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MEDIATION AND OPEN GOVERNMENT

PUBLIC POLICY ADR: CONFIDENTIALITY IN CONFLICT?

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THE views expressed in this article are solely the views of the authors and do not necessarily reflect the views of the Office of the Attorney General of Texas.

I. INTRODUCTION

Recently the City of Addison, Texas became a party to litigation involving its issuance of a permit for the sale of aviation fuel at the Addison Municipal Airport.¹ As the lawsuit encountered the traditional twists and turns of litigation, the trial judge ordered the parties to submit the dispute to a form of alternative dispute resolution (ADR).² Specifically, the court ordered the parties to engage in a non-binding mediation process described in the Texas Alternative Dispute Resolution Act.³

The Texas statute does not explicitly grant a trial court authority to order authorized party representatives to participate, but such a requirement is typical and is usually deemed critical to creating a dynamic mediation session.⁴ Citing the statute, the judge ordered that "each corporate party must

Ed. note: With the authors' concurrence, SMU LAW REVIEW invited a response to this article, which is published in this issue. See Thomas S. Leatherbury and Mark A. Cover, *Keeping Public Mediation Public: Exploring the Conflict Between Confidential Mediation and Open Government*, 46 SMU L. REV. 2221 (1993).

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1. *Hedrick Beechcraft, Inc. v. Addison*, No. 91-14996-K (Dist. Ct. of Dallas County, 192nd Judicial Dist. of Texas, Sept. 8, 1992).

2. See TEX. CIV. PRAC. & REM. CODE ANN. §§ 154.023-027 (Vernon Supp. 1993). ADR ordinarily refers to the use of a neutral third party to facilitate settlement of a dispute outside of a formal court of law. The most common ADR techniques are mediation, mini-trial, moderated settlement conference, summary jury trial, and non-binding arbitration.

3. Order of Referral for Mediation, April 16, 1992, by the Honorable Merrill Hartman, Judge, *Hedrick Beechcraft* (No. 91-14996-K) [hereinafter Order]; see TEX. CIV. PRAC. & REM. CODE ANN. § 154 (Vernon Supp. 1993).

4. See Order, *supra* note 3 (including rules for mediation emphasizing the need to have persons with the power to settle a dispute present at the mediation).

be represented by an executive officer with authority to negotiate a settlement."⁵ The Addison City Council members balked. The ADR statute provides that all proceedings are confidential and privileged from disclosure; the statute additionally provides that the mediator is prohibited from disclosing anything, even to the appointing court, that transpires during the process, including the conduct and demeanor of the parties.⁶ Mediation is secret,⁷ increasingly, governmental processes are not.

Literal compliance with the court's order would cause the Addison City Council to violate another Texas statute, the Open Meetings Act.⁸ The dilemma of the Addison City Council crystallizes a concern of many in the application of ADR techniques to controversies involving governmental entities and the public interest. Some have argued that the ADR movement is on a collision course with the trend supporting open government.⁹ Critics reason that ADR defeats the interests of open government.¹⁰ Specifically, these critics offer several arguments. First, "ADR deprives the courts of the ability to articulate constitutional values, set precedent, and develop governing rules."¹¹ Second, ADR fails to produce a published, public opinion.¹² Third, ADR promotes two-tiered justice, where the rich obtain high-quality dispute resolution, and the poor are left to the court system or high-volume, low-quality, court-annexed arbitration.¹³ Fourth, ADR defeats the public's expectation and "right" to know how the parties decided the outcome of litigation involving social welfare, the environment, and civil

5. *Id.*

6. TEX. CIV. PRAC. & REM. CODE ANN. § 154.053 (Vernon Supp. 1993) ("[A]ll matters, including the conduct and demeanor of the parties and their counsel during the settlement process, are confidential and may never be disclosed to anyone, including the appointing court.").

7. See STANDING COMM. ON DISPUTE RESOLUTION, AMERICAN BAR ASS'N, LEGISLATION ON DISPUTE RESOLUTION 277 (1990).

A crucial aspect of any mediation is the freedom which participants have to say what they want and not fear that what transpires during mediation will be later used against them. It is thought that without an assurance of confidentiality, disputants will be unwilling to mediate, or else may be reluctant to fully participate. For these reasons, courts have recognized the importance of protecting the confidentiality of ADR sessions.

Id.

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

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

10. Jennifer Riggs, *Alternative Dispute Resolution and Other Informal Settlement Techniques in Agency Proceedings* (Sept. 24-25, 1992) (unpublished paper presented at the Advanced Administrative Law Course in Austin, Texas). Riggs states, "[I]n 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." *Id.* at D3.

11. Melinda Ostermeyer, *Summary of Panel Presentations, in EMERGING ADR ISSUES IN STATE AND FEDERAL COURTS* 24 (Frank E. A. Sander ed., 1991). "[T]he use of ADR may cause different standards around the country. [Richard Stewart] contended that liability should be determined by the courts, so that compliance with statutes is uniform and consistent." *Id.* at 28.

