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## Foreword

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# FOREWORD

*Wallace B. Jefferson\**

The annual Survey of Texas Law has become an essential staple in the diet of Texas lawyers and judges, providing informative articles used frequently to resolve disputes in today's fast-paced legal world. A survey focused on the past provides an opportunity to project trends into the future. It would not be surprising if upcoming surveys note the current emergence of a fundamental shift in the way law is practiced in Texas. It is not too soon to begin contemplating that landscape today.

For example, what will the structure of the judiciary look like in the next ten to twenty years? If current trends continue, only a small fraction of the courts' workload will include traditional jury trials. Although the number of civil cases filed in our trial courts has steadily increased in recent years,<sup>1</sup> the number of jury trials has decreased. One cause of this decline is the accelerating use of arbitration. Growing numbers of civil litigants are turning away from the court system to resolve disputes without judges or jurors.<sup>2</sup> They opt out of the judicial system because they believe the private sector offers a simplified, streamlined process—a quick resolution at an efficient price, rendered by a decisionmaker with specialized experience.

When citizens flee our judicial system, however, we lose the public component of justice. Texas courts are open and accessible. Cases that are litigated in our courts (even cases involving private conflicts) often affect public interests—jobs, the environment, technological or medical development, land use, a stable legal environment promoting investment in the Texas market. An open court system ensures that the people of Texas benefit from a full public airing of the issues, and it allows innovations and solutions learned from today's cases to help resolve tomorrow's disputes. Our system of judicial review and stare decisis helps ensure that courts treat similar cases similarly. Although the legal environment is anything but static, courts have adroitly negotiated changes in a principled and considered manner. Careful application of the law at the trial

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1. Trends in Cases Added, Disposed, and Pending per District Court, Fiscal Years 2002 through 2006, <http://www.courts.state.tx.us/pubs/AR2006/trends/trends-cases-added-disposed-and-pending-per-dc-fy02-06.pdf>.

2. See e.g., Justice Nathan L. Hecht, *The Vanishing Jury Trial: Trends in Texas Courts and an Uncertain Future*, 47 S. TEX. L. REV. 163, 172-81 (2005); Justice Scott Brister, *The Decline in Jury Trials: What Would Wal-Mart Do?*, 47 S. TEX. L. REV. 191 (2005).

level and a guaranteed right to appellate review allow the judicial system to avoid arbitrary results.

Private dispute resolution plays a valuable role as an alternative to the traditional justice system, but it is important to acknowledge the hidden costs. Outcomes in a private system need not be consistent, because neither the proceedings nor the results are recorded or made publicly available. When a significant error is committed in a private setting, there is little hope of correcting the resulting injustice because appellate review is virtually non-existent. Without appellate review, there is no mechanism to resolve varying and contradictory interpretations of the law. A privately litigated matter may ultimately harm the public good or, because the decision is secret, impede an innovation to a recurring problem, much to the detriment of Texas citizens.

Of course, litigants will always have the right to seek private dispute resolution, but we should take care to make the court system responsive so that we do not lose the benefit of a vibrant public court system, one that can provide justice at a fraction of the private cost and can ensure that the state maintains a principled and public development of the law. I hope that our Legislature will consider ways in which the structure of our judicial system may be modified to incorporate the benefits of private dispute resolution while still maintaining the advantages of our judicial system.

What would such structural changes look like? It may be time to update the statutory framework for the state's trial courts. Texas's patchwork court system has developed over many decades, resulting in a current structure that "has gone from elaborate . . . to Byzantine."<sup>3</sup> Some counties share a multi-county district court, while others have multiple districts within the county. And some counties are a part of more than one district, creating a shifting target for litigants who may not know which court's rules prevail. Overlapping geographical jurisdiction creates confusion for litigants and increases the risk of conflicting rulings in a single area. It is time to consider reapportioning the judicial districts to achieve greater consistency. The Texas Constitution provides a mechanism by which representatives from the three branches of government can work together to address reapportionment. It is time to invoke it.

The Texas Legislature should consider other ways to simplify the current trial court system. For example, it is worth examining whether Texans are best served by the current (and often redundant) complex system of county courts at law, district courts, and statutory probate courts, or whether streamlining some of these trial courts may be simpler and more beneficial.

Although civil jury trials have been declining in certain types of cases, this has not been true across the board. Resources previously committed to jury trials in cases overtaken by private dispute resolution could be

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3. *Sultan v. Mathew*, 178 S.W.3d 747, 753 (Tex. 2005) (Hecht, J., dissenting).

reallocated to focus on areas where there has been no such decline. The Legislature should consider creating more specialization in the district courts, allowing courts to focus exclusively on business litigation, mass tort litigation, or criminal trials. Family law cases, for example, have grown steadily throughout the last decade.<sup>4</sup> Concentrating our efforts there would help hasten a child's adoption, assist courts in the quick resolution of custody battles, and place more resources at the hands of court personnel who place children in safe and loving households.

Other types of specialization are also possible. More than a dozen other states have adopted specialized business courts to handle the complex commercial litigation docket. Adopting a specialized docket creates greater judicial expertise, enhances procedural innovation and consistency, and reduces the burden on non-specialized courts by removing these time-consuming cases from the dockets. The Legislature has already taken the first step by creating multidistrict litigation procedures.<sup>5</sup> These procedures could be expanded to include other complex litigation. Greater specialization may be one way to ensure that the court system remains responsive to the public's needs, both by concentrating resources where they are most needed and by developing specialized expertise in the public court system that can compete with what is currently offered in the private sector.

These ideas will require further study. I hope that, in the next biennium, legislative committees will explore these issues in greater depth. I am confident that we can develop a system to serve the needs of each and every litigant. Our courts will remain strong long into the future if we are willing to adapt the current system to meet the changing needs of Texas. Together the three branches of government can work to ensure that the people of Texas continue to have access to a fair, impartial, accessible, and accountable justice system that resolves disputes, adjudicates guilt, protects our children, and serves the public.

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4. <http://www.courts.state.tx.us/pubs/AR2006/trends/family-law-cases-fy97-06.pdf>.

5. Tex. Gov't Code Ann. §§ 74.161-64 (Vernon 2005).

