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An Overview of the Texas Bar Foundation Symposium on Cost Control at the Courthouse Held Semptember 30, 1987, Corpus Christi, Texas Recent Development.

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I. INTRODUCTION

The trial system used in the United States, including Texas, has been described as "the great contribution of the English speaking people to Western civilization; a procedure that allows for the open resolution of disputes in a system of ordered liberty, administered by an independent judiciary and a competent legal profession."[1] On September 30, 1987, in Corpus Christi, Texas, the state's judiciary assembled to discuss technological advancements and developing dispute resolution techniques affecting the legal profession. It is hoped that these advancements will produce a more ordered judicial system, thereby enhancing the "procedure that allows for the open resolution of disputes."[2] Innovative procedures capable of improving the jury selection process were introduced at the conference, along with technological advancements which included the use of telephone conferences and closed-circuit television in the courtroom and computer-assisted filing and record keeping methods. Also, the recently enacted Alternative Dispute Resolution Procedures Act, including views espoused by its proponents and opponents regarding its policy of encouraging out-of-court settlement and various methods of dispute resolution were examined at the conference.

II. JUDICIAL UTILIZATION OF EVOLVING PROCEDURES AND TECHNOLOGY

A. *Efficient Use of Jurors*[3]

The adversarial nature of the judicial process dictates that the advocate strive to identify and select jurors who are sympathetic to his client's case. The judge's responsibility, however, is to ensure the fairness of the voir dire proceeding by attempting to eliminate the possibility of seating a juror who

1. Address by Oliver S. Heard, partner, Heard, Goggan, Blair, Williamson, and Harrison, Texas Bar Foundation Symposium on Cost Control at the Courthouse (Sept. 30, 1987).

2. *Id.*

3. The material for this section is derived from an address delivered by the Honorable David Hittner, United States District Judge for the Southern District of Texas, Texas Bar Foundation Symposium on Cost Control at the Courthouse (Sept. 30, 1987); *see also* Hittner, *A Judge's View of Jury Service: A Personal Perspective*, 47A Texas Bar Journal 227 (1984).

possesses prejudices or biases.[4] Isolating these biases in order to disqualify veniremen who hold them is a recurring problem encountered by attorneys and judges. The Juror Information Form[5] is the initial tool utilized by most judges and attorneys when attempting to discover such biases.

The Juror Information Form currently utilized in Texas courts is deficient in that it fails to elicit the necessary type of information required by the attorney to identify inappropriate characteristics in particular jurors. The form solicits information limited in scope to facts concerning the individual's spouse, employment, previous jury experience and religious preference.[6] This questionnaire, however, does not provide the attorney or judge sufficient information to identify an individual's biases or prejudices.

Judge David Hittner[7] advocates using a more detailed form, currently utilized in United States District Court for the Southern District of Texas.[8] In addition to the information obtained by the current Juror Information Form, this new form asks the venireman to volunteer information such as military experience, titles of newspapers and magazines read, active political work performed and amount of education completed. The form also inquires into the types of extracurricular activities in which the venireman engages. Such information would assist attorneys and judges in identifying ideological preferences, political tendencies and an individual's ability to comprehend and assimilate evidence which will be adduced from the witness stand.

The proposed form also promotes a more efficient voir dire. The final two questions on the form inquire whether the venireman is aware of any reason why he should not serve and if any physical problem exists which would interfere with his service as a juror.[9] By first examining the answers to these questions, attorneys and judges can identify veniremen who have valid reasons for not serving and excuse them from the case at bar.

Once selected, a juror's performance can be markedly improved by the attorney's and judge's use of common sense and common courtesy. Jurors often do not understand what attorneys and judges do in the jury's absence. Brief explanatory remarks are often appreciated by jurors waiting in the jury room to be recalled into the courtroom. These remarks need not be time-consuming and they help keep the jury members from becoming frustrated. It is also well known that jurors carefully watch the judge during bench

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4. *Cf.* TEX. R. CIV. P. 228 (giving court freedom to hear evidence not confined to juror's answers when juror challenged for cause).

5. *See* Appendix A.

6. *See id.*

7. Judge of the United States District Court for the Southern District of Texas.

8. *See* Appendix B.

9. *See id.*

conferences, in an effort to understand the proceedings at the bench. Some attorneys fear that if a juror sees them reprimanded or sees one of their requests denied, a juror may conclude that the attorney is incompetent and may thereby be prejudiced against his client. Therefore, judges must maintain the appearance of neutrality throughout the trial proceedings. In this way, jurors are more likely to view the trial as evenly balanced, and not be influenced by the outcome of a bench conference.

In summary, by recognizing the advantages of increased information and courtesy, more efficient use of the jury system may result. In particular, the simple technics discussed will promote: (1) identification of veniremen with personal problems which may effect their ability to perform their duties as jurors; (2) an opportunity for attorneys to preview the types of information which they would normally solicit during voir dire; and (3) faster reassignment to another jury panel of those veniremen not chosen to sit as jurors.

B. *Telephone Conferencing at the Trial and Appellate Levels*[10]

A survey of approximately three hundred judges[11] regarding their experiences with, and attitudes toward, telephone conferencing in trial and appellate proceedings revealed that telephone conferences are considered appropriate and useful for routine matters. Hearings where exhibits are unnecessary, critical testimony will not be solicited, and only a few lawyers are involved are appropriate proceedings for telephone conferencing.

Proceedings in which telephone conferences have been useful include: "(1) Motions to transfer; (2) Hearings on special exceptions; (3) Motions on trial settings; (4) Some pretrial hearings; (5) Announcements; (6) Hearings where one attorney is in trial in another courthouse; (7) Motion for judgment where [the] case [is] not complex or where only a few issues are involved."[12] In addition, telephone conferencing could be invaluable for oral argument before appellate courts. Telephone conferences are useful in these proceedings because each require only that the participants hear and speak to one another.

The primary benefit of using telephone conferences is economic in nature. For example, assume an attorney with an $85.00 per hour billing rate has a thirty-minute hearing scheduled at an out-of-county courthouse which is four hours away by car. The total time spent would be approximately eight and one-half hours, and the client would be billed $722.50. Alternatively, if

10. The material for this section is derived from an address delivered by Cullen Smith of Naman, Howell, Smith & Lee of Waco, Texas, Texas Bar Foundation Symposium on Cost Control at the Courthouse (Sept. 30, 1987).

11. Address by Cullen Smith, Texas Bar Foundation Symposium on Cost Control at the Courthouse (Sept. 30, 1987)(approximately fifty per cent of the surveys were returned).

12. *Id.*

the hearing could be conducted via telephone conference, the costs involved would be only the attorney's one-half hour of time and a long distance telephone bill.

C. *The Use of Closed-Circuit Television to Present Courtroom Evidence* [13]

Like telephone conferencing, the use of closed-circuit television in the courtroom may save time and resources. Closed-circuit television should not be confused with videotaped depositions. "Closed-circuit television is a cost-conscious way to present 'live' testimony of a witness who may be otherwise unavailable for trial, to present out-of-court demonstrations or to view an accident scene."[14]

Historically, the use of closed-circuit television has been restricted to child sex abuse cases and misdemeanor arraignments. By using closed-circuit television in child sex abuse cases, children are protected from the trauma of explaining the abuse in an unfamilar room in front of many strangers. In misdemeanor arraignments, the defendant is taken to a video studio in the detention facility containing television cameras and monitors which are connected by satellite to similar equipment in the courtroom. This technology allows the defendant to see the courtroom and the parties involved while all participants in court can see the defendant. Closed-circuit television conserves judicial resources by minimizing time wasted while defendants are transported in and out of the courtroom. Additionally, the public's safety is protected by abrogating the need to physically transport the defendant to and from the courthouse.

As with telephone conferencing, the benefits of closed-circuit television are primarily cost and convenience oriented. The use of satellites and microwave communication is relatively inexpensive. Rental charges for these systems may range from several hundred dollars per hour to a few thousand dollars for an entire day. When compared with hourly charges and travel expenses for expert and out-of-town witnesses, these costs are minimal. Additionally, by using closed-circuit television, a person whose schedule will not permit his presence at a proceeding in another city may nevertheless participate. It is possible that this system could be used in the most extreme situation where an attorney, who is scheduled to be in court, but is instead stranded in an airport due to inclement weather. Assuming a complex case, where it is impractical for another associate or partner to assume responsibility for the case, and where a continuance is unlikely, by using closed-

13. The material for this section is derived from an address delivered by Wayne Fisher of Fisher, Gallagher, Perin & Lewis of Houston, Texas, Texas Bar Foundation Symposium on Cost Control at the Courthouse (Sept. 30, 1987).

14. Address by Wayne Fisher, Texas Bar Foundation Symposium on Cost Control at the Courthouse (Sept. 30, 1987).

circuit television, the attorney can conduct necessary parts of the trial from a television studio in the city in which he is stranded. Thus, by using closed-circuit television, the trial can continue, thereby avoiding unnecessary docket delays.

Despite these benefits, the use of closed-circuit television in the courtroom has been the subject of criticism. Closed-circuit television has been reproached for denying a criminal defendant his sixth amendment right to confront his accusers.[15] The effect of this argument, however, has recently been diminished. The courts in *Kansas City v. McCoy*[16] and *State v. Sheppard*[17] recently held that closed-circuit television does not abrogate the defendant's right to confront his accusers since it provides adequate safeguards which ensure that the defendant can simultaneously see and hear the witnesses opposing him.[18]

A second criticism of closed-circuit television is that it denies attorneys their right to adequately cross-examine witnesses. The primary concern is that by using closed-circuit television, documentary evidence is not available for scrutiny. This problem is easily solved by using an in-court printer which quickly reproduces any image produced by the camera. Images thereby transmitted can be inspected by the attorneys, objected to, admitted into evidence and published to the jury, or used in the same manner as any other piece of physical evidence. Another concern is that the camera will not adequately convey the witness' demeanor to the jury. Reactions, such as

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15. *See* U.S. CONST. amend. VI.

16. 525 S.W.2d 336 (Mo. 1975).

17. 484 A.2d 1330 (N.J. Super. 1984).

18. Address by Wayne Fisher, Texas Bar Foundation Symposium on Cost Control at the Courthouse (Sept. 30, 1987); *see also* Kansas City v. McCoy, 525 S.W.2d 336, 339 (Mo. 1975). In a misdemeanor trial, where an expert testified from a crime laboratory twelve miles away, by using a closed circuit television, the Mississippi Supreme Court held that the defendant's right of confrontation was not abrogated. Although the expert was not physically present in the courtroom, he was nevertheless available for cross-examination because his image and voice could be seen and heard by the accused and by the trier of fact. *See id. Accord* State v. Sheppard, 484 A.2d 1330, 1342-43 (N.J. Super 1984). The confrontation clause is not absolute. The clause does not require eye-to-eye contact between the accused and the defendant. Where it is in a child's best interest not to testify, and where he is available, via closed circuit television, for cross-examination, and can easily be seen and heard by the defendant, the judge, the jury, and the spectators, the confrontation clause is not offended. *See id. But cf.* Long v. State, No. 867-85, slip op. at 63-64 (Tex. Crim. App. 1987) (holding TEX. CODE CRIM. PROC. § 38.071 unconstitutional violation of confrontation clause insofar as it allowed introduction of video-taped interviews). This case is distinguishable from the use of closed-circuit television advocated at the symposium. First, *Long* involved the introduction of a pre-trial video-tape which is very different from "live" testimony subject to all the protections afforded by the rules of evidence. Also, the child in *Long* took the stand only during the rebuttal phase of the trial, and therefore the scope of cross-examination was limited to the evidence adduced during rebuttal. *See id.*

the witness nervously rubbing his hands together, or moving his feet, or any other types of body language, will only be detected if the camera is positioned correctly.

