Failing Faith in Litigation? A Survey of Business Lawyers' and Executives' Opinions

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John Lande†

I. INTRODUCTION

A decade ago, in an important article entitled “Failing Faith: Adjudicatory Procedure in Decline,” Professor Judith Resnik reviewed the work of the drafters of the 1938 Federal Rules of Civil Procedure who, she said, “had a belief, fairly termed ‘faith,’ in adversarial exchanges as an adequate basis for adjudication, in adjudication as the essence of fair decisionmaking, and in fair decisionmaking as essential for legitimate government action.” Noting a contemporary loss of faith, Resnik wrote:

Today, it is hard to get in touch with such faith. Quoting Wigmore’s description of cross-examination as the “greatest legal engine ever invented for the discovery of truth” often generates chuckles.... I believe that the pressures to produce outcomes [i.e., judges’ need to dispose of cases], coupled with first-hand experiences of seemingly illogical results rendered after extensive adversarial parrying by apparently unbridled attorneys,

† Director, Mediation Program, University of Arkansas-Little Rock; Ph.D, University of Wisconsin-Madison, 1985; J.D., Hastings College of Law, 1980; A.B., University of Michigan, 1974. This Article is adapted from my doctoral dissertation from the Sociology Department at the University of Wisconsin-Madison. I am very much indebted to my committee, especially Mark C. Suchman, my chair, and Howard S. Erlanger, Marc Galanter, Charles N. Halaby, and Jack Ladinsky. I appreciate the support of a Hewlett Legal Studies Fellowship from the Institute for Legal Studies at the University of Wisconsin Law School and a Fellowship from the Program on Negotiation at Harvard Law School enabling me to work on this project. I incorporate all the acknowledgments from my dissertation. I also want to thank Jim Alfini, Jim Boskey, Bryant Garth, Valerie Hans, Chris Honeyman, Bobbi McAdoo, Craig McEwen, Judith Resnik, and Robert Rosen for very helpful comments on an earlier draft of this article. I appreciate the encouragement of my former colleagues in the Department of Dispute Resolution at Nova Southeastern University. The author is solely responsible for the views expressed, which do not necessarily represent the views of the institutions that supported this research or of the people who have commented on earlier drafts.

have generated the emerging cynicism. If outcomes after trial or other forms of adjudication cannot, systematically and in the aggregate, be demonstrated (or at least felt) to be better than outcomes produced with little or no process, if attorney misbehavior and incompetence are widespread, if the adversarial model is applied in settings which render it farcical, why insist upon formal procedure?\(^2\)

Although Resnik provided some persuasive evidence of such a loss of faith,\(^3\) she recognized that she might have been “too quick to find a decline in faith.”\(^4\) To provide a more systematic assessment of contemporary faith in litigation,\(^5\) this Article looks at a particular context—business litigation—and analyzes the opinions of three groups of respondents: lawyers in private law firms who do commercial litigation (“outside counsel”), lawyers employed in business firms who do some litigation (“inside counsel”),\(^6\) and nonlawyer executives in business firms (“executives”). These groups have the greatest exposure to litigation in the corporate setting; furthermore, because they play powerful roles in our political, economic, and social life as well as the legal system, their opinions influence public opinion more generally. Thus it is especially useful to consider the extent to which members of these powerful and respected groups have faith in our legal system. Considering that support for court-connected alternative dispute resolution (ADR) procedures is often premised on a lack of faith in litigation, this analysis also has important implications about how court-mandated ADR could, over time, boost faith in litigation and/or undermine faith in ADR.\(^7\)

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2. Id. at 505 and 529. Resnik herself had not lost faith in adjudication and, indeed, advocated efforts to restore in others what she saw as this flagging faith. Id. at 544-56.

3. Id. at 526-39.

4. Id. at 539.

5. Although the title of Resnik’s article focuses on adjudication, her analysis focuses more broadly on litigation. In addition to adjudication, litigation encompasses a range of phenomena often occurring outside the courts, such as discovery and negotiation, that are typically managed by lawyers. See Marc Galanter, Adjudication, Litigation, and Related Phenomena, in LAW AND THE SOCIAL SCIENCES 152 (Leon Lipson & Stanton Wheeler eds., 1986). The present Article, like Resnik’s analysis, deals with litigation rather than merely adjudication. This broader focus is important because, as this study shows, many people’s opinions about the courts are related to the broader litigation process. See infra Part VI.

6. I use the terms “business lawyers” or simply “attorneys” to include both the outside counsel and inside counsel in this study.

7. This Article is based on a research project investigating opinions about litigation and ADR. This Article focuses primarily on opinions about litigation. My dissertation provides an extensive analysis of opinions about ADR. See John Lande, The Diffusion of a Process Pluralist Ideology of Disputing: Factors Affecting Opinions of
To provide a context for the results of this study, Part II of this Article summarizes some of the oft-discussed critiques of litigation. Part III describes the methodology of the study and Part IV describes the organizational settings in which the respondents work as well as their professional experience and experience with disputes. Part V analyzes the respondents’ views about litigation, their expectations about personal consequences of litigation, and their perceptions of the opinions of influential people in their lives about litigation. To provide a fuller understanding of these views, Part VI examines factors associated with the respondents’ general faith in litigation. Part VII summarizes the results separately by type of respondent. The data show that opinions of business lawyers and executives about litigation generally ranged from moderately positive to extremely negative. The outside counsel tend to be most positive, executives most negative, and inside counsel fall in between these poles. The findings suggest that outside counsel generally have faith in litigation and executives do not. Part VIII considers alternative possible scenarios for litigation in the future and how these scenarios might restore or provide some faith in litigation. For the lawyers, especially the outside counsel, relatively modest reforms to streamline litigation might deal adequately with their principal concerns. On the other hand, substantially increased privatization of dispute resolution would seem to be the appropriate way to address the executives’ misgivings. Part VIII also offers some cautions about the nature and likely trajectory of privatization efforts. Part IX summarizes the arguments in this Article.

II. Public Images of Litigation

The public image of litigation as reflected in the mass media is largely a negative one. One need scarcely turn on the TV, read the newspaper, or listen to casual conversations to hear sharply negative public attitudes about litigation. While there are some favorable
portrayals of the drama of courtroom confrontation, many depictions suggest that the integrity of litigation is shaky at best.

Critics attack the court system as one source for failed faith in litigation. A “litigation explosion” is charged with being both a cause and effect of a court system incapable of providing timely, affordable, and effective outcomes. A court system that is intended to provide

at 7; Steven Hayward, We Need a Sharp Retort to the Lawsuit Fever, ORANGE COUNTY REGISTER, November 3, 1994, at B8; Larry Milner, We’ve Become Lawsuit-Happy, DALLAS MORNING NEWS, July 26, 1993, at 17A. I was surprised at the substantial number of op-ed pieces defending litigation. See, e.g., Steven Lubet, Love ‘Em or Hate ‘Em, Lawyers Play Important Social Role, ARIZONA REPUBLIC, January 4, 1998, at H4; Editorial, Timeout in the Tort Reform Wars; a Bit of Calm Analysis Suggests the Problems in Civil Lawsuit Arena are Being Exaggerated, LOS ANGELES TIMES, December 3, 1995, at M4; David P. Mastagni, The Great California Litigation Myth, SAN DIEGO UNION-TRIBUNE, June 9, 1994, at 1. Nonetheless, my impression from casual conversations with non-lawyers is that most people have more negative than positive views about litigation.

9. As Professors Marc Galanter and Thomas Palay have pointed out, depictions such as in the popular TV series, “L.A. Law,” are systematically distorted, i.e., implausible and contrived. MARC GALANTER & THOMAS PALAY, TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM ix-x (1991).

10. For example, public satisfaction with the 1997 trial of Timothy McVeigh for the Oklahoma City bombing was often contrasted with the response to the criminal trial of O.J. Simpson, which many saw as indicative of a corrupt or ineffective legal system. This phenomenon was captured by a cartoon in which a clown labeled “O.J. Trial” is sitting on the throne of justice and lady justice pokes the clown with her sword and says, “I'd like my seat back.” Cartoon, CALIF. B.J., July 1997, at 8. Indeed, even in “L.A. Law,” although many of the lawyers were portrayed as glamorous, idealistic, and powerful, many of the key players were clearly cynical, selfish, and petty.

11. See Patricia M. Wald, Litigation in America: Introduction, 31 UCLA L. REV. 1 (1983); Marc Galanter, Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society, 31 UCLA L. REV. 4, 6-11, 61-69 (1983). Professors Samuel R. Gross and Kent D. Syverud, who do not appear to have lost faith in litigation, provide an exquisite description of the problem:

The essence of adversarial litigation is procedure. We define justice in procedural terms: the judgment of a competent court following a trial that was procedurally correct. When we want to improve our judicial system we pass a procedural reform, which invariably means elaborating old procedural rules or adding new ones—rules that govern the presentation of evidence and arguments, rules that create opportunities to investigate and to prepare evidence and argument, and rules that are designed to regulate the use of the procedures that are available to investigate, prepare, and present evidence and argument. The upshot is a masterpiece of detail, with rules on everything from special appearances to contest the jurisdiction of the court, to the use of exhibits during jury deliberation. But we cannot afford it. As litigants, few of us can pay the costs of trial; as a society, we are unwilling to pay even a fraction of the cost of the judicial apparatus that we would need to try most civil cases. We have designed a spectacular system for adjudicating disputes, but it is too expensive to use.

just, principled, practical, predictable, and economically rational solutions is widely perceived to do just the opposite. Indeed, many people believe that the courts decide cases based on political and ideological grounds rather than purely legal grounds.

Critics also blame litigation’s primary players—lawyers—for the system’s problems. They accuse lawyers in the U.S. of promoting needless complexity, fomenting strife, creating injustice by manipulating “legal technicalities,” selfishly taking advantage of opponents and clients, advancing the interests of the rich and powerful over the poor and weak, and undermining the health of the economy by acting as unproductive parasites. There is widespread dissatisfaction with lawyers as reflected, for example, by the popularity of disparaging lawyer jokes. Highly visible elites also have criticized lawyers in recent years, including U.S. presidents, a vice president, a chief justice of the U.S. Supreme Court, a Harvard president, and associations of large businesses.

In reviewing a collection of charges against the legal system, Marc Galanter found that many popular stories fit into a narrative with the theme that “the system has ‘spun out of control’ and

14. See Marc Galanter, Predators and Parasites: Lawyer-Bashing and Civil Justice, 28 Ga. L. Rev. 633 (1994); see also William H. Simon, The Ideology of Advocacy: Procedural Justice and Professional Ethics, 1978 Wis. L. Rev. 29. Indeed, even Resnik found that the rhetoric supporting adjudication is not translated into reality due to inequality of litigants’ resources and the refusal of the government to mandate resource supplements for weaker parties. Resnik, supra note 1, at 517-20. Moreover, the disparate quality of legal services available to different groups of litigants and the use of abusive litigation tactics further undermine her faith. Id. at 523-24.
15. See Richard L. Abel, American Lawyers 163-64 (1989). The public is actually ambivalent about lawyers, as Professor Abel suggests:

The mass media accurately capture public ambivalence about lawyers: they are both virtuous protectors who loyally represent clients against overwhelming odds and also outsiders and troublemakers; they are intimates of money and power, with all the good and bad connotations that these central symbols evoke for Americans; and they reinforce a social order that is essential but also oppressive.

Id. at 164.
America, or its substantial productive citizens, has been brought 'down by law.'

Although many people accept this narrative as a matter of faith, the charges against lawyers and courts are hotly debated in academic circles. It may not be surprising that many public officials and members of the general public are very critical of litigation. The public as a whole generally has little personal contact with lawyers and courts and thus may find litigation to be confusing and intimidating. Members of the general public are what Galanter calls "one-shotters"; even if they have several contacts with the legal system, they do not operate with the expectation of repeated contacts. Given the widespread media practice of systematically overrepresenting the unusual and sensational, one might expect the public's attitudes about

18. Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 Md. L. Rev. 1093, 1154 (1996). For example, advice columnist Ann Landers contributes to this theme by regularly publishing letters from readers about apparently ridiculous lawsuits. In a recent column, she printed a letter from a reader with "another beauty for [her] lawsuit collection" based on an Associated Press story, dateline Seattle, about a suit in which the plaintiff complained that milk cartons did not include warnings about the effects of fat and cholesterol. In her response, she promised to watch the outcome of the suit and keep her readers posted. Ann Landers, *Ann Defends Chicago*, SUN-SENTINEL (Fort Lauderdale), Aug. 31, 1997, at 2E. Unless she plans to do some independent investigation or the plaintiff wins a large award, it seems unlikely that she will ever hear about the outcome. See infra note 75.

19. *See Debate, Do Lawyers Impair Economic Growth?* 17 L. & Soc. Inqury 585 (1992); Alice I. Youmans, *Research Guide to the Litigation Explosion*, 79 Law Lib. J. 707 (1987). It is important to note that there is a vast body of empirical evidence indicating that many deeply-felt beliefs of those who have lost faith in litigation are incorrect. See, e.g., Marc Galanter, *supra* note 14 (extensive review of empirical research rebutting common beliefs). Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—and Why Not?*, 140 U. Penn L. Rev. 1147 (1992) (extensive review of empirical research rebutting common beliefs). At various points in this Article, I identify discrepancies between perceptions of respondents in this study and analyses of social science evidence. Not having closely analyzed the entire body of evidence, I do not attempt to adjudicate the true facts. Unless these analyses about the actual operation of the litigation system are grossly distorted, however, it appears that many people have significant misunderstandings.

20. *See Gallup Organization, Attitudes Toward the Liability and Litigation System* 180-81 (1982) (78% in a national survey of 2,013 members of the public said that they were never involved in civil litigation and 57% said that they do not know anyone who had been a party in the trial of a civil suit); Barbara A. Curran, *The Legal Needs of the Public: The Final Report of a National Survey* 186, 190 (1977) (in a survey of 2064 members of the public, 36% had no professional contacts with lawyers and 45% had been involved with only one or two cases with a lawyer in their lifetimes).

lawyers and courts to be at least somewhat distorted, even after cred-
iting the general public with a fair degree of common sense in inter-
preting images they receive through the media.

But what about those persons or entities which litigate repeat-
edly, the so-called “repeat players”? What are their attitudes to-
ward litigation and what explains those attitudes? Lawyers (or at
least litigators) are the quintessential repeat-players. They have
substantial contact with the court system and a great interest in its
operation. One might expect that litigators would have especially
favorable views of litigation because it provides them not only a living
but also a generally powerful and prestigious identity. This may also
be true, though to a lesser extent, for in-house attorneys working for
businesses. Managing activities in a confusing legal system can be a
source of power and prestige within an organization. And, though
some business leaders have been vocal in their criticism of litigation
in recent years, it is by no means inevitable that businesspeople
would see litigation as a threat to their interests. As managers of
entities that are generally the “haves” in society that often “come out
ahead” in litigation, they might be expected to view courts and law-
ners favorably, as protectors of their interests. Indeed, businesses
have historically used litigation when they have decided that it is in
their interest to do so.

This study provides a detailed examination of the views of these
three groups to analyze how much faith they have in litigation.

III. METHODOLOGY

This Article is based on two complementary data analyses: (1)
qualitative analysis of in-depth interviews, and (2) quantitative anal-
ysis of survey interviews. The qualitative interviews capture a rich
expression of the respondents' opinions, including some of their own
analyses of how their views are interrelated. However, because of the
nonrandom sampling and the small number of qualitative interviews,
it is difficult to generalize from that data to the general population of
business lawyers and executives. The survey interviews, on the other
hand, permit sharply-focused and standardized probes yielding data

22. Id. at 98 (A repeat-player is a person or entity which has “had and anticipates
repeated litigation, which has low stakes in the outcome of any one case, and which
has the resources to pursue its long-run interests”).
23. Id. at 97-107.
24. See YVES DEZALAY & BRYANT G. GARTH, DEALING IN VIRTUE: INTERNATIONAL
COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER
that can be analyzed statistically, and, because the survey respondents were selected using a randomized procedure, the survey results provide reasonable reflections of the survey populations within calculable margins of error.\textsuperscript{25} Combining both methods in this study permits "triangulation,"\textsuperscript{26} providing a more comprehensive explanation of disputing ideologies than would be possible from either method individually.

I conducted thirteen face-to-face qualitative interviews in southern Wisconsin in the first half of 1994. Respondents were selected using a "snowball" sampling procedure; i.e., respondents and other knowledgeable people were asked to suggest names of other possible respondents. There were roughly equal numbers of each of three types of respondents: four inside counsel, four outside counsel, and five nonlawyer executives. Interview protocols served as a general guide for the interviews. Based on the flow of the interview, I asked unscripted follow-up questions and skipped questions in the protocol. Interviews generally lasted 90 to 150 minutes. The interviews were tape recorded and transcribed for analysis. Excerpts of these interviews illustrate some patterns reflected in the quantitative data.

For the quantitative analysis, I conducted standardized telephone interviews of respondents in Massachusetts, Pennsylvania, Tennessee, and Florida. I selected respondents from a few states rather than on a nationwide basis because legal and ADR cultures, which are likely to affect (at least attorney) opinions, might vary dramatically by state.\textsuperscript{27} For further information about the procedures for selecting states for this survey, see Appendix 1.

\textsuperscript{25} For discussion of the margin of error, see infra note 33.

\textsuperscript{26} MARTYN HAMMERSLEY \& PAUL ATKINSON, ETHNOGRAPHY: PRINCIPLES IN PRACTICE 198-200 (1983) (collecting data using different sources and methods increases confidence in validity of findings).

\textsuperscript{27} The principal focus of this research was to analyze business lawyers' and executives' opinions about ADR, thus the sampling procedure centered around what I initially called "ADR culture" but later called "mediation culture" based on responses to the survey. See infra note 200. The literature on local legal culture attempts to explain variations in patterns of practice based on informal norms and expectations of regular players in a local legal system about how things are done there. See Herbert M. Kritzer \& Frances Kahn Zemans, Local Legal Culture and the Control of Litigation, 27 L. \& Soc'y Rev. 535, 538-41 (1993). Casual observations of differences in legal structures, behavior, and attitudes about ADR in different states and localities raises the possibility of analogous "mediation culture" (or "ADR culture") phenomena. For example, the mediation culture in one state may be quite congenial to a large volume of mediation practice whereas the mediation culture in another state might be relatively inhospitable for mediation practice. Similarly, mediation culture in various locales may endorse some styles of practice and condemn others. See John Lande,
The list of potential respondents ("sampling frame") of nonlawyer executives was drawn from the Compact Disclosure database on companies filing information with the U.S. Securities and Exchange Commission (SEC). Because I wanted to analyze relationships between respondents' views and those of superiors in their organizations, as described infra in Part V.H., the sample was limited to respondents who worked in organizations large enough to have a significant hierarchy. I therefore constructed sampling frames to include all named officers in companies with more than 50 employees. The sampling frames for inside and outside counsel were drawn from Westlaw's online database, which contained listings of approximately 600,000 lawyers in the United States. Potential inside counsel respondents were excluded if they worked for firms with fewer than 50 employees or if they did not spend at least five percent of their time working on litigation. The sample of inside counsel was limited to those working in organizations large enough to have a significant hierarchy so that I could analyze relationships between respondents' views and those of superiors in their organizations. The sample was limited to organizations large enough to have a significant hierarchy.


