

Public Resource Series Number Seven

Updated - Summer 2002

**Commentary on the  
Governmental Dispute  
Resolution Act  
and the  
Negotiated Rulemaking Act**

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## Introduction

The Center for Public Policy Dispute Resolution first published the Commentary on the Governmental Dispute Resolution Act and the Negotiated Rulemaking Act in 1997. This publication is an update, completed in the summer of 2002. The updated commentary reflects non-substantive changes affecting both statutes, such as the re-numbering of the Governmental Dispute Resolution Act by the 76<sup>th</sup> Legislature (1999) and the change in the title of the Open Records Act to the Public Information Act. The commentary also discusses the substantive changes affecting the Governmental Dispute Resolution Act since 1997. These changes, which are more fully described in the commentary, include: (1) making the Act applicable to “governmental bodies” as defined in the Public Information Act, rather than just to state agencies, which significantly expanded the scope of governmental entities that are subject to the Governmental Dispute Resolution Act; (2) clarifying that final settlement agreements arising from a dispute resolution procedure under the Act and to which a governmental body is a signatory would be subject to or excepted from disclosure as provided in the Public Information Act; and (3) providing that the Texas Department of Justice, in its victim-offender mediation program, could appoint a mediator without the approval of the parties. No substantive changes have been made to the Negotiated Rulemaking Act.

The 75th Legislature passed two landmark bills relating to the use of alternative dispute resolution procedures (ADR) in government: the Governmental Dispute Resolution Act, or GDR Act, and the Negotiated Rulemaking Act, or NR Act. These two statutes pave the way for greater use of ADR in Texas government by clarifying a range of legal issues associated with ADR applications in government and by providing clear authority and encouragement for government to use ADR. The GDR Act provides guidance for state agencies to resolve employee grievances, contracting disputes, enforcement and licensing matters, civil litigation, and any number of other conflicts using ADR procedures. The NR Act outlines a process state agencies may use to better develop regulations.

As with any statutes, reading and understanding all of the provisions of the GDR and NR Acts can be challenging. There are several important points in each statute that are clearly stated and easily understood, but others are by necessity more complex. Particularly dense and multi-layered are the provisions relating to confidentiality: because these sections in both acts build fundamentally upon the provisions of other Texas ADR law, and because they modify application of the Public Information Act, understanding the interactions and limitations can be difficult. These Commentary sections were developed to clarify areas such as these and to provide a ready guide for ADR practitioners, attorneys, and judges who must interpret and work with the statutes.

The Commentary sections of the publication were originally developed for *Rau & Sherman’s Texas ADR & Arbitration: Statutes and Commentary* (West Group 1997 [and updated in 1999]). Although an excellent resource, the Rau & Sherman book will not

continue to be published. Instead, the State Bar of Texas Alternative Dispute Resolution Section, the Center for Public Policy Dispute Resolution, and other contributors will be developing a similar compilation of statutes and commentaries, which will include the Center's commentaries on the GDR Act and the NR Act. Given the GDR and NR Acts' reliance on other Texas Statutes, particularly the Texas Alternative Dispute Resolution Procedures Act, readers of this commentary will likely find the compilation of Texas ADR laws an indispensable text. The book, which will be published by Imprimatur Press, is expected to be available in the fall of 2003.

The Center for Public Policy Dispute Resolution developed these materials in fulfillment of its mission to serve as a resource for governmental ADR in Texas. The Center is available to provide this support to all Texas government entities and to private parties involved in public disputes. Located in the University of Texas School of Law, Center personnel may be reached at (512) 471-3507 or via e-mail at *cppdr@mail.law.utexas.edu*. Additional resources are available through the Center's web site at *www.utexas.edu/law/acadprogs/cppdr*.

## **How to Use This Document**

This document is designed as a guide for better understanding the Governmental Dispute Resolution Act and the Negotiated Rulemaking Act. The chapters on each statute include: (1) a brief question and answer segment, (2) commentary on each section of the statute, and (3) the text of each statute as codified in the Texas Government Code. For the reader's convenience, many of the questions included in the question and answer segment are also interspersed in box form through the commentary segment. The document may be read straight through or the reader may refer to the section-by-section analysis in the commentary for specific assistance.

## **Governmental Dispute Resolution Act**

## Questions and Answers on the Governmental Dispute Resolution Act

### **Is the GDR Act mandatory or permissive?**

This statute is permissive, not mandatory. The “Policy” section, § 2009.002, encourages agencies to develop and use ADR in “appropriate” areas, as determined by the agency.

### **Does the GDR Act waive sovereign immunity?**

No. The statute contains language in § 2009.005 explicitly stating that use of ADR by a state agency does not waive sovereign immunity. Rather, the statute maintains the status quo as to agencies’ ability to assert a sovereign immunity defense: agencies possessing authority to waive sovereign immunity may still do so, and agencies without such authority may not now do so as a result of the GDR Act.

### **Does the GDR Act deny or limit any person their due process rights?**

No. The statute explicitly states in § 2009.052(b) that it “may not be applied in a manner that denies a person a right granted under other state or federal law....”

### **Does use of ADR under this statute mean that a person won’t have a hearing later if they want one?**

No. The statute explicitly states in § 2009.052(b) that use of ADR does not in any way affect a person’s right to an administrative or judicial hearing.

### **Who can serve as a mediator under the GDR Act?**

Only persons meeting the requirements set in the Texas ADR Act may serve as mediators or other impartial third parties under this act. These requirements provide that a person must have 40 hours training, and additional training if dealing with family issues, before serving as mediator.

### **Where can a state agency obtain a mediator under the GDR Act?**

The statute provides agencies with a wide range of options from which to obtain a mediator or other impartial third party. Agencies may: 1) contract with another government entity (such as the Center for Public Policy Dispute Resolution or SOAH); 2) “borrow” another government employee; 3) establish a pool of mediators; 4) contract with one of the many county Community Dispute Resolution Centers; or 5) hire a private individual. There are presently sixteen local publicly funded Dispute Resolution Centers across Texas, all of which can provide trained, experienced, and free or low-cost mediators.

### **Why does there need to be any confidentiality for government ADR?**

It is universally recognized that a minimum level of confidentiality must exist for ADR procedures to work. This is because the effectiveness of ADR is almost entirely contingent upon full and open communication among the disputants and between the disputants and the impartial third party. Without confidentiality, ADR processes could be easily misused as tactical pre-trial weapons to gain

information from the other side. In this atmosphere, disputants would not tend to reveal sufficient information and hence maintain the adversarial atmosphere that inhibits consensus resolutions.

**What are the confidentiality provisions in the GDR Act?**

The confidentiality provisions of the statute are found in § 2009.054. Broadly speaking, these provisions have two effects: 1) they make available to government ADR disputants the Texas ADR Act confidentiality provisions on discovery and testimony and 2) they establish an exception to the Public Information Act for certain records relating to an ADR procedure.

**What are the Public Information Act exceptions made by the GDR Act?**

By specifically designating certain records as confidential, the GDR Act creates exceptions to the Public Information Act. These exceptions are very narrow. The statute excepts records of communications made between the impartial third party and a disputant and between the disputants that are: 1) relevant to the dispute and 2) made during the dispute resolution procedure. The statute also exempts the notes of the impartial third party from discovery and the disclosure pursuant to the Public Information Act. These exceptions are outlined in § 2009.054(b)(1) and (2).

**Does the GDR Act affect the Open Meetings Act?**

The GDR Act provides no new exception to the Open Meetings Act. However, because most government entities using ADR send staff representatives to negotiations, governmental ADR processes usually do not involve a quorum of governmental decisionmakers deliberating on public business. As a result, there will often be no Open Meetings Act issues associated with governmental ADR. As a general rule, government decisionmakers should consult counsel regarding application of the Open Meetings Act.

**Is the final settlement agreement to which a government entity is a signatory confidential?**

The GDR Act itself does not make a settlement agreement involving a governmental body confidential. Section 2009.054(d) provides that where a governmental body is a signatory, the final agreement between the parties spelling out the terms of the settlement will be subject to or excepted from disclosure as provided by the Public Information Act.

**Can SOAH require use of ADR under the GDR Act?**

Section 4 of the statute amended § 2003.042(a)(5) of the Texas Government Code to give SOAH administrative law judges the discretionary authority to refer appropriate contested cases to mediation or another ADR procedure. This system closely resembles the one used in many civil courts today, under which Texas judges have been able to reduce litigation substantially by exposing more potential litigants to the advantages of ADR.

As a practical matter, the SOAH judge will consider the input of the parties in making this decision, as the judge would on any decision affecting a civil case. SOAH's financing mechanism is such that it has an incentive to take the parties'



input into account, but the SOAH judge may order a case to ADR if he or she feels that it would be worthwhile.

**Who would pay for the mediation when SOAH orders a dispute to ADR?**

Section 4 of the statute amended § 2003.042(a)(5) of the Texas Government Code to provide authority for the SOAH judge to apportion costs among the parties. This means the agency and the disputant party to the contested case may be assigned a share of costs by the SOAH judge. ADR has been shown to work best when costs are apportioned fairly among the parties, and this provision gives the SOAH judge discretion to make this judgment.

**Would an agency ordered to ADR by a SOAH judge have to agree to a SOAH judge serving as the mediator?**

No. Section 2009.053 of the statute states that the parties have the authority to agree between themselves on a mediator within a reasonable amount of time. If they fail to agree upon a mediator, then the SOAH judge may appoint a mediator for them. The SOAH judge may appoint anyone as mediator, but may not appoint him or herself, or another SOAH judge if either of the parties objects.

## Commentary on the Governmental Dispute Resolution Act

§ 2009.001	Short Title
§ 2009.002	Policy
§ 2009.003	Definitions
§ 2009.004	Agency Contracts; Budgeting for Costs
§ 2009.005	Sovereign Immunity
§ 2009.051	Development and Use of Procedures
§ 2009.052	Supplemental Nature of Procedures
§ 2009.053	Impartial Third Parties
§ 2009.054	Confidentiality of Certain Records and Communications
§ 2009.055	Interagency Sharing of Information; Consistency of Procedures
§ 2003.001	Definitions ( <i>amending</i> )
§ 2003.021	Office ( <i>amending</i> )
§ 2003.042	Powers of Administrative Law Judge ( <i>amending</i> )
§ 2003.047	Natural Resource Conservation Division ( <i>amending</i> )

### History and Purpose

Informed by the private sector's broadly positive experience with ADR since the turn of the century, public entities at all levels began in the late 1970s to consider ways of integrating ADR processes into government policy and procedures. Over the last two decades, governments have found an increasing number of applications for ADR processes, with federal agencies taking the lead and courts, state agencies and local authorities not far behind. Government decisionmakers are learning through these efforts what many of their counterparts in the private sector learned: that ADR can provide effective, equitable and efficient alternatives to traditional methods of dealing with conflict.

The Texas Legislature enacted the Governmental Dispute Resolution Act (GDR Act) in 1997 to accommodate and encourage the use of alternative dispute resolution by state governmental agencies. While many Texas agencies have used mediation and other ADR processes for a number of years<sup>1</sup>—and while such uses had been fully consistent with Texas law even without the GDR Act<sup>2</sup>—some agency counsel had been hesitant to implement ADR initiatives without specific legislative authorization. Prior to

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<sup>1</sup>A number of Texas agencies used ADR procedures in one form or another prior to passage of the GDR Act, including: the Department of Criminal Justice, Department of Human Services, Department of Insurance, General Land Office, General Services Commission, Texas Education Agency, Texas Natural Resource Conservation Commission, Office of the Attorney General, Office of the Comptroller, Public Utility Commission, and many others. For a thorough listing of these agencies, see Center for Public Policy Dispute Resolution, Texas State Government: A Survey of Government Use of Alternative Dispute Resolution (1995).

<sup>2</sup> See generally, B. Shannon, *The Administrative Procedure and Texas Register Act and ADR: A New Twist for Administrative Procedure in Texas?*, 42 Baylor L. Rev. 705 (1990).

the passage of the GDR Act, observers in government and legal circles voiced lingering concerns, some more substantial than others, about governmental ADR:

- Were Texas agencies allowed to use ADR at all? If so, under what circumstances?
- Were mediations of governmental disputes covered by the Texas Alternative Dispute Resolution Procedure Act, which contemplates primarily court-referred disputes?
- Which records, if any, used during governmental ADR processes become 'open' records under the Public Information Act (formerly known as the Texas Open Records Act)?
- Did the confidentiality provisions of the ADR Procedures Act trump the Public Information Act?
- What were the minimum qualifications, if any, for an impartial third party in a governmental mediation?

The GDR Act answered these questions by providing a comprehensive statutory process that institutionalized governmental alternative dispute resolution at the state level.

The GDR Act explicitly works to supplement, not replace or limit, all existing dispute resolution practices and procedures used by Texas agencies. The GDR Act is permissive in application, not mandatory, and does not alter application of the Texas sovereign immunity doctrine.

The GDR Act was based in part on the federal Administrative Dispute Resolution Act, enacted in 1990 and permanently reauthorized in 1996, which promotes the use of ADR in federal agencies in a government-wide, systematic manner. The GDR Act builds by reference upon key provisions of the Texas Alternative Dispute Resolution Procedures Act (ADR Procedures Act),<sup>3</sup> first passed in 1987 to guide ADR use for all civil disputes; in fact, the two acts are so closely intertwined that a simultaneous reading of both is necessary to fully understand the GDR Act.

In the interim between the 1997 and 1999 sessions of the Texas Legislature, a series of open records decision requests made by municipalities to the Office of the Attorney General highlighted the desirability of extending the applicability of the GDR Act to municipalities and other governmental entities. In Open Records Letter No. 98-0302 issued on January 30, 1998, the Office of the Attorney General concluded that a settlement agreement to which a municipality was a party and which arose out of an alternative dispute resolution proceeding was confidential under Civil Practice and Remedies Code Section 154.073. Therefore, the municipality was not required to disclose the terms of that agreement in response to an open records request made by the news media.<sup>4</sup> Subsequently, the Office of the Attorney General reversed its position. In Open Records Decision 658, the Attorney General expressly overruled OR98-0302 and concluded that final settlement agreements entered into by municipalities were not confidential under the Civil Practice and Remedies Code Section 154.073, the Texas ADR Procedures Act. The confidentiality of final ADR agreements involving municipalities

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<sup>3</sup> Tex. Civ. Prac. & Rem. Code Ann. §154.001 (Vernon 2001).

<sup>4</sup> OR98-0302 reversed the Attorney General's original determination of the issue in Open Records Letter 97-2600. In OR97-2600 the Attorney General had indicated the agreement was subject to disclosure.

was unclear. As a result, the Texas Senate Interim Committee on Public Information issued a recommendation that the Legislature clarify the statutory law to ensure that final settlement agreements of governmental bodies were not subject to the Public Information Act.

