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KEEPING PUBLIC MEDIATION PUBLIC: EXPLORING THE CONFLICT BETWEEN CONFIDENTIAL MEDIATION AND OPEN GOVERNMENT

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Mark A. Cover**

A fundamental tenet of democracy is the involvement of the citizenry in government, involvement epitomized by the prototypical small-town meeting.¹ Democratic government has grown from that of a small town meeting into that of a nation of two hundred fifty million citizens. By necessity, many of the discussions and decisions involving the public interest have shifted from the town hall to vast complexes of offices, departments, and bureaus, often beyond the direct purview of the citizens.

Because of this shift, the state and federal² governments passed open records³ and open meetings acts.⁴ The rationale in passing those acts is that openness and involvement are as important to democracy today as they were two hundred years ago.⁵ Government still, as always, must be accountable to the people.⁶ As one commentator observed:

Ed. note: SMU LAW REVIEW invited Messrs. Leatherbury and Cover to write this article as a response to another article published in this issue. See Will Pryor and Robert M. O'Boyle, *Public Policy ADR: Confidentiality in Conflict?* 46 SMU L. REV. 2207 (1993).

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1. See Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 428, 428-29 (1991) [hereinafter *Confidentiality*]. "Like much of this country's judicial process, the right of public access to court proceedings and records derives from our English common law heritage. It exists to enhance popular trust in the fairness of the justice system, to promote public participation in the workings of government, and to protect constitutional guarantees." *Id.*; see also Arthur R. Miller, *Private Lives or Public Access?*, A.B.A. J., Aug. 1991, at 65 [hereinafter *Private Lives*].

2. See 5 U.S.C. § 552 (1989).

3. See TEX. REV. CIV. STAT. ANN. art. 6252-17, § 3B (Vernon Supp. 1993).

4. See *id.* art. 6252-17.

5. See Dianna Hunt, *Closing the Door: Clout of Open Records in Texas Starts to Decline*, HOUS. CHRON., Dec. 13, 1992, at 1A. "'There continues to be a general desire on the part of those who are in public office to maintain secrecy rather than openness,' says former Congresswoman Barbara Jordan, who helped draft the state [open records] law in 1973."; *Id.* "'When the public does not see what is going on, it becomes suspicious, and secrecy is anathema to the citizen being enlightened and knowledgeable.'" *Id.* at 20A (quoting Barbara Jordan).

6. *Id.* at 1A. "It's at the heart of the American and the Texas constitutions: Government is the servant, and not the master, of the people." *Id.*

When linked, secrecy and political power are dangerous in the extreme. For all individuals, secrecy carries some risk of corruption and or irrationality; if they dispose of greater than ordinary power over others, and if this power is exercised in secret, with no accountability to those whom it affects, the initiation to abuse is great.⁷

In fact, given the size and the complexity of government today, openness is even more important than in the past because the decisions are easier to hide and the public trust is easier to abuse.⁸

Balanced against this fundamental policy of openness is the realization that some matters have historically been confidential.⁹ For example, the law favors confidentiality in communications between attorney and client, in trade secrets, and in some information of an intensely personal and private nature.¹⁰ Problems arise when legitimate reasons support both openness and confidentiality. One such problem involves mediation of public policy disputes, in which the policy of open government clashes with the policy of facilitating mediation through confidentiality.

Public policy mediation should not be confidential. Public policy disputes are those which affect members of the public beyond the parties, and which often involve one or more levels of government.¹¹ Mediation is defined as "a voluntary, informal (yet structured) process of dispute resolution wherein a neutral party, the mediator, assists disputants to find a mutually acceptable settlement of their dispute."¹² Mediation has significant advantages both for

7. Lloyd Doggett & Michael J. Mucchetti, *Public Access to Public Courts: Discouraging Secrecy in the Public Interest*, 69 TEX. L. REV. 643, 651 n.33 (1991) (quoting SISSELA BOK, SECRETS: ON THE ETHICS OF CONCEALMENT AND REVELATION 106 (1982)).

8. See *Under Siege: Texas' Open-Government Laws are being Eroded*, HOUS. CHRON., Dec. 20, 1992, at A23.

It is no secret that government likes to keep secrets. Government at every level. It is in the political nature. Doing the public's business out of the public eye avoids embarrassment, avoids having to put up with other people's opinions, avoids accountability, and lessens the chance of revelation of wrongdoing.

Id.

9. Register Div. of Freedom Newspapers, Inc. v. County of Orange, 205 Cal. Rptr. 92, 102 (Cal. Ct. App. 1984) (explaining that open records act "provisions evidence legislative concern with 'two fundamental if somewhat competing societal concerns—prevention of secrecy in government and protection of individual privacy' ") (quoting *Black Panther Party v. Kehoe*, 117 Cal. Rptr. 106, 109 (Cal. 1974)); see also *Private Lives*, *supra* note 1, at 66 ("Confidentiality is an integral part of the civil litigation process, and plays an essential role in fostering resolution of disputes from start to finish."); *Confidentiality*, *supra* note 1, at 464 ("Judicial protection of various types of information to ensure that it is used solely for legitimate litigation purposes also protects the substantive rights of the parties.").