Opponents of closed-circuit television also criticize its dependence upon complex equipment which is susceptible to failure. For example, if a satellite communication is interrupted, the judge is faced with two equally distasteful choices. First, he can grant a postponement until the witness scheduled to appear by closed-circuit television is available in person, or until communication can be resumed. This alternative is undesirable because it creates potential scheduling conflicts for all parties involved. Second, he may refuse to grant the continuance and force one party to try his case without the opportunity to present all of his evidence. This alternative is likewise undesirable because it imposes an unjustified hardship upon one of the litigants.

Another problem which may arise is the failure of the camera and sound director to react quickly enough to follow the courtroom action or position the cameras correctly, resulting in the failure to transmit the speaker's actions. Due to the question and answer format used in courtroom proceedings, speakers rapidly change demanding quick reaction from the camera and sound director. Failure to timely switch from one location to another may yield the undesirable result of the monitor displaying the questioning attorney's image, while the witness, squirming under the pressure of a difficult question, is responding.

Despite these problems, the use of closed-circuit television will likely become increasingly prominent in Texas courtrooms. The system's ability to adapt to the various scenerios which could impede the judicial process, such as when a key witness is hospitalized and unable to attend the trial, can facilitate the resolution of cases, thus enhancing our "system of ordered liberty."[19]

D. *Use of Computers in Computer Filing and Computer Access at the Courthouse*[20]

The final technological improvement to enhance the efficiency within Texas' courthouses to be discussed at the conference was the implementation of computers capable of performing time-consuming, administrative duties in a fraction of the time required by manual processing. These duties include generating pleadings, citations, and registered-mail receipts and envelopes. Such computers are currently available, and in addition to the above tasks, they accurately update the dockets in all cases, and easily identify

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19. Address by Oliver S. Heard, Texas Bar Foundation Symposium on Cost Control at the Courthouse (Sept. 30, 1987).

20. The material for this section is derived from an address delivered by Oliver S. Heard, Texas Bar Foundation Symposium on Cost Control at the Courthouse (Sept. 30, 1987).

obstructions in the docket. By consolidating massive amounts of information into easily accessible data banks, obstructions can be identified, thereby more equitable distribution of the caseload among available courts may be accomplished. Finally, all of this information can be stored on computer tape, requiring far less space than is required for conventional paper files.

In developing a computer system capable of processing volumes of lawsuits, some counties have implemented an automated system which is proposed for adoption throughout Texas within the next two years. The system, referred to as "A Unified State Docket Management System" (USDMS), is based upon technology currently used to process approximately one million tax accounts in Harris County and the Harris County Independent School District, in addition to tax suits in Bexar and Dallas counties. The proposed system recognizes that cases are often filed by parties who do not intend immediate action. A facial examination of a conventional docket which includes these cases, however, raises the presumption that the docket is hopelessly bottlenecked. If, however, the precise status of each case was known, the courts could prioritize matters requiring immediate attention and delay examining other cases on the docket until they merit attention. Because manually prioritizing the docket is virtually impossible, USDMS is a viable way of accomplishing this goal.

The USDMS proposes catagorizing cases based on their status and the nature of the anticipated proceeding. These include: "(A) service pending;[21] (B) uncontested discovery; (C) contested discovery;[22] (D) abated (may be coded to reflect bankruptcy, and other pending matters . . .); (E) suspense;[23] (F) contested jury; (G) contested nonjury (pending the judgment of the Court)."[24] When pleadings and motions are filed which merit moving the case to another docket, the case can be easily transferred electronically. The filing clerk will update the docket each time action is taken on a file. Such information isolates the cases which must be scheduled into the judge's calendar, and is easily available through the USDMS database. Thus, by examining the latest docket, a judge or clerk can determine, for example, that of ten thousand pending lawsuits, four thousand are still pending completed service (a problem for the attorney's and sheriff's office to solve); eight hun-

21. *See id.* This docket is intended "for cases where one or more answers are not due". *Id.*

22. *See id.* The two discovery dockets are equivalent to the "active" docket currently used by Mr. Heard's office for tax matters. It includes "cases where all answers are due or have been filed for all named defendants." *Id.*

23. *See id.* This docket is intended "for cases where the parties have made application to defer entry of judgment on the ground that the parties have entered into a payment schedule to discharge the claim". *Id.*

24. *Id.* Appendix C contains the proposed model governing the catagories for docket management.

dred are subject to an automatic stay in bankruptcy; several thousand others are pending settlement negotiations between the parties; one hundred are currently ready for trial; and six trial courts are available for trying these cases during the next two weeks. Use of this computerized docket will avoid time-consuming and cumbersome manual review of thousands of files by court personnel.

Additionally, under the USDMS, after a case has been on the active docket for one hundred eighty days, it shall be dismissed without prejudice. This rule precludes the current problem of dismissing thousands of lawsuits which are still pending, but are inactive, because a defendant cannot be served, or because an automatic stay in bankruptcy has been imposed; only those suits which have not been diligently pursued, yet still remain on the active docket, are subject to mass dismissal. Such a rule will conserve both court personnel's and attorneys' time which would otherwise be used for reinstating all improperly dismissed suits.

A system which incorporates the various dockets and penalties discussed above has been used by a Bexar county attorney for several years with a minimal error factor.[25] This system was developed to process thousands of tax suits and uses data stored on magnetic tape. A current proposal would create a system in Texas similar to USDMS. The proposed statute advocates adopting computer-assisted dockets within two years that will simplify recording processes and alleviate docket management problems by minimizing the time necessary to perform menial, administrative tasks, thereby affording attorneys more time to focus upon substantive issues.

III. ALTERNATIVE DISPUTE RESOLUTION

A. *Introduction*

At the symposium on "Cost Control at the Courthouse,"[26] the speakers also discussed alternative dispute resolution (ADR). ADR is a broad term encompassing a wide range of pretrial procedures designed to aid parties in

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25. Address by Oliver S. Heard, Texas Bar Foundation Symposium on Cost Control at the Courthouse (Sept. 30, 1987) Corpus Christi, Texas. Mr. Heard was instrumental in developing computer-assisted filing techniques.

26. Texas Bar Foundation Symposium on Cost Control at the Courthouse (Sept. 30, 1987). The afternoon session discussing alternative dispute resolution consisted of the following participants: Frank G. Evans, Chief Justice of the Texas First Court of Appeals, Houston; Cyndi Taylor Krier, Texas Senate; James B. Sales, President-Elect, State Bar of Texas; R. Hanson Lawton, Professor, South Texas College of Law; Edward F. Sherman, Professor, University of Texas School of Law; Francis S. Baldwin, Baldwin & Baldwin; Finis Cowan, Baker & Botts; Joeseph D. Jamail, Jamail & Kolius; George F. Pletcher, Helm, Pletcher, Hogan, Bowen & Saunders; Philip J. Pfeiffer, Fulbright & Jaworski; William O. Whitehurst, Jr., Kidd, Whitehurst, Harkness & Watson; Paul E. Stallings, Vinson & Elkins; William R. Edwards, Edwards & Terry.

satisfactorily settling their disputes out of court.[27] The ADR concept emerged in the late 1970's and has grown in use and popularity,[28] especially in the federal district courts.[29] In June of 1987, the Texas Legislature unanimously approved the Alternate Dispute Resolution Procedures Act (Act).[30] The Act, effective on July 20, 1987, imposes upon courts the affirmative duty to encourage out-of-court settlement.[31] This section will briefly trace the history of ADR in Texas, analyze significant provisions of the Act, and discuss the advantages and disadvantages of ADR methods and the Act.

The Act evolved from a series of events in Texas and around the nation.[32] On October 9, 1980, Texas' first Neighborhood Justice Center opened in Houston.[33] The Texas Legislature, in 1983, promulgated a statute authorizing county commissioners courts to establish and maintain ADR systems that can be supported by a fee of up to five dollars per civil case filed.[34] Due to this program, dispute resolution centers have opened in several cities

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27. *See* AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON DISPUTE RESOLUTION, ALTERNATIVE DISPUTE RESOLUTION, AN ADR PRIMER 1 (1987)(defining ADR); STATE BAR OF TEXAS & TEXAS YOUNG LAWYER'S FOUNDATION HANDBOOK OF ALTERNATIVE DISPUTE RESOLUTION, NEW HORIZONS FOR THE TEXAS JUSTICE SYSTEM 2-3 (1987) (hereinafter NEW HORIZONS FOR THE TEXAS JUSTICE SYSTEM)(discussing purpose of ADR).

28. *See* NEW HORIZONS FOR THE TEXAS JUSTICE SYSTEM, *supra* note 27, at 2-3 (discussing ADR development throughout country); *see generally* L. KANOWITZ, CASES AND MATERIALS ON ALTERNATIVE DISPUTE RESOLUTION 1-25 (1986)(discussing ADR development and use in United States); Dekgadi, Dunn, Brown, Lee & Hubbert, *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1361-66 (overview of ADR given).

29. *See, e.g.*, Lambros, *The Summary Jury Trial and Other Alternative Methods of Dispute Resolution*, 103 F.R.D. 461 (1984)(discussing use of summary jury trial in United States District Court, Northern District of Ohio); Levin & Golash, *Alternative Dispute Resolution in Federal District Courts*, 37 U. FLA. L. REV. 29, 29 (1985)(discussing success of ADR in federal courts).

30. *See* Alternative Dispute Resolution Procedures Act, ch. 1121, § 1, 1987 Tex. Sess. Law Serv. 7725 (Vernon)(codified at TEX. CIV. PRAC. & REM. CODE ANN. § 154.001-.073 (Vernon Supp. 1988)); NEW HORIZONS FOR THE TEXAS JUSTICE SYSTEM, *supra* note 27, at 4 (noting Act's unanimous approval).

31. *See* NEW HORIZONS FOR THE TEXAS JUSTICE SYSTEM, *supra* note 27, at 4 (Act assures quick and effective justice); *see also* Address by State Senator Cyndi Taylor Krier, Texas Bar Foundation Symposium on Cost Control at the Courthouse (Sept. 30, 1987)(discussing future of ADR in Texas).

32. *See* NEW HORIZONS FOR THE TEXAS JUSTICE SYSTEM, *supra* note 27, at 2-3 (discussing recent development of ADR throughout country). There are over 150 minor dispute mediation centers in over 35 states. *See* Edwards, *Alternative Dispute Resolution: Panacea or Anathema*, 99 HARV. L. REV. 668, 668 (1986).

33. *See* NEW HORIZONS FOR THE TEXAS JUSTICE SYSTEM, *supra* note 27, at 3 (discussing history of ADR in Texas). Three years later, the American Bar selected the Houston Center as one of three sites in the United States to test and implement an ADR intake and referral system known as the "multi-door" project. *See id.* at 4 & n.7.

34. *See.* TEX. CIV. PRAC. & REM. CODE ANN. § 152.001-.004 (Vernon Supp. 1988).

across Texas.[35] In 1987, the Alternative Dispute Resolution Procedures Act was overwhelmingly approved by the Texas Legislature.[36]

Overall, the Act has the effect of: (1) establishing a policy of encouraging voluntary settlement of pending litigation and peaceful resolution of claimants' disputes;[37] (2) providing guidelines to implement types of ADR procedures;[38] and (3) ensuring confidentiality of any matters brought forth in an ADR proceeding.[39]

B. *Alternative Dispute Resolution Procedures Act*

1. General Provisions

The Act defines "court" as inclusive of practically all Texas courts at both the trial and appellate levels.[40] Constitutional and statutory courts, as well as courts of general and special jurisdiction, fall within the purview of the Act.[41] "Dispute resolution organization" is defined as an organization that offers services for the settlement of conflicts out of court.[42] The organization may be "a private profit or nonprofit corporation, political subdivision, or public corporation, or a combination of these, that offers alternative dispute resolution services to the public."[43]

The specified purpose of the Act is to establish a procedurally effective method of resolving most disputes without resorting to formal court action.[44] The policy provision specifically states that special consideration should be directed to conflicts involving parent-child relationships,[45] and the

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This Act was amended in 1987 to allow a filing fee of up to $10. *See* Act of April 4, 1987, ch. 22, §§ 1-2, 1987 Tex. Sess Law. Serv. 111 (Vernon).

