Dispute Resolution and the Vanishing Trial: Comparing Federal Government Litigation and ADR Outcomes

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ABSTRACT

The study of civil cases handled by Assistant United States Attorneys (AUSAs) indicates that use of ADR can be an efficient and effective procedural solution to the problems of time and cost in the justice system without sacrificing the quality of macrojustice. When ADR was used, 65% of cases settled (only 29% of cases settled when it was not used). Significantly more cases settled when ADR was voluntary than when it was mandatory (71% vs. 50%), and tort cases settled with more frequency than employment discrimination cases (73% vs. 60%).

When using ADR, AUSAs subjectively estimated that the process saved significant time and money. AUSAs spent an average of $869 in neutral fees and estimated that the process saved $10,735 in litigation expenses per case. AUSAs spent an average of 12 hours preparing for ADR and 7 hours in the ADR process per case, which they estimated saved 88 hours of staff time and 6 months of litigation time per case. Analyses of various macrojustice

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outcomes show that ADR outcomes were not significantly different from litigated outcomes, indicating that the process was neutral, favoring neither private parties nor the government.

While these statistics are descriptive, a final analysis shows that the earlier a case is referred to ADR, the shorter its time to disposition. In sum, the study provides a better picture of how ADR is used by the government in federal court cases, and suggests that ADR has the potential to improve dispute processing without sacrificing the quality of justice.

I. INTRODUCTION

In *A World Without Trials?*, Professor Marc Galanter documents a decline in both the absolute number and rate of civil trials and jury trials in state and federal courts, a decline that is both long-term over the past century and precipitous in the past two decades.[1] Focusing on litigation in the federal courts, he reports that the percentage of case terminations through civil trial dropped from 11.5% in 1962 to 1.7% in 2004 despite the fact that by then there were five times as many cases filed a year.[2] The absolute number of civil trials dropped from 5802 in 1962 to 3951 in 2004.[3] He identifies five "vanishing trial stories" as hypotheses to explain the phenomenon: convergence of common law and civil code systems[4]; displacement of trials to administrative, arbitral, and other dispute resolution mechanisms[5]; assimilation of trial-like procedures and due process into surrounding institutions other than courts[6]; transformation of the legal system from a rational, rule-centered, and formal system into an informal decisional process entailing negotiation, participation, and interaction[7]; and evolution of an adversarial process into something different, entailing process pluralism "intelligently designed" to produce more optimal outcomes.[8]

Although Galanter cautions against attributing the decline entirely to alternative dispute resolutions (ADR), he observes:

> While confidence in adjudication and courts has declined, the courts, politicians, and business elites have embraced "alternative dispute

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[1] Marc Galanter, *A World Without Trials?*, 2006 J. DISP. RESOL. 7, 13–14 (2006).

[2] *Id.* at 7–8.

[3] *Id.*

[4] *Id.* at 23–24.

[5] *Id.* at 24–27.

[6] *Id.* at 27–30.

[7] Galanter, supra note 1, at 30–31.

[8] *Id.* at 31–33.

> resolution." Courts have incorporated "alternative" processes like mediation, early neutral evaluation, arbitration, summary jury trial; they have engaged in outsourcing to ADR institutions; and doctrinally, they have enhanced both the power of those institutions and their exclusive jurisdiction. ADR institutions and programs have proliferated.[9]

These findings have sparked a vigorous debate on the impact of "the vanishing trial" on justice in the United States.

One can argue that issues of justice are more salient when the federal government is a litigant.[10] The Attorney General, through the Department of Justice, has final authority to supervise and conduct litigation on behalf of the United States, including actions to enforce public law or in defense of the government.[11] These disputes do not simply entail the private interests of parties to a contract or tort. Even when the government is engaged in civil litigation involving tort claims, it is acting as an entity empowered by the public and funded through taxpayer dollars. Thus, the question arises, what has been the impact of the rise of ADR and decline of trials on the outcomes of this special sector of litigation?

Advocates argue various ADR techniques are efficient and effective procedural solutions to managing federal court dockets;[12] however, most scholars and commentators agree that there is insufficient empirical research about the efficacy and success of ADR as compared to traditional litigation.[13]

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[9] *Id.* at 17 (citations omitted). For a general history of the rise of ADR in the courts, see Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement is Re-Shaping Our Legal System*, 108 PENN. ST. L. REV. 165 (2003). For an account of the evolution of both community and court programs, and the failure of entirely private systems to flourish, see Kimberlee K. Kovach, *Privatization of Dispute Resolution: In the Spirit of Pound, but Mission Incomplete: Lessons Learned and a Possible Blueprint for the Future*, 48 S. TEX. L. REV. 1003 (2007).

[10] In theory, the government acts on behalf of its citizens under the basic notions of the social contract embodied in our Constitution. *See generally*, JEAN JACQUES ROUSSEAU, THE SOCIAL CONTRACT: PRINCIPLES OF POLITICAL RIGHT (1762), *available at* http://www.constitution.org/jjr/socon.htm (last visited April 18, 2009).

[11] 28 U.S.C. § 515 (2002).

[12] *See, e.g.*, James F. Henry, *The Courts at a Crossroads: A Consumer Perspective of the Judicial System*, 95 GEO. L.J. 945, 961–64 (2007) (addressing the arguments for ADR in the federal judicial system).

[13] Lisa B. Bingham, *Why Suppose? Let's Find Out: A Public Policy Research Program on Dispute Resolution*, 2002 J. DISP. RESOL. 101, 123 (2002); Deborah R. Hensler, *ADR Research at the Crossroads*, 2000 J. DISP. RESOL. 71, 74–75 (2000); Deborah R. Hensler, *Suppose It's Not True: Challenging Mediation Ideology*, 2002 J. DISP. RESOL. 81, 95 (2002); Thomas J. Stipanowich, *ADR and the "Vanishing Trial":*

Even less research exists comparing the use of ADR and litigation when the federal government is a litigant.

This study examines litigation and ADR when the federal government is a litigant using a unique dataset of civil cases handled by Assistant U. S. Attorneys (AUSAs) in the Department of Justice (DOJ) between 1995 and 1998, a period in the middle of the steep decline Galanter reports in civil trials in the past 20 years.[14] DOJ handles the vast majority of cases in the federal courts that involve the U.S. government, and the government is involved in approximately one-third of all civil cases in the federal courts.[15] This context provides an excellent opportunity to examine the use of ADR in the federal government and empirically compare ADR and litigation cases in trial courts.[16] How does the federal government use ADR in legal actions and for what kinds of cases? How do ADR cases compare to litigated cases in terms of macrojustice, which is defined as the overall pattern of outcomes? Are there substantive differences in outcomes of ADR and litigation cases? Are there differences in trial rates and disposition times between ADR and litigation cases? If ADR is used, does the timing of the intervention affect disposition time?

First, we review the role of ADR in the federal government and explore issues of macrojustice and dispute processing in ADR and litigation. Second, we present a descriptive analysis of some characteristics of the litigation and ADR cases, which helps identify what types of cases receive ADR interventions. Third, we statistically compare ADR and litigation cases with respect to monetary outcomes, trial rates, and time to disposition. We also explore the relationship between the timing of an ADR intervention and the time to final disposition of the case. We conclude with a discussion about the implications of these results and suggestions for future research. There are limitations to our sample, unique and useful as it is. We need to do much more systematic and rigorous research to understand the impact of dispute resolution both on the decline in trials and on justice.

The Growth and Impact of "Alternative Dispute Resolution," 1 J. EMPIRICAL LEGAL STUD. 843, 845–48 (2004).

[14] Galanter, *supra* note 1, at 13–14.

[15] JEFFREY M. SENGER, FEDERAL DISPUTE RESOLUTION: USING ADR WITH THE UNITED STATES GOVERNMENT 3 (2004).

[16] For a discussion of court-connected ADR in the federal appellate courts, see Shawn P. Davisson, Note, *Privatization and Self-Determination in the Circuits: Utilizing the Private Sector Within the Evolving Framework of Federal Appellate Mediation*, 21 OHIO ST. J. ON DISP. RESOL. 953 (2006).

II. ALTERNATIVE DISPUTE RESOLUTION IN THE FEDERAL GOVERNMENT

Alternative[17] or appropriate[18] dispute resolution (ADR) is an umbrella term for a wide variety of conflict management techniques and processes used in lieu of traditional judicial and administrative methods such as litigation and administrative adjudication. Many ADR processes use a third party neutral, such as a facilitator, mediator, or arbitrator.[19] Professor Robert Kagan has documented the dramatic growth in adversarial legalism as an approach to governance from the 1960s to 1980s.[20] ADR use was relatively sparse in the federal government until the 1990s, when it began to grow in earnest through a combination of congressional legislation, presidential proclamations, and Attorney General guidance as a response to a perceived explosion in litigation or the threat of litigation.[21] Although Congress passed a series of legislative acts incorporating ADR into all three branches of the federal government, the greatest impacts have been experienced in administrative agencies and federal courts.[22]

The Administrative Dispute Resolution Act of 1990[23] was watershed legislation for government ADR.[24] This Act and its companion, the

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[17] *See generally* JEROME T. BARRETT, A HISTORY OF ALTERNATIVE DISPUTE RESOLUTION: THE STORY OF A POLITICAL, CULTURAL, AND SOCIAL MOVEMENT (2004).

[18] Some commentators have used the phrase "appropriate dispute resolution" to suggest that processes like mediation need not be viewed as alternative to anything. For a discussion using this terminology, see Frank E. A. Sander & Lukasz Rozdeiczer, *Selecting an Appropriate Dispute Resolution Procedure: Detailed Analysis and Simplified Solution*, *in* THE HANDBOOK OF DISPUTE RESOLUTION 386 (Michael L. Moffitt & Robert C. Bordone, eds., 2005).

[19] The Administrative Dispute Resolution Act defines alternative means of dispute resolution as including but not limited to "conciliation, facilitation, mediation, fact finding, minitrials, arbitration, and use of ombuds, or any combination thereof." 5 U.S.C. § 571(3) (2008). All of these processes entail the use of a third party who is not one of the disputants.

[20] *See generally*, ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW (2001).