10. See *Private Lives*, *supra* note 1, at 66; Note, *Trade Secrets in Discovery: From First Amendment Disclosure to Fifth Amendment Protection*, 104 HARV. L. REV. 1330, 1331 (1991) (arguing that "in some cases, compelled public disclosure of trade secrets through the discovery process constitutes an unconstitutional taking of property without just compensation"); Dianna Hunt, *Future Looks Bleak for Public's Access to State Government*, HOUS. CHRON., Dec. 16, 1992 at A1, A16 (quoting Barbara Jordan for the statement that "[t]here are times when the privacy concerns do override the public's right to know").

11. Barbara McAadoo & Larry Bakken, *Local Government Use of Mediation for Resolution of Public Disputes*, 22 URB. LAW. 179, 179 n.1 (1990). "Public disputes are defined as 'controversies that affect members of the public beyond the primary negotiators. Public disputes nearly always involve one or more levels of government, often as a party, and usually as a decision maker.'" *Id.*

12. *Id.* at 184. "The mediator is *not* empowered to impose any decision on the parties, but

the parties¹³ and for the resolution of the underlying disputes,¹⁴ and thus it should be encouraged even in matters of public policy.¹⁵ Public policy mediation, however, should never be confidential.

This article responds to Will Pryor and Robert M. O'Boyle's article on confidentiality in ADR.¹⁶ Pryor contends that non-binding, public-policy mediation should be confidential. This response argues, to the contrary, that public-policy mediation should not be confidential. Part I examines the preliminary assertions of Pryor. Part II examines the conflict between confidential mediation and the Open Records Act. Part III examines the conflict between confidential mediation and the Open Meetings Act. Part IV examines Texas Rule of Civil Procedure 76a as an example of openness in the judicial system. Finally, the conclusion argues that openness is paramount in a democratic government, and thus, when openness and ADR conflict, the policy of openness is superior to that of furthering dispute resolution in public policy disputes.

I. PRELIMINARY ASSERTIONS EXAMINED

Pryor begins by correctly asserting that the public has lost confidence in our civil justice system.¹⁷ He then suggests three reforms which can improve the public attitude toward the system: first, mandatory pro bono;¹⁸ second, amending the Rules of Evidence and Discovery to reduce complexity and expense; third, and "potentially most meaningful," the development and availability of ADR. By ADR, Pryor means "non-binding mediation."¹⁹ Based on this third suggestion, Pryor then makes several flawed

instead helps them to engage in constructive, progressive negotiations, in order to resolve disputes without litigation." *Id.* (emphasis in original).

13. *Id.* at 193. "When a mediation process is successful, it is almost certain to attract more residents to use mediation for future issues. They come to realize that the process encourages their thoughtful participation, and that it is a valid way to be involved in the public decision-making process." *Id.*

14. *Id.* at 188-89 (listing several advantages of mediation). First, "mediation allows the interested parties themselves to ultimately craft solutions uniquely suited to the dispute at hand." *Id.* at 188. Second, mediation "can include a distinct disputant 'education' component, in order to be certain that all parties are clear about the underlying problems that must be resolved." *Id.* Third, "the mediation process thus ensures some continuity of communication, without which misconceptions and mistrust run rampant." *Id.* at 189. Fourth, "[m]ediation provides interest groups with the opportunity to hear all the particulars of contrary positions and to offer, in a neutral setting, the possibility of questioning these contrary positions. Therefore, trade-offs and exchanges between interested parties are more likely to occur than in the usual, more adversarial, decision-making process." *Id.* Finally, "[m]ediation encourages cooperation and promotes positive ongoing relationships." *Id.*

15. *See id.* at 183. "Modifications to accommodate a mediation process, prior to the formal public hearing process, could ensure greater citizen participation, an attempt to strive for consensus-oriented decision, less adversarial hearings, and, in general, greater public support for counsel decisions." *Id.*

16. Will Pryor & Robert O'Boyle, *Public Policy: Confidentiality in Conflict?*, 47 SMU L. REV. 2207 (1993).

17. Pryor & O'Boyle, *supra* note 16 at 2209.

18. Mandatory pro bono is a controversial subject beyond the scope of this article. *See, e.g.,* Jonathan Macey, *Not All Pro Bono Work Helps the Poor*, WALL ST. J., Dec. 30, 1992, at A7.

19. Pryor & O'Boyle, *supra* note 16, at 2211.

arguments.

First, Pryor incorrectly argues that confidential mediation will improve public perception of the civil justice system.²⁰ The flaw in this argument is that, if the public currently lacks confidence in our civil justice system, then removing the dispute from public scrutiny exacerbates this lack of confidence by making the system even more bewildering and secretive to the non-parties.²¹ Furthermore, although Pryor avoids constitutional challenge by limiting his contemplation of public-policy ADR to non-binding mediation,²² *confidential* non-binding mediation is inconsistent with a policy of open government because, although the public agency need not accept the mediator's resolution, if it does choose to accept it, the *process* of reaching that resolution has been removed from public scrutiny.²³

Second, Pryor states that the overwhelming percentage of all lawsuits are settled anonymously, and, given this anonymity, argues that "it seems a bit disingenuous to criticize [a process] for producing the same or similar results in a more timely, efficient, less stressful, and less expensive fashion on the grounds that the process [non-binding mediation] preserves anonymity."²⁴ There are two flaws with this argument. First, in Texas the proclivity to settle actually supports a policy of openness because Texas Rule of Civil Procedure 76 presumes that all court records, including settlements involving government bodies, are open.²⁵ Second, anonymity of settlement cannot apply to public policy disputes.²⁶ Public policy disputes by their very nature

20. *Id.* at 2210.

