

MEDIATION AND COURT CONGESTION IN TEXAS:
1980-2010 EMPIRICAL DATA

A Dissertation

by

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ABSTRACT

Problems in the U.S. legal system became a significant public issue during the 1970s and 1980s; “court congestion” was one of these. Alternative processes (Alternative Dispute Resolution, or ADR) were proposed as a major component of legal reform, and ADR programs were established in several jurisdictions. In Texas, ADR legislation was enacted in 1983 and 1987. Since then, ADR (primarily mediation) has become widely practiced in many areas of the state. Data collected by the Office of Court Administration which includes the type of case, the number of cases filed, and the type of disposition of the case for district courts in Texas is used to determine whether ADR has been effective in reducing court congestion in Texas. The results fail to show a significant impact from ADR. ADR continues to enjoy wide support, however, and this apparent contradiction between the empirical results and the acceptance of ADR is explored. Theoretical concerns are also discussed. ADR may be addressing more fundamental goals than merely reducing litigation.

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I. INTRODUCTION

Background

Alternative Dispute Resolution (ADR), or the settlement of disputes between two or more parties without use of the traditional courts, has become an important part of the U.S. legal system. Both of the two most common forms of ADR, arbitration and mediation, have long been used throughout history, including here in the U.S. However, a 1987 edition of one casebook noted that "Ten years ago, most American lawyers would have associated mediation with international or labor relations disputes, and probably confused it with arbitration."¹ It is a new trend--one that is still evolving. Despite its youth, however, ADR has rapidly spread to many jurisdictions.

Most commentators date the beginning of ADR to 1976 and, more specifically, to a speech by Frank Sander. The event was an important professional gathering of leaders in the legal field: "The Pound Conference." To put ADR into the proper perspective, then, one must understand the situation of the legal system in 1976. Criticism of the effectiveness and relevance of many political and government institutions had been growing. Social unrest had been fostered by racial tensions, the Vietnam War, the "sexual revolution," the spreading use of recreational drugs, and other traumatic changes in society.² At the same time, the lack of respect for the

¹ L. L. RISKIN & J. E. WESTBROOK, *DISPUTE RESOLUTION AND LAWYERS*, 84 (Abridged ed., 1988).

² *See, e.g.*, J. HASKINS & K. BENSON, *THE 60s READER* 1 (1988) (describing the 1960s as a decade of division, confusion, and waves of social movements); R. R. JONES & G. L. SELIGMANN, *THE SWEEP OF AMERICAN HISTORY* 589 (1974) (noting that during the 60s there was "widespread revolt against the accepted values and institutions of middle-class American society"); R. A. DIVINE *et al*, *AMERICA PAST AND PRESENT* (2011) (Chapter 16 is titled: "Years of Turmoil, Years of Change, 1969-1980").

“establishment” by some elements of society extended to the legal system: it was viewed as a tool for the oppression of the politically weak. There had also been a significant increase in the demands put on the legal system, especially in terms of the number of disputes. The legal system had been trying to cope with a sharp increase in legislation during the 1950s and 1960s, and this growth seemed to be continuing. The general consensus, therefore, was a "litigation explosion" which exacerbated flaws that had existed all along.

The Pound Conference was intended to address these issues. And why was it called the Pound Conference? For that, one must go back even further, to 1906. The setting of the 1906 event was anything but auspicious -- an annual gathering, basically a convention, of the American Bar Association, held that year in St. Paul, Minnesota. As one would expect, the list of speakers included respected members of the legal profession. Among those slated was Roscoe Pound, the “phenomenal” Roscoe Pound, “an expert on every legal system and on all branches of Anglo-American law,”³ the future Dean of the Harvard Law School, who was widely regarded as the finest legal scholar in the country at that time. So it is unlikely that anyone suspected that his address would be anything other than a scholarly lecture on some aspect of the law.

The title of Pound's speech is "The Causes of Popular Dissatisfaction with the Administration of Justice." Pound begins innocuously enough, “Dissatisfaction with the

³ A. L. Goodhart, *Roscoe Pound*, 78 HARV. L. REV. 1, 27 (1964).

administration of justice is as old as law."⁴ And then, as he works his way through the history of the usual grievances, his observations become more pointed. One list of the abuses in legal administration amounted to 155 items, this from the *Mirror of Justices*. And one of those 155 abuses is that judges are no longer executed for corrupt or illegal decisions.⁵

Pound's concern is that dismissing the criticism as nothing more than the usual complaints would lead to overlooking the real and serious deficiencies of the day. He then begins a detailed examination of those deficiencies. He has four major categories that he discusses, in turn. The first is criticism or dissatisfaction with any system. These are problems that are common across the board, and so they are to be found in the American legal system as well as others. The second group of criticism is the flaws that are peculiar to the American legal system, the ones related to the characteristics that distinguish it from others. The third group of problems is due to the structure and procedures of the legal system. And the fourth set of flaws comes from what he calls the environment of the judicial administration.⁶

The reaction from the audience was "mixed."⁷ Pound's speech was considered, by some, as an unconscionable attack on an institution and profession that had been constructed through centuries of wisdom. Another commentator notes "a cool"

⁴ R. Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*. 10 *Crime & Delinquency* 355, 355 (1964).

⁵ *Id.* at 357.

⁶ *Id.*

⁷ R. E. Lee, *The Profession Looks at Itself: The Pound Conference of 1976*, 1981 *BYU L. REV.* 737, 737 (1990).

audience.⁸ The speech was a shock -- shock that such an imminent personage as Pound was the one who gave voice and, therefore, credence to the popular complaints. It was a coming-of-age moment, when the country's greatest legal mind was confident enough to subject the legal system to a harsh self-critique. It was "the first truly comprehensive, critical analysis of American justice and of problems that had accumulated in the first 130 years of our independence."⁹ Pound's speech did find willing ears among enough of the bar, however, to spark "decades of reform."¹⁰ It is now considered to be the most influential speech/paper by an American legal scholar. Time, then, has cast Pound's contribution in a favorable light.

It was no accident that threescore and ten years later, in the same forum and at the same podium that Roscoe Pound used for his address, another national law assembly was held. The 1976 conference was the result of careful planning by leaders from the bar, the Chief Justices of the various states, the U.S. Judicial Conference, and, behind it all, was the Chief Justice of the U.S. Supreme Court, Warren Burger.

Burger had started organizing the conference at least a year earlier with the idea of continuing the Pound legacy and addressing the "unfinished business."¹¹ Burger called it the "first time that the chief justices of the highest state courts, the leaders of the federal courts,organized Bar, legal scholars,have joined forces to take a hard

⁸ B. McAdoo & N. Welsh, *Does ADR Really Have a Place on the Lawyer's Philosophical Map?* 18 *HAMLIN J. PUB. L. & POL'Y* 376, 376 (1997).

⁹ W. E. Burger, *Agenda for 2000 A.D.: a need for systematic anticipation*, 15 *Judges' J.* 27, 27 (1976).

¹⁰ R. T. Shepard, *Introduction: The Hundred-Year Run of Roscoe Pound*. 82 *Indiana Law Journal* 1153, 1153 (2007).

¹¹ E. A. Tamm & P. C. Reardon, *Warren E. Burger and the Administration of Justice*, 1981 *BYU L. Rev.* 447, 512 (1981).

look at how our system of justice” performs.¹² Burger had orchestrated the conference in such a way to focus not just on the problems, but also to suggest solutions. The most important solution came in the form of Professor Frank Sander’s speech.

Once again an outstanding legal scholar takes to the podium, and his speech triggers widespread reform throughout the legal community. Sander’s speech has been called the “big bang”¹³ of ADR. In his speech, Sander readily admits to the problems of the judicial system, and he observes that the traditional litigation system is equipped to effectively deal with only certain types of disputes. Other types of disputes would be better served by other methods, and so the ideal courthouse would take the incoming disputes, sort them, and send them to the most appropriate method. Thus, the concept of the “multi-door” courthouse was born.¹⁴

At the time, the concept of alternative dispute resolution was much more "alternative" than today. Sander’s speech gave the idea legitimacy. And all leaders of the legal community understood, only too well, that these suggestions had the blessing of the highest authorities in the land. Sander’s 1976 speech referred to multiple modes of dispute resolution, but they have been grouped together under the ADR umbrella since the earliest years. Even in later assessments of the progress of ADR and its future

¹² Burger (1976), *supra* note 9, at 27.

¹³ M. L. Moffitt, *Special Section: Frank Sander and His Legacy as an ADR Pioneer: Before the Big Bang: The Making of an ADR Pioneer*. 22 NEGOTIATION J. 437, 437 (2006).

¹⁴ *Id.*

prospects, Sander continues to make little distinction between mediation and binding arbitration, for example.¹⁵

The “dissatisfaction” of 1906 and 1976 share much in common, yet there are some clear differences. Pound’s 1906 critique was broad in nature, with multiple causes giving rise to several manifestations of disrespect of the law. The 1976 analysis, while presented within the same general framework as Roscoe Pound’s analysis, was much more pointed – it reflected a dissatisfaction on the part of the legal system within itself. Specifically, the specter of increasing caseloads was perceived by jurists and by others as the main threat. This overriding concern by the master architect of the 1976 Pound Conference, Chief Justice Warren Burger, is emphasized by his calling for fundamental changes.¹⁶

ADR, then, was intended from the start to be an important addition to the U.S. system of justice. It is the modern label applied to what is an old, informal technique. Many references to extra-judicial dispute settlement can be found in the historical records. Often these references include the common practice by ethnic or religious groups of settling disputes among group members by informal procedures within the group community.¹⁷ References to this type of community dispute resolution are often used to support the argument that ADR is preferable in some respects to court

¹⁵ J. R. Sternlight, *Is Binding Arbitration a Form of ADR: An Argument That the Term ADR Has Begun to Outlive Its Usefulness*, 2000 J. DISP. RESOL. 97 (2000).

¹⁶ W. E. Burger, *Annual Report on the State of the Judiciary*, 69 A.B.A. J. 442, 445 (1983).

¹⁷ K. KOVACH, *MEDIATION IN A NUTSHELL* 21-22 (2010).

adjudication. The important point, however, is that ADR is new in that it represents a different approach to dispute resolution. It is an old procedure with a new name.

Sander had to educate his audience about the characteristics of ADR, and his concern is well-taken. The general nature of ADR is fundamental for understanding how this process works and, thus, what the research parameters are. The basics of ADR are simple: third party intervention in settling disputes. This is obvious from the long history of ADR. Along with a new name, though, ADR has also acquired more structure as it has evolved from informal procedure to an institutionalized process. ADR encompasses several distinct forms, including, but not limited to: arbitration, mediation, mini-trial, moderated settlement conference, and summary jury trial. This list is not exhaustive nor definitive--it is merely a description of the more common processes.

There are several other ways to categorize dispute resolution processes. One way is by consent. Traditional court proceedings are non-consensual in that a party may be required to submit to the authority of the court. Some ADR processes, like arbitration, may be non-consensual in that one party may prefer a different forum, but pre-dispute agreement or court rules may specify that the party must submit to the ADR process. The ADR procedures that are typically considered to be consensual include mediation, moderated settlement conferences, pre-trial conferences, etc. These procedures are different from non-consensual ones in that in each the resolution of the dispute must be acceptable to both disputants.

Proponents of ADR cite several advantages.¹⁸ The primary advantages to the disputants are:

- ADR is less expensive than regular litigation
- ADR is quicker
- ADR offers more control over the outcome in that each disputant may choose which element on which to compromise.
- ADR fosters the repair or development of a working relationship between the disputants, which may be important if some relationship is expected to continue.

There are also advantages to the sovereign (state):¹⁹

- a reduction in court congestion
- a reduction in judicial branch expenditures
- an increase in the access to justice by state citizens
- an improvement in the quality of justice (associated with the control and relationship factors above)

Table 1 lists the states that enacted ADR legislation during the 1980s. It took five years after the Pound Conference (the 1976 "start" of the ADR movement) for the first state, New York, to adopt ADR in 1981. The next five years saw only five more states added to the list. By 1989, 14 states had ADR legislation in place.

¹⁸ Id. at 38 (listing eight advantages: 1) time and cost savings, 2) confidentiality and privacy, 3) self-determination, 4) authorizing and acknowledging feelings and emotions, 5) opportunity for preserving relationships, 6) potential for creative solutions, 7) process flexibility and informality, and 8) avoidance of legal precedent).

¹⁹ Few commentators compile lists of benefits to the state, but these four advantages are implicitly recognized as beneficial to the state.

TABLE 1: STATES WITH COMPREHENSIVE ADR LEGISLATION, 1980s

STATE	YEAR OF ADOPTION
Colorado	1983
Florida	1985
Hawaii	1989
Illinois	1987
Iowa	1985
Michigan	1988
New Jersey	1987
New York	1981
Ohio	1989
Oklahoma	1983
Oregon	1989
Texas	1987
Virginia	1988
Washington	1984

Mediation/ADR in Texas

The fundamental Texas statute governing ADR and mediation gives the state policy regarding alternative dispute resolution:

It is the policy of this state to encourage the peaceable resolution of disputes, with special consideration given to disputes involving the parent-child relationship, including the mediation of issues involving conservatorship, possession, and support of children, and the early settlement of pending litigation through voluntary settlement procedures.²⁰

The statute also defines mediation.

(a) Mediation is a forum in which an impartial person, the mediator, facilitates communication between parties to promote reconciliation, settlement, or understanding among them.

²⁰ Chapter 154 of the Texas Civil Practice and Remedies Code, Section 154.002

(b) A mediator may not impose his own judgment on the issues for that of the parties.

(c) Mediation includes victim-offender mediation by the Texas Department of Criminal Justice described in Article 56.13, Code of Criminal Procedure.²¹

Mediation differs from arbitration in that the mediator does not fashion the settlement. Mediation also differs from other forms of ADR in that “pure” mediation places the emphasis on the process. Mediation focuses, too, on the feelings and interests of the parties rather than legal issues. It looks to the future and how the parties’ relationship may evolve and continue rather than looking at the past to assign fault. Perhaps the most basic tenet of mediation is that the parties (disputants) are in control of negotiation, and the mediator is in control of the process. Since the parties’ participation must be voluntary and in good faith, mediation is not always successful. When it is, however, it can lead to effective agreements and the avoidance of future conflict.

The mediator and the process are the keys to successful mediation, Most of the literature and studies focus on the role of the mediator, mediator behavior, and mediation models. The reason for the focus on the mediator is that he or she is in control of the process, and it is the process that leads to a resolution. A few of the important functions the mediator may play are:²²

²¹ Id. at Section 154.023

²² Like the advantages of ADR, commentators have their lists. *See, e.g.*, RISKIN & WESTBROOK, *supra* note 1, at 92 (listing 12 mediator roles: 1) urging parties to communicate, 2) helping parties understand the process, 3) conveying messages, 4) helping parties to agree on the issues, 5) setting the agenda, 6) provide an appropriate environment, 7) keeping order, 8) helping parties to understand the problems, 9) identify unrealistic expectations, 10) helping parties devise proposals, 11) assist with negotiations, and 12) persuade parties to accept a particular solution).

- an environmental control device to keep the atmosphere civil,
- a playing-field leveler to ensure that the process is fair and that each party has a chance to participate in the process,
- a lightning rod to absorb some of the accusations/hurt that the parties would otherwise direct towards one another,
- a reality check to assist the parties in objectively evaluating their expectations, and
- a fresh look to suggest or explore alternatives which may not be apparent to the parties.

There are several dimensions involved in mediation. There are different mediation “versions,” settlement strategies, and mediator styles.²³ Some terms are relatively common, such as the community or neighborhood justice model, the caucus model, and the conference model. The community or neighborhood justice model is designed primarily for interpersonal disputes in which continuing, significant personal relationships are involved. Neighbors, friends, and family members may be involved, so there is a need for improving the relationships among the parties.²⁴

The caucus model is a type of shuttle diplomacy. The disputants meet privately with the mediator to discuss settlement or resolution terms. The mediator can speak with the caucus party more directly and can elicit confidential information. The conference model is also settlement-oriented, but there is a greater use of joint meetings with all disputants.

²³ S. S. Silbey, & S.E. Merry, *Mediator Settlement Strategies*, 8 LAW & POL’Y 7, 8-25 (1986).

²⁴ See G. Pavlich, *The Power of Community Mediation: Government and Formation of Self-Identity*, 30 LAW & SOC’Y REV. 707 (1996).

Mediation may occur at any stage of the dispute. It commonly occurs after a lawsuit has begun (after filing and citation) but before trial begins. Mediation may be court-ordered: the judge determines the case might settle in mediation and orders the parties to attempt mediation before trial. Mediation may also be required by prior agreement.

The possible outcomes are: the parties reach full agreement (settlement), they reach partial agreement, or the parties fail to agree. In the event of failure, there may be further mediation efforts before resorting to court. If the mediation was court-ordered, the mediator usually reports back to the court whether the case was settled or not.

The mediation process is a confidential one. This confidentiality belongs to each of the parties, so either one may assert his right to keep all communications and disclosures confidential. The confidentiality is one of the key incentives to mediation. Far better to discuss these matters in front of the mediator (who is prevented from disclosing them) than to air them in open court. Confidentiality is a bar, however, to gathering data.

Organization and Hypotheses

The organization of this study is as follows. The next section summarizes the important issues in the literature. ADR does not belong exclusively to any one field, and the literature reflects the diversity and overlap. Section III describes the data more fully. One important contribution of this research is the richness of the Texas district data. Section IV discusses the theory that has been developed. Although relatively scant compared to the vast literature on the practice of ADR, especially mediation and

arbitration, the theory provides a basis for a more complete understanding of this phenomena. Section V outlines the method of analysis. Section VI explains the analysis of the filings and dispositions. Section VII discusses the theoretical implications of the results. Section VIII concludes and gives recommendations.

In summary, this study uses court data to examine the claim that ADR reduces court congestion. The specific ways that court congestion is reduced is:

- Fewer disputes are filed with the court system,
- More disputes in the court system are settled by ADR without formal adjudication, and
- Concomitantly, there are fewer trials (adjudications).

The formal hypotheses, then, are:

- Null Hypothesis #1: The disputes filed with the courts have not declined because of ADR.
- Null Hypothesis #2: The number of disputes settled without formal adjudication (trial) has not increased because of ADR.
- Null Hypothesis #3: The number of disputes in the court system resolved by trial has not declined because of ADR.

II. LITERATURE

Conflict

There are several strands of literature relevant to this research. Since dispute resolution presumes a dispute, it is appropriate to begin with a review of conflict theory. Conflict in the theoretical literature can be defined in different ways. One definition is simple: the existence of incompatible interests, as in a disagreement or competition.²⁵ A better definition, though, is that conflict “is the interaction of interdependent people who perceive incompatible goals, and interference from each other in achieving those goals.”²⁶

The first definition is broad; the existence of incompatible interests would encompass most situations. Parsing the second, narrower definition specifies the following four elements: 1) interaction, 2) interdependence, 3) perception of incompatible goals, and 4) interference. These requirements restrict the concept of conflict to include just those situations in which a person’s goals are adversely impacted by interactions with others. In other words, the actions of one of the parties must have negative consequences for the other. Besides requiring at least two participants, a conflict also has two aspects of interaction: a mixture of cooperation and of competition.²⁷ And, of course the qualifying term in the definition, the term “perceive,” also allows for the situation where the conflict is resolved once the parties come to a better understanding of each other’s goals.

²⁵ J. P. FOLGER, M. S. POOLE, & R. K. STUTMAN, *WORKING THROUGH CONFLICT: STRATEGIES FOR RELATIONSHIPS, GROUPS, AND ORGANIZATIONS* 4 (1997) (citing C. F. Fink, *Some conceptual difficulties in the theory of social conflict*, 12 J. CONFLICT RESOL. 412 (1968).

²⁶ Id. (citing J. L. HOCKER & W. W. WILMOT, *INTERPERSONAL CONFLICT* (1985).

²⁷ Id. at 5.

The interaction aspect of the definition gives rise to two basic types of interaction: productive and destructive. Interaction is deemed productive if it promotes the benefits mentioned above. On the other hand, if the interaction makes the benefits more distant, such as escalation, avoiding the issues, and a general hardening of the disputants' positions, the interaction is destructive.²⁸ The key, then, is how the parties in a dispute interact -- how they attempt to bolster their own goals, how they deal with the goals of the adverse party, and their general choice of strategies and behaviors.

Conflict is usually regarded as being negative, or destructive, but it also may produce some benefits, too. The positive aspects of conflict have been noted as including: 1) addressing important issues, 2) sparking new and creative ideas, 3) allowing the venting of frustrations and tensions in less-harmful ways, 4) strengthening relationships, 5) promoting the evaluation and description of goals and missions, and 6) improving social justice and equity. Conflict, therefore, should be viewed as normal and healthy.²⁹ There are several different theoretical approaches in conflict literature. The traditional approaches include: the psycho-dynamic perspective, field theory, experimental gaming research, the human relations perspective, and intergroup conflict research. A brief survey of the main, traditional approaches begins with the psycho-dynamic perspective, which is a product of Freud's psychoanalytic theory. The fundamental premise of this perspective is a "hydraulic model of human motivation."³⁰

²⁸ Id. at 8-9.

²⁹ Id. at 1.

³⁰ Id. at 14.

The psychic energy in the mind must be released, and psycho-dynamic theory describes the mechanisms for controlling and directing this energy. The components of the mechanism are: the id, the source of the energy; the superego, which constrains the energy by means of a value system; and the ego, which mediates the first two components. When a conflict develops, two impulses are generated – the aggressive impulse and anxiety. The psycho-dynamic perspective, therefore, explains the aggression and anxiety that accompanies conflict. It shows the importance of substitute activities, displacement, scapegoating, and inflexibility, plus it incorporates the concept that the unconscious or subconscious plays a major role.³¹ Studies have shown that even pre-verbal infants form a type of implicit knowledge, often based on perceived intent, which continues to affect thought, expectations, and responses throughout adulthood.³²

The field theory approach conceptualizes conflict within the framework of “climate.” The individual, when responding to conflict, is affected by different “fields of force.”³³ There are goals, barriers, and requirements. An important characteristic of this theory is how the individual perceives his environment in the psychological sense. The competitive nature of conflict depends on how the individual views his interdependence; the individual’s trust, attitudes, beliefs, and other perceptions provide a feedback, re-enforcing or influencing themselves and how the individual interacts.³⁴ This perspective

³¹ Id. at 18.

³² See Boston Change Process Study Group (BCPSG), *The foundational level of psychodynamic meaning: Implicit process in relation to conflict, defense and the dynamic unconscious*, 88 INT’L J. PSYCHOANALYSIS 843 (2007).

³³ FOLGER *et al*, *supra* note 25, at 19.

³⁴ Id. at 21.

emphasizes the importance of interdependence in conflict.

Another approach to conflict involves two related perspectives: the social exchange perspective and experimental gaming. Both perspectives are based on two assumptions. The first assumption is the interdependent nature of conflict, and the second assumption is that the individual's behavior is affected by rewards and costs.³⁵

The social exchange perspective claims that the guiding principle for individuals is self-interest and that, in interacting with others, the rewards and costs of that interaction are evaluated by the individual in terms of their self-interest. In essence, individuals exchange resources by interacting, and this exchange is expected to result in acceptable outcomes: behavior on the part of the other individual that is consistent with the first individual's self-interest. Conflict arises, then, when the other individual is blamed for unsatisfactory outcomes – when the other person is preventing his self-interest from being achieved.³⁶

Social exchange and the experimental gaming research perspective use concepts that are shared by economics. These perspectives view conflict, and all interaction, as a strategic game in which one individual's behavior depends on the expected behavior of the other, interacting individual. One advantage of the experimental gaming research is the insights available from applying game theory to the processes involved in conflict. Social exchange and experimental gaming research both focus on the strategies used by individuals in conflict situation. Both observe the series of behaviors, moves, and

³⁵ Id. at 22.

³⁶ Id. at 23.

counter-moves that are often observed in conflicts and recognize that the rewards and costs are interdependent: that effect of the moves and counter-moves on the relationship is of great importance.³⁷

Another approach to conflict, the human relations perspective, has developed within the context of organizations and communication within organizations. It focuses on the work group, the arena in which most significant interactions take place, and on what is considered to be the most important work relationship: the superior-subordinate relationship. This approach also identifies familiar patterns and behaviors that individuals use. These behaviors are based on two factors: assertiveness (which is related to the pursuit of one's own interests) and cooperativeness (which is related to the satisfaction of the other individual's concerns). Several categorical styles of behavior that combine the two factors include: competing, accommodating, avoiding, collaborating, and compromising. There are value judgments associated with these styles, and so this approach yields a prioritization of behaviors. In practice, though, there is no need of making value judgments since there may not be a single, "proper" way to resolve conflict.³⁸

The last approach in this survey of the traditional perspectives is the intergroup conflict research. This approach views conflict as inherent in the different characteristics of groups. Researchers in this area have used social categorization to investigate how individuals view themselves by identifying the groups with which the individuals claim

³⁷ Id. at 29.

³⁸ Id. at 33.

to belong. The assumption is that there are natural conflicts between different groups. It is, basically, a have/have-not distinction. Rich/poor, liberal/conservative, and other divisions give rise to group differences, which in turn become conflictual in nature. Usually, the differences can be related to economic or political differences, but the basic idea is that group identity, by itself, creates differences (and conflict) between groups. The differences lead to polarization between the groups on certain issues, and then to stereotyping – a movement to “we/they” situation. After time, the issues/attitudes become entrenched, and there is a self-fulfilling prophecy in that the “we/they” becomes integral to the group identity. This approach is useful to understanding the dynamics of some aspects of conflict that exert a strong influence on the individual – in many cases this influence may be a barrier to resolving the conflict.³⁹

In addition to the traditional approaches, there are several more modern approaches and refinements.⁴⁰ Noting the number of approaches that have been developed is relevant in that there are many different ways to characterize conflict. There is no single, exclusive theory that applies to a particular situation; several perspectives are possible, with each one providing some insight into the conflict.

Regardless of the multiplicity of theoretical approaches, the management of conflict is, necessarily, closely tied to the communication aspect of any attempt at resolution. An example of the application of this communication framework that is often

³⁹ Id. at 34-37.

⁴⁰ See, e.g., J. Rothman & M. Albertstein, *Individuals, Groups and Intergroups: Theorizing about the Role of Identity in Conflict and its Creative Engagement*, 3 J. DISP. RESOL. 631 (2013) (theoretical work on the role of identity in conflicts).

crucial to ADR and mediation is “face.” Again, there are different definitions, but the central concept is that “face” is the party’s desire “to be seen as a certain kind of person.”⁴¹ Face is central to the self-identity of a person and is intimately bound to the emotional aspect of the conflict. Positive interactions in a conflict, then, respect the parties’ identities and are not threatening, while a destructive attack is an attempt to humiliate the other party. “Face” is just one aspect of conflict resolution that can be the crucial element to a voluntary settlement of a dispute, so a fuller discussion of “face” can serve to illustrate the social/psychological problems that can be a deciding factor in disputes and settlements.

“Face” is a mix of three basic identity needs: acceptance/belonging (fellowship face), value/respect (competence face), and freedom from being controlled by others (autonomy face). Interestingly, “Face” is also dependent on the cultural/social environment. “Face” in China, for example, comes in two distinct forms: one relating to something akin to integrity, and the other corresponding to a social standing. “Face” can be highly contextual, then, in that the characteristics of the parties may be very important aspects of the issue of “face.”⁴²

A loss of “face” is often the result of an attack by the other party. To “lose face” is to have one’s identity challenged or ignored, as when a person is shamed or humiliated. It can also be the result of a mistake that becomes known to the other parties (competence), or even when chance circumstances seem to conspire against one of the

⁴¹ FOLGER *et al*, *supra* note 25, at 128.

⁴² *Id.* at 127-129.

parties.⁴³ “Face-saving” is a defensive behavior after loss of face or after an attack on one’s face. The identity, or “face,” of the parties is also an integral aspect of how the parties manage to “give a little” in the negotiations (or mediation) in order to reach a compromise. Folger notes that “face,” especially when there are attacks or loss of face involved, can become major issues in the conflict.⁴⁴ If “face” becomes important, it can change the climate of the interaction into a destructive rather than positive one and makes the parties more inflexible in their positions. Face, then, can become the controlling factor in the process and prevent any potential agreement.⁴⁵

The concept of face is but one of the crucial issues to cooperative problem-solving, and it is linked to several strategies and behaviors. These include the positive behaviors regarding face, or “face-saving.” Face-saving includes the type of interaction which supports or contributes to the other party’s face.⁴⁶ Face-saving interaction can be broken-down further, and the detailed aspects of face-saving behavior is, as one would expect, just as complex as the other aspects of face. One important point is that the way in which the parties interact can be viewed as identifiable strategies and behaviors affecting face, and that these can serve as warnings (markers) that the specific interaction behaviors are positive or destructive.

Interaction involves communication, including nonverbal communication. If the interaction (or communication) is positive (designed to resolve conflict), then it is called

⁴³ Id. at 129.

⁴⁴ Id. at 135.

⁴⁵ Id. at 137.

⁴⁶ Id. at 136-138.

“person-centered.” These communication behaviors incorporate the psychological viewpoint of the other person to anticipate the likely response or behavior of the other person. If, instead, the interaction of the parties ignores or fails to incorporate the perspective of the other party, perhaps focusing on the other issues or the initial roles, the interaction is termed “position-centered.”⁴⁷

Another frequent aspect that is mentioned in the literature is “venting.” The expression of anger, or “venting,” is sometimes viewed as cathartic and, possibly, beneficial, and so the mediator may allow a disputant to “vent” (in caucus, preferably) as part of his role. Emotions are part of the dispute; addressing the emotional intelligence problems is necessary to advance negotiations.⁴⁸

Another aspect of communication, the actual choice of words used, has been the subject of recent research. The closer the match of language style, the greater the amplification of interests, which can be either good or bad. In dating, matched language styles will predict more successful results, but in conflict negotiations, the closer the language styles the more likely that the negotiations will fail.⁴⁹

In summary, conflict, disputes, and settlement may often be more a clash of personalities, communication failures, and self-image issues such as “face” rather than costs and damages. Most ADR professionals and the literature make a point of acknowledging the emotional aspects of the dispute resolution process. A complete

⁴⁷ Id. at 147-151.

⁴⁸ L. S. Schreier, *Emotional Intelligence and Mediation Training*, 20 CONFLICT RESOL. Q. 99 (2002).

⁴⁹ M. Krakovsky, *The Words That Bind: Deal or No Deal?* DISCOVER, Nov. 2013, 28, 30.

understanding of litigation and settlement must include the basic “human” aspects of conflict.⁵⁰

Why Litigate?

The next important issue is why people in conflict turn to litigation instead of working cooperatively to resolve the conflict. There are different ideas about the particulars of the motive for litigation, but the basic rationale is that litigation occurs if a cost-benefit analysis predicts a positive result. Spier expresses the decision as “the expected gross return from litigation...exceeds the cost of bringing the case to trial,” but notes that other considerations (such as the impact on future litigation, business reputation, etc.) may be significant.⁵¹ Gould explains litigation based on wealth and utility, but the same motivating factor: increasing the wealth/utility of the plaintiff is subsumed in his analysis.⁵² Another scholar uses the same foundation and adds that the expected return can be increased by additional investment: “...each select a level of resource inputs that maximizes his expected utility in the event of a trial.”⁵³

Additional notions include Posner’s characterization of the court system as a part of the market for judicial services,⁵⁴ which continues to assume a positive value or benefit that can be gained by the plaintiff. The concept of dispute resolution as a service

⁵⁰ See A. DAMASIO, *DESCARTES’ ERROR: EMOTION, REASON, AND THE HUMAN BRAIN* (1994) (Medical findings are that, without the capacity to feel emotion, the mind can function intellectually, but it is not able to make good decisions).

⁵¹ K. E. Spier, *Litigation*, 259 at 264 in A. M. POLINSKY & S. SHAVELL, *HANDBOOK OF LAW AND ECONOMICS* (Elsevier, 2007).

⁵² J. P. Gould, *The Economics of Legal Conflicts*, 2 J. LEGAL STUD. 279 (1973).

⁵³ W. M. Landes, *An Economic Analysis of the Courts*, 14 LAW & ECON. 61, 101 (1997).

⁵⁴ W. M. Landes & R. A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235 (1979).

is consistent with economic functions of basic social behaviors, including those found in primitive societies.⁵⁵ Galanter, in explaining litigation, looks at “who sues whom.”⁵⁶ The relationships between and the characteristics of the parties describes much of the pattern of litigation that is observed. There are two types of litigants: “one-shot” and “repeat-player” parties. A substantial amount of litigation is by repeat players suing one-shots: litigation as a means of disciplining or correcting deviant behavior. Litigation serves as the method of enforcing the rules.⁵⁷

Munger’s study of litigation in West Virginia finds that advancing or defending business interests may explain much of litigation activity.⁵⁸ Another scholar writes that litigation is commonly assumed to be a bane to the economy, yet it can be a means of doing business.⁵⁹ This idea views litigation as a method of pursuing economic activity as well as a means of resolving disputes; Jobobi finds that there is a close relationship between the amount of litigation and economic activity. The combined findings of Munger and Jabobi suggest that business interests (organizational or individual) are making decisions based on profit maximization and not just loss minimization, similar to the cost-benefit analysis noted by Spier.

⁵⁵ R. A. Posner, *A Theory of Primitive Society, with Special Reference to Law*, 23 LAW & ECON. 1 (1980).

⁵⁶ M. Galanter, *Afterword: Explaining Litigation*, 9 LAW & SOC’Y REV. 347, 348 (1975).

⁵⁷ *Id.* at 360.

⁵⁸ F. W. Munger, *Commercial Litigation in West Virginia State and Federal Courts, 1870-1940*, 30 AM. J. LEGAL HIST. 322 (1986).

⁵⁹ T. Jacobi, *The Role of Politics and Economics in Explaining Variation in Litigation Rates in the U.S. States*, 38 J. LEGAL STUD. 205, 206 (2009).

