Secret Justice:

Alternative Dispute Resolution

Fall 2001

The Reporters Committee
For Freedom of the Press

As the court system moves more and more cases to settlements through various "alternative dispute resolution" programs, the public and the press run the risk of being shut out of the process. And in controversial cases, where a manufacturer's product could be causing serious harm to consumers, the incentives are even greater for litigants to follow the ADR route. But courts have given the press some access to ADR, and there are solid arguments in favor of such access.

Secret Justice:
A continuing series

The American judicial system has, historically, been open to the public, and the U.S. Supreme Court has continually affirmed the presumption of openness. However, as technology expands and as the perceived threat of violence grows, individual courts attempt to keep control over proceedings by limiting the flow of information. Courts are reluctant to allow media access to certain cases or to certain proceedings, like jury selection. Courts routinely impose gag orders to limit public discussion about pending cases, presuming that there is no better way to ensure a fair trial. Many judges fear that having cameras in courtrooms will somehow interfere with the decorum and solemnity of judicial proceedings. Such steps, purportedly taken to ensure fairness, may actually harm the integrity of a trial because court secrecy and limits on information are contrary to the fundamental constitutional guarantee of a public trial.

The public should be the beneficiary of the judicial system. Criminal proceedings are instituted in the name of "the people" for the benefit of the public. Civil proceedings are available for members of the public to obtain justice, either individually or on behalf of a "class" of persons similarly situated. The public, therefore, should be informed — *well* informed — about trials of public interest. The media, as the public's representative, needs to be aware of threats to openness in court proceedings, and must be prepared to fight to insure continued access to trials.

In this series, the Reporters Committee takes a look at key aspects of court secrecy and how they affect the newsgathering process. We will examine trends toward court secrecy, and what can be done to challenge it.

The first article in this "Secret Justice" series, published in Fall 2000, concerned the growing trend of anonymous juries. The second installment, published in Spring 2001, covered gag orders on participants in trials.

This report was researched and written by Ashley Gauthier, who is the 2001-2002 McCormick-Tribune Legal Fellow at the Reporters Committee.

What is ADR?

Alternative Dispute Resolution (ADR) is the general name given to a variety of procedures available to parties in civil cases to resolve their disputes before a formal trial.

The main types of ADR are:

Mediation:

In mediation, a neutral third party helps the parties come to an agreement about how to resolve the case. The mediator has no authority to impose a solution on the parties. Instead, he goes back and forth between sides to help them come to an understanding about how the case could be resolved to their mutual satisfaction. A mediator can be helpful in helping parties evaluate their case realistically, as the mediator can point out which facts or arguments he believes or rejects. When courts order parties to try ADR, they most often order mediation.

***Non-mediated settlement*:**

This process is where the parties negotiate with each other without the help of a third party to come to a mutually satisfactory resolution of the case. This process is not ordered or overseen by a court and, therefore, is a private, rather than public, process. However, the settlement agreement might become a public record if (a) one of the parties is a public entity or (b) the agreement is submitted to the court for approval or enforcement. Private settlement agreements are rarely given to a court for approval unless a state statute requires it. For example, many states require that any settlement involving a minor be submitted to a court for approval to ensure that the minor's interests are protected.

Summary jury trial or mini trial:

These procedures permit parties to present their case to a judge or jury, which issues a non-binding opinion or verdict. The opinion or verdict is then used by the parties as a basis for settlement discussions. It helps the parties see what might happen at a trial or what other people might think about the facts and evidence.

Arbitration:

In arbitration, the parties authorize a neutral third party (or panel) to decide the outcome of their dispute. The process is similar to a trial in the sense that each side presents facts and arguments to the decision maker(s), but it is different because the rules of evidence do not apply and the arbitrator(s) need not adhere exactly to the law.

Why do parties use ADR?

The primary motivations for ADR are to save money and control risk. Preparing for trial is extremely expensive, and parties can save money if they can resolve the case without having to incur the expense of trial preparation. Also, when parties settle cases, they have some control over the outcome of the case in that they can negotiate for terms of the settlement. If a lawsuit goes to trial, the outcome of the case is left entirely in the hands of the judge or jury. Parties cannot control the risk of losing at trial. ADR gives parties a chance to control that risk.

In some cases, privacy or confidentiality may be a factor. Most litigants think of ADR as private, and thus, if they seek secrecy, they may be motivated to try ADR. However, in many cases, confidentiality is not a major concern. Nevertheless, lawyers put confidentiality clauses into settlement agreements as a matter of habit, even if confidentiality was not specifically negotiated. Thus, settlements are usually secret merely by virtue of routine.

It should also be noted that, in the last decade or so, courts have developed rules that *require* parties to try ADR, usually mediation, before trial. Mandatory ADR has become popular because it helps unclog the court system and because most cases can settle once the parties have undertaken discovery and understand what evidence exists. Most experienced litigation lawyers can fairly assess whether they can win a case and how much the case is worth, although they know that anything could happen at trial, and they would prefer to settle for a fair amount than risk a terrible verdict. But court-ordered conferences raise the issue of whether those conferences should be deemed public hearings, especially when they are run by a court magistrate.