In fact, analysis of the survey data revealed very few significant differences in opinions about litigation among respondents from the different states. The few differences observed are probably due to the fact that the Florida sample happened to contain a somewhat smaller percentage of executives than did the samples from the other states. For example, a substantially larger proportion of Florida respondents than respondents in the other states said that they expected increased litigation in their firms or from major clients would increase their opportunities for advancement. Similarly, a larger proportion of Florida residents perceived that the leaders in their profession believe that the court system is working well. Thus this Article does not refer to the states of the respondents.

28. Unfortunately, by definition, this sampling frame excludes privately held companies. However, this database includes more executives than any other database that was available. The database is organized by firm and the listings include names of officers identified in SEC filings.

29. When the survey was conducted, there were approximately 723,000 lawyers in the U.S. according to a recent government estimate. U.S. Bureau of the Census, Statistical Abstract of the United States 204 (1993) (based on reports from the American Bar Foundation). This estimate for 1988 "represents all persons who are members of the bar, including those in industries, educational institutions, etc., and those inactive or retired." Id. Thus the Westlaw Legal Directory seems fairly comprehensive. The Westlaw Directory seems especially comprehensive for the purpose of this survey, as the Census Bureau figure includes approximately 84,000 attorneys employed in educational institutions, the judiciary, and other government agencies who are less likely to have individual listings in Westlaw's directory.

30. Westlaw has two separate databases of corporate counsel, a directory compiled by itself and one generated by Prentice Hall. The frames for inside counsel were constructed by combining listings from both databases and eliminating duplicate listings.
limited to inside counsel with at least some minimal current experience with litigation so that I could analyze the relationships between their evaluations of their own litigation experience and their evaluations of the system of litigation generally, as described infra in Part V.C. Because insurance companies are unique in the business of litigation, inside counsel employed by insurance companies were also excluded. To select outside counsel, I used the commercial law directory in Westlaw and selected attorneys whose listings indicated that their practices include litigation. Outside counsel were excluded from the sample if they worked in firms employing ten or fewer attorneys or if they did not spend at least five percent of their time working on litigation. The restrictions on the sample of outside counsel are comparable to those for the inside counsel and executives.

Using these databases, I developed twelve sampling frames for selection of respondents: one for each of the three types of respondent in each of the four states. Then potential respondents were selected randomly from each sampling frame. Survey interviews were completed for 178 respondents including 70 outside counsel, 58 inside counsel, and 50 executives. The overall response rate was a very respectable 66%. The attorneys were especially well-represented;

31. Handling claims and disputes is an intrinsic operation of insurance companies, unlike virtually any other kind of business.

32. To avoid overburdening organizations approached in the survey, no more than three potential respondents were included from any single office. This resulted in the exclusion of less than four percent (18 of 465) of the potentially eligible respondents. Half of these exclusions were Tennessee outside counsel, thus the survey may somewhat underrepresent lawyers in large Tennessee law firms.

33. In addition to the 178 complete interviews, I conducted 18 brief interviews (lasting about two or three minutes) with potential respondents who were unwilling to participate in the complete interviews. These included four outside counsel, four inside counsel, and ten executives. By conducting the brief interviews, I was able to estimate whether there was selection bias, i.e., that the opinions of respondents were systematically significantly different from those who refused to respond to the complete interview. This analysis did not indicate that there was significant bias, although it was difficult to make a confident conclusion about this because of the small number of brief interviews. See Lande, Ideology of Disputing, supra note 7, at 56-58. The data reported in this Article includes responses from the brief interviews for the questions covered in those interviews.

The sampling error for the percentages of responses in a sample this size is about six to ten percent depending on the percentages involved. For a sample of 100 in which 50% of the respondents give one answer and 50% give another, the sampling error is plus or minus ten percent. In a sample of 100, if 10% of the respondents give one answer and 90% give another, the sampling error is plus or minus six percent. See Jonathan M. Hyman et al., Civil Settlement: Styles of Negotiation in Dispute Resolution 15-17 (1995). This survey focuses on percentages of respondents within the samples of each of the three types of respondents, each of which is under 100. Therefore the sampling errors for these figures are somewhat more than six to...
more than 80% agreed to participate. Executives were less cooperative; only 43% agreed to participate. The interviews were completed in the second half of 1994. They were conducted by telephone and generally lasted 20 to 25 minutes. Slightly different versions of the surveys were developed to fit the different types of respondent, though the substance was the same for all respondents.

Many of the survey questions used 11-point “Likert scales,” with possible answers ranging from zero to ten with a middle category of five. To simplify the presentation, the data are generally collapsed into three categories: zero to four, five, and six to ten, reflecting responses below, at, and above the middle category. Collapsing the data makes it easier to present and understand; however, it sacrifices some important information about the intensity of responses. The statistical significance tests were based on the full, uncollapsed scales.

ten percent. While the sampling error involves random error, the fact that the response rate is generally quite high, see infra text accompanying note 34, indicates a reduced likelihood of systematic error.

34. High response rates reduce the risk of selection bias. See infra note 33 for definition of selection bias. In this survey, the response rates for the attorneys are quite high by social science standards, suggesting a low risk of selection bias. Although the response rate for the executives is lower than that for the attorneys, it is not unusually low and some statistical tests suggest it does not indicate significant selection bias.

35. Obviously the data reflect respondents’ perspectives when they were interviewed and their views may change over time. I imagine that the patterns observed have not changed radically since the interviews were conducted, especially the opinions regarding litigation. It is true that in the interim, there has been extensive media coverage of some sensational trials, notably the criminal trial of O.J. Simpson. Nonetheless, I suspect that the lawyers who generally have faith in litigation see such cases as aberrations and these cases do not undermine their faith. By the same token, I suspect that these events reinforce the cynicism of those who did not previously have much faith in litigation. I know of no significant changes in the nature of litigation in the interim that would substantially change respondents’ personal experiences with litigation. This article also reports some data on experience with and opinions about ADR procedures and it is more likely that this may have changed in the interim as publicity about and usage of ADR procedures has increased. It would be useful to conduct similar studies in the future to track changes in the opinions described in this Article.

36. For example, respondents were asked whether they agreed or disagreed with various statements on a scale from zero to ten, where zero meant that they strongly disagreed, ten meant that they strongly agreed, and five represented a middle position. The same type of scale was used with questions with other response categories such as whether the respondents thought that the courts were working poorly or well, were satisfied or dissatisfied with their experiences in litigation, etc.

37. A finding is considered statistically significant if the probability of error due to chance is less than a specified amount. In the social sciences, the minimum probability acceptable for statistical significance is conventionally considered to be
IV. RESPONDENTS’ BACKGROUND AND EXPERIENCE

A. Respondents’ Professional Experience and Organizational Settings

Respondents worked for firms in a wide variety of industries or, in the case of outside counsel, served clients in many different industries. The industries most represented in the sample are general manufacturing, finance, health care, and computers. Outside counsel had been employed by their current firms for an average of eight years, compared with ten years for inside counsel and thirteen years for executives.

Inside counsel in the sample generally worked for larger and more complex firms than did the executives. Inside counsel provided a median estimate of 4,000 to 5,000 employees, including 6 to 10 attorneys, in their firms. By contrast, the executives gave a median estimate of 750 to 1,000 employees, including one attorney, in their firms. Close to half (43%) of the inside counsel’s firms were wholly-five percent, indicated as “p < .05.” In other words, the observed relationship is considered statistically significant is there is less than a five percent chance that one would observe the relationship in the sample data if there was not such a relationship in the full population. It may be easier to think of it this way: There is at least a 95% probability that there really is a relationship in the full population given the statistical relationship in the data collected from the sample. One has even greater confidence in a finding if the relationship is significant at the .01 or .001 levels. Note that one should not interpret a statistically significant finding as indicating that the relationship necessarily exists in the general population. Rather, this simply means that the collected data support that hypothesis. The converse is also true: a finding that is not statistically significant does not necessarily mean that there is no relationship in fact. If an observation (such as a correlation presented in this Article) is not statistically significant, one should generally not make any inference based on the observation, such as the sign or magnitude of the correlation. See generally John Neter et al., Applied Statistics 310-38 (3rd ed. 1988).

38. This Part provides a summary description of the survey respondents’ background and experience. For further detail, see Lande, Ideology of Disputing, supra note 7, at 65-88.

In general, the survey respondents were middle-aged men. The vast majority (85%) of the sample is male. They ranged in age from 27 to 77 with an average of 44. The average age was 42 for outside counsel, 40 for inside counsel, and 50 for executives. The age difference (as well as the length of tenure in their positions described in the text) is probably a function of differences in sampling frames. The frames for the attorneys included both junior and senior attorneys whereas the frame for executives included only the top several levels of executives in the corporations. For further information on the sampling frames, see supra notes 28-32 and accompanying text.

39. The median refers to the 50th percentile in a group, i.e., half the values are above the median and half are below it. The median is sometimes considered a better measure of central tendency than an average when some scores have extreme values and thus skew the average disproportionally.
owned subsidiaries whereas very few (6%) of the executives' firms were wholly-owned subsidiaries.

Most outside counsel (59%) in the sample worked in firms with offices in one or two cities. The median size of their law firm was in the range of 51 to 100 attorneys. The vast majority of outside counsels' clients (an average estimate of 82%) were businesses and most of these business clients (an average estimate of 73%) had annual revenues of more than $1 million.

Most respondents owned an interest in their firms, including 66% of the inside counsel and 90% of the executives. Slightly more than half of the outside counsel (53%) were equity partners in their law firms.

The different types of respondents fit into very different organizational authority structures. To determine who were their “organizational superiors,” respondents were asked about the position of the people whose judgments and decisions affected them most in their current position.40 For outside counsel in this sample, the organizational superiors were divided almost equally between partners in their law firm and their clients, with somewhat more in the former category. The organizational superiors for approximately two-thirds of inside counsel in the sample were non-legal executives, officers, and managers in their firm. For most of the other inside counsel, their organizational superiors were the top officials in the legal department. The organizational superiors for three-quarters of the executives were other top executives and officers in their firm. Most of the other executives said that they were affected most by the judgments and decisions of their firms' customers or clients.

B. Respondents' Experience with Litigation and ADR

Inside counsel and outside counsel in the sample had practiced law for an average of 14 years; however, outside counsel had devoted a greater proportion of their time to litigation activities than had inside counsel. Outside counsel estimated that litigation constituted an average of 83% of their time in the prior year, compared with 57% for inside counsel.41 Indeed, so many outside counsel devoted virtually all of their time to litigation that the median proportion of their

40. Respondents were asked about their perceptions of their “organizational superiors” opinions about litigation, as described infra in Part V.G., which were significantly correlated with the respondents' own views about litigation, as described infra in Part VI.

41. The mean percentage of time devoted to litigation is probably related to the sample selection procedure which included only attorneys who did litigation for at
time spent on litigation was 98%. Outside counsel also devoted a
greater proportion of their entire legal careers to litigation than did
inside counsel. Outside counsel said that they spent at least half of
their time doing litigation in an average of 82% of the years in since
they received their law degrees; this compares with an average of
62% for inside counsel. Not surprisingly, the proportion of lawyers' current time devoted to litigation is strongly correlated with the pro-
portion of their careers in which they have focused on litigation.42

As these data indicate, for many lawyers, litigation was the cen-
tral focus of their work. This was rarely the case for executives. As
one might expect, executives had less experience with litigation than
the attorneys in the study. In fact, one needs to measure amount of
experience quite differently for lawyers and nonlawyers. Overall, the
executives had little experience personally as a party, witness, or ju-
ror, but had somewhat more experience participating in decision-
making about litigation for businesses. Thirty-two percent of the ex-
cutives had never been a juror or witness and 40% had been a juror
or witness only once or twice. Almost three-quarters (74%) said that
they had never been a party in a lawsuit43 and an additional 22%
said that they had been a party only once. However, more than
three-quarters (82%) said that they had been responsible, individu-
ally or as part of a team, for decision-making for a business in a law-
suit, and had played such a role in a median of four or five suits.
Thus, most of the executives' personal experience with litigation had
been in their professional capacity.

42. Correlation refers to the extent of linear association between two variables. Where two variables are perfectly associated, if one knows the value of one variable, one can tell the exact value of the other; in that situation, the correlation coefficient is 1.0. For example, the length of objects in inches is perfectly correlated with their length in feet. Correlations have a negative value if the increase in one variable is associated with the decrease of another variable. For example, if B is a point on a straight line with endpoints A and C, the distance between A and B is negatively correlated with the distance between B and C, i.e., -1.0. Larger correlation coefficients in absolute value (i.e., numerical value without regard to whether it is positive or negative) indicate greater degrees of association between the two variables. If there is no association, the correlation is 0. See generally NETER ET AL, supra note 37, at 172-73. Correlations indicated in the text are statistically significant unless other-

43. This excluded situations where they may have been named as parties but
were not personally involved in the litigation.
All three groups of respondents' professional experience with litigation had been more often defense- rather than plaintiff-oriented.\textsuperscript{44} This was especially true for inside counsel, who on average estimated that their firm was a defendant in 82% of cases that they personally handled or supervised in the prior three years, compared with 65% for outside counsel, and 73% for executives.

Experience with ADR varied by type of respondent. Outside counsel had the most experience as a third-party neutral (such as an arbitrator or mediator),\textsuperscript{45} while executives had the least. About half of outside counsel (47%), one quarter of inside counsel (26%), and 7% of the executives had served as a neutral at least once. Respondents generally had more experience with ADR as partisans (i.e., advocates and principals) than as neutrals. The attorneys had much more experience as partisans in ADR than did the executives. Ninety percent of the outside counsel and 84% of the inside counsel had some experience as a partisan in ADR compared with only 39% of the executives. More than half of the attorneys had participated as partisans in at least four ADR proceedings compared with only 12 percent of executives.

V. Respondents' Opinions About Litigation

This Part shows that the three types of respondents—outside counsel, inside counsel, and executives—had sharply different views about civil litigation.\textsuperscript{46} Outside counsel typically had the most

\textsuperscript{44} As several attorneys pointed out, the distinction between plaintiff and defendant status may be misleading in some cases where the parties have claims against each other and the formal status reflects who "got to the courthouse" or "pulled the trigger" first. Thus the measure of how often the respondents' firms or clients are defendants is necessarily imprecise. Nonetheless, the concept was quite clear to the respondents and most had no problem providing estimates in response to this question.

\textsuperscript{45} For simplicity, I refer to participation as an arbitrator or mediator as experience as a "neutral." I use this term reflecting common usage even though mediators and arbitrators may not necessarily be neutral in fact in some situations. See Lande, supra note 27, at 881-82 (mediators may be biased consciously or unconsciously in favor of actual or prospective repeat customers).

\textsuperscript{46} Respondents were instructed to give their opinions about civil cases other than family cases and not to consider criminal cases when giving their opinions. Family and criminal cases were excluded because preliminary interviews suggested that respondents' opinions about these cases might differ substantially from their opinions about general civil cases. Moreover, business lawyers and executives presumably would have greater experience with the civil justice system generally than family and criminal cases and thus have greater confidence in their opinions about general civil cases. Since the vast majority of lawsuits are settled without trial (and even without pretrial court decision-making), see Herbert M. Kritzer, Adjudication to Settlement: Shading in the Gray, 70 JUDICATURE 161, 163-64 (1986), respondents were
favorable views of litigation whereas the executives were generally quite critical and the inside counsel's views were typically somewhere in between. Part V.A presents respondents' views of how well the courts have been working overall. Part V.B considers how litigation shapes and reflects their professional roles. Part V.C summarizes respondents' evaluations of their own experiences with litigation and their expectations about how increased litigation for their firm or major client would affect them personally. The succeeding portions of this Part analyze respondents' beliefs about litigation along a number of dimensions, including a series of questions about the integrity of the court process, the time and expense involved in litigation, and the sensitivity of the courts to the concerns of businesses. Finally, Part V.H considers respondents' perceptions of opinions about litigation of key actors in their lives, namely authorities in their organizations and professions.

A. Faith in Litigation

Respondents were asked to evaluate how well the court system had been working overall in the past ten years or so. As Table 1 indicates, both outside and inside counsel gave significantly more positive evaluations of the court system than did the executives. About half of the attorneys and only one fifth of the executives believed that the court system is generally working well. Conversely, about a third of the attorneys said that the system is working poorly, compared with more than half of the executives with that opinion.48 Opinions instructed that references to lawsuits and litigation included cases that are settled as well as those that go to trial.

47. Respondents were asked, "How well [do] you think the court system has been working overall in the past ten years or so, on a scale of zero to ten, where zero means very poorly, ten means very well, and five is right in the middle?" The average outside counsel response was 5.4, average inside counsel response was 5.2, and average executive response was 4.2. Although there is no significant statistical difference in average responses between inside counsel and outside counsel, it is interesting to note that the proportion of inside counsel giving the middle response is almost double that of the outside counsel, suggesting more ambivalence by the inside counsel.

48. The executives' opinions correspond to those in a 1993 survey of 1,255 members of the public in California conducted by Yankelovitch Partners, Inc. In that survey, 52% of respondents said they had an "only fair" or "poor" opinion of the courts. The study also included a survey of 251 attorneys, of whom only 20% had that opinion. Elizabeth Ellers, Surveying the Future, 66 S. Cal. L. Rev. 2183, 2189-90 (1993). In a sophisticated survey of Chicago residents, researchers interviewed 1,575 respondents in 1984 (the "first wave") and reinterviewed 804 respondents in 1986 (the "second wave"). These members of the public were apparently not quite as negative in their attitudes toward the court system as were respondents in the later California survey. Considering both waves, 26-30% described the job that the courts were doing as very good or good, 45-47% as fair, and 25-27% as poor or very poor. Tom R. Tyler,
about how well the court system has been working overall is referred to in this Article as the respondents' "faith" in litigation. Part VI considers how respondents' faith in litigation is related to the other variables discussed in this Article.

**Table 1. Opinions about How Well the Court System Has Been Working Overall (percentages)**

<table>
<thead>
<tr>
<th></th>
<th>Outside Counsel</th>
<th>Inside Counsel</th>
<th>Executives</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Well</td>
<td>51</td>
<td>45</td>
<td>20</td>
<td>39</td>
</tr>
<tr>
<td>Middle response</td>
<td>15</td>
<td>28</td>
<td>25</td>
<td>22</td>
</tr>
<tr>
<td>Poorly</td>
<td>34</td>
<td>27</td>
<td>55</td>
<td>38</td>
</tr>
<tr>
<td>Total</td>
<td>100</td>
<td>100</td>
<td>100</td>
<td>99*</td>
</tr>
<tr>
<td>Number of Respondents</td>
<td>73</td>
<td>60</td>
<td>60</td>
<td>193</td>
</tr>
</tbody>
</table>

*Does not add to 100% due to rounding.

