

PRIVACY, CONFIDENTIALITY, AND ARBITRATION

by

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This paper is only an overview of the issues presented. Because of its generality and because the law is evolving the material may not apply to a specific situation and may not reflect the most current authority after this presentation.

When is an arbitration private, when is it confidential, and what is the difference between privacy and confidentiality? What should a confidentiality order contain?

PRIVATE ARBITRATION

Arbitration is generally a "private" process. For example, it normally means that arbitrations are closed to the public and to the media.

Attendance at Hearing. Commercial Rule 25 provides:

The arbitrator and the AAA shall maintain the privacy of the hearings unless the law provides to the contrary. Any person having a direct interest in the arbitration is entitled to attend hearings. The arbitrator shall otherwise have the power to require the exclusion of any witness, other than a party or other essential person, during the testimony of any other witness. It shall be discretionary with the arbitrator to determine the propriety of the attendance of any other person.

Employment Rule 22 states:

The arbitrator shall have the authority to exclude witnesses, other than a party, from the hearing during the testimony of any other witness. The arbitrator also shall have the authority to decide whether any person who is not a witness may attend the hearing.

Note that the word "privacy" does not appear in the Employment Rules.

Publicity. Under the heading "Confidentiality" the AAA Statement of Ethical Principles states:

An arbitration proceeding is a *private* process. In addition, AAA staff and AAA neutrals have an ethical obligation to keep information confidential. However, the AAA takes no position on whether parties should or should not agree to keep the proceeding and award confidential between themselves. *The parties always have a right to disclose details of the proceeding, unless they have a separate confidentiality agreement.* Where public agencies are involved in disputes, these public agencies routinely make the award public.

(www.adr.org/StatementofEthicalPrinciples) (emphasis added)

Based on the AAA's Principles, absent a sequestration or confidentiality order, nothing in the AAA Rules prevents a party from telling others, including the media, what happened in the arbitration.

Even with a sequestration order, once the Award is issued, nothing prevents a party from discussing the Award with anyone, unless a protective or confidentiality order continues to apply.

Sequestration. Parties often invoke the witness rule to sequester witnesses. Commercial Rule 25 supports the arbitrator who orders sequestration. (“The arbitrator shall otherwise have the power to require the exclusion of any witness, other than a party or other essential person, during the testimony of any other witness.”).

Public Hearings. Commercial Rule 25 has an exception for applicable law as does Rule 21 of the Labor Arbitration Rules. For example, civil service arbitrations may be open to the public. *See* Tex. Local Gov’t Code §143.010(c) (“Each commission proceeding shall be held in public.”) and §143.057(f) (“In each hearing conducted under this section, the hearing examiner has the same duties and powers as the commission, ...”); Tex. Educ. Code §21.256(a) (“A hearing under this subchapter must be private unless the teacher requests in writing that the hearing be public, except that a hearing examiner may close a hearing if necessary to maintain decorum.”); *Kennedy v. Ft. Worth*, No 348-124765-90, 348th Judicial District, Tarrant County (Feb. 7, 1991) (“proceedings before a hearing examiner/arbitrator, pursuant to Texas Local Government Code Section 143.057 are subject to the provisions of the Texas Open Meetings Law, Tex. Rev. Civ. Stat. Art. 6252-17.”)

Public Records. Information used in an arbitration may be a public record. To illustrate, records kept in a police officer’s civil service file are subject to release. Local Gov’t Code § 143.089(f); Open Records Decision No. 562 at 6 (1990).

Also, investigation reports about employees may be public records. *City of Houston v. Paxton*, 2016 WL 767755, at *1 (Tex. App.-Austin, 2016) (“investigation into allegations of employee misconduct conducted by the City's Office of the Inspector General (OIG) is not protected by the attorney-client privilege but is subject to disclosure under the Texas Public Information Act (TPIA). *See* Tex. Gov't Code §§ 552.001–.353.”).

