

1999 Texas ADR Legislative Report

ACKNOWLEDGMENTS

The 1999 Alternative Dispute Resolution Legislative Report is the cumulative effort of the professional staff and student interns of the Center for Public Policy Dispute Resolution at the University of Texas School of Law. During the legislative session, Jan Summer, the Center's Executive Director, and Suzanne Marshall, the Center's Deputy Director, supervised student interns in tracking and analyzing over 150 separate items of legislation. Student interns during the session included Pam Geiger, Gregg Litt, Traci Tadwalt, Susan Luce, Sylvie Volel, Writer Mott, Tiffany Reyes, and Paul Quinzi.

At the end of May, John Fleming joined the Center as Program Director. He wrote the Executive Summary and the Featured Legislation sections and, under the guidance of Jan Summer, coordinated the final editing and publishing of this report. In this effort, Writer Mott, Tiffany Reyes, Paul Quinzi, and Christopher Ash provided invaluable assistance. Melanie Alspaugh, our Administrative Associate, provided proofreading and formatting assistance. The Center is also pleased to welcome Tracy Tarver to its professional staff. Tracy has been responsible for attending to the details of transforming the raw manuscript into the finished publication you now read.

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EXECUTIVE SUMMARY

Over 150 bills with significant mention of alternative dispute resolution were introduced in the 76th Legislature. Thirty-two of these bills became laws. The number and breadth of these bills demonstrate the maturation of the field of alternative dispute resolution. Only eight of the thirty-two bills that were passed can be classified as solely "alternative dispute resolution (ADR) bills." Rather, the majority of these bills focus on other substantive legal areas (such as municipal annexation, sunset legislation of various agencies, and real estate broker's liens), and the alternative dispute resolution provisions were included as a means of resolving disputes in the context of the specific subject matter. This is significant because it demonstrates that the public and the Legislature are now routinely thinking of how alternative dispute resolution can be applied in specific settings.

This report lists all ADR bills considered. H.B. 826 receives detailed attention as our Featured Legislation, and we provide brief explanations of other ADR bills that were enacted. The report also includes brief comments on some ADR bills that did not pass, but which may be instructive in determining the future direction of ADR legislation. Viewed from an overall ADR perspective, the 1999 Legislative session reflects the expanding use of alternative dispute resolution by governmental entities, the continued refinement of when and how alternative dispute resolution should be used, and the clarification of certain confidentiality issues.

Expanding ADR Use by Governmental Entities. The passage of H.B. 826, which extends the applicability of the Governmental Dispute Resolution Act to apply to counties, municipalities, and other governmental entities, demonstrates the strong public policy in Texas for use of alternative dispute resolution in the public arena. This commitment is further reflected in S.B. 89, which made substantial changes to the law relating to municipal annexation. S.B. 89 provides that certain issues relating to services to areas proposed for annexation that are not successfully resolved by negotiation may be submitted to binding arbitration. Bills such as S.B. 370, the sunset bill for the Texas Department of Public Safety,

reflect the continuing expansion of the use of mediation within state agencies. S.B. 370 includes a provision that establishes mediation as an option to resolve employee grievances.

State Contract Claims. H.B. 826 creates a new procedure to permit contractors to pursue breach of contract claims against the State. The claims process mandates the use of negotiation and permits the use of mediation. Claims not resolved by negotiation or mediation may become contested cases before the State Office of Administrative Hearings.

Rethinking When and How ADR Is Used. Two bills which passed the 76th Legislature restrict or prohibit the use of mediation or other alternative dispute resolution procedures in the context of disputes in which there are allegations of family violence (see discussion of H.B. 819 and S.B. 1124). Four bills refine when and how arbitration can (or cannot) be used in lieu of litigation or administrative proceedings in nursing home enforcement cases (see H.B. 3450, H.B. 3451, H.B.3452, and S.B. 18). These bills should not be viewed as a retreat from Texas' commitment to alternative dispute resolution. Rather, these bills reflect a maturing of thought about when these processes are appropriate and the circumstances in which these processes can be used in an abusive manner.

Clarifying the Issue of Confidentiality. The maturing of the field of alternative dispute resolution is further demonstrated by refinements to the provisions relating to confidentiality. H.B. 826 amends the confidentiality provisions of The Texas ADR Procedures Act, Chapter 154 of the Civil Practices and Remedies Code ("Chapter 154") to clarify that final settlement agreements entered into by governmental entities are subject to the provisions of the Public Information Act (Open Records). Thus, such agreements are either subject to disclosure, excepted from disclosure, or confidential as may be applicable under Open Records law. H.B. 3838 resolves any question that may have existed as to whether or not the confidentiality provisions of Chapter 154 conflicted with the

duty to report child abuse or elder abuse under other applicable law. H.B. 3838 amends Chapter 154 by creating an exception to the confidentiality provisions of Chapter 154 for reports of child abuse or elder abuse. It is now clear that mediators have a duty to report child abuse or elder abuse disclosed in mediation to the extent that such must be reported under other applicable law.

Moving toward a less adversarial environment. Perhaps one of the most interesting public policy statements made by the 76th Legislature is contained in H.B. 512 which is commonly referred to as the "I am sorry" bill. The bill provides that statements of sympathy or benevolence made to an accident victim or his or her family member are not admissible as evidence of liability. By encouraging such statements, the bill recognizes what experienced mediators know: recognition of the pain or loss of the other person can go a long way in avoiding or resolving disputes

FEATURED LEGISLATION: ANALYSIS OF H.B. 826

Perhaps no other single bill passed by the 76th Legislature affects the resolution of disputes in the public arena more than H.B. 826. The bill extends the applicability of the Governmental Dispute Resolution Act beyond state agencies to include local governments and other entities to which the Texas Public Information Act (Open Records) applies. Further, the bill clarifies the extent to which records concerning governmental dispute resolution processes are subject to disclosure, and creates for the first time an administrative and legislative process for the resolution of certain contract claims against the State of Texas.

I. Revision and Extension of the Governmental Dispute Resolution Act

In 1997, the Legislature enacted the Governmental Dispute Resolution Act. This Act established the use of alternative dispute resolution by state agencies as state policy and provided the statutory framework for the development and use of ADR procedures for state government.

Between legislative sessions, the Texas Senate Interim Committee on Public Information became aware of problems resulting from the gap between the coverage of the generally applicable Texas Alternative Dispute Resolution Act and the newly enacted Governmental Dispute Resolution Act applicable only to state agencies. As a result of this gap, the authority of local government to use ADR procedures was unclear. Furthermore, questions arose as to the confidentiality of final agreements reached in ADR processes involving local governmental entities. Under the provisions of the Governmental Dispute Resolution Act, a final written agreement to which a state agency is a signatory may be disclosed pursuant to proper open records requests. Confidentiality issues involving local governmental entities, however, gained broader attention when several Texas municipalities refused open records requests made by several Texas newspapers for mediated agreements, citing the confidentiality provisions of the Texas Alternative Dispute Resolution Act as grounds for the refusal. When clarification was requested from the Office of the Attorney General regarding the issue of the applicability of this confidentiality provision, conflicting Attorney General responses were issued.

In OR98-0302, the Attorney General opined that the confidentiality provisions of the Civil and Practice Remedies Code, Section 154.073 permitted a municipality to withhold mediated settlement agreements from disclosure. Subsequently in July 1998, the Attorney General issued Open Records Decision 658 which overruled OR98-0302. In Open Records Decision 658, the Attorney General determined that mediated settlement agreements entered into by a municipality must be disclosed under the Public Information Act and are not confidential, notwithstanding the confidentiality provisions of the Texas Dispute Resolution Act

cited by the municipality. The Attorney General's decision cited the Governmental Dispute Resolution Act mandate that final settlement agreements of state agencies may be subject to disclosure through proper requests under the Public Information Act. Noting that the Governmental Dispute Resolution Act applied only to state agencies, the Attorney General further concluded that the Act's provision on disclosure of settlement agreements represented the State's public policy, and therefore, a settlement agreement of the municipality was also reachable through open records requests. This series of letters served to draw attention to the uncertainty of the statutory confidentiality of these agreements when local government is a party.

H.B. 826 addresses these local governmental confidentiality questions and other questions raised by alternative dispute resolution practitioners regarding the local government's use of ADR. These questions include: Is there sufficient statutory authority to permit local government to use ADR? Is there sufficient authority to permit local governments to retain and compensate qualified independent neutrals?

A. Extension of Alternative Dispute Resolution to "Governmental Bodies"

As originally enacted in 1997, the Governmental Dispute Resolution Act applied to state agencies. With the passage of H.B. 826, the Act is amended to apply to "governmental bodies." The term "governmental body" is given the meaning assigned in Government Code Section 552.003, Public Information Act (Open Records). This definition includes state government, county government, municipal government, school districts, county boards of school trustees, county boards of education, governing boards of special districts, and any deliberative body with rulemaking or quasi-judicial power that is classified as an agency, department, or political subdivision of a county or municipality. The term also includes governing bodies of certain non-profit water supply or wastewater service corporations and sections or portions of organizations, corporations,

commissions, committees, institutions, or agencies that spend or are supported in whole or in part by public funds. However, the definition expressly excludes the judiciary.