12. *Private Dispute Resolution Systems: Advancing Justice or Hindering It?*, ADVANCING JUST. UPDATE, Fall 1989 (summarizing Michele Herman's view).

13. *Id.*

rights.¹⁴ Fifth, ADR eliminates the impetus for change in the current public court system.¹⁵ Sixth, ADR limits the opportunity for public reaction and input during the resolution of disputes.¹⁶ Seventh, ADR introduces issues of accountability where ADR services are private and the interests are public.¹⁷ Finally, and most significantly, ADR produces an inferior quality of justice.¹⁸

These concerns are unavailing. ADR qualitatively and quantitatively offers the participants in public policy disputes a better means of issue resolution than the current system. This article addresses each of the concerns raised and concludes that alternatives to litigation serve the public interest and are consistent with the public's growing and legitimate demand for open government and accountability.

II. THE CURRENT SYSTEM OF CIVIL JUSTICE IS BROKEN

The public lacks confidence in our civil justice system.¹⁹ This lack of confidence has its roots in many different areas. The concern may arise from a perceived failure of a bureaucratized judiciary to address the personal and emotional issues unique to domestic relations, from the perception that the system is incapable of adjudicating relatively straightforward contract disputes in a timely manner, or from the idea that the system seems to be designed to maximize inefficiency and the profits of lawyers.²⁰ In any case, public dissatisfaction cannot reasonably be disputed, nor is it wholly without justification. Our courts have been unable to "keep pace with the public's demand for prompt justice at a reasonable cost."²¹ The public perceives that

14. *Id.* (summarizing Leonard M. Ring's view).

15. *Id.* (summarizing Herman's view).

16. David A. Lax and James K. Sebenius, *Three Ethical Issues in Negotiation*, 2 NEGOTIATION J. 363, 368 (1986). "It is often easy to 'solve' the negotiation problem for those in the room at the expense of those who are not." *Id.* "Another line of criticism describes dispute resolution programs as interfering with the public notice benefits of consumer lawsuits and their potential to stimulate major reform campaigns." NANCY H. ROGERS & CRAIG A. MCEWEN, *MEDIATION: LAW, POLICY, PRACTICE* 219 (1989).

17. *Cf.* MICHAEL J. KEATING, JR., *PUBLIC ENDS AND PRIVATE MEANS: ACCOUNTABILITY AMONG PRIVATE PROVIDERS OF PUBLIC SOCIAL SERVICES*, (1985) (discussing the problem of accountability arising from privatization of public social services).

18. See Harry T. Edwards, *Hopes and Fears for Alternate Dispute Resolution*, 21 WIL-LAMETTE L. REV. 425, 438-40 (1985); Eleanor H. Norton, *Bargaining and the Ethic of Process*, 64 N.Y.U. L. REV. 493, 499 (1989).

19. Thomas C. Fischer, *Toward Legal Gridlock?*, 24 NEW ENG. L. REV. 697, 697-99, 703-04 (1990). The public perceives a litigation crisis, whether or not the concern is justified. *Id.* A 1987 Harris poll found that sixty-eight percent of Americans think that people bring more lawsuits than they should. *Id.* at 703 (citing LOUIS HARRIS & ASSOC. STUDY NO. 864014, *PUBLIC ATTITUDES TOWARD THE CIVIL JUSTICE SYSTEM AND TORT LAW REFORM* 21-24 (1987) (available from Louis Harris & Assoc., 630 5th Ave., New York, New York 10111)). Fewer than one-half of those polled thought that the perceived litigation explosion was due to an increase in the number of dangerous products, a greater understanding by citizens of their legal rights, or population growth. *Id.* at 704.

20. *Id.* at 706 (stating that many people blame the "contingent fee system" for stirring up massive amounts of litigation).

21. Frank G. Evans & Robyn F. Galerston, *Private Judging in Texas: A 21st Century Solution to Litigation Costs*, 10 CORP. COUNS. REV. 43, 44 (1991).

most court dockets are in fact backlogged²² and that the length of time to trial is often measured in years, not in days, weeks, or even months. Another concern is the expense of a litigation system in which a litigant need not be poor to be unable to afford a lawyer. Further, concern about a civil justice system in which parties who can afford to litigate win, and parties who cannot afford to litigate lose, is not completely without merit.²³

Regardless of culpability, this failure on the part of the current legal system matters particularly in the context of public policy dispute resolution. The public recognizes that the same rules of evidence and procedure are applied to lawsuits concerning legislative apportionment, environmental protection, public school finance, and prison overcrowding, by the same lawyers and judges with the same crowded dockets as suits concerning common civil disputes. Assuming that restoration of public confidence in the outcome of public policy disputes is a desirable goal, a more general climate of appreciation for our civil justice system is imperative.