The award may be a public record for civil service hearings. Tex. Loc. Gov’t Code §143.010 (h) (“The commission shall maintain a public record of each proceeding with copies available at cost.”) and §143.057(f) (“In each hearing conducted under this section, the hearing examiner has the same duties and powers as the commission, including the right to issue subpoenas.”).

Common Law. The common law may create a right to privacy that a party may enforce by asserting a claim for publication of a private fact. *Industrial Foundation of the South v. Texas Indus. Acc. Bd.*, [540 S.W.2d 668](#), 685 (Tex. 1976) (information must contain highly intimate or embarrassing facts about person's private affairs such that its release would be highly objectionable to reasonable person, and the information must be of no legitimate concern to the public).

CONFIDENTIAL ARBITRATION

A confidential arbitration may mean the parties, the arbitrator, witnesses, and others who attended the arbitration may not disclose opening statements, witness testimony, exhibits used in arbitration, or observations of conduct by parties, witnesses, and arbitrators during the arbitration. See, Ronald Ravikoff, "Your Arbitration is Private, but is it Confidential?" (www.iumsadr.com/publications/articles?search_year=&search_text=confidential&submit=Search#0); Richard Smellie, "Is arbitration confidential?" (May 2013) (www.fenwickelliott.com/sites/default/files/richard_smellie_is_arbitration_confidential.pdf); Laura A. Kaster, "Confidentiality in U.S. Arbitration" New York Dispute Resolution Lawyer, Spring 2012, Vol. 5, No. 1 (www.mediate.com/mediator/attachments/26226/Confidentiality%20in%20Arbitration%20DRSNewsSpr12.pdf).

Rules. AAA Commercial Rule 23, AAA Employment Rule 23, and JAMS Rule 26 grant the arbitrator the authority to issue orders to preserve confidentiality.

Code of Ethics for Arbitrators in Commercial Disputes (2004) Canon VI B states: "The arbitrator should keep confidential all matters relating to the arbitration."

Sample court orders supply guidance to the arbitrator regarding how to craft protective or confidentiality orders for private information, e.g., social security numbers, proprietary information, or trade secrets. See Western District Local Rules, Appendix H, Confidentiality and Protective Order (www.txwd.uscourts.gov/?mdocs-file=2694) and Northern District Protective Order (Appendix A to Miscellaneous Order No. 62) (www.txnd.uscourts.gov/sites/default/files/forms/MiscOrder62A-ProtectiveOrder.pdf)

Still, Commercial Rule 51 provides:

The AAA shall, upon the written request of a party to the arbitration, furnish to the party, at its expense, copies or certified copies of any papers in the AAA's possession that are not determined by the AAA to be privileged or confidential.

Compare Employment Rule 41 that states:

The AAA shall, upon the written request of a party, furnish to the party, at that party's expense, certified copies of any papers in the AAA's case file that may be required in judicial proceedings relating to the arbitration.

Compare with the London Court of International Arbitration Rule 30.1

Unless the parties expressly agree in writing to the contrary, the parties undertake as a general principle to keep confidential all awards in their arbitration, together with all materials in the proceedings created for the purpose of the arbitration and all other documents produced by another party in the proceedings not otherwise in the public domain – save and to the extent that disclosure may be required of a party by legal duty, to protect or pursue a legal right or to enforce or challenge

an award in bona fide legal proceedings before a state court or other judicial authority.

Statutes. Federal or state law may create confidentiality. For example, the ADA, 42 U.S.C.A. § 12112; 29 C.F.R. § 1630.14, the FMLA, 29 C.F.R. § 825.500(g), HIPAA, 45 C.F.R. § 160.103, or the Texas Trade Secret Act, Tex. Civ. Prac. & Rem. Code § 134A.006, may support entry of a protective order classifying information as confidential. The Florida Arbitration Code states an arbitrator may issue a protective order to the extent a court. Fla. Stat. § 682.08.

