

---

# **Renting a Judge: Impacts on the Judicial Branch**

---

Sadie Dillon  
Lisa Blomgren Amsler  
Indiana University  
School of Public and Environmental Affairs  
Spring 2016

## **Table of Contents:**

Abstract .....	2
Alternative Dispute Resolution (ADR) .....	3
Arbitration .....	4
Private Judging .....	5
Application in California .....	7
Application in Ohio .....	9
Application in Indiana .....	11
Empirical Findings about Indiana's use of Private Judging.....	12
Public Policy & Rule of Law .....	13
Public Interest .....	14
Efforts of Regulation .....	15
Disclosure.....	15
Open to the Public .....	15
Public Facilities and Resources .....	16
Constitutional Objections	
First Amendment .....	16
Due Process .....	17
Equal Protection .....	18
Impact on the Judicial Branch	
Advantages of Private Judging .....	19
Concerns of Private Judging .....	22
Recommendations .....	24
Conclusion .....	26
Appendix .....	27
References .....	28

***Renting a Judge: Impacts on the  
Judicial Branch***

Sadie Dillon

*Public and Nonprofit Management*

*Senior*

*Abstract submitted for SPEA Honors Thesis Presentation*

Lisa Blomgren Amsler

*Keller – Runden Professor of Public Service*

*School of Public and Environmental Affairs*

*Faculty Mentor*

People are becoming more aware of alternative dispute resolution (ADR). Whether voluntary and consensual or mandatory and binding, forms of ADR are showing up everywhere. One specific form is arbitration, in which an arbitrator may conduct an adjudicatory hearing, decide the case, and write an award or opinion. Arbitration clauses are becoming a part of our everyday lives. The Supreme Court of the United States supports arbitration; however, a new form of arbitration, called private judging, is impacting the way courts function.

For my honors thesis, I will look at the impacts private judging, or renting a judge, has on the judicial branch. I will begin by evaluating the implementation of renting a judge in a variety of states. I will focus on the procedure, techniques, and actual application. Next, I will compare the positive and negative effects of private judging. I will decide whether it helps or hurts the courts. Lastly, I will make suggestions on how to improve private judging. I will describe how the suggestions will enhance the judicial branch overall.

## **Alternative Dispute Resolution (ADR):**

As time progresses, people are becoming more aware of alternative dispute resolution (ADR); it is becoming a more accepted process. The Judicial Arbitration and Mediation Services, Inc. (JAMS) defines ADR as “a variety of alternatives to litigation, wherein a neutral party assists the disputing parties, includes a full range of dispute resolution processes between direct negotiation and litigation” (ADR Glossary). The modern era of ADR was introduced by the American Bar Association (ABA) in 1976 at the Pound Conference (Ward, 2007, p. 77). Initially there was a pressure from clients to use ADR; however the pressure now comes from the courts and legislative mandates (p. 78). In 1983, amendments made to Federal Rule of Civil Procedure 16 required parties in certain cases to explore ADR options (p. 82). In 1990, the Civil Justice Reform Act (CJRA, 1990) required the federal courts to offer court – sponsored ADR. The court – sponsored ADR forms included mediation, arbitration, mini-trial, and summary jury trial (p. 82).

The Alternative Dispute Resolution Act of 1998 (ADRA, 1998) states that ADR results in “greater satisfaction [for] the parties, innovative methods of resolving disputes, and greater efficiency in achieving settlements” (Ward, 2007, p. 82-83). When Congress passed the Act, it wanted ADR to have a major role in the court system (Crowne, 2001, p. 1768). The Act required the federal courts to offer ADR programs; courts can mandate participation. Through the years, ADR forms have greatly increased. Currently, some of the forms consist of the following: arbitration, mediation, med/arb, summary jury trial, final offer arbitration, fact finding, and private judging.

## Arbitration:

Next, I will focus specifically on arbitration. Arbitration is a “process [that] offers less formal procedures, abbreviated presentations and the undivided attention of the neutral(s). The arbitrator rules on discovery requests and disputes” (ADR Glossary). Arbitration is a form of ADR that is favored more than others among large corporations. Understanding arbitration and its history is important. To begin, arbitration occurs in different areas including employment contracts, interstate commerce, and labor. It can be voluntary or mandatory; there are different Acts that apply to it. First, there is the Federal Arbitration Act (FAA). This Act focuses on all arbitration in interstate commerce, including mandatory, pre-dispute arbitration agreements in contracts. Before the FAA, courts struck down arbitration awards (Padis, 2013, p. 671). Then in 1925, the FAA was created by Congress to address judicial hostility to arbitration agreements. The Act also ensures that private agreements to arbitrate are “enforced according to their terms” (p. 682). The FAA was initially interpreted narrowly (p. 673). For example, it was originally assumed that it only applied to federal courts and not state courts. Section 2 of the Act solidifies that arbitration clauses are to be enforced unless there is a lawful reason they should not be (Federal Arbitration Act (FAA)). FAA, Section 2 states:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, **shall be valid, irrevocable, and enforceable**, save upon grounds as exist at law or in equity for the revocation of any contract.

