HOUSE COMMITTEE ON CIVIL PRACTICES
TEXAS HOUSE OF REPRESENTATIVES
INTERIM REPORT 2002

A REPORT TO THE
HOUSE OF REPRESENTATIVES
78TH TEXAS LEGISLATURE

FRED M. BOSSE
CHAIRMAN

COMMITTEE CLERK
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Committee On
Civil Practices

December 15, 2002

Fred M. Bosse
Chairman

P.O. Box 2910
Austin, Texas 78768-2910

The Honorable James E. "Pete" Laney
Speaker, Texas House of Representatives
Members of the Texas House of Representatives
Texas State Capitol, Rm. 2W.13
Austin, Texas 78701

Dear Mr. Speaker and Fellow Members:

The Committee on Civil Practices of the Seventy-Seventh Legislature hereby submits its interim report including findings for consideration by the Seventy-Eighth Legislature.

Respectfully submitted,

Fred M. Bosse, Chairman

Kyle Janek, Vice-Chair*

Ron Clark*

Harold V. Dutton, Jr.

Ruben Hope

Trey Martinez-Fischer

Joe Nixon

John T. Smithee

Zeb Zbranek

* At the time the report was circulated for signatures, Rep. Janek and Rep. Clark were no longer members of the Texas House of Representatives.

Kyle Janek
Vice-Chairman

Members: Ron Clark, Harold V. Dutton, Jr., Ruben Hope, Trey Martinez-Fischer, Joe Nixon, John T. Smithee, and Zeb Zbranek

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HOUSE COMMITTEE ON CIVIL PRACTICES
INTERIM CHARGES

At the beginning of the 77th Legislature, the Honorable James E. "Pete" Laney, Speaker of the House of Representatives, appointed nine members to the Committee on Civil Practices. The committee membership includes the following: Fred M. Bosse, Chair; Kyle Janek, Vice-Chair; Ron Clark; Harold V. Dutton, Jr.; Ruben Hope; Trey Martinez-Fischer; Joe Nixon; John T. Smithee; and Zeb Zbranek.

During the interim, Speaker Laney charged this Committee with the following issues:

1) Examine practices by courts and attorneys in product liability cases that may be detrimental to public health and safety. The review should include the sealing of records that might assist the public in assessing the dangers of using a product, agreements not to disclose information to the public or regulatory agencies, and any other rules, practices or laws deemed relevant by the committee.
2) Examine changes over the last decade to the civil justice system that affect the right of litigants (citizens or businesses) to receive appropriate review by a judicial body, including arbitration, mediation, other types of alternative dispute resolution.
3) Review changes in federal laws and law enforcement procedures, as well as recommendations from state and national agencies charged with homeland protection, to assess the need for changes in state civil laws to protect life and property and to detect, interdict and respond to acts of terrorism.
4) Review recent decisions of Texas appellate courts and identify those decisions that: (1) clearly failed to properly implement legislative purposes, (2) found two or more statutes to be in conflict, (3) held a statute to be unconstitutional, (4) expressly found a statute to be ambiguous, or (5) expressly suggested legislative action.
5) Monitor the rule-making proceedings of the Texas Supreme Court.

The Committee has completed its hearings and investigations and has issued the following report with findings. Each member who signed the report approved all sections.

The Chairman wishes to express appreciation to the Committee members and their staff; Texas Legislative Council, the State Bar of Texas and staff; the Supreme Court and the Supreme Court Advisory Committee and staff; and all of the various associations and individuals who testified and prepared valuable information for this report. The Chairman also wishes to express appreciation to Steven Schar, the Committee's Assistant Clerk, for his work on this report and in particular Charge Three.

Committee on Civil Practices
Interim Report to the
78th Legislature

Charge One

Examine practices by courts and attorneys in product liability cases that may be detrimental to public health and safety. The review should include the sealing of records that might assist the public in assessing the dangers of using a product, agreements not to disclose information to the public or regulatory agencies, and any other rules, practices or laws deemed relevant by the committee.

Charge One

Examine practices by courts and attorneys in product liability cases that may be detrimental to public health and safety. The review should include the sealing of records that might assist the public in assessing the dangers of using a product, agreements not to disclose information to the public or regulatory agencies, and any other rules, practices or laws deemed relevant by the committee.

History

The debate on sealing judgments, settlements and records produced in the course of litigation surfaced during the 77th Legislature as part of a comprehensive bill addressing product defects, H.B. 3125. Article 3 of the bill states:

> "Not later than January 1, 2002, the supreme court shall adopt and amend rules governing practice and procedure, including the rules regarding sealing of records, to prevent the courts of this state from being used in a manner that constitutes a danger to the public health and safety and constitutes conduct described by Section 98.002, Civil Practice and Remedies Code, as added by this Act."[1]

Although H.B. 3125 was never reported out of the Committee on Civil Practices, it provided a forum during the legislative session for finger-pointing and blame-laying between the plaintiff-lawyer community and the tort reform groups over responsibility to inform the general public and the regulatory agencies about product defects.

Following the legislative session, in June, 2001, a series of articles and editorials appeared in newspapers across the state on the subject of who was most to blame for the failure to disclose, and publicize, the Firestone tire defects that were asserted to have caused several hundred deaths and injuries. Industry groups took the position that the attorneys for the plaintiffs in those cases should have made full disclosure of all of the facts known to them to the public, the Federal Trade Commission and other regulatory agencies. Subsequently, the tires could have been taken off the market earlier, therefore preventing many of the deaths and injuries. The plaintiff lawyers countered with the position that their primary legal and professional responsibility is to their client, and if they acted in a way that compromised their client's best interest in the name of the public good, they could be disciplined. They also argued that all of the information that was available to them was also available to Firestone and their attorneys. Therefore, it was those attorneys who had the primary responsible to disclosure such defects to the public. The vast documents and research pertaining to alleged defects in Firestone tires appear to have been customarily either sealed or made confidential by agreement between the parties and counsel. In many cases Firestone appears to have made this confidentiality a condition of settlement with litigants.[2]

[1] H. B. 3125, 77th Legislature, 2001

[2] See Appendix A; Bradsher, Keith, *S.U.V. Tire Defects Were Known In '96 But Not Reported*, New York Times, June 24, 2001; Editorial by Fred Baron, Re: "*S.U.V.Tire Defects Were Known In '96 But Not Reported",* New York Times, June 29, 2002; and Editorial by Mike Valentine, *Shame On The Trial Lawyers*, Houston

In 1989, the 71st Legislature passed legislation which directed "the Supreme Court to adopt rules establishing guidelines for the courts of this state to use in determining whether in the interest of justice the records in a civil case, including settlements, should be sealed."[3] In so doing the Legislature established a state policy of limiting the sealing of civil cases in the interest of justice. Additionally, our state and federal constitutions both establish a policy of open courts.

By 1990, the Texas Supreme Court adopted Rule 76a of the Rules of Civil Procedure, establishing guidelines which strictly limit a litigant's ability to seal court records. Rule 76a reads as follows:

Rule 76a. Sealing Court Records

"1. Standard for Sealing Court Records.

Court records may not be removed from court files except as permitted by statute or rule. No court order or opinion issued in the adjudication of a case may be sealed. Other court records, as defined in this rule, are presumed to be open to the general public and **may be sealed only upon a showing of all of the following:**

(a) a specific, serious and substantial interest which clearly outweighs:

(1) this presumption of openness;

(2) any probable adverse effect that sealing will have upon the general public health or safety;

(b) no less restrictive means than sealing records will adequately and effectively protect the specific interest asserted.

2. Court Records.

For purposes of this rule, court records means:

(a) all documents of any nature filed in connection with any matter before any civil court, except:

(1) documents filed with a court in camera, solely for the purpose of obtaining a ruling on the discoverability of such documents;

(2) documents in court files to which access is otherwise restricted by law;

(3) documents filed in an action originally arising under the Family Code.

(b) settlement agreements not filed of record, excluding all reference to any monetary consideration, that seek to restrict disclosure of information concerning matters that have a probable adverse effect upon the general public health or safety, or the administration of public office, or the operation of government.

©) discovery, not filed of record, concerning matters that have a probable adverse effect upon the general public health or safety, or the administration of public office, or the

Chronicle, July 1, 2002; Houston Chronicle Staff Editorial, *Lawyers' Silence*, Houston Chronicle, July 1, 2001; Editorial by Craig Ball, *In The Cross-Hairs; Non-sense To Be Demonizing Victims' Lawyers*, Houston Chronicle, July 8, 2001

[3] § 22.010 Gov. C. Acts of the 71st Leg., ch. 426, § 1, eff. Sept. 1, 1989

operation of government, except discovery in cases originally initiated to preserve bona fide trade secrets or other intangible property rights.

3. Notice.

Court records may be sealed only upon a party's written motion, which shall be open to public inspection. The movant shall post a public notice at the place where notices for meetings of county governmental bodies are required to be posted, stating: that a hearing will be held in open court on a motion to seal court records in the specific case; that any person may intervene and be heard concerning the sealing of court records; the specific time and place of the hearing; the style and number of the case; a brief but specific description of both the nature of the case and the records which are sought to be sealed; and the identity of the movant. Immediately after posting such notice, the movant shall file a verified copy of the posted notice with the clerk of the court in which the case is pending and with the Clerk of the Supreme Court of Texas.

4. Hearing.

A hearing, open to the public, on a motion to seal court records shall be held in open court as soon as practicable, but not less than fourteen days after the motion is filed and notice is posted. Any party may participate in the hearing. Non-parties may intervene as a matter of right for the limited purpose of participating in the proceedings, upon payment of the fee required for filing a plea in intervention. The court may inspect records in camera when necessary. The court may determine a motion relating to sealing or unsealing court records in accordance with the procedures prescribed by Rule 120a.

5. Temporary Sealing Order.

A temporary sealing order may issue upon motion and notice to any parties who have answered in the case pursuant to Rules 21 and 21a upon a showing of compelling need from specific facts shown by affidavit or by verified petition that immediate and irreparable injury will result to a specific interest of the applicant before notice can be posted and a hearing held as otherwise provided herein. The temporary order shall set the time for the hearing required by paragraph 4 and shall direct that the movant immediately give the public notice required by paragraph 3. The court may modify or withdraw any temporary order upon motion by any party or intervenor, notice to the parties, and hearing conducted as soon as practicable. Issuance of a temporary order shall not reduce in any way the burden of proof of a party requesting sealing at the hearing required by paragraph 4.

6. Order on Motion to Seal Court Records.

A motion relating to sealing or unsealing court records shall be decided by written order, open to the public, which shall state: the style and number of the case; the specific reasons for finding and concluding whether the showing required by paragraph 1, has been made; the specific portions of court records which are to be sealed; and the time period for which the sealed portions of the court records are to be sealed. The order shall not be included in any judgment or other order but shall be a separate document in the case; however, the failure to comply with this requirement shall not affect its appealability.

7. Continuing Jurisdiction.

Any person may intervene as a matter of right at any time before or after judgment to seal

or unseal court records. A court that issues a sealing order retains continuing jurisdiction to enforce, alter, or vacate that order. An order sealing or unsealing court records shall not be reconsidered on motion of any party or intervenor who had actual notice of the hearing preceding issuance of the order, without first showing changed circumstances materially affecting the order. Such circumstances need not be related to the case in which the order was issued. However, the burden of making the showing required by paragraph 1, shall always be on the party seeking to seal records.

8. Appeal.

Any order (or portion of an order or judgment) relating to sealing or unsealing court records shall be deemed to be severed from the case and a final judgment which may be appealed by any party or intervenor who participated in the hearing preceding issuance of such order. The appellate court may abate the appeal and order the trial court to direct that further public notice be given, or to hold further hearings, or to make additional findings.

9. Application.

Access to documents in court files not defined as court records by this rule remains governed by existing law. This rule does not apply to any court records sealed in an action in which a final judgment has been entered before its effective date. This rule applies to cases already pending on its effective date only with regard to:

(a) all court records filed or exchanged after the effective date;

(b) any motion to alter or vacate an order restricting access to court records, issued before the effective date."[4] [*Emphasis Added*]

In Section 1 of the rule, the Supreme Court clearly set out very limited circumstances under which court records may be sealed. Furthermore, Section 2(b) states that "settlement agreements not filed of record, excluding all reference to any monetary consideration, that seek to restrict disclosure of information concerning matters that have a probable adverse effect upon the general public health or safety, or the administration of public office, or the operation of government" be included within the sealing provisions of Rule 76a. Clearly, litigation settlements stemming from civil actions are prohibited by Rule 76a from being sealed, especially if such records contain information which have adverse effects upon the general public's health and safety. According to the Texas Supreme Court only 31 Rule 76a motions have been heard since January of 2002.

Committee Review

The following witnesses testified at the April 3, 2002 hearing:[5]

George Scott Christian--*Texas Civil Justice League*
Reggie James--*Consumers Union, SW Regional Office*
Dan Lambe--*Texas Watch*

[4] Rule 76a, R. of Civ. Proc., 2002

[5] http://www.capitol.state.tx.us/tlo/77R/witmtg/2002/C100/09310001.HTM . It should be noted that requests for additional testimony were made but none was received.

The following witness testified at the June 13, 2002 hearing:[6]

Tommy Fibich--*Texas Trial Lawyers Association*

Over the last ten years since rule 76a was promulgated, many in the legal community have found creative ways to continue to restrict public access to such records. Such agreements or techniques appear to violate Rule 76a, as well as state policy. Recently, out-of-court settlements such as those involving Firestone tires, catholic priests, and other high profile matters have brought attention to the sealing of documents related to these cases. Most are accomplished through "confidentiality agreements." A confidential agreement is describe as a contractual agreement which prohibits all parties involved from discussing or disclosing any information regarding such settlements, even if the allegations in the suit effect the "general public's heath and safety." Such "confidentiality agreements" also appear to violate at least the spirit of our State's open court doctrine.

Chief Judge Joseph F. Anderson, Jr. of the U.S. District Court in South Carolina has written two letters to colleagues regarding the sealing of records. "He argues that he and his colleagues would do lawyers, the judiciary and especially the public a big favor by eliminating the option of secret settlements when the public safety issues are at stake."[7] Just as in 1990 when the Texas Supreme Court grappled with the issue, in 1994 South Carolina federal judges considered local rules prohibiting court-approved secrecy or confidentiality agreements.

In one letter Anderson gave examples of presiding over a contentious product liability case. Alleged damaging documents came to light and the case was subsequently settled. Included in the settlement were conditions that all documents be returned and agreements were made never to disseminate them or even discuss them with anyone.[8] Under the Texas Rules of Civil Procedure, this provision and others like it would violate Rule 76a.

The issue at hand has perplexing arguments. Arguments are made that confidentiality agreements facilitate out-of-court settlements, which are encouraged in today's judicial system. Others argue that public interest in disclosure of information such as alleged sexual misconduct by priests or defects in child safety seats outweigh the benefit of encouraging of out-of-court settlements.

The Committee acknowledges that anything that the Legislature could or would do to limit confidentiality agreements or the sealing of records would face the same problems that are present with regard to Rule 76a. Out-of-court settlements are frequently accomplished outside the

[6] http://www.capitol.state.tx.us/tlo/77R/witmtg/2002/C100/16410001.HTM . It should be noted that requests for additional testimony were made but not acted upon.

[7] Article by Dan Christensen, *Federal Judges Order Study of Secrecy in Settlements*, Miami Daily Business Review, Sept. 19, 2002.

[8] Article by Dan Christensen, *Federal Judges Order Study of Secrecy in Settlements*, Miami Daily Business Review, Sept. 19, 2002.

courthouse, between the attorneys and parties. The only evidence of the settlement filed with the court may be a suit dismissal. From examining the dismissal, it is frequently impossible to know any of the terms of the settlement. Also, claims are often settled prior to a suit even being filed. In those instances there is not even public documentation of a claim. And lastly, as set forth in more detail in another section of this report, claims are increasingly being resolved through arbitration, under binding agreements requiring it in lieu of court. These are non-public proceedings, not subject to Rule 76a or any other rules of the Rules of Civil Procedure.

Since September, South Carolina's federal district judges have implemented changes to prohibit the ability to seal such settlements and/or court documents.[9] Currently, South Florida's federal district judges and South Carolina's State Supreme Court are also looking into similar changes. The Texas Supreme Court Rules Advisory Committee has also begun re-examining Rule 76a for such changes. Michigan state courts and South Florida's federal district courts already have rules which unseals secret settlements after two years.

The Committee's review of this matter was limited to matters pertaining to public safety. The Committee understands that there are circumstances in which confidentiality is less controversial, such as the protection of trade secrets or other proprietary information.