Additionally, statutes about physician-patient communications may support classifying information as confidential, e.g., Tex. Health and Safety Code Ann. § 84.006 (confidentiality of reportable occupational conditions); Tex. Health and Safety Code Ann. § 161.032 (confidentiality of peer review records); Tex. Health and Safety Code Ann. § 576.005 (confidentiality of mental health records); Tex. Health and Safety Code Ann. § 595.001 (confidentiality of mental health records); Tex. Health and Safety Code Ann. § 773.091 (confidentiality of medical emergency communications); and Tex. Occ. Code Ann. §§ 159.001 to 159.009 (medical records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a physician are confidential.).

ADR Statute. Texas Civil Practice and Remedies Code § 154.073(a) states:

Except as provided by Subsections (c), (d), (e), and (f), a communication relating to the subject matter of any civil or criminal dispute made by a participant in an alternative dispute resolution procedure, whether before or after the institution of formal judicial proceedings, is confidential, is not subject to disclosure, and may not be used as evidence against the participant in any judicial or administrative proceeding.

But, courts have held that §154.073(a) does not apply to private arbitrations.

Rather, “Chapter 154 applies to court-ordered referrals to alternative methods of dispute resolution, not to private, contractual agreements to resolve disputes.” *In re Cartwright*, [104 S.W.3d 706](#), 711 (Tex. App. 2003); *Porter & Clements, L.L.P. v. Stone*, [935 S.W.2d 217](#), 220 (Tex. App. 1996) (“The present case does not involve court-ordered referral of pending litigation to an ADR procedure. Rather, the parties contractually agreed to arbitration before the current dispute ever arose. As such, the current dispute is governed by the Texas Arbitration Act, not the ADR Act.”); Tex. Civ. Prac. & Rem. Code §154.021. “(a) A court may, on its own motion or the motion of a party, refer a pending dispute for resolution by an alternative dispute resolution procedure...”)

Common Law. Common law privacy rights may support a confidentiality order. *Borninski v. Williamson*, 2005 WL 1206872 (N.D. Tex. 2005) (slip copy) (court granted employee's request that his social security number be protected and ordered that no party disclose such personal information to third parties and such information should be disclosed only to the court, parties to lawsuit, and their representatives and agents); *State ex rel. Crowden v. Dandurand*, [970 S.W.2d 340](#), 343 (Mo. 1998) (“Employees have a fundamental right of privacy in employment records.”).

Contract. The parties’ arbitration contract may provide for confidentiality. For example, “The parties agree to arbitrate their claims under the Employment Arbitration Rules of the American Arbitration Association but modified as follows: (a) the Arbitration shall be confidential; ...”

Similarly, a nondisclosure agreement, a purchase contract, or a franchise agreement may have a confidentiality clause.

APPLYING CONFIDENTIALITY

Applicable Law. When faced with an arbitration clause that provides that the “arbitration is confidential,” the starting point for the arbitrator may be to view that provision as providing for the “arbitration to be confidential in accordance with applicable law.” That view allows the arbitrator and any other tribunal to apply the confidentiality provision as disputes arise.

For example, does the arbitration clause violate the National Labor Relations Act, 29 U.S.C.A. §§ 157 (concerted activities) and 158 (interference with §157 rights)?

Contract language. Does the contract make the entire proceeding confidential? Does the confidentiality clause apply only to trade secrets? Is the language ambiguous?

Prejudice or harm. Is there prejudice or harm to a party or third party if the information is not kept in confidence? Is there prejudice or harm to a party or third party if the information is kept in confidence?

Need for the information. Does the party need the information from the arbitration to support a claim or defense?

Publicly Available Information. Is the information publicly available, e.g., information on claimant’s or respondent’s website? Information may not become confidential just because it is presented at the arbitration.

Similarly, AAA Employment Rule 39 provides that the award is publicly available:

- b. An award issued under these rules shall be publicly available, on a cost basis. The names of the parties and witnesses will not be publicly available, unless a party expressly agrees to have its name made public in the award.

