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Confidentiality in Consumer and Employment Arbitration
By
Christopher R. Drahozal*

Writing as the "Deal Professor" in the *New York Times Dealbook*, Steven Davidoff Solomon led off a story on ousted American Apparel CEO Dov Charney by asserting that "[t]he real lesson from the ouster of Dov Charney … is the danger of arbitration clauses."[1] The story headlined that "Arbitration Clauses Let American Apparel Hide Misconduct," and Solomon asserted that the purpose of the firm's "aggressive" use of arbitration clauses was "to ensure that any dispute was kept quiet and protect the company from excessive damages."[2] At several places in the article, however, Solomon acknowledged that American Apparel's contracts with its models included not only arbitration clauses but also confidentiality provisions. Indeed, it was through the confidentiality provisions that:

> American Apparel required that the entire proceeding—including the outcome—be kept confidential. Employees were also contractually barred from disparaging or otherwise say anything bad about Mr. Charney or American Apparel. As if this were not enough, employees also were required to agree not to speak to the news media without the approval of American Apparel.[3]

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[1] Steven Davidoff Solomon, *Arbitration Clauses Let American Apparel Hide Misconduct*, N.Y. TIMES DEALBOOK (July 15, 2014), http://dealbook.nytimes.com/2014/07/15/arbitration-clauses-let-american-apparel-hide-misconduct/?_r=1. For further reports on Charney's alleged misconduct, see Michael Hiltzik, *American Apparel Saga: Why Did It Take So Long to Sack Dov Charney?*, L.A. TIMES (June 20, 2014), http://www.latimes.com/business/hiltzik/la-fi-mh-dov-charney-20140620-column.html#page=1; Soraya Nadia McDonald, *So Many Sex, Financial Allegations Involving American Apparel's Dov Charney that Company Couldn't Afford the Insurance*, WASH. POST (June 23, 2014), http://www.washingtonpost.com/news/morning-mix/wp/2014/06/23/so-many-sex-financial-allegations-involving-american-apparel-chairman-dov-charney-that-company-couldnt-afford-the-insurance/.

[2] Solomon, *supra* note 1.

[3] *Id.*

Despite this acknowledgement, Solomon did not appear to consider that it might be the confidentiality provision, not the arbitration clause, that "let American Apparel hide misconduct." At no point did Solomon address whether an arbitration clause by itself would have resulted in the sorts of confidentiality obligations that American Apparel expressly imposed by the confidentiality provisions in its contracts.[4]

Interest groups and others likewise have described arbitration clauses as creating confidential proceedings that allow corporations to hide wrongdoing. The Alliance for Justice stated in its publication *Arbitration Activism*: "Open court proceedings can expose corporate misconduct in the public record, but through arbitration, corporations can prevent negative publicity [and] keep their wrongdoing secret …."[5] Myriam Gilles has contended that "arbitration allows for no publicity of claims.… Indeed, any such disclosure would run counter to the promise of complete confidentiality, which is central to the institution of arbitration."[6] Mark Lemley and Christopher Leslie, in analyzing the effect of arbitration clauses on enforcement of the antitrust laws, have asserted that "because arbitration proceedings are almost always

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[4] The confidentiality provision that American Apparel used in its contracts with models provides:

> You and American Apparel hereby agree that any arbitration proceedings initiated hereunder shall be kept in the strictest of confidence, meaning that you and American Apparel hereby agree not to … disclose or cause to be disclosed to the media or any other third party … the dispute(s) to be arbitrated hereunder, or any of the underlying facts and circumstances relating to such dispute(s).

Model Release and Arbitration Agreement, AMERICAN APPAREL, http://i.bnet.com/blogs/aa-tesa-model-contract-redacted.pdf.

[5] ALLIANCE FOR JUSTICE, ARBITRATION ACTIVISM: HOW THE CORPORATE COURT HELPS BUSINESS EVADE OUR CIVIL JUSTICE SYSTEM 5 (2013).

[6] Myriam Gilles, *The Demise of Deterrence: Mandatory Arbitration and the "Litigation Reform" Movement* 17 (2014) (paper presented at Pound Civil Justice Institute 2014 Forum for State Appellate Court Judges). Gilles also asserted that, to preserve confidentiality, "no arbitral body requires … that an arbitrator explain his or her reasoning for any particular ruling or resolution." *Id.* This statement is incorrect. Both the AAA Consumer and Employment arbitration rules, for example, require the arbitrator to issue a reasoned award, and, indeed, both sets of rules authorize the AAA to publish redacted versions of those awards. *See infra* text accompanying notes 53-55.

confidential, the world will not benefit from learning about the antitrust violation."[7] A common assumption of these commentators seems to be that the only way the public learns of wrongdoing is through proceedings in open court,[8] or else that an arbitration clause prevents disclosure of the parties' dispute in court or otherwise. Either way, on this view of arbitration, the "fate of the law in the wake of ADR" is to lose the power to regulate conduct because business wrongdoing vanishes behind an arbitral invisibility cloak.[9]

This view of arbitration as hiding business wrongdoing is based on what appears to be a misunderstanding of the confidential nature of arbitration under U.S. law. I use the word "confidential" because critics of consumer and employment arbitration describe the process as confidential, not because it is confidential. To the contrary, under U.S. law, arbitration is a private process, not a confidential one.[10] The public cannot attend arbitration hearings, and the

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[7] Mark A. Lemley & Christopher R. Leslie, *Antitrust Arbitration and* Illinois Brick, 100 IOWA L. REV. 2115, 2129 (2015).