During this timeframe, the GDR Act applied to state agencies and provided that final agreements entered into by these agencies in alternative dispute resolution proceedings, though subject to the confidentiality provisions of Civil Practice and Remedies Code Section 154.073, were still subject to disclosure or excepted from disclosure in accordance with the Texas Public Information Act.<sup>5</sup> In response to the confidentiality issues raised by the Open Records decisions described above, the 76<sup>th</sup> Legislature (1999) changed the applicability of the GDR Act from state agencies to “governmental bodies,” which made the GDR Act, including its confidentiality provisions, applicable to counties, cities, and other governmental entities.<sup>6</sup>

The 76<sup>th</sup> Legislature also renumbered the GDR Act as Chapter 2009 of the Texas Government Code. The 77<sup>th</sup> Legislature (2001) only amended Section 2009.053(a) to provide that the Texas Department of Criminal Justice could appoint a mediator in a victim-offender mediation, without having the approval of the parties.

### **Section 2009.001 Short Title**

This section states the title of the chapter as the "Governmental Dispute Resolution Act."

### **Section 2009.002 Policy**

This section explicitly establishes Texas state policy on governmental dispute resolution. It directs “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 its activities. The statement provides governmental bodies with the clear authority and strong endorsement of legislators and the governor to use ADR in a wide range of circumstances.

**Is the GDR Act mandatory or permissive?**

This statute is permissive, not mandatory. The "Policy" section, Sec. 2009.002, encourages agencies to develop and use ADR in "appropriate" areas, as determined by the agency.

The policy statement makes a strong endorsement of ADR, but it is carefully worded to stop short of mandating ADR use. The statement directs ADR adoption only for “appropriate” activities of the governmental bodies; thus the imperative is only triggered where government decisionmakers determine, in their discretion, that ADR is

<sup>5</sup> Tex. Gov’t Code Ann. § 552.003 (Vernon 2001).

<sup>6</sup> See H.B. 826, 1999 Tex. Session Law Service Chapter 1352.

appropriate. While ADR processes like mediation have proven useful in a variety of government settings, including management of employee grievances, resolution of state administrative contested cases and disposition of pre-litigation disputes, each agency operates in a different context and each must make its own determination about appropriate procedure. In short, government decisionmakers may take from the policy statement a directive to integrate ADR processes wherever they decide ADR would be effective in promoting the fair and expeditious resolution of disputes.

### **Section 2009.003 Definitions**

This section defines ADR procedures by reference to the ADR Procedures Act, adopts other terms from the state Administrative Procedure Act (APA)<sup>7</sup>, defines the term “governmental body” by reference to the Texas Public Information Act and defines the term “state agency.”

As to definitions of ADR procedures, it is important to note that the term “alternative dispute resolution procedure” includes all of the processes described in Sections 154.023-154.027 of the ADR Procedures Act, and also any procedure that meets the general criteria established by Subsection 154.021(a)(3). These criteria include processes that provide for intervention by an impartial third party. Thus, new and hybrid ADR processes meeting this standard would fall under the definition of ADR procedures used in the GDR Act.

The GDR Act defines the term “governmental body” by assigning to it the same definition contained in the Texas Public Information Act, Section 552.003 of the Texas Government Code. The definition is sufficiently broad to include state government, county government, municipal government, school districts, and certain non-profit water and wastewater service corporations. The term also includes 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 sections or portions of an organization, corporation, commission, committee, institution, or agency that spends or that is supported in whole or in part by public funds are also classified as “governmental bodies” under this definition. The judiciary is expressly excluded from the definition of “governmental body” under Government Code Section 552.003(b).

The GDR Act’s definition of “state agency” in Section 2009.003 includes not only “traditional” agencies but also the Office of Attorney General, institutions of higher education and the State Office of Administrative Hearings (SOAH).

### **Section 2009.004 Contracts; Budgeting for Costs**

The GDR Act grants broad fiscal discretion to governmental bodies seeking to implement ADR initiatives. Subsection 2009.004(a) clarifies that governmental bodies have budgetary authority to pay for costs incurred developing and using ADR processes and evaluating their performance. A non-exclusive list of possible expenditures—

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<sup>7</sup> Tex. Gov’t Code Ann. § 2001.002 (Vernon 1997).

“reasonable fees for training, policy review, system design, evaluation, and the use of impartial third parties”—covers many foreseeable items, but others necessary to achieving the objectives of the Act are certain to arise and are authorized by this language. State agencies may use funds budgeted for any activity area appropriate under the General Appropriations Act, including funds for legal services and executive administration, to cover ADR expenses.

Reflecting the fact that ADR needs can be met by an array of service providers, Subsection 2009.004(c) authorizes governmental bodies to contract with many different sources for assistance in implementing ADR initiatives: other governmental bodies, the Center for Public Policy Dispute Resolution at The University of Texas School of Law, any of the sixteen local dispute resolution centers,<sup>8</sup> or any private entities. Certain “governmental bodies”, such as the Office of Attorney General and SOAH, have developed ADR expertise and can be especially useful in assisting other governmental bodies with ADR. SOAH’s appointment of an ADR Coordinator and the growing experience of SOAH administrative law judges administering ADR procedures point to that entity’s increasing capacity to provide assistance in this area. The state’s higher education resources, including, among others, the University of Houston’s A.A. White Dispute Resolution Institute and the University of North Texas, also have a growing focus on ADR and are available to governmental bodies.

The GDR Act specifically mentions the Center for Public Policy Dispute Resolution at the University of Texas School of Law as a source of governmental ADR expertise. Funded by special item legislative appropriation, the Center has focused exclusively on government applications of dispute resolution since its founding in 1993, serving agencies, courts and local governments to facilitate greater use of ADR. The Center coordinated the initial effort to draft the GDR Act, has a great deal of experience working with Texas governmental bodies on ADR initiatives and can provide unique consulting guidance on a range of topics, from individual mediations and contract clauses to large consensus-building efforts (i.e., negotiated rulemaking) and evaluation projects.

Texas’ county-based dispute resolution centers provide another avenue from which governmental bodies may obtain ADR assistance. The local centers, funded primarily by county court filing fees under Chapter 152 of the Civil Practice and Remedies Code, collectively comprise a statewide system of low-cost impartial third parties and experienced ADR practitioners.

Private firms are another option for governmental bodies. Over the last decade a number of firms offering ADR consulting services, experienced impartial third party assistance and other ADR services have emerged in most parts of the state. These firms can provide high quality services, although generally at a higher price than publicly funded organizations.

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<sup>8</sup> A list of the sixteen local dispute resolution centers is included at the end of this commentary.

## Section 2009.005 Sovereign Immunity

The intersection of government ADR use and the sovereign immunity doctrine has been a complex one in Texas and elsewhere, primarily (albeit not entirely) because ADR processes involve decisions about settling claims and, in certain situations, commitments to abide by an arbitrator's settlement decision.<sup>9</sup> The complexity of the intersection is compounded by concerns of legislators and attorneys general that through ADR, state agency personnel are provided an avenue for unwittingly ceding one of the state's most powerful defenses, sovereign immunity.

### Does the GDR Act waive sovereign immunity?

No. The Act contains language in Sec. 2009.005 explicitly stating that use of ADR by a state agency does not waive sovereign immunity. Rather, the Act maintains the status quo as to agencies' ability to assert a sovereign immunity defense: agencies possessing authority to waive sovereign immunity may still do so, and agencies without such authority may not do so now as a result of the GDR Act.

Consider a worst case scenario for a state agency: an employee who is not a statutory decisionmaker of the agency stumbles into a contract with a binding arbitration provision without first consulting with the agency's legal representatives. A conflict arises and after losing badly in an arbitration, the state loses again on its subsequent motion to assert sovereign immunity and vacate the arbitrator's decision, on the grounds that immunity was waived by the employee's unauthorized signing of the contract or other action waiving immunity. Putting aside for the sake of argument the numerous and serious questions about the soundness of this scenario's legal bases, it is clear that for some people government ADR use is associated with potentially grave legal consequences.

The GDR Act deals with its intersection with sovereign immunity issues in a carefully balanced way. The provisions of Section 2009.005 ensure that the statute does not constitute a waiver of sovereign immunity and that it does not provide agencies with new authority to waive immunity. Section 2009.005 clarifies that the GDR Act makes no changes in existing law on this area: while the statute encourages use of ADR processes, it neither expands nor restricts any agency's existing or future authority to waive or assert sovereign immunity. Accordingly, an agency may use any ADR process it chooses under the GDR Act, but must make its own analysis of existing law to determine (1) if and how any sovereign immunity issues are relevant and (2) that use of the process it selects conforms with its ability to assert or waive sovereign immunity.

Subsections (a) and (b) clarify that the GDR Act does not affect the current status of sovereign immunity doctrine application in Texas and subsection (c) makes this same statement regarding the use of binding arbitration. By stating, "Nothing in this chapter

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<sup>9</sup> Absent governmental immunity, there are four statutory frameworks within which an agency might agree to binding arbitration: agreements covered under the provisions of the Federal Arbitration Act, 9 U.S.C. § 1-307; agreements covered under the provisions of the Texas General Arbitration Act, Tex. Civ. Prac. & Rem. Code Ann., §171.002 (Vernon 1997); agreements covered by the Texas ADR Procedures Act, Section 154.027 (b), incorporated by reference in Subsection 2009.003(1) of the GDR Act; and agreements covered by the Texas International Commercial Arbitration and Conciliation Act, Tex. Civ. Prac. & Rem. Code Ann., § 172.002, *et seq.* (Vernon 1997).

authorizes binding arbitration as a method of alternative dispute resolution,” the subsection makes clear that the GDR Act provides no “new” authority for governmental bodies to utilize binding arbitration, but also does not affect any existing authority to utilize the process. Any governmental body that possesses authority to use binding arbitration may do so under the GDR Act, and any governmental body lacking authority to enter into binding arbitration does not gain that authority by virtue of the GDR Act.

Subsection (c) draws a fine line that is perhaps clarified with an example. During the 74th Legislature, H.B. 2644 was passed granting the Department of Human Services the authority to use arbitration to settle certain disputes arising from the Department’s oversight of nursing homes.<sup>10</sup> In a new Section 242.265 of the Health & Safety Code, H.B. 2644 states that the arbitrator’s award is to be binding upon the parties. As a result, the Department of Human Services has statutory authority to use binding arbitration for this type of dispute. The Department’s authority to use binding arbitration is not affected by the GDR Act; it may continue to use the process, consistent with GDR Act provisions with no change. Likewise, however, the Department cannot assert the GDR Act as a basis for using binding arbitration for another class of disputes, because the Act does not provide “new” authority to do so.

### **Section 2009.051 Development and Use of Procedures**

Subsection (a) establishes the GDR Act’s explicit authorization for governmental bodies to use ADR. It also states that *state* agencies that develop ADR procedures must ensure that these procedures are consistent with the Texas ADR Procedures Act and, where applicable, the state Administrative Procedures Act (APA). The subsection further provides that SOAH may, if it chooses, issue model guidelines for use of alternative dispute resolution procedures by state agencies. Model guidelines produced by SOAH under this subsection might be very detailed, providing guidance for instance on the use of mediation for contested cases, or very generic, expressing overall directives for "appropriate" use of ADR in a variety of agency settings.

Subsection (a) provisions also convey the Legislature's intent to apply minimum standards and practical guidance to the current ADR practices of governmental bodies. By requiring that government ADR procedures "must be consistent with" the ADR Procedures Act and the state APA, the subsection requires governmental bodies to bring their existing ADR programs into conformance with the pertinent requirements of these acts.

Subsection (b) authorizes each agency that is subject to the APA to adopt its ADR procedures by rule. One group of state agencies—institutions of higher education—is included in the definition of "state agency" in Section 2009.003 of the GDR Act, but is not subject to the APA. Thus, institutions of higher education fall under the GDR Act’s general provisions but do not receive authority under the Act to adopt procedures by rule.

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<sup>10</sup> Tex. Hum. Res. Code Ann. § 32.021 (Vernon 2001).



In determining which ADR systems should be adopted by rule, one approach is to divide the types of disputes the agency deals with into “internal” and “external” categories. Internal disputes are those arising from within the agency, such as employee grievances or disputes over contracts for services; external disputes generally involve a dispute with a non-agency entity, such as regulatory, enforcement or permitting disputes. Since policies regarding management of internal affairs of an agency are not typically established by rule, ADR systems for dealing with external disputes are better candidates for adoption by rule.

While rulemakings can be cumbersome and time consuming, agencies considering an ADR system for managing a substantial number of external conflicts, or for external conflicts dealing with controversial subject matters, are probably well-advised to adopt rules. Not only will adoption by rule give the system a stronger legal basis than adoption by policy, compliance with the APA rulemaking procedure guarantees citizen input into the system design and puts interested parties on notice of the new alternative available to them.

### **Section 2009.052 Supplemental Nature of Procedures**

This section states that ADR processes used under the Act may only add to the dispute resolution options available at a governmental body and may not abridge or limit the disputants’ due process rights. Subsection (a) states that ADR procedures are not to replace, but rather to supplement, current governmental body dispute resolution procedures. Subsection (b) states that ADR procedures may not be

applied in a manner that denies a person a right granted under other state or federal law, including a right to an administrative or judicial hearing.

**Does the GDR Act deny or limit any person their due process rights?**

No. The statute explicitly states in § 2009.052 (b) that it "may not be applied in a manner that denies a person a right granted under other state or federal law...."

**Does use of ADR under the GDR Act mean that a person won't have a hearing later if they want one?**

No. The statute explicitly states § 2009.052 (b) that use of ADR does not in any way affect a person's right to an administrative or judicial hearing.

From a practical standpoint, subsection (a) would encourage a governmental body to append any ADR procedures it chooses to adopt to the governmental body’s existing framework for resolving disputes. A state agency managing a contested case, for example, is required under the APA to provide an opportunity for an adjudicative hearing before determining the rights, duties, or privileges of a party. This agency may create a mediation program to try to resolve the dispute, but it must keep intact the availability of the adjudicative hearing if the mediation does not produce a mutually acceptable settlement. Subsection (b) should dispel the fears of those who have perceived ADR processes as creating an opportunity for bad faith actors to deny a disputant his or her “day in court.”

The 76<sup>th</sup> Legislature (1999), in a statement of applicability, clarified that the provisions of the GDR Act found at Chapter 2009 of the Government Code do not make

ADR mandatory or limit disputants' legal remedies.<sup>11</sup> However, the 1997 GDR Act amended Section 2003.042 of SOAH's enabling statute to give SOAH administrative law judges the authority to refer contested cases in their jurisdiction to ADR. This authority institutionalized ADR as an option for resolving contested cases in the context of administrative law.

### **Section 2009.053 Impartial Third Parties**

Section 2009.053 provides several important measures regarding "impartial third parties," also called "neutrals." The section establishes who may serve as neutrals for governmental bodies, who must approve of the neutral selection, what minimum requirements the governmental body's neutrals must meet, and what statutory standards and duties apply to them.

