

Public Resource Series Number Nine  
October 2005

# 2005 Texas ADR Legislative Report

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**Center for Public Policy Dispute Resolution**

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## ACKNOWLEDGMENTS

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Our summer interns, **Lindsay Jaffee, Laura Balza, and Paige Bruton** updated bill summaries, delved into some of the bills more intricate final versions, and helped make sense of some of the changes along the way. Under the direction of **Jan Summer**, Executive Director, **Susan Schultz** wrote and edited the Report with the assistance of **Tracy Tarver**, Program Director. **Vicki Read**, Administrative Associate, and **Natalie Gray**, Administrative Assistant, prepared the final draft and ensured its timely publication.

The Center is also grateful to its many friends and supporters for the tremendous, collaborative effort that it takes to stay informed during a legislative session. In particular, the Center extends its appreciation to **Margaret Menicucci** for her invaluable insight into water issues and her gracious help in tracking water bills while at the Center and wishes her well in all future endeavors.

## EXECUTIVE SUMMARY

During the regular session of the 79<sup>th</sup> Legislature, the Center tracked over 160 bills with potential impact on alternative dispute resolution (ADR), especially in relation to governmental use. As addressed below, 44 of those filed bills were Sunset bills (including companion bills), which the Center tracks because of the ADR recommendation adopted by the Sunset Advisory Commission and included in most Sunset bills. Of the remaining tracked bills, this report summarizes 16 bills that retained ADR implications and were enacted into law. Some ADR bills that were not passed are also briefly summarized for their historical value.

Overall, 5,484 House and Senate bills were filed during the regular session, 1,389 were passed, and 19 were vetoed. In the end, 25% of the filed bills became law. The regular session and the two subsequent special sessions were heralded as opportunities to reform the public school financing structure, held to be unconstitutional by a state district judge and pending before the Texas Supreme Court. The legislators also took on the issue of reducing property taxes. In the end, the legislators were unable to reach agreement on either of these major issues.

On the ADR front, several bills with ADR language were primed to make significant modifications and additions to various governmental procedures, but these were either much diluted or died altogether. For example, S.B. 3 was a heavily debated bill that addressed water management and conservation issues and included several ADR provisions. S.B. 3 went through several iterations and was even divided up into other pieces of legislation when the main bill was stalled. Ultimately, S.B. 3 and most of its piece-parts died. However, as summarized below, a water bill did pass that adds mediation in disputes concerning groundwater district management plans. See H.B. 1763. Also, most proposed changes to the dispute resolution procedures for claims against the State stalled and died. See H.B. 974 and H.B. 1330 in the *Filed In But Not Passed* Section. The bill that did pass changes the time frames for negotiation and mediation in contract disputes against the State. See H.B. 1940.

On a more positive note, third time was the charm for legislation aimed at giving commissioners courts more flexibility in funding alternative dispute resolution centers in their counties. See H.B. 282/S.B.168. This legislation is discussed in the Featured Legislation section. The Family Code was amended in part to authorize the appointment of parenting coordinators (H.B. 252) and to expressly give confidential protections to two collaborative law procedures (H.B. 260). The function of ombudsman was invoked in at least three bills dealing with border issues to improve community relations and gather information. See S.Bs. 425 and 827; H.B. 925. The concept of binding arbitration also continues to appear in legislation. The result from this session is that property owners now have the option of requesting binding arbitration to settle certain ad valorem tax determinations. See H.B.182/S.B. 1351.

Further, following the Featured Legislation section, we have included an update on state agencies that are acquiring ADR provisions in their statute through the Sunset

review process. The Texas Sunset Advisory Commission's recommendation encourages state agencies to use ADR processes where appropriate for internal and external conflicts; reinforcing the policy expressed in the Governmental Dispute Resolution Act.

The need to foster better understanding of ADR processes and their applications persists. While confusion between "mediation" and "arbitration" is still apparent, ambiguity in the use of other terms such as "third party neutral," "ombudsman," and "confidentiality" is also prevalent and warrants our attention. The Center looks forward to the continuing challenge of training and educating people, especially those associated with government and public policy issues, on how dispute resolution may be used to improve relations and minimize conflicts.



## **FEATURED LEGISLATION: HB 282/SB 168 RAISING THE CAP FOR FUNDING DISPUTE RESOLUTION CENTERS**

The term “dispute resolution” appeared in an assortment of legislative bills, but one bill in particular that passed this session will help dispute resolution at the local level throughout Texas: H.B. 282. A copy of the enrolled version appears following this article. This bill strengthens financial support for the community dispute resolution centers around the state. These centers are gems within their communities, offering affordable dispute resolution processes to those seeking to resolve their controversies outside the courtroom. The passage of this bill is indeed a highlight for ADR this session.

Texas law gives county commissioners the authority to establish and maintain in their county a community dispute resolution center, referred to in the statute as an alternative dispute resolution (ADR) system, for the resolution of citizen disputes.<sup>1</sup> Today, seventeen such centers operate throughout Texas, including Amarillo, Austin, Beaumont, Bryan/College Station, Conroe, Corpus Christi, Dallas, Denton, El Paso, Ft. Worth, Houston, Kerrville, Lubbock, Richmond, San Antonio, Waco, and Paris. Since the law was first enacted in 1983, the maximum fee that a commissioners court could set as a court cost to establish and maintain these centers has been \$10 per civil case (with certain exceptions) filed in county or district courts.<sup>2</sup> However, operating costs and demand for ADR services at the centers have significantly increased over the years, while the \$10 funding cap has stayed the same.<sup>3</sup> Some centers have attempted to meet rising costs by instituting administrative or scheduling fees and pursuing other fund-raising activities, but these efforts are not dependable sources of income and detract from the mission of affordable dispute resolution. Consequently, the centers banded together to support legislation giving county commissioners greater flexibility in setting court costs dedicated to ADR systems. After three sessions, they finally reached their legislative goal.