In 1998, Congress passed the Alternative Dispute Resolution Act which orders federal courts to use ADR as a means of unburdening the federal court caseload. Each district court is required to promulgate rules that "require that litigants in all civil cases consider the use of an alternative dispute resolution process at an appropriate stage in the litigation." In most jurisdictions, parties are required to attend a settlement conference at least once prior to trial. The statute also mandates that "each dis-

trict court shall . . . provide for the confidentiality of the alternative dispute resolution processes and to prohibit disclosure of confidential dispute resolution communications." The statute does not describe how the courts should accommodate First Amendment concerns.

Can ADR be kept secret?

Success in challenging the secrecy of ADR will depend on a few factors:

1. Whether you are seeking access to the ADR proceeding itself or only to documents;

2. What type of ADR proceeding it is;

3. Whether documents were ever filed with, presented to or enforced by a court, and;

4. Whether the litigants are private or public entities.

If you seek access to the ADR proceeding itself, it probably will not be granted. Most courts believe that ADR works only if the parties feel free to say whatever they want without fear of it being reported or used against them later. In fact, there is a rule of evidence in every jurisdiction that prevents parties from using confidential statements made in ADR proceedings from being used as evidence later. This policy was developed to encourage honesty during ADR. Following this belief, courts have ruled that there is no right of access to summary jury trials or settlement proceedings. *See U.S. v. Glens Falls Newspapers Inc.* (2nd Cir.); *In re Asbestos Products Liability Litigation* (E.D. Pa., listed below under 3d Cir.); *Cincinnati Gas & Elec. Co. v. General Elec. Co.* (6th Cir.); *In re Cincinnati Enquirer* (6th Cir.); *CMS Enterprise Group v. Ben & Jerry's Homemade, Inc.* (Pennsylvania).

If you seek access only to settlement documents, then you may have a better

Secret settlements in hazardous cases

Secret settlements have been scrutinized over the past year, mostly due to the infamous Ford-Firestone lawsuits involving people injured or killed in rollover accidents blamed on defective tires.

But the secrecy issues in those cases are different from the question of access to settlements in general. In cases discussed elsewhere in this report, the issue focuses on whether the press or public are entitled to access alternative dispute resolution proceedings or documents, such as settlement agreements. In many of the "public hazard" cases, however, the issue is whether *other* documents, such as pleadings or discovery materials, can be sealed as a condition of settlement. The analysis of legal issues relating to those other documents is often different from the analysis of whether there is access to the ADR proceedings themselves.

A few states have rules that allow access to settlement agreements and other materials in cases that present public safety issues. Texas Rule of Civil Procedure 76a was one of the first such rules, and it remains one of the broadest. It allows access to unfiled settlements and unfiled discovery as well as documents filed with the court. It also allows third parties, like the media, to intervene.

It is still possible to seal a record in Texas, but a party must meet two hefty requirements. First, a court must balance the presumption of openness and the public's interest in the records against a specific and substantial interest a party may have for sealing the records. The records cannot be sealed unless some significant interest outweighs the interest in keeping the records open. Second, the court must find that there is no less restrictive means to protect the privacy interest asserted by the party.

Other states that have passed antisecrecy rules are Virginia, North Carolina, New York, Oregon, Georgia and Florida, but their statutes are not as broad as the Texas rule.

The Virginia statute allows plaintiffs' attorneys to share information, but it does not allow information to be released to the public. *(Va. Code Ann. 8.01-420.01(A))*

The North Carolina and Oregon statutes apply only to settlements involving the government, not private companies. *(N.C. Gen Stat. 132-1.3(b)(2); Or. Rev. Stat. 30.402)*

The New York statute allows records to be sealed upon a showing of "good cause," but the standard is fairly loose and not sufficient to protect the public interest. *(N.Y. Ct. R. 216.1(a))*

The Georgia rule applies only to documents filed with the court and does not allow third-party intervention. *(Ga. Unif. Super. Ct. R. 21)*

The Florida rule applies only to court orders and judgments, but it does allow third-party intervention. *(Fla. Stat. Ann. 69.081)*

Last year, California's Judicial Council amended its Rules of Court to spell out the conditions that must be met before a document may be sealed. The rule has made it more difficult for records to be sealed, but it does not specifically grant access to unfiled documents in public hazard cases. *(Cal. Rule of Court 243.1)* This year, the legislature considered a bill that would have banned secret settlements in cases involving public hazards, but the bill failed in the last legislative session. *(A.B. 36, S.B. 11)*

Arizona also considered a bill that would have limited the abilities of parties to enter into secret settlements in public hazard cases. The bill failed after substantial lobbying by business interests. *(Arizona S.B. 1530)*

Similarly, Nevada rejected a bill that would have made public any settlement that concealed a public danger. *(Nevada S.B. 411)*

Despite the lack of media-friendly legislation, sealing orders can usually be challenged when parties try to seal court records as a condition of settlement. An oft-cited case in this area is *Brown v. Advantage Engineering Inc.*, 960 F.2d 1013 (11th Cir. 1992).

