

# 1997 Texas ADR Legislative Report

## ACKNOWLEDGMENTS

This document is the result of many hours of work from a number of talented and committed individuals. The entire staff of the Center for Public Policy Dispute Resolution worked together to identify and track ADR legislation, analyze bills, research interpretive issues, draft bill summaries, double- and triple-check bill information, edit and re-edit text and lay out the final document. Andrew Bowman coordinated the project with crucial assistance from several Center interns and research assistants, including Marcia Grimes, Jennifer Nickolas, Leigh Sebastian and Matt Wirthlin. Marcia, Jennifer and Leigh collaborated to produce bill summaries and vet the summaries for accuracy, while Matt oversaw bill analysis and tracking during the legislative session. Critical evaluative, analytic and editorial input on bills was provided by Jan Summer. Tricia Mitchell helped keep the project on track to the end and Gary Wene assisted with layout and printing. The entire effort was produced in conjunction with E. Wendy Trachte-Huber and the A. A. White Dispute Resolution Institute, College of Business Administration, University of Houston, and with assistance from the State Bar of Texas, Alternative Dispute Resolution Section.

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## EXECUTIVE SUMMARY

Alternative dispute resolution legislation considered by the 75th Legislature was characterized by both incremental and dramatic initiatives. More than 85 bills were filed with significant mention of ADR, of which 21 were passed. A large number of the bills passed provide for modest expansions in ADR applications -- permitting use of arbitration in resolving disputes between consumers and credit agencies, for instance, or authorizing private child support enforcement agencies to conduct mediations. Others passed represent important advances, such as the Governmental Dispute Resolution Act and the Negotiated Rulemaking Act. Perhaps most dramatic were many of the bills considered but not passed, such as HB 851, which would have required most civil cases filed throughout Texas to go to ADR, and SB 175, which mandated inclusion and use of ADR clauses in state contracts. The diversity of subject areas and transactions for which ADR was considered by the 75th Legislature reflects the increased acceptance of ADR techniques generally to resolve public and private conflicts more efficiently and equitably.

### **Highlights:**

The two most substantial ADR bills passed in 1997 both dealt with government ADR use: **SB 694**, the Governmental Dispute Resolution Act, and **SB 882**, the Negotiated Rulemaking Act. The Governmental Dispute Resolution Act provides explicit statutory authorization and encouragement for state agency ADR use. It grants budgetary authority to pay for items related to implementing the Act, establishes minimum training and other requirements for government ADR, authorizes agencies to hire impartial third parties and obtain other necessary assistance and articulates a standard for confidentiality of communications made in government ADR. The bill also provides State Office of Administration Hearings administrative law judges with the authority to conduct ADR proceedings and refer contested cases to ADR.

The Negotiated Rulemaking Act encourages Texas agencies to use negotiated rulemaking and outlines how the process should be used. The statute establishes the factors which the agency must consider before deciding to use the process, outlines notice requirements when the process is used, provides minimum standards for facilitators, and grants authority to agencies to help support the participation of necessary interests who face resource constraints.

**SB 454** and **SB 1161** also deal with governmental ADR. SB 454 removes ADR materials from the definitions of government records. By removing the materials from the records definition, the bill works to remove the materials from records retention requirements. SB 1161 allows counties to contract with private entities to handle child support issues, including the provision of mediation for disputes related to child support and visitation.

**HB 1971**, **SB 149**, and **SB 386** introduce the use of ADR processes in three new areas. HB 1971 provides for the use of binding arbitration as an optional step in resolving disputes between consumers and credit reporting agencies about the information held in the consumer's credit report. SB 149 authorizes the use of non-binding ADR processes in resolving disputes over tenure review evaluations. SB 386 alters the appeals process in conflicts between health organizations and their enrollees over health care treatments to allow a court to order non-binding ADR procedures.

One of the session's most sweeping bills, **SB 1**, also contains important ADR provisions. SB 1 restructures the water management responsibilities in Texas, requiring the development of regional long term water management plans which will be incorporated into a comprehensive state plan. SB 1 authorizes TNRCC to use dispute resolution procedures where two parties cannot agree on payment for water diverted in an emergency situation, and also provides that the Water Development Board may resolve conflict arising from the regional planning process. While not specifically provided for elsewhere in the bill, ADR techniques

could potentially serve to resolve conflicts arising in the various stages of elaborating water management plans.

### [Index of ADR Bills Considered](#)

## **BILLS PASSED**

### **Business and Finance**

HB 1445 Granting increased regulatory powers to the Texas Racing Commission; requiring binding arbitration of certain simulcasting disputes.

HB 1595 Granting Texas Department of Transportation responsibility for regulating motor vehicle sales, leases and distribution; requiring mediation for certain disputes between franchised auto dealers and manufacturers or distributors.

HB 1870 Separating regulation of trust companies from regulation of banks; defining civil action under the act to include ADR procedures; authorizing use of arbitration in determining the value of a security held by a secured creditor.

HB 1971 Regulating interest rates, certain lenders, and credit reporting agencies; permitting arbitration of disputes about information in the consumer's credit file.

SB 555 Modernizing business associations law; authorizing arbitration of certain intra-corporate disputes.

SB 898 Recodifying and correcting certain enacted codes; clarifying that authority to arbitrate does not apply only to non-profit corporations.

### **Criminal Justice**

HB 156 Prohibiting stalking offenders from contacting their victim without consent; allowing for mediation between stalking offender and victim or victim's family when desired by each party.

## **Education/Youth**

SB 133 Delineating student behavior that requires attendance at a juvenile alternative education program; requiring binding arbitration when each school district and county juvenile board fail to reach a memorandum of understanding.

SB 149 Requiring institutions of higher education to create tenure review; requiring, at the faculty member's option, the use of non-binding ADR procedures when termination is challenged. Family/Child Support

SB 29 Addressing the implementation of child support enforcement provisions of federal law; retaining existing use of mediation.

SB 798 Amends mandatory statement to be included in pleadings of certain family law disputes to include phrase, before final trial.

SB 1161 Allowing certain counties to contract with private entities to enforce and collect child support obligations; allowing the private entity to provide mediation services to resolve support or visitation disputes.

## **Health Care**

SB 175 Amending regulation of nursing facilities by DHS and the Board of Human Services; amending binding arbitration provisions regarding certain disputes between DHS and the nursing facility.

SB 386 Subjecting decisions by health insurance carriers, HMO's, or managed care entities on specific treatments for their insureds to standards of review; allowing insureds to file complaints against the carrier, HMO, or managed care entity for failure to meet such standards; authorizing courts to refer certain complaints to mediation or other non-binding ADR.

## **Insurance**

SB 1106 Encouraging insurers to bring actions to recover from third parties and/or their insurers; expanding the definition of action to include mediation and arbitration in addition to litigation.

### **Labor**

SB 1286 Allowing police officers and firefighters to select or elect a majority bargaining agent; allowing the AAA to conduct elections and certify their results.

### **Natural Resources**

SB 1 Requiring creation of a comprehensive region-by-region water management system by September 2001; providing for use of dispute resolution procedures for disputes involving emergency water transfers.

### **State Agencies**

SB 323 Requiring 30 hours of training and continuing legal education for ALJ's with less than 3 years bench experience; recommending ADR training.

SB 454 Revising the definition of records to exclude documentation of ADR processes and their results.

SB 694 Encouraging state agencies to create and implement alternative dispute resolution procedures for use in agency disputes; allowing SOAH to refer administrative hearings to ADR.

SB 882 Encouraging state agencies to use negotiated rulemaking; prescribing the procedures by which the agency shall promulgate regulations when using negotiated rulemaking.

### **BILLS NOT PASSED**

### **Annexation**

HB 751/SB 313 Allowing special elections for disannexation; requiring an arbitration panel to determine and apportion costs of the election.

HB 2013/SB 727 Enabling MUD's in extra-territorial jurisdictions and municipalities to negotiate alternatives to annexation.

HB 2362/SB 1602 Creating a moratorium on all annexations until 9/1/99; requiring negotiation of a service plan outlining how the municipality would extend services to the annexed area; requiring arbitration where they fail to agree on such a plan.

HB 2363/SB 1744 Provides for the same service plan and arbitration; does not include the moratorium.

HB 2364/SB 1742 Provides for arbitration of disputes; does not include the moratorium or the service plan.

### **Construction**

HB 1742/SB 867 Allowing contractors and claimants to request mediation to resolve disputes between them; providing disincentives for not participating in mediation.

HB 3352/SB 1443 Giving authority to a new Correctional Facilities Construction Claims Commission to conduct binding arbitration to resolve disputes between the state prison system and a state prison construction contractor.

### **Environmental**

HB 2444/SB 1764 Allowing the executive director of TNRCC to refer permit disputes to ADR procedures.

HB 2707 Requiring TNRCC to arbitrate all intergovernmental disputes arising under TNRCC jurisdiction; allowing disputes between TNRCC and non-governmental entities to be arbitrated only when the other party agrees.

HB 3460/SB 1874 Allowing TNRCC and/or parties applying for permits to use ADR procedures to be established by the TNRCC.

### **General ADR**

HB 851 Requiring courts to refer most civil cases to mediation if the parties have not settled within 60 days of service on the defendant.

HB 1558/SB 1731 Requiring state agencies to develop procedures for employee grievances; allowing for the use of already established ADR processes.

HB 1962 Authorizing justice of the peace courts in certain counties to charge the same court fees as county and district courts.

HB 2455 Allowing institutes of higher education to use ADR for personnel disputes.

HB 3171 Requiring 24 hours of dispute resolution training for members of appraisal review boards; at least 8 hours of the training must focus on resolving disputes between a governmental agency and a member of the public.

### **Negotiated Rulemaking**

HB 1383/SB 413 Promoting the use of negotiated rulemaking by the Health and Human Services Department.

### **Peer/Youth Mediation**

HB 3430 Defining peer mediation programs; establishing guidelines for peer mediation in schools.



SB 1689 Authorizing Harris County to establish peer mediation in schools; establishing funding from court filing fees.

### **Public Utilities**

HB 12 Creating an electric utility deregulation study; requiring the study to consider ADR for consumer issues.

HB 1509/SB 684 Providing for electric utility deregulation; requiring ADR for certain inter-utility and consumer disputes.

HB 2755/SB 965 Allowing OPUC to intervene in certain ADR proceedings; requiring PUC to adopt ADR procedures.

SB 965 Authorizing PUC to use ADR for certain matters; providing guidelines for PUC use of ADR.

### **State Contracting**

SB 175 Requiring ADR clauses in state contracts.

SB 1786 Directing a limited waiver of sovereign immunity; requiring mediation.

### **Statute Summary:** [The Governmental Dispute Resolution Act](#)

S.B. 694 Sen. Buster Brown / Rep. Sherri Greenberg Relating to the use of alternative dispute resolution procedures by state agencies. Summary:

The Governmental Dispute Resolution Act (GDR Act), passed with broad and bipartisan support by the 75th Legislature, responds to Texas agencies' growing interest in ADR processes. As in the private sector, Texas government decisionmakers are learning that ADR can provide more effective, equitable and efficient ways of dealing with conflict than traditional, adversarial methods. The purpose of the Act is to increase the appropriate use of ADR conflict management techniques by state agencies.

The GDR Act provides explicit statutory authorization and encouragement for state agency ADR use. Specifically, the Act authorizes and encourages Texas agencies to use ADR procedures; permits agencies to share ADR expertise including using existing employees as impartial third parties; authorizes expenditures for training, system design, and impartial third parties as needed; articulates a standard for the confidentiality of communications made in ADR procedures; and authorizes administrative law judges at the State Office of Administrative Hearings to conduct ADR procedures and refer cases to ADR.