[8] *See also* Judith Resnik, *Fairness in Numbers: A Comment on* AT&T v. Concepcion, Wal-Mart v. Dukes, *and* Turner v. Rogers, 125 HARV. L. REV. 78, 132 (2011) ("[H]olding aside state attorneys general (many reporting themselves strapped for resources) or action by the Federal Trade Commission, the Court's FAA jurisprudence provides no mechanism for fairness generated by publicity, which would force information into the public about the kinds of claims that the millions of ordinary customers of AT&T and other providers may have.").

[9] This article focuses primarily on the extent to which arbitration clauses shield business wrongdoing from public view. Arbitral confidentiality also is said to deny non-repeat players access to information about patterns of arbitral decisionmaking, limit the development of the law, and preclude cooperation among potential claimants. *See, e.g.*, Resnik, *supra* note 8, at 132; Mark A. Lemley & Christopher R. Leslie, *Antitrust Arbitration and Merger Approval* 28 (Stanford Law Sch. Pub. Law & Legal Theory Research Paper Series, Paper No. 2578059, 2015), *available at* http://ssrn.com/abstract=2578059 [hereinafter Lemley & Leslie, *Merger Approval*]; *see also* Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2316 (2013) (Kagan, J., dissenting) ("Its confidentiality provision prevents Italian Colors from informally arranging with other merchants to produce a common expert report.").

[10] *See, e.g.*, Metalclad Corp. v. United Mexican States, ICSID Case No. ARB(AF)/97/1, Decision on a Request by the Respondent for an Order Prohibiting the Claimant from Revealing Information Regarding ICSID Case ARB(AF)/97/1, at ¶ 9 (Oct. 27, 1997) ("Though it is frequently said that one of the reasons for recourse to arbitration is to avoid publicity, unless the agreement between the parties incorporates such a limitation, each of them is still free to speak publicly of the arbitration."); CONSUMER FINANCIAL PROTECTION BUREAU, ARBITRATION STUDY: REPORT TO CONGRESS PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(a), § 4.9, at 21 (2015) [hereinafter CFPB FINAL REPORT] ("[A]rbitration is a private although not a confidential process"); Richard C. Reuben, *Confidentiality in Arbitration: Beyond the Myth*, 54 U. KAN. L. REV. 1255, 1260 (2006) ("A crucial distinction … must be drawn between the 'privacy' of the arbitral proceeding and the 'confidentiality' of the proceeding."); Amy J. Schmitz, *Untangling the Privacy Paradox in Arbitration*, 54 U. KAN.

arbitrator and arbitration administrator cannot disclose information about the arbitration. But the parties generally are under no such duty. Agreeing to arbitrate does not preclude a consumer or employee from disclosing the facts underlying a dispute they have with a business. Nor does it typically preclude a party from disclosing information obtained in the arbitration process or any resulting award. Only if the parties have entered into a confidentiality agreement—as was the case with American Apparel models—are they restricted from disclosing information about the arbitration (and potentially their dispute, depending on the terms of the confidentiality agreement). So the "real lesson from the ouster of Dov Charney" is not that arbitration clauses are dangerous, but rather that perhaps confidentiality provisions are. By focusing on arbitration clauses, these commentators are misdirecting public attention toward arbitration clauses when it would better be directed elsewhere.

Part I provides an overview of U.S. law on the confidentiality of arbitration, addressing the confidentiality obligation (or lack thereof) resulting from arbitration statutes and courts decisions. Part II then compares the confidentiality obligations under the consumer and employment arbitration rules of the American Arbitration Association to the baseline of court litigation. Part III then analyzes confidentiality provisions in arbitration clauses, both their frequency as well as their enforceability.

I. An Overview of U.S. Law on Arbitration Confidentiality

This section provides a brief overview of U.S. law on the privacy and confidentiality of the arbitration process. It looks at statutes (most of which are silent on the issue) and court decisions (which address only one narrow aspect of confidentiality). As a result, the extent of

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L. REV. 1211, 1211 (2006) ("Arbitration is private but not confidential . . . . Arbitration is private in that it is a closed process, but it is not confidential because information revealed during the process may become public.").

confidentiality will be determined to a large degree by rules promulgated by arbitration administrators and provisions of the parties' contract.

A. Statutes

Neither the Federal Arbitration Act (FAA) nor the Uniform Arbitration Act (UAA) imposes any obligation of confidentiality on the parties to an arbitration agreement, the arbitrator, or the arbitration administrator. Nor do they address the privacy of the arbitration process.[11] The only provision of the Revised Uniform Arbitration Act (RUAA) expressly dealing with confidentiality authorizes an arbitrator to issue a protective order as "to the extent a court could if the controversy were the subject of a civil action in this State."[12] Thus, the primary arbitration laws in the United States impose no express obligation of confidentiality on any of the participants in the arbitration process.

