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Common Misconceptions About Confidentiality in Arbitration Proceedings

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Litigants and attorneys often assume—wrongly—that arbitration proceedings are completely confidential. In fact, there are many ways that private arbitration proceedings can become subject to public scrutiny.

Arbitrators Are Bound to Confidentiality, but What About the Parties?

When you find yourself in a commercial or business dispute you may prefer to arbitrate rather than litigate in court. Maybe you do want to avoid publicity and the risk of having the world learn of your business practices disclosed in litigation makes. But are arbitration proceedings *actually* confidential?

Private does not equate to confidential. While arbitrations are held behind closed-doors and remain shielded from non-parties absent consent by both the parties and the Panel, the onus to maintain confidentiality is only on the arbitrators themselves—not the parties. There must be a clear agreement to maintain confidentiality. For instance, JAMS, the largest private alternative dispute resolution provider, only "requires the Arbitrator to maintain the confidential nature of the Arbitration, not Plaintiffs." Nor does the Federal Arbitration Act require confidentiality. In fact, the American Arbitration Association makes clear in its statement of Ethical Principles that "[t]he parties always have a right to disclose details of the proceeding, unless they have a separate confidentiality agreement."

We Have a Confidentiality Agreement, So Isn't Everything Confidential?

Numerous courts have found that an agreement to keep the arbitration confidential does not—unto itself—constitute good cause to seal arbitration materials in a subsequent federal confirmation action. Courts routinely reject arguments that arbitration awards and supporting documents should be sealed merely to honor the parties' underlying confidentiality agreement related to their arbitration.

Indeed, in the recent case of *Lohnn v. IBM*, the Court directly addressed, and rejected, this very argument stating:

[T]he fact that information exchanged between private parties [that] is subject to a confidentiality agreement that binds them is not itself sufficient to deprive the public of the right of access to that

information when it is properly filed in support of a motion asking the Court to take dispositive judicial action on a matter properly before the Court.

Simply executing a confidentiality agreement does not guarantee that arbitration proceedings will remain confidential.

Is the Arbitration Award Confidential?

Perhaps you find yourself in an arbitration where the proceedings have remained confidential. Does this mean the arbitration award will also remain confidential? Well, no. The common law right of access is the backbone of our judicial system.

For example, in order to confirm arbitration awards as enforceable judgments, the award—often a memorandum containing a discussion of the evidence—must be publicly recorded. Consequently, there is no way to protect the confidentiality of any evidence the arbitrator cites, unless the parties contractually agree to keep the arbitration award confidential. Even then, the court must choose to uphold that agreement. If, for example, a party moves to file the award under seal, the court can determine the presumption of access should be overcome.

Courts have found that when a party to an arbitration proceeding is subject to confirmation proceedings in a federal court, that party cannot have a legitimate expectation of privacy because there is a presumption of public access to judicial proceedings. Accordingly, courts routinely find that a parties' agreement to privately arbitrate does not obligate a court to shield its confirmation or enforcement proceedings from the public, nor does it overcome the presumption of public access to proceedings before the court.

Even when parties agree that information should be sealed, the Court must still perform a balancing test to assess whether the rights of the public outweigh particular privacy interests.

Indeed, "[w]hile parties may contract to engage in confidential arbitration proceedings, when they ask the Court to rule on the validity of those proceedings, they chose a forum to which the public presumptively has a right of access." Laudig v. Int'l Bus. Machines Corp.

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