A related view is litigation rent-seeking.⁶⁰ In the rent-seeking view, the parties decided how much to invest, with the idea that investing in the litigation will increase the expected return. One outcome that rent-seeking models can explain is how the parties' behavior often dissipates value.⁶¹

The causes of litigation are complex. Even within one specialized area, that of construction project management, empirical studies have found that there are many sources of conflict that generate disputes.⁶² One dominant factor, however, in most of the disputes was a substantial degree of uncertainty. Careful planning and drafting of contracts is urged as one way to prevent disputes that result from uncertainty. The emotional intelligence of personnel involved was also identified as a major factor. If the parties involved in the project were unable to work cooperatively to negotiate solutions as problems developed, disputes were much more likely to occur.⁶³

In summary, one common view is that litigation is wasteful and should be avoided. More careful analysis, however, indicates that litigation can, like conflict, have a positive side. It can be a way of enforcing compliance, as noted by Galanter, or a method of seeking financial/business advantages, as explained by Munger and Jacobi.

⁶⁰ G. Dari-Mattiacci, & F. Parisi, *Rents, Dissipation and Lost Treasures: Rethinking Tullock's Paradox*, 124 PUBLIC CHOICE 411 (2005).

⁶¹ Id. at 419-420.

⁶² P. Love, P. Davis, J. Ellis & S. Cheung, *A systemic view of dispute causation*, School of Built Environment, Curtin University (2010) (available at http://www.researchgate.net/profile/Peter_Love2/publication/235284509_A_systemic_view_of_dispute_causation/links/0c960535cd34936eb3000000.pdf).

⁶³ Id. at 668-675.

Instead of assuming that the goal is no litigation, perhaps the goal should be to determine the optimal level of litigation.

Failure

In private matters, where the parties are free to settle their differences without litigation, it may appear to defy rationality that the parties fail to settle. This apparent irrationality springs from the fact that failure to settle is not well understood.⁶⁴ The vast majority of cases do settle, however, and the need for research in this area has been noted. One reason for the paucity of research is that, besides a lack of understanding, settlements are very complicated.⁶⁵

Spier notes that litigation involves additional costs, so there is a clear advantage to settling.⁶⁶ Settlement can save the cost of litigation; a saving that can be divided between the parties and increase the plaintiff's benefit while decreasing the defendant's loss. The reasons that parties fail to settle, then, is explored in the literature. Ashenfelter writes that research has identified four characteristics as possible reasons for failure: difference in expectations, the principal-agent problem, attitudes of the disputants about risks, and the costs involved in seeking intervention/aid.⁶⁷

The first characteristic, differences in the parties' expectations, is the same thing, essentially, as a disparity in beliefs about what a fair or objective resolution of the dispute would be. It is the difference in the expected values. At least two underlying

⁶⁴ O. Ashenfelter & J. Currie, *Negotiator Behavior and the Occurrence of Dispute*, 80 AM. ECON. REV. 416, 416 (1990).

⁶⁵ D. A. WATERMAN & M. A. PETERSON, *MODELS OF LEGAL DECISION MAKING* vii (1981).

⁶⁶ Spier, *supra* note 51, at 269.

⁶⁷ Ashenfelter & Currie, *supra* note 64, at 417-419.

principles may be responsible. First is the difference in the parties' information set. This can also be characterized as the parties' beliefs. The information sets include private facts as well as the individuals' assumptions and constructs about the rules and procedures for resolving the dispute. Each disputant's private information significantly influences the disputant's estimate of the expected resolution outcome. A second reason for the difference in beliefs may be the observed psychological phenomenon that individuals tend to over-estimate the probabilities of success.⁶⁸

The difference in information, or asymmetry of information, can pose problems for settlement because of strategic incentives.⁶⁹ The conflicting information results in a failure to settle. To elaborate, the ordinary assumption is that a guilty defendant will settle in order to save litigation costs. An innocent defendant will not settle for anything more than the costs of litigation since she knows that trial will prove her innocence. These two conditions give rise, though, to an incentive by a guilty defendant to act as though she were innocent: to fail to settle.⁷⁰ Settlement failure, then, may be a strategic move by some guilty defendants.

The second characteristic that Ashenfelter cites for negotiation failures is the principal-agent problem. Principals hire the agents because they think the agents will obtain the principal a better outcome, but the agent's incentives are to increase his own

⁶⁸ Id. at 417.

⁶⁹ K. N. Hylton, *Asymmetric Information and the Selection of Disputes for Litigation*, 22 J. Legal Stud. 187, 189 (1993).

⁷⁰ Id. at 195.

fee. Agents are prone to intensify and prolong the dispute, therefore. If both principals (disputants) hire agents, then the dispute becomes even more complicated.⁷¹

The third characteristic is the disputants' view of the uncertainties involved. The use of a dispute resolution process is inversely related to the risk of the outcome. The issue of risk is a major topic in the literature and is discussed later in this section.

The fourth characteristic is costs. Again, this is often a focus of the literature. Costs are a primary factor because they are avoidable by settling. The higher the cost of litigation, then, the more likely that settlement will occur.⁷²

Spier adds that if there are other, important concerns (such as the indivisibility of the resource, non-pecuniary issues, etc.), then these concerns could be a reason that settlement may fail.⁷³ Strategic issues may be involved, too. As Galanter notes, a repeat player may decide it is in his best interest to pursue litigation to send a signal to other potential disputants. His decision to litigate involves considerations that go beyond the particular dispute at hand. Conversely, a one-shot player whose gain or loss depends on just the one dispute has a different, narrower focus.⁷⁴

The difference in players also pertains to the resources and expertise that the players possess. This affects their anticipated success in litigation and, concomitantly, their willingness to settle. A disputant with a strong bargaining position may refuse to settle even if the offer is in her settlement zone. The bargaining strength is affected by

⁷¹ Ashenfelter & Currie, *supra* note 64, at 417-418.

⁷² *Id.* at 418-419.

⁷³ Spier, *supra* note 51, at 279-280.

⁷⁴ Galanter, *supra* note 56, at 360.

the facts of the case, previous experience, financial resources, political and emotional aspects of going to trial, as well as subjective assessments of other factors, such as her own persuasive ability, the court's attitude, etc.⁷⁵

Another issue pertaining to success or failure may be the defendant's self-interest in maintaining secrecy. Secrecy may shield the defendant from additional litigation or it can relate to other concerns.⁷⁶

Litigation Explosion

The primary reason for the rapid acceptance and growth of ADR is a general frustration with the traditional legal system. In particular, the delay, cost, and unsatisfactory results of the court system were considered to be intolerable. The underlying cause of these problems, it was generally believed, was a drastic rise in litigation – an “explosion” of litigation that started in the 1950s and became more onerous in the two decades following.

Deep concern about congestion in the court system was expressed as early as 1958, when Chief Justice Earl Warren addressed the American Bar Association. He reported that the increase in litigation and the resulting delay in justice was “corroding the very foundations of constitutional government.”⁷⁷ The next Chief Justice, Warren Burger, continued sounding the alarm. Burger remarked that increase in litigation in the federal court system was six times the rate of growth in the population. The growth in

⁷⁵ D. A. Anderson, *Improving Settlement Devices: Rule 68 and beyond*, 23 J. LEGAL STUD. 225, 228 (1994).

⁷⁶ Spier, *supra* note 51, at 324.

⁷⁷ E. Warren, *The Problem of Delay: A Task for Bench and Bar Alike*, 44 A.B.A. J, 1043, 1043 (1958).

the federal courts of appeal was 16 times the population growth rate. This increased litigiousness was also being felt in the state courts.⁷⁸

The Chief Justice's alarm was shared by many observers. One scholar developed a list of the causes and examined each cause at length.⁷⁹ The first cause examined was the introduction of attorney advertising.⁸⁰ The initial step in opening up the doors to advertising occurred in 1976 when the Supreme Court ruled that free speech extended to commercial and business endeavors.⁸¹ That case involved state restrictions on advertising by pharmacists. The state restrictions on advertising by pharmacists was just one example of widespread limitations on advertising by licensed professionals. The court, in ruling for the pharmacist, based its decision at least in part on the history of labor negotiations--labor organizations and employers were protected by their First Amendment rights during contract negotiations. The court noted that the key aspect involved was economic interest of the parties, and the fact that the parties were acting in their own self-interest did not remove the protection of free speech.⁸²

Attorneys were not far behind the pharmacists. The following year, the court ruled prohibitions on attorney advertising by a state bar violated free speech protection.⁸³ Following the same reasoning as the pharmacists' case, the court noted that advertising may lead to more litigation but that the improvement in the access to justice was a good

⁷⁸ W. E. Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274, 275 (1982).

⁷⁹ W. K. OLSON, *THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT* (Dutton ed. 1991).

⁸⁰ *Id.* at 5-31.

⁸¹ *Va. Pharmacy Bd. v. Va. Consumer Council*, 425 U.S. 748 (1976).

⁸² *Id.* at 761-762.

⁸³ *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).

thing. The court pointed out that research had indicated that a large percentage of the population was not adequately served by the legal system. Higher awareness and more information on the part of the general public was not a harm; these could bring great benefits. Injured parties would be better able to seek remedies in the courts, and so it would serve society at large by deterring improper behavior. Advertising the court said, is the traditional and accepted mechanism for sellers to inform potential buyers of the availability of goods and services and the price. A free market economy works best when this free flow of information exists. The court also opined that advertising could serve to lower the costs of legal services in the market.⁸⁴

Free speech in advertisements was extended in a subsequent case where a picture of a contraceptive device was publicized.⁸⁵ The picture was of a Dalkon Shield, which had caused severe medical problems for many of its users. The idea behind the advertising was twofold. First, some users may not have been aware that the product they had been using was the exact product that could have been responsible for their medical problems, and the time limit for filing claims was fast approaching. This advertising, directed at specific, potential litigants, was upheld.⁸⁶

A recent Supreme Court case that has further extended this line of reasoning to a situation that involved the use of pharmacist records by drug companies to target particular consumers.⁸⁷ This activity is called detailing. The pharmacist must keep

⁸⁴ Id. at 377-378.

⁸⁵ *Zauderer v. Office of Disc. Counsel*, 471 U.S. 626 (1985).

⁸⁶ Id. at 655-666.

⁸⁷ *Sorrell v. IMS Health Inc. et al*, No. 10-779 131 S.Ct. 2653 (2011).

records of patients and prescriptions pursuant to state regulations, so drug companies seek to collect this information and use it to their advantage. Despite the fact that this information is required by the state, and the purpose of the drug companies is aimed at manipulating the doctors, state restrictions on the access and use of this information was struck down.⁸⁸ The law has moved from upholding restrictive regulation of business practices to a position where any regulation by the state must satisfy a high standard of state and public interest.

Another major development that contributed to the increase in litigation, according to Olson, was the rise in the use of contingency fees.⁸⁹ Contingency fees are a type of fee arrangement for legal services in which the attorney is paid for the bulk of his fees only if the injured party wins and collects damages. If the injured party loses, she owes the attorney nothing. The main alternative to contingency fees is that the attorney is paid on an hourly basis by the plaintiff, win or lose. The impact is that plaintiffs must have substantial financial resources to pursue legal redress.

By the 1960s all of the states had rules in place that allowed contingency fees on the part of attorneys. Plaintiffs could instigate legal action with little or no financial risk as long as they could find a willing attorney. Contingency fees are commonly thought of as encouraging lawsuits that have no merit. A notable point of fact, too, is that the vast majority of personal injury cases filed in the U.S. involve contingency fees.⁹⁰ Another

⁸⁸ Id. (slip op. at 25, available at <https://supreme.justia.com/cases/federal/us/564/10-779/opinion.html>).

⁸⁹ OLSON, *supra* note 79, at 32-50.

⁹⁰ T. J. Miceli, *Do Contingent Fees Promote Excessive Litigation?*, 23 J. LEGAL STUD. 211, 211 (1994).

criticism of contingency fees is that they encourage litigation by providing “excessive recovery” on the part of attorneys.⁹¹

Another development that Olson notes is the rise in class action litigation.⁹² In class actions, a large group can be represented by a much smaller number of plaintiffs. Class actions address the problem “free-riders” and other collective action problems. The injury suffered by each injured party is small compared to the cost of litigation. Without class-action, then, injurers will escape liability for the bulk, possibly the entirety, of the damages they cause.⁹³

Another development that increases the amount of litigation is the extension of the jurisdiction of state courts to hear disputes that involve a nonresident defendant.⁹⁴ Historically, states had jurisdiction (the power or the authority to hear the case) only if both parties were citizens of the state. The seminal case that changed this was in 1945 where state jurisdiction over a non-resident was upheld based upon certain minimal activity or contacts within the state.⁹⁵ The exercise of jurisdiction under these circumstances was not deemed to be inconsistent with the traditional notions of justice; soon thereafter, other states adopted similar rules, either by statute or by court rules. These extensions of jurisdiction, which became known as “long-arm” statutes, resulted in an increase in the number of potential defendants. The traditional notions of justice

⁹¹ D. L. Rubinfeld & S. Scotchmer, *Contingent Fees for Attorneys: An Economic Analysis*, 24 RAND J. ECON. 343, 343 (1993).

⁹² OLSON, *supra* note 79, at 51-66.

⁹³ J. R. Macey & G. P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1 (1991).

⁹⁴ OLSON, *supra* note 79, at 69-88.

⁹⁵ *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

would not prevent an out-of-state citizen to escape liability simply by conducting his business operations from another state.⁹⁶

Another extension by state courts is the choice of the law for deciding cases. This “choice of law” allows courts too much discretion, Olsen argues, and the result is competition between the states in attracting plaintiffs.⁹⁷ The legal standards for the choice of law (usually, a choice between the law of the state where the injury occurred or the law of the state of the tribunal) are even lower than the standard for jurisdiction.⁹⁸ The assumption behind this criticism, it should be noted, is that the states are competing for potential litigation.

Another development which increased litigation was a change in pleading rules.⁹⁹ The traditional form of pleading was that the defendant and plaintiff filed successive pleadings with the court, and this process would narrow the issues to allow the judge to arrive at a just verdict. This type of pleading elevated form over substance: satisfaction of the rules became more important than the merits of the case. The change, a move to less formal, “notice pleading,” was a change to a much lower standard, and this lower standard encouraged more litigation.

Another, related, development that led to an increase in litigation is the adoption of modern discovery as an integral part of the litigation process.¹⁰⁰ Since the pleadings no longer served to narrow the dispute, discovery was instituted. There are five purposes

⁹⁶ B. Spencer, *Jurisdiction to Adjudicate: A Revised Analysis*, 73 U. CHI. L. REV. 617, 637-646 (2006).

⁹⁷ OLSON, *supra* note 79, at 178-196.

⁹⁸ J. Martin, *Personal Jurisdiction and Choice of Law*, 78 MICH. L. REV. 872, 872-874 (1980).

⁹⁹ OLSON, *supra* note 79, at 89-107.

¹⁰⁰ OLSON, *supra* note 79, at 225-231.

to discovery: (1) to increase the probability of settlement, (2) to increase the fairness and accuracy of settlements, (3) to improve the accuracy of trials, (4) to filter complaints better in order to terminate meritless disputes, and (5) to lower the transaction costs of resolving disputes.¹⁰¹

Discovery is a key aspect of any discussion on risk, litigation, and settlement. One common concept of litigation posits that the parties are relatively optimistic about their outcome, so that each side prefers a trial rather than settlement. Providing information to correct the other side's false beliefs fosters settlement. Additionally, discovery, as a substitute for the common-law pleadings, also promotes a fair and accurate outcome by the court. A court, to have complete information, must have full knowledge of the law and the facts of the case; complete information allows an accurate decision.¹⁰²

Another factor that Olsen lists is the shift from firm rules to “fuzzy” rules, and he discusses the change in custody rules to the “best interests of the child” standard.¹⁰³ It is obvious that discarding a firm, well-defined custody standard for one that allows more discretion by the court will encourage more litigation on these matters.

Historically, the father had long been considered the parent who had the superior right of custody (and control, in general) over minor children.¹⁰⁴ As society's views of

¹⁰¹ R. D. Cooter & D. L. Rubinfeld, *An Economic Model of Legal Discovery*, 23 J. LEGAL STUD. 435, 436 (1994).

¹⁰² The adjudication process, including discovery, is intended to elicit the pertinent information and suppress misleading information.

¹⁰³ OLSON, *supra* note 79, at 131-151.

¹⁰⁴ L. Akre, *Struggling with Indeterminacy: A Call for Interdisciplinary Collaboration in Redefining the “Best Interest of the Child” Standard*, 75 MARQ. L. REV. 628, 634 (1992).

women changed, this assumption of male superiority in all matters changed, and custody became an issue for the court to resolve. The fuzziness of “the best interest of the child” does not necessarily mean that alternative standards would reduce litigation, though. In Minnesota, the child’s primary caretaker was added to the “best interest” standard, but the change “spawned an incredible amount of litigation concerning who changed more diapers...”¹⁰⁵ The point is that any relaxing of a rigid standard can be expected to generate litigation.

Olsen’s next factor is the increase in the use of expert witnesses.¹⁰⁶ Two main concerns are raised when an expert witness is used in litigation. The first of these is that the expert is a biased witness. Economic principles say that “large-scale monetary incentives will change behavior,” and this should be just as true for experts as for novices.¹⁰⁷ The second concern over expert witnesses is the difficulty of cross-examining an expert witness. The expert, being on his pedestal of special knowledge, is hard to dislodge. Fact-finders (the judge or the jury) will overweigh the testimony of an expert witness with his halo of superior insight.

The next factor Olsen lists is the destruction of the sanctity of contracts by the use of excuses: “unconscionable,” “contracts of adhesion,” etc.¹⁰⁸ These precepts can allow a plaintiff to successfully fight the applicability of a contract’s terms, thus

¹⁰⁵ G. Crippen, *Stumbling Beyond Best Interests of the Child: Reexamining Child Custody Standard-Setting in the Wake of Minnesota’s Four Year Experiment with the Primary Caretaker Preference*, 2 MINN. L. REV. 427, 452 (1990).

¹⁰⁶ OLSON, *supra* note 79, at 152-165.

¹⁰⁷ M. J. Mandel, *Going for the Gold: Economists as Expert Witnesses*, 13 J. ECON. PERSPECTIVES 113, 113 (1999).

¹⁰⁸ OLSON, *supra* note 79, at 197-219.

increasing litigation. The principles, though, can be viewed as a “safety net” for catching “unfair” behavior that the rigid, formulaic contract law let slip through.¹⁰⁹

Next on Olsen’s list is the increasingly aggressive atmosphere of the legal system.¹¹⁰ In essence, this complaint is the same as the “sporting theory” of Roscoe Pound: it is the win that counts, and no one respects the loser for having played by the spirit as well as the letter of the rules. Pound coined the term “the sporting theory of justice,” and the criticism of the legal system is still valid.¹¹¹

The next item on the list of factors is the “nuisance suit,” or “frivolous litigation.”¹¹² Both of these are used to refer to litigation that has no merit. In other words, the chances of the plaintiff prevailing at trial are equivalent to zero. Despite the fact that there is no benefit from trial, there is the possibility that the litigation can produce a positive value for the plaintiff if the defendant is risk averse or faces a significant opportunity cost to defending the suit. An example of the latter is a real estate development project that is halted by the filing of litigation. The opportunity cost (the cost of the delay of the development project) may be high enough that the defendant is willing to “pay-off” the plaintiff.¹¹³

¹⁰⁹ A. J. Schmitz, *Embracing Unconscionability’s Safety Net Function*, 58 ALA. L. REV. 73, 73-77 (2006).

¹¹⁰ OLSON, *supra* note 79, at 223-246.

¹¹¹ E. F. Sherman, *Dean Pound’s Dissatisfaction with the “Sporting Theory of Justice”: Where Are We a Hundred Years Later?*, 48 S. TEX. L. REV. 983, 983-986 (2007).

¹¹² OLSON, *supra* note 79, at 247-270

¹¹³ R. D. COOTER & T. S. ULEN, *LAW & ECONOMICS* 429 (2012).

The last major factor on Olsen's list is that lawyers can't be sued by non-clients for frivolous suits, invasion of privacy, or other harms inflicted on defendants.¹¹⁴ They can participate in the increase in litigation and profit from that surge in business without having to be concerned about any downside – any potential liability for accepting a nuisance suit, for example. This aspect of the legal system, the importance of the economic incentives on the part of attorneys, is the subject of some research that supports the idea that attorneys have a major role in shaping the development of the law and the amount of litigation.¹¹⁵

Olsen's explanation of the litigation explosion was comprehensive and well-written. It resonated with many. Even Chief Justice Burger praised it.¹¹⁶ The irony is that almost all of Olson's criticisms are levied at changes that were themselves reforms designed to cure more egregious faults. Instead of comparing the reforms to the original situation, though, Olson focuses on the imperfections in the reforms in an attempt to explain the then-current frustrations.

Risk

Risk is one of the most commonly discussed issues in the literature. Often, however, it is not precisely defined. Many scholars appear to use the term "risk" as equivalent to uncertainty, but the two are not necessarily the same. Risk is often regarded as a distinct issue, separate from the issue of costs, but some commentators,

¹¹⁴ OLSON, *supra* note 79, at 317-326.

¹¹⁵ See P. H. Rubin & M. J. Bailey, *The Role of Lawyers in Changing the Law*, 23 J. LEGAL STUD. 807 (1994).

¹¹⁶ R. M. Mastro, *The Myth of the Litigation Explosion*, 60 FORDHAM L. REV. 199, 199 (1991).

Posner, for one, view risk as a type of cost. This general view of risk as a cost corresponds to a failure of the court to precisely “carry out those functions assigned to it.”¹¹⁷

The usual discussion of risk is to compare the decisions of a risk-neutral disputant with those of a risk-averse disputant. In general, the higher the risk, the more likely that settlement or ADR will be preferred to trial. The presumption, again, is that trial is “risky.” Although an accurate decision is assumed to be the goal, what is usually omitted from the discussion is that fact that greater accuracy entails greater costs.¹¹⁸ Nevertheless, reduction of risk is one of the perceived advantages of ADR compared with traditional litigation, and it is a major incentive to settle the dispute.

One concept related to risk is the arbitrator exchange concept.¹¹⁹ This approach is based on the fact that, in most arbitrations, the disputants must agree on the selection of the arbitrator, in contrast to a trial where the disputants have no choice of the judge. Arbitrators, then, act in their own self-interest in that their incentive is to be acceptable to both parties, the defendant and the plaintiff. The result is that the arbitrators will act the same way. If an arbitrator is considered to have favored plaintiffs in past disputes, defendant will not agree to use him. If, conversely, the arbitrator’s history is to favor defendants, then plaintiffs will not agree to him. This process selects only those arbitrators that have scrupulously avoided being viewed as friendly to one side or the

¹¹⁷ R. A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399, 400 (1973).

¹¹⁸ L. Kaplow, *The Value of Accuracy in Adjudication: An Economic Analysis*, 23 J. LEGAL STUD. 307 (1994).

¹¹⁹ O. Ashenfelter, *Arbitrator Behavior*, 77 AM. ECON. REV. 342 (1987).

other, which means the arbitrators are, in essence, “exchangeable.”¹²⁰

Another aspect of risk in the context of arbitration is the format of the arbitration. For example, final offer arbitration is intended to produce offers from the two disputants that are close to one another.¹²¹ This creates a strong incentive for the disputants to make an offer that is closer to the “correct” value than the offer from the other party, which, in turn, makes the arbitrator’s award more accurate.

Evaluation

By the late 1980s, several attempts had been made to evaluate the success of ADR. The best research at that time was limited, though, in the ways in which the answers were sought. To gauge how well mediation worked, for example, most studies used settlement rates and satisfaction surveys. There was very little evidence, though, that mediation has had any appreciable effect in reducing court backlogs.¹²² Even in the earliest research, it was recognized that several reasons may be involved. First, some disputants might take advantage of mediation programs over matters that they would not otherwise pursue. Since ADR costs less, there will be more disputes that have a positive value as a result of the cost-benefit analysis. In this way, ADR may be too successful in that it encourages parties to take action over relatively minor issues.¹²³ Another consideration that was obvious from the beginning was that mediation programs would

¹²⁰ Id. at 345-346.

¹²¹ Id. at 343.

¹²² J. Roehl & R. Cook, *Mediation in Interpersonal Disputes: Effectiveness and Limitations*, 31, 38 in K. KRESSEL & D. G. PRUITT, *MEDIATION RESEARCH: THE PROCESS AND EFFECTIVENESS OF THIRD-PARTY INTERVENTION* (1989).

¹²³ S. Shavell, *Alternative Dispute Resolution: An Economic Analysis*, 24 J. LEGAL STUD. 1, 19-20 (1995).

attract the easy cases: mediation skims the cream. But this is one of the purposes of mediation, to take the easy route for the easy disputes and leave the more difficult cases for the courts. The courts get the disputes which would have wound up being litigated regardless of any mediation program.¹²⁴

There were problems with using satisfaction surveys used to measure the effectiveness of the programs instead of control groups. Without a well-constructed experimental design that includes a control group and random assignment, the results of any study are suspect.¹²⁵ In many studies of programs with different groups, however, the more cooperative disputants wound up in the mediation group while the more antagonistic disputants are found in the comparison (“no mediation”) group. This is the same “skimming the cream” issue that was noted, above.

In 1995, a study was published evaluating one of the few random assignment experiments involving ADR. The program was designed to assess whether mediated settlement conferences (MSC) could produce more efficient, less costly, and more satisfying results.¹²⁶ In reference to the efficiency issue, the evaluation addressed four aspects: 1) time to disposition, 2) frequency of settlement, 3) frequency of trial, and 4) court workload (judges and other court officials). The program encompassed 13 counties and extended from 1991-1992. For evaluation purposes, three counties were designated as “intensive-study” counties, and cases filed during that time period were

¹²⁴ K. KRESSEL & D. G. PRUITT, *MEDIATION RESEARCH: THE PROCESS AND EFFECTIVENESS OF THIRD-PARTY INTERVENTION* 389 (1989).

¹²⁵ *Id.* at 400-401.

¹²⁶ S. H. CLARKE, E. D. ELLEN, K. MCCORMICK & NORTH CAROLINA, *COURT-ORDERED CIVIL CASE MEDIATION IN NORTH CAROLINA: AN EVALUATION OF ITS EFFECTS* 19 (1995).

randomly assigned to either the Mediation Group or the Control Group. For disputes assigned to the Mediation Group, the senior resident judge could order the parties to participate in MSC proceedings. Disputes assigned to the Control Group were excluded from the MSC program, but the parties could, of their own accord, seek mediation or other forms of ADR outside of the court-sponsored program.¹²⁷

During the program period in the three intensive-study counties, there were 1,986 cases total, or just a little under 1,000 disputes in each group. Of these 2,000-some cases, a random selection of cases was drawn for detailed study. There were 245 Mediation Group cases that reached final resolution by the end of the study assessment, with only nine cases still unresolved. The Control Group numbered 244 cases (all but about ten of these disputes had reached a final resolution by the conclusion of the study). An additional random sampling, the Preprogram Group, was also taken from cases filed during 1989 – cases which would have been eligible for the MSC program if there had been one at the earlier date.¹²⁸

The key results of the study, for the purposes of this research, are in the analysis of the impact on court congestion. Much of the literature assumes that court congestion is alleviated if the average time to disposition is reduced. Although the number of cases on the court docket does bear a relationship to how congested the court might be, it is not the best measure. The MSC program design and evaluation selected another way of measuring court congestion. A queue at the courthouse does not work the same way as a

¹²⁷ Id. at 19-21.

¹²⁸ Id. at 24-29.

queue at a check-out counter. The reason is that the litigation process takes time. The filing of a case starts a timer (of sorts), but it is for the parties/attorneys and not the court.¹²⁹ It is but one of several possible time segments, the number and duration of which depends in large part on the disputants/attorneys.

Once the various procedural matters are completed, the case is ready to go to trial. Often, this comes to the attention of the court at docket call, which is the court's periodic updating of the status (including scheduling issues) of the cases that have been filed with the court. Docket calls may be held every Tuesday morning, for example, and each case that is "on the docket" may receive the attention of the court. Many of the cases will still have procedural matters in progress (e.g., discovery processes such as depositions) and this will be noted by the court. If the procedural matters are completed, however, the court will move the case to the trial calendar (set a date for trial). It is at this stage that any additional delay is due to court congestion instead of case preparation. If the court's trial calendar is such that the first open date is some time far in the future, then court congestion has caused that delay.

To re-iterate, court congestion is not just a matter of how many cases are "active" in the court's docket. It is how much delay is involved in getting the court to process any motions or other items in preparation for trial, and to "hear" the dispute once the parties are ready for trial. Although the number of cases on the docket is associated with

¹²⁹ See M. O'CONNOR & B. P. DAVIS, O'CONNOR'S TEXAS RULES, CIVIL TRIALS (2004) (contains tables to help keep track of the timetables).

court congestion or delay, the underlying reason for congestion is the total demand on the court's time. A relatively large number of cases may be on the docket, but if each case requires very little in terms of the court's time, there may be little congestion. But if each case requires a substantial amount of the court's time, then even a few cases may result in significant delay.

The North Carolina MSC study used court records of the selected cases (the three groups) to measure the number of documents (motions, orders, and other papers) that were signed by the judge or the court clerk. This count was used as a proxy or indicator of the amount of court time used by the cases. For the Mediation Group, the average was 1.95 orders signed by the judge versus 1.21 and 1.54 for the Control Group and Preprogram Group, respectively. Since the Mediation Group cases would have required an order to MSC, the higher figure for these cases is understandable. The numbers for documents signed by the court clerk were 1.24, 1.14, and 1.32 for the Mediation Group, Control Group, and Preprogram Group, respectively. Other than the orders to MSC, then, there was not a significant difference in court workload.¹³⁰

Trials, of course, present the biggest use of court time for many disputes. The MSC program did not result in a significant reduction in the percentage of cases that went to trial, however. Although it is a central tenet of ADR that the process will result in fewer cases being tried (by any traditional means, whether it be jury trial, bench trial, or otherwise), the percentage of disputes in each group that continued on to trial was

¹³⁰ CLARKE, *et al*, *supra* note 126, at 37-38.

quite similar. The combined (all forms of trial) rates were 9.4%, 9.8%, and 11.9% for the Mediation, Control, and Preprogram Groups, respectively. Jury trial rates (jury trial being even more time-consuming for the court) were also close: 5.7%, 6.8%, and 7.4%, respectively.¹³¹

If the trial rates and other matters (orders, motions, etc.) are so similar, then is there any advantage to the court to have cases on the MSC track? In one sense, the answer might be yes. The judges in the program did report that, in their opinion, the program did reduce the number of cases that were placed on the trial calendar but then settled before trial. Once a trial calendar is prepared, a case that is on the calendar that winds up settling before trial creates a gap in the calendar that may be filled with the trial of a different dispute. The judges reported that the MSC disputes, on average, resulted in fewer of these MSC cases being placed on the trial docket. The report notes that the evaluation of the program did not examine trial calendars or any other way to independently verify the judges' claims.¹³² In sum, the North Carolina MSC program was one of the most carefully planned studies of the effectiveness of mediation at reducing court congestion up to that time, yet the best that can be said is that some delay reduction may have been realized in the area of making the trial calendars more efficient.

Just a year later, in 1996, another comprehensive, in-depth study was published. The report was an evaluation of a pilot program encompassing alternative dispute resolution techniques. An independent evaluation of the program was conducted by the

¹³¹ Id. at 62-63.

¹³² Id. at 38.

RAND Institute for Civil Justice at the request of the Judicial Conference and the Administrative Office of the U.S. Courts.¹³³ The study analyzed ADR programs in six federal district courts during 1992-93. Four of the districts used mediation, two of which involved mandatory ADR assignment--which allowed random case referral to a mediation group or control group.

The avowed objective of the study was to assess the implementation, costs, and effects of the new ADR programs. The study used several evaluation criteria:

- length of litigation
- litigation expense (to the parties)
- ADR program cost (court/government costs)
- settlement/damages outcomes
- level of satisfaction with the process
- perception of fairness of the process

Table 2, below, lists the districts and the basic characteristics of each program.

¹³³ J. S. KAKALIK, INSTITUTE FOR CIVIL JUSTICE (U.S.) & JUDICIAL CONFERENCE OF THE UNITED STATES, AN EVALUATION OF MEDIATION AND EARLY NEUTRAL EVALUATION UNDER THE CIVIL JUSTICE REFORM ACT (1996).

TABLE 2: DISTRICTS AND PROGRAMS

Jurisdiction	ADR Method	Mandatory Program	Random Selection
NY Southern	Mediation	Yes	Yes
PA Eastern	Mediation	Yes	Yes
OK Western	Mediation	No	No
TX Southern	Mediation	No	No
CA Southern	Other	Yes	No
NY Eastern	Other	No	No

The study made several basic findings:

- length of litigation is not significantly shortened
- litigation expense is not significantly reduced
- ADR programs cost from \$130 to \$490 per case
- monetary settlements are more likely with ADR
- ADR does not increase perceived fairness
- mediation does seem to increase the level of satisfaction among litigants¹³⁴

The report notes that “sound empirical research on various ADR mechanisms is quite thin.”¹³⁵ The report concludes that no major effects, good or bad, could be found in the programs studied, and it notes that the results are consistent with prior empirical research.¹³⁶

Of the six evaluation criteria, the length of litigation (time to disposition, or TTD) statistic is the most relevant to court congestion. The length of time a dispute remains on the docket is related to the total court resources expended on that case, as

¹³⁴ Id. at xxix-xxxiii.

¹³⁵ Id. at xxx.