Representative Hope and Senator Wentworth, who each have bustling ADR systems in their districts, filed identical bills in the House and Senate: House Bill 282 and Senate Bill 168. Through their combined efforts, H.B. 282 was passed and signed by the Governor. The bill amends Chapter 152 of the Civil Practice and Remedies Code by:

- 1) changing the cap on the court cost that a commissioners court may set on county and district civil cases for an ADR system from \$10 to \$15; and
- 2) allowing all commissioners courts to set an ADR fee on justice court cases (deleting the existing population bracket), and raising the cap for the justice court fee from a maximum of \$3 to \$5.

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<sup>1</sup> TEX. CIV. PRAC. & REM. CODE ANN. §152.002 (Vernon 1997).

<sup>2</sup> §152.004

<sup>3</sup> In 1999, an amendment to the law allowed Harris County (the only county qualifying under the stated population bracket) to set an additional filing fee of up to \$3 for justice court cases (also with some exceptions). See §152.005.

Thus, H.B. 282 raises the cap on court fees that may be used to sustain a dispute resolution center but leaves the imposition of any actual fee increase within the discretion of each county government.

Through an amendment on the Senate Floor, another provision (originally found in H.B. 1310) was added to H.B. 282 expressly authorizing the Jefferson County ADR System to charge a user fee. The provision states:

[An ADR system] that provides services for the resolution of disputes in a county with a population of 250,000 or more but less than 290,000 may collect a reasonable fee in any amount set by the commissioners court from a person who receives the services. This section may not be construed to affect the collection of a fee by any other entity described by Section 152.002(b)(1).

This provision was included at the request of Jefferson County, whose dispute resolution center is a division of county government. See H.B. 1310 Bill Analysis. The population bracket targets Jefferson County specifically (according to the last formal census in 2000). Representative Ritter, who has Jefferson County in his district, authored the original bill, H.B. 1310. The last sentence of the provision indicates that it is not intended to affect the collection of a user fee by other ADR systems outside of Jefferson County.

H.B. 282 provides county governments more flexibility to finance existing dispute resolution centers and encourage the establishment of new ones as needed. As the population continues to grow in Texas, so do controversies. Texas is well served by supporting centers that provide affordable dispute resolution guidance to individuals seeking to fashion solutions.

The enrolled version of H.B. 282 reads as follows:

AN ACT

relating to the funding of alternative dispute resolution systems.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Section 152.004(a), Civil Practice and Remedies Code, is amended to read as follows:

(a) To establish and maintain an alternative dispute resolution system, the commissioners court may set a court cost in an amount not to exceed \$15 [~~\$10~~] to be taxed, collected, and paid as other court costs in each civil case filed in a county or district court in the county, including a civil case relating to probate matters but not including:

- (1) a suit for delinquent taxes;
- (2) a condemnation proceeding under Chapter 21, Property Code; or
- (3) a proceeding under Subtitle C, Title 7, Health and Safety Code.

SECTION 2. Section 152.005, Civil Practice and Remedies Code, is amended to read as follows:

Sec. 152.005. ADDITIONAL FEE FOR JUSTICE COURTS [~~CERTAIN COUNTIES~~]. (a) To establish and maintain an alternative dispute resolution system, the commissioners court [~~of a county with a population of 2.5 million or more~~] may, in addition to the court cost authorized under Section 152.004, set a court cost in an amount not to exceed \$5 [~~\$3~~] for civil cases filed in a justice court located in the county, but not including:

- (1) a suit for delinquent taxes; or
- (2) an eviction proceeding, including a forcible detainer, a forcible entry and detainer, or a writ of re-entry.

(b) A clerk of the court shall collect and pay the court cost in the manner prescribed by Section 152.004(c).

SECTION 3. Chapter 152, Civil Practice and Remedies Code, is amended by adding Section 152.006 to read as follows:

Sec. 152.006. FEE FOR ALTERNATIVE DISPUTE RESOLUTION CENTERS. An entity described by Section 152.002(b)(1) that provides services

for the resolution of disputes in a county with a population of 250,000 or more but less than 290,000 may collect a reasonable fee in any amount set by the commissioners court from a person who receives the services. This section may not be construed to affect the collection of a fee by any other entity described by Section 152.002(b)(1).

SECTION 4. (a) Sections 1 and 2 of this Act apply only to a civil case filed on or after the effective date of this Act.

(b) Section 3 of this Act applies only to alternative dispute resolution services provided on or after the effective date of this Act. Any alternative dispute resolution services provided before the effective date of this Act are governed by the law in effect immediately before that date, and that law is continued in effect for that purpose.

SECTION 5. This Act takes effect September 1, 2005.

## **UPDATE ON AGENCY ADR PROVISIONS THROUGH THE SUNSET PROCESS**

In 2002, the Texas Sunset Advisory Commission adopted an Across-the-Board recommendation (ATB) that encourages state agencies to use alternative dispute resolution (ADR) processes. This ATB reinforces on an individual state agency level the policy stated in the Governmental Dispute Resolution Act:

that disputes before governmental bodies be resolved as fairly and expeditiously as possible and that each governmental body support this policy by developing and using alternative dispute resolution procedures in appropriate aspects of the governmental body's operations and programs.

Tex. Gov't Code Ann., §2009.002. The ATB, among other things, directs an agency:

- 1) to develop and implement a policy to encourage the use of negotiated rulemaking and ADR procedures to assist in the resolution of internal and external disputes, and
- 2) to designate a coordinator to implement the policy and collect data.

