DISPUTES PROCESSING RESEARCH PROGRAM — FIVE YEARS OF PROGRESS

The University of Wisconsin Law School's Disputes Processing Research Program has emerged as the major academic center for research on the relationship between dispute resolution and the civil justice system. Responding to the need for more comprehensive information and a better understanding of the civil justice system, professors from the Law School and related departments came together in 1977 to establish the Program. Initial support from the Ford Foundation, the University and the Law Alumni Association allowed the Program to develop research projects which have since reworked our understanding of how civil trial courts operate.

In 1978, the Program submitted a proposal to the United States Department of Justice to fund the Civil Litigation Research Project. This research represents the largest commitment of money and effort made in the U.S. to study the economic costs of civil litigation. Other Program projects have continued to explore how courts operate within the context of society. To date, the Program has coordinated ten projects involving $3 million. Ten law school professors, in addition to numerous legal researchers, law students and associates from other departments, have participated.

The results of these projects have been:

— the development of a new way to conceptualize civil justice
— the creation of several major data bases on litigation and alternatives to litigation
— the production of the first baseline data on rates of disputing in various areas of American life
— the creation of the first comprehensive data base on the costs of litigation and its alternatives
— analysis of the costs of litigation, including the factors that affect the time lawyers spend on cases
— detailed examination of how consumer disputes are processed and the role of consumer law in affecting resolution
— identification of the importance of "negotiated justice" in civil litigation with special emphasis on the changing role of the judge in resolving civil cases.

The Program is also committed to the communications of its findings to the academic and professional communities. It has two series of publications — a Working Papers and a Reprint series — which it distributes nationally and internationally. The Program has hosted two national conferences related to its research efforts: "Making Auto Repairs Credible" and "When Consumers Complain." Both brought together researchers, policy analysts and practitioners in efforts to open discussion on the effects of Program findings on approaches to the resolution of disputes. Associates of the Program have been in demand for many national and international conferences sponsored by such institutions and governments as The Rand Corporation, Harvard Law School, Duke University, Federal Republic of Germany, Wisconsin Bar Association.

Summaries of completed and on-going projects are shown below. For more information, contact Professor David A. Trubek, Director, Disputes Processing Research Project, in care of the Law School.

PROJECT SUMMARIES

(1) LAWYERS AND CONSUMER PROTECTION LAWS: Professor Stewart Macaulay, University of Wisconsin Law School.

Examining the role private lawyers play in consumer complaints, this study highlights the role of the lawyer as "gatekeeper" to the remedy system. The study shows that lawyers tend to deflect consumer complaints, which are generally costly to process in relationship to their value, and may create role conflicts for small-town lawyers. As a result, lawyers may "transform" consumer disputes by persuading clients to drop the matter.

(2) FINAL OFFER INTEREST ARBITRATION IN WISCONSIN: Professor William H. Clune III, University of Wisconsin Law School.

Professor Clune investigated the factors influencing perceptions of the fairness of final offer interest arbitration among participants in the Wisconsin system. It was found that role in the process (Labor-Management, Party-Negotiator) was more important than either economic results or experience with the process (winning, losing, settling, etc.). Thus, preconceived attitudes based on politics and interest group affiliation were more influential than "micro" disputes-processing variables. The research also investigated some political and legal efforts by interest groups to change the structure of disputing in this area (the procedural ground rules).

(3) THE MILWAUKEE CONSUMER DISPUTE STUDY: Professor Jack Ladinsky, Department of Sociology, University of Wisconsin-Madison.

The project measured the incidence of consumer problems faced by a cross-section of people in Milwaukee County. Random-sampled telephone interviews solicited information on fourteen different potential consumer disputes during the previous year. Interviews traced the life history of the dispute. This "bottom up" perspective illuminates, from the consumer's perspective, how people handle consumer problems, particularly the degree to which perceived problems are transformed into legal conflicts. Professor Ladinsky also surveyed the institutionalized third-party fora available for handling consumer disputes. His interest was to determine not only the incidence of consumer disputes but how many of them reach the institutionalized fora. The project's find-

ings indicated that most people faced with consumer problems complain directly to the product or service provider and most who complain receive some compensation. While consumers complain frequently to the provider, those with disputes rarely turn to outsiders for help in resolving disputes. Of 663 disputes, only 26 were taken to a third party, usually a lawyer. Only 1 went to court.

(4) READING THE LANDSCAPE OF DISPUTES: WHAT WE KNOW AND DON'T KNOW (AND THINK WE KNOW) ABOUT OUR ALLEGEDLY CONTENTIOUS AND LITIGIOUS SOCIETY: Professor Marc Galanter, UW Law School.

Professor Galanter analyzed the literature which asserts we have a "litigation explosion" and seeks to prescribe cures for this alleged epidemic. Labelling this literature "hyperlexology," from its tendency to find overuse of the law, Galanter explores the basis for the critics' contentions that Americans litigate more than we used to, more than in other nations, or frequently in comparison with any baseline of legally cognizable social conflict. This analysis leads to a critique of current legal scholarship on disputing, which itself is based on very little data and which ignores much of the evidence that is available.

(5) CIVIL LITIGATION RESEARCH PROJECT: Professor David M. Trubek, UW Law School, Professors Joel Grossman and Herbert Kritzer, Department of Political Science, UW-Madison, William L. F. Felstiner, The Rand Corporation, and Professor Austin Sarat, Department of Political Science, Amherst College.

The Civil Litigation Research Project sought to develop a conceptual framework that would relate knowledge about *disputing behavior* to the concerns of judges, court administrators, and others concerned with the *administration* of the civil justice system. This approach, which we call "courts in context" approach provided the basis for the creation of a massive data base including a survey of the disputing experience of the population and detailed data on civil cases in state and federal courts, cases brought to such "alternative institutions" as the American Arbitration Association, and "bilateral disputes" which never went to any third-party forum. These data have been archived and are available for public use.