[21] SENGER, *supra* note 15, at 11–16; Lisa B. Bingham & Charles R. Wise, *The Administrative Dispute Resolution Act of 1990: How Do We Evaluate its Success?*, 6 J. PUB. ADMIN. RES. & THEORY 383, 385 (1996).

[22] In addition to the Acts affecting the executive and judicial branches, the Congressional Accountability Act of 1995, Pub. L. No. 104-1, 109 Stat. 3 (codified at 2 U.S.C. §§ 1301–1438 (2008)), instructed legislative agencies to use ADR for employment disputes.

[23] Pub. L. No. 101-552, 104 Stat. 2736 (codified as amended at 5 U.S.C. §§ 571–583 (2008)).

[24] SENGER, *supra* note 15, at 13.

Negotiated Rulemaking Act of 1990,[25] were permanently reauthorized with the passage of the Administrative Dispute Resolution Act of 1996.[26] This Act requires each federal agency to adopt an ADR policy, designate a senior official to be its dispute resolution specialist, provide regular training on ADR, and review each of its contracts, grants, and related agreements and consider amending them to authorize and encourage the use of ADR.[27] In the Act, Congress noted:

> [A]dministrative proceedings have become increasingly formal, costly, and lengthy resulting in unnecessary expenditures of time and in a decreased likelihood of achieving consensual resolution of disputes; . . . alternative means of dispute resolution have been used in the private sector for many years and, in appropriate circumstances, have yielded decisions that are faster, less expensive, and less contentious; . . . such alternative means can lead to more creative, efficient, and sensible outcomes. . . . Federal agencies may not only receive the benefit of techniques that were developed in the private sector, but may also take the lead in the further development and refinement of such techniques; and . . . the availability of a wide range of dispute resolution procedures, and an increased understanding of the most effective use of such procedures, will enhance the operation of the Government and better serve the public.[28]

This reasoning is echoed in ADR legislation aimed at the federal court system.[29] The Civil Justice Reform Act of 1990[30] directed all federal district courts to implement "a civil justice expense and delay reduction plan"[31] and specifically encouraged the use of ADR programs in this effort.

After several years of experimentation with ADR at the district court level,[32] Congress passed the Alternative Dispute Resolution Act of 1998,[33]

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[25] Pub. L. No. 101-648, 104 Stat. 4969.

[26] Pub. L. No. 104-320, 110 Stat. 3870 (codified at 5 U.S.C. §§ 571–583 (2008)).

[27] 5 U.S.C. § 571 (promotion of alternative means of dispute resolution).

[28] *Id.* (congressional findings).

[29] Ettie Ward, *Mandatory Court-Annexed Alternative Dispute Resolution in the United States Federal Courts: Panacea or Pandemic*, 81 ST. JOHN'S L. REV. 77, 79–88 (2007) (reviewing the evolution of ADR in the federal courts).

[30] Pub. L. No. 101-650, §§ 101–106, 104 Stat. 5089 (codified as amended at 28 U.S.C. §§ 471–482 (2007)).

[31] 28 U.S.C. § 471.

[32] *See generally*, Amy M. Pugh & Richard A. Bales, *The Inherent Power of the Federal Courts to Compel Participation in Nonbinding Forms of Alternative Dispute Resolution*, 42 DUQ. L. REV. 1 (2003) (arguing that federal courts have strong inherent powers to order parties to participate in nonbinding ADR even in the absence of court rules or existing court-connected programs).

which instructs each federal district court to "devise and implement its own alternative dispute resolution program . . . to encourage and promote the use of alternative dispute resolution in its district,"[34] "require that litigants in all civil cases consider the use of an alternative dispute resolution process at an appropriate stage in the litigation . . . . [and] provide litigants in all civil cases with at least one alternative dispute resolution process."[35] The Act authorizes federal district courts to use a broad range of ADR processes, defined as "any process or procedure, other than adjudication by a presiding judge, in which a neutral third party participates to assist in the resolution of issues in controversy, through processes such as early neutral evaluation, mediation, mini-trial, and arbitration."[36] The rationale behind this Act resonates with that of earlier legislation. Congress asserted that ADR

> has the potential to provide a variety of benefits, including greater satisfaction of the parties, innovative methods of resolving disputes, and greater efficiency in achieving settlements; . . . [ADR] may have potential to reduce the large backlog of cases now pending in some Federal courts throughout the United States, thereby allowing the courts to process their remaining cases more efficiently . . . .[37]

Recent presidents have also encouraged ADR in the federal government. In 1991, President George H. W. Bush issued an executive order stating that ADR "can contribute to the prompt, fair, and efficient resolution of the claims."[38] Seven years later, President Bill Clinton issued a memorandum stating,

> As part of an effort to make the Federal Government operate in a more efficient and effective manner, and to encourage, where possible, consensual resolution of disputes and issues in controversy involving the United States, including the prevention and avoidance of disputes, I have determined that each Federal agency must take steps to . . . promote greater use of mediation, arbitration, early neutral evaluation, agency ombuds, and other alternative dispute resolution techniques . . . .[39]

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[33] Pub. L. No. 105-315, 112 Stat. 2993, 2994 (codified at 28 U.S.C. §§ 651–658 (2007)).

[34] 28 U.S.C. § 651.

[35] 28 U.S.C. § 652.

[36] 28 U.S.C. § 651.

[37] *Id.* (findings and declaration of policy).

[38] Exec. Order No. 12,778, 56 Fed. Reg. 55,196 (Oct. 25, 1991).

[39] Memorandum on Agency Use of Alternate Means of Dispute Resolution and Negotiated Rulemaking, 34 WEEKLY COMP. PRES. DOC. 749 (May 1, 1998).

One tie that binds together these various ADR Acts and presidential proclamations is the recognition of the strong role played by administrative agencies in promoting the efficiency and effectiveness of the civil justice system. For example, in the Civil Justice Reform Act, Congress found "[t]he courts, the litigants, the litigants' attorneys, and the Congress *and the executive branch*, share responsibility for cost and delay in civil litigation . . . ."[40] This finding inherently acknowledges the fact that the federal government is the single largest consumer of judiciary services. However, its suggestion rings particularly true for DOJ, the agency that handles the vast majority of federal civil litigation cases. There are roughly 10,000 attorneys in DOJ, about half of whom serve as Assistant United States Attorneys (AUSAs) handling litigation in field offices in every federal district court in the country.

The Department of Justice was receptive to the push to use ADR. Attorney General Janet Reno created an Office of Dispute Resolution to coordinate the use of ADR in DOJ and issued guidance noting:

> Our commitment to make greater use of ADR is long overdue. Clearly, our federal court system is in overload. Delays are all too common, depriving the public of swift, efficient, and just resolution of disputes. The Department of Justice is the biggest user of the federal courts and the nation's most prolific litigator. Therefore, it is incumbent upon those Department attorneys who handle civil litigation from Washington and throughout the country to consider alternatives to litigation.
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> . . . .
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> If we are successful, the outcome will benefit litigants by producing better and quicker results, and will benefit the entire justice system by preserving the scarce resources of the courts for the disputes that only courts can decide.[41]

This proactive response has led some to assert that the government may be leading the private sector in the movement to institutionalize ADR.[42]

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[40] Pub. L. 101-650, Ch. 1, § 102, 104 Stat. 5089 (1990) (emphasis added).

[41] Department of Justice, Policy on the Use of Alternative Dispute Resolution, and Case Identification Criteria for Alternative Dispute Resolution, 61 Fed. Reg. 36,895 (July 15, 1996).

[42] Jeffrey M. Senger, *Turning the Ship of State*, 2000 J. DISP. RESOL. 79, 95 (2000). For comprehensive information on the use of ADR at the federal agency level, visit the website of the Federal Interagency ADR Working Group, http://www.adr.gov (last visited Oct. 16, 2008).

While ADR has been growing in earnest in the federal government for the past 15 years, relatively little research has been conducted on its impacts and effectiveness in the federal court system. Moreover, little research has explored the intersection of administrative agencies and the courts, especially in regard to agency discretion to use ADR or pursue litigation and the impacts of those choices on macrojustice and dispute processing.[43] The involvement of the government as a party increases the importance of these issues.

III. MACROJUSTICE: COMPARING ADR AND LITIGATION

Claims that ADR can systematically produce outcomes different from the public justice system represent important questions of public policy not yet fully addressed. Before we can assess evolving private justice systems, we need to understand the full dynamics of the shadow in which they operate. One issue that frames this inquiry is control over the design of the system.[44] This control generally takes one of three forms. First, the disputants themselves may control the design, as is in the case of grievance procedures in collective bargaining agreements.[45] Second, one party may have superior economic power and the capacity to impose a system on the other disputant, as can be the case with adhesive or mandatory arbitration clauses in employment and consumer disputes.[46] Lastly, an authoritative third party may provide a system for the benefit of disputants; this is the case with state and federal court-connected ADR programs.[47] Arguably, these programs are more likely to be fair than one-party adhesive designs, because courts are publicly accountable institutions acting in the public interest.[48] Typically, courts have consulted with representatives of the plaintiff and

[43] For a discussion of the relationship between Department of Justice litigators and conflicts with their clients, see Michael Herz & Neal Devins, *The Consequences of DOJ Control of Litigation on Agencies' Programs*, 52 ADMIN. L. REV. 1345, 1361–62 (2000) (addressing conflicts over enforcement litigation); Mark B. Stern & Alisa B. Klein, *The Government's Litigator: Taking Clients Seriously*, 52 ADMIN. L. REV. 1409, 1420–21 (2000) (discussing conflicts over settlement decisions).

[44] Lisa B. Bingham, *Control over Dispute-System Design and Mandatory Commercial Arbitration*, 67 LAW & CONTEMP. PROBS. 221, 221–25 (2004).

[45] *Id.* at 225–26.

[46] *Id.* at 231–32.

[47] *Id.* at 243.

[48] *Id.* at 249.

defense bar when they design their programs.[49] Thus, court ADR programs represent a good context for examining issues of macrojustice.