B. Confidentiality, Open Records, and Record Retention

In H.B. 826, the Legislature addressed the ambiguities in, and the inconsistencies between, the confidentiality provisions of the statutes relating to alternative dispute resolution and those provisions of the Government Code and Local Government Code relating to open records and record retention. By extending the Governmental Dispute Resolution Act to local governments and other "governmental bodies" as defined above, the newly covered entities are now clearly included in the Governmental Dispute Resolution Act's provision in Section 2009.054(c). This section provides that the disclosure of final written agreements reached in a dispute resolution proceeding wherein the governmental body is a signatory is governed by the provisions of Government Code Chapter 552, the Public Information Act. Thus, the confidentiality of such final written agreements may be subject to required disclosure or excepted from required disclosure depending on how the information is treated in the Public Information Act or other law.

In a further attempt to achieve consistency and clarity, H.B. 826 also adds new Subsection 154.073(e) to the Texas Alternative Dispute Resolution Act. This new subsection essentially tracks the exception on confidentiality for final written agreements entered into by governmental entities defined in Government Code, Section 2009.054(c).

II. Contract Claims against the State

Section 9 of H.B. 826 creates a new Chapter 2260 in the Government Code to provide a statutory procedure for resolving contract claims against the State of Texas. The doctrine of sovereign immunity shields the State from liability for its

acts and also shields the State from being sued absent its consent. The State's immunity, however, can be waived by express consent by the Legislature or, in some limited cases, by the State's conduct. The courts have been careful to separate the concepts of immunity from liability and immunity from suit. The distinction is nowhere better illustrated than in the case law relating to state contracts. Texas courts generally have acknowledged that the State has waived its immunity from liability by entering into a contract with a private entity. However, prior to 1997, the appellate courts were split as to whether or not entering into a contract also constituted a waiver of the State's immunity from suit. In *Federal Sign v. Texas Southern University*, the Texas Supreme Court resolved the conflict.

In *Federal Sign*, the Court held that by entering into a contract with a private person, the State waived its immunity from liability, but did not waive its immunity from suit. Thus, legislative consent must be obtained before a contractor can sue the State for breach of contract. The Court stated that as a matter of general policy, the Legislature is the appropriate body to determine when the State should waive its immunity from suit. However, the Court left open the possibility that in some circumstances the state's conduct might constitute waiver of its sovereign immunity from suit.

In the interim between the 1997 Legislature and the 1999 Legislature, two appellate courts addressed the question left open by the Supreme Court in *Federal Sign* and issued opinions permitting contractors to maintain an action against a governmental entity for breach of contract without legislative consent in limited circumstances (*Texas Southern University v. Araserve Campus Dining Services of Texas, Inc.* and *Alamo Community College Dist. v. Obayashi Corp.*). In each of these cases, the respective court held that the conduct of a public entity was sufficient to amount to a waiver of sovereign immunity from suit. In *Araserve*, the Court found that a contractor could maintain a lawsuit without legislative consent where the contractor had fully performed a contract for the

sale of goods and the state university had accepted the goods. In *Obayashi*, the Court rejected a claim of sovereign immunity raised by a junior college district in a suit for payment of equitable adjustment claims where the contractor brought the suit after completing the contract.

Government Code Chapter 2260 is the Legislative attempt to provide a procedure for contractors to resolve their contract claims without waiving the state's immunity from suit. This new chapter creates a unique multi-tiered dispute resolution system for state contract disputes.

A. Key Provisions

Applicability.

The types of claims which are subject to Chapter 2260 are limited to claims of breach of written contracts between a state government unit and a contractor for goods, services, or a "project" as defined by Government Code Section 2166.001. Chapter 2260 applies to state institutions of higher learning, but expressly excludes counties, municipalities, and other political subdivisions of the state. Claims for personal injury or wrongful death arising from a breach of contract are not covered. The term "contractor" excludes subcontractors, employees of unit of state government, and students at an institution of higher learning.

The Chapter does not apply to the resolution of contract claims between a contractor and the Department of Transportation for contracts subject to the administrative claims process in Section 201.112 of the Transportation Code, such as claims involving highway projects, certain airport and air navigational facility projects where the Texas Department of Transportation serves as agent for local government, and certain professional consulting contracts (such as for engineering, surveying and real estate appraising services).

Damage Limitations.

The new Chapter restricts the amount a contractor may recover for claims. The contractor may not recover more than the balance due and owing on the contract price, including orders for additional work. Specifically, damages may not include consequential damages, exemplary damages, damages based on unjust enrichment theory, attorney fees, or home office overhead.

Required Contract Provision.

Contracts to which the Chapter applies must include a provision mandating the use of the dispute resolution procedures used by the unit of state government under Chapter 2260 to resolve disputes arising under the contract.

Exclusivity and Sovereign Immunity.

Section 2260.006 states that Chapter 2260 does not waive the State's sovereign immunity from suit or liability. Thus, a contractor who desires to file suit would still be required to seek permission under Civil Practice and Remedies Code Chapter 107. However, Section 2260.005 makes the use of the dispute resolution procedures of Chapter 2260 exclusive and a prerequisite to seeking permission to sue.

Despite this clear and unequivocal language, is "waiver of immunity by conduct," a viable concept now that the Legislature has created Chapter 2260? The provisions of 2260.005 state that the dispute resolution procedures are exclusive and must be followed as a prerequisite "to suit in accordance with Chapter 107, Civil Practice and Remedies Code." Civil Practice and Remedies Code Chapter 107 outlines the process of obtaining legislative consent. But, are contractors required to comply with Chapter 2260 in suits such as Araserve and Obayashi where the Courts have determined legislative consent is not required? Based upon an opinion handed down by the Austin Court of Appeals on July 29, 1999, the answer may be that for now contractors can bypass Chapter 2260 and sue without legislative consent where the contractor can allege and prove waiver of

immunity by conduct such as in *Araserve*. In *Little-Tex Insulation Company, Inc. v. General Services Commission*, the Court noted in a footnote that the "exclusivity" language of section 2260.005 suggests that the statutory procedures apply only to those claims where permission to sue is sought under Civil Practices and Remedies Code Chapter 107. Therefore, in those cases in which contractors claim that sovereign immunity from suit has been waived by conduct, the Court seems inclined to permit a direct court action.

However, the question may soon become moot as to new state contracts which incorporate the language mandated by Section 2260.004 requiring that the dispute resolution process used by the unit of state government under Chapter 2260 be used to attempt to resolve disputes arising under the contract. Similar to mandatory binding arbitration provisions contained in contracts in the private sector, this new provision may be construed by the Courts to constitute a waiver of the contractor's right to a direct court action in those circumstances where the doctrine in *Araserve*, *Obayashi*, and *Aer-Aerotron* might otherwise apply.

The Claims Process.

The dispute resolution procedure of Chapter 2260 is multi-tiered. Following the filing of the claim by the contractor with the agency, the agency must give the contractor notice of any counterclaim. The state and contractor are required to negotiate in an effort to resolve the claim and any counterclaim. Mediation of the claim is an option. If negotiation or mediation does not resolve the claim, the contractor may file a request for a contested hearing before the State Office of Administrative Hearings.

Filing the claim.

The contractor initiates the process by filing a written notice of the claim not later than the 180th day after the date of the event-giving rise to the claim. The notice must state the nature of the alleged breach, the amount of damages sought, and the legal theory of recovery.

Counterclaim.

The unit of state government must provide the contractor written notice of any counterclaim not later than the 90th day after it receives the contractor's notice of claim. If the unit of state government does not give timely notice of its counterclaim, it waives its right to assert the counterclaim. Other than the requirement to give notice of any counterclaim, the unit of state government is not required to make a formal response to the notice of claim.

Negotiation.

The first tier dispute resolution process for contract claims is negotiation which is to be conducted in accordance with the guidelines in Section 2260.052. The chief administrative officer of the unit of state government is the person named to negotiate the claim unless another officer of the unit has been designated as the representative in the contract.

Section 2260.052 permits the negotiation to be delayed until 60 days after the later of the contract termination date, the original contract completion date, or the date the claim is received.

Mediation.

The parties may agree to mediate at any time prior to the 270th day after the claim is filed, that is at any time prior to the date of request for a contested hearing.

Rules of mediation and negotiation.

Section 2260.052(c) provides for the development of rules for mediation and negotiation. The State Office of Administrative Hearings (SOAH) and the Office of the Attorney General are to provide a model rule, which may be voluntarily adopted by agencies with rulemaking authority. If the agency does not have rulemaking authority, it is to use the rule adopted by the Attorney General.

Payment of claims resolved by negotiation or mediation.

Payments for claims resolved by mediation or negotiation may be paid only from monies appropriated to the unit for payment of the contract claim or for payment of the contract. If these monies are insufficient, the balance can be paid only from money appropriated by the Legislature to pay the claim. Some state agencies are questioning how this mandate affects their ability to replace contractors who have had contracts terminated because of a dispute. For instance, if a unit of state government terminates a building contractor and replaces it with another to complete the project and thus expends all of the remaining contract funds to complete the project, where will the funds come from to fulfill the agency's obligation to pay the terminated contractor if the contractor is successful in its claim against the agency?