In *Brown*, the U.S. Court of Appeals in Atlanta (11th Cir.) held that a district court had abused its discretion in sealing a court record as a condition of a settlement without finding that there were extraordinary circumstances that required sealing.

The appellate court said, "It is immaterial whether the sealing of the record is an integral part of a negotiated settlement between the parties, even if the settlement comes with the court's active encouragement. Once a matter is brought before a court for resolution, it is no longer solely the parties' case, but also the public's case. Absent a showing of extraordinary circumstances . . . the court file must remain accessible to the public."

Thus, the media should make efforts to challenge sealing orders, as courts may find the sealing orders erroneous on their own.

chance of obtaining access. The primary factors will be whether those documents were ever filed with, presented to or enforced by a court and whether the litigants are private or public entities.

If a settlement agreement was made in private between two private parties and was never submitted to a court for any reason, then the chances of obtaining access are minimal. Under those circumstances, the settlement agreement is not a "court record" because it was never in the court's possession. The court does not have an agreement to provide to the public, and it would have no reason to force a private party to turn over the document in its private possession. *See Enprotech Corp. v. Renda* (3d Cir.).

If a settlement agreement were submitted to the court for either approval or enforcement, then the agreement would likely be considered to be a "court record" subject to disclosure. *See Bank of America Nat'l Trust & Sav. Ass'n v. Hotel Rittenhouse Assocs.* (3d Cir.); *SEC v. Van Waeyenberghe* (5th Cir.); *Union Oil Co. of Calif. v. Leavell* (7th Cir.); *EEOC v. The Erection Co.* (9th Cir.); *In re Marriage of Johnson* (Illinois).

However, settlement agreements are generally not required to be submitted to a court for approval. Usually, court approval is required only in limited circumstances, such as when one of the parties is a minor. *See Duggan v. Koenig* (Alaska); *C.L. v. Edson* (Wisconsin); *Schnell v. Farmers Insurance Exchange* (Wisconsin).

Otherwise, the parties merely file a joint motion to dismiss with the court, explaining that the dispute has been resolved between the parties and court action is no longer necessary.

If a public entity is a party to the agreement, then a court could rule that the document must be disclosed pursuant to the First Amendment or an open records law, in spite of confidentiality provisions. *See Society of Professional Journalists v. Briggs* (D. Utah — listed below under 10th Cir.); *Anchorage Sch. Dist. v. Anchorage Daily News* (Alaska); *Copley Press, Inc. v. Superior Court* (California); *Register Div. of Freedom Newspapers, Inc. v. County of Orange* (California); *Lesher Communications, Inc. v. Contra Costa County* (California); *The Tribune Co. v. Hardee* (Florida); *Helen, Georgia v. White County News* (Georgia); *State ex rel. Findlay Pub. Co. v. Hancock Cty. Bd. of Comm'rs.* (Ohio); *State ex rel. Sun Newspapers v. Westlake Board of Education* (Ohio); *Morning Call, Inc v. Housing Authority of City of Allentown* (Pennsylvania).

However, at least one court has found that settlements are protected by exceptions that keep secret records pertaining to litigation. *See Tuft v. City of St. Louis* (Missouri).

And the U.S. Court of Appeals in New York (2d Cir.) has consistently denied access to settlement agreements merely because it thought the interest in confidentiality outweighed the public's right of access. *See U.S. v. Glens Falls Newspapers Inc.*; *City of Hartford v. Chase*; *In re Franklin Nat. Bank Securities Litigation*.

Cases discussing access to ADR are compiled below. The cases are sorted by jurisdiction for practitioners to see what cases govern in their area. Also, cases allowing access are marked with a "+" and cases denying access are marked with a "-".

Cases concerning public access to alternative dispute resolution

Federal cases:

(Federal district court cases are included within their circuit.)

Second Circuit

- *U.S. v. Glens Falls Newspapers Inc.*, 160 F.3d 853 (2nd Cir. 1998) (settlement negotiations and agreements do not have to be released to the public because the need for a fair and efficient resolution of the case outweighs the negligible presumption of access to settlement materials).
- *City of Hartford v. Chase*, 942 F.2d 130 (2nd Cir. 1991) (confidentiality order that was predicate for settlement cannot be subsequently modified by trial court; confidentiality order operates to bar disclosure of city records and provides defense to state public records act).
- *Palmieri v. State of N.Y.*, 779 F.2d 861 (2d Cir. 1985) (State sought access to settlement agreement and information regarding that agreement; held that it was erroneous to modify sealing order absent express finding of improvidence of magistrate's initial grant of protective orders or extraordinary circumstances or compelling need by state for information).
- *U.S. v. Town of Moreau, N.Y.*, 979 F.Supp. 129 (N.D.N.Y. 1997) (newspaper and reporter were not entitled to access to settlement negotiation information).
- *In re Franklin Nat. Bank Securities Litigation*, 92 F.R.D. 468 (E.D.N.Y. 1981) *aff'd sub nom. FDIC v. Ernst & Ernst*, 677 F.2d 230 (2d Cir.1982) (holding that settlement will remain sealed despite strong public interest in the case because settlement would not have been reached without secrecy provision).