To the contrary, both the FAA and the UAA require public disclosure of arbitration awards when a party seeks to confirm or enforce an arbitration award in court.[13] Under the FAA, most courts have refused to allow filing of the award under seal, even when the parties have entered into a separate confidentiality agreement covering the arbitration.[14] At a minimum, then,

[11] 9 U.S.C. §§ 1-16 (2015); UNIF. ARB. ACT §§ 1-25 (1956).

[12] UNIF. ARB. ACT § 17(e) (2000).

[13] 9 U.S.C. § 13(b) (2015); UNIF. ARB. ACT § 15(a)(2) (1956). RUAA appears not to have retained the provision in the UAA requiring filing the award with the court, but the practice may nonetheless remain. *See* Susan Wiens & Roger Haydock, *Confirming Arbitration Awards: Taking the Mystery Out of a Summary Proceeding*, 33 WM. MITCHELL L. REV. 1293, 1304 (2007) ("A copy of the arbitration award must accompany the motion or petition [to enforce an arbitration award].").

[14] *See, e.g.*, Ovonic Battery Co., Inc. v. Sanyo Elec. Co., Ltd, No. 14-CV-01637-JD, 2014 WL 2758756, at *3 (N.D. Cal. June 17, 2014) (denying motion to seal arbitration awards as not narrowly tailored); Century Indem. Co. v. AXA Belgium, No. 11 CIV. 7263 JMF, 2012 WL 4354816, at *14 (S.D.N.Y. Sept. 24, 2012) (holding that "the parties have not identified sufficient countervailing factors to overcome the presumption in favor of access"); Global Reinsurance Corp.-U.S. Branch v. Argonaut Ins. Co., No. 07 CIV. 8196 (PKC), 2008 WL 1805459, at *1 (S.D.N.Y. Apr. 21, 2008) (holding that party seeking to have court seal arbitration award failed to overcome presumption of

when a party seeks to have a court confirm or enforce an arbitration award, the award on which it relies likely will be made public.[15]

A few state statutes impose some obligation of confidentiality on alternative dispute resolution proceedings, sometimes defined to include arbitration. But as Richard Reuben explains, "only four have statutes that apply to arbitrations generally, regardless of subject matter: Arkansas, California, Missouri, and Texas."[16] And of these four, at least one statute (Texas) does not apply at all to contractual arbitration.[17] The other statutes, even if applicable to contractual arbitration, arguably do no more than prevent arbitration materials from being discovered in or introduced into subsequent court proceedings rather than imposing a broad duty of confidentiality on the parties.[18]

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public access). *But see* Decapolis Grp., LLC v. Mangesh Energy, Ltd., No. 3:13-CV-1547-M, 2014 WL 702000, at *2 (N.D. Tex. Feb. 24, 2014) (finding "that any public interest in the Award is minimal and counterbalanced by the interest in confidentiality expressed in the parties' agreement").

[15] In addition, parties are bound to comply with other federal laws, such as the securities laws, that require disclosure of the arbitration. *See* GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 2863 (2d ed. 2014)

[16] Reuben, *supra* note 10, at 1265; *see* ARK. CODE ANN. § 16-7-206 (West 2015); CAL. EVID. CODE § 703.5 (West 2015); MO. ANN. STAT. § 435.014 (West 2015); TEX. CIV. PRAC. & REM. CODE ANN. § 154.073 (West 2015).

[17] In re Cartwright, 104 S.W.3d 706, 711 (Tex. App. 2003) ("Chapter 154 applies to court-ordered referrals to alternative methods of dispute resolution, not to private, contractual agreements to resolve disputes."); 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.").

[18] ARK. CODE ANN. § 16-7-206(b) (West 2015) ("Any record or writing made at a dispute resolution process is confidential, and the participants or third party or parties facilitating the process shall not be required to testify in any proceedings related to or arising out of the matter in dispute or be subject to process requiring disclosure or production of information or data relating to or arising out of the matter in dispute."); CAL. EVID. CODE § 703.5 (West 2015) ("No arbitrator or mediator, shall be competent to testify, in any subsequent civil proceeding, as to any statement, conduct, decision, or ruling, occurring at or in conjunction with the prior proceeding …."); MO. ANN. STAT. § 435.014 (2) (West 2015) ("Arbitration, conciliation and mediation proceedings shall be regarded as settlement negotiations. Any communication relating to the subject matter of such disputes made during the resolution process by any participant, mediator, conciliator, arbitrator or any other person present at the dispute resolution shall be a confidential communication. No admission, representation, statement or other confidential communication made in setting up or conducting such proceedings not otherwise discoverable or obtainable shall be admissible as evidence or subject to discovery.").

