

# Report of Survey Results of Alternative Dispute Resolution Use in Texas State Agencies

## ACKNOWLEDGMENTS

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#### **EXECUTIVE SUMMARY**

The Center for Public Policy Dispute Resolution (CPPDR) at The University of Texas School of Law was created in 1993 and serves as a resource to governmental agencies, courts, and practitioners for the planning, design and implementation of appropriate alternative dispute resolution processes and to the private sector regarding disputes having an impact on public policy. In 1997, the Governmental Dispute Resolution Act authorized the Center to collect and analyze information about state agencies' ADR programs and report its conclusions and useful information to state agencies and the legislature. In August of 1998, the Center sent a survey to 151 state agencies to gather information about the current level of alternative dispute resolution use in state government. The survey was divided into two parts: Part I of the survey (referred to as "Employment") was sent to the agencies' human resources director. Part II

of the survey (referred to as "Legal") was sent to the agencies' in-house general counsel.

This executive summary provides a general overview of the survey findings. Additionally, in an effort to make the information in this report as accessible as possible, a summary of the data in each subsection is provided in italicized paragraphs following the subsection headings. By sending out this survey, the Center wanted to learn:

**1) Whether state agency use of ADR processes had increased since 1996:**

The Center found that the use of ADR processes within state government has increased since 1996. The greatest category of increase is in the employment area of agency operations, with agencies reporting a 41% increase in ADR use. The majority of agencies responding to the Legal portion of the survey reported that ADR use had remained about the same in their agency. However, there was a 24% increase in ADR use among respondents to the Legal section, which is due primarily to ADR referrals by courts during the course of litigation and a small increase in ADR referrals in the course of contested cases.

**2) Whether and to what extent ADR was being used by state agencies in the areas of employment, contracts, rulemaking, contested cases, and litigation:**

ADR is being used by state agencies in the areas of employment, contracts, rulemaking, contested cases, and litigation but the amount of ADR use varies in each of these categories.

**Employment**

The use of ADR processes in employment disputes increased 41% since 1996. Over one-third of the responding agencies use ADR in attempting to resolve employment disputes. Most significantly, 100% of reporting agencies who employ at least 1500 people utilize one or more ADR processes in this area. The

overwhelming ADR process of choice was mediation. Small agencies appear least likely to use ADR for employment disputes. The larger agencies are most likely to use ADR in these types of disputes. They also employ a huge percentage of Texas government employees who are potentially affected by agency personnel decisions and complaint processes when compared to the numbers of employees employed by the smaller agencies.

State agencies report different practices and policies on the use of confidentiality in mediations; a few agencies said that they did not recognize confidentiality in mediations, with some citing the Public Information Act as the reason. The new Governmental Dispute Resolution Act makes all ADR processes confidential with some exceptions. The types of disputes most frequently mediated include interpersonal conflicts between employees and disputes involving claims of discrimination, such as those based on race, gender and age. Other types of disputes which were mediated involved workplace rules, promotions or demotions, performance appraisals, job assignments, suspension and terminations.

#### **Contracts, rulemaking, contested cases, and litigation**

Overall, the use of ADR in these areas of agency operations rose by 24% since 1996. However, a large majority of agencies indicated that their use of ADR had remained the same over the last two years. Again, small agencies appear to be least likely to use ADR in these areas. In the contract area, only 5% of reporting agencies use ADR clauses in their contracts although 60% reported an interest in using such clauses. State agencies have not yet widely utilized the process of negotiated rulemaking. Only 4% of the agencies reported the use of negotiated rulemaking during the past two years. The majority of responding agencies had contested cases which were heard by the State Office of Administrative Hearings. Over one-third of the responding agencies reported that their agency had a policy which authorized ADR use for contested cases. The most common ADR process authorized by these agencies' policies is mediation. Fifteen percent

(15%) of the agencies with contested cases heard by SOAH have been referred by SOAH to an ADR process. In the area of litigation, the majority of reporting agencies with litigation cases reported being referred to an ADR procedure by the court.

### **3) The impact of the Governmental Dispute Resolution Act and the Negotiated Rulemaking Act:**

An overwhelming majority of state agencies are aware of the Governmental Dispute Resolution Act and the Negotiated Rulemaking. In those agencies who reported an increase in ADR use within their agency, over 90% of them also reported familiarity with these Acts. However, the survey results seem to indicate that familiarity with these acts does not guarantee an increase in ADR use.

### **4) Whether there are possible areas for additional education or assistance to state agencies:**

Several areas seem to be appropriate for additional education, assistance and further study with regard to state agency ADR use. These areas, including the use of ADR clauses in governmental contracts and using ADR in contested cases, are specifically discussed in the next section titled "Recommendations."

## **RECOMMENDATIONS**

Based upon the results of this survey, the Center makes the following recommendations:

- Executive personnel within an agency, including board members, commissioners, executive directors, legal counsel and other appropriate agency personnel should receive training in alternative dispute resolution which includes topics such as conflict management, mediation, advanced negotiation, negotiated rulemaking, and ADR systems design. Until the policy and decision-makers of an agency are knowledgeable about ADR

and actively encourage its use, it appears that the rate of ADR use may not significantly increase.

- State agency leaders should adopt an agency policy which encourages the use of ADR in appropriate areas of agency operations, such as employment, contracts, rulemaking, contested cases and litigation and should ensure that agency practices are consistent with this policy.
- Each state agency should designate an ADR coordinator as a point of contact for ADR information expertise, who can also assist the agency in evaluating how ADR can be implemented or expanded within their agency into appropriate areas of operations.
- Agencies should design an employee complaint or grievance system which includes ADR processes as a component of the system. Preferably, these processes should be available for employees to access at various stages in the complaint or grievance process.
- Agencies must develop confidentiality policies and practices for ADR processes in employment disputes which are consistent with the provisions of the Texas ADR Act and the Governmental Dispute Resolution Act.
- In the employment area, there appears to be a need for assistance to agencies to refine their existing ADR systems so as to provide consistency in approach to topics such as confidentiality, mediator selection, record-keeping, and determining which types of personnel disputes are appropriate for mediation. The Center is in the process of drafting a sourcebook for implementing mediation into employee complaint and grievance processes that may assist in this effort.
- Agencies should share information with one another and work together to achieve some consistency in ADR application, both in terms of areas of use and in actual practice.

- State agencies should seek assistance in evaluating where and how ADR processes can be implemented into their agency, bridging the gap between training and implementation.
- State agencies need assistance and incentives in developing ADR contract clauses.
- Additional study needs to be made to evaluate whether there is a relationship between agency size and ADR use since the smaller agencies seem less likely to use ADR than the larger agencies.
- A statewide cost-savings analysis should be conducted to document the benefits realized by state government through using ADR processes in specific areas of agency operations.
- Agencies should understand the provisions of the Governmental Dispute Resolution Act and the Negotiated Rulemaking Act in order to make informed choices about ADR use.
- Agencies should be encouraged to use ADR processes in the area of contested cases, both internally and at SOAH. SOAH should continue to refer appropriate contested cases to ADR, using a case assessment or screening process early in the contested case process to determine which cases would benefit from ADR.
- Agencies should consider the use of the negotiated rulemaking process for proposed rules, particularly in cases in which rule challenges are anticipated.
- Agencies should design a system for evaluating and processing disputes, thereby encouraging the early prevention of disputes which can be resolved without the need for extensive administrative hearings, contested cases, and litigation.