Through the Sunset review process, this ATB, when applied, is included in each agency's Sunset bill and becomes part of that agency's statutory framework when the bill is passed and becomes law. The ATB was applied for the first time in the **2003 Sunset review process**. During the 2003 legislative session, the following agencies acquired all or part of the ATB:

Texas State Board of Public Accountancy  
Texas Board of Architectural Examiners  
State Board of Dental Examiners  
Texas Board of Professional Engineers  
Texas Council on Purchasing from People with Disabilities  
Court Reporters Certification Board  
Texas Ethics Commission  
Texas Funeral Service Commission  
Texas Higher Education Coordinating Board  
Texas Department of Housing and Community Affairs  
Texas Health and Human Services Commission  
State Office of Administrative Hearings  
Texas Board of Professional Land Surveying  
Texas Department of Licensing and Regulation  
Texas State Board of Plumbing Examiners  
Board of Tax Professional Examiners  
Texas Workforce Commission

Through the **2005 Sunset review process**, these additional agencies acquired all or part of the ATB:

H.B. 972	<b>Texas Board of Chiropractic Examiners</b>
H.B. 1155	<b>Texas State Board of Examiners of Dietitians</b>
H.B. 1413	<b>Texas State Board of Examiners of Marriage and Family Therapists</b>
S.B. 419	<b>Texas State Board of Medical Examiners (including Physician Assistant and Acupuncture)</b>
H.B. 1535	<b>Texas Midwifery Board</b>
H.B. 1025	<b>Texas Optometry Board</b>
S.B. 403	<b>Texas State Board of Examiners of Perfusionists</b>
S.B. 402	<b>Texas State Board of Podiatric Medical Examiners</b>
H.B. 1283	<b>Texas State Board of Examiners of Professional Counselors</b>
H.B. 1015	<b>Texas State Board of Examiners of Psychologists</b>
S.B. 408	<b>Public Utility Commission of Texas</b>
S.B. 409	<b>Office of Public Utility Counsel</b>
S.B. 415	<b>Texas State Board of Social Worker Examiners</b>
S.B. 407	<b>Texas State Board of Veterinary Medical Examiners</b>

The State Office of Administrative Hearings has published ADR model guidelines on its website: [www.soah.state.tx.us](http://www.soah.state.tx.us). These guidelines are helpful resources for agencies seeking assistance in establishing or expanding ADR procedures. The Center will again be offering an ADR Orientation in the fall for state agencies that wish to become more familiar with ADR and governmental ADR programs. State agencies are also encouraged to send their agency ADR coordinator to participate in the Dispute Resolution Coordinators Roundtable, which was initiated in January of 2004 under the auspices of the Center. The DR Coordinator Roundtable meets quarterly to share information and discuss topics such as drafting an ADR policy, designing an ADR program, how to find third-party neutrals, and how to evaluate an ADR program. The purpose of the DR Coordinator Roundtable is to offer support and education to state agencies contemplating the challenge of implementing ADR programs.

## **NOTABLE ADR BILLS PASSED BY THE 79<sup>th</sup> LEGISLATURE**

### Civil Practice and Remedies

>>**H.B. 282** by Rep. Hope /**S.B. 168** by Senator Wentworth  
Civil Practice and Remedies Code, Chapter 152<sup>4</sup>  
*Relating to funding of ADR systems*

Please refer to the Featured Legislation section for discussion of these bills.

### Family

>>**H.B. 202** by Rep. Goodman  
Family Code, Chapters 4 and 6  
*Relating to certain marital property agreements*

#### **Bill Summary:**

The major effect of this bill is to allow parties seeking to dissolve their marriage the option of accomplishing that task through informal settlement conferences, with or without attorneys. Prior to this bill, parties could agree to use arbitration (§6.601), mediation (§6.602), or collaborative law procedures (§6.603). This bill adds another voluntary process for resolution outside of the courtroom.

#### **ADR Provisions:**

By adding Section 6.604, the bill provides that parties to a suit for dissolution of a marriage may agree to one or more informal settlement conferences and may decide to conduct the conferences with or without attorneys. If the parties reach a written settlement agreement during one of these conferences, then it may be binding on the parties if the agreement meets the following criteria:

- 1) contains a statement that the agreement is not subject to revocation, and such a statement is prominently displayed in bold, capitalized, or underlined type, and
- 2) is signed by each party, and
- 3) is signed by the party's attorney, if any, who is present at the time of the signing.

If the settlement meets the above requirements, then a party is entitled to judgment on the settlement. If the court finds the terms of the settlement to be just and right, then the terms are binding on the court, and the agreement may be set out in full or incorporated into the final decree. Otherwise, the court may require the parties to submit a revised agreement or set the case for a contested hearing. Note: No other

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<sup>4</sup> The statutory reference that appears below the bill numbers throughout this Report is intended to highlight only the provisions that reflect ADR language. The bills mentioned may well be amending other statutory provisions, but those are not covered in this Report.

third party besides the judge has to review the terms of the divorce settlement. Consequently, individuals engaging in these informal conferences would be well advised to be cautious about what they sign.

>>**H.B. 252** by Rep. Goodman

Family Code, Chapter 153

*Relating to the use of parenting plans and parenting coordinators in suits affecting the parent-child relationship*

**Bill Summary:**

This bill formalizes the use of parenting plans and authorizes the appointment of parenting coordinators in suits affecting the parent-child relationship. In adopting these terms, Texas is joining a trend among the states. The new statute contains a policy statement that “the use of parenting plans and parenting coordinators in suits affecting the parent-child relationship will assist in promoting the best interest of children” and that “conciliatory forms of dispute resolution, including mediation and the use of parenting coordinators, promote the policy in Section 153.001, Family Code [concerning parents’ contact with and access to children].” A parenting plan must be included in a temporary order establishing a conservatorship and in a final order in a suit affecting the parent-child relationship.