Subsection (a) of Section 2009.053 provides that a governmental body may appoint any governmental employee or private individual to serve as an impartial third party. Subsection (a) also provides that appointment of the impartial third party is "subject to the approval of the parties," except in two situations. First, when a SOAH administrative law judge has referred a case involving a state agency to ADR, the administrative law judge may appoint an impartial third party if the disputants cannot agree on one in a reasonable amount of time. The Legislature may have provided this exception for SOAH to acknowledge SOAH's adjudicatory neutrality. Second, the Texas Department of Criminal Justice (TDCJ) may appoint an impartial third party without the participants' approval to conduct a victim-offender mediation. The victim-offender mediation program at TDCJ is entirely voluntary and unique. A mediator will be assigned to a case upon the request of a victim. The mediator will consult with the victim and offender for several months in determining whether the case is appropriate for mediation. Because the process remains voluntary, if a party objected to the mediation, the party could simply request the designation of a new mediator as a condition to continuing the process.

The clause in Subsection 2009.053(a) directing that the appointment of the neutral is "subject to the approval of the parties," conveys the Legislature's intent to authorize ADR only where the parties approve of the mediator selection, save the two limited exceptions described above. Empirical research and common sense, support the idea that parties are more likely to find ADR useful when they are comfortable with the individual serving as the neutral, and that when the parties feel the governmental body nomination is unacceptable, it is worth finding a substitute. By implication, the subsection prohibits a governmental body from appointing an impartial third party who the parties do not find acceptable. As a consequence, for example, if a governmental body attempted to appoint as neutral one of its employees whose impartiality was

#### **Who can serve as a mediator under the GDR Act?**

Only persons meeting the requirements set in the Texas ADR Act may serve as mediators or other impartial third parties under this act. These requirements provide that a person must have 40 hours training, and additional training if dealing with family issues, before serving as a mediator.

<sup>11</sup> § 10 of Acts 1999, 76<sup>th</sup> Leg., ch. 1352, eff. Sept. 1, 1999.

questioned by the opposing party, then that governmental body would have to appoint a different neutral.

Two related questions arise regarding the “subject to the approval of the parties” clause. First, what if the parties fail to agree upon a neutral, outside of the SOAH and victim-offender mediation exceptions? Second, if during the course of the ADR procedure either party becomes unsatisfied with the neutral, does the clause require that the neutral cease serving and another be appointed?

Outside of the SOAH and victim-offender mediation exceptions, the Act does not provide a default mechanism for settling upon a neutral. Accordingly, if a party objects to the governmental body’s appointment of the neutral because they are uncomfortable with the selection or with the neutral’s management of the process, and if the parties cannot then reach agreement upon a substitute, then the GDR Act intends that the ADR procedure cannot go forward. This important protection guarantees non-governmental parties to governmental ADR that they cannot be forced to accept neutrals who they perceive are biased in the appointing governmental body’s favor. As a practical matter, the parties would be wise to negotiate an acceptable neutral anyway, since odds are high that any case under the GDR Act will sooner or later end up in SOAH or a court with authority to appoint a neutral if the parties fail to agree. However, the GDR Act provides a firm and clear requirement for mutual approval of the neutral.

With regard to the second question, the Act is silent as to whether a party may withdraw its approval of the neutral once the ADR procedure has begun. The clause requires that the “governmental body’s appointment” be subject to the approval of the parties, but it does not state that the neutral “serves at the will of the parties.” However, it would seem inconsistent to require approval of appointment but not of performance, since it is possible that a party might discover a bias or other ground for disapproval after the process has begun. As a practical matter, ADR processes are far more effective when the neutral is acceptable to all parties throughout the session. For these reasons, it is likely that a party may withdraw its approval of the neutral under the GDR Act when it determines that the neutral is not acceptable for the reasons outlined above. A party may also likely withdraw its approval when it learns after appointment that the neutral does not meet the GDR Act’s minimum qualifications for impartial third parties.

**Where can a state agency obtain a mediator under the GDR Act?**

The statute provides agencies with a wide range of options from which to obtain a mediator or other impartial third party. Agencies may: (1) contract with another government entity (such as the Center for Public Policy Dispute Resolution or SOAH); (2) "borrow" another government employee; (3) establish a pool of mediators; (4) contract with one of the many county Community Dispute Resolution Centers (listed on pages 30-31); or (5) hire a private individual. There are presently sixteen local publicly funded Dispute Resolution Centers across Texas, all of which can provide trained, experienced and free or low-cost mediators.

Subsection (b) permits governmental bodies seeking impartial third parties to contract with the Center for Public Policy Dispute Resolution at the University of Texas School of Law or any of the community dispute resolution centers across Texas, and any state or federal agency. The subsection also authorizes governmental bodies to enter into pooling agreements with other governmental bodies and to provide compensation in

such agreements either in kind or monetarily. Authorization to develop a pool of mediators compensated in kind would enable creation of a statewide government mediator group, with mediators available “on loan” to participating governmental bodies on a flexible and as-needed basis. Such a mediator group could provide governmental bodies with a low cost, convenient and plentiful source of mediators with the added benefit of being one step removed from the governmental body sponsoring the ADR procedure.

Subsection (c) allows a state agency to obtain the services of a qualified third party through an agreement with SOAH.

Subsection (d) requires the impartial third party to meet the qualification for neutrals set forth in Section 154.052 of the Texas ADR Procedures Act. These qualifications include completion of 40 hours of training in dispute resolution techniques and completion of an additional 24 hours of specialized training for mediation of disputes relating to the parent-child relationship.

Subsection (d) additionally directs that the impartial third party in a governmental ADR procedure must abide by the standards and duties described in Section 154.053 of the ADR Procedures Act. These include a duty not to coerce or compel settlement, a duty to keep the parties' confidence, and the duty to keep the communication, conduct, and demeanor of the parties confidential from all outside parties, unless expressly authorized by the disclosing party. Subsection (d) also provides that impartial third parties may have the qualified immunity for volunteers described in Section 154.055 of the Texas ADR Procedures Act, if applicable.

### **Section 2009.054 Confidentiality of Certain Records and Communications**

**Balancing ADR Confidentiality and Open Government.** It is universally recognized that a minimum level of confidentiality is necessary for ADR procedures to be successful. The effectiveness of ADR largely derives from the amount of full and open communication among the disputants and between the disputants and the impartial third party. If a disputant harbors concerns that what he or she says or does in negotiations might be revealed later and used to his or her detriment, that disputant will not be as forthcoming. In such an atmosphere, disputants will tend to conceal their true interests, even from the neutral, and perpetuate the adversarial dynamic that inhibits consensus resolutions. For these reasons, Texas' ADR Procedures Act, and now the GDR Act, follow other jurisdictions in providing statutory confidentiality protections against allowing disclosure of specific communications made during ADR procedures.

When ADR procedures are utilized by government entities, either as sponsors of dispute resolution processes or as disputants themselves, the need for confidentiality in ADR may come into conflict with the tenets of open government laws. The public's right of access to information about any government function through open records (under the Public Information Act) and open meetings, including information about public

decision-making through ADR, is paramount. Because the Public Information Act provides an avenue for obtaining information produced in government ADR that would otherwise be protected from court-related discovery under the ADR Procedures Act, special provisions for confidentiality are contained in the GDR Act. To extend authority to governmental bodies to engage in ADR procedures without granting open government confidentiality protections would be the same as denying ADR confidentiality generally. If, through the Public Information Act, a party can obtain information protected from disclosure in the discovery process, then discovery protections become ineffective and the disputants become inhibited from sharing information freely. Confidentiality provisions for government ADR must therefore address both avenues for obtaining information shared during the ADR procedures: court related discovery and open government disclosure provisions.

**Why does there need to be any confidentiality for government ADR?**

It is universally recognized that a minimum level of confidentiality must exist for ADR procedures to work. This is because the effectiveness of ADR is almost entirely contingent upon full and open communication among the disputants and between the disputants and the impartial third party. Without confidentiality, ADR processes could be easily misused as tactical pre-trial weapons to gain information from the other side. In this atmosphere, disputants would not tend to reveal sufficient information and hence maintain the adversarial atmosphere that inhibits consensus resolutions.

The GDR Act strikes a careful and appropriate balance between ensuring the minimum confidentiality requisite for effectiveness in the ADR process and guaranteeing the maximum public access to information about the government. The Legislature determined in the instance of the GDR Act that the relative gains from allowing a narrowly crafted confidentiality provisions to accommodate governmental ADR outweigh minimal losses to the public in government openness.

The confidentiality provisions in the GDR Act are similar to those provided for private disputes as outlined by the Texas ADR Procedures Act, but are slightly more limited. The GDR Act confidentiality provisions may be more limited than those provided by federal statutes and in other states. The provisions provide the minimum level of confidentiality required for the process to be effective and the maximum level of openness possible to keep the public informed of government activity.

**Confidentiality of Communications in Governmental Dispute Resolution Procedures.** The confidentiality provisions of the GDR Act are found in Section 2009.054. The provisions are best understood as comprising three tiers: Tier I (Subsection 2009.054(a)), application of ADR Procedures Act confidentiality protections to governmental ADR; Tier II (Subsection 2009.054(b)), designation of narrow confidentiality provisions for insuring non-disclosure of certain items; and Tier III (Subsections 2009.054 (c) and (d)), clarifications regarding disclosure of final written agreements and testimony from impartial third parties. The tiers are “stacked” one upon another: Tier I establishes the basis for governmental ADR confidentiality, Tier II builds upon Tier I, and Tier III modifies the Tier II provisions.

**Tier I: Subsection 2009.054(a).** Subsection 2009.054(a) of the GDR Act expressly applies the provisions of Sections 154.053 and 154.073 of the ADR Procedures Act to the communications, records, conduct, and demeanor of the impartial third

party and the disputants. Section 154.053 of the ADR Procedures Act deals with the impartial third party. This section prohibits coercion of settlement by an impartial third party and prohibits impartial third parties from disclosing to other parties or to anyone else information given in confidence and communications relating to the subject matter of the dispute, unless expressly authorized by the parties. These provisions strictly limit a party's ability to discover information or require testimony from a mediator or other impartial third party through court action.

**What are the confidentiality provisions in the GDR Act?**

The confidentiality provisions of the statute are found in § 2009.054. Broadly speaking, these provisions have two effects: (1) they make available to government ADR disputants the Texas ADR Act confidentiality provisions on discovery and testimony and (2) they establish an exception to the Public Information Act for certain records relating to an ADR procedure.

Section 154.073 of the ADR Procedures Act allows disputants to communicate with the impartial third party and with each other in confidence and without fear that what they say will be used against them later in court or administrative hearing. Subsections 154.073 (a) and (b) protections direct that (1) communications relating to the dispute made by a participant during an ADR procedure before or after formal proceedings are confidential, not subject to disclosure and may not be used as evidence against the participant in a later proceeding; and (2) any record made at an ADR procedure is confidential, and neither the participants nor the third party may be required to testify or be subject to processes requiring disclosure of this information.

Subsections (c), (d), (e), and (f) of Section 154.073 include important limits on the protections granted in (a) and (b). Subsection (c) states that any oral communication or written material that would have been discoverable or admissible independent of the ADR procedure remains admissible and discoverable; in other words, a disputant cannot 'offensively' hide material by simply introducing it during an ADR procedure.

Subsection (d) of Section 154.073 was added in the 1999 legislative session to insure consistency between Section 154.073 and the provisions of 2009.054(c) of the GDR Act as to the confidentiality of final written agreements entered into by governmental bodies. Although final written agreements entered into by a governmental body in an ADR procedure are subject to the general confidentiality provisions of Section 154.073, such agreements still may be subject to disclosure under the Public Information Act as more fully discussed below in the commentary on Section 2009.054(c).

Subsection (e) provides a mechanism for resolving conflicts of law. The subsection states that when the provisions of Subsections (a) and (b) conflict with "other legal requirements for disclosure of communications or materials," the specific matter in question may be submitted to the court of jurisdiction *in camera* for a ruling. Subsection (f) of Section 154.073 clarifies that the confidentiality provisions do not affect the duty to report abuse, neglect, or exploitation.<sup>12</sup>

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<sup>12</sup> Tex. Fam. Code Ann. § 261.201 (Vernon 2001); Tex. Hum. Res. Code Ann. § 48.101 (Vernon 2001).

**Tier II: Subsection 2009.054(b).** Tier II provisions build upon Tier I measures to ensure that confidentiality protections apply to both avenues for obtaining information regarding governmental ADR: traditional discovery and Public Information Act requests.

ADR Procedures Act confidentiality provisions in Sections 154.053 and 154.073 are broad in coverage, and persuasive arguments are easily made that these provisions already provide useful exceptions to the disclosure requirements of the Public Information Act. Specifically, Subsection 154.073(a) states that certain ADR communications are “not subject to disclosure” and Subsection 154.073(b) establishes that certain ADR records are “confidential.” However, because the ADR Procedures Act generally refers to court-referred ADR, some have questioned whether these provisions apply only to court-referred ADR applications. Tier II protections address such questions by explicitly framing confidentiality protections in the context of ADR involving a governmental body. Explicit establishment in the GDR Act of these protections relative to governmental bodies, however, should not undermine the strength of the arguments supporting broad application of the ADR Procedures Act protections.

Subsection 2009.054(b) provides that, notwithstanding the authority of review granted to the courts in Subsection 154.073(e) of the ADR Procedures Act regarding conflict of laws and disclosure, certain information in governmental ADR is to remain confidential, even against Public Information Act inquiries, unless all parties agree to the disclosure. The information made confidential in Subsection 2009.054(b) includes *only*: (1) communications, and records of those communications, between an impartial third party and the disputants that are relevant to the dispute; (2) communications, and records of those communications, made among the parties to the dispute that are relevant to the dispute; and (3) the notes of the impartial third party.

GDR Act subsection 2009.054(b) establishes the exception to Public Information Act disclosure requirements by declaring that the designated information is “confidential.” Under Section 552.101 of the Public Information Act, information “considered to be confidential by law, either constitutional, statutory, or by judicial

**What are the Public Information Act exceptions made by the GDR Act?**

By specifically designating certain records as confidential, the GDR Act creates exceptions to the Public Information Act. These exceptions are very narrow. The statute excepts records of communications made between the impartial third party and a disputant and between the disputants that are (1) relevant to the dispute and (2) made during the dispute resolution procedure. The statute also exempts the notes of the impartial third party from discovery and the disclosure pursuant to the Public Information Act. These exceptions are outlined in Sec. 2009.054 (b) (1) and (2).