The GDR Act builds by reference upon key provisions of the Texas Alternative Dispute Resolution Procedures Act, first passed in 1987 to guide ADR use for civil disputes. The thrust of the GDR Act is to add to existing dispute resolution options and to build upon the rights and protections of current law. The GDR Act explicitly works to supplement, not replace or limit, all existing dispute resolution practices and procedures used by Texas agencies. The legislation is permissive in application, not mandatory, and does not effect the Texas sovereign immunity doctrine. It is based in part on the federal Administrative Dispute Resolution Act, enacted in 1975 and permanently reauthorized in 1996, which promotes the use of ADR in federal agencies in a government-wide, systematic manner.

### **Key Provisions:**

*Policy Statement:* The Act contains a formal declaration in Section 2008.002 that it is Texas state policy to resolve conflicts before state agencies as fairly and expeditiously as possible and that ADR procedures should be applied in all appropriate activities areas and levels of state government.

*Budget Authority:* Section 2008.004 of the Act authorizes the expenses associated with implementing the statute to be paid out of any appropriate area of the agency's budget. The section also authorizes agencies to contract with other public and private entities, including the several county-based community

Dispute Resolution Centers, for training and expertise that may be necessary to meet the objectives of the Act.

*Sovereign Immunity:* The GDR Act makes clear that it does not affect an agency's existing authority to assert or waive sovereign immunity as established by other law. Section 2008.005 explicitly states that the activities authorized by the Act neither constitute a waiver of sovereign immunity nor provide agencies with new authority to waive immunity. Accordingly, an agency may use any ADR process it chooses under the GDR Act, but must make its own analysis to determine (1) if and how any sovereign immunity issues are relevant and (2) that use of the process it selects conforms with its ability to assert or waive sovereign immunity.

Subsections (a) and (b) of Section 2008.005 clarify that the GDR Act does not affect the current status of sovereign immunity doctrine application in Texas. Subsection (c) makes the same statement regarding the use of binding arbitration. By stating, Nothing in this chapter authorizes binding arbitration as a method of alternative dispute resolution, the subsection makes clear that the GDR Act provides no new authority for agencies to utilize binding arbitration, but also does not affect any agencies' existing authority to utilize this procedure. Any agency which possesses authority to use binding arbitration may do so under the GDR Act, and any agency lacking such authority does not now possess it by virtue of the GDR Act.

*Supplemental Nature of Procedures:* Section 2008.052 states that ADR procedures authorized by the Act are not intended to replace or limit, but rather to supplement, current agency dispute resolution procedures. It also states that ADR procedures may not be applied in a manner that denies a person a right granted under other state or federal law, including a right to an administrative or judicial hearing.

*Impartial Third Parties:* Section 2008.053 provides that agencies may appoint a governmental officer or employee or a private individual to serve as an impartial third party in an alternative dispute resolution procedure. Agencies may also contract with SOAH, the Center for Public Policy Dispute Resolution, community dispute resolution centers, other government entities, or may enter into a pooling agreement with several government entities, to obtain impartial third parties. The section also provides that the impartial third party must be acceptable to the disputants, except under certain circumstances for cases referred by SOAH administrative law judges.

Section 2008.053 also requires that whether or not the impartial third party is a state employee, the qualifications required by the Texas ADR Procedures Act are also required in governmental ADR. These minimum qualifications include completion of 40 hours of ADR training and the absence of a conflict of interest. The section also directs that the impartial third party in a governmental ADR procedure must abide by the standards and duties described in the Texas ADR Procedures Act. These include a duty not to coerce or compel settlement, a duty to keep the parties' confidence, and a duty to keep the communication, conduct, and demeanor of the parties confidential from outside parties, including the appointing agency.

*Confidentiality:* The GDR Act addresses the issue of confidentiality in a way that strikes a careful and appropriate balance between the processes' need for confidentiality and the public's right to open government. The confidentiality provisions are similar to those provided for private disputes as outlined by the Texas ADR Procedures Act, but are slightly more limited. The GDR Act provides the minimum level of confidentiality required for the process to be effective.

Section 2008.054 outlines the confidentiality provisions of the GDR Act. Subsection (a) adopts the provisions of two sections of the Texas ADR Procedures Act, Sections 154.053 and 154.073, for the communications,

records, conduct, and demeanor of the impartial third party and the disputants. Section 154.053 of the Texas ADR Procedures Act sets the standards and duties of impartial third parties. Section 154.073 of the Texas ADR Procedures Act establishes confidentiality of communications in dispute resolution procedures generally.

Subsection 2008.054 (b) provides that certain information is to remain confidential even against Open Records Act inquiries, unless all parties agree to the disclosure. The information specifically excepted from the Open Records Act includes only: (1) communications, and records of those communications, between an impartial third party and the disputants, and between the disputants, that are relevant to the dispute and made during the ADR procedure; and (2) the notes of the impartial third party.

Subsection 2008.054 (c) states that a final written agreement to which a government entity is a signatory that is reached through a dispute resolution procedure is not to be construed as a "communication" under Section 2008.054 (c); or, more simply, that final agreements under the Act are subject to normal treatment under the Open Records Act. Finally, Subsection 2008.054 (d) clarifies that the impartial third party may not be required to testify in any proceedings as a result of the dispute resolution process.

*ADR Use by SOAH:* Sections 2 through 5 of the GDR Act amend parts of the SOAH enabling statute to facilitate greater use of ADR by SOAH. The GDR Act amends SOAH provisions of the Government Code to reference ADR procedure through the Texas ADR Procedures Act and to explicitly authorize SOAH to conduct ADR procedures.

The GDR Act also amends Section 2003.042 of the Government Code to provide that SOAH judges may refer cases to ADR procedures and may issue orders apportioning costs to the parties and appointing a neutral, subject to the Section 2008.053 requirements. Section 2008.053 requirements state that the impartial

third party must be acceptable to the disputants, except that SOAH judges may appoint an impartial third party for the disputants if they cannot agree on one within a reasonable period of time.

Other amendments to Section 2003.042 deal with SOAH judges serving as impartial third parties. Section 2003.042 (a) (7) allows SOAH judges to serve as impartial third parties if they meet the general requirements outlined in the GDR Act. If either of the parties objects to a SOAH judge serving as the impartial third party, however, then the SOAH judge may not so serve. Section 2003.042 (a) (8) provides that SOAH judges may serve as impartial third parties for disputes referred for that purpose by other state agencies pursuant to contract. Section 2003.042 (b) prohibits SOAH judges from serving as impartial third parties in the same case or dispute in which he or she is a judge and has made the referral to the ADR process.

Finally, Section 2003.047 (j) states that a SOAH judge may not refer a case from the Texas Natural Resource Conservation Commission to an alternative dispute resolution procedure if the Commission has already conducted such a procedure, unless all the parties thereto so agree. For cases where the Commission has not already conducted such a procedure, the section directs the SOAH judge to consider the Commission's recommendation in deciding whether to issue a referral to ADR.

**S.B. No. 694**

AN ACT

1-1 relating to the use of alternative dispute resolution procedures by

1-2 state agencies.

1-3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

1-4 SECTION 1. Subtitle A, Title 10, Government Code, is amended

1-5 by adding Chapter 2008 to read as follows:

1-6 CHAPTER 2008. ALTERNATIVE DISPUTE RESOLUTION AT STATE AGENCIES

1-7 SUBCHAPTER A. GENERAL PROVISIONS

1-8 Sec. 2008.001. SHORT TITLE. This chapter may be cited as

1-9 the Governmental Dispute Resolution Act.

1-10 Sec. 2008.002. POLICY. It is the policy of this state that

1-11 disputes before state agencies be resolved as fairly and

1-12 expeditiously as possible and that each state agency support this

1-13 policy by developing and using alternative dispute resolution

1-14 procedures in appropriate aspects of the agency's operations and

1-15 programs.

1-16 Sec. 2008.003. DEFINITIONS. In this chapter:

1-17 (1) "Alternative dispute resolution procedure"

1-18 includes:

1-19 (A) a procedure described by Chapter 154, Civil

1-20 Practice and Remedies Code; and

1-21 (B) a combination of the procedures described by

1-22 Chapter 154, Civil Practice and Remedies Code.

- 1-23           (2) "State agency" means an officer, board,
- 2-1   commission, department, or other agency in the executive branch of
- 2-2   state government with statewide jurisdiction that makes rules or
- 2-3   determines contested cases. The term includes:
- 2-4           (A) the attorney general;
- 2-5           (B) an institution of higher education as
- 2-6   defined by Section 61.003, Education Code; and
- 2-7           (C) the State Office of Administrative Hearings.
- 2-8           (3) The following terms have the meanings assigned by
- 2-9   Section 2001.003:
- 2-10          (A) "contested case";
- 2-11          (B) "party";
- 2-12          (C) "person"; and
- 2-13          (D) "rule."
- 2-14          Sec. 2008.004. AGENCY CONTRACTS; BUDGETING FOR COSTS.
- 2-15   (a) A state agency may pay for costs necessary to meet the
- 2-16   objectives of this chapter, including reasonable fees for training,
- 2-17   policy review, system design, evaluation, and the use of impartial



2-18 third parties. To the extent allowed by the General Appropriations  
2-19 Act, the agency may use for this purpose money budgeted for legal  
2-20 services, executive administration, or any other appropriate aspect  
2-21 of the agency's operations.

2-22 (b) A state agency may contract with another state agency,  
2-23 including the Center for Public Policy Dispute Resolution at The  
2-24 University of Texas School of Law, with an alternative dispute  
2-25 resolution system created under Chapter 152, Civil Practice and  
3-1 Remedies Code, or with a private entity for any service necessary  
3-2 to meet the objectives of this chapter.

3-3 Sec. 2008.005. SOVEREIGN IMMUNITY. (a) This chapter does  
3-4 not waive immunity from suit and does not affect a waiver of  
3-5 immunity from suit contained in other law.

3-6 (b) The state's sovereign immunity under the Eleventh  
3-7 Amendment to the United States Constitution is not waived by this  
3-8 chapter.

3-9 (c) Nothing in this chapter authorizes binding arbitration  
3-10 as a method of alternative dispute resolution.

3-11 (Sections 2008.006-2008.050 reserved for expansion

3-12 SUBCHAPTER B. ALTERNATIVE DISPUTE RESOLUTION

3-13 Sec. 2008.051. DEVELOPMENT AND USE OF PROCEDURES. (a) Each

3-14 state agency may develop and use alternative dispute resolution

3-15 procedures. Alternative dispute resolution procedures developed

3-16 and used by a state agency must be consistent with Chapter 154,

3-17 Civil Practice and Remedies Code, and with the administrative

3-18 procedure law, Chapter 2001. The State Office of Administrative

3-19 Hearings may issue model guidelines for the use of alternative

3-20 dispute resolution procedures by state agencies.

3-21 (b) If a state agency that is subject to Chapter 2001 adopts

3-22 an alternative dispute resolution procedure, it may do so by rule.

3-23 Sec. 2008.052. SUPPLEMENTAL NATURE OF PROCEDURES.

3-24 (a) Alternative dispute resolution procedures developed and used

3-25 under this chapter supplement and do not limit other dispute

4-1 resolution procedures available at a state agency.

4-2 (b) This chapter may not be applied in a manner that denies

4-3 a person a right granted under other state or federal law,

4-4 including a right to an administrative or judicial hearing.

4-5 Sec. 2008.053. IMPARTIAL THIRD PARTIES. (a) A state agency  
4-6 may appoint a governmental officer or employee or a private  
4-7 individual to serve as an impartial third party in an alternative  
4-8 dispute resolution procedure. The agency's appointment of the  
4-9 impartial third party is subject to the approval of the parties,  
4-10 except that when a State Office of Administrative Hearings  
4-11 administrative law judge has issued an order referring a case to an  
4-12 alternative dispute resolution procedure under Section 2003.042(5),  
4-13 the administrative law judge may appoint the impartial third party  
4-14 for the parties if they cannot agree on an impartial third party  
4-15 within a reasonable period.

4-16 (b) The impartial third party must possess the  
4-17 qualifications required under Section 154.052, Civil Practice and  
4-18 Remedies Code.