21. See Lloyd Doggett, *Keeping Court Records in the Open*, in TEXAS FREEDOM OF INFORMATION HANDBOOK, 10-1, 10-7 (3d ed. 1992) (arguing that "justice faces its gravest threat when courts dispense it secretly. Our system abhors star chamber proceedings with good reasons. Like a candle, court records hidden under a bushel make scant contribution to their purpose."); Doggett & Mucchetti, *supra* note 7, at 651 n.36. ("If there is a public perception that cases can be sealed on the whim of a judge or at the insistence of a prominent individual or powerful corporation, the public's confidence in the judicial decision-making process is eroded."); *id.* at 644 ("Concealing information when its release would enhance government accountability or avert danger to health and safety sacrifices the public interest and jeopardizes confidence in the judicial system.") (quoting Letter from Texas Attorney General Jim Mattox to Chief Justice of the Texas Supreme Court Tom Phillips, 1 (March 21, 1990)).

22. See, e.g., *Dearborn Fire Fighters Union v. City of Dearborn*, 231 N.W.2d 226 (Mich. 1975).

23. See *Acker v. Texas Water Comm'n*, 790 S.W.2d 299, 300 (Tex. 1990).

[The Scope of the Open Meetings Act] is consistent with the recommendation of Woodrow Wilson that 'Government ought to be all outside and no inside.' Our citizens are entitled to more than a result. They are entitled not only to know what government decides but *to observe how and why every decision is reached*. The explicit command of the statute is for openness at *every* stage of the deliberations.

Id. (emphasis added) (footnotes omitted).

24. Pryor & O'Boyle, *supra* note 16, at 2212.

25. See TEX. R. CIV. P. 76(a) (presuming that all court records are open and requiring a hearing and public policy determination for all confidential settlements); see also Doggett & Mucchetti, *supra* note 7, at 656 (noting that under Rule 76(a) the "trial judge is thus called upon to balance the needs of the public against the asserted interest of the party seeking secrecy"). See *infra* notes 87-96 and accompanying text (discussing Rule 76(a)).

26. Cf. *Confidentiality*, *supra* note 1, at 477.

[T]he number of cases that conceivably could contain information that has any bearing on public health or safety is minuscule compared to the corpus of litiga-

are not anonymous, both because one of the parties is a government agency and because the dispute involves a matter of public concern which affects many individuals.²⁷

Third, Pryor argues that “[c]ritics of mediation inappropriately infer that the public is, in some fashion, included in the process of dispute resolution absent mediation”²⁸ when in fact most disputes are settled in private phone calls, letters, and communications. Therefore, Pryor reasons, “[t]he public is not included even when the subject of a dispute is public.”²⁹ In effect, Pryor is arguing that two wrongs make a right. Under a policy of openness, these back-room discussions and negotiations are exactly the sort of activity prohibited if a quorum is involved.³⁰ Simply because these meetings occur, possibly in violation of the Open Meetings Act,³¹ does not mean that they should occur and does not justify additional confidentiality in mediation.

Fourth, Pryor argues that “[w]ith regard to cases not requiring judicial review, mediation produces the same result as a case settled without mediation.”³² This argument ignores the fact that court proceedings are recorded and that minutes are often kept in public meetings, either voluntarily or by law.³³ In mediation, however, no record is required. Thus, the decision and the process, which ordinarily would be recorded in the minutes and open to public review, are hidden by confidential mediation.

Fifth, Pryor argues that “[p]arties to mediation of public policy disputes traditionally recognize that any negotiated settlement is contingent upon judicial, legislative, or even public approval.”³⁴ The parties are not *required* to condition settlement upon public approval, however. Thus, the parties could decide on a course of action, keep it confidential, and remove it entirely from

tion in this country. Clearly, any argument based on these cases is a rather slim reed for supporting a global and universal right of public access to all materials produced in every docketed case.

Id.

27. See McAdoo & Bakken, *supra* note 11, at 179-81.

28. Pryor & O'Boyle, *supra* note 16, at 2212.

29. *Id.*

30. See, e.g., Acker v. Texas Water Comm'n, 790 S.W.2d 299 (Tex. 1990); Hunt, *supra* note 5, at 1 (noting that with the passage of open government statutes, “[g]one were the smoke-filled rooms and closed-door policies that marked the earlier days of Texas government”). Acker, a primary case construing the Open Meetings Act, involved just such a back-room meeting. Acker requested a permit from the Water Commission and received a favorable recommendation. The Commission recessed, however, and two of its three members discussed his request in the restroom. Upon reconvening, the Commission voted to deny the permit. Acker then filed suit under the Open Meetings Act, alleging that the restroom discussion violated the Act. The Court explained that the “executive and legislative decisions of our governmental officials as well as the underlying reasoning must be discussed openly before the public rather than secretly behind closed doors.” Acker, 790 S.W.2d at 300.

31. TEX. REV. CIV. STAT. ANN. art. 6252-17 (Vernon Supp. 1993).

32. Pryor & O'Boyle, *supra* note 16, at 2212.

33. TEX. REV. CIV. STAT. ANN. art. 6252-17 § 3B (Vernon & Supp. 1993). (“A governmental body shall prepare and retain minutes or make a tape recording of each of its open meetings.” *Id.*; cf. Daily Gazette Co. v. Withrow, 350 S.E.2d 738, 746-47 (W. Va. 1986) (stating that “[a] public official has a common law duty to create and maintain, for public inspection and copying, a record of the terms of settlement of litigation brought against the public official or his or her employee(s) in their official capacity.”).