**Does the GDR Act affect the Open Meetings Act?**

The GDR Act provides no new exception to the Open Meetings Act. However, because most government entities using ADR send staff representatives to negotiations, governmental ADR processes usually do not involve a quorum of governmental decisionmakers deliberating on public business. As a result, there will often be no Open Meetings Act issues associated with governmental ADR. As a general rule, government decisionmakers should consult counsel regarding application of the Open Meetings Act.

decision,” is excepted from the public information provisions. In stating that the specified items are confidential “Notwithstanding Section 154.073(e)” of the ADR Procedures Act, Subsection 2009.054(b) directs that the items are to be considered confidential regardless of whether their treatment under the ADR Procedures Act “conflicts with other legal requirements,” such as the Public Information Act.

**Tier III: Subsections 2009.054 (c) and (d).** Tier III provisions clarify treatment of final written agreements and testimony of neutrals relative to Tier II.

Subsection 2009.054(c) states that a final written agreement to which a governmental body is a signatory that is reached through a dispute resolution procedure is not to be construed as a "record of communication" that would be made confidential under Subsection 2009.054(b)(1). Reflecting the concept that settlement agreements entered into by a governmental body should be available to the public under public information laws, this provision ensures that final agreements involving a governmental body will not be withheld from disclosure simply because they are the product of a dispute resolution procedure. Instead, the confidentiality of all or portions of these final written agreements is governed by the Public Information Act or other applicable law.

Subsection 2009.054(d) clarifies that an impartial third party may not be required to testify in any proceedings relating to or arising out of the matter in dispute. This provision modifies Subsection 2009.054(b)(2), which states that the notes of the impartial third party are confidential, unless the notes are of a communication that all the parties have consented to disclose. Section 2009.054(d) establishes that even if the neutral’s notes are of a communication that all parties have consented to disclose, the neutral may not be called to testify about the communication.

**Is the final settlement agreement to which a government entity is a signatory confidential?**

The GDR Act itself does not make a settlement agreement involving a governmental body confidential. The statute states in § 2009.054(c) that where a governmental body is a signatory, the final agreement between the parties spelling out the terms of the settlement will be subject to or excepted from disclosure as provided by the Public Information Act.

Subsection 2009.054(d) is drafted differently than its counterpart in Subsection 154.073(b) of the ADR Procedures Act. Subsection 2009.054(d) states that “An impartial third party may not be required to testify in any proceedings relating to or arising out of the matter in dispute.” Subsection 154.073(b) of the ADR Procedures Act more broadly states that “*the participants or the third party facilitating the procedure may not be required to testify in any proceedings relating to or arising out of the matter in dispute or be subject to process requiring disclosure of confidential information or data relating to or arising out of the matter in dispute*” (emphasis added). While the GDR Act provision affects only the impartial third party, the ADR Procedures Act provision affects the parties and the neutral and provides additional protections against non-testimonial requirements for disclosure.

The difference between these two provisions may be perceived to create some ambiguity. On one hand, adoption of the narrower GDR Act provisions might appear to



reflect by implication the drafters' intent to scale back ADR Procedures Act provisions so that only the neutral is protected from being forced to testify. On the other hand, the GDR provisions could be read as an explicit, additional protection for neutrals under the GDR Act which build upon the ADR Procedures Act protections.

There are at least two persuasive reasons for concluding that the latter interpretation is correct. First, the strong confidentiality provisions of both Acts indicate a clear intent to provide adequate confidentiality protections for ADR generally, and this intent would be undermined if parties can be required to testify about the ADR procedure in state agency applications. Allowing participants to be forced to testify under the GDR Act would clearly neutralize the other confidentiality provisions of the Act, such as the specific protections of Subsection 2009.054(b) regarding communications and records made during ADR procedures. Nothing else in the GDR Act provisions indicates an intent to curtail protections against being forced to testify; rather, the Act merely omits to mention all the protections provided in the ADR Procedures Act.

Second, a close reading of Subsection 2009.054(b)(1) also supports the idea that Subsection 2009.054(d) is an additional, not limiting, protection. Subsection 2009.054(b)(1) states that although certain communications are confidential, these communications may be disclosed if "all parties to the dispute consent to the disclosure." This wording could have been interpreted to mean that if all disputants agree to disclosure of an item, the neutral could be forced to disclose the material, in testimony or otherwise. In this context, the explicit protection of Subsection 2009.054(d) was necessary to prevent forcing neutrals to disclose.

For these reasons, Subsection 2009.054(d) of the GDR Act should be read as an explicit protection for the impartial third party that does not replace or diminish in any way the protections granted in Section 154.073 of the ADR Procedures Act.

### **Section 2009.055 Interagency Sharing of Information; Consistency of Procedures**

This section reflects the Legislature's judgment that governmental bodies may learn from each other's experiences and should incorporate in each of their ADR systems the common elements of successful Texas ADR applications. Subsection (a) encourages governmental bodies to develop consistent ADR policies and to assist other governmental bodies in order to meet the goals of the Act by coordinating their efforts and sharing results. It also encourages governmental bodies to share information with the Center for Public Policy Dispute Resolution, which may collect and analyze this information and report its findings. Subsection (b) encourages governmental bodies to adopt consistent ADR policies wherever possible.

**Amendment of Government Code, Title 10, Chapter 2003, State Office of Administrative Hearings, 2003.001:**

**Section 2003.001 Definitions**

This section defines “alternative dispute resolution procedure” in the SOAH enabling statute by referencing the definition contained in Section 2009.003 of the GDR Act.

**Amendment of Government Code, Title 10, Chapter 2003, State Office of Administrative Hearings, Section 2003.021:**

**Section 2003.021 Office**

This section amends the SOAH enabling statute by explicitly authorizing SOAH to conduct ADR procedures.

**Amendment of Government Code, Title 10, Chapter 2003, State Office of Administrative Hearings, Section 2003.042:**

**Section 2003.042 Powers of Administrative Law Judge**

The 1997 GDR Act amendments to Section 2003.042 of SOAH’s enabling statute institutionalize ADR as an option for resolving contested cases referred to SOAH. The amendments grant SOAH administrative law judges authority to refer contested cases in their jurisdiction to ADR and to serve as impartial third parties, subject to certain restrictions.

Subsection 2003.042(a)(5) provides that SOAH judges may issue orders referring cases to ADR procedures and apportioning costs to the parties and appointing a neutral, subject to the Section 2009.053 requirements. Section 2009.053 states that the impartial third party must be qualified and acceptable to the disputants, except that SOAH judges may appoint an impartial third party for the disputants if they cannot agree on one in a reasonable period of time. At some point, SOAH may develop guidelines defining a “reasonable period of time” and describing the process administrative law judges will use when appointing “default” neutrals.

**Can SOAH require use of ADR under the GDR Act?**

Section 4 of the statute amended § 2003.042 (a)(5) of the Texas Government Code to give SOAH administrative law judges the discretionary authority to refer appropriate contested cases to mediation or another ADR procedure. This system closely resembles the one used in many civil courts today, under which Texas judges have been able to reduce litigation substantially by exposing more potential litigants to the advantages of ADR.

As a practical matter, the SOAH judge will consider the input of the parties in making this decision, as the judge would on any decision affecting a civil case. SOAH’s financing mechanism is such that it has an incentive to take the parties’ input into account, but the SOAH judge may order a case to ADR if he or she feels that it would be worthwhile.

**Who would pay for the mediation when SOAH orders a dispute to ADR?**

Section 4 of the statute amended § 2003.042 (a)(5) of the Texas Government Code to provide authority for the SOAH judge to apportion costs among the parties. This means the agency and the disputant party to the contested case may be assigned a share of costs by the SOAH judge. ADR has been shown to work best when costs are apportioned fairly among the parties, and this provision gives the SOAH judge discretion to make this judgment.

Subsection 2003.042(a)(7) allows SOAH judges to serve as impartial third parties if they meet the requirements outlined in the GDR Act. If either of the parties objects to a SOAH judge serving as the impartial third party, however, then the SOAH judge may not so serve. Guidelines developed by SOAH will likely also outline the procedure a party would follow to object to the appointment of the neutral. Subsection 2003.042(a)(8) provides that SOAH judges may serve as impartial third parties for disputes referred by other state agencies pursuant to contract. Subsection 2003.042(b) prohibits SOAH judges from serving as impartial third parties in the same case or dispute in which he or she has made the referral to the ADR process. This provision would prohibit a SOAH judge from both referring a case in his or her jurisdiction to ADR and then appointing him or herself as the neutral.

**Would an agency ordered to ADR by a SOAH judge have to agree to a SOAH judge serving as the mediator?**

No. § 2009.053 of the statute states that the parties have the authority to agree between themselves on a mediator within a reasonable time. If they fail to agree upon a mediator, then the SOAH judge may appoint a mediator for them. The SOAH judge may appoint anyone as mediator, but may not appoint him or herself, or another SOAH judge if either of the parties objects.

**Amendment of Government Code, Title 10, Chapter 2003, State Office of Administrative Hearings (SOAH), Section 2003.047:**

**Section 2003.047(j) Natural Resources Conservation Division**

This subsection provides a unique exception to the authority granted SOAH administrative law judges in Subsection 2003.042(a)(5). The subsection states that a SOAH judge may not refer a case from the Texas Natural Resource Conservation Commission to an alternative dispute resolution procedure if the Commission has already conducted such a procedure, *unless the parties agree*. For cases where the Commission has not already conducted such a procedure, the section directs the SOAH judge to consider the Commission's recommendation in deciding whether to issue a referral to ADR. This exception likely reflects the Legislature's recognition of the Commission's substantial experience with ADR processes.

## Local Dispute Resolution Centers in Texas

Under Section 152.001 of the Texas Alternative Dispute Resolution and Financing Act, county commissioner's courts may adopt filing fees to fund ADR activities. Sixteen local dispute resolution centers have been created across the state under this provision. These dispute resolution centers, also called DRC's, generally provide no-cost or low-cost ADR services, including mediation, arbitration, and increasingly, public policy facilitation. Most use minimal staff to coordinate volunteer impartial third parties from the local area. These DRC's collectively comprise one of the state's largest resources for dispute resolution practitioners.

### **Amarillo (Potter & Randall Counties)**

Dispute Resolution Center  
P.O. Box 9257  
Amarillo, TX 79105-9257  
Phone: (806) 372-3381 Fax: (806) 373-3268  
Email: pcoffey@prpc.cog.tx.us  
Website: [www.prpc.cog.tx.us/program.htm](http://www.prpc.cog.tx.us/program.htm)  
Pam Coffey, Program Director

### **Austin (Travis County)**

Dispute Resolution Center  
5407 N. IH 35, Suite 410  
Austin, TX 78723  
Phone: (512) 371-0033 Fax: (512) 371-7411  
Email: kris@austindrc.org  
Website: <http://www.austindrc.org>  
Kris Donley, Executive Director

### **Beaumont (Jefferson County)**

Dispute Resolution Center of Jefferson County, Inc.  
Courthouse Annex 1 • 215 Franklin Suite, 131A  
Beaumont, TX 77701  
Phone: (409) 835-8747 Fax: (409) 784-5811  
Email: cebworth@co.jefferson.tx.us  
Website: [www.co.jefferson.tx.us/med\\_cntr/med.htm](http://www.co.jefferson.tx.us/med_cntr/med.htm)  
Cindy Bloodsworth, Executive Director

### **Central Brazos Valley (Brazos, Burleson, Grimes, Leon, Madison, Robertson, Washington)**

Dispute Resolution Center Central Brazos Valley, Inc.  
Texas Workforce Commission Building  
801 East 29<sup>th</sup> St.  
Bryan, TX 77803  
Phone: (979) 779-3743 ext. 229 Fax: (979) 823-2071  
Email: drc@bvcog.org  
Website: [www.disputeresolutionbv.org](http://www.disputeresolutionbv.org)  
Cindy Taylor, Director

### **Conroe (Montgomery County)**

Dispute Resolution Center  
P.O. Box 3609  
Conroe, TX 77305-3609  
Phone: (936) 760-6914 Fax: (936) 538-8050  
Email: kbnorris@co.montgomery.tx.us  
Kathy Bivings-Norris, Director

### **Corpus Christi (Nueces, San Patricio, & Bee Counties)**

Nueces County Dispute Resolution Services  
901 Leopard, Room 401.2  
Corpus Christi, TX 78401  
Phone: (361) 888-0650 Fax: (361) 888-0754  
Email: drsctex@igc.org  
Melissa Garcia-Samuels, Executive Director

### **Dallas (Dallas County)**

Dispute Mediation Service, Inc.  
3400 Carlisle Suite 240, LB-9  
Dallas, TX 75204-1298  
Phone: (214) 754-0022 Fax: (214) 754-0378  
Email: hcooke@dms-adr.org  
Website: <http://www.dms-adr.org>  
Herbert V. Cooke, Executive Director

### **Denton (Denton County)**

Dispute Resolution System of Denton County  
P.O. Box 310439  
University of North Texas  
Denton, TX 76203  
Phone: (940) 565-3445 Fax: (940) 565-4658  
Email: mckee@scs.cmm.unt.edu  
Website: [www.unt.edu/drs](http://www.unt.edu/drs)  
Bill McKee, Director

### **El Paso (El Paso County)**

Dispute Resolution Center  
1100 N. Stanton, Suite 610  
El Paso, TX 79902  
Phone: (915) 533-4800 Fax: (915) 532-9385  
E-mail: p.gross@riocog.org  
Patricia Gross, Coordinator  
Jake Brisbin, Jr., Executive Director

### **Fort Worth (Tarrant & Parker Counties)**

Dispute Resolution Services of Tarrant County  
131 E. Exchange Ave., Suite 208  
Fort Worth, TX 76106  
Phone: (817) 877-4554 Fax: (817) 877-4557  
Email: bobgood@drstarrantco.org  
Bob Good, Director

**Houston (Harris County)**

Harris County Dispute Resolution Center  
49 San Jacinto, Suite 220  
Houston, TX 77002-1233  
Phone: (713) 755-8274 Fax: (713) 755-8885  
Email: drc\_houston@hotmail.com  
Nicholas Hall, Executive Director

**Lubbock (Lubbock, Hockley, Garza, Yoakum, Terry, Cochran & Dickens Counties)**

South Plains Dispute Resolution Center  
P.O. Box 3730, Freedom Station  
Lubbock, TX 79452-3730  
Phone: (806) 762-8721 Fax: (806) 765-9544  
Email: spag.drc@juno.com  
D. Gene Valentini, Executive Director

**Paris (Lamar, Fannin, & Red River Counties)**

Dispute Resolution Services  
Paris Junior College  
2400 Clarksville  
Paris, TX 75460-6298  
Phone: (903) 783-9839 Fax: (903) 782-0443  
Email: mediation@paris.cc.tx.us  
Carl E. Lucas, Director

**Richmond (Fort Bend County)**

Fort Bend County Dispute Resolution Center  
211 Houston Street  
Richmond, TX 77469  
Phone: (281) 342-5000  
Fax: (281) 232-6443; Houston Metro Fax: (888) 303-6443  
Email: fbdrc@fbnet.net  
Shelly Hudson, Executive Director

**San Antonio (Bexar County)**

Bexar County Dispute Resolution Center  
Bexar County Justice Center  
300 Dolorosa, Suite 1102  
San Antonio, TX 78205-3009  
Phone: (210) 335-2128 Fax: (210) 335-2941  
E-mail: mailto:mlabenz@bexar.org  
Website: www.bexar.org/drc  
Marlene Labenz-Hough, Director

**Waco (McLennan County)**

McLennan County Dispute Resolution Center  
P.O. Box 1488  
Waco, TX 76703  
Phone: (254) 752-0955  
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# CHAPTER 2009. ALTERNATIVE DISPUTE RESOLUTION FOR USE BY GOVERNMENTAL BODIES

## SUBCHAPTER A. GENERAL PROVISIONS

### § 2009.001. Short Title

This chapter may be cited as the Governmental Dispute Resolution Act.