Findings and Legislative Options

Speaker Laney's charge to the Committee on Civil Practices did not specifically direct it to make recommendations to the 78th Legislature for remedial legislation. However, it is the consensus of the Committee that it has a responsibility to set forth options that the 78th Legislature might pursue on this subject to address matters that came to the attention of the Committee during the review. The following are some possible legislative remedies.

Finding 1:

Legislatively direct the Texas Supreme Court to make the appropriate changes to Rule 76a to prohibit confidentiality agreements, to ensure openness and public confidence in the State's judiciary, and to further protect the general public.

Finding 2:

Legislatively codify under Rule 76a under § 22.010 Gov. Code with the appropriate changes to prohibit confidentiality agreements; ensuring openness, public confidence in the State's judiciary and additional protection for the general public's.

[9] Appendix B

Charge Two

Examine changes over the last decade to the civil justice system that affect the right of litigants (citizens or businesses) to receive appropriate review by a judicial body, including arbitration, mediation, other types of alternative dispute resolution.

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Examine changes over the last decade to the civil justice system that affect the right of litigants (citizens or businesses) to receive appropriate review by a judicial body, including arbitration, mediation, other types of alternative dispute resolution.

Introduction

On November 5, 2001, the House Committee on Civil Practices was charged to review ". . . changes over the last decade to the civil justice system that affect the right of litigants (citizens or business) to receive appropriate review by a judicial body, including arbitration, mediation, other types of alternative dispute resolution."[10] The Committee has completed its review and has found that only one method of alternative dispute resolution, binding arbitration, has the effect of actually limiting the access of potential litigants to the judicial system.[11] Therefore, the primary focus of this report will be arbitration, although other forms of alternate dispute resolution will be discussed.

The report outlines the history of arbitration, its origin, its development, and its current role in the civil justice system. The review also examines testimonial arguments for and against changes being proposed regarding the use and procedural aspects of arbitration. The report tracks various changes being considered and enacted by other states and concludes with the Committee's findings forwarded to the 78th Texas Legislature.

History

Black's Law Dictionary defines *alternative dispute resolution (ADR)*, as a procedure for settling a dispute by means other than litigation, such as arbitration, mediation, or mini-trial. The two most common types of ADR are arbitration and mediation. Arbitration is a method of dispute resolution involving one or more neutral third parties, or arbitrators, who are agreed to by the disputing parties and whose decision is binding.[12] Mediation is a method of nonbinding dispute resolution involving a neutral third party, the mediator, who tries to help the disputing parties reach a mutually agreeable solution.[13]

Federal and state law both allow parties to contractually agree to resolve, or try to resolve,

[10] Press release from Speaker James E. "Pete" Laney dated November 5, 2001. It should be noted the House Committee on Business & Industry has also been charged with similar issues concerning arbitration.

[11] This was determined by the committee staff, based on the binding nature of arbitration. Other ADR methods reviewed by the Committee and staff appear to be non-binding.

[12] Black's Law Dictionary, Garner, Bryan A. (editor in chief), Seventh Edition 1999.

[13] Black's Law Dictionary, Garner, Bryan A. (editor in chief), Seventh Edition 1999.

disputes through non-judicial methods.[14] While most ADR methods are non-binding[15] and used to assist in negotiating resolutions to disputes before or during pendency of litigation, arbitration is a completely separate and binding alternative to trial.

The use of arbitration is ancient in origin and has been generally accepted by a broad array of developing judicial systems. Roman law recognized arbitration agreements and even had guidelines for enforcement. Arbitration can be found in such literature as Greek mythology and Old Testament scripture. Arbitration was used in political disputes dating as far back as the first millennium B.C..[16] Even the first President of the United States of America, George Washington, acknowledged the benefits of such non-judicial methods by designating in his will an alternative to the courthouse to resolve potential disputes.

> "In the construction of which it will readily be perceived that no professional character has been consulted, or has had any Agency in the draught--and that, although it has occupied many of my leisure hours to digest, & to through it into its present form, it may, notwithstanding, appear crude and incorrect. But having endeavoured to be plain, and explicit in all Devises--even at the expence of prolixity, perhaps of tautology, I hope, and trust, that no disputes will arise concerning them; but if, contrary to expectation, the case should be otherwise from the want of legal expression, or the usual technical terms, or because too much or too little has been said on any of the Devises to be consonant with law, My Will and direction expressly is, that all disputes (if unhappily any should arise) shall be decided by three impartial and intelligent men, known for their probity and good understanding; two to be chosen by the disputants--each having the choice of one--and the third by those two. Which three men thus chosen, shall, unfettered by Law, or legal constructions, declare their sense of the Testators intention; and such decision is, to all intents and purposes to be as binding on the Parties as if it had been given in the Supreme Court of the United States."[17]

Early English common law courts, on the other hand, exhibited a hostile attitude toward non-judicial forums. As far back as the fifteenth century, cases held arbitration clauses unenforceable.[18] Such agreements were viewed as contrary to public policy, because litigants were shut out from the court of jurisdiction.[19]

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[14] Texas Watch, *The Pitfalls of Arbitration*, at 3.

[15] Methods of ADR which are non-binding pre-trial alternatives are collaborative law, mediation, mini-trial, moderated settlement conferences, non-binding arbitration, and summary jury trial.

[16] 64 N.C.L. Rev. 219, Jan. 1986, *Arbitration Agreements and Antitrust Claims: The Need For Enhanced Accommodation Of Conflicting Public Policies*. Arbitration was used to settle disputes between Athens and Megara over the possession of the island of Salamis around 600 B.C. and between Genoa and Viturians over the country's boundaries in 117 B.C.

[17] President George Washington's will is located and archived at the University of Virginia and can be located on the web at http://gwpapers.virginia.edu/will/text.html .

[18] 64 N.C.L. Rev. 219, Jan. 1986, *Arbitration Agreements and Antitrust Claims: The Need For Enhanced Accommodation Of Conflicting Public Policies*.

[19] 64 N.C.L. Rev. 219, Jan. 1986, *Arbitration Agreements and Antitrust Claims: The Need For Enhanced Accommodation Of Conflicting Public Policies*; 49 Tul. L. Rev. 1054, May 1975, *Arbitration from the Arbitrator's Point of View*; 38 Hous. L. Rev. 1237, Jan. 2002, *Pre-dispute Mandatory Arbitration in Consumer Contracts: A*

Many legal scholars speculate about the reasons for early common law hostility toward arbitration.[20] Throughout the nineteenth and early twentieth centuries in England, arbitration agreements were enforceable only through comprehensive judicial review. Not until 1979 did England pass similar legislation to the United States Federal Arbitration Act, thus creating an arbitration process with binding consequences and strictly limiting a litigant's original right to judicial review.[21]

One need look no further than the United States Bill of Rights to see that our forefathers preserved ". . . the right to a trial by jury . . ."[22] Early decisions by the United States Supreme Court also indicate a concern for the fairness associated with arbitration agreements, as well as it's effects on public interest.[23] In 1974, the United States Supreme Court, in *Alexander v. Gardner-Denver Co*.,[24] held that an employee could bring a discrimination claim in state court after having lost in arbitration.

Recently however, the United States Supreme Court has taken a different approach, consistently upholding agreements for binding arbitration. The use of arbitration has even been expanded to resolve civil rights disputes, in stark contrast to Justice Hugo Black's statements that arbitrators "may be wholly unqualified" to handle such cases.[25]

Throughout the course of time, as the American economy grew, so did the number of litigants. Lawmakers began looking for "a voluntary, more efficient, less expensive, and more flexible alternative . . ."[26] to litigation. The first statute in the United States to validate arbitration agreements was enacted by the state of New York in 1920.[27] Massachusetts and Oregon followed

Call to Reform by Richard Alderman.

[20] 64 N.C.L. Rev. 219, Jan. 1986, *Arbitration Agreements and Antitrust Claims: The Need For Enhanced Accommodation Of Conflicting Public Policies*.

[21] 49 Tul. L. Rev. 1054, May 1975, *Arbitration from the Arbitrator's Point of View*

[22] U.S. Constitutional Bill of Rights, Amend VII, ratified December 15, 1791

[23] 38 Hous. L. Rev. 1237, Jan. 2002, *Pre-dispute Mandatory Arbitration in Consumer Contracts: A Call to Reform* by Richard Alderman.

[24] 415 U.S. 36, 59-60 (1974)

[25] Holding, Reynolds, *Private Justice*, San Francisco Chronicle 7, Oct. 2001. Justice Hugo Black was nominated to the U.S. Supreme Court in 1937 and is heralded for his defense of civil liberties.

[26] 38 Hous. L. Rev. 1237, Jan. 2002, *Pre-dispute Mandatory Arbitration in Consumer Contracts: A Call to Reform* by Richard Alderman.

[27] Act of Apr. 19, 1920, ch. 275, 1920 N.Y. Laws 803 (current version as amended at N.Y. Civ. Prac. Law, Art. 75 General Arbitration Act and Art. 75-A Health Care Arbitration Act.)

shortly thereafter with more narrowly written statutes.[28] In 1923 the first bills were introduced in the United States Congress recognizing arbitration agreements.[29] In 1925 Congress passed the Federal Arbitration Act (FAA), based on the New York statute,[30] in an attempt to place arbitration agreements "upon the same footing as other contracts"[31] and to create an alternative to conventional courtroom litigation. Legal scholars state that in 1925, the FAA was primarily directed at resolving disputes arising from maritime and interstate commerce agreements.[32] In 1965 the Texas Legislature adopted the Texas General Arbitration Act (TGAA),[33] based on the Uniform Arbitration Act.[34] The TGAA governs all arbitration agreements in Texas, other than those preempted by the FAA when factors such as admiralty law and interstate commerce come into play. During the 75th Legislature, a nonsubstantive re-codification of the TGAA was enacted[35] "reorganizing the TGAA into a more usable code of laws."[36]

For over 75 years, independent arbitrators and arbitration associations have been resolving disputes between businesses, particularly merchants and parties to construction contracts, in the United States. In 1983, the Supreme Court dramatically changed the landscape of arbitration agreements by expanding the role of mandatory arbitration from primarily commercial to consumer

[28] Act of Apr. 29, 1925, ch.294, 1925 Mass. Acts 337 (current version Mass. Gen. Laws Ann. ch. 251, §§ 1-22); Act of Feb. 24, 1925, ch. 186, 1925 Or. Laws 279 (current version Or. Rev. Stat. §§ 33.210- .340); (Note: New Jersey passed a broad statute similar to the New York statute, Act of Mar. 21, 1923, ch. 134, 1923 N.J. Laws 291 § 1 (current version as amended at N.J. Rev. Stat. § 2A: 24-1 to -11 (1983)).

[29] Texas Watch, *The Pitfalls of Arbitration*, at 3.

[30] 71 Va. L. Rev. 1305, Nov. 1985, *The Second Arbitration Trilogy: The Federalization of Arbitration Law*.

[31] Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 24 (1991)

[32] 64 N.C.L. Rev. 219, Jan. 1986, *Arbitration Agreements and Antitrust Claims: The Need For Enhanced Accommodation Of Conflicting Public Policies*.

[33] Acts of 1965, 59th Leg., p. 1593, ch. 689.; Re-designated Ver. Ann. Civ. Stat. art. 238-2 and amended by Acts of 1995, 74th Leg., ch. 588.

[34] According to NCCUSL's website: "The Uniform Arbitration Act was first promulgated by the National Conference of Commissioners of Uniform State Laws in 1955. The 1955 Uniform Arbitration Act does two fundamental things. First, it reverses the common law rule that denied enforcement of a contract provision requiring arbitration of disputes before there is an actual dispute. After a real dispute arises, the parties have always been able to agree to arbitrate. It is agreeing to arbitrate in anticipation of any possible disputes that the common law prohibited. Second, the 1955 Uniform Arbitration Act provides some basic procedures for the conduct of an arbitration. The Uniform Act does not mandate arbitration of any dispute. Its function is to let persons determine whether or not they want to use arbitration by agreement."
http://www.nccusl.org/nccusl/uniformact_summaries/uniformacts-s-aa.asp

[35] 75th Leg., ch. 165, § 5.01, 1997 Tex. Sess. Laws

[36] Keeper, Paul D., *Recent Changes in Texas Arbitration Law*, 28 April, 1998. (The article was presented to the ADR Section of the Travis County Bar Association by Mr. Keeper. He is a practicing mediator and arbitrator. The article is located on the State Bar of Texas ADR Section website at http://www.texasadr.org/recentdev.cfm .)

transactions.[37] *Cone Memorial Hospital v. Mercury Construction Corporation*[38] held that the FAA created a "liberal federal policy favoring arbitration,"[39] solidifying the enforcement of arbitration agreements.[40] Furthermore, *Greentree Financial Corporation v. Randolph* held that the law favors the enforcement of arbitration clauses, including those in consumer contracts. The decision requires a consumer to prove that arbitration is cost prohibitive before being allowed to pursue litigation when binding arbitration is required by a written agreement.[41]

The dramatic increase in the use of binding arbitration clauses in consumer contracts has given the issue increased emphasis on the agendas of consumer protection and public interest groups. Many have begun suggesting that binding arbitration for consumer disputes is less attractive, not to mention less fair and no more efficient, than litigation.

Justice Sandra Day O'Conner stated that "courts of this country should not be the places where the resolution of disputes begin. They should be the places where disputes end--after alternative methods of resolving disputes have been considered and tried."[42] While this statement is arguable when applied to the other, non-binding forms of ADR, binding arbitration precludes the dispute from ever going to court at all in the great majority of cases. Even when a suit to set aside an arbitration award is successful, the result is usually to re-arbitrate. Since arbitration in Texas is a creature of statute, it is the responsibility of the Legislature to ensure that the process is as fair as possible.

Committee Review

Throughout the Committee's interim review numerous individuals and organizations submitted testimony and written comments regarding arbitration and other issues pertaining to ADR. The Committee held two public hearings on the subject of ADR. The first hearing was held on April 3, 2002, in Austin, Texas[43] and the second on June 13, 2002, in Dallas, Texas, as part of

[37] 38 Hous. L. Rev. 1237, p1240 n. 13, Jan. 2002, *Pre-dispute Mandatory Arbitration in Consumer Contracts: A Call to Reform* by Richard Alderman. Arbitration agreements are increasingly being incorporated into contracts governing credit, residential and commercial construction, manufactured home sales, vehicle sales transaction and insurance coverage.

[38] 460 U.S. 1 (1983)

[39] *Id.* at 33.

[40] Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213 (1985).

[41] National Arbitration Forum website http://www.arb-forum.com/about/newsDetail.asp?ID=9 .

[42] *Dispute Resolution, Texas Style*, 1997, ADR Section of the State Bar of Texas http://www.texasadr.org/drtexas.cfm .

[43] A complete audio recording of this hearing can be located on the Committee website at http://www.house.state.tx.us/house/commit/archive/c100.htm or by contacting House Video & Audio by mail at P.O. Box 2910, Austin, Texas 78768 or phone at (512) 463-0920.

the State Bar of Texas Annual Meeting.[44]

The following witness testified at the April 3, 2002 hearing:[45]

Janet Ahmad--*Home Owners for Better Building, President*
Delynn Archer--*Home Owners for Better Building, Member*
David Bragg--*AARP*
Bob Bush--*Texas Association of Builders*
John C. Cobarruvias--*Home Owners for Better Building, Member*
Mary Cohn--*Self*
Judy Corder--*Texas Association of Mediators*
David W. Duffner, M.D.--*Texas Medical Association*
Wayne I. Fagan--*Mediator*
John C. Flemming--*Attorney/Arbiter*
Reggie James--*Consumers Union, SW Regional Office*
Dan Lambe--*Texas Watch*
Pati McCandless--*Unicare Life, Health Insurance Co.*
Stephen Paxson--*Attorney/Arbitrator*
Dawn Richardson--*Self*
Mike Schless--*Self*
Ray Tonjes--*Texas Association of Builders*
Amy Weaver--*Home Owners for Better Building, Member*
Walter A. Wright--*Association of Attorney-Mediators*

The following witness testified at the June 13, 2002 hearing:[46]

Janet Ahmad--*Home Owners for Better Building, President*
Andrew Barton--*American Arbitration Association*
Tamara R. Pearlman--*Home Owners for Better Building, Member*
Jerry & Linda Reier--*Self*

Throughout the interim hearings, the Committee heard testimony from a number of mediators across the state regarding the proposed Uniform Mediation Act (UMA) written by the National Conference of Commissioners on Uniform State Laws (NCCUSL). Each witness testified that the Texas statute governing mediation should not be amended to reflect changes proposed by NCCUSL. Each witness testified that the current Texas statutes contain broad confidentiality protections that

[44] A complete audio recording of this hearing can be obtained by contacting House Video & Audio by mail at P.O. Box 2910, Austin, Texas 78768 or phone at (512) 463-0920.