Contested case hearing.

If the claim is not resolved on or before the 270th day after the claim is filed, the contractor may file a request for hearing with the State Office of Administrative Hearings. The parties may agree to extend the negotiation period. Contested hearings for contract claims are to be conducted under Subchapter C, Contested Case Hearing.

The administrative law judge is to issue a written decision, which contains findings of fact and conclusions of law, and a summary of the evidence. The decision cannot be appealed, and therefore, the portion of the Administrative Procedures Act on judicial review is made inapplicable. Whereas in most administrative hearings, an agency may modify an administrative judge's ruling, the agency is denied authority to do so with respect to rulings on contract claims.

Award and payment.

If the contractor prevails and the net amount (after deduction of any counterclaim) is less than \$250,000.00, the unit of state government is to pay the

claim, but only to the extent it has appropriated funds to do so. Any deficiency can be paid only upon legislative appropriation.

Where the case involves damages of \$250,000.00 or more, the administrative judge is to issue a written report containing the judge's findings. The judge is to include a recommendation that the Legislature appropriate money to pay the claim to the extent determined by the judge to be valid, or a recommendation that no money be appropriated and that the Legislature should deny consent to sue.

The contractor is entitled to prejudgment interest at the rate provided in Chapter 304 of the Finance Code, but not in excess of six percent per annum.

Effective Date and Existing Claims.

Section 12 of H.B. 826 makes Chapter 2260 applicable to claims pending or arising on or after the effective date. Section 14(a) of H.B. 826 states that Chapter 2260 takes effect immediately. However, because the House passed the bill on a voice vote and did not take a record vote, the law cannot become effective until September 1, 1999. Contractors who have pending claims must give the notice provided in Section 2260.051(b) not later than 180 days after the effective date of the act.

State Claims Against the Contractor.

Although Chapter 2260 provides that a unit of state government can assert a counterclaim, there is no express authority to permit the state units to use the procedures of Chapter 2260 to assert claims against a contractor who has not filed a claim. One might anticipate that once the dispute resolution procedures contained in Chapter 2260 have been incorporated into state contracts, the parties will have contracted to use them and be bound by the results much like private parties who include binding arbitration in contracts. However, the administrative law judge is not granted authority to award damages to the State. This is so even in cases where the contractor has initiated the procedure. If the counterclaim is determined to exceed the amount of the contractor's claim, the

administrative judge has no express authority to render an award. Therefore, Chapter 2260 is probably of limited benefit to a unit of state government that has a contract claim against a contractor.

B. Conclusion

The creation of Chapter 2260, therefore, marks an initial step in establishing a dispute resolution process for state contract claims after successive failures to pass legislation in previous legislative sessions. It also indicates a need to improve the legislative consent to sue process for contract disputes so that legislators are not faced with trying to evaluate sometimes factually and legally complex claims in order to determine whether permission to sue should be granted without some guidance from a fact-finding body. Since the State Office of Administrative Hearings can hold contested case hearings and make decisions which can support payment of claims up to \$ 250,000 without further legislative evaluation, they have been delegated authority to serve, in essence, as an arbitrator and those claims do not go before the legislature for further evaluation.

For claims over \$ 250,000, the State Office of Administrative Hearings makes a recommendation to the legislature, which is supported by an administrative record, as to whether to appropriate money to pay all or part of a valid claim, or not to appropriate money to pay the claim and deny consent to suit. In this situation, the legislature can rely upon the State Office of Administrative Hearings' findings (since they are supported by the contested case process in which the contractor and state agency have had an opportunity to present evidence and cross-examine witnesses) in order to evaluate whether, and to what extent, to pay the claim.

As with any new process, it will take time to fully realize all the questions and issues raised by this new legislation. As the administrative process set forth in the Act is utilized by contractors, the State Office of Administrative Hearings will begin developing relevant precedent and procedural rules for these cases.

Likewise, the courts may also provide adjudicatory decisions for those cases in which sovereign immunity has been waived by state agencies through conduct, thereby bypassing the administrative process set forth in Chapter 2260. One may expect that future legislation may address questions raised by such cases and questions as to how a state government unit can recover its claims against a contractor (particularly where a counterclaim may exceed any amount due to the contractor).

A task force, including interested parties (agencies and in some cases, contractor representatives), has begun working on: (1) contract language incorporating H.B. 826 language for state contracts, and (2) model rules for implementation of the dispute resolution process in agencies. During the course of its work, the task force will continue to discuss the practical application of the statute, including the identification of issues raised by this legislation, and discussion of appropriate forums for resolution of these issues. After the contract language and model rules have been developed, the task force will continue to meet periodically to discuss issues that arise during the implementation of this Act so that state agencies can share information and ideas on how to address those issues. The task force is sponsored jointly by the Office of the Attorney General and the Center for Public Policy Dispute Resolution.

To read the language of H.B. 826 please click [here](#).

BILL SUMMARIES: LEGISLATION PASSED BY THE 76TH LEGISLATURE

Business and Commerce

H.B. 3285 by Rep. Van de Putte

Texas Business and Commerce Code, Section 15.50

Relating to covenants not to compete between physicians.

Bill Summary: Section 15.50 of the Business and Commerce Code prescribes the requirements for enforceability of covenants not to compete. H.B. 3285 adds a new subsection (b) relating to covenants not to compete for physicians. The new subsection requires access to certain patient lists and patient records for the departing physician. It also requires that the agreement contain a provision permitting a "buy out" of the covenant at a "reasonable price."

ADR Provision: At the option of either party, the buy out price is to be determined by an arbitrator. The arbitrator is to be selected by mutual agreement. In the absence of an agreement the arbitrator is to be selected by the court. The decision of the arbitrator is binding.

Civil Practice and Remedies

H.B. 512 by Rep. Gray

Civil Practice and Remedies Code, Section 18.061

Relating to the admissibility in a civil action of certain communications of sympathy; the "I am Sorry" bill.

Bill Summary: This new section to the Civil Practice and Remedies Code will prohibit, in a civil action, the introduction of sympathetic statements related to pain or suffering made to the injured person or the injured person's family member when used to prove liability or fault. The bill does not apply to excited utterances which include statements of culpability or negligence. For instance, "I feel so bad about you being hurt" would not be admissible. The statement "I feel so bad you're hurt because I have been meaning to get those brakes fixed for months" would be admissible.

ADR Provision: Although this bill is technically not an ADR bill, it reflects the observations made by ADR professionals regarding the power of apology to aid in the amicable resolution of disputes.

H.B. 3838 by Rep. Goodman

Civil Practice and Remedies Code Sections 154.053 and 154.073

Relating to the protection of certain children; mediator duty to report child or elder abuse.

Bill Summary: This bill makes numerous changes in the Family Code to comply with recent Federal law mandates to improve protection for abused and neglected children. It also amends the Texas ADR act as described below.

ADR Provision: The current Civil Practice and Remedies Code Section 154.053 defines the standards and duties of impartial third parties appointed under the ADR act. H.B. 3838 adds a new subsection (d) which will require all parties to a court ordered ADR proceeding, including the impartial third party, to report abuse or neglect of children and abuse, exploitation, or neglect of the elderly as provided in Subchapter B, Chapter 261 of the Family Code, and Subchapter C, Chapter 48 of the Human Resource Code respectively.

The current Civil Practice and Remedies Code Section 154.073 provides for the confidentiality of communications made in an ADR proceeding. H.B. 3838 adds a new subsection (e) which creates an exemption from confidentiality for communications relating to the abuse or neglect of children or of the elderly for which the parties have a duty to report as discussed above.

S.B. 598 by Sen. Duncan

Civil Practice and Remedies Code, Chapter 147

Relating to actions regarding certain computer failures; Year 2000 computer date failure.

Bill Summary: S.B. 598 creates a new Chapter 147 of the Civil Practice and Remedies Code which establishes a two year period of limitations, a fifteen year statute of repose, and limits damages which may be recovered because of Y2K computer failures. The bill requires a claimant to give written notice to a defendant sixty days prior to initiating a lawsuit for damage caused by a Y2K failure. The notice must specify the nature of the failure and the amount of damages or other remedy sought. The act provides limitations on damages for defendants who have made good faith efforts to cure, correct, avoid or mitigate

the claimant's potential computer date problem.

ADR Provision: S.B. 598 does not provide any substantive dispute resolution language. However, the prefatory language states that it is designed to provide incentives for parties to resolve Y2K claims early by use of informal nonadversarial dispute resolution prior to litigation. This purpose is achieved presumably by the provisions which limit ultimate damages for defendants complying with the offer to settle provisions (Sec. 147.048) following receipt of a notice of claim and by the provisions which create an affirmative defense for persons who initiate an offer to cure or correct (Sec.147.081).

S.B. 1718 by Sen. Ellis

Civil Practice and Remedies Code, Chapter 152

Relating to alternative dispute resolution systems established by counties.

