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Hensler: Hensler: ADR Research at the Crossroads

ADR Research at the Crossroads*

Deborah R. Hensler**

One of the remarkable aspects of the ADR movement is the empirical research that it has engendered. The granddaddy of court-administered alternative dispute resolution--the pretrial settlement conference--was the occasion for the first experimental study of an innovative legal procedure.¹ Small claims courts--another early alternative to full-fledged litigation--were put under the microscope in the 1960s.² Over the years, a host of empirical studies on the adoption, implementation and consequences of court ADR programs has been published.³

Empirical research on ADR was nurtured by the burgeoning of empirical research on civil litigation and court management, which coincided with the flowering of ADR in state and federal courts. The Civil Litigation Research Project ("CLRPP"), led by law-and-society scholars at the University of Wisconsin, provided a model for detailed investigation of patterns of claiming, pre-trial maneuvering and civil case outcomes in state and federal courts.⁴ The Federal Judicial Center ("FJC") conducted groundbreaking research on the consequences of tighter case management in the federal courts.⁵ The National Center for State Courts ("NCSC") investigated the sources of civil case delay in the state trial courts.⁶ By the early 1980s, the notion that empirical research might play a significant role in determining the merits and demerits of civil procedural change had begun to take hold.

In 1979, when RAND established the Institute for Civil Justice ("ICJ") to conduct policy analysis on civil justice reform, understanding the consequences of the new ADR programs was on many of our advisors' agendas.⁷ RAND's advisors

* My thinking on the relationship between ADR research and practice has been much enriched by discussions with Norman Brand, Christopher Honeyman, and Maude Pervere, practitioners, scholars, and good friends all.

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1. See MAURICE ROSENBERG, *THE PRETRIAL CONFERENCE AND EFFECTIVE JUSTICE: A CONTROLLED TEST IN PERSONAL INJURY LITIGATION* (1964).

2. See Barbara Yngvesson & Patricia Hennessey, *Small Claims, Complex Disputes: A Review of the Small Claims Literature*, 9 L. & SOC'Y REV. 219 (1975).

3. The literature on court-ordered ADR is vast. For an extensive list of references on court-ordered non-binding arbitration, focusing on empirical analyses, see Keith O. Boyum, *Afterword: Does Court-Annexed Arbitration "Work"?*, 14 JUST. SYS. J. 244, 251 (1991). Empirical research results on family mediation are summarized in Jessica Pearson, *Family Mediation*, in NATIONAL SYMPOSIUM ON COURT-CONNECTED DISPUTE RESOLUTION RESEARCH: A REPORT ON CURRENT RESEARCH FINDINGS - IMPLICATIONS FOR COURTS AND FUTURE RESEARCH NEEDS (Susan Keilitz ed., 1994).

4. For a discussion of the Civil Litigation Research Project and its influence on socio-legal studies, see David M. Trubeck, *Studying Courts in Context*, 15 L & SOC'Y REV. 485 (1980-81).

5. See STEVEN FLANDERS, *CASE MANAGEMENT AND COURT MANAGEMENT IN UNITED STATES DISTRICT COURTS* (1977).

6. See THOMAS CHURCH, JR. ET AL., *JUSTICE DELAYED: THE PACE OF LITIGATION IN URBAN TRIAL COURTS* (1978).

7. I was among a small group of RAND analysts who constituted the founding staff of the Institute for Civil Justice "ICJ." During the first year of its existence, we held many informal meetings with interested individuals to help shape our initial research agenda. The advisory process was subsequently

were leaders of the business and legal communities who were interested in knowing whether arbitration, in both its court-ordered non-binding form and its contractually binding private form, reduces the time and costs required to resolve legal disputes. At the same time, legislators and judges were asking whether mandating non-binding court-administered arbitration meant consigning citizens with lawsuits over modest amounts of money to "second class" justice. Scholars such as Owen Fiss and Judith Resnik⁸ were beginning to ask how the adoption of non-adversarial processes would reshape the public adjudication process. In short, understanding how court ADR was affecting the efficiency and fairness of the justice system seemed well worth empirical investigation.

