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Comment: Court ADR Analytics

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Benjamin G. Davis*

Table of Contents

INTRODUCTION 379

I. ADR DATA DILEMMA 380

II. TAKING DATA AND TURNING IT INTO INFORMATION AND BEYOND 381

III. THE PUBLIC INTEREST: SHOULD WE CARE? 382

IV. COST AND OTHER CONCERNS 383

V. QUID MOVING FORWARD—DEVELOP, CRITIQUE AND ITERATE 383

CONCLUSION 384

INTRODUCTION

For the reasons in my comments below, Jordan Hicks's note entitled *Judicial-ish Efficiency: An Analysis of Alternative Dispute Resolution Programs in Delaware Superior Court*[1] is a *tour de force*. Its content and methodology suggest a fresh

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1. Jordan Hicks, Note, *Judicial-ish Efficiency: An Analysis of Alternative Dispute Resolution Programs in Delaware Superior Court*, 81 WASH. & LEE L. REV. 321 (2024).

approach to thinking about court-annexed Alternative Dispute Resolution ("ADR") in general and court-annexed mandatory nonbinding arbitration programs in particular. The meticulous analysis of three different eras (1978–2008, 2008–2018, and 2018–present) of the program, with a focus on judicial efficiency (speed, failure rate, and prejudicial concerns), provides an important template for how this work might be expanded to look at programs in other courts in different jurisdictions. Whether this approach can be incorporated in the analysis of ADR efficacy on a broader level is the topic of this comment.

I. ADR DATA DILEMMA

Having attempted, when I was Chair of the American Bar Association Section of Dispute Resolution, to get basic data on court-annexed ADR programs around the country, I had to resign myself to the impossibility of the task. Coming from international commercial arbitration conducted under the auspices of arbitral institutions, I hoped that basic statistics as to the numbers of cases, appointments, and results might be available across the various state jurisdictions and territories in which court-annexed ADR is conducted. My optimism derived from my experience with the international commercial arbitration institutions where basic data (albeit not necessarily completely up to date) on the number of cases, places of arbitration, nationality and other features of arbitrators, nationality of parties, amounts in dispute, etc. could generally be gathered for each year.[2]

When I turned to court-annexed ADR across the United States, I found the task was impossible for several reasons. First, depending on the state, the approach of the state or federal court toward court-annexed ADR varied in how it was constructed. In some courts in some states, the court-annexed ADR program is an internal structure of the court with all

2. *ICC Dispute Resolution 2020 Statistics* and *AAA-ICDR Data and Statistics* are a couple of examples of the kind of data that is available online in the international commercial dispute resolution field from institutional providers. *See generally* INT'L CHAMBER COM., ICC DISPUTE RESOLUTION 2020 STATISTICS (2021), https://perma.cc/5Z6G-2YDF (PDF); *AAA-ICDR Data and Statistics*, AM. ARB. ASS'N, https://perma.cc/S2TL-B6Z5 (last visited Feb. 2, 2024). Of course, this data does not include the non-institutional processes, which remain an ADR black box on the international level.

aspects of the program run in-house. In other courts in other states, the court-annexed ADR program is essentially outsourced to a local ADR body (institution or otherwise) that manages the process. In other states still—as I learned about a court in Idaho in one of my interviews—the court-annexed arbitration is conducted by a judge different than the one to which the case was originally assigned (i.e., not by a practitioner from the local bar, named by some institution to which the process of naming the arbitrators is outsourced, or part of an internal court program).

Second, again depending on the state, the state or federal court approach to maintaining statistics appeared to be varied. I remember that in one state, the approach of the court was essentially to keep a calendar of the dates and times of the court-annexed ADR procedures like a date book, but no deeper analysis of the program appeared to be done.

Third, depending on the type of offerings of court-annexed ADR programs, the consistency of the statistical data across courts within a state or across state lines was also unsure.

Fourth, meaningful data and analytics might be available within the reports of private entities such as Resolution Systems Institute,[3] much like the information from international commercial arbitration institutions, but I am hesitant to think that the interests of these types of entities are sufficiently aligned with a possible public interest in knowing what these systems do.

In sum, I soon recognized that my error was in thinking that the kind of data that could be turned into information would be readily available.

II. TAKING DATA AND TURNING IT INTO INFORMATION AND BEYOND

Mr. Hicks's student note takes the data and turns it into information about court-annexed ADR. What is particularly significant, in my view, is that, when available data seemed to falter, he developed data consistent with the methodology he had chosen to help fill in the datasets needed for his analysis. Gathering the data is no easy task. Beyond that, finding a way

3. *See generally Home*, RESOL. SYS. INST., https://perma.cc/G2AY-HZMP (last visited Feb. 2, 2024).

to think about that data in terms of the intersection between the legal regime at the time and what the data tells about the efficiency of that regime over the three eras turns data into information. We begin to better understand the failures and successes of the regimes put in place and how they could be improved. Approaches such as narrowing the types of cases to which the process applies and the effect of speeding up the nomination processes for the arbitrators are some of the points that Mr. Hicks addresses. [4]

More globally, he provides an important managerial vision of the judicial process. He combines an understanding of the complexities related to each form of the court-annexed arbitration program over the eras he analyzes. He demonstrates an understanding of how the process can be tweaked, or substantially changed, in order to improve the efficiency of the system.