Third Circuit

+ *Bank of America Nat'l Trust & Sav. Ass'n v. Hotel Rittenhouse Assocs.*, 800 F.2d 339 (3d Cir. 1986) (reversing order denying access to settlement agreement and related motions).
- *Enprotech Corp. v. Renda*, 983 F.2d 17 (3d Cir. 1993) (order denying motion to compel production of settlement agreement is not appealable when settlement had not been filed with the court, compliance with terms and conditions of the settlement agreement had not been ordered by the court, and no order for enforcement of agreement had been sought).
- *In re Asbestos Products Liability Litigation*, 1991 WL 170827, 19 Media L. Rep. 1220 (E.D. Pa. 1991) (denying media access to pretrial conference where settlement options may be discussed; stating that settlement has historically been private and closed to the press and public).

Fourth Circuit

+ *Boone v. Suffolk*, 79 F. Supp. 2d 603 (E.D. Va. 1999) (there is no First Amendment or statutory right of access to settlement agreements in civil cases, but common law right of access required settlement agreement to be unsealed).
+ *Ex parte Knight Ridder, Inc.*, 982 F.Supp. 1080 (D.S.C. 1997) (settlement agreement was judicial record to which right of public access existed under common law and First Amendment).

Fifth Circuit

+ *SEC v. Van Waeyenberghe*, 990 F.2d 845 (5th Cir. 1993) (presumptive right of access to settlements; lower court failed to balance right of access with interest in sealing).

Sixth Circuit

- *Cincinnati Gas & Elec. Co. v. General Elec. Co.*, 854 F.2d 900 (6th Cir. 1988) (no right of access to summary jury trial because it is analogous to a settlement conference).
- *In re Cincinnati Enquirer*, 94 F.3d 198 (6th Cir. 1996) (newspaper failed to demonstrate First Amendment right of access to summary jury trial in class action arising from prison riots).

Seventh Circuit

+/- *Union Oil Co. of Calif. v. Leavell*, 220 F.3d 562 (7th Cir. 2000) (finding that settle-

ment agreement and other court records should not be sealed because court records should be open to the public, but also noting that parties who want secrecy should "opt for arbitration").

- *B.H. v. McDonald*, 49 F.3d 294 (7th Cir. 1995) (there was no public right of access to in-chambers conferences concerning implementation of consent decree).

+ *Arkwright Mut. Ins. v. Garrett & West, Inc.*, 782 F.Supp. 376 (N.D.Ill. 1991) (settlement would not be sealed absent compelling argument for secrecy).

Ninth Circuit

+ *EEOC v. The Erection Co.*, 900 F.2d 168, 17 Media L. Rep. 1667 (9th Cir. 1990) (reversing sealing of consent decree for failure of court to articulate any findings for closure order).

+ *U.S. ex rel. McCoy v. California Medical Review, Inc.*, 133 F.R.D. 143 (N.D.Cal. 1990) (good cause did not exist to hold settlement hearing in secret or to seal briefs related to the hearing).

Tenth Circuit

+/- *Daines v. Harrison*, 838 F.Supp. 1406 (D.Colo. 1993) (holding that magistrate abused his discretion in ordering that terms of settlement agreement between sheriff's department and dismissed deputy be kept confidential, since secrecy surrounding disbursement of public funds was contrary to public policy and parties had not demonstrated an interest favoring confidentiality that would outweigh interests favoring disclosure; however, the agreement never was part of the court's records and thus it is beyond court's authority to order disclosure of the settlement; stated that petitioners must follow procedures in Colorado Open Records Act to obtain settlement agreement).

- *Resolution Trust Corp. v. Hess*, 859 F.Supp. 1411 (D.Utah 1994) (court ruled that congressional committees were not entitled to discover financial information confidentially obtained by RTC during settlement negotiations).

+ *Society of Professional Journalists v. Briggs*, 675 F. Supp. 1308 (D. Utah 1987) (settlement agreement resolving lawsuit that involved allegations of county officials' misconduct is public document to which First Amendment right of access applies).

Eleventh Circuit

+ *Pansy v. Stroudsburg*, 23 F.3d 772 (11th Cir. 1994) (settlement agreement that was never filed with, interpreted or enforced by a federal district court was held not to be a "judicial record" under the right of access doctrine, even though the court issued an order sealing the terms of the agreement; however, the sealing of the agreement should be made only upon a showing of good cause; any showing that the records would be available under a relevant open records law mandates a strong presumption against an order of confidentiality; case remanded).