**B. Role of Litigation in Respondents' Professional Lives**

Litigation played a very different role in the professional lives of the three groups of respondents. Excerpts from the in-depth interviews provide an especially vivid portrait of how litigation fits into the respondents' lives. This Part considers the perspectives of each group in turn, beginning with outside counsel.

Obviously, litigation is what litigators do. The court system provides the structure in which lawyers do their professional work, especially outside counsel who specialize in litigation. The following is a description of the general perspective of law firm litigators by an attorney who had been in private practice and is now general counsel of a business firm:

**Why People ObeY The Law 51 (1990).** Responding to a related question, 55-59% said that they were somewhat or very satisfied with the way that the courts solve problems compared with 41-45% who said that they were somewhat or very dissatisfied. Id.

49. In some instances, grammatical errors common in spoken language have been left as spoken when this did not interfere with the understanding of the quoted statements. Some of the quotations have been edited to enhance readability. Where speakers repeated several words or used similar patterns of everyday conversation that did not affect the meaning, the repeated words were omitted without ellipses or brackets. All editing has maintained the substance and tone of respondents' statements. Full, unedited transcripts are on file with the author. Because the subjects were promised that the interviews would be confidential, the subjects are identified only by number and indication whether they were an outside counsel, inside counsel, or executive. The interviews were numbered in the order that they were transcribed rather than the order in which they were conducted.
As outside counsel, you want to protect your client's interests to the max from a legal perspective. And what you're looking to do is to practice the law. You want to push your advantages. . . . So outside attorneys are looking at "Here are the tools that I've got. Here's what I need to do. Here's what I could do. Here are issues that I could proceed on for my client if I'm not told absolutely that I shouldn't do some of those things."50

While the litigation process may be frustrating for clients (as described below), it can be very exciting and fulfilling for the attorneys. The outside counsel in this study generally seemed to enjoy their work. As one lawyer who obviously revels in the work of advocacy said, "Our good old-fashioned bare-knuckles brawl in front of the jury isn't such a bad system."51 Nonetheless, a number of lawyers, especially veteran litigators, echoed a theme that "litigation just isn't as much fun as it used to be." Here is one example:

I don't think the [court] system today is anywhere near the fun that it was twenty years ago or more. I think the system is nowhere near as user-friendly as it was. I don't think the system permits the good training and experience to make the lawyers who use it, on a percentage basis, as good as the percentage of good lawyers was. But that again is said by an old-timer as opposed to a newcomer. I just think with the crowds and the cases and the congestion and the attending attitudes that it has created, the whole system doesn't have the same appeal to me that it did years ago. Admittedly I'm older. But the fact of the matter is I think it's an opinion that's shared by many.52

For the vast majority of executives, litigation has very little positive to recommend it. For one thing, many executives feel that the law generally, and the potential of litigation in particular, inhibits them from engaging in the entrepreneurial activities that they are in business to do. One executive said:

As I look back at my business career, I have an antipathy for precedent at times because I find it constraining in terms of the ability to break new ground. So I don't necessarily always look for, "Well, how was it done before? Or what did some previous court decide? Or what did some previous regulatory body conclude on this?" as opposed to "Give me the facts and circumstances today and where we want to go in the future. Try to

50. Interview with inside counsel 4 (Mar. 16, 1994).
51. Interview with outside counsel 1 (Mar. 17, 1994).
52. Interview with outside counsel 3 (Mar. 23, 1994).
define a problem or the opportunity in terms of the visions of the future as opposed to the precedent in the past."

The following quote displays a similar perspective, highlighting how preserving business relationships is much more important than the law, which is presumably the primary consideration in litigation. Although this excerpt is from the general counsel of a conglomerate firm, it probably reflects the views of many executives as well:

Many of our businesses are with an industry in which it's primarily a customer-dominated market. In other words, if I have a dispute with a car company, . . . the overriding consideration is the long-term relationship. Whether we win, lose, or draw, the economics, how strong our case is—none of that matters."

Moreover, on a personal level, participating in litigation provides executives with few rewards.

[Litigation] doesn't fall within [executives'] day-to-day job classification. They're not going to get any stars from anybody for spending a lot of time on litigation, so they turn it over to lawyers. They rely on the lawyers to report back to them. There's seldom any upside to being involved in litigation.

Unlike for lawyers, who are repeat-player litigators, for executives, litigation tends to be more of a one-shot enterprise with enormous potential risks and consequences that they find difficult to comprehend and evaluate. A law firm attorney contrasted his perspective with that of his clients:

I would say that most clients have a lot more frustration with the system than I have because, compared to what they do in the business world, litigation is a lot more risky. I'm used to that. I understand that litigation is risky and that every time I go into the courtroom, I may be well prepared [to lose]. . . . To me, if I'm going to try five cases in a year, I understand that in one of those five I'm probably going to get surprised and I'm not going to get the result that I expect. But for the client, this may

53. Interview with executive 3 (Apr. 15, 1994).

54. Interview with inside counsel 1 (Jan. 22, 1994). This quote reflects findings similar to those in Professor Stewart Macaulay's classic study of the automobile industry where businesspeople generally avoided using legal norms and sanctions because they believed that doing so would threaten ongoing relationships that they valued. Stewart Macaulay, Non-Contractual Relations in Business: A Preliminary Study, 28 Am. Soc. Rev. 55 (1963). This phenomenon is captured quite nicely in the following quote:

If something comes up, you get the other man on the telephone and deal with the problem. You don't read legalistic contract clauses at each other if you ever want to do business again. One doesn't run to lawyers if he wants to stay in business because one must behave decently. Id. at 61.

55. Interview with inside counsel 3 (Mar. 9, 1994).
be the only litigation that they've had in a long period of time and if it's their one case that goes the other way, this is a disappointment to them. They don't like uncertainty. One of the things they try to get in their business transactions is more certainty. . . . They may be trading stocks and they're willing to take risks because they're the ones that are judging the risks and they feel on top of it. And they think, "I'm willing to bet that something is going to happen in the market because that's what I do for a living." But in court they're [thinking], "[Am I] willing to bet [my] 75 percent chance that we're going to win this case [even though] there is a] 25 percent chance [I'm] going to lose the company and get a $10 million verdict against [me]?

. . . That's a real terrible risk for them and they're totally out of control, so they hate it.\textsuperscript{56}

While most executives do not like litigation, most can live with it. However, some have extremely intense feelings about it, as described by the same lawyer:

I do have one client in particular that I've dealt with recently who . . . thinks the world is coming to an end primarily because of product liability lawsuits. He's just on a rampage. [He thinks that] product liability stuff is going to ruin the country and every time I talk to him he says, "Well, I'll just close the doors and leave the key behind. I'll just turn over the whole company."\textsuperscript{57}

Though many executives feel that litigation reduces their control over their affairs, many do not necessarily want to exercise control over litigation because they would then have to assume responsibility for the decisions and possibly be assigned blame for unfavorable outcomes. According to a general counsel:

One of the things that I find here inside our corporation is that frequently there are a lot of people who would just as soon [have] the lawyers make all of the decisions, because it saves [effort] for them to do that. And then there's always somebody else that they can blame.\textsuperscript{58}

Executives may lose face within their organizations not only if the company loses a suit but also for merely suggesting litigation. In the words of one executive:

We are so anti-litigation oriented that [executives in my company who would suggest] that we would commence [litigation would] be more likely to get their hand slapped if they bring in

\textsuperscript{56} Interview with outside counsel 4 (Mar. 18, 1994).
\textsuperscript{57} Id.
\textsuperscript{58} Interview with inside counsel 4 (Mar. 16, 1994).
the lawyers, which has happened. . . . A lawsuit is messy and polarizes people. We slap hands for that because we encourage people to search for the win-win [solutions]. . . . Someone who is happy-go-lucky and throwing around lawsuits—it would probably work against them, at least in this company.69

When a business is involved in litigation, executives are often in the uneasy role of being formally responsible for making the major decisions while being pushed in a particular direction by the way the attorneys frame the choices. As a result, executives often just ratify decisions that the attorneys have already effectively made, at least in cases where the legal issues are especially salient.60 Here is one of several accounts describing how this process works:

I think generally, business lawyers will give the business managers the courtesy and the respect of having them make the decision. But I think that’s, in many instances, a formality. I mean if I come in and I tell you, “Look, the odds we’re going to win this case are a toss-up. I mean we’re before a California jury. It should be a $200,000 case, but it’s a California jury so it could be $2 million. Or we can settle it for $300,000.” I mean there’s not a businessman in this world who’s going to say, “Let’s gamble. Let’s go for that” and then get stung with $2 million. So, yeah, the business guys made the decision but in effect the lawyer has.61

Litigation thus presents executives with few advantages and is accompanied by a dependence on lawyers, which creates additional problems for them. Executives typically face the unappealing choice of getting personally involved with litigation (with its undesirable risk and reward prospects for them) or accepting the consequences of leaving the lawyers without adequate supervision. As one general counsel described:

I think if the lawyer is in control of litigation, there’s a great opportunity—and in fact I’ve observed consistently—that the

59. Interview with executive 3 (Apr. 15, 1994).
60. When executives feel more confident in their knowledge of the issues, they may assert more authority in making decisions. For example, executives may be more assertive in some commercial and employment disputes if they have more confidence in their judgment than in some product liability cases if they do not have as much confidence about their knowledge about the issues involved. Cf. supra text accompanying note 56 (executives are uncomfortable taking risks based on assessment of legal issues even though they are comfortable taking risks in their business operations).
61. Interview with inside counsel 1 (Jan. 22, 1994).
litigation can tend to get out of hand. You find that excess discovery is engaged in. There’s more argument than is necessary. Without firm control, the lawyers are left to their own process.\textsuperscript{62}

Inside counsel reflected a blend of the experience and perspectives of both outside counsel and executives. Like outside counsel, they had been socialized in the legal profession. They worked closely with private attorneys and many had been in private practice themselves before taking positions as corporate counsel. They understood how the litigation process works and did not operate under the same disadvantages as executives in trying to understand and navigate the court system. For many inside counsel, litigation was a major, if not the principal, activity in their work. As noted \textit{infra} in Part V.C, they generally perceived, unlike executives, that additional litigation may actually \textit{enhance} their prestige.

On the other hand, inside counsel were similar to executives in that they were typically much more familiar with the personnel and problems within their companies than were outside counsel. Moreover, like the executives, they tended to identify with their companies and placed disputes in a longer-term perspective of the company’s interests in maintaining relationships with suppliers, customers, employees, and others. Furthermore, while inside counsel may gain stature from litigation, this is particularly so when they are perceived as having achieved a practical and timely resolution in the litigation. Indeed, inside counsel may get the most benefit from narrowly averting litigation and thus demonstrating their worth to their company. As one inside counsel stated, “[Top executives] are looking at the bottom line. [Inside counsel are evaluated based on] getting the issues resolved and what’s it costing us in terms of money, reputation, time, all that sort of thing.”\textsuperscript{63} Thus, unlike for outside counsel, litigation is not an end in itself for inside counsel. Inside counsel often analyzed litigation using a similar approach as executives. One executive compared inside and outside counsel this way:

\begin{quote}
I’m generalizing here and it’s perhaps unfair, but I think the types of attorneys that tend to be on the inside are counsel \[who\] are more motivated and know how to get to win-win \[results]. Whereas I think the hired gun approach is more adversarial by its nature. This is cynical, but \[outside counsel] oftentimes \[are] looking to take it all the way as opposed to measuring inputs and outputs and viewing it as just another business decision.\textsuperscript{64}
\end{quote}

\textsuperscript{62} Interview with inside counsel 3 (Mar. 9, 1994).
\textsuperscript{63} Interview with inside counsel 4 (Mar. 16, 1994).
\textsuperscript{64} Interview with executive 3 (Apr. 15, 1994).
Such observations suggest that inside counsel may feel caught in a tension between the perspectives of outside counsel and executives. As indicated infra in Part V.G, their views about litigation differ sharply from those of both their organizational superiors and colleagues and leaders in their profession.

C. Personal Interest in and Satisfaction with Litigation

Given the differences in the roles that litigation plays in their professional lives, it is not surprising that the attorneys and executives had quite different evaluations of their own personal experiences with litigation. The attorneys, especially outside counsel, were fairly satisfied, whereas the executives were generally very dissatisfied with the results in their experiences with litigation. Three-quarters of outside counsel (76%) and more than half of inside counsel (58%) said that they were satisfied, compared with only one quarter of executives (25%). All three groups of respondents were less satisfied with the process of handling cases in litigation than with the results. Somewhat more than half of outside counsel (57%) said that they were satisfied with the process in their litigation experiences, compared with a third of inside counsel (32%) and one fifth of executives (20%). For each group in the sample, especially the executives, satisfaction with litigation process and results are highly correlated with each other. Neither measure of satisfaction is, however, significantly correlated with how often respondents' firms or clients were defendants, as some might expect.

Respondents were also asked to assess the likely personal consequences if their firm or a major client engaged in a substantially increased volume of litigation. Respondents were asked about five

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65. Executives' reported satisfaction here is considerably less than that reported in a careful 1982 survey that the Gallup Organization conducted for the Insurance Information Institute. Gallup surveyed 205 senior executives in Fortune 500 companies, 204 presidents or owners of small businesses, and 108 risk managers in businesses other than insurance companies. The respondents were asked about the satisfaction of business defendants with results of suits that were settled and brought to trial. They generally believed that businesses were satisfied with settlement results (percentages of satisfaction ranging from 53% to 67% in the three groups) but were not satisfied with trial results (percentages of satisfaction ranging from 38 to 44%). GALLUP ORGANIZATION, supra note 20, at 198-99, 209. In the 1984-85 survey of Chicago residents, of those who had experience in court and knew the results, 50% said that they were very pleased with the outcome and 25% said that they were somewhat pleased. See Tyler, supra note 48, at 89.

66. For further information about correlations, see note 42, infra.

67. Outside counsel were asked about the consequences for private attorneys of a substantial increase in the volume of litigation of a major business client of their law firm. Inside counsel and executives were asked about the consequences for inside
types of consequences for them (or people like them)\textsuperscript{68} of increased volumes of litigation in their firms: (a) effect on their personal compensation, (b) opportunity for advancement, (c) their relative importance within their firm ("prestige"), (d) their ability to work independent of direction of colleagues in other professions ("autonomy"),\textsuperscript{69} and (e) their ability to do work they find very satisfying. Not surprisingly, the three types of respondents had very different expectations about these consequences. The executives' ratings differ significantly from those of both outside and inside counsel on all five variables. Inside and outside counsel's ratings differ significantly from each other regarding compensation, advancement, and prestige, but not regarding autonomy or opportunity to do satisfying work.

More than 85\% of the outside counsel saw increased litigation as beneficial for their compensation, advancement, and prestige, and these perceptions are very highly inter-correlated. Given the incentive structure in law firms in which generating new business has become increasingly important,\textsuperscript{70} this is precisely what one would expect. Regarding opportunities to do satisfying work, 40\% of the outside counsel saw increased litigation as beneficial with almost half (46\%) expecting no change. Although close to half of the outside counsel (43\%) saw increased litigation as enhancing their autonomy,

\begin{itemize}
\item \textsuperscript{68} Respondents were asked about their expectations of the probable consequences of increased volume of litigation for "typical" members of the class of respondent that they belonged to (i.e., attorneys in private firms, inside counsel, or top executives). In preliminary interviews in which respondents were asked about probable effects for them personally, several respondents had difficulty addressing the question because of what they said were idiosyncratic elements in their organization. In response to questions about "typical" members of their class of respondent, many respondents explicitly based their responses on the situation in their own organizations and many others probably did so implicitly. Thus responses to these questions are likely to reflect how respondents perceive their own current situations or similar situations in other firms where they might expect to work in the future.

\item \textsuperscript{69} For each group of respondents, the question referred to the position of those most likely to have formal authority or practical influence over the respondents' activities. The question for outside counsel referred to autonomy from top executives of the major business client (whose volume of litigation increased). The question for inside counsel referred to autonomy from top executives of the firm. The question for executives referred to autonomy from the firm's lawyers.

\item \textsuperscript{70} See Galanter & Palay, supra note 9, at 52-53.
\end{itemize}
almost a third (31%) expected that increased litigation would decrease their autonomy, presumably due to increased monitoring and intervention by their clients.\footnote{Some outside counsel might anticipate that increased litigation would reduce their autonomy due to a need for a larger legal team and thus increased need for supervision within the team. This is certainly plausible. If, however, the respondent anticipated being at the head of such a team, it could result in increased autonomy.} For outside counsel, perceived effects on autonomy and work satisfaction are modestly correlated with each other but neither of these variables is significantly correlated with anticipated effects on compensation, advancement, or prestige.

Almost three quarters of inside counsel (72%) saw increased litigation as increasing their prestige within their firm. Managing legal disputes is one of their principal tasks. Because litigation can be a major source of uncertainty and organizations typically value individuals who can manage or reduce uncertainty, it is not surprising that increased litigation would contribute to the prestige and power of inside counsel within their firms.\footnote{See generally David J. Hickson et al., A Strategic Contingencies Theory of Intraorganizational Power, 16 ADMIN. SCI. Q. 216 (1971).} Though more than half of the inside counsel (53%) did not believe that increased litigation would have any effect on their opportunities for advancement, almost half (42%) believed that it would increase such opportunities, perhaps because it might lead to an increase in the size of the legal department. Unlike outside counsel, however, inside counsel are not generally paid based on the volume of litigation work. This presumably explains why almost two-thirds of the inside counsel (63%) said that increased litigation would not affect their compensation; nonetheless, more than a third (37%) believed that it would result in greater compensation.

Inside counsel were more divided about whether increased litigation would affect their autonomy and opportunities to do satisfying work, and, if so, the direction of the effect. A plurality of inside counsel believed that it would improve their autonomy (40%) and work satisfaction (45%) compared with 23% who believed it would reduce their autonomy and 29% who expected it would reduce their work satisfaction. As with outside counsel, perceived effects on compensation, advancement, and prestige are highly inter-correlated. For inside counsel, perceived effects on advancement and prestige are also moderately correlated with work satisfaction.

The executives generally perceived few personal benefits from increased litigation. Though some of the executives believed that it would not affect them personally, many believed that it would hurt...
them, especially in terms of autonomy (70%) and opportunities to do satisfying work (70%). Much smaller percentages of executives expected it would decrease their compensation (17%), opportunities for advancement (30%), or prestige (26%). Almost all five of the five variables are significantly inter-correlated for executives.