35. *See* NEW HORIZONS FOR THE TEXAS JUSTICE SYSTEM, *supra* note 27, at 4 n.8 (Beaumont, Corpus Christi, Dallas, Denton, Lubbock, San Antonio, and Texas City). The legislature also repealed a law that severely hindered private arbitration agreements. *Id.* at 4 (citing TEX. REV. CIV. STAT. ANN. art. 224-1, *repealed by* Act of June 18, 1987, ch. 817, § 1, 1987 Tex. Sess. Law Serv. 5670 (Vernon)).

36. *Id.* at 4 (Act unanimously approved by legislature).

37. *See id.* (setting forth three attributes of Act)(citing TEX. CIV. PRAC. & REM. CODE ANN. §§ 154.001-.073 (Vernon Supp. 1988)).

38. *See id.*

39. *See id.*

40. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 154.001(1) (Vernon Supp. 1988)).

41. *See id.* (defining "courts" to include family, probate, municipal, and justice of the peace courts).

42. *See id.* § 154.001(2).

43. *Id.*

44. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 154.002 (Vernon Supp. 1988); *see also* NEW HORIZONS FOR THE TEXAS JUSTICE SYSTEM, *supra* note 27, at 4. *See generally* Address by State Senator Cyndi Taylor Krier, Texas Bar Foundation Symposium on Cost Control at the Courthouse (Sept. 30, 1987)(basic policy of Act is to encourage settlement).

45. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 154.002 (Vernon Supp. 1988). Those disputes include issues involving possession, conservatorship, and support of children. *Id.*

"early settlement of pending litigation through voluntary settlement procedures."[46]

Under the Act, it is the duty of all courts at both trial and appellate levels to implement the policies of the Act by encouraging the settlement of disputes.[47] This duty is also extended to court administrators.[48]

The Act stipulates that parties may enforce any written settlement agreement through contract actions.[49] If parties reach a settlement as to a portion of their case, that settlement agreement can be incorporated into the court's final decree disposing of the case.[50] The court may also incorporate the terms of the parties' agreement into a decree which modifies an outstanding order.[51]

The Act authorizes the Texas Supreme Court to compile statistics on cases slated for alternative dispute resolution procedures.[52] These statistics will aid in determining the most appropriate types of ADR for particular types of cases.[53]

2. Referral Procedures

The Act authorizes a party to make a motion that his case be referred to an ADR proceeding; furthermore, the court may refer appropriate cases to ADR on its own motion.[54] The authority to refer pending cases to ADR enables the courts to perform their duty to encourage early dispute settlement.[55] The court may refer cases to a variety of ADR procedures described in the Act, including those established under the auspices of a county commissioners court.[56] The court may also refer the conflict to a dispute resolution organization, as defined in the Act, or to any voluntary, informal

46. *Id.* State Senator Krier, in her address to the conference, stressed that all these alternatives to trial were voluntary. *See* Address by State Senator Cyndi Taylor Krier, Texas Bar Foundation Symposium on Cost Control at the Courthouse (Sept. 30, 1987).

47. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 154.003 (Vernon Supp. 1988).

48. *See id.*

49. *See id.* § 154.071(a) (executed settlement agreement enforceable in same manner as any written contract).

50. *Id.* § 154.071(b).

51. *Id.* § 154.071(c) (court may incorporate settlement agreement into order at its discretion; not mandatory that terms of settlement be made part of any order).

52. *See id.* § 154.072.

53. *See* NEW HORIZONS FOR THE TEXAS JUSTICE SYSTEM, *supra* note 27, at 135-36 (discussing needs and purposes of collecting data).

54. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 154.021 (Vernon Supp. 1988).

55. *See* NEW HORIZONS FOR THE TEXAS JUSTICE SYSTEM, *supra* note 27, at 6 (to assure performance of duty, courts have authority to refer disputes to ADR).

56. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 154.021 (Vernon Supp. 1988); *see also id.* § 152.002 (authorizing county commissioners court to establish ADR system).

dispute resolution forum conducted by an impartial third party.[57]

The Act provides an avenue for a party to appeal a court's referral of their case to an ADR mechanism.[58] Once the court decides that a pending dispute should be referred to an ADR proceeding, it must notify the parties of that determination.[59] After notification, any party may file a written objection to the referral within ten days.[60] If the court determines the objection to be reasonable, the case cannot be referred to an ADR procedure.[61]

3. Selected Types of ADR Mechanisms

a. Mediation

In a mediation procedure, an impartial third party acts as moderator between the parties in dispute.[62] The role of the moderator is to facilitate open communication among the parties and create an atmosphere conducive to cooperation.[63] By encouraging the disputants to discuss their respective sides candidly, the mediator guides them toward reconciliation and settlement,[64] and a mutually acceptable agreement.[65] He does not force the parties to settle nor convey his impressions of the merits of the case.[66] The parties are not bound unless they stipulate otherwise.[67]

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57. *See id.* § 154.021.

58. *See id.* § 154.022; *see also* NEW HORIZONS FOR THE TEXAS JUSTICE SYSTEM, *supra* note 27, at 17 (discussing legislature's intent in enacting ADR).

59. TEX. CIV. PRAC & REM. CODE ANN. § 154.022(a) (Vernon Supp. 1988); *see also* Address by State Senator Cyndi Taylor Krier, Texas Bar Foundation Symposium on Cost Control at the Courthouse (Sept. 30, 1987)(discussing this section).

60. TEX. CIV. PRAC. & REM. CODE ANN. § 154.022(b), (c) (Vernon Supp. 1988).

61. *Id.* § 154.022(c). The judge should exercise caution and restraint when making any decision dealing with referral or the reasonableness of the objection. *See* NEW HORIZONS FOR THE TEXAS JUSTICE SYSTEM, *supra* note 27, at 17 (discussing possible abuse of discretion).

62. TEX. CIV. PRAC. & REM. CODE ANN. § 154.023(a) (Vernon Supp. 1988)).

63. *See id.*; *see also* Address by Judge Frank Evans, Texas Bar Foundation Symposium on Cost Control at the Courthouse (Sept. 30, 1987)(mediator points out possible compromise issues); NEW HORIZONS FOR THE TEXAS JUSTICE SYSTEM, *supra* note 27, at 41 (mediator's role is to foster settlement atmosphere).

64. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 154.023(a) (Vernon Supp. 1988).

65. *See id.*

66. *See id.* § 154.023(b); *see also* Silberman & Schepard, *Court-Ordered Mediation in Family Disputes: The New York Proposal*, 14 N.Y.U. REV. L. & SOC. CHANGE 741, 741 (1986)(mediator facilitates decision-making among parties rather than making decision himself); NEW HORIZONS FOR THE TEXAS JUSTICE SYSTEM, *supra* note 27, at 41 (unlike arbitrator, mediator does not force agreement).

67. *See* NEW HORIZONS FOR THE TEXAS JUSTICE SYSTEM, *supra* note 27, at 41 (mediator lacks authority to render binding judgment). *See generally* S. GOLDBERG, E. GREEN & F. SANDER, DISPUTE RESOLUTION 91-146 (1985)(discussing process of mediation).

b. Mini-Trial

The mini-trial[68] merges the formal style of litigation with aspects of mediation, arbitration and negotiation.[69] The mini-trial appeals primarily to corporate litigants and its goal is to effect an expedient resolution of disputes by paring the often complex collateral issues from the main legal issue, thus producing a more readily solvable business problem.[70] Therefore, the attendance at the mini-trial of a person with authority to bind a corporate litigant, such as a Chief Executive Officer, greatly enhances the probability of settlement.[71]

Procedurally, a mini-trial should be based on a simply drafted pre-mini-trial agreement which outlines the goals of the parties, the commitment to negotiate, and the framework of the mini-trial itself.[72] Once this is accomplished, the actual mini-trial usually consists of an informal, summary presentation by counsel, and testimony of an expert for each side.[73] After the presentations by the parties, the neutral advisor and the party representatives are encouraged to ask questions and reply frankly.[74] Once all the infor-

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68. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 154.024 (Vernon Supp. 1988).

69. NEW HORIZONS FOR THE TEXAS JUSTICE SYSTEM, *supra* note 27, at 54 (mini-trial voluntary, non-binding proceeding); Lambros, *The Summary Jury Trial and Other Alternative Methods of Dispute Resolution, A Report to the Judicial Conference of the United States Committee on the Operation of the Jury System*, 103 F.R.D. 461, 467 (1984)(mini-trial hybrid of many ADR mechanisms).

70. Edwards, *Alternative Dispute Resolution: Panacea or Anathema*, 99 HARV. L. REV. 668, 673 (1986)(mini-trial highly successful in commercial cases); Lambros, *The Summary Jury Trial and Other Alternative Methods of Dispute Resolution, A Report to the Judicial Conference of the United States Committee on the Operation of the Jury System*, 103 F.R.D. 461, 467 (1984)(mini-trial reduces litigation into business problem). The mini-trial, however, may be inappropriate when the case turns on the witnesses' credibility. *See* NEW HORIZONS FOR THE TEXAS JUSTICE SYSTEM, *supra* note 27, at 57 (appropriate and inappropriate uses of mini-trial).

71. *See* NEW HORIZONS FOR THE TEXAS JUSTICE SYSTEM, *supra* note 27, at 54, 56-57 (noting person with settlement authority necessary for effective mini-trial); Lambros, *The Summary Jury Trial and Other Alternative Methods of Dispute Resolution, A Report to the Judicial Conference of the United States Committee on the Operation of the Jury System*, 103 F.R.D. 461, 467 (1984)(presence of top management essential).

72. NEW HORIZONS FOR THE TEXAS JUSTICE SYSTEM, *supra* note 27, at 56 (steps to be considered before mini-trial begins). For an example of pre-mini-trial agreement see *id.* at 59-60.

73. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 154.024(b) (Vernon Supp. 1988); NEW HORIZONS FOR THE TEXAS JUSTICE SYSTEM, *supra* note 27, at 54 (discussing mini-trial's characteristics). The length of presentations within the mini-trial vary depending on the parties' agreement, but it is recommended that the mini-trial last no more than two days. *See id.* at 55-56. Additionally, a mini-trial proceeding typically sets equal time limits for both sides, in which time may be reserved for rebuttal. *Id.* at 56.

74. NEW HORIZONS FOR THE TEXAS JUSTICE SYSTEM, *supra* note 27, at 53-55 (role of impartial third party detailed). The creator of the mini-trial, Eric D. Green, describes an

mation is gathered, the impartial third party may issue an advisory opinion.[75]

c. Moderated Settlement Conference

In a moderated settlement conference, each of the parties present their side of the case to a panel of impartial third parties.[76] The panel is generally composed of three experienced lawyers.[77] The setting is normally informal and evidentiary rules are usually relaxed.[78] Each party takes approximately thirty minutes to present their case to the panel.[79] The panel may issue an advisory opinion and case evaluation which could form the basis for further negotiation.[80] The moderated settlement conference is a flexible procedure that can accommodate cases of varying complexity, provided that both sides earnestly work towards a settlement.[81]

d. Summary Jury Trial

The fourth type of ADR method suggested by the Act is the summary jury trial.[82] This confidential type of alternative dispute resolution attempts

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actual case in which the mini-trial was used in Green, *Recent Developments in Alternative Forms of Dispute Resolutions*, 100 F.R.D. 512, 515-520 (1983).

75. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 154.024(c) (Vernon Supp. 1988).

76. *See id.* § 154.025.

77. *See* NEW HORIZONS FOR THE TEXAS JUSTICE SYSTEM, *supra* note 27, at 62 (moderated settlement conference structured presentation to panel of attorneys); Address by R. Hanson Lawton, Texas Bar Foundation Symposium on Cost Control at the Courthouse (Sept. 30, 1987)(in moderated settlement conference, present case to panel of three lawyers). The panel members usually have little preparation on the case; they may have read a short summary of the issues. *See id.*

78. *See* NEW HORIZONS FOR THE TEXAS JUSTICE SYSTEM, *supra* note 27, at 63 (panel may relax or dispense with evidentiary rules to facilitate settlement procedure). Although moderated settlement conferences are usually conducted in an informal setting, the parties may structure their meeting in any way they wish. They may agree on certain rules and formalities or dispense with all restrictions completely. *See id.*; *see also* Address by R. Hanson Lawton, Texas Bar Foundation Symposium on Cost Control at the Courthouse (Sept. 30, 1987)(parties usually set out case to conference panel without court reporter present).

79. *See* NEW HORIZONS FOR THE TEXAS JUSTICE SYSTEM, *supra* note 27, at 62-63 (attorneys generally give fifteen to thirty minute presentations); Address by R. Hanson Lawton, Texas Bar Foundation Symposium on Cost Control at the Courthouse (Sept. 30, 1987)(in about thirty minutes, attorneys present gist of case to three-lawyer panel).

80. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 154.025 (Vernon Supp. 1988); NEW HORIZONS FOR THE TEXAS JUSTICE SYSTEM, *supra* note 27, at 63 (panel's evaluation may include award intended only for parties' use in further negotiations); Address by R. Hanson Lawton, Texas Bar Foundation Symposium on Cost Control at the Courthouse (Sept. 30, 1987)(after deliberation, panel issues advisory opinion).

81. *See* NEW HORIZONS FOR THE TEXAS JUSTICE SYSTEM, *supra* note 27, at 63-64 (describing moderated settlement conference).

82. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 154.026 (Vernon Supp. 1988).

to simulate trial, but in an abbreviated, informal and confidential manner.[83] The summary jury trial is a unique type of ADR because it requires six jurors, unless agreed otherwise.[84] While the Act does not address who should conduct the trial, it is implicit that a judge or magistrate, not of the appointing court, presides.[85] All parties with the authority to settle should attend the entire proceeding to enhance the possibility of settlement.[86] This type of ADR is most appropriate in a case involving a single factual question which would normally require a separate trial.[87]

While an explanation of summary jury trial procedures is not present in the Act, certain steps are commonly taken.[88] After the parties have substantially completed discovery and preparation for trial, a pretrial conference should be held to explain the procedure, present motions in limine, and narrow the issues of the case.[89] If the statutorily suggested option of a panel of

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83. *See* NEW HORIZONS FOR THE TEXAS JUSTICE SYSTEM, *supra* note 27, at 69 (mini-trial's characteristics listed); *see also* Lambros, *The Summary Trial and Other Alternative Methods of Dispute Resolution, A Report to the Judicial Conference of the United States Committee on the Operation of the Jury System*, 103 F.R.D. 461, 468-70 (1984)(discussion of summary jury trial in United States District Court).

84. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 154.026(b), (c) (Vernon Supp. 1988); *see also* Lambros, *The Summary Jury Trial and Other Alternative Methods of Dispute Resolution, A Report to the Judicial Conference of the United States Committee on the Operation of the Jury System*, 103 F.R.D. 461, 468 (1984)(noting uniqueness of summary jury trial).

85. *See, e.g.*, NEW HORIZONS FOR THE TEXAS JUSTICE SYSTEM, *supra* note 27, at 69 (non-appointing judge conducts trial); Address by Edward F. Sherman, Texas Bar Foundation Symposium on Cost Control at the Courthouse (Sept. 30, 1987)(stating non-appointing judge presides); Lambros, *The Summary Jury Trial and Other Alternative Methods of Dispute Resolution, A Report to the Judicial Conference of the United States Committee on the Operation of the Jury System*, 103 F.R.D. 461, 470 (1984)(judge or magistrate presides).

86. NEW HORIZONS FOR THE TEXAS JUSTICE SYSTEM, *supra* note 27, at 69 (attendance of parties with settlement authority urged).

87. *Id.* (noting appropriateness of summary jury trial). Additionally, this type of ADR is appropriate in actions based upon negligence, personal injury, products liability, or age, race and gender discrimination. *See* Lambros, *The Summary Jury Trial and Other Alternative Methods of Dispute Resolution, A Report to the Judicial Conference of the United States Committee on the Operation of the Jury System*, 103 F.R.D. 461, 472 (1984). The summary jury trial was created to satisfy parties who need "a day in court" and are unsure of a jury's reaction. *Id.* at 468; Address by Edward F. Sherman, Texas Bar Foundation Symposium on Cost Control at the Courthouse (Sept. 30, 1987)(summary jury trial is type of reality testing).

88. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 154.026 (Vernon Supp. 1988) (no procedures for summary jury trial listed). For a description of a summary jury trial, see generally NEW HORIZONS FOR THE TEXAS JUSTICE SYSTEM, *supra* note 27, at 69-71 (noting steps usually followed in summary jury trial); Lambros, *The Summary Jury Trial and Other Alternative Methods of Dispute Resolution, A Report to the Judicial Conference of the United States Committee on the Operation of the Jury System*, 103 F.R.D. 461, 468-472 (1984)(discussing foundation, process, and selection of jurors in summary jury trial).

89. *See* NEW HORIZONS FOR THE TEXAS JUSTICE SYSTEM, *supra* note 27, at 69 (1987)(use of pre-summary jury trial conference urged); Lambros, *The Summary Jury Trial*

six jurors is selected, voir dire is conducted with a group of only ten to twelve veniremen.[90]

After jury selection, the nonpublic trial begins, in which no witnesses are called and all evidence is presented by the attorneys.[91] The duration of the presentation during the summary jury trial varies, but it should not last more than half a day.[92] After each side has made its presentation, the jury is given abbreviated instructions and then retires to deliberate.[93] The jury may return a single, unanimous verdict, or each juror may deliver his own. Afterwards, the jury may be questioned regarding the presentations.[94]

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and Other Alternative Methods of Dispute Resolution, A Report to the Judicial Conference of the United States Committee on the Operation of the Jury System, 103 F.R.D. 461, 470 (1984)(outlining steps at pre-summary jury trial conference). Judge Lambros of the United States District Court for the Northern District of Ohio distributes a booklet at the pre-summary jury trial conference. *See generally id.* at 482-489 (handbook on summary jury trial procedures).

90. *See* NEW HORIZONS FOR THE TEXAS JUSTICE SYSTEM, *supra* note 27, at 69 (limited voir dire in summary jury trial); Lambros, *The Summary Jury Trial and Other Alternative Methods of Dispute Resolution, A Report to the Judicial Conference of the United States Committee on the Operation of the Jury System*, 103 F.R.D. 461, 470 (1984)(process of choosing veniremen abbreviated in summary jury trial). Usually each side may strike two jurors. *Id.* Only after completion of the trial are the jurors apprised of the fact that a real trial did not take place. NEW HORIZONS FOR THE TEXAS JUSTICE SYSTEM, *supra* note 27, at 70 (jury told verdict only advisory after summary jury trial complete).

91. *See* NEW HORIZONS FOR THE TEXAS JUSTICE SYSTEM, *supra* note 27, at 70 (evidentiary procedures of summary jury trial discussed); Lambros, *The Summary Jury Trial and Other Alternative Methods of Dispute Resolution*, 103 F.R.D. 461, 471 (1984)(summary jury trial private in nature). The rules of evidence are relaxed; for example, hearsay is commonly admitted. *See* NEW HORIZONS FOR THE TEXAS JUSTICE SYSTEM, *supra* note 27, at 70 (example of relaxed evidentiary rules given); Lambros, *The Summary Jury Trial and Other Alternative Methods of Dispute Resolution*, 103 F.R.D. 461, 471 (1984)(discussing relaxed conditions as compared to actual trial). Moreover, while exhibits are permitted, experts are prohibited. Address by Edward F. Sherman, Texas Bar Foundation Symposium on Cost Control at the Courthouse (Sept. 30, 1987)(no experts permitted in summary jury trial); Lambros, *The Summary Jury Trial and Other Alternative Methods of Dispute Resolution*, 103 F.R.D. 461, 471 (1984)(exhibits allowed in summary jury trial).

92. NEW HORIZONS FOR THE TEXAS JUSTICE SYSTEM, *supra* note 27, at 70 (summary jury trial lasts half day); Lambros, *The Summary Jury Trial and Other Alternative Methods of Dispute Resolution*, 103 F.R.D. 461, 471 (1984)(noting time period of summary jury trial). Usually each party is allowed one hour presentation time plus rebuttal. *See id.*

93. NEW HORIZONS FOR THE TEXAS JUSTICE SYSTEM, *supra* note 27, at 70 (jury given regular verdict form); Lambros, *The Summary Jury Trial and Other Alternative Methods of Dispute Resolution, A Report to the Judicial Conference of the United States Committee on the Operation of the Jury System*, 103 F.R.D. 461, 471 (1984)(jury charge abbreviated in summary jury trial).

94. NEW HORIZONS FOR THE TEXAS JUSTICE SYSTEM, *supra* note 27, at 70-71 (individual or unanimous verdicts permitted); Lambros, *The Summary Jury Trial and Other Alternative Methods of Dispute Resolution, A Report to the Judicial Conference of the United States Committee on the Operation of the Jury System*, 103 F.R.D. 461, 471 (1984)(jury may give consensus or individual verdicts).

e. Arbitration

The Act also provides for nonbinding arbitration, which consists of the parties presenting their sides of the dispute to a neutral third party who makes a decision on the issues and renders a specific award.[95] The parties should agree in advance whether they will be bound by the award.[96] If they stipulate that the award is binding, it is enforceable as a contract.[97] A nonbinding award serves as the basis for further negotiations.[98] Through nonbinding arbitration, the disputants obtain an advisory decision in an informal proceeding and yet retain their rights to trial.[99]

4. Impartial Third Parties

Once a court chooses to refer a pending lawsuit to an ADR proceeding as provided in the Act, it may appoint an impartial third party who meets certain qualifications specified in the Act.[100] The court should consult with the litigants in its appointments of impartial third parties.[101]

The neutral third parties that participate in ADR must have special qualifications. Eligibility for appointment as an impartial third party in an ADR procedure requires completion of at least forty hours of classroom training conducted by an ADR system[102] or other organization approved by the appointing court.[103] An additional twenty-four hours of classroom training is

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95. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 154.027(a) (Vernon Supp. 1988); *see also* L. KANOWITZ, CASES AND MATERIALS ON ALTERNATIVE DISPUTE RESOLUTION 304 (1986)(describing non-binding arbitration, comparing with binding arbitration); S. GOLDBERG, E. GREEN & F. SANDER, DISPUTE RESOLUTION 189-242 (1985)(describing arbitration process).

96. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 154.027(b) (Vernon Supp. 1988)(award non-binding unless agreed otherwise).

97. *See id.* The Act provides that "if the parties so stipulate in advance, the award is binding and is enforceable in the same manner as any contract obligation." *Id.*

98. *See id.*; *see also* L. KANOWITZ, CASES AND MATERIALS ON ALTERNATIVE DISPUTE RESOLUTION 304 (1986)(though award nonbinding, parties will often accept it voluntarily).