+ *Mullins v. Griffin*, 886 F. Supp. 21 (N.D. Ga. 1995) (court deletes restriction on disclosure of terms of settlement from consent order).

D.C. Circuit

+ *E.E.O.C. v. National Children's Center, Inc.*, 98 F.3d 1406 (D.C. Cir. 1996) (consent decree in sexual harassment suit should not have been sealed, in light of strong public interest in disclosure).

State cases:

Alaska

+ *Anchorage Sch. Dist. v. Anchorage Daily News*, 779 P.2d 1191 (Alaska 1989) (settlement documents involving school district must be disclosed despite confidentiality clause because the policy of encouraging settlements by ensuring confidentiality was outweighed by the policy favoring disclosure of public records).

-/+ *Duggan v. Koenig*, 14 Media L. Rep. 2242 (Alaska Superior Ct. 1987) (newspaper had right of access to some information in sealed settlement resolving lawsuit filed by minors who were alleged victims of sexual assault; paper could obtain total value of settlement amount and ranges of settlement payments, but actual documents and information about identities, injuries and specific facts about assaults would remain sealed).

Arkansas

+ *Arkansas Best Corp. v. General Elec. Capital Corp.*, 878 S.W.2d 708 (Ark. 1994) (finding that public had right of access to settlement agreement).

California

+ *Copley Press, Inc. v. Superior Court*, 74 Cal. Rptr. 2d 69 (Cal. App. 1998) (news media has right of access to the amount of a settlement reached between a school district and a student who was sexually assaulted on school property).

+ *Register Div. of Freedom Newspapers, Inc. v. County of Orange*, 205 Cal.Rptr. 92 (Cal.App. 1984) (requiring county to disclose documents from settlement of claim brought by county jail inmate).

+ *Lesher Communications, Inc. v. Contra Costa County*, 21 Media L. Rep. 1879 (Cal. Superior Ct. 1993) (Public Records Act required disclosure of settlement files in case against county).

Colorado

- *Pierce v. St. Vrain Valley School Dist.*, 981 P.2d 600 (Colo. 1999) (reversing appellate court decision that found that settlement provision requiring confidentiality violated public policy; holding that First Amendment does not bar public entities from entering into confidential settlements where efficient resolution of matter outweighs public access).

Connecticut

- *Waterbury Teachers Ass'n v. Freedom of Information Com'n*, 694 A.2d 1241 (Conn. 1997) (portions of board of education grievance hearings involving negotiations and settlements could be kept secret despite open meetings laws).

Florida

+ *The Tribune Co. v. Hardee*, 19 Media L. Rep. 1318 (Fla. Cir. Ct. 1991) (public hospital must disclose settlement agreement under state public records act even though settlement agreement of federal lawsuit contained confidentiality provision).

+ *Miami Herald Publishing Co. v. Collazo*, 329 So.2d 333 (Fla. App. 1976) (order sealing settlement agreement reversed).

Georgia

- *Savannah College of Art and Design v. School of Visual Arts Inc.*, 515 S.E.2d 370 (Ga. App. 1999) (motion to unseal confidential settlement agreement denied where party's privacy interest in confidentiality outweighed public's right of access to court records).

+ *Helen, Georgia v. White County News*, 25 Media L. Rep. 1123 (Ga. Super. Ct. 1996) (settlement documents relating to police chief's civil rights suit against city are public records under state open records act; confidentiality provision is void as against public policy).

Illinois

+ *In re Marriage of Johnson*, 598 N.E.2d 406 (Ill. App. 1992) (right of access under either First Amendment or common law applies to settlement records such as transcripts filed with trial court in personal injury action and divorce proceeding, but such right does not extend to settlement document that was not submitted to the court).

+ *Centralia Press Ltd. v. Mt. Vernon Illinois*, 25 Media L. Rep. 1120 (Ill. Cir. Ct. 1996) (settlement agreement in civil suit involv-

ing city is public record not exempt from disclosure under state public records law).

+ *Carbondale Convention Center, Inc. v. City of Carbondale*, 614 N.E.2d 539 (Ill. App. 1993) (parties failed to show why settlement agreement should be exempt from Freedom of Information law).

Iowa

+ *Des Moines School District v. Des Moines Register*, 487 N.W.2d 666 (Iowa 1992) (settlement of dispute between school board and former principal alleging discrimination must be made public under state public records law, but redactions are permitted to protect third-party sources).

Kentucky

+ *Lexington-Fayette Urban County Government v. Lexington Herald-Leader Co.*, 941 S.W.2d 469 (Ky. 1997) (settlement agreement in case against police department must be disclosed because privacy interest does not overcome public's right of access and Open Meetings Act litigation exception did not apply to settlement agreements that did not arise out of closed meetings but were simply negotiated by counsel).

+ *Courier-Journal & Louisville Times Co. v. O'Bannon*, 15 Media L. Rep. 1935 (Ky. App. 1988) (access to civil arbitration award granted).

