

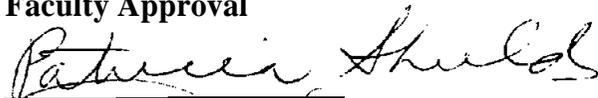
**Negotiated Rulemaking:  
A Study of State Agency Use and Public Administrators' Opinions**

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**An Applied Research Project (Political Science 5397)  
Submitted to  
The Department of Political Science  
Southwest Texas State University  
In Partial Fulfillment for the Requirements for the  
Degree of Masters of Public Administration**

**Spring 1998**

**Faculty Approval**


## TABLE OF CONTENTS

<b>List of Tables</b> .....	i
<b>Dedication</b> .....	ii
<b>Acknowledgments</b> .....	iii
<b>CHAPTER 1 _ INTRODUCTION AND STATEMENT OF THE RESEARCH QUESTION</b> .....	<b>1</b>
Introduction .....	1
Purpose of the Research .....	4
Chapter Summaries .....	4
<b>CHAPTER 2 _ LITERATURE REVIEW</b> .....	<b>6</b>
Introduction .....	6
Overview .....	6
History .....	12
Federal History of Negotiated Rulemaking .....	13
State History of Negotiated Rulemaking .....	17
Texas History of Negotiated Rulemaking .....	17
Essential Components .....	18
Statute .....	18
Guidelines for Negotiated Rulemaking .....	19
Strategic Decisions .....	22
Rulemaking and Group Dynamics .....	22
Federal Experience .....	24
Environment .....	26
Transportation .....	30
Education .....	31
Health Care .....	32
Agriculture .....	35
Interior .....	36
Budgetary Process .....	37
State Experience .....	39
State Water Plan and Policy .....	39
State Environment Legislation .....	41
Strategic Planning .....	42
Land Development .....	43
Alternate Models .....	44
General Consensus-Based Models .....	44
Legislative Negotiations Model .....	45
Negotiated Investment Strategies Model .....	45
Inter-Agency Models .....	46

Agency Culture .....	48
External Factors .....	50
Internal Factors .....	50
Advantages, Disadvantages and Consequences of Using Regulatory Negotiation .....	51
Advantages .....	52
Disadvantages .....	53
Consequences .....	54
Conceptual Framework .....	55
Conclusion .....	57
 <b>CHAPTER 3 - TEXAS SETTING .....</b>	 59
Purpose .....	59
State Statute .....	59
Texas State Agency Experience .....	62
Texas Department of Health Experience .....	63
 <b>CHAPTER 4 - METHODOLOGY .....</b>	 66
Purpose .....	66
Research Design .....	66
Sample .....	68
Operationalization of the Descriptive Categories .....	69
 <b>CHAPTER 5 - RESULTS .....</b>	 72
Introduction .....	72
Demographics .....	72
Essential Components .....	77
External Factors .....	80
Advantages .....	81
Disadvantages .....	84
Consequences .....	86
 <b>CHAPTER 6 - CONCLUSION .....</b>	 88
Recommendations .....	88
Conclusion .....	90
 <b>BIBLIOGRAPHY .....</b>	 93

<b>APPENDICES</b> .....	<b>96</b>
<b>Appendix A: Texas Negotiated Rulemaking Act</b> .....	<b>96</b>
<b>Appendix B: Survey Instrument</b> .....	<b>97</b>
<b>Appendix C: List of State Agencies in Sample</b> .....	<b>98</b>
<b>Appendix D: List of State Agency Respondents Not Participating in Negotiated Rulemaking</b> .....	<b>99</b>
<b>Appendix E: List of State Agency Respondents Participating in Negotiated Rulemaking</b> .....	<b>100</b>

# LIST OF TABLES

## **Table**

- 2.1 Federal Uses of Negotiated Rulemaking through 1995
- 4.1 Operationalization of the Conceptual Framework
- 5.1 Frequency and Percent of State Agency Respondents Participating and Not Participating in Negotiated Rulemaking
- 5.2 Frequency and Percent of State Agency Respondents Reasons for Not Participating in Negotiated Rulemaking
- 5.3 Frequency and Percent of State Agencies Participating in Negotiated Rulemaking by Organizational Category
- 5.4 Frequency and Percent of State Agency Respondents Not Participating in Negotiated Rulemaking by Organizational Category
- 5.5 Frequency and Percent of Responses Regarding the Essential Components of Negotiated Rulemaking
- 5.6 Frequency and Percent of Responses Regarding External Factors Affecting Negotiated Rulemaking
- 5.7 Frequency and Percent of Responses of Opinions Regarding Advantages of Negotiated Rulemaking
- 5.8 Frequency and Percent of Responses of Opinions Regarding Disadvantages of Negotiated Rulemaking
- 5.9 Frequency and Percent of Responses of Opinions Regarding Consequences of Implementing Rules from a Negotiated Rulemaking Process

# DEDICATION

This applied research paper is dedicated in the memory of four people who believed in me, and supported my effort to pursue a higher education.

My Mother, Blanche M. Beechinor, September 30, 1997

My Father, Col. Robert M. Beechinor, Jr., October 3, 1997

My Aunt, Mary M. Tracy, March 7, 1998

My Professor, Dr. Daniel **Farlow**, March 10, 1998

# ACKNOWLEDGEMENTS

I would like to thank the following members of the faculty. Dr. Patricia Shields for her support and guidance throughout this research. Dr. Kay Hofer for making every class a challenge and an accomplishment. Dr. Charles Garafolo for granting me the opportunity to enter the program.

I would especially like to thank Julia Maldonado for the technical support she provided to produce this paper.

I would like to give special recognition to my sister and graduate school mentor Diane and my brothers William and France for their love, support and encouragement.

# Negotiated Rulemaking: A Study of State Agency Use and Public Administrators' Opinions

## CHAPTER 1 - INTRODUCTION AND STATEMENT OF THE RESEARCH QUESTION

*"No matter how inconvenient the regulation might be to an individual or business, if the rules were properly designed, they would serve the interest of the whole community in terms of safety, quality of life and sometimes sheer economics."*

Oliver Wendell Holmes, Jr., Associate Justice of the Supreme Court

(quoted in Cuomo, 1995, p. 121).

### INTRODUCTION

From obtaining a driver's license to paying an entrance fee at a State park, most Texans find their personal and work lives subject to some state agency regulations.<sup>1</sup> State agencies promulgate regulations under legislative mandate. Public administrators are charged with the responsibility of rulemaking, rule implementation, rule enforcement and litigation. Public administrators must incorporate political, social, cultural and legal venues to affect the execution of public policy.

Many powerful, influential, diverse and competing interests can impact a public administrator's ability to promulgate rules. The impact upon the administrator is felt when agencies formulate rules. When developing rules,

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<sup>1</sup>The terms regulations and rules are used interchangeably.

public administrators often receive comments, critiques and criticisms from individuals and groups who perceive they may have a stake in what will become a final rule. As they deal with constructing a rule, public administrators contend with a multitude of interested parties such as consumer groups, citizens, politicians, lobbyists, trade and professional associations, technical experts, economists, policy analysts and other federal and state agencies.

The traditional process of promulgating rules is governed by the Administrative Procedure Act (APA). The APA still governs the overall rulemaking process even though specific statutes may require an agency to set minimum standards in certain areas, require an advisory group to review the rules or require final approval of the rules by a state board or commissioner.

Agencies are administratively charged with the responsibility to develop rules.

When an agency proposes rules, the language must be published in the Texas Register<sup>2</sup> for a minimum 30 day public comment period. The agency may conduct one or more public hearings during the comment period to receive comments. At the end of the comment period, the agency is required to review and consider all comments. An agency's response to the comments, with rule changes, if any, are published again in the Texas Register as a final rule with an effective date of implementation.

For the majority of the proposed and final rules published in the Texas

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<sup>2</sup>The Texas Register is the official State document used for publication of proposed and final rules. The Texas Register is a public document.

Register by state agencies, the traditional process under the APA affords agencies, special interest groups and the public sufficient input into rulemaking. At times, the due process and public comment required by the APA may not be sufficient, especially if the rules are controversial and evoke strong and conflicting opinions from diverse parties. An affected party's dissatisfaction and exception to a rule could result in a legal challenge. Although litigation in Texas challenging an agency's rule is infrequent, the cost to the State to defend a challenged rule can be significant.

How can state agency public administrators overcome the controversy and conflict often associated with formulating **rules**? A consensus-based process known as "negotiated rulemaking" can help public administrators in state agencies more effectively handle the competing interests. The widely accepted definition of negotiated rulemaking is, *"a consensus-based process in which a proposed rule is initially developed by a committee composed of representatives of all those interests that will be affected by the rule, including those interests represented by the rulemaking agency."* (Center for Public Policy Dispute Resolution, 1996, p. 11) Negotiated **rulemaking** does not replace the APA requirements, but rather supplements the traditional rulemaking procedure by addressing controversial issues up front and working towards reaching a consensus with the interested parties.

Negotiated rulemaking has been used the last two decades by fourteen different federal agencies. Fifteen states have used some form of negotiated

rulemaking. For this study, a survey was conducted to explore how extensively Texas state agencies have used negotiated rulemaking and also explore what public administrators' opinions are towards negotiated rulemaking.

## **PURPOSE OF THE RESEARCH**

There are four purposes to the research. First, is to find out how many and which Texas state agencies use negotiated rulemaking. Second, is to determine which essential components of the negotiated rulemaking process are used by state agencies. Third, is to learn if public administrators in state agencies have experienced the affects of external factors such as legislative requests when promulgating rules. Fourth, is to discover what the attitudes of Texas public administrators are towards the advantages, disadvantages and consequences of using negotiated rulemaking.

## **CHAPTER SUMMARIES**

This applied research project includes six chapters, tables, bibliography and appendices. Chapter 1 introduces the subject, negotiated rulemaking, contains the research purpose, and this summary of the chapters. Chapter 2 is a review of the literature on negotiated rulemaking, its history, essential components, strategic decisions, federal and state experiences, alternate models, agency culture, and the advantages, disadvantages and consequences of the process. The research setting which includes Texas state agencies is described in

Chapter 3. Chapter 4 contains an explanation of the research methodology, the survey instrument, an assessment of the methodology chosen for the research and the research population which includes the state entities that meet the definition of "agency" in the 1997 Texas Negotiated Rulemaking Act. The analysis of the data is contained in Chapter 5. Chapter 6 contains a summary of the applied research project and the conclusion of the research. The Appendices contain the State statute, the survey instrument, and a list of state agencies in the study.

## CHAPTER 2 - LITERATURE REVIEW

*"Rules are products of the bureaucratic institutions to which we entrust the implementation, management and administration of our law and public policy."* Cornelius Kerwin (1994, p. 4)

### INTRODUCTION

The purpose of this chapter is to review the development and use of negotiated rulemaking at the federal and state level. The chapter speaks to how state agencies can use negotiated rulemaking, a consensus-based process, to overcome controversy and conflict often associated with promulgating rules. Examples of similar consensus-based processes and their application in settings other than rulemaking are discussed. The paper concludes with the development of the conceptual framework. The conceptual framework is used to organize the empirical component of this study.

### OVERVIEW

Our society relies upon rules to accomplish many goals and as a result government regulations permeate almost every aspect of our private and public lives. Kerwin (1994, p. 7) described rules as a way government attempts to structure the future. Rules affect individuals, businesses and activities.

The process of rulemaking begins when a federal or state administrative agency<sup>3</sup> implements a law. The functions of the administrative agencies are

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<sup>3</sup>A government organization set up to implement a law (Shafritz, 1993, page 3)

governed by the Administrative Procedure Act (APA).<sup>4</sup> The federal and state APA has served as a foundation of agency rulemaking for over 40 years. The APA is written with the government agency as the responsible party to provide rulemaking expertise. (Harter, 1982, pp. 4 and 9) The APA specifies how agencies: (1) publicize information about their operation; (2) develop rules and publish notice of comment; (3) engage in adjudication; and (4) are subject to judicial review. (Shafritz, 1993, p. 9) Kerwin (1994, pp. 52-54) identified similar core elements of rulemaking as information, participation and accountability. Information is the notice provided to the public about the rule. Participation is the public's comments back to the agency on the proposed rules. The agency's accountability comes through judicial review when rules are challenged by the affected parties.

The APA<sup>5</sup> makes the distinction between rulemaking that requires a hearing (informal) and rulemaking that requires a public notice and opportunity for public comment (formal). The enabling statute determines whether formal or informal procedures are used. Agencies publishing rules for public comment afford interested parties the right to petition for issuance, amendment, or repeal of

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<sup>4</sup>The federal and Texas APA are similar in requirements with the exception that Texas has distinct statutes relating to the Texas Open Records Act (TORA) and the Texas Open Meetings Act (TOMA) while the Federal APA was amended to include the Freedom of Information Act of 1966, the Privacy Act of 1974 and the Sunshine Act of 1976. (Shafritz, 1993, p. 9)

<sup>5</sup>Unless the enabling statute specifies otherwise, the Texas APA requires all state agencies to publish in the Texas Register a "Notice of Proposed Rules," containing (the text of the proposed rule and other information. (Center for Public Policy Disputes Resolution, 1996: p. 31)

the rule. (Shafritz, 1993, p. 429) All rules enacted must be within the statutory authority of the enabling legislation. In addition to issuing rules, the administrative agencies are also charged with the implementation of the rules, enforcement of rules and adjudicating interpretive disputes (Shafritz, 1993, p. 416).

Public administrators are the individuals within administrative agencies charged with the responsibility for **rulemaking**, rule implementation, rule enforcement and litigation. Public Administrators must incorporate political, social, cultural and legal venues to affect the execution of public policy. When promulgating rules, public administrators must often contend with controversy and conflict especially from external parties affected by the rules.

Litigation is a significant issue for government agencies. Litigation challenging an agency's rules is directly related to the magnitude of the negative effects anticipated by the affected parties. The courts, especially at the federal level, have routinely been petitioned by the affected parties to render judgement on litigation challenging an agency's rule which is perceived to be inconsistent with the enabling statute.

In addition to the perceived threat to the affected party's business practice and finances, the vagueness of the rule language is a major cause for litigation. Williams (1984, p. 179) in his article on police rulemaking cites state case law in *Sun Ray Drive - In Dairy, Inc. v. Oregon Liquor Control Commission* which illustrates the court's instruction to the state to write clear, concise and specific

rules. The Court of Appeals of Oregon stated:

**An** administrative agency cannot properly perform its duty under the law unless employees at all levels work towards the same objectives under a clear direction of policy from the head of the agency... The public is entitled to consistency of enforcement from the agency. That situation cannot be achieved in the absence of written standards. (Williams, 1984, p. 179)

In recent years, several of the administrative law cases on the Supreme Court docket involve claims concerning non-rule rules. *Bower v. City of New York* and *Lujan v. National Wildlife Federation* are examples. (Mashaw, 1994, p. 195) The use of non-rule rules is a form of agency evasion to rulemaking. In lieu of rules, agencies have issued guidelines, interpretations and manuals. Affected parties have challenged through the courts the statutory and legal basis of agencies using this type of non-rule rules. (Kerwin, 1994, p. 180)

The outcry of "*too much government*" by businesses, taxpayers and politicians initiated the movement for "deregulation."<sup>6</sup> Unlike the 1970s regulatory reform which emphasized rulemaking based on efficiency, fairness and political accountability; today's regulatory reform is based on reducing rulemaking authority and making it subject to an analysis of the costs and benefits for government intervention. (Mashaw, 1994, p. 186)

Governor Mario Cuomo in his book *Reason to Believe* (1995, p. 119), identified two reasons for cutting back on regulations. First, regulations cost

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<sup>6</sup>The lifting of restrictions on business, industry, and other professional activities for which government rules are established and bureaucracies created to administer. (Shafritz, 1993, p. 145)

businesses money not only to comply with the rules but also to show compliance by documentation.<sup>7</sup> The extra cost to businesses is objectionable especially when the regulation does not appear to be achieving anything worthwhile. Second, some government agencies have promulgated volumes of rules to cover every possible scenario and eventuality, causing the affected businesses to feel overburdened and harassed.

The sheer volume of federal rules is staggering. The total number of pages in the Code of Federal Regulations<sup>8</sup> is more than 130,000 pages. In 1995, there were 202 volumes of the Code of Federal Regulations which took up 21 feet of shelf space. (Gore, 1995, p. 42) On March 3, 1993, President Bill Clinton directed Vice President Al Gore to lead the National Performance Review of the federal government.<sup>9</sup> Several of the National Performance Review goals are to reduce the volume of regulations, eliminate obsolete regulations and to negotiate and seek consensus on new rules. (Gore, 1995, p. 270)

How can public administrators design rules to serve the interest of many? How can public administrators organize and manage the diversity of opinions and interests impacting the rulemaking process? Can a public administrator achieve *regulatory common sense*? According to Phillip Howard, the author of *The Death of Common Sense* (1994), rules must be simple enough to be understandable and

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<sup>7</sup>Perceived by businesses to be extra paperwork required by the government.

<sup>8</sup>The encyclopedia of federal law and rules.

<sup>9</sup>A campaign to reinvent government.

flexible enough so that individuals can try to make sense of each situation  
Perhaps public administrators can find the answer in the philosophy of common sense known as *pragmatism*.

Patricia M. Shields endorses the philosophy of pragmatism which was formulated during the turn of the century by William James and John Dewey. (Shields, 1996, p. 393) Shields recognizes public administrators work in a world of paradox and contradiction, disorder and pattern, action and conflict (1996, page 391). Public administrators must blend the art and science of **governance**<sup>10</sup> with pragmatic problem solving to make public programs work. According to Shields (forthcoming, p. 7):

*Public administration deals with the stewardship and implementation of the products of a living democracy.* The key elements are *products* and *democracy*. The term product is used as developed by Dewey. It is those items that are **con-structed** and **pro-duced** such as bridges, space ships, laws, healthcare, and education." As implementors public managers engage the products. They are involved in making and doing the instrumentalities of democracy. Public administrators operate within a living democracy. This is an environment that is changing, organic and teaming with values. Public administrators are stewards in that they are concerned with accountability, and effective use of scarce resources and ultimately making the connection between the doing, the making and democratic values. Pragmatic inquiry is well suited to facilitate this vision of public administration.