Shortly after the FAA was created, the American Arbitration Association (AAA) was created in 1926 as a not – for – profit (Matthews, 2005, p. 24). The AAA ensures the development and use of prompt, effective and economical methods of dispute resolution. The AAA's mission is “one of service and education” (Matthews, 2005, p. 24). The AAA provides case management, dedicated personnel, and advanced training in order to meet dispute resolution needs of the public. The AAA is one of the larger providers of alternative dispute resolution. They have created their own rules and policies that must be applied when a company uses their services.

Second, there is the Labor Management Relations Act of 1947 (LMRA). This Act encourages voluntary arbitration (Markham, 2010, p. 613). Section 301(a) specifically deals with disputes over the terms of collective bargaining agreements. This section not only authorized courts to hear those disputes, but it also is the basis for judicial review of labor arbitration awards (Ibid). LMRA, section 301 (a) states,

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

While there are a lot of distinctions between forms and approaches of arbitration, it is clear that arbitration is a successful and useful form of ADR. A specific form of arbitration, which I will focus on next, is private judging.

### **Private Judging:**

Private judging is “a private trial conducted by a former judge and is most similar to a conventional trial in that judgment may be appealed for errors of law or as against the weight of the evidence” (JAMS, ADR Glossary). It originated in California in 1976

(Whittlesey, 2007, p. 543). Ten years after the 1976 Pound Conference, Mr. Roger J. Patterson, attorney in the District of Columbia, discussed the methods of ADR that have developed thus far (Patterson, 1987-88, p. 591). Patterson mentions that private judging is a less traditional form of arbitration (p. 597). Arbitration generally occurs because the parties agreed on it before a problem occurred. For example, there is usually an arbitration clause in contracts that the parties sign and agree to. On the other hand, private judging is more ad hoc, meaning it is a process chosen by the parties after a problem arises. The parties then choose their “judge,” who has the same authority as the courts and whose decision is both enforceable and appealable (Bendix & Chernick, 1994, p. 33). The parties have to also figure compensation (Whittlesey, 2007, p. 548). The reason private judging is gaining popularity is because of the vast amount of cases in the courts. Both the state and federal courts are overwhelmed. Private judging relieves some of the pressure on the courts. It is also important to provide a range of options for litigants to choose what method is most suitable for their specific dispute (p. 558).

Many states have begun using private judging, but each one applies it differently. There is no uniform statutory procedure (p. 545). However, private judging has some basic characteristics, which include: it requires the consent of both parties; the parties select the judge; the private judge is generally a former judge or lawyer; there is flexibility in the time and place; each side can present proof and arguments; the decision is reasoned and well written supported by facts and the law; and the decision is binding but subject to appeal. Overall, the process of private judging has been applied

in a variety of states, more specifically California; it has many positive and negative impacts on both the parties involved and the courts.

### **Application in California:**

The option of “renting – a judge” has grown tremendously in the state of California into a multimillion dollar industry. It has become an official part of the state court system (Kim, 1994, p. 166). In order to understand private judging, people have to look at the background of it. First, there are the statutory procedures (p. 168). There are two types of private judges in California: temporary judges and referees. While temporary judges are closer to the actual process of adjudication, both require consent of all parties and the parties get to choose their judge. According to article VI, section 21 of the California Constitution states, “[o]n stipulation of the parties litigant the court may order a cause to be tried by a **temporary judge** who is a member of the State Bar, sworn and empowered to act until final determination of the cause” (p. 169). Most temporary judges are appointed and paid by the state to make up for the overload of cases in the courts.

On the other hand, referees obtain their power from the California general reference statutes, more specifically section 638 of the California Code of Civil Procedure (p. 170). As soon as the parties select a judge, they request an order of reference or appointment. The order allows the parties to set guidelines for the process; for instance, they decide rules, payment, and where/when to have the trial. Once the trial is over, the temporary judge enters their decision just like an active judge; the referee must file a statement of decision with the courts. Both decisions must contain “findings of fact and conclusions of law” (p. 170). This entire process follows substantive



law because the parties have the right to appeal, unlike in arbitration (p. 171). The power of a private judge is not completely clear. One thing we do know is that a temporary judge does have greater power than a referee. For instance, a temporary judge holds the same powers as an active judge, with a few limitations. The private judge has the ability to hold someone contempt of court, while a referee does not. However, since renting a judge is the decision of the parties, they will most likely not be held in contempt. Both a temporary judge and a referee have the right to call a jury, which is debated continuously. The Judicial Council of California is actually considering limiting the use of public courtrooms and other resources for these private hearings.