When RAND's researchers approached courts to gain their cooperation with data collection efforts, we generally met with a positive reception. In most of the jurisdictions where RAND conducted its studies, statutory authorization for mandatory non-binding arbitration had been vigorously debated within the bench and bar. Some statutes included "sunset clauses," to ensure that the new programs would come up for reconsideration after some years of experience with them. Program supporters wanted to assemble data that would help answer the question of whether their program was "working." An important issue for state court administrators was what resources were necessary to administer an effective program, and whether those resources would be provided at the state or local level. Experienced court administrators--leery of the notion that the new programs would quickly produce significant savings in court resources that then would flow directly to their offices--wanted to assemble "hard data" on program expenditures. Steering committees charged with developing rules for the new programs and administrators responsible for managing them were interested in learning the results of their initial decisions. Even in states like Pennsylvania, which first adopted mandatory non-binding arbitration in the early 1950s,⁹ judges, lawyers, and court administrators were curious about the effects of program implementation policies and practices. With interest in ADR growing nationwide, Pennsylvania bench and bar leaders also welcomed the opportunity to show off what they had accomplished over the years.

Some courts commissioned research on their new ADR programs by outside evaluators. But most of RAND's research during the 1980s was conducted using funds raised by RAND from private contributors and foundations. Judges, lawyers and court administrators supported RAND's research by providing information and advice and access to court records, and sometimes by providing court personnel or interns to assist in data collating. In return, my colleagues and I designed data collection tools to provide the information that judges, lawyers and administrators thought would be helpful to them, as well as information that would permit us to explore more theoretical issues. We also participated in discussions of program design and revision, helping decision-makers to relate study findings to operational and policy questions.

formalized by the establishment of a Board of Overseers, comprising state and federal judges, plaintiff and defense counsel, consumer advocates, and corporate representatives.

8. See Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

9. See Deborah Hensler, *Court-Ordered Arbitration: An Alternative View*, 1990 U. CHI. LEGAL F. 399, 403 (1990).

Meanwhile, other researchers were pursuing similar studies of court-administered ADR. Court-ordered non-binding arbitration and mediation of family law cases were the main foci of empirical analysis. Researchers shared protocols and ideas, facilitating comparisons across jurisdictions and between different types of programs. Because of resource limitations, many research projects were modest in scale and scope. But over time, the questions asked by the researchers grew more subtle, and the analyses they performed grew more sophisticated. As a result of academic exchanges, funding from institutions such as the National Science Foundation Law and Social Science Program and the Hewlett Foundation, and the dissemination efforts of organizations such as the National Institute for Dispute Resolution ("NIDR") and the Center for Public Resources ("CPR"), a community of dispute resolution scholars engaged in sustained research on court ADR emerged.

The new research benefitted from the political climate surrounding ADR during the 1980s. Although mandating ADR was controversial in some jurisdictions, the titanic battle over state tort reform that was raging during the same period distracted the attention of business leaders and attorney groups from the ADR debate.¹⁰ Although some legislators were interested in the results of ADR research, neither the proponents nor opponents of ADR mandates had a great deal at stake in the outcome of ADR experiments. Deliberately designed to divert the most routine cases from trial calendars, court ADR posed little challenge to judges: At best, the programs might reduce the number of cases a judge had to deal with to a more manageable number. At worst, the cases would come before the judge after an attempt at resolution had failed. With little in the way of public resources devoted to court ADR, local court officials saw the programs as an addition to court routine and administrative burden, rather than a source of new court positions. They were interested mainly in determining how to manage their programs most efficiently.