III. THE PUBLIC INTEREST: SHOULD WE CARE?

With the growth of court-annexed ADR procedures over the past fifty years as part of the development of the multi-door courthouse, the disputes addressed through these processes are many. However, the question that has nagged at me is whether we know if these processes properly (under some definition of "properly") address these disputes. Throughput of cases may be one metric that is of interest, but the quality of the process might also be of interest. The view of the results, from both the point of view of the parties subject to the process and from the point of view of the system as a whole, as to whether it promotes fairness or some other public interest, are concerns I suggest we at least consider with respect to whether they need to be addressed.[5] In order to make those kinds of findings, Mr. Hicks's micro-level approach suggests a methodology that, in turn, could be built up and aggregated to reach both the within-state (state

4. *See* Hicks, *supra* note 1, at 355 n.229, 356–58.

5. The Consumer Financial Protection Bureau report on arbitration (as opposed to court-annexed arbitration) is an example of trying to think systemically about the efficacy of a dispute resolution approach. *See* CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY (2015), https://perma.cc/8SC7-ZCRB (PDF).

and federal court-annexed processes) and the across-state-line court-annexed processes.

IV. COST AND OTHER CONCERNS

The cost of making such an effort, I imagine, would be nonnegligible, and thus whether this type of study is an appropriate allocation of scarce resources in any given year is certainly a reasonable objection. Moreover, with the evolution of the court-annexed procedures across eras, as described by Mr. Hicks, we can see that a similar evolution might also be going on in various other states. In short, there is a risk just by the passage of time for studying that the target of an analysis in a given state might be evolving, thus making it difficult to amass data that can be turned into information that is useful. And yet, Mr. Hicks thinks of this concern also by calling for a willingness to iterate in the approaches to court-annexed processes.[6]

V. QUID MOVING FORWARD—DEVELOP, CRITIQUE AND ITERATE

This long-term effort to develop, critique and iterate again and again is crucial to improving an ADR process. From 1989 to 1993, I had the privilege to lead a team to develop the first computerized Case Management System at the International Chamber of Commerce ("ICC") International Court of Arbitration in Paris, France.[7] I understand that the development, critique and iterative process has gone forward four or five times since then to upgrade that system and turn it into something unimagined by us back then (even while the underlying ICC rules have evolved and broadened). The commitment to iteration is vital because it institutionalizes a self-critique that goes beyond whoever is addressing the system at any given moment.

At the same time, iteration is not enough. One worry that can be present is the seduction of what might be called "the New

6. *See* Hicks, *supra* note 1, at 363–64.

7. To give a sense of how ancient this effort was, we started in the MS-DOS environment and in the middle of the project the Windows operating system was introduced. And, of course, all of this was before the internet had blossomed in the mid-1990s.

New Thing".[8] It is important to keep in mind the infamous rule of "garbage in, garbage out," or "GIGO." One of the kindest comments that I have received all these years later is that the basic work we did back in the 1989–1993 period remains robust in the development of the current systems operating under new and improved rules. What that suggests is, as an initial matter, thinking in terms of bringing together all stakeholders at the beginning and for the long haul of development is crucial.[9] And, with those stakeholders in place, the next step is to simply understand the current system that is in place: really get into the mechanics of how it works. By understanding those mechanics, one can see where the system works and where issues such as bottlenecks and error rates are likely to arise. That process of understanding what is in place may reveal opportunities to standardize processes, at least in part, while keeping the flexibility to have more tailored approaches as needed. This managerial approach to judicial process helps to develop the kind of understanding of a system, and how to improve it, that Mr. Hicks suggests.

CONCLUSION

I first address what I call the ADR Data Dilemma, discussing how data can be turned into information and beyond. Then I raise the question as to whether there is a public interest that is addressed by the kind of work that Mr. Hicks has done. Thinking at a more aggregated level, I express my concerns about costs and other aspects of this effort to address the efficiency, or lack thereof, of court-annexed ADR programs across the United States. And I end by making some suggestions from my own experience about how, at the court level, efforts made can be aggregated to reach across America.

In many ways, though, what I suggest is really no more than what Mr. Hicks has shown can be done, and convinced us should be done, to make sure court-annexed processes fulfill

8. I believe the "New New Thing" right now is Generative AI and Chat GPT.

9. Stakeholders from the various institutions may rotate out and be replaced by others. The point is to have (what I call) the perimeter of analysis include all relevant parties in the initiation of such a project as soon as possible.

their mission in our polity. That quality of his work is a testament to his vision. Maybe, just maybe, with his fresh eyes looking at what was, for me, an intractable problem of looking systematically at court-annexed ADR programs, Mr. Hicks has suggested a new way forward.