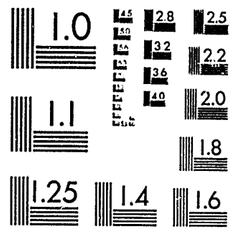

CIVIL LITIGATION RESEARCH PROJECT: FINAL REPORT

VOLUME I

Studying the Civil Litigation Process: The CLRP Experience

By

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March, 1983

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CIVIL LITIGATION RESEARCH PROJECT:

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The CLRP Experience

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VOLUME III - Other Studies of Civil Litigation and Dispute Processing

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VOLUME I

STUDYING THE CIVIL LITIGATION PROCESS: THE C.L.R.P. EXPERIENCE

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PREFACE

The Civil Litigation Research Project was organized in response to a Request for Proposals (RFP) from the Federal Justice Research Program of the United States Department of Justice. The RFP was issued in August, 1978, and the contract was signed and became effective in January, 1979. The original contract was for two years, but was extended through June 11, 1982. Jurdisdiction over the project passed from the Department of Justice to the National Institute of Justice in the fall of 1981.

The Civil Litigation Research Project (CLRP) is based at the University of Wisconsin Law School, but the research team for this report included scholars from other institutions and academic disciplines. At Wisconsin the senior staff included David M. Trubek from the Law School, and Joel B. Grossman and Herbert M. Kritzer from the Political Science Department. William L.F. Felstiner, now at The Rand Corporation, was for most of the contract period affiliated with the Social Science Research Institute of the University of Southern California. Austin Sarat is a political scientist at Amherst College.

In addition to the senior staff, key staff members included Richard Miller, who was project manager and director of the screening survey; Jill Anderson, who was codirector of the study of alternative dispute processing institutions; and Lynne Williams, Kristin Bumiller, Laura Guy, Elizabeth McNichol, Jeffrey Marquardt,

Stephen McDougal, Judith Hansen, George Brown, Dan Krymkowski, Rick Schroeder, Betsy Ginsberg, Rob Sikorski, Mary Pfister, and Jeanette Holz.

Scholars associated with the project in more limited roles and for briefer time periods included Marc Galanter, Neil Komesar and Stewart Macaulay from the University of Wisconsin Law School, Steven Fenrod and Dan Coates from the University of Wisconsin Psychology Department, Frank Gollop (now at Boston College) from the University of Wisconsin Economics Department, Earl Johnson Jr., from the University of Southern California, and Terence Dungworth from Public Sector Research, Inc.

We are also indepted to Daniel Meador and Maurice Rosenberg who were, in turn, Assistant Attorneys General in the Office for Improvements in the Administration of Justice (OIAJ). The project was begun, and continued for most of its tenure, under their stewardship. Within OIAJ, Harry Scarr, Charles Wellford, and Mae Kuykendall served as project monitors. Their advice and counsel on matters both bureaucratic and academic were always helpful to us, and their strong support of our efforts is much appreciated. Cheryl Martorana served in the same capacity when the contract was transferred to the National Institute of Justice. Her tolerant good spirits and sage advice have helped make this final report a reality.

Most of our survey work was carried out by Mathematica Policy Research (MPR) of Princeton, New Jersey. Lois Blanchard, Joey Cerf, Paul Planchon and, at an earlier stage, John Hall, were central to the success of our efforts. Ken Kehrer, an MPR vice president and

director of the survey division, was a strong supporter throughout the CLRP-MPR connection.

Throughout the project, our efforts were divided between theoretical and empirical tasks. The theoretical efforts centered around dispute decision making and drew upon work in a variety of disciplines, including economics, political science, sociology and psychology. Most of this work was done in the early months of the project and much of it was published in the special issue on dispute processing of the Law & Society Review (Vol. 15, Nos. 3-4, 1980-81). Issues addressed by this theoretical work included lawyer effort, household investment decisions, dispute emergence and transformation.

The empirical efforts of the project were directed toward three goals: the development of a large data archive on dispute processing and litigation to be made available for widespread scholarly use; the collection of data bearing especially on the costs of civil litigation; and the analysis of as much of these data as time and funds permitted.

The data base includes information from the court records of 1,659 cases in state and federal courts; information from the institutional records of cases sampled from various alternative dispute processing institutions; a screening survey of households; and surveys of lawyers, litigants, organizations and disputants identified by the screening survey. All survey instruments were developed by CLRP staff. Primary responsibility for fielding the surveys (except for the organizational screening survey) was subcontracted to MPR.

Volume I of this final report describes the collection and archiving of the data base, and the overall theoretical perspectives utilized in its design, collection, and analysis. Volume II contains the core of the analysis undertaken so far. It includes descriptive statistics on the lawyers in our data base and their cases, the construction and empirical analysis of a model explaining the time investment of lawyers (the major costs of litigation), and an assessment of the costs of civil litigation compared with its benefits. Volume III contains the papers that resulted from the early theoretical work of the project (including those published in the Law & Society Review), and a number of subsidiary empirical analyses undertaken during the contract period. Some of these, such as our studies of court delay and the pace of litigation, utilized institutional records data almost exclusively. Others relied primarily on the screening survey. In addition to these three volumes, we have prepared an Appendix of Data Collection Instruments (questionnaires, coding forms) for those who wish to have the original instruments used in creating the data base.

Chapter 1

BACKGROUND AND MOTIVATION FOR THE STUDY

In 1977, Attorney General Griffin Bell created the Office for Improvements in the Administration of Justice (OIAJ), to be responsible for developing programs and projects to bring about improvements in our civil and criminal justice systems.[1] Under the sponsorship of OIAJ, two million dollars was allocated on an annual basis, through the Federal Justice Research Program, for justice system research. The Civil Litigation Research Project (CLRP) was funded as part of that effort. Its mission was to generate basic data on the justice system, and data to inform policy relevant research.

Need for Civil Justice Planning Data

The civil justice system has been subject to criticism from many quarters as inaccessible, costly, and inefficient. As this criticism has mounted, ideas for reform have proliferated. By and large, however, these ideas have not addressed the system as a whole but, rather focused on the immediate or immediately visible problems. Yet a rational reform effort must deal with the system as a whole. It must take account of the needs of citizens as well as the efficient administration of the courts. It must be based on a hard look beyond and behind complaints, as important as they are, at the law explosion and the growth of a litigious society (sse, for example, Rifkind, 1976; Manning, 1977). These requirements can only be met if there is available for analysis a large and systematically

gathered body of data about civil justice. At the time this CLRP study was initiated, data that were available had been gathered for limited, largely administrative, purposes. They were not adequate to shed much light on such salient issues as the causes of delay, the costs of existing and alternative approaches to civil disputes, and the use and non-use of courts for specific problems or by specific groups. This project was designed to collect adequate data to be able to address such questions within the context of a single, theoretically coherent research strategy.

Our primary purpose was to contribute to an enhanced understanding of the role courts play in processing civil disputes. But courts cannot be studied in isolation, because litigation is merely one of many techniques available to process the conflicts arising in society that are governed by law. Our project, therefore, examined litigation in context, by exploring a range of available dispute processing alternatives, determining the conditions under which courts are used (or not used) to process and settle civil conflict, examining the use of other approaches to dispute processing, and explaining current dispute patterns. We collected survey data on a representative sample of civil disputes, including but not limited to cases in federal and state courts. The data collected on this sample--and other supplemental data--provide information that help us understand how and why courts and alternative dispute processing institutions and facilities are used. The surveys also indicate some of the costs to disputants and to institutions of processing various types of dispute.

One of the original motivations for this study was concern about the perceived high and steeply rising costs of civil litigation, both to litigants and to the judicial system (Rosenberg, 1972). Policymakers and others have expressed concern that this cost escalation unduly limits, or inefficiently rations, access to the courts and leaves many citizens without adequate fora for resolution of their problems and protection of their rights. Many reform proposals have been designed to reduce the costs and delays of civil litigation, or to provide alternative dispute processing mechanisms that would provide effective solutions at lower cost.[2] However, it is hard to determine the effect of increasing costs on disputants, and thus the effect of particular reform proposals, because we do not adequately understand existing demand for the dispute resolution services of courts and other institutions. What does it cost to pursue a case in court, or in arbitration? What determines the willingness of individuals and organizations to spend money on lawyers, arbitration, litigation? How are decisions to invest in such services made? Without such information, it is impossible to answer many of the questions that concern policymakers.

The "market" for dispute processing services is complex, and the units in which such services are provided hard to identify. The product is often a mix of private (lawyers) and public (court) services. As in the case of medical services, the suppliers of legal services may have a significant impact on the structure of the demand. The existence of a range of financing mechanisms, including retainers, contingent fees, prepaid legal services plans and legal services organizations further complicates the picture.

Our data base provides information about the accessibility, efficiency and cost of dispute processing services in American society. The design of our project and its data gathering efforts were directed to the production of a data base useful for both theoretical and policy purposes. Our theoretical and measurement efforts reflect our interest in finding a coherent and interpretable way to talk about civil justice issues. Our first analysis efforts (reported in Volume II) concentrate on the impact of alternative fee arrangements on the cost of legal services. Thus, they involve only one part of the data base we have created, and reflect theoretical concerns specific to that analysis. The theoretical framework that guided our entire approach, however, was much broader. Although some of it has, as we shall make clear, been modified in the course of our data gathering and analysis efforts, it is useful to begin our discussion by presenting the guiding theory and framework as a whole.

The Need for Theory: Courts in Context

Court reform is of perennial concern to the legal profession, but it captures only occasionally the attention of a wider public. We live in such a time. The much debated "litigation explosion" and the so-called "crisis in the courts" have renewed debate on the role of courts in our society. Federal and state governments confront a wide variety of proposals for reform. Much of this attention focuses on deficiencies in the administration of civil justice.

There are continuities between today's civil reform agenda and those of the past, but there has been a shift of emphasis. Prior to

the 1970s, civil justice reformers emphasized "internal" improvement--the search for better courts (Rosenberg, 1972). Important reforms such as simplified procedures, use of pretrial conferences, discovery, and better techniques for caseload management, were introduced. In many instances these helped courts deal more effectively with their traditional civil business.

As useful as they were, however, these efforts at internal improvement had limitations. First, the "better courts" approach was based on premises increasingly in doubt: that the judicial business of the present would, and should, continue in the future; that litigation rates and patterns would remain relatively stable; and, thus, that the courts were able to handle most or all of this business quite adequately. Moreover, the "better courts" reforms were ad hoc and piecemeal in character. With a few notable exceptions, civil justice reform was not preceded by careful empirical inquiry, nor subjected to rigorous evaluation. Rarely were the reform efforts linked to an overall strategy for improvement of civil justice administration. Relatively little attention was given to the basic social forces that generated demand for court services, or to the relation between the dispute processing role of courts and the performance--or potential--of other institutions in our society that perform similar functions.

The 1970s brought recognition that civil justice reformers were facing more substantial problems than had been perceived in the past. Scholars began to point to trends with potentially harmful consequences for the civil justice system, such as rising litigation

rates and costs, and increasing public dissatisfaction with the courts. Paradoxically, Americans seemed to be litigating more, paying more for the privilege, and enjoying it less (see Ehrlich, 1976; Tribe, 1978).

While some of this literature seems to have overstated the extent of the "crisis" (Galanter, 1983), it served to identify issues obscured by the "better courts" approach and led scholars to advocate new approaches and more inclusive reform strategies. They urged a more sytematic approach to court reform and encouraged planners to canvas alternative techniques for managing legal disputes. They began to recognize that "better" courts are not enough; it may also be necessary to change the basic business of the courts by reducing the need for judicial involvement in some disputes and by the diversion of some disputes to alternative institutions (see Danzig, 1973; Nader and Singer, 1976). Attention turned to the potential of arbitration and mediation as alternatives to judicial dispute processing. New institutions to handle small complaints on a mass basis were proposed. Experiments with diversion schemes like the Neighborhood Justice Centers were undertaken. More systematic methods for designing and evaluating reforms were developed.

The 1976 Pound Conference, held in Minneapolis, Minnesota, on "The Causes of Popular Dissatisfaction with the Administration of Justice" signalled a new era of civil justice reform. Setting the tone for the Conference, Chief Justice Warren Burger stressed the need to develop "new machinery for resolving disputes" and the need

for systematic planning for civil justice (Burger, 1976). Other speakers followed the Chief Justice's lead. According to Professor Frank Sander (Sander, 1976), "We are increasingly making greater and greater demands on the courts to resolve disputes that used to be handled by other institutions of society." Noting that the courts alone cannot respond to such accelerating demands, Sander concluded that it had become "essential to examine other alternatives."

This new way of thinking about civil justice looks at courts in context, and defines civil justice in functional terms. Substantial emphasis is placed on the role of courts in the management of conflict, and courts are seen as part of a network of institutions and processes through which some of society's individual and collective conflicts are defined and processed. Court work is evaluated in terms of its contribution to the efficient resolution of disputes. Reform proposals are framed with a view to improving dispute processing, whether through the courts or alternative institutions. The "courts in context" perspective thus leads naturally to the search for alternatives to litigation.

The search for such alternatives is potentially very broad. It encompasses experiments that retain most of the elements of the standard judicial approaches to dispute processing as well as efforts to restructure radically the machinery of dispute resolution. It includes minor modification in the way courts conduct their business, as well as experimentation with new institutions and new techniques to resolve disputes. And it includes changes in the social relations that generate conflict.

Contrast, for example, the interest in court-annexed arbitration with proposals for wider use of mediation (see Johnson, et al., 1977). There have been numerous experiments with mandatory arbitration of cases brought to civil courts. These plans vary considerably, but all retain crucial features of the judicial approach to dispute processing. Disputes enter the system only after they have been defined as legal claims and lawyers brought in to represent the parties. Issues of fact and law are defined and argued. Reliance is placed on the adversary process. A neutral arbiter is given the power to make a final resolution of the issues which is often effectively binding on participants. Most mediation experiments, in contrast, downplay the role of lawyers, make no effort to restate the issues in legal terms, and rely on consensual agreement between disputants. Both are "alternatives to litigation," but of a very different order.

Although we can describe the emergence of a "courts in context" approach to civil justice, it is premature to say that this approach has crystallized into a coherent <u>strategy</u> for reform. It may indeed be inappropriate to use the word "strategy" at all (Sarat, 1981). In the first place, civil justice reform is hardly an organized or centralized effort in the United States. In the second place, although the courts in context approach has generated a search for alternatives to litigation, and led to proposals for a variety of experiments, the approach is too new, the search too broad, and the experiments too problematic, to label it as a cohesive full-blown strategy of reform.

Is there reason to believe that we will begin to look at civil justice in a more systematic fashion, and that a more coordinated <u>national</u> approach to civil justice administration will emerge? A case could certainly be made for a more coherent strategy and a national approach, in which the courts in context approach would play an important role. Resources for the administration of civil justice are limited, and it is unlikely that vast new sums will become available in the 1980s. This fact points to the need for more efficient use of available resources, including the scarce resource of judicial time. This would suggest that we must take a hard look at the sorts of things courts can do, and to consider diversion efforts where other institutions are more appropriate. Moreover, there is no reason to think that these problems are best approached exclusively on a state-by-state basis, with no effort at national coordination. In the first place, while we have 50 separate state court systems which handle almost all our civil justice business, these courts increasingly are called on to apply federal law, so that civil justice administration is a federal as well as state concern. In the second place, all the states face common problems, and could benefit from a more centralized source of research, development and information, including the benefits of research on the viability of "alternatives" to litigation. While these arguments for a <u>national</u> effort in civil justice remain strong, little has been done to move toward more systematic and coordinated civil justice planning. There is no governmental institution at the national level that is concerned with civil

justice matters, and the federal government has not shown much interest in creating any. CLRP was conceived by people for whom a national civil justice policy seemed to be an important goal, but the interest in such ideas has waned. What has continued, however, is the research agenda that the initial interest in civil justice planning brought into being, and as the results of this research become better known perhaps interest in these matters will reappear.

Prior Empirical Studies

Although interdisciplinary research on civil justice began over fifty years ago, there has been relatively little of it. What has been done focuses either on the courts or on the "context," but rarely on the links between the judiciary and other dispute processing institutions. Studies have been limited to specific courts or policy problems, employed existing statistical series compiled largely for administrative purposes, or based on relatively small-scale and narrow empirical inquires.

The earliest efforts focused on the operation of the courts and the effectiveness of various procedural reforms. This research--which has produced the most substantial body of work so far--began in the 1920s with the Johns Hopkins study of divorce courts. Research on civil courts initiated by Charles E. Clark and his colleagues at Yale in the 1930s provided important information on the types of cases that were being brought to the courts, the relative frequency of trials versus settlement, and the use of juries (Clark and Corstet, 1938). The Chicago Jury project provided

further insights into the operation of civil courts (Kalven and Zeisel, 1966). Finally, the Columbia Project for Effective Justice conducted a series of studies, focusing on the effectiveness of such procedural reforms as the pretrial conference and compulsory arbitration (Rosenberg, 1964).