Bill Summary and ADR Provision: Chapter 152 of the Civil and Practice and Remedies Code permits counties to establish dispute resolution centers, permits judges to refer cases to the centers, and permits the imposition of a court cost by the county in all civil cases to finance the centers. Prior to S.B. 1718, Section 152.003 permitted judges to refer cases to the county dispute resolution centers on the motion of a party but did not specifically permit the court to refer cases on its own motion. S.B. 1718 amends 152.003 by adding a specific provision to allow referral to the dispute resolution centers on the court's own motion. This makes the court's authority under 152.003 consistent with its authority to refer cases to ADR under its own motion under Section 154.021 (Chapter 154 is the Texas Alternative Dispute Resolution Procedures Act). In addition, the bill amends Section 152.004 of the Code to exclude from the \$10.00 court cost assessment any suit for delinquent taxes; a condemnation proceeding under Chapter 21, Property Code; and a proceeding under Subtitle C (Texas Mental Health Code), Title 7, Health and Safety Code.

Finally, the new Section 152.005, expands the financing resources for certain county dispute resolution centers. It authorizes a fee (with several exceptions)

not to exceed three dollars for civil cases filed in a justice of the peace court in a county with a population of 2.5 million or more.

Criminal Procedure

S.B. 1124 by Sen. Armbrister

Code of Criminal Procedure, Article 5.08

Relating to mediation in family violence cases.

Bill Summary and ADR Provision: Chapter 5 of the Code of Criminal Procedure contains provisions to help prevent family violence. S.B. 1124 adds Art. 5.08 which will prohibit a court from referring or ordering a victim or the defendant to mediation, dispute resolution, arbitration, or other similar procedure in a criminal proceeding arising from family violence. Since victim mediation in a criminal case can only be ordered at the request of or with the permission of the victim (see Art. 26.13(g) and Art. 42.12 Section 11(a)(16) of the Code of Criminal Procedure), the new section prohibits court referral of victim mediation in family violence cases even when requested by the victim.

S.B. 1125 by Sen. Armbrister

Code of Criminal Procedure, Article 26.13(h)

Relating to mediation in criminal cases.

Bill Summary and ADR Provision: Art. 26.13 of the Code of Criminal Procedure provides guidelines to the court in accepting guilty pleas. This new section, Art. 26.13(h) prohibits a court from ordering the State or its prosecuting attorneys from participating in mediation, arbitration or any similar dispute resolution process in criminal prosecutions. The only exception is written consent by the State.

Education

S.B. 4 by Sen. Bivens

Education Code, Section 29.012

Relating to public school finance and public education.

Bill Summary: S.B. 4 is a comprehensive school finance, property tax relief, and teacher pay raise package which provides funds for students, teachers, local school districts, and taxpayers. This bill also provides for programs to improve student learning including provisions for children with disabilities.

Section 2.13 of the bill includes an amendment to Section 29.012 (Residential Facilities) in the Education Code which requires certain agencies to develop and adopt by rule a memorandum of understanding. The agencies required to develop and adopt the memorandum of understanding by cooperative effort are: Texas Education Agency, Texas Department of Mental Health and Mental Retardation, Texas Department of Human Services, Texas Department of Health, Texas Department of Protective and Regulatory Services, Interagency Council on Early Childhood Intervention, Texas Commission on Alcohol and Drug Abuse, Texas Juvenile Probation Commission, and Texas Youth Commission.

ADR Provision: The memorandum of understanding is to establish the respective responsibilities of school districts and residential facilities regarding the public education of children with disabilities placed in those facilities as required by the Federal Individuals with Disabilities Act. The amendments require that the memorandum of understanding include provisions for binding arbitration consistent with Government Code, Sec. 2009 (the Government ADR Act) and with the Civil Practices and Remedies Code, Sec. 154.027 (the arbitration provision of the Alternative Dispute Resolution Act).

Family

H.B. 819 by Rep. Naishtat Family Code, Sections 6.602(d) and 153.0071

Relating to an objection to the mediation of certain proceedings on the basis of family violence.

Bill Summary and ADR Provision: The Family Code, Section 6.602 establishes guidelines for alternative dispute resolution in divorce proceedings. The Family

Code, Section 153.0071 contains identical guidelines for ADR in suits affecting the parent-child relationship. The new Sections 6.602(d) and 153.0071(f) restrict the authority of a court to refer cases to mediation where an objection is filed by a party on the basis that the objecting party or a child who is a party in the proceeding has been the victim of family violence. The court may not refer a case to mediation following the filing of the objection until a hearing is held and the court determines that the preponderance of the evidence does not support the objection. If the court does refer such a case to mediation, the court is to include in its order precautions for the safety of the objecting party. The order is to provide that the parties not be required to have face-to-face contact and be placed in separate rooms during mediation.

H.B. 1209 by Rep. Goodman

Family Code, Sections 6.602(b) and 153.0071(d)

Relating to the clarification of certain provisions and other technical corrections in the Family Code; enforceability of mediated agreements in family law cases.

Bill Summary: H.B. 1209 makes numerous technical amendments to notice provisions of the Family Code. Generally, the amendments are designed to refine guidelines to prominently display certain notices.

ADR Provision: H.B. 1209 amends the requirements of Section 6.602(b) and 153.0071(d) which relate respectively to mediated settlement agreements in suits to dissolve marriage and in suits affecting the parent-child relationship. The existing requirements for enforceability of a mediated settlement agreement in these proceedings are: (1) the agreement must include a statement in a separate paragraph that the agreement is not subject to revocation; (2) the agreement must be signed by each party; and (3) the agreement must be signed by each party's attorney, if present when the agreement is signed. H.B. 1209 amends element (1) to provide that the statement must be prominently displayed in boldfaced type or capital letters or underlined.

H.B. 3272 by Rep. Goodman Family Code, Section 210.1065

Relating to the enforcement and collection of child support; court monitors for delinquent child support.

Bill Summary: H.B. 3272 relates to the enforcement and collection of child support. The bill creates the position of child support court monitor who may be appointed by the presiding judges of the administrative judicial regions. These court monitors are to monitor cases where a party has been placed on probation for failure to comply with a child support order.

ADR Provision: Under new subsection 210.1065(b)(3) of the Family Code contained in the bill, the duties of the child support court monitor include "providing mediation services or referrals to services, if appropriate."

S.B. 368 by Sen. Harris

Family Code, Section 231.119

Relating to court-ordered support, including the child support enforcement functions of the Office of the Attorney General and the sunset review of those functions; ombudsman for child support cases.

Bill Summary: S.B. 368 is designed to improve the efficiency of the child support collection activities of the Office of the Attorney General. The bill directs the creation of an interagency working group of certain state agencies to be headed by the Office of the Attorney General. The interagency working group is to create a partnership strategy for the agencies and to identify the child support services provided by these agencies. The bill further creates a county advisory work group to modify child support programs that affect counties. The bill also contains provisions directing the Attorney General to redesign and improve the child support collection functions. Also contained in the bill are provisions to comply with the federal Personal Responsibility and Work Opportunity Act.

ADR Provision: The bill creates an ombudsman program in the Child Support Division of the Office of Attorney General to deal with complaints about the Office's child support collection activities. The Attorney General is to select an employee to serve as chief ombudsman to manage the program. The Office of

the Attorney General is to develop a uniform procedure for taking and resolving complaints. Each field office of the agency is to designate an ombudsman for its office. The field office ombudsman is responsible to see that an employee of the office responds to and resolves each complaint. If the problem cannot be solved at the field office level, it is referred to the chief ombudsman.

Government: State and Local

H.B. 564 by Rep. Oliveira

Government Code, Section 772.010

Relating to a border advocacy division of the governor's office; Border Commerce Coordinator-Ombudsman.

Bill Summary and ADR Provision: H.B. 564 adds Section 772.010 to the Government Code. This addition requires the Governor's office or the office of the Secretary of State as determined by the Governor to establish a border commerce coordinator in the Governor's office or the office of the Secretary of State. The border commerce coordinator is to examine trade issues in the Texas and Mexico border region with regard to improving intergovernmental cooperation; seek increased funding for the North American Development Bank, particularly for development of wastewater facilities; work with federal officials on transportation issues; explore sale of excess electricity from the US to Mexico; and serve as ombudsman for agencies within the border region to help reduce regulation by improving communication between federal, state, and local government.

H.B. 826 by Rep. Greenberg

Government Code, Chapter 2009; Sections 441.031 and 441.091

Local Government Code, Section 201.003(8)

Civil Practices and Remedies Code, Section 154.073

Relating to alternative dispute resolution proceedings of governmental bodies; extension of Governmental ADR Act to local government and other governmental

entities, and state contract dispute procedures.

Bill Summary and ADR Provision: H.B. 826 extends the Government Alternative Dispute Resolution Act to apply to local governments and other political subdivisions of the State to which the Public Information Act applies. The bill also creates a process for resolving contract disputes with the State. The bill is treated more fully in the Featured Legislation section of this report.

S.B. 89 by Sen. Madla

Local Government Code, Chapter 43

Relating to municipal annexation - negotiation and arbitration requirements.

Bill Summary: This annexation bill imposes certain requirements on municipalities relating to annexation. It requires that municipalities prepare an annexation plan; give three years of notice for annexations; give written notice to all affected property owners and public service-providers; and assure individuals the right to continue using their land subsequent to annexation for the same uses as existed at the time of the notice of proposed annexation. It imposes requirements to provide services to annexed areas.