4-19 (c) A state agency also may obtain the services of a  
4-20 qualified impartial third party through an agreement with the State  
4-21 Office of Administrative Hearings, the Center for Public Policy  
4-22 Dispute Resolution at The University of Texas School of Law, an  
4-23 alternative dispute resolution system created under Chapter 152,

4-24 Civil Practice and Remedies Code, or another state or federal

4-25 agency or through a pooling agreement with several state agencies.

5-1 The agreements may provide that the using agency or the parties

5-2 will reimburse the furnishing agency, in kind or monetarily, for

5-3 the full or partial cost of providing the qualified impartial third

5-4 party.

5-5 (d) The impartial third party is subject to the standards

5-6 and duties prescribed by Section 154.053, Civil Practice and

5-7 Remedies Code, and has the qualified immunity prescribed by Section

5-8 154.055, Civil Practice and Remedies Code, if applicable.

5-9 Sec. 2008.054. CONFIDENTIALITY OF CERTAIN RECORDS AND

5-10 COMMUNICATIONS. (a) Sections 154.053 and 154.073, Civil Practice

5-11 and Remedies Code, apply to the communications, records, conduct,

5-12 and demeanor of the impartial third party and the parties.

5-13 (b) Notwithstanding Section 154.073(d), Civil Practice and

5-14 Remedies Code:

5-15 (1) a communication relevant to the dispute, and a

5-16 record of the communication, made between an impartial third party

5-17 and the parties to the dispute or between the parties to the  
5-18 dispute during the course of an alternative dispute resolution  
5-19 procedure are confidential and may not be disclosed unless all  
5-20 parties to the dispute consent to the disclosure; and  
5-21 (2) the notes of an impartial third party are  
5-22 confidential except to the extent that the notes consist of a  
5-23 record of a communication with a party and all parties have  
5-24 consented to disclosure in accordance with Subdivision (1).

5-25 (c) Subsection (b)(1) does not apply to a final written  
6-1 agreement to which a governmental entity is a signatory that is  
6-2 reached as a result of a dispute resolution procedure conducted  
6-3 under this chapter. Information in the final written agreement is  
6-4 subject to required disclosure, is excepted from required  
6-5 disclosure, or is confidential in accordance with other law.

6-6 (d) An impartial third party may not be required to testify  
6-7 in any proceedings relating to or arising out of the matter in  
6-8 dispute.

6-9 Sec. 2008.055. INTERAGENCY SHARING OF INFORMATION;  
6-10 CONSISTENCY OF PROCEDURES. (a) A state agency may share the

6-11 results of its alternative dispute resolution program with other  
6-12 agencies and with the Center for Public Policy Dispute Resolution  
6-13 at The University of Texas School of Law. The center may collect  
6-14 and analyze the information and report its conclusions and useful  
6-15 information to state agencies and the legislature.

6-16 (b) State agencies should, to the extent feasible given the  
6-17 differences in agency purpose, jurisdiction, and constituency,  
6-18 adopt policies and procedures for alternative dispute resolution  
6-19 that are consistent with the policies and procedures of other state  
6-20 agencies.

6-21 SECTION 2. Section 2003.001, Government Code, is amended to  
6-22 read as follows:

6-23 Sec. 2003.001. DEFINITIONS. In this chapter:

6-24 (1) "Administrative law judge" means an individual who  
6-25 presides at an administrative hearing held under Chapter 2001.

7-1 (2) "Alternative dispute resolution procedure" has the  
7-2 meaning assigned by Section 2008.003.

7-3 (3) "Office" means the State Office of Administrative

7-4 Hearings.

7-5 (4) [~~3~~] "State agency" means:

7-6 (A) a state board, commission, department, or

7-7 other agency that is subject to Chapter 2001; and

7-8 (B) to the extent provided by Title 5, Labor

7-9 Code, the Texas Workers' Compensation Commission.

7-10 SECTION 3. Subsection (b), Section 2003.021, Government

7-11 Code, is amended to read as follows:

7-12 (b) The office shall conduct all administrative hearings in

7-13 contested cases under Chapter 2001 that are before a state agency

7-14 that does not employ an individual whose only duty is to preside as

7-15 a hearings officer over matters related to contested cases before

7-16 the agency and may conduct alternative dispute resolution

7-17 procedures.

7-18 SECTION 4. Section 2003.042, Government Code, is amended to

7-19 read as follows:

7-20 Sec. 2003.042. POWERS OF ADMINISTRATIVE LAW JUDGE. (a) An

7-21 administrative law judge may:

7-22 (1) administer an oath;

7-23 (2) take testimony;

7-24 (3) rule on a question of evidence;

7-25 (4) subject to review by the state agency before which

8-1 the contested case is brought, issue an order relating to discovery

8-2 or another hearing or prehearing matter, including an order

8-3 imposing a sanction that the agency may impose; ~~and~~

8-4 (5) issue an order that refers a case to an

8-5 alternative dispute resolution procedure, determines how the costs

8-6 of the procedure will be apportioned, and appoints an impartial

8-7 third party as described by Section 2008.053 to facilitate that

8-8 procedure;

8-9 (6) issue a proposal for decision that includes

8-10 findings of fact and conclusions of law;

8-11 (7) serve as an impartial third party as described by

8-12 Section 2008.053 for a dispute referred by an administrative law

8-13 judge, unless one of the parties objects to the appointment; and

8-14 (8) serve as an impartial third party as described by

8-15 Section 2008.053 for a dispute referred by a government agency



8-16 under a contract.

8-17 (b) An administrative law judge may not serve as an

8-18 impartial third party for a dispute that the administrative law

8-19 judge refers to an alternative dispute resolution procedure.

8-20 SECTION 5. Section 2003.047, Government Code, as added by

8-21 Section 1, Chapter 106, Acts of the 74th Legislature, 1995, is

8-22 amended by adding Subsection (j) to read as follows:

8-23 (j) An administrative law judge hearing a case on behalf of

8-24 the commission may not, without the agreement of all parties, issue

8-25 an order referring the case to an alternative dispute resolution

9-1 procedure if the commission has already conducted an unsuccessful

9-2 alternative dispute resolution procedure. If the commission has

9-3 not already conducted an alternative dispute resolution procedure,

9-4 the administrative law judge shall consider the commission's

9-5 recommendation in determining whether to issue an order referring

9-6 the case to the procedure.

9-7 SECTION 6. This Act takes effect September 1, 1997.

9-8 SECTION 7. The importance of this legislation and the

9-9 crowded condition of the calendars in both houses create an

9-10 emergency and an imperative public necessity that the  
9-11 constitutional rule requiring bills to be read on three several  
9-12 days in each house be suspended, and this rule is hereby suspended.

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President of the Senate

Speaker of the House

I hereby certify that S.B. No. 694 passed the Senate on  
March 20, 1997, by the following vote: Yeas 31, Nays 0; and that  
the Senate concurred in House amendment on May 24, 1997, by a  
viva-voce vote.

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Secretary of the Senate

I hereby certify that S.B. No. 694 passed the House, with  
amendment, on May 21, 1997, by a non-record vote.

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Chief Clerk of the House

Approved:

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Date

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Governor

**Statute Summary:** [The Negotiated Rulemaking Act](#)

**S.B. 882**

Sens. Buster Brown, Rodney Ellis / Reps. Sherri Greenberg, Mark Stiles

Relating to negotiated rulemaking by state agencies.

**Summary:**

This statute encourages Texas agencies to use negotiated rulemaking and outlines how this process should be used. It is permissive, not mandatory, and it does not affect the Administrative Procedures Act (APA) rulemaking requirements. The statute implements Recommendation General Government 5, "Increase the Use of Negotiated Rulemaking," by the *Texas Performance Review*. The statute amends only Section 2008 of the Government Code.

Negotiated rulemaking, also known as regulatory negotiation or "reg-neg," is a consensus-based process that agencies may use to help them better develop proposed rules. In a reg-neg, the agency participates in an intensive, facilitated negotiation effort among all the interests affected by the rulemaking prior to issuing the proposed rule. The process springs from the concept that the agency and its stakeholders can develop a better rule working together than working against each other. Reg-neg complements and in no way alters all APA notice-and-comment/public hearings requirements.

Reg-neg has been used extensively by federal and state agencies. Fourteen federal agencies and departments have used the process since 1980, as have at least 15 states. Negotiated rulemaking has also been used twice in Texas. The first use was sponsored by the General Land Office to formulate oil spill damages assessment rules. The second use was initiated by the Comptroller to design a new timberland tax appraisal manual. Each Texas use has produced a consensus proposal for the rulemaking.

**Key Provisions:**

*Process:* The Negotiated Rulemaking Act outlines a five step process. These are:

1) Assess the suitability of negotiated rulemaking and plan the committee structure and meetings; 2) Publish notice of the intent to use reg-neg and consider comments; 3) Establish the negotiating committee and appoint the facilitator; 4) Negotiate towards consensus; and 5) Report to the agency.

The **first step** outlined by the Act is for the agency to assess whether reg-neg should be used for a particular rulemaking. In this assessment phase, sometimes known as "convening," Section 2008.052 requires the agency to use a neutral party ("convener") to objectively evaluate the appropriateness of the process and to identify interests that will be affected by the rule. The Act requires that the convener consider certain criteria and report his or her findings to the agency.

The Act lists these criteria:

- (1) the number of identifiable interests that would be significantly affected by the proposed rule;
- (2) the probability that those interests would be adequately represented in a negotiated rulemaking;
- (3) the probable willingness and authority of the representatives of affected interests to negotiate in good faith;
- (4) the probability that a negotiated rulemaking committee would reach a unanimous or a suitable general consensus on the proposed rule;
- (5) the probability that negotiated rulemaking will not unreasonably delay notice and eventual adoption of the proposed rule;
- (6) the adequacy of agency and citizen resources to participate in negotiated rulemaking;
- (7) the probability that the negotiated rulemaking committee will provide a balanced representation between public and regulated interests; and
- (8) the willingness of the agency to accept the consensus of a negotiated rulemaking committee as the basis for the proposed rule.

If, after receiving the convener's report, the agency chooses to proceed, step two requires that the agency publish notice of its intent to use reg-neg and to

consider input on its proposal and on committee make-up. These notice requirements are spelled out in Section 2008.053, which also requires the agency to describe in the notice statement the procedure through which a party may apply for appointment to the negotiating committee.

**Step three** is described in Sections 2008.054 and 2008.055. Here the agency uses public input and the convening report to identify stakeholders to form a negotiating committee. Section 2008.054 (b) requires the agency to consider the appropriate balance between representatives of affected interests in appointing membership of the negotiating committee. The agency also appoints an impartial third party to facilitate the committee's negotiations at this time. The Act requires in Section 2008.055 (b) that the facilitator meet the minimum requirements for impartial third parties set out in the Texas ADR Procedures Act and that he or she not have conflicts relative to any of the parties, including the agency.

In **step four**, the facilitator assists the committee in negotiating for a consensus proposal on the rulemaking. The consensus requirement set out in Section 2008.056 means that each committee member must concur for there to be a "committee consensus recommendation."

When the committee concludes its negotiations, step five requires that it submit a report to the agency. Section 2008.056 (d) outlines what the committee's reporting requirements are. If the committee reaches consensus, the agency may choose to adopt the report as a Proposed Rule, alter it, or reject it. If the committee does not reach consensus, it may forward any information it has compiled to the agency. The bill requires that both the convener's report and the committee's final report be available to the public upon request. If an agency uses negotiated rulemaking in developing a proposed rule, Section 2008.053 (b) requires the agency to announce in a statement accompanying its Register notice of the proposed rule that the process has been used.

*Fiscal Assistance to Parties:* The Act also includes technical provisions clarifying budget authority and confidentiality of records. Budget authority is found in Section 2008.003, which provides guidance on how costs of participating in a

negotiated rulemaking may to be covered. Section 2008.003 authorizes agencies to help defray certain costs of impecunious parties, where the participation of such groups is deemed necessary by the agency and where the groups can certify their financial need. This provision makes clear that the agency may provide assistance to public interest groups, local governments and others who face resource constraints but who also represent unique interests that otherwise would not have a voice in negotiations.