**ADR Provisions:**

If the parties cannot reach agreement on a temporary or final parenting plan, the court may order the parties to participate in a dispute resolution process, subject to a party’s objection. The term “dispute resolution process” includes ADR processes under Section 153.0071 of the Family Code and Chapter 154 of the Civil Practice and Remedies Code, such as arbitration (non-binding, unless the parties agree to a binding arbitration) and mediation. The final parenting plan must provide for a voluntary dispute resolution process for the parties to use in resolving disputes arising from the plan.

The court may also appoint a “parenting coordinator,” described as an impartial third party, to assist parties in developing a parenting plan and resolving other family issues arising from an order in a suit affecting the parent-child relationship. The statute shields the parenting coordinator from certain information disclosures, allows for compensation, subject to the parties’ ability to pay, and denotes minimum qualification requirements, including some training *but does not specify mediation training.*

>>**H.B. 260** by Rep. Goodman

Family Code, Chapters 6 and 153

*Relating to suits affecting the parent-child relationship, protective orders, and collaborative law*

**Bill Summary:**

This bill makes various changes and clarifications throughout the Family Code.



**ADR Provisions:**

Under existing law, parties may decide to mediate their suit affecting the parent-child relationship. They may also agree to make the agreement binding by complying with specified requirements, in which case the parties are entitled to judgment on the mediated agreement. A new provision effectuated by this bill states that, notwithstanding existing law, a court may decline to enter a judgment on a mediated settlement agreement if it finds that:

- 1) a party to the agreement was a victim of family violence, and that circumstance impaired the party's ability to make decisions; and
- 2) the agreement is not in the child's best interest.

The bill also adds confidentiality language to two collaborative law sections: Section 6.603 Family Code (dealing with dissolution of marriage) and Section 153.0072 (dealing with a suit affecting the parent-child relationship). The collaborative procedures under these two sections are given the same confidentiality protections as the alternative dispute resolution procedures under Chapter 154 of the Civil Practice and Remedies Code.

Note: A bill that did not pass, HB 205, would have added collaborative law procedures to the list of alternative dispute resolution procedures under Chapter 154 of the Civil Practice and Remedies Code. Because collaborative law procedures do not use an impartial third party, such procedures would be best located under a separate chapter in any future legislation.

>>**H.B. 706** by Rep. Haggerty

Family Code, Chapter 60

*Relating to the adoption of the Interstate Compact for Juveniles*

**Bill Summary:**

This bill adopts an updated version of the Interstate Compact for Juveniles (ICJ). The Interstate Commission consists of representatives from each state that has passed the enabling legislation for the ICJ. The ICJ promotes cooperation among the states for the proper supervision of juveniles and includes provisions for the return of juveniles to their home state, the tracking of such individuals, and the equitable allocation of costs between member states.

**ADR Provisions:**

The ICJ includes a general provision giving the Interstate Commission the power and duty to provide for dispute resolution among compacting states. More specifically, the Interstate Commission may attempt, upon request from a compacting state, to resolve disputes among compacting states and between compacting and non-compacting states. The Interstate Commission is also directed to promulgate a rule providing for mediation and binding dispute resolution for disputes among compacting states.

## Government

>>**S.B. 6** by Senator Nelson

Government Code, amended in part by adding Subtitle J: Guardianships

*Relating to protective services and certain family law matters; providing penalties*

### **Bill Summary:**

This bill amends various codes, including Education, Human Resources, and Government, to effectuate systematic changes in the State's treatment of child and adult protective services. As it progressed through the legislative process, the bill experienced various language changes, including the proposal and subsequent deletion of two ADR provisions. One would have established an informal dispute resolution process for disputes between the Department of Family and Protective Services and a residential child-care facility. Another would have required each health and human services agency to adopt a joint memorandum of understanding for resolving disputes between the agencies that relate to the agencies' areas of service responsibilities.

### **ADR Provision:**

A provision that survived in the final version of the bill creates the Guardianship Certification Board (Chapter 111, Government Code). As a new governmental entity, attached administratively to the Office of Court Administration, the Board acquired some ADR provisions, similar to those contained in the Sunset recommendations. The Board, among other responsibilities, is charged with developing and implementing a policy to encourage the use of appropriate ADR procedures to assist in the resolution of internal and external disputes. These procedures must conform, to the extent possible, to any model guidelines issued by the State Office of Administrative Hearings for the use of alternative dispute resolution by state agencies.

>>**S.B. 425** by Senator Hinojosa

Government Code, Chapter 775

*Relating to subdivision platting requirements and assistance for certain counties near an international border*

### **Bill Summary:**

This is the first of three summarized bills dealing with border issues and using an ombudsman to foster better communications and collaboration. Among other things, this bill expands the border areas to which the provisions of the statute apply. Namely, it allows counties located within 100 miles of an international border and containing a city with a population of more than 250,000 to regulate subdivision platting requirements and utility services and to receive assistance from the state. Similarly, in Section 775.001 of the Government Code, it amends the definition of the term "colonia" to encompass an economically distressed area that is also located in a county:

- (a) any part of which is within 100 miles of an international border; and
- (b) that contains the majority of the area of a municipality with a population of more than 250,000.

**ADR Provision:**

The bill effectuates a change to the colonia ombudsman provision in Section 775.003 of the Government Code by reflecting the change in the definition of “colonia.” Thus, the colonia initiatives coordinator (the agency designated by the governor to be the state’s colonia coordinator) *shall*\* appoint a colonia ombudsman not only in each of the six border counties designated as having the largest colonia populations but additionally in each county any part of which is within 100 miles of an international border and that contains the majority of the area of a municipality with a population of more than 250,000.

\*Note: S.B. 827, discussed below, changes the existing “may” to “shall.”

