

Positively Neutral

Arbitration and Mediation for Attorneys and Their Business Clients



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Welcome to the First Quarter, 2022 edition of my newsletter, in which I share hopefully relevant and interesting content pertaining to the arbitration and mediation of business disputes. This quarter, I flag an item that often is of extreme importance to business clients: arbitration confidentiality.

One of the driving motivations for arbitration is the desire (and expectation) that the existence, adjudication and result of a dispute will remain out of public awareness. While legislatures are considering the appropriateness of confidentiality in consumer and employment discrimination cases, the desire for confidentiality remains a bedrock of business entities in commercial disputes.

Business entities frequently are under the misimpression that, having included an arbitration provision in a contract, they are ensured confidentiality. Wrong. Those desiring confidentiality must specifically provide for it in their arbitration agreement.

They also need to consider collateral judicial proceedings to confirm or vacate an award, since the submission of court pleadings can make public events that business clients expect to remain confidential. Contractual language requiring that matters be submitted under seal may provide additional protection, if a court respects the parties' request.

Based on a conversation I recently had with fellow arbitrator Dave Reif discussing these issues, here's a short list of ways attorneys can best ensure their clients' confidentiality expectations will be fulfilled:

–Ask your transactional colleagues to review their template arbitration provisions to ensure they specifically address confidentiality and the sealing of court filings.

–At the outset of a dispute, consider discussing with adversary counsel the entry of a confidentiality agreement if the arbitration provision does not already call for confidentiality.

–If appropriate, ask the court to seal filings pertaining to the arbitration.

–Consider mediating the dispute which will better ensure its confidentiality.

As always, I am happy to follow up with anyone who would like to discuss this or other ADR related matters.

--Rob