One pragmatic solution to **rulemaking** is for the public administrator to apply negotiated rulemaking. The problems associated with rulemaking will not

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<sup>10</sup>The art and science of governance is defined as **politics**. (Shafritz, 1993, p. 368)

<sup>11</sup>Another item public administrators **con-struct** or **pro-duce** is **rules**.

completely disappear using a negotiated approach. However, negotiated rulemaking can augment the existing one dimensional approach required by the APA. A regulation developed by and has the support of the respective interests would have a political legitimacy lacking in the current regulatory process.

(Harter, 1982, pp. 7, 112 and 113)

## HISTORY

A widely accepted definition of negotiated rulemaking is: "*a consensus-based process in which a proposed rule is initially developed by a committee composed of representatives of all those interests that will be affected by the rule, including those interests represented by the rulemaking agency.*" (Center for Public Policy Dispute Resolution, 1996, p. 11) The definition recommended by the Center for Public Policy Dispute Resolution (1996, p. 27) for consensus is:

"Consensus is reached when all representatives agree that their major interests have been taken into consideration and addressed in a satisfactory manner. They must also agree that given the combination of gains and trade offs and given the current circumstances and alternative options, the resulting agreement is the best one the representatives are likely to make."

Controversy, conflict and confrontation are the building blocks for consensus rulemaking. Hahn-Baker (1994, p. 42) recognized how confrontation between different factions of environmental groups<sup>12</sup> can bring a new vitality to a movement and significant advances. Excerpts from that experience:

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<sup>12</sup>Environmental groups are organizations such as Sierra Club and Green Peace.

"...confrontation is a way of asking questions about important issues. The controversy that evolves from confrontation is a discussion of the differences in our views of the world ...controversy is also the beginning of the journey to remedy the imperfections." (Hahn-Baker, 1994, p. 42)

Consensus building for legislation, policy and rules has evolved from the traditional 1960s style of conflict and confrontation often used by community organizers. Today, consensus organizers in the community elicit support from everyone, including past enemies and detractors. Organizers build on partnerships in order to succeed. (Eichler, 1995, p. 258) A consensus-based negotiated rulemaking process can take the negative associated with conflict and confrontation and redirect it into a constructive and meaningful outcome. Negotiated rulemaking allows parties to focus on their respective interests as it relates to many other interests and to participate directly and immediately in a consensus-based decision. Through negotiated rulemaking, participants share in the development and concurrence of a rule, rather than "participate" by submitting information that the decision maker<sup>13</sup> considers in reaching the decision. (Harter, 1982, pp. 28 & 29)

### **Federal History of Negotiated Rulemaking**

The federal government has been the pioneer in the area of negotiated rulemaking. Consensus participation traces its origins 60 years ago to the Fair Labor and Standards Act. The Act required committees to be established to work

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<sup>13</sup>The decision maker is the respective federal or state agency promulgating the rule.

together to solve issues ranging from wages to other work place conditions (Kerwin, 1994, p. 185) Since then, select federal legislation has mandated negotiated rulemaking. Examples such as the Price-Anderson Amendments (Public Law 100-408) and Hawkins-Stafford Elementary and Secondary School Improvement Amendments (Public Law 100-297) mandated the use of regulatory negotiation. The school amendment concerned a federal aid program for education of disadvantaged children and the Price-Anderson Amendment established negotiated rulemaking for the Nuclear Regulatory Commission. (Posey, 1995, p. 32) In 1990, Congress passed the Negotiated Rulemaking Act. The law does not mandate the use of regulatory negotiation, but recommends its use and sets guidelines for agencies to follow.

The 1993 enactment of the National Performance Review was followed by eight presidential directives implementing the National **Performance** Review recommendations. President Clinton has issued several directives encouraging agencies to use negotiated rulemaking. The National Performance Review recommendations for improving the regulatory systems are:

- Create an Inter-agency Regulatory Coordinating Group.
- Encourage more innovative approaches to regulations.
- Encourage consensus-based rulemaking.
- Encourage public awareness and participation.
- Streamline agency rulemaking procedures.
- Encourage alternative dispute resolution when enforcing regulations.
- Rank risks and engage in "anticipatory" regulatory planning.
- Improve regulatory science.
- Improve agency and congressional relationships.
- Provide better training and incentives for regulators. (Gore, 1994, pp

**21 1-212)**

Table **2.1** reflects the frequency negotiated rulemaking has been used through **1995** by multiple federal agencies. The Environmental Protection Agency (EPA) has used negotiated rulemaking for many years as evidenced by the agency's use of negotiated rulemaking on seventeen occasions. The Departments of Education, Interior, and Transportation respectively have used the negotiated rulemaking process seven times. Two-thirds of the agencies listed in Table **2.1** have used negotiated rulemaking less than three times.

**TABLE 2.1**

**Federal Uses of Negotiated Rulemaking through 1995**

Number of times Negotiated <b>Rulemaking</b> has <b>been</b> used	<b>Agency/Subdivision</b>
3	Department of Agriculture <i>Animal and Plant Health Inspection Service</i>
7	Department of Education
1	Department of Energy <i>Federal Energy Regulatory Commission</i>
2	Department of Health and Human Services <i>Health Care Financing Administration</i> <i>Indian Health Service (with Bureau of Indian Affairs)</i>
1	Department of Housing and Urban Development
7	Department of the Interior <i>Bureau of Indian Affairs (with Indian Health Services)</i> <i>Minerals Management Service</i> <i>Bureau of Land Management</i> <i>Office of Self-Governance</i> <i>Office of Surface Mining Reclamation and Enforcement</i>
3	Department of Labor <i>Occupational Safety and Health Administration</i>
7	Department of Transportation <i>Federal Aviation Administration</i> <i>Office of the Secretary</i> <i>National Highway Traffic Safety Administration and</i> <i>Federal Highway Administration</i> <i>Coast Guard</i> <i>Federal Railroad Administration</i>
17	<b>Environmental</b> Protection Agency
1	Farm Credit <b>Administration</b>
4	Federal Communications Division
1	<b>Federal</b> Trade Commission
1	Interstate Commerce Commission
2	Nuclear Regulatory Commission

Source: *Negotiated Rulemaking Sourcebook* (1995), Administrative Conference of the United States, pp. 375-398

## **State History of Negotiated Rulemaking**

States other than Texas that have used the negotiated rulemaking process are:

Arizona, California, Colorado, Idaho, Indiana, Maine, Massachusetts, Montana, New Mexico, New York, Ohio, Oklahoma, Virginia and Washington.

Negotiated rulemaking statutes were enacted in Florida, Montana, and Nebraska in 1996. New York State conducts negotiated rulemaking under Executive Order. Although there is no state law, the state legislatures of Idaho, Maine, Indiana, Oklahoma and Washington encourage the use of negotiated rulemaking. (Center for Public Policy Dispute Resolution, 1996, p. 50)

## **Texas History of Negotiated Rulemaking**

Although the federal government has longevity in the use of negotiated rulemaking, Texas has made legislative and administrative strides to implement negotiated rulemaking in the State. The Texas Setting Chapter discusses negotiated rulemaking events in Texas and the recently enacted 1997 Texas Negotiated Rulemaking Act. Negotiated rulemaking experiences at the Texas Department of Health are also described.

## ESSENTIAL COMPONENTS

### Statute

The essential components of negotiated rulemaking are basically the same for the 1990 Federal Negotiated Rulemaking Act and the 1997 Texas Negotiated Rulemaking Act. Negotiated rulemaking is not mandated in either of the Acts, The essential components of negotiated rulemaking found in the federal and state laws are:

An agency may engage in negotiated rulemaking to assist it in drafting a proposed rule by requiring a agency to appoint a **CONVENOR**. The convenor shall recommend to the agency whether negotiated rulemaking is feasible.

An agency that intends to engage in negotiated rulemaking shall **PUBLISH NOTICE** of such in the Federal Register or Texas Register. The agency shall establish and appoint members to a negotiated **RULEMAKING COMMITTEE**.

An agency shall appoint a **FACILITATOR**. The facilitator must be approved by the rulemaking committee and serves at the will of the committee. The use of the agency representative on the **rulemaking** committee as the facilitator is prohibited.

The rulemaking committee shall send a **WRITTEN REPORT** to the agency at the conclusion of negotiations stating whether:

- there was consensus on the proposed rule; or
- specifies issues reached on consensus, issues unresolved and other information, recommendations or materials; or
- the committee did not reach consensus,

## **Guidelines for Negotiated Rulemaking**

Negotiated **rulemaking** is a consensus-based process whereby agencies develop rules using neutral facilitators and a balanced negotiating committee comprised of representatives of all interests (stakeholders) that the rule will affect, including the agency staff. Negotiated **rulemaking** generally follows these steps:

1. The agency evaluates the necessity for negotiated rulemaking and approves its application.
2. All stakeholders are convened.
3. The **rulemaking** committee is organized.
4. The proposed rule is negotiated in the **rulemaking** committee.
5. A report of the committee's results are submitted back to the agency.

(Center for Public Policy Dispute Resolution, 1996, pp. 20-29)

Negotiated rulemaking is not necessary for every rule drafted and certain criteria needs to be evaluated before an agency commits to the process

**Affirmative** answers to the following questions suggest that a given rule meets the criteria for negotiated rulemaking.

- Is the rule needed surrounded in doubt?
- Are the issues significantly diverse that negotiated rulemaking would help?
- Will all stakeholders benefit?
- Can the spokesperson for the stakeholders (respective) fully represent the constituency?
- Is it likely the committee will reach a consensus?
- Will the agency buy into the committee's consensus report?

(Center for Public Policy Dispute Resolution, 1996, pp. 9, 17-19)

Once an agency has decided to use negotiated rulemaking, a convenor is

selected. The convenor is a person or team of people who assist the agency in: identifying parties (stakeholders); conferring with parties to identify the issues; and reporting to the agency the need if any for a negotiated rule. The agency will either accept or reject the convenor's recommendation for rulemaking. If the agency accepts the convenor's recommendation the committee members are selected.<sup>14</sup> At a federal level, a notice is published in the Federal Register. In Texas, a notice is published in the Texas Register informing the public of the upcoming negotiated rulemaking.

Before the rulemaking committee meets, a facilitator is selected. The facilitator may also be the individual who served as the convenor. The facilitator has a dual role. Most importantly, the facilitator impartially chairs the committee meetings, sets the pace, establishes ground rules, allows full opportunity for all to be heard, remains process oriented, and meets the deadlines set for the committee. The facilitator's secondary role is as a mediator by helping parties identify concerns and look at ways they can be addressed through negotiations. The Texas Negotiated Rulemaking Act and the Federal Negotiated Rulemaking Act specifically prohibits an agency from using one of its own rulemaking committee members as a facilitator. It is recommended that the facilitator be contracted out in order to ensure neutrality with no bias.

Good practice dictates the publication in the Federal Register or Texas

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<sup>14</sup>Usually from the convenor's initial stakeholder list.

**Register** of all meetings of the rulemaking committee as open meetings. This practice establishes credibility with the public and stakeholders. Open meetings require minutes and anything revealed can be used in litigation. Subcommittees and work groups can be used to break up complex and large issues into manageable subjects. An important recommendation is to obtain a commitment in writing from the stakeholders participating in negotiated rulemaking not to refute the agreed upon rule."

Because negotiated **rulemaking** is a relatively new concept, there are misperceptions about the process. A common misperception is the negotiated rulemaking process supersedes the APA requirements. This perception is incorrect. Instead, negotiated rulemaking is a supportive supplement to the APA requirements

In addition, negotiated rulemaking DOES NOT

- cause the agency to delegate away its authority;
- exempt the agency from any statutory requirements;
- eliminate the agency's responsibility to produce economic and regulatory analysis; or
- require any parties to set aside their legal or political rights.

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<sup>15</sup>"The members of the negotiated **rulemaking committee** agree not to take action to inhibit the adoption by agency decision makers of a final rule to the extent that it contains the same substance and effect as the agreed rule. If a party fails to keep this agreement, all other parties agree to submit comments to the agency and any other relevant state or judicial officials and government bodies stating that:

- (i) all parties concurred **in** the agreed rule submitted to the council, and
- (ii) all parties support approval of a **final** rule with the same substance and effect as the agreed rule **submitted** by the negotiated **rulemaking** committee."

Source - Organized Protocols and Guidelines, Initial Meeting **Task** Force in Waiver Rule, Negotiating Group. Texas Council on Workforce and Economic Competitiveness

I consider this important. It helps prevent politics, special **interests** and post committee doubts and hidden **agendas** from coming up after the fact.

(Center for Public Policy Dispute Resolution, 1996, p. 12)

## **STRATEGIC DECISIONS**

### **Rulemaking and Group Dynamics**

Strategic decisions must be made by public administrators when deciding whether or not to use negotiated rulemaking or take an informal approach and use non-rule rules. Public administrators' decisions are influenced by previous rulemaking experiences, some of which may have been difficult, costly and unsuccessful. In addition, bringing diverse groups together to work and produce a meaningful product is challenging. A clear understanding of group dynamics and the strategy it takes to create a **synergized** rulemaking committee is important for the negotiated rulemaking process to be successful.

Hamilton and Schroeder (1994, pp. 127, 147) conducted a study to determine when and for what reason government agencies chose to issue formal rules and informal rules.<sup>16</sup> Formal rules are published according to the administrative procedure process and go through a specified public comment process. Informal rules may be issued by way of agency directives, policy memoranda and guidelines. The results of Hamilton and Schroeder's (1994, p. 147) study showed that agencies strategically chose informality when they wished to: provide discretion in agency actions; establish rules that entailed major costs;

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<sup>16</sup>Informal rules are also referred to as non-rule rules.

promote standards that involved controversy; provide individual negotiations over issues that involved a smaller numbers of facilities; or seek to avoid congressional and judicial scrutiny and constraints as a result of actions such as court reprimands. Lubber's (1994, p. 165) analysis of Hamilton's and Schroeder's study suggested another hypothesis should be developed to evaluate whether **formal** rules which have statutory authority are more enforceable than **non-legislative** mandated rules. Government agencies have taken a defensive approach to **rulemaking** by using informality. Informality gives federal regulators a way to evade the constraints of Congress and the courts and elude executive branch oversight by the Office of Management and Budget (**OMB**).<sup>17</sup> The informal process is considered on the federal level to be the "life blood" of administrative implementation. Some agencies have retreated to informality in response to what is perceived as the "ossification" of rulemaking. (**Mashaw**, 1994, p. 194)

An agency's use of informal rules often leads to political challenges or litigation. Howard (1994, pp. 173 & 176) writes about the need of regulators to eliminate preordained and rigid rules. Rules should be practical and flexible Hamilton and Schroeder (1994, p. 129) credits Professor Colin S. Diver for defining three practical measures of regulatory precision:

- transparency (does the rule have an accepted meaning);

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<sup>17</sup>The Director of OMB is second only to the President in political clout, because the agency is the tool by which the President exercises power over every facet of the Executive Branch. OMB assists and approves in the development of regulatory proposals generated by administrative agencies. (Shafritz, 1993, p. 330)

- a accessibility (is the rule really applicable in the real world); and
- a congruence (does the rule achieve the desired results?).

Before engaging in **rulemaking**, Diver suggests agencies take a pragmatic approach and consider the rate of compliance with the intended rules, the over and under inclusiveness of the rule, the cost of **rulemaking** and the cost of implementing a rule. (Hamilton and Schroeder, 1994: page 129) Public administrators must make strategic decisions on the approach taken when formulating rules. Issues the public administrator needs to consider before making a decision are: the practicality of the rule; the necessity to issue formal rules or be evasive and issue informal rules; the benefits, if any, of using negotiated **rulemaking**; and, ultimately, the risk that the rules will be challenged by litigation.

## **FEDERAL EXPERIENCE**

The origin of negotiated rulemaking can be traced to the Fair Labor and Standards Act, which was enacted in the 1930s. The public servants and private citizens who worked cooperatively to draft rules affecting wages and work conditions under the Fair Labor and Standards Act are considered the pioneers of negotiated rulemaking. (Kerwin, 1994, p. 185) The Great Society programs of Lyndon Johnson and expansion of social regulations during the 1960s and 1970s set the stage for public participation in government and negotiated **rulemaking**.

During the 1970s, agencies administering the Occupational Safety and

Health Act, Consumer Product Safety Act, Safe Drinking Water Act, Clear Water Act and revisions to the Endangered Species Act were required to hold legislative type hearings to allow affected parties the opportunity to present information and recommendations to the agency. (Kerwin, 1994, p. 173) This type of participation was beyond the statutory scope of the APA's requirement for written comments from the public on proposed rules.

Another approach to participatory rulemaking taken at the federal level was an advanced notice of proposed rulemaking. This venue allowed an agency to publish a notice informing and soliciting from the public information and recommendations on how to solve an issue or problem in a rule. The advanced notice of proposed rulemaking allows for public participation in the early stages of the rulemaking process. (Kerwin, 1994, p. 174)

Several federal agencies have been mandated by Congress to use negotiated rulemaking. Congress has written into specific legislation requirements for negotiated rulemaking. In addition to congressional mandates, Presidential Executive Orders can require agencies to engage in public participation for rulemaking. President Jimmy Carter issued Executive Order 12044 in 1978 requiring federal agencies to find ways to involve the public in rulemaking, coordinate rulemaking with senior agency officials, analyze rules to determine the impact of implementation, write rules in "plain English and determine what rules are obsolete and unnecessary. (Kerwin, 1994, p. 174) President Carter's reform and concept of involving the public in rulemaking in

the 1970s is mirrored in the 1990s by President Clinton's Executive Orders issued as part of the National Performance Review to reinvent government. President Clinton's directives to the federal agencies are: cut obsolete regulations and reform what is still needed, focus on the outcome of the rules not the process, form partnerships with the staff that implement the rules and finally negotiate the rule by consensus with the stakeholders who are affected by the implementation of the rule. (Gore, 1996, p. 57)

The evolution of public participation in the rulemaking process has provided federal agencies with a history of varied experiences with negotiated rulemaking. The results of the negotiated rulemaking experiences have been mixed and each agency<sup>18</sup> has taken a slightly different approach to the use of negotiated rulemaking. Agencies participating in negotiated rulemaking are not guaranteed success, nor should failures with negotiated rulemaking be interpreted as absolute. Because negotiated rulemaking is a relatively new concept which has resulted in mixed outcomes, it is difficult to make generalizations about the process. Key examples of negotiated rulemaking in the federal context follow:

## **Environment**

The EPA publishes in the Federal Register approximately 300 technical and detailed regulations a year. The agency has seen 80% of its rules challenged

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<sup>18</sup>Each agency has a different legislative mandate, organizational culture and regulatory responsibility. Because of these factors, an agency will adjust and modify the negotiated rulemaking process to fit its needs. One size rulemaking does not fit all.

in court and devotes 125 staff positions a year to defend rules from adjudication. The EPA promotes consultation and negotiation with parties directly affected by agency actions. In doing so, the EPA has used private mediators and regulatory negotiations to develop rules. (Singer, 1990, p. 145) The EPA regulations are designed to protect many classes of beneficiaries from a multitude of harms which can result from an enormous variety of sources ranging from industrial effluent to household garbage. The EPA was the first federal agency to use advanced notices and distribution of environmental information to the public on rules the agency was developing. A toll free long distance telephone system was used by EPA to receive public comments on solid and hazardous waste, drinking water and clean water programs. The new regulations from the above programs established public meetings, public hearings, and advisory groups. (Kerwin, 1994 pp. 179-180)

The success of the regulatory rulemaking process for the EPA has depended to a significant degree upon the ability to integrate the expertise and knowledge of the agency's varied professional groups into a single collaborative group to produce a coherent product. McGarity calls this "bureaucratic pluralism" (1991, p. 60). From within the EPA, the agency can draw upon a mix of professional perspectives. The professional disciplines represented on an EPA rulemaking team are:

Scientific  
Engineering  
Management

Economic-analytical  
Legal  
Political

Enforcement

When an agency brings individuals from the different professional worlds of legal, management, engineering, economics and politics it creates the potential for professional and ideological clashes and conflicts. According to McGarity, the rulemaking process must be effectively managed to control conflict<sup>19</sup> and to allow bureaucratic pluralism to work (1991, p. 64).