Civil justice research concerned as much with "context" as with the courts is more recent. The approach involves investigating the underlying problems and disputes that generate litigation, attempting to understand the forces that lead disputants to choose settlement or arbitration rather than litigation, and mapping the unresolved disputes and unsolved problems that may require attention. Studies of "context" include both research on legal needs and legal problem incidence, and a related area which has been called "disputes processing research."

The former was originally stimulated by the concern that the legal needs of the poor in America were not being met (Carlin, et al., 1966), and produced studies which tried to measure the incidence of certain civil "legal" problems, and to determine whether individuals used or did not use lawyers to deal with these problems. Although this approach focused initially on the poor (Levine and Preston, 1970), however, later work expanded the scope of inquiry to the population at large, culminating in the American Bar Foundation's survey of The Legal Needs of the Public (Curran, 1977). Using a national probability sample of individuals, this project examined "legal problem" incidence and lawyer use. It contributed much to our understanding of problem incidence and

dispute definition, and offered some insight into the reasons why lawyers are or are not used. However, since it was initiated principally to orient the design of new legal services delivery systems, the survey's findings are of limited utility for more general civil justice research or planning. Many focus on one problem or one stratum of the population; most are limited to exploring the propensity to use lawyers. They do not tell us much about the relative use of courts and other institutions to resolve disputes (see Miller and Sarat, 1980-81). And they ignore approaches to dispute processing that are not dependent on the use of an attorney.

Dispute processing research takes the dispute as its principal unit of analysis. Since disputes are the basic events from which civil litigation emerges, study of the dispute focuses on the conditions under which courts are--and are not--called upon by individuals and organizations involved in a conflict. While dispute processing research provides fundamental theoretical insights, and has played a major role in the emergence of the courts in context approach, work in this field has been primarily theoretical, or based on very limited empirical samples, or derived from statistics collected for very different purposes.

The Role of Costs

Concerns for the costs of civil litigation are traditional and recurring. In this section we set forth some general aspects of the "cost" issue: in Volume II we report some more specific and

detailed analyses conducted using the data we have collected. To a degree, the conclusions in Volume II qualify the general discussion that follows.

If one were to go back to Roscoe Pound's famous speech on the Causes of Popular Dissatisfaction with the Administration of Justice, one would find an argument about the way in which the costs of litigation inhibit access to justice. Pound argued, at the turn of the century, that the high costs of going to court had the undesired effect of turning the courts into service organizations for the rich.

A recent national survey of the American public found that 39% of those interviewed believe the expense of taking a civil case to court represents a major national problem. It found also that comparable numbers of judges and lawyers believe that the costs of civil litigation are unacceptably high (Yankelovich, Skelly and White, 1978). The Court of Appeals for the Second Circuit, as well as the American Bar Association, have each sponsored a special commission to study the costs of civil litigation. Other similar efforts have been carried out at the state level as well as by other courts and civic groups.

Despite the consensus on the nature of the cost problem, the available body of systematic knowledge on the costs of civil litigation is meager. Few empirical studies have been designed to determine the nature of the costs of civil litigation, to compare the costs of litigation with other techniques for resolving disputes, or to assess whether the costs of civil litigation are

indeed a barrier to access to civil justice. Most of the popular and jurisprudential discussion of costs focuses on the distributional effect of various cost allocation devices; but here again there is little in the way of empirical research (see Rosenberg, 1980-81).

To talk about the costs of civil litigation, one must first confront a rather substantial conceptual barrier. What does it mean to talk about costs? In all the literature on civil litigation there has been only one systematic attempt to identify the components of costs. In a recent paper, Earl Johnson, Jr. identifies three categories of costs--economic, social-psychological, and political--and four types of cost absorbers--disputants (litigants), lawyers, the courts themselves and an unspecified, and perhaps unspecifiable, group of secondary cost absorbers including society at large. Johnson's classification scheme yields a 15-cell table with one cell corresponding to each type of cost and each cost absorber.

Insofar as litigants are concerned, the major economic cost is the expense of retaining an attorney. This, indeed, is the most clearly recognized and most frequently commented upon aspect of the civil litigation process. Other economic costs included court fees, such as those required by most courts in order to file pleadings, obtain service of process, and the like. These also include opportunity costs, such as the income lost because of the time litigants must devote to the preparation and trial of a case.

Johnson identifies an additional cost which he calls "resentment." Resentment is any reduction in the litigant's income attributable to an antagonism generated by the lawsuit. This kind of cost is likely to become a significant factor in situations where the litigants are involved in a continuing contractual or business relationship. Thus, a franchise dealer may win a $100,000 lawsuit against General Motors yet later incur losses in the millions because of termination of this franchise or, more likely, because of less favored treatment from General Motors in prices or delivery schedules.

Johnson argues that, in addition to economic costs, the civil litigation process exacts a variety of social-psychological costs from litigants. Among these costs, he argues, are the anxieties of the process, anxieties that may be generated by having to testify in public, antagonisms generated from the other litigant or litigants, and diminution of social esteem which may occur if the litigant is perceived as a trouble maker. Litigants may also suffer political costs, for example, decreased influence due to economic losses sustained as a result of civil litigation. On the whole, Johnson's category of political costs seems rather remotely related to the civil litigation process.

As one moves from the litigants to the lawyers, Johnson argues that lawyers representing clients in civil cases engender a variety of variable and fixed economic costs. Variable costs include secretarial and investigative resources; fixed costs include rent, utilities, etc. Other economic costs to attorneys may arise from

the hostility they engender for representing a particular client or a particular cause. Such hostility may reduce future income because of the loss of present or potential clients.

Among the social-psychological costs of civil litigation for attorneys, Johnson includes reduced professional self-respect deriving from the nature of the subject matter or technical simplicity of the advocacy action. Where the case is boring, routine, simple or not challenging--in other words, where it represents an underutilization of the lawyer's knowledge and skill--he or she presumably will suffer psychological costs and perhaps social costs as well. This is especially likely if a substantial portion of time has to be devoted to such matters. Involvement in an unpopular case may also risk the cost of reduced social status.

Johnson argues that the costs of civil litigation should also be viewed from the perspective of the courts themselves. Courts may incur the same kind of costs as incurred by their users. The economic costs to courts are, in reality, costs to taxpayers. However, individuals within these institutions quite properly tend to behave as if the resources expended were their own. Among the significant economic costs of civil litigation from the perspective of courts one might include the judges' compensation and the compensation of auxiliary personnel. These costs are best understood as a proportionate share of the time which either the judge or other court personnel invest in a civil case. Yet, even this kind of an accounting may not be fully satisfactory. Assuming

a court has unused capacity available, a specific lawsuit may not increase the taxpayer's investment in the judge's salary or in the costs of maintaining the courts. Having already "purchased" 30 hours a week of a judge's time, more cases can be assigned to that judge without adding to the taxpayers' costs or the costs of court until those 30 hours are fully occupied. In the same way, a proportionate share of other variable costs (such as telephones, supplies, and the like) can also be assigned as the costs of civil litigation. There is, in addition, a variety of opportunity costs incurred by those (most significantly jurors) participating in the adjudication process. Taken away from their regular occupations and ordinary pursuits, these private citizens frequently are deprived of income they would be earning if not on jury service.

A recent study by James Parkison and Stephen Buckles (1978) attempts to determine empirically the economic costs of civil litigation in one court system. As the first step in their analysis they calculated the total cost of court services within each circuit in the state of Missouri. The results of a study of how judges and nonjudicial personnel spend their time were then used to allocate the cost of specific court resources to the various functions of each court. The next step was to use the estimates of time spent on particular types of cases as the basis of assigning costs to those cases. The final step was to develop estimates of the average cost of disposing of particular types of cases in particular types of courts. According to their results, cost differences among cases of different types arise when different methods and different amounts

of resources are used to dispose of cases and even within particular categories of cases, they found cases settled before trial to cost less than cases settled after a trial.

In addition to cost differentials by case type, there were also important cost differentials among courts. Among the factors which Parkinson and Buckles speculate may be important in explaining costs per court are the number of judges assigned to the court, the geographical jurisdiction of the court, the particular combinations of judicial and nonjudicial personnel employed, how rules of procedure are applied, and whether a court employs its resources efficiently.

Johnson also identifies a set of secondary cost absorbers. In any particular lawsuit, for example, there may be unnamed parties or interests injured by changes in the interpretation or enforcement of a rule. Johnson argues that taxpayers frequently must bear the costs of civil cases that result in increased tax-paid benefits to particular litigants (e.g., legal services for the poor, or more humane conditions for prisoners). Taxpayers also bear a substantial portion of the legal costs of business litigation, since these costs are deductible business expenses. Most of the economic costs to courts are in fact costs to the taxpayer rather than costs to individual officials occupying judicial positions. Salaries for judges and judicial personnel, for example, are paid primarily out of general tax revenues. Thus, in the long run the taxpayer is the real cost bearer of whatever economic burdens a given civil case imposes on the courts.

The impact of costs on civil litigation or dispute processing can be understood in at least two ways: (a) in terms of their effect on the overall level of civil litigation entering a court system; and (b) in terms of their distributional consequences, that is, the way in which the costs of various dispute processing strategies affect the capacity of particular segments of the population to use the civil courts.

With respect to the overall incidence of litigation, the economics of supply and demand suggest that incidence will vary inversely with costs. Althouth there is, as in other areas of research on the cost of civil litigation, little empirical work on which to draw, it is reasonable to assume that this relationship is not a simple one, but affected by many factors: the costs of other means of setting disputes, the supply of court services in relation to the demand at prevailing costs, and the extent to which the prevailing costs exceed or fall short of the worth of the kinds of disputes generally translated into civil litigation.

William Landes (1971) suggests that litigation costs not only influence the incidence of civil cases that enter the system, but also the way in which they are processed. His argument is simple: the more costly civil proceedings, the more likely lawsuits are to be terminated through some kind of party initiated settlement. As the costs of civil proceedings increase, the value of damages that might be obtained through a trial falls, lowering both the amount a defendant is likely to offer and the amount the plaintiff is likely to accept. Complex discovery rules and extended discovery

procedures are critical factors contributing to the cost of civil proceedings. Landes's argument suggests that the effect of cost on litigation is more than an entry level phenomenon.

With respect to the effect of costs on the distribution of litigation and litigants, there is a substantial body of literature about the biasing impact of costs on access to justice (Cappelletti and Garth, 1978-79). It is generally argued that the high costs of civil litigation discourage the poor and perhaps middle income groups from using the courts. Furthermore, as the costs of litigation increase one would expect that the average size of claims which enter a court system would also increase. To the extent that there is some overlap or relationship between the size of civil cases and their complexity, then as costs increase the complexity of the cases which courts must deal with also should increase. As Lawrence Friedman (1967: 786) argues, "the cost of using the judicial process . . . is so high that it acts as a significant barrier against litigation that does not measure its outcome in the thousands of dollars." But, since the cost of litigation is more than monetary, and the nonmonetary costs vary across users, the rationing effect of cost may cross economic lines.

One of the major trends in litigation in this century, for example, is the decline in commercial litigation. Although major commercial and industrial interests can usually afford to litigate, they seem to avoid it as much as they can. As noted, litigation is expensive in more than the dollars spent on lawyers, witness fees or court costs. It is expensive in business goodwill and in its

disruptive effect on ongoing business relationships. These undesirable byproducts contribute to the decline in commercial litigation even for those who are not deterred by simple dollar costs. Thus, although the tremendous expansion of business activity in this century could have led to an appetite for litigation far beyond the capacities of courts, the rising price of going to court has prevented this from happening.

Another way of understanding the rationing effect of cost is proposed by Marc Galanter. Galanter (1974) argues that the costs of civil litigation act to discourage <u>individuals</u> of all social classes from using courts. The level of resources and expertise needed to use the courts acts, Galanter contends, to promote litigation as a form of organizational behavior. Organizations, by employing counsel on a retainer basis and by using courts on a high-volume basis, seek to minimize the costs of any individual transaction. The high costs of litigation thus shape the configuration of parties in civil lawsuits. One can refine the propositions derived from Friedman's argument about the decline of commercial litigation to fit Galanter's argument. The real impact of costs may be to direct the attention of commercial institutions toward the use of courts to collect consumer debts, while at the same time directing them towards a greater interest in alternative mechanisms to regulate their relationships with other commercial entities (Wanner, 1974, 1975).

The biasing effect of costs in civil litigation has frequently been cited as one of the major reasons for providing alternatives to

the traditional means of financing legal services. Such alternatives mitigate the cost factor. Jerome Carlin, for example, has argued that legal services for the poor result in a higher level of litigation initiated by the poor (Carlin and Howard, 1965). The same interest in cost reduction as an avenue toward increased access may be assumed to underlie the recent growth of interest in prepaid legal services. Such services, it is said, will reduce the costs of lawyers and therefore allow individuals not otherwise able to gain access to justice to do so. There is, however, no evidence about the actual affects of plans which subsidize the cost of legal services.

Because legal rules do not change automatically--they must be challenged in the courts--subsidizing legal services is often linked with efforts to bring about legal and, therefore, social change (by reducing the costs of such change). The other side of that coin is also important. The price device has a conservatizing effect on legal change. Many judge-made or statutory rules are never brought before courts for interpretations or review. It may be the cost of litigation that helps shield such rules from challenge. Litigation costs may also have a stabilizing effect on social relationships. To the extent that lowering cost produces more litigation, more widely distributed throughout the population, then lowering legal costs may only further erode systems of private, informal social control (Cavanagh and Sarat, 1980). The costs of using courts in the American legal system contribute to the development of what Lawrence Friedman has called "networks of reciprocal immunities"

(Friedman, 1967). As an example Friedman cites the relationship between landlords and tenants, often spelled out formally in a lease. Minor infractions of duty on either side may amount to breaches of the lease, but both parties are protected by the costs--in money and disruption--of claiming their rights; thus, the tenant can play his radio late at night or perhaps even stop paying rent a month before his lease expires without risking a lawsuit, and the landlord may delay small repairs without losing a tenant or suffering a lawsuit. This network of reciprocal immunities, which Friedman argues is beneficial to both parties, might be threatened if the costs of access to the legal system ceased to be a major factor.

To summarize: there is widespread agreement that litigation costs (1) have an important impact on the overall level of litigation and on the processing of civil cases; (2) act as a barrier to particular kinds of litigation or particular classes of potential litigants; (3) are, therefore, an essential access to justice issue, and (4) could be reduced in such a way as to provide broader more equitable access without substantially overburdening the court system. At the same time there is also in the literature on civil litigation some suggestion that the cost device is useful in filtering out frivolous litigation. Reference to the English practice of assessing costs to the losing party is appropriate. Cost is clearly a major component of the civil justice process, and cost allocation devices are important mechanisms for controlling that process.

It does not make sense, however, to address the costs of civil litigation without comparing them with the costs of other, comparable, dispute resolution processes. It is necessary to analyze the business of courts and their procedures in relation to the full range of legal problems that occur in society and to the contribution of nonjudicial institutions to the resolution of such problems. There is little in the way of empirical research that illuminates these concerns.[3] Yet the joining of a concern for costs with a concern for courts and their alternatives seems to us at the center of theoretical and policy interest in civil justice. We have tried to think about the civil justice system in a way that brings those concerns together and makes possible systematic empirical research to shed policy light upon them.

Chapter 2

THEORETICAL FRAMEWORK

The primary purpose of this CLRP study was to assemble a data base on the costs of litigation and alternatives to litigation that could be used by scholars and policymakers to better understand the civil justice system. This goal had an important influence on the research design decisions made in the first phase of the project.

Our initial design had three major elements. First, we chose as our dependent variables (that is, the variables to be explained) decisions made by the actors in the process--principally the disputants (whether individuals, organizations, or governmental entities in disputes) and their attorneys. Second, we employed a behavioral approach to generate hypotheses about the reasons different disputants make different types of dispute decisions, using independent variables that included legal, institutional, economic, social, and psychological factors. Third, we gathered data on several thousand disputes from varied sources. Our dispute sample is drawn from court cases, from disputes taken to alternative institutions and facilities such as private arbitration and administrative agencies, and from "bilateral disputes"--those where no court, arbitrator, or other third party was involved.