34. Pryor & O'Boyle, *supra* note 16, at 2213.

public review and accountability. Such a decision directly conflicts with the statement of policy in the preamble of the Texas Open Records Act.³⁵ Nevertheless, Pryor argues that there is no accountability problem because “[a]ccountability issues in a non-binding mediation discussion, however, do not differ from other accountability issues regarding private service providers who participate in rendering public services (for example, child day care).”³⁶ This statement ignores the obvious and important difference, that private service providers, such as child daycare, are not making public policy determinations, determinations that could easily result from non-binding mediation discussions.

Finally, Pryor makes the “two tiers” of justice argument: that the civil justice system provides two tiers of justice, one for the wealthy and another for the poor.³⁷ Therefore, he reasons, “[n]on-binding mediation, as an alternative to the continued litigation option, presents the best hope for the interests traditionally, and increasingly, excluded from just resolution of disputes in our judicial system.”³⁸ This statement may be true for the named parties, but the public-at-large—both wealthy and poor—is excluded from confidential mediation, and the purpose of openness is to allow public participation in and observation of the government decision-making process. In public-policy disputes, the public is always the real party in interest, even if not explicitly recognized as such.³⁹

II. THE OPEN RECORDS ACT

Although confidential public policy mediation does not explicitly violate the Open Records Act,⁴⁰ it is nonetheless inconsistent with the policy of openness underlying that Act.⁴¹ Pryor argues that the Act does not apply to

35. TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 1 (Vernon Supp. 1993):

The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.

Id.

36. Pryor & O'Boyle, *supra* note 16, at 2213.

37. *Id.* at 2213-14.

38. *Id.* at 2214.

39. Doggett & Muccheti, *supra* note 7, at 658.

When a private dispute is taken before a city council, a state regulatory board, or into the halls of Congress, it is no longer purely private. The public finances these legislative and executive institutions and has a fundamental right to know how these matters are being resolved. This right is incorporated in open meetings, open records, and freedom of information acts.

Id.

40. TEX. REV. CIV. STAT. ANN. art. 6252-17a (Vernon Supp. 1993).

41. *See id.* § 1. “[I]t is hereby declared to be the public policy of the State of Texas that all persons are, unless otherwise expressly provided by law, at all times entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees.” *Id.*; Hunt, *supra* note 5, at 1A (stating that the “Texas Open Records Act was designed to give the force of law to the concept that government must conduct its business in the open”). *Cf.* Doggett & Muccheti, *supra* note 7, at 651. “Inspection of public records provides ‘a check upon dishonest public officials, and will in

the judiciary, and therefore, court-ordered mediation need not be open.⁴² Taking a myopic view of the Act, this argument is correct.⁴³ Court proceedings and court records are generally open, however, and confidential settlements require Rule 76a proceedings.⁴⁴ Pryor notes that “[a]s a practical matter, the mediator may choose not to maintain any records related to the negotiations.”⁴⁵ Yet it is precisely because the mediator may choose not to maintain any records that there is an openness problem. Even if the decision is initially public, the process becomes private due to the absence of records.⁴⁶

Although the general presumption of the Act is openness,⁴⁷ the legislature created several exemptions from disclosure.⁴⁸ Each of these exemptions reflects a legislative determination that the benefits of confidentiality outweigh those of openness.⁴⁹ For example, the Act exempts matters covered by the attorney-client privilege.⁵⁰ This exemption parallels the attorney-client evidentiary privilege and is thus consistent with the strong policy supporting

many respects conduce to the betterment of public service.’ Guaranteeing greater access to court records, including discovery records, serves this function.” *Id.*

42. Pryor & O’Boyle, *supra* note 16, at 2214-15.

43. TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 2(1)(H) (Vernon Supp. 1993) (excluding the judiciary).

44. See *Private Lives*, *supra* note 1, at 65. “Evidence admitted at trial generally is available to the public through the traditional common law right of access to the courtroom.” *Id.*; Doggett & Mucchetti, *supra* note 7, at 647-48. “The United States Supreme Court has recognized a ‘presumption—however gauged—in favor of public access to judicial records.’” *Id.*; M.L. Stein, *Will “rent-a-judges” Hold Secret Proceedings?*, EDITOR & PUBLISHER, Aug. 15, 1992, at 23 (noting that “both state law and the U.S. Supreme Court have declared that trial proceedings be open unless there is an [sic] strong showing that they should be closed”); Dianna Hunt, *Looking at the Record: Freedom of Information in Texas*, HOUS. CHRON., Dec. 13, 1992, at 21A (noting that, although the Open Records Act does not apply to the judiciary, “the public is granted broad access to court records through common law and Constitutional law. Generally, unless a court document has been specifically sealed by a judge, it is available to the public.”). *But see Private Lives*, *supra* note 1, at 65. “This right of access, however, is not absolute; it never has extended beyond the confines of court proceedings and documents themselves. . . . Further, there never has been any right of public access to the activities, discussions and papers of the parties outside of the courtroom during discovery or settlement.” *Id.*

45. Pryor & O’Boyle, *supra* note 16, at 2215.

46. North Carolina by statute requires the consideration of settlement terms before a public body to be entered into the minutes of that body. See N.C. GEN. STAT. § 143-318.11(a)(4) (1990 & Supp. 1992); see also *News & Observer Publishing v. Wake County Hosp.*, 284 S.E.2d 542, 549 (N.C. Ct. App. 1981) (stating that the statute “requires a ‘public body’ to report its consideration of settlement terms in executive session by entering the terms ‘into its minutes within a reasonable time after the settlement is concluded’”).