Professor Thomas Main recently observed that ADR represents the new equity.[50] Court-connected ADR provides an opportunity for personal and individualized justice not bound by the strictures of precedent or the limits on courts to shape remedies within the law. Just as courts of common law and equity operated successfully in parallel producing distinct outcomes, so too can courts and ADR have a dynamic and beneficial relationship.[51]

However, some critics have expressed concerns that ADR constitutes a form of "second class justice" that will undermine the system of precedent and access to justice and weaken the enforcement of public law.[52] This fear

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[49] DONNA STIENSTRA ET AL., FED. JUD. CTR., REPORT TO THE JUDICIAL CONFERENCE COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT: A STUDY OF THE FIVE DEMONSTRATION PROGRAMS ESTABLISHED UNDER THE CIVIL JUSTICE REFORM ACT OF 1990, 219 (1997) *available at* http://www.fjc.gov/public/pdf.nsf/lookup/0024.pdf/$file/0024.pdf (referring to advisory group that helped court design an early assessment program). See also the Planning and Policy Advisory Committee of the Wisconsin Court System, http://www.wicourts.gov/about/committees/ppac.htm (last visited Apr. 18, 2009), which has representatives including members of the bar and nonlawyers and has worked on an alternative dispute resolution policy. Similarly, the Florida state courts have created advisory committees related to ADR. *See* Alternative Dispute Resolution, http://www.flcourts.org/gen_public/adr/brochure.shtml (last visited Apr. 18, 2009).

[50] Thomas O. Main, *ADR: The New Equity*, 74 U. CIN. L. REV. 329 (2005). *See also* Jay Tidmarsh, *Pound's Century, and Ours*, 81 NOTRE DAME L. REV. 513, 577 (2006). *But see* Kenneth F. Dunham, *Is Mediation the New Equity?*, 31 AM. J. TRIAL ADVOC. 87, 114 (2007).

[51] Main, *supra* note 50, at 389–90.

[52] *See generally* JEROLD S. AUERBACH, JUSTICE WITHOUT LAW? 144–46 (1983); Wayne D. Brazil, *Why Should Courts Offer Nonbinding ADR Services?*, 16 ALTERNATIVES TO HIGH COST LITIG. 65 (1998); Wayne D. Brazil, *Court ADR 25 Years After Pound: Have We Found A Better Way?*, 18 OHIO ST. J. ON DISP. RESOL. 93 (2002); Wayne D. Brazil, *Should Court-Sponsored ADR Survive?*, 21 OHIO ST. J. ON DISP. RESOL. 241, 253–54 (2006) (reviewing arguments that court-connected ADR promotes a "two-tiered system of justice"). *But see* Sophia I. Gatowski et al., *Court-Annexed Arbitration in Clark County, Nevada: An Evaluation of Its Impact on the Pace, Cost, and Quality of Civil Justice*, 18 JUST. SYS. J. 287, 301 (1996). Professor Judith Resnik expresses concern about how the growing orientation toward managing litigation and procedure for settlement, and the accompanying growing federal common law related to settlement agreements and their enforceability, are undermining due process and access to adjudication. Judith Resnik, *Procedure as Contract*, 80 NOTRE DAME L. REV. 593, 594–600 (2005). Resnik has speculated that the proliferation of administrative adjudication and private dispute resolution may reduce the availability of adjudication over the next century, and we will lose the capacity for the public to observe and know how power is deployed in our society. Judith Resnik, *Whither and Whether Adjudication?*, 86 B.U. L. REV. 1101, 1103 (2006). At the same time, there are calls for

is heightened by legislative ambiguity; the Civil Justice Reform Act and the Alternative Dispute Resolution Act provide little specific discussion about the role of ADR in the court system and leave district courts "tremendous discretion" in designing and implementing ADR processes.[53] The result is that programs vary widely along a number of dimensions.[54] A recent study by Professor Lande suggests that court administrators view the administration of justice broadly and do not see it as encompassed by a traditional trial to a judge or jury.[55] This raises the question how one would determine when court systems are effectively providing justice, and how we might define that term.[56]

In response to these concerns, some researchers have examined the overall pattern of outcomes produced by ADR programs and compared these

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judges to become activist in the service of settlement, particularly in the context of large, complex litigation. Eric D. Green, *Re-Examining Mediator and Judicial Roles in Large, Complex Litigation: Lessons from* Microsoft *and Other Megacases*, 86 B.U. L. REV. 1171, 1171–79 (2006).

[53] Caroline Harris Crowne, Note, *The Alternative Dispute Resolution Act of 1998: Implementing a New Paradigm of Justice*, 76 N.Y.U. L. REV. 1768, 1770 (2001).

[54] Ward, *supra* note 29, at 85 observes:

> Even if we examine solely mediation programs, we find tremendous variation in different courts. Some mediation programs are mandatory; some are voluntary. Some litigants receive the services of a mediator from the court without cost; some litigants pay for mediation at market prices or at reduced prices. Some mediators are court staff; others are volunteers or private providers. Some mediation sessions are limited to a single short session; others, especially those for which litigants pay, may continue as needed. Some mediators use evaluative techniques; some mediators favor facilitative or transformative approaches. Many mediation sessions operate as settlement conferences. Variations occur among districts, and within districts . . . ."

Id. (citations omitted).

[55] John Lande, *How Much Justice Can We Afford?: Defining the Courts' Roles and Deciding the Appropriate Number of Trials, Settlement Signals, and Other Elements Needed to Administer Justice*, 2006 J. DISP. RESOL. 213, 221–22 (2006). Professor Moffitt, consistent with this broader view, argues that courts should allow the parties to customize their litigation by allowing them to negotiate the civil procedure. Michael L. Moffitt, *Customized Litigation: The Case for Making Civil Procedure Negotiable*, 75 GEO. WASH. L. REV. 461, 464–65 (2007).

[56] One judge defined success for ADR programs in New York courts as "effective outcomes for people rather than merely counting filings and dispositions." Jonathan Lippman, *Achieving Better Outcomes for Litigants in the New York State Courts*, 34 FORDHAM URB. L.J. 813, 814 (2007). For more detailed discussions of justice and mediation, see Joseph B. Stulberg, *Mediation and Justice: What Standards Govern?*, 6 CARDOZO J. CONFLICT RESOL. 213 (2005); Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got to Do With It?*, 79 WASH. U. L.Q. 787 (2001).

with the pattern of outcomes in adjudicated cases.[57] This kind of analysis of outcome quality is sometimes referred to as macrojustice and can include issues such as outcomes, trial rates, and time to disposition.[58] Outcomes are often defined as the mean cash recovery or as the percentage of a claim that the claimant recovers.[59] Researchers have approached the issues of macrojustice using surveys, archival data, and random assignment experiments.[60]

However, researchers are frequently plagued by two major methodological problems in studying ADR interventions, particularly when they use surveys and archival data.[61] One issue, as demonstrated by Galanter's research, is that the vast majority of all cases filed as civil complaints in court settle before reaching trial. Thus, if a case settles after an ADR intervention, it is difficult to determine whether this is one of the cases that would have settled absent the intervention or whether it is one of the few cases that would have consumed more judicial time and resources through a trial.[62] A second problem stems from selection bias resulting from how and why cases are selected and assigned to traditional judicial processing versus to an ADR intervention. Cases that go to mediation or arbitration and cases that do not are not necessarily comparable because these cases often are

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[57] SENGER, *supra* note 15, at 237–238.

[58] For reviews of research related to court-connected ADR, *see* Stipanowich, *supra* note 13; Roselle L. Wissler, *The Effectiveness of Court-Connected Dispute Resolution in Civil Cases*, 22 CONFLICT RES. Q. 55 (2004).

[59] *E.g.*, Leandra Lederman & Warren B. Hrung, *Do Attorneys Do Their Clients Justice?: An Empirical Study of Lawyers' Effects on Tax Court Litigation Outcomes*, 41 WAKE FOREST L. REV. 1235, 1239 (2006) (defining as the proportion of the tax at issue recovered by the IRS and finding that "attorneys obtain significantly better results in tried cases than unrepresented taxpayers do—and that the magnitude of that effect increases with greater attorney experience—but, surprisingly, that attorneys do not obtain better outcomes in settled cases").

[60] *See*, Ralph Peeples et al., *Following the Script: An Empirical Analysis of Court-Ordered Mediation of Medical Malpractice Cases*, 2007 J. DISP. RESOL. 101, 103 (2007) (observing that most research is based on surveys of mediators, parties, and their lawyers, and reporting the results of a rare observational study of mediated medical malpractice cases in North Carolina courts).

[61] For an excellent overview of these issues, see JENNIFER E. SHACK, BIBLIOGRAPHIC SUMMARY OF COST, PACE, AND SATISFACTION STUDIES OF COURT-RELATED MEDIATION PROGRAMS (2d ed. 2007), *available at* http://courtadr.org/files/MedStudyBiblio2ndEd2.pdf (last visited Apr. 18, 2009).

[62] *See, e.g.*, STEVEN HARTWELL & GORDON BERMANT, ALTERNATIVE DISPUTE RESOLUTION IN A BANKRUPTCY COURT: THE MEDIATION PROGRAM IN THE SOUTHERN DISTRICT OF CALIFORNIA 46– 47 (1988) (discussing bankruptcy mediation, in a process where only 5% of the cases typically result in a court decision).

handpicked for one process or the other and are not true comparison groups.[63] A few evaluations have attempted to control for selection bias by using random assignment. Nevertheless, evidence suggests that outcomes are related to program structure and design.[64]

Despite these methodological issues, a number of studies suggest that arbitration and litigation produce comparable macrojustice outcomes. For example, a study of court-annexed non-binding arbitration found no difference in mean outcome when comparing arbitrated and litigated cases.[65] Moreover, an evaluation of mandatory arbitration in Colorado compared win rates in arbitration and litigation and found win rates to be similar.[66] Other studies have compared mediated or conventional settlement to litigation. Using random assignment, a study comparing mediated settlement to conventional settlement found that case outcomes were indistinguishable, but that both case types differed from cases that went to trial: the proportion of plaintiffs who received money for mediated settlement was eighty-eight percent, while fifty-three percent of those who went to trial received money.[67] The study also found that mediated and negotiated settlements averaged $37,673 and $34,364, respectively, while trial awards averaged $58,451.[68] However, a different study of settled and arbitrated cases in Hawaii found comparable outcomes.[69] One commentator notes that "a null finding reassures" critics because "[h]ad systematic changes been discovered, it would be necessary to address fundamental policy questions—and the pursuit of simple efficiencies through court-annexed arbitration would likely be discontinued, probably permanently."[70]

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[63] STIENSTRA ET AL., *supra* note 49, at 16.