ADR Provision: Section 43.052 requires that municipalities have an annexation plan and required notifications do not apply to areas containing fewer than 100 separate tracts of land on which one or more residential dwellings are located per tract. If a municipality attempts to circumvent these requirements by proposing to separately annex two or more such areas, persons residing or owning property in the areas may file a petition and request arbitration. (Section 43.052(i)).

A person in a municipality with a population of 1.6 million or more with a grievance about the allocation of services can petition the municipality and request arbitration if the municipality then fails to take action. A person in a municipality with a population of less than 1.6 million with a grievance about allocation of services can apply to the courts for a writ of mandamus. (Section 43.056(l)). The court hearing such writ is given broad remedial powers and may order the parties to mediation.

If the municipality has a population of less than 1.6 million, the municipality must negotiate with the property owners on a plan for services to the area after annexation (Section 43.0562) or may negotiate a contract for provision of services in lieu of annexation (Section 43.0563). If the parties cannot agree on a service plan, either party may request arbitration. The arbitrator is to be selected by mutual agreement. The authority of the arbitrator is limited to issuing a decision relating only to the service plan issues in dispute; any decision that exceeds the arbitrator's authority may be appealed. If the municipality disagrees with the arbitrator's decision, it may not annex the covered area for five years. (Sections 43.0564 and 43.0565).

The bill amends Section 43.0751 which provides for municipalities negotiating strategic partnership agreements with water control and improvement districts and municipal utility districts within areas designated in a municipality's annexation plan by mutual consent. Under the amended section, if the parties cannot agree on the terms of a strategic partnership plan, either party may request arbitration to be conducted under Section 43.0752.

The bill creates a new section Local Government Code 43.0752 for the conduct of arbitration of strategic partnership agreements under 43.0751. Certain provisions under section 43.0564 (arbitration of negotiations for services) apply to the appointment of an arbitrator and the conduct of arbitration proceedings under this section. One such provision specifies that if the municipality disagrees with the decision of the arbitrator, it may not annex the covered area for five years.

S.B. 370 by Sen. Brown

Government Code, Section 411.0073

Relating to the continuation and functions of the Department of Public Safety of the State; mediation of DPS employee grievances.

Bill Summary: This is the sunset bill for the Texas Department of Public Safety. It

extends the Department's existence for an additional ten years. The bill makes numerous changes to the Department's operations and procedures.

ADR Provision: The new Government Code Section 411.0073 provides that the department shall establish procedures for an employee to elect to resolve an employment-related grievance through mediation. The procedures must also address the circumstances under which mediation is appropriate. The person selected to serve as mediator must have completed mediation training. Mediations under this section are not subject to the requirements of the Governmental Dispute Resolution Act except for the requirements on confidentiality.

S.B. 371 by Sen. Brown

Government Code, Section 501.148

Relating to the continuation and functions of the Correctional Managed Health Care Advisory Committee – Role as Independent Third Party.

Bill Summary: This is the sunset bill for Managed Health Care Advisory Committee that oversees contracts for prison health services for the Texas Department of Criminal Justice (TDCJ). The bill creates the committee and sets forth its authority, membership, and duties. **ADR Provision:** As part of its duties, the committee is to act as an independent third party for dispute resolution in the event of a disagreement between TDJC and the health care providers.

S.B. 757 by Sen. Duncan

Government Code, Section 2003

Relating to the State Office of Administrative Hearings.

Bill Summary: S.B. 757 amends Chapter 2003 of the Government Code to make technical changes and clarifications to functions, duties, and powers of the State Office of Administrative Hearings (SOAH) and its judges. The bill permits SOAH to assess fees when it conducts contested case hearings or ADR proceedings, which are voluntarily referred to it (as opposed to those proceedings where it possesses mandatory jurisdiction).

ADR Provision: The bill adds section 2003.0412 to clarify that the provisions of Section 2001.061 (ex parte communications) apply to SOAH matters, except in the case of ADR procedures. The bill directs the chief administrative law judge to adopt rules that prescribe the types of ADR procedures in which ex parte communications are prohibited and in which ex parte communications are allowed. Rules prohibiting ex parte communications shall be modeled after, but may vary from, Section 2001.061.

S.B. 1421 by Sen. Lucio

Government Code, Section 775.003

Relating to the regulation of the subdivision or development of land in certain economically distressed areas; Colonia ombudsmen.

Bill Summary: S.B. 1421 revises the regulations for the subdivision or development of land in colonias and other "economically distressed" areas. Among other provisions, the bill addresses the provision of water and wastewater services to colonias; enforcement of regulations on the proliferation and expansion of colonias; and the coordination of local government and state initiatives relating to colonias.

ADR Provision: The bill creates Government Code Chapter 775, Coordination of Colonia Initiatives, which authorizes the Governor to appoint a state agency to act as the state's colonia initiatives coordinator. Section 775.003 of the new chapter authorizes the State initiatives coordinator to appoint an ombudsman in each of the six counties that contain the highest colonia populations. The duties of the ombudsmen are not defined.

Health and Safety

H.B. 2085 by Rep. McCall

Health and Safety Code, Section 12.004

Relating to the continuation and functions of the Board and Department of Health.

Bill Summary: H.B. 2085 is the sunset bill for the Texas Department of Health. The bill extends the term of existence of the agency and makes numerous changes to the statutory provisions regulating the Department.

ADR Provision: The new Section 12.004 is designed to increase early public input in rulemaking prior to the time a proposed rule is published for comment under the Administrative Procedure Act. The Department is to establish a checklist of methods for identifying persons who will be affected by a proposed rule. At a minimum, the Department is to solicit advice and opinions from affected local health departments, the recipients and providers of affected services, and of advocates for affected recipients or providers. The checklist of methods for the Department to consider includes negotiated rulemaking, informal conferences, advisory committees, and any other appropriate method. If the Department is unable to obtain "significant" input from the public or affected parties, the Department is to state in writing to the Board the reasons why the Department was unable to do so.

H.B. 3450, H.B. 3451, and H.B. 3452 by Hilderbran; S.B. 18 by Zaffirini

Health and Safety Code, Sections 242.252, 242.269, 242.061, 242.062, and 242.072

Relating to arbitration in cases involving nursing homes and related institutions licensed by the Texas Department of Human Services and the assessment and collection of civil penalties from same.

Bill Summaries and ADR Provision: In 1995 the Legislature crafted an alternative arbitration procedure for certain kinds of disputes involving nursing and convalescent homes and related institutions (Health and Safety Code, Section 242.251, et seq.). As originally enacted, an affected institution or the Department of Health could elect arbitration in disputes relating to renewal of a license under Section 242.033; suspension or revocation of a license under Section 242.061; assessment of a civil penalty under Section 242.065; assessment of monetary penalties under 242.066; or assessment of a penalty as described under Section 32.021(k), Human Resources Code. Four separate bills define when arbitration

can be used, clarify the ability of courts to enforce arbitration awards relating to civil penalties, and address other issues relating to arbitration in these cases.

Judgement based on arbitrator's order. Section 242.265 provides that an arbitrator's order is final and binding on all parties. Section 242.267 provides a limited right for a party to ask a court to vacate an arbitrator's order. However, prior to passage of H.B. 3450, there was no express provision to permit a court to enter a judgement in accordance with the arbitration order in a case where civil penalties were being sought under Section 242.065. H.B. 3450 adds a new Section 242.269, directing the district court in which a suit for civil penalties under Section 242.065 has been filed, to enter judgement in accordance with the arbitrator's order upon application of a party to the suit, unless a timely motion to vacate the arbitration order has been filed. The judgement as entered by the court is enforceable as any other judgement.

"And we really mean it!" At first blush, much of H.B. 3451 seems redundant of existing law. Under Section 242.268, arbitration was not available in cases of denial, revocation, or suspension of a license under 242.061, emergency closing orders under 242.062, or orders suspending admissions issued under 242.072. Despite this express provision, state courts were referring these cases to arbitration. H.B. 3451 is a reaffirmation of the Legislature's position contained in Section 242.268. H.B. 3451 adds specific language to 242.061, 242.062, and 242.072 which denies courts the power to order arbitration of proceedings under the affected sections. For good measure the Legislature also added new Section 242.094(f) which prohibits courts from ordering arbitration in cases seeking involuntary appointment of a trustee of a facility.

Other changes. H.B. 3452 amends Section 242.252(b) to clarify when a party may request arbitration in a court case. If the affected institution elects arbitration, it must file the election with the court and send notice to the Department and the Office of the Attorney General not later than the 10th day

after the date on which the answer is due or the date on which the answer is filed, whichever is sooner. The Department's election is to be filed with the court and notice is to be sent to the institution not later than the date the institution may elect arbitration (Section 242.252(c)).

H.B. 3452 adds a new Subsection 242.252(d). This subsection states that arbitration may not be elected if an affected institution has had an award levied against it in the previous five years.

New Subsection 242.252(e) directs the district court and the State Office of Administrative Hearings (which is appointed to administer arbitrations under Chapter 242) to dismiss the arbitration, and directs the district court to retain jurisdiction if the election is not timely made or if arbitration of the dispute is not permitted under Chapter 242.