¹³⁶ Id. at 53.

noted. The study concluded that ADR was associated with some small reduction in TTD, but it was statistically insignificant.¹³⁷

One of the most recent comprehensive reviews of empirical research was published in 2004.¹³⁸ This survey, too, notes the dearth of quality research in the field: settlement rates and participant satisfaction continues to be the primary tool of researchers. This survey notes that, of the eight studies of general jurisdiction courts that used a comparison group of cases that were not mediated, only four of those involved random assignment. Half of the comparison group studies reported favorable results in terms of higher settlement rates, but half reported no difference. Wissler also notes that there were mixed results regarding participant satisfaction.¹³⁹

In summary, very little research to date has focused on the effectiveness of ADR for reducing court congestion. What research has been done has looked at settlement rates and satisfaction, and even these studies have produced mixed results. The relationship between the use of ADR and traditional court litigation remains uncertain.

¹³⁷ Id. at 287.

¹³⁸ R. Wissler, *The Effectiveness of Court-Connected Dispute Resolution in Civil Cases*, 22 CONFLICT RESOL. Q. 55 (2004).

¹³⁹ Id. at 65-67.

III. DATA

The Texas Judicial Council and the Office of Court Administration publish an annual report which summarizes data that they collect from all of the courts in the state. The report covers activity in the Texas Supreme Court all the way down to the Municipal Court and Justice of the Peace levels. In Texas, the District Courts have original jurisdiction over all matters unless specific statutory authority rests with another court. The District Courts' jurisdiction (or authority to “hear” a case) includes civil and criminal matters. In 2000, there were 414 district courts that collectively received 746,015 new cases, of which 486,320 (64.8%) were civil, a 7% increase over the previous year.¹⁴⁰

The published data is reported by county, not by district, in both summary fashion and in detail for civil, criminal, and juvenile matters. An example of a detailed report is available in Appendix A. The civil case data is used by this research. The civil report consists of 11 different categories, how the cases are added to the docket, and the type of disposition. The case categories for the reports remained mostly unchanged during the 1980-2010 time period. Likewise, the changes made to the docket status/action were minor. The consistency in the reporting scheme from 1980-2010 allows for the testing of the hypotheses.

¹⁴⁰ Unless otherwise noted, all data is from TEXAS JUDICIAL COUNCIL, ANNUAL REPORT OF THE TEXAS JUDICIAL SYSTEM: FISCAL YEAR 2000 (2000).

An explanation of case categories is provided in each report, but the wording seldom changes. The 2000 annual report, for example, lists the civil case categories (all categories and explanations are found on page 166 of the report):

- INJURY OR DAMAGE INVOLVING MOTOR VEHICLE
- INJURY OR DAMAGE OTHER THAN MOTOR VEHICLE
- WORKERS' COMPENSATION
- TAX
- CONDEMNATION
- ACCOUNTS, CONTRACTS, NOTES
- RECIPROCAL
- DIVORCE
- OTHER FAMILY LAW
- OTHER CIVIL

The explanation given for “INJURY OR DAMAGE INVOLVING MOTOR VEHICLE” is: “All cases for damages associated in any way with motor vehicle (auto, truck, motorcycle, etc.), with or without accompanying personal injury. Examples include personal injury, property damage, and wrongful death cases which involve motor vehicles.”

For the second category, INJURY OR DAMAGE OTHER THAN MOTOR VEHICLE, the explanation is: “Cases for personal injury or damages arising out of an event not involving a motor vehicle. Examples include “slip-and-fall” cases, as well as personal injury, property damage, and wrongful death not involving motor vehicles.”

The third category, WORKERS' COMPENSATION, are cases that are “Appeals from awards of compensation for personal injury by the Workers' Compensation Commission (Ch. 410, Labor Code).”

TAX is the fourth category, and these cases are: “Suits brought by governmental taxing entities for the collection of taxes.” The next category, CONDEMNATION, are: “Suits by a unit of government or a corporation with the power of eminent domain for the taking of private land for public use.” ACCOUNTS, CONTRACTS, NOTES are: “Suits based on enforcing the terms of a certain and express agreement, usually for the purpose of recovering a specific sum of money.”

The next three categories deal with marriage and family. RECIPROCALs are cases that are: “Actions involving child support in which the case has been received from another court outside the county or state.” The next category, DIVORCE, is: “A suit brought by a party to a marriage to dissolve that marriage pursuant to Family Code Chapter 6. (Annulments are not reported here, but under All Other Family Law Matters.)” The category of OTHER FAMILY LAW says: “Includes all family law matters other than divorce proceedings and those juvenile matters which are reported in the Juvenile Section, including:

- Motions to modify previously granted divorce decrees, or other judgments or decrees, in such matters as amount of child support, child custody orders, and other similar motions which are filed under the original cause number;
- Annulments;
- Adoptions;
- Changes of name;
- Termination of parental rights (child protective service cases);
- Dependent and neglected child cases;
- Removal of disability of minority;
- Removal of disability of minority for marriage;
- Voluntary legitimation (Section 13.01, Texas Family Code); and
- All other matters filed under the Family Code which are not reported elsewhere.

The last category, OTHER CIVIL, is: “All civil cases not clearly identifiable as belonging in one of the preceding categories.”

Information on docket and disposition activity is also contained in the reports.

The 2000 report lists the following for docket activity:

- Cases Pending 9/01/99
- Docket Adjustments
- New Cases Filed
- Other Cases Added
- Total Cases Added
- Percent of Total Added
- Cases Pending 8/31/00

The specific line items for dispositions changed, but the dispositions for 2000 are:

- Default & Agreed Judg.
- Summary Judgments
- Final Judgments
- Dismissed
- Other Dispositions
- Total Dispositions
- Percent of Total Dispositions
- Percent of Total Pending
- Disp. As % of Total Added

For 2000, there were a total of 470,529 dispositions in the district courts statewide. Of these dispositions, 24.2% were default and agreed, 0.728% (less than one percent) were summary judgments, 24.3% were final judgments, 26.4% were dismissals, and 24.3% were “other” dispositions.

There are three general issues about the data: missing data, inconsistent data, and the reports of the Dispute Resolution Centers (DRCs).

The reports are, for the most part, complete in that data is reported for all counties. There are a few instances, however, where the reports note that data was not received from particular counties before the publication date. In most of those few instances, the missing reports are from the small counties, and the missing data should not materially affect the research analysis or conclusion.

Most instances of apparent problems with inconsistent data were due to data entry errors. The data for recent years is available online, either in pdf or excel spreadsheet format. The data from earlier years is available from the reports available in selected libraries across the state, and the information must be copied and manually entered into a computer. Most apparent inconsistencies were eliminated after the data was verified. A few, remaining inconsistencies remained, including:

- inconsistent sums, totals, or figures in older, “hard-copy” reports (all sums and totals were verified after computer entry and checked against the printed sums and totals; the few errors in the data that were discovered were rare and minor, and never amounted to more than a few cases; verification was primarily for the purposes of identifying transcription errors, which were relatively common due to the usual data entry mistakes and the difficulty inherent in reading poor quality, printed copies of the reports)
- inconsistent or blank cells/numbers in the pdf/spreadsheet files (at least one instance of apparent missing/incorrect data in the 2003 file was identified, but the file did contain enough information that made it possible to compute and correct certain missing entries)

Another apparent inconsistency is that there was a change in case categories. Starting with 1986, “Family” replaced “non-adversarial.” The cases which fell under the category of “non-adversarial” would still be reported under “family” because they fall

under the family code. To illustrate, the “non-adversarial” category (used from 1980 to 1985) includes only:

- Adoptions
- Changes of Name
- Occupational Driver’s License
- Termination of Parental Rights
- Dependent and Neglected Child Cases
- Removal of Disability of Minority
- Removal of Disability of Minority for Marriage
- Voluntary Legitimation (Section 13.01 Texas Family Code)

Thus, the 1986 changes in case categories amounted to a minor re-shuffle and a rename. Neither should have any effect on the consistency of the data before and after 1986.

There were two major changes to the law which had significant impacts on the reported case categories: workers compensation (WC) and reciprocals. WC law in Texas underwent a major change that took effect in 1991.¹⁴¹ WC litigation (and costs to employers) had been increasing significantly for a number of years. In 1980, 18,766 WC cases were filed in Texas. In 1990, that number had risen to 29,799, an increase of 59%. Businesses complained about the high cost of injuries, but even more about the high cost of litigation. The 1991 law was designed to reduce the amount of litigation, and it did. The result was a drastic reduction in WC filings.

¹⁴¹ TEX. REV. CIV. STAT. ANN. Arts. 8308-09 (Vernon 1991). There have been several revisions to the statute, the most recent being in 2013.

Reciprocals is the label used for cases brought under the original Uniform Reciprocal Enforcement of Support Act (URESAs)¹⁴² or Revised Uniform Reciprocal Enforcement of Support Act (RURESAs), a later revision. These uniform laws allowed a state (if the state adopted the uniform act) to enforce another state's family support orders. The impetus was to prevent the 'deadbeat' dads from avoiding their family support obligations (alimony, maintenance, child support, etc.) by moving to another state. Before the original URESAs, the poster-board example was a woman who was left with small children and no means of support after the ex-husband/father absconded to another state. The poor woman was left with no option other than to follow the ex to his new home state (follow at least in the sense that she had to obtain legal representation there) and basically repeat the same legal procedures to obtain support. If she was successful, or it looked as though she might be, the ex would move, again, to yet another state, and the process had to begin again.

URESAs/RURESAs was replaced by the Uniform Interstate Family Support Act (UIFSA).¹⁴³ UIFSA eased the burden of the spouse seeking to enforce support orders from a foreign (out of state) court order and simplified the process. With the adoption of UIFSA, the number of "reciprocals" in terms of new cases filed dropped dramatically.

¹⁴² The Uniform Reciprocal Enforcement of Support Act (original, 1950 version), was adopted in Texas in 1951 (1951 Tex. Gen. Laws, Ch. 377, at 643).

¹⁴³ Texas enacted the act in 1995, chapter 159 of the Family Code. Adoption of the Uniform Interstate Family Support Act was required by the Personal Responsibility and Work Opportunity Act of 1996 (42 U.S.C. §466) in order to maintain certain federal funding.

The data for WC and reciprocals is not consistent due to changes in the law. The underlying “cause of action” giving the court jurisdiction to hear the lawsuit changed. For purposes of this research, therefore, the two case categories of workers comp and reciprocals have been removed from the data set used for analysis, and a “revised total” number of cases has been computed to replace the reported “total.”

Other reporting changes during the years pertained to the docket activity. Docket adjustments and “show causes added” are two examples. The docket information used in this research, though, was limited to “new cases filed,” which did not change.

There were also changes in disposition reporting. In 1996 “change of venue” dispositions was dropped. Considering the small number of cases involved, though, this change would not significantly alter the disposition percentages used by this research.

A major change in reporting that does affect this research, was a consolidation of certain types of dispositions. Starting in 1996, three actions (default & agreed, final judgments, and dismissed) consolidated what had been seven separate reporting actions.

“Default & Agreed” combined two actions that had previously been reported separately. Final judgment combined three actions: bench trial, jury trial, and directed verdict, which had been separately reported. The third major combination was “dismissed,” which replaced dismissed by plaintiff and dismissed for want of prosecution. Although the disaggregated reported numbers would have allowed a more precise analysis of the dispositions, using the combined actions preserves the consistency of the data and allows meaningful analysis.

In summary, the changes that were made in the reporting format did not materially affect the consistency of the district data. Some precision of the data was lost when some of the types of dispositions were consolidated, but enough differentiation remains to conduct a reasonable analysis. On the whole, the time period 1980 through 2010 was a 31 year period during which very little changed in the way district court data was reported in Texas.

The last major consistency problem is the reporting for the Alternative Dispute Resolution Centers (DRCs). Reporting began in 1988 (the comprehensive statute was enacted the previous year), and reporting stopped with the 2006 publication. During the 1988-2005 reporting years, some centers did not report any data. In at least one instance (Austin/Travis), the center was active but just stopped sending in reports. In other instances (Denton, for example) the centers waned, sometimes to be renewed. The DRCs were designed to foster ADR and to provide ADR services to those who could not otherwise afford it, but not to monopolize. The concept is that the DRCs serve some parts of the community but also act to promote ADR in general. Accordingly, this research does not presume that reported DRC activity reflects anything more than a qualitative indication of the relative ADR activity of the county. The DRC data is used, then, to identify which counties are “active” in mediation/ADR. A group of 15 counties are identified as being very “active.” More information is given in the Appendix.

TABLE 3: DISPUTE RESOLUTION CENTERS AND ACTIVE GROUPS

CENTERS LISTED IN REPORTS	ACTIVE 15 COUNTIES	LARGE 9	BIG 4	DH
Amarillo/Potter & Randall	Bexar	Denton	Bexar	Dallas
Austin/Travis County	Brazos	El Paso	Dallas	Harris
Beaumont/Jefferson County	Collin	Jefferson	Harris	
Bryan/College Station/Brazos Valley	Dallas	Lubbock	Tarrant	
Conroe/Montgomery County	Denton	Montgomery		
Corpus Christi/Nueces County	El Paso	Nueces		
Dallas/Dallas Dispute Mediation Service, Inc	Harris	Potter		
Denton/Denton County	Jefferson	Randall		
El Paso/El Paso County	Lubbock	Travis		
Fort Worth/Tarrant County	Montgomery			
Houston/Harris County	Nueces			
Kerrville/Hill Country	Potter			
Lubbock/Lubbock County	Randall			
Paris/Lamar County	Tarrant			
Plano/Collin County	Travis			
Richmond/Fort Bend				
San Antonio/Bexar County				
San Marcos /Hays County				
Waco/McLennan County				
Woodville/Tyler County				

The DRC data was also used to discriminate among the active counties to determine when the counties established active ADR programs. Two counties, Harris and Dallas, established centers even before the earlier, 1983 legislation (which allowed counties to charge court fees to support ADR programs). These two counties (DH) are used as a separate "active" ADR group. Another group, the four counties (BIG 4) that

adopted ADR programs early, are also used as a separate group for analysis. Another group of nine of the remaining 15 counties is used as a fourth active group. Table 3 lists the counties in each group.

IV. THEORY AND MODEL

General Theory

Critics note that the ADR literature, though large, is confused, unsystematic, and of variable quality.¹⁴⁴ The theory is scant – most of the work is aimed at practical matters or is intended to criticize or defend particular aspects of ADR. The paucity of ADR theory is notable because one of the primary concerns of legal theorists has been the nature of adjudication.

Theoretical work concerning disputes, or more generally, justice, has a long history. The Bible, Aristotle, Plato, and St. Thomas Aquinas are some of the ancient sources of legal theory.¹⁴⁵ Aristotle wrote at length about the theory of justice and focused on two types: general justice, or observing the relevant laws, and particular justice, which encompasses distributive (equal distribution on an equal basis) and corrective justice (correcting unfair portions, such as making good the harm that one has caused another). He notes that the general nature of the law sometimes fails to produce the right result; there are certain matters that the law cannot resolve. Aristotle considers justice to be of two sources: man-made, and from nature. The principles of nature, he says, are the same everywhere, but the principles of man-made law may differ.¹⁴⁶

St. Thomas Aquinas also conceived of justice as consisting of distinct but related concepts: a universal law, a natural law that derives from the eternal law, and human

¹⁴⁴ W. L. Twining, *Alternative to What? Theories of Litigation, Procedure and Dispute Settlement in Anglo-American Jurisprudence: Some Neglected Classics*, 56 MOD. L. REV. 380, 380 (1993).

¹⁴⁵ R. C. SOLOMON & M. C. MURPHY, WHAT IS JUSTICE?: CLASSIC AND CONTEMPORARY READINGS 17-60 (1990).

¹⁴⁶ ARISTOTLE & H. APOSTLE (Trans.), THE NICHOMACHEAN ETHICS 91-92 (1980).

law. St. Thomas qualified the human law as being right or just only if it is consistent with natural law.¹⁴⁷ St. Thomas also contemplated the need for changes in human law but explained that changes would be expected as man was able to evolve (in a sense), or move closer to perfection.¹⁴⁸

Legal theorists often ascribe the beginnings of modern legal theory to Bentham's² writings. Bentham, "England's most famous jurist,"¹⁴⁹ was a prolific critic and reformer. His grand design, allegedly, was to implement a complete reform of the entire British legal system. His theory, based on utility, was intended to provide cheap, accessible justice. Bentham's work was a great influence on later thinkers. One of these was Karl Llewellyn (1893-1962) who added significant developments to legal theory. Llewellyn observed that there were three major categories of problems that confronted society. One problem was dealing with disputes, one was creating a system that coordinated activity and minimized disputes, and the third problem was, when a novel situation arose, deciding who had the responsibility (or authority) to choose or create a solution and determine how to implement it?¹⁵⁰

Llewellyn's theoretical contributions, often referred to as law-jobs theory, is particularly relevant to ADR because dispute prevention and dispute resolution form the core of a general, sociological theory of the legal system and, more broadly, the

¹⁴⁷ AQUINAS, THOMAS (SAINT THOMAS AQUINAS), JEFFREY HAUSE (ed.) & ROBERT PASNAU (ed.), BASIC WORKS, 624-630 (2014).

¹⁴⁸ Id. at 669-674.

¹⁴⁹ Twining, *supra* note 144, at 383.

¹⁵⁰ K. N. LLEWELLYN & F. F. SCHAUER, THE THEORY OF RULES 63 (2011).

functions of government. A brief explanation of this theory is that all individuals belong to groups. At first, the family, and then, later, a work group, etc. And, of course, a very important group, the state. There is, in any group, an implicit social agreement: certain requirements, including rules that are designed to organize and control the behavior of its members. Well-developed rules will prevent unnecessary conflict and will specify the resolution of conflict when it does occur. The rules for the resolution of conflict, moreover, have several goals. The first is to resolve any disputes in such a way as to minimize disruption and preserve the cohesiveness and functioning of the group. Another goal is the rules must be able to accommodate change. Behavior and expectations of the members may have to be altered to align with the new circumstances. A third goal is that of creating and regulating the decision-making process, including the authority figures and procedures. Last, the rules must provide a way of developing techniques, skills, and other practical concerns that are necessary for implementing all of these goals. This last one is termed the job of juristic method.¹⁵¹

There are several important characteristics of Llewellyn's theory. The first one is the applicability to all groups, from two to millions of members and from primitive societies to the vastly complex. Another important point is that his theory obviates the need for a narrow definition of law. Small groups, institutions, and all forms of organized human activity share these attributes regardless of whether a label of "legal" is applied. This is particularly relevant to ADR since ADR extends across the boundaries

¹⁵¹ Twining, *supra* note 144, at 383.

of what is usually considered as the traditional legal system. A third point is that the law-jobs system of rules is a requirement for group longevity and accomplishment of group objectives. These rules may or may not be highly formal or institutionalized, but the system must operate with some degree of effectiveness for the group to survive. The last characteristic of note is that the theory is contextual. Any component must be viewed in relationship to the whole. The broad view is the key, and it would be a mistake to focus on one aspect without considering its place in the overall scheme.¹⁵² This, too, is especially relevant to the current legal system and ADR. Many disputes never reach the legal system or any formal ADR process, and most of those that do are resolved without resort to trial. ADR must be viewed in relationship to the entire dispute resolution process -- not just with respect to traditional litigation.

Llewellyn's law-jobs and other theoretical work has been the foundation for others in the field. One of these later theorists, Mirjan Damaska, advanced Llewellyn's ideas in several important ways. Damaska adopts a relatively abstract view--a detached observer--of legal theory. He subdivides his theory into three parts with each part consisting of a polar model.¹⁵³ These three parts form the framework of analysis:

- System of government,
- Structure of state authority,
- System of procedures.

The first part, system of government, addresses the theoretical roles of government. At one polar extreme, the managerial state, government's role is to manage

¹⁵² Id.

¹⁵³ Id. at 389-390.

all of the important aspects of social life. At the other extreme lies the reactive state, in which the role of government is limited to providing just the framework within which the citizens interact. These extremes parallel comparative economics: a command economy versus a free market or laissez-faire economy.

The second part, structures of state authority, have the polar extremes of hierarchical authority versus co-ordinate authority. The hierarchical model is a rigid, bureaucratic system with professionals who make decisions based on precisely defined standards. This model calls to mind a tightly-controlled military organization that runs by standard operating procedure, and everything requires a particular form. The other extreme is a system with amorphous standards rather than rigid ones. Instead of hierarchical authority its members are expected to participate in the system even though they may be lay people without formal training or specialized knowledge. The authority is shared. It is a horizontal or single level system. Twining notes that this contrast comports well with the difference between the English jury system of lay citizens compared to the European system of all adjudicatory decisions made by a hierarchical system of judges and official personnel.

The third part, the systems of procedure, contains the polar models of inquisitorial versus adversarial modes. He distinguishes these concepts from the common usage of these terms, however. In his system, these two modes are not different means to the same end -- they are means with different goals. The inquisitorial mode has the goal of solving a problem by implementing government policy. The adversarial mode is to resolve a particular dispute between specific, identifiable citizens.

Although Damaska creates a theory using these three polar parts, his emphasis is not on choosing which polar models to adopt. Instead, consistent with the notion that an entire system must be viewed as a whole, the three polar systems provide a framework of analysis -- they are ideal types in a sense, but not necessarily ideal choices. The ideal choice, ideal in the sense of best choice for a society, will be some mix of the polar extremes, but a mix that, when viewed as an overall system, is optimal for that society. Although there is a multitude of possible mixes, the best mix for conflict resolution, and by extension ADR, will probably be a system of coordinate authority in a reactive state with adversarial procedures.¹⁵⁴

A discussion of legal theory would not be satisfactory unless it included some of the observations made regarding primitive societies. It has already been noted that the social and cultural anthropology aspects of legal theory are important sources. Admittedly, there are competing points of view as to whether primitive societies can be analogous to modern ones. Richard Posner supports the claim that an understanding of primitive and archaic societies can add to our knowledge.¹⁵⁵ Posner's approach is that of economic analysis, but his perspective is broad enough to incorporate non-market and social matters in general. Posner's goal in looking at primitive systems is to determine whether social efficiency and wealth can be used as the basis of analyzing these cultural systems. His theoretical framework largely rests on the information and insurance

¹⁵⁴ Id. at 391.

¹⁵⁵ Posner, *supra* note 55, at 1-3.

aspects of primitive societies. He also examines in detail certain aspects of the legal system (property, marriage and family law, etc.) in terms of economic incentives. Included in this analysis, sometimes explicitly and sometimes implicitly, are considerations of disputes and the way that primitive societies resolve disputes.¹⁵⁶

The most important characteristic of primitive societies -- the one which Posner addresses first, is information. Posner uses several different terms relating to information, but this discussion will treat the matter in a more general fashion. Information in primitive societies is different from information in modern ones. For one thing, there is a lack of technical or scientific information. The cause of illness or disease, for example, may be blamed on witchcraft or other supernatural forces. Another difference is that information is limited, in most situations, to oral communication and memory. Posner notes that government bureaucracy and other aspects of more complex societies (even ancient ones, such as the Egyptians) is absent. The other important difference in the information of primitive societies is that there is little or no privacy. Closely shared living space, group community activities, and the lack of privacy in general means that there are few secrets. The result is that there are no intellectual property rights, and that each person's deeds and behaviors are common knowledge throughout the community.¹⁵⁷

Overall, primitive societies have a broad base of shared information about each of its members, but there are high information costs associated with any other type of

¹⁵⁶ Id at 28-32.

¹⁵⁷ Id at 5-8.

information. Typical attributes of these societies, then, include weak government (as modern mankind would view it). The family/kin/village relationships substitute for government: forming and enforcing the rights and duties of each member. Production is quite limited, and is usually confined to a primary food source which is perishable. Since technical and scientific knowledge is practically nonexistent and there is no intellectual property, the specialization of labor is also limited. Along with limited production of perishable food, there are few markets in the ordinary sense, and few opportunities to trade.¹⁵⁸

From these aspects Posner derives a few guiding principles. One of these is the need for insurance, or protection from a failure in production. The insurance motive is the reason underlying many of the "legal" features of primitive societies. Gift giving, for example, is one way of purchasing insurance (Posner notes it is an effective method of smoothing consumption as well as providing redistribution). Gift giving supplants the usual sort of trading of more developed societies. Gift giving ensures⁶ that, in lean times, the individual can expect to receive gifts as a form of reciprocity or insurance. This feature is so vital to these societies that gift giving rises to the level of duty in many respects. Posner points out that, in at least some societies, a wealthy member who refuses to redistribute his wealth by gift giving may face severe penalties -- even death.¹⁵⁹ With limited trading opportunities and perishable wealth, it makes sense to

¹⁵⁸ Id. at 8-9.

¹⁵⁹ Id. at 15.

give away the production you don't need -- the opportunity cost is nil, and the benefit is insurance for rainy days.

Gift giving is largely confined to one's kin or group, since these are the reliable sources of reciprocal gifts if the need arises. Exceptions are notable -- a gift (the bride price) for a wife, for example. Since most societies prefer matrimonial links outside of the closest kin, many brides come from a neighboring village. Those gifts/bride prices, stand out as the most significant exchanges of wealth outside of the usual gift giving within one's own group. On the matter of brides, Posner observes that a woman (childbearing age, one assumes) is a capital good. She performs services, is often a significant provider of food (working the fields, etc.), as well as producing children (especially males, who serve as a retirement fund).¹⁶⁰

There are other facets of primitive societies that Posner examines and finds consistent with an insurance or other economic function, but this discussion turns now to the dispute and dispute resolution theory of primitive societies. Posner addresses both aspects of the law: rulemaking and enforcement. Rulemaking is relatively straightforward -- since there is no formal legislature, rules are by custom. Custom establishes the boundaries of behavior and the punishment for any transgression, often with great precision. Custom may also prescribe bride prices, gift giving, contract and property rights, and other necessary relationships with great specificity. In a primitive

¹⁶⁰ Id. at 10.

society change (other than the vagaries of harvest and so forth) is rare, so there is little need for flexibility or room for negotiations.¹⁶¹

Custom is the source of the law and dispute resolution is an integral part of its implementation. Observe that, without government, there is no formal separation of civil and criminal procedure as in modern systems. Almost all transgressions, then, are wrongs against individuals -- a dispute resolution matter. But each individual is a member of a group, and a wrong against an individual is a wrong against his group, too. The group, after all, has invested in their member and rely on him as an insurer. The group has a strong incentive to punish (deter) and/or recover the harm done. Again, the group (family/kin) substitutes for government. The default remedy in many cases is retribution. The family and kin of the wronged individual expect him to exact justice, if he is able, and they will be ready to assist him if he needs it. The importance of each group member in terms of production/insurance acts as the incentive for his group to demand justice.¹⁶²

These detailed characteristics of primitive societies form the basis of how these societies resolve disputes. There is substantial variation in the exact nature of the dispute resolution process, and some form of third-party intervention is usually involved, even in relatively minor matters. This is consistent with the nature of the information: a victim would want others to know the situation before he acts to recoup his losses. Otherwise, he may be considered the wrong-doer. And making sure that everyone knows

¹⁶¹ Id. at 37.

¹⁶² Id. at 31.

that the victim exacted justice is the best deterrence of future misbehavior against that individual. The dispute resolution process also varies according to the family/kin relationship between the two disputants. The choice of the third party, the flexibility allowed to deviate from the prescribed penalty, and the need for rebuilding relationships are all germane to the dispute resolution.¹⁶³

Posner has extended the principles of economic analysis to the “law,” an area not traditionally considered to be within the realm of economics. Posner believes that the economic concepts of rationality and the maximization of satisfaction can be applied to other fields, including decisions that may have an emotional component. Posner’s view is that the economic analysis can be applied and the results evaluated to see if economics can help explain the activity.¹⁶⁴ In developing his own norm, wealth maximization, Posner reviews some of the legal scholars of the past: Blackstone, who examined the actual operation of the legal system in England, and Bentham, Blackstone’s critic, who used the principle of the greatest happiness to promote his views of legal and social reform. Posner's solution is a general principle of wealth maximization, which he is careful to distinguish from utilitarianism. Wealth maximization, he claims, is sufficient for an ethical norm: that of efficiency. But there is an important element that must be added -- the consensual basis of efficiency.¹⁶⁵

¹⁶³ Id. at 29.

¹⁶⁴ R. A. POSNER, ECONOMIC ANALYSIS OF LAW 18-21 (2nd ed., 1977).

¹⁶⁵ R. A. POSNER, THE ECONOMICS OF JUSTICE 13-99 (1981).

The law and economics approach simplifies the problem enough so that economic principles can be applied to the dispute. Efficiency supplants the dual nature of a "just" outcome that would be prescribed by earlier theorists. Other modern thinkers outside of the law and economics approach have continued their concept of justice as being more than one concept. Posner relies on Rawls definition of justice, at least as expressed by Posner, as "the basic structure of society or the way that society determines the duties and rights of its members as well as the division of advantages from social Corporation,"¹⁶⁶ but finds the dual nature of previous theorists intractable. Modern theorists may claim to be dealing with questions and concepts,¹⁶⁷ but Posner stipulates that his standard of theory is that it must be testable.¹⁶⁸ The current quantitative methods available, however, are limited. For law and economics, then, efficiency is the objective of litigation and, more broadly, dispute resolution.

Before proceeding to discuss what scholars term "the basic theory of litigation," a few clarifications of terminology will be noted in an attempt to avoid confusion.

- The terms litigation, lawsuit, filing, suit, or some other indication of the start of legal action are considered synonymous. Shavell includes the hiring of an attorney in contemplation of filing litigation, for example, in his definition of litigation. So these terms should be understood to be loosely defined and to mean the filing of a lawsuit.
- A plaintiff is the disputant who is assumed to be the wronged party, and the one who initiates some type of action (litigation, ADR, or settlement negotiation).
- The defendant is the transgressor.
- In regards to "expected," "expected benefit," etc., this discussion will use the term "expected" when risk-neutrality is assumed and "anticipated" when risk-neutrality is not assumed.

¹⁶⁶ Posner (1977), *supra* note 164, at vii.

¹⁶⁷ B. BIX, JURISPRUDENCE: THEORY AND CONTEXT 4 (1996).

¹⁶⁸ Posner (1981), *supra* note 165, at 5.

- A benefit is the value, or payment, or award bestowed by trial or the dispute resolution process.
- Settlement (or settle) will mean the result of negotiations between disputants without the involvement of third-parties (usually done via negotiations between the disputants' lawyers). Some literature and many ADR practitioners use the term settlement to refer, too, to the successful result (an agreement) from ADR. The literature and legal practice also use settlement to refer to the benefit, or the amount of an award.
- External ADR is the voluntary use of ADR by the disputants and unconnected to the court. It is often called private ADR, and only the disputants know the results.
- Court-connected ADR is usually called court-annexed ADR in the literature. It is ADR that is mandated or somehow related to the court.

Shavell's works are the most comprehensive body of theory on litigation and ADR to date.¹⁶⁹ Shavell uses three stages in his basic theory of litigation:

- The decision to litigate,
- The decision to settle,
- Trial.

The first stage, the decision to start litigation, (Shavell uses the term suit) is defined in general terms. It may be considered as the initiation of a lawsuit by filing (the filing of a lawsuit with a court) or some other action that involves a cost. The decision by the disputant is made on a cost-benefit basis: the benefits must outweigh the costs.¹⁷⁰ In general, the benefit is usually considered to be an expected benefit, and risk neutrality is assumed.

The second stage, the decision to settle, also uses a cost-benefit analysis. The key to the settlement decision is that some costs can be avoided: namely, the cost of trial.

¹⁶⁹ Shavell, *supra* note 123.

¹⁷⁰ *Id.* at 10.

Note that the settlement decision varies from the litigation decision in a significant way. The settlement decision requires that both disputants determine a net benefit as compared with the outcome from trial. The third step, of course, is trial. It is the default result: the "stick" that drives the settlement decision.

Shavell notes four fundamental factors that must be considered in the litigation decision:¹⁷¹

- Risk aversion -- as the risk aversion increases, the more likely a decision to litigate will be made.
- The probability of winning -- as the probability of winning the lawsuit increases the probability of litigation also increases.
- The cost of litigation -- the probability of litigation is inversely related to the cost of litigation.
- The size (amount) of the award (benefit) is positively related to the probability of litigation.

Each factor will be addressed, starting with cost. The cost of trial (really, the cost of continuing the litigation) that is avoidable by settling becomes the litigation cost that is relevant for the settlement decision. Costs already incurred (sunk costs), however substantial, are not pertinent to the decision to settle. The fundamental condition for settlement incorporates the costs and benefits for both disputants. The decision rule can be expressed as follows: if the plaintiff's minimum acceptable amount is less than the defendant's maximum acceptable amount, a mutually beneficial settlement is possible.¹⁷² The minimum acceptable amount for the plaintiff is his expected benefit from trial less the costs of litigation that can be avoided. Likewise for the defendant. Thus, any figure

¹⁷¹ Id.

¹⁷² Id. at 11.

between the two amounts would be preferred by both disputants. The sum of the avoidable costs becomes an important factor in settlement negotiations, then, since settlement is feasible only if the difference between the disputants' expectations of a trial award is less than their avoidable costs.

The basic theory described so far assumes risk neutrality, fixed (or exogenous) costs, and some estimate by each disputant of the probability of an award after trial and an estimate of that award. If the assumption of risk neutrality and fixed cost (assumed to be known) are true, and the estimates of the probabilities of an award and the amount of the award are the same for both litigants, then the result is straightforward. All disputes would settle and there would be no trials. The disputants would always choose to avoid the costs of litigation. An example of this is a situation involving no factual dispute, strict liability on the part of the defendant, and an award that is prescribed. A defective product, for instance -- litigation is rarely instituted. The seller (or manufacture) of the product refunds the purchase price to the disappointed buyer. These types of disputes arise but seldom reach the point where a lawsuit is filed or an attorney is consulted. In this sense, the existence of a legal system with well-defined rights serves as an incentive for disputants to settle their disputes early and at low cost. For such simple disputes, the system provides a broad benefit to society and the economic system as a whole.

Cost is an important consideration, but instead of assuming that costs are immutable, each disputant can be allowed to control at least a portion of the litigation expense. Shavell notes the disputants' decision as to how much to spend on litigation depends on the relationship between spending and the anticipated return from settlement

or trial (or the loss for the defendant). Although each disputant makes his own decision about expenses, the impact of the spending will depend, too, on the spending of the other disputant, so that spending may resemble a contest, of sorts, of who spends more.