In California (CA), the ability to rent a referee began in 1872 when statutory authority was implemented (p. 173). Then in 1966 there was a provision that authorized temporary judges. Finally in the 1970s, the rent a judge process became popular; three Los Angeles lawyers used a referee in a complex commercial case in 1976. In 1979, H. Warren Knight retired from the Orange County Superior Court to create the Judicial Arbitration & Mediation Services (JAMS) (p. 174). JAMS was the first rent a judge establishment and is now the largest provider of ADR.

The two most common cases that use referees or temporary judges in CA are complex commercial litigation and divorces. For both cases, the advantages of renting a judge include: speed, privacy, and the specialized knowledge of the private judge. While those are the two most common case types, some public parties, such as state agencies, are now using the process. For example, the University of California and a neighborhood association settled a dispute over the construction of a new pharmacy

school (p. 174). Some people argue that renting a judge is a private process and should not be used to decide issues of public policy (Kim, 1994, p. 175).

The rent a judge business has grown tremendously. In 1979, JAMS started with one retired judge; then in 1993, they had 230 retired judges in fourteen offices in three states. Most of the cases they hear are either arbitration or mediation. The revenues of JAMS increased by tenfold to a total of \$24 million. Other companies, like JAMS, are experiencing similar successes. To rent a judge, the price can range from \$300 to \$500, but the more well-known private judges can be as much as \$5000 a day. JAMS General Counsel John Welsh said that private judges make far more than judges on the bench (p. 176). They make approximately \$20,000 more and their pensions are seventy five percent of their salaries. While the direct and indirect benefits may increase the chance of judges retiring early, the main reason, according to several sources, is need for rest and relaxation. Also many public judges are dissatisfied with the public justice system; they believe there are more opportunities with ADR. Even though the number of private judges is increasing, the number of cases being heard by private judges is significantly lower than the cases being filed in the state court system (p. 178). For example, in 1994, JAMS heard approximately 240 cases a year while the Orange County courts heard about 54,000 cases (Kim, 1994, p. 179).

### **Application in Ohio:**

Ohio implemented their private judging statute, Ohio Revised Code § 2701.10, on September 26, 1984 (Whittlesey, 2007, p. 546). However, it went unused until 1988. The code says that someone can be a private judge if they voluntarily retired (p. 547). It lays out the process for them to become a private judge. First, they must register with

the clerk of all courts they want to get cases from. The courts are required to have a roster of the registered private judges. There is no limit on how many courts they can register with. Once they are registered, they will begin to receive referrals on civil cases or submissions on specific issues or questions of law.

The private judges then wait until parties choose to submit a referral or a submission. The parties have to enter into a written agreement. The agreement includes the following: who the private judge is; whether it is a referral or submission; if it is a submission, they describe the issue or question; indicate how the parties will pay and provide facilities and personnel; and identify the amount the parties will pay. This written agreement is then filed with clerk or presiding judge. The presiding judge enters an order and the private judge then has all the powers of an active judge.

Depending on whether it is a referral or submission, the next steps will vary (p. 550). For referrals, the private judge tries all issues, prepares the facts and conclusions from the law, and enters a ruling like an active judge. For submissions, the private judge tries the specific issue or question, prepares the facts and conclusions from the law, makes a decision on the specific issue or question, and enters his/her findings with the clerk of the court. In both situations, the judge's final decision has the same effect as an active judge and the appeal process is the same.

An extension of section 2701.10 is Rule VI, which is the Supreme Court's rule for the government of the judiciary of Ohio. Rule VI actually defines what a voluntarily retired judge is. It is "any person who was elected to and served on an Ohio court without being defeated in an election for new or continued service on that court" (p.

550). Lastly, the rule explains that private judges must follow the Ohio Rules of Civil Procedure, the Ohio Rules of Evidence, and the Code of Judicial Conduct (p. 551).

### **Application in Indiana:**

Indiana implemented their private judging statute in 1982; it is modeled after California's statute (Litkovitz, 1995, p. 506). There has been very little use of the process thus far. According to Thomas Carusillo, Director of Trial Court Services at the Indiana Supreme Court, there were six requests from 2004 – 2009 (personal communication, April 19, 2016). There have not been any requests since 2009. During an interview process, a few of the current private judges stated that they have yet to be contacted for a case, and they had no knowledge of anyone receiving a case. The private judges also answered questions about their understanding of private judging and how the system works (See the questions in Appendix, Item 1).