D. Litigation Explosion and Frivolous Lawsuits

Two of the most common criticisms of the civil justice system are that the system is flooded with frivolous lawsuits and that there has been a litigation explosion in recent years. Virtually all of the executives (94%) said that there had been a litigation explosion the past ten years or so, and almost as many inside counsel (82%) agreed. Even among the outside counsel, almost half (49%) agreed, compared with 40% who disagreed.\(^\text{73}\)

Respondents were also asked how often lawsuits initiated by individuals against businesses are so frivolous that they should never have been filed in court. Almost three quarters of the executives (70%) thought that more than half of such cases are so frivolous.\(^\text{74}\) This compares with more than half of the inside counsel (53%) but only 14% of the outside counsel who characterized these lawsuits in this way. Surprisingly, only for the outside counsel were perceptions

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73. In addition, six percent of the executives, seven percent of the inside counsel, and twelve percent of the outside counsel said that there had been an increase in litigation but would not characterize it as an "explosion."

A 1987 survey of 578 lawyers conducted for the American Bar Association found that 62% of the lawyers believed that there was a litigation explosion then. Paul Reidinger, The Litigation Boom, A.B.A. J., Feb. 1, 1987, at 37. A 1982 survey of the general public, senior corporate executives, entrepreneurs in small businesses, and business risk managers did not ask about a "litigation explosion" but did ask whether the number of lawsuits had changed in the prior year. All four groups believed that there had been an increase, including 69% of the public and 72 to 83% of the business respondents. Gallup Organization, supra note 20, at 14.

Empirical studies of actual litigation trends are at odds the perception of a generalized litigation explosion. With respect to many types of cases, the litigation rates have been relatively level. Sharp increases in litigation rates have occurred in particular types of cases such as family law, criminal, and certain types of product liability cases. A large proportion of the product liability cases deal with a relatively small number of products and businesses. See Galanter, supra note 18, at 1102-09.

74. More executives seem to have become concerned about frivolous suits in recent years. In the 1982 Gallup survey, only 37 to 43% of the three groups of business respondents (as well as 31% of the general public) said that plaintiffs have a justified cause for bringing suit in less than half the cases. Gallup Organization, supra note 20, at 17. Because of the reversal in the wording of this question, these figures are comparable to the 70% of executives in my survey who believe that more than half of cases are frivolous. The question in my survey specifically asked about suits by individuals against businesses, which may account for some or all of the difference between the two survey results.
of a litigation explosion significantly correlated with proportion of frivolous suits. Many of the respondents recited, with gusto, cases that they had heard of that they felt were outrageous,\footnote{Hayden described several “horror stories” that were widely publicized in the mass media. Journalistic investigations revealed that the horror stories were misleading but these rarely achieve the level of notoriety of the horror stories themselves. Hayden, supra note 17, at 104-08. Perhaps the most famous contemporary legal horror story is about the woman who won a $3 million award against McDonald's because she was burned when she put a coffee cup in her lap. Most people are probably not aware that “McDonald's knew the danger of selling coffee [fifteen to twenty degrees hotter than its competitors]—it had received 700 complaints in the previous five years, some involving serious burns—but it never considered changing its practice.” Moreover, few people probably know that the plaintiff originally demanded only $2000 or that the trial judge reduced the total award to $640,000. Gross & Syverud, supra note 11, at 5, 7.} such as the following:

There was a person who had some sort of gallbladder surgery. . . . The surgeon, by mistake, cut part of her bladder. So they just sewed her up with a smaller bladder. . . . If the normal person pees five times a day, she had to do it ten times a day. She got $11 million. They could do a lot of things to me for $11 million. Come on, is this right? Was she right with the law and that some injustice that happened to her? Of course. But the idea had got fanned into such a big deal that the jury went crazy and the judge wasn't going to stop it.\footnote{Interview with inside counsel 2 (Mar. 2, 1994).}

There was a case in which a boy was riding a bicycle with a helmet on and had an accident. And they came back and they awarded the child $8 million. The suit was based on the fact that the bicycle manufacturer didn't tell the kid that he needed to have a light on his bike when he rode at night.\footnote{Interview with executive 2 (Apr. 8, 1994).}

A young girl's mother and dad sue a school board in Texas for the right to play football on the boy's football team. They prevail. The girl is injured. Then her parents sue the school board for failing to protect her . . . and she prevails. I think that's an unfair result. There's a lot of those kinds of cases.\footnote{Interview with outside counsel 3 (Mar. 23, 1994).}

For many of the respondents, the mere fact that the suit was filed is a moral affront, regardless of the outcome.\footnote{Cf: David M. Engel, The Oven Bird's Song: Insiders, Outsiders, and Personal Injuries in an American Community, 18 L. & Soc'y Rev. 551, 574-77 (1984) (members of the public disapproved of filing tort suits which were seen as “intrusions upon existing relationships, as pretexts for forced exchanges, as inappropriate attempts to redistribute wealth, and as limitations upon individual freedom”).} This is illustrated by the following colloquy with the general counsel of a food company:

75. Hayden described several “horror stories” that were widely publicized in the mass media. Journalistic investigations revealed that the horror stories were misleading but these rarely achieve the level of notoriety of the horror stories themselves. Hayden, supra note 17, at 104-08. Perhaps the most famous contemporary legal horror story is about the woman who won a $3 million award against McDonald's because she was burned when she put a coffee cup in her lap. Most people are probably not aware that “McDonald's knew the danger of selling coffee [fifteen to twenty degrees hotter than its competitors]—it had received 700 complaints in the previous five years, some involving serious burns—but it never considered changing its practice.” Moreover, few people probably know that the plaintiff originally demanded only $2000 or that the trial judge reduced the total award to $640,000. Gross & Syverud, supra note 11, at 5, 7.

76. Interview with inside counsel 2 (Mar. 2, 1994).

77. Interview with executive 2 (Apr. 8, 1994).

78. Interview with outside counsel 3 (Mar. 23, 1994).

79. Cf: David M. Engel, The Oven Bird's Song: Insiders, Outsiders, and Personal Injuries in an American Community, 18 L. & Soc'y Rev. 551, 574-77 (1984) (members of the public disapproved of filing tort suits which were seen as “intrusions upon existing relationships, as pretexts for forced exchanges, as inappropriate attempts to redistribute wealth, and as limitations upon individual freedom”).
[There] are the little ticky-tacky [lawsuits] and you'd be surprised at how many civil cases you can have. People sue for really crazy things. . . .

Question: What happens in those silly cases?

Well, usually it gets dismissed fairly quickly. I'm talking about really silly ones. We had one . . . where the top ten or fifteen food companies were being sued by an individual out in California, of course. This individual was suing them because on the food packages, they had a little "K" for kosher and he said it was infringing on his freedom of religion because it was trying to make him Jewish by eating the food. This was a lawsuit! This was a lawsuit that was filed!

Question: And what happened to it?

Oh, it was dismissed immediately. It was filed! This whole thing went on, the [plaintiff's] lawyer saying, "[It's] not me. I'm just representing them." [So I said,] "Come on. Why are you even doing it?"

Even some lawyers who believed that popular stories about frivolous suits exaggerate the extent of the problem believe that they can cause serious difficulties even if they are eventually rejected by the courts:

I think there are a lot fewer frivolous cases than folklore among business people would have it. . . . [Y]ou hear the horror stories of a frivolous case and the plaintiff got $2 million. I bet that hasn't happened very often. If it was so frivolous, they wouldn't have gotten $2 million.

There are frivolous cases that are filed and when that happens, it is sometimes expensive to get rid of them. Your chances of actually getting attorney's fees are not that good, particularly if you represent a fairly good-sized business. It's some poor plaintiff that [does not have a] very good lawyer and they really are off the deep end in filing their complaint. I think most judges are going to say, "I may dismiss the case, I'll give you summary judgment, but I'm not going to assess attorney's fees. It's not the plaintiff's fault. They went to some lawyer that was the best they could afford [who] wasn't very good. I know Joe Schmoe. He's in here all the time. He's struggling. He doesn't have much of a practice. You guys ran up $40,000 worth of legal fees." . . . And so from the businessperson's standpoint it's, "I got sued. It was a bullshit lawsuit. My lawyer spent $40,000 getting rid of it and we couldn't get any attorney's fees from the other side. What a travesty!"

80. Interview with inside counsel 2 (Mar. 2, 1994).
81. Interview with outside counsel 4 (Mar. 18, 1994).
E. Integrity of the Search for Truth and Fairness

This Part analyzes respondents' confidence in litigation's ability to produce fair outcomes based on the truth. Consistent with the preceding findings, the attorneys generally had more faith in the integrity of the litigation process than did the executives. The attorneys had generally favorable assessments of the fairness of outcomes in lawsuits unlike most of the executives in this study. A majority of the outside counsel (70%) and inside counsel (54%) viewed court results as being fair more than half the time compared with less than a third of the executives (30%) who believed that.

In response to a related question, most respondents said that the legal system is not a good mechanism for finding the truth. Forty percent of outside counsel believed that the legal system correctly determines the truth more than half the time, compared with 38% of inside counsel and 28% of executives, suggesting little confidence in this aspect of the justice system. Indeed, many respondents laughed cynically when the proposition was posed to them. The

82. A principal function of litigation is to produce appropriately reasoned resolutions of disputes. See supra text accompanying note 2 (Resnik's justification for adjudication as producing outcomes superior to those produced with little or no process). I use the term "integrity" to refer to the degree to which litigation is perceived to produce such outcomes.

83. The views of the Chicago residents in the 1984-85 survey were most similar to those of the inside counsel's views, as 56-59% agreed or strongly agreed that court decisions in Chicago are almost always fair, compared with 41-44% who disagreed or strongly disagreed. TYLER, supra note 48, at 49.

84. Several reviewers noted that finding the truth correctly at least half the time is a fairly low standard for evaluating the ability to find the truth in litigation. One reviewer characterized the respondents' views as "not merely an indictment [of the system]; it is a hanging charge." It is tempting to compare the standard of finding the truth at least half the time with the results of a coin toss where one will get a particular result 50% of the time simply by chance. Of course, determining "the truth" in contested lawsuits is much more complicated than determining the result of a coin toss. Moreover, litigation usually involves making multiple determinations. If vindication of the truth of one's perspective is important, individuals may well focus more on instances where the court erred about the facts than when the court made (what they believe to be) correct determinations. For example, if there are five facts to be adjudicated, partisans may feel that the court did not find the truth if they believe that even one of the five determinations was erroneous. Considering the coin toss analogy, the probability of correctly calling a set of five tosses is substantially less than 50%. I suspect, however, that most people would not make such distinctions in daily life when determining whether the court "got it right." Thus these survey findings suggest a considerable lack of confidence in this feature of litigation, even among the outside counsel.

85. This is similar to Resnik's experiences in casual conversations that description of cross-examination as the "greatest legal engine ever invented for the discovery of truth" often generated chuckles. See supra text accompanying note 2.
lawyers, especially the outside counsel, seemed to think that the litigation process is imperfect but somehow muddles through to produce the right result in many cases even if it is not based on an accurate determination of the facts. This may be due, in part, to the premise that an adversary system is intended to guarantee opportunities to make one's case and that if parties have been given their procedural rights, the results are presumably correct by definition. The executives obviously had less confidence in both the truth-finding process itself and the fairness of the results, perhaps because, unlike the legal culture, their professional culture is not based on the premises of an adversarial legal system. For all three groups of respondents, confidence in the truth-finding process and the fairness of the results are significantly correlated.

In the in-depth interviews, many respondents, especially the lawyers, expressed confidence in the fairness of court results generally. For example, one general counsel said:

Courts are fairly fair. They're fairly predictable. If you read the law, if you look at the issues before the court, you generally know what is going to happen. There are cases that are 51/49 that's right on the line, but they're the rare cases. Most of the cases are 70/30. Pretty much it's going to be your win unless you really blow it here. Or you're going to lose this one and you really ought to be dealing with it.

Supporters of the court system typically qualified their support, however, indicating that it generally works fairly well but noting various exceptions. Here an outside counsel argued that the courts are basically working properly and he attributed the problems that do exist to a minority of litigants and attorneys who are selfish and uncooperative:

86. See supra note 11 (arguing that the essence of adversarial litigation is procedure and thus justice is defined in procedural terms).
87. It is interesting to compare this limited confidence in the operation of litigation with a greater confidence in the system of law as a means of ordering relations. The vast majority of all respondents agreed that legal rules and precedents provide useful guidelines for structuring business relations. This included not only 90% of outside counsel and 77% of inside counsel but also 65% of executives. Moreover, approximately 60% of all three types of respondents agreed that "the courts help restrain inappropriate business practices," suggesting some faith in the value of litigation generally to maintain commercial norms. Unfortunately, the ambiguous wording of the question makes it difficult to separate a faith in a deterrent role of litigation in general from a faith in actual enforcement of business norms in specific cases. Given the pattern of responses to the other questions, I suspect that the executives probably have greater faith in the general deterrent role and the attorneys have more confidence in both roles of litigation.
88. Interview with inside counsel 2 (Mar. 2, 1994).
The court system, I think, is working fine. . . . When I go in to try a case, the judges do a good job. Things are fairly timely and so on and so forth. When you get involved in one of these Superfund cases where you've got 100 parties and bunches of lawyers and all that, I don't know how much it's the responsibility of the judge or the court system to try to iron all those things out. . . . Because ultimately, the judge cannot take away from someone the right to have all the due process and go through all the procedure. . . . What I find frustrating is that it somehow is very difficult for people to come to a conclusion . . . that it doesn't make economic sense for [them] to exercise all [their] rights to the fullest. . . . Part of the problem [is that] it only takes a couple of stinkers to say, "We're going to take advantage of that. We know that you're willing to give up some of your rights. We're going to say that we're not willing to give up any of ours and as a result we're going to get a little bit better deal." And then everybody says, "Well gee, if they're going to be an S.O.B. about it, I don't—" It just all falls apart then.89

Many supporters of the court system qualified their otherwise favorable view because of concerns about the time and expense of litigation.90 For example, one lawyer said, "I may be old-fashioned in this way, but litigation is a good dispute resolution mechanism too. It's a shame that it's so hard to get to. But there are lots of disputes where litigation is quite right with the result."91 Another example of this perspective is from the attorney who said that the courts are "fairly fair" and predictable. When I asked how well he thought the court system had been working in the past ten years or so, I noted for the record that he rolled his eyes, suggesting something between disbelief and disgust. He responded:

Rolled his eyes and laughed! I mean, the system is overburdened. It's in rough shape. You get justice but it takes so long, maybe the justice isn't worth it. The civil system is in bad shape. The criminal system is in worse [shape]. Given the justice systems I've seen outside the U.S., we have a phenomenal system [here]. We have very capable people; the judges are sharp cookies. You can always get a bad apple but these are intelligent people, dedicated and all of that stuff. But intelligent and dedicated are useless if you're overburdened. . . . I mean if you had enough courtrooms and you had enough judges and you had enough jails, . . . the system could actually run smoothly.

89. Interview with outside counsel 4 (Mar. 18, 1994).
90. Opinions about the time and expense involved in litigation are discussed further infra Part V.F.
91. Interview with outside counsel 1 (Mar. 17, 1994).
and people could actually get a speedy resolution of rights. Then I think the system could work. But it ain't working and it's getting worse and people are terrified of it.\textsuperscript{92}

Yet another reason why lawyers and executives reacted negatively to litigation is that they believed that it is not framed in terms of their substantive concerns, which they think are often too complex for the courts. This view was expressed by a utility company executive:

> Judges are trained in the law, not necessarily in the fundamentals of a particular industry or avenue of commerce. They're coached on fairness and precedent and things like that. \ldots For example, we have a number of disputes with people who we transact with in a transmission grid. Well, that's a very complex engineering-econometric type consideration where we use those mechanisms. It's just not the type of thing you want to bring to the courts.\textsuperscript{93}

While a few respondents expressed unqualified support for litigation, quite a number of lawyers and executives expressed unqualified criticism, such as the following statement from a corporate counsel:

> I started out as a plaintiff's trial attorney with a strong belief in the jury system and a strong belief that, while it had its flaws, it was the best we had to offer. I don't believe that anymore. I think the system is broken. I think it behooves you to do anything possible to avoid it. I find it hard to find any area in which the civil justice or criminal justice system works anymore. \ldots You can go through all of the different systems, whether it be family law, through divorce, products claims, malpractice claims, securities litigation, you know, virtually every category of major litigation. And you look at it then in terms of some kind of a set of objective criteria that you would apply against any kind of a dispute resolution process. Is it predictable, reliable in terms of a rule? Are the transaction costs reasonable in terms of a result? Does it provide guidance then for the future? Not a single one of these systems would even get a passing grade. I mean all of them—to a one—are abject failures.\textsuperscript{94}

### F. Jury Decisions and Perceived Bias Against Business

Several survey questions about jury decisions helped to clarify the respondents' perceptions about the integrity of the litigation process, particularly in cases involving businesses. These questions are

\begin{itemize}
  \item \textsuperscript{92} Interview with inside counsel 2 (Mar. 2, 1994).
  \item \textsuperscript{93} Interview with executive 3 (Apr. 15, 1994).
  \item \textsuperscript{94} Interview with inside counsel 1 (Jan. 22, 1994).
\end{itemize}
especially interesting in light of public criticism regarding the role of juries and claims that the jury system is responsible for problems in the legal system and society more generally.95 As with the preceding items, outside counsel were generally most sympathetic to litigation and the executives were least sympathetic.

One question asked respondents' opinions about how often juries do a good job in determining liability in lawsuits by individuals against businesses. More than half of the executives (58%) and almost that proportion of inside counsel (46%) said that juries do a good job in less than half these cases, compared with only 12% of the outside counsel. All three groups of respondents had less confidence in juries' abilities to determine damages than liability. About three quarters of the executives (82%) and inside counsel (74%) thought that juries do a good job in assessing damages in less than half the cases, compared with 44% of the outside counsel.96

Despite the different assessments of the two types of jury decisions—damages and liability—respondents' opinions about them are highly correlated for all three groups. One attorney illustrated this contrast of opinion about the two types of jury decisions: "There may be product liability situations or civil rights situations where this plaintiff should win. I think as those go, all that's O.K. The size of the award [is where] the jury has gone nuts."97 Another attorney expressed a similar frustration with juries' decision-making about damages:

[Jurors will] focus on something that is more akin to "L.A. Law" than is true in a courtroom context because that's what they've been schooled in terms of what a courtroom is. And in terms of monetary judgments and awards, they liken the numbers they see there to the lottery numbers. And I don't know if anyone has done a statistical study, but I think that the sheer [number

95. See Galanter, supra note 18, at 1095-98.
96. The 1982 Gallup survey also indicated widespread lack of confidence in juries' decisions about damages. Sixty-five to 77% of the business respondents (and 57% of the general public) thought that judges rather than juries should determine the amount of damages when a defendant is liable. Gallup Organization, supra notes 20, 65, at 29. Moreover, 61 to 72% of the business respondents (and 40% of the general public) believed that the amount of damages awarded in civil suits is too high. Id. at 32.

