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LITIGATION

Keeping arbitration disputes 'under the radar'

By Hon. Robert A. Baines (Ret.)

Maintaining a low profile regarding the existence of a dispute, or the issues in that dispute, are often prime motivators for choosing arbitration. As Lucy Dalglish, executive director of the Reporters Committee for Freedom of the Press, recently noted: "This is what God made arbitration for." However, wanting confidentiality and accomplishing it are very different things. Lawyers whose clients value maximum confidentiality should be aware of potential "windows" into their private arbitration, and consider how best to close them.

First, do not take confidentiality of a "private" arbitration for granted. Confidentiality is *not* required by law. Contrary to the commonly-held perception, there are no statutory provisions requiring confidentiality of contractual arbitrations. Most arbitration providers' rules require confidentiality by the arbitrator, but not the parties or their attorneys. There is no California State Bar Rule requiring attorneys to preserve in confidence information learned in the course of an arbitration (other than, of course, safeguarding a client's confidences). In short, absent an agreement to the contrary, the parties, their attorneys, and the witnesses may openly discuss the matters involved in the arbitration.

Second, maximize confidentiality with a confidentiality agreement. Most arbitration clauses in commercial contracts are relatively brief, with the parties agreeing to arbitrate all disputes arising under that contract and to use a particular arbitration provider; they often do not address confidentiality. Arbitration is a matter of contract, and the degree of privacy is up to the contracting parties. If they want to keep their underlying contract, and any disputes arising under that contract, confidential, and there is no confidentiality provision in the original contract, they likely will want to enter into an arbitration confidentiality agreement, which can be made an order by the arbitrator, and which can address the various stages of the arbitration process.

The pre-hearing and discovery phase. In addition to a stipulated protective order for proprietary information, the parties and counsel may agree to maintain the entire arbitration proceeding in confidence, including agreeing upon instructions each party is to give its participating employees and other potential witnesses. It may also include an agreed-upon response to any possible third party requests for information about the dispute. It may also include provisions regarding the conduct of discovery, and the handling of deposition transcripts and documents.

The Hearing. Obviously, the parties will want the

hearing to be held in confidence. Generally, this is not difficult as arbitration hearings are commonly held at the private offices of the arbitrator or one of the attorneys, and are not required to be publicly noticed. Also, arbitrators generally have the authority to exclude non-parties, and will routinely do so upon request.

If the hearing is reported, the parties will want to stipulate that any transcript is deemed fully confidential and available to only to designated persons. The arbitrator also can be asked to instruct witnesses not to discuss the matters testified to (although there is scant authority for the arbitrator being able to enforce such an order against a non-signatory to the arbitration agreement or the confidentiality agreement).

The award and thereafter. Once an award has been rendered, keeping it confidential becomes more difficult. Even if parties agree not to reveal the award to third parties, if court proceedings are needed to confirm, amend or vacate, confidentiality may be out of the window.

Although the parties may request that the court seal the file, the court will not necessarily oblige. There are significant limitations on a judge's ability to seal court records. The required showings are high, and include identifying an "overriding interest" supporting confidentiality, and a substantial probability that a party will be prejudiced absent sealing.

However, post-award confidentiality can be increased by inclusion of certain provisions in the confidentiality agreement such as:

Limit the form of the award. If you believe you will be unable to obtain a sealing order, and the parties agree to not challenge the award, then consider stipulating to a "bare-bones" award in which the arbitrator gives only a "thumbs up/thumbs down" and the relief ordered. Then, if confirmation is needed, only this minimal information will appear in the public records.

If the parties cannot agree up-front to such an award, they may agree that the arbitrator first issue an interim award (with full findings and conclusions); then, if the parties thereafter agree to accept that interim award, the final award can be a bare bones one.

Agree upon a venue for any confirmation or challenge. Consider your venue options for court proceedings on the award, and agree in advance to use the one that will minimize the chances of third parties becoming aware of the matter.

Consider a mechanism to encourage prompt acceptance and satisfaction of the award. This could include a provision allowing the losing party to satisfy the award at a discounted rate if paid promptly, or, alternatively, imposing fee-shifting measures

that would make a challenge less attractive to a losing party.

Consider a waiver of the right to challenge the award. If the parties have confidence in their selected arbitrator, they could waive their right to challenge the award in court. Such a waiver, if knowingly and carefully made, would likely be upheld under state law; however, the federal courts appear split on this issue.

Agree to use the ADR provider's internal appeal process. Consider agreeing to use the internal appeals process of your arbitration provider, and to make it the exclusive method for challenging the award.

Third, remember that despite your well-drafted confidentiality agreement, some caveats apply. Your agreement may not prevent third parties from discovering the information exchanged during your arbitration, if that information is relevant to later litigation. Be aware, too, that there are certain types of cases for which public disclosure may be required by law.

When a public entity is a party, for instance, the entity's agreement to a confidential arbitration, and an arbitrator's confidentiality order, will likely not override the public's right of access to the agency's records of that arbitration under the applicable freedom of information act.

Similarly, in a "consumer" arbitration in California, arbitrators are required to publicly disclose, on a quarterly basis, certain aspects of those arbitrations.

In medical malpractice cases involving a health care plan, the award must advise the patient of the right to report the matter to the Department of Managed Health Care.

When a publicly-traded company is a party, various filings are required, and these may include disclosure of pending legal matters, including arbitrations, that might materially affect the value of the company.

In short, irrespective of what the deities may have expected, there is no substitute for a well-drafted arbitration confidentiality agreement to accomplish your client's privacy needs.



Hon. Robert A. Baines (Ret.) has been a JAMS panelist since 2005 and has more than 40 years of litigation experience, including 22 years on the bench in Santa Clara County. He has successfully resolved a wide variety of matters at JAMS, including business partnership dissolutions, software licensing disputes, real property disputes, personal injury matters and professional liability matters.