There are two main documents that describe the current system. First, there is the Indiana ADR Rule 6. It includes a very basic description of how the system works. There are five subsections that describe case selection, compensation, trial process, place of hearing and recordkeeping (Indiana Alternative Dispute Resolution Rule 6, 2015). Second, there is the Indiana Code Section 33-38-10. It has nine subsections that are very detailed and fully lay out the system (Indiana Code § 33-38-10, 2015). Those subsections include the definition of a private judge; who may act as a private judge; registration and appointment of judges; trial without jury; appeals; costs; time and place.

According to Honorable Raymond Kirtley, Indiana Senior Judge and Private Judge, the Indiana Supreme Court Division of State Court Administration is the administrative body over private judging. For easy access, the administration has

included a list of registered judges, basic procedural rules, and frequently asked questions on the IN Judiciary website - <http://www.in.gov/judiciary/>.

### **Empirical Findings about Indiana's use of Private Judging:**

According to the Indiana Supreme Court's Division of State Court Administration, there are currently eighteen registered private judges in Indiana. However, many of the phone numbers or emails the Division provided are out of date or wrong; therefore, trying to contact them is nearly impossible. People are forced to take the names provided and find their information elsewhere. Of the eighteen private judges on the roster, I was in contact with eight. However, I only received responses from three. Those three include: Hon. Kim Van Valer, Hon. Raymond D. Kickbush, and Raymond M. Kirtley.

I conducted interviews both on the phone and through email. They answered a variety of questions (See Appendix, Item 1). Hon. Valer said she is a mediator and private judge. She stated she has been a private judge since 2008; she learned about the process by doing her own research. Hon. Kickbush said he is a senior judge and private judge. He has been a private judge since he retired from the bench twenty years ago. He decided to learn more about the process when he decided to retire. Hon. Raymond said he is also a senior judge and private judge. He started in 2008. He learned about private judging by reading the Indiana Rules for ADR and the Indiana Code. All three private judges provided a general definition of private judging; to summarize, they stated that it is a process agreed upon by the parties. Also, they all mentioned that the parties have to decide how they will pay for it. For the final few questions, the three private judges directed me to the Indiana State Court

Administration and Indiana Code 33-38-10. They all stated they had not heard a case as a private judge and were unaware of any records of previous cases.

### **Public Policy and Rule of Law:**

Renting a judge seems like the ultimate combination of public and private justice; it is quick, efficient, and convenient as well as enforceable and appealable (Kim, 1994, p. 189). However, the system may put too much public power into private hands. First, while both the public and private judicial systems settle disputes, there is the function of rulemaking in those disputes (p. 190). In the private system, the parties expect the arbitrator or mediator to simply settle the dispute. However, in the public system, the courts enforce values in the Constitution and statutes. With regards to rulemaking, the rent a judge system has the power of both the private and public systems, which causes confusion and frustration. Private judges typically decide cases that are very narrow and simply settle disputes (p. 192). They do that because otherwise the litigants would choose judges based on whether or the judge supports or opposes the rule of law their case is questioning. Private judges have to be careful not to set precedents that allow people to predict how the judge will rule (p. 192).

Second, private judges have all this authority without any formal accountability (p. 193). The only requirement for them is the consent of the litigants. There are no formal requirements they must satisfy; they do not go through a screening process; and they are not appointed to their positions. Also, the system creates a buyer's market where the litigants get to choose who they want to decide their case; this causes the private judges to modify their reputations and decision-making to attract people (p. 191).

Ultimately, renting a judge is weakening the judicial system because it is putting all the power in the litigant's hands.

**Public Interest:**

There is also the concern with the depth and breadth of a private judge's decision making authority (p. 193). A rent – a – judge is allowed to hear any type of case, including ones that discuss gun control, school prayer, and abortion, as long as the litigants agree to hire them. Those specific cases directly impact peoples' civil liberties; they have the same impact as court judgments. They can create rules and set precedent for future cases. In order to protect the public's interest, there have been two possible demands to limit the private judge's ruling. First, they would "categorize cases according to the type of issue at stake" (p. 194). For example, disputes that involve public law or values should stay in the public courts; those cases would include constitutional questions, government regulation, and topics with a lot of public concern. Second, they would focus on the number of uninvolved parties who will be affected by the judgment. An example would be mass tort cases.

Under both of those approaches, there are three specific types of cases that private judges would be suitable for. First, there are family dispute cases such as divorce (p. 195). There are torts that involve a single plaintiff and are only applying existing standards. Lastly, there are complex commercial litigations which allow experts in that area decide the outcome. While all of this would benefit the public interest, it would be a lot more difficult than it sounds to pull out the specific public law cases. It would also be extremely difficult to write guidelines and enforce them for rent a judges.

On top of all that, it would be another time consuming and wasteful process in the judicial system.

### **Efforts of Regulation:**

Renting a judge in CA would have gone out of control if the Judicial Council of California had not adopted new rules and regulations in February of 1993 (p. 196).