Reviewing social science research on jury behavior, Galanter concluded that while "critics claim that jury verdicts are irresponsible and capricious, serious students of the jury are virtually unanimous in their high regard for the jury as a decision-maker." Galanter, supra note 18, at 1109-15.
97. Interview with inside counsel 2 (Mar. 2, 1994); see also supra text accompanying note 76 (account of a suit where respondent agreed with the decision on liability but not damages).
of zeros that come up in lotteries make it no longer [unusual] for a jury to talk about $5 million, $10 million, $100 million, maybe a billion dollars in some of their judgments. And [they] do it without any relationship to what the damage was.98

Many of the comments about juries focused on the capabilities of the jurors to make decisions. One general counsel expressed the view that juries' good judgment is often outweighed by emotion, saying, "Oh, a plaintiff's lawyer can get [jurors] all riled up on emotion. It's got nothing to do with the law. It's got nothing to do with real liability. It's got nothing to do with real facts. It's got to do with who's the better actor."99

Several executives explained their views that businesses should and do try to avoid jury trials because issues are too complex for jurors to handle.

Is it any surprise that many commercial contracts these days have a clause where each party waives its right to a trial by jury? Doesn't that tell you something? That they are not willing to trust twelve peers off the street with the complexity of their business transaction. . . . And that doesn't mean that people are stupid. It means that businesses have become very complex in many respects. The nature of their product offerings, not necessarily how the business is run, but the nature of the products. Open up the insides of a laptop computer and try to have some jury decide whether or not there has been a patent infringement on the design of a microchip. I certainly wouldn't be capable of doing that.100

Responses to several questions revealed that respondents generally thought that litigation is not congenial for businesses. About three-quarters of the executives (75%) and inside counsel (73%) believed that juries judge businesses more harshly than juries judge individuals. Three fifths of the outside counsel (60%) shared this view.101 On a similar point, respondents generally believed that the courts are not very sensitive to businesses' concerns. About two-thirds of all three types of respondents disagreed with the statement that "the legal system generally considers the needs and practices of

98. Interview with inside counsel 1 (Jan. 22, 1994).
100. Interview with executive 3 (Apr. 15, 1994).
101. But see Valerie P. Hans & William S. Lofquist, Jurors' Judgments of Business Liability in Tort Cases: Implications for the Litigation Explosion Debate, 26 L. & Soc'y Rev. 85, 94-104 (1992) (study of jurors in cases involving businesses found that most jurors were skeptical of plaintiffs' claims and did not generally believe that businesses should be held to a higher standard than individuals).
particular business communities.” This includes 67% of executives, 68% of inside counsel, and 61% of outside counsel. Not surprisingly, the vast majority of respondents believed that “lawsuits involving a business divert economic resources from more productive activities.” Almost all of the executives (92%) and inside counsel (91%) agreed with that statement as did 76% of the outside counsel. 102 This distrust of litigation and juries in particular is reflected in the following relatively sober explanation of an apparent jury bias against businesses:

I think jurors are sometimes willing to do justice . . . because they just view this rule . . . as one that kind of comes up with a harsh result in this case. And those are the cases that maybe will go to a jury more often than not because a plaintiff’s lawyer knows that and [thinks], “God, if I get by this motion for summary judgment and get to a jury, I’ve got a real chance because that argument about, ‘Well the law says X is just not going to be real persuasive to most folks on the jury.” 103

G. Time and Expense of Litigation

Criticism of the time and expense of litigation is commonplace in our society. In a recent response to this concern, the federal government enacted the Civil Justice Reform Act of 1990104 which required federal courts to develop “civil justice expense and delay reduction plans.” 105 Concerns about time and expense might be especially salient for businesses as time and expenses incurred in litigation could have substantial effects on profitability. Because criticisms of the time and expense of litigation are so common and sometimes not carefully considered, the questions in the survey were prefaced with the phrase “considering realistically how much [or long] you think that lawsuits should cost [or take].” Nonetheless, the responses by all three groups were extremely critical of litigation. Virtually all of the executives (96%) and inside counsel (91%) and almost two-thirds of the outside counsel (64%) said that less than half of suits involving

102. The views in this survey are even more negative than in a 1993 survey of 815 members of the general public in which three-quarters believed that the amount of litigation was hampering the nation’s recovery. Randall Samborn, Anti-Lawyer Attitude Up, Nat’l L.J., Aug. 9, 1993, at 1. The fact that “only” three-quarters of the public expressed this view compared with 92% of executives in my survey may be due to the fact that the National Law Journal survey focused specifically on the nation’s recovery rather than the economy in general.
103. Interview with outside counsel 4 (Mar. 18, 1994).
a business are resolved at an appropriate cost. Judgments about the
time involved in litigation were only slightly better. Eighty-six per-
cent of the executives, 79% of the inside counsel and 63% of the
outside counsel said that less than half of suits involving a business
are resolved within an appropriate amount of time.\textsuperscript{106} Judgments
about litigation time and costs are highly correlated with each other
for all three types of respondents.

An executive gave the following account of how litigation costs
can seem to snowball out of control as part of routine practice and as
a result of lawyers' interests in perpetuating litigation to increase
their fees:

How do I collect from someone that isn't paying me? My routine
is very simple. I write threatening letters. . . . Next, if that
doesn't do it, I have my lawyer write the same kind of threaten-
ing letter on his letterhead, saying in no uncertain terms that if
you do not . . . settle this account, we will do the following. Well
what else can you do if the guy doesn't do it? You then have to
file suit. And really there's no quick way of saying, "Let's go
right now into arbitration." The guy gets a . . . subpoena and . . .
his lawyer answers the subpoena. . . . We've started to shell out
money already. And nobody has stopped the clock and said,
"Wait. How much is this going to cost me before I file this and
he files that and now we go into discovery?" . . . Before you know
it, it starts to get expensive. I don't think that there's any great
incentive for the legal system [to keep the costs low], with all
due respect to my friends who are lawyers.\textsuperscript{107}

A general counsel who had previously been in private practice
explained that the delay and expense of litigation was due, at least in
part, to attorneys' concerns about ethical duties and potential mal-
practice liability.

[Attorneys'] professional standards and what they were trying
to accomplish may not be aligned with what's really in the best
interest of the business. . . . The outside counsel also has to take

\textsuperscript{106} These opinions are comparable to the 1982 Gallup survey in which 78 to 89%
of the business respondents (and 67% of the general public) said that there are consid-
erable delays in bringing lawsuits to trial (as opposed to only moderate, slight, or no
lawyers found that 71% believed that funding for the courts will decline relative to
court workloads and 89% believed that criminal cases will require an increasing share
of court time and resources. \textit{Deborah R. Hensler & Marisa E. Reddy, California
Lawyers View the Future: A Report to the Commission on the Future of the
Legal Profession and the State Bar} 8 (1994). Obviously both of these trends would
reduce court resources available for civil cases and could slow the civil litigation
process.

\textsuperscript{107} Interview with executive 4 (Apr. 7, 1994).
into consideration . . . “Are you following the code of ethics in terms of what you have to do? Are you covering yourself in the potential malpractice claim? If you forego doing certain things—unless it’s real clear that your client understands exactly what it is that you’re not doing and why—are you going to end up in a situation that if the outcome is not good, they’re going to turn around and sue you for malpractice?” You’ve got that kind of attention too and I think those types of cases have certainly increased very significantly in the last number of years.\textsuperscript{108}

Others attribute delay and expense to attorneys’ sloppy litigation practices. Here a veteran inside counsel described what he saw as dysfunctions of litigation and how plaintiffs’ attorneys contributed to the problems:

In a substantial number of cases, people who are not in the elite plaintiff’s counsel hierarchy often don’t prepare their case until they absolutely have to. So what they do is file a suit to beat the statute of limitations, they don’t work it, they send out form interrogatories, and so forth. They take depositions willy-nilly and even those they don’t take for a substantial period of time. The plaintiffs themselves are sitting there—one, two, three, four years pass. Finally you end up at the courthouse steps with substantial money having been sunk into it and the plaintiff’s attorney, by that time, realizes what they’ve got and they settle. So you’ve all just wasted a tremendous amount of money that could have gone to compensate the plaintiff in the first place. . . . When we look at the costs of our litigation in the products [liability] area, two-thirds of it goes for discovery. Ninety-five percent of the material generated in discovery is never used at trial. So it’s an incredible waste. People will say that within the first six weeks of having a case, you know probably 80-90% of what you’ll ever know about that case on both sides.\textsuperscript{109}

This attorney was no more charitable in describing what he saw as the defense bar’s generating an expensive process that seems out of control:

I think part of the problem is the defense bar or the “litigators.” [I think that a] tremendous [segment] of the litigation fraternity [are] people who have never tried a lawsuit. Their training and their sole practice is generating this huge mass of discovery. You get this team together and they get focused on “a case” and

\textsuperscript{108} Interview with inside counsel 4 (Mar. 16, 1994).
\textsuperscript{109} Interview with inside counsel 1 (Jan. 22, 1994).
they just start the processes. It's no longer, in some cases, dozens of depositions. It's hundreds of depositions. You can do what you can to try to control it, but it's extraordinarily difficult to control. You've invested these incredible sums of money and the person who can make the decision to settle it is being fed a description of the case that may not be totally accurate because, in part, some of the people who are working it up aren't experienced or skilled enough in the actual trial of the lawsuit to know whether the case is winnable and what the odds are.110

H. Perception of Leaders' Opinions

Peoples' opinions are often affected by the perceived opinions of others who play an important role in their lives. This Part analyzes what respondents think that authorities in their professional lives believe about litigation. It focuses on perceived opinions of top executives, organizational superiors, and leaders in the respondents' professions.

In the corporate context, top executives are often seen as the ultimate authorities to be satisfied. Thus their views may be taken as an important indicator of value in the corporate world. Given the high value placed on obtaining successful results in both business and litigation, top executives' views on litigation outcomes may be especially influential. Respondents in this study were asked their opinion about how often top executives are satisfied with results of litigation involving a business. All three groups believed that top executives are more often dissatisfied than they are satisfied. This perception was especially prevalent among the executives in this study. Sixty-three percent of the respondents who were executives believed that top executives were satisfied in less than half the cases, compared with 42% of inside counsel and 47% of outside counsel. By contrast, only 10% of the respondents who were executives believed that top executives are satisfied in more than half the cases, compared with 28% of the inside counsel and 30% of the outside counsel.

Survey respondents were asked a somewhat similar question about perceived opinions of their "organizational superiors" about litigation. Unlike the preceding question, this one focused on the class of people that each respondent identified as having the greatest influence in their current position.111 Moreover, instead of asking specifically about satisfaction with results of business litigation, this question asked about the superiors' general evaluations of how well

110. Id.
111. For a definition of the term "organizational superior," see supra Part IV.A.
the court system has been working in the past ten years; these questions used the same wording as in the question about the respondents' own views, as described in Part V.A. Most respondents believed that their organizational superiors take a dim view of the traditional litigation process. More than half of the outside counsel (54%), two-thirds of executives (67%), and five out of six inside counsel (84%) believed that their organizational superiors think that the court system has been working poorly. The majority of each group of respondents had more faith in litigation than they believed their superiors did. This was especially true for inside counsel (77%), but it was also the case with outside counsel (59%) and executives (51%).

Thus, relative to their perceptions of their superiors' views, many respondents—particularly inside counsel—saw their own views of litigation as relatively moderate.

As professionals, respondents' opinions may be affected by the perceived opinions of leaders in their profession. About two-thirds of both the outside counsel (62%) and inside counsel (67%) believed that leaders of the bar think that the courts are working well. Roughly the same percentage of executives (70%) said that they think that the leaders of their profession think that the courts are working poorly. In general, respondents believed that their professional leaders had more extreme opinions than the respondents did themselves. In other words, executives generally had more faith in litigation than they believed their professional leaders do, whereas outside counsel and especially inside counsel generally had less faith in litigation than they believed bar leaders do. Forty-two percent of the executives gave higher overall ratings of litigation than they believed their professional leaders would and only 24% gave lower overall ratings than they believed their professional leaders would. Forty-five percent of outside counsel gave ratings of litigation lower than perceived bar leaders' ratings, compared with 20% who gave ratings higher than perceived bar leaders' ratings. The gap is even larger for inside counsel: Fifty-four percent of inside counsel gave ratings of litigation lower than perceived bar leaders' ratings, compared with 19% who gave ratings higher than perceived bar leaders' ratings.

These patterns suggest that many respondents may experience a tension between the pressures from their organization and their profession. This tension seems especially pronounced for inside counsel.

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112. One inside counsel who sharply criticized the litigation process characterized the opinions of top managers in his firm in this way: "They would express to you views much stronger in the negative than mine." Interview with inside counsel 3 (Mar. 9, 1994).
who often believed that their bosses disliked if not detested litigation while their professional leaders thought that litigation was generally working quite nicely. Inside counsel themselves did not think that litigation was quite as bad as they believed their superiors did, nor did they think it quite as good as did the leaders of their profession. Their perceptions of the negative opinions of top executives may be best evidenced by the fact that many respondents (of all types) laughed when asked about executives’ opinions about litigation.\textsuperscript{113} Some inside counsel also felt estranged from bar leaders as reflected by one general counsel who stated, “I see no recognition of a need to change [the litigation system] . . . by the bar or by the judiciary system. I think the bar generally feels that it’s a major concession if they admit that there might be something wrong with it.”\textsuperscript{114}

VI. Correlates of Faith in Litigation

Part V shows that opinions of business lawyers and executives about litigation generally ranged from moderately positive to extremely negative. Outside counsel tended to be the most positive, executives the most negative, and inside counsel fell in between. This Part analyzes how the factors discussed in Part V are (or are not) related to the respondents’ overall faith in litigation.\textsuperscript{115} The patterns

\textsuperscript{113} Some respondents also joked about using negative numbers in response to these questions.

\textsuperscript{114} Interview with inside counsel 1 (Jan. 22, 1994).

\textsuperscript{115} Ideally, one would hope that a survey like this would provide strong evidence about what “causes” people to hold the opinions they do about litigation. This study does provide evidence that is quite suggestive but it is not sufficient to support strong claims of causation for several reasons. One of the basic elements for establishing causality is called causal order; in other words, for $X$ to cause $Y$, $X$ must precede $Y$ in time. When considering discrete events, this is usually not problematic. For example, if someone is in an automobile collision and sustains serious injuries, it is generally possible to determine whether the injuries preceded the collision. By contrast, the process of opinion formation probably is often an iterative process involving reciprocal causation, i.e., various opinions (or perceptions or other cognitive states) may influence each other. If that is the case, correlations between opinions may be good, though not conclusive, evidence of such a causal process.

Even when causal order is not problematic, correlations in themselves do not prove causation because the correlations may be “spurious.” An association is spurious when the two associated events are both caused by the same prior cause. For example, there may a correlation between the volume of swimsuit sales and number of drowning deaths but this would not prove that the sales caused the deaths or vice versa; presumably they are both caused in part by the amount of swimming associated with the swimming season. For further discussion of causal inference in this study, see Lande, Ideology of Disputing, *supra* note 7, at 59-64.

Where there are multiple related variables, one might use multiple regression statistics rather than correlations to analyze relationships between variables because
of correlations differ greatly among the three types of respondents, as summarized in Part VII.

Opinions about how well the court system has been working overall ("faith in litigation")\textsuperscript{116} were not significantly related to most of the variables describing respondents' organizational settings and amounts of professional and disputing experience discussed in Part IV (see Tables 2 and 3). Moreover, in the relatively few instances where there is a significant correlation,\textsuperscript{117} the relationships were fairly weak and are significant for only one type of respondent. For outside counsel, faith in litigation is related to length of their professional experience and the size of their firms. Older attorneys, who had been practicing law for longer periods in their careers and in their current firms (variables which were all correlated with each other) had less favorable opinions about litigation than younger attorneys with less experience. In addition, attorneys in larger firms (i.e., firms with more attorneys and more offices) had more favorable opinions than attorneys in smaller firms. Outside counsel who had more experience as partisans in ADR (presumably as advocates) had less favorable opinions about litigation.\textsuperscript{118} Among inside counsel, faith in litigation was related to the percentage of their careers in which they focused primarily on litigation. Inside counsel who had greater percentages of their careers devoted to litigation had more

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\textsuperscript{116} See \textit{supra} Part V.A.

\textsuperscript{117} For discussion of correlations, see \textit{supra}, note 42. For discussion of statistical significance, see \textit{supra} note 37. Note that the statistical significance of correlations is in part a function of sample size; a given correlation coefficient is more significant in a larger sample than a smaller sample. Thus because the sample of outside counsel is larger than the samples of inside counsel and executives in this study, a particular correlation coefficient in Tables 2-7 may be statistically significant at a given level for one group but not others.

\textsuperscript{118} This may be an example of reciprocal causation similar to that described in \textit{supra} note 115. Frustration with litigation may have prompted some attorneys to explore ADR alternatives, and experience with ADR (however caused) may have led to negative comparative judgments about litigation.
favorable opinions about litigation than those with smaller proportions of their careers in litigation. Executives' faith in litigation was related to the number of cases in which they were parties—the more cases in which they were parties, the less they liked litigation.\textsuperscript{119}

\begin{table}[ht]
\centering
\caption{Correlations Between Faith in Litigation and Personal and Organizational Characteristics}
\begin{tabular}{lccc}
\hline
Variable & Outside Counsel & Inside Counsel & Executives \\
\hline
Age & -.30** & -.19 & .04 \\
Length of professional career & -.31** & -.17 & .12 \\
Tenure with current firm & -.23* & -.13 & .00 \\
Number of employees in firm & .- & .14 & .13 \\
Number of attorneys in law firm & .27* & .- & .- \\
Number of cities with law firm offices & .29* & .- & .- \\
Percentage of clients that are businesses & .08 & .- & .- \\
Percentage of business clients with more than $1 million in annual sales & -.12 & .- & .- \\
\hline
\end{tabular}
\end{table}

\begin{table}[ht]
\centering
\caption{Correlations Between Faith in Litigation and Experience with Litigation and ADR}
\begin{tabular}{lccc}
\hline
Variable & Outside Counsel & Inside Counsel & Executives \\
\hline
Percentage of career in which at least half of time was devoted to litigation & -.18 & .28* & .- \\
Percentage of time in prior 12 months devoted to litigation & -.05 & .20 & .- \\
Number of cases as witness or juror & .- & .- & .12 \\
Number of cases as party & .- & .- & -.30* \\
Number of cases as decision maker & .- & .- & .02 \\
Percentage of cases as defendant & -.07 & .08 & -.07 \\
Number of cases as neutral in ADR & -.10 & -.03 & .00 \\
Number of cases as partisan in ADR & -.26* & .03 & -.05 \\
\hline
\end{tabular}
\end{table}

\textsuperscript{119} The inverse relationship between the amount of executives' experience with the courts and their faith in litigation is similar to the pattern found in a survey of the public in California where people who had been litigants had less favorable opinions of the courts than people who had never been litigants. See Ellers, supra note 48, at 2190.
As Table 4 shows, the correlations between satisfaction with litigation results and faith in litigation vary sharply by type of respondent. For outside counsel (who gave relatively high ratings on both variables) there was no significant correlation. For inside counsel (who gave intermediate ratings on both variables) there was a moderate correlation. For executives, the group giving the lowest ratings on both variables, the correlation was very strong. By contrast, there were significant correlations between satisfaction with litigation process and faith in litigation for all three types of respondents. Moreover, the correlations were of roughly similar magnitude for all three groups, despite the sharp differences in the three groups’ ratings of the two variables.