Most commentators use the cost word in broad terms, although they are usually much more specific when they address the different types of costs involved in dispute resolution. Posner, however, divides cost into two components: direct costs and error costs. Posner's direct costs are equivalent to the out-of-pocket legal and court fees. Posner's other cost, the error costs, is "the social costs generated when a judicial system fails to carry out the allocation or other social function assigned to it".¹⁷³ This means that any deviation from the correct value (risk) is a type of cost for Posner. Since his aim is the application of economic principles to law, this simplifies the analysis. Instead of having to treat risk as a separate item, it can be viewed as a type of cost, just like out-of-pocket expenses and opportunity costs are treated. Posner's point is noted: risk can be converted into a cost.

As noted, a dispute will proceed through the litigation process only in the event that the disputants differ somehow in their beliefs. Most scholars, when discussing theory, do not offer detailed explanations for a difference in beliefs, but there is some work on the nature of this difference. Two relevant theories are asymmetric information

¹⁷³ Posner, *supra* note 117, at 400.

(AI) and divergent expectations (DE).¹⁷⁴ The DE theory proposes that each disputant estimates the probability of award, but the estimate is not accurate because of error (error as in risk). One way to conceptualize this is that each disputant takes a random draw from a known distribution. Accordingly, about half of these draws result in a plaintiff's estimate being less than a defendant's estimate, and these disputes are the ones that are settled quickly -- perhaps before litigation is formally started. In a fraction of the remaining cases, those in which the plaintiff's estimate is greater than the defendant's, the estimates are relatively close. Close enough that the difference between the values is less than the sum of the litigation expense. These, too, will settle. This leaves the rest of the draws: the plaintiff's estimate is significantly more than the defendant's. It is these draws that are litigated.¹⁷⁵

A second theory for the difference in disputants' estimates is the asymmetric information theory. In AI, one of the disputants has better information than the other. The key is obvious: the results depend on which party is better informed. If the dispute goes to trial, the better-informed party will win, and in settlement negotiations the better-informed party will get the better bargain.¹⁷⁶

There are several extensions to the basic theory that scholars have noted. A nuisance lawsuit is one of the extensions to the basic theory. A nuisance suit is defined

¹⁷⁴ J. Waldfogel, *Reconciling Asymmetric Information and Divergent Expectations Theories of Litigation*, No 6409, NBER Working Papers, National Bureau of Economic Research, Inc. 1 (1998), available at <http://EconPapers.repec.org/RePEc:nbr:nberwo:6409>.

¹⁷⁵ *Id.* at 3-5.

¹⁷⁶ *Id.* at 5-6.

as one with a negative anticipated value: the cost is greater than the award.¹⁷⁷ Kaplow and Shavell point out that if the social incentives are taken into account, some nuisance lawsuits may be desirable. These would be instances where the benefit to the plaintiff is relatively small but the social benefit (changing the defendant's behavior in a socially desirable way) may be substantial. This has already been discussed. The primary concern, however, is why nuisance suits are filed. There are three possible reasons according to Kaplow and Shavell. The first explanation is that of asymmetry of information. Another reason for nuisance suits is that a plaintiff may have low costs and the defendant has high costs, which is the scenario outlined in the construction situation earlier noted. Another reason is that the cost of litigation is spread out over time, and, as the suit progresses, the anticipated awards are likely to be greater than the additional costs of continuing the suit.¹⁷⁸

Discovery, or the disclosure of information to the other disputant is an aspect of the asymmetry of information and is discussed in the literature section. Kaplow and Shavell say that discovery has the general effect of increasing settlement and reducing trial. This is the common belief in the legal community, and it is one of the purposes of discovery (as already noted). They observe that there may be a voluntary sharing of information which would render compulsory discovery unnecessary. They also note that

¹⁷⁷ L. Kaplow & S. Shavell, *Economic Analysis of Law*, No 6960, NBER Working Papers, National Bureau of Economic Research, Inc. 52-53 (1999) available at <http://EconPapers.repec.org/RePEc:nbr:nberwo:6960>.

¹⁷⁸ *Id.*

discovery can be abused -- it may be used strategically, as they put it, because it allows one disputant to increase the litigation costs of the other disputant.¹⁷⁹

Scholars do not go into great depth as to why discovery increases settlement beyond the increased sharing of information (and reducing the asymmetry of information). Since the asymmetry of information is one reason disputants do not settle, discovery should bring the disputants' estimates closer together. The same logic is often used as a justification of mediation -- it brings the parties' knowledge and expectations in alignment with reality. Discovery has evolved quite a bit over the years, but the basic rules of civil procedure, the rules that encompass discovery, were one of the reforms prompted by Roscoe Pound's 1906 speech.

Texas ADR Theory

The criteria for a theory for Texas ADR must be established. The following criteria will be adopted:

- The theory should be broad enough to include all relevant decision-making and the data to be analyzed.
- The theory should be as simple as possible.
- The theory should be consistent with current theoretical work.
- The theory should be consistent with how ADR is practiced in Texas.

The first criteria is necessary because of completeness concerns. It must be comprehensive enough to include all the major aspects of the process that are needed to understand the whole. This is in keeping with the theoretical foundations that each part of a legal system should be viewed in context and how that part relates to the overall

¹⁷⁹ Id. at 55-57.

framework (consistent with the framework of analysis established by Damaska). For Texas ADR, the full range of decisions includes the decisions/legislation by the state regarding ADR plus the decisions of the individual disputants. Individuals may decide not to pursue redress (do nothing), to settle, to use ADR to resolve the dispute, or to go to trial. A theory should be broad enough to cover all alternatives.

The second and third criteria are consistent with the general scientific method: advancement in incremental steps. The third criterion is especially appropriate for a study that is an initial or early analysis of novel data -- established or conventional theory should be used. The third criterion is also consistent with the limited scope of this research. The purpose of this research is to investigate whether the data supports the claim (or assumption) that ADR relieves court congestion. Since this claim is widely shared, the prevailing thought should be used unless there is a compelling reason to do otherwise.

The fourth criterion is similar to the first. It may appear superfluous, but the first criterion is concerned with scope, and the fourth is concerned with practicum and procedure. The decision-making is done within the framework that has been created, either by the state, professional practice, or otherwise.

A reminder, at this point is that the broad topic of this research is ADR, but the reality is that in Texas, and in many other jurisdictions, the dominate form of ADR is mediation. As noted at the beginning of this research, the characteristics of mediation are the ones that are most relevant even though other ADR processes may be used.

A review of the advantages of mediation is that disputants' advantages are: 1) lower cost, 2) less delay, 3) greater control of the outcome, and 4) better relationships. The state's advantages are: 1) less court congestion, 2) reduction in court system costs, 3) better access to justice, and 4) better quality of justice. Starting at the top of the list and working down, the first advantage is cost. Cost has been discussed extensively and is, clearly, a major factor in the individual's choice of litigation, ADR, settlement, or no action. The plaintiff, will make his choice based on a cost-benefit analysis. Texas ADR theory will continue this basic assumption but will assume that costs are independent of the gross benefit (the award, either from trial, settlement, or ADR) to simplify the analysis.

Delay is usually noted as a factor separate from the others, although it could be considered as just another type of cost. Texas ADR theory will accept, for simplification, that delay can be aggregated with other costs. Delay, though, can also be viewed as relating to satisfaction and justice. This concept is concisely summarized by the familiar quotation "Justice delayed, is justice denied."¹⁸⁰ Some length of time is always required by dispute resolution processes -- the idea of delay as an important factor would be better described as excessive delay. It is recognized that delay can be one of the tactical activities which disputants may use to gain an advantage (real or not) in the dispute resolution process, or to exact some sort of external benefit (external in terms of external to the issue of the dispute). The notion of excessive delay carries with it a connotation

¹⁸⁰ Commonly attributed to William Gladstone.

of the abuse of the process or a fault of the process (if delay is due to other reasons such as court congestion). But excessive delay is difficult to measure because that would entail determining when the dispute is ready (should be ready) for trial, settlement, or the actual ADR session. The length of time from that point to the start of the process is the unnecessary delay. However, litigation and ADR studies typically use the length of time of filing to the time that the trial or other process formally begins, however misleading this may be. So the extent of excessive delay remains anecdotal and questionable. Note that caseload management, which has been widely adopted by the courts, is usually considered to be effective in preventing undue delay.¹⁸¹

Control is the power of the disputants to affect the process and determine the nature as well as the amount of the award. Control may be very important to disputants, especially for non-economic issues (child custody), matters that disputants consider confidential, and other concerns, depending on the nature of the dispute. Control is a factor that is not addressed in detail by any theorists. It is, however, emphasized in much of the ADR literature. Although Shavell's theory is that disputants should have the incentive to be precise and cautious in crafting their agreements, but that is impossible in many disputes. The remedy sought cannot be negotiated *ex ante*. Texas ADR theory accepts that the control that accompanies mediation (and, to a certain

¹⁸¹ Delay is often confused with undue delay. See D. Steelman, *What Have We Learned About Court Delay, "Local Legal Culture," and Caseflow Management Since the Late 1970s?*, 19 JUSTICE SYSTEM J. 145 (1997).

extent, other ADR processes) can be of significant value. The more control that a disputant has, then, the more likely that the disputant will prefer that forum/process.

The next factor is the issue of ongoing relationships. Posner's discussion of primitive societies noted that the dispute resolution process may be flexible yet complex with disputants who are closely related. This makes sense because the smaller the group, the more important each person's contributions are to that group in relative terms. Peachey notes that the closeness or relationship between disputants affected the injured party's view of the appropriate punishment.¹⁸² Bush and Folgers explain that transformation mediation can strengthen damaged relationships: the goal of improving that relationship as a means of improving the functioning of the group is, by definition, a social incentive. Texas ADR theory acknowledges this as an important factor and assumes that disputes which involve ongoing relationships will be drawn to mediation instead of litigation.

The first two advantages to the state are linked. Court congestion and judicial system funding are two sides of the same coin. Reducing the number of court cases also reduces the number of courts that have to be provided by the state. Court congestion also relates to the satisfaction/justice issue. Disputants who use the court system are more likely to be satisfied and feel that the procedural justice was fair if they perceive

¹⁸² D. Peachey, *What People Want from Mediation*, 300, 308 in KRESSEL, K. & PRUITT, D, *MEDIATION RESEARCH: THE PROCESS AND EFFECTIVENESS OF THIRD-PARTY INTERVENTION* (1989).

that the court was attentive. The more congested the court, the less attention that can be devoted to individual disputants.

The last two advantages to the state concern justice. Justice is an ephemeral concept for policymakers. Most commentators and theorists consider two types of justice: the process and the result. Procedural justice relates to whether the disputant gets a “fair” treatment. The issue is whether ADR results in a “fair” process as compared to the traditional litigation system. It can work both ways, however, depending on the situation. Given the strictures of trial, some disputants may view that process as the most fair, especially if they view the other disputant as having excessive power. Conversely, the flexibility available with mediation may be viewed as more fair than trial because certain matters could be raised in mediation that would could not be introduced at trial.

The other prong of justice is the outcome. Was the result “correct?” Recall that Pound was concerned that all parties acquiesce in the decision – fairness of the result. Unfortunately, justice, like satisfaction, depends on the point of view. There are some disputes that are difficult to resolve. The access to justice and the quality of justice are similar to the traditional bifurcation of process and result. Quality of justice may be synonymous with the outcome or result. Access to justice, though, concerns the ability of individuals to avail themselves of court services.

Access to justice can be seen as a cost issue rather than a process issue. Lower income and less sophisticated disputants are assumed to be under-served by the court system because of the legal fees and court fees. This was a concern in Pound’s speech in

1906, and the small claims court movement was started as a reform to address these problems. The issue continues, however, and some critics have charged that small claims court makes it easier (cheap and faster) for the powerful to press their claims against lower income and unsophisticated defendants. Since mediation does not require an attorney (and, if a disputant hires one, legal fees should be much lower than for traditional litigation), and scheduling is much more flexible than in a court, the assumption is that mediation will significantly improve access to justice.

The model for Texas ADR for purposes of this research varies from Shavell's models in some respect. Shavell has three models: the basic one without ADR, one with voluntary ADR, and one with mandatory ADR. His purpose is to show how the incentives for the disputants and the incentives for the state varied. This research is more limited, and a single model is needed. The model for Texas ADR is shown, below, in figure 1.

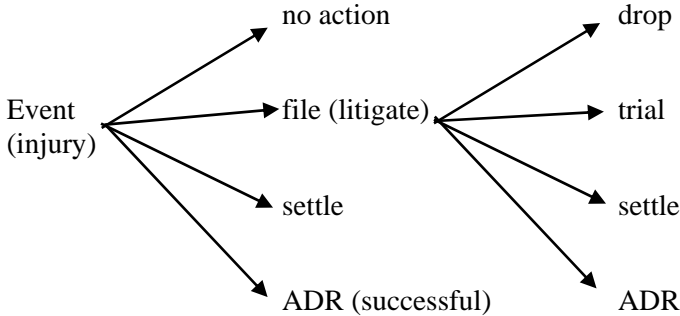


FIGURE 1: MODEL OF TEXAS ADR/MEDIATION

This model differs in that the plaintiffs now have four alternatives: no legal action, settling, ADR, and filing (traditional litigation). This set of choices is necessary to exhaustively explain plaintiffs' behavior. The assumption remains that unsuccessful ADR cases may eventually be filed, but many disputes will reach resolution and avoid the courts, at least according to the theory.

The model captures, in a comprehensive manner, all of the possible outcomes. If the dispute is dropped, the implication is that no action is taken by the injured party because there is a negative net benefit from settling, ADR, or filing: the loss-minimizing action is to do nothing. The second result is a settlement – an agreement by the disputants. The defective product dispute mentioned earlier is a simple example, or a situation where the defendant has better information and knows that the correct award is higher than the plaintiff's demand. Settlement also will occur if the total cost exceeds the difference between the disputants' anticipated awards, as discussed earlier. Settlement can occur at any time: before or after filing.

The third outcome is ADR resolution: an award that results from ADR. (Note that this is often called a settlement in the literature.) There is the possibility that the award becomes zero, especially in the case of transformative mediation. Or, if the award is non-monetary, as may be the case with child custody, a custody sharing agreement may be the result. Again, this outcome may occur before or after filing. It may be external ADR or court connected.

The last outcome is trial. This result describes only a small percentage of disputes, but it is the award against which all the other results are compared.

The impact of ADR as a substitute service, then, is to divert disputes. ADR is cheaper than court, so the disputants use ADR rather than filing. ADR may also divert some disputes from being dropped or settled in the traditional way, but this would require that one of the advantages of ADR is worth the extra cost of ADR. ADR is the better service in the market for dispute resolution.

It is reasonable that the general theory that has been discussed applies to Texas ADR. There remains one issue, though, of how ADR has been implemented in the Lone Star State. Using Damaska's basic framework, Texas's legal system is primarily a reactive state with an emphasis on co-ordinate authority. This helps to explain the way that Texas adopted ADR. Although the state court system uses the typical hierarchical structure of trial and appellate courts, courts in Texas have elected judges, bifurcated appeals for criminal and civil disputes, and several courts of limited jurisdiction, such as probate courts. The overlap of the lower-level courts is controlled, but the point is that while the courts are bureaucratic/professional, there is a substantial degree of horizontal authority, including a strong emphasis on the jury system. Texas is reactive in that the framework is established, but much of the responsibility of management is left in lower levels of the court structure.

The implementation of ADR in Texas followed these principles. Instead of a state wide mandate, it was a statewide acknowledgment: the legislature extended the authority to the individual counties to establish dispute resolution programs by using court filing fees (essentially, public funds). Note that some counties, through local bars and community leaders, had already created dispute resolution centers. After public

funding became available in 1983, several additional counties created ADR programs, but on their own time schedule.

The comprehensive 1987 legislation also fell far short of mandating ADR – but it recognized its authority. The 1987 statute is best characterized as a reactive state action since it establishes assurances that, if the dispute resolution process met certain standards, the participants were assured that the outcome would be honored statewide and given full legal effect.

At this point the structure of state authority must be considered. The structure of state authority relates to how Texas has implemented ADR – the fourth criterion. The adoption of ADR was piecemeal, county by county, and gradual. Adoption was piecemeal in that it was not homogenous statewide. Different counties established dispute resolution centers at different times – starting in 1980 and continuing thereafter. This research assumes that the creation of dispute resolution centers by a county reflects the growth of ADR in that county, if only because of the availability of an organized ADR provider.

In addition to being piecemeal, the adoption was gradual. Few in the legal profession knew much about mediation in 1980, and the general public – the pool of actual and potential disputants – knew even less. There was a learning curve, much like that of the introduction of a new product or service in the market. In some counties the learning curve might have been steeper than in others. The nature of the learning curve probably depended on the general knowledge and awareness in the legal profession as well as the presence or absence of a dispute resolution center. A reasonable conclusion,

therefore, is that there was a period of time during which more and more disputants became informed about ADR – and started to consider its use as a substitute for traditional litigation. The data analysis must incorporate this practical consideration. This is reasonable: as awareness and knowledge of ADR grew, the choices made by disputants changed, and ADR use developed. After a sufficient period of time, it is also reasonable to assume that a relatively stable level was reached: a mature market for dispute resolution services. This pattern of change in the filings and dispositions over time should reflect a shift to a new, stable level of litigation, but a stable level of filings that is less than the level before ADR.

Since the assumption is that ADR spread to different counties at different times, the counties that were slow to adopt ADR and counties that never did adopt ADR to a significant degree will serve as controls. In these counties the pattern will be delayed and/or slowed if the counties were late or weak in their embrace of ADR. For counties that never did adopt ADR to any significant degree, the pattern should be weak or nonexistent.

One more implementation consideration is appropriate. So far this discussion has treated the disputes generically. But the data is organized by categories of disputes. Each of these categories of dispute varies in terms of how well the disputes fit with the advantages of ADR. In looking at the particular categories in Texas, one can see that there are three general types of dispute categories, at least in terms of mediation/ADR characteristics. As discussed in the data, two categories were removed from consideration because of changes in the law. Workers compensation disputes and

URESAs disputes were deleted from the data to be analyzed. The remaining categories are:

- personal injury, auto
- personal injuries, non-auto
- tax
- condemnation
- accounts, contracts, notes
- divorce
- family
- other disputes

The first two categories are personal injury -- often referred to as torts. One major characteristic of this category is that, in most of these disputes, it is reasonable to assume that at least one of the parties is, or is represented by, an insurance company. Insurance companies are repeat players in that they are engaged in multiple disputes over time and at the same time. Insurance companies have a high level of sophistication, their cost structure (litigation cost) is different as compared to an individual disputant, and the incentives and cost-benefit analysis are different. The cost advantages of ADR should become well-known to insurance companies, but the marginal cost of litigating one more (or less) dispute may be quite small. Although the marginal cost may be relatively small due to the volume of disputes (economies of scale), the cost-benefit analysis of one particular dispute may be based on an average cost rather than the marginal cost. It is likely that, for ordinary disputes, there is a range of settlement values that have been established by the insurance company's overall experience.

The incentives for settlement may be more or less flexible than the incentives for an individual disputant, depending on the settlement practices. The insurance company's

additional concerns are relevant, too: strategic concerns about its reputation in the legal field as to how it deals with litigation. An insurance company may be an aggressive litigator in order to deter frivolous or nuisance lawsuits. It may be a tough negotiator when it comes to settlement offers because the insurance company knows the distribution of the awards.

Risk for an insurance company is also an issue. The risk associated with one dispute will be a factor, but the risk profile of insurance companies is likely to be much less risk-averse than the plaintiff's if the plaintiff is a one-shot player with a relatively large benefit/loss that depends on the outcome of the particular dispute. Delay may also be less of a factor for insurance companies than for individual plaintiffs. A delay in paying an award in a particular dispute may be preferred by an insurance company and dreaded by a cash-strapped individual. The information asymmetry between insurance companies and individual plaintiffs may be pronounced. The insurance company is likely to have much better information about some matters (procedural, anticipated award amounts, etc.), so it makes sense that advertising by attorneys ("Have you been involved in an accident? Then call...") is a reference to this asymmetry of information. An experienced plaintiff's attorney may reduce the asymmetry, but it may not eliminate it. Overall, the incentives for insurance companies to make a settlement offer or participate in ADR are real, but the incentives may not be strong ones. Even so, settlement negotiations or ADR are viable options either before filing or after for insurance companies. They may be quick to offer a settlement once they receive notice of a claim.

For tax and condemnation disputes, the plaintiff will be a government entity, a sophisticated repeat player. The observations made of insurance companies are also applicable to government entities. Delay in tax and condemnation disputes may be more important to the repeat player than in personal injury disputes, however. Delay may be restricted to some degree because of statutory provisions or other government policies that relate to the length of time allowed to resolve the tax or condemnation dispute. For these disputes, then, one might expect delay to be preferred by the individuals/defendant. For one thing, tax disputes may involve an individual or business with limited resources with which to pay the award. Default judgments, too, may be more common outcomes. Another outcome that is likely for tax disputes is some sort of settlement or agreed judgment if the defendant is able to negotiate a payment schedule. Condemnation, on the other hand, is indivisible in the sense that the transfer of property cannot be spread over time. In both types of disputes, settlement or ADR resolution is feasible before the dispute is filed: ADR as an alternative should have an impact on the number of disputes filed.

The next main category, accounts, contracts, notes, (CAN) is the most distinctive category. The contractual nature of the dispute is an important consideration. The terms will tend to be very detailed. The remedy for any transgression (breach of the agreement) is usually quite specific: the magnitude of the award is known. The risk of collection, even if there is secured property, may be an incentive for some negotiation flexibility in settlement negotiations or ADR. In many instances the CAN disputes involve disputants who may have an ongoing relationship: vendor/buyer, landlord/tenant, creditor/debtor,

etc. Since one of the advantages of mediation is the improvement of an ongoing relationship, ADR should be an attractive alternative to many disputants.

Divorce and family law matters also have certain characteristics. First, most of the disputes are ones which cannot be resolved without filing and some sort of judgment (agreed or final). There are no privately obtained divorces or adoptions. This means that ADR should not have an impact on the filings. Any impact will be limited to whether there are more agreed judgments -- whether ADR has diverted final judgments (trials) to ADR resolution (agreed judgments). These categories, too, are likely to involve ongoing relationships such as shared custody of children. Mediation of divorce and family law disputes comprises a significant portion of mediation cases; a lot of ADR activity reported by the dispute resolution centers is in these categories.

The last category is "Other." It is a catch-all category. The exact nature of many of these disputes is not public information because the records are "sealed" by the court: the records are inaccessible to anyone except the parties and lawyers involved. The reason is that many of these disputes involve things like involuntary confinement, commitment to an institution, employment matters that deal with sensitive information, etc. The important point is that, like divorce and family, ADR does not divert any significant number of these disputes before filing, and, contrary to divorce and family law, there may be little diversion to agreed judgment that can be expected after filing.

To summarize, ADR should have different effects on the dispute categories. The anticipated impact of mediation/ADR is listed in Table 4, below.

TABLE 4: IMPACT OF MEDIATION BY CATEGORY OF DISPUTE

CATEGORY OF DISPUTE	IMPACT OF MEDIATION/ADR
CAN (accounts, contracts, notes)	High Impact - decrease NCF (filings per capita)
	High Impact - increase Agreed Judgments
	High Impact - decrease Final Judgments
	High Impact - decrease Default and Dismissed
MA (mediation amenable disputes)	Moderate Impact - decrease NCF (filings per capita)
	Moderate Impact - increase Agreed Judgments
	Moderate Impact - decrease Final Judgments
	Moderate Impact - decrease Default and Dismissed
NA (non-amenable disputes)	No change in NCF (filings per capita)
	Some impact in Divorce, Agreed Judgments
	Some impact in Divorce, Final Judgments
	No change in Default and Dismissed

Using this theoretic framework allows for the construction of expected outcomes of NCF and dispositions for the graphical analysis. Detailed computation and reasoning is provided in the Appendix, but the expected patterns of impact are now provided. The first expectation is that NCF will decrease to a lower, stable level. Assuming that other factors are constant, then, a graph for a hypothetical county (Mediation County) that adopts mediations is presented in figure 2, below.

Mediation County, NCF per capita with and without ADR effects

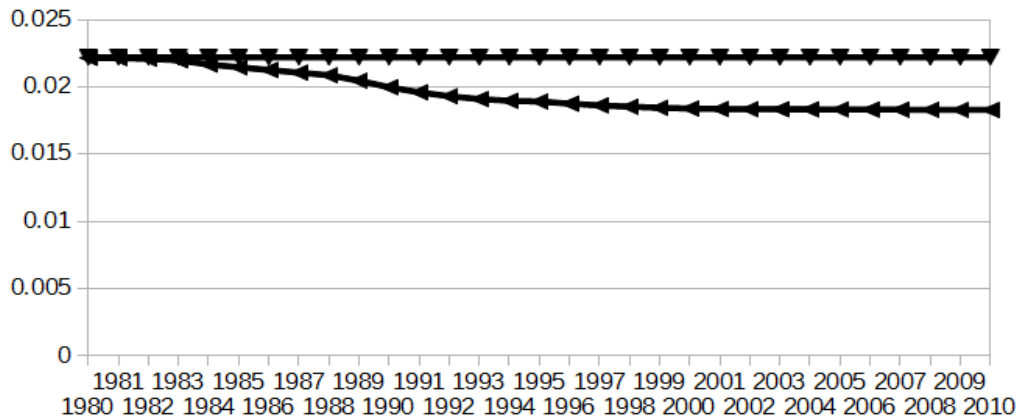


FIGURE 2: MEDIATION COUNTY, NCF PER CAPITA

The graph of the per capita case filings with ADR shows a slight decline in the early 1980s, a steeper decline beginning about 1988, and then a tapering off. This corresponds with the assumptions of how ADR was adopted. At some point, there will be a flattening out of filings: disputes that are not appropriate for mediation and “belong” in the court system.

MEDIATION COUNTY DEFAULT & AGREED J. %

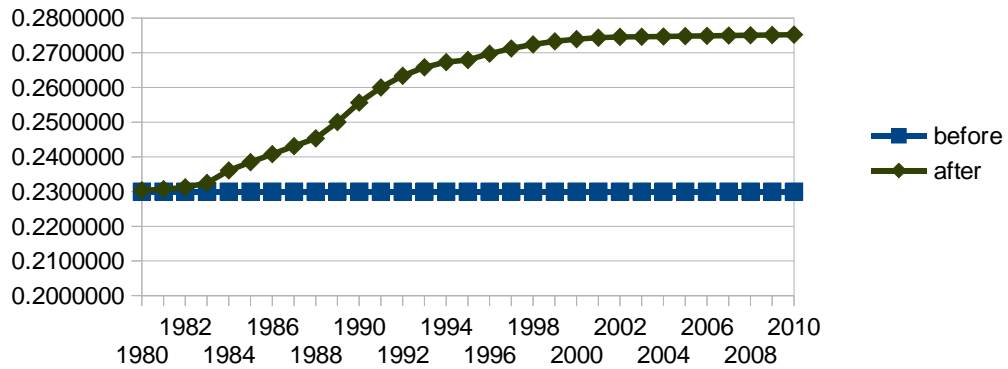


FIGURE 3: MEDIATION COUNTY, DEFAULT & AGREED J.

In the matter of dispositions, as more cases are diverted from trial to agreement, the percentage of default and agreed judgment (D&A) will increase, as shown by figure 3, above. Corresponding to the pattern described for NCF, the increase will be slow at first, with a higher rate as mediation becomes more widely accepted. After some period of time, the disputes that can be resolved by mediation are all diverted to D&A. D&A percentages, then, plateau at a higher level than before mediation was implemented.

For final judgments (traditional trial/adjudication), the mirror image of the D&A pattern should be seen. A smaller percentage of disputes are tried as cases divert to D&A, as indicated by figure 4.

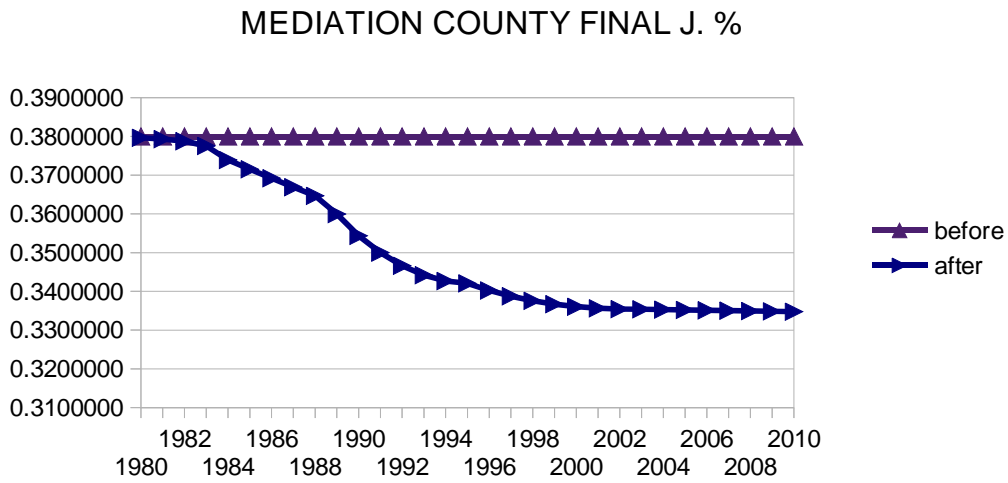


FIGURE 4: MEDIATION COUNTY FINAL J.

The patterns, above, are for the hypothetical Mediation County for generic disputes, some of which can be mediated and some which will have to be adjudicated by traditional means. This expected pattern will vary, though, depending on the exact nature of the disputes.

V. METHOD

Comparisons

This analysis will use the published data from the Office of Court Administration (OCA), which is described in the data section of this paper. New case filings per capita will be computed from the docket data to measure new litigation. The detailed docket data on dispositions will be used to compute each type of disposition as a percentage of total dispositions to measure the relative change in dispositions. Four groupings of counties with active ADR programs and seven groupings of selected control counties will be constructed. An additional control group will consist of all of the counties that are not selected as active counties. The selection of active counties will be based on the dispute resolution center (DRC) information given in some of the reports.

The counties with active ADR programs will be subdivided into groups by the level of activity and by the approximate year that the county's DRC was established. The OCA reports show that there are 15 counties that have consistently demonstrated a significant level of ADR activity based on the number of disputes handled by their DRCs. (Note that the 15 active counties comprise about half of the total population in state.) The control groups will be constructed based on population levels, and each control group will consist of several counties.

The active counties and subdivisions are:¹⁸³

- 15 active counties
- Dallas & Harris Counties
- Dallas, Harris, Bexar, and Tarrant Counties

¹⁸³ See the Appendix for more information on the active county groups and the control county groups.

- Nine of the remaining counties (excluding Brazos and Collin)

Since the assumption is that the spread of mediation was gradual, it may not be the case that a bright line can be drawn in terms of when the impact of ADR on the court data would be noticeable. Using the four groupings of counties (listed, above) recognizes that the pattern of change in the data may be discernible soon after the counties adopted ADR or, later, after the 1987 statute. Dallas and Harris, for example, may show an impact before 1987.

The data will also be organized by the fit between ADR and the category of dispute. The eight specific categories will be reduced to three, broad case categories relating to the kind of disputes in which mediation is likely to be used -- either before or after filing. The first broad category is called mediation-amenable (MA) disputes. This includes the two personal injury categories, auto and non-auto, plus the tax and condemnation categories. In these four categories of dispute, mediation is likely to be an attractive option for disputants, and so there should be a significant diversion of disputes away from traditional court litigation.

A separate category will consist of the one category of accounts, contracts, notes (CAN) disputes. Since the CAN disputes, by definition, involve disputants that have some sort of pre-existing relationship, many of these relationships may be ongoing. If so, mediation will be an especially attractive option for the disputants. The diversion away from litigation and trial should be of even greater magnitude.

The third broad category consists of disputes that mediation will not divert before filing. These disputes (divorce, family, and other) are called non-amenable (NA)

disputes. Still, there may be diversion of disputes after filing – disputes that would go from trial into agreed judgments, especially for divorce disputes.

Using the different groupings of counties and categories means that the groups can serve as controls for one another: mediation should affect the active groups at different times. The analysis will examine each group over time and compare the pattern or timing with other groups. Each of the broad categories of disputes -- MA, CAN, and NA -- can be analyzed over time and compared with one another for each county group and among county groups. Table 5, below, shows the general scheme of comparison.

TABLE 5: METHOD – COMPARISONS

COUNTY	CATEGORY	ACTION
Active groups Active v. control	CAN MA NA	NCF (filings) Dispositions: (D&A, etc.)

If mediation has made an impact on court congestion, one might expect that, prior to 1987, the number of CAN filings (new case filings, or NCF on a per capita basis) was about the same in the 15 counties compared to the rest of the state. After 1987, though, the NCF in the 15 counties should start to decrease, slowly at first and in a more pronounced manner as mediation spreads and diverts more and more disputes. At some time, the decrease should taper off as maturity sets in, but the new, stable level of

NCF should be lower in the 15 counties with active ADR programs. The decrease that should be discernible in the 15 active counties, therefore, is a decrease relative to the control counties. This serves to control for other, unknown factors that might affect the filing rate but that can be assumed to have a relatively homogenous impact statewide.

Quantitative Methods

Simple graphical analysis should show the impact of mediation on the court data if proponents of ADR are correct in that mediation will relieve court congestion.

Graphing the new case filings per capita, agreed judgment, etc. by county group and category group should reveal any major changes. More importantly, since the exact nature of the pattern of change is not known, simple graphing should allow one to identify any patterns that may be associated with ADR. Finding these patterns of change in the expected time periods and groups will be strong evidence of the effectiveness of mediation.