Some lawyers did view court ADR as a threat. In California, some plaintiff attorneys argued that non-binding arbitration posed a practical obstacle to access to jury trial, and opposed it on that ground.¹¹ Some defense attorneys worried that if ADR succeeded in reducing litigation time and costs, their own fees would diminish. But these attorneys were wary of opposing court ADR openly because many of their clients--insurance companies and other corporations--supported it.¹² In the main, however, mandatory non-binding arbitration looked to lawyers like just another new procedure to master. Serving as a court-appointed arbitrator was regarded at best as an honor and more generally as a professional obligation. For some new lawyers, the honoraria most programs provided to arbitrators offered an additional but modest

10. See Joseph Sanders & Craig Joyce, "Off to the Races": *The 1980s Tort Crisis and the Law Reform Process*, 27 HOUS. L. REV. 207 (1990).

11. See DEBORAH HENSLER ET AL., *JUDICIAL ARBITRATION IN CALIFORNIA: THE FIRST YEAR 98* (1981).

12. In a study of the pilot phase of the New Jersey automobile personal injury arbitration program, I found that attorneys in large plaintiff firms and small defense firms were least satisfied with the new program. Deborah Hensler, *The New Jersey Automobile Arbitration Program* (Feb. 1986) (unpublished manuscript, on file with author).

stream of revenue, when other work was short, and an opportunity--in an era of declining trial rates--for advocacy experience.¹³

In sum, as ADR spread through the court system in the 1980s, legislators, judges, court administrators and lawyers acted primarily as interested onlookers of the research process. Some were enthusiastic about empirical research's potential to shed light on the impact of court ADR, but most were only modestly interested and indeed somewhat skeptical about the notion that program adoption and design decisions could properly flow from empirical research results. Few were opposed, and few seemed to fear the consequences of independent evaluation. Researchers, in turn, shared results freely, debated their meaning cordially, and together pondered research priorities for the next decade.

More recently, however, I think many ADR administrators and practitioners--and perhaps even some scholars--have turned away from empirical investigation and critical analysis of ADR consequences. Research on court ADR--particularly research with an evaluative component--has become unwelcome in some quarters. The critical reaction to the publication of RAND's evaluation of court ADR under the Civil Justice Reform Act ("CJRA")¹⁴ was a dramatic manifestation of this shift.

The CJRA was a highly controversial congressional effort to legislate certain forms of judicial case management.¹⁵ The controversy that surrounded the CJRA's passage pertained to the propriety of Congress directing judges to adopt specific strategies for managing their workload. But the Act also broke new ground in mandating evaluative research on the consequences of procedural reform, as a basis for subsequent reconsideration of the Act's provisions.¹⁶ The Act's research provisions invited some courts to serve as "demonstration" sites that would be evaluated by the Federal Judicial Center ("FJC"), and ordered others to participate in an "experiment." RAND was selected by the Administrative Office of the U.S. Court to design and conduct the experimental evaluation.

ADR was not the focus of the CJRA, and RAND's research on federal districts courts' experiments with ADR under the CJRA was ancillary to the main experimental evaluation of the effects of stricter case management. In its ADR study, as in the main study, RAND focused on Congress' stated objectives of reducing delay and public and private costs of civil litigation.

The CJRA evaluation compared ten courts that were required by Congress to adopt certain case management principles, including ADR, to ten courts that were not subject to such specific requirements (although like all other federal district courts they were directed to adopt plans for reducing civil case delay and costs).

13. See JANE ADLER ET AL., *SIMPLE JUSTICE: HOW LITIGANTS FARE IN THE PITTSBURGH COURT ARBITRATION* xv-xvi (1983).

14. See JAMES S. KAKALIK ET AL., *AN EVALUATION OF MEDIATION AND EARLY NEUTRAL EVALUATION UNDER THE CIVIL JUSTICE REFORM ACT* (1996). I was not a member of the CJRA evaluation team. But I was a consultant to the Task Force whose work provided a basis for the act (commonly known as the "Biden Task Force," after Senator Joseph Biden, who assembled it). And I was serving as Director of the Institute for Civil Justice when the evaluation report was published.