**Table 4. Correlations Between Faith in Litigation and Satisfaction with Litigation Experience**

<table>
<thead>
<tr>
<th>Variable</th>
<th>Outside Counsel</th>
<th>Inside Counsel</th>
<th>Executives</th>
</tr>
</thead>
<tbody>
<tr>
<td>Satisfaction with results in their experiences with litigation</td>
<td>-.06</td>
<td>.30**</td>
<td>.54**</td>
</tr>
<tr>
<td>Satisfaction with process in their experiences with litigation</td>
<td>.40**</td>
<td>.48**</td>
<td>.38**</td>
</tr>
</tbody>
</table>

**p < .01**

These results indicate that faith in litigation was strongly associated with individuals’ assessments of their own experiences with litigation. Perhaps surprisingly, for the outside counsel, satisfaction

120. For each type of respondent, I conducted regression analyses examining the relationships between faith in litigation and satisfaction with litigation results and process. For discussion of regression analysis, see supra note 115. For the outside counsel, satisfaction with the process was strongly related to faith in litigation, consistent with the correlations. For some unknown reason, regression analysis of outside counsel’s faith in litigation on satisfaction with the results of their experiences in litigation indicated a significant negative relationship, i.e., analysis suggested that the greater the satisfaction, the less the counsel’s faith. This is hard to explain. It seems more likely that there is no clear significant relationship as suggested by the correlation coefficient in Table 4. See id.

121. For inside counsel, a regression analysis involving a model with satisfaction with both litigation results and process indicated no significant relationship between faith in litigation and satisfaction with litigation results. This suggests that although satisfaction with litigation results was related to faith in litigation for inside counsel, it was not as directly related as satisfaction with the process. See id.

122. For executives, a regression analysis involving a model with satisfaction with both litigation results and process indicated no significant relationship between faith in litigation and satisfaction with litigation process; this was the opposite pattern as that for the inside counsel. This suggests that although satisfaction with litigation process was related to faith in litigation for executives, it was not as directly related as satisfaction with the results. See id.
with the process but not the results was relevant to their faith in litigation. An explanation for this phenomenon is that, as repeat-player litigators, outside counsel recognize that they can expect to lose in a substantial percentage of cases, but that the cases will “average out” over time.\footnote{This is exemplified by the attorney who described how he expects to be surprised by the outcomes in some cases and is psychologically prepared for that.} On the other hand, regardless of the favorability of the outcome, one could expect that the process will almost always be appropriate. For inside counsel, faith in litigation was especially associated with their assessment of the quality of the litigation process in their experience, but it was also related to their satisfaction with the results. Executives’ faith in litigation was also related to satisfaction with both process and results but the relative magnitude is the opposite of that for the inside counsel. For the executives, the results were much more strongly related to their faith in litigation, perhaps because they can understand the results better than the process, they value the results more than the attorneys, or the process has little abstract value for them. In addition, they continue to live with the results of litigation much more than the private firm attorneys who move on to new cases as old ones terminate. Inside counsel and especially executives may have a lot more at stake in litigation because they may have fewer cases to “average out” over time.\footnote{By contrast, outside counsel paid on an hourly basis are paid regardless of the litigation outcome.}

As Table 5 shows, none of the expected consequences of increased litigation\footnote{See supra text accompanying note 56.} are significantly correlated with faith in litigation except for executives’ expectations about the effect of increased litigation on their opportunities to do satisfying work. This one significant finding is consistent with the preceding set of correlations suggesting that executives’ faith in litigation is strongly associated with their

\footnote{To use a simplistic example, assuming only cases with two parties in which one wins and the other loses, parties (and their attorneys) can expect to lose half the time, other things being equal. Real life is not so simple and many lawyers may well assume that they can “beat the odds,” but even so, most attorneys probably recognize that they will lose a significant proportion of their cases.}

\footnote{See supra Part V.C.}
satisfaction (or, for most executives, *dissatisfaction*) in their personal experiences with—and expectations of—litigation.

**Table 5. Correlations Between Faith in Litigation and Expected Personal Consequences of Increased Litigation**

<table>
<thead>
<tr>
<th>Variable</th>
<th>Outside Counsel</th>
<th>Inside Counsel</th>
<th>Executives</th>
</tr>
</thead>
<tbody>
<tr>
<td>Increased compensation</td>
<td>-.04</td>
<td>-.16</td>
<td>-.19</td>
</tr>
<tr>
<td>Increased opportunities for advancement</td>
<td>-.08</td>
<td>-.04</td>
<td>.13</td>
</tr>
<tr>
<td>Increased relative importance within their firm</td>
<td>-.22</td>
<td>-.09</td>
<td>.05</td>
</tr>
<tr>
<td>Increased ability to work independent of direction of colleagues in other professions</td>
<td>-.06</td>
<td>.17</td>
<td>.11</td>
</tr>
<tr>
<td>Increased ability to do work they find very satisfying</td>
<td>.12</td>
<td>.10</td>
<td>.40**</td>
</tr>
</tbody>
</table>

**p < .01

These results showing lack of other significant correlations between faith in litigation and expected consequences of increased litigation might be especially surprising given the widespread perception that lawyers and businesspeople are materialistic and self-interested. This survey suggests that other factors are much more important to business lawyers and executives in influencing their faith in litigation.

As Table 6 shows, the correlates of faith in litigation with specific perceptions about litigation are remarkably similar for inside counsel and executives. Moreover, the pattern of correlations for outside counsel differs dramatically from the inside counsel and executives. For the outside counsel, faith in litigation is most associated with their perceptions of the timeliness and costs of litigation and, to a lesser extent, the sensitivity of the courts to the needs of businesses.\(^{127}\) The two principal factors, time and cost, are performance measures of case-processing capabilities independent of the quality of the process or the results. By contrast, the degree of the outside

\(^{127}\) Although most outside counsel gave negative assessments of the litigation process regarding time and cost, the positive correlations indicate that the lawyers who had more favorable assessments of litigation on these dimensions also had more faith in litigation.

Regression analysis of a model including appropriateness of both time and cost suggests that outside counsel's faith in litigation is more directly related to concern about cost than timeliness as the latter is not significant in this model. For discussion of regression analysis, see *supra* note 115.
counsel's faith in litigation is not associated with perceptions about the somewhat more abstract characterizations of litigation explosions, frivolous lawsuits, fairness of results, integrity of the fact-finding process, and quality of jury performance.

**Table 6. Correlations Between Faith in Litigation and Specific Opinions About Litigation**

<table>
<thead>
<tr>
<th>Variable</th>
<th>Outside Counsel</th>
<th>Inside Counsel</th>
<th>Executives</th>
</tr>
</thead>
<tbody>
<tr>
<td>Existence of a litigation explosion in past 10 years</td>
<td>.11</td>
<td>.15</td>
<td>.24</td>
</tr>
<tr>
<td>Frequent suits so frivolous that they should not have been filed</td>
<td>-.08</td>
<td>.04</td>
<td>.43**</td>
</tr>
<tr>
<td>Court results are often fair</td>
<td>.07</td>
<td>.51**</td>
<td>.36**</td>
</tr>
<tr>
<td>Courts are a good means of finding truth</td>
<td>.11</td>
<td>.47**</td>
<td>.42**</td>
</tr>
<tr>
<td>Legal rules and precedents provide useful guidelines for structuring business relations</td>
<td>-.06</td>
<td>.11</td>
<td>.10</td>
</tr>
<tr>
<td>Courts help restrain inappropriate business practices</td>
<td>.13</td>
<td>.32*</td>
<td>.06</td>
</tr>
<tr>
<td>Juries often do a good job of determining liability</td>
<td>-.10</td>
<td>.20</td>
<td>.47**</td>
</tr>
<tr>
<td>Juries often do a good job of assessing damages</td>
<td>.06</td>
<td>.29*</td>
<td>.30*</td>
</tr>
<tr>
<td>Juries use a higher standard in judging businesses than individuals</td>
<td>-.15</td>
<td>.11</td>
<td>.17</td>
</tr>
<tr>
<td>Lawsuits involving business divert resources from more productive activities</td>
<td>.16</td>
<td>.20</td>
<td>.31*</td>
</tr>
<tr>
<td>Courts consider needs of particular business communities</td>
<td>.24*</td>
<td>.18</td>
<td>.13</td>
</tr>
<tr>
<td>Cases are often resolved at an appropriate cost</td>
<td>.37**</td>
<td>.21</td>
<td>.17</td>
</tr>
<tr>
<td>Cases are often resolved within an appropriate amount of time</td>
<td>.31**</td>
<td>.21</td>
<td>.19</td>
</tr>
</tbody>
</table>

* p < .05  ** p < .01

For inside counsel, faith in litigation was strongly associated with the integrity of the litigation process. This relationship is reflected in the association of faith in litigation with beliefs about whether juries do a good job of determining damages and whether litigation is a good way to find the truth, produce fair results, and restrain inappropriate business practices. This pattern of correlations is similar for executives except that the executives' faith in litigation is also strongly correlated with perceptions of frequent...
frivolous suits and whether juries do a good job of determining liability, but not correlated with perceptions of court restraint on inappropriate business practices. Thus inside counsel’s and executives’ assessments of litigation were largely related to the quality of the process and especially the results. As suggested above, inside counsel and especially executives may be less willing and able to “average out” a loss, so even a single loss may be quite upsetting, particularly if they believe the decision to be wrong. Many executives felt especially embattled by the threat of juries making what they perceive to be irrational decisions against businesses, and this seems to have colored their views of litigation generally.

In addition to the respondents’ own perceptions of litigation, respondents’ faith in litigation was strongly associated with their perceptions of the views of important classes of individuals in their professional lives (see Table 7). The respondents’ own evaluation of litigation was significantly correlated with their perceptions of their organizational superiors’ views. This is one of the few areas of similarity between all three groups of respondents. Although respondents’ views were strongly correlated with their perceptions of their superiors’ views, as noted above, the majority of each group of respondents had more faith in litigation than they believed their superiors did.128

<table>
<thead>
<tr>
<th>Variable</th>
<th>Outside Counsel</th>
<th>Inside Counsel</th>
<th>Executives</th>
</tr>
</thead>
<tbody>
<tr>
<td>Organizational superiors believe that court system is working well</td>
<td>.39**</td>
<td>.37**</td>
<td>.50**</td>
</tr>
<tr>
<td>Professional leaders believe that court system is working well</td>
<td>.40**</td>
<td>.04</td>
<td>.50**</td>
</tr>
<tr>
<td>Top corporate executives are often satisfied with court results</td>
<td>.09</td>
<td>-.05</td>
<td>.37**</td>
</tr>
</tbody>
</table>

** p < .01

Interestingly, for the outside counsel and the executives, the strong correlations between faith in litigation and perceived opinions of leaders in the respondents’ profession are virtually identical to the correlation between faith in litigation and perceived opinions of organizational superiors. This may reflect a major overlap between the two classes of influential individuals. In other words, for outside

128. *See supra* Part V.H.
counsel and executives, the same kinds of people may be both their organizational superiors and professional leaders. This is clearly not the case for inside counsel as bar leaders are likely to be outside counsel and their organizational superiors are often non-lawyers. This may account for the dramatic difference between the correlations of inside counsel's views with the perceived views of their organizational superiors (which is highly statistically significant) and with those of their professional leaders (which is not significant). This disparity suggests that the inside counsel generally identified with executives' views but did not identify with the (perceived) views of bar leaders, and, indeed, may have been quite alienated from them.

VII. THREE VIEWS OF LITIGATION

One of the striking findings of this study is that the three groups of respondents have remarkably different patterns of opinions about litigation. This Part summarizes the distinctly different views of these three different populations.

A. Outside Counsel

The outside counsel in this study tended to be in their 30s and 40s and have been with their firms since the mid-1980s. They tended to work in medium- to large-sized law firms located in the major cities in their states. About half the sample consisted of attorneys who were equity partners in their firms. The vast majority of their legal careers and current work had been and continued to be devoted to litigation. They generally represented business enterprises in a wide variety of industries. Although they typically represented defendants, a considerable portion of their caseload involved representation of plaintiffs as well. Almost all had some experience with ADR proceedings, including about half who had served as neutrals.

As a group, outside counsel had a generally favorable view of litigation with some qualifications. They generally believed that relatively few suits are truly frivolous, though about half believed that there has been a litigation explosion in recent years. As a group, they were very pleased with the results of litigation, which they typically believed to be fair, though they were ambivalent about the process of litigation. A majority believed that juries usually do a good job of determining liability but a poor job of assessing damages. They were most critical of the time and expense involved in litigation. This criticism appears to be related to a combination of their own frustrations
from working in the system and a recognition of their clients' frustrations. Almost two-thirds believed that the courts were not particularly sensitive to businesses' concerns, and many believed that top corporate executives were lukewarm at best about the results of litigation. On a personal level, they strongly associated increased litigation with their own personal interests including compensation, professional advancement, and prestige. They were less certain about the positive effects of increased litigation on their professional autonomy or work satisfaction, but most believed that it would help or at least not hurt them. Thus outside counsel had fairly positive views about litigation, albeit with some reservations. One lawyer summarized the sentiments of many outside counsel when he said that "litigation is a good dispute resolution mechanism . . . . It's a shame that it's so hard to get to."  

Why do outside counsel generally have faith in the system of litigation? Although this study cannot provide definitive answers, it is quite suggestive. The findings suggest that this faith is related to two general factors: (1) the degree of support from a network of influential players in their lives, and (2) the degree of satisfaction with the litigation process. There are several findings relating to support of influential people in lawyers' lives. Greater faith in litigation was associated with perceptions about favorable opinions of their superiors and bar association leaders. Younger lawyers in bigger firms (who thus have the largest and most influential set of superiors and other opinion leaders) generally had the greatest confidence among

129. Interview with outside counsel 1 (Mar. 17, 1994).

130. For a discussion of some limitations in possible causal inferences based on this kind of study, see note 115, supra. In addition, the strongest inferences are limited to the population sampled. The population of outside counsel included only those currently employed as such who, by definition, continue to invest their professional identities in litigation, unlike former litigators who were dissatisfied and switched to other professional activities.

131. This is an association where causal processes seem especially opaque. Conceivably some respondents "read" the views of influential people on a range of matters which then influences the respondents to adjust their own views, consciously or unconsciously, to emulate them. Of course, this learning could operate in both directions so that the influentials adopt opinions they hear from the rank-and-file. A third possible process might be that some individuals believe that the influential people are similar to them in various ways and thus infer that the influentials' views mirror their own views. There may also be a selection process in which prospective employees and superiors make decisions to work together based on a perceived match on issues such as these. Conceivably all of these dynamics might be at work.
the outside counsel. Similarly, the more that outside counsel believed that courts consider the needs of businesses, their primary clients, the greater their confidence in the system.

Faith in litigation was also related to several factors regarding the process of litigation. Most directly, the outside counsel's overall faith in litigation was strongly associated with their satisfaction with the process of litigation in their personal experience. Faith in litigation was also related to their perceptions about the costs and timeliness of litigation. These are factors over which lawyers have more control than litigation results and most cases could, at least in theory, be handled well. Moreover, as most lawyers and clients have negative perceptions of the time and cost of litigation, it makes sense that outside counsel who are the least critical of the process in these respects would have the most faith in litigation. Their confidence was also inversely related to the amount of experience as a partisan in an ADR proceeding: Outside counsel with less ADR experience have greater faith in litigation. This correlation may signify satisfaction with litigation and/or ignorance of alternatives.

It is worth noting numerous factors that, perhaps surprisingly, do not seem to explain outside counsel's faith in litigation. Their level of faith does not seem to be related to the percentage of their work devoted to litigation, or the proportions of their clients who were businesses or were defendants. Their faith in litigation seems to be completely unrelated to their expectations about how it affected their self-interest in compensation, prestige, advancement, autonomy, or work satisfaction. Perhaps most surprising of all is that their faith in litigation was not significantly related to the extent of their satisfaction with litigation results or their perception of top executives' satisfaction with litigation results.

132. There are several possible interpretations of the findings that the outside counsel's faith in litigation was inversely related to their age and experience in practice. That is, the younger attorneys were most enthusiastic and the older veterans were more resigned, as reflected by the comments about “litigation not being as much fun as it used to be.” See supra text accompanying note 52. This may reflect a natural aging process in which the rigors of litigation increasingly take their toll on attorneys over time. This finding may also reflect changes in the world of litigation in recent decades. The veterans may base their more critical assessments on comparisons with their recollections of litigation as practiced earlier in their careers, often characterized as reflecting greater civility and trust. More recent cohorts of business litigators would have less, if any, experience with a perceived (and perhaps quite real) “Golden Era.”

133. This is another situation where it is difficult to sort out causal effects. Counsel who are relatively dissatisfied with litigation may seek out alternative procedures. Instead or in addition, those with more ADR experience may become more conscious of dissatisfactions with litigation by comparison.
B. Executives

The executives in this study tended to be in their 40s and 50s and had been with their firms since the early to mid-1980s. By virtue of the sample selection procedure, they were senior executives in publicly held firms. Generally the firms were relatively small and independent rather than wholly-owned subsidiaries of larger corporations. They had few lawyers on staff and thus were likely to rely heavily on outside counsel when they needed legal services. When the firms were parties in lawsuits, they were almost always defendants. Very few of the executives had any personal experience with ADR.

In stark contrast with outside counsel, executives had little good to say about litigation. Most said that they were dissatisfied with the results in their experience with litigation and even more were dissatisfied with the process. Most believed that the courts are not sensitive to the needs of businesses. Many had doubts about the process of finding the facts, especially when juries make the decisions, and questioned the fairness of court outcomes. They were virtually unanimous that there has been a litigation explosion, and the vast majority believed that most suits by individuals against businesses are frivolous. They were very frustrated by the time and expense involved in litigation, which they found especially disturbing considering that they believed that most suits by individuals against businesses have no merit. About half believed that their organizational superiors and professional leaders were even more critical of litigation than they were. On a personal level, most saw no benefit to increased litigation. Though most did not believe that it would affect their personal advancement, large majorities thought that it would reduce their autonomy from (and thus increase their dependence on) lawyers and would decrease their work satisfaction. Thus, in contrast to the feeling of many outside counsel, litigation is decidedly no fun for most executives.