The EPA has one of the most highly developed internal procedures for generating rules of any agency in the federal government. The agency has a computerized "action tracking system" that tracks every rule and measures current progress against pre-determined "milestones." (McGarity, 1991, pp. 70-71) The system is designed to highlight delays in rulemaking and attach responsibility for those delays.

At the EPA, rules begin with a start action request that is submitted by the agency's staff to a steering committee.<sup>20</sup> If the request is approved, the steering committee selects a work group<sup>21</sup> membership and determines the type of review. The work group is the primary working unit responsible for the development of regulations in EPA. The work group's first task is to draft a "development plan" to be submitted for approval to the steering committee (McGarity, 1991, pp. 70-

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<sup>19</sup>Amason (1996, pp. 123, 140, 141) identified conflict as a "paradox." The positive and negative affect of conflict must be managed to maintain a balance and promote decision quality.

<sup>20</sup>The steering committee is comprised of high level management.

<sup>21</sup>The work group is a functional staff level team.

89) The work group puts the regulations together and submits a regulatory package to the steering committee which contains:

- Proposed rules
- Impact analysis
- Outline of options with pros and cons and why each was rejected
- Establishment of resources to implement the rule
- Enforcement plans and regional resource requirements.

The steering committee must approve the regulatory packet before submitting it to the senior management level and ultimately to the Administrator of EPA. (McGarity, 1991, p. 70-89) The work group deliberations allow for creative collective thinking about innovative regulatory alternatives. Negotiating occurs within the work groups and a minority report can be submitted to the steering committee. The incentive for the group to work collaboratively is the negative consequences associated with delay which is monitored by the "action tracking system." (McGarity, 1991, p. 70-89)

In response to the 1993 National Performance Review and subsequent Presidential Executive orders, the EPA has set new regulatory standards and goals for the agency. The EPA has an agency action plan to improve the regulatory and statutory process to promote innovative technologies. The agency is working towards establishing partnerships with different industries to re-engineer common products and processes to promote pollution prevention. (Gore, 1995, p. 160)

The 1995 EPA progress report to the National Performance Review projected the deletion of 11% of the EPA's existing pages of regulations. In addition, the EPA

projects the revision of approximately 70% of the remaining regulations to assist businesses in achieving environmental protection goals quicker and at less cost. (Gore, 1995, p. 272)

## **Transportation**

There are many divisions within the Department of Transportation. One of the department's divisions, the Federal Aviation Administration (FAA) first used negotiated rulemaking in the early 1980s. Prior to using the negotiated rulemaking process, the FAA attempted several times to revise an obsolete rule for the maximum times pilots could fly and the minimum rest time between assignments. All previous attempts by the FAA to revise the rule had been blocked by a court action. In an effort to resolve the issue, the FAA decided to bring various parties together in an attempt to change the rule. The rule committee that was formed agreed the final decision was to be unanimous or no new rule would be produced. At the end of the rulemaking process, the committee failed to agree, but asked the FAA to draft a rule based upon the committee's discussions and resubmit the draft for the committee's review. The rulemaking committee approved the FAA redraft, which was published and adopted with no opposition or court action. (Singer, 1990, p. 146)

Another rulemaking endeavor by the Department of Transportation proved not to be as successful. Using negotiated rulemaking, the Department was unsuccessful in promulgating a rule dealing with handicap access to airlines.

(Singer, 1990, page 146) A plausible reason for the negotiated rule failure is the handicapped parties fundamental principles and values may have been in direct conflict with the agency's mandate and the airline industry's objections to the increased costs to comply with the handicap requirements.

The Department of Transportation has responded to President Clinton's National Performance Review by reorganizing the agency and moving more of the regulatory decision making from the federal level to the state level. The agency's directive for rulemaking is to use a consensus building approach for decision making that will be customer oriented. (Gore, 1995, pp. 180-181)

## **Education**

Sometimes negotiated rulemaking is problematic because agencies are unwilling to comply with mandates to use negotiated rulemaking. The Department of Education is such an example. In 1992, Congress amended the Higher Education Act re-authorizing the student financial assistance programs. Congress also mandated that regulations be developed through regulatory negotiation. A rulemaking committee called the Higher Education Amendment Rules Committee was formed. The agency did not follow Congress's mandate to use negotiated rulemaking and literally refused to give up control. The Department of Education retained control by implementing a flawed process. The Department of Education did not allow the parties that made up the committee to select their mediator or to establish their own ground rules and

protocols. The Department of Education presented the packaged product to the **rulemaking** committee on the eve of their first negotiation session. This led to criticism and opposition. Ultimately, Secretary of Education Riley received a formal letter from the rulemaking committee objecting to the agency's conduct and biased participation in the regulatory negotiation process. The Department assumed and maintained a dominant position rather than as an equal party at the negotiating table. (Pelesh, 1995, pp. 151, 161-169) The purpose of the regulatory negotiation process is to front load criticism and avoid later adversarial conduct and expenditure of resources as was the case for the Department of Education and the Higher Education Amendment Rules Committee.

The Department of Education's 1995 progress report for the National Performance Review included the agency's deletion of 30% of the obsolete federal regulations with additional plans to eliminate or revise 90% of the remaining rules. Senior department officials have held public meetings throughout the country in an attempt to be customer focused for purposes of enacting legislation, drafting regulations and rule implementation. (Gore, 1995, p. 272)

## **Health Care**

Like the EPA, the Department of Health and Human Services has responsibility for the laws and rules that protect the health and safety of millions of Americans. Several of the department's programs include the Food and Drug

Administration (FDA), Medicare, Medicaid and Aid to Families with Dependent Children (AFDC). Throughout the years, the FDA has empaneled numerous advisory committees to assess the safety and efficacy of drugs. The panels are usually comprised of respected and neutral experts from academics. Although the panel's decisions are strictly advisory, the FDA has generally agreed to the panel's determinations. (Harter, 1982, p. 25)

The department in 1978 initiated a national campaign to solicit public participation on health care rules. Public hearings were held nationally and **mailouts** on rules under development were sent to interested parties. When developing rules for food labels, the FDA solicited public participation through mass mailings and conducted an "experimental TV survey" in Columbus, Ohio to obtain information on the public's opinions. (Kerwin, 1994, p. 178) The response to the food label rules was successful with over 10,000 public comments received. However, there was a negative impact. The 10,000 public comments became a burden for the agency staff to read, analyze, decide and respond to.

Almost in contradiction to the agency's predicament to review, analyze and respond to successful public participation and comments, the Department of Health and Human Services reported in 1995 to the National Performance Review the agency's implementation of a new process to remove within the agency multiple layers of staff that review rules. How the Department of Health and Human Services will deal with another successful public comment period with fewer resources remains an unknown. The agency's emphasis has now been

placed on public participation and consensus building in the early stages of rule development. The department has proposed to eliminate more than 1,000 pages of rules and an additional 700 pages of rules are projected to be eliminated by statutory change. Revision to the remaining rules constitutes approximately 2,000 pages according to the Department of Health and Human Services report to the National Performance Review. (Gore, 1995, p. 273)

In addition to rulemaking, federal agencies are charged with setting national health care standards. The Centers for Disease Control, the World Health Organization and the National Institutes of Health (NIH) are several agencies that set health care standards. From a national policy perspective, health care policymakers have taken a collegial approach in addressing national health care issues. The NIH employs consensus method models to solve problems in health and medicine. The format and results have been successful, however, empirically their validity and reliability have not been established. (Fink, 1984, pp. 979-983)

The following are the consensus-based models used predominantly by NIH for setting national health care standards.

**Consensus Models** used by NIH to set national health care standards.

- ▶ The *Delphi* model is used to obtain an opinion in a systematic manner. Experts are polled with self administered questionnaires (blinded). The *Delphi* is complete when convergence of an opinion or point of diminishing return is reached. (Fink, 1984, pp. 979-983)
- ▶ *Nominal* Group is a structured meeting intended to obtain qualitative information from target groups associated with problem areas. The following steps are taken:

- Tiered approach with participants listing individual ideas as a topic.
- Second phase is discussion.
- After discussion, participants rank the idea's worth.
- Groups views are assessed.

The success of *nominal group* is based on the skills of the leader and the commitment of group which should be no larger than 8-10 individuals. (Fink, 1984, pp. 979-983)

- ▶ *Consensus development* is used for evaluating technology and promulgating opinions about how to apply them. *Consensus development* is achieved by:

- dissemination of findings to interested parties;
- media is provided information;
- physicians are mailed information;
- publication of information in professional journals; and
- formal presentations.

(Fink, 1984, pp. 979-983).

## **Agriculture**

Among the Department of Agriculture's responsibilities includes a program known as the Agriculture Marketing Service. This program sets agriculture marketing orders for different types of commodities by writing rules that establish quality standards and limit the amounts of commodities that can be shipped to market. During the 1970s, the department took initiative and started a pre-notice public participation requirement. This pre-notice was a preliminary investigation by the department of public attitudes and views on planned marketing orders. The notice allowed interested parties to submit comments which are used by the department to frame the issues to be covered and resolved

in the marketing order rulemaking. (Kerwin, 1994, pp. 176-177)

The department reported to the National Performance Review 80% of the pages containing agriculture rules will be eliminated or reinvented. The department is now providing greater access so the public can participate in the regulatory process. The department continues to provide the states<sup>22</sup> with ongoing policy guidance to the Women, Infant and Children (WIC) program to maximize the baby formula cost containment efforts. (Gore, 1995, pp. 152 and 271).

## **Interior**

The Department of Interior used public participation for rulemaking during the period when President Carter was implementing regulatory reform. Because of early public input, the department was able to eliminate existing unnecessary rules. The public provided the department with information, costs and data that demonstrated existing rules had a negative and costly impact with no beneficial outcome. There was some public criticism of the department's early public participation process. This process allowed the public to comment before rules were drafted. Although the critical parties may have chosen not to invest resources in an effort they perceived was still undeveloped or that may result in no benefits, the department considered the outcome of the early public

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<sup>22</sup>Texas has a statewide WIC program.

participation process to be beneficial. (Kerwin, 1994, pp. 178-179)

The Department of Interior's report to the National Performance Review described the implementation of a new plain language approach to the department's regulatory activities. The department's interest is to better organize the rules and make the rules understandable and practical for the public. (Gore, 1995, p. 274)

### **Budgetary Process**

A modified form of negotiated **rulemaking** has been used for federal budget summits. Congress and **officials** from the Administration conducted "budget summits" to facilitate the development of the federal budget. The summits were initiated because the Executive and Legislative branches do not share common perspectives on the budget. The summits are not mandated by law, but rather allow representatives of the Administration and Congress to negotiate a budget compromise. The first summit was held in 1987. The summit group consisted of several high level representatives including the Director of OMB, Treasury Secretary for the Administration and ranking members of the Senate and House Budget Committees. The success of the summits depended largely on the ability of the negotiators to effectively represent their constituencies. Another factor in the success of the summits is the ability of the negotiators to speak freely to one another in confidence with limited information and access to the press. (Cullather, 1995, pp. 511-518)

President Reagan initially did not negotiate with Congress via budget summits. October 19, 1987, the day known in the investment world as "Black Monday" when the stock market fell 508 points forced Reagan to negotiate with Congress on deficit reduction measures. Three days after "Black Monday" Reagan announced he was "putting everything on the table with the exception of Social Security, with no other preconditions." (Cullather, 1995, p. 519) The resulting summit lasted four weeks and allowed negotiations to address spending levels, deficit targets and taxes. The accord agreed upon at the summit was enacted in law December 22, 1987, as the Fiscal 1988 Budget Reconciliation Act. (Cullather, 1995, pp. 518 & 519)

During Bush's administration, there were two budget summits. The first summit was considered a pseudo-agreement because it was based on accounting maneuvers. The second summit, however, resulted in an agreement that would reduce the deficit by \$500 billion over five years with \$130 billion in new taxes. The second summit took five months of negotiating before an agreement was reached. By using budget summits, the leaders of Administration and Congress are able to discuss, debate, offer proposals and counter proposals as part of the budget negotiation process. (Cullather, 1995, p. 517-523)

The use of budget summits has improved the efficacy of the development of the federal budget and the effectiveness of the budget as a policy document and accounting tool. There is evidence of better coordination and cooperation of legislative and executive branches. The budget agreements are a representation of

both sides and has decreased the time Congress devotes to the budget. The composition of the summit members remains an issue because of the selective and limited representation. The summit process promotes better communication and coordination and realistic budget projections. Budget provisions are negotiated and reached by consensus. The most important aspect of the budget summit has been the ability to achieve consensus between political parties and government bodies. (Cullather, 1995, pp. 525-529)

## **STATE EXPERIENCE**

From the literature reviewed, states and municipalities have used modified forms of consensus-based processes to resolve controversy and conflict in setting policy for statewide planning and resources, strategic planning and amending legislation. Examples are as follows.

### **State Water Plan and Policy**

The State of California's population continues to grow and with that increase comes a demand on natural resources. In an effort to consolidate and conserve one valuable resource, water, the Southern California Metropolitan Water District (SCMWD) initiated a consensus-based process as part of the state's water plan. The district is responsible for local water development,

securing imported water, conservation, reclamation and storage. The SCMWD is made of **27** cities, counties and special districts under California statute. The **27** entities have respective needs, demands and requests for water resources.

Conflict and controversy arise when the benefit to one entity's allocation of water resources is made at the detriment to another entity within the district.

Prior to using a consensus-based process, water planning by the SCMWD consisted of a technical analysis to forecast the SCMWD's needs, identifying alternate supply options, and making decisions on different supply combinations the SCMWD would use. Consensus building was incorporated into SCMWD's water planning to allow the various entities within the SCMWD to collaborate and reach by consensus the distribution of the SCMWD's water resources. The consensus building method used by the SCMWD was a modification of Dwight Eisenhower's American Assembly model developed in **1950**. The Eisenhower American Assembly Model allows **65-75** diverse participants to discuss a specific policy issue. The assembly members are divided into four equal size groups attending four discussion periods over three consecutive days. Each discussion period is three hours and each group has a facilitator. Each group discusses the same question at the same time and after discussion, the facilitators draft a summary of the four groups' recommendations and findings. The final report is presented to the group at large and voted on section by section to accurately reflect the consensus of the body. (deHaven-Smith, Wodraska, **1996**, pp. 367-**369**).

The SCMWD made three modifications to the above model:

1. The SCMWD allowed the steering committee to decide the assembly details (topics, questions, background papers, and selection of participants).
2. A series of assemblies were scheduled, not one. Three assemblies were held over the district in a period of 15 months.
3. The SCMWD conducted open forums around the region to solicit input from the public. Public comments were received and reported back to the assembly by a spokesperson from the public forum.

The consensus building process was successful in bringing a level of regional cooperation which the SCMWD and member agencies had previously never achieved. The SCMWD recognized that relying solely on a technology analysis was not **sufficient** to distribute the **SCMWD's** water resources. Technology analysis without decision maker participation can be perceived as manipulative even though the analysis was objective, **informative** and vigorous. (deHaven-Smith, Wodraska, 1996, pp. 369-370)

### **State Environment Legislation**

Another state that used a consensus-based model for pending legislative changes is Massachusetts. The Massachusetts Legislature passed in 1973 an environmental law to conserve and recycle used motor oil. The law required businesses that sold motor oil to accept used oil back from do it yourself oil changers who had receipts. When the law was applied in daily business practice, it proved to be ineffective. In an effort to address the problem, the Massachusetts

Executive Office of Environmental Affairs (EOEA) used a non-neutral party as facilitator (local government manager) and convened a committee of interested stakeholders to determine if the law should be repealed or amended. At the time of Fisher's article, *Consensus Building Case Focuses on Used Oil Changes*, (1997, pp. 17-18) proposed legislative changes were still being debated by the EOEA.

### **Strategic Planning**

Strategic planning is not a rulemaking process, however, the use of a consensus-based process can benefit organizations conducting strategic planning. Strategic planning is a process of creating a desired future which ultimately includes change. Change is a major challenge for government agencies to design and implement. The City of Roanoke, Virginia's Project Management Team (PMT) was charged with developing a new system for delivery of fire and Emergency Medical Services (EMS) services. An outside facilitator was used who established basic ground rules for the PMT. The PMT was comprised of the:

City Administrator	Volunteer EMS
City EMS Department	Medical Director, EMS
Fire Department	

The PMT applied SWOT (Strengths, Weakness, Opportunities, and Threats) as part of the team's analysis of the following general areas: data of national fire and EMS trends, changes in the delivery of fire and EMS services, Roanoke's experience in fire and EMS services, and interviews with focus groups

and field personnel. Three options were identified by the **PMT**, and a consensus was reached on one option. Prior to the presentation of the final plan each city council member was briefed on the plan. In addition, a city wide public information and briefing with all **city/volunteer** EMS and fire employees was done before submission of the final plan to council. (Snead & Porter, 1996, pp. 10-14) The negotiated process was determined by the **PMT** to be a time consuming effort, but the outcome was a success in achieving a coordinated and consolidated fire and EMS service for the City of Roanoke.