*Confidentiality:* Section 2008.057 clarifies the confidentiality of certain records and information used in a negotiated rulemaking. The Act ensures that negotiated rulemakings enjoy slightly more narrow protections on confidentiality than those the Legislature deemed appropriate for government ADR in the Governmental Dispute Resolution Act. Because negotiated rulemakings are essentially large-scale mediations, a minimum degree of confidentiality is crucial to the viability of the process.

Section 2008.057 (a) establishes that Sections 154.053 and 154.073 of the Texas ADR Procedures Act apply to the communications, records, conduct and demeanor of the facilitator and members of the committee. When Negotiated Rulemaking Act confidentiality provisions conflict with other law, Section 2008.057 (b) provides that the attorney general, subject to review by the Travis County district court, decides whether a communication or record is confidential or subject to required disclosure. Notwithstanding subsection (b), however, Section 2008.057 (c) provides that certain material is to be held confidential even as to Open Records requests; this material includes (1) private communications and records of those communications between the facilitator and a member or members of the committee, and (2) notes of the facilitator. Finally, Section 2008.057 (d) provides that the report and recommendations of a convener and the negotiating committee are public information and available on request.

**S.B. No. 882**

AN ACT

1-2 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

1-3 SECTION 1. Subtitle A, Title 10, Government Code, is amended

1-4 by adding Chapter 2008 to read as follows:

1-5 CHAPTER 2008. NEGOTIATED RULEMAKING

1-6 SUBCHAPTER A. GENERAL PROVISIONS

1-7 Sec. 2008.001. SHORT TITLE. This chapter may be cited as

1-8 the Negotiated Rulemaking Act.

1-9 Sec. 2008.002. DEFINITIONS. In this chapter:

1-10 (1) "State agency" means an officer, board,

1-11 commission, department, or other agency in the executive branch of

1-12 state government with statewide jurisdiction that makes rules. The

1-13 term includes:

1-14 (A) the attorney general;

1-15 (B) an institution of higher education as

1-16 defined by Section 61.003, Education Code; and

1-17 (C) the State Office of Administrative Hearings.

1-18 (2) The terms "party," "person," and "rule" have the

1-19 meanings assigned by Section 2001.003.

1-20 Sec. 2008.003. COSTS OF PARTICIPATING IN NEGOTIATED

1-21 RULEMAKING. (a) A member of a negotiated rulemaking committee

1-22 established under Subchapter B is responsible for the member's own

1-23 costs in serving on the committee, except as provided by Subsection

2-1 (b).

2-2 (b) The state agency that established the negotiated

2-3 rulemaking committee may pay a member's technical assistance

2-4 expenses and reasonable travel and per diem costs related to the

2-5 member's service on the committee at the rate set in the General

2-6 Appropriations Act for state employees and may provide a reasonable

2-7 rate of compensation to the member if:

2-8 (1) the member certifies that the member lacks

2-9 sufficient financial resources to participate as a member of the

2-10 committee; and

2-11 (2) the agency determines that the member's service on

2-12 the committee is necessary for the adequate representation of an

2-13 affected interest.

2-14 (c) The state agency that established the negotiated

2-15 rulemaking committee shall provide appropriate administrative



2-16 support to the committee.

2-17 (Sections 2008.004 to 2008.050 reserved for expansion

2-18 SUBCHAPTER B. PROCEDURES FOR NEGOTIATED RULEMAKING

2-19 Sec. 2008.051. AUTHORITY FOR NEGOTIATED RULEMAKING. A state

2-20 agency may engage in negotiated rulemaking to assist it in drafting

2-21 a proposed rule by following the procedures prescribed by this

2-22 chapter.

2-23 Sec. 2008.052. APPOINTMENT AND DUTIES OF CONVENER. (a) A

2-24 state agency that proposes to engage in negotiated rulemaking shall

2-25 appoint a convener to assist the agency in determining whether it

3-1 is advisable to proceed.

3-2 (b) The state agency may appoint an agency employee or

3-3 contract with another individual to serve as the convener. The

3-4 convener may not have a financial or other interest in the outcome

3-5 of the rulemaking process that would interfere with the person's

3-6 impartial and unbiased service as the convener.

3-7 (c) The convener shall assist the agency in identifying

3-8 persons who are likely to be affected by the proposed rule,

3-9 including persons who oppose the issuance of a rule. The convener

3-10 shall discuss with those persons or their representatives:

3-11 (1) whether they are willing to participate in

3-12 negotiated rulemaking;

3-13 (2) whether the agency should engage in negotiated

3-14 rulemaking to develop the proposed rule;

3-15 (3) which issues that a negotiated rulemaking

3-16 committee should address; and

3-17 (4) whether there are other persons the convener needs

3-18 to identify who may be affected by the proposed rule.

3-19 (d) The convener shall then recommend to the agency whether

3-20 negotiated rulemaking is a feasible method to develop the proposed

3-21 rule and shall report to the agency on the relevant considerations,

3-22 including:

3-23 (1) the number of identifiable interests that would be

3-24 significantly affected by the proposed rule;

3-25 (2) the probability that those interests would be

4-1 adequately represented in a negotiated rulemaking;

4-2 (3) the probable willingness and authority of the

4-3 representatives of affected interests to negotiate in good faith;

4-4 (4) the probability that a negotiated rulemaking

4-5 committee would reach a unanimous or a suitable general consensus

4-6 on the proposed rule;

4-7 (5) the probability that negotiated rulemaking will

4-8 not unreasonably delay notice and eventual adoption of the proposed

4-9 rule;

4-10 (6) the adequacy of agency and citizen resources to

4-11 participate in negotiated rulemaking;

4-12 (7) the probability that the negotiated rulemaking

4-13 committee will provide a balanced representation between public and

4-14 regulated interests; and

4-15 (8) the willingness of the agency to accept the

4-16 consensus of a negotiated rulemaking committee as the basis for the

4-17 proposed rule.

4-18 Sec. 2008.053. NOTICE REQUIREMENTS FOR NEGOTIATED

4-19 RULEMAKINGS. (a) After considering the convener's recommendation

4-20 and report, a state agency that intends to engage in negotiated

4-21 rulemaking shall publish timely notice of its intent in appropriate

4-22 media and file timely notice of its intent with the secretary of

4-23 state for publication in the Texas Register. The notice must

4-24 include:

4-25 (1) a statement that the agency intends to engage in

5-1 negotiated rulemaking;

5-2 (2) a description of the subject and scope of the rule

5-3 to be developed;

5-4 (3) a description of the known issues to be considered

5-5 in developing the rule;

5-6 (4) a list of the interests that are likely to be

5-7 affected by the proposed rule;

5-8 (5) a list of the individuals the agency proposes to

5-9 appoint to the negotiated rulemaking committee to represent the

5-10 agency and affected interests;

5-11 (6) a request for comments on the proposal to engage

5-12 in negotiated rulemaking and on the proposed membership of the

5-13 negotiated rulemaking committee; and

5-14 (7) a description of the procedure through which a

5-15 person who will be significantly affected by the proposed rule may,  
5-16 before the agency establishes the negotiated rulemaking committee,  
5-17 apply to the agency for membership on the committee or nominate  
5-18 another to represent the person's interests on the committee.

5-19 (b) A state agency that intends to proceed with the  
5-20 rulemaking process after receiving the report of the negotiated  
5-21 rulemaking committee shall announce in a statement accompanying the  
5-22 notice of a proposed rule required by Subchapter B, Chapter 2001,  
5-23 that:

5-24 (1) negotiated rulemaking was used in developing the  
5-25 proposed rule; and

6-1 (2) the report of the negotiated rulemaking committee  
6-2 is public information and the location at which the report is  
6-3 available to the public.

6-4 Sec. 2008.054. APPOINTMENT AND DURATION OF NEGOTIATED  
6-5 RULEMAKING COMMITTEE. (a) After considering comments it receives  
6-6 in response to the notice of proposed negotiated rulemaking, a  
6-7 state agency that intends to proceed shall establish a negotiated

6-8 rulemaking committee and appoint the members of the committee.

6-9 (b) A state agency shall consider the appropriate balance

6-10 between representatives of affected interests in appointing the

6-11 negotiated rulemaking committee.

6-12 (c) The state agency shall appoint individuals to the

6-13 committee to represent the agency and appoint other individuals to

6-14 the committee to represent the interests identified by the agency

6-15 that are likely to be affected by the proposed rule. Article

6-16 6252-33, Revised Statutes, does not apply to the size or

6-17 composition of the committee or to the agency's ability to

6-18 reimburse expenses of committee members under Section 2008.003(b).

6-19 (d) The committee is automatically abolished on the adoption

6-20 of the proposed rule, unless the committee or the state agency

6-21 after consulting the committee specifies an earlier abolition date.

6-22 Sec. 2008.055. APPOINTMENT OF FACILITATOR.

6-23 (a) Concurrently with its establishment of the negotiated

6-24 rulemaking committee, a state agency shall appoint a facilitator.

6-25 The agency may appoint an agency employee, subject to Subdivision

7-1 (b)(3), or contract with another state employee or private

7-2 individual to serve as the facilitator. The agency's appointment  
7-3 of the facilitator is subject to the approval of the negotiated  
7-4 rulemaking committee and the facilitator serves at the will of the  
7-5 committee.

7-6 (b) The facilitator:

7-7 (1) must possess the qualifications required for an

7-8 impartial third party under Section 154.052(a) and (b), Civil

7-9 Practice and Remedies Code;

7-10 (2) is subject to the standards and duties prescribed

7-11 by Section 154.053(a) and (b), Civil Practice and Remedies Code,

7-12 and has the qualified immunity prescribed by Section 154.055, Civil

7-13 Practice and Remedies Code, if applicable;

7-14 (3) shall not be the person designated to represent

7-15 the agency on the negotiated rulemaking committee on substantive

7-16 issues related to the rulemaking; and

7-17 (4) shall not have a financial or other interest in

7-18 the outcome of the rulemaking process that would interfere with the

7-19 person's impartial and unbiased service as the facilitator.

7-20 Sec. 2008.056. DUTIES OF NEGOTIATED RULEMAKING COMMITTEE AND

7-21 FACILITATOR. (a) The facilitator shall preside over meetings of

7-22 the negotiated rulemaking committee and assist the members of the

7-23 committee:

7-24 (1) to establish procedures for conducting

7-25 negotiations; and

8-1 (2) to discuss, negotiate, mediate, and employ other

8-2 appropriate alternative dispute resolution processes to arrive at a

8-3 consensus on the proposed rule.

8-4 (b) It is presumed that the committee has reached a

8-5 consensus on a matter only if the consensus is unanimous, unless

8-6 the committee unanimously:

8-7 (1) agrees to define a consensus to mean a general

8-8 rather than a unanimous consensus; or

8-9 (2) agrees to define the term in another manner.

8-10 (c) The facilitator shall encourage the members of the

8-11 committee to reach a consensus but may not compel or coerce the

8-12 members to do so.

8-13 (d) At the conclusion of the negotiations, the committee



8-14 shall send a written report to the agency that:

8-15 (1) contains the text of the proposed rule, if the

8-16 committee reached a consensus on the proposed rule; or

8-17 (2) specifies the issues on which the committee

8-18 reached consensus, the issues that remain unsolved, and any other

8-19 information, recommendations, or materials that the committee

8-20 considers important, if the committee did not reach a consensus on

8-21 the proposed rule.

8-22 Sec. 2008.057. CONFIDENTIALITY OF CERTAIN RECORDS AND

8-23 COMMUNICATIONS. (a) Sections 154.053 and 154.073, Civil Practice

8-24 and Remedies Code, apply to the communications, records, conduct,

8-25 and demeanor of the facilitator and the members of the negotiated

9-1 rulemaking committee as if the negotiated rulemaking were a dispute

9-2 being resolved in accordance with Chapter 154, Civil Practice and

9-3 Remedies Code.