There were three major changes made that include:

1. "if a party before a rent-a-judge is a 'repeat customer,' that fact must be disclosed to the other side;
2. Rent-a-judge trials must be open to the public; and
3. Rent-a-judges may not use public facilities or resources without the consent of the presiding judge" (Kim, 1994, p. 196).

### **Disclosure:**

The disclosure of a repeat customer helps to address whether or not the private judge can be impartial in deciding the case. It deals specifically with the ethical conduct of the judge. However, there is still the troubling fact there is no one who is making sure they are following these rules. One possible solution to that problem is to require the judges to publicly disclose their record of cases (p. 197).

### **Open to the Public:**

Many people argue that the privacy of renting a judge violates the First Amendment rights of the public and the media. This has not been an easy task though. This is particularly true because the trial only has to be made accessible to those who have explicitly said they want to hear the case. The process to say they will attend the trial is not easy either; they must explain why they want to attend the trial and a copy of



their letter must be sent to each party, the judge, and clerk. It should be a general rule that all cases are open to the public unless the parties can justify why it should not be.

### **Public Facilities and Resources:**

The Judicial Council has limited private judge's use of public facilities and the jury pools unless the presiding judge believes it would be beneficial for the justice system (p. 198). The issue with this is that there is no clear definition of what would "further the interest of justice." Also, if the previous two rules are implemented, then it makes the process of renting a judge a more public service; that means the private judges should have a right to the public resources. Overall, the use of a private judge is a complex and complicated process that does not have a one – size – fits – all fix.

### **Constitutional Objections:**

Those who oppose private judging argue that it is unconstitutional. They argue that it violates peoples' First Amendment, Due Process, and Fourteenth Amendment rights.

### **First Amendment:**

With regards to the First Amendment, people wonder if private judging is limiting their freedom of speech and their "right to know" (Whittlesey, 2007, p. 559). According to Whittlesey, the "right to know" means that "if an individual has the right to speak, there must be a concomitant right to listen ... The freedom to listen implies the freedom to know" (559). This issue is constantly brought up when people discuss how it impacts the media and their role in presenting information to the public (Hasan, 2009, p. 26). People also argue that they have the right to attend criminal trials, so therefore the same rules should be applied to civil trials (27). However, the US Supreme Court does

not agree (30). They have refused to hear a case concerning the public's right to attend a civil trial. As a result, this does not violate anyone's First Amendment right of the US Constitution. On the other hand, each state has their own constitution. Many people could argue that their First Amendment free speech rights in their own state are being violated. For instance, in California and Ohio, they have an open door policy (Whittlesey, 2007, p. 560). Ohio's Constitution states, "*All courts shall be open, and every person ... shall have justice administered without denial or delay*" (560). The language used makes it seem like everyone should have a right to any type of trial. The Ohio Supreme Court ruled on this issue; it came to the conclusion that the Ohio Constitution does not give any greater right of access than the First Amendment of US Constitution. In California, they believe that the open door policy should still be enforced, but it would not apply to proceedings conducted in private homes (Hasan, 2009, p. 32). That policy could cause even more potential problems with right to access. How would you define 'private homes,' and where would you draw that line?

**Due Process:**

With regards to due process, people argue that not everyone has the same right of access to private judging because of its costs (Kim, 1994, p. 181). They argue that the poorer litigants cannot access a private judge because they would not be able to afford it. However, the US Supreme Court has ruled that the Due Process Clause only requires states to "afford all individuals a meaningful opportunity to be heard" (Whittlesey, 2007, p. 555). This does not mean that they have to be the right to any forum they want; they have to use what is plausible for them personally. Also, the parties have a variety of other forms of ADR that they could choose to pursue. On the

other hand, California law has a broader definition of the “right of access” to the court system (Kim, 1994, p. 181). The CA Supreme Court says that people “are entitled not merely to access to the courts but to *timely access*” (p. 181). Therefore, since renting a judge provides a quicker process than the courts, it should be the route that everyone can consider taking. The issue with CA’s argument is that the CA courts have not clearly defined what “timely access” is; it does not necessarily mean the fastest hearing process. It could mean that the litigants should not face any unjustified obstacles (p. 183).

### **Equal Protection:**

With regards to equal protection, critics bring up the issue of the costs again. They argue that wealth is classified as a suspect class (Hasan, 2009, p. 32). They claim that poorer litigants are being denied the benefits of a private judge, and therefore their Fourteenth Amendment right of equal protection is violated. However, the courts have developed three tiers of scrutiny to test whether laws violate equal protection (Whittlesey, 2007, p. 556). First, there is strict scrutiny. In order to violate strict scrutiny, the law must “disadvantage a suspect class” or “violate the exercise of a fundamental right” (p. 556). The US Supreme Court has never considered wealth a suspect class, and it has never addressed the right of access to private judging. Second, there is intermediate scrutiny. It is applied to gender, illegitimacy, and alienage (p. 557). The poor do not fall under any of those categories. Lastly, there is rational basis. Private judging does not violate rational basis because it is a self-support system that reduces court congestion (p. 558). Under federal law, renting a private judge does not violate anyone’s right of equal protection.