Maine

+ *Doe v. Department of Mental Health, Mental Retardation, and Substance Abuse Services*, 699 A.2d 422 (Me. 1997) (arbitrator's decisions regarding disciplinary action taken against state employees did not fall within

An interview with Richard C. Reuben

Richard C. Reuben is an associate professor of law and adjunct associate professor of journalism at the University of Missouri-Columbia and the editor of Dispute Resolution Magazine, published by the American Bar Association section on dispute resolution. He has worked as a journalist at the Atlanta Constitution and the Daily Journal Corp. in California. He is also the former associate director of Stanford Center on Conflict and Negotiation and a former fellow at Harvard Negotiation Research Project. He received his J.S.D. from Stanford Law School and earned an undergraduate degree in journalism from Georgia State University. For his doctoral dissertation, he wrote about how Alternative Dispute Resolution (ADR) could be considered a "state action" for constitutional purposes.

Why do courts generally deny access to ADR proceedings?

Access to ADR proceedings is often denied because confidentiality is typically an important reason why people use ADR, particularly mediation. One of the advantages of the mediation process is to get away from media scrutiny and talk about the parties' underlying interests at stake in the lawsuit. ADR provides a forum in which parties can discuss their differences in a frank and candid manner without worrying about someone else hearing it. But for a journalist, what sounds like "confidential" on one side sounds like "secret" on the other.

Why do some courts allow access to settlement agreements but not to the conferences?

The reason is because the final agreements are often public records. For example, an arbitration agreement affirmed by a court is a public record, and it is appropriate for reporters to look at those records. Similarly, a settlement agreement adopted as a court record is fair game.

Why is a court-ordered settlement conference not considered to be a court proceeding?

Because there's a lot of information, ideas and interests that are discussed that may or may not find their way into the final settlement agreement, and it's the agreement itself that the parties are asking the courts to enforce.

You wrote about ways in which ADR could be interpreted as being state action. What is state action, and why is the concept important?

State action is the basic requirement for the application of the Bill of Rights to any given situation. The constitution is fundamentally a limitation on the power of government to inject itself into private life and affairs. The state action doctrine is the test used to determine whether the actor is a government actor, and that determines whether a constitutional guarantee, such as free speech, applies. When there is state action those protections do apply, as a general matter, and when the government is not participating in the alleged offensive conduct, then the constitution does not apply. State and federal statutes may apply, but the constitution doesn't apply. Thus, in the context of ADR, constitutional protections may be applied if the ADR process constitutes a state action, but constitutional protections would not apply if it were not state action.

Businesses will often agree in a contract that, if a dispute arises, they will go to private arbitration rather than file a complaint in court. If arbitration is chosen in this manner, is it public?

This is where the state action doctrine kicks in. One of the standards the U.S. Supreme Court has used over the years to determine whether private conduct can be viewed as public is the "entanglement rationale." Under this rationale, where the public and private conduct are sufficiently entangled to the point that it would be fair to attribute that private conduct to the government, the courts will do so.

With regard to arbitration, there are laws that allow for enforceability of arbitration agreements and awards. Under the Federal Arbitration Act and similar state laws, courts may decide whether there is an agreement to arbitrate and if there is one the court will enforce that agreement. When the arbitrator decides the case, it might go back to the court for purposes of enforcement, and the court has continuing jurisdiction over the case while it is privately arbitrated. When you look at the case law on entanglement, this is actually a higher degree of entanglement than has been found in most of the cases in which the courts actually found entanglement. Thus, the structure of the law that generally permits the enforceability of those private agreements to arbitrate creates the type of entanglement that gives rise to the application of

confidentiality exception to Freedom of Access Act and could be disclosed).

- *Doe v. Roe*, 495 A.2d 1235 (Me. 1985) (denying newspaper the right to intervene to challenge secret settlement, finding that news media has no sufficient interest in settlements).

+/- *Guy Gannett Pub. Co. v. Univ. of Maine*, 555 A.2d 470 (Me. 1989) (settlement agreement between university and former basketball coach was subject to disclosure pursuant to Freedom of Access Act, except for sentence containing certain medical information, which was protected from disclosure).

+ *Bangor Pub. Co. v. Univ. of Maine System*, 1995 WL 870104, 24 Media L. Rep. 1792 (Me. Superior Ct. 1995) (university required to disclose documents relating to the financial terms of employee settlements, even though files were held by outside counsel).

Maryland

+ *Baltimore Sun Co. v. Mayor and City Council of Baltimore*, 755 A.2d 1130 (Md. 2000) (sealing the record of a confidential settlement violated the common law principle of openness regarding public access to court proceedings and records).

Massachusetts

- *H.S. Gere & Sons, Inc. v. Frey*, 509 N.E.2d 271 (Mass. 1987) (settlement documents could remain "impounded" because information sought was not generally public information; parties and witnesses had legitimate expectation that information would remain private).

the state action doctrine. Because of the partnership between public and private actors, those private arbiters should be considered public actors for constitutional purposes.