47. See *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, writ ref’d n.r.e.) (stating that the “legislative mandate of the [open records] act is strong and clear. It requires that information regarding the affairs of government and the official acts of those who serve the public to be freely available to all, ‘unless otherwise expressly provided by law.’”).

48. See TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 3a (Vernon Supp. 1993) (listing specific disclosure exemptions).

49. Cf. *Private Lives*, *supra* note 1, at 66 (noting that, although protective discovery orders are exceptional, “their availability to provide confidentiality during discovery and settlement serves objectives of the justice system as important as the attorney-client privilege work product doctrine, or the protection of trade secrets and privacy rights”).

50. TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 3(a)(1) (Vernon Supp. 1993) (creating an attorney-client privilege by incorporation of T.R.C.P. 167).

it,⁵¹ but the privilege may not be used as a subterfuge to circumvent an open records act.⁵² Another relevant exemption is for litigation records.⁵³ Withholding information about litigation is discretionary, and this discretion has led to abuse by making the litigation exemption the most commonly used exemption in the Open Records Act.⁵⁴ Despite the abuse, this exception is consistent with the policy behind the attorney work product privilege.⁵⁵ The policy is to avoid giving the opponent an unfair advantage through access to the attorney's work product, trial strategy, and mental processes.⁵⁶ The presentation of information about the case to opponents and the actual resolution of the dispute, however, are not privileged and thus also should not be confidential in government mediation.⁵⁷

The best examples of the clash between ADR confidentiality and open records acts involve attempts to make public policy settlements secret.⁵⁸

51. See, e.g., CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 242-43 (1986).

52. See *Librach v. Cooper*, 778 S.W.2d 351, 354 (Mo. Ct. App. 1989) (holding that a settlement agreement made during a closed meeting of the school board did not fall within the attorney-client communication exception to the state Open Records Acts merely because an attorney was present). The court explained that the parties

do not seek any settlement proposals or negotiations discussed prior to the final Agreement, nor do they seek the records or minutes relating or pertaining to those possible communications and deliberations. . . . However, to prohibit the disclosure of the final contract here merely because an attorney was consulted by the Board causes the exception to engulf the Act's disclosure provisions.

Id.

53. TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 3(a)(3) (Vernon Supp. 1993).

54. See *Hunt*, *supra* note 5, at 1. "One of the most commonly used exemptions to the Open Records Act, the litigation exception allows agencies to withhold information related to pending or anticipated legal action, including disciplinary proceedings." *Id.* *Hunt* explained that

[i]n years past, the government agency had to show that the information could interfere with its legal strategy in a case before being allowed to withhold the information. In 1990, however, the Attorney General's office abandoned that requirement and concluded that information that related to pending or expected litigation could be withheld. Since then, the amount of information closed to the public because of the litigation exception has soared.

Id.

55. See *Hunt*, *supra* note 45, at 21A (explaining that the litigation exemption "is designed to prevent the use of the Open Records Act to circumvent the legal system's discovery procedures").

56. See WOLFRAM, *supra* note 51, at 292-96 (discussing the work product privilege).

57. See *id.* at 268-71.

58. See, e.g., *State ex rel. Sun Newspapers v. Westlake Bd. of Educ.*, 601 N.E.2d 173, 175 (Ohio Ct. App. 1991) (issuing mandamus to release a confidential settlement agreement between the school board and a former administrator because "[a] public entity cannot enter into enforceable promises of confidentiality with respect to public records.") (quoting *State ex rel. Dwyer v. Middletown*, 557 N.E.2d 788 (Ohio Ct. App. 1988)); *Dutton v. Guste*, 395 So. 2d 683, 685 (La. 1981) (concluding that settlement documents between the state and architects for the Superdome were public and must be made available under the state's open records statute.); *cf. Guy Gannett Publishing Co. v. University of Maine*, 555 A.2d 470, 472-73 (Me. 1989) (holding that the rule making evidence relating to settlements inadmissible does not protect that evidence from public disclosure).

The inadmissibility in evidence of settlement agreements has as its policy objective the encouragement of out-of-court disposition of disputes by the parties themselves. That objective is in no way compromised by our holding that the public has a right to know the terms upon which a public employer has settled with a resigning contract employee.

These examples demonstrate that if ADR confidentiality is allowed under an open records act, the possibilities swallow the rule of openness. For example, merely by sending a public policy dispute to mediation, the parties could make confidential that process which otherwise would be of record; and by making the settlement itself confidential, the parties could also hide the decision.