Information Sources. Is there another source for the information?

Unconscionable. Is the contract confidentiality clause unconscionable? Does it violate a statute? Compare, *Davis v. O'Melveny & Myers*, [485 F.3d 1066](#) (9th Cir. 2007) (holding confidentiality provision was substantively unconscionable) and *In re Checking Account Overdraft Litig.*, [84 F.Supp.3d 1345](#),1350, (S.D. Fla. 2015) (holding confidentiality provision was substantively unconscionable) with *Poublon v. C.H. Robinson Co.*, [846 F.3d 1251](#),1265-66 (9th Cir. 2017) (holding confidentiality provision was not unconscionable); See *Gilmer v. Interstate/Johnson Lane Corp.*, [500 US 20](#), 28 (1991) (litigant is to be afforded the opportunity to effectively vindicate her statutory cause of action in the arbitral forum)

Information used in the Arbitration. The fact that the information is used or referenced in this Arbitration may be considered but may not be enough to prove confidentiality and entitlement to protection. Similarly, the fact that the information is used or referenced elsewhere independently of this Arbitration may be considered but may not be enough to prove that the information is not confidential and is not entitled to protection.

Ownership of the Information. Is the owner of the information asserting confidentiality? Does the owner want to share it with others?

Applicable Rules. Do the applicable rules allow for access to the information from the arbitration? For example, the AAA Employment Due Process Protocol recites:

3. Access to Information One of the advantages of arbitration is that there is usually less time and money spent in pre-trial discovery. Adequate but limited pre-trial discovery is to be encouraged and employees should have access to all information reasonably relevant to mediation and/or arbitration of their claims. The employees' representative should also have reasonable pre-hearing and hearing access to all such information and documentation.

(https://www.adr.org/sites/default/files/document_repository/Employment%20Due%20Processes%20Protocol_0.pdf)

Further, under Employment Rule 1:

The parties shall be deemed to have made these rules a part of their arbitration agreement whenever they have provided for arbitration by the American Arbitration Association (hereinafter "AAA") or under its Employment Arbitration Rules and Mediation Procedures or for arbitration by the AAA of an employment dispute without specifying particular rules*. If a party establishes that an adverse material inconsistency exists between the arbitration agreement and these rules, the arbitrator shall apply these rules.

Thus, when combined Employment Rules 1 and 39 may supersede the parties' contractual agreement for confidentiality.

EXAMPLES OF CONFIDENTIALITY DISPUTES

Assume that the parties' Arbitration Agreement states that the arbitration will be confidential.

The Respondent, a repeat player, requests an order that a witness's deposition or hearing transcript may not be used by the Claimant's attorney to impeach the witness in another arbitration involving the Respondent, the same Respondent's attorney, a different claimant, the same Claimant's attorney, and the same type of claim.

The Claimant's attorney gives to another arbitrator presiding over a claim by a different claimant your order permitting the deposition of the Respondent's president to urge that the second arbitrator also allow the deposition. What do you do if you are the arbitrator who issued the order? What do you do if you are the arbitrator receiving the order?

The Claimant wants to use a deposition transcript from another arbitration to avoid the cost of retaking the deposition. The arbitrator in the other arbitration issued a protective order but has not ruled whether the deposition is confidential. The Respondent designated the deposition as confidential in the other arbitration.

At your hearing, the Respondent uses a deposition transcript from another arbitration involving the same respondent but a different claimant to impeach a witness in the pending arbitration. The arbitrator in the first arbitration designated the deposition transcript as confidential. Only after the deposition is used to impeach the witness does the Respondent argue that the deposition is confidential

Based on the parties' Arbitration Agreement that the arbitration is confidential, the Arbitrator includes a statement in the Award that it is to remain confidential. The Award is silent about a remedy for making the Award public. One party discloses the Award to another arbitrator. What remedy is available to the nondisclosing party?