[64] Stipanowich, *supra* note 13, at 911; Wissler, *supra* note 58, at 81.

[65] *E.g.*, DEBORAH R. HENSLER ET AL., JUDICIAL ARBITRATION IN CALIFORNIA: THE FIRST YEAR 85 (1981).

[66] Lloyd Burton et al., *Mandatory Arbitration in Colorado: An Initial Look at a Privatized ADR Program*, 14 JUST. SYS. J. 183, 189 (1991).

[67] Stevens H. Clarke & Elizabeth Ellen Gordon, *Public Sponsorship of Private Settling: Court Ordered Civil Case Mediation*, 19 JUST. SYS. J. 311, 321 (1997).

[68] *Id.*

[69] John Barkai & Gene Kassebaum, *Pushing the Limits on Court-Annexed Arbitration: The Hawaii Experience*, 14 JUST. SYS. J. 133, 144 (1991).

[70] Keith O. Boyum, *Afterword: Does Court-Annexed Arbitration "Work"?*, 14 JUST. SYS. J. 244, 245 (1991).

IV. DISPUTE PROCESSING: COMPARING ADR AND LITIGATION

Courts experiment with ADR programs as a means of improving dispute processing; a typical precipitating development is an overloaded docket.[71] Professor Lande observes that the "precipitous decline in the number and rate of trials" coincides with a "major increase in the number of pending cases."[72] Recent literature conceives dispute processing in a systemic perspective; dispute systems are the "composition, arrangement, and structure of dispute resolution processes in organizations,"[73] and dispute system design is the conscious, purposeful, and deliberate effort to identify and improve the way an organization manages conflict by decisively and strategically arranging its dispute resolution processes.[74] The dispute system designs currently used in the federal courts vary widely.[75] Some use a variety of voluntary ADR

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[71] Art Thompson, *The Use of Alternative Dispute Resolution in Civil Litigation in Kansas*, 12 KAN. J.L. & PUB. POL'Y 351, 352–353 (2003). *But see* James R. Holbrook, *The Effects of Alternative Dispute Resolution on Access to Justice in Utah*, 2006 UTAH L. REV. 1017, 1019 (2006) (reporting that Utah had experienced few of the pressures that normally prompt courts to use ADR, but nevertheless adopted ADR to provide less expensive, faster, and better solutions than traditional court trials). More generally, courts considered ADR "on the belief that it offered promise for earlier, less costly, and more satisfactory disposition for many civil cases." Bobbi McAdoo, *All Rise, the Court Is in Session: What Judges Say About Court-Connected Mediation*, 22 OHIO ST. J. ON DISP. RESOL. 377, 430 (2007) (reporting results of an extensive empirical study of judges' views of mediation in the courts in Minnesota).

[72] Lande, *supra* note 55, at 219.

[73] Lisa B. Bingham & Tina Nabatchi, *Dispute System Design in Organizations*, *in* THE HANDBOOK OF CONFLICT MANAGEMENT 105, 106 (William J. Pammer, Jr. & Jerri Killian eds., 2003).

[74] *See generally* CATHY A. CONSTANTINO & CHRISTINA SICKLES MERCHANT, DESIGNING CONFLICT MANAGEMENT SYSTEMS: A GUIDE TO CREATING PRODUCTIVE AND HEALTHY ORGANIZATIONS (1996); DAVID B. LIPSKY ET AL., EMERGING SYSTEMS FOR MANAGING WORKPLACE CONFLICT: LESSONS FROM AMERICAN CORPORATIONS FOR MANAGERS AND DISPUTE RESOLUTION PROFESSIONALS (2003); WILLIAM L. URY ET AL., GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COSTS OF CONFLICT (1988). For streaming video of recent debates on the emerging field, see Dispute System Design Symposium 2008, held by the Harvard Negotiation Law Review (Mar. 7, 2008), http://blogs.law.harvard.edu/hnmcp/ (last visited Apr. 18, 2009); The Second Generation of Dispute System Design: Reoccurring Problems and Potential Solutions, held by the Ohio State Journal on Dispute Resolution (Jan. 24, 2008), http://moritzlaw.osu.edu/jdr/symposium/2008/schedule.html (last visited Apr. 18, 2009).

[75] *See generally* ELIZABETH PLAPINGER & DONNA STIENSTRA, ADR AND SETTLEMENT IN THE FEDERAL DISTRICT COURTS: A SOURCEBOOK FOR JUDGES AND LAWYERS (1996). For a review of empirical research on court-connected ADR structured

interventions, mandatory ADR interventions, or a combination of both, including non-binding arbitration, mediation, and early neutral evaluation.[76] Others use a dispute system design that combines interventions or offers choices, as in the multi-door courthouse.[77] Apart from the valiant work of the Federal Judicial Center[78] and the nonprofit Resolution Systems Institute,[79] there have been few systematic efforts to compare the efficacy of these widely varying dispute system designs, although differences in design as to, for example, the timing of an intervention, are often cited to explain different results in evaluations of court-annexed ADR.[80]

One measure of an ADR program's effect on court efficiency is the trial rate (the rate at which cases proceed from complaint to a full adjudicatory trial before a judge or a jury). Using a random assignment design to compare a treatment group of cases to a control group, Eaglin found that a pre-argument conference program in the Sixth Circuit Court of Appeals increased the number of cases that are settled, voluntarily dismissed, or dismissed for lack of prosecution.[81] Moreover, it resulted in cases terminating at an earlier stage in the appellate process. McEwen and Maiman found that parties in small claims cases that went to mediation were twice as likely to comply with their settlement as parties to an adjudicated case.[82] Thus, the case was less likely to require further judicial intervention. They reason that the voluntary consent characteristic of mediation is the central factor responsible for the higher compliance rates.[83] Others have argued that

around the elements of dispute system design and organized by the nature of the court as small claims, general civil, and appellate, see Wissler, *supra* note 58.

[76] *E.g.*, JAMES S. KAKALIK ET AL., AN EVALUATION OF MEDIATION AND EARLY NEUTRAL EVALUATION UNDER THE CIVIL JUSTICE REFORM ACT 2–3 (1996); *see generally* Resolution System Institute's Court ADR Resource Center, http://courtadr.org (last visited Apr. 18, 2009).

[77] *See*, Frank E. A. Sander, *The Future of ADR*, 2000 J. DISP. RESOL. 3 (2000).

[78] For a number of downloadable publications evaluating ADR programs in a variety of federal courts, see the Federal Judicial Center, http://www.fjc.gov (last visited Apr. 18, 2009).

[79] For a downloadable summary of seventy evaluations of court-connected mediation programs with attention to the design features of each program and a searchable database, see SHACK, *supra* note 61.

[80] Wissler, *supra* note 58, at 68.

[81] JAMES B. EAGLIN, FED. JUD. CTR., THE PRE-ARGUMENT CONFERENCE PROGRAM IN THE SIXTH CIRCUIT COURT OF APPEALS 41 (1990) *available at* http://www.ca6.uscourts.gov/Internet/mediation/eaglinevaluation_pt1.htm.

[82] Craig A. McEwen & Richard J. Maiman, *Small Claims Mediation in Maine: An Empirical Assessment*, 33 ME. L. REV. 237, 261 (1981).

[83] Craig A. McEwen & Richard J. Maiman, *Mediation in Small Claims Court: Achieving Compliance Through Consent*, 18 LAW & SOC'Y REV. 11, 40–45 (1984).

mandatory mediation rules can be valuable to encourage parties to use the process.[84] A number of studies have found that voluntary and mandatory ADR programs are about equally effective at settling cases.[85]

Closely related to trial rates is time to disposition. In general, time to disposition is measured in terms of a case's life on the court's docket (the elapsed time from filing a complaint to closing a case due to settlement). Researchers have used a variety of methods to measure whether ADR saves disposition time as compared to litigation, including surveys, archival data sources, and random assignment experiments. For example, using survey research methods, the Federal Judicial Center found that attorneys believed that court-annexed arbitration saved them billable time and reduced costs, and that their clients spent less time on the case as a result of the arbitration process.[86] There were similar findings in an attorney survey that was part of an evaluation of North Carolina court-ordered arbitration.[87] The Federal Judicial Center found that almost half of surveyed lawyers in one district and more than half in another felt ADR reduced disposition time of their cases. The majority of surveyed attorneys in three districts believed that ADR decreased the cost of the cases.[88] Similarly, a study of counsel in civil cases in Ontario, Canada found that attorneys reported lower fees in mediated cases.[89] Recently, counsel in California civil trial courts reported cost savings if a case settled in mediation.[90]

Researchers also use archival data sources to examine how long cases remain on the court's docket with and without ADR. For example,

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[84] Sander, *supra* note 77, at 6–8.

[85] *See, e.g.*, Steven B. Goldberg & Jeanne M. Brett, *Disputants' Perspectives on the Differences Between Mediation and Arbitration*, 6 NEGOTIATION J. 249, 254 (1990); Craig A. McEwen & Richard J. Maiman, *Mediation in Small Claims Court: Consensual Processes and Outcomes*, *in* MEDIATION RESEARCH: THE PROCESS AND EFFECTIVENESS OF THIRD PARTY INTERVENTION 66 (Kenneth Kressel et al. eds., 1989); Jessica Pearson & Nancy Thoennes, *Divorce Mediation: Reflections on a Decade of Research*, *in* MEDIATION RESEARCH: THE PROCESS AND EFFECTIVENESS OF THIRD PARTY INTERVENTION 18 (Kenneth Kressel et al. eds., 1989).

[86] BARBARA MEIERHOEFER, FED. JUD. CTR., COURT-ANNEXED ARBITRATION IN TEN DISTRICT COURTS 85–89 (1990).

[87] Stevens H. Clarke et al., *Court-Ordered Arbitration in North Carolina: Case Outcomes and Litigant Satisfaction*, 14 JUST. SYS. J. 154, 160 (1991).

[88] STIENSTRA ET AL., *supra* note 50, at 9.

[89] JULIE MACFARLANE, COURT-BASED MEDIATION OF CIVIL CASES: AN EVALUATION OF THE ONTARIO COURT (GENERAL DIVISION) ADR CENTRE (1995).