In *Anchorage School District v. Anchorage Daily News*,⁵⁹ the court resolved a conflict between the Alaska Open Records Act and a confidential settlement agreement involving the local school district and an asbestos contractor. The court stated that:

We recognize the important public policy served by those measures which encourage settlement. We recognize also that some litigants are unwilling to settle unless the terms of settlement remain confidential, and that a municipality's inability to assure confidentiality may, therefore, adversely affect its ability to negotiate a settlement. Nevertheless, the specific statutory provisions upon which the Daily News relies reflect a policy determination favoring disclosure of public records over the general policy of encouraging settlement.⁶⁰

The court then held that "a public agency may not circumvent the statutory disclosure requirements by agreeing to keep the terms of a settlement agreement confidential."⁶¹

In *Daily Gazette Co. v. Withrow*⁶² the court addressed a challenge under the West Virginia Open Records Act to the confidentiality of a settlement agreement between the local sheriff and a former employee. The court found that the settlement agreement was a public record⁶³ and then explained that two interests mandated settlement disclosure:

(1) the public's right to know whether a public official or a public employee has been charged with official misconduct (and whether such charges have been tacitly admitted) and (2) the financial impact upon the public of a litigation settlement which is paid either with public funds or with insurance proceeds generated by publicly financed insurance premiums.⁶⁴

The court implied that another reason for disclosure in a public interest case

Id. (citation omitted); see also *Confidentiality*, *supra* note 1, at 464. "[P]ublic access may be important when one of the settling litigants is a governmental agency, public entity, or official." *Id.*; but see *Doggett & Mucchetti*, *supra* note 7, at 659 n.75 (noting that secrecy provisions in settlement agreements have been given effect under the Open Records Act, but citing only Op. Tex. Att'y Gen. No. ORD-415 (1984)).

59. 779 P.2d 1191, 1191-92 (Alaska 1989).

60. *Id.* at 1193 (emphasis added) (citation omitted).

61. *Id.* (summarily applying the same reasoning to the Open Meetings Act). "The purpose of the open meetings act is to assure that government units transact business openly. . . . The open meetings requirement is intended to further the same purpose as the public records disclosure statutes, not to decimate it." *Id.* at 1193 n.5.

62. 350 S.E.2d 738 (W. Va. 1986).

63. *Id.* at 743. "It is clear that a release or other litigation settlement document in which one of the parties is a public body, involving an act or omission of the public body in the public body's official capacity, is a 'public record' within the meaning of a freedom of information statute." *Id.*

64. *Id.*

is that "the activities complained about are by their very nature newsworthy. It is particularly in matters such as these that freedom of communication should be kept open and that none of the real issues or facts become obscured." ⁶⁵ The court then held the settlement confidentiality provision void. ⁶⁶

In *Register Division of Freedom Newspapers, Inc. v. County of Orange* ⁶⁷ the court rejected the argument that allowing public access to settlements involving government would expose government to baseless lawsuits. The court explained that,

[a]gainst this interest must be measured the public interest in finding out how decisions to spend public funds are formulated and in insuring governmental processes remain open and subject to public scrutiny. We find these considerations clearly outweigh any public interest served by conducting settlement of tort claims in secret, especially in light of the policies of disclosure and openness in governmental affairs. ⁶⁸

Also in the context of confidential public policy settlements, a frequent argument supporting confidential settlements is that removing confidentiality will "chill" future settlements. ⁶⁹ When a court faces this argument, it directly confronts the conflict between the policy of open government and the policy of dispute settlement. As argued in this article, openness triumphs. For example, in *Des Moines Independent Community School District Public Records v. Des Moines Register & Tribune Co.* ⁷⁰ the court addressed the confidentiality of a settlement agreement between the school district and a fired administrator. After noting that other "[c]ourts have generally held that settlement agreements with public bodies are subject to disclosure," ⁷¹ the court rejected the possible chilling effect on future settlements and held that the state legislature had not demonstrated an intent to keep such settle-

65. *Id.* (quoting *Miami Herald Publishing v. Collazo*, 329 So. 2d 333, 338 (Fla. Dist. Ct. App. 1976), *cert. denied*, 342 So. 2d 1100 (Fla. 1976)).

66. *Id.* at 746. The court explained that:

The courts refuse to enforce a provision in a litigation settlement agreement prohibiting disclosure of the terms of the agreement where such a provision is contrary to the freedom of information statute. Assurances of confidentiality do not justify withholding public information from the public; such assurances by their own force do not transform a public record into a private record for the purpose of the State's Freedom of Information Act. . . "[T]o allow the government to make documents exempt by the simple means of promising confidentiality would subvert FOIA's disclosure mandate."

Id. (quoting *Washington Post Co. v. United States Dept. of Health & Human Serv.*, 690 F.2d 252, 263 (D.C. Cir. 1982)).

67. 205 Cal. Rptr. 92 (Cal. Ct. App. 1984).

68. *Id.* "[O]pening up the County's settlement process to public scrutiny will, nevertheless, put prospective claimants on notice that only meritorious claims will ultimately be settled with public funds. This in turn will strengthen public confidence in the ability of governmental entities to efficiently administer the public purse." *Id.* Limiting its "holding to the actual discussions and actions of the claims settlement committee," the court explained that the holding did not mean that "every discussion regarding settlement of an action or potential case against the county should be made public." *Id.* at 102 n.13.

69. *See, e.g.*, *Times Herald Printing Co. v. Jones*, 717 S.W.2d 933, 939 (Tex. App.—Dallas 1986) (en banc), *vacated on other grounds*, 730 S.W.2d 648 (Tex. 1987).

70. 487 N.W.2d 666 (Iowa 1992).

