We Need Good Data to Know
Whether What We Are Doing – and Espousing – Is Good

Theory-of-Change Symposium
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Nancy A. Welsh argues that our field needs relevant, routinely-collected, up-to-date data about the full range of dispute resolution processes. She describes the work of the ABA Section of Dispute Resolution's Advisory Committee on Dispute Resolution Research in developing recommendations about what data should be collected. She is professor of law and director of the Aggie Dispute Resolution Program at Texas A&M School of Law.

My goal for our field is pretty much the same as it has always been – to know that we are doing something good: that we actually are helping to improve people's ability to solve problems and resolve disputes in a way that they find to be sufficiently fair. We have been successful in institutionalizing many of our processes in the courts and in contracts, but institutionalization does not guarantee we really are contributing to people's lives in a positive way.

Actually, I have to admit that I do not think we can say exactly how successful we have been in institutionalizing our processes because we do not have much data regarding the number of cases referred to or resolved by our processes.

So what strategies would we need to pursue in order to determine that we are doing something good?

We Need Good, Relevant, Routinely-Collected, Up-To-Date Data

For a start, we need data. Data regarding the occurrence, effects, and perceptions of dispute resolution processes. Relevant, routinely-collected, up-to-date data.

If courts begin to collect such data, make it accessible to researchers, and report at least some aspects of it, think about what we could learn. How often are these processes being used? For what kinds of cases? For what kinds of parties? Are certain demographics affected differently than others? What are parties' perceptions of the fairness of these processes and their outcomes? Do those perceptions vary between different demographic groups? Between one-shot and repeat users? Between lawyers and litigants? Between different contexts? How do parties' perceptions compare from process to process? How do outcomes – on an aggregated basis – compare from process to process?

If courts can collect such data, private providers of arbitration and other dispute resolution processes can collect the data as well and make it available for accountability purposes. Again, think about what we could learn. Perhaps most important, we could see whether there are important variations in the use, perceptions, and outcomes of court-connected, agency-connected, and private processes.

I chair the ABA Section of Dispute Resolution's Advisory Committee on Dispute Resolution Research. Both the Section and its Advisory Committee are committed to the development of cutting-edge information to assist stakeholders in the justice system (including judges, administrators, lawyers, dispute resolution neutrals, policymakers, and litigants) and assure the quality of dispute resolution services.

To meet this goal, the Section and the Advisory Committee are encouraging rigorous qualitative and quantitative empirical research regarding dispute resolution. This requires the collection and reporting of data. One important source of such data can come from court-connected processes, including (but not limited to!) mediation, judicial settlement conferences, early neutral evaluation, non-binding arbitration, and ODR. Very few courts currently collect and report such data.

Planning to Collect Standard Data Elements

In an exciting development, the National Center for State Courts' National Open Court Data Standards Civil Workgroup on ADR invited the Advisory Committee to submit recommendations regarding the data elements that courts should collect regarding ADR. Building on the work done by the ABA Section of Dispute Resolution's Task Force on Research and Statistics more than a decade ago, as well as the more recent work of the Task Force on Research on Mediator Techniques, the Advisory Committee developed preliminary recommendations and submitted them to the Workgroup in July, 2019. Our preliminary recommendations anticipated the regular inputting of data regarding the use of dispute resolution / settlement assistance plus the collection of data from surveys provided to the parties, lawyers, and neutrals. We have since developed version 2.0 of those preliminary recommendations and are now soliciting feedback on them so that we can develop final recommendations. We hope to present our recommendations at the Section's spring conference in April, 2020.

It is significant that our Advisory Committee is not limiting its recommendations regarding data collection to a single process, like mediation. No single process deserves all of our attention or, frankly, unwavering loyalty.

The Advisory Committee also is not recommending the collection of data for a limited time period as in the evaluation of a pilot project. Processes change in response to context. The parties using these processes change. Expectations change. A time-

limited evaluation that occurred 20 years ago does not teach us much today. Indeed, that is one reason that the Section's Task Force on Research on Mediator Techniques called for more empirical research and the use of consistent terms, variables, and methodologies that permit duplication and/or testing for validity.

I am cautiously optimistic that courts may decide to collect data regarding dispute resolution. More and more frequently, governors and state legislators are turning to their courts and asking about filings relevant to the incidence of various crises in the news – e.g., gun-related deaths and opioid-related deaths and incidents. Often, courts cannot answer these questions.

If governors and state legislators want answers, they need to provide the funds for data collection and analysis. In at least one state, such funds have now been made available. The New York State Unified Court System, meanwhile, has announced the adoption of presumptive ADR for all civil cases along with plans to collect data to permit evaluation and revision. A relatively small number of private vendors provide case management software to state courts throughout the nation, and these vendors have indicated willingness to incorporate additional data elements important to the courts as long as the ultimate result is a relatively standardized package.

Money remains tight for many state court systems. But these and other developments suggest that we may be at a tipping point regarding courts' ability and willingness to collect and provide data generally. My hope is that this will create an opening for the collection of data regarding dispute resolution.

Opportunities from Research on Dispute Resolution

We need more researchers (both quantitative and qualitative, both inside and outside law schools) to take on our field as their life's work. And we need to be ready to hear both good news and bad from those researchers. It is only by listening to both the good and the bad that we will know what and how we need to change. Because, of course, change is inevitable.

And that seems a very appropriate way to end my contribution to this online symposium on my theory of change.