S.B. 18 by Senator Zaffirini adds a new Subsection 242.252(e), which clarifies that the Attorney General is to represent the Department in arbitration proceedings at the request of the Department.

S.B. 358 by Sen. Madla

Health and Safety Code, Section 533.039

Relating to the continuation and functions of the Department of Mental Health and Mental Retardation – Ombudsman.

Bill Summary: The Texas Department of Mental Health and Mental Retardation was set to expire under the Texas Sunset Act in 1999. S.B. 358 allows for the department's continuation until 2007 and modifies some departmental responsibilities.

ADR Provision: This bill adds Section 533.039 which requires the commissioner to employ an ombudsman to assist persons who have been denied service by the Department of Mental Health and Mental Retardation or any of its programs, facilities or local authorities. The ombudsman is responsible for providing information on all services and programs applicable to the client to whom

services were denied and for referring that person(s) to the appropriate facility or department.

Insurance

S.B. 1468 by Rep. Harris

Insurance Code, Article 29.04(10)

Relating to requirements for collective negotiations by physicians with certain health benefit plans.

Bill Summary: Antitrust law restricts the ability of physicians to collectively negotiate contracts with health benefit plans. S.B.1468 authorizes physicians practicing within the service area of a health benefit plan to collectively negotiate the terms and conditions of physician contracts with the health plan if the health plan has substantial market power and if the physicians have a representative to engage in collective negotiations.

ADR Provision: Article 29.04 outlines the kinds of provisions that may be the subject of the permitted negotiations. Article 29.04(10) permits the inclusion of a contract provision for dispute resolution procedures.

Property

H.B. 1052 by Rep. Brimer

Property Code, Chapter 62

Relating to creating a real estate broker's lien on commercial real estate.

Bill Summary: H.B. 1052 amends the Property Code, Title 5, Subtitle B, by adding Chapter 62, the Broker's and Appraiser's Lien on Commercial Real Estate Act. This bill amends the Property Code to create a real estate broker's lien on commercial real estate. The bill specifies the steps a broker must take in order to file a lien on commercial real estate in order to collect the broker's commission. In addition, the bill imposes requirements relating to lien filing, contents and priority, subordination, and escrow accounts. The bill further mandates that any person named in the notice of lien as obligated to pay the commission must establish an escrow account from the proceeds of the transaction or conveyance in an amount sufficient to satisfy the lien and related costs. The amount in escrow shall be held in escrow until the rights of the parties claiming the amount in escrow are determined by a written agreement of the parties, a court order, or an alternative dispute resolution process agreed to by the parties.

ADR Provision: This bill enables brokers and persons against whom the brokers claim a commission to engage in ADR to resolve disputes concerning a broker's commission. The bill provides that a broker's lien remains valid and that any suit to foreclose the lien is stayed until the dispute resolution process is completed.

S.B. 506 by Sen. Harris

Property Code, Section 27.0041

Relating to suits against contractors for damages resulting from construction defects

Bill Summary: This bill makes numerous amendments to the Residential Construction Liability Act.

ADR Provision: The new Property Code Section 27.0041 outlines a specific provision for mediation under the Residential Construction Liability Act. This section allows either the claimant or the contractor to file a motion to compel mediation of the dispute when the damages sought are in excess of \$7,500, if they file within 90 days of the filing of suit. Within 30 days of that filing, the court must order the parties to mediate and will appoint a mediator if the parties cannot agree on one. The maximum allowable elapsed time between the court order of mediation and the actual mediation is 60 days. The parties will split the cost of the mediation.

It further appears that mediation could still be requested or ordered under Civil Practice and Remedies Code, Chapter 154 at any time in the proceeding, whether or not the amount in controversy exceeds \$7,500.00.

Revised Statutes

H.B. 1342 by Rep. Hilbert

Revised Statutes, Title 71, Chapter 7, Article 4528b

Relating to interstate regulating nurses; Nurse Licensure Compact.

Bill Summary: This bill creates the Nurse Licensure Compact, an interstate compact for the purpose of regulating nurses. The bill enables a state that joins

the compact to take actions against a nonresident nurse whose home state is a member of the compact. Actions that member states may take include license revocation, suspension, and probation.

ADR Provision: States in the compact may submit disputes to a three-member arbitration panel, comprised of an individual appointed by the compact administrator in the home state, an individual appointed by the compact administrator in each remote state involved, and an individual mutually agreed upon by the compact administrators of each party state involved in the dispute. Decisions of the panel are binding and final.

H.B. 3377 by Reps. Turner and Sylvester

Revised Statutes, Title 109, Article 6243g-4

Relating to membership and credit in and benefits and administration of public retirement systems for police officers in certain municipalities; pension plans.

Bill Summary: This bill deals with pension plans for police officers in cities of 1.5 million or more. It consolidates certain terms and deals with rates of pay, contributions, etc. Existing pension boards will continue to control the money and provide administrative support and oversight.

ADR Provision: If the pension board wants to remove a board member, that member and the board must choose an impartial hearing examiner to decide whether or not to remove that member. If they cannot agree on an examiner in approximately 10 days, they shall request a list of arbitrators from the American Arbitration Association, the Federal Mediation Conciliation service, or another organization. The board member and the board will each strike names until an arbitrator is agreed upon. The pension system pays for the cost of the arbitrator. An arbitrator is responsible for determining when a suspended member is considered separated from service.

Utilities

S.B. 7 by Sen. Sibley

Utilities Code, Section 13.003

Relating to electric utility restructuring and to the powers and duties of the Public Utility Commission; electric deregulation bill.

Bill Summary: This electric deregulation bill provides for consumer choice in retail electricity by 2002. It allows co-ops and municipally owned utilities to opt out of retail competition for their regions. It mandates the designation of a provider of last resort for each region. It creates a system for recovery of stranded costs from all retail customers.

ADR Provision: The Office of Public Utility Counsel may intervene on behalf of residential consumers or small commercial consumers in proceedings, including alternative dispute resolution proceedings. Additionally, the office may initiate, intervene, or appear in a judicial proceeding involving an action taking by an administrative agency, including an alternative dispute resolution proceeding. (There will also likely be a stream of disputes between the various companies attempting to participate in the market. ADR may be appropriate, but the bill makes no such provision.)

S.B. 86 by Sen. Nelson

Utilities Code, Chapter 17

Relating to the protection of telecommunications and electric service customers.

Bill Summary: This bill provides greater consumer protections in the telecommunications and electric services industries, including customers of municipally owned utilities and customers of electric cooperatives. It adds Chapter 17 to Title 2A of the Utilities Code to protect consumers from unfair or fraudulent business practices, including but not limited to over-billing and slamming.

ADR Provision: The bill provides that among the rights of utilities customers is the right to impartial and prompt resolution of disputes with any billing utility, service provider, telecommunications utility, retail electric provider, or electric utility. Under the new Chapter 17.157, the Public Utilities Commission is

authorized to resolve disputes between a customer and a certificated telecommunications or electric utility. Additionally, the bill includes similar protections for customers of electric cooperatives in Section 17.006. An electric cooperative shall not be deemed to be a "service provider" for purposes of dispute resolution under Chapter 17.156. The board of directors of the electric cooperative or its designee shall perform the dispute resolution function provided for by Section 17.157 for electric customers served by the electric cooperative within its certified service area.

BILL SUMMARIES: LEGISLATION CONSIDERED BUT NOT PASSED BY THE 76TH LEGISLATURE

As noted in the Executive Summary, over 150 bills containing provisions which affect alternative dispute resolution were introduced in the 76th Legislature. Thirty-two of these bills were enacted. Selected bills that were not passed are summarized below. These bills reflect the range of subjects where parties are contemplating the use of alternative dispute resolution processes. Some of these bills may find new life in the 77th Legislature.

VETOED BILL

Transportation

S.B. 621 by Sen. Gallegos

Relating to conditions of employment for peace officers employed by certain transportation authorities.

This bill would have amended Chapter 451 of the Transportation Code by adding Section 451.1085, Peace Officer Employment Matters In Certain Authorities.

Currently, most employees of the Houston Metropolitan Transportation Authority

(HMTA) are covered by a collective bargaining agreement; however, police officers employed by HMTA are unable to negotiate an employment agreement with management. S.B. 621 would have created a statute to allow police officers employed by the HMTA to meet and confer, and to negotiate over wages and other employment conditions. Under S.B. 621, an association that would have submitted a petition signed by a majority of police officers would have been recognized as the sole bargaining agent, unless a majority of covered police officers withdrew that recognition. If there were a question of whether an association was the majority representative, it would have been determined by an election procedure determined by the parties. If the parties could not agree on election procedure, S.B. 621 would have allowed either party to request that the American Arbitration Association conduct the election.

Governor Bush vetoed the bill, declaring that it would "deprive[] local citizens of the right to disapprove agreements made with transit authority peace officers under this bill's "meet and confer" provisions," and that the bill "departs from existing 'meet and confer' laws" in Texas.

BILLS NOT PASSED

Annexation

H.B. 1200 by Rep. Crabb

Relating to the disannexation of certain areas annexed on or after December 1, 1996 by certain municipalities.