By comparison, other state statutes—most notably, in California as well as in Maryland and the District of Columbia—require arbitration administrators to make various disclosures about consumer and employment arbitrations they administer.[19] For example, California law requires administrators to publish on their web site "in a format that allows the public to search and sort the information using readily available software" eleven separate items, including:

- "The name of the nonconsumer party, if the nonconsumer party is a corporation or other business entity, and whether the nonconsumer party was the initiating party or the responding party, if known."
- "Whether the consumer or nonconsumer party was the prevailing party."
- "The total number of occasions, if any, the nonconsumer party has previously been a party in an arbitration administered by the private arbitration company."
- "Whether the consumer party was represented by an attorney and, if so, the name of the attorney and the full name of the law firm that employs the attorney, if any."
- "The amount of the claim, whether equitable relief was requested or awarded, the amount of any monetary award, the amount of any attorney's fees awarded, and any other relief granted, if any."
- "The name of the arbitrator, his or her total fee for the case, the percentage of the arbitrator's fee allocated to each party, whether a waiver of any fees was granted, and, if so, the amount of the waiver."[20]

Compliance with the California disclosure law has been incomplete, however.[21] A recent amendment emphasizing the importance of compliance seems unlikely to have much effect,[22]

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[19] CAL. CIV. PROC. CODE § 1281.96 (West 2015) (amended effective Jan. 1, 2015); D.C. CODE § 16-4430 (West 2015); MD. CODE COM. LAW §§ 14-3901 to -3905 (West 2015).

[20] CAL. CIV. PROC. CODE § 1281.96(a) (West 2015).

[21] David J. Jung et al., *Reporting Consumer Arbitration Data in California: An Analysis of Compliance with California Code of Civil Procedure §1281.96* (Mar. 18, 2013 with Dec. 2013 update), http://gov.uchastings.edu/docs/arbitration-report/2014-arbitration-update.

although some administrators were already making disclosures that went beyond the legal requirements in some respects.[23]

B. Court Decisions

Court decisions in the U.S. addressing the scope of confidentiality resulting from an arbitration clause have focused almost exclusively on one, relatively narrow issue: whether materials produced for or in an arbitration are discoverable in subsequent litigation.[24] The leading case on this issue is *United States v. Panhandle Eastern Corp*.[25] In *Panhandle Eastern*, the plaintiff sought discovery from defendant of "[a]ll documents relating to the Sonatrach Arbitration," including any papers filed with the arbitrators, written statements by witnesses, and hearing transcripts.[26] The court refused to grant a protective order, concluding that confidentiality rule relied on by the defendant applied only to the internal operations of the Court of Arbitration of the International Chamber of Commerce and not "to the parties to arbitration proceedings or to the independent arbitration tribunal which conducts those proceedings."[27]

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[22] Act of Sep. 30, 2014, ch. 870, 2013-2014 CAL. STAT. 5671, 5671 (amending § 1281.96 to "express the intent of the Legislature that private arbitration companies comply with all legal obligations" under the section) (codified at CAL. CIV. PROC. CODE § 1281.96(f) (West 2015)).

[23] For example, the AAA made its data available in spreadsheet format before required to do so by California law. *See* Jung et al., *supra* note 21, at 32.

[24] BORN, *supra* note 15, at 2874 ("[V]irtually all U.S. decisions addressing the issue have involved the question whether a party could resist production of materials from an arbitral proceeding in response to an otherwise valid request for discovery from a third party (rather than the question whether a party to an arbitration could voluntarily disclose or use materials from an arbitration for its own purposes)."). *See generally* Reuben, *supra* note 10, at 1265-71 (describing cases).

[25] 118 F.R.D. 346 (D. Del. 1988).

[26] *Id.* at 348.

[27] *Id.* at 349-50.

Subsequent cases have reached similar results on varying facts.[28] The broader issue, of whether an arbitration clause includes an implied obligation of confidentiality, has not to my knowledge been addressed by U.S. courts.[29]

II. Confidentiality in Court Versus Arbitration (with No Confidentiality Agreement)

In this section, I examine the confidentiality of the arbitration process in consumer and employment arbitration in the U.S.[30] Because an arbitration clause does not include an implied obligation of confidentiality under U.S. law, any confidentiality obligation must come from either administrator rules or the parties' agreement. I focus here on the consumer and employment arbitration rules of the American Arbitration Association (AAA),[31] and use the Federal Rules of Civil Procedure as a baseline for comparison. The available empirical evidence suggests that the AAA is the leading administrator of consumer arbitrations in the U.S.,[32] so that

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[28] Other cases reaching a similar result include A.T. v .State Farm Mut. Auto Ins. Co., 989 P.2d 219, 221 (Colo. App. 1999) ("Because an arbitration record is potentially public in nature and plaintiff failed proactively to preserve it as confidential, we agree with the trial court's conclusion that the plaintiff's medical information disclosed in the arbitration proceeding was not confidential."); Galleon Syndicate Corp. v. Pan Atl. Group, 637 N.Y.S.2d 104, 105 (N.Y. App. Div. 1996) ("There is no confidentiality privilege precluding disclosure of the material requested as the parties to the arbitration proceeding governed by the Rules of the American Arbitration Association are, in the absence of a confidentiality provision, not prohibited from disclosing documents generated or exchanged during the arbitration and since evidentiary material at an arbitration proceeding is not immune from disclosure."); Industrotech Constructors, Inc. v. Duke Univ., 314 S.E.2d 272, 274 (N.C. App. 1984) ("In the circumstances of the case, then, we must conclude that confidentiality does not require reversal of the court's order [requiring production of the transcripts of a prior arbitration proceeding].").