[90] HEATHER ANDERSON & RON PI, EVALUATION OF THE EARLY MEDIATION PILOT PROGRAMS 65–66 (2004), *available at* http://www.courtinfo.ca.gov/reference/documents/empprept.pdf.

researchers found that arbitrated cases had shorter disposition times than litigated cases.[91] Similarly, Hanson and Keilitz found that arbitrated cases had shorter disposition times than cases litigated before the arbitration program was implemented, without slowing the disposition of cases left for litigation.[92] Researchers studying ADR programs in Maine courts compared time to disposition and settlement by examining case records before and after the ADR program;[93] they found support for the general proposition that earlier in the life of the case is better.[94] So too, researchers studying an arbitration program in civil trial courts in Arizona found that the earlier in the life of the case a county tended to assign a case to arbitration, the shorter the mean disposition time.[95]

The most comprehensive evaluation of court-annexed programs to date is popularly known as the Rand Report.[96] That study found no significant decrease in time to disposition in six court programs using mediation or early neutral evaluation. In one district, ADR increased time to disposition, but this was apparently a function of selection bias, in that judges encouraged the most intractable cases to use mediation and thus delayed trial. Similarly, the study found no significant evidence of cost savings. Likewise, Meierhoefer found no overall evidence that court-annexed arbitration reduced time to disposition in a random assignment design.[97]

Other scholars, using a random assignment design to evaluate court-ordered arbitration in North Carolina, found that various programs reduced

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[91] *E.g.*, MEIERHOEFER, *supra* 86, at 95 (citing Eastern Pennsylvania results using a before and after design reported in E. ALLAN LIND & JOHN E. SHAPARD, EVALUATION OF COURT-ANNEXED ARBITRATION IN THREE FEDERAL DISTRICT COURTS (Federal Judicial Center rev. ed. 1983)).

[92] Roger A. Hanson & Susan Keilitz, *Arbitration and Case Processing Time: Lessons from Fulton County*, 14 JUST. SYS. J. 203 (1991).

[93] Howard H. Dana, Jr., *Court-Connected Alternative Dispute Resolution in Maine*, 57 ME. L. REV. 349, 375 (2005).

[94] *Id.* at 390–91 (2005) (reporting on a study of the courts comparing data from 2000, 2002, and 2003). A study of 1995–1997 Maine pilot program also found support for an earlier intervention. *Id.* at 372 n.149. Similarly, Schmitz argues that earlier in the life of the case is better. Suzanne J. Schmitz, *A Critique of Illinois Circuit Rules Concerning Court-Ordered Mediation*, 36 LOY. U. CHI. L.J. 783, 792 (2005).

[95] Roselle L. Wissler & Bob Dauber, *Court-Connected Arbitration in the Superior Court of Arizona: A Study of Its Performance and Proposed Rule Changes*, 2007 J. DISP. RESOL. 65, 79–80 (2007).

[96] KAKALIK ET AL., *supra* note 76.

[97] MEIERHOEFER, *supra* note 86.

disposition time by 10%–45%.[98] Another group of researchers also used a random assignment design in the evaluation of the Western District of Missouri's Federal District Court Early Assessment Program.[99] Early assessment is a form of early neutral evaluation in which a third party examines the merits of the case and gives an opinion on its strengths and weaknesses to the disputants. The evaluation examined the program over a period of four and one-half years, using random assignment including over three-thousand cases assigned to one of three treatments: mandatory, voluntary, or no assessment. In mandatory assessment, the parties received a neutral evaluation of the merits of their case whether they asked for one or not.[100] In voluntary assessment, the parties could request the evaluation.[101] In the no assessment condition, there was no neutral evaluation of the strengths or weaknesses of the case before trial.[102] They found that mandatory assessment cases terminated significantly earlier than both the voluntary assessment and no assessment groups.[103] The researchers attributed the result in part to the timing of the assessment, in that a notice of session date was sent to the mandatory assessment cases when they were ready, while an invitation to participate was sent to the voluntary cases, creating a lag time during which the court and parties scheduled the session.[104] Maine courts also used random assignment to assess impact on disposition time; while cases opting into ADR voluntarily had the shortest mean disposition time, cases randomly assigned to ADR also terminated more quickly.[105]

There has been some debate in the literature about the impact of delay reduction programs in the courts. Some contend that the delay reduction programs will have only transitory effects because they will be offset by an increase in demand for litigation.[106] However, recent studies reveal that the length of time a case spends on the court's docket is partly a function of the timing of the ADR intervention.[107] Spurr found that early intervention by a

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[98] Clarke & Gordon, *supra* note 67; STEVENS H. CLARKE ET AL., INST. OF GOV'T, COURT-ORDERED ARBITRATION IN NORTH CAROLINA: AN EVALUATION OF ITS EFFECTS (1989); Clarke et al., *supra* note 87.

[99] STIENSTRA ET AL., *supra* note 49.

[100] *Id.* at 226–231.

[101] *Id.*

[102] *Id.*

[103] *Id.* at 247–248.

[104] *Id.* at 250.

[105] Dana, Jr., *supra* note 93, at 368 (examining 1988–90 pilot in superior court).

[106] For a discussion, see Stephen J. Spurr, *The Duration of Litigation*, 19 LAW & POL'Y 285 (1997).

[107] *Id.*

judge imposing a time schedule created a deadline effect and resulted in earlier settlement.[108] In comparison, where mandatory arbitration is scheduled relatively late in the life of a case, it will tend to lengthen the time cases spend on the court's docket.[109] This is because litigants delay their own bilateral settlement discussions and instead wait for the ADR intervention.[110] Lawyers delay settlement negotiations until the eve of—or after—arbitration. For example, researchers have found no decrease in time to disposition for court-ordered arbitration, but found a decrease when the parties voluntarily elected arbitration.[111] However, researchers could draw no conclusions about cost savings because it was difficult to distinguish cases that would have settled without ADR.[112]

Studies of mediation in small claims court generally find no shortening of time to disposition because the dispute system design generally provides for mediation to occur on the day of trial.[113] The timing of the ADR intervention is important. There is a debate as to whether it should occur before or after completion of discovery.[114] One study of general civil

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[108] *Id.*

[109] Robert J. MacCoun, *Unintended Consequences of Court Arbitration: A Cautionary Tale from New Jersey*, 14 JUST. SYS. J. 229 (1991); ROBERT J. MACCOUN ET AL., ALTERNATIVE ADJUDICATION: AN EVALUATION OF THE NEW JERSEY AUTOMOBILE ARBITRATION PROGRAM (1988).

[110] Some have recommended mandatory mediation programs specifically to create a deadline effect to trigger settlements. *See, e.g.*, Christopher Fugarino, *Mandating Mediation for Cases Before the U.S. Court of Appeals for Veterans Claims Can Improve the Efficiency of the Court and the Experience of the Parties*, 16 FED. CIR. B.J. 379, 384 (2006/2007).

[111] HENSLER, ET AL., *supra* note 65, at 80.

[112] *Id.* at 81.

[113] Wissler, *supra* note 58.

[114] McAdoo, *supra* note 71, at 420 (reporting results of an empirical study of mediation in Minnesota courts). Professor McAdoo reports:

> If mediation only replaces bilateral attorney negotiations on the courthouse steps, or even the judicial settlement conference, the potential for significant cost savings to parties seems to be limited. Earlier research suggested that most mediation occurred after almost all discovery on a case is completed. In the survey, the judges were asked two questions about mediation practice vis-à-vis discovery practice: (1) At what point does the mediation process usually occur; and (2) When do judges think mediation *should* occur in a case?
>
> A majority of the judges (57%) believe that mediation occurs after all or almost all discovery is completed. Only 43% of the judges, however, think that mediation should occur at this late point. Instead they think mediation should occur "after limited targeted discovery."

mediation in Ohio found that earlier mediation referral was associated with earlier termination of the case.[115]

V. RESEARCH QUESTIONS

Although some research on ADR has explored the intersection between administrative agencies and the courts, especially in regard to agency discretion to use ADR or pursue litigation and the impacts of those specific cases in terms of macrojustice, many questions remain unanswered.[116] How does the federal government use ADR in legal actions and for what kinds of cases? How do ADR cases compare to litigated cases in terms of macrojustice issues? Are there substantive differences in the disposition outcomes of ADR and litigation cases? Are there differences in trial rates and disposition times between ADR and litigation cases? If ADR is used, does the timing of the intervention affect disposition time?

This study is a first step toward answering these questions. It is the first comprehensive evaluation of ADR use at the Department of Justice (DOJ). It examines litigation and ADR in civil cases handled by Assistant U. S. Attorneys (AUSAs) across the United States. These cases generally originate in other federal agencies and are transferred to DOJ for action in various district courts across the country.[117] The cases are handled by AUSAs and their assistants, who largely comprise the judicial face of the federal government. These AUSAs do not control the initiation of most lawsuits, but rather make strategic choices about managing the caseloads assigned to them, including whether to use ADR. The cases allow for an examination of how DOJ (and by proxy the federal government) is using ADR in civil matters and for what kinds of cases.

VI. THE DATA

DOJ regularly collects information about its cases in various computerized data tracking systems. This data is generally used for internal purposes; however, officials from the DOJ Office of Dispute Resolution provided three datasets for this study. The first dataset contained general information about all civil cases handled by AUSAs across the country from 1995 to 1998. The second dataset contained data from evaluation forms

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Id. (citations omitted).

[115] Roselle L. Wissler, *Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research*, 17 OHIO ST. J. ON DISP. RESOL. 641 (2002).

[116] *See, e.g.*, Stipanowich, *supra* note 13; Wissler, *supra* note 58.

[117] 28 U.S.C. § 515 (2008).

completed by AUSAs in cases where they used ADR. The third dataset came from the Financial Management Information System and contained information about funding for ADR neutrals. The information in all datasets was organized by case name, case number, and filing date. Using these variables, our researchers consolidated the three datasets into a single, comprehensive database. The database was cleaned to facilitate statistical analyses. Duplicate entries were removed and several variables were recoded to facilitate meaningful analysis.