Graphing the data also has other advantages.¹⁸⁴ A graph may reveal changes that may or may not have been anticipated. A graph of workers compensation and URESA disputes, for example, over the 1980 -- 2010 time period is a clear signal that something in those two categories of dispute radically changed. Another advantage relates to the assumptions that have been made in forming the expectations. Graphing may provide a relatively simple way to confirm the assumptions of other data parameters that are not directly related to the hypotheses. An example of this is the "other disputes" category. A

¹⁸⁴See F. J. Anscombe, *Graphs in Statistical Analysis*, 27 AM. STATISTICIAN 17 (2012).

graph of other disputes should show a relatively constant filing rate across all counties. This would mean that the fundamental factors involved are the same and do not change. This assumption may be questioned given the changes in law and society over the 31 years at issue. If, however, the graph of other disputes in the 15 active counties is similar to the graph of other disputes in the control groups, then this lends support to the assumption that the other factors (other than mediation) were relatively consistent statewide.

Other quantitative methods such as time series analysis and segmented regression have been successfully used in similar, natural experiment studies, but preliminary investigation of these methods show that the number of observations available from the data presents a major obstacle to using these methods. Application of segmented regression or time series analysis produces inconsistent results. In short, graphical analysis is the best method for the data that is available.

The expected outcome of the research is that there is little evidence that mediation/ADR has a significant impact on court congestion in Texas. The research will discuss the implications and possible reasons, theoretical considerations, as well as recommendations for further research.

VI. EMPIRICAL ANALYSIS AND RESULTS

It would be natural to assume that the best data for evaluating the impact of mediation would be statewide filings. If filings (per capita) decline, the implication is that disputants are choosing alternative means to settle disputes. The predictions of mediation advocates, if valid, would also specify when this would start to occur: total filings in the state would start to decline after ADR becomes available. The use of mediation may take some time to spread, but the impact should be discernible within the time period covered by the data.

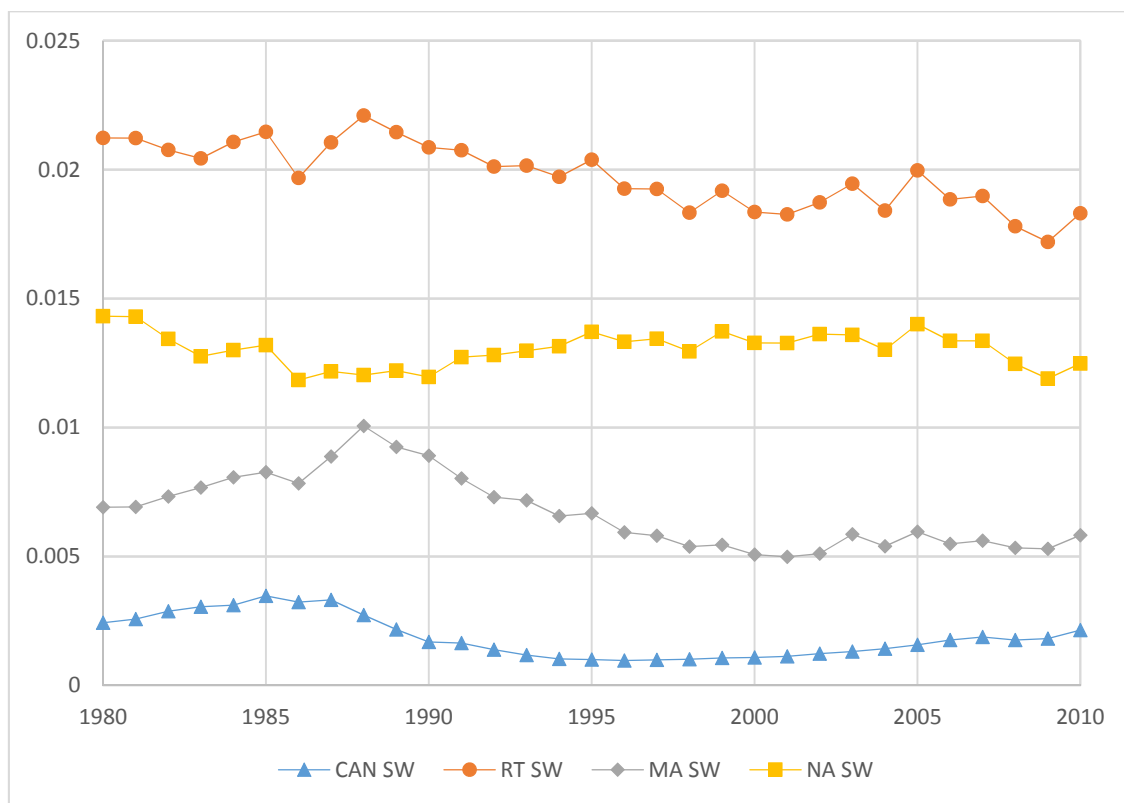


FIGURE 5: STATEWIDE NEW CASES FILED

As figure 5 (above) shows, statewide new case filings show an over-all reduction in total filings beginning around 1988. The top series, total filings per capita, went from 0.0212 in 1988 to 0.0183 in 2010. With this general trend as the only information, an observer could conclude that ADR has been successful in reducing court congestion by about 13-14% (2010's 0.0183 compared with 1980's 0.0212 filings per capita).

If mediation/ADR is responsible for the decline in filings for the statewide data, then the disaggregated data should show the impact of ADR, too. Since the data reports are by case category and county, as well as by year, this means that the impact of mediation can be evaluated at these levels, too. The data for the three main case categories (contracts, accounts, and notes, or CAN; mediation amenable, or MA; and non-amenable, or NA, plotted below the total, illustrate that there were differences among the categories.

Filings for the MA category increase for eight years -- a moderate increase for the first six years, and a larger increase for years seven and eight. During these first several years, CAN cases also increased, with a decline in CAN filings beginning after 1987. Given the assumptions that the impact of mediation would not be very significant until after the 1987 legislation, the CAN and mediation amenable cases seem to follow the expected pattern.

Non amenable filings decrease during the first several years. If the non-amenable category is a control, then, the increase in filings for the mediation amenable and CAN categories is understated. After the first several years, NA filings rise, but

only to about the same level they were in 1980. Also of note is that the NA filings do not display much variability. They remain in the .012 to 0.014 range.

Overall, the three case categories are not grossly inconsistent with expectations. The rise in CAN filings in the later years is a concern, but even with the increase, rates remain below the level of 1987. The MA filings could be the poster-board picture for ADR: at first, filings are rising and court congestion is worsening, but with the passage of ADR legislation, the filing rates drop.

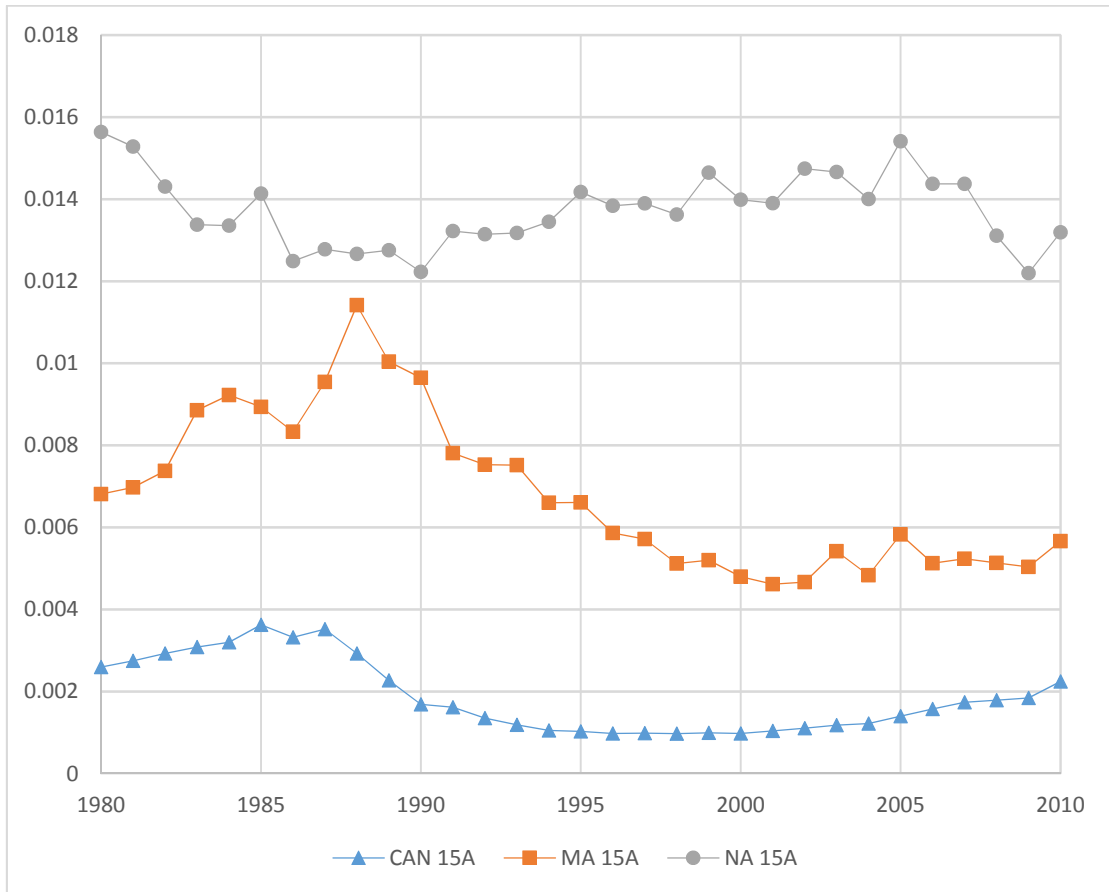


FIGURE 6: ACTIVE 15 COUNTIES NCF

If mediation is producing results at the state level, filings at the county level should show an even greater impact in the counties that have active ADR programs. However, as figure 6, above, shows, the patterns seen at the statewide level are also observed in the 15 active counties.

The most striking similarities in the graphs are the increase in CAN and MA filings for the first several years, a rather prominent peak in MA filings in 1988, and the same troubling increase in CAN filings after 2000. The lack of significant differences in the active county filings suggests that more extensive analysis is warranted.

The filings for MA cases show an increase and then a decrease at the statewide level and for the active counties. The change from an increase to decrease was about the right time, so the question arises as to what happened in counties without active ADR programs: the control counties. As figure 7, below, shows, there was a difference. The problem is that the difference does not support the expectations. The increase in MA filings for the control groups is still evident, but it is a much less pronounced increase in comparison with the active counties. The years 1983-1990 were anomalous for the active counties: the early increase in filings was the biggest difference compared to the control counties. Three things can be inferred from this anomaly: 1) the active counties experienced a litigation explosion that the control counties did not, 2) unknown, major litigation factors are the cause, or 3) natural variation is the cause. The implication of the first alternative is that the larger counties (recall that the active counties are mainly the more populous ones) were victims of the litigation explosion, and smaller counties somehow avoided the full effect. The fact that filing rates and patterns between the

active counties and the controls were basically the same for the rest of the time period could suggest that ADR had an impact just on the “large county explosion” and no impact on litigation, generally. The second alternative, different factors, is also a stretch given that the patterns and rates are so similar in the other years. The third possibility, natural variation, may be at least one of the causes. Regardless of which alternative (or combination) is valid, ADR does not seem to be a cause, at least according to the expectations.

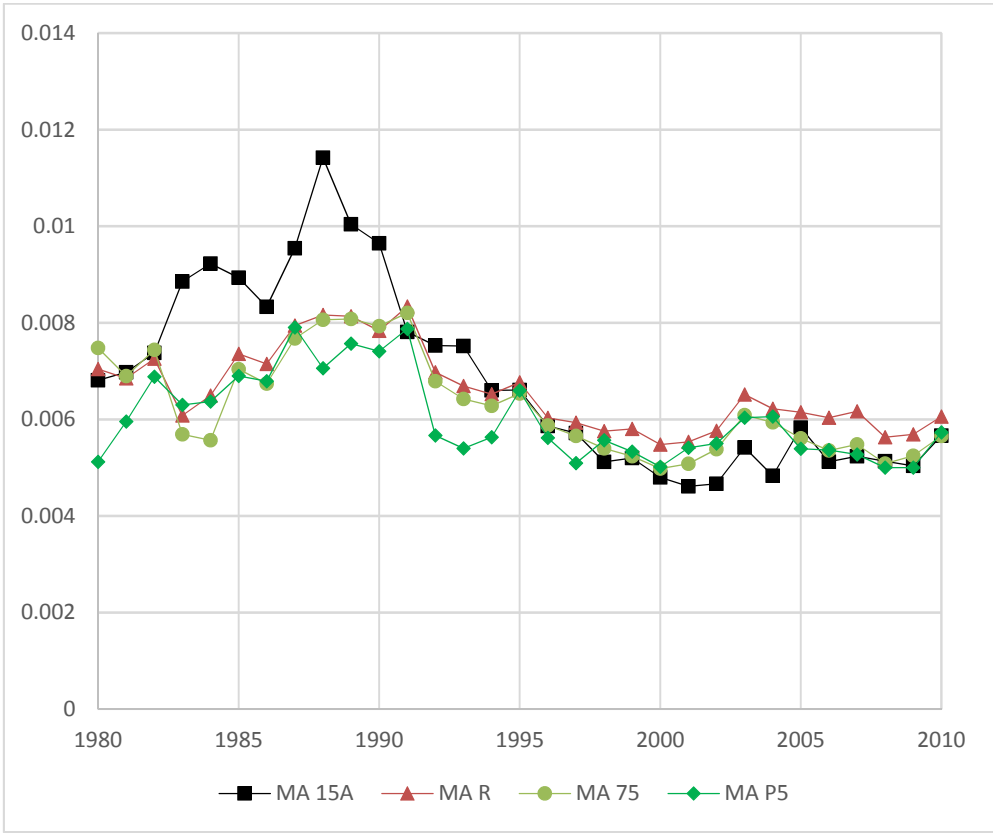


FIGURE 7: MA, 15 ACTIVE AND CONTROLS

Another way to test for ADR is to look at the time differential between the counties that were early adopters of ADR and the counties that established active programs later. If the use of ADR is implemented at different times but there is a similar impact, then there should be evidence of a time shift in CAN and MA filing patterns. As figure 8, below, shows, there were some differences in the pattern of filings during the first several years for DH and the Large 9 (L9). Most of the difference was from about the time of the 1987 legislation and for a few years afterward. The Large 9 group did experience higher litigation rates, but after 1990 the two groups' filing rates are very similar. On the whole, then, finding that ADR was responsible for the three or four years of elevated filings in DH (for 1987-1989) is contrary to expectations.

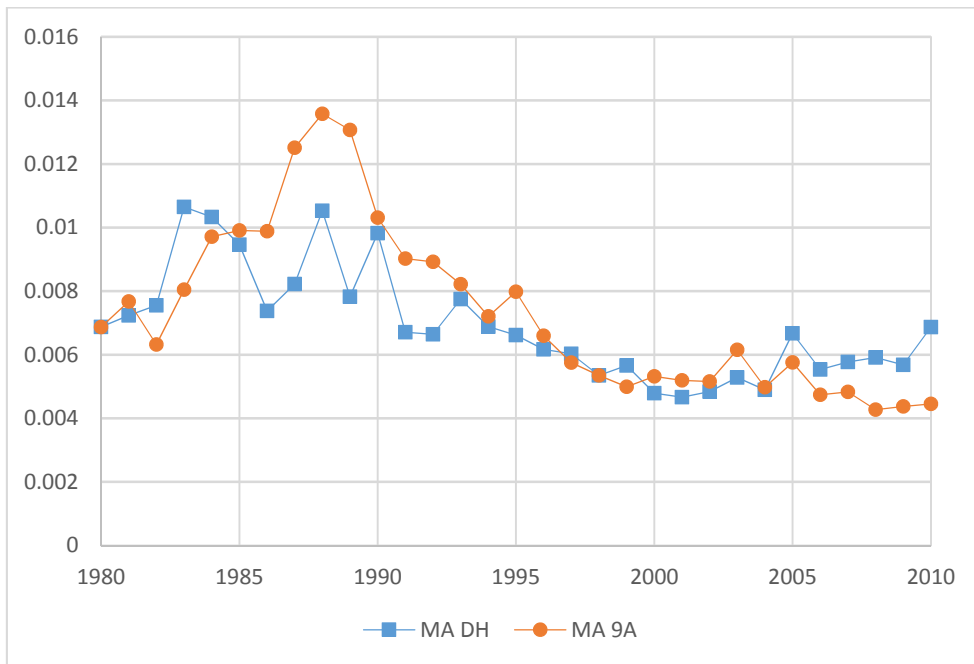


FIGURE 8: MA, NCF FOR DH AND L9

Some insight might be gleaned from additional comparison with the control counties. In figure 9, below, two control groups (the largest county control groups) are added. The prominence of 1987-1989 for the L9 group remains notable, but a curious dip in filings for the P4 group, the largest counties that were not included in the active group, is also prominent. The dip for P4 for two years indicates that some substantial variation in the filing rates can appear, at least over the two years (1983-1984). This observation means that it is likely that both anomalies, the dip in the P4 and the hump in the L9, are unrelated to ADR, but are instances of natural variability. Overall, the evidence from MA filings of a shift in filing rates is very weak.

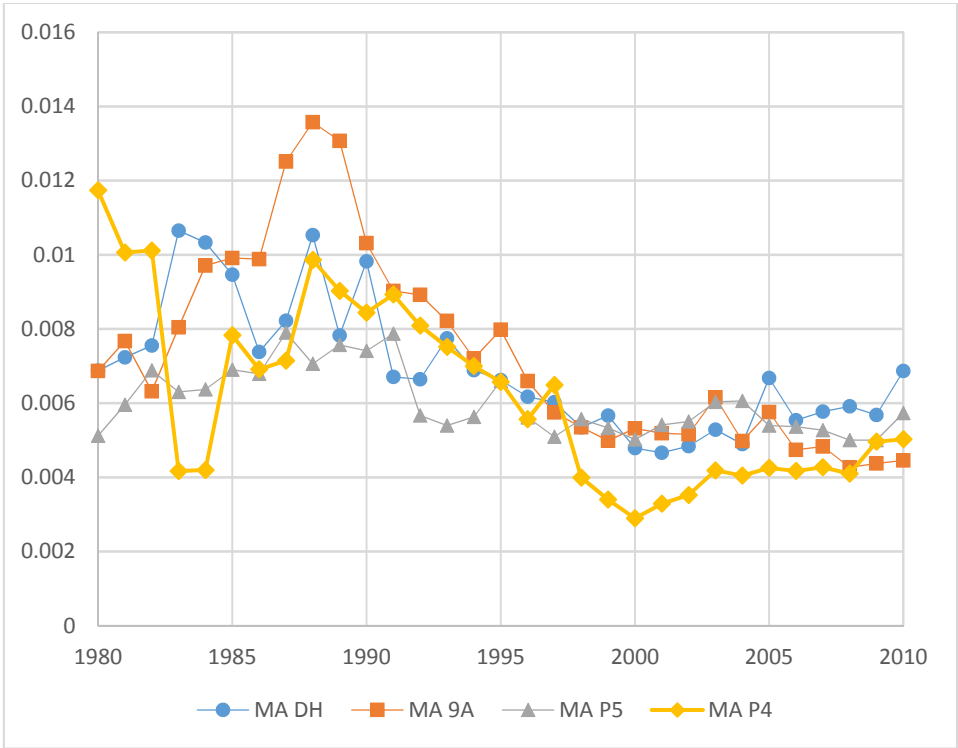


FIGURE 9: MA, NCF, DH & L9 WITH CONTROLS

The category most impacted by mediation, according to expectations, is CAN. If ADR is most attractive to parties in a continuing relationship, then CAN is the one category in which most disputes are between parties with established relationships. Many of these, it is reasonable to conclude, will be on-going relationships. Figure 10, below, of CAN filings reveals several notable relationships.

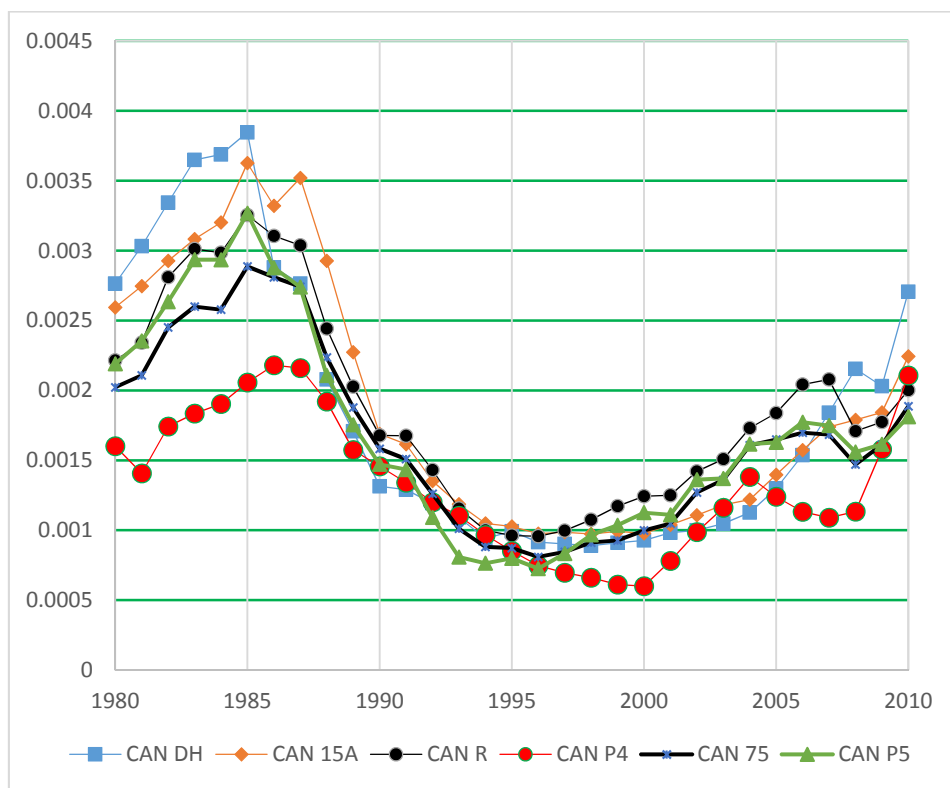


FIGURE 10: CAN, NCF, ACTIVE AND CONTROLS

The graph shows a rise in CAN filings in all groups up through about 1987, a strong decline through about 1990, then a weaker decline until about 1996, and then an increase through 2010. Taking each of these aspects in order, the early rise is not

necessarily inconsistent with expectations because litigation may have been increasing up until the 1987 legislation. The increase from 1980 until about 1986 is notable in that the patterns are very similar, as shown by the slopes. The sharp decline in filings at about the same time is also suspect as being the result of ADR because the same decline is evident in the control groups. There is no time shift between the two ADR groups nor is there any shift when comparing with the control groups. Also, the rates quickly converge—much too quickly if ADR spreads gradually. The later rise is inconsistent, too, with expectations and is observed in both the active and control groups. The CAN graphs are remarkable for their similarity -- the assumptions and expectations are contradicted by the data. A reasonable conclusion, then, is that ADR has an insignificant impact on CAN disputes.

Another way that ADR could affect court congestion is its impact after filing. If disputes are more likely to settle, especially with reduced involvement on the part of court personnel, then this would show ADR can be effective. The way the data is reported means that any significant impact of ADR should be discernable in the default and agreed (D&A) type of disposition. Since the dispositions are, like filings, reported by year, county, and category of dispute, this allows comparison in much the same way as done with filings. One difference, though, is that the expectation for filings was that a decrease would be consistent with ADR effectiveness. For dispositions, an increase in D&A dispositions is the expected outcome. Additionally, the disposition data must be transformed in a way that allows valid comparison over time. The percentage of D&A

dispositions, as compared to total dispositions, will fulfill this need. If ADR is increasing the settlement rate, then the D&A disposition percentage should increase.

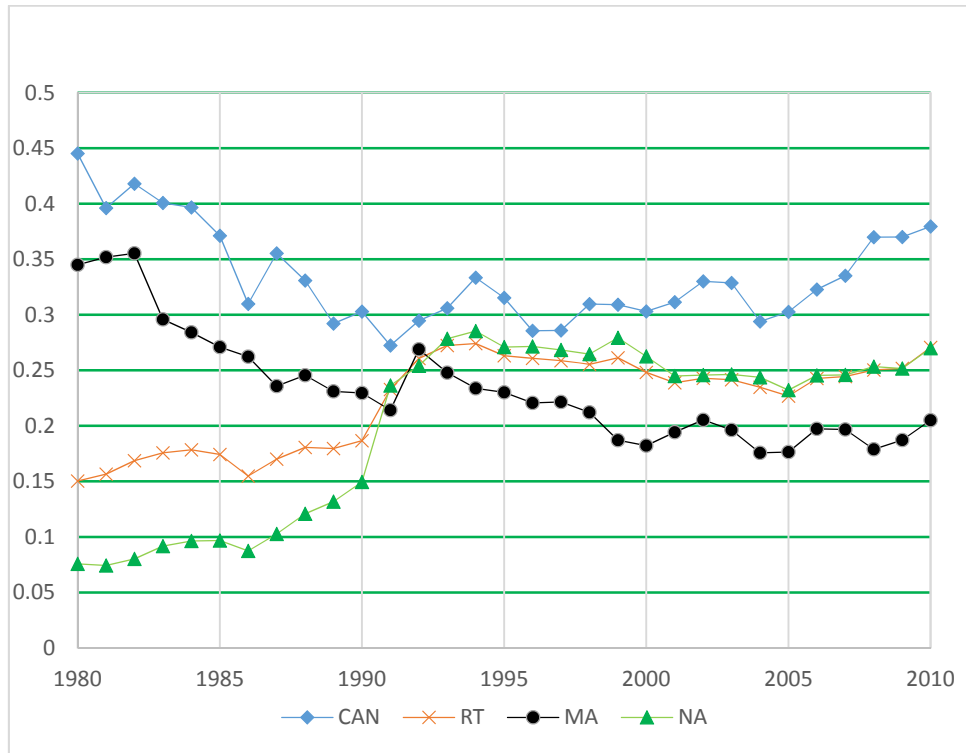


FIGURE 11: ACTIVE D&A

The graph of D&A disposition rates for the active 15 counties is shown in figure 11, above. The revised total (RT) rate is the average of D&A dispositions overall, so it provides a benchmark. The RT rate increases sharply during the early 1990s, which means that D&A dispositions, in general, increased during that time. Standing on its own, an increase in the percentage of dispositions that are D&A would be consistent with expectations.

Looking at the categories, however, gives a different picture. The D&A percentages increase from 1980 through about 1993 for the NA disputes and then are relatively stable. The NA disputes, recall, include divorce and family law matters. If mediation is responsible for more divorces being “agreed,” then that would be consistent with expectations, except for the fact that the impact is observed over just a few years. After 1993, the NA rates do not increase.

For MA disputes, the D&A rates actually decline until about 2000. This is contrary to expectations that mediation/ADR, whether court-connected or not, will result in increased settlements. The CAN disputes also decline, reaching their lowest point around 1991. After 1991, the percentages increase, but only slightly until about 2005. The increase in D&A dispositions is too late to be credited to ADR.

If D&A dispositions increase as a result of ADR, the expectation is that this increase would be accompanied by a decrease in trials. Trials, in this sense, and in the way the term is used by the literature, is a broad term. Trial by jury happens to be relatively rare. (The Annual Report for 2010 shows that there were 1,501 final judgments as the result of trial by jury; this is a small fraction of the total of 272,744 of all final judgments for that year.) Trials, for the purposes of this research, should be broadly construed to mean final adjudication by the court. This definition would include jury trial, trial without a jury (a “bench” trial), and summary judgments. This definition comports with the final judgment dispositions reported in the data. It is “final judgments,” then, that would decline in response to ADR.

Figure 12, below, shows the final judgment dispositions (FJ) for the active 15 county group. Final judgments do decline, but for the NA cases. From 1988 to 2002, CAN cases do show a slight decline in FJ, but MA cases show a slight increase. After 2003, FJ appears to remain relatively constant, with some variation. The patterns in FJ are consistent with the D&A trends, but both are inconsistent with expectations.

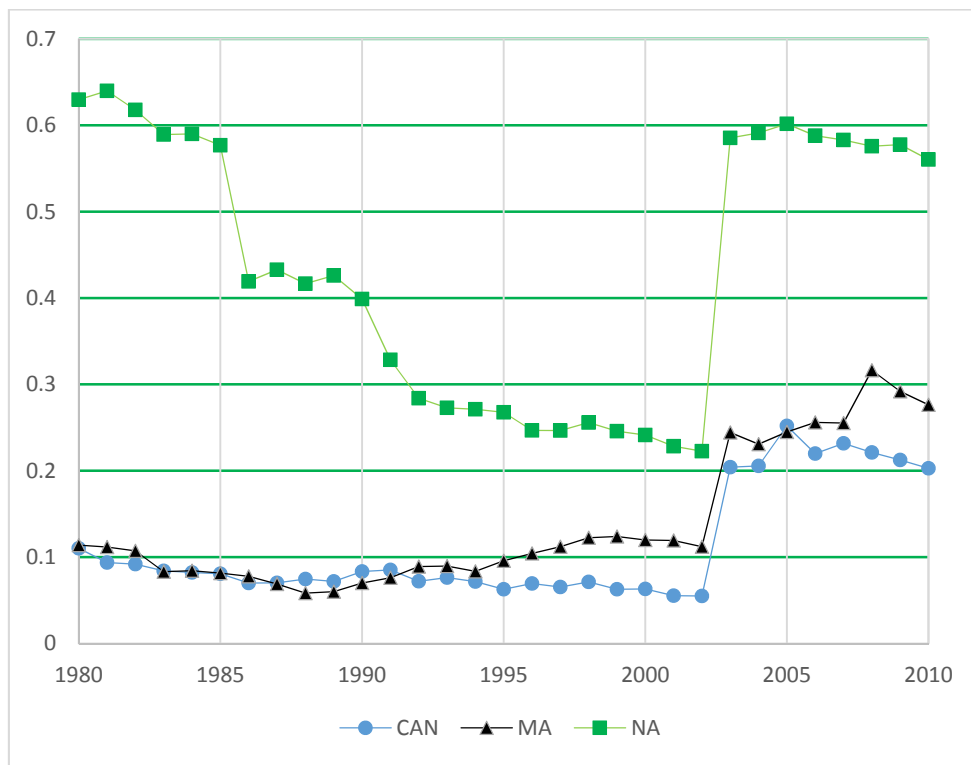


FIGURE 12: ACTIVE 15 FINAL J.

An additional comment is required regarding the huge leap in FJ for all cases. This jump in FJ is observed in all county groups and all case categories; it is due to case-

law developments in “final judgment” status.¹⁸⁵ Like the change in the law that required WC and reciprocals to be dropped from this analysis, this jump in FJ must also be ignored.

Additional graphs and analysis are contained in the appendix. The best tests for the impact of ADR/mediation, those examined above, show that the data can be construed as consistent with expectations on a gross level, but when the data is analyzed more closely, the evidence is weak in some cases and contradictory in others. On the whole, there is no consistent evidence that ADR/mediation has made a significant reduction in court congestion. The specific results are:

- the first null hypothesis, ADR does not reduce filings, is not rejected,
- the second null hypothesis, ADR does not increase settlement after filing, is not rejected,
- and the third hypothesis, ADR does not reduce the number of trials, is not rejected.

¹⁸⁵ The reason for the jump requires a short explanation. A decision by a court resolving a dispute is not necessarily a final judgment. Orders (or decrees) by a court may dispose of certain legal issues in a dispute, but for the court decree to become “appealable” to a higher court, the decree must be “final” in that it disposes of the entire dispute. The actual way this is accomplished is that the judge will sign a decree that is prepared by one of the parties (usually the prevailing party). The problem is that the party who prepares the “final order” is not allowed to appeal it, unless certain language is included. These are legal technicalities, and the exact law on these matters varied amongst the courts of appeal. A series of case decisions culminated, however, into a general consensus on how orders could be requested and still preserve the right to appeal. Attorneys and judges (and perhaps court clerks) became more conscientious and consistent in how decrees were drafted and entered into the record.

VII. DISCUSSION

The result of the analysis has shown that, despite a general decline in the litigation rate per capita statewide, there is scant evidence that ADR has been the cause. The characteristics of the data used in this analysis differentiates this research from other empirical studies. The first distinguishing characteristic is time. The use of 31 years of court filings and dispositions allows for the impact of ADR to become evident over the course of that period of time during which ADR was implemented. This is in contrast to other empirical studies which looked at results from relatively short time periods.

The second distinctive aspect of this research is that it involved an entire state and not just particular districts, courts, or programs. It is conceivable that ADR could have a positive impact on court congestion in a limited setting, such as a court or program, but establishing a causal link between ADR and a general decline in litigation requires examination of ADR against a much broader backdrop. A particular court-connected program may tell something about settlement in that court-connected ADR, but it will not speak to the impact of ADR on the filing of litigation. Only a broad-based analysis can investigate a causal link between ADR and a decrease in litigation filings.

A third aspect is that by using data from the entire state, the research uses the natural experiment approach. The DRC data indicates that ADR was not implemented at the same time or same rate in the various counties of the state: a natural experiment. The counties that adopted ADR later versus earlier is one way to use this natural experiment, and counties that failed to implement strong ADR programs at all is another method of a natural control.

A fourth aspect is the reporting scheme that happens to segregate the data into categories that should be affected by ADR in different ways. The CAN disputes, according to ADR assumptions, should show the greatest reduction in filings and the greatest increase in ADR-induced agreements (or settlements) after filing. The categories of disputes that are amenable to mediation before filings, the MA disputes, should show some reduction in filings and some increase in post-filing agreements. The non-amenable disputes, however, will have filing rates that are unaffected by ADR, although there may be an increase of post-filing agreement.

The lack of evidence of a significant impact on filing rates is, perhaps unfortunately, consistent with the little research that has been reported. This raises questions, however. The first question pertains to the overall decline in litigation rates. Was this a coincidence? Perhaps it was. The literature and theory on litigation indicates that there are many factors involved in litigation rates. Factors, like those proposed by Munger and Jacobi, may include general economic or political conditions. The task of identifying specific factors and estimating the impact of any one factor may be beyond the available data and analytical tools.