[29] By comparison, some courts in other countries have held that an arbitration clause brings with it an implied obligation of confidentiality. BORN, *supra* note 15, at 2865-69 (listing England, Singapore, and Switzerland).

[30] Much, but not all, of the discussion that follows applies to business-to-business arbitration as well.

[31] AM. ARBITRATION ASS'N, CONSUMER ARBITRATION RULES (effective Sept. 1, 2014), *available at* https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTAGE2021425& [hereinafter AAA, CONSUMER RULES]; AM. ARBITRATION ASS'N, EMPLOYMENT ARBITRATION RULES (effective Nov. 1, 2009), *available at* https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_004362 [hereinafter AAA, EMPLOYMENT RULES].

[32] CFPB FINAL REPORT, *supra* note 10, § 2, at 34-39.

its rules are frequently used even if not necessarily representative of the rules of other arbitration administrators.[33] I assume that the parties' agreement does not include a confidentiality provision, reserving consideration of such provisions to the next section.

First, unless subject to a separate confidentiality agreement, a party is always free to disclose that it has a dispute and the nature of the dispute. Agreeing to arbitrate the dispute does not preclude the party from making such disclosures.

Several examples illustrate this point:

- Although Jamie Leigh Jones's employment contract with Halliburton included an arbitration clause, she nonetheless stated in an interview on MSNBC and testified before Congress that she had been sexually assaulted by Halliburton co-workers.[34]

- Every vignette in the short documentary *Lost in the Fine Print* involves individuals subject to arbitration clauses describing their disputes with businesses.[35] Two of the

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[33] *See* Scott D. Marrs & Joseph W. Hance III, *Arbitration Confidentiality: What You Thought You Knew Could Hurt You*, 77 TEX. BAR J. 152, 152-53 (2014). For example, the JAMS Streamlined Arbitration Rules include provisions on privacy and confidentiality similar to those in the AAA rules, except that they do not authorize publication of awards. JAMS STREAMLINED ARBITRATION RULES & PROCEDURES R. 21, at 20-21 (effective July 1, 2014), *available at* http://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_streamlined_arbitration_rules-2014.pdf. By comparison, the arbitration rules of the International Institute for Conflict Prevention & Resolution (CPR) impose a confidentiality obligation not only on the arbitrator and the administrator but also on the parties. *See, e.g.*, CPR ADMINISTERED ARBITRATION RULES R. 20, at 25 (effective July 1, 2013), *available at* http://www.cpradr.org/Portals/0/Administered%20Arbitration%20Rules.pdf ("Unless the parties agree otherwise, the parties, the arbitrators and CPR shall treat the proceedings, any related discovery and the decisions of the Tribunal, as confidential, except in connection with judicial proceedings ancillary to the arbitration ...."). But there is little indication that the CPR Rules are used in consumer and employment arbitrations.

[34] NBC News, '*Live with Dan Abrams*' *for Dec. 10,* TODAY (Dec. 10, 2007) (interview with Jamie Leigh Jones), http://www.today.com/id/22221847/#.VSBMq_nF-So; *Enforcement of Federal Criminal Law to Protect Americans Working for U.S. Contractors in Iraq, Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the House Judiciary Comm.*, 110th Cong., 32-38 (Dec. 19, 2007) (testimony of Jamie Leigh Jones). Courts eventually held that claims relating to the alleged sexual assault were not within the scope of the arbitration clause. *See* Jones v. Halliburton Co., 625 F. Supp. 2d 339, 356-57 (S.D. Tex. May 9, 2008) (refusing to compel arbitration of "Plaintiff's claims for assault and battery; intentional infliction of emotional distress arising out of the alleged assault; negligent hiring, retention, and supervision of employees involved in the assault; and false imprisonment"), *aff'd*, 583 F.3d 228 (5th Cir. 2009). The first court decision so holding was not issued until almost six months after the MSNBC interview.

[35] ALLIANCE FOR JUSTICE, LOST IN THE FINE PRINT (2014), *available at* http://www.afj.org/multimedia/first-monday-films/films/lost-in-the-fine-print [hereinafter LOST IN THE FINE PRINT]; *see* Paul Bland, *Lost in the Fine Print—New Documentary Blows Lid off Gross Unfairness of Forced Arbitration*, PUBLIC JUSTICE (Oct. 6, 2014), http://publicjustice.net/content/lost-fine-print-%E2%80%93-new-documentary-blows-lid-gross-unfairness-forced-arbitration (describing the documentary).

individuals interviewed in the film also described their experiences in arbitration including the outcome of the proceedings.[36]

- A *New York Times* article reported the difficulties faced by several servicemembers that gave rise to alleged violations of the Servicemembers Civil Relief Act, all as part of an article criticizing the use of arbitration to resolve their claims.[37]