Because of our concern for the system as a whole, our starting point of analysis must be the baseline social events that lead to disputes, however settled. This led us to include all disputes in our sample, regardless of whether they were brought to a third party

or not, whether they were taken to a court, or whether they were settled early in the process or went through all available stages up to, and including, trial in the highest available civil court. Because we focused on the decisions of actors in disputes, we were able to ask the same questions across the whole sample of disputants. Because we drew our sample from different institutions, and included in it disputes of varying types and disputes which have been through varying settings, we were able to correlate forum choice, stages, and resource investment decisions with party characteristics, dispute types, lawyer roles, and other variables we think explain dispute decisions. And because our questions were generated through a comprehensive behavioral model, we made it possible to explain the various responses and choices we observed.

Defining a Dispute

Disputes are the events that ultimately generate litigation. But only a small percentage of all disputes actually reach the courts. In many cases, the rejection of a claim is the end of the transaction; the disappointed claimant decides to "lump it," and absorbs the alleged loss. In other instances the parties reach a settlement through bilateral negotiations. A third set of disputes is resolved by the intervention of nonjudicial third parties. Arbitration is a well-known example. Finally, some disputes actually lead to litigation, i.e., to the filing of a lawsuit. Even within this group, there is great variation in the extent to which courts are actually involved in the processing of those disputes

brought to them. In many cases, little occurs in court, at least after the filing of the complaint. Only a very small percentage of all cases filed actually reach the stage of a full civil trial.

These facts are what lie behind the pyramid metaphor of civil justice. The question is--How can we observe these variations in behavior and begin to explain them? The first thing needed is to find a common unit for study. For us, this is the "civil legal dispute." A dispute is a social relationship created by three conditions: an individual has a grievance, makes a claim, and the claim is rejected. A grievance is a belief in entitlement or right to a resource that someone else could grant or deny. A claim is a demand or request for the resource in question made to a person or organization with the ability to accept or deny the claim. Since our interest is in civil legal disputes, we restrict our inquiry to claims involving resources that civil courts can grant or deny (or that one party believes or alleges a civil court could grant or deny).

The first reaction to a claim can be acceptance, rejection, or a compromise offer. Immediate acceptance followed by collection means no dispute. However, trouble in collecting an ostensibly accepted claim creates a dispute. Rejection of a claim establishes a dispute relationship unambiguously by defining conflicting claims to the same resource. A compromise offer is a partial rejection of the claim, initiating negotiation and so a dispute.

Theories of Dispute Processing

Although the range of disputing is as broad as the range of social behavior and social interaction, our definition of disputes helps to bound and limit the subject. It excludes, for example, disputes between nations or conflicts which are sufficiently diffuse so that no identifiable opposing party can be said to exist. We recognize that these are artificial exclusions, but they are necessary in a research project whose originating focus is the civil court system of a single nation. Moreover, we recognize that our definition portrays a type of concreteness in the activities of disputing that fails to capture important elements in the generation of social conflict. For example, people may experience an injurious event and externalize blame for that event without knowing, at least in the first instance, who (or what) was responsible. Without a relatively specific source there can be no object registering a claim and therefore no dispute in our sense. However, if the injured person voices the grievance, he or she might find that someone could come forward with information which clarified the specific source of the injury. Because such a generalized voicing of grievances cannot be framed as a demand for remedy, we relegate it to the predispute phase of the disputing process.

Once a claim is made and resisted, that is, once a dispute exists, the work of processing that dispute begins. Our language is the language of processing, not resolution, in order to suggest that disputing is generally quite open-ended, that disputes do not always "end" when an authoritative judgment is reached and a division of

resources has occurred. "People never fully relegate disputes to the past, never completely let bygones be bygones . . . there is always a residuum of attitudes, learned techniques, and sensitivities that will, consciously or unconsciously, color later conflict. . . . The end of one dispute may create a new grievance, as surely as a decision labels one party a loser or a liar. Even where such labeling is avoided, it is rare that any process explores and resolves all aspects of all disputant grievances, and new claims may emerge from the recesses of untouched dissatisfactions" (Felstiner, Abel, and Sarat, 1980-81). The language of processing suggests that any dispute may move through several stages or institutions before it reaches even a temporary equilibrium. The language of processing moves the study of disputing somewhat away from the standard legal case method, which limits the study of conflict to the presentation of the dispute in legal form, on the one hand, and the rendering of an authoritative, usually judicial, decision on the other.[4]

The study of dispute processing--although it departs from or, perhaps more accurately, expands--the case method has its origins within the same intellectual tradition. The study of dispute processing extends the sphere of relevant inquiry outside the legal process. Just as scholarly interest in the legal process has moved from an exclusive preoccupation with appellate courts to include trial courts and administrative agencies, the study of dispute processing gets outside the legal process altogether. It makes the use of law itself a variable suitable for study. It allows us to

recognize that law plays but a small part in the ordering of social relations or the repairing of social trouble.[5] Nevertheless, its focus remains the case or controversy. As Eric Steele argues, "Social control and the resolution or avoidance of conflict include a large part of political and social life. But scholarship in this tradition has in fact been limited to what happens to grievances, disputes or trouble cases. It has been primarily concerned with focused, visible conflict. . . . This distinctive delineation of the dispute as a unit of analysis is parallel to . . . the fundamental Anglo-American model of what sort of conflict is appropriate for adjudication--concrete cases and controversies between present parties in interest" (Steele, 1977; see also Engel, 1980; Trubek, 1980-81b: 728-733). What this means is that most dispute processing research takes the law and the legal process as the implicit, if not overt, focus of comparison.

There are three general approaches to the study of disputing and dispute processing.[6] The first, and perhaps the earliest, approach took as its major concerns the institutions, mechanisms, or means through which disputes are handled in any society. Work within this tradition is largely descriptive and often designed to present and refine a typology of dispute processing techniques. The second approach takes the existence of a plurality of dispute processing techniques as given, and seeks to answer the question of why particular disputes are handled through one or another of those techniques. It focuses on the disputant as the unit of analysis and on the task of explaining how dispute processing strategies develop

and how and why choices of strategy are made. The third, and most recently developed, approach takes neither the dispute processing mechanism nor the disputant as its primary concern. It is concerned with the dispute itself, with its development and with the way that development is shaped by the disputants and the techniques used to process the dispute. None of these three approaches approximates the status of a full-fledged theory of disputing or dispute processing. Indeed, "there is no general agreement on what . . . [dispute processing research] really means. Nor do scholars agree on whether it is really desirable to try to study courts as dispute processors, compare lawsuits with other disputes, or isolate the dispute from other social relation- ships. . . . [T]he dispute-focused approach is little more than a general set of orientations. Even among those who share this approach there is disagreement on how to apply it to specific issues and tasks" (see Trubek, 1980-81a: 490).

Perhaps the most influential early treatment of the subject was provided by Richard Abel (1973); but see also Felstiner (1975); Eckhoff (1966); and Aubert (1963). It was Abel who moved the language from dispute resolution to dispute processing and it was he who provided analytic focus for the first approach to the study of disputing, what we call the cross-institutional approach. The central concern is to describe and compare different ways of handling disputes. Research employing this approach sometimes focuses on a particular institution or set of institutions and sometimes on a particular technique for processing disputes, such as

mediation or arbitration (see, e.g., Nader, 1969; Galanter, 1974; Sarat and Grossman, 1975; Engel and Steele, 1979). Most often the intention is to describe the institution or technique (and compare among them) by reference to abstract characteristics of dispute processing or by reference to some prototype of courts. Among the characteristics used to describe or compare institutions or techniques are "public/private, therapeutic, value dissensus/ conflict of interest, zero-sum/compromise, decision-oriented/ agreement-oriented, rule-oriented/person-oriented" (see Steele 1977: 670). Studies of dispute processing that employ the institutional approach have often emphasized the limits or dysfunctions of formal legal processes for disputes of various types. They suggest, by implication if not directly, the superiority of informal, mediative methods of dispute processing (e.g., Sander, 1976). Research in this tradition has, most recently, been associated with the development of the neighborhood or community justice movement in the United States.[7]

The second approach to the study of dispute processing takes the problem of choice among dispute processing institutions or techniques as its main concern. It seeks to identify the factors that influence the course of dispute processing most often, although not exclusively, by reference to the characteristics of the people involved in disputes (Macaulay, 1963; Sarat, 1976; Mayhew and Reiss, 1969; Ladinsky and Susmilch, 1980). In addition, some effort has been invested in determining the frequency with which different kinds of disputes occur (see Curran, 1977). This research

establishes the baseline for charting what FitzGerald and Dickens (1980-81: 691) call "dispute trajectories."

Research on choice among dispute processing strategies often takes as its problem the quantity of formal litigation. Given that many alternatives may be available for disputing, this approach asks how many disputes end up in court and why they do so. As Robert Kidder puts it, "Seen in this light, litigation becomes the very narrow end of a filtering funnel. Only a select few of society's disputes find their way through the thickets of diversion and into the courts. Most disputes exit from the flow at some earlier stage. So the question of access--can people get 'justice' from the law if they need it--becomes defined as a problem of measuring and how richly the society is endowed with effective alternatives to law . . . " (Kidder, 1980-81: 718).

The third approach to dispute processing is, in effect, just taking shape. The theoretical and conceptual work of CLRP is, in part, responsible for its development. As noted, this approach seeks to move beyond both the institutional and the disputant center-choice approach to make the dispute itself the object of inquiry; it asks why and how disputes emerge. It focuses on the development of disputes even as they are being processed (see Felstiner, Abel and Sarat, 1980-81; Mather and Yngvesson, 1980-81; Boyum, 1980). Taking seriously that disputes are seldom fully settled, it suggests that those who are interested in dispute processing institutions and techniques should examine differences in the way disputes develop, and that those interested in disputant

choice should broaden their inquires to include both the predispute phase and the way in which the language of and audiences for disputes shape those choices.

A Model of Dispute Processing

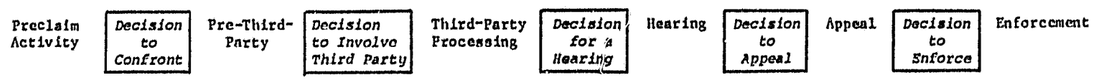
At the core of each of the three approaches to dispute processing is a focus on the dispute decision. Throughout the life of a dispute, the participants must make a series of decisions which will affect how the dispute will ultimately be processed and, thus, whether it will result in litigation and ultimately in trial. A preliminary understanding of these decisions is the key to explaining what is occurring in the civil justice system. Disputes potentially involve six stages:

1) preclaim activity;
2) pre-third-party activity;
3) third-party processing;
4) hearing;
5) appeal; and
6) enforcement.

Between each of these stages there are key transition decisions. The model is illustrated in Figure 1.

Figure 1

A Model of Dispute Processing: Stages and Transitions



In each stage, the participants must allocate resources to various activities. These activities include making and responding to claims, seeking information and assistance, negotiating and settling, and participating in third party processes.

Disputants make decisions to move to one or more stages. We set out to determine what stages each dispute went through, the criteria used to make key transition decisions, and the reasons for choice of alternative third party processing options where they exist (e.g., arbitration vs. litigation, state vs. federal courts). A major concern was to assess the information available to disputants about the relative costs and benefits of available options, and in general to assess the role of costs, both pecuniary and nonpecuniary, in all dispute decisions.

Our original goal, based on the image of costs found in most of the literature, was to use cost as a primary predictor of dispute behavior. We quickly realized that in fact dispute and cost were synonymous: dispute behavior is the expenditure of time and money (i.e., the incurring of costs). The best way to understand this "incurring of costs" is as a form of investment under conditions of uncertainty. The uncertainty in this case has to do with both what the return on an investment will be and what the amount of the investment will be, since the investment process is affected by what happens in the processing of the dispute. (This uncertainty about the amount of the investment is not unique to disputing; in most construction projects, for example, there is often substantial uncertainty about what the final cost will be.) In theory, one

could treat anticipated cost as a predictor of an investment decision. However, it would be extremely difficult to look at anticipated cost and its influence in a retrospective study of the type that we were involved in. (This problem is addressed further below.)

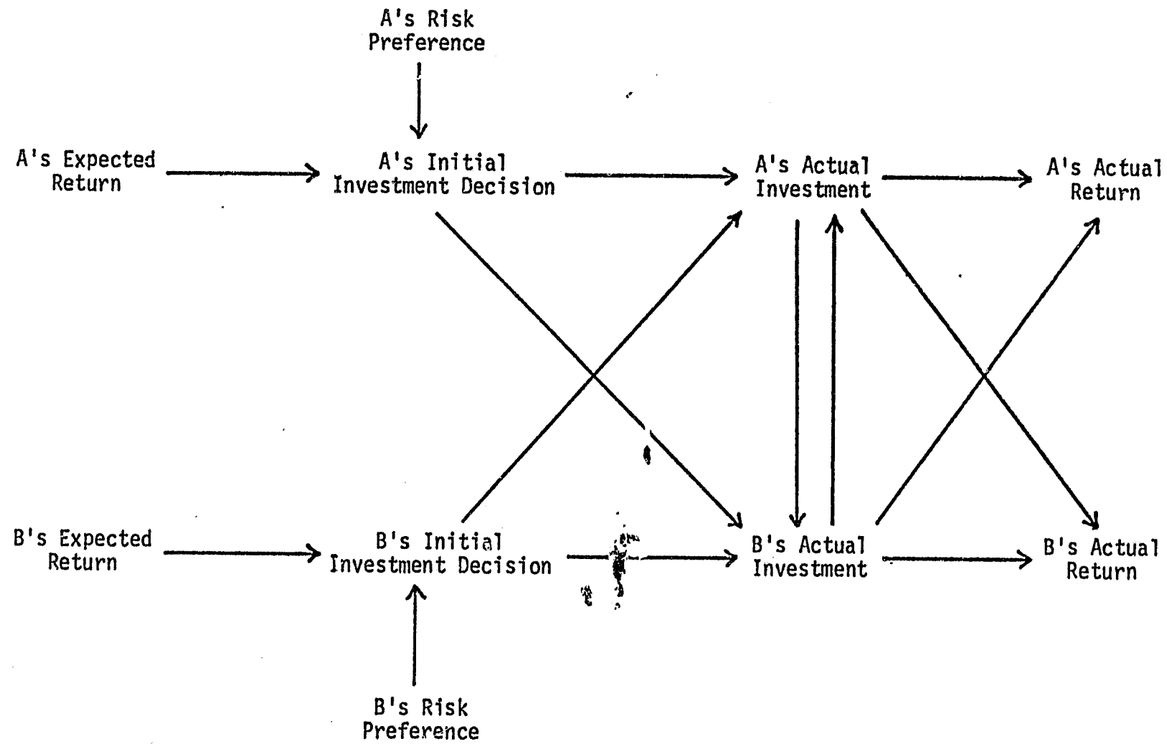
Thus, we came to view investment as our primary dependent variable; we sought to explain why disputants and their representatives (i.e., lawyers) invested (spent) what they did on dispute processing. At its simplest level, we envisioned the decision process in terms of a model like that shown in Figure 2. In this model dispute decisions represent decisions about future returns under conditions of uncertainty. An important complication arises from the fact that, assuming a dispute involving only two parties, each party's actual investment reflects not only its own investment decisions but also the other side's investment decisions. This arises for two reasons. First, some investment will occur as a direct response to the other side's investment; for example, part of the investment in discovery will be in terms of responses to the other side's interrogatories and depositions (e.g., cross-examining the other side's witnesses). Second, even if one side decides to invest a large amount in one phase of dispute processing, the actual investment may not be made if the other side moves to settle. These sets of relationships are shown in the Figure 2.

[Figure 2 about here]

The major problem presented by this model, however, is one of measurement. The only variable in the model that we had any

Figure 2

The Investment Decision Model



relatively concrete way of measuring was actual investment. The Justice Department's original Request for Proposals, out of which this CLRP study grew, viewed cost as an independent (i.e., explanatory) variable. However, according to the model in Figure 2, the dependent variable (i.e., the one to be explained) is the willingness to incur cost; actual cost is an explanatory variable only in relation to actual return. If it were not for the interaction between the two parties, actual investment might be a fairly reliable indicator of the investment decision; but as Figure 2 shows, this is not the case. In order to begin to test the model as shown, we would have needed measures of expected return, risk preference, investment decisions, and actual return. Most of these could not be obtained.

We therefore decided to take the following tack. Dispute decisions, decisions to invest, depend on the expected value to the disputant of the decision. We focused on this variable, which is the net perceived benefit to the disputant of the choice, and depends on the disputant's perception of:

--the outcomes that might result from the decision

--the probabilities of these outcomes

--the costs of the decision.

We assume that disputants will select the option which has the highest expected value to them.

We hypothesized that five basic variables affect any disputant's expected value for any decision and thus determine dispute decisions. These are:

--the dispute processing capability of the party

--the objectives of the disputant

--perceived characteristics of disputing alternatives

--the nature of strategic interaction with opponent

--the capability and self-interest of dispute representatives (lawyers and degree of client control).