Is there the same type of entanglement where parties go to arbitration and don't need the court to order or enforce the agreement?

It would still be covered by the Federal Arbitration Act, even if the court doesn't enforce it.

Why do parties think that private resolution can be better than public resolution?

When we talk about public resolution, we are talking about trial and courts are constrained in the way they can resolve disputes. They are constrained by rules of procedure, rules of evidence and rules of law. One of the benefits of ADR is that it lets the parties work out the dispute in the way that best satisfies their needs, and it may be in a way that the court wouldn't have jurisdiction or authority to do.

Should public access to ADR proceedings depend on whether the litigants are public or private entities?

In some respects, it does matter. In most states, where one of the parties is a government entity subject to open records and meetings laws, press access may be granted. On the other hand, access to disputes involving private parties is often determined by the parties themselves.

Should access depend on the type of ADR used? For example, should there be different rules for non-mediated settlement as opposed to court-ordered settlement?

It seems to me that the arguments are greater that one should have access when the parties are compelled into mediation or another form of ADR. On the other hand, what makes those processes work is the cloak of confidentiality that surrounds them. So it's a real question of policy. I think the courts and legislatures are willing to sacrifice some access in favor of another important societal goal, which is the settlement of disputes. But where one of the parties is a governmental entity, the arguments are greatest that the media should be permitted access.

Why is confidentiality so important to parties?

Here it is helpful to distinguish among ADR processes. I'll speak mostly to mediation: mediation is a process in which two parties, aided by a mediator, discuss the issues that are presented by the conflict as well as the underlying concerns, problems and issues that give rise to the conflict. Often, people are reluctant to do this to begin with. Indeed, it is part of a mediator's job to talk about the very things that people want to avoid. Yet for the process to work, these issues must be discussed. The mediator must create an environment in which that kind of discussion can take place, and in order for the process to work, particularly when you talk about private disputes like family matters or business matters, the parties need some assurance that their statements won't come back to hurt them, such as being used in a court of law, be used in a later proceeding or be disclosed to a business competitor. Without such assurances, parties just would not be willing to participate.

Do you have an opinion as to whether it is better policy to allow access to ADR or not?

I think that, as a matter of policy, the courts have struck the correct balance between these two important competing interests — access to dispute resolution and the societal interest in promoting early settlement of disputes. During early settlement discussions, either with or without a mediator, the parties need some space to talk frankly about their issues and concerns without fear of seeing it in the paper the next day or having it come back to haunt them in a subsequent trial. But there are harder questions. If one of the parties is a public agency, an open discussion may need to take place for the public's benefit. And even harder questions arise when there is a great public interest in the outcome of a private dispute, such as the Firestone cases. There's a great public interest in what happened, but there's also a great public interest in settlement that may outweigh the interest in access.

What should a journalist know to better understand the process?

There are plenty of stories that can be written about the conflict that don't necessarily require the media to be in on the details of the settlement discussion. There really is room for both interests [in access and in confidentiality] to be satisfied. But a journalist should understand what the process are, what mediation is and how it is different from arbitration.

Second, journalists should understand the reasons why confidentiality is important in private consensual processes like mediation so they can continue to cover the case and work effectively with parties and mediators. When I was a journalist, I had access to settlement negotiations, but I had to make assurances that certain things wouldn't be reported. The information allowed me to cover cases fairly and get background information, even if I didn't print everything.

If you develop trusting relationships with people in the mediation process, such as mediators or attorneys, you can still get good stories.

Michigan

+ *Heritage Newspapers Inc. v. City of Dearborn*, 1995 WL 688259, 23 Media L. Rep. 2338 (Mich. Cir. Ct. 1995) (settlement agreements in lawsuits involving the city are public records subject to disclosure).

Minnesota

+ *Minnesota v. Hennepin County*, 505 N.W.2d 294 (Minn. 1993) (Minnesota courts have inherent judicial power to order closed settlement conferences when necessary, even if public bodies are parties to the litigation; in this case, trial court erred in closing conference between city and county because it was not designed to resolve lawsuit and was therefore subject to Open Meetings Law).

- *Minneapolis Star & Tribune Co. v. Schumacher*, 392 N.W.2d 197 (Minn. 1986) (proper for judge to seal settlement).

Missouri

- *Tuft v. City of St. Louis*, 936 S.W.2d 113 (Mo. App. 1996) (settlement agreement between city and one of its employees was exempt from disclosure under exemption for records relating to litigation involving a public governmental body).

Nevada

+ *McKay v. Board of County Com'rs of Douglas County*, 746 P.2d 124 (Nev. 1987) (there is no exception to the open meeting law for discussions between county board and attorney concerning proposed settlement of claim).

+ Nevada recently passed a law that prohibits government officials from secretly settling lawsuits. Any settlement involving a government agency or employee is deemed a public record, pursuant to A.B. 277. However, this statute has not yet been interpreted by any case law.