On the other hand, the CA constitution has an expanded equal protection clause (Hasan, 2009, 34). Also, the CA Supreme Court expanded their suspect classification to include wealth. The CA courts have defined “impermissible wealth based discrimination” as “the lack of wealth results in the denial of an important state sponsored benefit” and/or “the challenged statute or practice discriminates directly and solely against the poor” (p. 35). They will only acknowledge the classification if it impacts a significantly larger poor population compared to the wealthy. There is also the issue of there not being a specific definition of what wealth is and where to draw the line. Also if wealth was the issue, then could someone not make the same argument for paying taxes (Kim, 1994, p. 187)? A rent a judge defender explained it perfectly when he explained that there are other private options – school and hospitals – which only the rich can afford. He stated,

It may be true that only the rich can afford private judging. But, it is also true that only the rich can afford private schooling, private hospitals, better lawyers and bigger houses. There is nothing unconstitutional about the fact that the rich have advantages in this country .... As long as the wealthy do not unconstitutional deprive the poor of protected liberty rights, this access to superior facilities is constitutionally acceptable (Kim, 1994).

In conclusion, those who oppose renting a judge argue whether or not it is constitutional. They question its constitutionality under the First Amendment, Due Process Clause, and Equal Protection Clauses of the Federal Constitution. However, none of those clauses are violated with the current federal laws. It is more questionable under the state constitutions.

### **Impacts on the Judicial Branch: Advantages of Private Judging**

Private judging has major impacts on the judicial branch. Many of those being positive or advantageous to the courts, the litigants, and the private judges. Those

advantages include: cost efficiency, tailored expertise, appellate review, convenience, privacy, and reduced caseload.

### **Cost Efficiency:**

Unlike civil litigation, private judging allows parties to have their cases heard immediately (Whittlesey, 2007, p. 551). Private judges do not have a pile of cases they are reviewing like the courts do. Also private judging has a sense of cooperation between the parties and the private judge. The sense of cooperation promotes efficiency; that saves both time and money. Some may argue that the upfront price of a private judge is more expensive; however the speedy process may result in smaller total costs (p. 551).

### **Tailored Expertise:**

Since the parties get to select their judge, they are able to pick someone who is an expert over their issue (Whittlesey, 2007, p. 552). The parties are better served when they do not have to explain all the little details to the party; this will result in a quicker proceeding as well. When the judges have expertise, it also legitimizes the case. It instills confidence in the outcome because the parties are the ones who picked the judge as an expert in a particular area.

### **Appellate Review:**

The ability to appeal a private judge's decision is the one factor that sets this form of ADR apart from all the others. The final decision can be appealed in the traditional court system. Many parties choose private judging because of this option. This is particularly true for people who have a large stake in the outcome. For instance,

if there are large sums of money involved, people want to have the ability to appeal the final decision if it is not what they wanted.

**Convenience:**

Private judging is extremely convenient for everyone involved (Whittlesey, 2007, pg. 553). There is a lot of flexibility in the scheduling; for instance, the parties get to choose the place and time. The hearing can even be held in the evenings or on the weekends so people do not have to miss work. If no location or time can be agreed upon, the hearing could even take place on the phone. This is different than the formal scheduling of the traditional court system.

**Privacy:**

Cases heard by a private judge are held in private and they are confidential. This is important for people who do not want their case plastered all over the internet. More specifically, businesses like their cases to be private because it prevents “damaging or embarrassing business or personal behavior” from being released to the public (Whittlesey, 2007, 553).

**Reduced Caseload:**

Lastly, private judging reduces the number of cases in the courts. As private judging improves and becomes used more frequently, the relief in the overcrowding courts will only improve. This helps the both the courts and the parties who choose the traditional court system. This is true because it allows cases to be heard more quickly, and as a result they get their outcomes faster and they can decide what they want to do next. Also, it relieves some of the stress from the courts and the parties. The courts do not feel the burden of the massive number of cases that they still have to get through.

The parties will worry less about costs piling up, and they will not have the case hanging over their heads as long.

### **Impacts on the Judicial Branch: Concerns of Private Judging**

On the other hand, private judging has many negative impacts on the judicial branch. Those concerns include: two – tiered system, conflicts of interest, secrecy, brain drain, priority access to appellate courts, and non – availability of trial by jury.