These factors can be thought of as clusters of variables that explain disputant choice. They provided the independent variables for our survey effort. In Volume II, we provide a more detailed discussion of the model that emerged from this approach, and report on some analyses of dispute decisions we have conducted.

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; Curran, 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 "lumping it" (Felstiner, 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 "bilaterally." 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 41% 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 the 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

Figure 3

Dispute Processing Mechanism

Configuration of Parties	Col. 1 Bilateral	Col. 2 Court	Col. 3 Other Third Party
Individual v. Individual	A	B	C
Individual v. Organization (or Government)	D	E	F
Organization v. Organization	G	H	I

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 1

Characteristics of the Five Districts

Characteristic	National Average [a]	Central California	New Mexico	Eastern Pennsylvania	South Carolina	Eastern Wisconsin
Population 1975 (in 1,000s)[b]	2,367	10,759	1,144	5,092	2,816	2,831
Population Change, 1970-1975(%)[b]	6.4	3.9	12.5	-0.5	8.7	2.3
Net Migration 1970-1975(%)[b]	2.5	-0.5	5.8	-2.6	3.4	-0.2
Population 1970 (in 1,000s)[b]	2,250	10,343	1,016	5,112	2,591	2,768
Population Growth, 1960-1970(%)[b]	11.1	29.3	6.8	7.7	8.7	12.2
Black Population, 1970 (in 1,000s)[b]	246	838	18	767	788	119
Population of Spanish Heritage 1970 (in 1,000s)[b]	---	1,76[illegible]	407	nil	nil	nil
Urban Population 1970 (in 1,000s)[b]	1,65[illegible]	9,9[illegible]	711	4,287	1,232	2,128
Median Years of Education, 1970[b]	11.2	11.[illegible]	11.8	11.4	10.0	11.6
Number of Farms over 10 Acres, 1969[b]	28,534	8[illegible]68	10,563	12,845	37,080	34,648
Percent of Land Area on Farms[b]	45.4	[illegible]5.	60.2	42.0	37.1	53.6
Percent of Labor Force in Blue Collar Occupation[b]	44.7	43.9	27.4	53.1	58.8	54.3

Table 1 continued

Characteristic	National Average[a]	Central California	New Mexico	Eastern Pennsylvania	South Carolina	Eastern Wisconsin
State Court Organization[c]	---	Multi-tiered	Unified	Overlapping multitiered	Multi-tiered	Unified
State Court Use of Federal Rules of Civil Procedure[d]	---	no	yes	no	no	yes
Compulsory Arbitration in State Court[d]	---	no (thru 1978)	no	yes	no	no
Number of Federal Judges, 1975[b]	---	16	3	19	5	3
Federal Caseload/Judge, Weighted 1975 Total[e]	400[g]	414	385	242	520	383
Civil Only[e]	293[g]	270	264	193	402	282
Federal Court Efficiency, Median Disposition Time, 1978 Civil Cases (in months)						
All Cases[e]	10[g]	6	7	9	7	11
With No Court Action[f]	6[g]	6	4	5	5	7
During, or After Pretrial, But Before Trial[f]	17[g]	16	10	13	12	21

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.

e From Report of the Administrative Office of the U.S. Courts, 1978, Table C-5.

f From Report of the Administrative Office of the U.S. Courts, 1975, Table X-1.

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 Susmilch, 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 CLRP 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 <u>not</u> 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

[Table 3 about here]

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)

	Federal Courts					State Courts				
	Milw	LA	Phil	So Car	N Mex	Milw	LA	Phil	So Car	N Mex
Plaintiffs										
Individuals	37	57	60	63	65	68	73	83	77	53
Organizations	27	27	28	25	24	25	16	16	20	30
Governments	26	11	6	10	6	3	9	2	2	12
Mixed[a]	5	4	5	1	5	3	3	0	1	5
Other	5	1	0	1	0	2	0	0	0	0
Defendants										
Individuals	18	8	18	27	17	39	61	48	54	59
Organizations	29	45	57	45	38	14	18	35	22	26
Government	17	20	7	17	22	2	2	3	7	4
Mixed[a]	25	27	18	11	23	41	18	14	16	11
Other	10	0	0	0	0	3	0	0	0	1
	(172)	(158)	(151)	(155)	(173)	(189)	(158)	(147)	(146)	(196)

Note: Numbers of cases in parentheses.

[a] 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)

Pltf-Def	Federal Courts Milw	LA	Phil	So Car	N Mex	State Courts Milw	LA	Phil	So Car	N Mex
Ind-Ind	3	4	12	17	12	25	49	41	50	31
Ind-Org	9	20	32	26	21	10	10	27	15	14
Ind-Gov	13	20	6	15	21	2	2	3	5	3
Ind-Mix	8	13	10	5	11	29	12	12	7	5
Org-Ind	2	3	3	4	2	10	4	7	3	12
Org-Org	12	17	19	15	12	4	6	7	7	11
Org-Mix	8	7	5	5	8	10	6	1	8	5
Gov-Ind	21	2	1	6	2	3	8	1	1	12
Total Number of Cases	(172)	(158)	(151)	(155)	(173)	(189)	(158)	(147)	(148)	(195)

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

[Table 4 about here]

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

[Table 5 about here]

domestic relations (mostly divorce cases in Milwaukee, Los Angeles, and New Mexico, which are formally terminated by a judicial decree,

Table 4

"Area of Law" of Sampled Cases, State and Federal Courts
(Percent)

Area of Law	Federal Courts					State Courts				
	Milw	LA	Phil	So Car	N Mex	Milw	LA	Phil	So Car	N Mex
Torts	13	22	48	39	28	44	54	74	54	31
Contracts	39	29	28	37	39	30	21	25	16	43
Domestic Rel	0	2	0	0	1	21	19	0	5	20
Property	11	1	4	8	8	14	7	4	21	9
Regulatory	26	33	17	8	13	0	1	1	3	1
Public Law	32	30	14	17	32	2	3	0	4	1
	(172)	(158)	(15)	(155)	(173)	(189)	(156)	(146)	(146)	(196)

Note: Percentages based on multiple responses with up to four areas of law, so may add to more than 100. Numbers of cases in parentheses.

Table 5

Modes of Disposition of Cases
(Percent)

Mode[a]	Federal Courts					State Courts				
	Milw	LA	Phil	So Car	N Mex	Milw	LA	Phil	So Car	N Mex
Dismissals (Settlements)	64	64	79	74	68	58	65	64	72	42
Motions (Judgments)	26	29	18	19	19	23	19	35[b]	14	50
Trials	5	5	3	6	11	6	13	1	13	4
Other	6	2	0	2	2	13	3	1	1	5
N of cases	(172)	(158)	(151)	(155)	(173)	(189)	(158)	(147)	(150)	(196)

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.

Chapter 4

THE SCREENING SURVEYS

The Household Screening Survey

The Household Screening Survey was designed for two purposes. First, it provided baseline data on the incidence among households of grievances and disputes, and data for some analysis of factors related to the transformation of grievances into disputes--that is, to identify grievances which might have become disputes and then to determine whether a dispute in fact developed. Second, it was the instrument used to locate individual (bilateral) disputes not processed by any third-party institution. Disputes meeting certain criteria were then intensively studied through follow-up interviews using the other survey instruments. The survey was administered by telephone in January, 1980, to a random sample of about one thousand households in each of the five federal judicial districts.

Baseline Data

As noted repeatedly, not all greivances become disputes. Sometimes a claim for redress is never made and sometimes a grievance is resolved without conflict. Before our study, no estimates existed of the rates at which grievances occur in the general population or of the rate at which such grievances become disputes or are settled without conflict. Nor were there estimates of the rates at which disputes are resolved through negotiations or are taken to some third party. The screening interview provided such estimates and also provided data about the differential

characteristics of households which reported, which did or did not have problems of a civil legal nature, which did or did not make claims for redress, and which did or did not reach an agreement without disputing.

The screening interview also provided population estimates of the rates of contingent events and conditions which lead to disputes, facilitating estimation of the rates of occurrence of various types of civil legal problems, the rates at which claims for redress are made, rates of claim acceptance and rejection, and the rates at which various dispute processing mechanisms are used. Except for exploratory work in limited types of disputes, such as consumer problems, little or no data of this kind existed either.

Locating Disputes for Survey Purposes

It is impossible to locate individual disputes which had only been handled through bilateral negotiation except through a general household survey. The second--and most important--purpose of the Household Screening Interview, therefore, was to locate middle-range disputes for inclusion in the overall surveys of disputants and attorneys. This supplemented our sampling plan by producing disputes that could not be located in any other fashion.

Sampling Procedures

The households screened for disputing experience were selected through random digit dialing techniques. Our specific approach (see Waksberg, 1977, for detail) provided for an efficient design insuring both that households were randomly selected and that each

active residential number had the same probability of selection. (Note that while all residential telephone numbers have the same probability of selection, the proportion of unused telephone numbers is reduced sharply in our approach as compared with dialing numbers completely at random, thereby reducing survey costs.)

Once we contacted a household, we determined whether that household had had a dispute of the type to be included in our detailed study. For purposes of the screening survey, we inquired about disputes that had occurred during "the last three years." Since the screening survey was conducted in January 1980, this covered 1977 through 1979, deviating somewhat from the "terminated in 1978" rule used to select court cases. It would have been ill-advised to narrow the time focus explicitly to "terminated in 1978," however, both because the concept of terminated may not have been clear to all our respondents and also because memories could not be counted on to narrow the time frame accurately to such a specific period. There are two general ways in which we could have determined whether a household had been involved in an eligible dispute (i.e., one falling within our criteria): either ask directly, using an open-ended question, whether the household had been involved in a dispute (perhaps attempting to define what we meant by "dispute"), or obtain detailed information about a number of common problems that could have led to a dispute, and then used that detailed information to determine whether the household had been involved in an eligible dispute. We opted for the latter approach because it seemed much more likely to yield a sample of

appropriately comparable disputes--even though, as we recognized, the closed approach would tend to direct the range of responses in the direction of what we had identified a priori as problems leading to disputes. We compensated for the potential "narrowing" problem by including an open-ended probe at the end of the problem list. The methods we used identified 562 of the households contacted as reporting one or more eligible disputes (10.9 percent of the 5,148 households surveyed). We selected one dispute from each, giving us a dispute sample of 562.

Content of the Household Screening Interview

Grievance Identification. The structure of the household interview schedule roughly paralleled the functions of grievance/problem identification, dispute detection, and analysis of household experiences. The first section asked whether anyone in the household had had any of the list of 33 "problems," each of which would indicate a grievance by or against a household member. These problems were grouped into eight general areas: torts, consumer, debt, discrimination, real property, government, post-divorce, and landlord-tenant. Our interest in civil legal disputes led us to limit this inquiry to problems for which there were available legal remedies but for which the involvement of courts was not required (thus excluding divorce and estate disputes).

Some qualification criteria were checked to maintain comparability between these problems and the disputes sampled from courts and nonjudicial alternatives. The first criterion was that

the grievance be "middle range," which (as noted) we interpreted to mean that at least $1,000 was involved if the problem was essentially of a monetary nature. The other criteria were that the grievance had already ended and that it had begun within the past three years. There was also a check for multiple occurrences of the same problem; where multiple occurrences were reported only the most serious incident was pursued.

Dispute Detection. The second section of the Household Screening Interviews explored the outcome of grievances which passed the initial qualification screening and obtained background on each. Its purpose was to ascertain whether a claim was made and whether a dispute resulted, to further check qualification criteria, and to obtain information necessary for analysis and follow-up interviews.

We anticipated finding relatively few households with unambiguous civil legal grievances. Thus, efficient screening required that each problem be thoroughly probed for conditions which define a dispute conceptually. The probing was generally as follows:

1. Did the person with a grievance make a claim or ask for compensation? If not, why not? It is known that many grievances are not pursued and an important analysis question is to relate the making of a claim to household characteristics and types of grievances.
2. Has any compensation been collected? If not, has compensation been agreed upon? If no agreement was reached, what was the final outcome? Once a claim has been made, a

failure to reach agreement unambiguously defined a dispute. Finding an agreement explicitly or implicitly (when compensation was paid) required further questions about how agreement was reached.

3. How much compensation has been collected or agreed upon? Was more asked for at any time? Differences between the claimed and agreed amounts indicated a compromise, or partial rejection of the claim, and so a dispute.
4. Was an agreement reached right away or was any difficulty involved? If any difficulty, what was it? A lack of immediate agreement had been defined conceptually as a dispute. However, some disagreements or difficulties are trvial; the nature of the difficulty both clarified the status of a claim and provided background for the more detailed interview which followed.
5. Was the final agreement a compromise or did one side give in? If so, which side gave in? Other elements in an agreement besides settlement payments may be compromises and so identify a continuing dispute. If the person making a claim gave in, a dispute status was established.
6. After an agreement was reached, was there any difficulty? Disputes are not necessarily ended or prevented when an agreement is reached. These questions probe for a further, or perhaps the first, disputing relationship between the parties.

These six groups of questions enabled us to determine whether or not a dispute resulted from a given grievance. When relevant, further probes identified whether an insurance company was involved and considered the possibilities that either the insurance company was the real, active disputant or that a second dispute developed between the household and an insurance company.

Some background information about the problem and how it was handled was elicited to structure subsequent disputant interviews, to clarify ambiguous cases, and for analysis. We asked for a brief description of the problem and parties involved, and when it was over. Data were obtained about prior and subsequent relationships between parties, whether a lawyer, court, or other third party was involved, and whether the household had any prior experience with this kind of problem. With respect to particular kinds of legal action common in debt cases, more extensive questions were asked.

Household Characteristics. Questions in the third section asked about household background characteristics and prior legal experiences. We expected both these sets of variables to account for differences in how problems were handled; to explain why some grievances are pursued and others not, how the other side reacts to a claim or to a rejected claim, how much difficulty is encountered before agreement is reached; and to describe the rates of various types of problems according to household characteristic differences.

Results. Table 6 shows rates of grievances, claims, and outcomes, as reported by Miller and Sarat (1981). Slightly over 40 percent of the households in our sample had some middle-range

[Table 6 about here]

Table 6

Grievances, Claims, and Outcomes: Rates by Type of Problem[a]

	All Grievances		Torts		Consumer		Debt		Discrimination		Property		Government		Post-Divorce		Landlord	
Grievances[b] (Percents of Households)	41.6%	(5147)	15.6%	(5147)	8.9%	(5147)	6.7%	(5147)	14.0%	(5147)	7.2%	(3798)[c]	9.1%	(5147)	10.9%	(1238)[c]	17.1%	(2293)[c]
Claims (Percents of Terminated Grievances)	71.8	(2491)	85.7	(553)	87.3	(303)	94.6	(151)	29.4	(595)	78.9	(193)	84.9	(240)	87.9	(51)	87.2	(307)
Disputes: (Percents of Claims)																		
a. No Agreement	32.0		2.6		37.1		23.9		58.0		32.1		40.7		37.7		55.0	
b. Agreement After Difficulty	30.6		20.9		37.9		60.6		15.5		21.8		41.4		49.3		26.7	
c. Dispute	62.6	(1768)	23.5	(467)	75.0	(263)	84.5	(142)	73.5	(174)	53.9	(154)	82.1	(203)	87.0	(45)	81.7	(267)
Lawyer Use[d] (Percent of Disputes)	23.0	(1100)	57.9	(107)	20.3	(197)	19.2	(120)	13.3	(128)	19.0	(84)	12.3	(163)	76.9	(39)	14.7	(218)
Court Filing[d] (Percent of Disputes)	11.2	(1093)	18.7	(107)	3.0	(197)	7.6	(119)	3.9	(128)	13.4	(82)	11.9	(159)	59.0	(39)	7.3	(218)
Success of Claims (Percent of Claims)																		
a. No Agreement (0)	32.0		2.6		37.1		23.9		58.0		32.1		40.7		37.7		55.0	
b. Compromise (1)	34.2		85.4		15.2		23.5		11.3		9.7		18.3		35.5		10.3	
c. Obtained Whole Claim (2)	33.8		11.9		47.7		52.6		30.7		58.3		41.0		26.8		34.6	
	100.0		100.0		100.0		100.0		100.0		100.0		100.0		100.0		100.0	
d. Success Scale Mean[e]	1.02	(1782)	1.09	(479)	1.11	(265)	1.29	(142)	0.73	(174)	1.26	(154)	1.00	(203)	0.89	(45)	0.80	(267)

[a] Observations were weighted by the population of each judicial district so that the five samples could be combined. Weights were calculated to preserve the actual number of observations. Numbers in parentheses are the total upon which the reported proportions are based. The miscellaneous "other" category (see Appendix I) is included in the "all grievances" column but omitted as a separate item from this and subsequent tables (3.5 percent of households reported an "other" grievance).