71. *Id.* at 669.

ments confidential.⁷² In *Denver Publishing Co. v. University of Colorado*⁷³ the court also rejected the chilling effect on settlements argument. The court recognized that "such an effect is possible, [but] the public's right to know how public funds are expended is paramount considering the public policy of the Open Records Act."⁷⁴

The chilling effect on settlements argument has not been universally rejected, however.⁷⁵ For example, the Administrative Conference of the United States decided that:

The Conference, of course, recognizes the principle that decisions affecting the public welfare ought to be made in the open and subject to public and judicial scrutiny. Nevertheless, since settlements are essential to administrative agencies, a careful balance must be struck between the openness required for the legitimacy of many agency agreements and the confidentiality that is critical if sensitive negotiations are to yield agreements.⁷⁶

The Conference explained that "[c]onfidentiality assures the parties that what is said in the discussions will be limited to the negotiations alone so they can be free to be forthcoming."⁷⁷ Therefore, the Conference proposed in its Model Rule that:

[P]ublic policy favoring voluntary resolution of disputes therefore requires that the [mediator] not reveal, either voluntarily or through legal compulsion, information learned in confidence during the negotiations. To encourage the parties to negotiate, this rule enunciates an agency policy seeking to protect the confidentiality of settlement negotiations involving the [mediator].⁷⁸

III. THE OPEN MEETINGS ACT

Like the Open Records Act, the Open Meetings Act⁷⁹ reflects a policy of openness in government but does not extend to the judiciary, perhaps because judicial proceedings are of record and the courtroom is generally open.⁸⁰ Nevertheless, the Open Meetings Act is relevant because it applies to the executive and legislative branches,⁸¹ which are usually parties to pub-

72. *Id.* The court also noted that a new statute, inapplicable to this case because of retroactivity problems, "requires that, whenever there has been a settlement of a claim against a governmental body (or its employee) by its insurer, a written summary of the settlement terms must be filed with the governmental body and made public." *Id.* at 669-70 n.3.

73. 812 P.2d 682, 685 (Colo. Ct. App. 1990).

74. *Id.* The court held, however, that release was limited to the final settlement and thus an earlier proposed settlement was excluded. *Id.*

75. See also, *Private Lives*, *supra* note 1, at 66 (arguing that "the settlement process would be impaired if the parties could not rely on the assurance of confidentiality reached voluntarily in the settlement agreement. In fact, the greater incentive to litigate, simply to postpone or avoid public access to confidential information, would work to the disadvantage of poorer litigants.").

76. 1 C.F.R. § 305.88-11 (1992).

77. *Id.*

78. 1 C.F.R. § 305.88-11 app. (1992).

79. TEX. REV. CIV. STAT. ANN. art. 6252-17 (Vernon Supp. 1993).

80. See *supra* notes 40-77 and accompanying text.

81. See *Cox Enter. v. Board of Trustees*, 706 S.W.2d 956, 960 (Tex. 1986) (stating that the

lic-issue disputes.⁸² A current example of openness under the Act in all three branches of government is television. Meetings of governmental bodies may be videotaped, providing a record of what the individual officials say and how they vote.⁸³ And in the courtroom, new rules allow cameras under certain circumstances, thereby fostering even greater public involvement.⁸⁴

The problem with ADR is that the Open Meetings Act requires any deliberation involving a quorum of a governmental body to be open to the public unless expressly exempted under the Act.⁸⁵ The Act does not expressly authorize closed sessions for ADR, and so absent amendment, governmental mediation must be open.⁸⁶ One commentator has succinctly noted the problem, explaining that:

Mediation works around confidentiality. Under the Texas ADR Procedures Act, participants in ADR proceedings are promised strict confidentiality, which puts ADR procedures at odds with the TOMA. Unless the TOMA is amended, a governmental body would not be able to legally respect this confidentiality. In fact, the whole idea of the resolution of public disputes by a state agency's use of ADR procedures runs contrary to the policies of open government.⁸⁷

Open Meetings Act "is intended to safeguard the public's interest in knowing the workings of its governmental bodies."); *accord Ferris v. Texas Bd. of Chiropractic Examiners*, 808 S.W.2d 514, 516 (Tex. App.—Austin 1991, writ denied) (citing *Cox* and stating that the legislature's purpose in passing the Act was to ensure that every regular, special, or called meeting or session of every governmental body, with certain limited exceptions, would be open to the public. As originally conceived, the Act was designed to ensure that the public has the opportunity to be informed concerning the transactions of public business.

(Citation omitted)).

82. See McAdoo & Bakken, *supra* note 11, at 179 n.1 (stating that almost all public disputes involve at least one governmental unit as a party).

83. See TEX. REV. CIV. STAT. ANN. art. 6252-17 § 2(i) (Vernon Supp. 1993).

84. See TEX. R. CIV. P. 18c; TEX. R. APP. P. 21; see, e.g., Thomas S. Leatherbury, *Cameras in the Courtroom*, in TEXAS FREEDOM OF INFORMATION HANDBOOK 12-1, 12-8 to 12-15 (3d ed. 1992) (containing the local rules for cameras in the courtroom in Dallas and Travis counties); see generally *id.* at 12-1 (explaining the development of the law allowing cameras in the courtroom). For example, the School Finance case was one of the first to be televised from the Texas Supreme Court. *Id.*

85. TEX. REV. CIV. STAT. ANN. art. 6252-17 § 2(a) (Vernon Supp. 1993). One commentator, however, argues that there is no problem.

The specific provisions of APTRA relating to the specific act of resolving a contested case must obviously be construed as an exception to the general provisions of TOMA applicable to all governmental bodies. This construction preserves the integrity of both statutes and the exception to TOMA does not frustrate its goals due to APTRA's requirement that agency officials set forth meticulous findings of fact and conclusions of law that must be supported by the formal record.