### **Land Development**

A technique called "cross acceptance" was used by the state of New Jersey to institute a statewide land use. The cross acceptance process was valuable in building norms and consensus. The process was successful because it brought local, county and state officials to a common forum to consider areas of consensus and conflict related to land use development. Cross acceptance was an attempt by the state to establish a set of **norms**<sup>23</sup> that would assure voluntary cooperation based on mutual interest. A survey was conducted after the statewide plan was implemented. The results of the survey revealed that the quality of contacts had improved. In addition, the plan was credited with providing a structured forum for levels of government to participate. (Anglin,

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<sup>23</sup>A set of norms or *regime* is a defined set of rules that guide behavior of individuals and organizations in a given environment. If participants in a regime frame the rules there is a greater probability they will abide by the rules.

1995, pp. 433-443)

## ALTERNATE MODELS

Negotiated rulemaking is one of several types of consensus building processes. Several consensus-based hybrids have emerged from administrative agency experience and knowledge. Public administrators can modify existing models or combine a mix of the essential components from different models. New variations continue to be developed and modifications are made to existing models as public administrators continue to engage in negotiated rulemaking and other consensus-based activities. The following are examples of alternative models of consensus-based processes used in government.

### General Consensus-Based Models

- **Information exchanges and one at a time** meetings can be held to share information without needing to reach a consensus. This type of model is helpful when the subject and stakeholders are not well defined or identified. Education and information sharing help to bring definition and substance to a broad topic. This is a very preliminary and grass roots effort.
- **Workshops or round tables** are informal settings where an administrative agency can provide and receive information from specific interested parties. Again, consensus is not necessary for this process to be successful.
- **Policy dialogues or negotiations<sup>24</sup>** are used by agencies to discuss issues, generate options and reach outcomes on issues that are acceptable to all

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<sup>24</sup>Facilitators are used to handle the information exchange process.

parties.

(Center for Public Policy Dispute Resolution, 1996, pp. 52-53).

### **Legislative Negotiations Model**

A consensus-based model similar to negotiated rulemaking can be used to bring representatives of those interests that will be affected by legislation together to develop new laws or amend existing laws. Examples of successful legislative negotiations include legislation enacted for Iowa's Farm Credit Mediation Program. This state legislation was negotiated by representatives of farmers, bankers, state agriculture officials and state legislators. (Singer, 1990, p. 150)

Another example is the Southern Arizona Water Rights Act of 1982 which defined the access to water around Tucson. Townspeople, ranchers, farmers and Native American tribes affected by access to the water negotiated the legislation. Congressman Morris Udale has used regulatory negotiation for federal legislation. Congressman Udale has dubbed this type of regulatory negotiation as "leg-neg." (Singer, 1990, p. 150)

### **Negotiated Investment Strategies Model**

Other forms of regulatory negotiation include a hybrid known as "negotiated investment strategies." Mediation brings together parties with diverse interests to agree on priorities for spending public money. This has been used successfully at the state level when states were faced with federal and state funding cuts. (Singer, 1990, p. 150)

## Inter-Agency Models

McGarity (1990, pp. 90-102) identified several models that agencies can use internally for rulemaking, consensus building and decision making. The models are as follows:

A **Team** Model is comprised of representatives from all areas of the agency that contribute to the purpose of the outcome

The advantages to this model include:

- A multiple professional prospective.
- Decisions based on a wide range of information and analysis.
- Facilitation of innovation and cross disciplines.
- The avoidance of delays at the end stage.

The disadvantages of this model include:

- Resource intensive and time consuming process.
- Problems of accountability.
- Consensus could steer group away from best solution.
- Tendency to slip into a "group think."<sup>25</sup>
- Shifting responsibility of policy making to career staff not upper management.

(McGarity, 1991, pp. 90-93)

A **Outsider Advisor** Model is used when agency experts outside the program office are brought in for their expertise, but not included in the decision making process

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<sup>25</sup>According to Dr. Irvin Lester Janis (1972, pp. 35-36) this malady occurs when a small cohesive group tends to establish an unconscious esprit de corps by sharing allusions and norms that interfere with critical thinking and reality testing. (McGarity, 1991, p. 92)

The advantages to this model are two fold:

- Allows bringing in multiple perspectives yet lets the agency maintain authority and accountability for the total rulemaking effort.
- a The model conserves resources and avoids delays.

The disadvantages include:

- Inability to achieve an integrated cross-discipline approach.
- The use of outside experts may not provide a different perspective but rather affirm the program office position, which can slant the regulations.  
(McGarity, 1991, pp. 97-99)

The **Adversarial Model** forces staffers with different perspectives to confront one another in an adversarial setting.<sup>26</sup>

The advantages to the adversarial model are:

- Decision makers can choose between striking options based on the discussion of the pro's and con's of the issue.
- Produces quality data and analysis through "creative tension."
- Can expose hidden agendas.

The disadvantages include:

- Resource intensive.
- Delay due to lack of sharing common or important data between parties.
- Tension may not be creative.  
(McGarity, 1991, pp. 99-102).

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<sup>26</sup>The National Highway Traffic Safety Administration deliberately employs the **adversarial model** by pitting the program and policy office staff against each other for the development of auto safety standards. The program staff comes from engineering and the policy staff from economics. Any disputes not reconciled are heard by the Administrator. (McGarity, 1991, p. 98)

The **Hierarchical Model** is commonly used by the Department of Agriculture. The EPA uses this model when under pressure from outside sources to complete rules quickly. The model requires a single office to be responsible for all aspects of rulemaking with the exception of the final decision.

The advantages include:

- a Conserves agency resources.
- a Avoids delay.
- Places policy making in program offices responsible for the day to day implementation.
- a Best used when statutory directive is concise and clear and minimal policy discretion is required.

The disadvantages are:

- a Lack of ability to bring multiple perspectives and inputs into the process.
  - a There may be lower rates of success on judicial review.
  - a Stymies innovative and creative alternatives to regulations.
  - a Not a good model when dealing with uncertainty and gaps in large data fields.
- (McGarity, 1991, pp. 94-97)

Public administrators can use a variety of consensus-based models internally within the agency and externally for public participation. The application of consensus-based activities will vary among government agencies. Factors which influence whether an agency decides to use consensus-based models is discussed below.

## **AGENCY CULTURE**

Administrative agencies have their own organizational culture, which is

sustained by past and present experiences, workforce, and leadership. A major factor which explains whether an agency aggressively embraces or tepidly employs negotiated rulemaking is the organization's culture. Organizational cultures that advocate for a participatory form of government generally support activities such as negotiated rulemaking. In addition to the organizational culture, the rulemaking process in administrative agencies is shaped by internal and external environments and pressures. Rulemaking can be difficult and time consuming and may result in agencies not accomplishing their missions. The problem with rulemaking is not singular; there are many problems common to all administrative agencies and public administrators.

The general decline in published rules from 1980 through early 1990 reflects a shift from federal rulemaking to other "informal" techniques to implement policy. The agency's use of manuals and guidelines as non-rule rules has been discussed previously. Public administrators within agencies make strategic decisions to promulgate rules in either a formal or informal manner. There are many factors which influence the decisions made by public administrators. Mashaw (1994, pp. 188-207) in his article, *Improving the Environment of Agency Rulemaking: An Essay on Management, Games and Accountability*, identified the external and internal forces impacting administrative agencies. These forces create experiences which lead to the development of the agency culture, practice and philosophy.

## External Factors

External factors which impact how government agencies approach, develop and implement administrative mandates are:

Judicial Review	Congressional Interaction
Executive Oversight	Public and Constituency Acceptance

Losses in court due to uncertainties concerning the practicability of rules have contributed to the decision by many federal agencies to abandon formal rulemaking. Executive oversight at the federal level influences agencies to regulate or de-regulate. Congressional action stipulates rulemaking deadlines in the enabling legislation. Often, legislative mandates for the agency to implement rules come without resources or funding. Agencies hear comments and complaints from the general public and special interests. Special interests frequently take an adversarial role which often leads to delays because of litigation. (Mashaw, 1994, pp. 188-207)

## Internal Factors

Internal factors which impact how government agencies approach, develop and implement administrative mandates are:

Incentives	Structures
Procedures	Management

Incentives include professional competition and protecting turf. Because

of professional competition and **turf** battles, research staff often are not included in the information sharing necessary for effective rulemaking. This conflict in efficiency results from a defective process where the parties do not understand each other's goals and objectives, do not share a common definition of the enterprise and have become locked into positions unwilling to retreat or to compromise. (Elliott, 1994, pp. 171, 179) Agency procedures do not require all program staff to participate in rules which leads to failure to integrate the rulemaking process. Frequently, the procedures are designed for vertical consultation. Rules drafted by low level staff go directly to high level staff which often leads to "late hits" and the return of the rules for re-write.

Rework is the cost associated with using a system that detects problems late in the process rather than re-designing the system to do it correctly the first time. (Elliott, 1994, p. 177) Rework represents a failure of management to develop vision and shared values to motivate agency personnel and reduce internal competition and non-cooperation. (Mashaw, 1994, pp. 188-207)

### **ADVANTAGES, DISADVANTAGES AND CONSEQUENCES OF USING REGULATORY NEGOTIATION**

Negotiation involves two or more people embroiled in a dispute. Through negotiation, the parties communicate with each other in an effort to reach an agreement. The goal in collaborative negotiation is to find solutions that satisfy everyone's interest rather than everyone giving up something. This type of

negotiation is called "collaborative," "problem solving" or "win-win." (Singer, 1990, pp. 17, 20) Consensus building is based on the premise that a decision will be more effective if it is made with the input and support of those affected by it. People will more likely to go along with a decision if they have helped make the decision rather than for the decision to be forced upon them. Decisions made with input of those affected and involved in implementing are better decisions than if the people were left out. For all the cooperation and collaboration, consensus building is not a panacea or cure all and the process comes with a unique set of advantages, disadvantages and consequences.

#### Advantages

The benefits of negotiated rulemaking are:

<ul style="list-style-type: none"> <li>• Information sharing and communication</li> <li>• Public awareness and involvement</li> <li>• "Reality check" for agencies and interests</li> <li>• Creative options develop</li> <li>• Time, money and effort savings</li> </ul>	<ul style="list-style-type: none"> <li>• Cooperative relationships with parties</li> <li>• Rules clearer, accurate and specific</li> <li>• Decrease the number of public comments received.</li> </ul>
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(Center for Public Policy Dispute Resolution, 1996, p. 14-15).

The stakeholders who have participated on rulemaking committees have found the negotiated **rulemaking** experience to be informative, educational and enlightening. Participants have stated they found the process forced them to work together with people who have been their adversaries. Even with problems

associated with regulatory negotiation the participants agreed the end result of the negotiated rule looked far better than the usual notice and comment required for rules. (Singer, 1990, p. 148)

## **Disadvantages**

The disadvantages of the negotiated rulemaking process are reflected in the observations and statements made by individuals who have participated in negotiated rulemaking. David Doniger, attorney with the National Resource Defense Council, stated participating in regulatory negotiation takes ten times as much of the group's resources as commenting on rules. The EPA had to set up a "resource pool" administered by a private neutral organization, to allow stakeholders who otherwise could not afford to participate to be represented. There are often significant imbalances between the number of industry representatives versus consumer groups. The industry far exceeds the consumer groups in money, numbers and information. This can leave consumers **vulnerable** to industry influence. Participation in negotiated rulemaking does not guarantee acceptance of the rule by the members of the rulemaking committee. Even with regulatory negotiation, participants who agree to participate may retract and object after the rule comes out of committee. (Singer, 1990, pp. 148-149)

According to one participant, Margaret Zuleski of the Public Protection Unit of

Massachusetts Department of Attorney General, stated "the process<sup>27</sup> became more important than the substance." (Singer, 1990, pp. 148-149)

The drawbacks of using negotiated rulemaking are:

- Time consuming for staff to organize, coordinate and participate.
- Time consuming for participants of the negotiated rulemaking committee.
- Costly for agency staff, travel, contracts for **convenors/facilitators**.
- Costly for participants on negotiated rulemaking committee for travel, time away from work.
- Impedes communication due to limits on confidentiality of records.

(Center for Public Policy Dispute Resolution, 1976, p. 16)

## Consequences

In addition to the advantages and disadvantages of using the process of negotiated rulemaking, there are also consequences and results which come with the final rule product. The implementation of rules developed through a negotiated rulemaking process should have positive consequences similar to the following:

- Increases affected parties compliance with the rule.
- Results in earlier implementation of the rule.
- Increases the certainty of the outcome of the rule.
- Enhances the agency's credibility and accountability.
- Decreases the possibility of political challenges.
- Decreases the challenges to the rules by litigation.

(Center for Public Policy Dispute Resolution, 1996, p. 16).

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<sup>27</sup>The "process" **meaning** producing a regulation by consensus.

## **Conceptual Framework**

In this literature review, the reader has followed the public administrator through the challenging and unique policy and political landscape of rulemaking. Public administrators can learn from federal and state agency experiences, successes and failures as they attempt to promulgate, implement and enforce rules. Pragmatic public administrators are flexible, responsive and aware of the different rulemaking models, alternatives and variations of consensus-based techniques. One of the goals of this chapter is to develop the conceptual framework. The conceptual framework is used as the organizing framework for the empirical portion of the study. For example, the questionnaire which will be used to describe the opinions of public administrators is developed using the conceptual framework.

The literature review reflects scholarly opinions and speculations about the consequences of negotiated rulemaking. Unfortunately, there is little empirical evidence about the opinions of public administrators participating in this process. The following conceptual framework was developed from the existing literature. It provides a framework to examine public administrators' attitudes about negotiated rulemaking. The **conceptual framework** is summarized below.

### **Essential Components**

This study identifies how many and which **essential components** of the

rulemaking process are **used** by Texas state agencies. The components include:

- The use of a convenor.
- Posting of a public notice of intent to engage in negotiated rulemaking.
- The use of a facilitator.
- Creation of a rules committee.
- A final report by the rule committee to the state agency.

### **External Factors**

This study identifies how many and which state agencies have **experienced** the affects of **external factors** that can influence rulemaking. The external factors include:

- Litigation challenging a rule.
- Executive support for the negotiated rulemaking process.
- Legislative mandates or legislative requests for rule development.
- Identification and recognition of stakeholders (public and special interest groups).

### **Attitudes of Public Administrators**

The research explores what the attitudes of public administrators<sup>28</sup> are towards the advantages, disadvantages and consequences of negotiated rulemaking. The research also solicited comments from the public administrators for recommendations to improve the negotiated rulemaking process.

The **advantages** associated with the **process** are:

- Information sharing and communication.
- Public awareness and involvement.

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<sup>28</sup>Those public administrators responsible for rulemaking

- "Reality check"<sup>29</sup> for all participants.
- Creates options and alternatives.
- Time, money and resource savings for the state agency.
- Promotes cooperative relationships.
- Concise, clear, specific rules.
- Decreases the number of public comments.

The **disadvantages** associated with the **process** are:

- Time consuming for the state agency
- Time consuming for the participants.
- Costly for the state agency.
- Costly for the participants.

The positive **consequences** associated with **rule implementation** as a result of negotiated rulemaking are:

- Increases compliance with the rules.
- Earlier implementation of the rule.
- Certainty of **rule** outcome.
- Agency credibility and accountability
- Diminishes political challenges.
- Decreases litigation.

## Conclusion

From the literature reviewed, there is not a definite "one-way" or "right-way" to conduct a negotiated rulemaking process. The foundation of negotiated rulemaking is based upon a consensus-based process. In addition to rulemaking, the literature revealed modifications and uses of the consensus-based process for budget negotiations, statewide plans and policies, legislative negotiations,

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<sup>29</sup>Allows participants a chance to have their data and assumptions questioned by **other parties** with different view points and information.

national health care standards, land development and strategic planning. The next chapter describes the experiences of Texas state agencies using the negotiated **rulemaking** process.

## CHAPTER 3 - TEXAS SETTLING

### **Purpose**

The purpose of this chapter is to describe the events which led to the enactment of the Texas Negotiated Rulemaking Act. The statutory framework of the Act is outlined. Other state statutes impacting agencies using negotiated rulemaking are identified. Examples are provided of the Texas Department of Health's experiences using a modified form of negotiated rulemaking.

### **State Statute**

Prior to 1990, there was minimal to no recognition of negotiated rulemaking by the Texas Legislature or state agencies. Following the enactment of the Federal Negotiated Rulemaking Act of 1990, the Texas Legislature enacted the Texas Alternate Dispute Resolution Act of 1991 to provide statutory authority for a number of Alternate Dispute Resolution (ADR) procedures. (Sharp, 1996, p. 350) The Texas State Legislature encouraged the use of negotiated rulemaking and ADR techniques by funding the Center for Public Policy Dispute Resolution at the University of Texas School of Law. The Center was founded in 1993 to develop fair and economical alternatives to litigation and contested administrative proceedings in Texas public policy disputes. (Center for Public Policy Dispute Resolution, 1996, p. I)

In addition, John Sharp, the Comptroller of Public Accounts for the State

of Texas, took a pragmatic approach to "what works" when considering the complexity of diverse interests associated with establishing rules, procedures and regulations. (Shields, 1993, pp. 20-21) Each year Comptroller Sharp conducts an evaluation of state agencies known as the Texas Performance Review or TPR. In the TPR, Volume II, 1996, "Disturbing the Peace," Comptroller Sharp (pp. 351-352) made three recommendations:

1. State law should be amended to clarify state agencies' authority to use negotiated rulemaking.
2. State law should be amended to state that any interested party can request that an agency **consider** using negotiated rulemaking when developing a new rule.
3. State law should be amended to specifically authorize agencies using negotiated **rulemaking** to hire private facilitators or use neutral state employee facilitators trained in negotiated rulemaking and mediation.

The following year, the Texas Legislature recognized the value of negotiated **rulemaking** by amending Subtitle A, Title 10 of the Government Code by adding Chapter 2008, the Texas Negotiated Rulemaking Act.

The statutory framework and essential components for the Texas Negotiated Rulemaking Act<sup>31</sup> are listed below by section.