[b] Proportions are of households reporting one or more grievances of each type.

[c] These are proportions and numbers of households at risk. Households at risk of property problems are those owning their own home, apartment, or land within the three-year period (73.8 percent of all households). Households at risk of post-divorce problems were the 24.0 percent of all households which had a divorced member. The 44.2 percent of households which rented within the three years were at risk of landlord problems.

[d] The number in these rows differ slightly due to missing data.

[e] The success of claims was scaled 0, 1, or 2: 0 if no agreement was reached, 1 if the agreement was a compromise, and 2 if the entire claim was met.

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1 OF 2

grievance within the three-year period; approximately 20 percent reported two or more different grievances.[11] We cannot say whether this number is high or low, since there is no baseline of potential grievance-generating events or relationships against which to compare that number. However, two things can be said. First, experiencing significant grievances is by no means a rare or unusual event. Smaller grievances no doubt occur more often, larger ones less frequently. Second, the incidence of middle-range grievances provides a substantial potential for conflict.

The range of grievance experience as reported varied considerably. On the low end, 6.7 percent of the households surveyed reported grievances arising out of the payment or collection of debts; on the high end, 17.1 percent of the households that rented reported grievances in dealing with landlords. The range and distribution of grievances reported in Table 6 is quite similar to what has been found in other studies, both in the United States and abroad (see Curran, 1977; Sykes, 1969; Abel-Smith, et al., 1973; Cass and Sackville, 1975). Grievances involving race, sex, age, or other discrimination in employment, education, or housing were reported by 14 percent of the households. It is likely that the level of discrimination grievances has risen in recent years as a result of increased public awareness and sensitivity to this type of problem, although this could only be confirmed with longitudinal data. At the same time, public attention to the problem of discrimination may have produced a decline in instances of discriminatory behavior.

The second line of Table 6 shows that claiming is a frequent response to middle-range grievances. Apart from discrimination problems, behavior is similar across problem types. The range of claiming fluctuated between 79.9 percent (real property) and 94.6 percent (debts). Most of the problems were substantial. There was, nevertheless, considerable variation among problem types on stakes, situations, and the configuration of the parties--a variation that makes the high claiming rates for all categories except one all the more significant. There seems to be widespread readiness to seek redress of substantial injuries. Contrary to what some believe, Americans are assertive when the stakes are substantial--able and willing to seek redress when aggrieved.

The one exception was discrimination grievants, of whom only 29.4 percent made a claim. There are several probable explanations for this pattern. First, it may be that remedies for discrimination are less available and accessible than those for other types of problems. Second, it may be that people do not make claims unless they feel confident that something can be done to redress the grievance. In discrimination situations it may be easier for those who believe that they have been unfairly denied a job or residence just to keep on looking. Securing a job or residence is likely to be much more pressing and important than filing a claim for something which is made undesirable by the very act that generates the grievance. To pursue this hypothesis, our survey asked whether discrimination grievants who made no claim had nonetheless registered a complaint without asking for anything; an additional

26.6 percent reported having done so. Third, there may be some stigma attached to the mere assertion of a grievance in this area. Victory may turn into defeat. Those who are assertive, even if vindicated, may be branded as troublemakers. Finally, grievants may be uncertain about the fit between their own perceptions and definitions of grievances and those embodied in statutes or otherwise recognized in their community. Indeed, both the law and popular expectations in this area of relatively new rights appear unsettled. Many who experience discrimination problems are, as a result, uncertain whether their grievance constitutes a sustainable claim.

Line 3 shows the proportion of claims that developed into disputes (counted as claims that respondents said resulted in no agreement plus claims they said resulted in an agreement reached only after some difficulty). According to this definition, 62.6 percent of claims became disputes resulting in an overall dispute total for the household screening survey of 1,768. (This is, of course, a much larger total than the number in our dispute follow-up sample. A small part of the difference is because we only included one dispute per household in our follow-up sample. Most of the difference is explained by the more stringent definition of eligible dispute that we chose to employ in selecting our dispute sample for detailed follow-up data collection.)

While the variation among problem types is somewhat greater in disputing than in claiming, here again we are struck by how similar the proportions are for six of the eight problems. Putting aside

torts and property matters, the incidence of disputing varied only from a low of 73 percent in discrimination claims to a high of 87 percent in claims arising from post-divorce problems. Over 80 percent of claims to landlords, former spouses, debtors, creditors, and government agencies led to disputes. Tort claims were least likely to be contested (23.5 percent). This reflects, we believe, a highly institutionalized and routinized system of remedies provided by insurance companies, and the well-established customary and legal principles governing behavior in this area.

Estimates of the rate of direct participation by lawyers and courts in these middle-range disputes are also shown in Table 6. Examining line 4, we find that lawyers were used by less than one-fourth of those engaged in the disputes we studied. There are, however, two significant exceptions to the pattern. The role of lawyers is much more pronounced in post-divorce and tort problems. In the former, the involvement of lawyers is a function of the fact that court action is often required, e.g., adjustment in visitation arrangements or in alimony. In the latter, the contingent fee system facilitates and encourages lawyer use.

Few disputants (11.2 percent) reported taking their dispute to court (line 5). Excluding post-divorce disputes, where court action is often required, that number is even smaller, approximately 9 percent. These findings do not mean that courts or lawyers play a trivial role in middle-range disputes. Claims are made, avoided, or processed at least in part according to each party's understanding of its own legal position and that of its opponent; that

understanding reflects both the advice lawyers provide and the rights and remedies courts have in the past recognized or imposed.

Line 6 shows data on the success of claims made by these households. Overall, 68 percent of those who made a claim eventually obtained part or all of what they originally sought. Those who claim may do so because they are confident that their claims are justified. Indeed, the modal pattern among middle-range grievances is for claims to be made, disputes to result, and agreements to be reached. Claimants who reached an agreement only after some difficulty--and thus had disputes--were more successful than claimants reporting no difficulty reaching an agreement. Fully two-thirds (66.7 percent) of the first group obtained their whole claim, while only a little over one-third (39.7) of the second got all they asked for. Conflicts, disputes and difficulties are often engendered by the desire for, and are necessary in order to obtain, complete satisfaction.

Some important specific variations do, of course, show up in the claims' results. Virtually no tort claimants (2.6 percent) were unable to reach any agreement, but of the 97.3 percent of tort claimants recovering something, very few obtained all of their original claim. One might expect tort claims to be inflated for negotiating purposes, an expectation reinforced by the low proportion reporting any difficulty reaching an agreement.

While most tort claims resulted in a compromise agreement, other claims were much more likely to have all-or-nothing outcomes. To some extent this reflects the nature of the problems. For example,

property disputes involving permission to build may not be amenable to compromise. In some areas, opposing parties were more than usually unlikely to offer anything: for example, more than half of all discrimination (58.0 percent) and tenant (55.0 percent) claimants failed to obtain any redress at all. Such claimants are apparently in particularly weak bargaining positions and also may lack effective recourse to any third-party remedy system.

We have highlighted only a few of the descriptive data from the Household Screening Survey. Further analysis is reported in Miller and Sarat (1981). We now turn to the Organization Screening Survey.

The Organization Screening Survey

The disputes identified by the survey of households were between individuals or an individual and an organizaton. To complete the typology of opposing parties, we designed a survey to screen organizations for disputes with other organizations which were not processed by any third party. The interview was brief--designed to solicit the minimum information necessary to identify such disputes.

Method and Content. This survey was the most novel aspect of our data collection approach. In planning it we addressed a number of important methodological issues: how to construct a sampling frame of organizations in a large geographic area; how to select a respondent within a contacted organization and, having reached a respondent, how to select a single specific dispute for detailed examination. We again used random-digit dialing as the mechanism for selecting a sample of organizations.

"Organization" was operationalized as a business-use telephone (for this aspect of the study, government entities were excluded). This technique weights the probability of inclusion by the number of telephone lines going into an organization. Larger organizations were, thus, more likely to be included in the sample than were small, one-line organizations. We saw this as a desirable property for a sampling technique applied to organizations. In order to minimize the cost of the random-digit dialing operation, we used as our sampling list phone numbers identified during the household screening survey as likely business numbers.

Once we had reached an organization, the next step was to select a respondent. The first section of the interview addressed this problem. If the organization was "small" (less than 100 employees), we attempted to reach the manager, owner, or director. In the case of large organizations, we sought out respondents according to the following descending order of preference:

(1) a staff person in the organization's legal department;

(2) the person one would be referred to if one contacted the organization with a complaint or problem; or

(3) the person in charge of the office where the phone was answered.

The second section determined whether the respondent organization had any disputes of the type we were looking for. We first asked whether the organization had any disputes with other nongovernmental organizations during the past 12 months that involved at least $1,000. If so, we asked how many such disputes

were handled and settled without going to some third party. Finally, respondents were asked to identify the most recently terminated dispute with which he or she was generally familiar--a step that should insure a random selection effect.

In the organization survey we decided to use a more open-ended approach to detecting eligible disputes than was used in the household screening survey. Although this was necessary to reduce the costs of the survey, it also reflected our judgment that the respondents we would reach during the survey would be more likely to know the intent of our questions and therefore more efficient in providing information to us than the respondents contacted in the household screener.

The interviews obtained the following minimal information about the selected dispute: what the general issue was, how much money was at stake, whether an outside lawyer was used, and the identity of the opposing party. We also asked about the proportions of disputes (excluding labor disputes) which the organization normally takes to court or arbitration, or settles bilaterally.

Results. The Organization Screening Survey was administered to 1,516 organizations. Table 7 shows characteristics of our sample. Most organizations interviewed had less than 100 employees, and many were manufacturing, retail trade, or service establishments. Over a quarter of the respondents were owners of the businesses contacted, and most others were managers or professionals.

[Table 7 about here]

Table 7

Characteristics of the Sampled Organizational Respondents

	Percent of Sample	(N)
A. Size of Organization		
1. Large (over 100 Employees)	17.1	(253)
2. Small	82.9	(1224)
	100.0	
3. Number of telephone lines[a]		
1	24.1	(365)
2	18.8	(285)
3 to 4	20.0	(304)
5 to 9	13.2	(201)
Over 10	11.9	(180)
Missing	11.9	(181)
	100.0	
B. Industry		
Agriculture, mining	0.9	(14)
Construction	3.2	(49)
Manufacturing	15.8	(238)
Transportation	2.3	(35)
Communications, electric, gas	3.0	(45)
Wholesale trade	2.2	(33)
Retail trade	22.6	(341)
Finance, insurance, real estate	13.1	(197)
Services	26.1	(394)
Health services	7.9	(119)
Other	2.9	(43)
	100.0	
C. Respondent's Occupation		
Owner	27.7	(420)
President, chairman, executive director	7.7	(117)
General counsel	7.4	(112)
Vice-President, treasurer, secretary-treasurer	4.6	(69)
Manager, supervisor, director	20.6	(312)
Office manager, business manager	8.2	(125)
Attorney	4.9	(74)
Misc. professional	4.3	(65)
Legal secretary	2.9	(44)
Other secretary	2.0	(30)
Other	5.7	(86)
Missing	4.1	(62)
	100.0	

Notes

[a] Respondents' estimates of number of outside telephone lines in judicial district.

The survey found relatively few organizations that recently experienced a middle-range bilateral dispute. Only 265 organizations (17.5 percent)reported a dispute meeting our criteria. Some of these organizational respondents were unwilling to discuss their dispute in detail, but the survey yielded 194 bilateral disputes for inclusion in our follow-up disputant and lawyer interviews. The disputes cited by those who declined a follow-up interview had lower median stakes ($4,013) than the disputes we were able to study ($8,000), but were somewhat more likely to involve an outside lawyer (42.5 percent versus 33.2 percent).

Table 8 shows the proportions of organizations reporting one or more middle-range disputes according to various organizational characteristics. Larger organizations were considerably more likely to have had a dispute than were smaller ones. This is not surprising:

[Table 8 about here]

both the number and size of transactions that might engender disputes increase with organizational size. Relatively few retail trade and health service organizations reported a dispute (even after controlling for organizational size); higher proportions of construction and manufacturing firms, and communication, electric, and gas utilities had disputes with other businesses.

If a respondent believed his or her organization had experienced middle-range interorganizational disputes in the past year, we asked for an estimate of the number of those disputes settled without any

Table 8

Rates of Interorganizational Disputes and Bilateral Disputes by Organizational Characteristics

	Percent with Disputes		
	Some Dispute[a]	Bilateral Dispute	(N)
A. Size of Organization			
1. Large (over 100 employees)	49.4	44.3	(253)
Has legal department	61.6	56.8	(125)
No legal department	38.0	29.0	(100)
2. Small	16.2	11.9	(1223)
3. Number of telephone lines[b]			
1	4.9	3.8	(364)
2	10.9	6.7	(285)
3 to 4	17.8	13.8	(304)
5 to 9	27.4	20.4	(201)
Over 10	45.0	35.0	(180)
B. Industry[c]			
Argriculture, mining	14.3	14.3	(14)
Construction	36.7	24.5	(49)
Manufacturing	31.5	24.8	(238)
Transportation	28.6	22.9	(35)
Communications, electric, gas	46.7	33.3	(45)
Wholesale trade	36.4	33.3	(33)
Retail trade	10.6	7.9	(341)
Finance, insurance, real estate	26.9	23.4	(197)
Services	18.0	14.2	(394)
Health services	10.1	6.7	(119)
Other	48.8	44.2	(43)
C. All organizations	21.9	17.5	(1516)

Notes

[a] Percentages of organizations reporting any dispute with another nongovernmental organization in the previous 12 months that involved at least $1,000.

[b] Respondents' estimates of number of outside telephone lines in judicial district.

[c] Coding based on Standard Industrial Classification Manual published by the U.S. Department of Commerce.

third party (although possibly with the help of outside lawyers). The median number of such disputes known to the respondents was quite small--only 1.5. Eighty-five percent reported 10 or fewer settled bilateral disputes, and only 10 of 263 respondents estimated the number to be 100 or more.

There are five interpretations of the apparently low incidence of such disputes. The first is uninformed respondents--particularly in the case of large organizations, whose employees may have been unaware of problems elsewhere in the organization. The second is reluctant respondents--who may have believed that conflict should be hidden from outsiders. The third is protracted conflicts, so that few cases arising in the past 12 months were settled. The fourth is that the incidence of bilateral disputes is low because many organizations may routinely take disputes to a court or other third party. This seems unlikely. Indeed, the median respondent estimated that only four or five percent of disputes with other organizations went to court; and few nonlabor disputes were reported as going to arbitration. Fifth, the incidence may simply be low--low numbers of disputes in organizatons that have any at all is consistent with their relative rarity among organizations in general. Most organizations are simply quite small: 62.9 percent in our survey had four or fewer telephones. We put most weight on the fifth interpretation, and give modest additional weight to the first three.

What did these disputes involve? Table 9 shows distributions for the areas of law and the amounts at stake in the (most recently

[Table 9 about here]

Table 9

Characteristics of Selected Disputes
(Percent)

A. Area of Law	All Disputes	Organization Size: Large	Organization Size: Small	Stakes: Under $10,000	Stakes: Over $10,000	Use Outside Lawyer? Percent "Yes"	N
Real property	5.1	7.4	2.9	4.3	5.6	18.2	(11)
Lending and credit transactions	34.3	20.2	44.1	44.4	24.7	35.0	(80)
Other contract, commercial law	37.7	41.5	35.3	33.3	41.6	32.6	(89)
Torts	13.1	19.1	9.6	11.1	15.7	35.5	(31)
Business and corporation law	6.8	9.6	5.1	3.4	10.1	50.0	(16)
Business regulation law	3.0	2.1	2.9	3.4	2.2	57.1	(7)
Total	100.0	99.9*	99.9*	99.9*	99.9*	35.0	(234)

B. Amount at Stake	All Disputes	Organization Size: Large	Organization Size: Small	Use Outside Lawyer? Percent "Yes"	N
$1,000-$10,000	56.7	42.2	68.1	30.5	(118)
Over $10,000	43.3	57.8	31.9	39.3	(89)
Total	100.0	100.0	100.0		(207)

* Total less than 100.0% because of missing data.

terminated bilateral) disputes identified by our respondents. The legal issues were dominated by lending and credit transactions (34.3 percent) and other contract or commercial law (37.7 percent). Somewhat more than half the disputes (56.7 percent) involved less than $10,000. The area of law and the stakes are interrelated. Lending and credit transactions led to the largest group of smaller disputes (44.4 percent). Other types of contracts were at issue in many larger conflicts (41.6 percent).