At least three reforms can meaningfully improve both the flaws in the system and the public's attitude toward the system and the legal profession. Requiring the delivery of *pro bono publico* services, or at least meaningfully increasing the availability of free or low cost legal services, is one solution.²⁴ Generic "civil justice reform," amending the rules of evidence and discovery to reduce the complexity and the expense of routine litigation, is another important step.²⁵ The third and potentially most meaningful reform is the development and availability of ADR.

22. One commentator has suggested "that by the early 21st century the federal appellate courts alone will decide approximately [one] million cases each year. That bench would include over 5,000 active judges, and the Federal Reporter would expand by more than 1,000 volumes each year." John H. Barton, *Behind the Legal Explosion*, 27 STAN. L. REV. 567, 567 (1975).

23. Jeffrey R. Pankratz, *Neutral Principles and the Right to Neutral Access to the Courts*, 67 IND. L.J. 1091, 1109 (1992) (stating that only those who can afford a lawyer have true access to the courts which are designed to be operated by lawyers).

24. See *Cunningham v. Superior Court*, 177 Cal. App. 3d 336, 222 Cal. Rptr. 854, 867 (Cal. Ct. App. 1986) (holding that compelling an attorney to represent an indigent father without compensation constituted a denial of equal protection of the law); In re Amendments to Rules Regulating the Florida Bar - 1 - 3.1(a) and Rules of Judicial Admin. - 2.065 (Legal Aid), 598 So. 2d 41 (Fla. 1992) (addressing the issue of indigent legal services by approving a voluntary pro bono program); *In re Emergency Delivery of Legal Servs. to the Poor*, 432 So. 2d 39 (Fla. 1983) (The petitioner urged the court to adopt rules imposing mandatory requirements on the Florida Bar members.); Victor Marreno, *Symposium on Mandatory Pro Bono: Committee to Improve the Availability of Legal Services: Final Report to the Chief Judge of the State of New York*, 19 HOFSTRA L. REV. 755, 756 (1991) (suggesting that all members of the New York Bar be required to perform forty hours of pro bono work every two years).

25. See The Civil Justice Reform Act of 1990, ch. 23, §§ 471-482, Pub. L. No. 101-650, 104 Stat. 5090 (codified at 28 U.S.C. §§ 471-482 (Supp. 1992)) (Civil Justice Expense and Delay Reduction Plan) (containing several elements that affect complex litigation); *Box v. Ameritrust Texas, N.A.*, No. 2; 92-CV-0089, 1992 WL 404286, at *5 (E.D. Tex. Dec. 29, 1992) (noting that the District Court for the Eastern District of Texas has implemented a Civil Justice Expense and Delay Reduction Plan pursuant to the Civil Justice Reform Act of 1990); PRESIDENT'S COUNCIL ON COMPETITIVENESS, AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA 11-13 (1991) (recommending fifty specific changes to the current civil litigation system); BROOKINGS TASK FORCE ON CIVIL JUSTICE REFORM, JUSTICE FOR ALL: REDUCING COSTS AND DELAY IN CIVIL LITIGATION 8-29 (The Brookings Institution ed., 1989) (recommending 12 specific procedural changes to the civil litigation system).

III. MEDIATION AND THE RESOLUTION OF PUBLIC POLICY DISPUTES

Non-binding mediation is an appropriate and, indeed, preferable alternative to traditional court system resolution in many public policy circumstances. We do not attempt to define or narrow what is meant by a "public policy dispute"; others have done so.²⁶ However, it is critical to distinguish traditionally binding forms of ADR, such as arbitration, from presumptively non-binding ADR techniques like mediation. Non-binding mediation is the only appropriate ADR process for resolution of most public policy disputes and is the only technique contemplated by these authors. A binding dispute resolution technique "delegates decision making to private individuals and allows only limited governmental review."²⁷ Non-binding mediation avoids "serious constitutional challenge, because although private parties influence the agencies' decisions, government officers retain final authority."²⁸

Although the primary purpose of this article is to advocate the use of mediation to resolve public policy disputes and to address the associated concern that confidential mediation sessions are a threat to open and public government, it is first necessary to briefly address the various loosely-related concerns previously outlined.²⁹ Most of these concerns result from confusion over what the mediation process permits, and arise from a failure to measure non-binding mediation against the only alternative of continued litigation. For example, the most compelling and commonly-cited arguments charge that advocates of ADR are motivated by self-interest³⁰ and label settlement as "a capitulation to the conditions of mass society [that] should be neither encouraged nor praised."³¹ Attacking the motivation of ADR advo-

26. See SUSAN L. CARPENTER & W. J. D. KENNEDY, *MANAGING PUBLIC DISPUTES* 3 (1988).

Disputes over public issues come in all sizes and shapes. They occur between communities and their decision makers, between factions in government, between organizations, and between organizations and the public. Some conflicts erupt into bitter confrontation and rapidly grow worse. Others are chronic disagreements that flare up periodically, then die down and become dormant for a time. . . . Conflicts that are splashed across the morning newspaper or performed live on the evening news are so public and so political that they are hard to resolve by non-adversarial means, but for every confrontation that reaches national attention, there are thousands of smaller, less glamorous controversies that cost people time, money, and anxiety and that readily lend themselves to conflict management techniques.