**Subchapter B, Section 2008.051** Authority for Negotiated Rulemaking  
A state agency may engage in negotiated rulemaking to assist it in drafting a proposed rule by following the procedures prescribed by this chapter.

**Section 2008.052** A state agency is required to appoint a **CONVENOR**.

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<sup>30</sup>The statute does **not** mandate state agencies use negotiated **rulemaking**. The **law** became effective September 1, 1997.

The convenor shall recommend to the state agency whether negotiated rulemaking is feasible.

**Section 2008.053** A state agency that intends to engage in negotiated rulemaking shall **PUBLISH NOTICE** of such in the Texas Register. The state agency shall establish and appoint members to a negotiated **RULEMAKING COMMITTEE**.

**Section 2008.055** A state agency shall appoint a **FACILITATOR**. The facilitator must be approved by the rulemaking committee and serves at the will of the committee. The use of the state agency representative on the rulemaking committee as the facilitator is prohibited. The Committee shall send a **WRITTEN REPORT** to the agency at the conclusion of negotiations stating whether:

- there was consensus on the proposed rule; or
- specific issues reached on consensus, issues unresolved and other information, recommendations or materials; or
- if the committee did not reach consensus.

In addition to the Texas Negotiated Rulemaking Act, there are several other laws that impact state agencies using negotiated rulemaking. The laws are as follows:

**Texas Administrative Procedures Act (APA)** - The APA outlines the rulemaking procedures for state agencies.

**Texas Open Records Act (TORA)** - Information collected or made by or for a governmental body is presumed to be available to the public unless the information is exempt under TORA.

**Texas Open Meetings Act (TOMA)** - The TOMA requires that most meetings of government bodies must be open to the public, unless they fall within one of the statutory exceptions (Center for Public Policy Dispute Resolution, 1996, pp. 31-33).

The Essential Components of negotiated rulemaking outlined by the

Center for Public Policy Dispute Resolution at the University of Texas School of Law (1996) in the Texas Negotiated Rulemaking **Deskbook** track the language and intent of Subtitle A, Title 10, Government Code, Chapter 2008, the Texas Negotiated Rulemaking Act. According to the Center for Public Policy Dispute Resolution (1996, p. 9), negotiated rulemaking is a consensus-based process whereby agencies develop rules using neutral facilitators and a balanced negotiating committee comprised of representatives of all interests (stakeholders) that the rule will affect, including the agency staff.

### **Texas State Agency Experience**

The state's first effort at negotiated rulemaking came in 1995 when the legislature required three state agencies<sup>31</sup> to use negotiated rulemaking to establish rules for assessing damages in oil spills off the Texas coast. In addition to the state agency representatives, oil and gas facility owners, **waterway** vessels owners and the public were included as members of the rulemaking committee. The proposed rules resulted in minimal comments and the final rules were adopted by the three state agencies in the format agreed upon by the rulemaking committee. (Sharp, 1996, p. 350)

The state's second effort at negotiated rulemaking also occurred in 1995. Comptroller Sharp formed a negotiating committee to revise the State's

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<sup>31</sup>The three state agencies are the Texas General Land Office, Texas Natural Resource Conservation Commission and the Texas Parks and Wildlife Department.

timberlands tax appraisal manual. The committee was comprised of representatives from the timber companies, land owners, appraisal districts, county government and the Comptroller's office. After two negotiated meetings of the committee, a consensus was reached on the contents of the new manual. (Sharp, 1996, p. 350).

### Texas Department of Health Experience

Several programs within the Texas Department of Health (department) have used modified **forms** of negotiated rulemaking. The programs include Medical Radiologic Technologist Certification, Home and Community Support Services Agency licensing, Birthing Center licensing, Abortion Facility licensing and End Stage Renal Disease **Facility**<sup>32</sup> licensing. The programs mentioned above are controversial for a variety of reasons. The controversy may be created by the diversity of the stakeholders, or the affected industry may not have been regulated before, or the existing rules require major revisions or a combination of these factors. Probably the most controversial and emotionally charged program within the department is the licensing of abortion facilities in Texas. Several significant amendments were made to the Abortion Facility Licensing Statute during the last session of the State **Legislature**.<sup>33</sup> To incorporate the legislative changes and strengthen the language of the clinical sections, the Texas Department of Health

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<sup>32</sup>These are facilities providing dialysis services to patients with kidney disease.

<sup>33</sup>The 75th Legislative Session convened January 14,1997.

used a modified form of negotiated rulemaking. Rather than using a convenor, staff of the department solicited interested parties to participate in a facilitated rulemaking process. A rulemaking committee of ten was created. The members included abortion facility owners, physicians, nurses, department staff and representatives of organizations advocating both sides of the abortion issue. All solicited members agreed to participate in the rulemaking process on a voluntary, uncompensated basis.

The meetings were facilitated by two neutral private facilitators. The rulemaking committee agreed to focus on the delivery of women's health services by working on three major areas of the rules: quality of care, sterilization, and qualifications of staff. Each member of the rulemaking committee signed an agreement committing to work on the three specific tasks with **an** agreed upon deadline. Three subcommittees were formed to work on the respective rule changes. All meetings of the subcommittee and **rulemaking** committee were posted as Open Meetings in the Texas Register. After seven meetings of the subcommittees and five meetings of the rulemaking committee, a consensus vote by the **rulemaking** committee was made on the rule changes. The rules were subsequently published in the Texas Register as proposed for a 30-day public comment period. **A** minimal number of comments was received by the department. The comments are to be reviewed by the members of the rulemaking committee and changes to the rules, if any, will be made by the rulemaking

committee. The rulemaking committee will be asked to **vote**<sup>34</sup> on the final rule changes prior to the department presenting the rules to the Board of Health for a vote to adopt as final **rules**.<sup>35</sup>

The department's experience of participating in a facilitated, **consensus-**based process for abortion facility rulemaking resulted in a positive and productive outcome. Although the process is time and labor intense, the benefits of the long **term** results far outweigh the initial investment.

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<sup>34</sup>The vote **is** based upon the committee's agreed definition of consensus.

<sup>35</sup>The final rules will subsequently be published in the Texas Register with an effective date of implementation. The final abortion facility rules will be presented to the Board of Health June 1998.

## CHAPTER 4 - METHODOLOGY

### **Purpose**

The purpose of this chapter is to explain the methodology used for this research. The research purpose is two-fold. One is to identify how many and which state agencies use negotiated rulemaking. Second, of those state agencies that use negotiated rulemaking, what are the public administrators' opinions regarding negotiated rulemaking.

### **Research Design**

The research design selected for this project is survey research. Surveys can be used for descriptive, explanatory and exploratory purposes. There are three types of survey research: telephone survey, interview and self administered questionnaire. For this research project, questionnaires were sent to 117 state agencies. According to Babbie (1992, p. 262), survey research is the best method to collect data for a population too large to be observed directly. A telephone survey for this project would not have been feasible because it is time prohibitive. Although interviews allow for a higher completion rate over self administered questionnaires, again the time factor did not make this survey type feasible.

The survey instrument (see Appendix B) contains both open-ended and close-ended questions. The purpose is two-fold. One, is to obtain data from state agencies about the characteristics and external factors associated with negotiated rulemaking. Second, the methodology will allow for the exploration of public

administrators' opinions towards negotiated rulemaking. Babbie (1992, p. 262) also recognizes the appropriateness of survey research as a tool to measure attitudes in a large population. The strengths and weaknesses of survey research according to Babbie (1992, pp. 278, 279) are as follows:

#### STRENGTHS:

- Useful in describing the characteristics of a large population.
- Flexible in the amount of questions asked.
- Strong on reliability.
- Standardization allows for generalization.
- Easy to replicate.

#### WEAKNESSES:

- Standardization may yield superficial data.
- Inflexible because the design cannot be modified.
- Weak on validity.
- Context of social life cannot be measured.
- Wording of questions can bias respondents' answers
- Subject to artificiality.

The standardized survey instrument used for this study is strong on reliability. The questionnaire is designed to ensure all respondents are asked identical questions and offered identical response choices. Careful wording of the questions minimizes the unreliability of the respondents

The term "validity" refers to whether a measurement technique accurately measures the concept it was designed to measure. (Babbie, 1992, p. 132) The respondent's true feelings or opinions may not be reflected in response choices provided on the survey. This situation is a weakness for the survey research.

Two areas can strengthen the validity of the survey. First, careful wording of the questions can minimize irrelevant responses. Second, the questionnaire is sent to specific respondents in state agencies who are qualified to answer the questions.

The questionnaire is organized according to the four descriptive categories in the conceptual framework. They are: state agency use, essential components, external factors and attitudes of public administrators. Before mailing, the survey was pre-tested with a small group of Texas Department of Health professionals<sup>36</sup> and facilitators familiar with the negotiated rulemaking process.

## **Sample**

The 1997 Texas State Directory, 40th Edition, provides a comprehensive listing of state agencies, boards and commissions. Using the definition of "state agency,"<sup>37</sup> 117 entities (See Appendix C for a list of agencies receiving the questionnaire) were identified from a population of 215 listed in the directory. State entities such as river authorities and compact commissions were excluded from the sample. The sample group represents a broad spectrum from small boards<sup>38</sup> to agencies with thousands of employees. The questionnaire was addressed to the agency's General Counsel or Rules/Policy Section. A copy of the Texas Negotiated Rulemaking Act was enclosed with the questionnaire. The

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<sup>36</sup>Professionals include attorneys, rules and policy analyst, public administrators.

<sup>37</sup>As defined in Subtitle A, Title 10, Government Code, Chapter 2008, Negotiated Rulemaking Act.

<sup>38</sup>Consisting of three members and two staff.

response rate was 49% (see Appendix E for a list of responding agencies),

### Operationalization of the Descriptive Categories

Table 4.1 below illustrates how the six descriptive categories are operationalized. The questionnaire (see Appendix B) is included.

<b>TABLE 4.1</b>	
<b>OPERATIONALIZATION OF THE CONCEPTUAL FRAMEWORK</b>	
<b>Concept</b>	<b>Questionnaire Item(s)</b>
<b>STATE AGENCY USE</b>	Part I, Questionnaire Items 1 & 2
<b>ESSENTIAL COMPONENTS</b>	
Use of a Convenor	Part II, Questionnaire Items 1 & 2
Posting of a Public Notice	Part II, Questionnaire Items 3 & 4
Use of a Facilitator	Part II, Questionnaire Items 6, 7 & 8
Creation of Rules Committee	Part II, Questionnaire Items 5, 9
Final Report to Agency	Part II, Questionnaire Item 10
<b>EXTERNAL FACTORS</b>	
Judicial	Part III, Questionnaire Item 1
Executive	Part III, Questionnaire Item 2
Legislative	Part III, Questionnaire Items 3 & 4
Public and Constituency	Part III, Questionnaire Item 5

**TABLE 4.1****OPERATIONALIZATION OF THE CONCEPTUAL  
FRAMEWORK**

<b>Concept</b>	<b>Questionnaire Item(s)</b>
<b>ADVANTAGES</b>	
Communication	Part IV, Questionnaire Item 1
Public Involvement	Part IV, Questionnaire Item 2
Allows for Critical Questions	Part IV, Questionnaire Item 3
Creates Options	Part IV, Questionnaire Item 4
Agency Savings	Part IV, Questionnaire Item 5
Cooperative Relationships	Part IV, Questionnaire Item 6
Concise and Specific Rules	Part IV, Questionnaire Item 7
Decrease in Public Comment	Part IV, Questionnaire Item 8
<b>DISADVANTAGES</b>	
Time Consuming for Agency	Part IV, Questionnaire Item 9
Time Consuming for Participants	Part IV, Questionnaire Item 10
Costly for Agency	Part IV, Questionnaire Item 11
Costly for Participants	Part IV, Questionnaire Item 12
Confidentiality of Information Limits Communication	Part IV, Questionnaire Item 13
<b>CONSEQUENCES</b>	
Increase Compliance with Rule	Part V, Questionnaire Item 1
Earlier Rule Implementation	Part V, Questionnaire Item 2

<b>TABLE 4.1</b>	
<b>OPERATIONALIZATION OF THE CONCEPTUAL FRAMEWORK</b>	
<b>Concept</b>	<b>Questionnaire Item(s)</b>
<b>CONSEQUENCES</b>	
Increased Certainty of Rule Outcome	Part V, Questionnaire Item 3
Agency Credibility and Accountability	Part V, Questionnaire Item 4
Decrease in Political Challenge	Part V, Questionnaire Item 5
Decrease in Litigation	Part V, Questionnaire Item 6

Percent distributions are used in table format to describe the results of the research. A traditional Likert scale was used to score the responses from Strongly Agree (+2), Agree (+1), Neutral (0), Disagree (-1), and Strongly Disagree (-2). Likert scores were collected for the sixteen respondents participating in negotiated rulemaking. The tables reflect the cumulative percentages of respondents agreeing and strongly agreeing and respondents disagreeing and strongly disagreeing. The mean for the responses is included with the tables. Chapter 5 reports the findings of the study.

## **CHAPTER 5 - RESULTS**

### **Introduction**

This chapter presents the findings of the study. The questionnaire organized the conceptual framework for the study. The interpretation of the evidence collected from the questionnaire will be discussed in this chapter. A summary of the survey results and suggestions for additional research will be provided in the concluding chapter.

### **Demographics**

The survey instrument was mailed to 117 state agencies. A state agency constitutes an officer, board, commission, department or other agency with statewide jurisdiction that makes rules. State agencies include the Attorney General, institutions of higher education and the State Office of Administrative Hearings (Subtitle A, Title 10, Government Code, Chapter 2008, 1997). Fifty-eight state agencies responded to the questionnaire. Table 5.1 shows the frequency and percentage of the respondents participating and not participating in negotiated rulemaking.

<b>TABLE 5.1</b> <b>Frequency and Percent of State Agency Respondents Participating and Not Participating in Negotiated Rulemaking</b> <b>N=58</b>		
<b>Agency Participation</b>	<b>Frequency</b>	<b>% of Respondents</b>
Yes	16	28%
No	41	71%
N/A	1	1%
<b>TOTAL</b>	<b>58</b>	<b>100%</b>

The majority of the respondents (71%) indicated they did not participate in negotiated rulemaking. Sixteen (28%) state agencies participate in negotiated rulemaking. The agency shown as NA responded the respective state entity cannot respond to surveys.

Table 5.2 provides the reasons given by state agencies for not participating in negotiated rulemaking. Only three of the public administrators marked they were not aware of the process; six did not believe the process was relevant to the organization and over half (23) of the public administrators noted a situation had not occurred that would benefit from a negotiated rulemaking process.

<b>TABLE 5.2</b> <b>Frequency and Percent of State Agency Respondents Reasons for Not Participating in Negotiated Rulemaking</b> <b>N=41</b>		
<b>Reason</b>	<b>Frequency</b>	<b>% of Respondents</b>
Not aware of process	3	7%
Policy prohibits use	0	0%
Situation has not occurred that would benefit the use of negotiated rulemaking	23	56%
Do not believe process is relevant to organization	6	15%
Other	14	34%
<b>TOTAL</b>	<b>46<sup>39</sup></b>	<b>112%</b>

Comments by public administrators under “other” provides a general rationale why agencies do not participate in negotiated rulemaking. Five of the public administrators commented the infrequency of rulemaking and the lack of controversy as the major reasons for not participating in negotiated rulemaking. Two public administrators considered the current APA requirements of public notice and public hearing sufficient for rulemaking. Four other public administrators commented they have used informal approaches to rulemaking by sharing rule drafts with interested parties, forming work groups and holding round table dialogues to discuss rules. One public administrator stated their

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<sup>39</sup>The 41 public administrators checked more than one reason for not participating in negotiated rulemaking.

agency will be initiating a form of negotiated **rulemaking** in the near future. The administrator wrote, "We believe that the broader the buy-in at the early stages of the **rulemaking** process, the better off we will be at the other end."

Another public administrator considered the process to be too complex and cumbersome to be effective. One public administrator recommended the legislature fund the process. This same administrator stated they had become aware of negotiated **rulemaking** through the questionnaire and considered the concept to be "interesting" and would "give some serious thought to this formal process."

Table 5.3 represents the breakdown of the organizational types of agencies participating in negotiated rulemaking.

<b>TABLE 5.3</b> <b>Frequency and Percent of State Agencies Participating in Negotiated Rulemaking by Organizational Category</b> <b>N=16</b>		
<b>Agency Category</b>	<b>Frequency</b>	<b>% of Respondents</b>
Department	6	38%
Commission	3	18%
Board	6	38%
Higher Education	1	6%
<b>TOTAL</b>	<b>16</b>	<b>100%</b>

There is no pattern of an organizational type or particular service delivery associated with state agencies participating in negotiated rulemaking. State

agency participants range in diversity from law enforcement to professional licensing boards and include large departments (Texas Department of Transportation) to small specialized Commissions (Texas Racing Commission) (see Appendix E). The public administrators indicated the negotiated rulemaking process has been used as seldom as once within the last five years and as often as “numerous,” “frequently” to “constantly.”

Table 5.4 shows the breakdown of the organizational types of agencies not participating in negotiated rulemaking.

<b>TABLE 5.4</b> <b>Frequency and Percent of State Agency Respondents Not Participating in</b> <b>Negotiated Rulemaking by Organizational Category</b> <b>N=41</b>		
<b>Agency Category</b>	<b>Frequency</b>	<b>% of Respondents</b>
Department	4	10%
Commission	15	37%
Board	17	41%
Higher Education	1	2%
State Office/System	4	10%
<b>TOTAL</b>	<b>41</b>	<b>100%</b>

Again, there is no pattern of organizational type, agency size or service delivery associated with state entities not participating in negotiated rulemaking. The comments received regarding the infrequency of rulemaking and lack of controversy coupled with the statutory APA requirements for rules may be the

primary reasons why the majority of state agencies do not participate in negotiated rulemaking.

### **Essential Components**

Table 5.5 represents the 16 participating agencies' responses to the essential components of negotiated rulemaking. There was very little middle ground in the agency responses to the essential components of negotiated rulemaking.