This bill would have created a process for disannexation through the use of elections. The bill also would have provided for the use of arbitration panels to assess whether the municipality or special district would be entitled to compensation.

H.B. 3745 by Rep. Wilson

Relating to disannexation of areas annexed by certain municipalities.

This bill would have created a new section in the Local Government Code to establish procedures and provisions for the disannexation of territory annexed by a municipality with a population of more than 1.6 million in which an election approving the annexation had not been held, regardless of when the annexation occurred. If a disannexation occurred, an arbitration panel would be appointed to conduct an accounting of the costs of the annexation and the disannexation process. The arbitration panel would then have had 120 days to render a decision whether the municipality or disannexed district was entitled to compensation. If the arbitrators failed to reach a majority decision, the municipality or affected district would have been allowed to file an action for accounting in the district court of the county in which the tract is located.

Arbitration (See also Annexation, Education, Local Government, General ADR, and Police Officer and Firefighter Mediation and Arbitration)

H.B. 154 by Rep. Naishtat

Relating to the representation of the state by the attorney general in certain cases involving nursing facilities.

This bill would have modified the nursing home arbitration system by requiring the attorney general to represent the Texas Department of Human Services in arbitration at the Department's request. It also included a provision that civil penalties would not be considered reimbursable costs under the state's Medicaid program.

H.B. 901 by Rep. Dutton

Relating to requiring arbitration to establish a property owners' association lien for assessments.

This bill would have substantially changed the process for establishing a lien on property to enforce the collection of dues by a Homeowner's Association. The new process would have required, after notice, that the homeowner and

association establish the existence and the amount of the debt through arbitration.

H.B. 1991 by Rep. Dunnam *Relating to appeal of certain court orders and judgments relating to arbitration.*

H.B. 1991 would have amended the arbitration chapter of the Civil Practices and Remedies Code to repeal the section that entitles a party to appeal an arbitration award or decree.

H.B. 2412 by Rep. Hilbert / S.B. 1337 by Sen. Carona
Relating to arbitration of disputes in the workplace.

This bill would have amended Section 171.001 of the Civil Practice and Remedies Code. This bill would have added a paragraph (c) making an agreement to arbitrate disputes between employers and employees-at-will that arise out of the employment relationship valid if it complied with paragraph (a) of the same section.

H.B. 3555 by Rep. Wilson

Relating to the regulation of the manufacture and transportation of alcoholic beverages.

Generally this bill would have changed the permit and licensing features for the unauthorized sale of alcoholic beverages. This bill would have created a new subsection (e) to Section 102.72. The new subsection (e) would have required that any agreement between a manufacturer and distributor covered by Subchapter of the Alcoholic Beverage Code which is entered into, renewed or amended on or after September 1, 1999, include information on the front page of the agreement as to whether any portion of the agreement would be subject to arbitration.

Education

H.B. 1130 by Rep. Longoria

Relating to the creation of the Education Testing and Accountability Department for public school system accountability.

This bill would have created an Education Testing and Accountability Department. This department would have essentially managed the public school accountability system, by taking care of data and reviewing programs. This bill would have required the executive director of the Education Testing and Accountability Department or a representative designated by the executive director to act as an arbitrator in certain disputes.

H.B. 1883 by Rep. Naishtat *Relating to local-option bargaining by boards of trustees of public school districts.*

This bill would have amended Chapter 22, subchapter A of the Education Code to allow a school district's board of trustees to enter into a binding agreement with a labor organization relating to compensation, hours of employment, or working conditions. The means for electing a labor organization to represent district employees would have been established by district policy and the elected labor organization would have been required to fairly represent each class of employees to whom the agreement applied. Agreements reached would have been enforced by filing an action in the district court of the county in which the school district's central administrative office is located or the parties could have agreed to procedures under which any dispute would have been resolved through binding arbitration.

S.B. 252 by Sen. Ellis *Relating to certain counties establishing alternative dispute resolution systems for students.*

This bill would have authorized counties with a population of over 2,400,000 to establish an ADR system "for the peaceable and expeditious resolution of disputes between students in the public primary and secondary schools in the county." It would have given "alternative dispute resolution system" the meaning assigned to it in the Texas Alternative Dispute Resolution Systems and Financing

Act (Civil Practice and Remedies Code Sec. 152.001). Counties would have been able to contract with outside entities (non-profit corporation, public corporation, or political subdivision) to administer the system. This bill would have allowed counties to charge a court cost (up to \$3.50) on civil suits to support the system.

General ADR

H.B. 162 by Rep. Chisum

Relating to consent decrees, agreed judgments, and settlements of legal disputes involving the state.

This bill would have required state attorneys to obtain written approval from the Governor, Lieutenant Governor, and Attorney General before agreeing to a settlement that imposed any financial obligation on the state. This bill would have applied to any settlement agreements by the state reached during an ADR procedure, which involved expenditure or receipt of funds by the state.

H.B. 636 by Rep. Allen

Relating to the procedure by which an inmate imprisoned in the Texas Department of Criminal Justice may resolve a conflict over time-served credits for time spent confined before transfer to the department.

House Bill 636 would have required the Texas Department of Criminal Justice to develop a dispute resolution system for inmate complaints regarding time credits for time spent in county jail before transfer to the Department. This bill would have set deadlines for when such an error could have been raised in an application for a writ of habeas corpus.

H.B. 868 by Rep. Wilson

Relating to the Texas Human Rights Protection Act; providing civil penalties.

This bill would have outlawed hate crimes and harassment of those working to stop hate crimes. Specifically, the bill would have authorized the Commission on Human Rights to investigate hate crimes and to create an administrative

procedure through which the commission could charge people with hate crimes and ultimately sanction them with substantial financial penalties and restraining orders. It authorized the use of a conciliation process.

H.B. 1206 by Rep. Yarbrough / S.B. 489 by Sen. Ellis (related to H.B. 901)

Relating to providing an informal method of dispute resolution for members of property owners' associations.

This bill would have amended Chapter 202 of the Property Code by adding Section 202.010 entitled Hearing Before Property Owners' Association. This section would have required property owners' associations to establish a dispute resolution committee to hear disputes concerning fines or penalties levied against property owners. This bill outlined the procedural requirements for hearings conducted by the dispute resolution committee. It required an appeal to the board of the property owners' association before legal action could be taken.

H.B. 1813 by Rep. Brimer

Relating to the creation of a bill of rights for businesses operating or located in the State.

This bill would have amended the Business & Commerce Code to create a Texas Business Bill of Rights. The bill would have entitled businesses to certain rights, including a provision that would have required courts to review each pending dispute involving a Texas business to determine whether alternative dispute resolution would be appropriate.

H.B. 2460 by Rep. Yarbrough

Relating to the governance of property owner's associations.

This bill would have amended Section 27.031 of the Government Code to give courts jurisdiction over disputes between property owners and property owners' associations. It included a provision that would have prohibited obligating an owner of homestead property to pay association fees. This bill would have amended Section 202.007 of the Property Code, by requiring property owners'

associations to establish "dispute resolution committees," and procedures whereby disputes between the property owners and the associations could be resolved.

H.B. 2681 by Rep. Bosse

Relating to adoption of the Business Organizations Code.

This bill would have had the state adopt the Texas Business Organizations Code. It would have authorized the use of arbitration to resolve any issue about which there was a deadlock among the directors, shareholders, or other persons authorized to manage a corporation. Section 21.755 would have prohibited a shareholder of a close corporation from instituting a judicial proceeding before exhausting any non-judicial remedy set forth in a close corporation provision regarding dispute resolution unless irreparable harm will result before a non-judicial remedy is exhausted. Section 252.007 would have authorized a nonprofit association to participate in a judicial, administrative, or other governmental proceeding, arbitration, mediation or any other form of alternative dispute resolution.

H.B. 2718 by Rep. Brimer

Relating to small business assistance by the state.

This bill would have affected small businesses, defined as having less than 100 employees. The bill would have guaranteed assistance to small businesses in locating affordable workers' compensation and in determining unemployment insurance tax rates. The bill would have required the courts to review each pending dispute where a small business was a party to determine whether or not it would have been appropriate for ADR.

H.B. 2808 by Rep. Lewis

Relating to the development and management of water resources.

This bill would have authorized the Texas Natural Resources Conservation Commission (TNRCC) to establish water rights provisions for emergency

situations. Proposed Section 5.518 would have authorized TNRCC by emergency order to grant the temporary transfer and use of all or part of a surface water right to a retail or a wholesale water supplier for public health and safety purposes. Under proposed Section 5.518(d), the TNRCC would have been required to establish a dispute resolution procedure for claims arising out of the emergency transfer of water rights.

S.B. 35 by Sen. Shapiro

Relating to certain processes and procedures promoting the consolidation of elections.

This bill would have consolidated elections by combining dates for certain types of voting and precincts for joint elections and by requiring certain political subdivisions to hold joint elections. The engrossed version of the bill required that when political subdivisions are in dispute over how and where to join elections, the disputed issues would be resolved through ADR. Further, the bill provided that the Secretary of State should create a model joint election agreement and ADR procedures.

