr>
<tr>
<td><strong>Defendants</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Individuals</td>
<td>18 8 18 27 17</td>
<td>39 61 48 54 59</td>
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</tr>
<tr>
<td>Mixed&lt;sup&gt;a&lt;/sup&gt;</td>
<td>25 27 18 11 23</td>
<td>41 18 14 16 11</td>
</tr>
<tr>
<td>Other</td>
<td>10 0 0 0 0</td>
<td>3 0 0 0 1</td>
</tr>
</tbody>
</table>

**Note:** Numbers of cases in parentheses.

<sup>a</sup> A residual category for cases with different types of plaintiffs and defendants—mostly individuals combined with financial institutions.

### Table 3

**Configuration of Parties Selected Groups: State and Federal Courts**  
(Percent)

<table>
<thead>
<tr>
<th>Pltf-Def</th>
<th>Federal Courts (Milw LA Phl So Car N Mex)</th>
<th>State Courts (Milw LA Phl So Car N Mex)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ind-Ind</td>
<td>3 4 12 17 12</td>
<td>25 49 41 50 31</td>
</tr>
<tr>
<td>Ind-Org</td>
<td>9 20 32 26 21</td>
<td>10 10 27 15 14</td>
</tr>
<tr>
<td>Ind-Gov</td>
<td>13 20 6 15 21</td>
<td>2 2 3 5 3</td>
</tr>
<tr>
<td>Ind-Mix</td>
<td>8 13 10 5 11</td>
<td>29 12 12 7 5</td>
</tr>
<tr>
<td>Org-Ind</td>
<td>2 3 3 4 2</td>
<td>10 4 7 3 12</td>
</tr>
<tr>
<td>Org-Org</td>
<td>12 17 19 15 12</td>
<td>4 6 7 7 11</td>
</tr>
<tr>
<td>Org-Mix</td>
<td>8 7 5 5 8</td>
<td>10 6 1 8 5</td>
</tr>
<tr>
<td>Gov-Ind</td>
<td>21 2 1 6 2</td>
<td>3 8 1 1 12</td>
</tr>
</tbody>
</table>

**Total Number of Cases:** (172) (158) (151) (155) (173)  
(189) (158) (147) (146) (196)

**Note:** Percentages do not add to 100 because only the most frequent categories out of the 25 possible combinations of Individuals (Ind), Organizations (Org), Government (Gov), Mixed (Mix), and other Plaintiffs (Pltf) and Defendants (Def) are shown.
Table 4 reports on the subject matter of these cases. Many involved more than a single "area of law" designation, and multiple coding responses were permitted; thus the number of responses is considerably larger than the number of cases. Differences between and among the state and federal courts are note-worthy. Three of the five state courts were heavily dominated by tort cases, of which motor vehicle injury cases were the largest component. This was somewhat less true of Milwaukee and much less true for New Mexico. On the other hand, the state court in Albuquerque had nearly twice as many commercial contract cases as the three larger urban courts, and nearly three times as many as South Carolina. It is clearly more of a "business" court than the others in our sample. In the federal courts, tort cases were a major but less dominant type.

What is most surprising, perhaps, is the range of variation among the five courts. Public law and business regulation cases, which were virtually nonexistent in the state courts, occupied a significant portion of the federal dockets.

There is also some difference between federal and state courts in the mode of case dispositions, but in all courts except the state court in New Mexico the predominant mode of disposition was settlement. Table 5 suggests that the settlement rate was higher in the federal courts. As a formal matter, this is correct. But a large number of domestic relations (mostly divorce cases in Milwaukee, Los Angeles, and New Mexico, which are formally terminated by a judicial decree,....
Table 5

<table>
<thead>
<tr>
<th>Mode</th>
<th>Federal Courts</th>
<th>State Courts</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Milw LA Phil So Car N Mex</td>
<td>Milw LA Phil So Car N Mex</td>
</tr>
<tr>
<td>Dismissals (Settlements)</td>
<td>64 64 79 74 68</td>
<td>58 65 64 72 42</td>
</tr>
<tr>
<td>Motions (Judgments)</td>
<td>26 29 18 19 19</td>
<td>23 19 39b 14 50</td>
</tr>
<tr>
<td>Trials</td>
<td>5 5 3 6 11</td>
<td>6 13 1 13 4</td>
</tr>
<tr>
<td>Other</td>
<td>6 2 0 2 2</td>
<td>13 3 1 1 5</td>
</tr>
</tbody>
</table>

Note: Percentages may not add to 100 because of rounding.

a These are collapsed categories. We consider dismissals to be a rough index of settlements, "motions" of judgments by the courts.

b Includes court-ordered arbitration awards.

are in fact cases which have been settled between parties. Thus, if domestic relations cases were excluded, or if these cases were considered as "settled," the settlement rate for the state courts would rise appreciably. Rates of settlement may reflect a different mix of cases, a more or less activist judicial role in promotion of settlement, and perhaps a different "local legal culture." Tort cases might be expected to have the highest settlement rates after domestic relations cases. Few reported tort case trials turned up on our sample. Public law cases, on the other hand, might be expected to generate more trials.

This is but a brief profile of the civil court cases in our sample. They are not a random sample of the civil dockets of those courts, since our sampling rules excluded certain types of cases by size or category. Our major purpose in collecting these data was to provide a data base for the surveys of lawyers and litigants. Several analyses based on the court records data were undertaken, however, and copies of those papers are incorporated in Volume III of this report.