Added by Acts 1997, 75th Leg., ch. 934, § 1, eff. Sept. 1, 1997. Renumbered from V.T.C.A., Government Code § 2008.001 by Acts 1999, 76th Leg., ch. 62, § 19.01(55), eff. Sept. 1, 1999. Renumbered from V.T.C.A., Government Code § 2008.001 by Acts 1999, 76th Leg., ch. 1352, § 5, eff. Sept. 1, 1999.

### § 2009.002. Policy

It is the policy of this state 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.

Added by Acts 1997, 75th Leg., ch. 934, § 1, eff. Sept. 1, 1997. Renumbered from V.T.C.A., Government Code § 2008.002 by Acts 1999, 76th Leg., ch. 62, § 19.01(55), eff. Sept. 1, 1999. Renumbered from V.T.C.A., Government Code § 2008.002 and amended by Acts 1999, 76th Leg., ch. 1352, § 5, eff. Sept. 1, 1999.

### § 2009.003. Definitions

In this chapter:

- (1) "Alternative dispute resolution procedure" includes:
  - (A) a procedure described by Chapter 154, Civil Practice and Remedies Code; and
  - (B) a combination of the procedures described by Chapter 154, Civil Practice and Remedies Code.
- (2) "Governmental body" has the meaning assigned by Section 552.003.
- (3) "State agency" means an officer, board, commission, department, or other agency in the executive branch of state government with statewide jurisdiction that makes rules or determines contested cases. The term includes:
  - (A) the attorney general;
  - (B) an institution of higher education as defined by Section 61.003, Education Code; and
  - (C) the State Office of Administrative Hearings.
- (4) The following terms have the meanings assigned by Section 2001.003:

- (A) "contested case";
- (B) "party";
- (C) "person"; and
- (D) "rule."

Added by Acts 1997, 75th Leg., ch. 934, § 1, eff. Sept. 1, 1997. Renumbered from V.T.C.A., Government Code § 2008.003 by Acts 1999, 76th Leg., ch. 62, § 19.01(55), eff. Sept. 1, 1999. Renumbered from V.T.C.A., Government Code § 2008.003 and amended by Acts 1999, 76th Leg., ch. 1352, § 5, eff. Sept. 1, 1999.

#### **§ 2009.004. Contracts; Budgeting for Costs**

(a) A governmental body may pay for costs necessary to meet the objectives of this chapter, including reasonable fees for training, policy review, system design, evaluation, and the use of impartial third parties.

(b) To the extent allowed by the General Appropriations Act, a state agency may use money budgeted for legal services, executive administration, or any other appropriate aspect of the state agency's operations to pay for costs incurred under Subsection (a).

(c) A governmental body may contract with another governmental body, including the Center for Public Policy Dispute Resolution at The University of Texas School of Law, with an alternative dispute resolution system created under Chapter 152, Civil Practice and Remedies Code, or with a private entity for any service necessary to meet the objectives of this chapter.

Added by Acts 1997, 75th Leg., ch. 934, § 1, eff. Sept. 1, 1997. Renumbered from V.T.C.A., Government Code § 2008.004 by Acts 1999, 76th Leg., ch. 62, § 19.01(55), eff. Sept. 1, 1999. Renumbered from V.T.C.A., Government Code § 2008.004 and amended by Acts 1999, 76th Leg., ch. 1352, § 5, eff. Sept. 1, 1999.

#### **§ 2009.005. Sovereign Immunity**

(a) This chapter does not waive immunity from suit and does not affect a waiver of immunity from suit contained in other law.

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

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

Added by Acts 1997, 75th Leg., ch. 934, § 1, eff. Sept. 1, 1997. Renumbered from V.T.C.A., Government Code § 2008.005 by Acts 1999, 76th Leg., ch. 62, § 19.01(55), eff.

Sept. 1, 1999. Renumbered from V.T.C.A., Government Code § 2008.005 by Acts 1999, 76th Leg., ch. 1352, § 5, eff. Sept. 1, 1999.

## **SUBCHAPTER B. ALTERNATIVE DISPUTE RESOLUTION**

### **§ 2009.051. Development and Use of Procedures**

(a) Each governmental body may develop and use alternative dispute resolution procedures. Alternative dispute resolution procedures developed and used by a governmental body must be consistent with Chapter 154, Civil Practice and Remedies Code.

(b) Alternative dispute resolution procedures developed and used by a state agency also must be consistent with the administrative procedure law, Chapter 2001. The State Office of Administrative Hearings may issue model guidelines for the use of alternative dispute resolution procedures by state agencies.

(c) If a state agency that is subject to Chapter 2001 adopts an alternative dispute resolution procedure, it may do so by rule.

Added by Acts 1997, 75th Leg., ch. 934, § 1, eff. Sept. 1, 1997. Renumbered from V.T.C.A., Government Code § 2008.051 by Acts 1999, 76th Leg., ch. 62, § 19.01(55), eff. Sept. 1, 1999. Renumbered from V.T.C.A., Government Code § 2008.051 and amended by Acts 1999, 76th Leg., ch. 1352, § 5, eff. Sept. 1, 1999.

### **§ 2009.052. Supplemental Nature of Procedures**

(a) Alternative dispute resolution procedures developed and used under this chapter supplement and do not limit other dispute resolution procedures available for use by a governmental body.

(b) This chapter may not be applied in a manner that denies a person a right granted under other state or federal law or under a local charter, ordinance, or other similar provision, including a right to an administrative or judicial hearing.

Added by Acts 1997, 75th Leg., ch. 934, § 1, eff. Sept. 1, 1997. Renumbered from V.T.C.A., Government Code § 2008.052 by Acts 1999, 76th Leg., ch. 62, § 19.01(55), eff. Sept. 1, 1999. Renumbered from V.T.C.A., Government Code § 2008.052 and amended by Acts 1999, 76th Leg., ch. 1352, § 5, eff. Sept. 1, 1999.

### **§ 2009.053. Impartial Third Parties**

(a) A governmental body may appoint a governmental officer or employee or a private individual to serve as an impartial third party in an alternative dispute resolution



procedure. The governmental body's appointment of the impartial third party is subject to the approval of the parties, except:

- (1) that when a State Office of Administrative Hearings administrative law judge has issued an order referring a case involving a state agency to an alternative dispute resolution procedure under Section 2003.042(a)(5), the administrative law judge may appoint the impartial third party for the parties if they cannot agree on an impartial third party within a reasonable period; or
- (2) for a victim-offender mediation by the Texas Department of Criminal Justice as described in Article 56.13, Code of Criminal Procedure.

(b) A governmental body also may obtain the services of a qualified impartial third party through an agreement with the Center for Public Policy Dispute Resolution at The University of Texas School of Law, an alternative dispute resolution system created under Chapter 152, Civil Practice and Remedies Code, another governmental body, or a federal agency or through a pooling agreement with several governmental bodies. The agreements may provide that the using governmental body or the parties will reimburse the furnishing entity, in kind or monetarily, for the full or partial cost of providing the qualified impartial third party.

(c) A state agency may also obtain the services of a qualified third party through an agreement with the State Office of Administrative Hearings.

(d) The impartial third party must possess the qualifications required under Section 154.052, Civil Practice and Remedies Code. The impartial third party is subject to the standards and duties prescribed by Section 154.053, Civil Practice and Remedies Code, and has the qualified immunity prescribed by Section 154.055, Civil Practice and Remedies Code, if applicable.

Added by Acts 1997, 75th Leg., ch. 934, § 1, eff. Sept. 1, 1997. Renumbered from V.T.C.A., Government Code § 2008.053 by Acts 1999, 76th Leg., ch. 62, § 19.01(55), eff. Sept. 1, 1999. Renumbered from V.T.C.A., Government Code § 2008.053 and amended by Acts 1999, 76th Leg., ch. 1352, § 5, eff. Sept. 1, 1999.

Amended by Acts 2001, 77th Leg., ch. 1034, § 11, eff. Sept. 1, 2001.

#### **§ 2009.054. Confidentiality of Certain Records and Communications**

(a) Sections 154.053 and 154.073, Civil Practice and Remedies Code, apply to the communications, records, conduct, and demeanor of the impartial third party and the parties.

(b) Notwithstanding Section 154.073(e), Civil Practice and Remedies Code:

- (1) a communication relevant to the dispute, and a record of the communication, made between an impartial third party and the parties to the dispute or between the parties to the dispute during the course of an alternative dispute resolution procedure are confidential and may not be disclosed unless all parties to the dispute consent to the disclosure; and

- (2) the notes of an impartial third party are confidential except to the extent that the notes consist of a record of a communication with a party and all parties have consented to disclosure in accordance with Subdivision (1).

(c) Subsection (b)(1) does not apply to a final written agreement to which a governmental body is a signatory that is reached as a result of a dispute resolution procedure conducted under this chapter. Information in the final written agreement is subject to required disclosure, is excepted from required disclosure, or is confidential in accordance with Chapter 552 and other law.

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

Added by Acts 1997, 75th Leg., ch. 934, § 1, eff. Sept. 1, 1997. Renumbered from V.T.C.A., Government Code § 2008.054 by Acts 1999, 76th Leg., ch. 62, § 19.01(55), eff. Sept. 1, 1999. Renumbered from V.T.C.A., Government Code § 2008.054 and amended by Acts 1999, 76th Leg., ch. 1352, § 5, eff. Sept. 1, 1999.

#### **§ 2009.055. Sharing of Information; Consistency of Procedures**

(a) A governmental body may share the results of its alternative dispute resolution program with other governmental bodies and with the Center for Public Policy Dispute Resolution at The University of Texas School of Law. The center may collect and analyze the information and report its conclusions and useful information to governmental bodies and the legislature.

(b) Governmental bodies should, to the extent feasible given differences in their purpose, jurisdiction, and constituency, adopt policies and procedures for alternative dispute resolution that are consistent with the policies and procedures of other governmental bodies.

Added by Acts 1997, 75th Leg., ch. 934, § 1, eff. Sept. 1, 1997. Renumbered from V.T.C.A., Government Code § 2008.055 by Acts 1999, 76th Leg., ch. 62, § 19.01(55), eff. Sept. 1, 1999. Renumbered from V.T.C.A., Government Code § 2008.055 and amended by Acts 1999, 76th Leg., ch. 1352, § 5, eff. Sept. 1, 1999.

## CHAPTER 2003. STATE OFFICE OF ADMINISTRATIVE HEARINGS

### SUBCHAPTER A. GENERAL PROVISIONS

#### § 2003.001. Definitions

In this chapter:

- (1) "Administrative law judge" means an individual who presides at an administrative hearing held under Chapter 2001.
- (2) "Alternative dispute resolution procedure" has the meaning assigned by Section 2009.003.
- (3) "Office" means the State Office of Administrative Hearings.
- (4) "State agency" means:
  - (A) a state board, commission, department, or other agency that is subject to Chapter 2001; and
  - (B) to the extent provided by Title 5, Labor Code, the Texas Workers' Compensation Commission.

Added by Acts 1993, 73rd Leg., ch. 268, § 1, eff. Sept. 1, 1993. Amended by Acts 1995, 74th Leg., ch. 980, § 3.01, eff. Sept. 1, 1995; Acts 1997, 75th Leg., ch. 934, § 2, eff. Sept. 1, 1997; Acts 1999, 76th Leg., ch. 62, § 19.02(9), eff. Sept. 1, 1999; Acts 1999, 76th Leg., ch. 1352, § 7, eff. Sept. 1, 1999.

### SUBCHAPTER B. STATE OFFICE OF ADMINISTRATIVE HEARINGS

#### § 2003.021. Office

(a) The State Office of Administrative Hearings is a state agency created to serve as an independent forum for the conduct of adjudicative hearings in the executive branch of state government. The purpose of the office is to separate the adjudicative function from the investigative, prosecutorial, and policymaking functions in the executive branch in relation to hearings that the office is authorized to conduct.

#### (b) The office:

- (1) shall conduct all administrative hearings in contested cases under Chapter 2001 that are before a state agency that does not employ an individual whose only duty is to preside as a hearings officer over matters related to contested cases before the agency;
- (2) shall conduct administrative hearings in matters for which the office is required to conduct the hearing under other law;
- (3) shall conduct alternative dispute resolution procedures that the office is required to conduct under law; and

- (4) may conduct, for a fee and under a contract, administrative hearings or alternative dispute resolution procedures in matters voluntarily referred to the office by a governmental entity.

(c) The office shall conduct hearings under Title 5, Labor Code, as provided by that title. In conducting hearings under Title 5, Labor Code, the office shall consider the applicable substantive rules and policies of the Texas Workers' Compensation Commission. The office and the Texas Workers' Compensation Commission shall enter into an interagency contract under Chapter 771 to pay the costs incurred by the office in implementing this subsection.

(d) The office shall conduct hearings under the Agriculture Code as provided under Section 12.032, Agriculture Code. In conducting hearings under the Agriculture Code, the office shall consider the applicable substantive rules and policies of the Department of Agriculture.

(e) The office shall conduct all hearings in contested cases under Chapter 2001 that are before the commissioner of public health or the Texas Board of Health or Texas Department of Health.

(f) The office may adopt a seal to authenticate the official acts of the office and of its administrative law judges.

Added by Acts 1993, 73rd Leg., ch. 268, § 1, eff. Sept. 1, 1993. Amended by Acts 1995, 74th Leg., ch. 419, § 3.29, eff. Sept. 1, 1995; Acts 1995, 74th Leg., ch. 980, § 3.02, eff. Sept. 1, 1995; Acts 1997, 75th Leg., ch. 934, § 3, eff. Sept. 1, 1997; Acts 1999, 76th Leg., ch. 85, § 1, eff. Sept. 1, 1999; Acts 1999, 76th Leg., ch. 1411, § 1.01, eff. Sept. 1, 1999.

Amended by Acts 2001, 77th Leg., ch. 1420, § 21.001(65), eff. Sept. 1, 2001.