[45] http://www.capitol.state.tx.us/tlo/77R/witmtg/2002/C100/09310001.HTM

[46] http://www.capitol.state.tx.us/tlo/77R/witmtg/2002/C100/16410001.HTM

are a model for ADR statutes in other states.[47] "The confidentiality provisions have enhanced the public's willingness to participate fully in the process."[48]

The position of a witnesses on this issue is also reflected in a recent article:

> ". . . attempts to safeguard confidentiality through a complex and dizzying array of privileges and exceptions. . . . the UMA has taken a backward approach to confidentiality. The UMA proposal has headed in the wrong direction by not beginning with a wide umbrella of confidentiality protection followed by appropriate exceptions. Whereas the Texas ADR Procedures Act's confidentiality provisions start with the general proposition that all ADR communications are confidential, save for several exceptions, the UMA focuses instead on privileges from discovery and admissibility in later proceedings. Moreover, earlier drafts included virtually nothing concerning confidentiality outside of later legal proceedings. Apparently in response to such criticisms, the final version of the proposal added a section which states, in part, '[M]ediation communications are confidential to the extent agreed by the parties or provided by other law or rule of this State." Beyond that, however, there is no general requirement of confidentiality, and the quoted approach is inconsistent with the push for uniformity."[49]

The remaining testimony was from consumers who had been or were involved in resolving disputes through arbitration, business interests who employ binding arbitration clauses in consumer transactions, arbitrators and arbitration associations. The testimony of consumers and consumer groups was unanimous in supporting procedural changes and/or eliminating the use of binding arbitration clauses in consumer contracts, while the business interests were nearly as unanimous in supporting the status quo.[50] The one business group who opposed the use of binding arbitration clauses was the Texas Medical Association, based primarily on the experience of doctors under managed care agreements with insurance carriers.

During the interim review the Committee identified three compelling questions: 1) Do consumers understand the true nature of arbitration, namely that it is a proceeding conducted largely independent of the judiciary and government? 2) Does arbitration actually provide a fair and unbiased dispute resolution forum? and 3) Is arbitration a faster, less expensive and more efficient alternative to litigation?

1) *Do consumers understand the true nature of arbitration, namely that it is a proceeding*

[47] Testimony at the public hearing of the House Committee on Civil Practices, April 3, 2002; Fagan, Wayne I. and Shannon, Brian D., *A Potential Threat to Texas ADR*, Jan. 2002; (This article was written as a section of the Chair's Corner Newsletter to the State Bar of Texas' ADR Section. Many of the confidentiality provisions in the ADR statute identified in this article are located in § 154.053(a),(b), and ©)).

[48] *Id*. supra. n.42

[49] Fagan, Wayne I. and Shannon, Brian D., *A Potential Threat to Texas ADR*, Jan. 2002; (This article was written as a section of the Chair's Corner Newsletter to the State Bar of Texas' ADR Section. Many of the confidentiality provisions in the ADR statute identified in this article are located in § 154.053(a),(b), and ©)).

[50] It should be noted that none of the consumer witnesses who had been through an arbitration felt that they had been given a fair hearing, nor were they satisfied with the outcome.

conducted largely independent of the judiciary and government?

Many of the consumers who testified before the Committee did not realize that there was a binding arbitration clause in their contract. Most had never been exposed to arbitration and did not understand the entire effect of an arbitration and the rights that were being waived. One exception was Jerry Reier, who testified at the Dallas hearing. Mr. Reier had been involved in arbitration in a commercial context in his business, yet had never considered its impact when applied to the contract for the construction of his home.[51]

Several witnesses were surprised by the lack of formality of the arbitration proceeding. At least one expressed shock that a proceeding effecting purchases as large as a person's car or home would be decided in a hotel room, by someone they knew virtually nothing about. Most were even more troubled by the lack of a meaningful review, or appeal, of the arbitrator's decision. The general public has become accustomed to disputes being resolved in a more formal setting. Television presents Judge Wapner, Judge Judy and numerous other courtroom scenarios for dispute resolution, with varying degrees of formality. However, few people have ever had even a vicarious experience with arbitration. Nearly all of the witnesses expected more formality and most were surprised that the arbitrator was to be paid a fee by the parties.[52]

While there are minimum educational and experience requirements for most judges and minimum training and experience requirements for qualified mediators, there are no such standards for arbitrators. According to the American Arbitration Association (AAA):

> "More than 11,000 individuals in diverse fields and professions are listed on the AAA's national roster of arbitrators and mediators. These neutrals represent a broad spectrum of expertise. Many are nominated to the roster by leaders in their industry or profession. Others are invited directly by the AAA.
>
> Participation by business executives and professionals as arbitrators is vital to the system. Because of their specialized knowledge and experience, the parties are not required to spend time educating the arbitrator about relevant industry practices and customs. In labor-management relations, impartial experts arbitrate disputes arising out of the application and interpretation of collective bargaining agreements.
>
> Biographies of neutrals, describing their occupations, qualifications, and availability, are maintained in the AAA's computerized network of submission to the parties."[53]

Although arbitrators are often attorneys, retired judges, and experts in the field in dispute, there are no general standards or qualifications applicable to all arbitrators. The Committee heard

[51] Jerry Reier testimony from the June 13, 2002 hearing of the Committee. A complete audio recording of this hearing can be obtained by contacting House Video & Audio by mail at P.O. Box 2910, Austin, Texas 78768 or phone at (512) 463-0920.

[52] Testimony from the June 13, 2002 hearing of the Committee. A complete audio recording of this hearing can be obtained by contacting House Video & Audio by mail at P.O. Box 2910, Austin, Texas 78768 or phone at (512) 463-0920.

[53] American Arbitration Association's website *ADR Guides: Beginner's Guide to ADR* located at: http://www.adr.org/index2.1.jsp?JSPssid=15727&JSPsrc=upload\LIVESITE\Rules_Procedures\ADR_Guides\beginnersGuide.htm .

testimony from arbitrators and business groups that a general set of standards for all arbitrators is not needed. Rather, because of the specialized nature of some disputes, it is preferable to have an arbitrator who has expertise on the subject in dispute instead of just general minimum qualifications. This is also an argument that the business community advances to support arbitration before knowledgeable arbiter over the litigation of matters before less knowledgeable judges.

2) *Does arbitration actually provide a fair and unbiased dispute resolution forum*?

Consumers who testified before the Committee made a strong argument about the potential for bias in arbitration. The opponents of arbitration testified that few consumers ever won or have a chance of winning an arbitration dispute. Indeed, none of the consumers who testified before the Committee felt that they had won their dispute. The witnesses expressed feelings that the proceedings were not impartial and that the arbitrators were generally from the business community and favored the business side of the dispute. Home Owners for Better Building testified that no consumer involved in a residential construction arbitration dispute has a chance of winning before pre-determined arbitrators (those named in the contract), because they depend on the builders for their business. From the testimony before the Committee there appears to be an increasing use of predetermined arbitrators in residential construction contracts and other consumer contracts.

It may also be argued that corporate America is using arbitration as a form of ready made civil justice reform. In fact, Edward Anderson, managing director of National Arbitration Forum, stated that " . . . [N]ow is the time for corporate counsel to reexamine the use of the arbitration tool to accomplish their own Civil Justice reform goals."[54]

The consumer testimony suggested that there are arbitration associations and/or individual arbitrators who solicit consumer arbitration business from businesses and that these arbitrators give preferential rulings in favor of those businesses because of factors described as sustainable "repeat business." One arbitration association, called Construction Arbitration Services, Inc. (CAS), distributes a brochure to prospective business customers stating: *"Customer relationships survive, so goodwill and potential referrals are preserved. It's confidential, not a matter of public record."*

While it is assumed that the above statement is intended to promote CAS's services and to enhance the relationship between the business and the consumer, it could be read with an ironic twist as a solicitation for more referrals from the business to CAS. In a phone conversation with committee staff, CAS executives indicated that a great majority of CAS's arbitration business results from CAS being named as the sole arbitrator for disputes arising from home warranties.[55]

Please see the actual documents on the following three pages.

[54] Editor's Interview, *Do An LRA: Implement Your Own Civil Justice Reform Program NOW*, The Metropolitan Corporate Counsel, August, 2001.

[55] A letter from Mr. Lippman further stated that "since its inception CAS has been written into a number of home warranty documents." The board of CAS is comprised of former executives with American Arbitration Association and one former Federal Mediator (FMCS). Currently, CAS administers arbitrations in all 50 states for approximately 6 warranty companies (one of which includes Home Buyers Warranty).

A side-issue to the question of fairness is the extent to which consumers voluntarily enter into binding arbitration clauses. Several consumer witnesses thought that they had, through negotiations, struck arbitration clauses, but later discovered that they had unknowingly agreed to arbitrate disputes. At least one witness who struck the clause from the main contract later found that it was in a separate home-warranty contract. Other witnesses discussed the arbitration clause with their attorney before signing the an agreement. One witness stated that the attorney said the language was standard and it was very unlikely it would be removed. In other cases it appears that even some attorneys do not comprehend the full impact of arbitration.[56]

An Austin homebuilder representing the Texas Association of Home Builders, Ray Tonjes of Ray Tonjes Builder, Inc., stated that, when a customer attempts to strike a binding arbitration clause the consensus reaction among his builder-colleagues is to either "work it out or walk away." When asked specifically about what he would do he stated that it presented a "red flag," implying the client was litigious. He also stated that "those with the gold get to make the rules, if you want to participate, those [arbitration agreements] are the rules."[57]

Some of the more troubling testimony was given by Amy Weaver from Houston, Texas regarding her home-buying experience with Royce Homes. Ms. Weaver, a single mother, stated that she struck one clearly visible arbitration clause in the various contracts presented to her during closing. However, days before she was to move into her new home with her children, she was presented with an earnest money contract[58] with a box for three addendums to her contract. One of the addendums was for an arbitration agreement. Just above the addendum section, the contract stated: "Addendums: This contract is subject to all attached addendums but is null and void unless the following addendums are fully executed." She says that no separate addendum was executed, giving her the impression that she had not agreed to any terms associated with arbitration.

It was only months later, when a problem arose with the house, that she noticed the following statement at the top of the contract: "Provisions of this contract are subject to arbitration under the Texas General Arbitration Act, Sections 171.001 et seq. of the Texas Civil Practices and Remedies Code." Despite striking the specific language dealing with arbitration from the body of the contract, it appears that it was nonetheless subject to binding arbitration because of the reference to the Act.

To further complicate matters, Ms. Weaver mistakenly thought that she had a warranty on her new home. She signed a document titled "Builder Application for Home Enrollment" to enrol for a warranty with a company in Arlington, Texas, called Home Buyers Warranty. But she overlooked the following provision in the application: "If you, the home buyer(s) have not received a certificate of warranty coverage and a warranty booklet from HBW [Home Buyers Warranty]

[56] Delynn Archer testimony from the April 3, 2002 hearing of the Committee http://www.house.state.tx.us/committees/audio/100.htm .

[57] Ray Tonjes testimony from the April 3, 2002 hearing of the Committee http://www.house.state.tx.us/committees/audio/100.htm . It should also be noted that Mr. Tonjes gave the same testimony before the Committee on Business and Industry regarding a similar charge on May 15, 2002.

[58] See Appendix C

within thirty (30) days after closing, then no warranty exists on the home at this address." According to Ms. Weaver she made several calls to Royce Homes regarding complaints about the house during the first 30 days without results. After the 30 days expired she says that she was told for the first time that no warranty had been issued. While a binding arbitration clause in a non-existent home warranty may be of no consequence, a requirement to submit the dispute over the existence of the warranty to arbitration certainly is.

According to Ms. Weaver, she is now left with a $250,000 home with faulty plumbing. The Texas Board of Plumbing Examiners has found that plumbing was installed in violation of code, causing toilets to constantly back up and overflow. At the time of the hearing, Ms. Weaver was in the process of resolving her dispute through arbitration conducted by CAS, which her attorney advised her was her only option.

Please see the actual document on the following page.

Sometimes the wording of the binding arbitration clause itself can give rise to issues of fairness. A real estate broker's errors and omissions liability policy in common use in Texas came to the attention of the Committee. It contains the following language:

> "Any dispute relating to this policy or the interpretation of its provisions whether such dispute arises before or after termination, shall, upon the written request of either party, be submitted to three arbitrators, one to be chosen by each party, and the third by the two so chosen. If either party refuses or neglect to appoint an arbitrator within thirty days after the receipt of written notice from the other party requesting it to do so the requesting party may appoint two arbitrators. . . . **All arbitrators shall be executives officers of insurance or reinsurance companies or Fortune 500 corporations not under the control of either party.**
>
> **The arbitrators may abstain from following the strict rules of law**, and shall seek to enforce the intent of the policy in a manner most consistent with its provisions without regard to the authorship of the language or any presumption in favor of either party. Each party shall submit its case to its arbitrator within thirty days of the appointment of the third arbitrator.
>
> The decision in writing of any two arbitrators, when filed with the parties hereto, shall be final and binding on both parties. Judgment may be entered upon the award of the board in any court having jurisdiction thereof. **Each party shall bear the expenses of the third arbitrator and of the arbitration**. **Said arbitration shall take place in the city of New York unless some other place is mutually agreed upon.**"[59] (*Emphasis added.)*

Claims on these types of policies frequently involve $10,000 or less. There would seem to be a dampening effect on the claims process if the real estate broker must first select an insurance or Fortune 500 executive to arbitrate, pay their arbitrator and half of another arbitrator, then travel to New York for an arbitration before a panel not bound to follow the law. Indeed, how many real estate brokers in Texas, especially outside of the largest cities, could even find an arbitrator of their own with those qualifications. It would appear that the carrier could render the policy worthless for smaller claims by simply ignoring them.

Another side-issue to the question of fairness involves the confidential aspect of arbitration proceedings. Arbitration claims, as well as the proceedings themselves, are generally not open to the public. Such claims are generally handled by private arbitrators or through non-governmental arbitration associations, with no central registry of the claims themselves or the outcomes. While many arbitration rules provide that either party may record the proceedings, either electronically or stenographically, it is rarely done. Even then the record is not public. Although the proceedings of a judicial appeal of an arbitration proceeding would be public, the limitations on the grounds of review also limit the record.

Consumers and consumer groups generally argue against the confidentiality aspects of arbitration as being "justice in the dark". Advocates of arbitration, on the other hand, urge confidentiality as one of its benefits. On the website of American Arbitration Association, the largest arbitration association in the United States, under *ADR Guides: Beginner's Guide to ADR,* the following statement appears: "**Privacy:** Arbitration, Mediation and other forms of ADR are not

[59] Hartford Insurance Group Real Estate Agents Errors and Omissions Liability Insurance policy form GN 14-87, Edition 10/97, Section IV. See Appendix D

open to public scrutiny like disputes settled in court. The hearings and awards are kept private and confidential, which helps to preserve positive working relationships."[60]

In 1995, the Texas Legislature made significant changes to the state's venue laws to address allegations of widespread venue-shopping. A restrictive policy was adopted out of principals favoring fairness and convenience to litigants. The Committee submits that some of the same principals should be applied in developing a policy regarding the selection of arbitrators. Allowing one party to the contract to name a specific arbitrator, or group of arbitrators, certainly raises a fairness and convenience argument. The attitude of most of the consumer witnesses required to arbitrate before a named arbitrator seemed to be that they were "outsiders" trying to pursue justice before "members of the club."

A difference should be noted between general arbitration associations, such as AAA, and more specialized ones, such as CAS. AAA exists primarily to provide a structure, administration and procedure for arbitration. It does not employ arbitrators. It maintains lists of persons who act as arbitrators in specialized areas. Parties to disputes administered by AAA have the option of using arbitrators from these lists or not. Sometimes the arbitration agreement itself may specify a manner of selection of arbitrators but require that the arbitration be administered under the rules of AAA. When the arbitrator selection process is through AAA, the common practice is for AAA to submit a list of ten names, with biographical, and fee, information on each, and allow each party to eliminate three or four. Some of the more specialized arbitration associations actually employ arbitrators and leave the parties, or at least one of them, no choice as to who determines the claim.

In order to identify and guard against potential biases in the arbitration process, in 1994 the California Legislature adopted the first and most extensive law on disclosure and disqualification. California law requires a proposed neutral arbitrator to disclose to all parties, in writing, within 10 calendar days of appointment, the following information:

- All matters that would cause a person aware of the facts to reasonably entertain a doubt that the proposed arbitrator would be able to be impartial, including the existence of any ground specified in the Code of Civil Procedure, § 170.1 (standards for disqualification of a judge).