Second, parties to court cases and arbitration proceedings typically can disclose information obtained in those proceedings, including any judgment or award, unless subject to a confidentiality order. The AAA consumer and employment arbitration rules impose no obligation of confidentiality on the parties to the arbitration. As the AAA indicates in its *Statement of Ethical Principles*: "[T]he 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."[38] Two of the illustrations above (*Lost in the Fine Print* and the *New York Times* article) support that position as well.[39]

Third, documents filed with courts are generally available to the public: "[o]nce filed with the court, . . . '[d]ocuments that affect the disposition of federal litigation are presumptively

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[36] Ironically, Deepak Gupta, who argued in the Supreme Court on behalf of the respondents in *Concepcion* and *Italian Colors*, states in the film that by agreeing to arbitration, "You've given up your right to have whatever result become public." LOST IN THE FINE PRINT, *supra* note 35, at 6:46.

[37] Jessica Silver-Greenberg & Michael Corkery, *Failed by Law and Courts, Troops Come Home to Repossessions*, N.Y. TIMES (Mar. 16, 2015), http://www.nytimes.com/2015/03/17/business/wronged-troops-are-denied-recourse-by-arbitration-clauses.html?_r=0. In describing arbitration, the article states that "the results [of arbitration] are almost never made public," even though it later describes the arbitration award received by one of the servicemen interviewed.

[38] AM. ARBITRATION ASS'N, *Statement of Ethical Principles for the American Arbitration Association* 3, https://www.adr.org/cs/idcplg?IdcService=GET_FILE&dDocName=ADRSTG_009820&RevisionSelectionMethod=LatestReleased (last visited April 7, 2015) [hereinafter AAA *Statement of Ethical Principles*].

[39] *See supra* text accompanying notes 35-37.

open to public view.'"[40] By comparison, the AAA rules as well as arbitrator ethics guidelines generally require arbitrators and administrators to keep information about the arbitration confidential.[41] AAA Consumer Rule R-30 provides that "[t]he arbitrator and the AAA will keep information about the arbitration private except to the extent that a law provides that such information shall be shared or made public."[42] Rule 23 of the AAA Employment Arbitration Rules is similar, requiring that "[t]he arbitrator shall maintain the confidentiality of the arbitration."[43] In addition, the AAA/ABA Code of Ethics for Arbitrators provides that "[t]he arbitrator should keep confidential all matters relating to the arbitration proceedings and decision,"[44] and the AAA's *Statement of Ethical Principles* reiterates that "AAA staff and AAA neutrals have an ethical obligation to keep information confidential."[45]

Fourth, both judges and arbitrators have the authority to issue protective orders requiring the parties to keep sensitive information confidential. Federal Rule of Civil Procedure provides that "[t]he court may, for good cause, issue an order to protect a party or person from annoyance,

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[40] *E.g.*, City of Greenville, Ill. v. Syngenta Crop Prot., LLC, 764 F.3d 695, 697 (7th Cir. 2014) (quoting In re Specht, 622 F.3d 697, 701 (7th Cir.2010)).

[41] *See, e.g.*, Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 686 (2010) (quoting the AAA Class Arbitration Rules to the effect that "'the presumption of privacy and confidentiality' that applies in many bilateral arbitrations 'shall not apply in class arbitrations'"). The differing presumption of confidentiality the Court is referring to is the one applicable to the AAA, not the parties. *See* AM. ARBITRATION ASS'N, SUPPLEMENTARY RULES FOR CLASS ARBITRATIONS, R. 9(b) (2003) https://www.adr.org/cs/groups/commercial/documents/document/dgdf/mda0/~edisp/adrstg_004129~1.pdf.

[42] AAA, CONSUMER RULES, *supra* note 31, R. R-30.

[43] AAA, EMPLOYMENT RULES, *supra* note 31, R. 23.

[44] AM. BAR ASS'N & AM. ARBITRATION ASS'N, CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES, CANON VI(B) (Mar. 1, 2004).

[45] AAA *Statement of Ethical Principles*, *supra* note 38, at 3.

embarrassment, oppression, or undue burden or expense."[46] The AAA consumer and employment arbitration rules likewise authorize the arbitrator to issue protective orders to protect the confidentiality of information disclosed in the arbitration process.[47]

Fifth, the public can attend hearings and trials in court, but arbitration hearings typically are private—i.e., non-parties to the arbitration are not permitted to attend.[48] Under the AAA consumer and employment rules the arbitrator controls whether non-parties are permitted to attend the hearing.[49] Note, however, that in court, few cases actually go to trial, although the case may have a pre-trial hearing that is open to the public.[50] In arbitration, more cases make it to a hearing,[51] but those hearings typically are not open to the public.

Sixth, while the court's opinion and judgment typically are made public, the general rule in arbitration is that the arbitrator and the arbitration administrator must keep the award

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[46] FED. R. CIV. P. 26(c)(1). *See generally* Robert Timothy Reagan, *Confidential Discovery: A Pocket Guide on Protective Orders*, FED. JUDICIAL CTR. (2012), http://www.fjc.gov/public/pdf.nsf/lookup/confidentialdisc.pdf/$file/confidentialdisc.pdf.