>>**S.B. 827** by Senator Zaffirini

Government Code, Chapter 775

*Relating to systems for identifying colonias and for tracking the progress of state-funded projects that benefit colonias and the submission of a related report to the legislature*

**Bill Summary:**

The secretary of state is charged with establishing and maintaining a classification system to track the progress of state-funded projects that provide water or wastewater services, paved roads, and other assistance to colonias. In conjunction with the establishment of the classification system, the secretary of state is also to establish and maintain a statewide system for identifying colonias. In this new section of the Government Code (Section 405.021), a colonia is defined as a geographic area that:

- 1) is an economically distressed area as defined by Section 17.921 of the Water Code; and
- 2) is located in a county any part of which is within 62 miles of an international border. (Note: the mileage designation here is different than the 100 miles designation in Section 775.001 mentioned in S.B. 425.)

The secretary of state may contract with a third party to develop the classification system or the identification system or to compile or maintain the relevant information required. The information is to be gathered from the Office of Rural Community Affairs, the Texas Water Development Board, the Texas Transportation Commission, the Texas Department of Housing and Community Affairs, the Department of State Health Services, and any other agency deemed appropriate by the Secretary of State that provides water or wastewater services, paved roads, and other assistance to colonias. The Secretary of State shall also compile information from the various appointed colonia ombudsmen. The Secretary must then prepare a report on the progress of state funded projects that assist colonias and submit the report to the Legislature no later than December 1 of each even-numbered year.

**ADR Provision:**

This bill, like S.B. 425, amends Section 775.003 of the Government Code dealing with the Colonia Ombudsman Program. The amendment in this bill makes the appointment

of a colonia ombudsman mandatory. The statute now provides that the agency designated by the governor as the state's colonia initiatives coordinator *shall* appoint a colonia ombudsman in each of the six border counties that the coordinator determines have the largest colonia populations. Under S.B. 425, presumably, the appointment would also apply for any other county that meets the expanded criteria. S.B. 827 also adds new Section 773.004 that specifies the information that the colonia ombudsman must gather and provide to the secretary of state by September 1 of each even-numbered year.

>>**H.B. 925** by Rep. Chavez  
Government Code, Chapter 411  
*Relating to border issues*

**Bill Summary:**

The enrolled version of this bill is an amalgam of different original bills dealing with border issues. The resulting bill creates two new committees, one commission, one interagency work group and new responsibilities for the Border Commerce Coordinator (who under existing statute is designated by the governor).

**ADR Provision:**

In this instance, the function of ombudsman is assigned to a committee without much detail. Under new Section 411.0197 of the Government Code, the Public Safety Commission shall establish an Advisory Oversight Community Outreach Committee in the Department of Public Safety of Texas. The Committee shall:

- 1) document to the commission trade-related incidents involving department personnel;
- 2) develop recommendations and strategies to improve community relations, department personnel conduct, and the truck inspection process at this state's ports of entry; and
- 3) *act as an ombudsman* between the department and the communities located and residents residing in the area of the border of this state and the United Mexican States and between the department and the department's personnel.

Thus, the Committee has the opportunity to foster better relations among the communities within the border areas and within the department itself. The Commission is to receive information and recommendations from the Committee concerning trade-related incidents and border relations and consider actions to be taken. No later than January 1<sup>st</sup> of each odd-numbered year, the Commission is to submit to the Legislature a report documenting the Committee's recommendations and comments, incident reports, and the actions taken by the Commission and Department to address those matters.

>>**S.B. 1188** by Senator Nelson  
Government Code, Chapter 531  
*Relating to the medical assistance and children's health insurance programs*

**Bill Summary:**

This bill amends various aspects of the Medicaid system in an effort to streamline procedures, including those for long-term care; optimize financing; improve data collection and analysis; and develop a health education campaign to inform the public.

**ADR Provision:**

Section 531.020 is added to Chapter 531 and directs the executive commissioner of the Health and Human Services Commission to establish an Office of Community Collaboration within the Commission. The office is responsible for:

- 1) collaborating with community, state, and federal stakeholders to improve the elements of the health care system that are involved in the delivery of Medicaid services; and
- 2) sharing with Medicaid providers, including hospitals, any best practices, resources, or other information regarding improvements to the health care system.

>>**H.B. 2200** by Rep. Thompson  
Government Code, Chapter 57  
*Relating to the appointment of certified court interpreters*

**Bill Summary:**

This bill, for the most part, updates relevant statutory provisions to reflect the assimilation of the court interpreter certification program by the Department of Assistive and Rehabilitation Services (DARS), under the Health and Human Services Commission, from the Texas Commission for the Deaf and Hard of Hearing. A "certified court interpreter" is an individual who is a qualified interpreter as defined in the statute to interpret court proceedings for a hearing-impaired individual. This bill also expands the prohibited acts section to state in relevant part that a person may not "interpret for a hearing-impaired individual at a court proceeding ... unless the person holds an appropriate certificate under this subchapter.

**ADR Provision:**

The reason for noting this particular bill is that it adds a definition for "court proceeding" that includes "mediation, court-ordered arbitration, or other form of alternative dispute resolution." Thus, it would seem that a person who is not a certified court interpreter is prohibited from interpreting for a hearing-impaired individual in a mediation or other form of ADR.

>>**H.B. 1940** by Rep. Ritter  
Government Code, Chapter 2260  
*Relating to alternative dispute resolution of certain contract claims against the state*

**Bill Summary:**

The bill expands the scope of damages that may be recovered on a contract claim against the State to include damages related to any delay or labor-related expense incurred by the contractor as a result of an action or a failure to act by the unit of state government. The original version of the bill would have also allowed recovery of consequential damages and attorney's fees, but such costs were excluded in the final bill. The bill also amends the timeframes for negotiation, mediation, and the filing of counterclaims. Further, this legislation authorizes an appeal of contested case decisions on grounds of abuse of discretion, where no right of appeal had been expressly stated before.