99. *See* NEW HORIZONS FOR THE TEXAS JUSTICE SYSTEM, *supra* note 27, at 48-49 (discussing court-annexed arbitration in federal system).

100. TEX. CIV. PRAC. & REM. CODE ANN. § 154.051(a), (b) (Vernon Supp. 1988).

101. *Id.* § 154.051(b) (court may appoint person agreed on by parties). More than one third party may be appointed. *Id.* (c). The pool of impartial third parties may be obtained from many dispute resolution centers throughout Texas and the United States. *See generally* AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON DISPUTE RESOLUTION, ALTERNATIVE DISPUTE RESOLUTION, AN ADR PRIMER 28-32 (1987)(listing centers which have impartial third party rosters).

102. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 154.052(a) (Vernon Supp. 1988). The training requirements in the Act reflect the basic training requirements in place at most dispute resolution centers in Texas. *See* NEW HORIZONS FOR THE TEXAS JUSTICE SYSTEM, *supra* note 27, at 128-129.

103. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 154.052(a) (Vernon Supp. 1988).

required to qualify third parties to serve in ADR proceedings involving the parent-child relationship.[104] The court may circumvent the statutory educational requirements by appointing a third party who lacks the requisite classroom training only if that party qualifies on the basis of other training or experience in the relevant area of dispute.[105]

Impartial third parties are charged with the duty of assisting and encouraging parties to settle their disputes.[106] The impartial third party, however, may neither coerce nor compel the parties to settle.[107] The Act places a premium upon confidentiality by prohibiting the impartial third party's disclosure of: (1) information related by either party to the opposing side, unless otherwise agreed;[108] (2) communications regarding the subject matter of the proceeding;[109] and (3) any other matters relating to the settlement process.[110] This prohibition applies equally to potential communications with the appointing judge.[111]

Compensation of the impartial third party should be a reasonable fee taxed as other costs of the suit, unless the parties agree otherwise.[112] This dispersal of cost is similar to the taxation of costs of a special master.[113]

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104. *See id.* § 154.052(b). The Act stresses the importance of preserving family relationships by requiring impartial third parties in ADR to be trained in family dynamics, family law and child development. *See id.*

105. *See id.* § 154.052(c). The provisions of the Act regarding third party qualifications provide flexibility to the courts in making appointments for ADR. *See* NEW HORIZONS FOR THE TEXAS JUSTICE SYSTEM, *supra* note 27, at 128 (describing requirements for impartial third parties under Act). Some commentators advocate the institution of national standards or a code of ethics for neutral third parties. *See* S. GOLDBERG, E. GREEN & F. SANDER, DISPUTE RESOLUTION 517-21 (1985).

106. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 154.053(a) (Vernon Supp. 1988). One of the authors of the Act, State Senator Cyndi Taylor Krier, stated that this section was primarily designed to give notice to the impartial third party and create uniformity in a third party's conduct during the ADR proceeding. *See* Address by State Senator Cyndi Taylor Krier, Texas Bar Foundation Symposium on Cost Control at the Courthouse (Sept. 30, 1987).

107. TEX. CIV. PRAC. & REM. CODE ANN. § 154.053(a) (Vernon Supp. 1988).

108. *Id.* § 154.053(b). Confidentiality is one of the cornerstones of the ADR settlement process. Address by State Senator Cyndi Taylor Krier, Texas Bar Foundation Symposium on Cost Control at the Courthouse (Sept. 30, 1987).

109. TEX. CIV. PRAC. & REM. CODE ANN. § 154.053(b) (Vernon Supp. 1988).

110. *Id.* § 154.053(c). This prohibition includes information concerning the demeanor and conduct of counsel and the parties. *See id.*

111. *See id.*

112. *Id.* § 154.054.

113. NEW HORIZONS FOR THE TEXAS JUSTICE SYSTEM, *supra* note 27, at 18 (noting similarity of Act's provisions to rules of procedure). A special master's compensation is governed by rule 171 of the Texas Rules of Civil Procedure. TEX. R. CIV. P. 171. In determining the fees of a special master, the court may consider, among other things, the difficulty of the proceedings, the time involved, and the master's prestige. *See* Frost v. Frost, 695 S.W.2d 279, 282 (Tex. App.— San Antonio 1985, no writ)(considering prestige in compensation of special

5. Confidentiality of Communications in Dispute Resolution Procedures

The confidentiality of all records and statements made during an ADR proceeding is critical to the success of the ADR system.[114] Protecting confidentiality in ADR promotes candor between the parties, ensures fairness and privacy for the disputants, and helps the neutral third parties to be effective.[115] All communications made by a participant in an ADR procedure, whether relating to a civil or criminal matter, are confidential.[116] Such communications are neither admissible in court nor discoverable.[117] The records and statements of neutral third parties participating in ADR are also protected.[118] The neutral third party cannot be required to release any information or testify as to any matter relating to the dispute.[119]

An important exception to the rule of confidentiality, however, is contained within the Act.[120] If any record or settlement made in an ADR procedure would be admissible or discoverable outside of ADR, it remains admissible or discoverable.[121] Thus, the Act does not shield the disputants

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master); Roberson v. Roberson, 420 S.W.2d 495, 502 (Tex. Civ. App.—Houston [14th Dist.] 1967, writ ref'd n.r.e.)(fees for special master dependant in part on complexity and length of trial).

114. *See* NEW HORIZONS FOR THE TEXAS JUSTICE SYSTEM, *supra* note 27, at 126 (importance of confidentiality to ADR demonstrated by provisions of Act).

115. *See id.* at 123-24 (listing policy reasons for protecting confidentiality in ADR).

116. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 154.073(a) (Vernon Supp. 1988)(communications made in all ADR proceedings are confidential whether parties participate in ADR before or after suit is filed in court, i.e., whether referred to ADR by court or participate voluntarily); *see also* NEW HORIZONS FOR THE TEXAS JUSTICE SYSTEM, *supra* note 27, at 125-26 (discussing confidentiality provision of Act).

117. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 154.073(a) (Vernon Supp. 1988)(ADR communications not admissible as evidence in either judicial or administrative hearing). The confidentiality provisions of the Act complement existing protections of ADR statements and records. Rule 408 of the Texas Rules of Evidence can be interpreted to protect communications made during ADR as offers of settlement or compromise. *See* TEX. R. EVID. 408. Furthermore, most ADR organizations require that parties sign an agreement to keep the ADR procedure confidential and not to subpoena the neutral third party in any subsequent suit. *See* NEW HORIZONS FOR THE TEXAS JUSTICE SYSTEM, *supra* note 27, at 125-26.

118. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 154.073(b) (Vernon Supp. 1988).

119. *See id.* (neither participants nor neutral third party in ADR process may be required to release information or to testify regarding matter in dispute); *see also* NEW HORIZONS FOR THE TEXAS JUSTICE SYSTEM, *supra* note 27, at 125-26 (discussing confidentiality as relating to neutral third parties).

120. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 154.073(a)-(c) (Vernon Supp. 1988)(providing that all ADR communications confidential unless otherwise admissible or discoverable).

121. *See id.* § 154.073(c). "An oral communication or written material used in or made a part of an alternative dispute resolution procedure is admissible or discoverable if it is admissible or discoverable independent of the procedure." *Id.*

from normal court processes.[122] If the confidentiality rule conflicts with other legal requirements, the judge may determine, in camera, whether the information is subject to disclosure, thereby ensuring that parties are not disadvantaged by their open communication in ADR procedures.[123]

C. *Proponents' Perspective of Alternative Dispute Resolution*

Alternative dispute resolution can be an effective tool in relieving the caseloads of overburdened Texas' courts.[124] A high percentage of disputes processed through ADR result in settlement, leaving fewer cases to be adjudicated.[125] Conflicts can be resolved more quickly when ADR is part of the justice system; disputes that are adjudicated will reach the trial phase more quickly and ADR procedures generally last no more than a few days.[126] ADR can also result in monetary savings to parties, as ADR fees are usually much lower than court costs.[127] A large percentage of participants have been satisfied that ADR, as practiced in other jurisdictions, is a fair process,[128] thus enhancing compliance with the terms of settlement agree-

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122. *See* NEW HORIZONS FOR THE TEXAS JUSTICE SYSTEM, *supra* note 27, at 126 (describing confidentiality provision of Act).

123. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 154.073(d) (Vernon Supp. 1988); *see also* NEW HORIZONS FOR THE TEXAS JUSTICE SYSTEM, *supra* note 27, at 126 (discussing merits of protecting confidentiality of ADR procedures).

124. *See* S. GOLDBERG, E. GREEN & F. SANDER, DISPUTE RESOLUTION 5 (1985)(listing goals of ADR); Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 673 (1986)(discussing effectiveness of ADR in bringing settlement which would reduce courts' caseload); Addresses by State Senator Cyndi Taylor Krier, James B. Sales, Texas Bar Foundation Symposium on Cost Control at the Courthouse (Sept. 30, 1987)(describing advantages of ADR).

125. *See* S. GOLDBERG, E. GREEN & F. SANDER, DISPUTE RESOLUTION 527-28 (1985)(in typical mediation programs, 40-65% of clients reach agreements); D. MCGILLIS, COMMUNITY DISPUTE RESOLUTION PROGRAMS AND PUBLIC POLICY 58-61 (1986)(discussing dispute resolution rates in different cities); Address by State Senator Cyndi Taylor Krier, Texas Bar Foundation Symposium on Cost Control at the Courthouse (Sept. 30, 1987)(70% of ADR procedures successful).

126. *See* S. GOLDBERG, E. GREEN & F. SANDER, DISPUTE RESOLUTION 530-31 (1985)(empirical findings related to ADR); L. KANOWITZ, CASES AND MATERIALS ON ALTERNATIVE DISPUTE RESOLUTION 7 (1986)(ADR implemented to relieve time delay of courts); NEW HORIZONS FOR THE TEXAS JUSTICE SYSTEM, *supra* note 27, at 4, 55 (ADR provides "quick, effective access to justice"; mini-trials last one or two days); Address by State Senator Cyndi Taylor Krier, Texas Bar Foundation Symposium on Cost Control at the Courthouse (Sept. 30, 1987)(describing how ADR saves time).

127. *See* S. GOLDBERG, E. GREEN & F. SANDER, DISPUTE RESOLUTION 5 (1985)(describing merits of ADR); L. KANOWITZ, CASES AND MATERIALS ON ALTERNATIVE DISPUTE RESOLUTION 7-9 (1986)(discussing how ADR saves money); Address by State Senator Cyndi Taylor Krier, Texas Bar Foundation Symposium on Cost Control at the Courthouse (Sept. 30, 1987)(ADR can save on client's costs).

128. *See* D. MCGILLIS, COMMUNITY DISPUTE RESOLUTION PROGRAMS AND PUBLIC

ments.[129]

The Texas Act is designed to promote client satisfaction through flexibility. The Act discusses several procedures by which the ADR process may be tailored to fit the dispute.[130] All of the ADR procedures are designed to be nonbinding; however, the parties may agree in advance to be bound by any settlement they may reach in any type of ADR.

Furthermore, each method of ADR possesses unique traits making them particularly adaptable to specialized situations. For example, mediation is a procedure with characteristics especially suited to divorce and child-custody conflicts.[131] The mediator helps parties work with each other in a nonadversarial atmosphere and lowers emotional levels, reduces trauma and helps retain the relationships among the disputants.[132] Similarly, parties having difficulty negotiating an agreement may find that a summary jury trial will enable them to present a trial run of their case before a panel of ordinary people.[133] Summary jury trials are often successful in situations where the parties need to feel vindicated by a jury.[134] Conversely, mini-trials are suited

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POLICY 61-66 (1986)(statistics on clients' perceptions of ADR); Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 675 (1986)(clients perceived ADR as fair procedure); Address by State Senator Cyndi Taylor Krier, Texas Bar Foundation Symposium on Cost Control at the Courthouse (Sept. 30, 1987)(disputants found ADR fair to each side as they could tell whole story).