SAMPLE RULINGS

The confidentiality provision of the parties' Arbitration Agreement is governed by Texas law.

Existing laws and the AAA Rules are part of the parties' Arbitration Agreement. *See City of Houston v. Williams*, [353 S.W.3d 128](#), 141 (Tex. 2011); *Winder Bros. v. Sterling*, [118 Tex. 268](#), 269, [12 S.W.2d 127](#), 128 (1929); *Stanolind Oil & Gas Co. v. Terrell*, [183 S.W.2d 743](#), 744 (Tex. Civ. App.-Galveston 1944, writ ref'd n. r. e.); Rule 1.

This Arbitration is confidential subject to applicable laws and the AAA Rules.

In any employment dispute, employees are to have access to all information reasonably relevant to the resolution of their claims. The employees' representatives are to have reasonable pre-hearing and hearing access to all such information and documents. *See, Gilmer v. Interstate/Johnson Lane Corp.*, [500 U.S. 20](#), [114 L. Ed.2d 26](#), [111 S. Ct. 1647](#) (1991) (enforcing arbitration agreement that afforded protection of the employee including, among other things, discovery procedures sufficient to permit the employee a fair opportunity to present claims).

The exchanged documents, depositions, exhibits, the transcript, Hearing Orders, the Award, and all other materials related to this Arbitration (Materials) are subject to lawful subpoenas issued by any tribunal with jurisdiction over a party or its counsel. *See, Gotham Holdings, LP v. Health Grades, Inc.*, [580 F.3d 664](#) (C.A.7 (Ill.),2009) (confidentiality contracts bind only parties not stranger's resort to discovery under Federal Rules of Civil Procedure).

To the extent that the parties' obligation of confidentiality in the Arbitration Agreement precludes the application of a lawful subpoena issued by a tribunal with jurisdiction over a party or its counsel for materials, then it is unconscionable and unenforceable.

Any party or that party's counsel subpoenaed must seek a protective order for confidential treatment of the Materials and must give prompt notice to the opposing party so as to enable the opposing party to oppose the subpoena.

The tribunal that issued the subpoena has the authority to interpret the confidentiality provision in the parties' Arbitration Agreement. To assist that tribunal, a party or a party's representative may provide copies of Hearing Orders Nos. 2 and 8, the list of all exhibits, the parties' Arbitration Agreement, and paragraphs 99 through 110 of this Award, provided that the party or party's

representative has obtained an appropriate confidentiality order from that tribunal that protects the confidentiality of such material.

Although there is insufficient evidence to determine the confidentiality of admitted exhibits or documents exchanged but not listed in paragraphs 18-19, following the end of the Arbitrator's jurisdiction, any party may seek from an appropriate tribunal an order permitting or prohibiting the disclosure of admitted exhibits or exchanged documents. Also, following the end of the Arbitrator's jurisdiction, any party may seek from an appropriate tribunal an order permitting or prohibiting the disclosure of portions of the transcript.

This Award does not limit the use of any material that a party has a right or obligation to disclose under applicable law; of any material lawfully obtained by any party in any proceeding before another tribunal; or of any material lawfully obtained from a third source without restriction as to disclosure, provided such third party had the right to make the disclosure to the receiving party.

This Order does not limit the use of any material lawfully obtained by any party before another Tribunal or of any material lawfully obtained from a third source without restriction as to disclosure, provided such third party had the right to make the disclosure to the receiving party.

Claimant's Counsel may offer the testimony or the admitted exhibits in this proceeding ("Materials") solely for purposes of impeachment only in the matter styled and numbered [style and number]. ("Tribunal"). The other Tribunal may consider such Materials as it would any material offered, e.g., whether to consider or admit such Materials, what weight, if any, to give to such Materials, and the application of its protective order to such Materials.

This Order does not address the use of any material that originated from any other proceeding and that was offered in this proceeding,

Neither party may cite this Order to any other tribunal without first requesting and obtaining the permission of this Arbitrator.