**ADR Provision:**

This bill changes the time frame for negotiation and mediation of a contract dispute between a contractor and a unit of state government. Parties must begin to negotiate no later than the 120<sup>th</sup> day after the date the claim is received. The parties may also agree to mediate before the 120<sup>th</sup> (instead of 270<sup>th</sup>) day after the date the claim is filed. Thus, the time frames for negotiation and mediation are closely tied. The contractor still has until the 270<sup>th</sup> day after the claim is filed to request a contested case if issues are not resolved through negotiation or mediation.

Labor

>>**H.B. 7** by Rep. Solomons  
Labor Code, Chapters 402, 404, 410  
*Relating to the continuation and operation of the workers' compensation system of this state, the abolition of the Texas Workers' Compensation Commission, and the transfer to the Department of Insurance*

**Bill Summary:**

Amid reports that Texas has one of the most costly and least efficient workers compensation system in the country, the Legislature followed the recommendation of the Sunset Commission and abolished the Texas Worker's Compensation Commission (TWCC), which had been created in 1990. The bill transfers the functions of the TWCC to the newly created Division of Workers' Compensation within the Texas Department of Insurance (TDI). The Division is to be administered by a single commissioner, appointed by the Governor. In addition, the legislation creates a new state agency, the Office of Injured Employee Counsel (OIEC), administratively attached to TDI, to provide assistance to injured employees and administer an ombudsman program. A thorough summary of HB7 can be found on TDI's website: [www.tdi.state.tx.us](http://www.tdi.state.tx.us) and click on the workers' compensation reform link.

**ADR Provisions:**

The TWCC's ombudsman program is to be transferred to the OIEC by March 1, 2006. The OIEC will be administered by a Public Counsel, appointed by the Governor. The duties of the OIEC will include providing ombudsman assistance to injured employees during Division administrative dispute proceedings. Each regional division office is to have a qualified employee as ombudsman. The Public Counsel is to provide training guidelines and continuing education for ombudsman, including training on dispute resolution.

Regarding disputes over income benefits, HB 7 requires that information that the Division determines to be useful to parties in resolving disputes will be published by the Division and made available to the parties when a Benefit Review Conference (BRC) or Contested Case Hearing (CCH) is scheduled. A BRC is described as a "non-adversarial, informal dispute resolution proceeding" to determine disputed issues and resolve them by agreement of the parties. Before a BRC is scheduled, a party requesting a BRC must demonstrate previous efforts that party made to resolve the disputed issues. The Labor Code is amended to require a Benefit Review Officer (BRO) to have completed 40 classroom hours of training in dispute resolution techniques from an alternative dispute resolution organization recognized by the commissioner. The BRC will become more of a true mediation session, wherein the BRO will not make recommendations on the disputed issues nor issue interlocutory orders to pay benefits; however, an interlocutory order can be issued by other division staff. If the parties reach resolution of the issues during the BRC, the agreement is to be reduced to writing and signed and, thus, becomes binding on the parties with some limited exceptions provided in the statute.

For any issues not resolved during the BRC, parties may elect to proceed to arbitration or to a contested case hearing. Once arbitration is elected, it is irrevocable and binding on all parties for resolution of all disputed issues under the Division's jurisdiction. An arbitrator's award is then considered the final order of the Division.

Local Government

>>**H.B. 2039** by Rep. Nixon

Local Government Code, Chapter 271

*Relating to the adjudication of claims arising under written contracts with local governmental entities*

**Bill Summary:**

In response to confusion created by some Texas appellate court decisions, the Legislature confirms through this legislation that a local governmental entity that is authorized by statute or the constitution to enter into a contract waives sovereign immunity to suit when adjudicating a claim for breach of the contract, subject to the terms and conditions of the subchapter. A local governmental entity is defined as a

political subdivision of this state, other than a county or a unit of state government, as that term is defined by Section 2260.001 of the Government Code.

**ADR Provisions:**

The legislation also makes clear that, in adjudicating a breach of contract claim, the local governmental entity is also bound by any mandatory adjudication procedures specified in the contract or incorporated by reference. Specifically, contractual requirements to engage in alternative dispute resolution before bringing a suit or in an arbitration proceeding are enforceable, except to the extent those procedures conflict with the terms of the subchapter.

Tax

**H.B. 182** by Rep. Mowery

**S.B. 1351** by Senator Williams

Tax Code, Chapter 41A

*Relating to the appeal of certain ad valorem tax determinations through binding arbitration*

Note: these two bills were not originally filed as companions, but following amendments, their final versions enact identical changes.

**Bill Summary:**

Chapter 41 of the Tax Code provides property owners the right to protest various decisions made by an appraisal district or chief appraiser to an appraisal review board. Decisions that may be protested include among others a determination of the appraised value of an owner's property, an unequal appraisal, and a determination of ownership for a piece of property. Chapter 42 of the Tax Code allows for judicial review of decisions by the appraisal review board on any of the grounds specified in Chapter 41. By adding Chapter 41A to the Tax Code, these bills offer the property owner the right to appeal certain ad valorem tax appraisals through binding arbitration. This election is only available to appeal particular appraisal review board orders concerning the appraised or market value of the owner's property. All other appeals must still follow Chapter 42 procedures.

**ADR Provision:**

Appraisal review board orders that are eligible to be appealed through binding arbitration are those where the appraised or market value of the property as determined by the order is less than or equal to \$1 million and no other issue is in dispute. Appraisal review boards are now expected to notify property owners of this option by including an explanation of the owner's rights and the forms needed to request arbitration along with their order.

To appeal an appraisal, a property owner must submit a request for binding arbitration within 45 days of receipt of the order that includes at least an explanation of the basis



for the appeal and the owner's opinion of the property's appraised value. The owner must also include an arbitration deposit of \$500 payable to the comptroller. If these requirements are not strictly adhered to, a property owner waives his right to appeal by binding arbitration. It is the responsibility of the appraisal district to certify and submit the request to the comptroller, and to request that the comptroller appoint an arbitrator.