- Any matter required to be disclosed by Ethics Standards for Neutral Arbitrators in Contractual Arbitrations. (Adopted by the Judicial Council upon direction of the Legislature on July 1, 2002.)[61]

- Information concerning prior or pending arbitration proceedings in which the proposed neutral served or is serving as a party arbitrator for any party to the arbitration proceeding or for a lawyer for a party, and cases involving a party or lawyer in which the proposed

[60] American Arbitration Association's website *ADR Guides: Beginner's Guide to ADR* located at: http://www.adr.org/index2.1.jsp?JSPssid=15727&JSPsrc=upload\LIVESITE\Rules_Procedures\ADR_Guides\beginnersGuide.htm .

[61] Ca. Code Civ. Proc. § 1281.85 (2002)

neutral arbitrator served or is serving as a neutral arbitrator . The following information must be disclosed for all cases dating back five years:

1) the results of each case arbitrated to conclusion,
2) the date of the arbitration award,
3) identification of the prevailing party,
4) names of the parties' attorneys, and
5) the amount of monetary damages awarded.[62]

The California Code of Civil Procedure also sets out a mechanism to disqualify an arbitrator. An arbitrator may be disqualified for violating the above disclosure[63] or for the grounds for disqualification of a judge.[64]

Even in the absence of direct Texas statutory authority there is at least one case brought to the attention of the committee staff in which a reviewing court vacated an arbitration award for similar grounds. According to an article in the Washington Post, Stephen Paxson,[65] an attorney/arbiter specializing in residential construction, had an arbitration award vacated by Harris County District Judge Caroline Baker. The homeowners in the dispute charged that the builder had improperly prepared the foundation. The foundation subsequently broke in half and began sliding down a hill. In accordance with requirements for choosing an arbitrator, Mr. Paxson forwarded his resume to both parties which listed himself as a member of the Greater Houston Builders Association and cites law articles he had authored. Mr. Paxson was subsequently chosen to arbitrate the dispute.

After ruling in favor of the builder, it was discovered that he was serving as the builders association's legal counsel. He was also in the process of writing ". . . a brief arguing for a change in the law the homeowner was using as the basis for his case against the builder." After the award was vacated, Mr. Paxson stated he did not attempt to hide his legal affiliation and "if they had read the article, they would have also found what my views were prior to the case. . ."[66]

3) *Is arbitration a faster, less expensive and more efficient alternative to litigation?*

Proponents of arbitration argue that arbitration is superior to conventional litigation because it is cheaper, faster, and more flexible. Witnesses in favor of arbitration in its current form argue that limitations on discovery and appeal, along with the absence of a jury, bring about substantial savings to both parties in attorney fees. Proponents of litigation over arbitration point to substantial fees for filing, administration and arbitrators in arbitration that are not born by parties in litigation.

[62] Ca. Code Civ. Proc. § 1281.9 (2002)

[63] Ca. Code Civ. Proc. § 1281.9 (2002)

[64] Ca. Code Civ. Proc. § 170.1 (2002)

[65] It should be noted that Mr. Paxson testified during the Committee's interim hearing on April 3, 2002. Mr. Paxson testified "on" the charge.

[66] Mayer, Caroline E., *No Suits Allowed*, Washington Post, July 14, 2002.

Still other evidence was presented to the Committee indicating an increasing use of scheduling orders, discovery deadlines and intermediate dispute resolution requirements that parallel pretrial orders in litigated cases and therefore involve as much attorney time.

It is difficult to make general statements regarding the comparative cost and speed of arbitration versus litigation because the wide variations in the manner of handling arbitrations. Litigated matters in courts of record normally follow a predictable pattern. After a suit is filed and answered there is a period provided for discovery, then attempts to dispose of the action by pretrial motions, then often a referral to mediation, and, finally, a trial on the merits. One to two years is a typical time frame for a case to go to trial. If either party appeals, then another one to two years could be added to the process.

Arbitrations, on the other hand, can be handled in many ways. Sometimes the arbitration agreement itself sets the procedure and time frames. Sometimes it does so by reference, such as requiring adherence to the rules of AAA. When not specified, the procedures are usually set and governed by the arbitrators themselves. An arbitration decision can be reached in as little as 30 days or take well over a year, depending on: the complexity of the dispute, scheduling issues of the parties, the amount of discovery allowed by the arbitrator(s), and applicable rules chosen to be undertaken by the parties. While appeal of an arbitration decision, usually by suit in the District Court, is very limited, it can nonetheless take several months to a year to resolve. Additionally, similar to District Court decision, the decision on an arbitration review is also subject to appeal.

There is little doubt that arbitration can provide a faster decision than litigation in a court of record. Court dockets are notoriously backlogged and few courts can reach a case for trial as soon as discovery is complete and the parties are ready. Arbitration decisions are sometimes required within a very short time after submission of the dispute, eliminating or severely limiting discovery.

Proponents of arbitration, particularly in the residential construction field, emphasized the need for a speedy resolution of disputes. Lengthy construction stoppages during a dispute add substantial costs to the house. The builders contend that the speedier disposition benefits the home-buyer because it prevents the additional costs and inconvenience of delays in occupancy.

Opponents, on the other hand, contend that the benefits of a speedy resolution are more than offset by the difficulty in prosecuting a claim without the benefit of adequate discovery, without the presumed fairness of an elected judge presiding over the dispute, and without the option of a jury.

While arbitration would seem to lead to a speedier decision, the issue of whether it is a cheaper method is a matter of debate. The primary cost savings attributed to arbitration is in the area of attorney fees. In some of its historical applications arbitration was carried out without legal counsel. Disputes regarding construction jobs, involving maritime matters and between merchants often do not involve complex legal concepts. Frequently arbitration has been pursued by the parties themselves. Some of the disputes submitted to arbitration today, however, involve more complex issues and, in consumer disputes, the consumer often feels compelled to retain legal counsel when the business party has legal counsel. Additionally, it has become more common for attorney-arbitrators to adopt court rules as governing guidelines for discovery and other matters pertaining to the arbitration. Overall, attorneys appear to be playing a larger role in arbitrations.

Dr. David Duffner, an Austin Orthopedic surgeon representing the Texas Medical Association (TMA), took a particularly strong stand against the use of binding arbitration as a result of its use in managed care contracts between physicians and insurance carriers. He took issue with the notion that arbitrations were less expensive, since the doctors would always retain counsel because the carrier was always represented by counsel. He also complained that binding arbitration clauses in managed care contracts actually caused more expense because they prevented the joinder of the claims of several doctors in a single action as would be permitted in litigation.

The issue of arbitration with regard to these types of contracts was a high profile issue during the 77th Legislature. A TMA supported bill, HB 1862, also known as the "prompt-pay" bill, would have required that carriers promptly pay medical providers for insured services. It originally had arbitration as the enforcement mechanism, but an amendment replaced arbitration with enforcement by litigation. In an action apparently encouraged, and subsequently lauded, by insurance and lawsuit reform groups, Governor Perry vetoed HB 1862, stating that the bill "contained the fatal flaw of outlawing early alternative dispute resolution."[67] The "early dispute resolution" referred to by the Governor was binding arbitration. Of the Governor's 82 vetoes from last session, HB 1862 has probably been discussed the most.

Jerry Reier from Fort Worth, Texas, testified about his experience trying to resolve a residential construction dispute under a binding arbitration clause. Mr. Reier owns a mechanical engineering firm, and stated that he had a general familiarity with arbitration because he had dealt with it in international trade and had binding arbitration clauses in some of his contracts. He knew that the contract for the construction of his home contained a binding arbitration clause, but said that he signed it because his experience with such clauses in business contracts had not raised any concerns. When a dispute arose between Reier and his builder, they went to arbitration under the rules of AAA, as the contract required. Mr. Reier and his wife, Linda, were represented by his corporate attorney. The builder was also represented by counsel. The entire process took several months. The arbitration fees, those paid to AAA, were $9,875 for administering the dispute. The fees to his own attorney were $21,445.[68] The builder, Landon Banks Custom Homes located in the Dallas/Fort Worth Area, claimed $56,972[69] in fees for arbitrators and attorneys. The arbitrators found in favor of the builder. The Reier's were left with an unfinished home and a strong opinion that arbitration was not less expensive than litigation.

The Committee solicited written comments as well as testimony. Several groups and individuals obliged.

A comprehensive letter regarding arbitration was received from Alan G. Waldrop[70] on behalf

[67] Governor Rick Perry press release from 6/17/02 http://www.governor.state.tx.us/pressoffice/archives/june2001/06172001e.PDF .

[68] See Appendix E (page 5 of Mr. Reier's written testimony).

[69] See Appendix E (page 4 of Mr. Reier's written testimony).

[70] Alan G. Waldrop, with the law office of Locke Liddell & Sapp, is legal counsel for Texans for Lawsuit Reform (TLR).

of Texans for Lawsuit Reform (TLR).[71] The letter points out that during the 75th Legislative Session the Texas Legislature took "steps to assure that pre-dispute binding arbitration provisions in consumer contracts are fair and willingly agreed to by the consumer."[72] Section 171.002 of the Texas General Arbitration Act (TGAA) states that agreements to arbitrate disputes greater that $50,000 are not enforceable unless the agreement is signed by both parties and their attorneys. This provision would indeed render a large number of arbitration agreements unenforceable under state law. However, under the holding in *Palm Harbor Homes, Inc. v. McCoy*[73] the Federal Arbitration Act (FAA) preempts § 171.002(a)(2) in matters involving interstate commerce, and therefore the consumer protections in the TGAA do not apply. The court held, state law "would place the arbitration agreement on unequal footing with other contracts in the state."[74] An article on the State Bar of Texas ADR Section website even describes § 171.002(a)(2) as "overlooked more often than . . .observed."[75]

TLR believes that the Committee on Civil Practices may have overly discounted the standard of "unconscionability" as it pertains to arbitration agreements and the protection it gives consumers. Under the TGAA, arbitration agreements which are found to be "unconscionable" are unenforceable.[76] While this sounds compelling in theory, the problem in practice is that the statute provides no guidance as to what is or is not "unconscionable." Rau & Sherman's article *Texas ADR and Arbitration: Statutes and Commentary* states, "while the provision [§ 171.022] may have been reassuring to legislators, it is unlikely that it adds much or anything of substance to what courts would have been free to do anyway as a matter of general contract law."[77] No clear standard exists for proving that an agreement is "unconscionable," under § 171.022. In *American Employers' Ins. Co. v. Aiken*,[78] the Court of Appeals ruled that if a party to an arbitration agreement has the ability to reject the agreement, then considerations of unconscionability will not invalidate the agreement. Thus, the only way to reach the issue of unconscionability is to first establish that the agreement is in the clearest sense a contract of adhesion. The Committee has reviewed numerous cases interpreting the unconscionability provision of § 171.022, and its predecessor § 171.001, and has

[71] Letter from Alan G. Waldrop, August 14, 2002, submitted after the Committee's last public hearing. The Committee solicited comments from TLR because they are active participants in civil litigation issues and in Committee's hearings. Upon receipt of the letter, the committee staff forwarded a copy to each committee member for review. No written responses were received from any committee members.

[72] Letter from Alan G. Waldrop, August 14, 2002

[73] 944 S.W. 2d. 716, (Tex. App.--Ft Worth 1997).

[74] § 171.001 Civ. Prac. & Rem. C. (Annotated n. 6)

[75] Keeper, Paul D., *Recent Changes in Texas Arbitration Law*, 28 April, 1998. (The article was presented to the ADR Section of the Travis County Bar Association by Mr. Keeper. He is a practicing mediator and arbitrator. The article is located on the State Bar of Texas ADR Section website at http://www.texasadr.org/recentdev.cfm .)

[76] § 171.022 Civ. Prac. & Rem. C.

[77] Rau & Sherman, *Texas ADR and Arbitration: Statutes and Commentary* (West 1997) at 291., *Id.* Supra 49

[78] 942 S.W. 2d 156 (Tex. App.--Ft. Worth 1997).

yet to find an instance of an arbitration award being vacated because of an unconscionable binding arbitration clause. This includes *Palm Harbor Homes, Inc v. McCoy*[79] in which a manufactured home buyer claimed that the clause was secured by fraudulent inducement. Also, *Smith v. H. E. Butt Grocery Co.,*[80] involves an employment contract between an employer and employee, where there was shown unequal bargaining power and no actual negotiations leading to the contract.

TLR additionally points out that "the majority of arbitration agreements enforced by the courts are governed by the FAA which preempts the TGAA." The Committee reached the same conclusion. It appears that any changes that the Texas Legislature makes to the TGAA would affect only the cases involving strictly intrastate, non-federal matters. As a matter of public policy, however, the Committee believes that if the legislature determines that substantive or procedural changes need to be made to the TGAA to enhance consumer protections, they should be made without regard to the preemption by the FAA. There are several reasons for this. The TGAA still applies to some disputes, and adding necessary protections for a few consumers is better than none at all. The FAA may not preempt all state provisions, even when the dispute involves interstate commerce. It is possible that some changes, particularly regarding reporting and qualifications of arbitrators, would be enforced even in the face of preemption. Lastly, if Congress enacts changes to the FAA, the state issues could be given increased applicability, such as by the all-too-rare provisions in federal statutes that recognize and preserve protections provided by state law.

The main dilemma the Committee faced during its review of this issue was the lack of statistical data. Nearly all of the Committee's input was by way of anecdotal evidence. Those favoring arbitration set forth its benefits as an inexpensive, speedy and efficient way to resolve disputes and have pointed to specific arbitration proceedings to support this position. Those opposing arbitration, usually on the grounds that it was biased against consumers and can be more expensive, also pointed to their own experiences for support. No entity provided statistical data to the Committee assessing the average cost, average time, or outcome biases.

As a result of the public hearings, the Committee has concluded that reliable statistical data regarding cost, time and outcomes of arbitrations in Texas is not readily available. There are several reasons for this. First and foremost, arbitrations are nearly always conducted by private persons or entities, who are not subject to open records requirements and do not maintain central registries. In fact, one of the benefits urged by some in the arbitration business is that the proceedings *are* confidential. Additionally, even if there were disclosure requirements, there would not be much to disclose. At most arbitrations, there is no stenographic or electronic record of the proceedings. The decision is often merely a statement of who wins, who loses, and any monetary awards. The decision itself is then frequently made confidential.

The Committee recognizes the importance of anecdotal evidence. The testimony before the Committee pointed out a number of real and potential problem areas in consumer arbitration, and even some possible abuses. Some of that testimony has resulted in the Committee's suggestions for legislation. However, the primary concern of the Committee is that reliable data be available on the

[79] 944 S.W. 2d. 716, (Tex. App.--Ft Worth 1997, *no writ.*)

[80] 18 S.W. 3d. 910, (Tex. App.--Beaumont 2000, *no writ*.)

cost, time and outcomes of consumer arbitrations. If we are to concede, as the courts have held, that any binding arbitration clause voluntarily entered into is "conscionable" and enforceable, then consumers should have available to them some reference on which to voluntarily decide to enter into such an agreement.

Reforms in Other States and Congress

Several other states are in various stages of addressing some of the same issues regarding consumer arbitration that the Committee has studied. Provided below is a summary of a few measures under consideration, or enacted, in other states.

California State Legislature[81]

AB 2504 Provides for consumer protections by "requiring the disqualification of a judge who has a current arrangement concerning prospective employment or other compensated service as a dispute resolution neutral or is participating in, or within the last two years, has participated in discussions regarding such prospective employment or other service. *(Signed into law September 29, 2002.)*[82]

AB 2574 "[P]rovides that in any arbitration pursuant to an arbitration agreement, if a person is to serve as a neutral arbitrator, the proposed neutral arbitrator is required to disclose all matters that would cause a person aware of the facts to reasonably entertain a doubt that the proposed neutral arbitrator would be able to be impartial." The bill further prohibits any arbitration company from conducting an arbitration in which a financial relationship exist between any party or attorney for a party to such an arbitration dispute. *(Signed into law September 26, 2002.)*[83]

AB 2656 Requires "a private arbitration company involved in consumer arbitration cases to make certain information regarding those cases available to the public, as specified, and would provide that no private arbitration company shall have any liability for collecting, publishing, or distributing the information." *(Signed into law September 30, 2002.)*[84]

AB 2915 "[P]rohibits a neutral arbitrator or private arbitration company from administering any consumer arbitration that requires a non-prevailing consumer who is a party to the arbitration to pay the opposing party's costs or fees. The bill would require a private arbitration company to waive the fees and costs of arbitration, exclusive of

[81] Each bill from the California Assembly may be accessed on the internet at the following link: http://www.assembly.ca.gov/acs/acsframeset2text.htm

[82] See Appendix F

[83] See Appendix G

[84] See Appendix H

arbitrator fees, for an indigent consumer as defined. The bill would also require a private arbitration company to provide written notice to any consumer of the right to obtain a fee waiver, as specified, and to keep specified information concerning a consumer confidential . . ." *(Signed into law September 29, 2002.)*[85]

AB 3029 Provides ". . . that if a consumer arbitration agreement, entered into or renewed on or after January 1, 2003, designated one or more exclusive private arbitration companies . . . or incorporates the arbitration rules of a private arbitration company . . ., the consumer party shall have the option . . . after a dispute arises, to choose a different neutral private arbitration company . . . . The arbitration agreement shall plainly notify the consumer of this right.... as well as the right to obtain information about private arbitration companies . . . . The bill would prohibit an arbitrator or private arbitration company from administering or otherwise participating in a consumer arbitration in violation of these requirements." The bill further requires a private arbitration company to disclose certain conflict of interest information within 15 days of a demand to arbitrate or be subject to disqualification. *(Vetoed by the Governor October 1, 2002.)*[86]

Veto Comment by Governor Davis: A.B. 3029 . . . "cast too wide a net and could have the unintended consequences of making California's arbitration provisions so complex that national companies would not be willing to provide services in our state."