Organizational size was related to the mix of issues and the stakes reported. As one might expect from their relative financial instability, small organizations relatively frequently cited lending and credit transaction disputes (44.1 percent of their disputes). Larger organizations were more likely than smaller ones to mention disputes involving other kinds of contracts or commercial law (41.5 percent of their disputes versus 35.3). The disputes of larger companies, not surprisingly, had larger stakes: 57.8 percent involved more than $10,000, compared to 31.9 percent of small businesses' disputes. Overall, in about a third of the disputes, organizations turned to an outside lawyer for help with these disputes--most often when business law was at issue. The higher the stakes, the more likely outside lawyers were to be used.

Finally, respondents who reported any dispute were asked to estimate the percentage of all their middle-range interorganizational disputes which are processed by a court or an arbitrator, or handled bilaterally. These data are reported in Table 10. Few disputes go

[Table 10 about here]

to a court; the median percentage was 4.6, and 31 percent of the respondents said that no disputes were litigated. Arbitration is even rarer: 68 percent said no disputes were handled this way (labor disputes excluded). The overwhelming proportion of almost all organizations' disputes is handled by negotiation; the median percentage was 90.2.

Table 10

Distributions of Forum Choice

	Percent of Disputes		(N)
	Median	Mean	
Courts	4.6	17.0	(249)
Arbitration	0.2	6.0	(250)
No Third Party	90.2	74.5	(251)

Note: Respondents were asked to estimate the percentages of all middle-range disputes their organization had with other organizations which were processed by a court, arbitrator, or without any third party. Labor disputes were, as noted in the text, excluded.

Chapter 5

THE DISPUTANT AND LAWYER SURVEYS

Developing the Survey Instruments

We originally contemplated using two post-screener survey instruments--one for disputants and one for lawyers. We eventually used seven. Three of the added instruments were short versions of the lawyer, government lawyer, and organizational disputant questionnaires. These were used when the same respondent was involved in more than one case in the sample (503 lawyers, 53 government lawyers, and 30 organization disputants), or when the appropriate respondent did not recollect the relevant case (293 instances) but could describe investment in a "typical case" similar to it. Early work on the disputant questionnaire convinced us that investments in dispute processing of individual disputants, private organizations, and governments, are unlikely to be influenced by an identical set of factors. As a result, separate instruments were developed for each of these groups. They contained many common elements, but also differed substantially.

The first stage of instrument development involved a literature search and preliminary interviews to identify factors that might plausibly influence investments in dispute processing. That effort was paralleled by conceptual work leading to a descriptive model of dispute processing (described above) which defined disputing stages, transitions between stages, and activities within stages.

The lawyer and individual disputant questionnaires were written first. In general, question content was dictated by project staff

and format was provided by our survey subcontractor, Mathematica Policy Research (MPR). These questionnaires initially tried to capture information for investment, negotiations and stakes for each stage and transition separately. A small pretest of these instruments in June, 1979, however, indicated that respondents would not tolerate the repetition required by this approach. The questionnaires were rewritten to request aggregate investment data, and negotiation and stakes data at a maximum of three points. A second small pretest of these instruments in August, 1979 revealed major problems in cases that involved multiple clients or lawyers, in questions involving household demographic information, and in skip patterns generally. These questionnaires were rewritten again, submitted for OMB clearance in October, 1979 and pretested on 74 respondents in November, 1979. In this pretest we used both lawyers and nonlawyers to interview lawyers. Since the nonlawyer interviewers appeared to be as effective as the lawyers and cost us less, all subsequent interviewing was conducted by nonlawyers. Corrections based on the last and largest pretest were incorporated and the final instruments were submitted to OMB in December, 1979.

The organizational disputant and government lawyer questionnaires were based on the individual disputant and lawyer instruments and required only one pretest each. They were submitted in final form to OMB in May and March, 1980, respectively. The short form questionnaires did not contain significant material that had not been pretested in other instruments and they were not separately pretested.

Locating Respondents

Lawyer respondents were identified from the institutional records of the court and "alternatives" cases in our sample. These records almost always provided the addresses and telephone numbers of lawyers, but rarely contained information for locating disputants--especially defendants. We attempted to find these disputants by asking for assistance from their lawyers, by use of telephone company information and by consulting current telephone directories, except in Los Angeles where the number of relevant directories was too large. The household and organization screeners did provide locating information for the disputants interviewed in those samples. Since these were by definition bilateral, they involved lawyers. Whenever possible, we obtained names, addresses and phone numbers of their opponents directly from those disputants. In every case in which we had an address but could not secure a telephone number, we requested by postcard that the respondent contact us by mail.

Content of Surveys

A brief description of the contents of our survey instruments is offered here. (Copies of the complete surveys are available on request.)

The Individual and Organizational Disputant, and Government Lawyer Surveys

The individual and organizational disputant, and government lawyer surveys were designed to assess the way disputants choose

among various techniques for dealing with disputes. The basic objectives of these surveys were:

- To determine how individuals handle and resolve different types of civil legal disputes.
- To provide descriptive data on the strategies pursued by disputants to maximize gains and minimize losses in dispute processing.
- To describe the monetary and time investments involved in processing different kinds of disputes and in different kinds of dispute processing institutions.
- To analyze the factors that account for differences in those investments.
- To assess the effectiveness of different ways of processing disputes.

Choices in dispute processing are serial and rarely mutually exclusive. In other words, disputants may use several different techniques for resolving a single dispute. The techniques used may or may not be provided by public institutions. They may or may not be formal. They may or may not require lawyers. The descriptive data generated by this survey were designed to uncover the roles played by legal and judicial, and nonlegal, nonjudicial techniques for processing disputes.

Our hypothesis, of course, is that the choice of dispute processing institutions is part of larger, more inclusive strategies that disputants employ to reduce loss or maximize return. Once choices among dispute processing institutions have been made, strategic considerations dictate the way internal operating procedures will be used. Data help us understand the reasons why particular dispute resolution strategies were employed.

The Individual Disputant Survey

Section 1 - Major Events - This section oriented respondents to the questionnaire and generated descriptive data about major events involved in the dispute. Where some of those data were available from other sources (for example, court records), this section served to check and verify them.

Section 2 - Party Relations - Data from this section may be used to test the hypothesis that disputants who had important relationships prior to their dispute or expect or desire to continue their relationship beyond the dispute will avoid dispute processing institutions, like the courts, whose procedures complicate or threaten those relationships. Different choices and investments are predicted according to whether prior and/or expected future relationships are or are not present.

Section 2 measured several separate dimensions of relationships among the parties to a dispute. These included the nature of the relationship (i.e., did it involve business, professional or personal dealings), its length and importance, and the difficulty of replacing whatever the relationship provided. Other questions measured the "density" of personal relationships (the frequency of contact and the emotional content) and expectations about future relations, and sought to ascertain whether dispute processing itself led parties to reassess their relationship. The impact of expected future relationships on dispute processing choices and the impact of those choices on postdispute relations were also measured.

Section 3 - Key Decisions/Stakes and Revisions - This section sought information useful in explaining how dispute processing choices are made. Its purpose was to explain those choices in two ways. First, dispute processing choice was regarded as binary--involving paired judgments about alternatives. Second, dispute processing choice was viewed as dynamic. Individuals invest in dispute processing in a manner that reflects what is at stake in the dispute. But the stakes in a dispute will change during its course in such a way as to lead to greater or lesser investments than would be predicted simply by knowing stakes as they were perceived at its start.

The section began with a series of questions about lawyer usage which assumed that the decision to hire a lawyer is a major event in a dispute. We also asked about the decision to bring the dispute to a third party forum like the courts, the decision to bring the dispute to a formal trial or hearing, and the decision to appeal an adverse judgment. This section contained questions which track the reasons such decisions were or were not made in particular disputes.

The stakes in a dispute were operationalized as the amount of money or nonmonetary action that an individual would be willing to provide or to take, at any point in the dispute, to terminate it. Questions were asked about what the respondent would have done or accepted to settle the dispute for each of the opposing parties and about three possible changes in perceptions of stakes--right after the problem first occurred, after the facts of the case had been fully clarified, and at the end. Other questions measured the importance of monetary as opposed to nonmonetary, direct as opposed

to indirect, goals, and a disputant's prior experience with the legal system.

Section 4 - Settlement - Part of the strategy of dispute processing is to try to negotiate a settlement, often without outside intervention. Negotiations proceed through a series of offers and/or demands that may involve money or other things of value. They may or may not parallel the perceptions of stakes in the disputes.

The questions in this section worked backwards through the dispute, beginning with the settlement, if any, or the last negotiations. By talking about the most recent negotiations we expected to prompt more accurate recall of the entire sequence of events involved in trying to reach settlement. We asked about three sets of negotiations--the last, the first and the most important in between. We also asked the respondent to describe offers and/or demands made by opposing parties in the dispute. This information was sought to allow us to fill in data in cases in which we were not able to interview all parties.

Section 4 also contained three previously validated psychological scales--risk preference, contentiousness, and personal efficacy. We expected that investments in dispute processing would vary in accordance with these personality traits of disputants.

Section 5 - Time and Money - This section was designed to provide baseline information on a major dependent variable in the study, disputant investments of time and money. The purpose of the section was to identify the total investment of each respondent and to

disaggregate that investment in terms of major activities (that is, the behavior that people typically follow in processing disputes). We disaggregated monetary investments in two ways--in terms of the distinction between expenses for a lawyer and other expenses, and in terms of dispute processing stages.

Section 6 - Lawyer Relations and Client Control - For respondents with lawyers we sought information that described the nature of the relations between them. Our purpose was to test the hypothesis that the time spent on a dispute would vary inversely with client control for lawyers paid by the hour, and directly for lawyers paid by contingent fee.

Client control may affect the major strategic decisions which lawyers make or activities they carry out in handling disputes. To examine this hypothesis, we collected information on the client's role in those decisions and activities. We asked whether agreements about the nature and extent of the client's participation were ever reached and, if so, whether they were carried out. We tried to assess the extent to which the lawyer regularly provided information to the client about the progress of the case. We measured the client's role in deciding whether to take the dispute to a third party, to trial, or to appeal any adverse decision. Finally, we included several questions measuring satisfaction with the services provided by lawyers.

Section 7 - Demographics - In this section we gathered data about the composition and characteristics of the household during the time in which investments in the dispute were made. Questions about the

education of the respondent and other household members measured the general ability or skill of the household. Other questions were designed to determine wage rates to monetize the value of the time of the disputants so that information about the opportunity costs of different dispute processing strategies would be provided. We also sought information on total monetary resources available to the household at the time the dispute ended and about home ownership and residential mobility as well as race. Racial differences have often been important in explaining attitudes toward the legal system, including differential willingness to use legal institutions to resolve disputes.

The Organization Disputant Survey

Section 1 - The March Through - We began by assessing the capability of the respondent chosen to provide information necessary in the rest of the questionnaire and for determining the position of our respondent in the organization and whether or not the respondent was a lawyer. The major purpose of this section, however, was to orient respondents to the subject matter and to generate descriptive data about major events involved in the dispute.

Section 2 - Disputing Experience and Procedures - We believe that dispute processing and investments in disputing occur incrementally. A private organization will handle a dispute according to that organization's past experience with similar disputes; within this framework, decisions may be ad hoc or may be influenced by standard operating procedures. In this section we

examined the decision-making context in which dispute processing decisions occur--the frequency with which disputes, like the one we isolated, occur in each organization, whether or not there is a specialized dispute processing unit within the organization that deals with disputes of that type, and the extent to which the activities of that unit are guided by formal rules and procedures. The remaining questions in this section were designed to map the way in which decisions were made as to who, within the organization, would have primary responsibility for dealing with the dispute.

Section 3-6 - Party Relations, Key Decisions/Stakes and Revisions, Negotiations and Time and Money - The data sought and analyses proposed for these sections were the same as for sections 2, 3, 4, and 5 of the individual disputant questionnaire, except that in the organizational questionnaire:

(a) we measured the nature of the relationship between the organization considered as a whole and the opposing parties, as well as the nature of any personal relationships that may have existed between individuals in the organization and opposing parties,

(b) we asked questions about lawyer usage (both inside and outside lawyers), and

(c) we included estimates of the value of specific employee time.

Section 7 - Organizational Capacity - We sought to measure a series of variables likely to be important in explaining the investments in dispute processing made by different private organizations. The questions were based upon the notion that the capacity of organizations to engage in dispute processing activities is a

function of the potential resources available to the unit or individual within the organization who has primary responsibility for the dispute, and the difficulties which that individual or unit has in mobilizing those resources. Since we visualized private organizations as a series of loosely coupled units, between which stand a series of more or less important barriers, we measured the income and size of the unit directly responsible for dealing with the dispute, parallel information for the entire organization, the existence of knowledge and/or expertise in other units within the organization, and the difficulty of mobilizing such knowledge and expertise.

Section 8 - Lawyer Relations/Client Control - This section was asked only of organizations that used an outside lawyer in dealing with the dispute. Otherwise, content is the same as section 6 of the individual disputant questionnaire.

Section 9 - Individual Decision Makers' Characteristics - When the organizational respondents had decision-making responsibility regarding the relevant dispute, we asked questions about their experience in dispute processing and their educational background.

Section 10 - Satisfaction - The survey included questions designed to measure perceptions of the effectiveness of dispute processing institutions employed by these organizations.

Section 11 - Personality Variables - Where the respondents had responsibility for dealing with the relevant dispute we measured several of his/her personality characteristics, using the same scale used for section 4 of the individual disputant survey.

Section 12 - Routine Cases - We found that for a substantial number of cases, processing was so routinized that no single person in the organization could tell us all about the details of the case. This section, therefore, obtained information about time and money expenditures for the "typical" case equivalent to that included in our sample. In addition, where one organization was involved in more than one dispute in our sample, a short form questionnaire was administered for the second and subsequent cases. This form sought information only on amount of effort, expenditures, and outcome.

The Government Lawyers Survey

Section 1 - March Through - In this section, as with the organization disputant survey, we assessed the capability of the respondent chosen from institutional records to provide the information asked for in the rest of the questionnaire. In some situations, dispute processing was so routinized that few "real" decisions were made. We determined whether this was true for each case, and if it was, we collected information about the amount and salary cost of effort spent on the "typical" case. The major purpose of this section was, however, to orient respondents to the subject matter of our inquiry and to generate descriptive data about major events involved in the dispute. For "multiple case" respondents we limited our questions on each subsequent case to level of effort and outcome.

Section 2 - Disputes Procedures, Constraints and Decisions - This section provided information about two specific topics thought to be

related to dispute processing decisions: the degree of routinization of dispute processing activities and departures from that routine, and resource (e.g., budget) and time constraints that affect government dispute processing. In addition, the section sought information about the respondent's perceptions of why several key decisions--filing with a third party, going to trial or hearing, and appealing--were made.

Section 3 - Relationships - Dispute processing decision makers do not act in isolation; they must consider their relationships with other actors in this dispute and their potential relationships in future disputes that might arise. This section provided information on the existence and impact of: (1) relationships with the referring agency and its representative; (2) relationships between the U.S. Attorney's Office and lawyers in the specific litigation offices of the Justice Department; (3) relationships with nonlegal personnel in the respondent's office; (4) past and future relationships with the opposing party and the party's lawyer; and (5) future relationships with potential opposing parties. This section also sought information on the need for, the availability of, and the use of assistance from outside the respondent's immediate office.

Section 4, 5, and 7 - Decisions/Stakes Revisions, Negotiations and Time and Money - The data sought and analyses proposed for these sections were the same as for sections 3, 4, and 5 of the individual disputant questionnaire, except that in the government lawyer questionnaire:

(a) section 5 contained a series of questions to assess the role of the judge in any settlement discussions, and

(b) since governmental agencies usually do not maintain time records, section 7 included a series of questions inquiring about the "typical" case. This series of questions was also used to collect information for respondents contacted in the "routinized" case mentioned in the discussion of Section 1 and in the second and subsequent cases if a government lawyer was involved in more than one case in the sample.

Section 6 and 9 - Litigation Strategy - The data sought and analyses proposed for this section were the same as those for sections 6 and 8 of the lawyer questionnaire, except that in the government lawyer questionnaire the occasional nonlawyer respondent we encountered was asked a few questions about his or her education and dispute processing experience.

The Lawyer Survey

This instrument complemented the disputant surveys by gathering information about the dispute available only to the attorney, or for which the attorney was the best source of data. It also sought information about how lawyer motivations and experiences might affect dispute decisions, the lawyer's side of the lawyer-client relationship, and lawyer perceptions of dispute processing institutions.