Id.

27. Harold H. Bruff, *Public Programs, Private Deciders: The Constitutionality of Arbitration in Federal Programs*, 67 *TEX. L. REV.* 441, 443 (1989).

28. *Id.*

29. See *supra* notes 9-18 and accompanying text.

30. See Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 *HARV. L. REV.* 668 (1986). "It appears that some people have joined the ADR bandwagon, without regard for its purposes or consequences, because they see it as a fast (and sometimes interesting) way to make a buck." *Id.* at 668.

31. Owen M. Fiss, *Against Settlement*, 93 *YALE L. J.* 1073, 1075 (1984). Professor Fiss is not opposed to ADR *per se*, but is against all forms of settlement:

I do not believe that settlement as a generic practice is preferable to judgment or should be institutionalized on a wholesale and indiscriminate basis. It should be treated instead as a highly problematic technique for streamlining dockets. Set-

cates and arguing that disagreement is inherently better than agreement reflects cynicism and confusion within the judiciary, academia, and the legal profession at-large about a revolutionary, yet simple, concept.

The absence of a written opinion or judgment does not distinguish a conflict resolved through non-binding mediation from most other cases. Although various statistics are available, the overwhelming percentage of all lawsuits filed in local, state and federal courts in the United States are settled.³² An even higher percentage of suits are resolved without a published judicial opinion.³³ Given the anonymity assigned to the resolution of a majority of all disputes, it seems a bit disingenuous to criticize non-binding mediation for producing the same or similar results in a more timely, efficient, less stressful, and less expensive fashion on the grounds that the process preserves anonymity.

Critics of mediation inappropriately infer that the public is, in some fashion, included in the process of dispute resolution absent mediation.³⁴ The settlement of most disputes occurs, however, in a series of phone calls, letters, meetings, or other events which, by necessity and practicality, are private communications. Under virtually every set of rules of evidence and procedure, such phone conversations, items of correspondence and discussions are confidential and privileged. The public is not included even when the subject of the dispute is public. Non-binding mediation, which is merely the facilitation and the accommodation of a traditional series of communications, is thus falsely accused of being a process that excludes the public more than traditional processes. The communication is confidential not because it occurs in a structured — though usually informal — format, but rather because the communication pertains to a settlement negotiation of any kind.

Non-binding mediation is also erroneously blamed for removing public disputes from any review by those representing the public interest.³⁵ With regard to cases not requiring judicial review, mediation produces the same

tlement is for me the civil analogue of plea bargaining: Consent is often coerced; the bargain may be struck by someone without authority; the absence of a trial and judgment renders subsequent judicial involvement troublesome.

Id.

32. See Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System — And Why Not?*, 140 U. PA. L. REV. 1147, 1212-13 (1992) ("Fewer than 10% of lawsuits require a trial for their resolution."); Theodore Eisenberg & Stewart J. Schwab, *What Shapes Perceptions of the Federal Court System*, 56 U. CHI. L. REV. 501, 532 (1992) (stating that in the federal courts, 73% of all non-civil-rights cases settle); Evans & Galerston, *supra* note 21, at 44 ("In nine out of ten cases, a settlement is reached before a full trial on the merits."); PRESIDENT'S COUNCIL ON COMPETITIVENESS, *supra* note 25, at 7 (noting that over 92% of civil lawsuits settled or otherwise disposed of before trial).

33. See William M. Richman & William L. Reynolds, *Appellate Justice Bureaucracy and Scholarship*, 21 U. MICH. J.L. REF. 623, 632-40 (1988) (discussing the reasons for the increased use of unpublished opinions); Lauren K. Robel, *The Myths of the Disposable Opinion: Unpublished Opinions and Government Litigants in the United States Courts of Appeals*, 87 MICH. L. REV. 940, 955 n.74 (1989) (noting that 61% of federal appeals courts decisions were unpublished).

34. See *Private Dispute Resolution Systems*, *supra* note 12 (summarizing Leonard M. Ring's view).

35. See *supra* notes 16-17 and accompanying text.

result as a case settled without mediation. For the narrow category of cases which require court approval, such as class actions and suits involving the interests of minors, the interests and the practice of judicial review are still assured.³⁶

Parties to mediation of public policy disputes traditionally recognize that any negotiated settlement is contingent upon judicial, legislative, or even public approval. For example, if litigants to a very public dispute over the constitutionality of a state's funding of higher education were able to compromise and negotiate a settlement — either in the traditional fashion or through the process of mediation — one condition of the settlement agreement, presumably, would be legislative approval and adoption of the new funding formula. A second condition of the agreement would be judicial approval of the new formula's constitutionality. Third, the agreement could be conditioned upon voter approval of any necessary constitutional referendum. Though this hypothetical dispute involves a public policy issue in which a settlement is problematic, it does not render a non-binding mediation process inappropriate.