129. *See* D. MCGILLIS, COMMUNITY DISPUTE RESOLUTION PROGRAMS AND PUBLIC POLICY 66-67 (1986)(high percentages of clients satisfied with settlement agreements); Silberman & Schepard, *Court-Ordered Mediation in Family Disputes: The New York Proposal*, 14 N.Y.U. REV. L. & SOC. CHANGE 74, 742 (1986)(because ADR clients satisfied with settlements in family disputes, high rate of compliance with terms of agreement); Address by State Senator Cyndi Taylor Krier, Texas Bar Foundation Symposium on Cost Control at the Courthouse (Sept. 30, 1987)(in divorce and juvenile crime disputes, experienced enhanced compliance with settlement terms).

130. *See id.* § 154.023-.027 (listing mediation, mini-trial, moderated settlement conference, summary jury trial and arbitration as ADR procedures).

131. *See* L. KANOWITZ, ALTERNATE DISPUTE RESOLUTION, CASES AND MATERIALS 26-27 (1985)(listing advantages of mediation); Silberman & Schepard, *Court-Ordered Mediation in Family Disputes: The New York Proposal*, 14 N.Y.U. REV. L. & SOC. CHANGE 741, 742-50 (1986)(relating mediation merits to needs of family disputes); Address by State Senator Cyndi Taylor Krier, Texas Bar Foundation Symposium on Cost Control at the Courthouse (Sept. 30, 1987)(mediating divorces enhanced compliance with child support agreements, reduced trauma of children).

132. *See* Silberman & Schepard, *Court-Ordered Mediation in Family Disputes: The New York Proposal*, 14 N.Y.U. REV. L. & SOC. CHANGE 741, 742-50 (1986)(describing merits of mediation in family disputes); NEW HORIZONS FOR THE TEXAS JUSTICE SYSTEM, *supra* note 27, at 92-96 (mediation helps in child custody cases where emotions run high).

133. *See* Address by Edward F. Sherman, Texas Bar Foundation Symposium on Cost Control at the Courthouse (Sept. 30, 1987)(describing summary jury trials).

134. *See* Levin & Golash, *Alternative Dispute Resolution in Federal District Courts*, 37 U. FLA. L. REV. 29, 38 (1985)(describing success of summary jury trials in federal court-annexed procedures).

to complex business cases where a regular jury trial would be too time-consuming.[135] The business' Chief Executive Officers, familiar with making tough decisions, can often settle a case quickly after listening to the short mini-trial presentation.[136] Likewise, mediated settlement conferences have been successfully used by insurance companies in complex tort cases where the risk of loss to both sides would be great if the case went to a jury.[137] The neutral third party in the moderated settlement conference can discuss bases of settlement with both parties separately, and can often find a middle ground on which the dispute can be resolved satisfactorily for all.[138]

The Texas Alternative Dispute Resolution Procedures Act protects the parties' rights to a fair trial. By ensuring all communications made during ADR remain confidential,[139] parties can freely reveal all relevant information during ADR without fear that it will injure their cases in a subsequent trial.[140] Thus, ADR gives the parties another opportunity to settle their dispute in a nonadversarial atmosphere.[141] Additionally, the ADR process is completely voluntary.[142] No court can force a party to forego his trial rights by submitting to ADR.[143] Even if a court recommends ADR in a particular dispute, a party may refuse to participate by submitting a reasonable ob-

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135. *See* NEW HORIZONS FOR THE TEXAS JUSTICE SYSTEM, *supra* note 27, at 53-54 (mini-trials may be used to help settle complex cases where time expenditure of trial not justified); Address by Judge Frank Evans, Texas Bar Foundation Symposium on Cost Control at the Courthouse (Sept. 30, 1987)(mini-trial successful in complex business cases).

136. *See* Lambros, *The Summary Jury Trial and Other Alternative Methods of Dispute Resolution*, 103 F.R.D. 461, 467 (1984).

137. *See* NEW HORIZONS FOR THE TEXAS JUSTICE SYSTEM, *supra* note 27, at 106-07 (discussing use of moderated settlement conferences in insurance cases).

138. *See id.*; *see also* Address by R. Hanson Lawton, Texas Bar Foundation Symposium on Cost Control at the Courthouse (Sept. 30, 1987)(describing process of moderated settlement conference).

139. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 154.073 (Vernon Supp. 1988)(confidentiality provision).

140. *See id.*; *see also* NEW HORIZONS FOR THE TEXAS JUSTICE SYSTEM, *supra* note 27, at 123-26 (discussing confidentiality in Act).

141. *See* NEW HORIZONS FOR THE TEXAS JUSTICE SYSTEM, *supra* note 27, at 8 (Act important step in process of administering justice in Texas).

142. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 154.002, 154.022 (Vernon Supp. 1988)(policy of Act to resolve disputes by "voluntary" settlement procedures; if party has reasonable objection, court may not refer case to ADR); *see also* NEW HORIZONS FOR THE TEXAS JUSTICE SYSTEM, *supra* note 27, at 8 (analyzing Act); Address by Judge Frank Evans, Texas Bar Foundation Symposium on Cost Control at the Courthouse (Sept. 30, 1987)(discussing voluntary nature of Act).

143. *See* NEW HORIZONS FOR THE TEXAS JUSTICE SYSTEM, *supra* note 27, at 22 (discussing role of lawyers in ADR); address by Judge Frank Evans, Texas Bar Foundation Symposium on Cost Control at the Courthouse (Sept. 30, 1987)(ADR does not delay or halt trial).

jection.[144]

If no settlement is reached through ADR, the case may proceed to litigation without further interruption.[145] Lawyers for the parties usually counsel their clients through both litigation and ADR; therefore, rather than decreasing the demand for lawyers, the new emphasis on settlement techniques will actually create opportunities for skillful negotiations.[146] Because of the limited necessity for courtroom appearances and the tailored nature of alternate dispute forums ADR can benefit the lawyers, judges and citizens who work willingly towards settlement.[147]

D. *Opponents' Perspective of Alternative Dispute Resolution*

The public has greeted ADR with widespread interest and popularity, but this alone does not mean that ADR is a worthwhile endeavor. The disadvantages of this Act will be analyzed on two levels, criticisms about ADR in general, and then specific problems of the Texas Act.

Critics of ADR recognize that dispute resolution outside of the courtroom may disadvantage the poor and prevent widespread solutions.[148] The premise underlying most ADR mechanisms is that the parties are on equal footing.[149] In fact, however, many situations arise where inequalities exist; a readily apparent example is a worker's compensation claim against a large

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144. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 154.022 (Vernon Supp. 1988)(notification and objection provision).

145. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 154.001-.073 (Vernon Supp. 1988)(providing for contingencies if case proceeds to trial).

146. *See* NEW HORIZONS FOR THE TEXAS JUSTICE SYSTEM, *supra* note 27, at 20-25 (addressing role of lawyers in ADR); Address by J. Odem, Texas Bar Foundation Symposium on Cost Control at the Courthouse (Sept. 30, 1987)(lawyer as advocate in ADR).

147. *See* Addresses by Judge Frank Evans, J. Odem, Texas Bar Foundation Symposium on Cost Control at the Courthouse (Sept. 30, 1987)(ADR works as well as people participating).

148. *See* L. KANOWITZ, CASES AND MATERIALS ON ALTERNATIVE DISPUTE RESOLUTION 25 (1986)(list of criticism of ADR); S. GOLDBERG, E. GREEN & F. SANDER, DISPUTE RESOLUTION 490-91 (1985)(discussing three major criticisms of mediation). Additionally, the monetary savings to the parties diminishes and may become insignificant depending on the time the ADR mechanism is used. *See* L. KANOWITZ, CASES AND MATERIALS ON ALTERNATIVE DISPUTE RESOLUTION 25 (1986)(savings of ADR dependent upon trial's proximity). Due process or equal protection claims are available to binding ADRs unless waived. *See* Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 674 (1986)(court-annexed arbitration nonviolative of seventh amendment if waived).

149. *See* Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1076 (1984)(discussing disparities of settlements); *see also* L. KANOWITZ, CASES AND MATERIALS ON ALTERNATIVE DISPUTE RESOLUTION 25 (1986)(noting power imbalance as criticism of ADR); Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 673 (1986)(noting some types of ADR mechanisms only appropriate for corporate parties).

corporation.[150] With rare exceptions, when disparities exist between parties in litigation, the disadvantages are even more pronounced in dispute procedures conducted out of court.[151] Several factors are responsible for this increased disparity.

First, the disadvantaged party is less able to properly synthesize information necessary to predict the outcome of litigation, and therefore is greatly hindered in the bargaining process.[152] Second, the prohibitive cost of trial may force the plaintiff to settle; an undesirable result because the defendant can anticipate the plaintiff's cost as if the case were adjudicated and decrease his offer accordingly.[153] Finally, if the disadvantaged party is a plaintiff in financial straits, the defendant may exploit the plaintiff's situation causing him to accept an unrealistically small settlement.[154]

While an impartial third party cannot remedy these inequalities, during trial a judge can alleviate the disparities between disputants by asking questions, calling witnesses, and inviting outside parties to participate amici.[155] As a result, adjudication ensures rough equality between parties while ADR, in the name of judicial efficiency, deprives equality to those citizens most in need of legal remedies.

Another criticism of ADR is that alternative dispute resolution mechanisms create individual remedies which prevent widespread solutions.[156] Litigation is needed to reform bureaucratic organizations and prevent dangers to the public.[157] For example, if in the 1950s school busing was mediated, then the social changes prompted by *Brown v. Board of Education*[158] and its progeny would not have occurred.[159] Professor Bikel of Yale Law School aptly discusses the role of adjudication:

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150. *See* Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1076 (1984)(noting presumption of equality exists in settlement process).

151. *See id.* (listing three ways disparities of resources adversely affect settlement); Address by Professor Anthony G. Amsterdam, Judicial Conference, D.C. Circuit (May 21, 1984), *reprinted in* 105 F.R.D. 251 (1985)(discussing injustices of involuntary ADRs).

152. *See* Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1076 (1984)(poorer persons less able to amass necessary information).

153. *See id.* The indigent party receives little relief if he settles, since he is still subject to litigation costs. *Id.*

154. *See id.* (need of indigent party so great that may force him to settle).

155. *See id.* at 1077 & n.14 (noting successful use of amicus curiae).

156. *See* S. GOLDBERG, E. GREEN & F. SANDER, DISPUTE RESOLUTION 491 (1985)(noting public policy may be harmed by ADR); *see also* L. KANOWITZ, CASES AND MATERIALS ON ALTERNATIVE DISPUTE RESOLUTION 25 (1986)(list of criticisms of ADR).

157. *See* Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1083-85 (1984)(discussing advantages of adjudicatory process).

158. 349 U.S. 294 (1955)(separation by race inherently unequal)(cited in Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1089 & n.44 (1984)).

159. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1089 (1984)(noting uniqueness of adjudicatory process to alter society's structure).

> Adjudication uses public resources, and employs, not strangers chosen by the parties, but public officials chosen by a process in which the public participates. . . . Their job is not to maximize the ends of private parties, not simply to secure the peace, but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality in accord with them.[160]

In addition to the general problems of ADR, the Texas Alternative Dispute Resolution Procedures Act contains specific deficiencies. The Act effectively contradicts its stated policy of "voluntary" settlement,[161] lacks enforcement and penalty provisions, and contains ambiguities and omissions that permit inconsistent application of its provisions. Each method of ADR specified within the Act contains inherent maladies.