[47] AAA, CONSUMER RULES, *supra* note 31, R. R-23(a) (providing that the arbitrator may make an order "setting the conditions for any exchange or production of confidential documents and information, and the admission of confidential information at the hearing in order to preserve such confidentiality"); AAA, EMPLOYMENT RULES, *supra* note 31, R. 23 (providing that the arbitrator "shall have the authority to make appropriate rulings to safeguard" the confidentiality of the arbitration). I am unaware of any empirical evidence on how frequently AAA arbitrators issue protective orders in consumer and employment arbitrations.

[48] Resnik, *supra* note 8, at 111 ("Unlike courts, third parties can neither attend nor inspect records (if made) of proceedings, opinions are not published, and parties may be subject to admonitions of confidentiality.").

[49] AAA, CONSUMER RULES, *supra* note 31, R. R-30 ("The parties and their representatives in the arbitration are entitled to attend the hearings. The arbitrator will determine any disputes over whether a non-party may attend the hearing."); AAA, EMPLOYMENT RULES, *supra* note 31, R. 22 ("The arbitrator also shall have the authority to decide whether any person who is not a witness may attend the hearing.").

[50] *E.g.*, CFPB FINAL REPORT, *supra* note 10, § 6, at 48-49 & n.84 (finding that of the 1,205 individual consumer financial services matters filed in federal court from 2010 to 2012, only two cases went to trial).

[51] *Id.* § 5, at 12, 32 (reporting that arbitrators issued awards resolving 32.2% of AAA consumer financial services arbitrations, and that of those awards, 34.0% were decided after an in-person hearing, 8.2% after a telephonic hearing, and the rest after a documents-only hearing).

confidential, although a party can make the award public if it wishes.[52] However, the AAA's consumer and employment rules both authorize the AAA to publish redacted versions of awards.[53] Currently more than 4,200 AAA employment arbitration awards are available on Lexis, dating back to 1999.[54] The AAA rule permitting publication of consumer arbitration awards is much newer, having been added effective September 1, 2014,[55] and so no AAA consumer awards have yet been published.

Finally, seventh, settlement agreements ordinarily are private in both litigation and arbitration. If a case settles, information on the terms of the settlement, and sometimes even the fact of the settlement, is not publicly available.[56] In both litigation and arbitration, the majority, and perhaps the substantial majority, of cases settle.[57]

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[52] *See supra* text accompanying notes 35-37.

[53] AAA, EMPLOYMENT RULES, *supra* note 31, R. 39(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."); AAA, CONSUMER RULES, *supra* note 31, R. R-43 ("The AAA may choose to publish an award rendered under these Rules; however, the names of the parties and witnesses will be removed from awards that are published, unless a party agrees in writing to have its name included in the award.").

[54] *See* Lexis AAAEMP database. AAA employment arbitration awards are also available on Westlaw.

[55] AAA, CONSUMER RULES, *supra* note 31.

[56] Judith Resnik, *Procedure As Contract*, 80 NOTRE DAME L. REV. 593, 653 (2005) ("Parties may conclude agreements by dismissals and, in separate contracts that are neither filed with courts nor referenced in notices of dismissal, they may agree to terms that no other people can readily access and they may also agree (in 'confidentiality clauses') to refuse disclosure of the terms to others."); Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 BUFF. L. REV. 185, 219 (2004) ("Confidentiality of settlement negotiations and agreements is supported by strong public policies and grounded in long tradition.").

[57] *Compare* CFPB FINAL REPORT, *supra* note 10, § 6, at 48-49 & n.84 (finding that of the 1,205 individual consumer financial services matters filed in federal court from 2010 to 2012, 48.2% were resolved by known settlement and 41.8% by potential settlement; only two cases went to trial), with *id.* § 5, at 32 (of AAA consumer financial services arbitrations filed in 2010 and 2011, 23.2% settled and 34.2% were resolved in manners consistent with settlement); *see also* Theodore Eisenberg & Charlotte Lanvers, *What is the Settlement Rate and Why Should We Care?*, 6 J. EMPIRICAL LEGAL STUD. 111, 133 table 6 (2009) (reporting aggregate settlement rate from study of two federal district courts in 2001-2002 of 67.2% for employment discrimination cases and 67.6% for contract cases).

III. Frequency and Enforceability of Arbitration Clauses with Confidentiality Provisions

The above description changes if the parties have included a confidentiality provision, in addition to an arbitration clause, in their contract. While the confidentiality obligations of the arbitrator and arbitration administrator presumably will remain the same, the parties' confidentiality obligations will now be determined by the terms of the confidentiality provision. (One exception is award enforcement: as noted above, most courts hold that the award becomes public when submitted to a court for enforcement, even when subject to a confidentiality agreement.[58]) This section examines, first, the frequency of confidentiality provisions in arbitration clauses, and, second, their enforceability.