9-4 (b) In the negotiated rulemaking context the attorney

9-5 general, subject to review by a Travis County district court,

9-6 decides in accordance with Section 154.073(d), Civil Practice and

9-7 Remedies Code, whether a communication or material subject to

9-8 Section 154.073(d) is confidential, excepted from required

9-9 disclosure, or subject to required disclosure.

9-10 (c) Notwithstanding Section 154.073(d), Civil Practice and

9-11 Remedies Code:

9-12 (1) a private communication and a record of a private

9-13 communication between a facilitator and a member or members of the

9-14 committee are confidential and may not be disclosed unless the

9-15 member or members of the committee, as appropriate, consent to the

9-16 disclosure; and

9-17 (2) the notes of a facilitator are confidential except

9-18 to the extent that the notes consist of a record of a communication

9-19 with a member of the committee who has consented to disclosure in

9-20 accordance with Subdivision (1).

9-21 (d) The report and recommendations of a convener and a

9-22 negotiating committee are public information and available on

9-23 request to any member of the public.

9-24 Sec. 2008.058. ADMINISTRATIVE PROCEDURE ACT REQUIREMENTS

9-25 UNAFFECTED. (a) This chapter does not affect the rulemaking

- 10-1 requirements prescribed by Chapter 2001.
- 10-2 (b) A state agency that intends to proceed with the
- 10-3 rulemaking process after receiving the report of the negotiated
- 10-4 rulemaking committee shall proceed in accordance with the
- 10-5 requirements prescribed by Subchapter B, Chapter 2001.
- 10-6 SECTION 2. This Act takes effect September 1, 1997.
- 10-7 SECTION 3. The importance of this legislation and the
- 10-8 crowded condition of the calendars in both houses create an
- 10-9 emergency and an imperative public necessity that the
- 10-10 constitutional rule requiring bills to be read on three several
- 10-11 days in each house be suspended, and this rule is hereby suspended.

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President of the Senate

Speaker of the House

I hereby certify that S.B. No. 882 passed the Senate on  
April 7, 1997, by a viva-voce vote.

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Secretary of the Senate

I hereby certify that S.B. No. 882 passed the House on

May 26, 1997, by a non-record vote.

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Chief Clerk of the House

Approved:

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Date

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Governor

**Bill Summaries:** [ADR Legislation Passed by the 75th Legislature](#)

**HB 156**

Reps. Driver, Reyna / Sen. Shapiro

Relating to the various matters governing the contact of certain criminal offenders with the victims of their crimes.

**Bill Summary:**

HB 156 adds sections to Article 42.18 of the Code of Criminal Procedure to require that the Pardons and Paroles Division prohibit offenders convicted of stalking from intentionally or knowingly communicating directly or indirectly with the victim without appropriate consent of the victim. Communication includes going to or near the victim's residence, place of employment, business, or facility where the victim's child attends school. The statute also establishes special restrictions on imprisoned offenders contacting minor victims, provides penalties for imprisoned offenders making prohibited contact and authorizes victim-offender mediation in certain cases.

**ADR Provisions:**

While HB 156 establishes restrictions on contact between stalking victims and offenders, it provides exceptions if both parties desire to participate in a victim-

offender mediation. HB 156 provides in a new Section 8C (b) of Article 42.18 of the Code of Criminal Procedure that, notwithstanding the new restrictions on contact, a defendant may participate in victim-offender mediation authorized by Section 30 on the request of the victim or a guardian of the victim or a close relative of a deceased victim. Section 30 amends the same article by establishing voluntary victim-offender mediation in stalking cases. Section 30 states in relevant part that if:

a victim of the defendant, or the victim's guardian or close relative, wishes to participate in victim-offender mediation with a person released to parole or mandatory supervision, the division shall cooperate and assist the person if the person chooses to participate in the mediation program provided by the office. The Pardons and Paroles Division may not, however, require the offender to participate in the mediation and may not reward the offender for participation with favorable modifications of the parole or release conditions.

Finally, HB 156 also amends Article 26.13 of the Code by adding that before accepting a plea of guilty or a plea of nolo contendere and on the request of a victim of the offense, the court may assist the victim and the defendant in participating in a victim-offender mediation program.

#### **HB 1418**

Reps. Alexander, Siebert / Sen. Sibley

Relating to the regulation of motor carriers of household goods; providing a penalty.

#### **Bill Summary:**

HB 1418 requires the Texas Department of Transportation to adopt rules to protect consumers who use the services of a motor carrier. These rules should require a motor carrier transporting household goods to publish the location of the motor carrier's business, to file proof of cargo insurance, and to provide conspicuous notification to consumers of any limitation of carrier liability. The statute also requires the Department to appoint a committee consisting of

representatives of motor carriers to examine the rules and conduct a study of the feasibility of such rules.

**ADR Provisions:**

The statute amends the Section 8 of Revised Statutes Article 6675c by deleting the requirement that motor carriers which carry household goods must provide mediation for consumer disputes.

**HB 1445**

Rep. Gray / Sen. Armbrister

Relating to the continuation and functions of the Texas Racing Commission and to the transfer of certain Commission functions to the Texas Department of Commerce; providing penalties.

**Bill Summary:**

HB 1445 increases the regulatory powers of the Texas Racing Commission and diminishes its role in promoting the growth of the greyhound and horse racing industries. New regulatory authority granted to the Commission includes the power to formulate rules related to the industry, to recognize an organization representing members of a segment of the industry, and to collect fees, conduct disciplinary actions, and issue cease and desist orders if licensees fail to comply. The revised law gives the Commission authority to monitor facilities and to issue a suspension where conditions are inappropriate or unsafe. The statute also gives the Commission the authority to regulate intra- and interstate simulcast contracts and betting.

**ADR Provisions:**

The statute amends Section 11.011 of the Texas Racing Act to authorize use of binding arbitration for settling certain contract disputes between greyhound racing associations and state greyhound breed registries. The arbitrations are to conform with Chapter 171, Civil Practice and Remedies Code, and with rules to be developed by the Texas Racing Commission. The relevant subsection states in whole:

(l) Notwithstanding other provisions of law, a greyhound racing association and the state greyhound breed registry shall by contract agree that each simulcast contract to which the greyhound racing association is a party, including a simulcast contract with a horse racing association or a simulcast contract with another greyhound racing association, include terms that provide adequately for the development of greyhound racing, breeding, purses, and any actual or potential loss of live racing handle based on the association's historical live racing schedule and handle in this state. If a greyhound racing association and the state greyhound breed registry fail to reach an agreement, the racing association or the breed registry may submit the contract negotiations for binding arbitration under Chapter 171, Civil Practice and Remedies Code, and rules adopted by the commission. The arbitration must be conducted by a board of three arbitrators. The greyhound racing association shall appoint one arbitrator. The state greyhound breed registry shall appoint one arbitrator. The arbitrators appointed by the greyhound racing association and the state greyhound breed registry shall appoint the third arbitrator. A greyhound racing association and the state greyhound breed registry shall each pay its own arbitration expenses. The greyhound racing association and the state greyhound breed registry shall equally pay the arbitrator fees and costs. This subsection does not apply to a contract that was in effect before September 2, 1997.

**HB 1595**

Rep. Alexander / Sen. Cain

Relating to the regulation of motor vehicle dealers and manufactures including the regulation of certain retail installment transactions by dealers.

**Bill Summary:**

HB 1595 amends the Texas Motor Vehicle Commission Code to make the language of the Code consistent with a 1995 name change from Texas Motor Vehicle Commission to the Texas Motor Vehicle Board. The bill adds to the language formerly describing the role and duties of the Commission to define the Board as an independent entity within the department and not an advisory body

to the department. The bill also makes modifications to the composition, duties and authorities of the Board.

**ADR Provisions:**

The statute's primary effect is to provide for the mediation of disputes under the Board's jurisdiction between franchised dealers and manufacturers or distributors when certain conditions are met. According to the added Section 3.07A of the Motor Vehicle Commission Code, the Board may order parties to mediation if a franchised dealer brings an action against a manufacturer or distributor under a contract which contains an arbitration provision not in conflict with this Act. The mediator must be qualified under Section 154.052 (a) of the Civil Practice and Remedies Code and the parties are to select and compensate the mediator by agreement. If the mediation is successful, the Board will incorporate any resulting settlement into the Board's final decision. If the mediation does not result in a resolution of the dispute, the Board shall proceed to a contested case hearing or other appropriate exercise of its jurisdiction. The statute states explicitly that the mediation option does not apply to an action brought by the Board to enforce the terms of this Act.

Subsection 3.07A (g) contains a unique provision relating to confidentiality. The subsection states that Texas ADR Procedures Act confidentiality protections apply to mediations under HB 1595, but that if these protections conflict with another legal requirement for disclosure of communications or materials, the issue of confidentiality may be presented to the [Motor Vehicle] board to determine, in camera, whether the facts, circumstances, and context of the communications or materials sought to be disclosed warrant a protective order. Under the Texas ADR Procedures Act, conflicts of law on disclosure are to be resolved by the court having jurisdiction over the proceedings.

Key provisions of HB 1595's Section 3.07A amending the Texas Motor Vehicle Commission Code, Article 4413(36), include:

Section 3.07A. MEDIATION. (a) In this section, mediation means a non-binding forum in which an impartial person, the mediator, facilitates communication



between parties to promote reconciliation, settlement or understanding among them. A mediator may not impose his own judgment on the issue for that of the parties. (b) In an action brought by a franchised dealer whose franchise agreement provides for arbitration in compliance with the terms of this Act, against a manufacturer or distributor under Section 5.02(b) of this Act, the board shall order the parties to submit the dispute to mediation in the manner provided by this section. The requirements of this subsection apply only if the dealer's franchise agreement contains no arbitration provision in conflict with the terms of this Act. \* \* \* (g) Except as provided by this subsection, the provisions of Section 154.073, Civil Practice and Remedies Code, apply to a mediation proceeding conducted under this section. If Section 154.073, Civil Practice and Remedies Code, is in conflict with another legal requirement for disclosure of communications or materials, the issue of confidentiality may be presented to the board to determine, in camera, whether the facts, circumstances, and context of the communications or materials sought to be disclosed warrant a protective order of the board or whether the communications or materials are subject to disclosure. (h) By agreement, the parties shall select and compensate a mediator employed under the terms of this section. The board is not liable for the compensation paid or to be paid to a mediator employed as provided by this section. Without regard to the outcome of the mediation proceeding or subsequent regulatory or judicial proceedings, costs incurred by a party in a mediation proceeding required by this section may not be taxed against the opposing party. \* \* \*

## **HB 1870**

Reps. Marchant, Grusendorf / Sen. Sibley

Relating to the regulation of trust companies; providing administrative and criminal penalties.

### **Bill Summary:**

HB 1870 separates the regulation of trust companies from the regulation of banking. It creates the Texas Trust Company Act to regulate trust companies and

revises the powers and duties of the Texas Department of Banking regarding trust companies. The Act authorizes the Banking Commission to adopt rules relating to state trust companies. It also outlines the organization and powers of state trust companies, provides for the regulation of the transfer and ownership of shares, and addresses issues related to shareholders and participants. In addition, the Act regulates investments, loans, and deposits and calls for an annual examination of each state trust company by the Banking Commission.

**ADR Provisions:**

This statute contains two provisions relating to ADR. First, Section 8.008 of the Act authorizes an incorporated trust company or its affiliate or holding company to establish a compliance review committee to monitor internally aspects of its conduct and transactions. The Act provides that documents prepared for or created by compliance review committees are confidential and not discoverable or admissible in evidence in a civil action, and defines a civil action as a civil proceeding pending in a court or other adjudicatory tribunal with jurisdiction to issue a request or subpoena for records, including an alternative dispute resolution mechanism, voluntary or required, under which a party may compel the production of records. Documents from the compliance review committee are not to be available for ADR applications falling within the Act's definition of civil action.