Some have argued that ADR introduces issues of the accountability of the private service provider (the mediator), which are particularly problematic in the public arena.³⁷ Accountability is an appropriate concern in any binding form of ADR. Binding arbitration has been the subject of contractual agreement and judicial interpretation for years in labor-management disputes, particularly when the public interest in preventing disruption in police and fire protection services is at issue.³⁸ These cases highlight the problems associated with the "delegation to 'outsiders' of the authority assigned by the electorate to elected officials, who are subject to the checks and balances of our governmental institutions."³⁹

What is sound in the exercise of judicial power and the quasi-judicial power of the grievance arbitrator, when applied to interest arbitration in the *public* sector, is not consonant with a core concept of a representative democracy: the political power which people possess and confer on their elected representatives is to be exercised by persons responsible (*not independent*) and accountable to the people through the normal processes of the representative democracy.⁴⁰

Accountability 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

36. See Ostermeyer, *supra* note 11, at 27. "Judges have the fundamental responsibility to review all agreements and, if necessary, to conduct hearings to ensure that the agreement is fair to all parties." *Id.* (stating the view of the Hon. Patricia Wald, U.S. Court of Appeals, D.C. Circuit).

37. Cf. KEATING, *supra* note 17, at 6 (discussing the problem of accountability arising from privatization of public social services).

38. See *Dearborn Firefighters Union v. City of Dearborn*, 231 N.W.2d 226 (Mich. 1975); *Harney v. Russo*, 255 A.2d 560 (Pa. 1969).

39. *Dearborn*, 231 N.W.2d at 233.

40. *Id.* at 235 (emphasis added).

care).⁴¹

The concern raised by several commentators that ADR will promote "two tiers" of justice is exemplified by highly theoretical efforts to measure the "quality" of justice.⁴² The overriding problem with the "two tiers" objection is that it assumes that the wealthy do not already enjoy remarkable advantages in obtaining the results they want in litigation.⁴³ The principles of "you get what you pay for" and "money talks," are principles that apply to our current civil justice system. Non-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.

IV. PUBLIC POLICY ADR DOES NOT CONFLICT WITH THE PROVISIONS OF THE TEXAS OPEN RECORDS ACT

A. GENERAL RULE OF DISCLOSURE

The Texas Open Records Act requires that a governmental body make all information available to the public unless that information is specifically exempted from disclosure.⁴⁴

All information collected, assembled, or maintained by or for governmental bodies, except in those situations where the governmental body does not have either a right of access to or ownership of the information, pursuant to law or ordinance or in connection with the transaction of official business is public information and available to the public during normal business hours of any governmental body, with [certain enumerated] exceptions only⁴⁵

Twenty-two specific categories of information are exempted from disclosure under the Act.⁴⁶

B. GOVERNMENTAL BODIES DEFINED

Most municipal and state governmental bodies, as well as quasi-governmental bodies, are subject to the disclosure requirements of the Open Records Act.⁴⁷ The Act does not, however, apply to the judiciary.⁴⁸ Thus if

41. See KEATING, *supra* note 17, at 6.

42. See Edward Brunet, *Questioning the Quality of Alternative Dispute Resolution*, 62 TUL. L. REV. 1 (1987); Edwards, *supra* note 30; Fiss, *supra* note 31; DAVID LUBAN, *THE QUALITY OF JUSTICE* (Institute for Legal Studies Working Paper 8-6, 1988) (summarizing issues raised at a workshop identifying and measuring quality in dispute resolution processes and outcomes).

43. See JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 59-62 (1976).

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

45. *Id.*

46. *Id.*

47. See Tex. Att'y Gen. ORD-563 (1990) (finding the Texas Guaranteed Student Loan Corporation a "governmental body" within the meaning of the Open Records Act); Tex. Att'y Gen. ORD-602 (1992) (finding the Dallas Museum of Art a "governmental body" under the Act only to the extent it receives city and state financial assistance, and documents need only be provided related to those museum activities that receive such assistance).

48. TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 2(1)(H) (Vernon Supp. 1993); see Tex.

mediation is ordered, clearly indicating that the mediator serves under the authority and direction of a court, a strong argument can be made that all records received and stored by the mediator during the negotiation process fall outside the scope of the Open Records Act. As a practical matter, the mediator may choose not to maintain any records related to the negotiations.

