



CENTER FOR PUBLIC POLICY **DISPUTE RESOLUTION**

## 2009 Texas ADR Legislative Report

The Center for Public Policy Dispute Resolution is pleased to provide you with its summary of notable bills from the 2009 legislative session affecting alternative dispute resolution in Texas government.

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**NOTABLE ADR BILLS  
PASSED BY THE 81<sup>st</sup> LEGISLATURE**

ARBITRATION

**>> H.B. 1083**

Rep. Elkins

Civil Practice and Remedies Code, Section 154.021

*Relating to mediation orders in certain arbitration proceedings.*

This bill amends Section 154.021 as follows

Sec. 154.021. REFERRAL OF PENDING DISPUTES FOR ALTERNATIVE DISPUTE RESOLUTION PROCEDURE. (a) A court may, on its own motion or the motion of a party, refer a pending dispute for resolution by an alternative dispute resolution procedure including:

(1) an alternative dispute resolution system established under Chapter 26, Acts of the 68th Legislature, Regular Session, 1983 (Article 2372aa, Vernon's Texas Civil Statutes);

(2) a dispute resolution organization; or

(3) a nonjudicial and informally conducted forum for the voluntary settlement of citizens' disputes through the intervention of an impartial third party, including those alternative dispute resolution procedures described under this subchapter.

(b) The court shall confer with the parties in the determination of the most appropriate alternative dispute resolution procedure.

(c) Except as provided by agreement of the parties, a court may not order mediation in an action that is subject to the Federal Arbitration Act (9 U.S.C. Sections 1-16).

The bill analysis indicates that the language is intended to counter the practice among judges in a few of the larger counties who issue automatic orders to mediate in any case where an answer is filed. It refers in particular to a confirmation action, especially under the Federal Arbitration Act, which is intended to be an expedited proceeding, in that there are very few grounds on which an arbitrator's award can be challenged. It cites a case that had already proceeded to arbitration where a person was successful, and yet the person received an automatic order from a court ordering the person to mediate.

While the bill analysis indicates that the language is to prevent the courts from using mediation orders to raise the costs and burdens of confirming awards, the actual language is much broader.

**>> S.B. 1650**

Sen. Duncan

Civil Practices and Remedies Code, Chapter 51

*Relating to appeals in cases arising under the Federal Arbitration Act.*

Chapter 51 (Appeals) is amended by adding the following section:

Sec. 51.016. APPEAL ARISING UNDER FEDERAL ARBITRATION ACT.

In a matter subject to the Federal Arbitration Act (9 U.S.C. Section 1 et seq.), a person may take an appeal or writ of error to the court of appeals from the judgment or interlocutory order of a district court, county court at law, or county court under the same circumstances that an appeal from a federal district court's order or decision would be permitted by 9 U.S.C. Section 16.

As the bill analysis explains, under current law, appeals are only authorized to be taken from final orders or judgments unless an interlocutory challenge is permitted by statute. There is a statutory exception permitting interlocutory appeal of a lower court's denial of petition to order arbitration in cases subject to the Texas General Arbitration Act. However, there is no such statutory exception in cases subject to the Federal Arbitration Act. The Supreme Court of Texas has held that review in these cases is required to be made by writ of mandamus. As a result, there were two different procedures for seeking review under the two arbitration acts. This bill allows the same right of review for interlocutory orders under the FAA as currently allowed under the Texas General Arbitration Act.

**>> S.B.771**

Sen. Williams

Tax Code, Chapter 41A

*Relating to the determination of the value of property for ad valorem tax purposes, including appeals through binding arbitration of appraisal review board orders determining protests of property value determinations; providing penalties.*

**Bill Summary:**

Currently, appraisal districts do not have a standard for setting values on properties following a year in which the property's market value was determined to be lower than the initial value through the protest process. This bill provides that in the following tax year, the chief appraiser may not increase the appraised value of the property unless the increase by the chief appraiser is reasonably supported by substantial evidence when all of the reliable and probative evidence in the record is considered as a whole.

**ADR Provision:**

As an alternative to filing an appeal under Section 42.01, a property owner is entitled to appeal through binding arbitration. This bill allows the property owner to also request an "expedited arbitration." Under this process, argument and testimony for either party, property owner or appraisal district, is limited to one hour. The comptroller is charged with adopting rules to assist in the conduct of an expedited arbitration.

This bill also amends provisions addressing an arbitrator's qualifications. The comptroller is to include a qualified arbitrator in a registry for two years. An arbitrator may apply for renewal and is required among other things to take continuing education.

## FAMILY

### >> **H.B.1012**

Rep. Toureilles

Family Code, Chapter 153

*Relating to the conservatorship or possession of, or access to, a child in a suit affecting the parent-child relationship.*

#### **Bill Summary:**

Among effectuating various changes to the Family Code, this bill continues for a third session to address the qualifications and duties of a parenting coordinator. In addition, this bill allows the court to appoint another kind of third party called a parenting facilitator.

#### **ADR Provision:**

This bill contains many provisions governing parenting coordinators and facilitators and should be read carefully for full understanding. We note some of the distinctions made between a parenting coordinator and a parenting facilitator as these two terms are used in this bill. The parenting coordinator is to assist parties in resolving parenting issues “through confidential procedures”; while the parenting facilitator assist parties in procedures that are not confidential. Following this distinction, the bill requires that an appointed parenting coordinator comply with the Ethical Guidelines for Mediators as adopted by the Supreme Court of Texas. The bill adds to the training requirements to qualify for either parenting coordinator or facilitator, including training in dispute resolution and family law.