One of the factors associated with the level of executives’ faith in litigation is the amount of experience they had had as a party to a lawsuit; the more often they had been a party, the less faith they had. Their faith was even more strongly associated with the degree of their satisfaction with the process and especially the results in their litigation experience. Thus the extremely low satisfaction with

134. See supra text accompanying note 28.
their own litigation experience was strongly related to their low approval ratings of litigation. In the same vein, the belief that increased litigation would reduce their personal opportunities to do work they found satisfying was also related to their lack of faith in litigation. This lack of faith was firmly connected to perceptions of a large volume of frivolous lawsuits as well as of litigation being an untrustworthy mechanism for finding the truth and producing fair results, especially when juries are involved. Even more than outside counsel, executives’ overall views of litigation were strongly correlated with the perceived views of their organizational superiors and the leaders of their professions. As a group, they widely share a fear and loathing of litigation, distinguishing themselves from their leaders in that (they believe that) their own antipathy is somewhat less intense. In sum, their lack of faith in litigation seemed to be related to their perception of the process as being repugnant and the results unjust. Interestingly, the survey results suggest that executives’ (lack of) faith was not related to expectations about consequences of litigation for them personally or even their perceptions of the time and cost involved. Though this study does not show whether the executives ever had much faith to lose, it does suggest that they now have very little faith in litigation.

C. Inside Counsel

This study suggests that the inside counsel are hybrids, in most respects sharing or blending characteristics of outside counsel and executives. As a group, they were roughly the same age as outside counsel and had been at their current positions about the same length of time. Compared with the executives, they worked in larger firms that had more lawyers on staff and that were more likely to have legal departments. Almost half the firms were wholly owned subsidiaries of other firms and the inside counsel therefore were likely to be part of a larger legal operation under the direction of the parent company’s legal department. Although more than half of their work was devoted to litigation, they spent a larger portion of their time on other activities than did outside counsel and a larger part of their careers had focused on activities other than litigation. Like the executives' firms, when inside counsel's firms were involved in litigation, they were almost always defendants. Almost all inside counsel had some experience with ADR, though not quite as much as did outside counsel.

Inside counsel’s views generally reflect some intermediate point between outside counsel’s and executives’ perspectives. As a group,
they were not as approving of litigation as the outside counsel or as critical as the executives. Like outside counsel, most inside counsel were satisfied with the results in their experience with litigation and thought that litigation outcomes generally were fair. They were considerably less satisfied about the process. More like the executives, the vast majority of inside counsel believed that at least half of suits by individuals against businesses were frivolous and that there had been a litigation explosion in recent years. They expressed qualms about the factfinding process, especially by juries, and believed that the courts are not especially sensitive to businesses' concerns. They were also frustrated by the time and expense involved in litigation, again much like the executives were. Though inside counsel's views were somewhat similar to both other groups, they were aware of the differences between outside counsel and executives, and it seems likely that inside counsel sometimes felt caught in the middle. Inside counsel generally perceived that their organizational superiors are much more critical of litigation than they themselves are and that bar association leaders (who are primarily lawyers in private firms) are more satisfied about litigation than the inside counsel are. On a personal level, most did not believe that increased litigation involving their firms would affect their compensation or advancement, but two-thirds believed that it would enhance their prestige within their firms. They were divided about the effect of increased litigation on autonomy from their superiors and work satisfaction, though pluralities believed that it would improve each somewhat.

Inside counsel's faith in litigation was significantly correlated with satisfaction with the results and especially the process in their experiences with litigation. Their faith was strongly associated with perceptions about the fairness of court results. In particular, it was related to their critical evaluation of juries' assessment of damages and the courts' ability to determine the truth. Like the other groups of respondents, inside counsel's faith in litigation was associated with perceptions of organizational superiors' views of litigation, but, unlike outside counsel and executives, inside counsel's faith in litigation was not associated with the perceived views of leaders of their profession. Their faith in litigation was also related to the proportion of their career in which they focused primarily on litigation. Like the executives, inside counsel's faith apparently was not related to

135. Given the range of opportunities to do other kinds of work in law firms and business firms, this positive correlation may be more a matter of self-selection than positive experiences with litigation.
expectations about consequences of litigation for them personally or their perceptions of the time and cost involved.

This study suggests that inside counsel often find themselves caught between the opposing forces of colleagues from their profession and their firms, resulting in a more complex and ambivalent view of litigation than that held by either set of colleagues. On one hand, managing a process that their bosses find so mysterious, dangerous, and repulsive is a source of professional power and prestige for inside counsel within their firms. Through professional socialization and experience, they develop skills in and appreciation for litigation that executives rarely attain. On the other hand, inside counsel often feel frustrated with litigation by the very same things that drive their non-lawyer superiors crazy and which they are unable to control.

Presumably most inside counsel at one time did have faith in litigation. This study suggests that, to varying degrees, many of them had lost some of the faith during their careers. Inside counsel believed that the litigation system generally worked properly in ultimately producing appropriate results, but many had lost confidence in the process for producing the results. Like the executives, they saw the system as growing out of control with frivolous suits and unfair jury awards, but they were more accepting of litigation as a necessary evil.

VIII. BUILDING FAITH IN LITIGATION

These findings strongly suggest that litigators in private firms generally do have some faith in the litigation system (though they would like to see it improved), but business executives (and, to a lesser extent, inside counsel) have much less faith. Given these views, what would be needed to increase lawyers' and executives' faith in the litigation process? Part VIII.A sketches some possible answers to that question, suggesting that court management techniques might address outside counsel's concerns, while privatization of dispute resolution would seem to address inside counsel's and especially executives' concerns. Part VIII.B briefly outlines some cautions about a privatization strategy.

136. For a compelling expression of an extreme loss of faith, see text accompanying note 94, supra.
A. Possible Futures of Litigation

It may be helpful to consider several possible futures for the courts that Professors Lawrence B. Solum and Robert A. Baruch Bush envisioned separately. Each developed five similar scenarios that are useful in analyzing what might build faith in litigation. One scenario is that the courts would not fundamentally change their mission of adjudicating legal rights. A second scenario involves multi-door courthouses where courts acting as “expert ADR managers” who selectively send some cases out for various forms of ADR and retain a relatively pure model of adjudication only for cases considered truly suited for adjudication. A third scenario relies increasingly on administrative agencies for handling multiple cases involving recurrent issues such as workers’ compensation and mass tort cases. Bush suggested a fourth scenario in which substantive and procedural legal rules are simplified by “bring[ing] ADR features into court procedures,” such as by changing the role of the judge from a relatively passive umpire in an adversarial system to an active trial manager in an inquisitorial model, as used in some European civil
law courts. A fifth scenario involves what might be considered true "privatization" or "private ordering" in which disputants increasingly handle disputes through some combination of market and community mechanisms with little or no involvement of the courts or other state agencies.

Most courts in the United States currently reflect some combination of the first three scenarios to varying degrees. Courts directly or indirectly promote settlement in most cases, direct some cases to other dispute resolution procedures, and adjudicate the small proportion of cases not otherwise disposed. Although the courts have adopted various reforms to streamline the process and increase the courts' role in managing it, such reforms retain the basic structure of litigation. For example, under the Civil Justice Reform Act, selected federal courts have recently experimented with (1) differential case management, (2) early judicial management of litigation, (3) monitoring and control of complex cases, (4) encouragement of voluntary and cooperative discovery procedures, (5) promotion of good-faith efforts to resolve discovery disputes before filing motions, and (6) referral of appropriate cases to ADR programs. These federal court experiments were evaluated by RAND's Institute for Civil Justice which estimated that the median time expended to dispose of cases could be reduced by 30% by adopting early judicial management techniques including setting the trial schedule early and reducing the length of

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144. See Bush, supra note 138, at 460-63. Solum's typology does not include a clear counterpart of this scenario. See Solum, supra note 137.

145. Solum, supra note 137, at 2139-46.


147. In fact, most private courts typically rely on public resources more than is commonly supposed. See generally Marc Galanter & John Lande, Private Courts and Public Authority, 12 STUD. IN L. POL. & SOC'Y 393 (1992); Richard C. Reuben, Public Justice: Toward a State Action Theory of Alternative Dispute Resolution, 85 CAL. L. REV. 577 (1997). For further discussion of the public and private nature of dispute resolution, see supra Part VIII.B.

148. See Marc Galanter & Mia Cahill, "Most Cases Settle": Judicial Promotion and Regulation of Settlements, 46 STAN. L. REV. 1339, 1340 (1994) ("Over the past five decades, first state and then federal judges have embraced active promotion of settlement as a major component of the judicial role.").

149. Although the courts make important decisions in some of the cases that do not get to a full-dress trial, the vast majority of cases do not get the courts' individual attention for adjudication of any issue. See Kritzer, supra note 46, at 163.

the discovery period. These reforms are consistent with traditional efforts of the legal profession to “tinker with but not change the general setup” of litigation. Indeed, this reluctance fits with the views of outside counsel in this study who, by and large, were generally satisfied with litigation but would simply prefer it to be cheaper, quicker, and easier.

This study suggests that such litigation reforms are not likely to restore the faith of business executives. Consider executives such as the one who was outraged because he had incurred $40,000 in legal fees to get rid of (what he considered to be) a “bullshit lawsuit.” Are they likely to be satisfied if litigation is streamlined so that they can get rid of such cases in 30% less time and for 30% less money? I suspect not. The factors associated with their faith in litigation go much more to the quality of the process and the merits of the outcomes. To be satisfied, this study suggests that they would need to feel that individuals should take responsibility for their own actions and should not even file frivolous suits in the first place. In a world where executives have real faith in litigation, in the relatively few cases that would be filed, the premium would be on getting the results right and fair, presumably by judges (rather than juries) who are not biased against business interests. Moreover, the conduct of litigation as a whole would be geared to efficiently producing the “correct” results.

There is evidence that in recent decades litigants (or more likely, their attorneys) have increasingly used rough tactics in litigation and

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151. See id. at 91 (applicable to general civil cases with issue joined that do not close within the first nine months). These reforms did not significantly reduce litigation costs because “lawyers seem to do much the same work but in a shorter time period.” Id. at 90.

152. Bryant Garth, From Civil Litigation to Private Justice: Legal Practice at War with the Profession and Its Values, 59 Brook. L. Rev. 931, 935-38 (1993) (the bar has traditionally engaged in civil justice reform activities to promote the legitimacy of the courts and the legal profession).

153. See supra text accompanying note 81.

154. As noted above, the reforms measured in the RAND study were not found to significantly reduce litigation costs. See supra note 151. The hypothetical reduction of costs is suggested for the sake of argument.

155. Results in this study are consistent with a 1992 survey of Californians including lawyers and members of the general public. In response to an open-ended question asking about their main desires for the future of the court system, members of the public were more likely to focus on a desire for fair trials with good quality decisions. By contrast, most attorneys focused on technical issues related to the system being overcrowded and backlogged. Ellers, supra note 48, at 2192-93.

156. See supra Part VII.B.
"strategic litigation," in which litigation is used to merely to gain economic advantage rather than vindicate a substantive legal right.\textsuperscript{157} Bryant Garth provided an excellent overview of the increase in volume and nastiness of major business litigation in the 1970s and 1980s when "litigation tactics escalate[d] the conflicts by using whatever tools [were] available to pressure the other side into a favorable settlement."\textsuperscript{158} Litigation was not about vindicating rights; it was about winning a war in which competitive pressures on business firms and law firms legitimized use of "scorched earth" litigation tactics by which litigators "could make life so miserable . . . that [the other side] would eventually have to surrender."\textsuperscript{159} These tactics included motions to disqualify attorneys for conflicts of interest, disingenuous games with discovery and motion practice, and use of lawsuits as a strategy to intimidate the other side.\textsuperscript{160} Virtually every aspect of a case in litigation could be disputed. Even rules to protect against frivolous actions became weapons in adversarial combat: "Adversarial lawyers can run up the costs, generate delays and multiply the pressures to settle by, for example, charging the other side with a frivolous filing or motion."\textsuperscript{161} These tactics of strategic litigation are typically used in major suits rather than routine litigation. Thus many executives probably feel that they are being tracked by hungry wolves in big litigation or swarmed by stinging bees in smaller, routine litigation. Whether the litigation is large or small, it is not hard to understand why business executives would find it so distasteful.

If the traditional model of litigation—even with procedural reforms such as early and tight judicial management of pretrial litigation, including aggressive referrals to ADR procedures\textsuperscript{162}—is not


\textsuperscript{158} Garth, supra note 152, at 943; see also Kagan, supra note 13, at 45-53.

\textsuperscript{159} Garth, supra note 152, at 943-44 (quoting DAVID MARGOLICK, UNDUE INFLUENCE 198 (1993)).

\textsuperscript{160} See id. at 939-45.

\textsuperscript{161} See also Jeffrey W. Stempel, Reflections on Judicial ADR and the Multi-Door Courthouse at Twenty: Fait Accompli, Failed Overture, or Fledgling Adulthood?, 11 Ohio St. J. on Disp. Resol. 297, 321 (1996) (Federal Rule of Civil Procedure 11 prohibiting submission of statements not well grounded in law, fact, or argument has been "quickly and frequently applied to a wide range of disputes, sometimes harshly, unfairly, and erroneously").

\textsuperscript{162} Some might suggest that litigation would earn more confidence if the courts acted more as ADR managers, referring substantial portions of their dockets to ADR procedures. See supra notes 141-42 and accompanying text. Such a solution assumes that litigants would find that ADR procedures would result in outcomes that are (perceived to be) correct and fair. While this is certainly possible, it is also quite plausible
sufficient to earn executives' faith, what about Bush's scenario involving simplification of substantive and procedural law and an inquisitorial model of adjudication with European-style judicial control of trials? Professor Robert Kagan's insightful analysis of adversarionalism in the U.S. suggests that our legal system is deeply rooted in our political and economic culture and structure, and thus it would require fundamental social change to produce such a change in the legal system. Kagan characterized our legal system as one of “legal adversarialism,” a system relying on recognition of legal rights in judicial forums requiring party initiative generally acted upon through lawyers. In contrast, other legal systems involve processes relying more on political or technocratic norms and government control. American political culture is based on long-established values of individualism and suspicion of government power. This culture leads to a fragmented political and economic structure with significant dispersal of power within the public sector as well as between the public and private sectors. Moreover, citing Lawrence Friedman's book, _Total Justice_, Kagan argued that since the 1960s, we have proliferated legal rules and institutions to satisfy increased expectations that harms should be prevented, losses should be compensated, and rights should be vigilantly protected. Given the deep distrust of centralized government power to solve social problems, a system premised on individuals armed with powerful legal rights seems necessary to satisfy our expectations in a complex technological world that a large-scale shift of cases into ADR procedures would not generally produce these results over time and would further undermine faith in litigation. This scenario is discussed further in Part VIII.B.

163. See supra text accompanying note 144.
165. Id. at 3-4. The drafters of the Federal Rules of Civil Procedure who had the abiding faith in adjudication that Resnik described, see supra text accompanying note 1, made precisely these assumptions about the system of litigation. Resnik, supra note 1, at 506, 513 (stating that the adversarial system presumes that disputants are more or less evenly matched rational and competent actors, typically represented by attorneys, who engage in “civilized” legal warfare from which the truth and “correct” winner will emerge).
166. See Kagan, supra note 13, at 4-5.
167. See id. at 9. See also David Luban, _Settlements and the Erosion of the Public Realm_, 83 Geo. L.J. 2619, 2628-27 (1995). Professor Luban advocated the value of adjudication as a means of elaborating public values but recognized that his view goes against the grain of current American “conventional wisdom about the evils of litigation and litigiousness.” In this political environment where “state interference is [presumptively considered] an evil . . ., the idea of the law as a source of meaning and value for the community is undoubtedly strange.” Id.
169. Id. at 11-13.
populated by huge institutions. If Kagan’s analysis is correct (as I believe it is), to adopt major features of European legal systems would require a massive shift in our political culture and institutions. Returning to our business executives, who, as a group, are likely to favor reducing rather than increasing government authority, it seems especially unlikely that they would favor a European-style legal system.

This analysis naturally leads to consideration of the last scenario: privatization of dispute resolution. By definition, advocates of this scenario have little faith in litigation except perhaps to the extent that the courts authorize or facilitate private dispute resolution. Indeed, in recent years, the courts have enthusiastically promoted private dispute resolution through enforcement of pre-dispute arbitration agreements in a wide range of settings. Thus businesses can use binding arbitration to avoid litigation in a range of disputes, such as securities and employment disputes, including many actions based on statutory rights. Even without pre-dispute arbitration agreements, courts can aggressively order cases into mediation and non-binding arbitration and some courts are doing just that.

170. See generally Kagan, supra note 13. See also Galanter, supra note 18, at 1141 (the greater reliance on tort law in the U.S. compared with European countries “reflects not greater generosity to victims, but less reliance on administrative controls and social insurance”).

171. I suspect that most business lawyers also would not favor a European-style system as it would probably reduce their authority and prestige.

172. See generally Galanter & Lande, supra note 147.

173. See Stempel, supra note 161, at 317 n.62, 337-40 (discussing cases establishing general trend of enforcement of pre-dispute arbitration agreements in a wide range of cases); John T. Sant, How Contract Clauses Can Ensure ADR, 15 ALTERNATIVES TO THE HIGH COST OF LITIGATION 146, 147 (1997) (federal courts are broadening circumstances in which they will enforce pre-dispute agreements to arbitrate); Paul D. Carrington, ADR and Future Adjudication: A Primer on Dispute Resolution, 15 REV. LITIGATION 485, 499-501 (1996) (critiquing “binding arbitration pursuant to adhesion contracts”).


175. See generally Lande, supra note 27 (describing “liti-mediation” environments in areas where litigation normally ends in mediation). Courts’ functioning as “ADR managers” is the essence of the second scenario described above, see supra text accompanying notes 141-42, and is less purely private, see supra text accompanying notes 145-47. In a scenario emphasizing privatization, courts would focus more on shifting cases out of litigation per se rather than matching cases to an optimal procedure. See generally Frank E.A. Sander & Stephen B. Goldberg, Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure, 10 NEGOTIATION J. 49 (1994). Even wholesale channeling of cases into ADR would not necessarily constitute true privatization, however, as described infra in Part VIII.B.
On its face, a privatization scenario should have obvious appeal to business executives who, by definition, choose to run their own operations in the private sector. Indeed, use of ADR procedures offers an impressive list of potential benefits including opportunities to develop creative solutions, save time and money, provide greater control over the third-party neutrals and procedures, increase satisfaction with the disputing process and results, maintain relationships, protect privacy, and increase compliance with agreements, among others. Thus it is conceivable that reducing court dockets by increasing use of private procedures might increase executives' support for litigation. The analysis of executives' antipathy for litigation in this study suggests that to support a system relying heavily on private dispute resolution procedures, executives would need to be satisfied that the system properly focuses on the merits of the disputes and produces appropriate results. In fact, about three-quarters of the business executives (as well as the lawyers) in this study who had experience with ADR procedures reported satisfaction with the results of those experiences. Obviously, however, the satisfaction with ADR had not "rubbed off" onto executives' opinions about litigation when they responded to my survey; perhaps it would over time, if executives credit the courts for promoting privatization, though that remains to be seen.