15. John Burritt McArthur, *Inter-Branch Politics and the Judicial Resistance to Federal Civil Justice Reform*, 33 U.S.F. L. REV. 551, 553 (1999). See also Symposium, *Evaluation of the Civil Justice Reform Act*, 49 ALA. L. REV. 1 (1997).

16. JAMES S. KAKALIK ET AL., *AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT* 7-8 (1996).

Together, the twenty courts comprised about one-third of the federal courts total caseload, and one-third of their judgeships, and represented the full range of size, caseload composition and geographic diversity within the federal court system.¹⁷ The majority of the twenty courts ultimately adopted “delay reduction plans” that included some form of ADR. But RAND’s evaluation of ADR under the CJRA was limited to just six courts, because it was only in these courts that sufficient numbers of cases were referred to or volunteered for ADR to provide a basis for analysis.¹⁸ In these six courts, RAND found no evidence of statistically significant differences in time to disposition or litigation costs between cases that were referred to mediation or early neutral evaluation (“ENE”) and cases that proceeded to resolution on the normal calendar. Lawyers whose cases were referred to mediation or ENE were highly satisfied with the procedures and felt they accorded fair treatment to their clients, but they were not significantly more satisfied than lawyers whose cases were not referred to ADR.¹⁹

RAND’s report on the results of ADR under the CJRA noted that the study did not provide strong grounds for policy recommendations.²⁰ But publication of the report led to a firestorm of criticism within the ADR community.²¹ Judges who were known in their districts as ADR proponents, ADR practitioners, and ADR organizations were foremost among the critics.

That an evaluation intended to help shape policy--particularly one whose results could be interpreted as inimical to certain constituencies’ interests--would attract significant attention is not surprising. But I confess that I was surprised by the intensity of the criticism of RAND’s CJRA evaluation.²² As a policy analyst, I am accustomed to legislative indifference to empirical research, and to rejection of research results that run contrary to strongly held--and politically attractive--positions. But the rush to judgment with regard to the CJRA evaluation--the belief

17: *Id.* at 15-18.

18. KAKALIK ET AL., *supra* note 14, at 16-18.

19. *Id.* at 53.

20. *Id.* at 13, 48-49, 53.

21. In response to the controversy, the ABA Section of Dispute Resolution devoted its entire summer issue to commentary on the RAND Report. See DISP. RES. MAG., Summer 1997, at 2-19. The ABA Section of Litigation also covered the controversy. See generally LITIG. NEWS, July 1997, at 1, 5.

22. See Richard Reuben, *Perspectives on the RAND Report: The Dialogue Continues*, DISP. RES. MAG., Summer 1997, at 3 (commenting on the controversy). While committee deliberations were ongoing, a statement urging public policymakers not to rely on RAND’s findings in making decisions on whether to provide continuing financial support for federal court mediation was issued under the aegis of the Center for Public Resources Judicial Project. See *Views on RAND’s CJRA Report: Concerns and Recommendations*, 15 ALTERNATIVES TO HIGH COST LITIG. 67 (1997). An editorial by CPR project director Elizabeth Plapinger, questioning the validity of the study’s findings appeared in the National Law Journal. See Elizabeth Plapinger, *RAND Study of Civil Justice Reform Act Sparks Debate*, NAT’L L.J., Mar. 24, 1997, at B18. On the local level, a federal district court committee that had commissioned an evaluation of its mediation program that reached conclusions similar to RAND’s was pressed by private providers of mediation not to release its findings. (Confidential conversation with a member of the local district court CJRA advisory committee). The author attended an academic colloquium on ADR during this period at which RAND’s report on the CJRA evaluation was hissed by an audience including eminent judges, practitioners and ADR scholars.

that the results *must* be wrong and the immediate efforts to counter them--contrasted sharply with what I recalled as more balanced responses to previous ADR studies.²³