Section 1 - Dispute History - This section had two purposes: to provide structure for the remainder of the interview and to build

rapport with the respondent. All the respondent's clients and all opposing parties connected with the dispute were identified as well as the stage at which the respondent entered the case.

Section 2 - Decisions - Lawyer behavior in disputes is thought to be affected by the lawyer's personal interests as well as those of his other clients. The first set of questions in Section 2 was intended to find out why the respondent took the case. We assumed that later actions may be influenced by original objectives. The remainder of the section explored each respondent's understanding of the goals to be achieved in reaching each of the stages involved in the case. These goals may arise from either the client's or the lawyer's interests or practices, and can be expected to affect the investment the client must make in processing the dispute.

Section 3 - Client Relations - This section investigated two subjects: client control and lawyer's fees. Dispute processing theory suggests that the more active a role taken by clients, the better results they achieve. The first and last sets of questions in the section were intended to measure the lawyer's and client's understanding about the level of client participation that should and did occur. The remainder of the questions in the section were used to determine the respondent's fee arrangements and the fees actually paid.

Section 4 - Alternatives, Stakes ad Revisions - This section investigated two important variables--the institutional resources that were considered, rejected, or mobilized during the course of the dispute and the stakes involved. The first part of the section

asked about paths that might have been used and those that were available but not considered. Questions were asked about the characteristics of those dispute processing institutions that influenced the choices made.

The amount disputants will "invest" in disputing, and the disputing choices that will be made, depend in large measure on the amount of money sought in the dispute and on the kind and intensity of nonmonetary objectives involved. The second half of this section asked about the stakes in the case at three times during the dispute--when the respondent first formed an opinion, the first time that opinion changed, and the last time the opinion changed. An attempt was made to get the respondent to estimate the money value of nonmonetary objectives. The data on stakes were sought for each of the respondent's clients in the case and with respect to each opposing party.

The grids used to record answers to the stakes and settlement negotiations portions of Sections 4 and 5 allowed for no more than four responses to each question because it was unworkable to expand the grids further. Yet pretests indicated that such cases occurred in the court samples. As a result, questions were added to secure aggregated responses from the respondents in these "four-plus" cases.

Section 5 - Negotiations - In many disputes, negotiations with the other party is the most important activity engaged in by disputants and their lawyers; most cases are terminated by settlement, regardless of the institutions mobilized by the disputants. This section was intended to capture the dynamics of negotiations.

Questions were asked about the ingredients of settlement offers and demands between all the parties to the dispute at three points (first, most important intermediate, and last). When juxtaposed with data from Section 3, the data collected in this section were designed to explain the complex interaction between estimates of stakes and settlement offers and demands.

Pretest experience with cases drawn from administrative agencies led to the addition of questions about settlement discussions with a third party as well as with the opposing side. The pretest also suggested that "final" negotiations became confused with the actual settlement where a settlement was reached. As a consequence, final negotiations were only recorded where no settlement was achieved.

Section 6 - Litigation Strategy - Investment in dispute processing is a function of the individual activities engaged in by disputants and their representatives. Some of these activities are undertaken for direct reasons--interrogatories, for example, are asked to secure information. Others have indirect objectives--depositions are taken to convince an opposing party that the dispute is taken seriously and may impose high costs on both parties. This section secured information about indirect objectives at each stage of the dispute. As noted, an important and complicating aspect of disputing is that the level of activity and thus of investment is affected by the other party's behavior as well as by one's own objectives. This section thus separated activities initiated by the respondent and those that were responses to initiatives of the other side. It also collected data on two empirical questions frequently

noted by litigation researchers--the relative levels of formal and informal discovery, and the influence of third-party settlement suggestions.

Section 7 - Time and Money - This section had two objectives. The first part was concerned with law office efforts as a dependent variable. It identified who worked on a case, how much time they spent, how that time was divided between stages and what kinds of activities were undertaken. These data were collected to enable researchers to analyze the costs of dispute processing by personnel, time, and activity. The second part of the section called for an evaluation by the respondent of the particular dispute processing system used for this dispute.

Section 8 - Lawyer Orientation and Background - Lawyers vary in the extent to which they regard law practice as a profession in which craft considerations are an important ingredient in their behavior. Theory predicts that orientation toward craft will affect the type and level of effort made by lawyers and thus the investment made by their clients. The first set of questions in this section identified different indicators of professional orientation.

We also predicted that the level and quality of lawyer effort would vary with expertise and routinization. Thus, the respondent's expertise in the area of the dispute was measured and questions asked about the routinization of this type of case. Respondents were also asked to rate the performance of opposing lawyers in the dispute.

Dispute processing theory emphasizes the importance of personal relations, especially of expected future relations, in dispute behavior. This section thus secured data on the respondent's relationship to his/her client, to opposing parties, to other lawyers and to third parties in the case. Investment in dispute processing may also be affected by the degree of difficulty posed by a particular dispute. As a consequence, the respondent was asked to rate the complexity of this dispute on several dimensions. Since dispute processing theory assumes that the behavior of lawyers will be influenced by personality predispositions, the three psychological scales were also included (risk preference, contentiousness and general capacity).

The lawyer interview ended with a few questions about goals and expertise (income) and professional orientation (law school class standing), and one about records used. The last was to refresh the respondent's recollection and serve as a measure of the reliability of response to earlier questions.

Field Experience

We cannot compute any overall response rate for the surveys, since interviews with one respondent often led to new potential respondents (previously unidentified disputants or lawyers). We therefore have no way of knowing the number of potential interview targets. However, we can report on our ability to collect information about the fundamental case unit, since the number of cases was fixed by the sampling design. In addition, we will

describe the problems we met in contacting and interviewing dispute participants.

One of the most remarkable aspects of our experience was the generally high level of cooperation we received from the participants we sought to interview, particularly from lawyers (cf. Danet, et al., 1980). Only 17.4 percent of the 3,168 private lawyers we contacted refused to be interviewed, and only 1.3 percent of the 316 government lawyers refused. The refusal rates for the disputants we contacted was somewhat higher: 24.1 percent for individuals (n = 1,166) and 24.6 percent for organizations (n = 1,254). Some potential respondents claimed to have no memory of the dispute (or to have no access to their file for the case). As noted, because of the length of the interviews (about one hour on average), respondents involved in more than one dispute in our sample were asked to go through the entire interview only once; abbreviated interviews were carried out for the other cases. We encountered this problem most often with lawyers; about one-quarter of the completed lawyer interviews were repeats. For organizational disputants, only 4 percent of the interviews were repeats.

We anticipated, and encountered, another problem that led to abbreviated interviews for two types of respondents. For both private and public (governmental) organizations, we expected that either many cases would be handled through routinized procedures or that we would be unable to locate any person in the organization who worked on or recalled the particular case. For these situations, we tried to obtain some information about the "typical" case of the

general type on our sample. About 26.6 percent of the completed organization interviews and 35.8 percent of the completed government interviews were of this kind.

Our major obstacle was locating disputants. We had little trouble finding respondents whom we had initially identified through screening surveys. However, we found that most of these either would not, or could not, identify a potential respondent on the other side of the case. For the individuals from the household screener, the opposing party was frequently a large, diffuse organization, and the respondent never knew or could not recall the specific person inside the organization who had been contacted. Many times, particularly in cases from the organizational screener, the respondent did not want us to contact the opposing party, either because of a fear that such a contact might cause further problems or because of a desire not to "inflict us" upon the other side.

For disputes identified through institutional records, we encountered a different type of problem. The primary contact that many third-party institutions have with disputants is indirect, through the disputants' lawyers. The institutional files typically have good locating information for the lawyer, but often have no information at all concerning the disputants. Thus, while we located 98 percent of the lawyers identified as potential respondents, we were able to located only 80 percent of the organizational disputants involved in cases sampled through the institutional records, and only about 45 percent of the individual disputants. Efforts to use the lawyers we contacted to aid us in

locating the disputants were only minimally successful. Often the lawyers' information was out of date; by the time we conducted the interviews the cases were typically several years old.

We succeeded in completing 3,824 interviews with dispute participants (as well as the 6,656 screening interviews). A majority of these (2,099) were attorneys, as shown in Table 11. Organizational disputants accounted for 759 interviews, and individual disputants for another 708. These participant interviews covered 2,011 disputes. We estimate that in only 5 percent of these disputes did we collect data from all the direct dispute participants

[Table 11 about here]

(e.g., one lawyer and one litigant on each side); and in half of those 5 percent, at least one of the interviews was abbreviated in form. In 867 disputes we were able to interview at least one participant from each side. We also estimate that within our data set are 600 lawyer-client pairs; of these, 368 involve long interviews for both the disputant and the lawyer.

Before ending this discussion of our field experience, we need to address one last question: how representative of our total sample are those cases for which we obtained interviews? We can answer this question only in terms of the data we have for all or most cases; because we have virtually no information on cases identified through the screening surveys unless we actually obtained disputant interviews, we can answer this question only for cases sampled from institutional records. Tables 12 and 13 show comparative statistics for court cases and alternative institution

[Tables 12 and 13 about here]

Table 11

Number and Type of Complete Dispute Participant Interviews

Attorneys		
	Full interviews	1,596
	Short interviews	503
		2,099
Organizational Disputants		
From the case records samples		
	Full interviews	415
	Short interviews	228
From the screening sample		
	Full interviews	113
	Short interviews	3
		759
Individual Disputants		
From the case records samples		392
From the screening sample		316
		708
Government Disputants		
	Full interviews	113
	Short interviews	145
		258
OVERALL TOTAL		3,824

Table 12
A Comparison of Survey Samples and Overall Case Sample: Courts
(percent except where noted)

	All Cases	Cases Released for Interviewing	Not Released for Interviewing	Screened Out of Interviewing	Lawyer Interviews: Long 0	Long 1	Long >1	Any 0	Any 1	Any >1	Individual Interviews: 0	1	>1	Organizations Interviews: Long 0	Long 1	Long >1	Any 0	Any 1	Any >1
Median Number of Events	10	11	8	7	7	12	16	7	11	15	11	11	14	11	13	17	11	13	21
Site																			
WI	22	20	24	38	20	19	22	21	19	20	19	24	20	19	21	47	18	20	41
PA	18	19	10	10	17	19	24	15	19	22	19	21	40	19	21	20	18	23	18
SC	18	19	27	9	20	20	18	12	21	22	19	20	20	19	20	20	19	20	13
NM	22	22	24	26	26	23	16	26	20	22	22	23	20	23	21	3	24	19	7
LA	19	20	15	17	19	20	20	25	21	15	21	11	0	20	19	2	21	18	7
Court Source																			
Federal	49	48	53	54	38	52	57	37	50	53	49	44	40	46	57	70	47	50	61
State	51	52	47	46	62	48	43	63	60	47	51	56	60	54	43	30	53	50	39
One Plaintiff	15	15	12	11	12	14	20	13	15	17	14	19	20	16	13	7	15	15	15
One Defendant	36	35	27	46	26	32	50	24	30	47	36	32	40	32	43	52	30	42	63
With Trial	9	9	8	3	7	8	13	8	7	12	9	12	0	9	11	7	9	8	11
Area of Law																			
Torts	40	41	34	28	39	40	41	33	39	49	40	50	60	42	40	40	39	46	47
Contracts	31	30	29	40	26	30	36	28	27	35	31	28	30	26	45	53	25	40	48
Domestic Rel	7	7	14	4	15	4	2	20	5	2	8	3	0	9	0	0	11	a/	0
Property	9	8	8	17	7	9	7	6	9	8	7	10	10	9	3	10	9	5	8
Regulation	10	10	22	5	6	12	13	7	12	10	11	6	0	8	19	13	8	15	9
Public Law	13	13	2	21	14	15	8	14	18	7	12	17	0	15	4	3	17	4	2
Median Duration (days)	285	307	219	173	230	322	382	218	316	356	293	356	360	295	337	270	286	332	380
One Lawyer																			
% PL Lawyer	20	21	15	12	16	20	29	15	20	25	21	23	20	21	21	17	21	22	23
% DF Lawyer	31	33	20	21	20	32	52	16	27	49	33	32	60	30	41	57	29	39	67
Number of Cases	(1649)	(1423)	(59)	(167)	(490)	(560)	(373)	(324)	(549)	(550)	(1173)	(240)	(10)	(1143)	(270)	(30)	(976)	(381)	(66)

a/ less than 1 percent

Table 13
A Comparison of Survey Samples and Overall Case Sample: Alternatives
(percent except where noted)

	All Cases	Cases Released for Interviewing	Not Released for Interviewing	Screened Out of Interviewing	Lawyer Interviews: Long 0	Lawyer Interviews: Long 1	Lawyer Interviews: Long >1	Lawyer Interviews: Any 0	Lawyer Interviews: Any 1	Lawyer Interviews: Any >1	Individual Interviews 0	Individual Interviews 1	Individual Interviews >1	Organizations: Long Interviews 0	Organizations: Long Interviews 1	Organizations: Long Interviews >1	Organizations: Any Interview 0	Organizations: Any Interview 1	Organizations: Any Interview >1
Median Number of Events	3	6	3	3	3	5	4	3	5	5	4	3	3	3	4	6	3	4	9
Institution																			
AAA	30	29	68	0	19	49	57	17	42	54	34	19	18	29	28	50	31	24	29
WI Equal Rights	8	8	0	21	7	7	13	8	6	8	7	12	0	7	10	25	6	10	29
PA Human Rights	3	4	0	0	4	3	0	5	3	0	3	5	0	3	5	0	2	6	0
SC OSHA	6	7	1	0	7	9	0	8	9	0	10	7	0	5	15	25	5	12	14
NM Employment	6	6	10	0	9	1	0	10	2	0	7	7	0	7	4	0	6	9	0
LA Contract	6	7	0	0	8	7	0	9	6	2	6	9	12	7	7	0	7	6	14
WI Green Bay Zoning	7	8	0	0	11	0	2	13	1	2	5	12	41	9	5	0	9	5	14
PA Bd of View	7	8	0	0	6	15	0	4	15	8	9	7.5	0	9	2	0	10	2	0
SC County	10	7	0	7.9	6	6	25	2	12	22	7	7	18	8	5	0	7	7	0
NM Construction	6	7	10	0	9	3	0	9	3	3	5	10	12	7	4	0	8	4	0
LA BBB	9	10	10	0	14	1	2	16	1	2	8	15	0	9	14	0	8	14	0
% 1 PL	11	11	19	0	12	9	5	11	12	8	10	12	24	13	5	0	13	6	14
% 1 DF	9	8	6	21	8	3	25	8	5	16	8	8	19	8	11	0	7	10	29
With Hearing	52	53	45	42	48	62	68	45	52	71	53	52	74	54	50	25	55	50	43
Area of Law																			
Torts	28	24	39	75	17	37	47	12	39	46	27	18	18	26	18	0	27	18	0
Contracts	35	36	52	4	37	30	45	40	26	40	33	44	35	35	39	50	36	35	43
Domestic Rel	a/	a/	0	0	0	0	2	0	0	2	0	0	6	0	0	0	0	0	0
Property	15	17	0	0	19	18	2	17	18	13	15	18	41	20	7	0	21	8	14
Regulation	36	38	23	21	44	29	13	48	30	13	37	42	24	35	46	50	34	47	57
Public Law	7	8	0	0	7	15	0	5	15	8	9	6	0	10	2	0	11	2	0
Median Duration (days)	169	178	104	99	151	232	200	149	219	200	199	157	73	175	190	342	181	168	455
PL 1 Lawyer	9	9	19	0	10	7	2	10	9	2	7	12	18	10	5	0	10	4	14
DF 1 Lawyer	8	8	6	21	7	3	25	8	5	10	7	8	18	7	11	0	7	10	29
Number of Cases	(508)	(453)	(31)	(24)	(307)	(106)	(40)	(265)	(125)	(63)	(306)	(130)	(17)	(355)	(94)	(4)	(321)	(125)	(7)

a less than 1 percent

cases, respectively, on the following characteristics: number of "events" (pleadings, motions, briefs, hearings, etc.), site/source, numbers of plaintiffs and defendants, numbers of plaintiff's and defendant's lawyers, presence of a trial or hearing, duration of the case, and the area of the law. What is most remarkable about this table is the relative lack of variation between cases with no interviews, cases of a particular type, one-interview cases, and multi-interview cases. The one trend that stands out is that the longer and more extensive the activity in the case, the greater the number of interviews we were able to get. What this suggests is that our interviews dealt with cases which are slightly bigger and more complex than the population of cases in our sample. This is important, because in Volume II we argue that the world of litigation is populated primarily by "modest" cases. If anything, the typical case is probably <u>smaller</u> than the data presented in Volume II suggest.