C. INFORMATION EXEMPT FROM DISCLOSURE

1. *Matters Deemed Confidential by Other Law*

Section 3(a)(1) of the Open Records Act protects from required public disclosure, "information deemed confidential by law, either Constitutional, statutory, or by judicial decision."⁴⁹ The scope of protection, therefore, is determined solely by reference to the express terms of confidentiality provisions found outside the Act. Statutory confidentiality must, however, be express.⁵⁰

Numerous Texas statutes provide confidentiality. Section 34.08 of the Texas Family Code prohibits public disclosure of child abuse and neglect investigations carried out by the Department of Human Services and maintained in the department's licensing files.⁵¹ The Family Educational Rights and Privacy Act exempts "education records" from disclosure.⁵² Executive sessions authorized under the Open Meetings Act⁵³ also appear to be exempt from the Open Records Act. In Open Records Decision No. 330, the Attorney General concluded that Section 2(g) of the Open Meetings Act, a section authorizing an executive session, may be taken with Section 3(a)(1) of the Open Records Act as authority for withholding a transcript of an executive session, as long as the session was called and conducted in compliance with the Open Meetings Act.⁵⁴ The Open Meetings Act was amended in 1987 to provide expressly that the audio tape or certified agenda of a properly closed session is confidential.⁵⁵

Att'y Gen. ORD-572 (1990) (Although Bexar County Personal Bond Program is a governmental body subject to the Act, when investigating and preparing reports pursuant to TEX. CODE CRIM. PROC. ANN. art. 17.42, § 1 (Vernon Supp. 1993), the program functions as an arm of the court and information collected is exempt from disclosure.)

49. TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 3(a)(1) (Vernon Supp. 1993).

50. See Tex. Att'y Gen. ORD-573 (1990) (finding that the evidentiary privilege accorded information submitted to the Insurance Commissioner pursuant to section 11 of article 21.07-1 of the Texas Insurance Code does not render such information confidential for purposes of the Open Records Act).

51. See Tex. Att'y Gen. ORD-587 (1991).

52. See Tex. Att'y Gen. ORD-539 (1990) (finding that portions of a tape recorded interview between officials of Texas A&M University and a former student concerning the student's recruitment by the university and the student's attendance exempt from disclosure).

53. See *infra* notes 67-68 and accompanying text.

54. See Tex. Att'y Gen. ORD-330 (1982).

55. See TEX. REV. CIV. STAT. ANN. art. 6252-17, § 2A(h) (Vernon Supp. 1993).

2. *Attorney-Client Privilege and Court Order*

Records falling within the traditional concept of the attorney-client privilege also are excepted from the Open Records Act:

[m]atters in which the duty of the Attorney General of Texas or an attorney of a political subdivision, to his client, pursuant to the Rules and Canons of Ethics of the State Bar of Texas are prohibited from disclosure, or which by order of a court are prohibited from disclosure⁵⁶

This exception contains two different components: protection of the attorney-client privilege and recognition of protection from disclosure granted by court orders.

3. *Litigation Exception*

The Open Records Act contains a "litigation exception":

information relating to litigation of a criminal or civil nature and settlement negotiations, to which the state or political subdivision is, or may be, a party, or to which an officer or employee of the state or political subdivision, as a consequence of his office or employment, is or may be a party, that the attorney general or the respective attorneys of the various political subdivisions has determined should be withheld from public inspection⁵⁷

This exception authorizes governmental bodies to deny requests for information relating to pending or "reasonably anticipated" litigation involving a governmental entity or its officers or employees as well as information relating to settlement negotiations involving such litigation.⁵⁸ While Section 3(a)(7) of the Act protects communications within the attorney-client privilege from disclosure under the Open Records Act, that provision does not exempt attorney work product from disclosure. Such information may be exempted from disclosure under the Section 3(a)(3) "litigation exception" if the requirements of that section are met.⁵⁹

D. THE ACT'S DISCLOSURE REQUIREMENTS DO NOT CONFLICT WITH THE CONFIDENTIALITY OF ADR

The Texas Civil Practice and Remedies Code provides, in relevant part:

56. TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 3(a)(7) (Vernon Supp. 1993). Since not all communications between attorney and client contain client confidences or attorney advice, not all communications are privileged. See Tex. Att'y Gen. ORD-589 (1991) (finding that attorney fee bills may be withheld under section 3(a)(7) of the Act only if they reveal client confidences or attorney advice).

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

58. See *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Tex. Att'y Gen. ORD-588 (1991) (finding that information related to a contested case before an administrative agency is "information relating to litigation" within section 3(a)(3) of the Open Records Act).

59. Tex. Att'y Gen. ORD-574 (1990) (overruling Open Records Decision No. 304 (1982) to the extent that it conflicts with this decision); see Tex. Att'y Gen. ORD-575 (1990) (Work product, investigative, or other "discovery privileges" must qualify under the "litigation exception" of section 3(a)(3) of the Act or must otherwise be disclosed.).