AB 3030 This bill provides for enforcement of AB 2574, AB 2915, and AB 3029. It's effectiveness is wholly subject to the enactment and effectiveness of the aforementioned bills. A "private arbitration company that administers a consumer arbitration in violation of specific provisions" (in AB 2574, AB 2915, and AB3029), "in the court's discretion, be subject to disgorgement of any administrative fee obtained as a result of that violation." If a court vacates an award for such violations, the private arbitration company would be prohibited from conducting or administering future arbitration of the dispute, unless the consumer party elects otherwise by writing. *(Signed into law September 30, 2002.)*[87]

Washington State Legislature

HB 2754 Amends "mandatory arbitration act" of the Revised Codes of Washington (RCW). Provides that, in counties with a population of more than 150,000 mandatory arbitration of civil actions under chapter 7.06 RCW shall be required. In counties with populations of less than 150,000, the superior court of the county, by majority vote of the judges thereof, or the county legislative authority may authorize

[85] See Appendix I

[86] See Appendix J

[87] See Appendix K

mandatory arbitration in civil actions. (*Signed into law June 13, 2002.*)[88]

HB 1268 Provides for arbitration for the enforcement of collective bargaining agreements for state employees. The bill also provides guidelines for the arbitration proceedings. (*Signed into law July 1, 2002.*)[89]

New Jersey Legislature

S.B. 514 Tracks the Revised Uniform Arbitration Act (RUAA) adopted by the National Conference of Commissioners on Uniform State Laws in August 2000. The uniform act is designed for adoption by state legislatures and would clarify arbitration in procedures light of recent developments in arbitration law. The bill would establish that parties may expand the scope of judicial review by providing for such expansion in a record. The bill would also require the same disclosures from party and non-party arbitrators, and prohibits an individual from serving as a party arbitrator if the individual's interest in the outcome of the arbitration is not properly disclosed . The bill can also require a court to vacate an arbitration award for the evident partiality of both neutral and party arbitrators. *(Pass NJ Senate, currently in the Judiciary Committee in the Assembly)*

Federal Legislation

H. R. 2215 Section 11028 of the bill "Prohibits the use of mandatory arbitration clauses in motor vehicle franchise contracts, successfully ending a three-year attempt to free auto dealers from binding arbitration agreements." The bill further requires that arbitration awards be in writing and explain the factual and legal basis for an award. However the bill does not amend the Federal Arbitration Act. *(Signed into law November 2, 2002)*

S. 3026 "Would amend the Federal Arbitration Act to create new due process rights for parties and allow them to opt-out of arbitration agreements in favor of small claims court."
It would also require that arbitrators adhere to the Code of Ethics for Arbitrators in Commercial Disputes of the American Arbitration Association, and in bold capitol letters indicate whether arbitration agreements are voluntary or mandatory. Agreements also would be required to identify a source for consumers and employees to contact for information on the costs and fees. The bill also provides to the parties the option to forgo arbitration if their dispute is for less than $50,000 and take it to small claims court for adjudication. Also, an arbitrator may not have any financial or personal interest in the outcome of the arbitration. Further

[88] See Appendix L

[89] See Appendix M (It should be noted that because of the length of this bill the appendix only contains a summary of H. B. 1268. The actual bill maybe located at: http://www.leg.wa.gov/wsladm/billinfo/dspBillSummary.cfm?billnumber=1268 .)

arbitrators would be required to adhere to the same substantive law that would apply to a court. other provisions of the bill would give parties the right to present evidence and cross-examine witnesses, require arbitrators to render their decisions in writing. *(Introduced to the U.S. Senate on October 1, 2002)*

Findings and Legislative Options

Speaker Laney's charge to the Committee on Civil Practices did not specifically direct the Committee to make recommendations to the 78th Legislature for remedial legislation. However, it is the consensus of the Committee that it has a responsibility to set forth options that the 78th Legislature might pursue on this subject, address matters that came to the attention of the Committee during the review. The following are the Committee's findings and possible legislative remedies.

Finding 1:

There is no reliable statistical data available to either support or refute many of the claims of proponents and opponents of consumer arbitration. A central registry, or public filings, regarding disclosing the parties, outcomes, costs and disposition times of consumer arbitration proceedings would be helpful to the a consumer in making an informed decision of whether to agree to arbitration and to the legislature in addressing whatever problems may be associated with it.

Possible Legislative Remedies

Option 1.

Establish a central internet registry, possibly administered by the Office of Court Administration, the Office of the Attorney General, Secretary of State or other state office and require any person or entity who conducts or administers a consumer arbitration to disclose on such registry the following information regarding each consumer arbitration that the person or entity handles:

1) the names of parties to the dispute;
2) the name of each party's attorney, if any;
3) the name of the arbitrator or arbitrators conducting the arbitration;
4) the name of the entity administrating the arbitration, if any;
5) a general statement of the nature of the dispute and the relief requested by each party;
6) the arbitrator's findings;
7) the date that the arbitrator was first engaged on the claim;
8) the date that the claim was concluded;
9) the fees charged by the arbitrator; and
10) the fees charged by the entity administering the arbitration, if any.

The disclosure requirement could be enforced by administrative or criminal penalties. The Committee has made no assessment of the cost of establishing and maintaining such a registry, but, since fees seem to be assessed for arbitrators and administrative costs in virtually every arbitration, a nominal fee assessed to the parties and remitted to the registry administrator should cover any costs.

Option 2.

The legislature could require that the disclosure form described in Option 1 be filed with the County Clerk of the county in which the arbitration was held. While this would create 254 registries, rather than one, it would place no greater a burden on someone wishing to research and compile information on arbitrations than they would have in researching court records. The counties also already have the infrastructure in place for filing the disclosure forms. They could be filed in personal records indexes as are marriage licenses, assumed name certificates and campaign contribution reports. A fee could be assessed and paid to the County Clerk as it is for other filings. Something in the range of $10.00 per disclosure would be seem sufficient. As in Option 1, this filing requirement could be enforced by either a civil or criminal penalty.

Finding 2:

There appear to be instances in which consumers either do not know that they are entering into binding arbitration agreements or do not understand the implications of the agreement.

Possible Legislative Remedies

Option 1.

A clause could be required in any contract involving consideration of under $50,000 apprising a consumer of the existence of a binding arbitration clause and its effects. A suggested provision would be that the following statement appear in at least 12 point boldface type, clearly and conspicuously:

> THIS AGREEMENT CONTAINS A WAIVER OF IMPORTANT LEGAL RIGHTS, INCLUDING YOUR RIGHT TO A TRIAL BY A JUDGE OR A JURY. YOU SHOULD NOT SIGN THIS AGREEMENT WITHOUT FIRST CONSULTING WITH AN ATTORNEY.

Option 2.

The same provision could be required of all consumer contracts with binding arbitration clauses, regardless of the amount involved. However, since such a provision would probably apply only to arbitrations governed by Texas law (The Federal Arbitration Act appears to prohibit the enforcement of such a provision) it may not be necessary in contracts over $50,000, since those require that the parties' attorneys sign them anyway.

Finding 3:

It appears possible that a binding arbitration clause could require that the

arbitration be held at a location that is so inconvenient to the consumer as to render the consumer's pursuit of the arbitration remedy impractical.

Possible Legislative Remedies

Amend the Texas Arbitration Act to require that the arbitration be held in the county of a consumer's residence or the county in which the contract was actually executed. This would be consistent with the provisions of the Texas Deceptive Trade Practices Act dealing with suits against consumers (See V.T.C.A., Business & C., Section 17.46(23)). Any provision to the contrary would be unenforceable.

Finding 4:

When a pre-dispute arbitration agreement names a specific person or organization to act as arbitrator, or to have the power to select the arbitrator(s), exclusive of the parties, there seems to be a tendency toward bias toward the drafter of the agreement. This practice is not to be confused with the naming of an arbitration association, such as the American Arbitration Association, to administer the arbitration.

Possible Legislative Remedies

Prohibit the naming of a specific person to act as arbitrator and prohibit authorizing a person or entity to name the arbitrator(s) exclusive of the parties to the dispute, in pre-dispute consumer arbitration agreements.

Finding 5:

Most of the consumer-complainants heard by the Committee dealt with contracts for home construction. Since these contracts frequently involve the single largest financial transaction in the consumer's lifetime, strong protections should be in place to ensure that the consumer is on a parity with the builder in the consummation of the contract. The contract is nearly always furnished by the builder in a form that has been prepared by an attorney. Many of the consumer complaints regarding arbitration in home-building contracts could be eliminated if the consumer would have the contract reviewed by an attorney.

Possible Legislative Remedies

Amend the Texas Arbitration Act to require that contracts for the construction of a new residential dwelling containing a binding arbitration clause be executed by the consumer as well as the consumer's attorney. This would extend the existing requirement of V.T.C.A., Civil Practices & Remedies, Section Sec. 171.002(b) to home construction contracts. Again, this provision would only apply to contracts that are not preempted by the Federal Arbitration Act.

Finding 6:

A method of allowing multiple claimants under binding arbitration clauses to join into a single arbitration proceeding would be cost-efficient for all parties, particularly where there are a large number of smaller, but similar claims.

Possible Legislative Remedies

Amend the Texas Arbitration Act to allow for the joinder of claims.

Finding 7:

Aside from blatant irregularities and patent bias, there appear to be few grounds for review of an arbitration award. There appears to be no protection against an arbitrator misapplying the law to the facts.

Possible Legislative Remedies

Require a person who conducts an arbitration, upon the request of any party, to prepare findings of facts and conclusions of law and serve them on each party within 30 days after the request. The request can be enforced by a mandamus from the District Court. Either party may appeal to the District Court on the grounds that the findings and conclusions do not support the arbitration award. The District Court shall make its determination by summary proceedings, considering only the findings and conclusions, and shall set the arbitration award aside if it is not supported by the findings and conclusions. After the award is set aside, the District Court assumes jurisdiction of the dispute and, at its discretion, may remand it to arbitration, either before the original arbitrator(s) or before a new arbitrator or arbitrators are named by the District Court, or may order the parties to re-plead as in District Court actions generally and proceed accordingly under the Texas Rules of Civil Procedure.

Charge Three

Review changes in federal laws and law enforcement procedures, as well as recommendations from state and national agencies charged with homeland protection, to assess the need for changes in state civil laws to protect life and property and to detect, interdict and respond to acts of terrorism.

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Review changes in federal laws and law enforcement procedures, as well as recommendations from state and national agencies charged with homeland protection, to assess the need for changes in state civil laws to protect life and property and to detect, interdict and respond to acts of terrorism.

Introduction

During the interim the House Committee on Civil Practices, was charged to review changes in federal laws and law enforcement procedures, as well as recommendations from state and national agencies charged with homeland protection, to assess the need for changes in state civil laws to protect life and property and to detect, interdict and respond to acts of terrorism. Legislators have taken a particular interest in the impact of terrorist attacks on insurance markets and businesses. The terrorists attacks of 9-11, forced local, state and federal governments to review their jurisdictions and decide what changes they need to make to respond to September 11th and also prepare for any similar events in the future.

Congress is considering the Terrorism Insurance Bill, which, among its other provisions, would provide insurance to businesses in case of a terrorists attack. Governor Perry created the State Infrastructure Protection Advisory Committee (SIPAC). SIPAC aim is to protect government services and commerce from potential terrorism threats.[90] President Bush directed the creation of the Department of Homeland Security. Headed by former Pennsylvania governor Tom Ridge, its mission is to prevent terrorist attacks within the United States, reduce America's vulnerability to terrorism, minimize resulting damage, and recover from attacks that do occur.[91] Mirroring the federal initiative, Governor Perry created a state homeland protection agency called the Governor's Task Force, made up of various state agency heads. The goals of the Department of Homeland Security and the Governor's Task Force are essentially the same, to prevent terrorism and maintain the safety of the state.[92]

History

On November 29, 2001 the U. S. House of Representatives passed H.R. 3210, the Terrorism Insurance Bill, by a vote of 227 - 193. On July 25, 2002, the U.S. Senate passed a very different version of H.R. 3210, having substituted into it large portions of S. 2600, its own version of a terrorist insurance bill. The House refused to concur in the Senate's amendments and the bill is in

[90] Statement provided by the Lyndon B. Johnson School of Public Affairs.

[91] Department of Homeland Security website, www.whitehouse.gov/deptofhomeland/ .

[92] Governor Task Force on Homeland Security: Governor's website, http://www.governor.state.tx.us/homelandsecurity/ .

currently in conference.[93]

Those supporting the Terrorism Insurance Bill do so on the grounds that the existing United States legal system and insurance legislation is not equipped to deal with acts of mass terrorism on the scale of those that occurred September 11th. The 1993 attacks on the World Trade Center killed six people and resulted in 500 lawsuits by 700 individuals, businesses and insurance companies claiming 500 million in damages. It has taken eight years for these cases to reach trial, and hundreds have yet to be resolved.[94] Both houses of Congress have acknowledged the possibility of catastrophic economic consequences above and beyond the losses caused by mass-terrorist attacks themselves. These include paralyzing the commercial aviation industry and crippling the insurance industry. After the 1993 World Trade Center bombing, Congress did not pass any insurance legislation to deal with terrorism because it did not foresee further events on the scale of September 11th. Even after the 1995 Oklahoma City Bombing the feeling was that these were only isolated occurrences and that sweeping legislation was not necessary. Only minimal litigation resulted from Oklahoma City, probably a comment as much on governmental liability limitations as potential causes of action. Those opposing H.R. 3210, at least in the form passed by the House, contend that it goes too far to prevent the recovery by claimants of fair compensation for loss and would lower the threshold of accountability to potential claimants.

The Governor's Task force, The State infrastructure Protection Advisory Committee (SIPAC), and the Department of Homeland Security were all created in Texas in response to September 11th. The Governor's Task Force was created in October, 2001, by executive order. The Task Force held meetings in the fall to consider recommendations from the governor and other state agencies. In January, 2002 they made their recommendations to Governor Perry.[95] The SIPAC was formally created in October, 2001, but had already been under consideration. In the fall of 2000 Attorney General Cornyn entered into a partnership with the United States Critical Infrastructure Assurance Office in order to address security concerns regarding state infrastructure. The SIPAC held four public meetings between November, 2001 and March, 2002 and were also part of a national conference called *Critical Infrastructures: Working Together in a New World,* held in Austin in February, 2002. Their final report was issued on March 25, 2002.[96] The Department of Homeland Security would be a new federal agency with cabinet status. The bill to create it, The Homeland Security Act of 2002, has been passed by the House, but is still being considered by the Senate.[97]

[93] Legislation on the Internet, Library of Congress, http://thomas.loc.gov/ .

[94] Congressman David Dreier's website, background on H.R. 3210, http://dreier.house.gov .

[95] Supra n 92.

[96] Legislation on the Internet, Library of Congress, http://thomas.loc.gov/ .

[97] Legislation on the Internet, Library of Congress, http://thomas.loc.gov/ .

Committee Review

Federal Legislation - H.R. 3210 and S. 2600

The Terrorism Insurance Bill is intended to provide a federal backstop for insurance policies covering acts of terrorism. Insurance claims resulting from the September 11th attacks will total about $50 billion. The president said that 300,000 workers are out of jobs because of the lack of insurance and that "it's time to the put hard hats back on the workers of America."[98]

The Consumer Federation of America disagrees with the need for the terrorist insurance legislation. Their report to Congress, entitled "How the Federal Back Up for Terrorism Insurance Has Affected Insurers and Consumers: An Update", concludes that a terrorism insurance crisis does not exist. Its finding is that most of the nation has not had a severe problem finding coverage and that the price, while still expensive, has dropped. The following is a summary of their findings.