For example, the original dataset contained thirty-one specific causes of action, which were consolidated into six general causes of action (Employment Discrimination, Civil Rights, Fraud, Federal Torts Claims Act (FTCA),[118] Medical Recovery, and *Bivens*[119]) for the purpose of data analysis. The substantive legal areas, the original causes of action, and the consolidated causes of action are displayed in Table 1.

Table 1: Substantive Legal Areas and Causes of Action

Substantive Legal Area	**Original Causes of Action**	**Consolidated Cause of Action (COFAGRP)**
Employment Discrimination	• Includes discrimination complaints based on Age, the Equal Pay Act, Handicap, and Title VII	Employment Discrimination
Civil Rights	• Access to Clinic Entrances • Americans with Disabilities Act • Employment Discrimination (affirmative) • Fair Credit • Rights of Institutionalized Persons • Fair Housing • School Desegregation • Voting Rights	Civil Rights

[118] For a discussion of administrative dispute resolution of these claims, see Jeffrey Axelrad, *Federal Tort Claims Act Administrative Claims: Better Than Third-Party ADR for Resolving Federal Tort Claims*, 52 ADMIN. L. REV. 1331 (2000).

[119] *Bivens* cases are suits brought against unknown federal agents alleging wrongdoing. *See* Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

Fraud	• Anti-Kickback • Government Commercial Programs • Education • Environmental • False Claims • Health Care Fraud (other than Medicare-Medicaid) • Medicaid (may also include Medicare) • Medicare Only • Procurement Fraud • Qui Tam Suits (Suits brought under the False Claims Act by private citizens)	Fraud
Torts	• Air Crash • Asbestos • Conversion of Property • Drivers, Motor Vehicle Accidents • Medical Malpractice • Property Damage • Personal Injury • Wrongful Death • Other Non-Government Individuals (e.g., witnesses and jurors) Sued in Their Individual Capacity	FTCA
	• Medical Care Recovery Act • Medicare Recovery	Medical
	• Government Agents Sued in Their Individual Capacity, e.g., *Bivens*	*Bivens*

The variable "U.S. Role" refers to the role of the Assistant U.S. Attorney (AUSA), representing the United States government, in the case. The original database contained fourteen specific classifications for U.S. Role. Researchers consolidated and recoded this variable into three categories: Defendant, Plaintiff, and Other. This consolidation for the variable U.S. Role is shown in Table 2.

Table 2: Consolidation of Classifications for U.S. Role

Original U.S. Role	Consolidated U.S. Role
• Defendant	Defendant
• Plaintiff	Plaintiff
• Amicus • Appeal Filed Against • U.S. Has Filed the Appeal • Creditor • Counsel Cost Plus Contractor • Counsel for Government Employee • Third Party Defendant • Counsel for Native American • Third Party Plaintiff • Other • Intervenor • Counsel for Veteran	Other

The variable "Court" refers to the type of court in which the case was docketed. The original database contained seven specific classifications for Court. Researchers recoded the variable to create only three possibilities: District Court, State Court, and Other. The consolidation for this variable is shown in Table 3.

Table 3: Consolidation of Classifications for Court

Original Court	Consolidated Court
• District Court	District Court
• State Court	State Court
• Bankruptcy Court • U.S. Claims Court • District Court (Miscellaneous) • Magistrate Court (Miscellaneous) • Tribal Court	Other

"Disposition" refers to the final disposition of the case. The Disposition variable originally contained fifty-eight specific classifications. Researchers recoded this variable to create six possible case dispositions: Dismissed, Judgment, Settlement, Closed, Other, and Unknown. The consolidation for the disposition variable is shown in Table 4.

Table 4: Consolidation of Classifications for Disposition

Original Disposition	Consolidated Disposition
• Dismissed • Dismissed on Courts on Motion • Declination • Discharged • Death or Incompetency • Dismissed without Prejudice • Dismissed by Stipulation • Dismissed on Other Party's Motion • Dismissed on U.S. Motion • Declined—Department Policy • Declined—Lacks Legislative Merit	Dismissed
• Judgment for Opposing Party—Default Judgment • Judgment for U.S.—Jury Trial • Judgment/Order (other) for Opposing Party • Judgment for Opposing Party—Court Trial • Judgment/Order (other) for U.S. • Default Judgment for U.S. • Judgment for U.S.—Court Trial • Judgment for Opposing Party—Jury Trial	Judgment
• Administrative Settlement • Consent Judgment for Opposing Party • Consent Order • Judgment for U.S.—Consent Judgment • Settlement: Non-Monetary • Settlement: Monetary Recovery by Opposing Party • Settlement: Monetary Recovery by U.S. • ADR Settlement—Monetary Recovery by Opposing Party • ADR Settlement—Monetary Recovery by U.S.	Settlement
• Closed—No Distributable Assets • Closed—Possession of Property by Government • Closed—Property Released to Owner • Closed without Action	Closed

• Amended Judgment • Bankruptcy Plan Confirmed • Proof of Claim Filed (no further action) • Bankruptcy Decision Unfavorable to U.S. • Compliance • Consolidated by Court • Denied • Disclaimer of Interest • Decision (other than Dismissal/Judgment) by Court • Favorable to U.S. • Granted • Just Compensation and Distribution Determined • New Filing • Opened in Error/Office Error • Realization of All Available Assets • Returned to Agency Transfer from District (Rule 20, 21)	Other
• Cases without Recorded Disposition • Cases with Unidentifiable Disposition Code	Unknown

After this cleaning process, the database contained a total of 15,288 cases, with case-specific measures of time, disposition, and case demography, in addition to other quantitative and qualitative measures. Of the 15,288 cases, 14,777 (96.7%) went through traditional litigation processes, while 511 (3.3%) received an ADR intervention. It is important to note that this large sample of cases reflects a broad cross section of courts and ADR programs. The cases reflect the individual discretion of judges to refer a matter to ADR as part of case management.[120] The cases provide us with a window into early ADR experience by the federal government in litigation nationwide.

VII. Results and Discussion

Three sets of statistical analyses were performed on the dataset to answer the research questions. The first analysis examines some of the basic

[120] Robert G. Bone, *Who Decides? A Critical Look at Procedural Discretion*, 28 CARDOZO L. REV. 1961 (2007) (examining the role of the judge as a strategic player in efforts to settle the individual litigated case); Schmitz, *supra* note 94, at 789–92 (describing broad court discretion to order mediation and wide variation in the nature of the cases and timing of intervention).

characteristics of ADR and litigation cases. The second analysis focuses on issues of macrojustice. The final analysis focuses only on ADR cases and examines the timing of the ADR intervention in relation to disposition time. The results and discussion for each analysis are below.

A. *Characteristics of ADR and Litigation Cases*

The first analysis provides descriptive statistics of ADR and litigation cases regarding the causes of action and the role of the U.S. government in the cases. These variables provide a simple picture of how DOJ uses ADR in legal actions and for what types of cases. The analysis also includes a brief discussion about the costs and benefits of using ADR as perceived by AUSAs.

1. *Cause of Action*

Table 5 displays the number and percentage of cases involving ADR as compared to traditional litigation, broken down for each cause of action. The table shows that ADR is used in disproportionate frequency for Federal Tort Claims Act (FTCA) and Employment Discrimination cases. While FTCA cases only comprise 39% (n = 5937) of the total cases and 38% (n = 5600) of the litigation cases, they comprise 66% (n = 337) of the ADR cases. Likewise, Employment Discrimination cases comprise 22% of both the total cases (n = 3410) and the litigation cases (n = 3259), as compared to 30% (n = 151) of the ADR cases. Together, these two causes of action account for 96% (n = 488) of the cases where ADR was used. In contrast, they constitute only 60% (n = 8859) of the cases where traditional litigation was used. There was negligible use of ADR in the other four cause of action categories. ADR was used in only 2% of Civil Rights cases, and in 1% of Fraud, *Bivens*, and Medical Recovery cases. In contrast, these four causes of action comprise 40% of all traditional litigation cases.

These differences may be explained by institutional theory. The application of ADR to tort and employment discrimination cases has a long and well-established history in government and in the private sector, especially as compared to other types of cases. Therefore, the use of ADR for these cases has been largely institutionalized in government and holds legitimacy as a practice that can serve a variety of governmental interests.[121]

[121] Tina Nabatchi, *The Institutionalization of Alternative Dispute Resolution in the Federal Government*, 67 PUB. ADMIN. REV. 646 (2007).

Table 5: Total Number of Litigation and ADR Cases for Each Cause of Action

Cause of Action	Litigation	ADR	Total
FTCA	5600 (38%)	337 (66%)	5937 (39%)
Employment discrimination	3259 (22%)	151 (30%)	3410 (22%)
Civil rights	635 (4%)	10 (2%)	645 (4%)
Fraud	1314 (9%)	5 (1%)	1319 (9%)
Bivens	2373 (16%)	5 (1%)	2378 (16%)
Medical recovery	1595 (11%)	3 (>1%)	1599 (10%)
Total	14777 (100%)	511 (100%)	15288 (100%)

2. *U. S. Role*

Table 6 shows that ADR was used disproportionately often when the government was a defendant in a lawsuit. The government was a defendant in 96% (n = 488) of the cases where ADR was used, but only in 78% (n = 11918) of the cases where traditional litigation was used. This difference may stem from the fact that when the government is a plaintiff, it may be more likely to pursue cases that may set legal precedent. When the government is bringing an enforcement action, for example, it may desire a court to rule on the case so that this decision can be used to assist the prosecution of future lawsuits. In such cases, the application of ADR may not be appropriate, because ADR does not result in a court precedent.

Table 6: U.S. Role in Litigation and ADR Cases

U. S. Role	Litigation Cases	ADR Cases
Defendant	11918 (78%)	488 (96%)
Plaintiff	1644 (11%)	12 (2%)
Other	1726 (11%)	11 (2%)
Total	15288 (100%)	511 (100%)

3. *Costs and Benefits of ADR*

Researchers also examined the AUSA evaluation form dataset to qualitatively compare ADR and litigation cases.[122] Many AUSAs believed that, as compared to litigation, ADR saved both time and money. AUSAs subjectively estimated that on average, they spent about twelve hours preparing for ADR and about seven hours in the ADR session itself. In total, they estimated that ADR saved eighty-eight hours of staff time and six months of litigation time (meaning the case resolved six months earlier than it would have without ADR).[123] AUSAs also suggested that ADR saved money. On average, they spent $869 in fees for the ADR neutral and estimated ADR resulted in a savings of $10,735 in litigation expenses.[124] Table 7 summarizes these figures.