More recently, I have encountered other manifestations of indifference or hostility to empirical research on ADR. A graduate student, who was preparing a background paper intended to help state government officials decide whether or not to adopt a publicly subsidized ADR program, asked for assistance in locating sources that would "help build a case for ADR"--not sources that would shed light on what the consequences of adopting ADR might be. A court staff person whom a colleague contacted informally for information on the current status of his court's ADR program refused cooperation if there were a chance that the information would be used to "evaluate" the program, which the staff person described as "too new" to assess. The court in question has operated ADR programs for more than a decade. A program administrator with whom I discussed possible evaluative research opposed any assessment of the quality of services provided by third party neutrals with whom the program contracts, on the grounds that such an assessment might make it more difficult for her to recruit neutrals. The program is subsidized by public funds, the program administrator is a public employee and the objective of the program is to better serve the public. The neutrals are private practitioners, who provide services for fees.

At the same time as I discern a pulling back from empirical research, I have also noted a growing tendency to exclude scholars with divergent perspectives from scholarly conferences and other academic interchanges. Professor Sander noted divisiveness within the field among those who espouse different approaches to mediation. I also note a paucity of opportunities to exchange views on ADR with scholarly critics such as Owen Fiss,²⁴ Laura Nader,²⁵ and Judith Resnik.²⁶

I hasten to note that empirical research continues apace, yielding important information about the consequences of ADR in diverse settings, ranging from the U.S. Post Office²⁷ to large corporations.²⁸ I also admit that my memories of reactions

23. A popular explanation for why RAND failed to find significant effects of ADR was that it had studied the "wrong" programs--namely, evaluative mediation rather than facilitative mediation. In a subsequent review of empirical literature examining court-ordered mediation practices, I found few examples of facilitative mediation of civil damage suits. I also performed additional analyses of the CJRA data, but was unable to identify any significant differences in case outcomes between CJRA pilot courts that adopted more facilitative mediation approaches and courts that adopted more evaluative approaches. See Deborah Hensler, *In Search of Good Mediation: Rhetoric, Practice and Empiricism*, in HANDBOOK OF JUSTICE RESEARCH IN LAW (Joseph Sanders & V. Lee Hamilton eds., forthcoming) (on file with author).

24. Fiss, *supra* note 8.

25. See, e.g., Laura Nader, *Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Re-Form Dispute Ideology*, 9 OHIO ST. J. ON DISP. RESOL. 1 (1993).

26. See, e.g., Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211 (1995).

27. See Jonathan F. Anderson & Lisa Bingham, *Upstream Effects From Mediation of Workplace Disputes: Some Preliminary Evidence from the USPS*, 48 LAB. L.J. 601 (1997); Lisa Bingham, *Mediating Employment Disputes: Perceptions of Redress at the United States Postal Service*, 17 REV. PUB. PERSONNEL ADMIN. 20 (1997).

28. Craig A. McEwen, *Managing Corporate Disputing: Overcoming Barriers to the Effective Use of Mediation for Reducing the Cost and Time of Litigation*, 14 OHIO ST. J. ON DISP. RESOL. 1 (1998). See also Jeanne M. Brett et al., *The Effectiveness of Mediation: An Independent Analysis of Cases Handled by Four Major Service Providers*, 12 NEGOTIATION J. 259 (1996).

to previous critical research may suffer from “golden age bias”--the tendency to recall positive aspects of previous experience better than more negative aspects. But I think there is less enthusiasm for evaluative research on ADR today than there was during the 1970s and 1980s.

If a shift has occurred, what factors might explain it? I think there are at least three: First, as ADR has become institutionalized, not only within the courts but within other public agencies as well, new (albeit small) bureaucracies have been created to manage and, in some instance, promote it. Whereas funds to support public ADR programs used to be cobbled together from diverse sources, now some court and some public agency programs have their own government budgetary lines. Critical evaluations of ADR are not likely to draw cheers from those who depend on continued political support for their positions. Because public support for ADR is so frequently justified on cost savings grounds, program administrators especially fear cost-benefit assessments.