The comptroller must maintain a list of qualified arbitrators from which the parties may select. To qualify as an arbitrator under this chapter, a person must have completed at least 30 hours of training in arbitration and alternative dispute resolution processes, be a licensed real estate broker, salesperson or appraiser under the Occupation Code, and be willing to conduct the arbitration for a fee of \$450 or less. If the parties cannot agree to an arbitrator, the comptroller will appoint one.

## Water

>>**H.B. 1763** by Rep. Cook

Water Code, Chapters 16 and 36

*Relating to the notice, hearing, rulemaking, and permitting procedures for groundwater conservation districts*

### **Bill Summary:**

H.B. 1763 amends Section 16.053 of the Water Code, regarding Regional Water Plans, and parts of Chapter 36, regarding Groundwater Conservation Districts, to provide a new step for resolving conflicts that arise from regional water plans and certified groundwater district management plans. In each instance, the Center for Public Policy Dispute Resolution and the regional community dispute resolution centers are recognized as sources for providing qualified impartial third parties. The bill also amends and adds provisions to Chapter 36 to provide specific statutory direction and authority regarding rulemaking and hearing processes.

### **ADR Provisions:**

Section 16.053(p) of the Water Code, originally enacted in 2003, provides a two-step process to assist regional water planning groups and groundwater conservation districts in resolving conflicts in their respective regional water plans and groundwater district management plans. The first step calls on the Texas Water Development Board (TWDB) to facilitate discussion between parties to resolve the conflict. If the parties are not able to resolve the conflict, the statute authorizes the TWDB to resolve it. H.B. 1763 amends Section 16.053(p) to add mediation as a middle step in this process. Consequently, if the parties do not reach an agreement after the first attempt with TWDB facilitating, then the regional water planning group and the district must mediate the conflict. If the parties cannot resolve the conflict through mediation, then the TWDB may resolve it.

H.B. 1763 also amends Section 36.1072 of the Water Code to add mediation in two circumstances involving conflicts related to groundwater conservation district

management plans. However, unlike the amendment to Section 16.053(p) discussed above, mediation under Section 36.0172 is voluntary. The two circumstances are as follows:

- 1) If the TWDB decides not to approve a groundwater management plan, the groundwater conservation district may request that the TWDB enter into mediation to attempt to resolve the conflict. If the parties fail to resolve the conflict, the TWDB will make a final decision.
- 2) If a conflict arises between a person with a legally defined interest in groundwater or a regional planning group and a groundwater conservation district related to an approved groundwater management plan, the TWDB must first try to facilitate resolution of the conflict. If no resolution is reached, the parties may request to mediate the conflict.

In all three contexts, H.B. 1763 states that the parties to the conflict may seek the assistance of the Center for Public Policy Dispute Resolution or one of the local or regional community dispute resolution centers (established under Chapter 152 of the Texas Civil Practice and Remedies Code) in obtaining a qualified impartial third party to mediate the dispute. The costs of the mediation must be specified in the agreement between the parties and the relevant center.

Finally, H.B. 1763 adds Subchapter M to Chapter 36, regarding Permit and Permit Amendment Applications; Notice and Hearing Process. Section 36.406 in this new subchapter allows, among other things, a groundwater conservation district to authorize by rule a presiding officer in a contested hearing on a permit or permit amendment application to:

- 1) refer parties to ADR;
- 2) determine how the ADR costs will be apportioned, and
- 3) appoint an impartial third party as provided under the Governmental Dispute Resolution Act to conduct the process

Section 36.417 explicitly authorizes groundwater conservation districts to adopt rules regarding the use of alternative dispute resolution procedures. These new statutory provisions are not applicable to the Edwards Aquifer Authority (EAA). Nevertheless, the EAA, like other governmental bodies, may participate in ADR and establish ADR rules and policies pursuant to the Governmental Dispute Resolution Act, Tex. Gov't Code Ann., Chapter 2009.

### Sunset Bills

The state agencies that acquired ADR language through the 2005 Sunset review process this session are listed in the **Update on Agency ADR Provisions** section of this Report.

**SELECTED ADR LEGISLATION FILED IN  
BUT NOT PASSED BY THE 79<sup>TH</sup> LEGISLATURE**

While the following bills were not enacted during this legislative session, we offer them for their historical value. Some bills are repeats from last session; some bills might reappear in sessions to come.

**>>H.B. 974** by Rep. Madden

Civil Practice and Remedies Code, Chapter 160

*Relating to resolution of disputes arising under certain construction contracts*

This bill would have given statutory support to the existing practice of using boards to resolve disputes in construction contracts. The bill defined the term “dispute boards” as including dispute resolution boards and dispute review boards. It would have provided for the availability of dispute boards for both private and public works. Dispute boards were to conduct informal hearings resulting in recommendations to disputing parties or to hold formal hearings resulting in decisions that could be used in future proceedings by agreement of the parties.

New Chapter 160 would have offered disputing parties in construction contracts the option to contract with a board to provide them with advice and make final decisions in disputes. The new chapter would have applied to contracts between government entities or private property owners and contractors for the construction, repair or improvement of property with a value of \$1 million or more. Governmental entities that chose not to use dispute boards under this chapter would have had to include in their contract a provision stating that the option was actively considered before being rejected.

**>>H.B. 1330** by Rep. Chisum

Government Code, Chapter 2166

*Relating to the creation of a dispute resolution program for state building construction contracts*

The engrossed version of the bill would have added Chapter 2166 concerning the use of ADR processes to resolve construction disputes and would have been an alternative to the procedures set forth in Chapter 2260 pertaining to the resolution of contract claims against the state.