The second provision in Section 7.304 (c) authorizes the use of arbitration for determining the value of a security held by a secured creditor: (c) The value of security held by a secured creditor shall be determined under supervision of the court by: (1) converting the security into money according to the terms of the agreement under which the security was delivered to the creditor; or (2) agreement, arbitration, compromise, or litigation between the creditor and the receiver.

**HB 1971**

Rep. Marchant / Sen. Cain

Relating to usury and the regulation of lenders and credit reporting agencies; providing penalties.

**Bill Summary:**

HB 1971 adds new regulations covering interest rates, certain lending institutions and credit agencies. It sets weekly, monthly, quarterly and annual ceilings for interest rates on open-end accounts, consumer loans, secondary mortgages, judgment and prejudgment money, commercial transactions, qualified commercial loans and other loans. The statute also provides for licensing requirements and procedures for certain lenders, and outlines the duties, authorities, and prohibitions on authorized lenders.

Regarding credit reporting agencies, the bill outlines the conditions under which agencies may release consumer information and the procedures by which consumers may request, verify, and correct the information held in personal credit reports. The statute establishes penalties for failure to comply with any of the provisions regarding interest rates and credit reporting agencies.

**ADR Provisions:**

HB 1971 provides for the use of ADR in establishing a process by which consumers may contest information contained in the consumer's file held by a credit reporting agency. Under HB 1971's new Chapter 20, amending Title 2 of the Business & Commerce Code, Section 20.06 outlines a Dispute Procedure for consumer-credit agency disputes. This process requires that if informal procedures regarding contested information do not result in a mutually agreeable resolution between the consumer and the agency, then the dispute may lead to court action or, if both parties agree, to binding arbitration.

Provisions establishing binding arbitration are set out in Section 20.08, which states in pertinent part:

Section 20.08 (a) An action to enforce an obligation of a consumer reporting agency to a consumer under this chapter may be brought in any court as provided by the Fair Credit Reporting Act, as amended, or, if agreed to by both parties, may be submitted to binding arbitration after the consumer has followed

all dispute procedures in Section 20.06 and has received the notice specified in Section 20.06 (f) in the manner provided by the rules of the American Arbitration Association.

If the action or arbitration results in a determination in favor of the consumer, the disputed information must be removed from the file. Results of the arbitration action brought against a consumer reporting agency doing business in Texas must be reported in a timely manner to other consumer reporting agencies doing business in Texas. The statute also states in Subsection 20.08 (c) that a prevailing party in an action or arbitration proceeding brought under this section shall be compensated for the party's attorney fees and costs of the proceeding as determined by the court or arbitration. The law does not specify who must compensate the prevailing party.

#### **SB 1**

Sens. Brown, Lucio, Wentworth / Rep. R. Lewis

Relating to the development and management of the water resources of the state; providing penalties.

#### **Bill Analysis:**

This bill amends the Water Code by requiring creation of a coordinated state, regional and local planning system culminating with adoption of a state water plan incorporating regional plans by September 2001. The bill requires the development, management, and conservation of all state water resources in an effort to address public interests of health, safety, and welfare during drought conditions. The bill aims to accommodate both natural and economic interests throughout the state to ensure sufficient water supply at a reasonable cost.

In Section 16.053 (b), SB 1 directs the Texas Water Development Board (Board) to divide the state into an unspecified number of regions, based upon geographic and hydrogeologic characteristics, socioeconomic factors, and preexisting political and planning boundaries. From each of these regions, under Section 16.053 (c) the Board is to appoint an initial coordinating body composed of representatives from counties, municipalities, industries, small businesses, river

authorities and districts, agricultural and environmental associations, and utility companies to ensure adequate representation of the interests comprising that region. The initial coordinating body will designate additional representatives from each regional planning area. The planning representatives then must develop and submit a regional water plan for the approval of the Board, complying with guidelines to be set by the Board in coordination with the Texas Natural Resources Conservation Commission and the Texas Parks and Wildlife Department. Under Subsection 16.053 (e) (4) (C), the regional plans should consider all potentially feasible water management strategies for the area, including but not limited to conservation and reuse of current water supplies. The regional plan must also respond to specific area drought conditions and consider environmental water needs, existing water rights, opportunities for negotiation, and voluntary water transfers.

The Board will synthesize a comprehensive state plan from the approved regional plans, subject to consideration in a public hearing and a Board member majority vote. The Board will also submit recommendations for consideration in the next Legislature to facilitate water transfers throughout the state.

Subsections 16.053 (g) and (h) outline key parts of the process through which the regional plans are to be developed, coordinated and approved. These subsections provide in relevant part: (g) The board shall provide technical and financial assistance to the regional water planning groups in the development of their plans. The board shall simplify, as much as possible, planning requirements in regions with abundant water resources. The board, if requested, may facilitate resolution of conflicts within regions. (h) (1) Prior to the preparation of the regional water plan, the regional water planning group shall, after notice, hold at least one public meeting at some central location within the regional planning area to gather suggestions and recommendations from the public as to issues that should be addressed in the plan or provisions that should be considered for inclusion in the plan. (2) The regional water planning group shall provide an ongoing opportunity for public input during the preparation of the regional water

plan. (3)After the regional water plan is initially prepared, the regional water planning group shall, after notice, hold at least one public hearing at some central location within the regional water planning area. The group shall make copies of the plan available for public inspection at least one month before the hearing by providing a copy of the plan in the county courthouse and at least one public library of each county having land in the region. Notice for the hearing shall include a listing of these and any other location where the plan is available for review. (4)After the regional water plan is initially prepared, the regional water planning group shall submit a copy of the plan to the board. The board shall submit comments on the regional water plan as to whether the plan meets the requirements of Subsection (e) of this section. (5)If no interregional conflicts exist, the regional water planning group shall consider all public and board comments; prepare, revise, and adopt the final plan; and submit the adopted plan to the board for approval and inclusion in the state water plan. (6)If an interregional conflict exists, the board shall facilitate coordination between the involved regions to resolve the conflict. If conflict remains, the Board shall resolve the conflict. On resolution of the conflict, the involved regional water planning groups shall prepare revisions to their respective plans and hold, after notice, at least one public hearing at some central location within their respective regional water planning areas. The regional water planning groups shall consider all public and board comments; prepare, revise, and adopt their respective plans; and submit their plans to the Board for approval and inclusion in the state water plan. (7)The Board may approve a regional water plan only after it has determined that all interregional conflicts involving that regional water planning area have been resolved. \* \* \*

**ADR Provisions:**

SB 1 explicitly authorizes the use of ADR only in Section 11.139 of the Water Code, although it alludes to conflict resolution elsewhere and contains many junctures at which consensus-building processes would seem relevant.

Section 11.139 calls for use of ADR in disputes regarding emergency water transfers. Section 16.051 directs the Board to establish rules to govern the state water plan and to designate river basins in the state. In the event that any emergency transfer is needed, Section 11.139 authorizes TNRCC to grant emergency permit approval for a diversion of water resources, requiring the recipient to pay for the amounts of water appropriated during the emergency authorization period. Under Section 11.139 (j), if the owner of the water rights and the recipient of the emergency authorization cannot reach an agreement on compensation for the diverted water within 60 days of the permit termination date, or if full payment is not made, either party may file a complaint with the Commission [TNRCC] to determine the amount due. The Commission may use dispute resolution procedures for a complaint filed under this subsection. This act does not limit or specify which dispute resolution methods can be implemented to resolve these conflicts. After exhausting all administrative remedies under this subsection, an owner from whom the use is transferred may file suit to recover or to determine the amount due in a district court in the county where the owner resides or has its headquarters.

One key provision of SB 1 alludes directly to conflict resolution, but without detail. Section 16.053 (h) (6), quoted above, provides that If an interregional conflict exists, the board shall facilitate coordination between the involved regions to resolve the conflict. If conflict remains, the Board shall resolve the conflict. While the Board is to facilitate coordination between regional planning groups and within regional planning groups to resolve conflicting positions, the bill provides no guidance as to what facilitate is to include. Although use of facilitation, mediation and other interest-based techniques are not mentioned explicitly, it seems probable that ADR would be productive in this setting.

Other parts of SB 1 would also seem to benefit from use of ADR processes. For instance, Section 16.053 (h) (2) requires that each regional planning group must provide an ongoing opportunity for public input during the preparation of the water plan. Public participation and input into regional plans could be served by

use of large-scale mediations and facilitated public meetings. ADR might also be helpful in facilitating intergovernmental cooperation on planning within regions, developing the regulations to guide regional plans and helping local plan proponents obtain approval from Board representatives.

**SB 29**

Sen. Zaffirini / Reps. Goodman, Naishtat

Relating to the implementation of the child support enforcement provisions of Title III of the federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996; providing penalties.

**Bill Summary:**

SB 29 amends the Family Code, specifically addressing the implementation of the child support enforcement provisions of Title III of the federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996.

**ADR Provisions:**

The statute does not make substantive changes to Section 233.009 regarding the use of ADR but retains the statement authorizing the use of mediation to resolve issues not settled in a negotiation conference between the agency and the party responsible for child support.

**SB 133**

Sens. Bivins, Nelson / Rep. Dutton

Relating to placement of students expelled from public schools in juvenile justice alternative education programs.

**Bill Summary:**

Amending the Education Code, SB 133 changes the conditions which exempt a child from compulsory school attendance and the standards of conduct which lead to mandatory attendance at a juvenile justice alternative education program or expulsion. The statute defines the funding sources for the alternative education services and outlines the academic standards and mission of the programs.



SB 133 also amends Section 37.011 of the Education Code by requiring each school district in a county with a population greater than 125,000 and the county juvenile board to annually enter into a joint memorandum of understanding. The memorandum is to outline the responsibilities of the juvenile board and address issues related to alternative education programs including funding, transportation, and educational services for students after expulsion. A school district may provide the services or may contract with a county juvenile board, a private provider, or another school district to provide the services.

**ADR Provisions:**

SB 133

provides for the arbitration of certain disputes between a school district and a juvenile board. Amended Section 37.011 (p) of the Education Code states: if a district elects to contract with the juvenile board for placement in the juvenile justice alternative education program of students expelled ... and the juvenile board and district are unable to reach an agreement in the memorandum of understanding, either party may request that the issues of dispute be referred to a binding arbitration process that uses a qualified alternative dispute resolution arbitrator in which each party will pay its pro rata share of the arbitration costs. If the parties cannot agree on an arbitrator, each will select an arbitrator and those two arbitrators select a third arbitrator who will decide the issue. The arbitration decision issued is to be enforceable in a court in the county in which the juvenile justice alternative education program is located. The statute is somewhat ambiguous as to the type of arbitration: Section 37.011 (p) states that each party must submit its final proposal to the arbitrator, seeming to refer to 'baseball' arbitration, where the arbitrator is limited to choosing either side's final proposal, but this statement may only refer to informative statements for the arbitrator.

This bill also appears to charge the arbitrator with the responsibility of providing in his or her decision sufficient funding to support the alternative education program. Section 37.011 (p) states, Any decision by an arbitrator concerning the

amount of the funding for a student who is expelled and attending a juvenile justice alternative education program must provide an amount sufficient based on operation of the juvenile justice alternative education program in accordance with this chapter. The bill sets out factors for the arbitrator to consider in deciding the amount of funding for a student attending an alternative education program, including: the average per student expenditure in the district for alternative education services, the expected cost per student as outlined in the memorandum of understanding, and the costs necessary to achieve the academic goals outlined in the statute.

**SB 149**

Sen. Bivins / Rep. Cuellar

Relating to performance evaluation of tenured faculty at certain institutions of higher education.

**Bill Summary:**

SB 149 amends Chapter 51 of the Education Code to require governing boards of all institutions of higher learning to formulate rules and procedures for performance evaluations of tenured faculty at the institution. The evaluation criteria and procedures are to be based on the specific characteristics of the institution. Under Section 51.942, if the evaluation of a faculty member identifies incompetency, neglect of duty, or other good cause the results may serve as the basis for disciplinary action, including revocation of tenure and termination.