#### **Two-Tiered System:**

There is the argument that private judging is a two tiered system with regards to rich and the poor (Whittlesey, 2007, p. 554). The average cost of a private judge is \$300 to \$500 per hour all the way up to \$5500 per day. Therefore, on the one hand, there are the richer litigants who can afford the steep costs. On the other hand, there are the poorer litigants who would never be able to afford a private judge. As a result, people argue that private judging violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment, as discussed earlier. To recap, the due process clause says that people have a right to access the court system. The equal protection clause says that people have the right to be equal treatment in the court system.

#### **Conflicts of Interest:**

The fear with conflict of interest deals with the private payment to the private judges (Whittlesey, 2007, p. 558). People argue it will impact the judge's impartiality. The judges will favor one party over the other because they want a particular party to continue to use them. This happens most of the time when the private judge knows a party is wealthy or has a lot cases heard. This issue is also called the repeat customer.

**Secrecy:**

While confidentiality and privacy is important to many parties, it is also an argument against private judging. This argument has two aspects. First, the closed proceedings allow people to hide critical private information, such as “trade secrets, sensitive financial data, and embarrassing personal details” from the public (Whittlesey, 2007, p. 559). Second, critics argue that this violates the First Amendment. They claim that this violates the right to know and the right of public access aspects of the freedom of speech. The public does not know the date or time, and the judge does not publish an opinion.

**Brain Drain:**

Another argument is that private judging will entice the most talented judges into early retirement and away from the public court system (Whittlesey, 2007, p. 561). The judges are leaving the courts because they are realizing they can make more money and have more freedom being a private judge. As a result, the public courts will lose a lot of expertise, knowledge, and experience. The courts would also have to replace the retired judges. They would want judges who are just as qualified and knowledgeable.

**Priority Access to Appellate Courts:**

Private judging allows people to bypass the congested courts and get to the appellate courts quicker than those who used the traditional litigation process. The critics argue that people who know they have a high chance of losing in the lower courts will choose private judging because they can appeal it faster. Then when they go to the appellate courts, they will then fight with all they have to win.



### **Non-Availability of Trial by Jury:**

This varies among states; however, in those states that do not allow juries some wish they did (Whittlesey, 2007, p. 562). For instance, in Ohio they allowed them until 2006 and people were not pleased that they were taken away. The litigants appreciated the jury member's ability to bring common sense to the facts and to make the law intelligible (p. 567). Also, there is evidence that proves that jurors take cases seriously; they want to provide a well thought out verdict.

### **Recommendations:**

In order to improve the private judging system, there needs to be uniformity, whether that is through procedural guidelines or even a new act. Some examples are the Uniform Arbitration Act and the Uniform Mediation Act. However, those are examples of state laws, and the best solution would be something federally. A federal statute or act would create consistency that all states would have to abide by. They would have a single process that all private judges would reference. Also, if there were any questions about the application of private judging, then the federal courts would decide. That decision would apply unilaterally to all the states. It would eliminate the confusion and discrepancies between the different state statutes. This federal law could range from an amendment to the ADR Act of 1998 to a total new statute/act. It would have to be a federal law for the federal courts. For this paper, this cannot happen because it focuses on private judging in the state courts. It is outside of the federal court's control. They cannot regulate what state courts do unless it is interstate commerce.

Private judging is a combination of litigation and arbitration; thus, the best option would be to create an entire new act. In order to create a new state act, there would have to be a proposal submitted to the Uniform Law Commission (ULC), more specifically the Committee on Scope and Program (ULC, 2010). They provide guidelines from the ULC's "Statement of Policy Establishing Criteria and Procedures for Designation and Consideration of Uniform and Model Acts."

They ask five questions that the proposal would need to answer. The first question the ULC asks is, "Is uniformity of state law for the proposed subject matter desirable and realistic?" They want to make sure that the new act will produce substantial benefit for the public. Items that need to be considered when answering this question include: transactions across state lines; the laws in the different states; and what this act will do. The second question the ULC asks is, "What have the states already done with regard to this subject?" For this question, the act would have to go through the different states – such as CA, OH, and IN – and lay out how the statutes in the states are currently using private judges. The third question the ULC asks is, "Does the proposed project require changes in federal laws or regulations?" For private judging, there are no current federal laws other than what is listed in the ADR Act of 1998. However, like mentioned before, private judging is a combination of ADR and litigation. Therefore, it would make sense for it to have its own act with rules, procedures, and laws. The fourth question the ULC asks is, "What organizations or interest groups are likely to have an interest in the subject matter of the proposed project and are they likely to support or oppose a uniform or model act in this area?" There would be a variety of interest groups interested in this matter, especially the

courts, the litigation bar, and current private judges in the states. Lastly, the fifth question the ULC asks is, “Are there resources available to support the development of the proposed project?” It will take a lot of time to gather the information and draft the act. Also, the project will need existing expertise and a neutral financial supporter through it all.