Unless the parties agree otherwise, all matters, including the conduct and demeanor of the parties and their counsel during the settlement process, are confidential and may never be disclosed to anyone, including the appointing court.⁶⁰

Any record made at an alternative dispute resolution proceeding is confidential. The participants or the third party facilitating the procedure may not be required to testify or be subject to process requiring disclosure of confidential information in any proceedings relating to the dispute.⁶¹

The parties to public policy ADR may agree that certain information discussed be disclosed to the public in order to enhance the prospects for legislative or executive approval of the negotiated settlement.⁶² Furthermore, in the likely event that the information discussed would be discoverable by the participants or third parties independent of the ADR communication, the information is not subject to the statutory confidentiality requirements.⁶³ To the extent that information is within the scope of the ADR confidentiality statute, however, that information is expressly exempted from the disclosure requirements of the Open Records Act.⁶⁴ Additionally, a second basis for disclosure exemption exists for information that comes from a source that is confidential pursuant to other laws.⁶⁵ Finally, when public policy ADR is ordered by the judiciary or is conducted with an eye toward litigation, the disclosure requirements of the Open Records Act do not apply.⁶⁶

V. MEDIATION OF PUBLIC POLICY DISPUTES IS NOT PRECLUDED BY THE OPEN MEETINGS ACT

A. GENERAL RULE OF THE OPEN MEETINGS ACT

The Texas Open Meetings Act generally requires that "every regular, special, or called meeting or session of every government body shall be open to the public."⁶⁷ The "quorum" necessary to conduct such a meeting requires a majority of the governmental body unless otherwise provided by law.⁶⁸

B. "GOVERNMENTAL BODIES" SUBJECT TO THE ACT

The state and local governmental bodies subject to the Texas Open Meetings Act are defined as broadly as possible and include any "deliberative body having rule-making or quasi-judicial power."⁶⁹ As with the Open Records Act, the Open Meetings Act does not extend to the judicial branch

60. TEX. CIV. PRAC. & REM. CODE ANN. § 154.053(c) (Vernon Supp. 1993).

61. *Id.* § 154.073(b).

62. *Id.* § 154.053(c).

63. *Id.* § 154.073(c).

64. TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 3(a)(1) (Vernon Supp. 1993) (exempting "information deemed confidential by law, either Constitutional, statutory, or by judicial decision").

65. *See* TEX. FAM. CODE ANN. § 34.08 (Vernon Supp. 1992) (applying to child abuse/neglect investigations by Department of Human Services).

66. TEX. REV. CIV. STAT. ANN. art. 6252-17a, §§ 3(a)(3), (a)(7) (Vernon Supp. 1993).

67. TEX. REV. CIV. STAT. ANN. art. 6252-17, § 2(a) (Vernon Supp. 1993).

68. *Id.* §§ 1(a), (d).

69. *Id.* § 1(c).

of government.⁷⁰ As an example of the broad application of the Act to governmental bodies, the Act was amended effective January 1, 1992, to expressly apply to non-profit water or wastewater districts under Article 1434a of the Texas Revised Civil Statutes.⁷¹

C. EXEMPTIONS FROM OPEN MEETINGS ACT

The Open Meetings Act exempts from its provisions a number of different types of meetings and communications, including closed or executive meetings or sessions, attorney-client communications, settlement offers, and meetings to evaluate, appoint, discipline, or dismiss a public officer or employee.⁷² A few important exceptions to the Act follow.

1. *Closed or Executive Meetings Sessions*

The Open Meetings Act authorizes closed or executive sessions or meetings to address any of the subject matters otherwise exempted under the Act.⁷³ Before a closed or executive meeting may be held, a quorum of the governmental body must first convene in an open meeting, publicly announce the intended closed meeting and specify the section or sections of the Act that allow for the closed session.⁷⁴ Any interested person may then seek an injunction or writ of mandamus for the purpose of preventing or reversing a violation of the Act.⁷⁵

2. *Litigation Exception*

Section 2(e) of the Act provides that:

[p]rivate consultations between a governmental body and its attorney are not permitted except in those instances in which the body seeks the attorney's advice with respect to pending or contemplated litigation, settlement offers, and matters where the duty of a public body's counsel to his client, pursuant to the Code of Professional Responsibility of the State Bar of Texas, clearly conflicts with this Act.⁷⁶

The Texas Attorney General has held that an administrative agency may conduct proceedings involving disputed claims of privilege or confidentiality of documents *in camera* in contested administrative proceedings.⁷⁷ The Attorney General based his decision upon an exception to the Open Meetings Act found in the Administrative Procedure and Texas Register Act.⁷⁸ The Attorney General held that "the contested case procedural requirements in the Administrative Procedure and Texas Register Act . . . creates an excep-

70. *Id.*

71. *Id.*

72. TEX. REV. CIV. STAT. ANN. art. 6252-17, § 2 (Vernon Supp. 1993).

73. *Id.* § 2(a).

74. *Id.*; see *Rogers v. State Bd. of Optometry*, 619 S.W.2d 603, 606, (Tex. Civ. App.—Eastland 1981, no writ).

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

76. *Id.* § 2(e).