<b>TABLE 5.5</b> <b>Frequency and Percent of Responses Regarding the Essential Components of</b> <b>Negotiated Rulemaking</b> <b>N=16</b>		
<b>Question<sup>40</sup></b>	<b>Yes</b>	<b>No</b>
1. Does your agency use a convenor?	6 38%	9 56%
2. Was the convenor responsible for making a recommendation to the agency whether negotiated rulemaking is feasible for proposed rules?	3 19%	9 56%
3. Does your agency publish notice in the <u>Texas Register</u> of its intent to engage in the negotiated rulemaking process?	4 25%	11 69%
4. Are meetings of the rulemaking committee published in the <u>Texas Register</u> as open meetings?	10 63%	5 31%
5. Does your agency include department staff as equal members of the rulemaking committee?	11 69%	3 19%
6. Does your agency appoint a facilitator to preside over the meetings of the negotiated rulemaking process?	9 56%	6 38%
7. Does your agency allow the rulemaking committee to approve the facilitator?	3 19%	8 50%
9. Is the definition of "consensus" used by the rulemaking committee determined to always be unanimous?	3 19%	11 69%
10. At the conclusion of the negotiated rulemaking process, does the committee submit a report to the agency of the committee's results?	11 69%	4 25%

The majority of the agencies (56%) do not use a convenor or publish a notice (69%) in the Texas Register of intended negotiated rulemaking. An open forum is a common practice as actual meetings of the rulemaking committee are

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<sup>40</sup>Sixteen public administrators responded. Not all (sixteen) of the public administrators answered every question. Some of the public administrators answered the yes/no questions with a written commentary. The comments are summarized in the conclusion chapter. The answers do not sum to 100% because of the inconsistency of the responses.

published in the Texas Register as open meetings (63%). The rulemaking committees show a strong participation by agency staff (69%) and use facilitators (56%) the majority of the time. Half (50%) of the state agencies prefer not to allow the rulemaking committee to approve the facilitator. According to 69% of the public administrators, unanimity is not the chosen definition of consensus for the rulemaking committee. The rulemaking committees have a strong follow through (69%) with the executive level of the state agency by submitting the committee's results.

Of the sixteen participating agencies, six use convenors. The majority (5) indicated that the convenor appointed was an agency employee while the sixth agency indicated that both agency employees and contract individuals have been used as convenors. Three of the six agencies allowed the convenor to make a recommendation to the agency that negotiated rulemaking was feasible. In all instances the three agencies accepted the convenor's recommendations for negotiated rulemaking.

Of the nine agencies that use facilitators for meetings of the rulemaking committee, the survey showed a mix of resources. Six of the facilitators used were employees of the agency, two of the facilitators were employees of another state agency and four were independent contractors. An interesting note about the democratic process, one public administrator reported the facilitator for the rulemaking committee was removed and the committee elected their own facilitator.

## External Factors

Table 5.6 reflects the opinions of public administrators affected by external factors associated with negotiated rulemaking.

<b>TABLE 5.6</b> <b>Frequency and Percent of Responses Regarding External Factors Affecting</b> <b>Negotiated Rulemaking</b> <b>N=16</b>		
Question <sup>41</sup>	Yes	No
1. Has your agency been involved in litigation challenging the agency's rules?	7 44%	8 50%
2. Does the Board, Commissioner, Executive Head and Senior Management of your agency support the use of the negotiated rulemaking process?	11 69%	0
3. Does your agency have statutes mandating the use of Task Forces, AD HOC Committees, work groups or other consensus-based groups to assist the agency in promulgating rules?	6 38%	9 56%
4. Has your agency received legislative requests to create and use consensus-based groups made up of affected stakeholders to assist the agency with promulgating rules?	5 31%	10 63%
5. Are there "special interests" groups (i.e. professional associations, consumer groups) your agency has identified as stakeholders who are directly affected by your agency's rules?	16 100%	0

Almost half of the agencies (44%) have been involved in litigation challenging the agency's rules. Interestingly, the seven agencies involved in litigation marked the opinion question (Table 5.9) whether negotiated

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<sup>41</sup> Sixteen public administrators responded. Not all (sixteen) of the public administrators answered every question. Some of the public administrators answered yes/no questions with a written commentary. The comments are summarized in the conclusion chapter. The answers do not sum to 100% because of the inconsistency of the responses.

rulemaking decreases challenges to agency's rule by litigation as: three with a neutral response, three agreed, and one strongly agreed. There were no responses reflecting a lack of executive support for the use of negotiated rulemaking. The public administrators gave a strong no response (63%) to the question regarding statutory requirements for committees and task forces as well as for the question (56%) relating to legislative requests to create consensus-based groups to work on rules. It is difficult to determine if the combination of legislative mandates, litigation and political pressure are part of the motivating factors associated with this group of agencies participating in negotiated rulemaking. All the agencies (100%) have a well defined and identified body of special interest groups

### **Advantages**

Table 5.7 provides results of public administrators' opinions regarding the advantages of negotiated rulemaking. Only half of the advantages were strongly supported by the public administrators.

<b>TABLE 5.7</b>		<b>LEGEND</b>		
<b>Frequency and Percent of Responses of Opinions Regarding Advantages of Negotiated Rulemaking N=16</b>		<b>SD - Strongly Disagree D - Disagree N - Neutral A - Agree SA - Strongly Agree</b>		
<b>In your opinion, how strongly do you agree or disagree that the negotiated rulemaking process:</b>	<b>SD / D</b>	<b>N</b>	<b>SA / A</b>	<b>MEAN<sup>42</sup></b>
1. Increases communication among crucial parties	2 13%	0	14 87%	1
2. Increases public involvement	3 18%	6 38%	7 44%	.25
3. Allows all participants a chance to have their data and assumptions questioned by other parties with different view points and information	1 6%	2 13%	13 81%	1
4. Increases the likelihood to come up with more and different creative options	1 6%	2 13%	13 81%	.88
5. Results in time, money and resources savings by the agency	5 31%	8 50%	3 19%	-.125
6. Promotes cooperative relationships among crucial parties	1 6%	5 31%	10 63%	.75
7. Leads to clear, more accurate and specific rules in complex and technical subject matters	1 6%	7 44%	8 50%	.44
8. Decreases the number of public comments received	1 6%	9 56%	6 38%	.44

Public administrators positively responded (agreed or strongly agreed) to five of the eight advantages listed. Those areas of negotiated rulemaking perceived by public administrators to be advantages are ranked as follows:

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<sup>42</sup>The mean is an average of the responses.

Public administrators considered negotiated rulemaking to increase communication and allow participants to have data and make assumptions.	87%
Public administrators considered negotiated rulemaking to be a process that allows participants to be questioned by others with different view points.	81%
Public administrators stated negotiated rulemaking increases the likelihood of coming up with more and creative ideas.	81%
Public administrators agreed negotiated rulemaking promotes cooperative relationships among crucial parties.	63%
Public administrators stated negotiated rulemaking leads to clear, more accurate and specific rules for complex and technical subject matters	50%

There was one area the public administrators responded negatively (disagreed or strongly disagreed). Thirty-one percent (31%) of the public administrators did not consider negotiated rulemaking to be a savings of time, money or resources to the agency. Fifty percent (50%) of the public administrators gave a neutral response to this question

A significant neutral response was made by public administrators in three areas. They are as follows:

**-Increase in public involvement;**

38% of the public administrators were neutral.

Only 44% of the public administrators agreed or strongly agreed that public involvement is an advantage.

**-Leads to clear, more accurate and specific rules;**

44% of the public administrators were neutral, while 50% agreed

No one strongly agreed to this advantage.

**-Decreases the number of public comments;**

56% took a neutral position with only 38% agreeing and strongly agreeing this is an advantage.

## Disadvantages

Table 5.8 shows the results of public administrator opinions regarding the disadvantages of negotiated rulemaking. Again, there were several areas public administrator opinions were strongly recorded.

<b>TABLE 5.8</b>		<b>LEGEND</b>			
<b>Frequency and Percent of Responses of Opinions Regarding Disadvantages of Negotiated Rulemaking N=16</b>		<b>SD - Strongly Disagree D - Disagree N - Neutral A - Agree SA - Strongly Agree</b>			
<b>In your opinion, how strongly do you agree or disagree that the negotiated rulemaking process:</b>	<b>SD / D</b>	<b>N</b>	<b>SA / A</b>	<b>MEAN</b>	
9. Is a time consuming process for agency staff to organize, coordinate and participate	2 12%	1 6%	13 82%	1	
10. Is a time consuming process for participants of the negotiated rulemaking committee	1 6%	2 12%	13 82%	1	
11. Is a costly allocation to the agency for staff, travel meeting sites, supplies, printing, contracts for convenors, contracts for facilitator	4 25%	4 25%	8 50%	.31	
12. Is costly for participants on the negotiated rulemaking committee for time away from the business and travel	2 12%	3 19%	11 69%	.75	
13. Can impede communication and the sharing of information due to limitations for confidentiality of records	5 31%	10 63%	1 6%	-.31	

Public administrators responded affirmatively (agreed or strongly agreed) to four of the five disadvantages. The public administrators' opinions regarding the disadvantages of negotiated **rulemaking** are ranked as follows:

Public administrators considered negotiated rulemaking to be a time consuming process for agency staff to organize, coordinate and participate.	<b>82%</b>
Public administrators found negotiated <b>rulemaking</b> to be a time consuming process for participants of the <b>rulemaking</b> committee.	<b>82%</b>
Public administrators agreed it is costly for participants on the rulemaking committee for time away from the business and travel.	69%
Public administrators considered negotiated rulemaking to be a costly allocation to agency for staff, travel, supplies, printing and contracts for facilitator and convenor.	50%

The remaining disadvantage regarding negotiated rulemaking impedes communication and the sharing of information due to limitation of confidentiality of records received a strong neutral response (63%) with 31% of the public administrators disagreeing or strongly disagreeing. The significant neutral response may be due at this time to a limited number of open records requests received by public administrators for copies of rule committee minutes, audio tapes and disclosure of documents reviewed by the committee.

## Consequences

Table 5.9 reflects the opinions of public administrators regarding the consequences of implementing rules from a negotiated rulemaking process. The majority of the opinions about the consequences were favorable.

<b>TABLE 5.9</b>		<b>LEGEND</b>		
<b>Frequency and Percent of Responses of Opinions Regarding Consequences of Implementing Rules from a Negotiated Rulemaking Process N=16</b>		<b>SD - Strongly Disagree D - Disagree N - Neutral A - Agree SA - Strongly Agree</b>		
<b>In your opinion, how strongly do you agree or disagree that the implementation of rules from a negotiated rulemaking process:</b>	<b>SD / D</b>	<b>N</b>	<b>SA / A</b>	<b>MEAN</b>
1. Increases the affected parties compliance of the rules	1 6%	7 44%	8 50%	.44
2. Results in earlier implementation of the rule	4 25%	5 31%	7 44%	.125
3. Increases the certainty of the outcome of the rule	1 6%	4 25%	11 69%	.69
4. Enhances the agency's credibility and accountability to the public, the legislature and the affected parties	2 12%	3 19%	11 69%	.94
5. Decreases the possibility of affected constituencies contacting legislators resulting in political challenges to the rule	4 25%	3 19%	9 56%	.38
6. Decreases challenges to agency's rule by litigation	1 6%	7 44%	8 50%	.5

Five of the six consequences received a majority opinion of agreement<sup>43</sup> from the public administrators. The favorable consequences to negotiated rulemaking are:

Increases the certainty of the outcome of the rules	69%
Enhances the agency's credibility and accountability to the public, legislature and affected parties	69%
Decreases the possibility of affected constituencies contacting legislators resulting in political challenges to the rule	56%
Increases the affected parties compliance with the rules	50%
Decreases challenges to agency rules by litigation	50%

Only one consequence did not have a strong public administrator opinion for or against the outcome. This consequence is listed as negotiated rulemaking results in earlier implementation of the rules. Forty-four percent (44%) of the public administrators agreed to the consequence, however, 31% were neutral and 25% disagreed or strongly disagreed.

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<sup>43</sup>The percentage of the majority opinion is cumulative of Agree and Strongly Agree responses.

## CHAPTER 6 - CONCLUSION

### Recommendations

Recommendations to improve the negotiated rulemaking process were solicited from participating public administrators. Nine administrators offered suggestions or summations of their experience with negotiated rulemaking

Four of the public administrators generally considered the Texas Negotiated Rulemaking Act to be too formalized and complex. The concept of using a consensus-based process for negotiated **rulemaking** was supported by the administrators, but not in the current formalistic model. According to them, if an agency is doing its job, negotiated rulemaking should already be occurring in a modified and informal manner. An additional comment was for the legislature to fund the process.

Two of the public administrators supported negotiated **rulemaking** especially for rules that affect a vast number of individuals. Cautionary notes of experience and observations were listed by one of the supporting public administrators. The comments are as follows.

Always use non-agency staff to facilitate.

Agency staff should have an equal voice in negotiations.

The advantages and disadvantages of negotiated rulemaking should be thoroughly discussed with all parties and repeated often.

Negotiated rulemaking agreements must be signed by all parties who give input.

Negotiated **rulemaking** agreements must be carefully crafted.

Agreed goals and time **tables/implementation** dates should be posted at all meetings.

Accept that the process can be very tedious.

Accept the fact that "pioneers often get shot full of mows."

4 The University of Texas School of Law, Center for Public Policy Dispute Resolution has an excellent handbook, which should be referred to often.

Three public administrators provided critical comments regarding their experiences and about the Texas Negotiated Rulemaking Act. One administrator recommended to drop the provision authorizing the state agency to pay for "technical support" of stakeholders. The convening process is too complicated according to another administrator. This administrator stated they would not conduct negotiated rulemaking again under the current statutory scheme. It was the opinion of this administrator that state agencies will not use negotiated rulemaking unless the stakeholders pressure them to do so.

Finally, the importance of recognizing controversial subject matters for reasons relating to policy differences rather than core values was a lesson learned by one administrator. The negative outcome associated with the negotiated rulemaking process was related to the inability of the agency staff to act in "good faith" as participants of the rulemaking committee. If the rule involves core issues<sup>44</sup>, the participants will not compromise, the committee will probably never reach consensus and parties will retract their vote. Due to this event, the public administrator expressed concern about the agency's loss of credibility for future attempts at negotiated rulemaking.

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<sup>44</sup>In this case, stringent versus less stringent consumer safety rules.

## **Conclusion**

The findings suggest negotiated rulemaking is not necessary for every state agency promulgating rules. The sixteen agencies participating in negotiated rulemaking appear to benefit from the negotiated process because of frequent rulemaking activities and/or controversial rules which affect a large number of individuals.

In regard to the **essential components** of negotiated rulemaking, the participating agencies utilize a facilitator more frequently than a convenor. The participating agencies embodied the intent for inclusiveness and participation of a consensus-based process by including staff as equal members on the rules committee and publishing notice that the committee meetings are open to the public. The written commentaries of the administrators objecting to the formalized process outlined in the Texas Negotiated Rulemaking Act supports a modified and less structured approach to negotiated rulemaking which appears to be the current practice of agencies. There is a commitment of the respective agencies' rulemaking committees to submit a report of the committee's results to the executive level of the agency. This up-front process provides valuable information to agency executives on the basis of a proposed rule and may be one of the contributing factors for the strong executive support for negotiated rulemaking reported by the public administrators.

The **external factors** associated with negotiated rulemaking are consistent for public administrators participating in the process. There is a clear

identification of the respective agencies "special interest" groups, legislative mandates and requests for consensus-based committees. Interestingly, almost half of the participating administrators reported their agency had been involved in litigation challenging the agency's rule. Whether the agencies choose to participate in negotiated rulemaking in reaction to the litigation, or participated in an attempt to prevent future litigation, or for both reasons, is not known.

The **advantages** reported by the public administrators of negotiated rulemaking again support the intent of the consensus-based process. Increased communication, open dialogue and questions, creative ideas and alternatives and promotion of cooperative relationships are strong advantages to using negotiated rulemaking. Even if consensus is not reached by the committee, to be able to bring crucial and sometimes adversarial parties together to communicate, share ideas and have dialogue is an accomplishment.

The evidence also strongly supports the **disadvantages** to the process are associated with the time and costs to the agency and the participants. Perhaps cost can and should be looked at as an advantage rather than a disadvantage. This statement is made considering almost half of the participating public administrators noted their agency's rules have been challenged by litigation. The cost of several depositions during a lawsuit can pay for the total cost of a negotiated rulemaking process. The cost benefit of negotiated rulemaking will occur when it is viewed by the legislature and state agencies as an investment rather than an expense.

The consequences of negotiated rulemaking is seen by the public administrators to add credibility to the agency. As a result, this appears to decrease the number of political and legal challenges to the rules and increases the certainty of the outcome of the rules and the affected parties compliance with the rules.

The results of the survey indicate negotiated rulemaking either formal or informal is a relatively new approach for most agencies. Continued support by the legislature, the Texas Performance Review, University of Texas Center for Public Policy Dispute Resolution and state agency executive heads is necessary to establish a history and evaluate the outcomes of negotiated rulemaking. The current trend of the federal government legislating more programs, services and costs to the states will only increase the state government's role and level of controversy and complexity associated with rulemaking.

Public administrators responsible for the rulemaking process can take a pragmatic approach to finding out "what works" by participating in the consensus-based process known as negotiated rulemaking. Future research into negotiated rulemaking should explore the opinions of the participants, convenors and facilitators. Additional research may include a cost benefit analysis of negotiated rulemaking.

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# **APPENDIX A**

## **Texas Negotiated Rulemaking Act**

**GOVERNMENT CODE**  
**CHAPTER 2008. NEGOTIATED RULEMAKING**

SUBCHAPTER A. GENERAL PROVISIONS

**Sec. 2008.001.** SHORT TITLE. This chapter may be cited as the Negotiated Rulemaking Act.

**Sec. 2008.002.** DEFINITIONS. In this chapter:

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

(A) the attorney general;

(B) an institution of higher education as defined by Section 61.003, Education Code; and

(C) the State Office of Administrative Hearings.

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

**Sec. 2008.003.** COSTS OF **PARTICIPATING** IN NEGOTIATED RULEMAKING.

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

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

(1) the member certifies that the member lacks sufficient financial resources to participate as a member of the committee; and

(2) the agency determines that the member's service on the committee is necessary for the adequate representation of an affected interest.

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

[Sections 2008.004 to 2008.050 reserved for expansion]

## SUBCHAPTER B. PROCEDURES FOR NEGOTIATED RULEMAKING

**Sec. 2008.051. AUTHORITY FOR NEGOTIATED RULEMAKING.** A state agency may engage in negotiated rulemaking to assist it in drafting a proposed rule by following the procedures prescribed by this chapter.