### **§ 2003.042. Powers of Administrative Law Judge**

(a) An administrative law judge employed by the office or a temporary administrative law judge may:

- (1) administer an oath;
- (2) take testimony;
- (3) rule on a question of evidence;
- (4) issue an order relating to discovery or another hearing or prehearing matter, including an order imposing a sanction;
- (5) issue an order that refers a case to an alternative dispute resolution procedure, determines how the costs of the procedure will be apportioned, and appoints an impartial third party as described by Section 2009.053 to facilitate that procedure;
- (6) issue a proposal for decision that includes findings of fact and conclusions of law;
- (7) if expressly authorized by a state agency rule adopted under Section

- 2001.058(f), make the final decision in a contested case;
- (8) serve as an impartial third party as described by Section 2009.053 for a dispute referred by an administrative law judge, unless one of the parties objects to the appointment; and
  - (9) serve as an impartial third party as described by Section 2009.053 for a dispute referred by a government agency under a contract.

(b) An administrative law judge may not serve as an impartial third party for a dispute that the administrative law judge refers to an alternative dispute resolution procedure.

Added by Acts 1993, 73rd Leg., ch. 268, § 1, eff. Sept. 1, 1993. Amended by Acts 1997, 75th Leg., ch. 605, § 1, eff. Sept. 1, 1997; Acts 1997, 75th Leg., ch. 934, § 4, eff. Sept. 1, 1997; Acts 1997, 75th Leg., ch. 1167, § 2, eff. Sept. 1, 1997; Acts 1999, 76th Leg., ch. 62, § 19.02(10), eff. Sept. 1, 1999; Acts 1999, 76th Leg., ch. 1352, § 8, eff. Sept. 1, 1999.

### **§ 2003.047. Natural Resource Conservation Division**

(j) An administrative law judge hearing a case on behalf of the commission, on the judge's own motion or on motion of a party and after notice and an opportunity for a hearing, may impose appropriate sanctions as provided by Subsection (k) against a party or its representative for:

- (1) filing a motion or pleading that is groundless and brought:
  - (A) in bad faith;
  - (B) for the purpose of harassment; or
  - (C) for any other improper purpose, such as to cause unnecessary delay or needless increase in the cost of the proceeding;
- (2) abuse of the discovery process in seeking, making, or resisting discovery; or
- (3) failure to obey an order of the administrative law judge or the commission.

Added by Acts 1995, 74th Leg., ch. 106, § 1, eff. Sept. 1, 1995. Amended by Acts 1997, 75th Leg., ch. 934, § 5, eff. Sept. 1, 1997; Acts 1999, 76th Leg., ch. 1350, § 6, eff. Sept. 1, 1999.

## **Negotiated Rulemaking Act**

## Questions & Answers About the Negotiated Rulemaking Act

### **What is negotiated rulemaking?**

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

### **Why use negotiated rulemaking?**

The advantages of reg-neg are:

- provides fair and efficient means of exchanging information between various interests during rulemaking;
- improves relationships with regulatory stakeholders;
- increases public participation;
- provides a chance to hear early on critical comments that normally surface after the *Texas Register* proposed rule;
- fewer enforcement difficulties; and
- fewer court challenges and political end-runs around a rule.

### **What other agencies have used negotiated rulemaking?**

Reg-neg has been used extensively by federal and state agencies. Fourteen federal agencies and departments have used the process and similar tools since 1980, as have at least fifteen states. Negotiated rulemaking has been used three times in Texas. The first use was sponsored by the General Land Office to formulate oil spill damages assessment rules; the second was initiated by the Comptroller to design a new timberland tax appraisal manual; and the latest involved regulation of nursing home medicaid beds by the Department of Human Services. Each Texas use has produced a consensus proposal.

### **Are resources available for public interest groups to participate in reg-negs?**

The sponsoring agency may fund certain expenses, typically travel, per diem and technical assistance, for groups with resource constraints. Such groups also may receive assistance from philanthropic entities or from fellow committee members.

### **How is negotiated rulemaking different from traditional rulemaking?**

The negotiated rulemaking process is *supplemental* to all existing rulemaking requirements; an agency using the process must still conform to all APA, notice-and-comment, and other legal requirements. An agency using reg-neg merely adds an intensive, structured negotiation effort to its normal rulemaking procedure.

### **Is negotiated rulemaking appropriate for all rules?**

No. Negotiated rulemaking is not appropriate for some rules. It should only be used when the agency determines, using the criteria provided in Section 2008.052 (d), that the process is appropriate.

**Who gets to participate in a negotiated rulemaking?**

The negotiated rulemaking committee is "convened" by an impartial third party, known as the "convener." This individual identifies all the interests that will be affected by a rule and the organizations that are willing and able to represent these interests on the committee. Participants in a negotiated rulemaking are thus representatives of all the affected interests identified by the convener.

**Does an agency delegate its decisionmaking authority when it uses negotiated rulemaking?**

No. The members of the negotiated rulemaking committee attempt to reach consensus on a proposed rule that they submit to agency decisionmakers. The decisionmakers may choose to pursue the proposal through the APA procedure, particularly if the stakeholders have reached consensus on a rule, but they always retain full authority to promulgate an appropriate regulation.

**Can an agency use negotiated rulemaking to circumvent notice and comment requirements?**

No. A government entity using negotiated rulemaking must comply with all APA, notice-and-comment, and other legal requirements, as it would with any rulemaking.

**What is the procedure outlined by the Negotiated Rulemaking Act?**

The Negotiated Rulemaking Act outlines the following five-step process: 1) Assess the suitability of negotiated rulemaking and convene committee members; 2) Publish notice of the intent to use reg-neg and consider comments; 3) Establish the negotiating committee and appoint the facilitator; 4) Negotiate towards consensus; and 5) Report to the agency.

**Step 1:** The agency assesses whether reg-neg should be used for a particular rulemaking. The agency uses a neutral party or "convener" to objectively evaluate the appropriateness of the process and identify interests that will be affected by the rule. The bill requires that the convener consider certain criteria and report to the agency.

**Step 2:** The agency publishes notice of its intent to use reg-neg and considers input on this decision and on committee make-up.

**Step 3:** If the agency decides to proceed after public comment, the agency uses public input and the convening report to identify a balanced group of stakeholders to form a negotiating committee. The agency also appoints an impartial third party to facilitate the committee's negotiations.

**Step 4:** The committee negotiates for a consensus proposal on the rulemaking. The bill's consensus requirement means that each committee member must concur for there to be a "committee recommendation."

**Step 5:** When the committee concludes its negotiations, it submits a report to the agency. If the committee reaches consensus, the agency may choose to adopt the report as a Proposed Rule, alter it, or reject it. If the committee does not reach consensus, it may forward any information it has compiled to the agency.

**Why would an agency want to build consensus on a rulemaking?**

It is not unusual for an agency to take several years to develop and adopt certain regulations through the traditional rulemaking process. Sometimes these rules are held up by court challenges, through the political process, or because the agency is surprised by adverse comments after publication of the proposed rule. Negotiated rulemaking



increases participation among all affected parties and, as a result, reduces contentiousness, lessens political challenges, improves the technical grounding of rules, decreases the number of enforcement proceedings and reduces post-issuance litigation.

## Commentary on the Negotiated Rulemaking Act

[Updated from *Rau & Sherman's Texas ADR & Arbitration:  
Statutes and Commentary (West, 1997)*]

§ 2008.001	Short Title
§ 2008.002	Definitions
§ 2008.003	Costs of Participating in Negotiated Rulemaking
§ 2008.051	Authority for Negotiated Rulemaking
§ 2008.052	Appointment and Duties of Convener
§ 2008.053	Notice Requirements for Negotiated Rulemakings
§ 2008.054	Appointment and Duration of Negotiated Rulemaking Committee
§ 2008.055	Appointment of Facilitator
§ 2008.056	Duties of Negotiated Rulemaking Committee and Facilitator
§ 2008.057	Confidentiality of Certain Records and Communications
§ 2008.058	Administrative Procedure Act Requirements Unaffected

### History and Purpose

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

Reg-neg has been used by both federal and state agencies since its origination in the early 1980s. At least fourteen federal agencies and departments have used the process since 1980, including such active regulators as the Environmental Protection Agency, Federal Energy Regulatory Commission, Bureau of Land Management, Occupational Safety and Health Administration, Federal Communications Com-

#### What is negotiated rulemaking?

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

mission and Nuclear Regulatory Commission.<sup>13</sup> At least fifteen states have implemented reg-negs and similar formal consensus building processes, among them California, Colorado, Massachusetts, New Mexico, New York and Oklahoma.<sup>14</sup> The core principles of the process have even been adapted by local governments to help develop ordinances and codes.

The Texas Negotiated Rulemaking Act (NR Act), passed during the 75th Legislative Session (1997), encourages Texas agencies to use negotiated rulemaking and outlines how this process should be used. It is permissive, not mandatory, and amends only Section 2008 of the Texas Government Code. The statute is responsive to a 1997 *Texas Performance Review*<sup>15</sup> recommendation and a 1993 *National Performance Review* recommendation to increase the use of negotiated rulemaking by regulatory entities.

Although use of the negotiated rulemaking process has always been consistent with Texas law, passage of the NR Act makes a formal declaration to this effect, provides a broad and bipartisan endorsement of the process from the Legislature and the Governor, and establishes important protections, guarantees and minimum requirements for use of the process. Negotiated rulemaking had been used twice in Texas prior to passage of the NR Act, and both uses were successful in producing consensus proposed rules. The first use was sponsored jointly by the General Land Office, Texas Natural Resource Conservation Commission and Texas Parks and Wildlife Department to formulate oil spill damages assessment rules. The second use was initiated by the Comptroller to design a new timberland tax appraisal manual.

#### **Why use negotiated rulemaking?**

Some of the advantages of reg-neg are:

- provides fair and efficient means of exchanging information between various interests during a rulemaking;
- improves relationships with regulatory stakeholders;
- increases public participation;
- provides a chance to hear early on critical comments that normally surface after the *Texas Register* proposed rule publication;
- fewer enforcement difficulties; and
- fewer court challenges and political end-runs around a rule.

#### **What other agencies have used negotiated rulemaking?**

Reg-neg has been used extensively by federal and state agencies. Fourteen federal agencies and departments have used the process and similar tools since 1980, as have at least fifteen states. As of 1998, negotiated rulemaking has also been used three times in Texas. The first use was sponsored by the General Land Office to formulate oil spill damages assessment rules; the second was initiated by the Comptroller to design a new timberland tax appraisal manual; and the latest involved regulation of nursing home medicaid beds by the Department of Human Services. Each Texas use has produced a consensus proposal.

<sup>13</sup> Negotiated Rulemaking Sourcebook (1995), Administrative Conference of the United States, pp. 375-398; also reproduced in the Texas Negotiated Rulemaking Deskbook (1996), Center for Public Policy Dispute Resolution, pp. 50-51.

<sup>14</sup> Texas Negotiated Rulemaking Deskbook at 51.

<sup>15</sup> John Sharp, Comptroller, *Disturbing the Peace, The Challenge of Change in Texas Government*, Vol. 1, December 1996.

The Center for Public Policy Dispute Resolution has facilitated two negotiated rulemakings since the passage of the NR Act. In 1997, shortly after the passage of the NR Act, the Center assisted the Department of Human Services (DHS) in a negotiated rulemaking to develop rules establishing procedures for de-certification and reallocation of Medicaid beds in nursing facilities. The regulatory stakeholder negotiating committee reached consensus after three months of work and provided proposed rules to DHS. In 2000, the Center assisted the Public Utility Commission of Texas (PUC) in a negotiated rulemaking to develop a rule for customer choice Pilot Programs associated with electric utility deregulation. After two months of meetings, this stakeholder committee provided to the PUC a consensus-based proposed rule covering all but two issues assigned to the committee.

The NR Act outlines the following five-step process for negotiated rulemaking in Texas: 1) Assess the suitability of negotiated rulemaking and plan the committee structure; 2) Publish notice of the intent to use reg-neg and consider comments; 3) Establish the negotiating committee and appoint the facilitator; 4) Negotiate towards consensus; and 5) Report to the agency. Practical guidance and specialized legal analysis for use of the negotiated rulemaking process in Texas can also be found in the *Texas Negotiated Rulemaking Deskbook*, produced jointly by the Advisory Committee on Negotiated Rulemaking in Texas and the Center for Public Policy Dispute Resolution.<sup>16</sup>

## **SUBCHAPTER A. GENERAL PROVISIONS**

### **Section 2008.001. Short title**

This section states the title of the chapter as the "Negotiated Rulemaking Act," referred to herein as the NR Act.

### **Section 2008.002. Definitions**

This section introduces a unique definition of "state agency" and incorporates by reference to Section 2001.003 of the APA, definitions of the terms "party," "person," and "rule."

The NR Act's definition of "state agency" is the same as that found in Section 2009.003 of the Governmental Dispute Resolution Act (GDR Act). This definition includes not only state agencies as traditionally understood, but also the Office of

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<sup>16</sup> Members of the Advisory Committee on Negotiated Rulemaking in Texas are as follows: Karey Barton, Office of the Comptroller; David Bolduc, Texas Natural Resource Conservation Commission; David Brown, General Services Commission; Martin Cherry, Office of the Comptroller; Ingrid K. Hansen, General Land Office; Mary Keller, Department of Insurance; Paul Leche, Department of Human Services; Suzanne Marshall, Office of the Attorney General; Susan Steeg, Department of Health; Carole Vogel, Public Utilities Commission; Martin Wilson, Public Utilities Commission; Margaret Gosselink, Attorney/Mediator; Tom Reavley, Attorney/Mediator; Mike Schless, Attorney/Mediator; Howard Seitzman, Attorney/Mediator; Mel Waxler, Attorney/Mediator.

Attorney General, institutions of higher education and the State Office of Administrative Hearings (SOAH). This broadened definition ensures that each "agency" may take advantage of the Act and that there is no ambiguity regarding application of the NR Act to those listed entities not normally included in the definition. Although institutions of higher education do not generally engage in rulemaking under the APA, there are areas of the Office of Attorney General, such as the Child Support Division, which do make rules.

### **Section 2008.003. Costs of Participating in a Negotiated Rulemaking**

This section provides guidance on how costs of participating in a negotiated rulemaking are to be covered. Subsection 2008.003(a) establishes the general rule that each party to a negotiated rulemaking committee is responsible for its own costs. Subsection 2008.003(b) qualifies this requirement relative to groups facing resource constraints: it authorizes, but does not require, agencies to help defray certain costs of parties when the participation of such groups is deemed necessary by the agency "for the adequate representation of an affected interest," and when the group can certify to the agency their financial need. This qualifying provision makes clear that the agency may in its discretion and within its appropriate budgetary means provide assistance to public interest groups, local governments and others who are of limited means but who represent unique interests that otherwise would not be able to have a voice in negotiations.