Second, as state and federal courts have turned away from non-binding arbitration and towards mediation there has been an important change in the relationship between ADR practitioners and court ADR. Unlike court-administered non-binding arbitration, which offered modest honoraria to lawyers who agreed to serve as arbitrators a few times a year, mediation has opened up a new line of practice, promising lucrative--and in many jurisdictions, largely unrestricted--fees to lawyers and retired judges. In most jurisdictions, arbitrators received little or no training; their job was simply to preside over a relatively simple evidentiary hearing, and issue an advisory opinion, based on the facts and law. In contrast, training mediators has become a substantial line of business for some practitioners--so much so, that Professor Sander notes that in some jurisdictions there are more trained mediators available than there are disputants seeking mediation. Although some corporations and some public agencies have developed internal dispute resolution programs utilizing mediation, it appears that the main source of demand for fee-generating mediation is the courts. It is not surprising that lawyers and retired judges who have developed new dispute resolution and training services view critical evaluations of court-based mediation programs with alarm. Nor is it surprising that such concerns would mount as the supply of fee-for-service mediators increase.

Third, the success of mediation in displacing other quasi-adjudicative forms of alternative dispute resolution, has enabled ADR to tap into a contemporary cultural longing for more harmonious relations within our diverse society. To some, critical assessments of ADR appear to run counter to achieving this objective--rather than helping to define limits on, or prerequisites for, achieving it. As the ADR movement has grown, an increasing number of non-profit organizations and individual scholars have become committed to its continuation. It is not surprising that these organizations and individuals would prefer to celebrate ADR's successes, rather than investigate its limitations, to focus on positive outcomes rather than ponder null or negative results.

As I consider the state of ADR research today, I often think of the evolution of modern medicine. Over the last century, much has been learned about the nature of disease and antidotes for illness. This progress was a result of applying rigorous and objective investigative techniques (in particular, randomized clinical trials), reporting research results accurately and completely, and engaging in free wheeling debate

about the meaning of the findings. Of course, not all health care providers nor all manufacturers of drugs and devices have applauded these investigations or their results; some of modern medicine's failures are traceable to inadequate research, flawed reporting, or unwillingness to heed research results. But over time, the patent medicines and folk therapies of yesterday have been replaced by products and therapies whose claimed benefits and side-effects have an evidentiary basis. Some of these products and therapies will be set aside, as new empirical research reveals their shortcomings, or produces better alternatives. As a result, some practitioners and manufacturers will suffer a temporary loss of revenue, while they adjust their practices to newly available evidence. Some of them may wish that the research had turned out differently. Others may long for the days when a single bottle held the promise of curing-all. But most of us would agree that we are better served by knowing more about the complexities of disease and health, and about the benefits and limitations of alternative health care regimes. I think it would be good for all of us if we could adopt this model of knowledge-building for the ADR field as well.

ADR research today stands at a cross-road: Will it move forward, asking harder questions, applying more rigorous analytic techniques? Will researchers find collegial and financial support for objective investigation and reporting of research results? Will practitioners and scholars join in debate over the import of research findings, seeking to understand the strengths and weaknesses of each other's interpretations? Or will researchers be relegated to the roles of acolytes and salespeople, hobbled by ideology and constrained by fear of antagonizing public officials, private practitioners and funders?

When ADR was in its infancy, there were few individuals and institutions that had a stake in its success. A mark of ADR's achievements is that there are now many individuals, both inside and outside of the courts, as well as many institutions that care about the results of ADR evaluations. If ADR is to attain maturity and flourish, we all need to ask ourselves how we can learn more about it, and put that knowledge to work in ADR policy-making. We need to test our assumptions about what ADR is, and about what it can do, about whom it benefits, about its public and private costs, and about its contributions to the fair resolution of civil disputes.