- **Insurers have a greater capacity to cover terrorism losses in the wake of the September 11th.**
  More new capital was invested in insurance and reinsurance companies in the months following September 11th than was lost in the attacks. The World Trade Center loss estimates continue to drop, to $30 to $40 billion, or $19.5 to $26 billion after federal tax write-offs are allowed. Meanwhile, the insurance industry continues to be overcapitalized, with an ultra-safe premium to surplus ratio of 1.1 to 1.

- **Terrorism coverage is available in most cases. Even hard-to-place policies are being written.**
  Small and mid-sized businesses are having little trouble getting terrorism insurance. Even large properties can get coverage. Availability problems are limited to very large real estate and commercial properties (such as new construction projects) that must be insured for the more than the $500 million to $1 billion in stand-alone coverage that is available. Potential terrorist "trophy" targets, such as skyscrapers are harder to insure, but not impossible. In the last seven months, malls, sports stadiums, airlines, construction contractors and even the Sears Tower and World Trade Center clean-up site have gotten coverage.

- **Commercial rates in general are stabilizing and increases are starting to slow.**
  Insurers appear to be price gouging in some cases. Average price increases during the second quarter of this year were 20 percent for small businesses, 27 percent for mid-sized businesses and 34 percent for large businesses. This represents a decline from rate increases at the end of 2001. Evidence that price-gouging is occurring continues to mount, especially in lines of insurance (such as "umbrella" coverage) that are not likely to be affected by terrorism. The rate problem has been caused by a classic turn in the economic cycle of the industry, sped up, but not caused by, the terrorist attacks. CFA estimates that rates will stabilize completely by the end of 2002 to mid-2003.

[98] Fox News Channel.

- **Banks are freely loaning money to the vast majority of businesses, regardless of the terrorism insurance situation in the nation.**
  A survey of bank loan officers in April by the Federal Reserve reported that lack of terrorism coverage was having a minimal impact on lending. A separate survey by Bridger Commercial Funding found that 82 percent of bankers said that availability of terrorism insurance had little effect on their lending.[99]

"There are problems in the market, especially with high rates and price gouging, but the most-severe problems are unrelated to terrorism risk," said Hunter. "The nation is in the midst of a hard insurance market but relief is almost here. This means sharp price increases will soon end and coverage will be more available, especially if the fast-developing private terrorism insurance market is not stymied by Congress," he said. He goes on to add that he does not support the legislation and feels that what Congress should do is help cover the potential targets that can't get coverage

The Coalition to Insure Against Terrorism and the American Insurance Association have different findings than the CFA. CIAT believes the insurance industry is not providing adequate and affordable terrorism coverage under general property and casualty policies. They have concluded that a growing number of public and private companies are not covered for terrorism losses. One of their primary findings is that without terrorism insurance companies are forced to self insure, which means putting at risk capital that could otherwise be used for investment and job creation. Affordable terrorism insurance is becoming scarce and the rising insurance prices will necessarily be passed along to the users of the facilities. An example is the stadium for the Tampa Bay Buccaneers, who hasn't been able to obtain terrorism insurance at a reasonable price. The effect could be increases in the cost of admission and concessions. A recent survey by the Bond Market Association found that large lenders have placed a hold on or cancelled more than $7 billion in large loan volume for the year 2001, citing lack of terrorism insurance. The lack of such lending could delay the economic recovery and even threaten our economic security. Every business decision that is delayed or cancelled because of lack of insurance means jobs lost.[100]

The Committee did not hear testimony on the issue of terrorism insurance and was unable to find independent data to support the positions of either the CFA or CIAT. However, the reports of both organizations bring forth important considerations. While differing on the current availability and reasonableness of terrorism insurance, both agree on the importance of making terrorism insurance available at reasonable rates.

Other Federal Legislation

Congress has also taken other measures designed to help those harmed by the September 11th attacks and to help prepare for any future attacks. The measures include a Use of Force Resolution, the Air Transportation Safety and Stabilization Act, and the Bioterrorism Preparedness Act.

Recommendations from State Agencies

[99] Consumer Federation of America Report 8-22-02.

[100] Coalition to Insure Against Terrorism

State Infrastructure Protection Advisory Committee (SIPAC)

The SIPAC made only one comment relevant to the issues regarding civil litigation and terrorism. It pointed out that companies may be reluctant to take expensive precautions and maybe even to assess the need for precautions because their potential liability would be less if they do not know the risks. A company could be subjected to liability if it undertakes a thorough risk assessment, addresses the vast majority of the discovered flaws, but decides not to repair a small number of defects whose cost of repair outweighs a low risk. A claimant who suffers a loss attributable to the unaddressed flaw could recover based on failure to warn and/or remedy, where ignorance of the problem may otherwise have been a defense.[101]

Governor's Task Force

When the task force report contained only one recommendation dealing with civil law. The report recommended that the Governor support legislation to expand the current Good Samaritan Law to protect industrial response teams responding to emergencies at neighboring facilities.[102] Currently the Good Samaritan Law protects individuals from liability for good faith efforts to respond in the event of an emergency. Several witnesses representing major industrial facilities with sophisticated emergency response teams suggested expanding this law to ensure that emergency response teams responding to an emergency at a neighbor's facility would not be liable for actions taken in good faith and without gross negligence.[103]

[101] Report of the State Infrastructure Protection Advisory Committee, Office of the Attorney General.

[102] January's report to the Governor, Governor's Task Force on Homeland Security.

[103] Houston Bar Journal, "Texas Statute Trumps the Good Samaritan Rule."

Charge Four

Review recent decisions of Texas appellate courts and identify those decisions that: (1) clearly failed to properly implement legislative purposes, (2) found two or more statutes to be in conflict, (3) held a statute to be unconstitutional, (4) expressly found a statute to be ambiguous, or (5) expressly suggested legislative action.

Charge 4

Review recent decisions of Texas appellate courts and identify those decisions that: (1) clearly failed to properly implement legislative purposes, (2) found two or more statutes to be in conflict, (3) held a statute to be unconstitutional, (4) expressly found a statute to be ambiguous, or (5) expressly suggested legislative action.

Introduction

The Committee was given the following interim charge:

> Review recent decisions of Texas appellate courts and identify those decisions that: (1) clearly failed to properly implement legislative purposes, (2) found two or more statutes to be in conflict, (3) held a statute to be unconstitutional, (4) expressly found a statute to be ambiguous, or (5) expressly suggested legislative action.

In 1999, the Select Committee on Judicial Interpretations of Law was created and given a similar charge. The specific directive from Speaker Laney creating that committee was as follows:

> **Select Committee on Judicial Interpretations of Law**
>
> The Select Committee on Judicial Interpretations of Law shall examine the decisions of Texas appellate courts over the last five years to identify those decisions that:
>
> (1) clearly failed to properly implement legislative purposes;
>
> (2) found two or more statutes to be in conflict;
>
> (3) held a statute to be unconstitutional;
>
> (4) expressly found a statute to be ambiguous; or
>
> (5) expressly suggested legislative action.
>
> The Committee shall make recommendations for corrective legislation in response to the Committee's findings. To the extent possible, corrective legislation proposed by the committee should have the purpose of effectuating the original legislative intent of the statutes considered by the court and should not recommend other substantive changes.
>
> The members of the Committee are: Bosse, chair, Dunnam, Goodman, Gray, Hamric, Hinojosa, Smith, and Solomons.
>
> The Committee shall rely on the Texas Legislative Council to support its work.

Additional support, if necessary, may be approved by the House Committee on Administration.

The Committee shall report its findings to the 77th Legislature, and it is terminated when the 77th Legislature convenes.

In carrying out this charge the Committee is continuing the work of the Select Committee, which ceased to exist at the beginning of the 77th Legislature. As did the Select Committee, the Committee relied on the resources of Texas Legislative Council to research and summarize the applicable cases.

The attached memo from Jonathan Davis of the Texas Legislative Council identifies all such cases for the purposes of this review. The Committee on Civil Practices asks that any committee with appropriate jurisdiction regarding the following cases take appropriate action in regards to the identified decisions during the 78th Legislature.

M E M O R A N D U M

TO: The Honorable Fred Bosse
Chairman, Civil Practices Committee

FROM: Jonathan Davis
Legislative Counsel

DATE: September 10, 2002

SUBJECT: Summary Report of Texas Judicial Appellate Decisions

In November 2000, the House Select Committee on Judicial Interpretations of Law submitted its Interim Report to the 77th Texas Legislature. In the report, the committee found that the Texas Legislative Council, within existing resources, should perform a review of appellate decisions in which courts of this state have:

(1) clearly failed to implement legislative purposes;

(2) found two or more statutes to be in conflict;

(3) held a statute to be unconstitutional;

(4) expressly found a statute to be ambiguous;

(5) expressly suggested legislative action; or

(6) changed a common-law doctrine.

Attached please find a summary of those appellate decisions identified by the legislative council as falling within one of the categories described by the select committee. Almost all of these decisions were issued in 2001 and 2002; one was issued in 2000. Not included in the summary are appellate decisions that were subsequently overturned by a higher court.

Please note that included in the list may be some appellate decisions that discuss statutes that were amended after the case arose. Because of the subsequent amendments to those statutes, a court reviewing a particular statute as amended could reach a different conclusion about the amended statute.

DECISIONS CLEARLY FAILING TO IMPLEMENT LEGISLATIVE PURPOSES

none identified

DECISIONS FINDING TWO OR MORE STATUTES TO BE IN CONFLICT

1. *In re Bellamy*, 67 S.W.3d 482 (Tex. App.--Texarkana 2002)

2. *In re Kuhler*, 60 S.W.3d 381 (Tex. App.--Amarillo 2001, no pet.)

3. *Harris County Water Control and Imp. Dist. No. 99 v. Duke*, 59 S.W.3d 333 (Tex. App.--Houston [1st Dist.] 2001, no pet.)

4. *In re G.R.M., F.A.M., and N.D.M.*, 45 S.W.3d 764 (Tex. App.--Ft. Worth 2001, no pet.)

5. *Texas General Indem. Co. v. Texas Workers' Compensation Com'n*, 36 S.W.3d 635 (Tex. App.--Austin 2000, no pet.)

DECISIONS HOLDING A STATUTE TO BE UNCONSTITUTIONAL

1. *Glazer's Wholesale Distributors, Inc. v. Heineken USA, Inc.*, 2001 WL 727351 (Tex. App.--Dallas 2001, pet. granted)

2. *State v. Doe*, 61 S.W.3d 99 (Tex. App.--Dallas 2001, pet. granted)

3. *Rushing v. State*, 50 S.W.3d 715 (Tex. App.--Waco 2001, pet. ref'd)

DECISIONS EXPRESSLY FINDING A STATUTE TO BE AMBIGUOUS

1. *Keeter v. State*, 74 S.W.3d 31 (Tex. Crim. App. 2002)

2. *Boget v. State*, 74 S.W.3d 23 (Tex. Crim. App. 2002)

3. *City of Corpus Christi v. Public Utility Com'n of Texas*, 51 S.W.3d 231 (Tex. 2001); *TXU Elec. Co. v. Public Utility Com'n of Texas*, 51 S.W.3d 275 (Tex. 2001)

4. *Helena Chemical Co. v. Wilkins*, 47 S.W.3d 486 (Tex. 2001)

5. *Rylander v. Fisher Controls Intern., Inc.*, 45 S.W.3d 291 (Tex. App.--Austin 2001)

6. *City of Houston v. Jackson*, 42 S.W.3d 316 (Tex. App.--Houston [14th Dist.] 2001, pet. dism'd w.o.j.)

7. *Kutzner v. State*, 75 S.W.3d 427 (Tex. Crim. App. 2002)

DECISIONS EXPRESSLY SUGGESTING LEGISLATIVE ACTION

1. *McKinney v. State*, 59 S.W.3d 304 (Tex. App.--Ft. Worth 2001, pet. ref'd)

2. *Lawrence v. CDB Services, Inc.*, 44 S.W.3d 544 (Tex. 2001)

DECISIONS CHANGING A COMMON-LAW DOCTRINE

none identified

DECISIONS CLEARLY FAILING TO IMPLEMENT LEGISLATIVE PURPOSES

none identified

DECISIONS FINDING TWO OR MORE STATUTES TO BE IN CONFLICT

1. *IN RE BELLAMY*, 67 S.W.3d 482 (Tex. App.--Texarkana 2002)

Statutes found in conflict: Section 152.202, Family Code, which provides that a Texas court retains jurisdiction in a child custody case if a parent remains in this state, regardless of the child's home state, so long as there is still a significant connection with Texas and substantial evidence is still available in this state, and Section 155.003(b), Family Code, which prohibits a Texas court from exercising continuing jurisdiction in a child custody case if the child's home state is a state other than Texas.

Holding: In 1999, the Texas Legislature amended Chapter 152, Family Code, to replace the Uniform Child Custody Jurisdiction Act with the Uniform Child Custody Jurisdiction and Enforcement Act. Under the Uniform Child Custody Jurisdiction and Enforcement Act, when a provision of Chapter 152, Family Code, conflicts with another provision of the Family Code or another statute or rule of this state and the conflict cannot be reconciled, Chapter 152 prevails. Under the Uniform Child Jurisdiction and Enforcement Act, a court of this state retains jurisdiction in a child custody case even if Texas is no longer the home state of the child or of the custodial parent, so long as there is still a significant connection with this state.

2. *IN RE KUHLER*, 60 S.W.3d 381 (Tex. App.--Amarillo 2001, no pet.)

Statutes found in conflict: Section 21, Probate Code, which provides that in a contested probate or mental illness proceeding, a party is entitled to trial by jury, and Section 875(g), Probate Code, which provides for the appointment of a temporary guardian if after conducting a hearing under Section 875(f)(1), Probate Code, the court determines that the applicant has established the requisite grounds.

Holding: Section 21, Probate Code, deals with the resolution of contested issues in general. Section 875, Probate Code, specifically controls the appointment of an interim or temporary guardian. Where there may be an apparent conflict between two provisions, the statute dealing with the specific topic controls over the other. Section 875(g), Probate Code, governs the specific topic of appointing a temporary guardian.

3. *HARRIS COUNTY WATER CONTROL AND IMPROVEMENT DISTRICT NO. 99 v. DUKE*, 59 S.W.3d 333 (Tex. App.--Houston [1st Dist.] 2001, no pet.)

Statutes found in conflict: Section 51.591, Water Code, which provides that in a suit for the recovery of delinquent ad valorem taxes due a water control and improvement district, an attorney retained by the district is entitled to receive a fee of 10 percent of the amount of all delinquent taxes collected or paid after the suit is filed and that the fee is to be charged as court costs against the delinquent taxpayer, and Section 33.07(a), Tax Code, which before amendment in 2001, provided that in a delinquent ad valorem tax suit, a taxing unit is allowed to recover up to 15 percent of the

amount of taxes, penalty, and interest due as an additional penalty to cover the taxing unit's collection costs.

Holding: Section 51.591, Water Code, is a special provision concerning recovery of attorney's fees in delinquent tax suits brought on behalf of a water control and improvement district. The provisions of the Tax Code, including those concerning the recovery of attorney's fees, apply to all taxing units generally, including a water control and improvement district. Under Section 311.026(b), Government Code (Code Construction Act), if a conflict between a general provision and a special or local provision is irreconcilable, the special or local provision prevails as an exception to the general provision unless the general provision is the later enactment and the manifest intent is that the general provision prevail. Applying the analysis of the Code Construction Act, because the relevant provisions of the Tax Code were enacted after the provision of the Water Code at issue, combined with subsequent amendments to the Tax Code that expand its application to districts created by or pursuant to the Water Code, the legislature's manifest intent was that the provisions of the Tax Code prevail over any conflicting provisions of the Water Code. Concerning the collection of attorney's fees in a delinquent tax suit by a water control and improvement district, Section 33.07, Tax Code, prevails over Section 51.591, Water Code.

4. *IN RE G.R.M., F.A.M., AND N.D.M.*, 45 S.W.3d 764 (Tex. App.-- Ft. Worth 2001, no pet.)

Statutes found in conflict: The provisions of Chapter 155, Family Code, which provide exclusive transfer mechanisms for courts of continuing, exclusive jurisdiction in suits affecting the parent-child relationship, and Section 24.950, Government Code, which provides a mechanism for all district courts to maintain equal judicial burdens by equalizing their dockets.

Holding: In a situation where two statutes irreconcilably conflict, the statute last enacted prevails. Section 311.025(a), Government Code (Code Construction Act). Here, Section 24.950 was enacted much later than the exclusive transfer provisions of the Family Code. The Family Code provisions were originally enacted in 1973. Section 24.950, Government Code, was not enacted until 1985. Consequently, under the Code Construction Act, because Section 24.950, Government Code, was enacted last, it prevails over the transfer provisions in Chapter 155, Family Code.