One idea that may be relevant is the observation that reducing the costs of dispute resolution will increase the number of disputes (as noted by Shavell). This is Jevon's "paradox."¹⁸⁶ As the cost of a limiting resource declines, more of that resource

¹⁸⁶ See W. S. JEVONS & A. W. FLUX, THE COAL QUESTION: AN INQUIRY CONCERNING THE PROGRESS OF THE NATION, AND THE PROBABLE EXHAUSTION OF OUR COAL-MINES (1965).

will be demanded. This “paradox” is a fundamental principle of economics – the law of demand. As Posner astutely observes, dispute resolution (either ADR or traditional litigation) can be viewed as a service, and basic economic principles are applicable.

Another possibility is that ADR was a temporary fad. There was a shift to ADR in response to the court congestion problems of the 1980s, but as the congestion waned, there was a shift back (at least by some) to the traditional court system. This concept has support. Research shows that consumers may seek a change, for the sake of novelty or variety, even if the product (or service) is considered to be of lower quality.¹⁸⁷

Still another possibility is that ADR is nothing more than a placebo. The term “placebo” originates from Latin “I will please,” and placebos received approving comments by Thomas Jefferson and close scientific scrutiny by Benjamin Franklin.¹⁸⁸ A related concept, the halo effect, could also be credited. The halo effect is often limited to applications of personal attributes, but applies to the cognitive process that facilitate all judgements and inferences.¹⁸⁹ It has also been applied to business management.¹⁹⁰ The concept could also be applicable to ADR. Parties are more likely to settle if their beliefs change, including their beliefs about the probability of settlement.

The halo effect is just one of the phenomena that cognitive error embraces.

¹⁸⁷ See R. K. Ratner, B. E. Kahn, & D. Kahneman, *Choosing Less Preferred Experiences For the Sake of Variety*, 26 J. CONSUMER RESEARCH 1 (1999).

¹⁸⁸ M. Specter, *The Power of Nothing Do Placebos Work?*, THE NEW YORKER MAGAZINE Dec. 12, 2011 (available at <http://www.newyorker.com/magazine/2011/12/12/the-power-of-nothing>).

¹⁸⁹ See R. E. Nisbett & T. D. Wilson, *The Halo Effect: Evidence for Unconscious Alteration of Judgments*, 35 J. PERSONALITY & SOCIAL PSYCHOLOGY 250, 251 (1977).

¹⁹⁰ See P. ROSENZWEIG, THE HALO EFFECT-- AND THE EIGHT OTHER BUSINESS DELUSIONS THAT DECEIVE MANAGERS (2007).

Cognitive errors in ascribing an incorrect causal relationship is well known. In the medical field, the tendency for physicians to seize upon a particular cause for a patient's condition and stop looking for any other potential cause is common: search satisficing.¹⁹¹ It may be that the legal community has committed the same cognitive error – assuming that the spread of ADR deserves credit for reducing litigation.

So there are several possibilities to explain why the data and the general belief do not match. Surveys show that the majority of judges believe that ADR reduces court caseloads, although some opine that the impact “is almost imperceptible.”¹⁹² Perhaps there is a cognition error, but if ADR is no more than a placebo, is there any harm in that? Considering that ADR does involve some diversion of resources (court funds, personnel, etc.), there is an efficiency concern. It may be a squander of precious resources to continue ADR programs in the court system. If the discussion ends with this point, though, the same cognitive error (satisficing) may be made. A possibility – the placebo effect – is identified and a negative outcome from that (waste of resources) is noted, so the diagnosis is complete: the search ends.

To avoid making that error, the investigation should be continued. One additional comment about the allocation of resources is apparent. This efficiency issue, the optimal allocation of resources, is noted by law and economics scholars. Shavell observes that *ex ante* ADR agreements deserve public support because they provide

¹⁹¹ J. GROOPMAN, HOW DOCTORS THINK 169 (Mariner 2008).

¹⁹² B. McAdoo, *All Rise, the Court Is in Session: What Judges Say About Court-Connected Mediation*, 22 J. DISP. RESOL. 377, 386-387 (2007).

incentives for parties to choose the dispute resolution process before the dispute occurs. This increases social welfare and should, therefore, be encouraged. In contrast, *ex post* ADR agreements do not need to be encouraged – the cost/benefit analysis of the particular dispute drives the decision. There is no clear argument for ADR.¹⁹³ Do these same social benefits occur if ADR is a placebo? Do they, perhaps, offset the extra resources allocated by the court system? That might be.

Shavell's analysis is representative of the law and economics perspective towards the legal system and ADR. ADR is considered to be a substitute for a trial, or, to put it another way, an arbitrator is a substitute for a judge. The arbitrator, though, can be superior to a judge in terms of increased accuracy or risk reduction. The simplification of the model may distort the true character of the processes, however. The arbitrator (or ADR process), by reducing asymmetry, reduces risk, and can become preferable to a judge and trial. Economic principles teach that there is a cost to everything, though, including the additional information that is necessary to reduce asymmetry. How this extra, implicit cost is incorporated into the economic model is not tackled by the literature. Indeed, a better conceptual approach is to compare the processes and not the decision-makers.

The problem inherent in comparing an arbitrator (or any other third-party, such as a mediator, who may decide or influence the dispute resolution) is that the judge in the traditional system of litigation is not supposed to be an expert on the matters in

¹⁹³ Shavell, *supra* note 123, at 20-21.

dispute. He is supposed to be a neutral observer of the adversarial process. The judge comes to court with little preparation and little detailed knowledge of the facts or legal arguments of the dispute.¹⁹⁴ It is the adversarial process of trial that is designed to reduce asymmetry – to get at the truth.

The correct comparison, then, is between the processes. Does ADR, with its less formal rules, do a better job of reducing asymmetry and risk than the discovery, testimony, and cross-examination of the traditional trial process? That is an open question, especially considering the fact that many disputes involve emotional, non-monetary, and cognitive issues. It is valid to compare the results of trial with the results of ADR and to use the anticipated outcome of trial as the benchmark for settlement considerations, but to focus on the judge – only one aspect of the traditional process, is a mistake. Posner's view of competing services is apt. Even so, the traditional process and ADR are not perfect substitutes, just as other competing services are often not perfect substitutes.

Recall the advantages of ADR. One is to improve the satisfaction, or justice, by addressing the needs or desires of the parties that are not well-served by traditional litigation. A trial is constrained in terms of its scope. Issues that are legally recognized, such as actual damages and legal precepts, are admissible. In ADR, other issues may be included. Instead of perfect substitutes, then, the addition of ADR constitutes an expansion of the services available. Ignoring costs, then, some disputes will be attracted

¹⁹⁴ R. A. Posner, *A Conversation with Judge Richard A. Posner*, 58 DUKE L. J. 1807, 1816 (2009).

to the greater flexibility of ADR. The services available in the market has expanded, and economics would claim that, with a greater variety of services available, the demand can only increase. In terms of costs, it is not clear that ADR costs are lower. Studies have produced mixed results in terms of lower costs for ADR. Part of the reason may lie in that some studies find that there is not a significant difference in terms of motions, discovery, and attorney hours between mediation cases and non-mediation cases.¹⁹⁵ If costs are not that different, this is consistent with the notion that ADR is providing a service different from litigation and trial.

If ADR is a different service than trial, one way that it is different may be the emotional and other aspects of disputes that are not within the scope of traditional litigation. As noted, law and economics has difficulty addressing these issues, but there is overwhelming evidence that emotional and related aspects are important in dispute resolution. Some recent research shows that some emotional component is requisite for making good decisions, even if the decisions are relatively simple business or economic choices.¹⁹⁶

Another issue that law and economics ignores is a fundamental criticism that has been part of the ADR debate since its inception. It is relevant, too, to all forms of dispute resolution. It is the issue of justice: that concept that has preoccupied the finest minds through the centuries. The fear is that ADR does not advance justice, it frustrates it. The critics point out that many of the improvements in justice were those legal

¹⁹⁵ Wissler, *supra* note 138, at 67-68.

¹⁹⁶ DAMASIO, *supra* note 50.

developments in the 1950s-1970s that led to the alleged explosion in litigation. The “have-nots” made some gains, and ADR takes those away.¹⁹⁷

These concerns about justice come from too many eminent scholars to dismiss lightly. Some in Pound’s audience in 1906 might have felt that his criticisms were undeserved, but in retrospect they can be seen as insightful as well as prescient. This basic issue of justice deserves attention in this research; a broad examination of ADR would be lacking if it did not address the issue of justice.

The question, then, is how these results comport with basic theories of law and justice. As previously noted, there are multiple layers of law, according to theorists. The assumption is that human law will gradually develop to be in closer accord with the higher levels, whether that higher level be termed the natural law or something else. The key idea is that law (and, by extension, the legal process) will change. Potential criticism of any change, though, could be made that the law is moving away from a rational basis, and so the change is detrimental. This criticism is implicit in Olson’s list of ills – the move to fuzzy rules, for example, invites arbitrary results and encourages litigation. The increase in litigation, as has just been explained, is not necessarily an indication that the laws or legal process produces less “justice;” it is consistent with providing more “justice.”

Returning to the basic tenets of economics, there is more to be addressed than the simple efficiency discussed, above. The increase in dispute resolution services and

¹⁹⁷ R. B. Bush, *Mediation and Social Justice: Risks and Opportunities*, 27 J. DISP. RESOL. 1, 1-2 (2012).

resulting increase in demand may not seem to matter that much in an economic analysis. It may, in fact, matter a great deal. Entrepreneurship is one of the four fundamental factors of production. Entrepreneurship is considered to be the way that the other three factors (land, labor, and capital) are combined. Posner notes that economic development is highly dependent on property laws, the protection of rights, and other aspects of the legal system.¹⁹⁸ These laws are important in that they provide the incentives for economic activity.

Economic history usually addresses entrepreneurship as a person, but there are different views of the nature and role that the entrepreneurship has. The core meaning of entrepreneurship comes from the work of Irish economist Richard Cantillon (who coined the term entrepreneur in the early 1700s) as one who participates in the market and accepts the risk with the purpose of making a profit.¹⁹⁹ The nature of entrepreneurship is a core of economics, yet the functions of the entrepreneur have not been fully discussed. Instead of focusing on the person, it is more appropriate to focus on the broader concept of entrepreneurship.

Jean Baptiste Say enlarged the meaning of entrepreneurship to include the organization of the factors of production.²⁰⁰ Entrepreneurship in this broader sense encompasses the organization and management of economic activity. From that

¹⁹⁸ R. A. Posner, *Creating a Legal Framework for Economic Development*, 1 THE WORLD BANK RESEARCH OBSERVER 1, 1-4 (1998).

¹⁹⁹ R. F. Hébert & A. N. Link, *In Search of the Meaning of Entrepreneurship*, 1 SMALL BUSINESS ECON.: AN INTERN'L J. 39, 42 (1989).

²⁰⁰ H. H. Stevenson & J. Carlos Jarillo, *A Paradigm of Entrepreneurship: Entrepreneurial Management*, 11 STRATEGIC MANAGEMENT J. 17, 18 (1990).

perspective, entrepreneurship involves getting individuals to act together in a concerted way to produce the desired result: a complicated task.²⁰¹ This involves providing the incentives that make it in the individuals' self-interest to cooperate. It also involves the management of change, so flexibility is a key consideration.²⁰² The common thread is to obtain the maximum cooperation (or contribution) from the individuals involved. The flexibility required to elicit the maximum effort is the key, then, to increase the productive potential of the organization.

Consider, now, the organization to be an entire economy. How does entrepreneurship obtain the maximum cooperation? The legal infrastructure is the way that disputes are resolved, and for disputes to have a positive impact, the method of resolving disputes must be flexible. Rigid rules are a bane to innovation. The traditional legal system, however, is rigid. It must be rigid, though, to reduce uncertainty – the risk that Olson, Ashenfelter, and other scholars so despise. But uncertainty is also opportunity for entrepreneurial activities. The entrepreneur takes the risk and adds to the social welfare. This is the way that ADR, as an addition to the legal services market, can provide a boon to the economy, but the contribution of entrepreneurship in this way has been overlooked by the law and economics analysis. Law and economics simplifies and reduces the number of variables in order to determine the impact of one particular aspect, or the change in one variable. Entrepreneurship, in the most fundamental terms,

²⁰¹ C. Christensen, M. Marx, & H. Stevenson, *The Tools of Cooperation and Change*, 84 HARV. BUSINESS REV. 72, 73 (2006).

²⁰² H. Stevenson & David Gumpert, *The Heart of Entrepreneurship*, 92 in H. LEVINSON DESIGNING AND MANAGING YOUR CAREER (1989).

envisions change in the system: change in many variables.

Most of the time, the management of change (an entrepreneurial function) is rather slow and deliberate. Complicated things will change in complicated ways, and the concern is to disrupt the existing cooperation in the least way.²⁰³ When major change occurs, though, more flexibility is required – more drastic changes in the system, incentives, etc. must be implemented, sometimes all at once and not piecemeal. ADR has been a drastic change, but it was in response to major changes that presented opportunities. The change that ADR instituted was not just a change in costs, which is the essential focus of the law and economics analysis. It was much more drastic. The original goals of ADR, as expressed in the proceedings of the Pound Conference, was more comprehensive than offering a cheaper alternative – a way of diverting disputes from the courts. The goals of ADR were also to increase “justice,” or the satisfaction with the outcomes.²⁰⁴ If the outcomes are more satisfying, then this is a positive incentive for more entrepreneurial activity. This is the benefit that law and economics has not incorporated in its analysis. With good reason, too. The positive benefits are complex, difficult to compute or estimate, and so challenging to evaluate. The benefits exist, though, regardless of whether they are tractable.

General respect and acquiescence of the law can have a major macroeconomic impact. An example is Greece. One important reason for the current fiscal crisis in

²⁰³ H. H. STEVENSON, J. L. CRUIKSHANK & M. C. MOLDOVEANU, DO LUNCH OR BE LUNCH: THE POWER OF PREDICTABILITY IN CREATING YOUR FUTURE 156-157 (1998).

²⁰⁴ A. Meyer, *To Adjudicate or Mediate: That is the Question*, 27 VALPARAISO UNIV. L. REV. 357, 374 (1993).

Greece is due to widespread tax noncompliance (one can call an avoidance or evasion).²⁰⁵ The fiscal problems have been greatly exacerbated by the fact that tax evasion is the national pastime.²⁰⁶ The situation becomes a vicious cycle: people are less willing to pay taxes because they don't trust the system, but that shifts the tax burden to fewer individuals, which increases the incentive to cheat. This further erodes the trust or respect for the system.

Another example is crime. Actions by the law-abiding citizens have an impact on the crime rate, but the civic duty of the noncriminal population comes at a cost: time, effort, safety, etc.²⁰⁷ These costs may fall, though, as the percentage of the law-abiding population who actively participate in their civic duty increases. If the percentage of participation by the good citizens falls too low, the sacrifice (cost) for each citizen may increase above the level of benefits accruing to each, so fewer citizens participate. This may result in a stable equilibrium where the total costs (the cost to the collective good citizens and the cost to the state in terms of police protection, etc.) rise to high levels -- the optimal level of resources devoted to fighting crime adjust to where crime is much more prevalent.²⁰⁸ The social norms, or respect for the law, operate to engage the good citizens as major factors in the reduction of crime. The general respect of the law matters.

If these considerations are valid, the question remains: how does the

²⁰⁵ *Tax evasion in Greece: In flagrante*, THE ECONOMIST, Sept. 4, 2012 (available at <http://www.economist.com/blogs/freeexchange/2012/09/tax-evasion-greece>).

²⁰⁶ J. Surowiecki, *Dodger Mania*, THE YORKER MAGAZINE July 11, 2011.

²⁰⁷ Cooter and Ulen, *supra* note 113, at 481.

²⁰⁸ *Id.*

entrepreneurial aspect of ADR fit with basic theory? Posner considers consent to be a fundamental principle of justice. This parallels the consent that is articulated in the basic laws of this economy – the Declaration of Independence and the Constitution. The Declaration of Independence begins with a reference to natural law, and avows that the power of governments is based on the consent of the governed. The Constitution, too, has consent as an explicit requirement: Article VII provides that ratification by nine states is required.

Consent is also implicit in the entrepreneurial function of obtaining the maximum cooperation of individual members: incentives are established for willing, cooperative behavior. Coercion is not as productive. Cooperation is one of the suppositions that Rawls makes in his development of a theory of justice. A cooperative society will provide mutual advantages to its members. Rawls also postulates that a well-ordered society is one in which all members accept the principles of justice, and they know that other members of society accept the same principles.²⁰⁹ Consent is an explicit foundation. Rawls also posits that the general welfare, or the greater good of the many, cannot justify hardship imposed on a few. Establishing a legal system that minimizes total costs, then, will not justify the system if it fails to adequately serve some segments of society. This basic fairness is necessary to “expect the willing cooperation” of all members.²¹⁰ Rawls also notes that the problem of choosing the governing principles “is

²⁰⁹ J. RAWLS, A THEORY OF JUSTICE 4 (1971).

²¹⁰ *Id.* at 13.

extremely difficult.”²¹¹ Harmonizing these ideas with the current legal system suggest that ADR is a process that allows greater choice in the principles that are used to resolve disputes. There may be several principles that can be applied, but, in the context of a specific dispute, the more flexible ADR process also addresses other principles, such as equitable concerns, that are not recognized by statute or precedent. ADR can accommodate change (consistent with the entrepreneurial concept) and can still comport with the basic theory of justice.

Llewellyn, too, believed that the law, in the interests of justice, should accommodate the particular circumstances of a dispute. The legal philosophy of Llewellyn’s time, legal formalism, focused on the legal rules and sought to apply them to the specific cases. Judges were more like oracles, pronouncing how the law applied to the dispute. Instead, Llewellyn believed that the human aspect should be considered, as well.²¹²

Llewellyn was influenced by anthropology and sociology. His interest in learning what these areas of study could add to legal theory led him to direct a famous study of the Cheyenne social structure and how it dealt with legal problems. Applying the case-study method to the Cheyenne disputes, Llewellyn determined that the Cheyenne had developed a highly-developed system of justice. Disputes were handled on several different levels. If the dispute involved family members, then the dispute was handled at

²¹¹ Id. at 14.

²¹² J. M. Conley & W. M. O’Barr, *A Classic in Spite of Itself: "The Cheyenne Way" and the Case Method in Legal Anthropology*, 29 LAW & SOCIAL INQUIRY 179, 184 (2004).

the family level. If the dispute was among the warriors of the tribe (the younger men), then the warrior council handled the dispute. If the dispute was between tribes, then it might have to be decided by the combined elders of the tribes, the Council of Forty-Four. In this way, the various factors involved in the dispute could be considered, and the outcome was respected by all levels of the society.²¹³

Llewelyn's work with the Cheyenne system and other anthropology and sociology literature influenced his draft of the Uniform Commercial Code, which, in turn, has had a major influence on current law. The insights from the Cheyenne are consistent, too, with the lessons learned by Posner and others from their studies of primitive societies. Primitive cultures habitually dealt with disputes at different levels, and preferred that a third-party be involved in dispute resolution. This avoids the private revenge solution which could result in an escalation of the dispute. The key concept is that there is a general agreement of principles, an acknowledgment that all others in the society agree to the principles, and yet the flexibility to allow a choice of which principles would apply to the particular dispute, just as Rawls outlined. These same characteristics mark the use of ADR. Instead of a fixed set of legal rules, ADR places the resolution process at the appropriate level and allows the choice of applicable principles.

The theoretical framework of Damaska is relevant to the concept of ADR, as already noted. One of Damaska's polar extremes is that of policy implementation versus

²¹³ K. N. LLEWELLYN & E. A. HOEBEL, *THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE* (1941).

dispute settling. The scholars who are concerned about the relationship between justice and ADR (“justice critics”) are looking at policy. Their apprehension is based on several issues. The first of these is that ADR is a retrenchment of the old order. The civil rights, gender rights, and other major developments in the legal field starting in the 1950s were regarded by many as long-overdue, hard-won, and of great significance to the advancement of societal interest. Any potential threat to these gains, regardless of efficiency or expediency, will be scrutinized. These concerns are valid. For example, removing disputes dealing with race or gender discrimination from the courts, where the proceedings and results are open for all to witness, invites the suspicion that the cloak of ADR will be used to relax the anti-discrimination standards.

Another, related issue pertains to any power imbalance that might exist between the parties. An example of this is divorce and family law – disputes in which the female disputant is often at a disadvantage economically and in terms of legal sophistication. Many of these disputes may involve relationships in which the male dominated the female. A trial court, with its procedures that have been established to address such power imbalances, is viewed as the best guarantee of a “just” procedure and outcome. ADR, with its relaxed rules, may not be as effective at controlling for the imbalance in power.

These are but two of the issues that justice critics raise. In Damaska’s framework, ADR represents a movement from hierarchical authority, the traditional courts, to coordinate authority, and policy implementation will become a secondary consideration. ADR will emphasize the settlement – solving the dispute – and retreat from advancing

the social policies. In this regard, the justice critics have a point. Damaska, though, formulated his polar extremes as a framework for analysis, and not as a normative tool. Borrowing the economic principle that there is a trade-off in everything, the issue can be re-phrased: what is the optimal level of policy/dispute and hierarchical/co-ordinate authority?

For Posner, with the idea of justice based on consent, the consent of the disputants is the key consideration. In this regard, the movement in legal field is still towards favoring ADR when consent can (plausibly?) be found. ADR remains under the ultimate review of the courts. And consent is a central matter in whether the courts continue to endorse *ex ante* ADR agreements. In a recent case²¹⁴ the U.S. Supreme Court took on the issue of an arbitration clause and a waiver of class action in the agreements between Italian Colors (a restaurant) and other businesses, as original plaintiffs, and American Express, the original defendant. The holding of the court, that the mandatory arbitration provision and the waiver of class action would be enforced, allows corporations to shield themselves from substantial liability for small harms suffered by many. The court turned a blind eye to the economics of class action: that an individual who wished to pursue an individual claim would incur legal costs far in excess of the harm suffered. The court, in its reasoning, stressed that the public policy as expressed in the Federal Arbitration Act (FAA)²¹⁵ superseded other policy concerns. The court specifically noted that the FAA was intended to confer full contractual effect

²¹⁴ American Express Co. v. Italian Colors Restaurant, 133 S. Ct. 2304 (2013).

²¹⁵ 9 U.S.C §§ 1-16.

on arbitration agreements.²¹⁶ Contracts, of course, explicitly embody the consent of the parties.

Italian Colors is an expansion of the deference to the FAA that was prominently mentioned in a previous case that Italian Colors cited, *AT&T Mobility*.²¹⁷ In *AT&T Mobility*, the original lawsuit was brought by a cell-phone customer who sued for the sales tax that he was charged for phones that AT&T had advertised for “free.” The court’s decision noted that the FAA “was enacted in 1925 in response to widespread judicial hostility to arbitration agreements.”²¹⁸ The only defenses available under the FAA were the common-law contractual defenses of duress, fraud, etc. The consensual foundations of the basic contract were core to the public policy of the FAA, according to the court.

The Italian Colors case illustrates the tension that exists between competing principles. On the one hand, parties should be able to seek redress for a harm suffered in a contractual context even though the harm does not rise to the level of duress or fraud. On the other hand, the sanctity of contracts should be encouraged: this is how incentives are established for individuals to make optimal decisions regarding contracts. And, as Shavell notes in his theory of ADR, public support depends on whether the ADR agreements are *ex ante* or *ex post*.

One thing that Italian Colors makes clear, and that by providing a forum for the

²¹⁶ *American Express Co. v. Italian Colors Restaurant*, *supra* note 214, at 2306.

²¹⁷ *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

²¹⁸ *Id.* at 1746.

review of ADR, the traditional courts can maintain the hierarchical/policy functions while allowing most of the disputes to be handled by the co-ordinate/settlement functions. There may be room for both. The bulk of the disagreement is, as usual, over the accuracy of the decision.

Even within Damaska's framework, then, co-existing systems of the traditional courts and ADR may combine in synergistic ways in the same way that an expansion of services available expands the market and social welfare. Damaska provided the framework for analysis; he did not establish any limitations or prescriptions. There is no requirement that only one system is available. The same flexibility is seen in Llewellyn's description of the Cheyenne method of dispute resolution (different levels) and Posner's explanation of the dispute resolution mechanisms of primitive societies that he examines. This flexible nature also comports with the ancient concepts of justice and law. Aristotle concedes that the application of law is imperfect: "all laws are universal in statement but about some things it is not possible for a universal statement to be right."²¹⁹ Aquinas addressed the need for changes in the law for two reasons. The first is the development of logic or wisdom.²²⁰ The second is for accommodating the changes in the human condition. Consider, too, the usual changes in entrepreneurship: slow and deliberate. Add to this the view that alternative dispute resolution was not as new as some may think. Research in the history of ADR in the U.S. reveals that non-traditional

²¹⁹ ARISTOTLE, *supra* note 146, at 98.

²²⁰ AQUINAS, *supra* note 147, at 670 ("Change may occur with respect to reason, since it seems to be natural for reason to advance step-by-step from the imperfect to the perfect.").

dispute resolution (usually arbitration) was relatively common, as well as state sanctions of “private” dispute resolution.²²¹ There were two systems of dispute resolution in many of the states, and the recent (after the Pound Conference) embrace of ADR has been, in effect, a merger of the two systems. A broad view of the legal system, then, may conclude that the change has not been as drastic as believed. It is a change, but a change in the process, which is what Frank Sander envisioned.²²² If the traditional court system is a service, it was one that did not meet the needs of its customers. It was “incomprehensible” and riddled with “obfuscation and complexity.”²²³ Little wonder, then, that an alternative service was able to increase its market share. There are still issues about how well the competing services do at providing “justice,” but it may be unreasonable to assume that any human system will be able to deliver a perfect service in this regard.

Aristotle and Saint Thomas Aquinas conceived justice as a duality: conformity to the law plus an aspect of benevolence. The merger or overlap of the two, then, brings the law into greater conformity with the source of the law. Law and economics has yet to develop the theory and tools to do this, but incorporating the consent, justice, and psychological/emotional aspects as parts of the entrepreneurial function can move the theory along, sometimes slowly, sometimes in leaps. Additional research on ADR and how it fits into the legal system can take law and economics beyond the current, limited

²²¹ J. RESNIK, *MANY DOORS? CLOSING DOORS?: ALTERNATIVE DISPUTE RESOLUTION AND ADJUDICATION* 212-214 (1995).

²²² *Id.* at 217.

²²³ H. ABADINSKY, *LAW & JUSTICE: AN INTRODUCTION TO THE AMERICAN LEGAL SYSTEM* 319 (2nd ed. 1993).

focus. That will be a complex, difficult task, but (like entrepreneurship) one that has great potential.

Texas has been a leading jurisdiction in the area of ADR. It is appropriate, therefore, that a study of Texas court data is useful for gauging the impact of ADR on court congestion. Although the empirical analysis of this research is quite limited – whether ADR has reduced court congestion – this has provided the opportunity to explore the larger ramifications of ADR. Although ADR has not been shown to produce significant savings in terms of reducing litigation, it can have macroeconomic benefits that have the potential to far outweigh the savings from reduced expenditures on the judicial system.

VIII. CONCLUSION

Little evidence for a reduction in court congestion as a result of ADR/mediation can be discerned in the district data. The basic assumptions that have been made are simple. The first, that some time would be required (a learning period) during which mediation would gradually develop, is reasonable given the fact that there was little awareness of mediation in the late 1970s. The assumption that mediation was implemented at different times in the different counties is reasonable in light of the DRC reports, the knowledge that counties have been free to implement ADR programs at their discretion, and the fact that the learning period may not be the same for each county. The assumption that ADR would have a significant impact on CAN disputes, a moderate impact on MA disputes, and no impact on NA disputes is based primarily on the claims of ADR proponents. The additional assumptions regarding the comparability of filing and disposition rates across counties also appear to be reasonable. Given these assumptions plus the depth and breadth of the data, any significant impact by mediation should have been unearthed.

Each of the three formal hypotheses, then, have not been rejected. The first hypothesis (regarding the reduction in filings) would be rejected if the filings in active counties began to decrease after ADR was implemented. Comparison of active counties with control counties, however, failed to show a consistent, significant decrease in filings. Comparison among the active counties failed to show a consistent pattern that would indicate the early adoption counties were the first to see a decrease, with later-adopting counties showing a decrease but at a later time.

The second hypothesis, that settlements would increase (using default & agreed dispositions) also failed to be rejected. The comparisons between the active and control counties failed to show consistent evidence of an increase that would be attributable to mediation. Comparison within the active counties failed to produce the time-shift evidence that mediation was responsible for an increase in settlements. Additionally, comparison between the categories of dispute failed to show consistent evidence of a difference due to mediation.

The third hypothesis, the “trials” would be reduced, also failed. Any reduction in final judgment was not closely linked with increases in D&A dispositions, did not show any time-shift among the active counties, and lacked evidence that the reduction in trials was true for the CAN and MA disputes but not the NA ones.

Instead, the result of this research is consistent with the few studies that have looked into this issue. The other studies that have been published consist primarily of specific programs and limited time periods. No other study in the published record has come even close to examining an entire state for 31 years. This scope of this study is possible because Texas collected court data in a relatively consistent fashion for such a lengthy period of time. Moreover, the data was categorized in a fashion that meshes with some of the assumptions and characteristics of ADR.

Additional research is warranted, given these results. Data from other states could be combined, or perhaps contrasted with the Texas data. Additionally, the costs and benefits of ADR may be an important issue since it appears that there is little cost savings (from a reduction in filings or final judgments) in the courts as a result of ADR.

Another issue for study is why ADR still enjoys so much support. ADR may be furthering other goals: “access to justice,” entrepreneurship, or something else. As Shavell points out, reducing the cost of a process may have increased the use of the process – Jevon’s paradox – but that may not be the best answer. Other factors that may have reduced court congestion should also be studied. The increased use of caseload management, for example, may be responsible for keeping court congestion under control.²²⁴

Going beyond the superficial conclusions that can be drawn entails more basic theoretical issues. The access to justice, or the increase in the use of the court system because of ADR's reduction in costs, are two possibilities. Explaining the results by claiming that reduced cost leads to an increase in litigation conforms to the simple model, but it is dismissive of the larger legal environment. ADR was adopted as a reform, specifically targeted at the explosion in litigation. As noted in the literature section, many factors that are claimed to be the causes of the explosion were, themselves, reforms of some sort. The process of reform is endless.

A basic concept of law is rules backed by threats or sanctions. But legal theorists consider justice and law to be more complex than that. There are at least two levels that interact. One level is the controlling principles, which provide general guidance on policies. Another level, or perhaps consideration, concerns the method of changing the rules. Pound’s criticism is valid -- respect for the law is fundamental. It matters.

²²⁴ RESNIK, *supra* note 221, at 229-231.

Respect depends, however, on the proper functioning of the system at all levels. The adoption of ADR can be viewed as a rare example of comprehensive changes in the system, and the challenges of implementing these fundamental changes – of formulating how the principles apply, also bring opportunities for substantial social benefits. ADR may be able to address the larger issues that accompany the human condition in ways that the traditional system could not. These changes, or wholesale reforms, are consistent with basic theories of law and justice.

Part of solving a problem is asking the right question. Instead of asking if there is too much litigation, the better question may be what is the appropriate level of litigation? This speaks directly to the issue of why parties litigate. Part of the answer may be that parties litigate when the rules need to be changed. This is another way of saying that, as conditions and circumstances become more complex, dispute resolution becomes more complex in a sense. The Cheyenne and other primitive societies were able to develop relatively complex dispute resolution systems, and the U.S. system of dispute resolution appears to be moving in that direction.

Better understanding of the theoretical framework of the judicial system requires a better understanding of the operations of the system. The lack of consistent, comprehensive court data hinders that understanding, and the need for pertinent data cannot be understated: periodic changes in the reporting scheme may serve some purposes, but it presents a problem for long-term analysis. This is also an area that should be of great concern to policymakers. In summary, this research should not be viewed as an end; it raises more questions than it answers.