77. Op. Tex. Att'y Gen. No. JM-645 (1987).

78. *Id.*; see also TEX. REV. CIV. STAT. ANN. art. 6252-13a (Vernon Supp. 1993).

tion to the Texas Open Meetings Act with regard to contested cases."⁷⁹

D. THE OPEN MEETINGS ACT DOES NOT PRECLUDE CONFIDENTIAL ADR

The public policy ADR methodology contemplated by the authors includes a ratification process by the appropriate executive or judicial authority. To the extent that the mediation is court-ordered, the Act does not apply at all.⁸⁰ Outside the litigation context, the Open Meetings Act would be implicated only by mediation attended by a majority of the governmental body members.⁸¹ Even in that instance, however, the mediation could be conducted as a closed meeting or session so long as proper notice is given and the agenda descriptions do not threaten to violate the general rule of confidentiality attending ADR. In fact, the agenda is only discoverable pursuant to court order in an action brought under the Act.⁸²

VI. PUBLIC POLICY ADR DOES NOT CONFLICT WITH THE OPEN COURTS PROVISION OF THE TEXAS CONSTITUTION

Mediation of public policy disputes does not conflict with the open courts provision of the Texas Constitution, which provides that "[all] courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law."⁸³ In *Sax v. Vottele*⁸⁴ the Texas Supreme Court established a two-part test to determine whether or not the open courts provision of the Texas Constitution has been violated. First, the litigant must have a "cognizable common law cause of action that is being restricted."⁸⁵ Second, the restriction must be "unreasonable or arbitrary when balanced against the purpose and basis of the statute."⁸⁶

The Texas Supreme Court has utilized the *Sax* test often in passing upon open courts complaints. In *Moreno v. Sterling Drug, Inc.*⁸⁷ the court determined that the two year statute of limitations on wrongful death actions does not violate the open courts provision.⁸⁸ In *Lucas v. United States*⁸⁹ the supreme court determined that a statutory ceiling on medical malpractice damages did violate the open courts provision.⁹⁰ In *LeCroy v. Hanlon*⁹¹ the court found that a statute providing that a portion of a court clerk filing fee

79. Op. Tex. Att'y Gen. No. JM-645 (1987).

80. TEX. REV. CIV. STAT. ANN. art. 6252-17, § 1(c) (Vernon Supp. 1993).

81. *Id.* § 1(a),(c).

82. *See id.* §§ 2A, 3A; TEX. CIV. PRAC. & REM. CODE ANN. § 154.053 (Vernon Supp. 1993).

83. TEX. CONST. art. I, § 13.

84. 648 S.W.2d 661 (Tex. 1983).

85. *Id.* at 666.

86. *Id.*

87. 787 S.W.2d 348 (Tex. 1990).

88. *Id.* at 355-57.

89. 757 S.W.2d 687 (Tex. 1988).

90. *Id.* at 690.

91. 713 S.W.2d 335 (Tex. 1966).

go to the state general revenue fund violated the open courts provision.⁹²

An argument can be made that mandatory mediation, by statute or court order, as a prerequisite to bringing or trying a civil action constitutes a "restriction" on a cognizable common law cause of action.⁹³ It is unlikely, however, that the supreme court would determine that any such restriction is "unreasonable or arbitrary when balanced against the purpose and basis of the statute."⁹⁴

VII. CONCLUSION

Regardless of whether the public policy dispute is the subject of pending litigation or can be "reasonably anticipated" to be its subject, non-binding mediation does not run afoul of the Texas Open Meetings or Open Records statutes. The authors contemplate that any mediated resolution of a public policy dispute ultimately will be reviewed by either a court, a legislative body, the public, an executive authority, or a combination of the above. Information that could be discovered independent of the mediated negotiations themselves may be revealed to the reviewing body, and the parties to the mediation simply must make a determination as to whether or not approval of the negotiated settlement can be obtained while preserving the confidentiality of matters that otherwise could not have been discovered by the parties. Once the dynamics of a mediation have contributed to an agreement subject to review, however, the interests of all parties, including those represented by the reviewing body, should be sufficiently addressed to ensure, in most instances, that the required approval will be obtained.

More sophistication and experience with ADR in the public arena, in environmental litigation, consumer litigation, and other areas involving the public interest, will generate more acceptance of ADR throughout the legal profession. Whether or not the profession, including the judiciary and academia, thoroughly acknowledge the benefits of ADR, the public itself will require the widespread application of ADR techniques to a whole range of civil disputes.

92. *Id.* at 342.

93. See *Lucas*, 757 S.W.2d at 691-92 (finding that a statute need not abolish a cause of action in order to run afoul of the open courts provision).

94. *Sax*, 648 S.W.2d at 666; see Op. Tex. Att'y Gen. No. DM-3 (1991) (opining that Chapter 64 of the Texas Agriculture Code, requiring appealable arbitration of planting claims between farmers and vegetable seed sellers as a prerequisite to a civil action, does not violate the second prong of the *Sax* test).