In addition to the duties of a parenting coordinator, a parenting facilitator may also monitor compliance with court orders. A parenting facilitator is to comply with the standard of care applicable to the professional license held by the parenting facilitator in performing the parenting facilitator’s duties. If the parties have been ordered by the court to attempt to settle parenting issues with the assistance of a parenting facilitator and are unable to settle those issues, the parenting facilitator may make recommendations, but those recommendations do not affect the terms of an existing court order. A communication made by a participant in a parenting facilitation is subject to disclosure and may be offered in any judicial or administrative proceeding, if otherwise admissible under the rules of evidence. The parenting facilitator may be required to testify in any proceeding related to or arising from the duties of the parenting facilitator, including as to the basis for any recommendation made to the parties. A parenting facilitator shall keep a detailed record regarding meetings and contacts with the parties, attorneys, or other persons involved in the suit.

## HEALTH CARE

### >> **H.B.2256**

Rep. Hancock

Insurance Code, adding Chapter 1467

*Relating to mediation of out-of-network health benefit claim disputes concerning enrollees, facility-based physicians, and certain health benefit plans; imposing an administrative penalty.*

#### **Bill Summary:**

This bill provides for a dispute resolution process and applies to:

- (1) a preferred provider benefit plan offered by an insurer under Chapter 1301;
- and
- (2) an administrator of a health benefit plan, other than a health maintenance organization plan, under Chapter 1551

According to the bill analysis, the bill is to address balance billing, which is the practice of physicians billing patients for the portion of medical expenses not covered by the patient's insurance. Most commonly, this occurs when a facility-based physician does not have a contract with the same health benefit plans that have contracted with the facility in which they practice. An enrollee who is admitted into one of these facilities for a procedure or an emergency is ultimately responsible for an unexpected bill. Currently, there is no remedy for this bill other than the patient attempting to set up a payment plan with the facility-based physician.

#### **ADR Provision:**

An enrollee in an applicable health benefit plan may request mediation of a settlement of an out-of-network health benefit claim if certain requirements are met. With certain exceptions, if an enrollee requests mediation the facility-based physician or the physician's representative and the insurer or the administrator, as appropriate, shall participate in the mediation. To qualify for appointment as a mediator under this chapter a person must have completed at least 40 classroom hours of training in dispute resolution techniques in a course conducted by an alternative dispute resolution organization approved by the chief administrative law judge (ALJ) of the State Office of Administrative Hearings. The chief ALJ shall appoint the mediator, unless the parties agree otherwise, through a random assignment from a list of qualified mediators maintained by the State Office of Administrative Hearings. The mediator's fees shall be split evenly and paid by the insurer or administrator and the facility-based physician.

In an effort to settle the claim before mediation, all parties must participate in an informal settlement teleconference not later than the 30<sup>th</sup> day after the date on which the enrollee submits a request for mediation. The goal of the mediation is to reach an agreement among the enrollee, the facility-based physician, and the insurer or administrator, as applicable, as to the amount paid by the insurer or administrator to the facility-based physician, the amount charged by the facility-based physician, and the amount paid to the facility-based physician by the enrollee.

If the mediation is not successful, the mediator shall report the outcome to the Department of Insurance, the Texas Medical Board, and the chief ALJ. The chief ALJ shall then refer the matter to a special judge, who shall conduct a trial under Chapter 151, Civil Practice and Remedies Code.

## OMBUDS

### >> **S.B. 643**

Sen. Nelson

Health and Safety Code, adding Chapter 555

*Relating to the protection and care of individuals with mental retardation and to certain legal protections for individuals with disabilities; providing criminal penalties.*

#### **ADR Provisions:**

This bill creates the office of independent ombudsman for the purpose of investigating, evaluating, and securing the rights of residents and clients of state supported living centers and the ICF-MR component of the Rio Grande State Center. The office is to be administratively supported by the Department (of Aging and Disability Services). In the performance of its duties, the independent ombudsman acts independently of the department.

The governor is to appoint the independent ombudsman and that individual must have at least five years of experience managing and ensuring the quality of care and services provided to individuals with mental retardation.

Among its duties, the independent ombudsman is to evaluate the delivery of services to residents and clients to ensure that the rights of residents and clients are fully observed; immediately refer a complaint alleging the abuse, neglect, or exploitation of a resident or client to the Department of Family and Protective Services; conduct audits; and submit annual reports to relevant agencies and the Legislature.

## MISCALLENEOUS

### >> **H.B.2435**

Rep. Phillips

Civil Practice and Remedies Code, Section 151.010

*Relating to the location of an arbitration trial*

#### **Bill Summary:**

In this case, the caption is misleading, because rather than affecting arbitrations, this bill affects trials by special judges.

#### **ADR Provision:**

Interestingly enough, this is another bill referencing trials by special judges (*see* H.B. 2256 above). This bill opens the courthouse door to trials conducted by special judges.

A trial by a special judge under this section may now be held in a public courtroom and a public employee may be involved during regular work hours, if ordered by the judge who referred the case to the special judge.

## **STATE AGENCIES WITH ADR PROVISIONS**

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

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

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

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

Through the Sunset review process, this ATB, when applied, is included in each agency's Sunset bill and becomes part of that agency's statutory framework when the bill is passed and becomes law. The ATB was applied for the first time in the 2003 Sunset review process. Since then, over forty state agencies have acquired the ADR provisions through the Sunset process. Below is the list of agencies that acquired the ADR provisions in this most recent session:

Texas Department of Agriculture  
Credit Union Department  
Texas Commission on Fire Protection  
Texas Commission on Jail Standards  
Texas Juvenile Probation Commission  
Texas Commission on Law Enforcement Officer Standards and Education  
Texas Department of Motor Vehicles  
Texas Parks and Wildlife Department  
Texas Department of Public Safety  
Texas Youth Commission