Ronald L. Beal, *The Clash of the Open Meetings Act and APTRA: A Tragedy In the Making*, 55 TEX. B.J. 928, 929 (1992).

86. See Jennifer S. Riggs, *Alternate Dispute Resolution & Other Informal Settlement Techniques in Agency Proceedings*, in STATE BAR OF TEXAS PDP ADVANCED ADMINISTRATION LAW COURSE, D-1, D-3 (1991).

87. *Id.* at D-3; see also Brian D. Shannon, *The Administrative Procedure and Texas Register Act and ADR: A New Twist for Administrative Procedure in Texas?*, 42 BAYLOR L. REV. 705, 733 (1990).

[T]here is a natural tension between open government concerns and maintaining the confidentiality of ADR processes. . . . [T]he Act would not literally apply to

As with the Open Records Act, the exceptions to the Open Meetings Act involve legislative determinations that the proceedings should be confidential. Pryor contemplates that public policy mediation "includes a ratification process by the appropriate executive or judicial authority."⁸⁸ This contemplation falls short, however, because, although the decision may be ratified, the process of reaching the decision was secret. Furthermore, the contemplation of review assumes that the parties will in fact do so. Instead of so assuming, why not require review? If the parties will do so anyway, nothing is lost.

IV. RULE 76A

The policy of openness in government recently spread to civil procedure with Texas Rule of Civil Procedure 76(a). Rule 76(a) presumes that court records are open⁸⁹ and is based on the same rationale as the Open Records and Open Meetings Acts.⁹⁰ Under the rule, court records may only be sealed if there is "a specific, serious and substantial interest which clearly outweighs: (1) this presumption of openness; [and] (2) any probable adverse effect that sealing will have upon public health or safety,"⁹¹ and if no less restrictive means than sealing will protect the interest.⁹² As relevant here, "court records" include all documents filed in a civil case, "settlement agreements not filed of record . . . that seek to restrict disclosure of information concerning . . . the administration of public office, or the operation of government,"⁹³ and non-filed discovery concerning "the administration of public office, or the operation of government."⁹⁴

Several powerful justifications support the rule.⁹⁵ For example, "greater

ADR procedures unless they were conducted before a quorum of the governing body of an agency, an unlikely scenario. On the other hand, the resolution of largely public disputes through an agency's use of ADR procedures may run counter to policies of open government.

Id.

88. Pryor & O'Boyle, *supra* note 16, at 2218-19.

89. See Doggett, *supra* note 21, at 10-3. "Rule 76(a) begins by affirming the clear presumption that all civil court records are open to the public." *Id.*

90. See Doggett & Mucchetti, *supra* note 7, at 654 "[I]t is recognized that openness of the legislative process helps . . . outweigh the possible loss of expediency created by public access. Rule 76(a) and the revised Rule 166b(5)(c) represent a realization that similar interests are at stake in litigation. . . . [S]ecrecy, not openness, is the exception that requires justification." *Id.*

91. TEX. R. CIV. P. 76(a)(1).

92. TEX. R. CIV. P. 76a(1).

93. *Id.*

94. *Id.* at 76a(2); see also Doggett, *supra* note 21, at 10-4.

[T]he term 'court records' is expanded to include settlement agreements not filed of record, which seek to circumvent the rule by including provisions restricting 'disclosure of information concerning matters that have a probable adverse effect upon the general public health or safety or the administration of government or the operation of government.'

Id. (emphasis added).

95. Doggett & Mucchetti, *supra* note 7, at 648. "Several concerns motivated those who drafted and adopted Rule 76(a)." *Id.* Furthermore, the rule is not without its vocal critics. See Note, *supra* note 10, at 1345 (calling Rule 76(a) a "poor model for other states"); *Confidentiality*, *supra* note 1, at 501 (cautioning against "rush[ing] sheeplike down the path chosen by Texas" in adopting Rule 76(a)).

access to civil judicial records promotes public health and safety,"⁹⁶ "access to judicial records encourages greater integrity from attorneys and their clients,"⁹⁷ and "access ensures greater integrity from the bench. An old adage tells us that 'doctors bury their mistakes, but judges publish theirs.'"⁹⁸ "Finally, and most importantly, greater access strengthens democracy."⁹⁹ As incorporated in the rule, these justifications affirm the presumption that all civil court records are open, and, with this presumption in mind, the judge then balances the needs of the public with the asserted need for secrecy.¹⁰⁰

V. CONCLUSION

When confidentiality and open government collide in public policy mediation, confidentiality must lose. Mediation can play an important part in the resolution of public disputes, but it should not be confidential because the policy of furthering the efficient resolution of disputes pales in comparison with the fundamental policy of openness in a representative government. In an age when government paradoxically invades every facet of our lives because of its size, yet also because of that size avoids accountability, a policy of openness is crucial to monitor abuse of the public trust and to ensure responsibility to the people. As its name suggests, public policy mediation must always remain public under this policy of openness.

96. Doggett & Mucchetti, *supra* note 7, at 648.

97. *Id.* at 650.

98. *Id.* at 650-51.

99. *Id.* at 652.

100. Doggett, *supra* note 21, at 10-13 "The trial judge is thus called upon to balance the needs of the public with the asserted interest of the party seeking secrecy." *Id.*