### **Sec. 2008.052. APPOINTMENT AND DUTIES OF CONVENER.**

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

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

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

(1) whether they are willing to participate in negotiated rulemaking;

(2) whether the agency should engage in negotiated rulemaking to develop the proposed rule;

(3) which issues that a negotiated rulemaking committee should address: and

(4) whether there are other persons the convener needs to identify who may be affected by the proposed rule.

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

(1) the number of identifiable interests that would be significantly affected by the proposed rule;

(2) the probability that those interests would be adequately represented in a negotiated rulemaking;

(3) the probable willingness and authority of the representatives of affected interests to negotiate in good faith;

(4) the probability that a negotiated rulemaking committee would reach a unanimous or a suitable general consensus on the proposed rule;

(5) the probability that negotiated rulemaking will not unreasonably delay notice and eventual adoption of the proposed rule;

(6) the adequacy of agency and citizen resources to participate in negotiated rulemaking;

(7) the probability that the negotiated rulemaking committee will provide a balanced representation between public and regulated interests; and

(8) the willingness of the agency to accept the consensus of a negotiated rulemaking committee as the basis for the proposed rule.

### **Sec. 2008.053. NOTICE REQUIREMENTS FOR NEGOTIATED RULEMAKINGS.**

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

(1) a statement that the agency intends to engage in negotiated rulemaking;

(2) a description of the subject and scope of the rule to be developed;

(3) a description of the known issues to be considered in developing the rule;

(4) a list of the interests that are likely to be affected by the proposed rule;

(5) a list of the individuals the agency proposes to appoint to the negotiated rulemaking committee to represent the agency and affected interests;

(6) a request for comments on the proposal to engage in negotiated rulemaking and on the proposed membership of the negotiated rulemaking committee; and

(7) a description of the procedure through which a person who will be significantly affected by the proposed rule may, before the agency establishes the negotiated rulemaking committee, apply to the agency for membership on the committee or nominate another to represent the person's interests on the committee.

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

(1) negotiated rulemaking was used in developing the proposed rule; and

(2) the report of the negotiated rulemaking committee is public information and the location at which the report is available to the public.

**Sec. 2008.054. APPOINTMENT AND DURATION OF NEGOTIATED RULEMAKING COMMITTEE.**

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

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

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

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

**Sec. 2008.055. APPOINTMENT OF FACILITATOR.**

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

(b) The facilitator:

(1) must possess the qualifications required for an impartial third party under Section 154.052(a) and (b), Civil Practice and Remedies Code;

(2) is subject to the standards and duties prescribed by Section 154.053(a) and (b), Civil Practice and Remedies Code, and has the qualified immunity prescribed by Section 154.055, Civil Practice and Remedies Code, if applicable;

(3) shall not be the person designated to represent the agency on the negotiated rulemaking committee on substantive issues related to the rulemaking; and

(4) shall not have a financial or other interest in the outcome of the rulemaking process that would interfere with the person's impartial and unbiased service as the facilitator.

**Sec. 2008.056. DUTIES OF NEGOTIATED RULEMAKING COMMITTEE AND FACILITATOR.**

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

(1) to establish procedures for conducting negotiations; and

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

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

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

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

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

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

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

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

#### **Sec. 2008.057. CONFIDENTIALITY OF CERTAIN RECORDS AND COMMUNICATIONS.**

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

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

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

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

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

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

**Sec. 2008.058. ADMINISTRATIVE PROCEDURE ACT REQUIREMENTS UNAFFECTED.**

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

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

# **APPENDIX B**

## **Survey Instrument**

March 3, 1998

Dear Survey Participant:

This questionnaire seeks to gain information about negotiated rulemaking.

Specifically, the survey is designed to:

- assess the use of negotiated rulemaking by state agencies
- assess the opinions of public administrators about the advantages, disadvantages and consequences of using negotiated rulemaking.

If rulemaking is not within your purview, would you please direct the questionnaire to the appropriate **individual(s)** within your organization who would be able to respond. I have enclosed a copy of the Texas Negotiated **Rulemaking** Act for your information.

The results of the survey will be used as partial fulfillment for a Masters in Public Administration requirement. The questionnaire takes about 20 minutes to complete. Please return the completed questionnaire in the enclosed self-addressed stamped envelope by March 17, 1998.

If you have any questions, please contact Julia R. "Becky" Beechinor, at (512)834-6647.

Your assistance in this study is greatly appreciated.

Sincerely,

Julia R. "Becky" Beechinor

## QUESTIONNAIRE

**Negotiated rulemaking** is *"a consensus-based process in which a proposed rule is initially developed by a committee composed of representatives of all those interests that will be affected by the rule, including those interests represented by the rulemaking agency."*

**State Statute, Reference:** Subtitle A, Title 10, Government Code, Chapter 2008, Negotiated Rulemaking Act, as amended by the 75th Texas Legislature. 1997

### PART I - State Agency Use

In this section, the survey seeks to find which state agencies use negotiated rulemaking. If you mark **NO** to Question 1, please answer the question "why" and return the survey in the enclosed envelope.

1. Has your agency used some form of negotiated rulemaking?  
 Yes  No

If **NO**, why has the negotiated rulemaking process not been used:

- Not aware of process  
 Policy prohibits use  
 Situation has not occurred that would benefit from a negotiated rulemaking process  
 Do not believe the process is relevant to this organization.  
 Other; describe \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

If **YES**, how many times has the negotiated rulemaking process been used for the development of rules in the past five years? \_\_\_\_\_

2. Does your agency use the negotiated **rulemaking** process for:

- proposed rules only  
 proposed and final rules  
 other; describe \_\_\_\_\_

## PART II - Essential Components

In this part of the survey, the essential components described in the Texas Negotiated Rulemaking Act are outlined. I would like to know which components your agency uses for negotiated rulemaking.

1. Does your agency use a convener?  Yes  No

If **YES**, was the convener an:

- agency employee  
 an individual under contract  
 both agency employee and contract individuals have been used  
 other; describe \_\_\_\_\_  
\_\_\_\_\_

2. Was the convener responsible for making a recommendation to the agency whether negotiated rulemaking is feasible for proposed rules?

Yes  No

If **YES**, how many times did the agency:  
accept the convener's recommendation \_\_\_\_\_  
reject the convener's recommendation \_\_\_\_\_

3. Does your agency publish notice in the **Texas Register** of its intent to engage in the negotiated rulemaking process?

Yes  No

4. Are meetings of the rulemaking committee published in the **Texas Register** as open meetings?

Yes  No

5. Does your agency include department staff as equal members of the rulemaking committee?

Yes  No

6. Does your agency appoint a facilitator to preside over the meetings of the negotiated rulemaking process?

Yes  No

7. Does your agency allow the rulemaking committee to approve the facilitator?

Yes  No

8. Have the facilitators been:

- one of your agency employees
  - an employee of another state agency
  - an independent contractor
  - other; describe \_\_\_\_\_
- 

9. Is the definition of "consensus" used by the rulemaking committee determined to always be unanimous?

Yes  No

10. At the conclusion of the negotiated rulemaking process, does the committee submit a report to the agency of the committee's results?

Yes  No

### **PART III**

This portion of the survey seeks information on external factors associated with agencies when they promulgate rules.

The External Factors are:

- Judicial
- Executive
- Legislative
- Public and Constituency

1. Has your agency been involved in litigation challenging the agency's rules?  
 Yes  No  
  
If **YES**, were the rules promulgated:  
 using the negotiated rulemaking process with the Administrative Procedure Act requirements  
 by using the Administrative Procedure Act requirements only
2. Does the Board, Commissioners, Executive Head and Senior Management of your agency support the use of the negotiated rulemaking process?  
 Yes  No
3. Does your agency have statutes mandating the use of Task Forces, Ad Hoc Committees, work groups or other consensus based groups, to assist the agency in promulgating rules?  
 Yes  No
4. Has your agency received legislative requests to create and use consensus based groups made up of affected stakeholders to assist the agency with promulgating rules?  
 Yes  No
5. Are there "special interest" groups (i.e., professional associations, consumer groups) your agency has identified as stakeholders who are directly affected by your agency's rules?  
 Yes  No

## PART IV - Advantages and Disadvantages

In this section of the survey, I am interested in knowing your opinion about the advantages and disadvantages of the negotiated rulemaking process. Please circle the number that shows the extent you agree with the following statements.

### ADVANTAGES

In your opinion, how strongly do you agree or disagree that the negotiated rulemaking process:

1.  Increases communication among crucial parties.

Strongly Disagree		Neither Agree nor Disagree		Strongly Agree
1	2	3	4	5

2.  Increases public involvement.

Strongly Disagree		Neither Agree nor Disagree		Strongly Agree
1	2	3	4	5

3.  Allows all participants a chance to have their data and assumptions questioned by other parties with different view points and information

Strongly Disagree		Neither Agree nor Disagree		Strongly Agree
1	2	3	4	5

4.  Increases the likelihood to come up with more and different creative options.

Strongly Disagree		Neither Agree nor Disagree		Strongly Agree
1	2	3	4	5

5.  Results in time, money and resource savings by the agency.

Strongly Disagree		Neither Agree nor Disagree		Strongly Agree
1	2	3	4	5

6.  Promotes cooperative relationships among crucial parties.

Strongly Disagree		Neither Agree nor Disagree		Strongly Agree
1	2	3	4	5

7.  Leads to clearer, more accurate and specific rules on complex and technical subject matters.

Strongly Disagree		Neither Agree nor Disagree		Strongly Agree
1	2	3	4	5

8.  Decreases the number of public comments received.

Strongly Disagree		Neither Agree nor Disagree		Strongly Agree
1	2	3	4	5

## **DISADVANTAGES**

In your opinion, how strongly do you agree or disagree the negotiated rulemaking process:

9.  Is a time consuming process for agency staff to organize, coordinate and participate.

Strongly Disagree		Neither Agree nor Disagree		Strongly Agree
1	2	3	4	5

10.  Is a time consuming process for participants of the negotiated rulemaking committee.

Strongly Disagree		Neither Agree nor Disagree		Strongly Agree
1	2	3	4	5

11.  Is a costly allocation to the agency for staff, travel, meeting sites: supplies, printing, contracts for conveners, contracts for facilitator.

Strongly Disagree		Neither Agree nor Disagree		Strongly Agree
1	2	3	4	5

12.  Is costly for participants on the negotiated rulemaking committee for time away from the business and travel.

Strongly Disagree		Neither Agree nor Disagree		Strongly Agree
1	2	3	4	5

13.  Can impede communication and the sharing of information due to limitations for confidentiality of records.

Strongly Disagree		Neither Agree nor Disagree		Strongly Agree
1	2	3	4	5

## **PART V - Consequences of Rule Implementation**

In this section, I am interested in knowing your opinion about the consequences of implementing rules which have been developed through a negotiated **rulemaking** process. Please circle the number that shows the extent you agree with the following statement.

In your opinion, how strongly do you agree or disagree that the implementation of rules from a negotiated **rulemaking** process:

1.  Increases the affected parties compliance of the rules

Strongly Disagree		Neither Agree nor Disagree		Strongly Agree
1	2	3	4	5

2.  Results in earlier implementation of the rule.

Strongly Disagree		Neither Agree nor Disagree		Strongly Agree
1	2	3	4	5

3.  Increases the certainty of the outcome of the rule

Strongly Disagree		Neither Agree nor Disagree		Strongly Agree
1	2	3	4	5

4.  Enhances the agency's creditability and accountability to the public, the legislature and the affected parties.

Strongly Disagree		Neither Agree nor Disagree		Strongly Agree
1	2	3	4	5

5.  Decreases the possibility of affected constituencies contacting legislators resulting in political challenges to the rules.

Strongly Disagree		Neither Agree nor Disagree		Strongly Agree
1	2	3	4	5

6.  Decreases challenges to agency's rule by litigation.

Strongly Disagree		Neither Agree nor Disagree		Strongly Agree
1	2	3	4	5

What are your recommendations to improve the negotiated rulemaking process? \_\_\_\_\_

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Your contributions to this effort is greatly appreciated. If you would like a summary of the results, please print your name and address on this questionnaire and I will see that you are sent a copy. Thank you.

**NAME**

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**ADDRESS**

---

**CITY/STATE/ZIP**

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**PHONE**

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## **APPENDIX C**

### **List of State Agencies in Sample**

TEXAS STATE BOARD OF PUBLIC  
ACCOUNTANCY  
333 GUADALUPE TOWER II STE 900  
AUSTIN TX 78701

TEXAS STATE BOARD OF ACUPUNCTURE  
EXAMINERS  
c/o STATE BOARD OF MEDICAL  
EXAMINERS  
PO BOX 2018  
AUSTIN TX 78768-2018

ADMINISTRATIVE LICENSE REVOCATION  
PROGRAM  
STATE OFFICE OF ADMINISTRATIVE  
HEARINGS  
PO BOX 13025  
AUSTIN TX 78711-3025

TEXAS AEROSPACE COMMISSION  
1700 N CONGRESS ROOM B60  
AUSTIN TX 78701

TEXAS DEPARTMENT ON AGING  
PO BOX 12786  
AUSTIN TX 78711-2786

TEXAS DEPARTMENT OF AGRICULTURE  
PO BOX 12847  
AUSTIN TX 78711-2847

STATE AIRCRAFT POOLING BOARD  
4900 OLD MANOR RD  
AUSTIN TX 78723

TEXAS COMMISSION ON ALCOHOL AND  
DRUG ABUSE  
9001 NORTH IH 35 STE 105  
AUSTIN TX 78753-5233

TEXAS ALCOHOLIC BEVERAGE  
COMMISSION  
PO BOX 13127  
AUSTIN TX 78711-3127

TEXAS ANIMAL HEALTH COMMISSION  
PO BOX 12966  
AUSTIN TX 78711-2966

TEXAS APPRAISER LICENSING AND  
CERTIFICATION BOARD  
PO BOX 12188  
AUSTIN TX 78711-2188

TEXAS BOARD OF ARCHITECTURAL  
EXAMINERS  
PO BOX 12337  
AUSTIN TX 78711-2337

OFFICE OF THE ATTORNEY GENERAL  
PO BOX 12548  
AUSTIN TX 78711-2548

BANKING DEPARTMENT OF TEXAS  
2601 NORTH LAMAR  
AUSTIN TX 78705-4294

STATE BOARD OF BARBER EXAMINERS  
333 GUADALUPE STE 2-110  
AUSTIN TX 78701

TEXAS COMMISSION FOR THE BLIND  
PO BOX 12866  
AUSTIN TX 78711-2866

TEXAS STATE BOARD OF CHIROPRACTIC  
EXAMINERS  
333 GUADALUPE TOWER III STE 825  
AUSTIN TX 78701

TEXAS DEPARTMENT OF COMMERCE  
PO BOX 12728  
AUSTIN TX 78711-2728

COMPTROLLER OF PUBLIC ACCOUNTS  
PO BOX 13528  
AUSTIN TX 78711-3528

GOVERNMENTAL RELATIONS AND  
PUBLIC INFORMATION  
TEXAS HIGHER EDUCATION  
COORDINATING BOARD  
PO BOX 12788  
AUSTIN TX 78711-2788