Table 7: The Perceived Costs and Benefits of Using ADR

Costs of ADR	
Average fee paid to the mediator	$869
Average time spent in preparation	12 hours
Average time spent in mediation	7 hours
Estimated Benefits from ADR	
Average litigation costs saved	$10,735
Average staff time saved	88 hours
Average litigation time saved	6 months

[122] These evaluation forms were completed by AUSAs upon the termination of a case in which they used ADR. This dataset consisted of 828 forms completed between 1994 and 2000.

[123] "Staff time" was defined as, "[t]he number of hours you and others (including paralegals) would have spent on this case if ADR had not been used." It only captures time saved by the lawyers and their offices, and it does not include time that was saved by the client agency. "Litigation time" was defined as, "[t]he number of months it would have taken to achieve final resolution of the case if ADR had not been used."

[124] "Litigation expenses" were defined as, "[t]he amount of money you would have spent on transcripts, witness fees, A.L.S. [Automated Litigation Support], travel, etc. to prepare and litigate this case if ADR had not been used." These estimates do not include savings of attorney fees.

B. *Macrojustice in ADR and Litigation*

It is now appropriate to turn to a larger examination of macrojustice issues in ADR and litigation. Macrojustice involves issues about the fairness of dispute resolution processes and, specifically, about whether a particular dispute resolution process favors one side or the other. Issues of macrojustice take on heightened importance when the federal government is a litigant. If the government received better results in ADR than in traditional litigation, private parties would be reluctant to use ADR with the government because they would fare better in court. Conversely, if the government did worse in ADR than in litigation, government counsel would choose not to participate in the process. This study focuses on macrojustice issues involving case disposition, settlement rates, and monetary relief.

1. *Case Disposition and Settlement Rates*

Table 8 presents information on the disposition of cases. Cases in which ADR was used settled almost two-thirds of the time (65%, n = 333), while cases that did not use ADR settled less than one-third of the time (29%, n = 4259). Roughly half of this difference is accounted for by the fact that ADR cases were dismissed by the court less frequently (19%, n = 95) than traditional litigation cases (34%, n = 4968). Nonetheless, this difference suggests that ADR may be a more effective vehicle for obtaining a settlement than traditional litigation

Table 8: Disposition of Cases

Disposition	Litigation Cases	ADR Cases	Total
Dismissed	4968 (34%)	95 (19%)	5063 (33%)
Settlement	4259 (29%)	333 (65%)	4592 (30%)
Judgment	1330 (9%)	38 (7%)	1368 (9%)
Closed	357 (2%)	1 (.2%)	358 (2%)
Other	1283 (9%)	14 (3%)	1297 (8%)
Unknown	2580 (17%)	30 (6%)	2610 (17%)
Total	14777 (100%)	511 (100%)	15288 (100%)

Researchers examined the dispositions of ADR cases more closely by comparing voluntary ADR cases (47.5%, n = 285) to those that were court-ordered (52.5%, n = 315) (see Table 9). While 60% (n = 362) of all these ADR cases reached settlement, more voluntary ADR cases (71%, n = 203) settled than did court-ordered cases (50%, n = 159)—a statistically significant difference ($p < .001$). This difference may stem from the fact that

when attorneys voluntarily choose ADR for a specific case, they believe the process may be of value given the facts and circumstances of that case. In contrast, mandatory court programs often require that attorneys use ADR even when they believe it would be fruitless in a particular case. This finding has important implications for program designers, as it indicates that mandatory ADR programs may have lower overall effectiveness in settling cases in certain circumstances.

Table 9: Disposition of ADR Cases

Type of Case	Settled	Other Disposition	Total
Court-ordered ADR	159 (50%)	156 (50%)	315 (52.5%)
Voluntary ADR	203 (71%)	82 (29%)	285 (47.5%)
Total	362 (60%)	238 (40%)	600 (100%)

Researchers also found an interesting difference between the settlement rates of the two largest categories of cases. While 60% (n = 76) of employment discrimination cases settled, 73% (n = 248) of torts cases settled (see Table 10), a statistically significant difference ($p < .001$). This difference may be due in part to the fact that by the time a case gets to DOJ, it has often been pending for a year or more at the agency level. Employment discrimination cases regularly involve parties who are still involved in long-term relationships with one another (sometimes still working at the same office). During the time that the case is pending, it is possible continued friction might cause the relationship to further deteriorate, making settlement less likely. Moreover, by 1995, all federal agencies had implemented dispute resolution in employment discrimination cases, which might have contributed to early settlement at the agency level. In contrast, parties in tort disputes often have little contact with one another, other than in the litigation context; thus, there may be less opportunity for their relationships (which are likely temporary in any case) to erode. If so, this would suggest it is important to resolve employment discrimination cases early—before the parties become so at loggerheads with one another that the case becomes much harder to settle.

Table 10: Dispositions of Employment Discrimination and Tort ADR Cases

Disposition	Employment Discrimination	Torts	Total
Settled	76 (60%)	248 (73%)	324 (69%)
Other disposition	51 (40%)	92 (27%)	143 (31%)
Total	127	340	467

2. *Monetary Relief*

Macrojustice debates about ADR and litigation have addressed issues of both monetary relief requested and monetary relief granted. Some have speculated that plaintiffs may do better in ADR than in litigation because plaintiffs who settle a case sidestep the possibility of having a judge dismiss the lawsuit entirely (dismissal occurs in a significant number of litigated cases).[125] On the other hand, some believe that plaintiffs may do worse in ADR than in litigation because they may settle for less than their case is worth out of fear that they will recover nothing if a jury finds in favor of the defendant.[126] Thus, determining whether there are differences between ADR and litigation cases in the amount of relief granted is an important macrojustice issue, especially when viewed from a public policy perspective.

To examine these issues, we compared ADR and litigation cases with respect to monetary relief requested by parties and monetary relief granted by the decisionmaker. Specifically, we used matched pair samples to compare the monetary outcomes of ADR and litigation cases, while controlling for other variables.[127]

The first matched pair sample examines differences between ADR and litigation cases with respect to the amount of relief requested, while controlling for cause of action, the role of the U.S., the type of court in which the case was docketed, the amount of relief granted (using the absolute value of the difference), and other variables when necessary to identify a single

[125] Lewis L. Maltby, *Employment Arbitration and Workplace Justice*, 38 U.S.F. L. REV. 105, 112–113 (2003) (reporting that some 60% of cases in federal court are resolved through summary judgment).

[126] *See generally*, Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1 (2001) (arguing for a cooling off period to correct for undue mediator pressure to settle).

[127] While the limitations and potential biases inherent to the matched-pair comparison used for this analysis are well-understood by the authors, the nature of the data unfortunately precluded more sophisticated methods of analysis.

match. This sample contains 277 ADR and litigation cases. The mean amount of relief requested in ADR cases ($3,203,882.37) is lower than the mean amount of relief requested in litigation cases ($5,144,618.16), but this difference is not statistically significant ($p<.6017$).

The second matched pair sample examines differences between ADR and litigation cases with respect to the amount of relief granted. This sample was constructed in the same manner as the first sample, except that "relief granted" was replaced with "relief requested." The second sample contains 272 ADR and litigation cases. Corresponding with the results for relief requested, the mean amount of relief granted in litigation cases ($228,140.18) is greater than the mean amount of relief granted in ADR cases ($190,621.52). As with relief requested, this difference is not statistically significant ($p<.5526$). Researchers also examined employment discrimination and FTCA cases separately, and found that there are no statistically significant differences in the amount of relief granted between these types of ADR and litigation cases ($p<.1136$).

These findings address the concern that an ADR process might change the outcomes that would otherwise result from litigation. The analyses show that, in general, parties in ADR and litigation cases request and are granted about the same amount of relief. The results provide evidence that ADR did not have the macrojustice effect of altering traditional legal remedies in these cases.

C. *Dispute Processing: Timing of the ADR Intervention and Time to Disposition*

For the final analysis, we were interested in examining the relationship between the timing of the ADR intervention and final disposition. More specifically, we wanted to determine whether the time at which ADR was introduced in a case had an impact on the time it took the case to reach final disposition. Experienced trial lawyers say that there are four classic points of settlement in the life of a case: (1) immediately before the complaint is filed; (2) immediately after the complaint is filed; (3) upon completion of discovery; and (4) on the eve of trial.[128] Researchers have found that there is a "deadline effect" associated with certain events in the life of a case, such as the scheduling of a settlement conference.[129] It stands to reason then, that the earlier one uses ADR, the earlier a case may settle.

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[128] Personal conversation with Robert Cathcart, former chair of the Litigation Department of Shipman and Goodwin, Hartford, Connecticut.

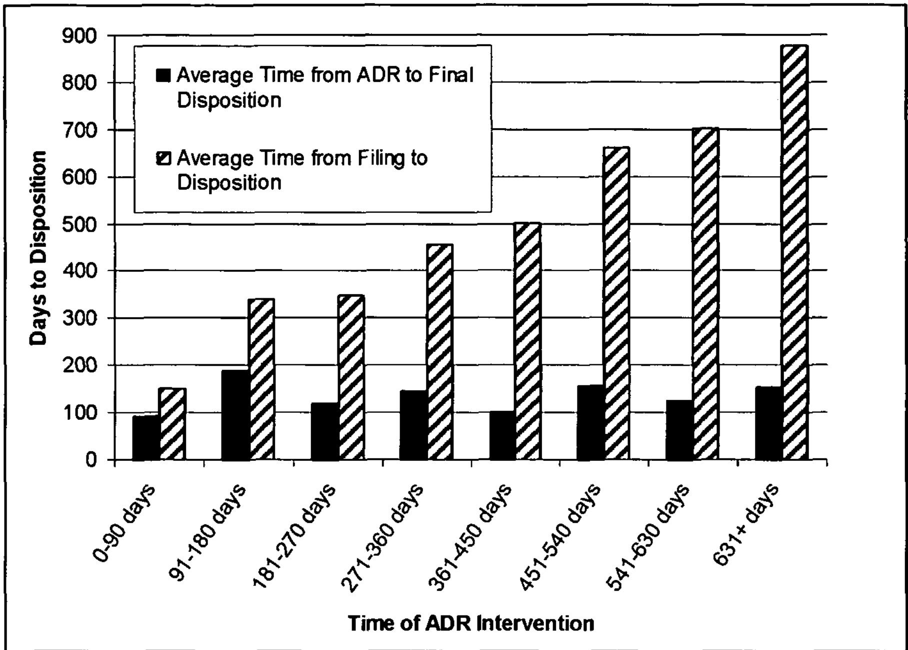
[129] Spurr, *supra* note 106, at 305.