Specific provisions of the Act simply eschew the stated policy of voluntary settlement.[162] The futility of objecting to an ADR proceeding is obvious to a practicing attorney; if a presiding judge advises the litigants to use an ADR procedure, the attorneys have virtually no choice but to do so.[163] This is precisely the type of coercion that the "policy" statement of the Act attempts, but fails, to eliminate.[164] If a party is involuntarily subjected to an ADR mechanism, all parties waste money and time since settlement possibilities among reluctant disputants are remote.[165]

Even if the Act were to work as envisioned, the complete lack of enforcement mechanisms or effective penalties, may result in widespread misuse by judges, litigants and impartial third parties.[166] If a party to the suit follows a

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160. *Id.* at 1085 (Professor Bikel uses the pseudonym Owen M. Fiss in his writing); *see also* Barrett, *The Peacemakers, Harried Judges Rely on 'Special Master' To Settle Tough Suits*, 80 Wall Street J., Nov. 5, 1987, at 1, col. 1 (noting ADR undermines public perception that defendants ought to meet their accusers in public forum).

161. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 154.002 (Vernon Supp. 1988)(settlement procedures voluntary).

162. *See id.* § 154.002 (settlement procedures in ADR voluntary); Panel Discussion and Open Forum Debate, Texas Bar Foundation Symposium on Cost Control at the Courthouse (Sept. 30, 1987)(Mr. Joe Jamail questioning voluntariness of choosing to attempt an ADR).

163. Panel Discussion and Open Forum Debate, Texas Bar Foundation Symposium on Cost Control at the Courthouse (Sept. 30, 1987)(Mr. Jamail asserted strongly that ADR process not voluntary).

164. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 154.002 (Vernon Supp. 1988)(procedures voluntary).

165. *See* Wilkinson, *ADR: Valuable Tool Is Often Misunderstood*, 10 Nat'l L.J., Nov. 2, 1987, at 23, col. 1 (ADR's success in corporate sphere dependent upon belief that it will work); NEW HORIZONS FOR THE TEXAS JUSTICE SYSTEM, *supra* note 27, at 55 (parties' willingness to settle crucial to mini-trial's success); L. KANOWITZ, CASES AND MATERIALS ON ALTERNATIVE DISPUTE RESOLUTION 12 (1986)(parties must negotiate in good faith).

166. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 154.001-.073 (Vernon Supp. 1988); *see also* Barrett, *The Peacemakers, Harried Judges Rely on 'Special Master' To Settle Tough Suits*,

referral order in bad faith, uses dilatory tactics, or breaks confidentiality guidelines, no specific provision of the Act prescribes a penalty.[167] Moreover, the Act fails to provide enforcement provisions for abuses committed by "impartial" third parties.[168] Additionally, the Act is silent as to the punishment or redress available if a judge abuses his discretion regarding an imposition of an ADR procedure.[169] Although not addressed by the Act, the court's denial of a reasonable objection to referral, or its selection of an unqualified third party, would most likely result in a mandamus action.[170] Thus, the additional disadvantage of increased appellate court caseloads exists.

Since conformity with the Act's provisions is prevented by its inherent ambiguities, litigants are subject to unequal treatment. For example, the provisions referring to standards, duties and confidentiality of an impartial third party are so ambiguous as to be unenforceable and unhelpful.[171] The Act fails to provide guidance for the conduct of impartial third parties during ADR procedures. Instead, the duties delineated by the Act are mere verbiage, lacking definition as to what constitutes coercion of the parties as opposed to mere encouragement.[172] An additional ambiguity exists regarding whether prejudgment interest is tolled by participating in ADR.[173] Fi-

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80 Wall Street J., Nov. 5, 1987, at 1, col. 1 (quoting law professor Judith Resnik of the University of Southern California who questioned accountability of special masters); Panel Discussion and Open Forum Debate, Texas Bar Foundation Symposium on Cost Control at the Courthouse (Sept. 30, 1987)(discussion acknowledging deficiencies of sanctions and penalties of non-abiding parties).

167. *See* Panel Discussion and Open Forum Debate, Texas Bar Foundation Symposium on Cost Control at the Courthouse (Sept. 30, 1987)(participant questioning whether usual pretrial sanctions exist when lawyer absent from ADR mechanism). *But see* NEW HORIZONS FOR THE TEXAS JUSTICE SYSTEM, *supra* note 27, at 25 n.1 (order of contempt may be given to parties not following ADR).

168. *See* Panel Discussion and Open Forum Debate, Texas Bar Foundation Symposium on Cost Control at the Courthouse (Sept. 30, 1987)(Judge Evans acknowledging that no answer in Act to question of breaking confidentiality). In addition, the selection of impartial third parties is ameliorated by subsection (c) of section 154.052 of the Act, since it allows a court to appoint a third party at its discretion. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 154.052(c) (Vernon Supp. 1988).

169. *See* Panel Discussion and Open Forum Debate, Texas Bar Foundation Symposium on Cost Control at the Courthouse (Sept. 30, 1987)(discussion of lack of penalties).

170. *See, e.g.,* Garcia v. Peeples, 734 S.W.2d 343, 345, 348 (Tex. 1987)(writ issued since blanket protective order improper); Jampole v. Touchy, 673 S.W.2d 569, 573 (Tex. 1984)(writ granted on denial of discovery request). The general rule states that a writ of mandamus will be granted only when the judge abuses his discretion and an adequate remedy at the appellate level is absent. *See* Jampole, 673 S.W.2d at 572-73.

171. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 154.053, 154.073 (Vernon Supp. 1988).

172. *See id.*

173. *See id.* §§ 154.001-.073 (Act silent on prejudgment interest issue).

nally, while the Act allows any party, including the judge, to refer the case to ADR, it does not address the questions of when a motion can be made and whether a pending motion should preclude a referral.[174]

The Act also impedes administration of impartial justice and creates an ethical dilemma for practicing attorneys. For example, since an impartial third party is subject to only the standard of confidentiality, a disputant is free to communicate ex parte with the impartial third party.[175] Since the Act prevents the "impartial third party" from revealing his discussions with the communicating disputant, his objectivity to the other party's claim is in danger of being skewed.[176] Similarly, if one of the disputant's attorneys acts unethically, uncertainty exists over whether the impartial third party must be bound to confidentiality. This conflict is accentuated when the impartial third party is a lawyer who has an ethical duty to report lawyer misconduct.[177] These issues leave the desirability of the Act in question and, at the very least, call for a set of clear, unambiguous duties for impartial third parties.

In addition to these broad criticisms, the specific ADR procedures mentioned in the Act have several distinct deficiencies. The first of the mechanisms, mediation,[178] possesses basic flaws. Mediation's strengths are also its weaknesses since it relies on an assumption of the parties' parity of information, resources, and power.[179] If any disparity exists, the mediator's role is undefined.[180] Thus, if the mediator intervenes on behalf of the disadvan-

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174. *See id.* § 154.021 (Act addresses movants only but addresses no other restrictions).

175. *See* Barrett, *The Peacemakers, Harried Judges Rely on 'Special Master' To Settle Tough Suits*, 80 Wall Street J., Nov. 5, 1987, at 10, col. 1 (master would accommodate party by ex parte communications).

176. *See id.* TEX. CIV. PRAC. & REM. CODE ANN. § 154.053(b) (Vernon Supp. 1988)(discussion of information by one party to impartial third party confidential). The Act contradicts itself by mandating that the appointing judge remain unaware of any disclosures made during ADR, to insure his objectivity about the case, while delegating to the same judge the task of examining ADR communications in camera when a question arises as to their admissibility. *Compare id.* § 154.073(c) (judge may review ADR communications in camera to determine whether protective order warranted) *with id.* § 154.015(a) (court should appoint impartial third party to preside over ADR) *and id.* § 154.073(a) (communications made during ADR inadmissible during any judicial procedure); *see also* NEW HORIZONS FOR THE TEXAS JUSTICE SYSTEM, *supra* note 27, at 18 (Act clear that appointing judge should abstain from participation in ADR procedure).

177. *See, e.g.*, MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-103 (1979)(duty to disclose lawyer violating disciplinary rules); MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.3 (lawyer violates Rules by not disclosing lawyer who broke a Rule).

178. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 154.023 (Vernon Supp. 1988).

179. L. KANOWITZ, CASES AND MATERIALS ON ALTERNATIVE DISPUTE RESOLUTION 12 (1986)(pros and cons of mediation discussed).

180. *Id.*

taged party, he has lost his appearance of impartiality.[181] Mediation is inappropriate under most circumstances because the mediator's duties are undefined regardless of whether parity exists.

The mini-trial,[182] as well as the moderated settlement conference,[183] are similarly deficient because they rely on the wealth of the parties. The mini-trial is considered a mechanism available only to the wealthy since it involves large, complicated suits involving corporations.[184] Moreover, the moderated settlement conference consists of a panel of impartial third parties who are usually experts.[185] The cost of impaneling the impartial third parties, and the preparation necessary for proper administration of these procedures, outweigh the overall goal of ADR—the reduction of litigation costs.

The ADR procedure of summary jury trial[186] possesses the two undesirable aspects of tending to create skepticism toward the judicial process and failing to effectively meet the goal of alleviating judicial workloads. Since the premise of a summary jury trial is based on reality testing, and the jury is deceived about the process until after the trial is final, this could embitter jurors, causing them to become skeptical about their roles as jurors in the future.[187] The entire aspect of judicial economy espoused by ADR is defeated by utilizing a judge or magistrate to conduct the proceeding.[188] Where the judge's time is consumed presiding over a summary jury trial, the supposed time-saving function of this type of ADR is nullified since he is neglecting other court duties.

Arbitration, the last method of ADR suggested in the Act,[189] embodies two diametrically opposed, equally objectionable concepts. First, arbitration's efficiency may ameliorate the quality of justice.[190] For example, in

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181. *Id.* (illustrating limits of mediators).

182. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 154.024 (Vernon Supp. 1988).

183. *See id.* § 154.025 (confidentiality provision).

184. *See* Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 673 (1986)(mini-trial caters to wealthy).

185. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 154.025 (Vernon Supp. 1988); NEW HORIZONS FOR THE TEXAS JUSTICE SYSTEM, *supra* note 27, at 62 (moderated settlement conference panel may consist of attorneys).

186. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 154.026 (Vernon Supp. 1988)(confidentiality provision).

187. *See* NEW HORIZONS FOR THE TEXAS JUSTICE SYSTEM, *supra* note 27, at 70 (jurors deceived until proceeding complete).

188. *See id.* at 69; Address by Edward F. Sherman, Texas Bar Foundation Symposium on Cost Control at the Courthouse (Sept. 30, 1987)(noting that non-presiding judge contradicts summary jury trial).

189. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 154.026 (Vernon Supp. 1988).

190. L. KANOWITZ, CASES AND MATERIALS ON ALTERNATIVE DISPUTE RESOLUTION 11 (1986)(advantages and disadvantages of arbitration listed).

labor and commercial cases, arbitration can dispense with grievances quickly and inexpensively, but this expediency sacrifices the benefits of a more reasoned decision, thereby harming an individual's rights.[191] Conversely, the formalities employed to safeguard participants rights in labor relations have created the problems of procedural delays already present in the judicial process.[192] Thus, the arbitration process, in its pure form, forsakes fairness for expedience; when cures are attempted, the process contracts the delays inherent within the current system.