### **Conclusion:**

In conclusion, private judging is a form of ADR that is combination of arbitration and litigation. It is most commonly used in CA, where it began. The CA statute has been replicated in other states, such as OH and IN. However, according to registered private judges in IN, the process is hardly ever used. Thus far, there have been many constitutional objections followed by efforts to regulate it. The constitutional objections include: First Amendment, Due Process, and Fourteenth Amendment rights. The efforts of regulation include: disclosure requirements, openness to the public, and the use of public facilities and resources. Private judging also has many impacts, both positive and negative, on the judicial branch. The advantages include: cost efficiency, tailored expertise, appellate review, convenience, privacy, and reduced caseload. The concerns include: two – tiered system, conflicts of interest, secrecy, brain drain, priority access to appellate courts, and non – availability of trial by jury. Overall, in order to improve the system there needs to be uniformity. The federal courts have no control because the issues do not deal with interstate commerce. Therefore, the states should work with ULC to create a new state act.

## **Appendix**

1. What is your job title?
2. How long have you been a private judge?
3. How did you come to learn about private judging?
4. Can you please describe your understanding of what it means to be a private judge?
5. What is the standard for judicial review in IN for private judging?
6. How common is private judging in IN?
7. Are there records on private judging cases in IN?
8. What administrative body is in charge of private judging?

Item 1. Questions for the private judges in Indiana.

## **References**

- ADR Glossary. (n.d.). Retrieved February 7, 2016, from <http://www.jamsadr.com/adr-glossary/>
- Alternative Dispute Resolution Act of 1998 (ADRA). Title 28, US Code, Section 1, *etseq.*
- Bendix, H. I., & Chernick, R.. (1994). Renting the Judge. *Litigation*, 21(1), 33–56.  
Retrieved from <http://www.jstor.org/stable/29759744>
- Civil Justice Reform Act of 1990 (CJRA). Title 28, US Code, Chapter 23, *etseq.*
- Crowne, C. H. (2001). THE ALTERNATIVE DISPUTE RESOLUTION ACT OF 1998: IMPLEMENTING A NEW PARADIGM OF JUSTICE. *New York University Law Review*, 76(6), 1768 – 1811.
- Federal Arbitration Act. Title 9, US Code, Section 1-16.
- Hasan, C.. (2009). Rent-a-judge. Retrieved from Lund University Libraries.
- Indiana Alternative Dispute Resolution Rule 6 (January 1, 2015).
- Indiana Code § 33-38-10, (2015).
- Indiana Supreme Court Division of State Court Administration. *Roster of Private Judges*. Retrieved from <http://www.in.gov/judiciary/admin/2414.htm>
- Kim, A. S.. (1994). Rent-a-Judges and the Cost of Selling Justice. *Duke Law Journal*, 44(1), 166–199. <http://doi.org.proxyiub.uits.iu.edu/10.2307/1372869>
- Labor Management Relations Act § 301(a), (1976), 29 U.S.C. § 185(a) (1976).
- Litkovitz, A, (1995). The Advantages of Using a “Rent – a – Judge” System in Ohio. 10 Ohio St. J. on Disp. Resol. 491. Retrieved from [www.lexisnexus.com/hottopics.lnacademic](http://www.lexisnexus.com/hottopics.lnacademic)
- Markham, J. W. (2010, November). Judicial Review of an Arbitrator's Award Under Section 301(A) of the Labor Management Relations Act. Retrieved February 26, 2016, from [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1701719](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1701719)
- Matthews, J. M. (2005). CONSUMER ARBITRATION. *Florida Bar Journal*, 79(4), 22-31.
- Padis, G. (2013). Arbitration Under Siege: Reforming Consumer and Employment Arbitration and Class Actions. *Texas Law Review*, 91(3), 665-710.
- Patterson, R. (1987-1988). Dispute Resolution in World of Alternatives. *Catholic University Law Review* 37(3), 591-604.

Uniform Law Commission. (2010, August). New Project Proposals. Retrieved April 25, 2016, from <http://www.uniformlaws.org/Narrative.aspx?title=NewProjectProposals>

Ward, E. (2007). MANDATORY COURT-ANNEXED ALTERNATIVE DISPUTE RESOLUTION IN THE UNITED STATES FEDERAL COURTS: PANACEA OR PANDEMIC?. *St. John's Law Review*, 81(1), 77-98.

Whittlesey, J. W. (2007). PRIVATE JUDGES, PUBLIC JURIES: THE OHIO LEGISLATURE SHOULD REWRITE R. C. § 2701.10 TO EXPLICITLY AUTHORIZE PRIVATE JUDGES TO CONDUCT JURY TRIALS. *Case Western Reserve Law Review*, 58(2), 543-573.