It would have required the Texas Building and Procurement Commission to develop and implement a “nonbinding dispute resolution and avoidance program” to be used by contractors and state agencies to avoid and resolve disputes. The program had several goals. It would have encouraged the prevention of disputes by using partnering, facilitation, dispute review boards, or some other similar method. It would have promoted problem solving, and provided for the use of neutral third parties such as

mediators and facilitators to reach settlement or arbitrators and adjudicators to reach resolution of those disputes that were not settled. The commission would have been permitted to contract with a dispute resolution organization to assist in creating and implementing this program.

State agencies entering into contracts for building projects would have been required to include a provision that specifically allowed the parties to elect to use the dispute resolution program should a dispute arise. A contractor could have elected to use the nonbinding dispute resolution program at any time before filing a request for a formal contested case hearing under Chapter 2260. Electing to use the program would have been binding on all parties to the contract in relation to that specific dispute.

>>**H.B. 2986** by Rep. West

>>**S.B. 949** by Senator Armbrister

Utilities Code, Chapter 102

Natural Resources Code, Chapter 111

*Relating to the informal resolution of certain proceedings conducted by the Railroad Commission of Texas*

These bills would have required parties to a contested case before the Railroad Commission to participate in mediation as a prerequisite to an administrative hearing. This requirement would not have applied to certain proceedings initiated under Chapter 103 and 104 nor to proceedings related to the rates, services, or practices of a gas utility, public utility, or pipeline facility not docketed by the Commission.

The mediation process was to be conducted by a member of the Commission staff within 90 days of the proceeding being docketed unless otherwise agreed. If an agreement was reached at mediation, the contested proceeding would be dismissed. If an agreement was not reached, the mediator would issue a confidential memorandum to each party with his conclusion that either “no discriminatory act has been identified” or “further formal proceeding is warranted”.

>>**S.B. 3** by Senator Armbrister

Texas Water Code, Chapters 11 and 36

*Relating to the development and management of the water resources of the state, including the creation of a groundwater conservation district; imposing fees and providing penalties*

This water omnibus bill sought to address continuing water management issues in Texas, in the tradition of past water legislation, such as S.B. 1 in 1997 and S.B. 2 in 2001. It would have addressed some tough challenges: the viability of streams, rivers, bays, and estuaries, water conservation, conjunctive use of surface and groundwater, aquifer storage and recovery, groundwater management and regulation, and changes to the Edwards Aquifer Authority.

Regarding dispute resolution processes, the bill would have created some stakeholder processes and a dispute resolution review panel:

- 1) Changes to Chapter 11 of the Texas Water Code included the establishment of the Environmental Flows Commission (formerly the Study Commission on Water for Environmental Flows) to address appropriate methods by which reasonable amounts of existing water rights could be converted to use for environmental flows protections and to develop rules, procedures and policies. The Environmental Flows Commission would have appointed bay/basin stakeholder committees to make recommendations on the flow regime. In developing those recommendations, the stakeholder committee was directed to operate on a consensus basis to the maximum extent possible.
- 2) Changes to Chapter 36 of the Texas Water Code would have among other things added Section 36.125 concerning the appointment of a Dispute Resolution Panel. In a dispute between a groundwater conservation district and a person affected by the district's action under the subchapter, either party could file a petition with the Texas Commission on Environmental Quality requesting the appointment of a dispute resolution panel to mediate and assist the parties in resolving the dispute.

**>>S.Bs. 503, 504, and 505** by Senator West  
Civil Practice and Remedies Code

These three bills were filed in the 2003 session and were again filed in this past regular session. They concern the disclosure of arbitration awards, filing of certain arbitration information, and registration of arbitrators.

S.B. 503 - *relating to making the award of an arbitration an open record*

Proposed Chapter 177 would have contained a statement that the State's policy is to provide open access to the records of all decisions in civil disputes, whether adjudicated or arbitrated, to create precedential guidance. It would have required arbitrators to file arbitration awards with the Office of Court Administration. Parties could apply to have certain arbitration awards that qualified sealed.

S.B. 504 - *relating to the filing of certain information by arbitrators after each arbitration*

Proposed Chapter 181 would have required arbitrators or arbitrator service providers to file after each arbitration disclosure reports with the Office of Court Administration containing relevant names, nature of the dispute, details of the award/decision, fees and expenses. Parties could agree to limit disclosure of names of parties, attorneys and the award and/or decision.

S.B. 505 - *relating to registration of arbitrators and arbitration services providers with the secretary of state*

Proposed Chapter 180 would have required each arbitrator or arbitration services provider to register annually with the office of the secretary of state. The secretary of state would maintain a list of such registrants. Failure to register would have resulted in ineligibility to be appointed by a court to arbitrate.

**>>S.B. 715** by Senator Barrientos

Labor Code, Chapters 21 and 25

*Relating to the prohibition of certain required arbitration agreements and employee waivers*

This bill would have prohibited an employer from discriminating against an individual because of the individual's refusal to sign an arbitration agreement. Also, an employer would have been prohibited from requiring as a condition of employment that an individual submit to mandatory arbitration or waive any rights. An arbitration agreement or waiver would not be enforceable unless the employee or prospective employee knowingly and voluntarily agreed and signed the agreement or waiver. An employer would have the burden of proof in attempting to enforce an arbitration agreement or waiver of rights.

**>>S.B. 1201** by Senator Ellis

Government Code, Chapter 671

*Relating to creating an office of civil rights at certain state agencies*

The purpose of this bill was to create a pilot program that would establish an office of civil rights in the Texas Department of Transportation and the Texas Department of Criminal Justice to address all informal complaints of employment discrimination filed against the agency. The program was to be evaluated by the Legislative Budget Board after three years in a report to the Legislature, comparing the number of formal complaints filed before and after the implementation of the program.

Each office was to establish voluntary mediation policies and procedures for resolving these informal complaints, using independent mediators approved by the director of civil rights. The intent was to minimize potential conflicts of interest when state agencies are in charge of both investigating internal complaints (informal) and defending the agency in external complaints (formal).