**ADR Provisions:**

The statute amends Chapter 51 of the Education Code, adding Section 51.942. A faculty member facing termination as a result of the evaluation must be given the opportunity for referral of the matter to a nonbinding alternative dispute resolution process as described in Chapter 154, Civil Practice and Remedies Code. If both parties agree, another type of alternative dispute resolution method may be elected. The governing board must give specific reasons in writing for any decision to terminate a faculty member on the basis of an evaluation conducted

pursuant to this section. The statute does not specify which parties pay for the ADR procedures or how the impartial third party is to be selected.

### **SB 175**

Sens. Zaffirini, Moncrief / Reps. Naishtat, Hilderbran

Relating to the regulation of nursing homes and similar facilities; providing penalties.

#### **Bill Summary:**

The Texas Department of Human Services (DHS) and the Texas Board of Human Services (Board) regulate the competence, character and financial condition of Texas nursing facilities. SB 175 amends the Health and Safety Code to alter nursing facility regulation in part by modifying the licensing process to require background examinations for all persons owning or operating a nursing facility. DHS will review all applicants' and existing license holders' financial conditions and past compliance records. The existing Code requires facility operators to post licenses and related reports. As amended, facilities must also post all reports resulting from the licensing review and reports showing the facility's deficiencies cited by the Department.

SB 175 requires DHS and the Board to issue rules and minimum standards of care relating to quality of life, quality of care and residents' rights. It requires nursing facilities to report to DHS any actions resulting in exploitation of residents, accidental injury or hospitalization of residents.

#### **ADR Provisions:**

SB 175 amends Chapter 242 of the Health and Safety Code, which authorizes binding arbitration for certain disputes between DHS and nursing facilities, including disputes relating to the renewal, suspension and revocation of licenses, and to the assessment of certain civil and monetary penalties. Two of the amendments extend to DHS certain provisions which had applied only to nursing facilities. First, the bill amends Section 242.253 (c) to require the party electing arbitration to pay the cost of arbitration; previously, DHS was required to pay all costs when it initiated arbitration and to split costs when the nursing facility

initiated the proceedings. Second, amendments to Section 242.267 allow both DHS and nursing facilities to apply for an order vacating the arbitrator's order, where previously only the nursing facility could make such application.

Another amendment by SB 175 narrows the range of disputes for which arbitration is available. Amending Section 242.268, the statute prohibits arbitration of disputes involving emergency and closing orders under Section 242.062, suspension, revocation or denial of licenses and orders suspending admissions under Section 242.072. The statute also amends Section 32.021, Human Resources Code, to require the use of an informal dispute resolution process for resolving disagreements over certain violations and monetary penalties. The amendments do not define informal dispute resolution process.

### **SB 323**

Sen. Armbrister / Rep. Gray

Relating to judicial training and continuing education for administrative law judges of the State Office of Administrative Hearings.

#### **Bill Summary:**

Under SB 323, SOAH will be required to provide at least 30 hours of continuing legal education and training for ALJs having less than three years bench experience. The bill also requires SOAH to provide continuing legal education and advanced judicial training for ALJs with more than three years experience, to the extent that money is available.

#### **ADR Provisions:**

Among other areas of continuing education for both new and experienced ALJs, training in ADR procedures is recommended.

### **SB 370**

Sens. Armbrister, Sibley, Nelson / Reps. Bosse, Gray, Alexander

Relating to the continuation and functions of the Texas Department of Transportation, the abolition of the Texas Turnpike Authority, and the creation of regional tollway authorities; authorizing the issuance of bonds and the imposition of taxes; granting the power of eminent domain; and providing penalties.

**Bill Summary:**

SB 370 abolishes the Texas Turnpike Authority, addresses other transportation and highways issues and amends various sections of the Transportation Code.

**ADR Provisions:**

SB 370 amends Section 8, Article 6675c, Revised Statutes, by removing provisions relating to the use of mediation for certain consumer-related disputes. Previously, Subsection 8 (f) (3) had required associations of motor carriers transporting household goods to create a mediation system available to consumers. As amended Section 8, Article 6675c, Revised Statutes contains no mediation provisions.

**SB 386**

Sens. Sibley, Nelson, Harris, Madla, Cain / Reps. Smithee, Berlanga, Van de Putte, Naishtat

Relating to review of and liability for certain health care treatment decisions.

**Bill Summary:**

SB 386 adds Chapter 88 to the Civil Practice and Remedies Code to require a health insurance carrier, health maintenance organization, or managed care entity to use ordinary care when deciding specific treatments for insured enrollees, and outlines procedures for enrollees to file complaints in the event of conflicts concerning treatments. Under Section 88.002 (a), health care entities may be liable for damages proximately caused by the failure to provide ordinary care in treatment decisions for enrollees. The bill states in Section 88.002 (g) that any indemnification clause in a contract between a health care entity and a physician or other health care provider relieving a health care entity from liability is void. A health insurance carrier, health maintenance organization, or managed care entity may not remove a physician or health care provider from its plan for advocating on the behalf of the enrollee. The health care entities are subject to liability only for treatments available under the enrollee's plan.

The Insurance Code as written outlined the measures which all health care organizations must include in their review procedures. SB 386 adds to the Code

that if the enrollee appeals the adverse determination (denial of treatment) and the utilization review agent denies the appeal, then the enrollee may seek review from an Independent Review Organization. The utilization review agent is responsible for payment of the independent review. The Independent Review Organization must be certified by the Insurance Commissioner and may not be affiliated with a health care entity. If the health care entity denies treatment to an enrollee in a life threatening condition, then the enrollee is entitled to an immediate appeal to the Independent Review Organization, bypassing the utilization review requirements of the insurer, HMO or managed care entity. Section 88.003 (a) prohibits an enrollee from filing a cause of action, unless the enrollee exhausted all appeals and available review procedures under the Code or, before instituting an action, submitted written notice of a claim and agreed to review of the claim by an Independent Review Organization. If the health care entity requests a review by the Independent Review Organization fourteen days after receiving the enrollee's notice, then the enrollee must submit to the independent review. However, if the health care entity fails to make the request, then the enrollee may maintain the action.

**ADR Provisions:**

Section 88.003 (d) contains the bill's ADR provisions. It states that if the party files a cause of action without exhausting the utilization review requirements or submitting the required written notice, the action shall not be dismissed by the court, but the court may, in its discretion, order the parties to submit to an independent review or mediation or other nonbinding alternative dispute resolution and may abate the action for a period of not to exceed 30 days for such purposes. Such orders of the court shall be the sole remedy available to a party complaining of an enrollee's failure to comply [with the specified review procedures]. Thus a court may only require ADR procedures in the event that an enrollee files an action without exhausting the utilization review requirements or without giving prior notification of the action to the health care entity. Section 88.003 (e) of the bill provides that the enrollee is not required to submit a claim to

the Independent Review Organization or to court ordered ADR processes if the claim alleges a harm proximately caused by the health care entity has already occurred and if the review would not benefit the enrollee.

#### **SB 454**

Sen. Duncan / Rep. D. Jones

Relating to the definition of a record for records management and archival purposes.

#### **Bill Summary:**

This law revises the definitions of state, county and local government records explicitly excluding documentation resulting from alternative dispute resolution involving state personnel.

#### **ADR Provisions:**

Prior to SB 454, the definition of state, county and local government records included any document, regardless of physical form, received or created by a government institution or department in connection with official business. As amended by SB 454, Sections 441.031 (5) and 441.091 (1) (G) of the Government Code and Section 201.003 (8) (G) of the Local Government Code, now state that the term state, county and local government record does not include:

any records, correspondence, notes, memoranda, or other documents associated with a matter conducted under an alternative dispute resolution procedure in which personnel of a state department or institution of local government, special district, or other political subdivision of the state participated as a party, facilitated as an impartial third party, or facilitated as the administrator of a dispute resolution system or organization.

Since state, county and local government records are subject to retention requirements, by excluding ADR materials from the records' definition SB 454 appears to remove ADR materials from retention requirements.

#### **SB 555**

Sen. Sibley / Rep. Solomons

Relating to certain business organizations; providing penalties.

**Bill Summary:**

This law modernizes aspects of current law governing business entities, amending the Texas Business Corporation Act and making minor changes to the Texas Revised Limited Partnership Act, the Texas Revised Partnership Act, the Texas Limited Liability Company Act, the Texas Professional Association Act, and the Texas Miscellaneous Corporation Laws Act. The primary change to the Business Corporation Act is the addition of articles on shareholder agreements, derivative proceedings, and provisions on the conversion of domestic to foreign partnerships, and vice versa. The statute amends Business Corporation Act provisions dealing with mergers, share exchanges and conversions.

**ADR Provisions:**

Two provisions of this statute mention ADR. First, the bill adds Art. 2.30-1 to the Texas Business Corporation Act, making intra-corporate relationships a matter of contract without regard to the corporate statute. The article reads:

An agreement among the shareholders of a corporation that complies with this article is effective among the shareholders and the corporation even though it is inconsistent with one or more provisions of this Act in that it: ...

(7) authorizes arbitration or grants authority to any shareholder or other person as to any issue about which there is a deadlock among the directors, shareholders, or other person or persons empowered to manage the corporation to resolve that issue. ...

Subsection (7) specifically states that shareholders may agree to arbitrate intra-corporate deadlocks. The amendment further provides that this clause is effective only if the agreement appears in the articles of incorporation or bylaws, if all the shareholders sign and approve the measure, and if a statement is conspicuously printed on each share certificate indicating that the shares are subject to a shareholder agreement differing from the standard agreement.

The second reference to ADR amends the Texas Revised Partnership Act, adding Article X. Section 10.04 states that for foreign limited liability partnerships,



conducting the following activities in Texas does not constitute transacting business in the state: maintaining or defending any action, suit, or administrative or arbitration proceeding, effecting settlement of the action, suit, or proceeding or settling claims or disputes to which it is a party.

**SB 798**

Sen. Zaffirini / Reps. Goodman, Naishtat

Relating to alternative dispute resolution in certain family-related suits.

**Bill Summary:**

SB 798 amends Section 6.404 of the Family Code as recodified by SB 334.

**ADR Provisions:**

The statute amends Section 6.404 of the Family Code. This section states that a party bringing a family-related suit must include a statement in the party's first pleading acknowledging the party's awareness of the availability of ADR procedures and the party's good faith effort to settle the contested issues using such procedures. The new language encourages parties to resolve contested issues with the use of ADR before final trial. The statement shall read:

"I AM AWARE THAT IT IS THE POLICY OF THE STATE OF TEXAS TO PROMOTE THE AMICABLE AND NONJUDICIAL SETTLEMENT OF DISPUTES INVOLVING CHILDREN AND FAMILIES. I AM AWARE OF ALTERNATIVE DISPUTE RESOLUTION METHODS, INCLUDING MEDIATION. WHILE I RECOGNIZE THAT ALTERNATIVE DISPUTE RESOLUTION IS AN ALTERNATIVE TO AND NOT A SUBSTITUTE FOR A TRIAL AND THAT THIS CASE MAY BE TRIED IF IT IS NOT SETTLED, I REPRESENT TO THE COURT THAT I WILL ATTEMPT IN GOOD FAITH TO RESOLVE BEFORE FINAL TRIAL CONTESTED ISSUES IN THIS CASE BY ALTERNATIVE DISPUTE RESOLUTION WITHOUT THE NECESSITY OF COURT INTERVENTION."

**SB 898**

Sen. Harris / Rep. Wolens

Relating to nonsubstantive additions to and corrections in enacted codes, including the nonsubstantive codification of various laws omitted from enacted

codes, and to conforming codifications enacted by the 74th Legislature to other Acts of that Legislature.

**Bill Summary:**

This bill codifies statutes enacted during the 74th Legislature to conform with existing code. The Act serves the purposes of the statutory revision program under Chapter 323 of the Government Code. The statute makes non-substantive changes, adding to and correcting the Code.