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APPENDIX

Reported Activity September 1, 1999 through August 31, 2000													
CIVIL CASES													
COUNTY		Injury or	Injury or		Accounts,		All						
POPULATION		Damage	Damage		Contracts,	Recip-	Other	Family	Civil	Total			
		Motor	Motor	Workers'	Tax	roccals	Law	Matters	Cases	Cases			
		Vehicle	Vehicle	Compensation	and	(UIFSA)	Divorce						
Anderson 48,024	Cases Pending 9/01/99	73	65	71	443	3	51	207	510	545	1,968		
	Docket Adjustments												
	New Cases Filed	81	84	1	203		47	234	37	140	827		
	Other Cases Added												
	Total Cases Added	81	84	1	203		47	234	37	140	827		
	Percent of Total A	9.8	10.2	0.1	24.5	0.0	5.7	0.0	28.3	4.5	16.9	100.0	
	Dispositions:												
	Default & Agreed Jud.	13	15		44		15	119	10	51	267		
	Summary Judgments	2	3				1				6		
	Final Judgments	12	39		35		4	89	9	47	235		
	Dismissed	27	37	1	112		13	50	7	136	383		
	Other Dispositions	3	9				3	9	2	5	31		
Total Disp	57	103	1	191		36	267	28	239	922			
Percent	6.2	11.2	0.1	20.7	0.0	3.9	0.0	29.0	3.0	25.9	100.0		
Cases Pending 8/31/00	97	46	71	455	3	62	174	519	446	1,873			
Percent of Total F	5.2	2.5	3.8	24.3	0.2	3.3	0.0	9.3	27.7	23.8	100.0		
Disp. As % of Total Added	70.4	122.6	100.0	94.1	0.0	76.6	0.0	114.1	75.7	170.7	111.5		
Andrews 14,338	Cases Pending 9/01/99	38	39	1	205		93	2	46	102	98	624	
	Docket Adjustments												
	New Cases Filed	16	2		25		43	90	66	30	272		
	Other Cases Added								43		43		
	Total Cases Added	16	2		25		43	90	109	30	315		
	Percent of Total A	5.1	0.6	0.0	7.9	0.0	13.7	0.0	28.6	34.6	9.5	100.0	
	Dispositions:												
	Default & Agreed Judg.		1				22			1	24		
	Summary Judgments									1	1		
	Final Judgments	9	7		16		26	78	68	20	224		
	Dismissed	4	2		4		8	3	5	7	33		
	Other Dispositions	2							51		53		
Total Disp	15	10		20		56	81	124	29	335			
Percent	4.5	3.0	0.0	6.0	0.0	16.7	0.0	24.2	37.0	8.7	100.0		
Cases Pending 8/31/00	39	31	1	210		80	2	55	87	99	604		
Percent of Total F	6.5	5.1	0.2	34.8	0.0	13.2	0.3	9.1	14.4	16.4	100.0		
Disp. As % of Total Added	93.8	500.0	0.0	80.0	0.0	130.2	0.0	90.0	113.8	96.7	106.3		

FIGURE A1: IMAGE OF PARTIAL PAGE FROM THE TEXAS JUDICIAL SYSTEM ANNUAL REPORT FISCAL YEAR 2000 (Texas Judicial Council, 2000)

The figure, above, shows the top part of a page from the 2000 report.²²⁵ The catalogue entries of the report titles and authors vary somewhat over the years. One

²²⁵ TEXAS JUDICIAL COUNCIL, *supra* note 140 at 182 (first two of six counties reported on that page). The Texas Judicial Council (created 1929) and Office of Court Administration (created 1977) are Texas government agencies charged with, among other duties, collecting and reporting judicial data. The reports are public information. (Texas Government Code Chapters 71 and 72.)

catalogue title is TEXAS JUDICIAL SYSTEM ANNUAL REPORT OF STATISTICAL AND OTHER DATA FOR CALENDAR YEAR [year]. Another one is ANNUAL REPORT – TEXAS JUDICIAL COUNCIL. The authors listed in library catalogues also vary: Texas Judicial Council, Texas Civil Judicial Council (an early version), or Office of Court Administration. Despite the differences in titles and authors, the reports cover the same court data.

The composition of statewide new case filings changed somewhat over the 1980-2010 period. Figure A-2, below, illustrated the trends and levels for the four most common categories. Divorce declined, but family law litigation rose by about the same amount. Together, divorce and family law have constituted about half of all civil filings during 1980-2010.

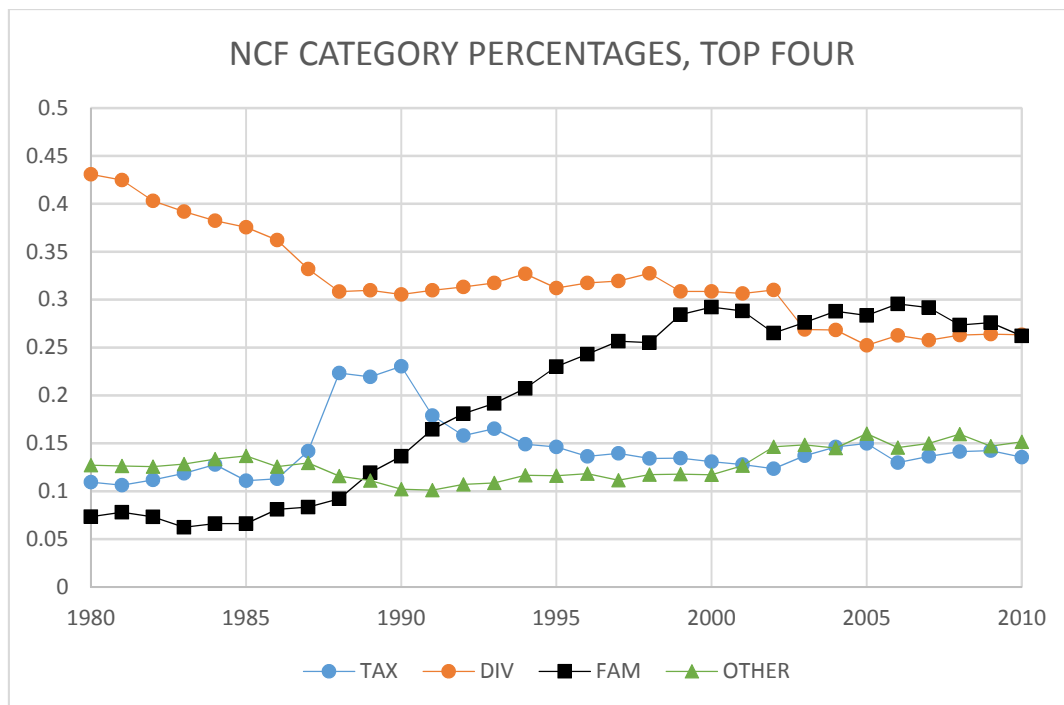


FIGURE A2: FOUR TOP CATEGORIES OF FILINGS FOR 1980-2010

The other six categories of filings are shown in Figure A-3, below. The CAN series is obvious: its characteristic shape. These graphs are based on the total statewide data, before any revision. Worker's compensation and Reciprocals are included, therefore, and decreased in response to the changes in those laws. The category that is consistently the smallest in terms of filings is Condemnation cases.

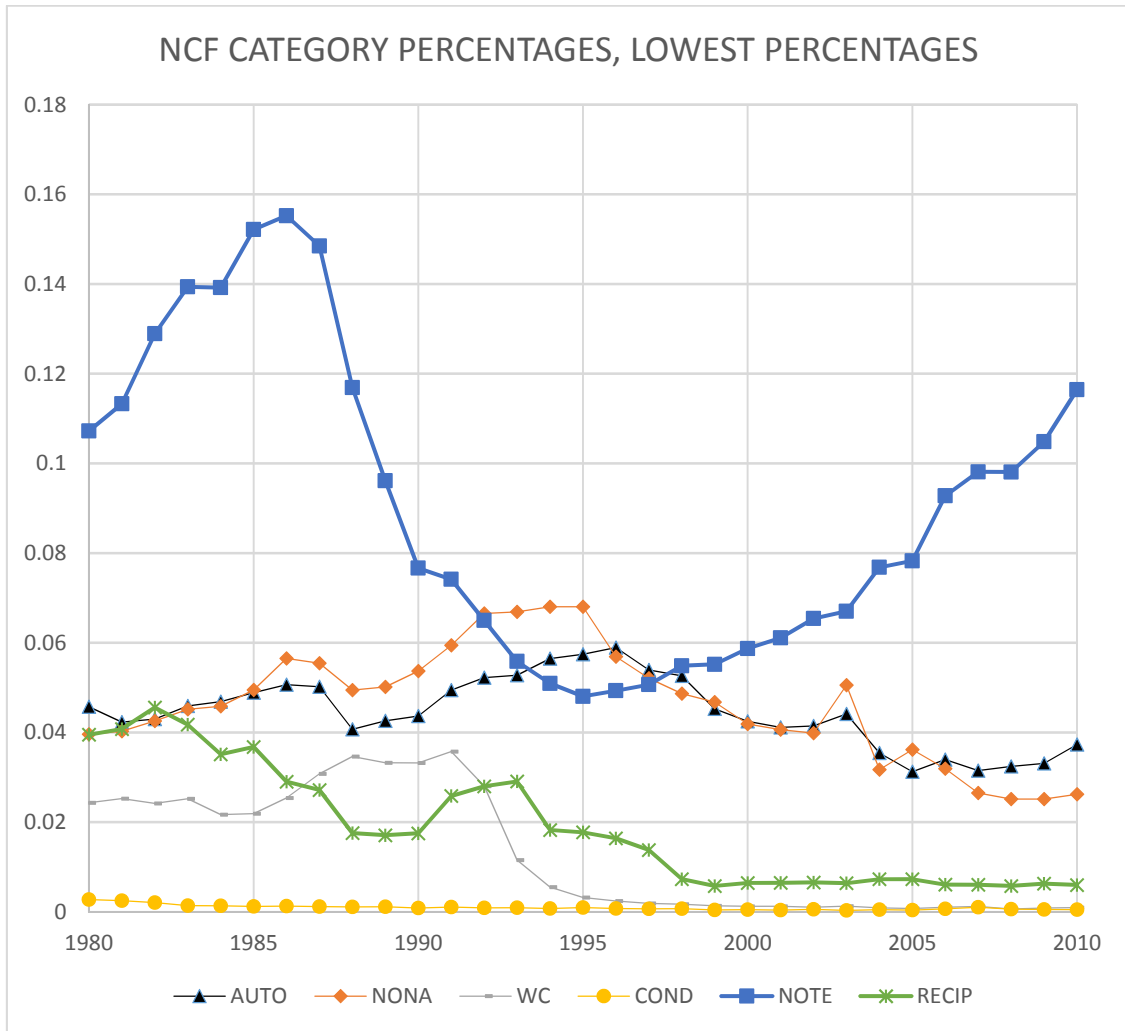


FIGURE A3: REST OF THE CATEGORIES OF FILINGS FOR 1980-2010

As noted in the Data section the Dispute Resolution Center reporting data included in the OCA Annual Reports was used to determine which counties had established significant, or “active,” ADR programs within a few years of the 1987 legislation. Example data on incoming disputes for the 15 counties selected as active in ADR is presented, below.

TABLE A1: SELECTED DISPUTE RESOLUTION CENTER ACTIVITY

CENTER AND COUNTY	1999	1996	1990	1989
Amarillo/Potter & Randall Counties	633	896	266	
Austin/Travis County		1680	1441	1400
Beaumont/Jefferson County	2033	1865	1391	946
Bryan/College Station/Brazos County				
Conroe/Montgomery County	445	304	286	
Corpus Christi/Nueces County	1255	1452	944	884
Dallas/Dallas County	2447	1577	5109	5805
Denton/Denton County		1838	1287	1002
El Paso/El Paso County	1190	1092	894	836
Fort Worth/Tarrant County	2653	3186	3016	3413
Houston/Harris County	3649	4662	6442	5904
Lubbock/Lubbock County	2714	1729	969	358
Plano/Collin County		1004		
San Antonio/Bexar County	4972	6041	4359	3782

Some reports were not received in particular years. Collin County, for example, often failed to file reports, as did Travis County in later years. Also note that Brazos County did not begin significant operations until 2000.

The 15 active counties are also among the most populous counties. Table A-2, below, shows that the 15 active counties comprise 57% of the state’s population in 1980. DH, alone, account for 28% of the total population. The Large 9 counties make-up about 15% of the population total. These percentages did not change much over the 31 years of the study.

TABLE A2: ACTIVE COUNTY GROUPS – PERCENT POPULATION

	POP % 1980	POP % 2010
15 COUNTIES	0.5712	0.5972
REST OF STATE	0.4288	0.4028
DH	0.2788	0.2569
BIG 4	0.4088	0.3971
L9	0.1457	0.1613

Using the remaining 239 counties as the control group (the “REST” of the state) would be tantamount to assuming that ADR spread to these counties at the same and rate. Instead, the spread of ADR would likely be inconsistent. Adoption would, however, be influenced by population: the greater the population, the more likely a county would create an ADR program. With “REST” as the only control, differences in

the spread of ADR to these 239 counties is obscured, plus the consolidation of all other counties into one group is inconsistent with the construction of the active county groups. To address these concerns, additional control groups were constructed. Besides population, the population growth rate for 1980-2010 was also considered in constructing the control groups: a mix of growth rates was preferred in the make-up of each control group. Control groups for different population levels were formed according to the following scheme (smallest to largest):

- **Counties with population of at least 5K but in that range,**
- **Counties with population in the 10K-15K range,**
- **Counties with population in the 25K-40K range,**
- **Counties with population in the 50K-80K range,**
- **Counties with population in the 100K-190K range,**
- **Counties with population over 200K.**

At least 10 counties were selected for each population control group (with the exception of the most populous, the 200K+, of which there were only four. The top 51 counties in terms of population were included in either the active group or one of the control groups. A detailed list of the control groups is shown in the table. “P4” is the group of four counties that are the most populous control group, and “P9” is the control group of small (around 5K) counties.

TABLE A3: CONTROL GROUP P4

GROUP	COUNTIES	RANK		GROUP POP. RANGE	
		POP.	GROWTH	SMALLEST	LARGEST
P4	Hidalgo Co.	7	14	218346	386777
N=4	Cameron Co.	11	36		
	Fort Bend Co.	13	5		
	Galveston Co.	15	74		

TABLE A4: CONTROL GROUP P5

GROUP	COUNTIES	RANK		GROUP POP. RANGE	
		POP.	GROWTH	SMALLEST	LARGEST
P5	Brazoria Co.	16	40	95005	192586
N=14	Bell Co.	17	34		
	McLennan Co.	18	84		
	Smith Co.	20	56		
	Williamson Co.	21	1		
	Webb Co.	22	18		
	Wichita Co.	23	152		
	Taylor Co.	25	125		
	Ector Co.	26	124		
	Midland Co.	27	54		
	Gregg Co.	28	119		
	Tom Green Co.	29	102		
	Johnson Co.	31	26		
	Grayson Co.	32	90		

The counties in the P5 control group vary in their growth rates. Williamson County has the highest growth rate of all the counties in Texas, and five of the counties have relatively low growth rates.

TABLE A5: CONTROL GROUP P6

GROUP	COUNTIES	RANK		GROUP POP. RANGE	
		POP.	GROWTH	SMALLEST	LARGEST
P6	Ellis Co.	34	19	50875	85387
N=18	Bowie Co.	35	115		
	Orange Co.	36	178		
	Victoria Co.	37	108		
	Angelina Co.	38	88		
	Hays Co.	39	6		
	Parker Co.	40	16		
	Guadalupe Co.	41	13		
	Coryell Co.	42	98		
	Hunt Co.	43	64		
	San Patricio C	44	141		
	Henderson Co.	45	41		
	Harrison Co.	46	109		
	Nacogdoches Co	47	83		
	Liberty Co.	48	61		
	Kaufman Co.	49	15		
	Comal Co.	50	10		
	Walker Co.	51	58		

The P6 control group has a large number of counties, 18, and a mix of growth rates. These counties' population runs from slightly more than 50,000 (2000 census) to about 85,000. Hays County, which is ranked number 6 in growth, is south of Austin, which accounts for its rapid increase in population.

TABLE A6: CONTROL GROUP P7

GROUP	COUNTIES	RANK		GROUP POP. RANGE	
		POP.	GROWTH	SMALLEST	LARGEST
P7	Starr Co.	57	25	22676	40873
N=15	Bastrop Co.	61	9		
	Wise Co.	67	27		
	Hood Co.	79	12		
	Hopkins Co.	80	80		
	Erath Co.	81	51		
	Medina Co.	82	33		
	Hill Co.	83	76		
	Caldwell Co.	84	59		
	Washington Co.	85	67		
	Rockwall Co.	86	3		
	Hutchinson Co.	87	217		
	Palo Pinto Co.	88	130		
	Wilson Co.	97	17		
	Burnet Co.	98	21		

The P7 control group has 15 counties, a county with a growth rate ranked 217, and a county with a growth rate ranked 3. These counties' population runs from slightly more than 22,000 to about 40,000. Bastrop County, which is ranked number 9 in growth, is south of Austin.

TABLE A7: CONTROL GROUP P8

GROUP	COUNTIES	RANK		GROUP POP. RANGE	
		POP.	GROWTH	SMALLEST	LARGEST
P8	Tyler Co.	122	92	9326	16654
N=13	Nolan Co.	123	208		
	San Jacinto Co	124	22		
	Jones Co.	125	128		
	Freestone Co.	126	95		
	Reeves Co.	127	209		
	Robertson Co.	128	136		
	Bosque Co.	129	87		
	Wilbarger Co.	130	216		
	Lamb Co.	131	232		
	Kendall Co.	132	8		
	Bandera Co.	157	11		
	Zapata Co.	166	29		

TABLE A8: CONTROL GROUP P9

GROUP	COUNTIES	RANK		GROUP POP. RANGE	
		POP.	GROWTH	SMALLEST	LARGEST
P9	Rains Co.	188	23	5092	6726
N=11	Childress Co.	193	172		
	Hansford Co.	194	198		
	Wheeler Co.	195	230		
	Dallam Co.	196	165		
	San Saba Co.	197	160		
	La Salle Co.	198	111		
	Somervell Co.	199	32		
	Hardeman Co.	200	247		
	Garza Co.	201	122		
	Jim Hogg Co.	202	167		

The smallest two control groups in terms of population are P8 and P9.

The graphical analysis of the data requires that some expectation of what the graphical impact should be. Some detailed assumptions must be made to determine this set of expectations.

Although mediation and arbitration promise positive benefits, these benefits would not materialize instantly after the enactment of legislation – implementing ADR would take time, as would be the case with implementing any new system. Instituting ADR must not be confused with a simple change in the law. When a statute or rule is enacted, a ruling is “handed down,” or some other change in the law occurs, the courts immediately substitute the new law for the old. Implementing ADR, however, requires more than just deciding what law is applied. The following rationale is for an example of ADR which occurs before litigation is begun, but the changes which must be made in the legal infrastructure are considerable. The scenario assumes that the results of ADR are effective (successful), thus the dispute is settled without court involvement. The impact on the judicial system, then, is to reduce “new case filings” (NCF), a main source of “court congestion.” [The rationale can be extended to cases which are already on the court docket (filed), but that scenario will be developed separately.] The terms “ADR,” “mediation,” and “arbitration” can be used interchangeably, it being understood that mediation is the prevailing form of ADR, so the example would be valid for all forms of ADR.

The first task of implementing ADR is one of education: getting the word out. Explaining ADR and the statutes, primarily to attorneys and potential litigants/disputants (the clients of the attorneys), but also to judges and others, including the general public. Persuading disputants that an alternative to their “day in court” is available, and that the process has nothing to do with sitting on the floor with crossed legs and chanting (meditation) can be difficult if the client has never heard of “mediation” beforehand. Practically speaking, there has to be a considerable amount of education – as with any change in the way of doing things, there is a 'learning curve.'

The next task is to meet the statutory requirements. If the court refers a case to ADR, the “impartial third party” is required to have 40 hours of ADR training. If the case is a divorce/family law matter, then 24 additional hours of training is required. If these are the requirements imposed by the courts, then these requirements will also be deemed to apply to all ADR procedures, even those which are done *in lieu* of court litigation. The reason is simple: if the process is only partially successful, or the dispute winds up in court for any reason at all, meeting the statutory requirements for whatever partial agreement that may have been reached will be important if one party seeks to enforce the partial agreement in court. Also, disputants will have much greater confidence in the process if it meets the statutory requirements as opposed to failing to meet those requirements. Conforming to the statute becomes a guarantee of quality for the participants. So one can expect that attorneys who practice ADR will, for professional as well as practical reasons, make sure that the process meets the statutory standards.

The statutory requirements mean that, before the number of ADR processes significantly increases (and before the courts can start referring cases to ADR on a routine basis), there must be enough trained “impartials” (attorney mediators, mainly). It will take some time for the attorneys (or other interested parties) to acquire the necessary training. In addition, logistical concerns must be addressed. The attorneys (or the courts, for court referrals) will have to create a list of mediators, find facilities, develop procedures, etc.

Counties which already had an operational ADR center when the 1987 statute was enacted should have been much more advanced than the counties that waited until 1987 or later to start operational centers. For the counties with early operational centers, the legislation would have been a spur to even greater and faster development of ADR. For the counties without operational centers, the legislation would be a strong incentive to start a center.

A reasonable scenario for the introduction and growth of ADR must also acknowledge that mediation and arbitration both have been practiced for many years. Considering the focus on ADR by the 1976 Pound conference, it is likely that mediation and arbitration became somewhat more common prior to the 1983 and 1987 legislation. Certainly some attorneys and firms were already acquainted with arbitration and mediation. In view of the advocacy of ADR generated by the Pound conference, the few attorneys and firms who had experience with mediation and arbitration were inclined to increase its use, given the appropriate client and dispute. These same attorneys and firms

probably were among the leaders in the legal field, with an influence far greater than their number.

The influence of leading attorneys on other attorneys, firms, and clients in the geographical vicinity and areas of practice is a given, and the influence extends into several, related realms. Influence on other attorneys/firms would be transmitted via conferences, legal articles, etc. Many of their clients, (e.g. insurance companies) would be statewide or even national and would be influenced by new developments. Judges, who may even come from the ranks of the 'top' attorneys and firms, continue to be influenced by leading attorneys the same as they were before becoming judges. And, of course, legislators, many of whom are attorneys, are influenced.

Although the development of mediation and arbitration was probably limited during the interim years of 1976 to 1983, this development should not be overlooked. The influence of these early practitioners was important in many ways, including the timing and the form of the legislation ultimately enacted. The practitioners' expertise also complemented the academic philosophy of ADR, which provided the framework for the impending ADR bloom. The development during the interim provided a core of expertise and advocacy to begin the journey up the learning curve once the 1983 and 1987 legislation was enacted. The core had to educate and publicize, and it had to train the mediators (note that the American Arbitration Association already had a training program for arbitrators). The core had to take the lead in promoting by example: educating and persuading the large clients such as insurance companies to embrace ADR. If the advantages of ADR were realized by the client/disputants, then progress

along the learning curve was assured. This scenario provides the framework for developing an example of the growth of ADR:

- The initial development of mediation and arbitration occurred over many years,
- The 1976 Pound conference and the perceived problems in the legal system provided the triggering event for the additional development and spread of ADR,
- After a short period, during which ADR experienced limited growth and development, the legislature enacted statutes to support the expansion of ADR,
- There followed a period of time during which the infrastructure developed (training of mediators, education of significant clients, etc.) and ADR was nurtured by a core of advocates,
- After a period of time, the general public/average disputant became comfortable with ADR, and ADR “bloomed.”

In many aspects, the assumptions are comparable to the introduction and growth of a new technology, process, or product—a new product curve. One difference is that ADR was in use for many years before it experienced significant growth. But the 1976 Pound conference could be characterized as the realization of a new use or application of an old technique. After the new use is discovered, there is a period of development/refinement, then early adopters begin to use it and spread the word, and finally the general public begins to use it. Thus, ADR is very similar to a new product curve/cycle.

TABLE A9: MEDIATION COUNTY ASSUMPTIONS

Year	Pop.	NCF	NCF pc	attorneys	NCF per attn.
1980	1000000	22200	0.0222	3000	7.4
1981	1020000	22644	0.0222	3060	7.4
1982	1040400	23097	0.0222	3121	7.4
1983	1061208	23559	0.0222	3184	7.4
1984	1082432	24030	0.0222	3247	7.4
1985	1104081	24511	0.0222	3312	7.4
1986	1126162	25001	0.0222	3378	7.4
1987	1148686	25501	0.0222	3446	7.4
1988	1171659	26011	0.0222	3515	7.4
1989	1195093	26531	0.0222	3585	7.4
1990	1218994	27062	0.0222	3657	7.4
1991	1243374	27603	0.0222	3730	7.4
1992	1268242	28155	0.0222	3805	7.4
1993	1293607	28718	0.0222	3881	7.4
1994	1319479	29292	0.0222	3958	7.4
1995	1345868	29878	0.0222	4038	7.4
1996	1372786	30476	0.0222	4118	7.4
1997	1400241	31085	0.0222	4201	7.4
1998	1428246	31707	0.0222	4285	7.4
1999	1456811	32341	0.0222	4370	7.4
2000	1485947	32988	0.0222	4458	7.4
2001	1515666	33648	0.0222	4547	7.4
2002	1545980	34321	0.0222	4638	7.4
2003	1576899	35007	0.0222	4731	7.4
2004	1608437	35707	0.0222	4825	7.4
2005	1640606	36421	0.0222	4922	7.4
2006	1673418	37150	0.0222	5020	7.4
2007	1706886	37893	0.0222	5121	7.4
2008	1741024	38651	0.0222	5223	7.4
2009	1775845	39424	0.0222	5328	7.4
2010	1811362	40212	0.0222	5434	7.4

Constructing hypothetical new case filings, consistent with the ADR assumptions, can be helpful. Starting with an assumed population in 1980 of one million, “Mediation County” would have a population of a nice, round number, and it would rank third in population (a slight bit larger than Bexar County's 988,971, but far behind Dallas County's 1,556,419 and Harris County's 2,409,547). For the growth in population of Mediation County, a rate of 2% annually approximates the statewide growth rate of 1.916957 for 1980-2010 (during which time the state population went from 14,225,512 to 25,145,561). Using the state average is appropriate since the growth rates for the different “ADR” counties varied from 0.048217% (Jefferson) to 5.7897% (Collin). The annual growth rate for the 15 “ADR” counties is 2.0684%, so Mediation Counties' growth rate is just slightly below the weighted average of those 15 counties.

Mediation County's rate of “new cases filed” in 1980 is 2.22% per capita, which is selected to be between the averages for the state (2.123% in 1980) and for the 15 ADR counties (2.444% in 1980). And, in the absence of any ADR or other factors, the assumption is that the per capita rate of new cases filed will not change. Adding in the number of attorneys in the county (3 per 1,000 population, or about the state average of “private, practicing” attorneys) fills in additional information. Attorney information comes from the STATE BAR OF TEXAS MEMBERSHIP: ATTORNEY STATISTICAL PROFILE (2011-12), from the State Bar of Texas Department of Research and Analysis. The 80,657 attorneys in the state with population of 25,674,681 (US Census, 2011 estimate) equals 0.00314, or about three attorneys for every 1,000 population.

By 2010, then, Mediation County population is 1,811,362, which would place it third in Texas (just ahead of Tarrant's 1,809,034 and behind Harris' 4,092,459 and Dallas' 2,368,139). A graph of “MEDIATION COUNTY, NEW CASES FILED” unadjusted for population would appear as shown. The number of cases would be going up, even though the per capita rate is fixed.

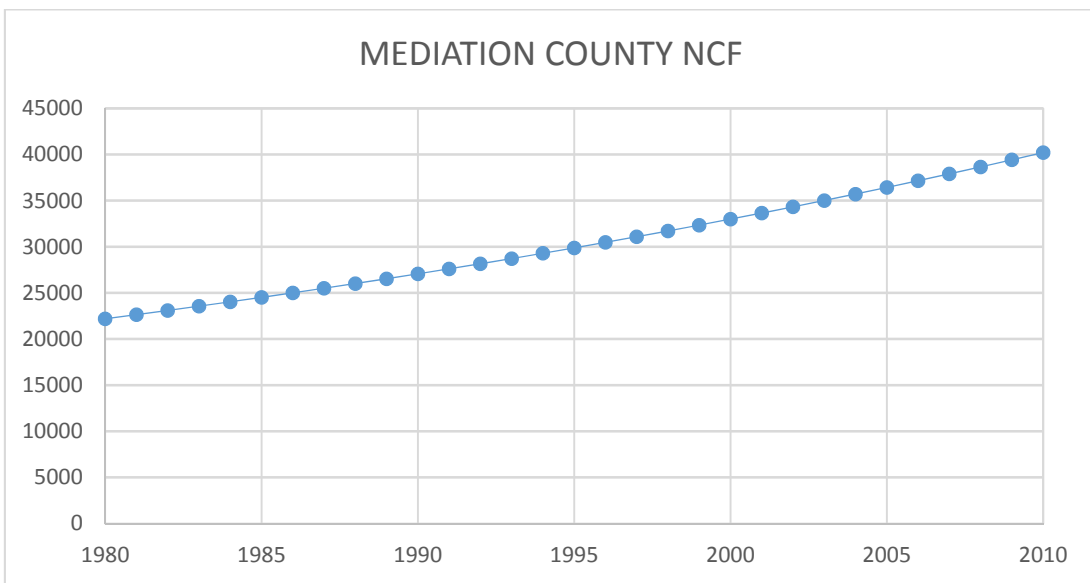


FIGURE A4: MEDIATION COUNTY NCF WITHOUT ADR

Adding the effects of ADR must maintain consistency with the scenario presented, above. Assume that in 1980 Mediation County had a small “core” of 10 (a small but round number out of a total of 3,000) attorneys experienced with mediation/arbitration, and these 10 averaged 3 mediation/arbitrations a year (or about one every 4 months, are enough to attain a proficiency with the process). Thirty

mediations/arbitrations per year represented a small fraction (about one-tenth of one percent) of the “new cases filed” during the year, but may have been a dramatic increase compared to the pre-1976 number of mediations/arbitrations. These attorneys spent most of their time on fields such as labor law, sports representation, or other fields in which mediation/arbitration was sometimes used. These attorneys were likely to be leaders in their respective fields as well as being influential proponents of ADR. And they would have been keenly aware of the 1976 Pound conference and related controversies. Accordingly, they would have been supportive of colleagues (especially in their own firms) acquiring some mediation/arbitration training. Therefore, five other attorneys from Mediation County took mediation/arbitration training by the end of 1980 (and it can be assumed that they will be doing mediations/arbitrations starting the following year).

The following two years (1981 & 1982) follows the same pattern. Additional attorneys get training (7 and 8, respectively), the average number of mediations/arbitrations climbs to 4, and then to 5, but the 110 mediations/arbitrations in 1982 represent less than one-half of one percent of the “new cases filed” in the county.

In 1983, with the passage of the initial ADR legislation, the numbers expand a little more quickly in terms of attorneys who get training and the average mediations/arbitrations per attorney. The following table includes the numbers for the years up through 1989.

TABLE A10: MEDIATION COUNTY EXAMPLE: EARLY ADR GROWTH

Year	Pop	NCF	NCF pc	# attn	# ADR attn	# in training	ADR/ prac.	# ADR	% NCF
1980	1000000	22200	0.0222	3000	10	5	3	30	0.00135
1981	1020000	22644	0.0222	3060	15	7	4	60	0.00265
1982	1040400	23097	0.0222	3121	22	8	5	110	0.00476
1983	1061208	23559	0.0222	3184	30	8	7.5	225	0.00955
1984	1082432	24030	0.0222	3247	38	16	15	570	0.02372
1985	1104081	24511	0.0222	3312	54	16	15	809	0.03300
1986	1126162	25001	0.0222	3378	70	17	15	1052	0.04209
1987	1148686	25501	0.0222	3446	87	17	15	1301	0.05101
1988	1171659	26011	0.0222	3515	104	34	15	1554	0.05975
1989	1195093	26531	0.0222	3585	138	42	15	2071	0.07806

In 1983, eight attorneys get training, and the number of mediations/arbitrations, “ADR,” per practicing ADR attorney climbs 7.5, in part to the additional “buzz” generated by the new legislation. In 1984, there is an even greater impact from the previous year's legislation: there are 15 ADRs per (ADR) attorney, another doubling, but this number is only one mediation/arbitration every three weeks for the few (38, or 1.117% of all attorneys) with ADR training. By the end of 1984, 16 attorneys get training, which is one-fourth of the number of new attorneys. Of course, the attorneys who go into training, at least at this stage of development, are the attorneys with experience, not the attorneys right out of law school. The “one-fourth” ratio is chosen for two reasons. First, the result is a doubling of the previous year, which is reasonable considering the interest generated by the 1983 legislation. Second, the one-fourth of new attorneys puts the number in perspective: this is not a rush to training. The number of

attorneys getting training is still a fraction of the number of attorneys being added by natural growth.

The next three years show that the number of ADR per practitioner remains at 15, and the number getting trained each year remains about the same (16 for 1985, and 17 per year for 1986 and 1987), which is still about one-fourth of the total of new attorneys added. The 1983 legislation influenced the growth of ADR, but it did not start a stampede. Attorneys are enthusiastic, but are still cautious about the new procedures, and they must be sure that the case is “right” and “ripe” for mediation/arbitration.

At the end of 1987, then, there are 87 practitioners (2.516% of attorneys) who do an average 15 ADR cases each, resulting in 1301 disputes that are settled without filing a lawsuit. The total number, 1301, is slightly more than 5% (5.101%) of the “new cases filed” during the year. This is still relatively small compared to the total court caseload, but it is a result of ADR experienced attorneys and relatively sophisticated clients who want the benefits offered by the ADR process.

TABLE A11: MEDIATION COUNTY, 1980-2010, with ADR

YEAR	# ATTN	# PRACT	% PRACT	# TRAIN	MED ATTN	# MED	% NCF	NCF PC
1980	3000	10	0.30%	5	3	30	0.14%	2.22%
1981	3060	15	0.50%	7	4	60	0.26%	2.21%
1982	3121	22	0.70%	8	5	110	0.48%	2.21%
1983	3184	30	0.90%	8	7.5	225	0.96%	2.20%
1984	3247	38	1.20%	16	15	570	2.37%	2.17%
1985	3312	54	1.60%	16	15	809	3.30%	2.15%
1986	3378	70	2.10%	17	15	1,052	4.21%	2.13%
1987	3446	87	2.50%	17	15	1,301	5.10%	2.11%
1988	3515	104	2.90%	34	15	1,554	5.97%	2.09%
1989	3585	138	3.90%	42	15	2,071	7.81%	2.05%
1990	3657	180	4.90%	50	15	2,704	9.99%	2.00%
1991	3730	230	6.20%	51	14	3,226	11.69%	1.96%
1992	3805	282	7.40%	52	13	3,661	13.00%	1.93%
1993	3881	334	8.60%	53	12	4,006	13.95%	1.91%
1994	3958	387	9.80%	54	11	4,258	14.54%	1.90%
1995	4038	441	10.90%	55	10	4,415	14.78%	1.89%
1996	4118	497	12.10%	57	9.5	4,720	15.49%	1.88%
1997	4201	553	13.20%	58	9.03	4,994	16.07%	1.86%
1998	4285	611	14.30%	59	8.57	5,239	16.52%	1.85%
1999	4370	670	15.30%	60	8.15	5,456	16.87%	1.85%
2000	4458	730	16.40%	61	7.74	5,647	17.12%	1.84%
2001	4547	791	17.40%	62	7.35	5,815	17.28%	1.84%
2002	4638	853	18.40%	64	6.98	5,960	17.37%	1.83%
2003	4731	917	19.40%	65	6.63	6,084	17.38%	1.83%
2004	4825	982	20.40%	66	6.33	6,218	17.41%	1.83%
2005	4922	1,048	21.30%	68	6.06	6,355	17.45%	1.83%
2006	5020	1,116	22.20%	69	5.82	6,495	17.48%	1.83%
2007	5121	1,185	23.10%	70	5.6	6,638	17.52%	1.83%
2008	5223	1,255	24.00%	72	5.41	6,784	17.55%	1.83%
2009	5328	1,327	24.90%	73	5.23	6,933	17.59%	1.83%
2010	5434	1,400	25.80%	75	5.06	7,085	17.62%	1.83%

After the 1987 legislation, a major impediment is removed—the impediment of uncertainty. Now the attorneys and clients are assured of confidentiality and enforceability, and they are confident that, should unresolved issues make it to court, the judge will rule in a manner consistent with the legislation. Now the rapid growth begins. In 1988, the number of attorneys who train in ADR rises to half of the total number added, and the ratio increases to 60% in 1989 and then 70% for the years after that. The number of ADR per practitioner stays at 15 through 1990, and then starts dropping off (as the number of attorneys who train grows, some of these may become “full-time” mediators/arbitrators; but many who train will continue in their own fields of specialty and serve as mediators/arbitrators only occasionally. The next table presents the example results, complete with data for 1980-2010

In summary, the assumed parameters of Mediation County are:

- 1980 population of one million, with a 2% growth rate,
- A “new cases filed” rate (before any effects of ADR) of 2.22%,
- Number of attorneys is 3 per 1K population.