TEXAS COSMETOLOGY COMMISSION  
PO BOX 26700  
AUSTIN TX 78755-0700

TEXAS STATE BOARD OF EXAMINERS  
OF PROFESSIONAL COUNSELORS  
1100 WEST 49TH STREET  
AUSTIN TX 78756

CREDIT UNION DEPARTMENT  
914 EAST ANDERSON LANE  
AUSTIN TX 78752-1699

TEXAS BOARD OF CRIMINAL JUSTICE  
PO BOX 13084  
AUSTIN TX 78711-3084

INTERNAL AFFAIRS  
TEXAS DEPARTMENT OF CRIMINAL  
JUSTICE  
PO BOX 99  
HUNTSVILLE TX 77342-0099

TEXAS COMMISSION FOR THE DEAF AND  
HARD OF HEARING  
PO BOX 12904  
AUSTIN TX 78711-2904

STATE BOARD OF DENTAL EXAMINERS  
PO BOX 13165  
AUSTIN TX 78711-3165

STATE BOARD OF EXAMINERS OF  
DIETITIANS  
1100 WEST 49TH STREET  
AUSTIN TX 78756

STATE BOARD OF EDUCATION  
c/o TEXAS EDUCATION AGENCY  
1701 N CONGRESS AVENUE  
AUSTIN TX 78701-1494

TEXAS EDUCATION AGENCY  
1701 N CONGRESS AVENUE  
AUSTIN TX 78701-1494

EMPLOYEES RETIREMENT SYSTEM OF  
TEXAS  
PO BOX 13207  
AUSTIN TX 78711-3207

STATE BOARD REGISTRATION FOR  
PROFESSIONAL ENGINEERS  
PO DRAWER 18329  
AUSTIN TX 78760-8329

TEXAS ETHICS COMMISSION  
PO BOX 12070  
AUSTIN TX 78711-2070

STATE FINANCE COMMISSION  
2601 NORTH LAMAR  
AUSTIN TX 78705

TEXAS COMMISSION ON FIRE  
PROTECTION  
PO BOX 2286  
AUSTIN TX 78768-2286

TEXAS FOOD AND FIBER COMMISSION  
17360 COIT ROAD  
DALLAS TX 75252

TEXAS FUNERAL SERVICE COMMISSION  
510 SO CONGRESS STE 206  
AUSTIN TX 78704-1716

GENERAL SERVICES COMMISSION  
PO BOX 13047  
AUSTIN TX 78711-3047

TEXAS DEPARTMENT OF HEALTH  
1100 WEST 49TH STREET  
AUSTIN TX 78756

TEXAS DEPARTMENT OF HEALTH AND  
HUMAN SERVICES  
PO BOX 13247  
AUSTIN TX 78711-3247

TEXAS HISTORICAL COMMISSION  
PO BOX 12276  
AUSTIN TX 78711-2276

TEXAS DEPARTMENT OF HOUSING AND  
COMMUNITY AFFAIRS  
PO BOX 13941  
AUSTIN TX 78711-3941

COMMISSION ON HUMAN RIGHTS  
PO BOX 13493  
AUSTIN TX 78711-3493

TEXAS DEPARTMENT OF HUMAN  
SERVICES  
PO BOX 149030  
AUSTIN TX 78714-9030

TEXAS INCENTIVE AND PRODUCTIVITY  
COMMISSION  
PO BOX 12482  
AUSTIN TX 78711

TEXAS DEPARTMENT OF INFORMATION  
RESOURCES  
PO BOX 13564  
AUSTIN TX 78711-3564

TEXAS DEPARTMENT OF INSURANCE  
PO BOX 149104  
AUSTIN TX 78714

INTERNATIONAL TRADE COMMISSION  
c/o TEXAS DEPARTMENT OF COMMERCE  
PO BOX 12728  
AUSTIN TX 78711-2728

TEXAS COMMISSION ON JAIL  
STANDARDS  
PO BOX 12985  
AUSTIN TX 78711-2985

TEXAS JUVENILE PROBATION  
COMMISSION  
PO BOX 13547  
AUSTIN TX 78711-3547

GENERAL LAND OFFICE  
1700 N CONGRESS AVENUE  
AUSTIN TX 78701-1495

TEXAS BOARD OF PROFESSIONAL LAND  
SURVEYING  
7701 N LAMAR STE 400  
AUSTIN TX 78752

TEXAS COMMISSION ON LAW  
ENFORCEMENT OFFICER  
STANDARDS-EDUCATION  
6330 US HWY 290 EAST STE 200  
AUSTIN TX 78723

TEXAS STATE LIBRARY AND ARCHIVES  
COMMISSION  
PO BOX 12927  
AUSTIN TX 78711-2927

TEXAS DEPARTMENT OF LICENSING AND  
REGULATION  
PO BOX 12157  
AUSTIN TX 78711

TEXAS LOTTERY COMMISSION  
PO BOX 16630  
AUSTIN TX 78761-6630

TEXAS STATE BOARD OF EXAMINERS OF  
MARRIAGE AND FAMILY THERAPISTS  
1100 WEST 49TH STREET  
AUSTIN TX 78756

TEXAS STATE BOARD OF MEDICAL  
EXAMINERS  
PO BOX 2018  
AUSTIN TX 78768-2018

TEXAS DEPARTMENT OF MENTAL  
HEALTH & MENTAL RETARDATION  
PO BOX 12668  
AUSTIN TX 78711-2668

MIDWESTERN STATE UNIVERSITY  
BOARD OF REGENTS  
3410 TAFT BLVD  
WICHITA FALLS TX 76308

TEXAS NATIONAL GUARD ARMORY  
BOARD  
PO BOX 5426  
AUSTIN TX 78763-5426

TEXAS NATIONAL RESEARCH  
LABORATORY COMMISSION  
2275 N HWY 77  
WAXAHACHIE TX 75165

TEXAS NATURAL RESOURCE  
CONSERVATION COMMISSION  
PO BOX 13087  
AUSTIN TX 78711-3087

SECRETARY OF THE BOARD OF REGENTS  
UNIVERSITY OF NORTH TEXAS  
PO BOX 13737  
DENTON TX 76203

BOARD OF VOCATIONAL NURSE  
EXAMINERS  
333 GUADALUPE STE 3-400  
AUSTIN TX 78701

BOARD OF NURSE EXAMINERS FOR THE  
STATE OF TEXAS  
PO BOX 140466  
AUSTIN TX 78714

TEXAS BOARD OF OCCUPATIONAL  
THERAPY EXAMINERS  
333 GUADALUPE STE 2-510  
AUSTIN TX 78701-3942

TEXAS OPTOMETRY BOARD  
333 GUADALUPE ST STE 2-420  
AUSTIN TX 78701

TEXAS BOARD OF PARDONS AND  
PAROLES  
PO BOX 13401  
AUSTIN TX 78711-3401

TEXAS PARKS AND WILDLIFE  
DEPARTMENT  
4200 SMITH SCHOOL ROAD  
AUSTIN TX 78744

STATE PENSION REVIEW BOARD  
PO BOX 13498  
AUSTIN TX 78711-3498

TEXAS STATE BOARD OF EXAMINERS OF  
PERFUSIONISTS  
1100 WEST 49TH STREET  
AUSTIN TX 78756

TEXAS STRUCTURAL PEST CONTROL  
BOARD  
1106 CLAYTON LANE STE 100LW  
AUSTIN TX 78723-1066

TEXAS STATE BOARD OF PHARMACY  
333 GUADALUPE TOWER III STE 600  
AUSTIN TX 78701-3942

TEXAS BOARD OF PHYSICAL THERAPY  
EXAMINERS  
333 GUADALUPE STE 2-510  
AUSTIN TX 78701-3942

TEXAS BOARD OF LICENSURE FOR  
PROFESSIONAL MEDICAL  
PHYSICISTS  
1100 WEST 49TH STREET  
AUSTIN TX 78756

STATE BOARD OF PLUMBING EXAMINERS  
PO BOX 4200  
AUSTIN TX 78765-4200

TEXAS STATE BOARD OF PODIATRIC  
MEDICAL EXAMINERS  
PO BOX 12216  
AUSTIN TX 78711-2216

POLYGRAPH EXAMINERS BOARD  
PO BOX 4087  
AUSTIN TX 78773

STATE PRESERVATION BOARD  
PO BOX 13286  
AUSTIN TX 78711-3286

TEXAS BOARD OF PRIVATE  
INVESTIGATORS AND  
PRIVATE SECURITY AGENCIES  
PO BOX 13509  
AUSTIN TX 78711

c/o STATE DEPARTMENT OF  
AGRICULTURE  
PRODUCE RECOVERY FUND BOARD  
PO BOX 12847  
AUSTIN TX 78711

TEXAS DEPARTMENT OF PROTECTIVE  
AND REGULATORY AFFAIRS  
PO BOX 149030  
AUSTIN TX 78714-9030

TEXAS BOARD OF EXAMINERS OF  
PSYCHOLOGISTS  
333 GUADALUPE STE 2-450  
AUSTIN TX 78701

TEXAS DEPARTMENT OF PUBLIC SAFETY  
PO BOX 4087  
AUSTIN TX 78773-0001

PUBLIC UTILITY COMMISSION OF TEXAS  
PO BOX 13326  
AUSTIN TX 78711-3326

TEXAS RACING COMMISSION  
PO BOX 12080  
AUSTIN TX 78711-2080

RAILROAD COMMISSION OF TEXAS  
PO BOX 12967  
AUSTIN TX 78711-2967

REAL ESTATE COMMISSION OF TEXAS  
PO BOX 12188  
AUSTIN TX 78711

RECYCLING MARKET DEVELOPMENT  
BOARD  
c/o GENERAL LAND OFFICE  
1700 N CONGRESS  
AUSTIN TX 78701-1496

TEXAS REHABILITATION COMMISSION  
4900 N LAMAR BLVD  
AUSTIN TX 78751-2399

TEACHER RETIREMENT SYSTEM OF  
TEXAS  
1000 RED RIVER  
AUSTIN TX 78701

SAVINGS AND LOAN DEPARTMENT OF  
TEXAS  
2601 N LAMAR STE 201  
AUSTIN TX 78705

SCHOOL LAND BOARD  
c/o GENERAL LAND OFFICE  
1700 N CONGRESS AVE  
AUSTIN TX 78701-1495

TEXAS SECURITIES BOARD  
PO BOX 13167  
AUSTIN TX 78711-3167

STATE SEED AND PLANT BOARD  
c/o TEXAS DEPARTMENT OF  
AGRICULTURE  
PO BOX 629  
GIDDINGS TX 78942

TEXAS STATE BOARD OF SOCIAL  
WORKER EXAMINERS  
1100 WEST 49TH STREET  
AUSTIN TX 78756

TEXAS STATE SOIL AND WATER  
CONSERVATION BOARD  
PO BOX 658  
TEMPLE TX 76503

STATE BOARD OF EXAMINERS FOR  
SPEECH-LANGUAGE  
PATHOLOGY AND AUDIOLOGY  
1100 WEST 49TH STREET  
AUSTIN TX 78756

STEPHEN F AUSTIN STATE UNIVERSITY  
BOARD OF REGENTS  
BOX 6078 SFA STATION  
NACOGDOCHES TX 75962

TEXAS BOARD OF TAX PROFESSIONAL  
EXAMINERS  
333 GUADALUPE TOWER II STE 520  
AUSTIN TX 78701-3942

TEXAS STATE TECHNICAL COLLEGE  
SYSTEM  
BOARD OF REGENTS  
WACO TX 76705

THE TEXAS STATE UNIVERSITY SYSTEM  
333 GUADALUPE TOWER III STE 810  
AUSTIN TX 78701-3942

TEXAS TECH UNIVERSITY AND TEXAS  
TECH UNIVERSITY  
HEALTH SCIENCES CENTER, BOARD OF  
REGENTS  
PO BOX 42011  
LUBBOCK TX 79409-2011

TEXAS WOMAN'S UNIVERSITY  
BOARD OF REGENTS  
PO BOX 425587 TWU STATION  
DENTON TX 76204-5587

TEXAS TRANSPORTATION COMMISSION  
125 EAST 11TH STREET  
AUSTIN TX 78701-2483

TRANSPORTATION PLANNING AND  
DEVELOPMENT  
TEXAS DEPARTMENT OF  
TRANSPORTATION  
125 EAST 11TH STREET  
AUSTIN TX 78701-2483

TEXAS DEPARTMENT OF  
TRANSPORTATION  
MOTOR VEHICLE BOARD  
PO BOX 2293  
AUSTIN TX 78768-2293

UNIVERSITY OF HOUSTON SYSTEM  
BOARD OF REGENTS  
1600 SMITH STE 3400  
HOUSTON TX 77002

THE UNIVERSITY OF TEXAS SYSTEM  
BOARD OF REGENTS  
201 WEST SEVENTH STREET  
AUSTIN TX 78701-2981

TEXAS VETERANS COMMISSION  
PO BOX 12277  
AUSTIN TX 78711

TEXAS BOARD OF VETERINARY MEDICAL  
EXAMINERS  
333 GUADALUPE TOWER II STE 330  
AUSTIN TX 78704-3998

TEXAS WATER DEVELOPMENT BOARD  
PO BOX 13231  
AUSTIN TX 78711-3231

TEXAS WORKERS COMPENSATION  
COMMISSION  
4000 S IH35  
AUSTIN TX 78704-7491

TEXAS WORKFORCE COMMISSION  
101 EAST 15TH STREET  
AUSTIN TX 78778-0001

TEXAS YOUTH COMMISSION  
PO BOX 4260  
AUSTIN TX 78765

NURSING FACILITY ADMINISTRATOR  
LICENSING BOARD  
PO BOX 149030  
MC-Y979  
AUSTIN TX 78714-9030

## **APPENDIX D**

### **List of State Agency Respondents Not Participating in Negotiated Rulemaking**

TEXAS STATE BOARD OF PUBLIC  
ACCOUNTANCY  
333 GUADALUPE TOWER II STE 900  
AUSTIN TX 78701

GOVERNMENTAL RELATIONS AND  
PUBLIC INFORMATION  
TEXAS HIGHER EDUCATION  
COORDINATING BOARD  
PO BOX 12788  
AUSTIN TX 78711-2788

ADMINISTRATIVE LICENSE REVOCATION  
PROGRAM  
STATE OFFICE OF ADMINISTRATIVE  
HEARINGS  
PO BOX 13025  
AUSTIN TX 78711-3025

TEXAS BOARD OF CRIMINAL JUSTICE  
PO BOX 13084  
AUSTIN TX 78711-3084

TEXAS AEROSPACE COMMISSION  
1700 N CONGRESS ROOM B60  
AUSTIN TX 78701

EMPLOYEES RETIREMENT SYSTEM OF  
TEXAS  
PO BOX 13207  
AUSTIN TX 78711-3207

TEXAS DEPARTMENT ON AGING  
PO BOX 12786  
AUSTIN TX 78711-2786

STATE BOARD REGISTRATION FOR  
PROFESSIONAL ENGINEERS  
PO DRAWER 18329  
AUSTIN TX 78760-8329

STATE AIRCRAFT POOLING BOARD  
4900 OLD MANOR RD  
AUSTIN TX 78723

TEXAS ETHICS COMMISSION  
PO BOX 12070  
AUSTIN TX 78711-2070

TEXAS COMMISSION ON ALCOHOL AND  
DRUG ABUSE  
9001 NORTH IH 35 STE 105  
AUSTIN TX 78753-5233

TEXAS FUNERAL SERVICE COMMISSION  
510 SO CONGRESS STE 206  
AUSTIN TX 78704-1716

TEXAS ANIMAL HEALTH COMMISSION  
PO BOX 12966  
AUSTIN TX 78711-2966

GENERAL SERVICES COMMISSION  
PO BOX 13047  
AUSTIN TX 78711-3047

TEXAS APPRAISER LICENSING AND  
CERTIFICATION BOARD  
PO BOX 12188  
AUSTIN TX 78711-2188

COMMISSION ON HUMAN RIGHTS  
PO BOX 13493  
AUSTIN TX 78711-3493

TEXAS BOARD OF ARCHITECTURAL  
EXAMINERS  
PO BOX 12337  
AUSTIN TX 78711-2337

TEXAS INCENTIVE AND PRODUCTIVITY  
COMMISSION  
PO BOX 12482  
AUSTIN TX 78711

STATE BOARD OF BARBER EXAMINERS  
333 GUADALUPE STE 2-110  
AUSTIN TX 78701

TEXAS BOARD OF PROFESSIONAL LAND  
SURVEYING  
7701 N LAMAR STE 400  
AUSTIN TX 78752

TEXAS STATE LIBRARY AND ARCHIVES  
COMMISSION  
PO BOX 12927  
AUSTIN TX 78711-2927

TEXAS DEPARTMENT OF LICENSING AND  
REGULATION  
PO BOX 12157  
AUSTIN TX 78711

TEACHER RETIREMENT SYSTEM OF  
TEXAS  
1000 RED RIVER  
AUSTIN TX 78701

TEXAS STATE BOARD OF EXAMINERS OF  
MARRIAGE AND FAMILY THERAPISTS  
1100 WEST 49TH STREET  
AUSTIN TX 78756

TEXAS STATE SOIL AND WATER  
CONSERVATION BOARD  
PO BOX 658  
TEMPLE TX 76503

SECRETARY OF THE BOARD OF REGENTS  
UNIVERSITY OF NORTH TEXAS  
PO BOX 13737  
DENTON TX 76203

STATE BOARD OF EXAMINERS FOR  
SPEECH-LANGUAGE  
PATHOLOGY AND AUDIOLOGY  
1100 WEST 49TH STREET  
AUSTIN TX 78756

TEXAS OPTOMETRY BOARD  
333 GUADALUPE ST STE 2-420  
AUSTIN TX 78701

TEXAS VETERANS COMMISSION  
PO BOX 12277  
AUSTIN TX 78711

TEXAS BOARD OF PARDONS AND  
PAROLES  
PO BOX 13401  
AUSTIN TX 78711-3401

TEXAS WATER DEVELOPMENT BOARD  
PO BOX 13231  
AUSTIN TX 78711-3231

TEXAS PARKS AND WILDLIFE  
DEPARTMENT  
4200 SMITH SCHOOL ROAD  
AUSTIN TX 78744

TEXAS WORKFORCE COMMISSION  
101 EAST 15TH STREET  
AUSTIN TX 78778-0001

TEXAS STATE BOARD OF EXAMINERS OF  
PERFUSIONISTS  
1100 WEST 49TH STREET  
AUSTIN TX 78756

TEXAS YOUTH COMMISSION  
PO BOX 4260  
AUSTIN TX 78765

TEXAS BOARD OF PHYSICAL THERAPY  
EXAMINERS  
333 GUADALUPE STE 2-510  
AUSTIN TX 78701-3942

OFFICE OF THE ATTORNEY GENERAL  
PO BOX 12548  
AUSTIN TX 78711-2548

PUBLIC UTILITY COMMISSION OF TEXAS  
PO BOX 13326  
AUSTIN TX 78711-3326

TEXAS EDUCATION AGENCY  
1701 N CONGRESS AVENUE  
AUSTIN TX 78701-1494

REAL ESTATE COMMISSION OF TEXAS  
PO BOX 12188  
AUSTIN TX 78711

TEXAS REHABILITATION COMMISSION  
4900 N LAMAR BLVD  
AUSTIN TX 78751-2399

# **APPENDIX E**

## **List of State Agency Respondents Participating in Negotiated Rulemaking**

BANKING DEPARTMENT OF TEXAS  
2601 NORTH LAMAR  
AUSTIN TX 78705-4294

TEXAS STRUCTURAL PEST CONTROL  
BOARD  
1106 CLAYTON LANE STE 100LW  
AUSTIN TX 78723-1066

TEXAS STATE BOARD OF EXAMINERS  
OF PROFESSIONAL COUNSELORS  
1100 WEST 49TH STREET  
AUSTIN TX 78756

TEXAS RACING COMMISSION  
PO BOX 12080  
AUSTIN TX 78711-2080

STATE BOARD OF EXAMINERS OF  
DIETITIANS  
1100 WEST 49TH STREET  
AUSTIN TX 78756

SCHOOL LAND BOARD  
c/o GENERAL LAND OFFICE  
1700 N CONGRESS AVE  
AUSTIN TX 78701-1495

TEXAS DEPARTMENT OF HEALTH  
1100 WEST 49TH STREET  
AUSTIN TX 78756

TEXAS STATE TECHNICAL COLLEGE  
SYSTEM  
BOARD OF REGENTS  
WACO TX 76705

TEXAS DEPARTMENT OF HOUSING AND  
COMMUNITY AFFAIRS  
PO BOX 13941  
AUSTIN TX 78711-3941

TEXAS TRANSPORTATION COMMISSION  
125 EAST 11TH STREET  
AUSTIN TX 78701-2483

TEXAS DEPARTMENT OF HUMAN  
SERVICES  
PO BOX 149030  
AUSTIN TX 78714-9030

TEXAS STATE BOARD OF PHARMACY  
333 GUADALUPE TOWER III STE 600  
AUSTIN TX 78701-3942

TEXAS DEPARTMENT OF INSURANCE  
PO BOX 149104  
AUSTIN TX 78714

TEXAS JUVENILE PROBATION  
COMMISSION  
PO BOX 13547  
AUSTIN TX 78711-3547

TEXAS COMMISSION ON LAW  
ENFORCEMENT OFFICER  
STANDARDS-EDUCATION  
6330 US HWY 290 EAST STE 200  
AUSTIN TX 78723

BOARD OF VOCATIONAL NURSE  
EXAMINERS  
333 GUADALUPE STE 3-400  
AUSTIN TX 78701