

USD LEGAL RESEARCH CENTER TARGETS STATE BAR CONCERNS

By Patrick M. Garry and Logan Hollars***

The University of South Dakota School of Law may be one of the smaller law schools in the country, but in the field of empirical legal research it is one of the select few. A Google search of empirical legal research centers produces the Hagemann Center for Legal Research at the University of South Dakota as the third entry in the list. (Last spring, the Center for Legal Research at the University of South Dakota was renamed the Hagemann Center, in honor of retiring Professor and Law Librarian John Hagemann.) Currently, only a few law schools in the country have empirical legal research centers, most notably Harvard University, Washington University, Wake Forest University, UCLA, the University of California, the University of Wisconsin and Duke University.

Empirical legal research is becoming a hot area in both the practice of law and the legal academy. Since 2004, law review references to empirical legal research studies has grown rapidly; and the topic of the 2006 American Association of Law Schools annual meeting was empirical scholarship. Traditionally, legal research and scholarship has focused on the doctrinal aspects of law and the process of legal reasoning. But recently, increasing attention has been placed on the empirical aspects of law—namely, whether a particular law or legal doctrine is actually achieving its stated objective, or whether it is having unintended negative effects.

Empirical legal research focuses on the actual real-world effects of law. While doctrinal research focuses upon the examination of case law, empirical legal research often entails the use of statistical or survey data. In using such data, empirical legal research can be an interdisciplinary endeavor that brings together law and social science.

As empirical legal research has been growing in popularity in the academy, it is also being increasingly used by practicing attorneys. The legal profession is discovering how to conduct such research on behalf of their clients. Empirical research gives attorneys one more tool to use: for instance, besides just arguing what the law is, based on interpretations of previous case law, attorneys can now show courts how existing laws actually work in real life. Using this approach, they might succeed in achieving a new interpretation of a law based on the actual effects of the previous interpretation. One of the aims of the Hagemann Center is not only to research issues of importance to the South Dakota Bar, but to provide a vehicle through which South Dakota practitioners can learn to use empirical legal research.

The notion of empirical legal research has been around for a long time. Dean Roscoe Pound once described it as “law in action” research. But even though the argument

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that legal scholarship could be enhanced by paying more attention to empirical research is not new, it is only now being seriously considered. For this reason, there have been increased calls for law schools to focus on empirical legal research and encourage its use. Empirical research is intended to test theoretical assumptions about the law, evaluate the congruence of regulatory goals and outcomes, and generally produce data necessary for lawyers, judges and other decision makers to perform their roles in resolving disputes, correcting social problems, making law, and administering justice. According to many legal educators, empirical legal research sheds important light on old legal issues and identifies new issues that the more traditional doctrinal approach cannot reach.

Empirical legal research has been conducted at USD for the past five years. Studies that have been completed and published include examination of the relationship between shareholder class action suits and stock market performance, the effects in South Dakota public libraries of the internet filtering act, whether the commercial trucking laws in South Dakota help or hinder transportation of goods in and out of the state, and whether campaign finance practices, vis-à-vis, ballot questions, give too much influence to out-of-state groups regarding the formation of South Dakota law.

In addition to these projects, the Hagemann Center is currently conducting research into the use of summary judgments in South Dakota and the way in which South Dakota state agencies receive and consider public comments in the course of their rulemaking. Another project involves the provision of legal services to South Dakota's rural counties. And finally, the Center is sponsoring a project that studies various unique estate planning options and how South Dakota may be the best jurisdiction for implementing these options. These are exciting areas of legal research, and ones that promise to greatly enhance the understanding of important issues to the South Dakota Bar.

George L Priest in a 1993 Michigan Law Review article urged promoting an "appreciation of the cooperative relationship between the academy and the bar toward the end of improving our system..." To further achieve its mission of improving the legal system in South Dakota, the staff of the Hagemann Center hopes in the near future to enlist the input of the State Bar, especially in helping to identify issues that need to be researched. The State Bar can also assist in full access to data needed in the research process.

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