The court also examined legislative intent and concluded that the legislative intent behind these irreconcilable provisions further supported its conclusion that Section 24.950 prevails. It also found further support for its conclusion by considering Section 24.950 in the context of its subchapter in the Government Code regarding reapportionment of judicial district courts as well as the enactment of Section 24.538, Government Code, creating the 393rd Judicial District (Denton County) and requiring that court to give preference to family law matters.

5. *TEXAS GENERAL INDEMNITY COMPANY v. TEXAS WORKERS' COMPENSATION COMMISSION,* 36 S.W.3d 635 (Tex. App.--Austin 2000, no pet.)

Statutes found in conflict: Section 408.082, Labor Code, which states that an injured worker must have a disability for at least one week before benefits are paid, and Section 408.121, Labor Code, which governs eligibility for impairment income benefits and provides that an employee's entitlement for impairment income benefits begins on the day after the employee reaches maximum medical improvement.

Holding: When two sections of a statute address a similar subject matter and a general provision can be read to conflict with a more specific provision, the general provision is controlled or limited by the special provision. In such circumstances, the special provision is regarded as though it were an exception or proviso, removing something from the operation of the general law. Section 408.121, Labor Code, as a specific provision, acts as an exception to the requirement of Section 408.082, Labor Code, that an injured employee must have suffered at least a week of disability before benefits accrue; in the case of impairment income benefits, an employee's entitlement does not depend on disability.

DECISIONS HOLDING A STATUTE TO BE UNCONSTITUTIONAL

1. *GLAZER'S WHOLESALE DISTRIBUTORS, INC. v. HEINEKEN USA, INC.*, 2001 WL 727351 (Tex. App.--Dallas 2001, pet. granted)

Finding of unconstitutionality: The arbitration provision in Section 102.77(b), Alcoholic Beverage Code (Beer Industry Fair Dealing Law), impermissibly delegates the judicial power of the state in violation of Section 1, Article V, Texas Constitution. The statute requires a trial court, at the option of either party and without a contractual agreement, to delegate to a nonjudicial entity the court's nondelegable authority and duty to determine the judicial issues in the case. The statute delegates the judicial power to persons outside the judicial system without providing any meaningful method of ascertaining the lawfulness of the arbitration award the court is expected to enforce by its judicial power.

2. *STATE v. DOE*, 61 S.W.3d 99 (Tex. App.--Dallas 2001, pet. granted)

Finding of unconstitutionality: Section 255.001, Election Code, which prohibits a person from entering into a contract or other agreement to print, publish, or broadcast political advertising if the political advertising does not indicate the full name of either the individual who personally entered into the contract or agreement with the printer, publisher, or broadcaster or the person that individual represents, and in the case of advertising that is printed or published, the address of either the individual who personally entered into the agreement with the printer or publisher or the person that individual represents, is unconstitutional in its entirety under the First Amendment to the United States Constitution.

Section 255.001, Election Code, is not narrowly tailored to serve an overriding state interest. The statute's broad proscription on anonymous political speech reaches well beyond the conduct targeted by the state. To the extent Section 255.001 has an impact on the targeted conduct, it is only as a deterrent and aid to enforcement of other statutes. A state cannot significantly infringe upon an individual's freedom of speech simply to obtain the ancillary benefit of detecting violations of other laws.

3. *RUSHING v. STATE*, 50 S.W.3d 715 (Tex. App.--Waco 2001, pet. ref'd)

Finding of unconstitutionality: Article 4.18, Code of Criminal Procedure, to the extent that the statute prohibits an appellate court from reviewing the jurisdiction of a district court trying a juvenile for a crime unless the juvenile contests jurisdiction before the trial court, violates Section 1, Article II, Texas Constitution, the Separation of Powers Clause. Because jurisdiction is a nonwaivable, nonforfeitable systemic requirement of a criminal proceeding, Article 4.18, in the guise of a preservation rule, infringes on the substantive power of the judicial department to decide the jurisdiction of a lower court. Article 4.18 infringes on that realm of proceedings that are so vital to the efficient functioning of a court as to be beyond legislative power.

DECISIONS EXPRESSLY FINDING A STATUTE TO BE AMBIGUOUS

1. *KEETER v. STATE*, 74 S.W.3d 31 (Tex. Crim. App. 2002)

Finding of ambiguity: Motions for new trial based on newly discovered evidence are controlled by Article 40.001, Code of Criminal Procedure, which provides: "[a] new trial shall be granted an accused where material evidence favorable to the accused has been discovered since trial." The statute is ambiguous in that the standard of "materiality" varies according to the context.

Resolution of ambiguity: Before its repeal by the Texas Rules of Appellate Procedure, Article 40.03, Code of Criminal Procedure, set out the grounds for a new trial in criminal cases. One of those grounds was "[w]here new evidence material to the defendant has been discovered since the trial." Article 40.03 was consistently interpreted to require the satisfaction of a four-part test, including that "the new evidence is probably true and will probably bring about a different result on another trial." The requirement that the evidence be "probably true" was characterized as an aspect of the statute's requirement that the new evidence be material.

Pursuant to the court's rulemaking authority, the Article 40.03 provision was repealed and replaced by a rule of appellate procedure providing for a new trial "[w]here new evidence favorable to the accused has been discovered since trial." Pronouncing that the appellate rule contained language "virtually identical" to that found in the statute, the court previously held that the same four-part test applied. "With the passage of Article 40.001, the Legislature clarified our rule by explicitly stating a materiality requirement. The only difference between the new statute and our former rule appears to be that the statute expressly requires the discovered evidence to be 'material' while the word 'material' was omitted from the rule. Nevertheless, because we construed the rule to incorporate the old statute's materiality requirement, no substantive change in the law has been effected. Thus, we interpret the new statute in conformity with our prior caselaw and continue to adhere to the four-part test."

2. *BOGET v. STATE*, 74 S.W.3d 23 (Tex. Crim. App. 2002)

Finding of ambiguity: In this case, the defendant argued that self-defense was an available

defense in a prosecution for criminal mischief, where the mischief arose out of the defendant's use of force against another. Section 9.31, Penal Code, "Self-Defense," provides that "a person is justified in using force against another when and to the degree he reasonably believes the force is immediately necessary to protect himself against the other's use or attempted use of unlawful force." According to the Court of Criminal Appeals, the issue was not the definition of the word "another," but rather what it means to direct force "against" another.

Resolution of ambiguity: When language is ambiguous, the court is permitted to look to extratextual factors. The court focused on the common law of self-defense, the legislative history of the Texas statute, the law of self-defense in other jurisdictions, and the object the legislature sought to attain when it enacted the statute.

"After weighing the above factors, we conclude that Section 9.31 is available in a prosecution for criminal mischief where the mischief arises out of the accused's use of force against another. Although self-defense has its roots in the law of homicide, the above analysis reveals that our statute provides justification for offenses other than those committed against the person."

3. *CITY OF CORPUS CHRISTI v. PUBLIC UTILITY COMMISSION OF TEXAS*, 51 S.W.3d 231 (Tex. 2001); *TXU ELECTRIC COMPANY v. PUBLIC UTILITY COMMISSION OF TEXAS*, 51 S.W.3d 275 (Tex. 2001)

Finding of ambiguity: Section 39.253, Utilities Code, relating to the allocation of stranded costs, which allocates transition charges among classes of customers and says that one component of how transition costs are allocated among all other customer classes is "the methodology used to allocate the costs of the underlying assets in the electric utility's most recent commission order addressing rate design," is ambiguous.

Resolution of ambiguity: The court concluded that the Public Utility Commission's construction of Section 39.253, Utilities Code--that the commission could apply the rate design methodology established in a utility's last rate design case to the data in that rate case rather than to more current data, in order to establish demand allocation factors that determine how transition charges are to be allocated among classes of customers--was a reasonable construction that does not contradict any of the language in Section 39.253, and the court agreed with the commission's construction.

4. *HELENA CHEMICAL COMPANY v. WILKINS*, 47 S.W.3d 486 (Tex. 2001)

Finding of ambiguity: Section 64.006(a), Agriculture Code, provides that a purchaser of seed who claims to have been damaged by the failure of the seed to produce or perform may initiate an arbitration action by filing a complaint with the commissioner of agriculture. Section 64.006(a) also provides that the complaint *must* be filed within the time necessary to permit effective inspection of the plants under field conditions. The latter clause is ambiguous because it may be mandatory and jurisdictional or it may be directory and the required timeliness merely a factor the

trial court may consider.

Resolution of ambiguity: To determine whether the legislature intended a provision to be mandatory or directory, the court is to "consider the plain meaning of the words used, as well as the entire act, its nature and object, and the consequences that would follow from each construction. . . . Even if a statutory requirement is mandatory, this does not mean that compliance is necessarily jurisdictional. . . . When a statute is silent about the consequences of noncompliance, we look to the statute's purpose to determine the proper consequences. . . . The word '[m]ust' creates or recognizes a condition precedent. Section 311.016(3), Government Code (Code Construction Act)." The court opined that "[t]he Legislature has instructed us to apply this definition unless its context 'necessarily requires a different construction.' . . .

"In addition to the overall statutory objective, we have historically looked to two factors to determine if the Legislature intended a provision to be jurisdictional: (1) the presence or absence of specific consequences for noncompliance . . . and (2) the consequences that result from each possible interpretation. When deciding whether the Legislature intended a particular provision to be jurisdictional, we must also consider the consequences that result from each possible construction. . . . Accordingly, we conclude that while submission to arbitration under the Act is mandatory if not waived by the seller, the Act's timing requirement is not."

5. *RYLANDER v. FISHER CONTROLS INTERN., INC.*, 45 S.W.3d 291 (Tex. App.--Austin 2001)

Finding of ambiguity: In an appeal brought by the comptroller of public accounts from a judgment in favor of a franchise tax payer, the court held that the term "not subject to taxation" in Section 173.103, Tax Code, as that section existed before amendment in 1993, which required a taxpayer to include in taxable gross receipts any amounts received from sales of tangible personal property to buyers in other states in which the taxpayer was not subject to taxation, was ambiguous and therefore open to construction.

Resolution of ambiguity: "In our attempt to find the intended meaning of the disputed statutory term, we are mindful that the Code Construction Act erects a presumption that a just and reasonable result was intended; and, the Act authorizes us to consider the objective sought to be obtained, former statutory provisions, including laws on the same or similar subjects, and the consequences of a particular construction of the disputed term. . . . We are forbidden to impose our own notions of public policy, such as the desirable scope of a statute, but must instead determine the legislative purpose from a consideration of the statutory scheme as a whole rather than from a literal application or interpretation of any particular statutory language. . . . We are also reminded that the Comptroller's administrative interpretation of ambiguous language in a revenue statute is entitled to our respect and due weight. . . . We are not bound, however, by the Comptroller's interpretation.

"We believe the most important consideration, if not an overriding consideration, is the legislature's 1993 enactment of Section 171.1032(a)(1). This amendment added, in the most explicit

language, the very qualification for which the Comptroller now contends, stating expressly that it is immaterial whether an income-based tax is actually imposed by the other state. . . .

"Finally, the task of statutory construction does not here involve a matter lying within agency expertise. It involves instead a non-technical question of law--legislative intent--determined from the legislature's use of the term 'not subject to taxation' in context and based on the ordinary meaning of those words. Courts are as competent as the Comptroller in making that assessment of legislative intent. This reduces considerably the degree of judicial deference owed the Comptroller's interpretation."

6. *CITY OF HOUSTON v. JACKSON*, 42 S.W.3d 316 (Tex. App.--Houston [14th Dist.] 2001, pet. dism'd w.o.j.)

Finding of ambiguity: The Firefighter's and Police Officer's Civil Service Law, Chapter 143, Local Government Code, establishes a grievance procedure for Houston. After the initial steps of the grievance process, a grievance may be appealed either (1) under Sections 143.057 and 143.129 to an independent third-party hearing examiner, whose decision is final; or (2) under Section 143.130 to a grievance examiner chosen by the civil service commission, whose decision may be appealed to the civil service commission under Section 143.131. In an appeal brought by an aggrieved firefighter under Section 143.134, providing that if the decision of the commission under Section 143.131 or the decision of a hearing examiner under Section 143.129 that has become final is favorable to a firefighter, the department head shall implement the relief granted to the firefighter not later than the 10th day after the date on which the decision was issued, "[t]he statute may be crystalline and unambiguous in the abstract, but reveals a latent ambiguity in our scenario. That is, while the statute makes it clear how a grievant is to proceed to enforce a final favorable order under sections 143.131 or 143.129, it is not at all patent how a grievant with a final favorable order under 143.130 should proceed when the other party, required to perform certain acts under the order, neglects to appeal and refuses to comply with the order."

Resolution of ambiguity: "[W]e must discern the intent of the legislature as it applies to this situation. . . . Legislative intent should be determined from the entire legislative act, and not simply from isolated portions. . . . As such, we must read the statute as a whole and interpret it to give effect to every part. . . . We must resolve any ambiguities by rejecting interpretations which defeat the purpose of the legislation as long as another reasonable interpretation exists. . . . A too-literal construction of a statute, which would prevent the enforcement of it according to its true intent, should be avoided. . . .

"We are also guided by the legislature itself in interpreting its acts. The Code Construction Act states, in pertinent part, that when construing a statute, whether or not the statute is considered ambiguous on its face, a court may consider, among other matters: the (1) object sought to be attained; (2) circumstances under which the statute was enacted; and (3) consequences of a particular construction. . . .

"We have thoroughly examined the relevant provisions of the act in reference to the applicable rules and canons of statutory construction. We find the legislature intended--though did not clearly articulate--that a final unappealed decision by a grievance examiner under section 143.130 is a final decision of the commission under section 143.131."

7. *KUTZNER v. STATE*, 75 S.W.3d 427 (Tex. Crim. App. 2002)

Findings of ambiguity: In an appeal from the convicting court's denial of the defendant's motion for DNA testing pursuant to Chapter 64, Code of Criminal Procedure:

(1) the phrase in Article 64.03, "'appeal of a finding under Article 64.03' can have different meanings and is, therefore, ambiguous. It could, for example, refer only to the findings that a convicting court makes under Article 64.03(a)(1). It could also refer to any finding that a convicting court makes under Article 64.03. The latter is arguably a more reasonable construction since Article 64.05 refers to an 'appeal of a finding under Article 64.03' and not to an appeal of only findings under Article 64.03(a)(1)"; and

(2) "the resolution of appellant's claims . . . requires us to construe the Article 64.03(a)(2)(A) phrase 'a reasonable probability exists that the person would not have been prosecuted or convicted if exculpatory results had been obtained through DNA testing.' We also decide that this phrase can have different meanings, and is, therefore, ambiguous. It could be interpreted to require a convicted person to show a reasonable probability exists that favorable DNA results would prove his innocence. It could also be interpreted to require a convicted person only to show a reasonable probability exists that favorable DNA results would result in a different outcome unrelated to the convicted person's guilt/innocence."

Resolution of ambiguities:

(1) "We initially recognize that nothing in the legislative history of Chapter 64 indicates a legislative intent to foreclose an appeal of the convicting court's Chapter 64.03(a)(2) determinations. Our review of the legislative history of Chapter 64 actually supports deciding that the Legislature intended to authorize appellate review of all of the convicting court's Article 64.03 determinations.

"We also note that the State's construction of Article 64.05 would prevent this Court from remedying a convicting court's erroneous Article 64.03(a)(2) determinations. . . . This is inconsistent with the purposes of Article 64.05, as stated by the supporters of Chapter 64, to 'give convicted people full access to the courts' and to 'provide a check on individual courts' decisions.' . . .

"We hold that Article 64.05 authorizes this Court to review the convicting court's determinations under Article 64.03."

(2) "The legislative history of Chapter 64 makes it very clear that the Legislature intended the foregoing language from Article 64.03(a)(2)(A) to mean a reasonable probability exists that exculpatory DNA tests will prove a convicted person's innocence. This does not, as some opponents of Chapter 64 suggest, require convicted persons to prove their innocence before a convicting court may order DNA testing under Article 64.03. It merely requires convicted persons to show a reasonable probability exists that exculpatory DNA tests would prove their innocence. The legislative history is so clear that this is what the Legislature intended that any other construction would violate the judiciary's ultimate duty to effectuate what the Legislature intended when it enacted the statute. . . . It would be difficult in this particular case to ignore the clear legislative intent repeatedly expressed throughout the legislative history of Chapter 64 and construe the statute any other way."