To conduct the analysis, we examined ADR cases for three elements: (1) when an ADR intervention was introduced; (2) the average time from the introduction of ADR to the final disposition; and (3) the average time from filing of the case to final disposition. The results, displayed in Table 11 and in Figure 1, clearly show that when ADR is introduced early in the life of the case, it takes the case less time to reach final disposition. For example, among cases in which ADR was introduced within ninety days of filing, it took, on average, only ninety-two days from the ADR intervention to reach final disposition, and a total of 150 days from filing to final disposition. The average time from filing to final disposition increases steadily when ADR is introduced to cases later in their life. In addition, the time from the ADR intervention to final disposition also generally increases as ADR is introduced to a case later in its life. For example, when ADR was introduced within 91–180 days of filing, it took, on average, 190 days from the ADR intervention to reach final disposition, and 339 days from filing to reach final disposition. Together, these results suggest that as the time from case filing to the introduction of the ADR intervention increases, so does the average amount of time it takes a case to reach final disposition increase.

Table 11: Time from Filing to ADR Intervention

	Average Time from ADR to Final Disposition	Average Time from Filing to Disposition
0-90 days	92	150
91-180 days	190	339
181-270 days	121	348
271-360 days	146	457
361-450 days	101	502
451-540 days	157	659
541-630 days	126	701
631+ days	154	879

Figure 1: Relationship between Time of ADR Intervention and Final Disposition



VIII. CONCLUSION

The findings reported here provide a more complete picture of ADR use in the Department of Justice (and by proxy the federal government). These findings show the overall impact without controlling for the individual dispute system design choices of various districts. ADR was used most frequently (in 96% of cases) when the U.S. government was a defendant. In addition, FTCA and employment discrimination cases together represent a disproportionate amount (96%) of the ADR cases. AUSAs reported subjective estimates of both time and money saved in ADR cases compared to litigation cases. Further analyses support the perceptions of AUSAs and suggest that ADR can be an efficient and effective procedural solution to the problems of time and cost in the justice system.

The analysis shows that 65% of cases settled when ADR was used, but only 29% of cases settled when it was not. This difference provides some support for claims that ADR is a better process than litigation for producing settlements among disputing parties. In addition, significantly more cases settled when ADR was voluntary than when it was mandatory (71% vs. 50%). This suggests an opt-out program may function more effectively than

a mandate. Tort cases were significantly more likely to settle than employment discrimination cases (73% vs. 60%), which suggests that federal government ADR use may be somewhat more effective in some types of cases than others, or, in the alternative, that federal agency in-house ADR programs settled the less intractable cases before they got to litigation.

One major concern about ADR in the civil justice system is whether it may produce outcomes that are substantively different from those produced in litigation. In our large sample, analyses show that ADR cases do not significantly differ from traditional litigation in terms of monetary outcomes. The findings suggest that parties in ADR and litigation cases request, and are granted, about the same amount of relief. They suggest that, at least in the context of federal court-connected ADR in which a third party designed a program for the disputants, there is no evidence of "second class justice;" ADR did not have the macrojustice effect of undermining traditional legal monetary remedies in those cases.[130]

In terms of dispute processing efficiencies, the descriptive data show that the earlier ADR is used in a case, the more quickly the case reaches resolution.[131] This result replicates independent studies in a number of state courts suggesting that, with an appropriate opt-out for good cause, early referral to ADR may facilitate settlement.

Nevertheless, this dataset is limited. We have no data regarding case complexity or the personal characteristics of the disputing parties. We cannot control for the myriad variations in court ADR programs or the individual variations in how judges exercised their discretion to refer cases, or not, to ADR. We cannot control for the nature of the ADR intervention, although the vast majority of cases used mediation. Overall, this study provides a better picture of how ADR is used by the government in federal court cases during the period of early institutionalization and precipitous decline in trials. However, more work remains. Our data reflects a limited time period; it is necessary to continue empirical assessment to compare these results with the current pattern of outcomes in ADR and litigated cases.

As Professor Sternlight has observed, ADR is now a permanent feature of our courts, and we need more research on how it functions and what

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[130] An open research question is whether adhesive systems designed by a single disputant and imposed on the other—as in mandatory employment or consumer arbitration—would produce similar macrojustice patterns.

[131] A multivariate regression analysis found that the date of the ADR intervention explained almost 60% of the variance in disposition time; however, the model was underspecified due to the absence of so many explanatory and control variables from our dataset, so we have omitted it here.

disputants want.[132] ADR has the potential to improve dispute processing without sacrificing the quality of justice. Professor Lande has outlined a research agenda that moves beyond whether mediation (and presumably other forms of ADR) works or not, and instead, citing Professor McEwen, argues that we should focus on how parties and their lawyers "work" ADR systems.[133] This requires collecting not only data about litigated cases, but also about negotiation and settlement in the shadow of the civil justice system.[134] Professor McAdoo observes that ADR programs should be held to the standard of achieving substantive and procedural justice, which requires systems to monitor and evaluate ADR programs; she argues we risk a breach of the public trust otherwise.[135]

Scholars have lamented the current state of our knowledge about how ADR functions in the federal courts, and a significant aspect of the problem is the wide variation in dispute system designs.[136] Our study did not control

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[132] Jean R. Sternlight, *ADR is Here: Preliminary Reflections on Where it Fits in a System of Justice*, 3 NEV. L.J. 289, 290–91 (2003).

[133] John Lande, Commentary, *Focusing on Program Design Issues in Future Research on Court-Connected Mediation*, 22 CONFLICT RES. Q. 89 (2004). *See also* John Lande, *Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs*, 50 UCLA L. REV. 69 (2002).

[134] Lande, *supra* note 55, at 234–35 (2006).

[135] McAdoo, *supra* note 71, at 430; *see also* Donna Shestowski, *Disputants' Preferences for Court-Connected Dispute Resolution Procedures: Why We Should Care and Why We Know So Little*, 23 OHIO ST. J. DISP. RESOL. 549 (2008) and Donna Shestowsky, *Disputants' Perceptions of Dispute Resolution Procedures:An Ex Ante and Ex Poste Longitudinal Empirical Study*, 41 CONN. L. REV. 63 (2008).

[136] Ward, *supra* note 29, at 86–87 (2007). Ward states that:

> Research is increasing, but still is sparse, and empirical research done in a particular jurisdiction may reflect only the operation of a fairly unique program operating in a local legal culture at a particular point in time. Even if a study is well-planned and reliable, the focus on particular programs and jurisdictions may make extrapolation of results to other court programs problematic. Additionally, inferences drawn from such research may or may not have wider application. This difficulty may help explain the variation in results reported as well as the sharply differing conclusions that different scholars draw from the available data.
>
> One particular difficulty has been the continued dearth of solid information about which ADR measures work and what side effects they produce. Controlled experiments can provide the most reliable data about the impact of remedial measures on quality and efficiency standards, but for various reasons are rarely undertaken. Findings produced by the studies that are most frequently done—surveys and analyses of statistical reports or other archival data - are of uncertain validity because of the problem of screening out the impact of extraneous factors in the absence of a rigorous control group. Legal scholars still hotly debate the reliability and interpretation of results.

for these. We need more and better research data to examine how design variables affect disposition time, trial rates, and substantive outcomes.

The American Bar Association Section of Dispute Resolution has proposed ten indicators for courts to collect so that the field can systematically assess differences in the impact of ADR programs nationally.[137] These include:

1. Was ADR used for this case? (yes/no)
2. What ADR process was used in this case? (Mediation, early neutral assessment, non-binding arbitration, fact-finding, mini-trial, summary jury trial, other)
3. Timing Information (the date the claim was docketed; the date of referral to ADR; the date of first ADR session; the date of close of ADR referral period; at what point in the docket duration did ADR occur (Before suit, after filing suit, before discovery, just before trial); the final disposition date of the case; the date of post-trial motions).
4. Whether the case settled because of ADR. If settled, whether the case settled in full or settled in part.
5. What precipitated the use of ADR? (Court order *sua sponte*; party consent to the process; party motion with one or more parties opposed and a court order for ADR following; automatic referral per court rule due to kind of case)
6. Was there a settlement without ADR? (yes/no) If so, how was the case terminated—e.g., dispositive motion, settlement in ADR, settlement by some other process, during or after trial, removal to another court, etc.
7. Case type (general civil, criminal, domestic, housing, traffic, small claims)
8. The cost of the ADR process to the participants
9. Did the disputants use more than one form of ADR? If so, which?
10. Satisfaction data: How satisfied are the participants with the process, the outcome, and the neutral?

In a perfect world, every court would collect this data. If we had it, researchers could control more systematically for the varying dispute system

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Id. (citations omitted).

[137] The American Bar Association Section of Dispute Resolution has recommended that court programs collect ten basic kinds of data systematically; this would permit better comparisons across varying dispute system designs. *See* Memorandum from Am. Bar Ass'n Section of Dispute Resolution Task Force on Research and Statistics (Oct. 11, 2005), *available at* http://www.abanet.org/dch/committee.cfm?com=DR014500, follow "Top Ten Data Fields for Court Programs" hyperlink under "Related Resources" (last visited Apr. 18, 2009). This site also contains the section's selected bibliography on Court ADR resources.

designs in use across the federal courts. We could learn how to make ADR programs better.[138] We owe it to the public to work toward this goal.

[138] For suggestions on how, see Gregory Todd Jones, *Fighting Capitulation: A Research Agenda for the Future of Dispute Resolution*, 108 PENN ST. L. REV. 277 (2003) (outlining an ambitious multi-disciplinary and inter-disciplinary research agenda for the field of dispute resolution).