The CLRP staff has begun to work on the third objective: analysis of the data. Numerous studies have been conducted, including analyses of the incidence of disputes in the U.S., the "pace" of litigation in selected courts, the monetary stakes and costs in typical civil lawsuits, the factors which determine how lawyers allocate time to lawsuits, and the comparative cost-effectiveness of settlement versus adjudication in litigated cases. These studies have been published in various places: a complete set will be available as part of the CLRP Final Report to the Department of Justice, to be available in 1983.

(6) DISCRIMINATION GRIEVANCES, LEGAL IDEOLOGY AND THE INDIVIDUAL SITUATION: Professor Kristin Bumiller, Department of Political Science, Johns Hopkins University.

This study is based upon survey data from the Civil Litigation Research Project's national sample of persons experiencing discrimination problems. Ms. Bumiller conducted followup interviews with a subsample of individuals who reported discrimination grievances to determine how and why they chose among possible disputing trajectories including political action. The analysis will emphasize the process of social exchange between authorities and the discriminated, the social and psychological mechanisms that stifle the perception of conflict, and the role of legal ideology in influencing choice.

(7) COMPARATIVE DISPUTES PROJECT: Dr. Jeffrey FitzGerald, School of Social Sciences, LaTrobe University (Australia) and Honorary Fellow, University of Wisconsin Law School.

Dr. FitzGerald's project compares the incidence of disputing in Australia and the United States. Using a questionnaire modeled on the household survey developed by the Civil Litigation Research Project, he surveyed over 1,000 households in an Australian state. The results permit comparisons with American data reported by the Civil Litigation Research Project. The study examines the patterns in the range of potential grievances, the relationship between types of grievances and dispute trajectories, the role third parties play in influencing trajectories, and variation in outcomes. In comparing the Australian and American data, Dr. FitzGerald has found overall a marked similarity between the incidence of disputing. While Australians appear a bit more inclined to complain, Americans are slightly more apt to litigate. However, for some dispute categories, most notably discrimination, he found a substantial variation. This has led him to turn to a detailed examination of the influence of lawyers and fee arrangements on disputing behavior.

(8) JUDICIAL PARTICIPATION IN THE SETTLEMENT OF CIVIL CASES: Professor Marc Galanter, UW Law School.

The project seeks to explore a growing trend toward judicial involvement in the settlement of civil cases. Its goal is to build a theory concerning the judge's role. Professor Galanter suggests that two clusters of factors affect the frequency, mode and outcomes of judicial participation: "bargaining arena" and "court." The bargaining arena includes such factors as case characteristics, party characteristics, lawyer-client relations, lawyer characteristics, and structure and culture of the bargaining arena. This last factor includes local norms and shared understandings about fairness of settlements in various substantive law areas. The second cluster, courts, includes the judicial organization, legal structure and culture. This approach to judicial involvement in settlement aspires to give a rich and differentiated account of what produces settlements, and to provide the basis for a more penetrating examination of the qualitative characteristics of settlements.

(9) THE PROCESS OF NEGOTIATION: AN EXPLORATORY INVESTIGATION IN THE DIVORCE CONTEXT: Professor Marygold Melli, UW Law School and Professor Howard Erlanger, UW Law School and Department of Sociology.

The present study examines negotiated justice in the context of setting child support awards in divorce cases in Dane County, Wisconsin. The research focuses on the roles litigants, lawyers and court officials play in determining whether a case will be settled, when it will be settled, and the amount of the child support award. Much of the work will be qualitative, based on observation and in-depth interviews; quantitative analysis, especially of the case files, is also involved.

(10) FEE ARRANGEMENTS AND FEE SHIFTING IN CANADA: Professor Herbert Kritzer, Department of Political Science, University of Wisconsin-Madison.

The project is an examination of the fee shifting rules employed in the province of Ontario, Canada. Initially, Professor Kritzer was concerned to find if the existence of court-based controls on lawyers' fees would preclude the need for closer supervision of lawyers' time. He found, first, that corporations do not rely on the formal structures of control but, second, these controls do appear to play a major role in affecting access to the courts. The fee shifting arrangements appear to inhibit innovative cases and cases pitting a person of low income against one of high income. This enhnaces the likelihood of settlement. Further, the research is finding that while contingency fees are officially banned in Ontario, they are developing indirectly as one means of slightly off-setting the conservative effects of the fee shifting role.

(11) THE SMALL CASE DIVISION OF THE U.S. TAX COURT: IS IT A SUCCESSFUL SMALL CLAIMS COURT?". Professor William C. Whitford, University of Wisconsin Law School.

In the late 1960s, a Small Case Division was established within the U.S. Tax Court to permit taxpayers to appeal *pro se* Internal Revenue Service decisions. Initial information on the Small Case Division has been favorable. The Division as with other *pro se* courts is meant to minimize the formal adversarial nature of litigation and permit wider access for people suffering the "little injustices." Research on other *pro se* courts has, however, concluded that they work mainly against the individual, favoring institutional users. Professor Whitford's research will investigate the initial claims for the Division's success in light of present knowledge of defects in other *pro se* courts. His research includes direct observation of court proceedings, interviews with government and private attorneys, a limited mail survey of taxpayers who have used the Division, and a data set detailing 1200 small cases from 1978 and 1981. The research initially appears to bear out claims for the Division's success. *Pro se* taxpayers appear to fare almost as well as taxpayers outside the Division who employ counsel. One explanation for the contrast between the Division and other *pro se* courts is that here the taxpayer is the proactive participant, initiating the proceedings, while in the usual case the individual is only responding to proceedings initiated by another, generally institutional, party.

— Rob Sikorski