DECISIONS EXPRESSLY SUGGESTING LEGISLATIVE ACTION

1. *McKINNEY v. STATE*, 59 S.W.3d 304 (Tex. App.--Ft.Worth 2001, pet. ref'd)

Issue: Whether it is appropriate, in connection with the trial of a criminal defendant who is indigent and represented by court-appointed counsel, who requests the appointment of an expert to assist in the defendant's defense, and who makes a preliminary showing that the issue for which the defendant seeks expert assistance is likely to be a significant factor at trial, for a statute (Article 26.05(a), Code of Criminal Procedure) to require that counsel pay the expert out of counsel's own pocket and accept the amount of reimbursement ultimately approved by the trial court.

Holding: "We know of no law that requires the trial court to approve a reasonable fee or that requires that an indigent defendant be allowed expert fees substantially equal to those paid by the prosecution. We would also point out that it is the county and not the state that must pay these fees. . . .

"Here, Appellant requested the advance payment of a retainer fee to secure expert assistance. By statute, however, he is entitled only to reimbursement for such expenses. Because we are bound by existing precedent and existing legislative enactment, we hold that the trial court properly denied Appellant's motion for the appointment of an expert on this basis."

Suggestion for legislative action: "We believe that this issue involves fundamental concepts of due process and equal protection, and we urge the legislature to revisit the question of funds for indigent defense."

NOTE: The 76th Legislature enacted House Bill No. 1752, effective September 1, 1999, amending Article 26.05, Code of Criminal Procedure, by adding Subsection (h) to permit reimbursement of expenses incurred for purposes of investigation or expert testimony to be paid directly to a licensed private investigator or to an expert witness in the manner designated by appointed counsel and approved by the trial court.

2. *LAWRENCE v. CDB SERVICES, INC.*, 44 S.W.3d 544 (Tex. 2001)

Issue: Employees of nonsubscribers to workers' compensation insurance under the Texas Workers' Compensation Act voluntarily elected to participate in employer benefit plans that provide injured employees specified benefits in lieu of common-law remedies. The court was asked to decide whether the Workers' Compensation Act prohibits voluntary preinjury agreements of this type and if not, whether to hold them void on public policy grounds because they undermine the legislature's workers' compensation scheme and whether the waiver signed by the employee meets the express-negligence and fair-notice tests.

Holding: "We discern no clear legislative intent to prohibit agreements such as those presented here. Although the parties and various *amici* have raised numerous fact-intensive public policy considerations favoring both sides of the issue, we believe these policy choices are best resolved by the Legislature. Absent any clear indication of legislative intent to prohibit such agreements, we decline to hold them void on public policy grounds. Finally, we hold that the waiver Lawrence executed satisfies the fair-notice and express-negligence tests."

Suggestion for legislative action: "Petitioners argue that enforcing their elections would contravene the workers' compensation scheme because their employers would then enjoy the benefits the Act bestows upon subscribers without having to provide their employees equivalent statutory benefits. . . .

"Given the lack of any clear legislative intent to prohibit agreements like the ones before us, and absent any claim by the petitioners of fraud, duress, accident, mistake, or failure or inadequacy of consideration, we decline to declare them void on public policy grounds. We believe the factually-intensive, competing public policy concerns raised by the parties and by *amici* in these cases are not clearly resolved by the statute and are best resolved by the Legislature, not the judiciary. . . .

"The Texas Workers' Compensation Act neither clearly prohibits nor clearly allows voluntary pre-injury employee elections to participate in nonsubscribing employers' benefit plans in lieu of exercising common-law remedies. And whether or not such elections should be held void on the theory that they contravene the general statutory scheme and thus violate public policy is a decision that we believe, absent clear legislative guidance and in light of numerous competing public policy concerns, is better left to the Legislature."

NOTE: The 77th Legislature enacted House Bill No. 2600, effective June 17, 2001. Section 16.01 of the bill amended Section 406.033, Labor Code, by adding Subsection (e) to read as follows:

(e) A cause of action described in Subsection (a) may not be waived by an employee before the employee's injury or death. Any agreement by an employee to waive a cause of action or any right described in Subsection (a) before the employee's injury or death is void and unenforceable.

DECISIONS CHANGING A COMMON-LAW DOCTRINE

none identified

Charge Five

Monitor the rule-making proceedings of the Texas Supreme Court.

Charge Five

Monitor the rule-making proceedings of the Texas Supreme Court.

Introduction

During the previous interim, the Committee performed an extensive review of the Texas Supreme Court's rule-making authority which is conducted by the Supreme Court Advisory Committee. The Committee reviewed whether the Legislature should play a role in the Supreme Court's rule-making. Currently, the Committee on Civil Practices is monitoring the same rule-making activities of the Supreme Court.

In 1939, during the 46th Legislative Session, H.B. 108 was enacted into law. H.B. 108 relinquished the Legislature's rule-making authority in civil judicial proceedings to the Supreme Court. The Supreme Court Advisory Committee (SCAC) was created in 1939, by Acts of the 46th Legislature based on a model used by the U. S. Supreme Court. The SCAC advises the Supreme Court on the language and implementation of rules. There were 36 members and 11 *ex officio* members, consisting of judges, lawyers and academicians with each member serving a three-year term. Other groups within the State Bar may also recommend changes to the Supreme Court, which are then referred to the SCAC for consideration.

Several recommendations were made regarding guidelines the Supreme Court should implement in order ensure the checks and balances between the Legislative and Judicial branches of governments. During the 77th Legislature, the following bills were filed directed at the Court's rule-making authority:

HB 1451 by Rep. Dunnam & Solomons--Relating to certain rules adopted by the supreme court, the court of criminal appeals, and the state bar related to practice and procedure in courts in this state. (*Tagged in Senate Jurisprudence Committee*)

HB 2105 by Rep. Dutton--Relating to the operation of the advisory committees of the supreme court. (*Referred to Senate Jurisprudence Committee*)

HB 2106 by Rep. Dutton--Relating to information on the supreme court website relating to proposed rules to forms. (*Referred to Senate Jurisprudence Committee*)

HB 2112 by Rep. Dutton--Relating to rules of civil procedure adopted by the supreme court. (*Signed into law by the Governor June 13, 2001*)

HB 2562 by Rep. Dunnam--Relating to the adoption of rules of civil procedure by the supreme court. (*Tabled on 3rd reading in the House*)

HB 3325 by Rep. Solomons--Relating to rules adopted by the Supreme Court of Texas

regarding the practice of law in this state by attorneys licensed in other jurisdictions. (*Referred to Senate Jurisprudence Committee*)

During this interim the Supreme Court most notably created a task force to study issues affecting civil litigation. The Supreme Court Task Force on Civil Litigation Improvements has different subcommittee studying the following issues: 1) Awarding of fees to attorneys ad litem and guardians ad litem; 2) Sharing of fees among lawyers; 3) Procedures for a mandatory demand for and offer of settlement; and 4) Procedures for the efficient trial of cases with large numbers of parties.[104]

One subcommittee of the Task Force on Civil Litigation Improvement, referred to as the "Jamail Committee" is currently proposing a rule for "offer of judgement" Rule 166b.[105] The Supreme Court Advisory Committee has also directed it's own Offer of Judgement Subcommittee to review Rule 166b.[106] This same issue has been debated by the legislature for several sessions. Member's of both houses have filed legislation in previous sessions but such legislation has yet to receive adequate support for it's passage.[107]

In an article on March 27, 2002, Mary Alice Robbins with Texas Lawyer reported that the Supreme Court Advisory Committee voted 17-3 against any concept involving an "offer of judgement" proposal. However, the issue has been discussed in every subsequent rules advisory committee meeting. Fourth Court of Appeals Chief Justice Phil Hardberger stated "Proceeding down a path you don't want to proceed down causes some confusion. Frankly, I had hoped the Supreme Court would simply take our vote. You wanted it, you got it."[108] Tommy Jacks a member of both the task force and the rules advisory committee also state, the 17-3 vote showed there is "a real serious level of misgivings" among lawyers on both sides of the docket and judges about introducing "something this radical" into the system.

The March 8, 2001 transcripts also show members of the rules advisory committee questioned

[104] Texas Supreme Court--Order No. 01-9149 creating the Supreme Court Task Force on Civil Litigation Improvements. The task force consists of the following members: Joseph D. Jamail, Houston (Chair); Charles L. (Chip) Babcock, Dallas; Ricardo G. Cedillo, San Antonio; James E. Coleman, Dallas; Tommy Jacks, Austin; Dee Kelly, Dallas; Harry Reasoner, Houston; Steve Susman, Houston; and Professor Elizabeth Thornburg, Dallas.

[105] Tex. R. Civ. Proc. Rule 166b.

[106] Professor Elaine A. Carlson, Chair of the Offer of Judgement Subcommittee and a member of the Task Force, has prepared an extensive document outlining the pros and cons surrounding the "offer of judgement" proposal. See Appendix N.

[107] S.B. 532, 76th Texas Legislature's Regular Session; H.B. 1524, 76th Texas Legislature's Regular Session; H.B. 61, 77th Texas Legislature's Regular Session; H.B. 2843, 77th Texas Legislature's Regular Session; and S.B. 1765, 77th Texas Legislature's Regular Session

[108] See Appendix O.

whether the Legislature was the more appropriate authority to make such substantive changes to Texas' civil justice system.[109]

The following information outlines the activity of the Supreme Court's Rules Advisory Committee during the 77th Legislature's interim.

Rule Proposals Adopted or Proposed for Adoption Since Last Interim Report

1. Amendments to Canons of Judicial Conduct:

Amended Canons 3(b)(10), 5 and 6 to strike certain provision restricting campaign speech by judges and judicial candidates following a decision by the U.S. Supreme Court which held that ethical restrictions in Minnesota, similar to those in this state, prohibiting judges and candidates from announcing positions on legal and political issues violated the First Amendment's free speech right. (*Adopted August 22, 2002.*)

2. Amendments to Texas Rules of Appellate Procedure:

The Supreme Court and the Court of Criminal Appeals proposes 25 revisions to the Texas Rules of Appellate Procedure, including requiring that, in every civil case, the opinions of the court must be published (Proposed Rule 47). The proposed changes also include new rules relating to the service of record materials in original proceedings (Proposed Rule 52.7©)), the procedure for offering a voluntary remittitur and implementing settlements (Proposed Rule 46) and expressly would allow a party to adopt by reference portions of an appellate brief filed in an appellate court by another party in the same case (Proposed Rule 9.7). (*Proposed August 8, 2002. Comment Period ends November 31, 2002. Proposed Effective Date January 1, 2003.)*

Rules Adopted by Supreme Court Advisory Committee and Forwarded to Supreme Court

1. Summary Judgment Changes (Tex. R. Civ. P. Rule 166a):

The proposed rule change would create a new subsection (j) that would require that an "order granting summary judgment must state the ground or grounds on which the motion was granted" and would not allow a summary judgment to "be affirmed on other grounds stated in the motion unless they are asserted by appellee in the appellate court as alternative grounds for affirmance."

Comments to the Rule would be added to make clear that the order granting a summary judgment must specify the grounds "on which they have granted a motion that urged multiple

[109] Such transcripts of the Rules Advisory Committee maybe located at the following website: http://www.jwtechlaw.com/cgi-bin/WebObjects/jwintercon?QS=9 or by contacting the Rules Advisory Committee, rules attorney, Chris Griesel at the Texas Supreme Court.

grounds."; would allow an appellant to "challenge only the grounds on which the trial court based its ruling. If the appellee's brief asserts alternative grounds for affirmance, the appellant may address them in a reply brief."; and would make clear that a trial court could grant an order "on each ground presented when appropriate".

2. Voir Dire Rule (Proposed Tex. R. Civ. P. Rule 226b):

The rule would clarify that the parties to a suit would have the right to conduct voir dire examination for a reasonable time, set by the court. The parties would be allowed to advise the jury panel of the claims, defenses, damages, and other relief sought in the case so that the panelists may intelligently answer questions about their qualifications, backgrounds, experiences, and attitudes and would also be allowed to question the panelists sufficiently to be able to make reasonably informed peremptory challenges and challenges for cause.

The rule would require that a voir dire examination not be abusive, repetitive, argumentative, or unduly invasive and would restrict a party from attempting to commit a panelist to a particular verdict or finding, but would allow a party to question a panelist generally about the panelist's ability to fairly consider any element of the claims, damages, defenses, and other relief sought in the case.

3. Recusal and Disqualification (Tex. R. Civ. Pro. Rules 18a and 18b):

The Rule would merge current Rules 18a and 18b. The Rule would retain the grounds for disqualification and recusal contained in the current rules and create new grounds for recusal. The Rule would create a system for review of filed recusal and disqualification motions, would require the hearings be conducted under the supervision of the regional presiding judges, and would place sanctions on parties for filing multiple recusal motions in a single proceeding.

4. Service of Citation (Tex. R. Civ. P. Rules 103 and 536):

The proposed rules changes would allow any person licensed as a notary public and who was uninterested in the outcome of a suit to serve citations and other notices, including process.

5. Discovery Rules Changes (Tex. R. Civ. P. Rules 176 and 194):

The proposed rules changes would be the first to the Texas discovery rules since their adoption in 1999. The proposed comment to the Rule 176.3 notes that the general rule that prohibits the use of a subpoena to circumvent the discovery rules does not apply to the use of subpoenas for a trial or hearing.

The proposed changes to Rule194 would create form requests for admissions that could be used in cases involving divorce, annulment, and spousal or child support.

6. Eviction Rules Changes (Tex. R. Civ. P Rules 738-755):

The proposed rules attempt to modernize the language of the rules of procedure in forcible

entry and detainer (FED) actions.

7. Texas Rules of Evidence Changes (Tex. R. Evid. Rule 103, 404, 701 and 702):

The proposed changes to Rule 701 and 702 seek to modify the Texas Rules of Evidence to conform with recent changes to the Federal Rules of Evidence. The proposed changes to Rule 103 and 404 add comments that explain the methods for preservation of error in obtaining a ruling from the trial court and explain that in certain criminal case there are additional provisions on the admissibility of certain extraneous acts.

Proposals Being Studied by the Supreme Court Advisory Committee

1. Discussion of Settlement Issues, Including Offer of Judgement or Offer of Settlement (Proposed change to Texas Rule of Civil Procedure):

The SCAC continues to discuss various settlement related issues, including provisions of a rule, similar to Federal Rule of Civil Procedure 68, that would govern the effects on parties of the making a settlement offer and the effects, if any, of failing to accept a properly qualifying settlement offer.

2. Uniform Rules for Electronic Media Coverage (Tex. R. Civ. P Rule 18c):

The SCAC continues to study a proposal of the Texas Judicial Council suggesting changes either to the Texas Rules of Civil Procedure or the Rules of Judicial Administration relating to uniform guidelines on electronic media coverage of civil matters. Some counties have adopted local rules relating to media coverage.

3. Ex-Parte Communications and Physician-Patient Confidentiality (Proposed change to Texas Rules of Evidence):

The SCAC is studying questions that have arisen about the propriety of ex-parte contact of medical providers by attorneys and the effect of those contacts on physician-patient confidentiality.

4. Visiting Judge Peer Review (Proposed change to Tex. R. Civ. P or Rules of Judicial Administration):

The SCAC is reviewing a proposal by the Texas Judicial Council that has suggested a biennial review of fitness and competence each visiting judge.

5. Rules of Judicial Administration--Changes related to counties that send cases to more than one court of appeals (Proposed Rules of Judicial Administration):

Many counties are part of more than one court of appeals region. The Supreme Court has asked the committee to evaluate operation of the rule and make suggestions for possible changes.

6. Texas Rules of Civil Procedure--Rule 202:

Rule 202 allows pre-lawsuit discovery and preservation of evidence. The SCAC has been asked to look at the operation of the rule and to make any comments or suggestions, if any, on the operation of the rule.

7. Executions (Proposed Changes Tex. R. Civ. P 646-653):

Several constables have suggested changes to the way certain types of courthouse sales are conducted. The SCAC is examining the advisability of making changes to conduct of courthouse sales under Texas Rules of Civil Procedure 646-653. Specifically, the SCAC is being asked to amend the rule to grant the ability to vary the day of the sale.

8. Operation of Rule 76A (Sealing Records):

The SCAC is examining the operation of Rule 76a relating to the method of requesting the sealing of court records in certain cases. The SCAC will examine the current operation of the rule and make comments, if any, the effect of Rule 76a on cases filed in Texas and any suggestions for change.

9. Cy Pres (Tex. R. Civ. P. 42):

The SCAC is examining the advisability of amending Rule 42 to state that judges may wish to consider the use of local low-income legal service providers when awarding cy pres decisions regarding unclaimed class action settlement funds.

Appendices A-O

Appendix A

Appendix B

Appendix C

Appendix D

Appendix E

Appendix F

Appendix G

Appendix H

Appendix I

Appendix J

Appendix K

Appendix L

Appendix M

Appendix N

Appendix O