#### **Are resources available for public interest groups to participate in reg-negs?**

The sponsoring agency may fund certain expenses, typically travel, per diem and technical assistance, for groups with resource constraints. Such groups also may receive assistance from philanthropic entities or from fellow committee members.

The mechanism established in Subsection 2008.003(b) is appropriate given the Act's requirement of full and effective participation by affected parties and the fact that participation in a negotiated rulemaking can require substantial expenditures. Given that many rules affect parties in diverse geographic areas of Texas, for instance, it will not be unusual for some participants to incur significant travel costs just to attend negotiating committee meetings. Parties may incur other costs as well, such as those associated with gaining subject matter familiarity and obtaining independent sources of subject matter and technical expertise. Subsection 2008.003(b) lists the specific costs which an agency may choose to fund when conditions are met. These items track exactly those listed in the federal negotiated rulemaking statute, which include technical assistance expenses, travel and per diem, and a committee member's reasonable rate of compensation.

Subsection 2008.003(c) directs that the sponsoring agency shall provide "appropriate administrative support" to the negotiating committee, which will include the range of traditional administrative expenses associated with conducting large meetings over weeks or months dealing with complex materials.

## SUBCHAPTER B. PROCEDURES FOR NEGOTIATED RULEMAKING

### Section 2008.051. Authority for Negotiated Rulemaking

This section formally clarifies the authority of Texas agencies to engage in the negotiated rulemaking or “reg-neg” process as outlined in the NR Act.

### Section 2008.052. Appointment and Duties of Convener

Section 2008.052 outlines the first step in a negotiated rulemaking, which involves the agency performing an objective assessment as to whether reg-neg should be used for a particular rulemaking. This assessment is known as the “convening” step in negotiated rulemaking terminology, and the party assisting the agency to conduct the assessment is known as the “convener.” The convener objectively surveys the regulatory landscape for the contemplated rulemaking and reports his or her findings to the agency.

Subsection 2008.052(a) requires the agency to use a convener to objectively evaluate the appropriateness of the process and to identify interests that will be affected by the rule. Subsection 2008.052(b) states that the convener may be an agency employee or any other individual, but must have no interest in the outcome and must be impartial and unbiased.

Although a convener is not required to have the qualifications set for an “impartial third party” under Section 154.052 of the Texas ADR Procedures Act, it is advisable as a practical matter that conveners possess these qualifications. Because the convener collects information about the interests, issues and parties involved in the rulemaking, he or she is often asked to serve as the facilitator for the negotiated rulemaking committee. Using the same individual as both convener and facilitator can save costs, since the facilitator will not need to take time to become familiar with the subject matter if he or she has been the convener. Under Section 2008.055 of the NR Act, however, the facilitator is required to have the qualifications provided in Section 154.052. As a result, ensuring that the convener selected meets the Section 154.052 requirements can be helpful as the process moves forward.

#### How is negotiated rulemaking different from traditional rulemaking?

The negotiated rulemaking process is *supplemental* to all existing rulemaking requirements; an agency using the process must still conform to all APA, notice-and-comment, and other legal requirements. An agency using reg-neg merely adds an intensive, structured negotiation effort to its normal rulemaking procedure.

#### Is negotiated rulemaking appropriate for all rules?

No. Negotiated rulemaking is not appropriate for some rules. It should only be used when the agency determines, using the criteria provided in Section 2008.052(d), that the process is appropriate.

Subsections 2008.052 (c) and (d) outline the tasks that the convener must accomplish. The convener is to "assist the agency in identifying persons who are likely to be affected by the proposed rule, including persons who oppose the issuance of a rule," and discuss with those persons their willingness to participate in negotiations, their opinion about the issues involved and the appropriateness of negotiating them, and the identity of any additional affected parties. By requiring that the convener meet with persons "opposed to the issuance of a rule," the Act clearly conveys the drafters' intent that parties of many different perspectives on the rulemaking's subject matter be consulted during the convening.

**Who gets to participate in a negotiated rulemaking?**

The negotiated rulemaking committee is "convened" by an impartial third party, known as the "convener." This individual identifies all the interests that will be affected by a rule and the organizations that are willing and able to represent these interests on the committee. Participants in a negotiated rulemaking are thus representatives of all the affected interests identified by the convener.

Subsection 2008.052(d) requires that the convener submit a recommendation to the agency as to whether negotiated rulemaking is appropriate for the rule. The recommendation is to be accompanied by a report to the agency that includes objective analysis of the following minimum list of criteria:

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

The agency receives the convener's report addressing these items and uses this information to help it determine whether to proceed with the next step.

**Section 2008.053. Notice Requirements for Negotiated Rulemakings**

This section outlines the two junctures at which an agency using negotiated rulemaking must give notice: (1) upon initiation of the negotiated rulemaking, and (2) upon publication of a proposed rule developed using the process.

If an agency chooses to proceed with a reg-neg after receiving the convener's report, Subsection 2008.053(a) requires that the agency publish notice of its intent to use the process and to consider input on its proposal and on committee make-up. This publication of notice constitutes the second step in a negotiated rulemaking. Notice must be made in the *Texas Register* and in "appropriate media" and must include the following items: a statement that the agency intends to use the process; a description of the scope and subject of the rule to be developed; a description of the issues involved, interests affected, and individuals to be appointed to the negotiating committee; and a description of the procedure through which a party may apply for appointment to the committee.

Where an agency has used negotiated rulemaking to develop a proposed rule, Subsection 2008.053(b) outlines additional notice requirements. In a statement accompanying its *Texas Register* notice of the proposed rule, the agency must declare that the process was used, that the report of the negotiating committee is public information and the location at which the report may be obtained by a member of the public.

#### **Section 2008.054. Appointment and Duration of Negotiated Rulemaking Committee**

Sections 2008.054 and 2008.055 outline step three of the negotiated rulemaking process, in which the negotiating committee is established and the facilitator appointed.

Subsection 2008.054(a) states that after an agency considers any comments received from its notice publication, the agency finally determines whether to proceed with the process and appoints the negotiating committee. In appointing the negotiating committee, Subsection 2008.054(b) requires the agency to "consider the appropriate balance between representatives of affected interests," and Subsection 2008.054(c) directs the agency to appoint a representative of the agency and representatives of the "interests identified by the agency that are likely to be affected by the proposed rule." The agency no doubt will draw heavily from its convening report in determining who the "affected" interests are. Taken together, subsections (b) and (c) reflect clearly the drafters' intent to require that committees be both balanced between the full range of different perspectives on the rulemaking and fully representative of all the interests which will be affected by the rule.

Subsection 2008.054(c) also includes a provision excepting negotiated rulemaking committees from Texas Government Code Section 2110.002 (formerly Article 6252-33 Revised Statutes),<sup>17</sup> which provides definitions and guidelines for state agency advisory committees. Subsection 2008.054 states that "Article 6252-33, Revised Statutes, [sic] does not apply to the size or composition of the committee or to the agency's ability to reimburse expenses of committee members" under the NR Act. This language

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<sup>17</sup> During the 75<sup>th</sup> Legislature, Article 6252-33 was repealed and codified at Section 2110.002 of the Government Code as part of the ongoing codification of Texas statutes. No revisions were made to the NR Act, so subsection 2008.054(c) still includes the statutory citation.



anticipates that some might interpret negotiated rulemaking committees as falling under the definition of advisory committees established by Section 2110.002, and that, consequently, negotiated rulemaking committees would be subject to the advisory committee guidelines also provided therein. Relative to size, composition and reimbursement, the Section 2110.002 guidelines restrict the size of advisory committees to no more than 24 members, require that the advisory committee's composition "provide a balanced representation between" regulated industries and consumers of those industries, and severely restrict reimbursement of most committee member expenses. Subsection 2008.054(c) provides that negotiated rulemaking committees are not subject to these restrictions.

Exception of negotiated rulemaking committees from these three guidelines reflects the tension they pose with various provisions of the NR Act. As to the 24 member size restriction, Subsection 2008.054(c) of the NR Act directs that a negotiated rulemaking committee should include all individuals necessary "to represent the interests identified by the agency that are likely to be affected by the proposed rule." Obviously, inclusion of all appropriate interests could in some cases mean that more than 24 members are required. Limiting the group arbitrarily to 24 members could make complying with the NR Act provisions problematic.

As to composition, Subsection 2008.054(c) requires agencies to include representatives of each interest "likely to be affected by the proposed rule" and Subsection 2008.054(b) requires agencies to consider "the appropriate balance between representatives of affected interests" when appointing a negotiated rulemaking committee. Section 2110.002 would require that agencies balance the negotiated rulemaking committee between two likely subgroups among the many interests affected: regulated industries and their consumers. Applying this requirement to negotiated rulemakings would likely skew the agencies' efforts to form a committee that is representative of and balanced between all the affected groups. The decision to except this Section 2110.002 requirement from reg-negs also likely reflects the Legislature's recognition that negotiated rulemaking committees operate on a consensus basis, as required by Subsection 2008.056(b), and not by vote. In a majority-rule advisory committee setting where key decisions are decided by vote, the Legislature determined that numeric balance among the two specified groups of committee members is required.

Finally, as to reimbursement, Section 2110.002 restrictions are clearly in conflict with NR Act provisions in Section 2008.003, which explicitly authorize the agency to underwrite certain costs of parties with limited means. Placing severe restrictions upon an agency's ability to underwrite the specific items authorized by Section 2008.003 could seriously impede the agency's ability to obtain representation of interests facing resource constraints, such as public interest groups and local governments.

Subsection 2008.054(d) states that unless a negotiated rulemaking committee agrees to an earlier date, it will be automatically abolished on adoption of the proposed rule.

### **Section 2008.055. Appointment of Facilitator**

This section outlines the procedures and requirements for appointing a facilitator for the negotiated rulemaking committee, a portion of step three in the negotiated rulemaking process. Subsection 2008.055(a) states that an agency must appoint a facilitator for the committee and may use one of its own employees, so long as that individual is not also the agency representative to the negotiating committee, or use another state employee or a private individual as facilitator. The subsection also establishes that although the agency appoints the facilitator, that appointment is subject to approval by the negotiating committee, and that the facilitator serves at the will of the committee.

Subsection 2008.055(b) provides the minimum requirements for negotiated rulemaking facilitators by reference to several sections of the ADR Procedures Act. Facilitators must have the qualifications set out in Subsections 154.052 (a) and (b) of the ADR Procedures Act, are subject to the standards and duties prescribed by Subsection 154.053 (a) and (b) of the ADR Procedures Act, enjoy the qualified immunity provided by Section 154.055 of the ADR Procedures Act, and shall not have financial or other interests in the outcome.

### **Section 2008.056. Duties of Negotiated Rulemaking Committee and Facilitator**

Step four, in which the facilitator assists the committee in negotiating towards a consensus proposal on the rulemaking, and step five, where the committee hands off the report to the agency, are both outlined in Section 2008.056. Subsection 2008.056(a) establishes the duties of the facilitator, which are to preside over the meeting, establish committee

procedures and assist the parties in negotiating towards consensus as needed, including using alternative dispute resolution processes to help the parties address issues. Consistent with mediation tenets, Subsection 2008.056(c) directs that the facilitator shall encourage the parties towards consensus, but may not compel or coerce agreement.

Subsection 2008.056(b) establishes that negotiated rulemaking committees operate on a consensus basis and that consensus is to be defined as unanimity, unless the committee unanimously decides upon a different definition. Inclusion of this provision in the statute means that even if a negotiating committee were to adopt a different basis of operation in its bylaws or protocols, such measure would be invalid unless the committee members had agreed to its adoption unanimously.

When the committee concludes its negotiations, step five requires that it submit a report to the agency. Subsection 2008.056(d) outlines what this report must include. If

<p><b>Does an agency delegate its decisionmaking authority when it uses negotiated rulemaking?</b></p> <p>No. The members of the negotiated rulemaking committee attempt to reach consensus on a proposed rule that they submit to agency decisionmakers. The decisionmakers may choose to pursue the proposal through the APA procedure, particularly if the stakeholders have reached consensus on a rule, but they always retain full authority to promulgate an appropriate regulation.</p>
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the committee reaches consensus, the report will include the text of the proposed rule. If the committee does not reach consensus, it forwards to the agency the issues on which consensus was reached, the issues that remain unsolved, and any other information the committee considers important.

### **Section 2008.057. Confidentiality of Certain Records and Communications**

Although not listed among the particular ADR applications in the ADR Procedures Act, negotiated rulemaking is in practice a large-scale mediation focused on resolving differences among stakeholders and facilitated by an impartial third party. Reflecting this fact, the same arguments for providing confidentiality protections in civil-based mediations under the ADR Procedures Act and in governmental mediations under the GDR Act apply to reg-negs. The need for minimum confidentiality protections, both in the context of discovery and open government provisions, is no less great when applied to rulemaking disputes than any others. The arguments supporting this need and balancing it with the requirements of open government have been documented in a number of venues, including the relevant sections of this volume, and need not be reproduced again here.

The confidentiality provisions of the NR Act are contained in Section 2008.057. These provisions share much in common with counterpart provisions of the GDR Act, which are best understood (and described in the *Commentary* to that statute) as operating in three tiers: Tier I (Subsections 2008.057(a-b)), application of ADR Procedures Act confidentiality protections to negotiated rulemaking committees; Tier II (Subsection 2008.057(c)), designation of narrow, specific confidentiality provisions that serve as Public Information Act exceptions for certain items; and Tier III (Subsection 2008.057(d)), clarifications regarding discoverability and availability of convener and negotiating committee reports. The tiers are “stacked” one upon another: Tier I establishes the basis for reg-neg confidentiality, Tier II builds upon Tier I by addressing the Texas Public Information Act, and Tier III modifies the Tier II provisions. The NR Act confidentiality protections are slightly narrower than those the Legislature deemed appropriate for government ADR in the GDR Act.

In the context of a negotiated rulemaking, confidentiality will be affected by the fact that most reg-negs are conducted in meetings open to the public, even when an agency determines, as is typically the case, that the Open Meetings Act does not apply. Parties will have no basis for asserting confidentiality for comments they have made in an open forum. As a result, the confidentiality provisions established in Section 2008.057 deal with information and communications shared in caucuses between the facilitator and committee members, among members and in private conversations between the facilitator and a committee member.

***Tier I: Subsections 2008.057 (a) and (b).*** Section 2008.057(a) of the NR Act applies the provisions of two sections of the ADR Procedures Act, Sections 154.053 and 154.073, to the communications, records, conduct, and demeanor of the impartial third party and the disputants.

Section 154.053 deals with the impartial third party. The section prohibits coercion of settlement by an impartial third party and prohibits impartial third parties from disclosing to other parties, or to anyone else, information given in confidence and other communications made during the procedure. These provisions strictly limit a party's ability to discover information or require testimony from an impartial third party through court action.