S.B. 318 by Sen. Ellis

Relating to requiring use of an alternative dispute resolution procedure to establish a property owners' association lien for assessments.

This bill would have created a new system for the resolution of disputes between property owners and respective property owners' associations. This bill would have amended chapter 202 of the Property Code by adding section 202.006, entitled Alternative Dispute Resolution Required to Establish Lien for Assessments. This section would have prohibited property owners' associations (association) from filing a lien on real property of any member (owner) for an assessment unless the association agreed to participate in an ADR procedure. The ADR procedure would have determined whether the assessment was valid and the correct amount to be assessed. The association would have been required to provide written notice to the owner of its intent to initiate the

procedure. The owner then was required to participate in the ADR procedure. If the owner refused to participate, the association would have been released from compliance with this section, and could have proceeded with the lien. This section required that the selection of the ADR procedure be determined by an agreement between the owner and the association. If they failed to agree within 30 days of the notice, either party could have requested a district court to make a referral to an ADR procedure.

S.B. 1821 by Sen. Haywood

Relating to authorizing plans for unit operators for oil or oil and gas production.

This bill would have amended the Natural Resources Code by adding Chapter 104, to provide rules for unitizing oil and gas interests in Texas. It also would have set up a dispute resolution process for disputes between oil well operators and working interest holders as to the value of the interests. This would have been accomplished by the three-appraiser approach; that is, each side would choose an appraiser and the two chosen would choose the third.

Local Government

S.B. 885 by Sen. Brown

Relating to arbitration of a decision of a transit authority relating to financing of a venue project.

S.B. 885 related to the financing of a project by the transit authority. It would have amended Section 334.0236, Local Government Code, to allow the municipality to submit a financing matter for binding arbitration to be conducted by a board of three arbitrators. The county and the transit authority each would have selected one arbitrator and one would have been chosen by the two arbitrators already selected. The municipality and transit authority would each have had to pay its own costs and equally share the cost of the arbitration.

Police Officer and Firefighter Mediation and Arbitration

H.B. 3088 by Rep. Haggerty

Relating to the process for disciplinary actions taken against Department of Public Safety officers.

This bill would have amended the Government code by changing the process relating to disciplinary action taken against Department of Public Safety (DPS) officers. This bill would have allowed officers who had been discharged, suspended, or demoted to appeal. The bill would have mandated arbitration consistent with the Governmental Dispute Resolution Act, between any discharged, suspended, or demoted officer and the DPS, before the appeal was to be heard by the commission. The bill contained provisions for the selection of an arbitrator through a process of elimination between the appealing officer and the Department. The arbitrator would have had the same duties and powers in conducting the arbitration hearing as a state agency conducting a hearing under Chapter 2001. The parties would have been allowed to agree to an expedited procedure for an arbitration hearing conducted under this section. If the parties could not agree to an expedited procedure, the arbitrator would have been required to recommend a decision on the appeal not later than the 30th day after the date the arbitration hearing ended or the date the briefs, if any were required by the arbitrator, were due, whichever occurred later. The appealing officer and the Department would have been required to share the arbitrator's fees and expenses equally. The commission would have had authority to make the final determination regarding the department's order to discharge, suspend, or demote the appealing officer after reviewing the order of the Department, the recommendation of the arbitrator, the stenographic record made and evidence presented at the arbitration hearing, and the briefs filed with the arbitrator, if any.

H.B. 3373 by Rep. Talton / S.B. 1538 and 1783 by Sen. Gallegos

Relating to police department mediation in certain municipalities and its effect on time schedules for appeals.

These bills would have amended the Local Government Code to allow the Police Department to set up and implement mediation for discipline and training. Under

these bills, all communications, records, conduct, and the demeanor of the mediator would have been confidential. Certain communications, oral and written, that were made between the mediator and the parties or between the parties during the mediation could not have been disclosed under this bill except by consent of all parties or the admission of criminal activity made to the mediator. Oral or written communication during the mediation would be admissible and discoverable if it would have been independent of the mediation. The mediator could not be made to testify, except in the case of a criminal admission.

S.B. 646 by Sen. Nelson

Relating to provisions governing fire fighters' and police officers' civil service in certain municipalities.

Senate Bill 646 would have amended the Local Government Code to modify provisions governing fire fighters' and police officers' civil service in certain municipalities. Included in this bill were several changes affecting arbitration of disciplinary actions. Under current law, a fire fighter or police officer may elect to appeal certain actions to an independent third party hearing examiner instead of the Fire Fighter's and Police Officers' Civil Service Commission. The hearing examiner's decision is final. S.B. 646 would have allowed a hearing examiner's decision to be appealed in district court. Also, under current law, when parties cannot agree on a hearing examiner, they must choose from a list of neutral arbitrators from the American Arbitration Association or the Federal Mediation and Conciliation Service. S.B. 646 would have allowed the parties to choose an arbitrator from another organization that provides arbitration services.

Public Utilities

S.B. 1311 by Sen. Brown

*Relating to the development and management of water resources.*BR> This bill would have changed the procedures for regulating public utilities that deal with

water resources. It would have amended a number of provisions in the Water Code and the Health and Safety Code. Section 2 of the bill would have added a provision requiring the TNRCC to establish a dispute resolution procedure for complaints stemming from emergency temporary transfers of water rights. Only after exhausting all remedies outlined in Section 5 of the Water Code would an owner have been able to file suit. It also provided that the winning party in a lawsuit under Section 5 would be entitled to costs and attorney's fees.

State Contracting

H.B. 69 by Rep. Nixon / S.B. 1025 by Sen. Ellis (similar to H.B. 826 which passed)

Relating to claims against a unit of state government relating to contracts for certain services or projects.

These bills were consolidated into H.B. 826, which was passed. See analysis in featured legislation section. However, not all of the provisions included in these bills made it into H.B. 826.

Other

H.B. 766 by Rep. Maxey / S.B. 1744 by Sen. Armbrister

Relating to creating a bill of rights for Texas businesses.

This bill would have required the Governor to appoint an ombudsman for state businesses and created a "business" bill of rights to aid businesses in dealing with state agencies.

H.B. 2418 by Rep. Naishtat / S.B. 1424 by Sen. West

Relating to the creation of a consumer assistance ombudsman program for health insurance consumers.

This bill would have amended the Insurance Code by adding Chapter 28. This new chapter would have created the Independent Consumer Assistance Ombudsman Program for Health Care Consumers. This program would have

provided assistance to consumers dealing with health care issues, mainly insurance and government assistance programs. It would have allowed the ombudsman to represent consumers in mediation and arbitration procedures with health care plans. It also would have allowed the ombudsman to assist the consumer in asserting rights and filing complaints, grievances and appeals.

H.B. 2489 by Rep. Coleman

Relating to the prohibition of certain discrimination based on sexual orientation.

This bill would have prohibited certain persons, employers, and labor organizations from discriminating in certain ways based on sexual orientation. The forms of discrimination covered in the bill ranged from hiring, firing, and membership to discrimination in public accommodations and selling and renting housing. The bill also would have established the relief available for victims of such discrimination. This bill would have authorized the Human Rights Commission to process and investigate complaints. The Commission also would have been required to engage in conciliation and further allowed to use binding arbitration if appropriate. The conciliation would have to have been held in public, unless all parties agreed that disclosure was not necessary to prevent sexual discrimination. Conciliation was defined essentially as resolution through informal negotiations.

H.B. 2897 by Rep. Brimer

Relating to litigation rights of businesses located in Texas.

This bill would have required Texas located businesses to operate and maintain a safe and reasonable work environment. In order to circumvent lawsuits, the bill would have required any employee bringing a suit under this provision to give written notice to the employer 30 days before filing suit. The bill also would have provided Texas businesses with the right to have every lawsuit in which a business is a party reviewed by the court to determine whether or not alternative dispute resolution would be appropriate.

H.B. 3308 by Rep. Thompson

Relating to the payment of certain costs incurred in connection with a suit to collect delinquent ad valorem taxes.

This bill would have amended Section 33.49(b), Tax Code, to require a taxing unit to pay all court costs for which it is liable, including fees for service of process in suits filed in error. Court costs described in the existing Section 33.49(a) would have included any fees for service of process, arbitration, or mediation.

H.B. 3475 by Rep. Averitt

Relating to the prompt payment of claims to first party claimants under Article 21.55, Insurance Code.

This bill would have amended Article 21.55 (Prompt Payment of Claims), Insurance Code, by modifying claim processing requirements to which an insurer is subject. Article 21.55 addresses processing requirements such as those related to the investigation of a claim, acceptance or rejection of a claim, and payment of a claim. The proposed bill would have expanded the insurer's liability to the new processing requirements, unless it was determined as a result of arbitration or litigation that a claim or any part of a claim received by an insurer was invalid.

S.B. 1414 by Sen. Shapiro

Relating to paying for services provided by the State Office of Administrative Hearings. This bill would have required the State Office of Administrative Hearings (SOAH) and the agency that refers to SOAH for hearings or for alternative dispute resolution procedures to enter into an interagency contract. The contract would have provided that the referring agency would pay SOAH the costs of conducting a hearing or procedure based on an hourly rate.