New York

- *Glens Falls Newspapers v. WWIDA*, 684 N.Y.S.2d 321 (N.Y. App. 1999) (FOI request for access to confidential settlement agreement denied on ground that disclosure of agreement would be advantageous to competitors).

Ohio

+ *State ex rel. Findlay Pub. Co. v. Hancock Cty. Bd. of Comm'rs.*, 684 N.E.2d 1222 (Ohio 1997) (settlement agreement entered into by county in federal civil rights lawsuit must be disclosed; confidentiality provision did not preclude disclosure under Public Records Act; fact that board no longer had actual possession of settlement agreement did not relieve it of duty to disclose agreement; exception from open meeting requirement for conferences with counsel regarding litigation did not exempt agreement from disclosure).

+ *State ex rel. Sun Newspapers v. Westlake Board of Education*, 601 N.E.2d 173 (Ohio App. 1991) (settlement agreement between board of education and former employee was a public record; public entity cannot enter into enforceable promises of confidentiality with respect to public records).

Pennsylvania

+ *Morning Call, Inc v. Housing Authority of City of Allentown*, 769 A.2d 1246 (Pa. Cmwlth. 2001) (settlement agreement between city housing authority and utility business was public record; confidentiality clause did not preclude access to full, unredacted copy of release).

+ *Morning Call, Inc. v. Lower Saucon Township*, 627 A.2d 297 (Pa. Cmwlth. 1993) (settlement agreement between township and private party was public record subject to public inspection and copying).

-/+ *CMS Enterprise Group v. Ben & Jerry's Homemade, Inc.*, 1995 WL 500847 (Pa.Com.Pl. 1995) (holding that there is no right of access to summary trial because it is an extension of the settlement conference; also ruling that the advisory verdict would be sealed until settlement or jury verdict after full trial; however, also ruling that media may attend summary trial up to verdict stage and may attend verdict stage if they agree not to publish the result until after settlement or full trial verdict; summary trial judge shall release to the media the results of the summary trial either upon settlement or full trial verdict).

Tennessee

+ *Contemporary Media, Inc. v. City of Memphis*, 1999 WL 292264 (Tenn. App. 1999) (holding that a governmental entity cannot enter into confidentiality agreements with regard to public records; settlement agreement with city is a public record).

Texas

+ *Thomas v. El Paso Cty. Comm. College Dist.*, 2001 WL 815049 (Tex. App. 2001) (community college district was compelled, under Public Information or Open Records Act, to disclose settlement agreement from suit by student).

- *In re Kaiser Foundation Health Plan of Texas*, 997 S.W.2d 605 (Tex. App. 1998) (complex case that found that Texas Rule of Civ. Proc. 76a, which governs the sealing of court records, does not apply to ADR agreements governed by Rule 11; newspaper sought documents introduced at summary jury trial, but law provided that documents introduced at summary jury trial are not subject to a Rule 76a request).

Virginia

+ *Shenandoah Publishing House, Inc. v. Fanning*, 368 S.E.2d 253 (Va. 1988) (erroneous to seal settlement and other documents without compelling justification).

+ *LeMond v. McElroy*, 391 S.E.2d 309 (Va. 1990) (Commonwealth's accounting records, including payment request for settlement check and computer sheet showing amount paid as result of settlement agreement, were not documents compiled specifically for use in litigation so as to come within exception to Freedom of Information Act).

Washington

+ *Yakima Newspapers, Inc. v. City of Yakima*, 890 P.2d 544 (Wash. App. 1995) (settlement agreement between city and former fire chief was public record which must be disclosed to newspaper).

+ *Pierce-Herald v. City of Puyallup*, 15 Media L. Rep. 1527 (Wash. Superior Ct. 1988) (settlement agreement resolving suit against city is a public record and must be disclosed).

West Virginia

+ *Daily Gazette Co., Inc. v. Withrow*, 350 S.E.2d 738 (W.Va. 1986) (settlements of federal civil rights suits against sheriff were public records subject to disclosure under Freedom of Information Act despite confidentiality agreements).

Wisconsin

+ *In re Estates of Zimmer (Zimmer v. Mewis)*, 442 N.W.2d 578 (Wis. App. 1989) (there is a presumptive right of access to settlement records).

+ *C.L. v. Edson*, 409 N.W.2d 417 (Wis. App. 1987) (affirming trial court's order unsealing settlement documents in a case against a psychiatrist for alleged sexual and psychological abuse of patients, including minors and incompetents).

+ *Journal/Sentinel, Inc. v. School Bd. of School Dist. of Shorewood*, 521 N.W.2d 165 (Wis. App. 1994) ("memorandum of understanding" reciting settlement terms of lawsuit was subject to public disclosure under public records law).

+ *Schnell v. Farmers Insurance Exchange*, 23 Media L. Rep. 1542 (Wisc. Cir. Ct. 1994) (settlement documents in civil suit involving minors are open to public; strong public interest in ensuring that children are treated fairly by judicial system).