Section 154.073 of the Texas ADR Procedures Act generally allows disputants to communicate with the impartial third party and with each other in confidence and without fear that what they say will be used against them later in court or hearing. Subsection 154.073 (a) and (b) protections direct that (1) communications relating to the dispute made by a participant during an ADR procedure are confidential, not subject to disclosure and may not be used as evidence against the participant in a later proceeding; and (2) any record made at an ADR procedure is confidential, and neither the participants nor the third party may be required to testify or be subject to process requiring disclosure of this information. Important limitations on these protections in the NR Act are described below.

An argument could be made regarding language in Subsection 154.073 (a) that an agency may have difficulty using certain information gained through the negotiated rulemaking process. Insofar as information shared with the agency during negotiating committee meetings may constitute a "communication" under Subsection 154.073(a) that is "confidential," a party to the negotiations could assert confidentiality to prevent disclosure by the agency. Of course, information shared in public discussions could not qualify as "confidential." In the context of a rulemaking, the agency would likely have an interest in using information from negotiations to establish the basis for the rule when it is proposed. Under some interpretations of Section 154.073, there is thus a risk that the agency could be in violation of that clause when it uses this information later in the rulemaking process. It seems unlikely that the drafters intended this interpretation, given that the intent of the process is to assist the agency in better developing rules in part by obtaining more information relevant to the rulemaking. However, this risk should be addressed in the negotiating committee's bylaws or protocols by clarifying a procedure for parties to waive any confidentiality relative to information shared with the agency that will be needed later by the agency.

Subsections (c) and (d) of Section 154.073 of the ADR Procedures Act include important limits on the protections granted in (a) and (b). Subsection (c) states that any oral communication or written material that would have been discoverable or admissible independent of the ADR procedure remains admissible and discoverable; in other words, a disputant cannot 'offensively' hide material by simply introducing it during an ADR procedure. Subsection 154.073(d) states that when the provisions of Subsections (a) and (b) conflict with "other legal requirements for disclosure of communications or materials," the specific matter in question may be submitted to the court of jurisdiction for a ruling. The court may review the material *in camera* to make its determination.

Subsection 2008.057(b) of the NR Act modifies Subsection 154.073(d) of the ADR Procedures Act. As stated above, Subsection 154.073(d) directs that the court of relevant jurisdiction should provide a ruling when there is a conflict of laws relating to disclosure. Subsection 2008.057(b) of the NR Act replaces the "court of relevant jurisdiction" with

the "attorney general, subject to review by a Travis County district court." Since disclosure questions regarding the Public Information Act and negotiated rulemaking are unlikely to occur in the context of a lawsuit, it is appropriate to require determination of such questions by the attorney general. The language in this subsection has the effect of clarifying the process for appropriately resolving these questions.

***Tier II: Subsection 2008.057(c).*** Tier II provisions build upon Tier I measures to ensure that confidentiality protections apply to both discovery and Public Information Act disclosure avenues for obtaining information about the negotiated rulemaking.

Subsections 2008.057 (c)(1) and (c)(2) establish the Public Information Act exception by declaring that the designated information is "confidential." Under Section 552.101 of the Public Information Act, information "considered to be confidential by law, either constitutional, statutory, or by judicial decision," is excepted from the public information provisions. In stating that the specified items are confidential "Notwithstanding Section 154.073(d)" of the ADR Procedures Act, the provisions of Subsection 2008.057(c) direct that the items are to be considered confidential and that accordingly there are no "conflicts with other legal requirements," including the Public Information Act.

Subsection 2008.057(c) outlines confidentiality provisions for records of communications. It provides that, notwithstanding the authority of review granted to the courts in Subsection 154.073(d) of the Texas ADR Procedures Act and modified by Subsection 2008.057(b) of the NR Act, certain information is to remain confidential unless all appropriate parties agree to the disclosure. The information specifically excepted from the Public Information Act includes only: a private communication, and a record of that private communication, between a facilitator and a member or members of the negotiating committee (Subsection 2008.057(c)(1)); and the notes of the impartial third party (Subsection 2008.057(c)(2)). The phrase "private communication...between a facilitator and a member or members" of the negotiating committee refers only to private caucuses between the facilitator and a committee member or group of committee members, comprising less than the whole committee.

***Tier III: Subsection 2008.057(d).*** Tier III provisions clarify the treatment of the convener's and the negotiated rulemaking committee's reports relative to Tier II. Subsection 2008.057(d) states that "the report and recommendations of a convener and a negotiating committee are public information and available on request to any member of the public." This clause makes the referenced information discoverable and available to any interested person.

## **Section 2008.058. Administrative Procedure Act Requirements Unaffected**

This section states explicitly that the use of negotiated rulemaking does not affect in any way the applicability of the APA to an agency or to the agency's responsibility to conform with any rulemaking procedures required by the APA.

**Can an agency use negotiated rulemaking to circumvent notice and comment requirements?**

No. A government entity using negotiated rulemaking must comply with all APA, notice-and-comment, and other legal requirements, as it would with any rulemaking.

## CHAPTER 2008. NEGOTIATED RULEMAKING

### SUBCHAPTER A. GENERAL PROVISIONS

#### § 2008.001. Short Title

This chapter may be cited as the Negotiated Rulemaking Act.

Added by Acts 1997, 75th Leg., ch. 1315, § 1, eff. Sept. 1, 1997.

#### § 2008.002. Definitions

In this chapter:

(1) "State agency" means an officer, board, commission, department, or other agency in the executive branch of state government with statewide jurisdiction that makes rules.

The term includes:

- (A) the attorney general;
- (B) an institution of higher education as defined by Section 61.003, Education Code; and
- (C) the State Office of Administrative Hearings.

(2) The terms "party," "person," and "rule" have the meanings assigned by Section 2001.003.

Added by Acts 1997, 75th Leg., ch. 1315, § 1, eff. Sept. 1, 1997.

#### § 2008.003. Costs of Participating in Negotiated Rulemaking

(a) A member of a negotiated rulemaking committee established under Subchapter B is responsible for the member's own costs in serving on the committee, except as provided by Subsection (b).

(b) The state agency that established the negotiated rulemaking committee may pay a member's technical assistance expenses and reasonable travel and per diem costs related to the member's service on the committee at the rate set in the General Appropriations Act for state employees and may provide a reasonable rate of compensation to the member if:

- (1) the member certifies that the member lacks sufficient financial resources to participate as a member of the committee; and
- (2) the agency determines that the member's service on the committee is necessary for the adequate representation of an affected interest.

(c) The state agency that established the negotiated rulemaking committee shall provide appropriate administrative support to the committee.

Added by Acts 1997, 75th Leg., ch. 1315, § 1, eff. Sept. 1, 1997.

## **SUBCHAPTER B. PROCEDURES FOR NEGOTIATED RULEMAKING**

### **§ 2008.051. Authority for Negotiated Rulemaking**

A state agency may engage in negotiated rulemaking to assist it in drafting a proposed rule by following the procedures prescribed by this chapter.

Added by Acts 1997, 75th Leg., ch. 1315, § 1, eff. Sept. 1, 1997.

### **§ 2008.052. Appointment and Duties of Convener**

(a) A state agency that proposes to engage in negotiated rulemaking shall appoint a convener to assist the agency in determining whether it is advisable to proceed.

(b) The state agency may appoint an agency employee or contract with another individual to serve as the convener. The convener may not have a financial or other interest in the outcome of the rulemaking process that would interfere with the person's impartial and unbiased service as the convener.

(c) The convener shall assist the agency in identifying persons who are likely to be affected by the proposed rule, including persons who oppose the issuance of a rule. The convener shall discuss with those persons or their representatives:

- (1) whether they are willing to participate in negotiated rulemaking;
- (2) whether the agency should engage in negotiated rulemaking to develop the proposed rule;
- (3) which issues that a negotiated rulemaking committee should address; and
- (4) whether there are other persons the convener needs to identify who may be affected by the proposed rule.

(d) The convener shall then recommend to the agency whether negotiated rulemaking is a feasible method to develop the proposed rule and shall report to the agency on the relevant considerations, including:

- (1) the number of identifiable interests that would be significantly affected by the proposed rule;
- (2) the probability that those interests would be adequately represented in a negotiated rulemaking;
- (3) the probable willingness and authority of the representatives of affected interests to negotiate in good faith;
- (4) the probability that a negotiated rulemaking committee would reach a unanimous or a suitable general consensus on the proposed rule;
- (5) the probability that negotiated rulemaking will not unreasonably delay notice and eventual adoption of the proposed rule;



- (6) the adequacy of agency and citizen resources to participate in negotiated rulemaking;
- (7) the probability that the negotiated rulemaking committee will provide a balanced representation between public and regulated interests; and
- (8) the willingness of the agency to accept the consensus of a negotiated rulemaking committee as the basis for the proposed rule.

Added by Acts 1997, 75th Leg., ch. 1315, § 1, eff. Sept. 1, 1997.

### **§ 2008.053. Notice Requirements for Negotiated Rulemakings**

(a) After considering the convener's recommendation and report, a state agency that intends to engage in negotiated rulemaking shall publish timely notice of its intent in appropriate media and file timely notice of its intent with the secretary of state for publication in the Texas Register. The notice must include:

- (1) a statement that the agency intends to engage in negotiated rulemaking;
- (2) a description of the subject and scope of the rule to be developed;
- (3) a description of the known issues to be considered in developing the rule;
- (4) a list of the interests that are likely to be affected by the proposed rule;
- (5) a list of the individuals the agency proposes to appoint to the negotiated rulemaking committee to represent the agency and affected interests;
- (6) a request for comments on the proposal to engage in negotiated rulemaking and on the proposed membership of the negotiated rulemaking committee; and
- (7) a description of the procedure through which a person who will be significantly affected by the proposed rule may, before the agency establishes the negotiated rulemaking committee, apply to the agency for membership on the committee or nominate another to represent the person's interests on the committee.

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

- (1) negotiated rulemaking was used in developing the proposed rule; and
- (2) the report of the negotiated rulemaking committee is public information and the location at which the report is available to the public.

Added by Acts 1997, 75th Leg., ch. 1315, § 1, eff. Sept. 1, 1997.

### **§ 2008.054. Appointment and Duration of Negotiated Rulemaking Committee**

(a) After considering comments it receives in response to the notice of proposed negotiated rulemaking, a state agency that intends to proceed shall establish a negotiated rulemaking committee and appoint the members of the committee.

(b) A state agency shall consider the appropriate balance between representatives of affected interests in appointing the negotiated rulemaking committee.

(c) The state agency shall appoint individuals to the committee to represent the agency and appoint other individuals to the committee to represent the interests identified by the agency that are likely to be affected by the proposed rule. Article 6252-33, Revised Statutes, does not apply to the size or composition of the committee or to the agency's ability to reimburse expenses of committee members under Section 2008.003(b).

(d) The committee is automatically abolished on the adoption of the proposed rule, unless the committee or the state agency after consulting the committee specifies an earlier abolition date.

Added by Acts 1997, 75th Leg., ch. 1315, § 1, eff. Sept. 1, 1997.

#### **§ 2008.055. Appointment of Facilitator**

(a) Concurrently with its establishment of the negotiated rulemaking committee, a state agency shall appoint a facilitator. The agency may appoint an agency employee, subject to Subdivision (b)(3), or contract with another state employee or private individual to serve as the facilitator. The agency's appointment of the facilitator is subject to the approval of the negotiated rulemaking committee and the facilitator serves at the will of the committee.

(b) The facilitator:

- (1) must possess the qualifications required for an impartial third party under Section 154.052(a) and (b), Civil Practice and Remedies Code;
- (2) is subject to the standards and duties prescribed by Section 154.053(a) and (b), Civil Practice and Remedies Code, and has the qualified immunity prescribed by Section 154.055, Civil Practice and Remedies Code, if applicable;
- (3) shall not be the person designated to represent the agency on the negotiated rulemaking committee on substantive issues related to the rulemaking; and
- (4) shall not have a financial or other interest in the outcome of the rulemaking process that would interfere with the person's impartial and unbiased service as the facilitator.

Added by Acts 1997, 75th Leg., ch. 1315, § 1, eff. Sept. 1, 1997.

#### **§ 2008.056. Duties of Negotiated Rulemaking Committee and Facilitator**

(a) The facilitator shall preside over meetings of the negotiated rulemaking committee and assist the members of the committee:

- (1) to establish procedures for conducting negotiations; and

(2) to discuss, negotiate, mediate, and employ other appropriate alternative dispute resolution processes to arrive at a consensus on the proposed rule.

(b) It is presumed that the committee has reached a consensus on a matter only if the consensus is unanimous, unless the committee unanimously:

(1) agrees to define a consensus to mean a general rather than a unanimous consensus; or

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

(c) The facilitator shall encourage the members of the committee to reach a consensus but may not compel or coerce the members to do so.

(d) At the conclusion of the negotiations, the committee shall send a written report to the agency that:

(1) contains the text of the proposed rule, if the committee reached a consensus on the proposed rule; or

(2) specifies the issues on which the committee reached consensus, the issues that remain unsolved, and any other information, recommendations, or materials that the committee considers important, if the committee did not reach a consensus on the proposed rule.

Added by Acts 1997, 75th Leg., ch. 1315, § 1, eff. Sept. 1, 1997.

### **§ 2008.057. Confidentiality of Certain Records and Communications**

(a) Sections 154.053 and 154.073, Civil Practice and Remedies Code, apply to the communications, records, conduct, and demeanor of the facilitator and the members of the negotiated rulemaking committee as if the negotiated rulemaking were a dispute being resolved in accordance with Chapter 154, Civil Practice and Remedies Code.

(b) In the negotiated rulemaking context the attorney general, subject to review by a Travis County district court, decides in accordance with Section 154.073(d), Civil Practice and Remedies Code, whether a communication or material subject to Section 154.073(d) is confidential, excepted from required disclosure, or subject to required disclosure.

(c) Notwithstanding Section 154.073(e), Civil Practice and Remedies Code:

(1) a private communication and a record of a private communication between a facilitator and a member or members of the committee are confidential and may not be disclosed unless the member or members of the committee, as appropriate, consent to the disclosure; and

(2) the notes of a facilitator are confidential except to the extent that the notes consist of a record of a communication with a member of the committee who has consented to disclosure in accordance with Subdivision (1).

(d) The report and recommendations of a convener and a negotiating committee are public information and available on request to any member of the public.

Added by Acts 1997, 75th Leg., ch. 1315, § 1, eff. Sept. 1, 1997. Amended by Acts 1999, 76th Leg., ch. 1352, § 4, eff. Sept. 1, 1999.

**§ 2008.058. Administrative Procedure Act Requirements Unaffected**

(a) This chapter does not affect the rulemaking requirements prescribed by Chapter 2001.

(b) A state agency that intends to proceed with the rulemaking process after receiving the report of the negotiated rulemaking committee shall proceed in accordance with the requirements prescribed by Subchapter B, Chapter 2001.

Added by Acts 1997, 75th Leg., ch. 1315, § 1, eff. Sept. 1, 1997.