**ADR Provisions:**

Prior to SB 898, Chapter 171.022 Civil Practice and Remedies Code appeared only to grant authority to non-profit entities for the enforcement of executory arbitration agreements. SB 898 renumbers Chapter 171.022 to Chapter 173 abrogating the common law rule of arbitration prohibiting specific enforcement of executory arbitration agreements between members of a nonprofit entities. While SB 898 maintains authorization for non-profits to arbitrate disputes, the recodification also extends this authority to other entities when a written agreement is to arbitrate a controversy that (1) exists at the time of the agreement; or (2) arises between the parties after the date of the agreement, as stated in Chapter 171.001.

**SB 1106**

Sen. Duncan / Rep. Averitt

Relating to actions for the amount of deductible under personal automobile insurance policies.

**Bill Summary:**

SB 1106 amends Article 21.79E of the Insurance Code to encourage insurers to take the necessary steps to collect from third parties or their insurers. If a third party is liable to an insurer for part of an insured individual's claim, then the insurer must bring an action within 12 months to recover the deductible against the third party after the payment of the insured party's claim, rather than 6 months as required previously.

**ADR Provisions:**

The bill amends the existing legislation with the addition of subsection (e) of Article 21.79E, which states: As used in this article, the phrase 'bring an action' is intended to include various courses of action such as reasonable and diligent collection efforts, mediation, arbitration, or litigation against responsible third parties or their insurers.

**SB 1161**

Sen. Carona / Rep. Hill

Relating to the authorization of certain counties to contract with private entities for child support and visitation enforcement services.

**Bill Summary:**

Existing law directs all counties to establish and maintain local registries for the recording and enforcement of child support payments under the authority of the Texas Attorney General's Office. SB 1161 adds Chapter 153 to the Human Resources Code, permitting counties to contract with private entities for the collection and enforcement of child support payments. This bill affects only certain counties with a population greater than 1.8 million (Harris and Dallas) and without previous authorization to contract with private entities. The bill authorizes the private entities to enforce any delinquencies in payments, enforce visitation periods, locate absent parents, collect fees, disburse payments, and perform other duties related to the state case registry of child support proceedings. The statute also outlines requirements for contracts between a county and private entity and provisions for the funding of contracted services.

**ADR Provisions:**

The statute authorizes the newly enabled private child support and enforcement entities to use mediation in child support issues. Section 153.002 (8) of the Human Resources Code authorizes counties to contract with private entities to provide any child support or visitation enforcement service authorized by the commissioners court, including mediation of disputes related to child support or visitation.

**SB 1286**

Sen. Gallegos / Rep. Talton

Relating to civil service for firefighters and police officers in certain municipalities.

**Bill Summary:**

SB 1286 amends the Local Government Code, adding provisions on police officer employment matters in Houston. While police officers may not strike or engage in work stoppages, members of police employment groups may select a majority bargaining agent or hold an election to select a police employment group to serve as their majority bargaining agent. The bargaining agent along with a bargaining team will formulate agreements with the public employer. Agreements approved by a majority of the bargaining team are subject to ratification in an election by all police officers in the municipality through procedures formulated by the bargaining team.

**ADR Provisions:**

SB 1286 contains a peripheral reference to ADR. If representatives of the police employee groups can not reach unanimous consensus on a majority bargaining agency by January 1, 1998, the statute allows employee groups to request the assistance of the American Arbitration Association in conducting elections. With regard to the election of a majority bargaining agent, Section 143.355 (f) of the Local Government Code provides that if the police employee groups participating in the election are unable to agree on the procedures for the election, any group may request that the American Arbitration Association conduct the election and certify the results. Certification of the results of an election resolves the question of the selection of the majority bargaining agent. An identical provision in Section 143.360 (d) addresses the election to ratify employee agreements.

**Bill Summaries:** [Selected ADR Legislation Considered and Not Passed by the 75th Legislature](#)

Perhaps the greatest indicator of the increasing comfort level with ADR in Texas is the breadth and scope of ADR legislation filed and considered by the Legislature in 1997. All in all more than 85 bills were filed that made significant mention of ADR this session, and while only 21 of them finally became law, it is clear that ADR is becoming a more accepted tool for legislators in a broad range of circumstances. Below is a description of the more significant bills that were

considered but not passed. If indeed as many observers have stated it takes two or three sessions to pass most bills, it is likely that at least some of those listed below will surface again in 1999 or 2001.

It should be emphasized that the list below is an objective one which does not necessarily reflect the priorities or policy judgments of the Center. Some of the bills not passed belong to that group of good bills which simply could not navigate the legislative process successfully, but others undoubtedly did not pass because they were considered inappropriate, poorly designed or ill-conceived. The Center provides this list merely to indicate the range of ADR legislation that at least one legislator deemed worth filing; to the extent this exercise illuminates the Legislature's broader thinking on ADR applications, it may be a useful guide for the ADR community.

### **Annexation**

HB 751, Rep. Crabb / SB 313, Sen. Galloway

These bills would have provided for special elections to disannex certain tracts of land which had recently been annexed. Following disannexation, the bills would have required the creation of an arbitration panel to determine costs of annexation and disannexation, and to apportion those costs and direct reimbursement where appropriate. As written, the bills appeared to apply only to Kingwood and the City of Houston.

HB 2013, Rep. Staples / SB 727, Sen. Gallegos

These bills would have provided a framework to "enable municipal utility districts in extraterritorial areas and municipalities to negotiate mutually agreeable alternatives to annexation." Although alternative dispute resolution was not specifically provided for in the legislation, many ADR procedures would be helpful in facilitating successful negotiations. The bills did not define the term negotiation and were unclear as to whether negotiation was required or simply authorized.

HB 2362, Rep. Hilbert / SB 1602, Sen. Lindsay

These bills related to annexations by a municipality and would have placed a moratorium on all annexations until 1 September 1999. The bills would have required a municipality to negotiate with MUDs the terms of a "service plan" outlining how the municipality would extend its services to the annexed area. On issues of disagreement, the bills required arbitration. The bills also would have created an "annexation oversight committee" authorized to act as an arbitration panel in certain situations.

HB 2363, Rep. Hilbert / SB 1744, Sen. Galloway

These bills contained the "service plan" arbitration provision of HB 2362, but not the oversight committee or moratorium provisions.

HB 2364, Rep. Hilbert / SB 1742, Sen. Galloway

These bills contained the "annexation oversight committee" provision of HB 2362, but not the service plan or moratorium provisions.

### **Construction**

HB 1742, Rep. Bosse / SB 867, Sen. Cain

These bills would have amended the Residential Construction Liability Act by adding a mediation provision allowing contractors or claimants to request mediation to resolve a dispute between them. They provided various disincentives for not participating in mediation, such as awarding attorney's fees against the refusing party.

HB 3352, Rep. Place / SB 1443, Sen. Wentworth

These bills would have established the Correctional Facilities Construction Claims Commission. The Commission would have had authority to conduct quasi-judicial binding arbitration proceedings to determine what amount of money, if any, shall be paid on an eligible claim submitted to the commission by a state prison construction contractor. The acts were explicitly intended not to waive the state's sovereign immunity from civil suit.

### **Environmental**

HB 2444, Rep. Talton / SB 764, Sen. Ratliff

These bills addressed the environmental permitting procedures of the TNRCC. The House bill would have allowed the executive director of TNRCC to refer parties to alternative dispute resolution to resolve issues that arise in opposition to a draft permit issued by TNRCC. The Senate bill allows the executive director to respond to the request for a public hearing and resolve the issues that create opposition.

HB 2707, Rep. Puente

This legislation would have amended the Water Code to require arbitration for all intergovernmental disputes arising under the jurisdiction of the TNRCC. The bill would have also required the TNRCC to adopt arbitration procedures to manage such disputes.

HB 3460, Chisum / SB 1874, Sen. Bivins

These bills related to the issuance of emergency and temporary orders and permits by the TNRCC and stated that either party would have been able to file a complaint with the Commission using soon to be established dispute resolution procedures. The provision in this bill referring parties to mediation when a dispute over repayment for an emergency water transfer arises also appears in SB 1.

General ADR

HB 851, Rep. Pitts

This bill would have amended the Texas ADR act by providing for mandatory ADR referral of most civil claims. With very limited exceptions, courts would have been required to refer pending suits to ADR if the parties had not settled within 60 days following service of defendant.

HB 1962, Rep. Howard

This bill allowed certain counties to authorize the justice of peace courts to administer the same ADR court fees as the county and district courts. The bill also permitted judges to refer probate matters to ADR on the motion of the parties, or by the judge's own motion.

HB 2455, Rep. Bailey

This bill encouraged institutions of higher education to implement alternative dispute resolution processes for the resolution of personnel disputes.

HB 3171, Rep. Brimer

This bill would have required that members of appraisal review boards have 24 hours of dispute resolution training, 8 hours of which would have focused on resolving disputes between a governmental agency and the public. The appraisal district would have reimbursed the county for the training.

HB 1558, Rep. Dukes / SB 1731, Sen. Barrientos

These bills would have mandated that state agencies adopt standards and procedures for employee grievance and complaint resolution. The bills' provisions explicitly would not have affected an "employee's ability to use an established dispute resolution process concerning the employee's wages; work hours; or other conditions of employment."

### **Negotiated Rulemaking**

HB 1383, Rep. Janek / SB 413, Sen. Moncrief

These bills would have promoted the use of negotiated rulemaking procedures by the Health and Human Services Commission. The Senate bill encouraged its use, while the House version would have required negotiated rulemaking for new rules.

### **Peer/Youth Mediation**

HB 3430, Rep. Naishtat

This bill encouraged peer mediation programs as programs in which students resolve disputes through mediation. The bill established guidelines for training school staff and for maintaining and evaluating the mediation programs.

SB 1689, Sen. Ellis

This bill would have allowed county commissioners courts in a county with a population of 2.4 million or more to establish an ADR system for resolving disputes between students in public schools. The courts would have been authorized to contract with a private non-profit organization or any other entity that may assist in developing an effective ADR system. The commissioners court



could have assessed a court filing fee of not more than \$3.50 to support the ADR system.

### **Public Utilities**

HB 12, Rep. Chisum

This bill would have required creation of a deregulation review board that assessed increased competition in the generation and sale of electricity. The board would have been required to consider a fair dispute resolution process for customers in assessing competition and making its recommendations.

HB 1509, Rep. Stiles / SB 684, Sen. Patterson

These bills dealt with electric utility deregulation. They included two ADR provisions. First, they would have required an Independent System Operator to establish a dispute resolution procedure for dealing with "disputes related to the operation of the state's transmission and distribution system." Second, they would have authorized the PUC to "investigate, mediate, and resolve any complaint submitted by a customer."

HB 2755, Rep. Wolens

This bill would have authorized the Office of Public Utility Counsel (OPUC) to "appear or intervene as a matter of right" as a party in all proceedings before the Commission, including a proceeding involving an ADR procedure, and in ADR proceedings where a "counselor" deemed that small commercial consumers were in need of representation. The bill would have also authorized OPUC to initiate or intervene as a matter of right in any ADR proceedings involving or arising out of any action taken by an administrative agency at which the Counselor was authorized to appear. It would have also mandated the Commission to adopt procedures for using ADR to resolve disputes and allowed the Commission to use ADR where the other party does not provide written objection within 10 days.

SB 965, Sen. Armbrister

This bill would have authorized the PUC to use ADR procedures to resolve pending issues or proceedings. It would have also established guidelines for the

PUC's use of ADR. The PUC would have had authority to intervene as a matter of right in ADR proceedings.

### **State Contracting**

SB 175, Sen. Barrientos

This bill would have required state government contracts to include an ADR clause for the initial attempt to resolve disputes arising under the contract. SOAH would have created a model ADR process for each unit of government.

SB 1786, Sen. Cain

This bill provided for a limited waiver of sovereign immunity and allowed claims resulting from a project contract to be brought against the State. It would have also referred claims to SOAH after attempts had been made to resolve the dispute through dispute resolution procedures at the agency level. Any award would have been limited to the value of the contract.