The parameters added by the ADR example are:

- There are 10 ADR “practitioner” attorneys in 1980,
- The net number grows by the number “trained” each year, per the table,
- The number of mediations per year is as shown in the table.

Graphically, the number of ADR cases is shown in the figures, following.

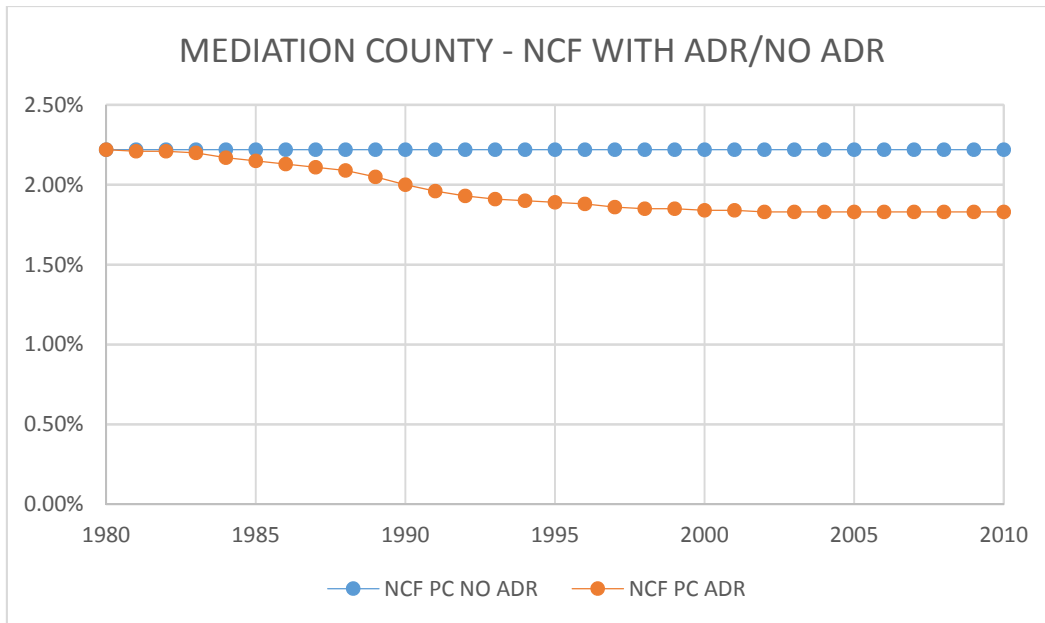


FIGURE A5: MEDIATION COUNTY NCF COMPARISON

The impact on court congestion, specifically the “new cases filed,” is shown and new cases filed without ADR is included for comparison (both are per capita). The graph of the per capita case filings with ADR shows a slight decline in the early 1980s, a steeper decline beginning about 1988, and then a tapering off. The graph shows the expected reduction in court congestion/filings with the introduction of ADR. There will be just a slight impact at first, a greater impact (negative slope) on the per capita filings associated with the growth of ADR, and then, at some point, a flattening out of the filings, which represents the level of filings for cases that are not appropriate for mediation and “belong” in the court system.

The parameters created to illustrate the expectations for new case filings, with modification, can also describe the expected impact on case dispositions that would be impacted by mediation.

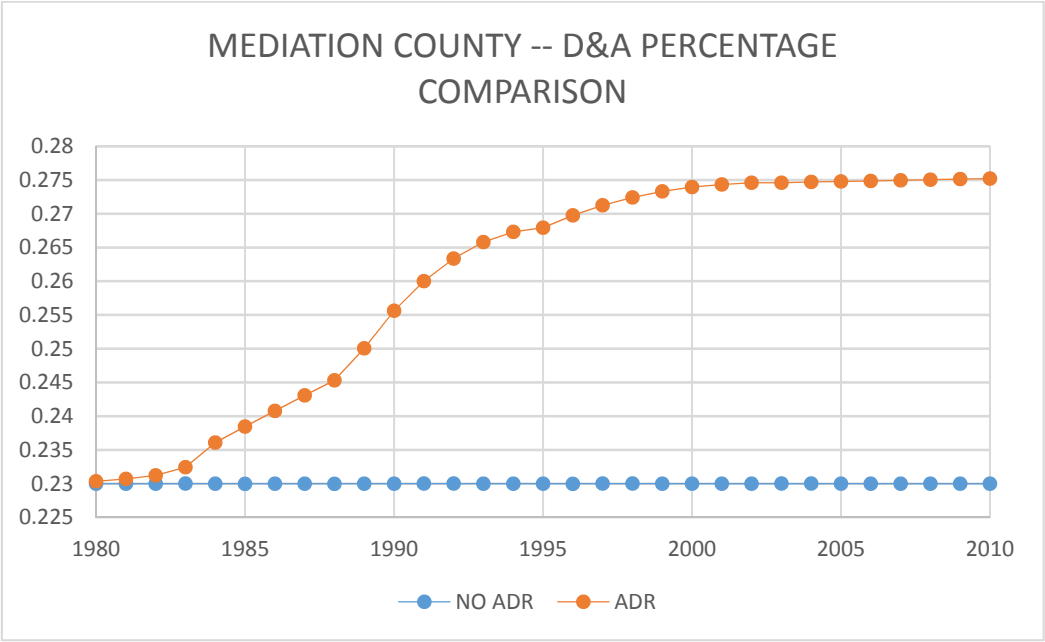


FIGURE A6: MEDIATION COUNTY -- D&A AS % OF TOTAL

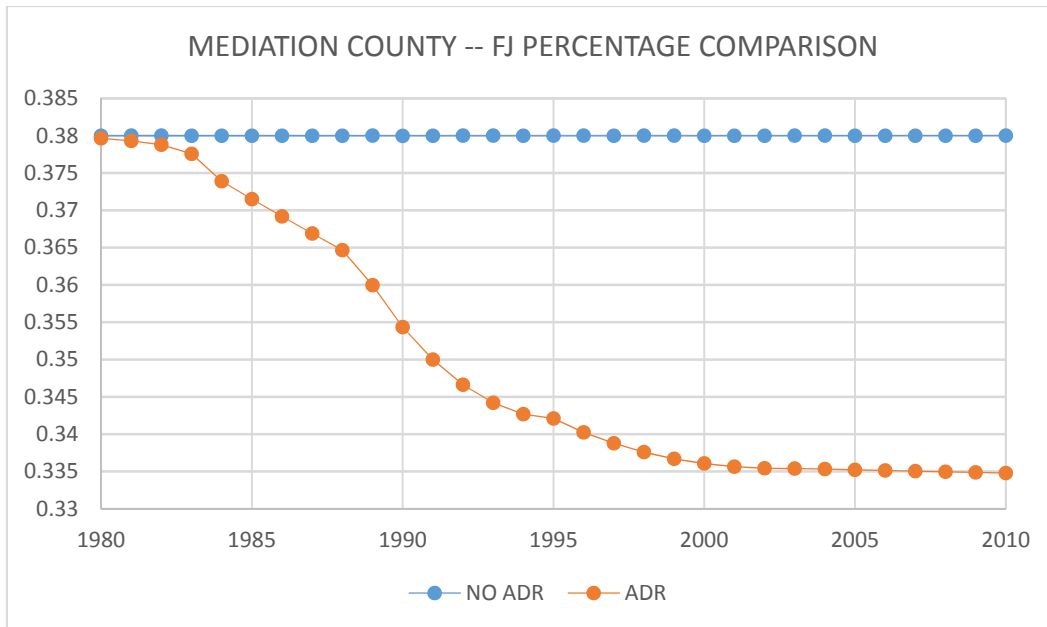


FIGURE A7: MEDIATION COUNTY - FJ AS % OF TOTAL

Since the example assumes that all increases in default & agreed would otherwise be disposed of by trial (final judgment), final judgments, with mediation, should appear as shown.

These graphs, collectively, illustrate the expected patterns to be observed in the data if mediation is reducing court congestion, either before or after filing.

The comparison of active counties, or counties where the impact of mediation should be evident, with control counties, or counties where the impact should be much weaker, can be done comparing a treatment with a control, as single active group with a single control group, as illustrated in figure provided. The concern, though, is whether the differences observed are merely normal variation, or meaningful differences.

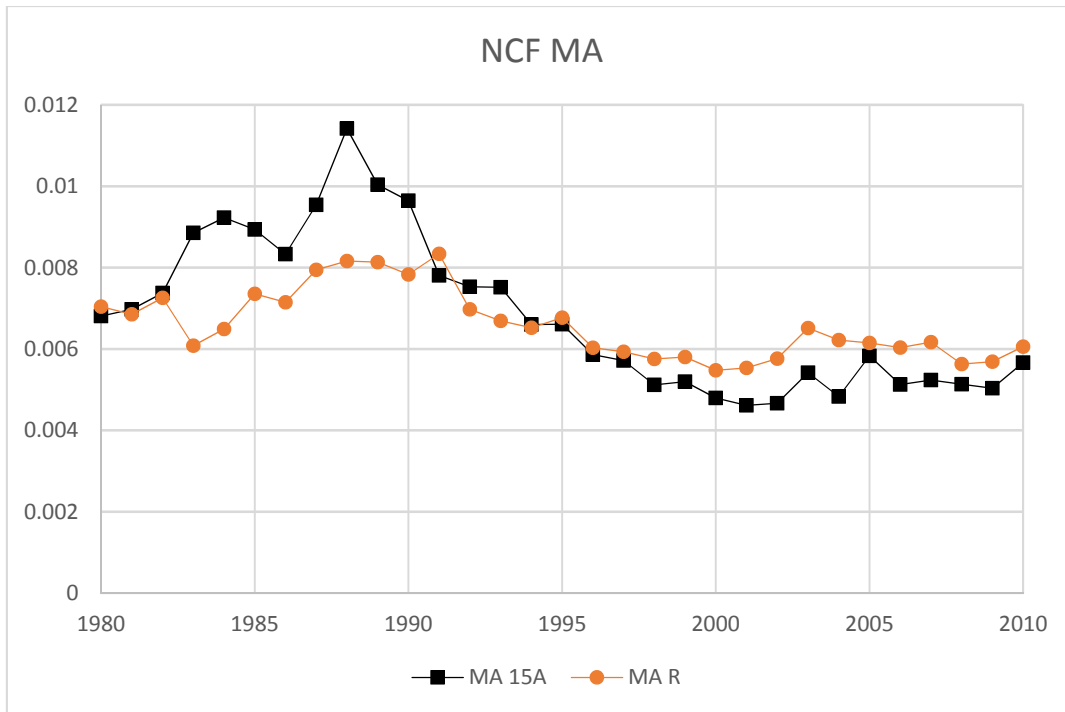


FIGURE A8: MA NEW CASE FILINGS, ONE ACTIVE AND ONE CONTROL

A better understanding can come from viewing multiple active groups and/or multiple control groups in the same graph. This helps to distinguish normal variation from something that does not appear to be normal.

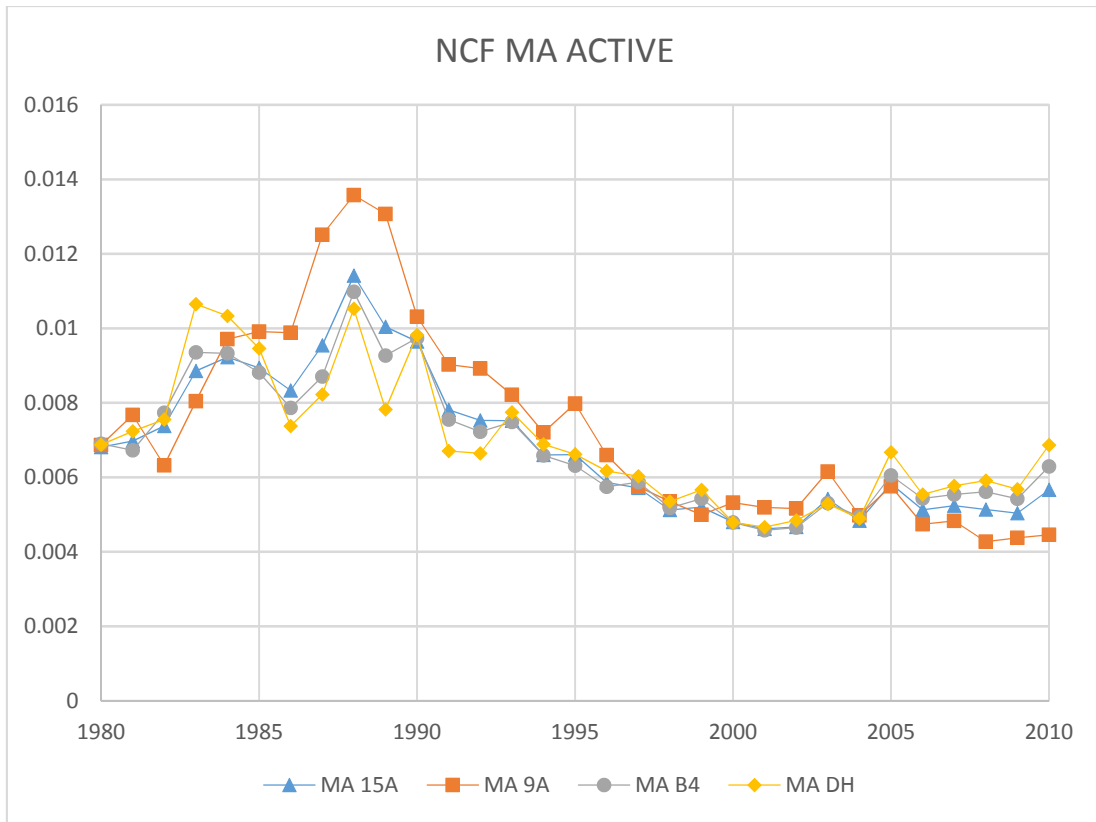


FIGURE A9: MA FILINGS FOR THE ACTIVE COUNTY GROUPS

The figure (A-9) confirms that the pattern of filings for the active groups was very similar. Figure A-10 shows that the variation among the control groups was much greater. The import is that the active groups do not display any significant timing or other differences due to ADR. Both graphs show an upward trend until about 1988-1991, and then downward trend.

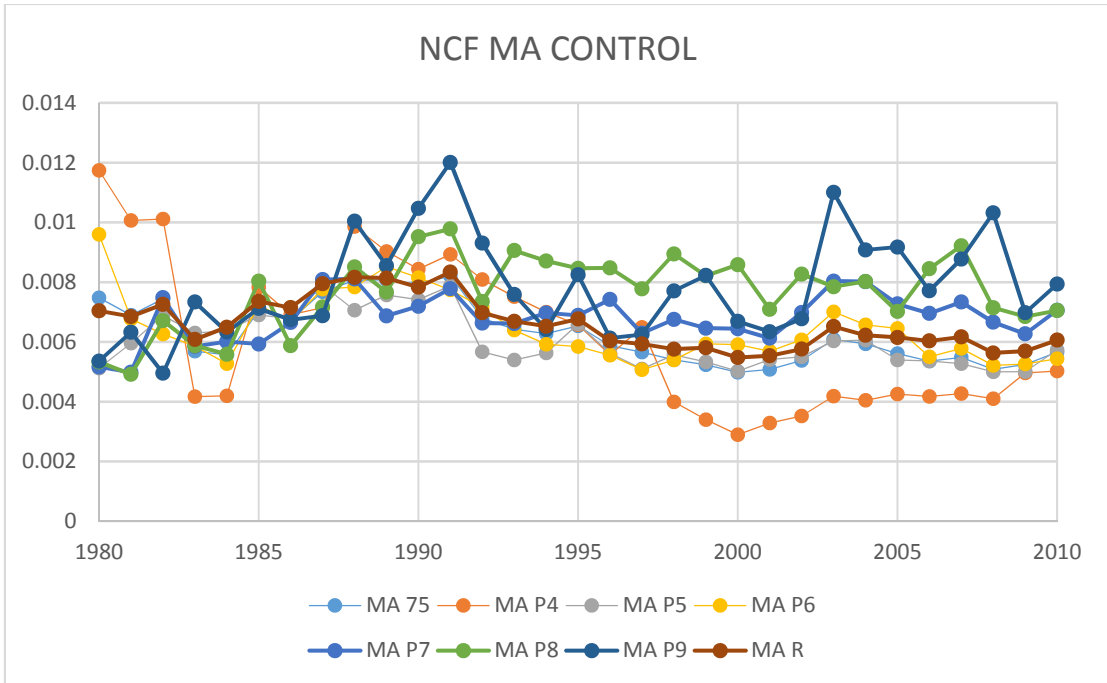


FIGURE A10: MA FILINGS FOR THE CONTROL GROUPS

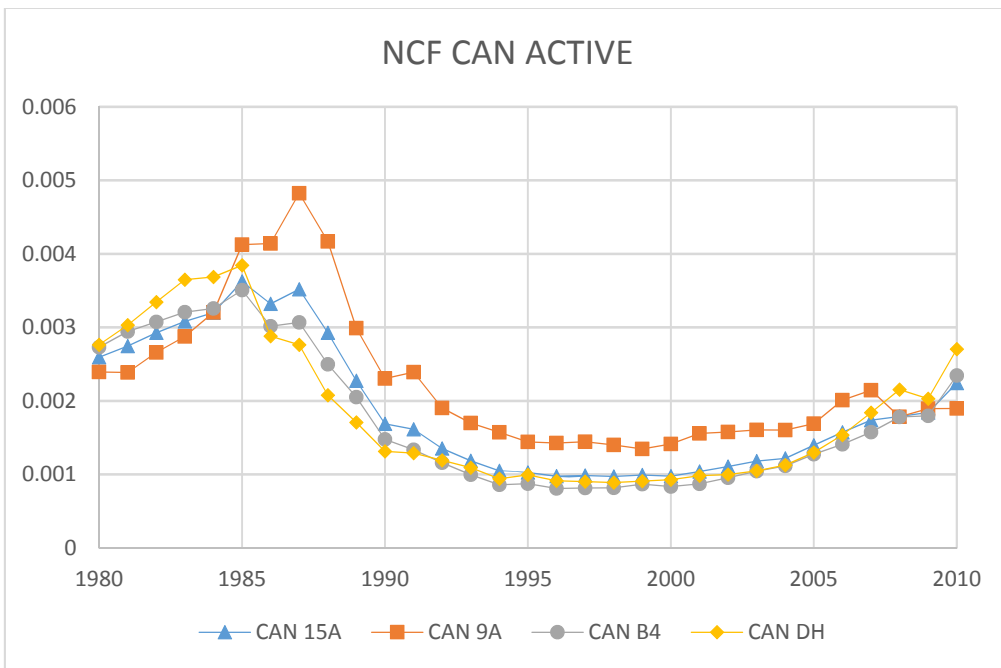


FIGURE A11: CAN FILINGS FOR THE ACTIVE GROUPS

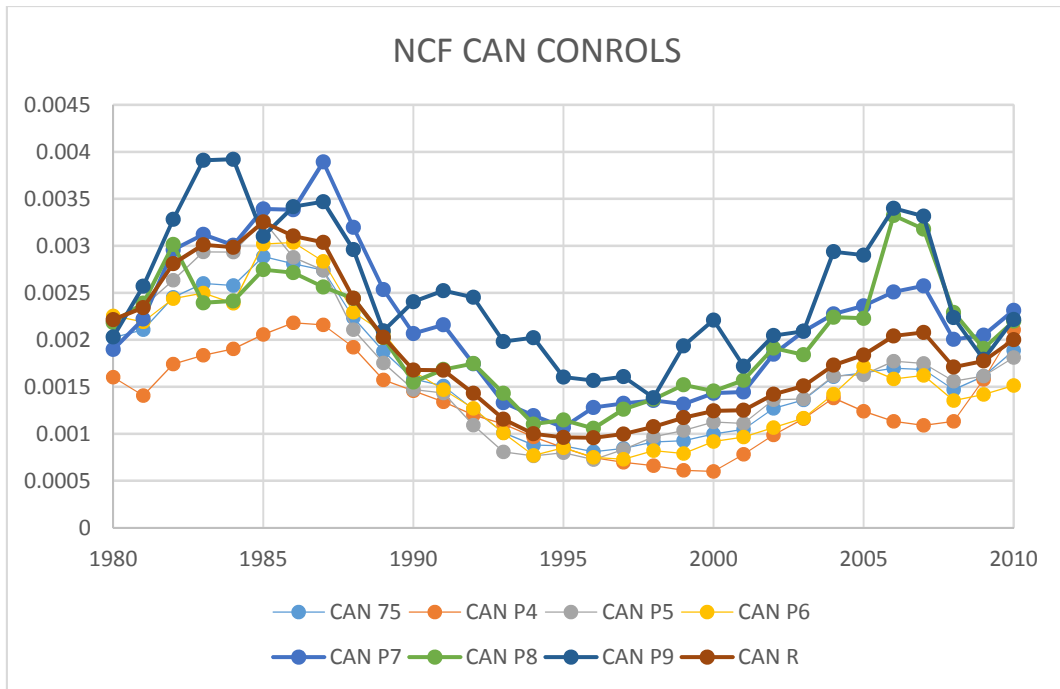


FIGURE A12: CAN FILINGS FOR THE CONTROL GROUPS

Figures for the CAN filings show that the active and control groups displayed very similar patterns. The variation displayed by the control groups is greater than the variation shown by the active groups. Both active and control counties had peaks in CAN filings at about the same time, so ADR did not result in any discernable difference in terms of time. The decline in CAN filings for the control groups that corresponds to the decline in filings for the active groups indicates that ADR was not responsible for the decline in filings. Again, the greater variation in the control groups indicates that the variation seen in the active groups is unlikely to be due to ADR.

In figures for MA default and agreed judgments, there is a consistent pattern among the active groups, with much more variability in the control groups. The pattern

for the active groups, however, is the wrong way: ADR should be increasing the D&A dispositions. The small county control group, P9, shows a relatively high amount of variation. Since the number of cases in the small counties is relatively few, more variation can be expected. Another point of note is that the D&A dispositions for the control groups is relatively flat, in contrast to the trend for the active groups. Instead of ADR increasing the D&A dispositions in the active group, it is just as reasonable to conclude that D&A dispositions were abnormally high for the active groups during the first years—when ADR would have not had a chance to make much of an impact. An alternative conclusion would be that ADR had a negative impact on D&A dispositions.

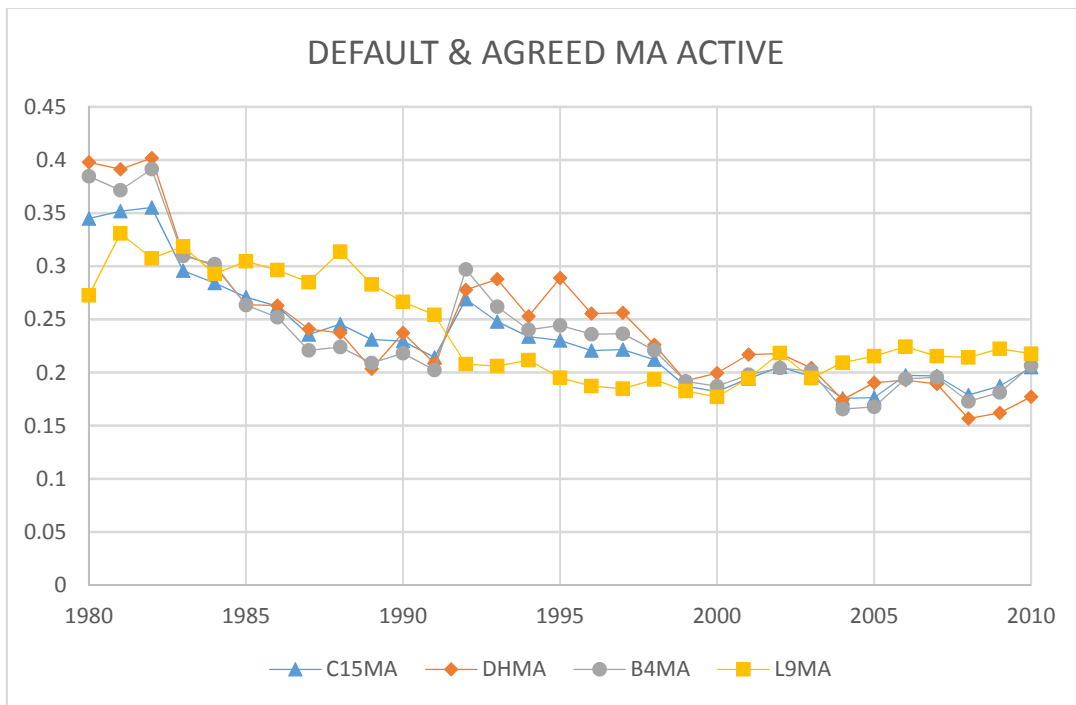


FIGURE A13: MA DEFAULT AND AGREED DISPOSITION, ACTIVE

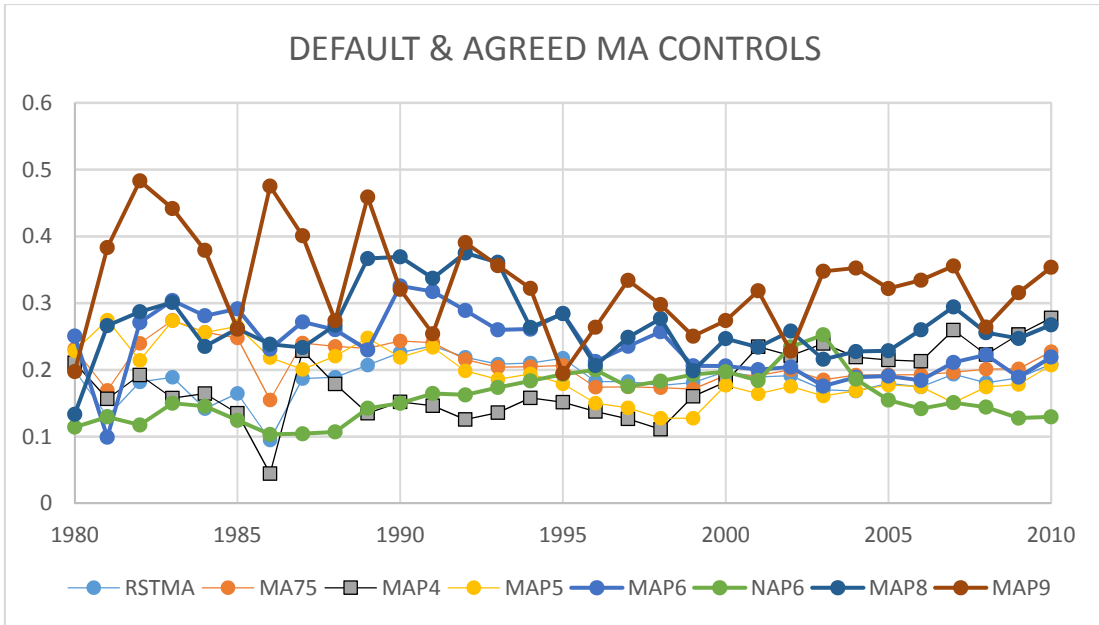


FIGURE A14: MA DEFAULT AND AGREED DISPOSITION, CONTROLS

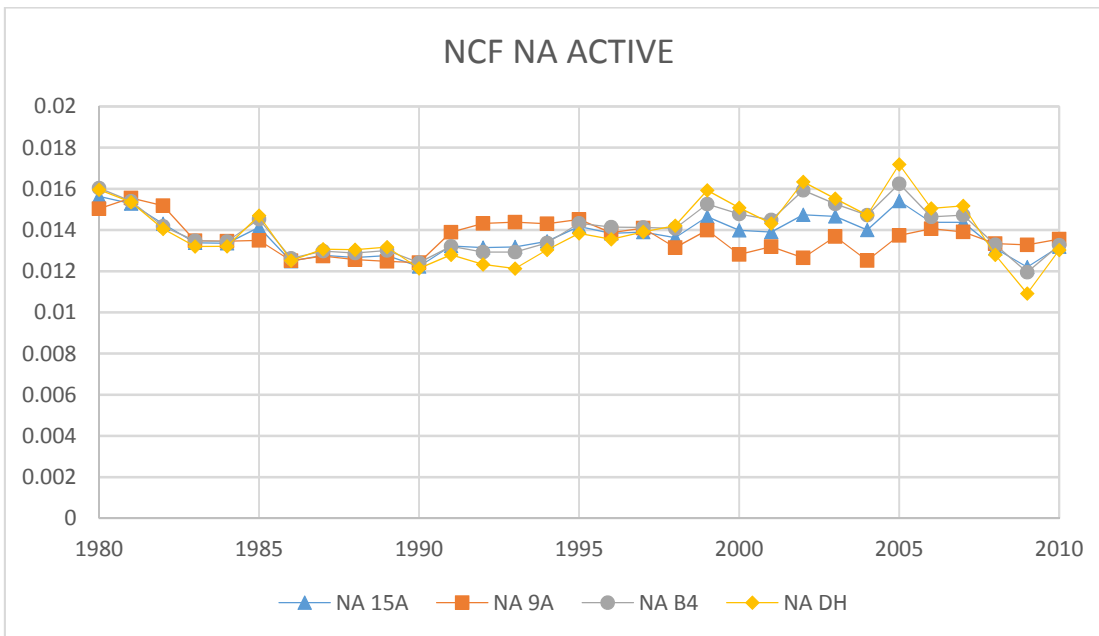


FIGURE A15: NA DEFAULT AND AGREED DISPOSITION, ACTIVE

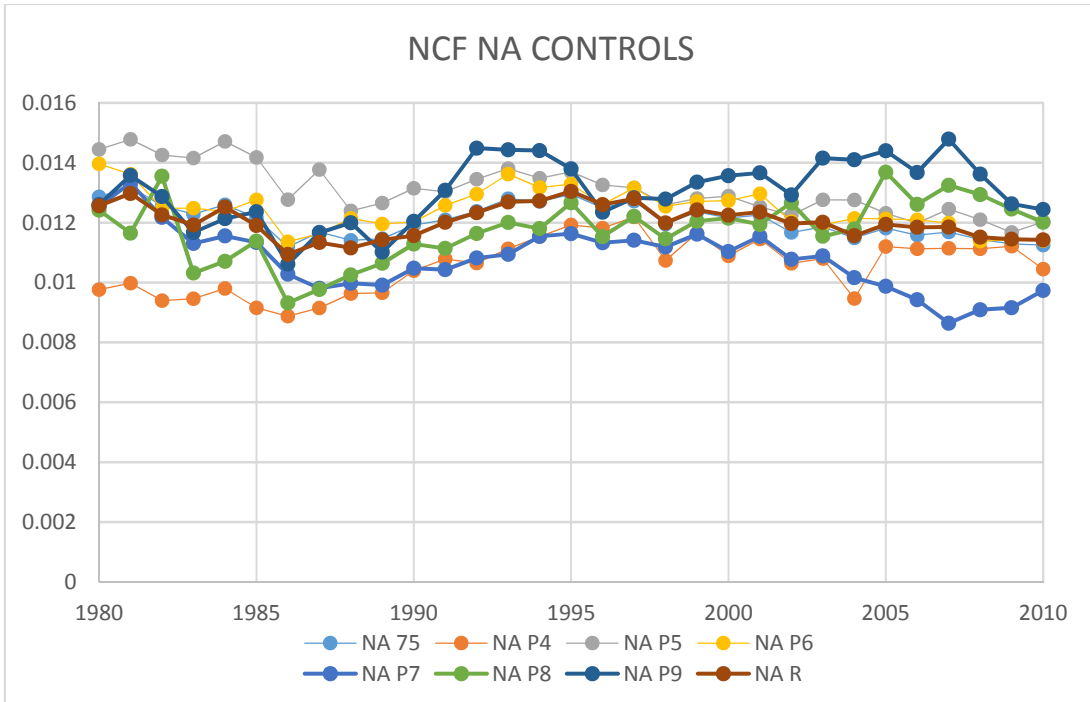


FIGURE A16: MA DEFAULT AND AGREED DISPOSITION, CONTROLS

Figures are provided for filings for the NA case category. Although filings should not be affected by ADR or mediation, the comparison is useful for verifying that the differences in trends and variation seen in the MA and CAN cases categories are very similar to what is found in the NA category. Since NA filings are not affected by ADR or mediation, the similarities with the MA and CAN analysis lends further support to the conclusion that ADR is not producing the effects seen.