Thus, the general problems with ADR are accentuated by the disadvantages inherent in the Texas Act. Any possible benefits theoretically possessed by ADR procedures are vitiated by the reality of the inherent problems of the forms of these procedures embodied within the Act. The realities of the probable coercive, ambiguous terms, omissions of enforcement mechanisms and penalties, conflicting ethical obligations, and other less readily predictable problems of the system produce a tenuous foundation upon which to rest the fate of complainants' controversies in Texas.

IV. CONCLUSION

The judicial conference apprised the state's judiciary of an array of new procedural and technological developments designed to increase efficiency and reduce costs of legal representation. Many of the topics simply indicate a growing realization by the legal profession that tradition, alone, is insufficient justification for failure to adapt to our increasingly automated world. These adaptations are neither mystical nor futuristic, but merely practical applications of the familiar. For example, the traditional, and sometimes cumbersome, voir dire proceedings can be made more efficient by using technology no more complicated than the duplicating machine necessary to make copies of a more detailed juror selection questionnaire. Telephones and computers, mechanisms utilized daily in most law firms, can be equally practical in the courthouse setting. The impracticality of requiring witnesses to travel great distances, at even greater expense, can be alleviated by innovations in telecasting technology, allowing effective "live" examination of witnesses thousands of miles away.

The judicial conference also examined unfamiliar options to litigation now available as a result of the Alternative Dispute Resolution Procedures Act. The Act, which defines ADR policies and procedures, is deficient in some aspects, such as a lack of enforcement mechanisms and possibilities for abuse through coercion. However, the remedies to the problems of the system lie, not in its abrogation, but in maintaining high standards of zealous advocacy.

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191. *Id.* (lessened quality of justice in arbitration may be undesirable).

192. *Id.* (formalization of arbitration creates problems similar to present judicial process).

With time and experience, the Act may demonstrate its promising potential for improving the efficiency of the judicial system in Texas. If properly maintained, the ADR system may decrease the backlog of cases docketed in the courts, save time and money in administration of justice, provide an additional means of resolving conflicts and increase client satisfaction through enhanced participation, while preserving citizens' constitutional rights to a jury trial. The success of alternate dispute resolution, however, will depend upon the good faith and integrity of the judges and lawyers charged with implementing the system.

The foregoing ideas are examples of the progressive thinking examined at the conference. These ideas, when properly implemented, can accomplish the goal of the legal profession: to provide complainants superior representation in the most efficient manner available under the circumstances.**

Mark P. Brewster
Mary Kathleen Finck
John P. Palmer

** Address by Oliver S. Heard, partner, Heard, Goggan, Blair, Williams & Harrison, Texas Bar Foundation Symposium on Cost Control at the Courthouse (Sept. 30, 1987).

Appendix A
Current Jury Information Form

JUROR NO **JUROR INFORMATION FORM** **PLEASE TYPE OR PRINT IN BLACK INK**

Husband or Wife's Name	How long have you lived in Harris County?	No. of Children	Home Phone No.	Religious Preference	Your Age
Your Place of Birth	Your present Employer	No. of years worked there ▼		What is your type of work?	Business Phone No.
Have you ever been an accused, complainant or witness in a criminal case? Yes ☐ No ☐	Your Husband or Wife's Employer	No. of years worked there ▼		What is their type of work?	

Have you ever served on a Civil Jury? ☐ Yes ☐ No

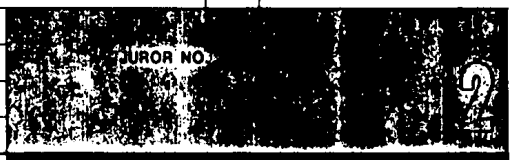
Have you ever served on a Criminal Jury? ☐ Yes ☐ No

Have you ever been party to a Law Suit? ☐ Yes ☐ No If yes, what type?

Any accidental bodily injury ever sustained requiring medical attention? By you? ☐ Yes ☐ No By your family? ☐ Yes ☐ No

If so, type of injury by you

If so, type of injury by your family



Signature

◀ PLEASE NOTE ▶ COMPLETE THIS FORM AND BRING IT WITH YOU WHEN REPORTING FOR JURY DUTY SEE BLUE ENCLOSURE #1 FOR COURT AND DATE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

NAME & ADDRESS: LAST FIRST MIDDLE INITIAL; STREET CITY P.O. BOX; COUNTY STATE ZIP CODE

PHONE: HOME (OR OTHER*) *IF YOU HAVE NO HOME PHONE GIVE PHONE NO. OF SOMEONE WHO CAN REACH YOU; WORK (Include EXTENSION)

HOW LONG HAVE YOU LIVED IN THIS COUNTY: YRS MOS; THIS STATE

PLACE OF BIRTH | ☐ SINGLE ☐ MARRIED ☐ WIDOWED ☐ SEPARATED OR DIVORCED | NO. OF CHILDREN | SPOUSE'S OCCUPATION (IF SPOUSE RETIRED, OCCUPATION BEFORE RETIREMENT)

ARE YOU EMPLOYED? ☐ YES ☐ NO | YOUR OCCUPATION OR BUSINESS | AGE | IF RETIRED, YOUR OCCUPATION BEFORE RETIREMENT

YOUR FIRM OR EMPLOYER'S NAME | BUSINESS ADDRESS OR EMPLOYER'S ADDRESS STREET CITY STATE

THIS BOX IS FOR OFFICIAL USE ONLY

DO YOU HAVE ANY PHYSICAL OR MENTAL INFIRMITY WHICH WOULD IMPAIR YOUR CAPACITY TO SERVE AS A JUROR? ☐ NO ☐ YES

IF ANSWER IS "YES" AND YOU SEEK AN INFIRMITY EXCUSE PLEASE INSERT A LETTER (SEE INSTRUCTION #1 ON BACK OF THE SUMMONS FORM)

ARE YOU A SALARIED EMPLOYEE OF U.S. GOVERNMENT? ☐ NO ☐ YES

IF "YES", GIVE YOUR DAILY WORK HOURS ▶ from (a.m.) to (p.m.)

AND YOUR REGULAR DAYS OFF:

HAVE YOU EVER BEEN CONVICTED OF A STATE OR FEDERAL CRIME PUNISHABLE BY IMPRISONMENT FOR MORE THAN ONE YEAR? ☐ NO ☐ YES

IF "YES" WERE YOUR CIVIL RIGHTS RESTORED? ☐ NO ☐ YES

ARE ANY SUCH CHARGES NOW PENDING AGAINST YOU? ☐ NO ☐ YES

ESTIMATED NO. OF MILES ONE WAY FROM YOUR HOME TO COURTHOUSE TO WHICH YOU ARE SUMMONED ▶

SOCIAL SECURITY NUMBER* ▶

I declare under penalty of perjury that all answers are true to the best of my knowledge and belief

SIGN HERE ▶ _____

NAME	Married ☐	Single ☐	Widowed ☐	Divorced ☐
ADDRESS	SPOUSE'S NAME			
OCCUPATION	SPOUSE'S OCCUPATION			
EMPLOYER'S NAME	SPOUSE'S EMPLOYER			
BUSINESS ADDRESS	SPOUSE'S BUSINESS ADDRESS			

	RECORD OF EXCUSES	MEMORANDUM
HOME PHONE		
BUS. PHONE		
EMERG. PHONE		
SPOUSE'S BUS. PHONE		

Appendix B
Proposed Jury Information Form Currently in Use in United States District Court Southern District of Texas

Juror No._____

JUROR QUESTIONNAIRE

NOTE: This Questionnaire is intended to help the Lawyers and the Court during jury selection and not to unreasonably invade your privacy. If you prefer not to answer, please say so.

1. Name:_____ 2. Age:_____
3. Address:_____
4. How long in Houston area:_____
5. Occupation:_____
6. Employer:_____ 7. How long?_____
8. Marital status:_____
9. Name of spouse:_____ 10. Occupation:_____
11. Spouse's employer:_____ 12. How long?_____
13. Number of children:_____ 14. Occupations:_____
15. Do you know any other member of this panel?_____
16. What magazines or newspapers do your read?_____
17. Have you ever been active in a political campaign?_____
    Which ones?_____
18. Have you or any member of your family been employed by a governmental entity other than the military?_____
19. If so, what entity?_____ What position, title or capacity did you hold?_____
20. To what civic clubs, societies, unions, professional association or other organizations do you belong?_____
    your spouse:_____
21. How many years of formal schooling have you completed?_____
22. If you attended college, please state:
    Name of College:_____ Location:_____
    Major subject:_____ Did you graduate?_____
    Highest degree attained:_____
23. If you were in the military service, state:
    What branch:_____
    Volunteer or enlist:_____ Highest rank attained:_____
24. Have you previously served on a jury? If yes, indicate the subject of the trials(s) (workers compensation, shoplifting, etc.), whether Federal or State, whether each jury reached a verdict:_____
25. Have you ever been a witness in a case?_____
26. Can you think of any reason why you should not serve as a juror?_____
27. Do you have any physical problem which interfere with your service as a juror?_____

Appendix C
A Proposed Rule Five Model
Governing Catagories for Docket Management

Rule. 5. (Suit on Liquidated Monetary Claim). In all cases for the collection of a debt, including but not limited to a suit on a promissory note, open account, stated account, or contract requiring payment of a specific sum, as well as any suit brought by a taxing authority for the collection of taxes, the control of the cases shall be subject to the following:

(a) In such a case the plaintiff shall entitle the original petition on "Original petition in suit on a debt", which will cause the action to be subject to the provisions of this Rule.

(b) Cases subject to this Rule shall be carried on one of four dockets.

(1) the "service pending docket", for cases where one or more answers are not due;

(2) the "active docket", for cases where all answers are due or have been filed for all named defendants;

(3) the "suspense docket", for cases where the parties have made application to defer entry of judgment on the ground that the parties have entered into a payment schedule to discharge the claim; or

(4) the "bankruptcy docket" for cases styled in a bankruptcy proceeding.

(c) At the end of 180 days after a suit upon a debt is transferred from the service pending docket to the active docket, it shall be dismissed unless the Court finds:

(1) that the suit is set for disposition by summary judgment or trial, or has been disposed of and is awaiting entry of judgment;

(2) that the plaintiff has attempted to secure disposition of the case by summary judgment or trial but has been unable to do so, either because a trial setting, though requested, has not been given, or a continuance has been granted by the Court; or

(3) that the plaintiff has certified, in writing, that a defendant has raised an issue of fact which precludes the granting of a summary judgment to the plaintiff.

(d) If the plaintiff certifies in writing that a defendant has asserted an issue of fact in the case which precludes the granting of a summary judgment, then the case shall be deleted from the "active docket" of suits on a debt and shall be transferred to the docket for civil cases generally, and effective upon notice of such transfer being given to the parties, the timetables for ordinary civil cases shall apply to the suit. Such certification by the plaintiff shall in no event be taken as an

admission that a fact issue exists, or that a motion for judgment, directed verdict or judgment n.o.v. is not proper, nor shall such a certification constitute waiver of compliance on appeal at any action of the trial court.

(e) When a suit on a debt or for the collection of taxes has been on the "active docket" for 180 days, the clerk shall issue a notice to all parties of intention to dismiss the case, without prejudice, for want of prosecution, upon not less than 21 days notice. If any party requests a trial setting before dismissal occurs, then the case shall not be dismissed but rather shall be tried when set, subject to any continuances granted by the Court, which continuances shall specify the new trial setting.

(f) If a suit is dismissed under this Rule, it may be reinstated in accordance with Rule 165a, Texas Rules of Civil Procedure.

(g) When the Court grants the application to defer entry of judgment under subsection (b)(3) of this Rule, the clerk shall list the case as inactive for 180 days. The case may be continued as inactive for an additional 180-day period, subject to the provisions of local rules for certification that the agreement reported under subsection (b) (3) continues in effect.