B. Cautions About Privatization of Dispute Resolution

Although I firmly believe that ADR procedures can provide important social benefits, most ADR procedures used in the U.S. are less private than many believe and these procedures do not necessarily get at the truth nor yield resolutions that seem fair. As a result,

176. See Galanter & Lande, supra note 147, at 395-97.

177. Lande, Ideology of Disputing, supra note 7, at 135-37. The survey data suggest that executives' support for ADR—particularly court-ordered arbitration—is based on a desire to extricate themselves from litigation and dependence on attorneys. Id. at 203. Interestingly, executives supported court-ordered arbitration more often than did the attorneys, who more often preferred mediation. Id. at 165-68. These findings are consistent with other studies finding that disputants are typically quite satisfied with ADR procedures. See Tom R. Tyler, The Quality of Dispute Resolution Procedures and Outcomes: Measurement Problems and Possibilities, 66 DENV. U. L. Rev. 419, 429 (1989); John P. Esser, Evaluations of Dispute Processing: We Do Not Know What We Think and We Do Not Think What We Know, 66 DENV. U. L. Rev. 499, 532 (1989).

178. The list of potential benefits is well-known even to casual students of dispute resolution. See supra text accompanying note 176. Although I have expressed concerns about potential dysfunctions of mediation process as it has been institutionalized in some places, see Lande, supra note 27, I have greater faith in the potential for ADR than Professor Resnik does. Resnik, supra note 1, at 544-46.
ADR may be less of a solution for executives' dissatisfaction with litigation than some would expect.

Although ADR is often thought of as inherently private, much of the field now manifests a move toward "publicization" (or "litigationization") rather than increased privatization. Galanter distinguished remedy systems that are "appended" to the courts (generally by virtue of being supervised by or oriented to the courts) from more truly private remedy systems (such as those in various private organizations including religious institutions, trade associations, ethnic communities, and gangs and other criminal groupings). In these terms, much of contemporary ADR practice is more oriented toward the (public) courts than more private institutions. Indeed, with the current trend toward incorporation of ADR processes into litigation, ADR practice is becoming increasingly formal and legalized. For example, where mediation is routinely ordered as part of litigation, attorneys often take an especially active role. Attorneys' statements frequently resemble presentations in court, focus closely on legal issues, and reflect the dynamics of traditional adversarial bargaining in litigation. Due to narrow conceptions of mediators' appropriate role and/or concern about losing future referrals from attorneys, mediators may be hesitant to interfere with attorneys' traditional strategies of protecting adversarial advantages through limited disclosure of information and using positional negotiation gambits. In these situations, mediation often "blends" into litigation.

179. Although the literal opposite of "privatization" would be "publicization," referring to giving something a public character, the term "publicization" is both awkward and confusing. It is confusing because it could refer to open dissemination of information, a very different meaning. For lack of a better term, I use "litigationization" which has the virtue of being "merely" awkward.

180. I do not suggest that a trend toward litigationization is necessarily bad (or good). Rather, my point here is that litigationization of private ADR does not necessarily result in the kind of informal procedure that I think many people would associate with privatization.

181. See Galanter, supra note 21, at 126-30. See also Galanter & Lande, supra note 147, at 407-10 ("private adjudication is not separate and remote from the public sphere, but . . . is confirmed, elaborated, and extended by official legal institutions").

182. With respect to mediation, I have called this "liti-mediation." See Lande, supra note 26, at 840-41. For an excellent analysis of court-connected ADR programs, see Elizabeth Plapinger & Margaret Shaw, Court ADR: Elements of Program Design (1992).

183. See, e.g., Bush, supra note 137, at 462. Cf. Dezalay & Garth, supra note 24, at 54-57. Dezalay and Garth described how international arbitration, which had been relatively informal and cooperative in prior decades, has become increasingly legalized and adversarial due to increased "American style practice" with "more attention to fact, motions, objections, delays," technical appeals, and "procedural management." Id. at 55, 57.
so that it seems like just another step in the process, especially when it occurs late in the litigation process.\textsuperscript{184}

Where the courts enforce ADR agreements rather than take the initiative to order cases into ADR proceedings, these proceedings are also becoming more like litigation and subject to closer court review. In reviewing recent trends in court decisions involving enforcement of agreements to arbitrate, Professor Carrie Menkel-Meadow concluded that both federal and state courts are increasingly willing to question the operation of arbitration procedures.\textsuperscript{185} This closer court supervision is likely to lead to even more litigation-like procedures. Even when ADR procedures are not regulated by law, associations of ADR practitioners are pressing to institutionalize procedures with the result that arbitration looks more like litigation.\textsuperscript{186} For example, groups of ADR practitioners concerned about pre-dispute agreements to arbitrate employment disputes involving statutory claims have developed a “Due Process Protocol” that specifies procedures these groups recommend that mediators and arbitrators follow. This protocol includes provisions, \textit{inter alia}, governing representation of employees, qualification and selection of mediators and arbitrators, conflicts of interest, and authority of arbitrators to permit discovery, issue subpoenas, and issue awards.\textsuperscript{187}

As more cases go into ADR proceedings due to statutory mandate, expectations of court order, or enforcement of contract provisions, there have been predictable calls for increased regulation.\textsuperscript{188}

\begin{footnotes}
\item[184.] \textit{See} Lande, \textit{supra} note 27, at 879-95.
\item[185.] Carrie Menkel-Meadow, \textit{California Court Limits Mandatory Arbitration}, 15 \textit{Alternatives to the High Cost of Litig.} 109, 125 (1997). “It is now clear that great departures (in time, procedures, neutrality and selection of neutrals) from the programs' promises and actual operation may result in refusals to compel arbitration through a variety of legal arguments, including waivers, estoppel, rescission of contracts, fraud, contract avoidance, unconscionability, and others.” \textit{Id.}
\item[186.] I express no ultimate opinion about whether this litigationization is, on balance, a good or bad development. I am sympathetic to the concerns leading in that direction and yet I am concerned about potential adverse effects as well.
\item[188.] \textit{See}, e.g., Garth, \textit{supra} note 152, at 959-60 (calling for greater regulation of and disclosure by ADR providers); Stempel, \textit{supra} note 161, at 361-95 (offering extensive prescriptions for procedural protections in court-connected ADR to assure accuracy and fairness, such as firm scheduling, greater control of fact development by
\end{footnotes}
Proper regulation requires a tricky balance. Obviously one would want to protect against common abuses that are normally difficult to prevent, detect, and correct without some formal regulatory scheme. On the other hand, bureaucratic regulation and routinization, which seem likely to develop over a period of time, may strip away the beneficial aspects that make ADR desirable. Resnik put it well:

Reliance upon some of the procedures associated with adjudication—visible decision-making, the creation of records, public scrutiny and participation, and appellate review—is one way in which to constrain that power, but if we add all those procedures to ... an ADR mechanism, have we done anything other than reinvent the wheel?

If ADR becomes sufficiently integrated into litigation or substantially incorporates features of litigation, many people are likely to believe that ADR no longer provides distinctive advantages. In this scenario, key constituencies may lose faith in both ADR and litigation.

As a related matter, this study suggests that for ADR procedures to gain and maintain confidence of constituencies such as business neutrals, more pre-decision activity, more reasoning and documentation of the rationale of decisions, and more public reporting of decisions; LAW & PUBLIC POLICY COMMITTEE, SOC'Y OF PROF. IN DISP. RESOL., MANDATED PARTICIPATION AND SETTLEMENT COERCION: DISPUTE RESOLUTION AS IT RELATES TO THE COURTS (1991) (making recommendations regarding limits on court actions mandating participation in ADR). Indeed, there is a compelling argument that court-ordered ADR constitutes "state action" that triggers constitutional due process protections. See generally Reuben, supra note 147.

189. See Resnik, supra note 1, at 545-46, 552-53 (expressing concern about limited constraints and accountability in ADR).

190. Resnik, supra note 1, at 554.

191. Detailed discussion of factors associated with business lawyers' and executives' support for ADR is beyond the scope of this Article. My dissertation provides an extensive analysis of this issue, see Lande, Ideology of Disputing, supra note 7, at 133-209, and the findings regarding mediation are summarized in Lande, Relationships Drive Support for Mediation, supra note 7.

In brief, this survey suggests that support for use of mediation is strongly related to satisfaction with ADR experiences and perceptions that mediation (or ADR generally) is sensitive to the needs of business, helps preserve relationships, increases work satisfaction, and is more a matter of common sense than specialized skill. Support for court-ordered arbitration is related to satisfaction with ADR experiences and perceptions that ADR increases autonomy in handling disputed matters. See Lande, Ideology of Disputing, supra note 7, at 185-97, 202-07. Obviously, litigationizing ADR procedures substantially could certainly change these perceptions and thus undermine support for ADR.

192. For a passionate argument in favor of maintaining clear distinctions between mediation, arbitration, and litigation, see Robert A. Baruch Bush, Efficiency and Protection, or Empowerment and Recognition? The Mediator's Role and Ethical Standards in Mediation, 41 FLA. L. REV. 263 (1991).
executives, they must be convinced that these procedures produce fair results based on the truth. This has important implications for the nature of dispute resolution practice. For example, there is a debate about the merits of an evaluative approach to mediation in which mediators give evaluations of likely litigation outcomes so that mediation essentially provides a short-cut to the results expected from litigation. Though many parties no doubt appreciate this approach for “saving” them from what they see as the time, expense, and nastiness of the litigation process, an evaluative approach risks alienating some parties who feel pressed to agree to (something close to) the very court outcomes that they find so appalling. Similarly, if arbitration becomes increasingly legalized, parties may view arbitration awards as being too similar to the litigation results that they are trying to avoid. In these situations, parties may have serious doubts about how much these procedures really do get at the truth and produce fair results. Again, this scenario risks loss of faith in both ADR and litigation.

IX. Conclusion

This study suggests that Resnik’s assessment of failing faith is about right for the executives and to some extent the inside counsel, though not so much for outside counsel. Lawyers, especially younger lawyers in large law firms, generally have faith in litigation; even they, however, are somewhat frustrated by it, especially by the cumbersome nature of the process. The problems that erode outside counsel’s faith relate primarily to delay and expense of litigation. Recent experiments in the federal courts suggest that case management methods that should theoretically remedy these problems could reduce delay somewhat but are likely to have little or no effect on


194. This survey indicates that support for use of both mediation and court-ordered arbitration is strongly related to perceptions that top executives are dissatisfied with litigation results, and that support for mediation is strongly related to perceptions that top executives are satisfied with the results of mediation. See Lande, Ideology of Disputing, supra note 7, at 184, 188-89, 192-95, 201, 205-06. If the results of ADR procedures are seen as similar to litigation results, support for ADR could be undermined.
litigation expense. Perhaps improved design or implementation of case management reforms would make litigation more efficient and ameliorate the problems. The disappointing results of the federal court experiments suggest, however, that solving these problems may require more fundamental changes in litigation and particularly in our culture of disputing.

Outside counsel's faith is also sapped by a perception that litigation does not serve their clients' interests well. Indeed, many lawyers accurately perceive the dismal opinions that executives have about litigation. In fact, most business executives do not have much faith in litigation, with views typically ranging from mild displeasure to total contempt. This study suggests that a substantial portion of executives' displeasure with litigation arises from their own personal experiences. Many executives harbor great doubts about the integrity of litigation in finding the truth and producing fair results. It seems unlikely that such doubts would be assuaged simply by changing cultural accounts of litigation in news and entertainment media or by making litigation more efficient. Rather, more fundamental changes in litigation itself would seem necessary to address such concerns.

The two obvious options are both problematic, though in different ways. One option is to simplify radically the legal system and shift greater adjudicatory authority (and resources) to judges. Such changes, however, are at odds with fundamental American legal and political values and thus it seems unlikely that such reforms would be adopted, let alone be implemented systematically.

The second option, increased use of ADR, may also undermine faith in litigation. Implicitly and often explicitly, ADR is premised on—and could contribute to—a lack of faith in litigation. Some proponents of increased use of ADR explicitly base their arguments on critiques of litigation. Moreover, in many cases, mediators and

195. See Kakalik et al., supra note 150, at 88-91.
196. See supra text accompanying note 81 (attorney stating that “it only takes a couple of stinkers” taking full advantage of their legal rights to inhibit cooperation and that judges do not have authority or responsibility to “iron out” all these problems). See also Milton Heumann & Jonathan Hyman, Negotiation Methods and Litigation Settlement Methods in New Jersey: “You Can’t Always Get What You Want,” 12 Ohio St. J. on Disp. Resol. 253, 254-56, 295-305 (1997) (research suggesting that lawyers often use a positional process out of habit even though they may prefer a problem-solving approach).
197. See, e.g., Thomas E. Carbonneau, Alternative Dispute Resolution: Melting the Lances and Dismounting the Steeds (1989); Richard M. Calkins, Mediation: The Gentler Way, 41 S.D. L. Rev. 277, 279-83 (1996); Monica L. Warmbord, Could an Attorney Face Disciplinary Actions or Even Legal Malpractice Liability for Failure to
lawyers counsel parties in mediation to accept settlement by highlighting potential unpleasant vagaries of continued litigation. Continuation of these approaches seems likely to augment and reinforce negative opinions about litigation. In addition, if courts order parties to use ADR procedures and if ADR practice becomes increasingly legalized due to court regulation, parties may become disenchanted and look for alternatives to both litigation and ADR.

Obviously, this is not an inevitable result. Indeed, if ADR proceedings generally produce results perceived to be based on the truth and substantively fair, such outcomes are likely to boost the confidence of business executives (and perhaps the public) in ADR and possibly litigation as well. Indeed, some of the impetus for legalization of ADR is precisely to ensure the quality of the results. This study suggests that providing a satisfying process and results perceived to be fair may be critical to the maintenance and growth of support for ADR.

More troubling is the question about what can be done to restore faith in litigation, especially among non-lawyers. In a thoughtful essay, David Luban catalogued a variety of public goods produced through adjudication including development of legal rules and precedents, discovery and publication of important facts, opportunities for intervention by persons not party to lawsuits, opportunities for structural transformation of large public and private institutions, and facilitation and enforcement of private settlements. The legal system enables economic formation and transactions, deters health and safety hazards, compensates injuries, protects basic civil rights, and provides an important forum for debating and establishing social norms. While litigation is not the only or necessarily the best procedure to promote these public values in every case, it is a crucial part of our system. Just as we do not notice every time a plane lands


safely, we often take for granted the many important contributions of the legal system that are so routine that we do not even recognize them. Although it is likely to be beneficial to adopt careful procedures for managing cases in litigation, including shifting some cases into ADR procedures, this study suggests that these measures alone are not likely to be sufficient to restore much faith in litigation. Indeed, it suggests that generating faith in litigation in the U.S. is likely to be more difficult than one might expect.
This Appendix describes the procedures used for selecting states for the telephone survey. Twenty-six smaller states were excluded from consideration because there were too few potential respondents in the databases used for sampling. On the other extreme, California and New York were excluded because they are so large and diverse. This left 19 intermediate-sized states that were considered based on their region of the country and what I originally thought of as their “ADR culture,” though it later appeared to measure what might be called “mediation culture.”

To develop ratings of “ADR culture,” I relied primarily on interviews with six experts who are familiar with ADR events around the country. I also developed an objective measure of state ADR culture based on the existence of important types of state statutes enacted between 1975 and 1991. Experts’ ratings were significantly correlated with the presence of these state ADR statutes; this indicated that these measures formed a highly reliable scale of “mediation culture.” Table 8 summarizes the ratings for

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200. An analysis of the survey responses suggests that the differences occurred among opinions about mediation but not arbitration, the other principal ADR procedure, so it is more accurate to refer to a “mediation culture.” See Lande, Ideology of Disputing, supra note 7, at 180-83.

201. These include two officials of a national organization of family court practitioners who have done trainings and worked with ADR organizations around the country, an official who worked for the American Bar Association Dispute Resolution Section for more than a decade, a consultant to numerous national ADR organizations, and a sociologist and law professor who have written extensively on ADR and who are familiar with events around the country.

These individuals were asked to rate state ADR culture based on their perceptions of the (1) volume of cases handled through ADR procedures; (2) level of activity of ADR organizations, especially community mediation programs; (3) ADR statutes as implemented; (4) attitudes of lawyers, judges, and legislators; and (5) presence of influential individuals.

202. The measure of state legislation was based on the number of state statutes enacted between 1975 and 1991 dealing with family, community, or general civil cases that authorize: (1) operation of ADR programs, (2) mandatory ADR referrals by courts, and (3) state-wide bodies specifically dealing with ADR issues, such as advisory commissions. See COMMITTEE ON DISP. RESOL., A.B.A., LEGISLATION ON DISPUTE RESOLUTION (1992). These areas were selected because they seem more central to the current ADR movement than statutes dealing with other more specialized or obscure areas.

203. Reliability refers to the extent to which a measurement instrument produces the same results over repeated measurements. If there is no relationship between repeated measurements, the reliability coefficient is zero. The highest possible reliability coefficient is 1.0. The reliability coefficient of the scale of mediation culture is 0.90, which indicates that the scale is very reliable. See EDWARD G. CARMINES & RICHARD A. ZELLER, RELIABILITY AND VALIDITY ASSESSMENT 37-51 (1979).
the states with a high level of agreement.\textsuperscript{204} I selected one "strong" and one "weak" state in each of two regions: Massachusetts and Pennsylvania, respectively, in the Northeast, and Florida and Tennessee, respectively, in the South. This provided more than one state for each level of mediation culture and some control over possible regional variation.

\begin{center}
\begin{tabular}{l l l l}
\hline
Region & Weak & Medium & Strong \\
\hline
Northeast & Pennsylvania & & Massachusetts \\
& & & New Jersey \\
South & Tennessee & Georgia & Florida \\
& Louisiana & & \\
Midwest & Missouri & Illinois & Ohio \\
& & Minnesota & \\
West & Utah & & Colorado \\
& & & Texas \\
\hline
\end{tabular}
\end{center}

\textsuperscript{204} Due to insufficient agreement between raters about five states (Indiana, Oklahoma, Virginia, Washington, and Wisconsin), these states were not given overall ratings for strength of mediation culture. See Lande, Ideology of Disputing, supra note 7, at 49-51.