Several other trends shown in Table 12 are worth noting. First, few of our interviews were with participants in domestic relations cases. People tend to move after obtaining a divorce and, consequently, we had even more difficulty finding them than finding the typical litigant. More important, however, is that a large number of divorce cases were screened out at the start of the interviewing process. We were specifically interested only in cases involving disputes of property division or child custody, and this could only be determined through the interviewing process. Consequently, most domestic relations cases were released for

interviewing but many show up as without interviews because the interviews were terminated when we determined the case did not involve a dispute of the type we wanted to study. That there appear to be very few cases where we obtained more than one interview with an individual disputant simply reflects the fact that very few cases involve individuals suing other individuals.

The trends depicted in Table 13 are essentially the same as those in Table 12. The major exception involves the distribution of the sources of the cases. Although Table 13 seems to show that we had some trouble obtaining interviews for cases from certain of the alternative institutions, in fact the explanation lies elsewhere. For some of the institutions it was necessary for us to obtain permission from the participants in a case <u>before</u> we could include that case in the sample. We were not able to get such permission for many cases (mostly because we could not locate the disputant rather than because we were denied permission). For the disputants we were able to locate, the interview completion rate was very high.

Chapter 6

THE DATA ARCHIVE

We have created a data archive in order to make our rich set of materials available to other scholars. The data archive consists of 3 data files, 2 files from the screening surveys, and one large disputes file (plus 15 files containing documentation). There are 1,593 cases in the organizational screener data set and 5,202 in the household screener data set. The disputes file contains the data from the institutional records and from the main lawyer and disputant surveys, all told, this file contains data on 2,582 disputes. It has been arranged in a hierarchical format, with each case headed by a general "case record."

The file contains 27 distinct record types. The first 19 consist of data from institutional records. These records include the general "case record" (type 01) which contains general information about the case, plus a variety of information derived from the "case supplements" (record types 02 through 19); the case supplements contain specific information about demands and outcomes, and specific "events" (pleadings, motions, discovery, briefs, trials, etc.) The specific record types are:

Type	Number	Description
01	2582	General case record
02	4438	Remedies (both sought and received) coding form
03	4835	Pleading events (e g., complaint, answer, amendments)
04	849	Procedural motions

05	2353	Substantive motions
06	2166	Briefs
07	356	Discovery motions
08	1019	Depositions
09	4412	Discovery documents (e.g., interrogatories and answers)
10	1431	Affidavits
11	2882	Miscellaneous documents
12	1136	Pretrial conference
13	187	Arbitration events (court-annexed arbitration only)
14	1087	Continuance requests
15	5375	Judicial actions
16	448	Trial (or hearing for alternatives)
17	324	Post-trial events (other than appeals to higher courts)
18	93	Appeals
19	1089	Alternatives remedy coding sheet

The case supplements typically contain "who," "what," and "when" information regarding each case event.

The remaining record types contain survey data. There are two types for each survey, both identical in form. One of the record types consists of those interviews that we decided to omit from the analysis, for one reason or another, after review; typically these were interviews in which the respondent did not seem to understand what we were talking about, or interviews for which a different interview schedule should have been employed. We eventually plan to

add to the archive an additional record type for each interview (types 21, 41, 61, and 81) that will contain the derived variables (e.g., our computation of the stakes in the case). The eight record types currently in the file are:

Type	Number	Description
20	747	Individual disputant interviews
25	5	Deleted individual interviews
40	770	Organizational disputant interviews
45	5	Deleted organizational disputant interviews
60	2082	Private lawyer interviews
65	6	Deleted private lawyer interviews
80	257	Government lawyer interviews
85	0	Deleted government lawyer interviews

Data Processing and Cleaning

Extensive efforts were made to check and clean the data; nonetheless some problems remain. The two biggest problems are codes that we were unable to reconcile, and possibly inconsistent dates (e.g., events appearing to be out of logical order). Rather than blotting out these questionable data items, we left them in the data set to allow future researchers to make their own choices. We have included them in the archival materials as listings of "known errors." There was one additional problem that we did not have the time or resources to resolve. We know from debriefing our field staff that in a very small number of cases event references had not been done the way we would have liked to have had them done. Event

references are the codes on the "event supplements" that are supposed to tell which prior event would refer to its most proximate "parent," thus forming a tree-like structure. A few cases were coded in a "hub and spoke" structure, however, with an event referring to its earliest "ancestor." We have included in the "error" listing a computer run that shows (for events with 2 or more references) how many times each event in the file was referred to. Events (particularly pleadings) that are referred to many times may indicate hub and spoke coding.

Our survey subcontractor, Mathematica Policy Research, was responsible for basic cleaning of the survey data. Our own checks of those data indicated that they are extremely clean, at least for valid codes. If one looks at specific points of information for a particular case from different sources in the data, one will nonetheless observe inconsistencies. For example, in some cases where our court record data show that there was a trial, the lawyers interviewed said that there was no trial; the converse is also true. In checking out some of these inconsistencies, we found evidence that the term "trial" was being used to mean different things in different contexts. A similar example occurs in the "outcome" data; where we had interviewed lawyers from opposite sides in a case, for example, we found that the lawyers did not always agree on its specific outcome (although they were usually not far apart). We were unable to resolve these seeming inconsistencies.

The original data, particularly the institutional records data, contained substantial identifying information (e.g., case numbers,

dates, names, etc.). In the public use version of the data set we have either blanked out these items or masked them in such a way as to preserve their usefulness for analytic purposes while protecting the confidences of our respondents. The specific change of most interest to users of the data is the treatment of dates. All calendar dates were transformed to relative dates: the specific numbers that appear in the data are relative to one another (i.e., one can subtract two dates to determine the number of days between them), but employ a randomly determined "base date."

There are two other specific points about the data that the user should be aware of. As we discussed in Chapter 5, a number of interviews were conducted with short forms of questionnaires. The data records contain a field that shows which form of the interview was used. The data from these interviews were reformated into the same arrangement as the standard interviews; data fields not included in the short from contain the entry -6. Lastly, each case in the main archive is headed by a type 01 record (the "general case" record). Obviously, for cases obtained from the household and organizational screening survey, we do not have an institutional record from which to construct this information. For these cases, we inserted a dummy general case record.

There are still substantial amounts of uncoded data on the original survey forms (e.g., information on nonmonetary stakes and lawyer strategies). We have temporarily placed the questionnaires in the University of Wisconsin Archives, in the hope that we will eventually obtain the resources necessary to code these data. If and when this is done, those data will be added to the data archive.

Documentation

The data archive includes 15 separate files of information:

1. Introduction and background (i.e., this chapter of the final report)
2. Codebook for the household screening survey
3. Codebook for the organizational screening survey
4. Codebook for the individual disputant survey
5. Codebook for the organizational disputant survey
6. Codebook for the private lawyer survey
7. Codebook for the government lawyer survey
8. Listings of known errors in the data
9. Frequencies for the individual disputant survey
10. Frequencies for the organizational disputant survey
11. Frequencies for the private lawyer survey
12. Frequencies for the government lawyer survey
13. Frequencies for the general case records
14. Frequencies for the events supplement records
15. Field notes from the institutional records coding operation.

Where practicable, we have integrated frequencies into the codebooks for the various lawyer and disputant surveys. We have not integrated frequencies into the codebooks for the institutional records data or the screening surveys.

We estimate that the total documentation length for this data set is about 200,000 lines. Because it is so large, we have placed the documentation on microfiche to supplement the machine-readable version.

Chapter 7

LESSONS FOR THE CIVIL JUSTICE RESEARCH FIELD

A project of the complexity and size of CLRP is a rarity. We believe that the data we collected, the analyses we have completed and those we still hope to undertake, and the people we have trained in the course of four years, will stand as the primary contribution of the project to the field of civil justice research.

In the course of this experience, however, we all learned a number of more intangible things which should be included in the "legacy" of CLRP. In this section we briefly mention some of the lessons the team learned from our work on the project.

CLRP was a quantum leap in civil justice research. One only has to compare the "state of the art" in civil justice research prior to the project with the goals set forth in the original RFP to see this (Trubek, 1980-1). The RFP sought to take research into new areas (like costs); to secure empirical data where no prior field work had been done; and to study the interrelations of activities and institutions previously studied, if at all, in isolation. Taken together, these aspirations presented an immense challenge to the Department and the research team.

We have shown that the "costs" question raised conceptual issues that had barely been considered in the literature: these had to be dealt with prior to beginning field work. At the same time, we had to design a massive data collection effort with little prior field experience or studies to build on. No one had ever tried to

interview lawyers on questions like this, or survey the dispute experiences of the general public. No one had tried to contact parties in terminated court cases, at least on a national scale. While one could point to elements of the "courts in context" approach in prior literature, no actual empirical work had been done on the relationship between disputes in courts and those that did not reach the courts. And there was no empirical research comparing the work of different dispute processing institutions.

Given the number of unexplored questions we dealt with and new techniques we tried out, it is no surprise that we encountered many surprises in the course of the project. For example, we were simply unprepared for the problem of locating clients from court and attorney records; this problem did not show up in our pretests, yet when we went to the field with the full survey we were unable to find about half of the disputants in our court sample. Further, as the data collection effort developed, we found that we had initially devoted too much conceptual time on some issues which were much less involved than we had thought (like the effect of party relationships) and not enough on others which proved extremely complex (like the assessment of the costs and benefits of litigation). Thus once the data were in we had to initiate a new round of conceptual work before we could adequately analyze our data.

A major problem created by the scope, novelty and complexity of the task was the need constantly to readjust budgets and staffing. Our original estimate of the number and type of personnel that would be needed was wrong in many respects. We underestimated the

resources needed for questionnaire construction and the number of separate surveys that would have to be prepared. In the end, we had to use many different instruments, each of greater complexity than had been anticipated. The complexity of the data set in turn made the analysis task more difficult than had been expected. All of this affected the budget and extended the time needed to complete the work.

One of the most serious problems we faced was that of assembling and maintaining a staff adequate for a task of this nature. When we first received the RFP, we realized that no one university had the resources for a project of the scope contemplated; the result was the joint venture between USC and Wisconsin, and the subcontract with Mathematica for survey work. While these relationships worked fairly well, they imposed costs of communication and coordination. Moreover, it proved difficult to keep the institutional ties going for the full four years of the project, especially when funds became scarce and personnel changes occurred at USC.

The complexity and novelty of CLRP led to many surprises, but not all of them were negative. We learned much about conducting civil justice research that is heartening. First, we found that a great deal of useful information can be secured from court records. Secondly, we found lawyers surprisingly cooperative and were able to elicit much more information from attorney interviews than we had expected. We found that telephone interviews can be used successfully to examine complex issues of civil justice administration. When we started, we feared that lawyers would not

be cooperative and telephone survey methods would not work: CLRP shows these fears were ill founded.

Some of the most interesting results of CLRP were unexpected by-products of the work we initially undertook. For example, the screener study discussed above was undertaken simply to locate bilateral disputes for further investigation. But we quickly realized that this survey offered a way to secure information on the disputing behavior of the population, including rates of claiming, disputing and court use, never before available. This led to a major article (Miller and Sarat, 1980-1) and to two spin-off studies: (1) a followup of the respondents in the screener who had discrimination grievances, conducted by Professor Kristin Bumiller of Johns Hopkins University, and (ii) a replication of the screener survey in Australia, carried out by Jeffrey FitzGerald of La Trobe University in Melbourne (FitzGerald, 1982). The first of these spin-offs should tell us more about why so few Americans with discrimination grievances complain to third parties; the second allows us to compare our disputing experience with that of another nation.

In a sense, many of the basic "findings" of the study are themselves surprises. As the reader will see from Volume II, the picture we draw of the world of litigation in America is at odds with much of the conventional wisdom. One of the most important discoveries is the prevalence of "negotiated justice" in civil litigation. That is, we found that most civil cases were resolved primarily by bargaining between the parties, often aided by some

informal mediation by judges. This finding has caused us to reassess some of the contrasts between litigation and "alternatives" with which we began the study. A second is the modest nature of the typical civil case in our sample: we found cases involved less money and were less procedurally complex than anticipated. This finding leads us to question some of the literature on the "costs" of litigation.

These surprises--positive and negative--led to many changes in the original research design, and to a substantial increase in the budget. The Department was quite flexible about all this, at least until we reached the stage of data analysis. Having spent over three-quarters of the budget to complete data collection, we found we had inadequate funds to carry out all the major analyses we'd hoped to do, and could get no further funds for analysis. This Report contains all the studies we were able to do with the resources we received. Much has been done, as we hope to show in the next two volumes. But more remains to be done if and when funding is available.

When CLRP was initiated, the policy of the Department of Justice seemed to be based on a view that social science research on civil justice could be of substantial benefit to policymakers. The Department recognized that there was a need for research on civil justice at the national level, and that within the federal government DOJ had a responsibility to contribute to the growth of a civil justice research field. CLRP and many other projects were initiated to implement that policy.

We think the policy which the Department initially adopted was the proper one. We believe that the studies CLRP has produced and the data we have collected demonstrate the soundness of the initial judgment. However, we do feel that there were errors in the strategy followed during the years in which the Department gave priority to the creation of a field of civil justice research. These errors became apparent during the life of CLRP, which was the largest and the most ambitious of the projects undertaken during this period.

The mistake we think that was made was to overestimate the capabilities of the research community and underestimate the time that was needed to build a viable support base for policy studies. When CLRP began, civil justice research was a very modest enterprise at best. Few people had the "craft skills" needed to conduct empirical research on these matters, and the body of available theoretical work was limited. There was a mismatch between the areas of theory development and the areas of most urgent policy concern. There were few centers of research on this topic, and none had experience in large, complex studies of the civil justice system.

Compare the situation in criminal justice research. The field of criminology is one of the oldest areas of policy-related social research. There have been academic centers of criminological research, particularly in academic settings, for several generations. The federal government spent millions of dollars over a long period of time to support research in this area. It was optimistic to expect that in a few years a parallel tradition in

civil justice studies could be developed, exclusively on the base of specific projects and contracts, either large or small.

Our experience in CLRP leads us to believe that the original goal was the right one, and to lament the apparent decision of the Department to abandon its commitment to the civil justice field. At the same time, we have learned how hard it is to go from an idea and a general set of concerns to completed studies which can speak directly to policymakers. To achieve this all of us, government and researchers alike, must make a more long-term and sustained commitment. If that occurs, we believe the CLRP experience will provide useful insights to how to proceed, and the CLRP studies and data will point the way to the needs of the future.

Notes

1. For a discussion of OIAJ see Sarat (1981).

2. Small claims courts are but one example; mandatory arbitration is another.

3. For one effort see Cook, et al. (1980).

4. For an interesting exception see Danzig (1978).

5. See Black (1973). For empirical confirmation see Miller and Sarat (1980-81).

6. See Trubek (1980-81a).

7. For a particularly influential treatment see Danzig and Lowy, (1975). See also Harrington (1982).

8. This approach can also create a technical problem if more than one participant in a particular dispute is interviewed: respondents are not selected independently of one another. Most statistical procedures require an assumption of "independent random sampling," and this assumption will be violated if "respondent" is used as the unit of statistical analysis. This problem must be considered on an analysis-by-analysis basis, since it may not arise in many specific analyses; where it does arise, the technically correct solution is to select randomly one respondent from each case where there were multiple respondents.

9. A retrospective study always involves recall problems. Not only are respondents' memories clouded by the passage of time, but they are also likely to be colored by what happened later in the dispute. Thus, while we would have preferred to examine specific <u>decisions</u> made by the disputants, our focus necessarily was on various dispute <u>events</u>; we believed that recall of events would be clearer than recall of decisions or attitudes which may never have materialized.

   There is an obvious advantage to studying the dispute process as it unfolds. The mechanism for this is a panel study. But the problems of such a study are substantial: contact between researchers and disputants might affect the course of the dispute; respondents might be less willing to discuss an ongoing dispute than one that is over and done with; and research ethics might be compromised if the researcher, even inadvertently, conveys confidential information about one side to the other.

10. This belief is based on the assumption that, with the exception of length of processing time, the clusters are extremely heterogeneous. We have found nothing that would lead us to believe otherwise.

11. The household was the aggrieved party in most cases for several reasons. Fully twenty-two of the thirty-three specific problems for which we probed were household grievances by their nature; eight could involve a grievance both of and against the household, and three involved grievances against the household. This apparent bias largely reflects our focus on disputes arising from members acting in a private nonbusiness capacity. It also reflects our methodological expectation that households would underreport grievances against themselves, an expectation that seems to have been accurate. For example, 2.8 percent of the households reported some property damage or personal injury other than auto accidents "through the fault of someone else" which involved over $1,000. In contrast, only 0.5 percent reported that a household member had "been accused of injuring anyone or of damaging someone else's property, either accidentally or on purpose."

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