A. Frequency of Confidentiality Provisions in Arbitration Clauses

An initial question is how frequently companies use confidentiality provisions in their consumer and employment contracts. Myriam Gilles and Anthony Sebok assert that such "confidentiality terms … are standard in contemporary arbitration agreements."[59] Public Justice, in its comments to the Consumer Financial Protection Bureau in response the CFPB's request for information on its arbitration study, explained that, in its experience, "in the wake of the U.S. Supreme Court's decision in Rent-A-Center West v. Jackson … the incidence of confidentiality provisions appears to be sharply on the increase."[60]

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[58] *See supra* text accompanying notes 13-15.

[59] Myriam Gilles & Anthony Sebok, *Crowd-Classing Individual Arbitrations in A Post-Class Action Era*, 63 DEPAUL L. REV. 447, 449 (2014). The only authority they cite is the Supreme Court's decision in American Express Co. v. Italian Colors Restaurant, 133 S. Ct. 2304 (2013), which involved a contract between Amex and businesses that accepted American Express cards for payment. *See also* Lemley & Leslie, *Merger Approval*, *supra* note 9, at 28 ("Arbitration clauses commonly contain confidentiality requirements ….").

[60] Public Justice Comments to Bureau of Consumer Financial Protection In Response to Request for Information for Study of Pre-Dispute Arbitration Agreements at 7, No. CFPB-2012-0017 (June 23, 2012) (citing Rent-A-Center West, Inc. v. Jackson, 561 U.S. 63 (2010)), *available at*

The available empirical data, however, reveal only limited use of confidentiality provisions in arbitration clauses, at least in consumer financial services contracts. In its Final Report to Congress, the CFPB reported that "most arbitration clauses in the sample were silent on confidentiality and did not impose any nondisclosure obligation on the parties."[61] As shown in Table 1, only 3.0% of credit card agreements (covering 7.3% of the market), 2.0% of prepaid card agreements (with market data unavailable), 5.6% of storefront payday loan contracts (covering 5.9% of the market),[62] and none of the mobile wireless contracts with arbitration clauses also included confidentiality provisions. A larger percentage of checking account contracts (11.5%, covering 28.0%) of the market and private student loan contracts (33.3% of a small sample of major lenders, with market data unavailable) with arbitration clauses included confidentiality provisions, but even so only a minority of the clauses.

TABLE 1: ARBITRATION CLAUSES WITH CONFIDENTIALITY PROVISIONS[63]				
	Confidentiality provision		**No confidentiality provision**	
	# of contracts	**% of market**	**# of contracts**	**% of market**
Credit cards	2 (3.0%)	7.3%	64 (97.0%)	92.7%
Checking accounts	7 (11.5%)	28.0%	54 (88.5%)	72.0%
Prepaid cards	1 (2.0%)	n/a	50 (98.0%)	100.0%
Storefront payday loans	4	5.9%	67	94.1%

http://publicjustice.net/sites/default/files/downloads/PublicJusticeCommentsToCFPB_ReMandatoryArbitration_Jun2012.pdf.

[61] CFPB FINAL REPORT, *supra* note 10, § 2, at 52.

[62] As the CFPB Final Report explained, the four storefront payday loan arbitration clauses provided that "'[a]ll disputes shall be resolved confidentially by binding arbitration,' but the clause did not separately impose any nondisclosure obligation so it is unclear what, if any, legal effect this language would have." *Id.*

[63] *Id.* at 52-53; *see also id.* at App. C, at 16 (reporting that one contract (4%) in a sample of tribal or other online payday loan contracts with arbitration clauses included a confidentiality provision).

	(5.6%)		(94.4%)	
Private student loans	2 (33.3%)	n/a	4 (66.7%)	n/a
Mobile wireless	0 (0.0%)	0.0%	7 (100.0%)	100.0%

Moreover, of the contracts with confidentiality provisions in the CFPB's sample, only one—in the checking account agreement of a small credit union—purported to bar disclosures about the underlying dispute.[64] The rest addressed only disclosures in the arbitration proceeding itself: as described by the CFPB, the clauses "precluded the parties from making disclosures about the arbitration proceeding, including its existence and outcome."[65]

The CFPB Final Report examined only consumer financial services contracts, not other types of consumer contracts and not employment contracts.[66] I know of no empirical studies examining the use of confidentiality provisions in those types of contracts.

B. Enforceability of Confidentiality Provisions in Arbitration Clauses

For consumer and employment contracts with both arbitration clauses and confidentiality provisions, the next question is whether the confidentiality provision is enforceable. A number of courts have held confidentiality provisions in arbitration clauses to be unconscionable, although other courts have rejected that position.[67] For those courts holding confidentiality provisions to

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[64] CFPB FINAL REPORT, *supra* note 10, § 52-53; *id.* at App. C, at 16.

[65] *Id.*

[66] The study also did not report on changes in the use of confidentiality provisions over time.

[67] Randall, *supra* note 56, at 218-19 ("The majority of courts have held these provisions unconscionable. Only a few courts have found otherwise.") (citing, *e.g.*, Ting v. AT&T, 319 F.3d 1126, 1151-52 (9th Cir.), *cert. denied*, 540 U.S. 811 (2003)). Cases decided since Professor Randall published her article are more evenly divided on the enforceability of confidentiality provisions. *Compare* In re Checking Account Overdraft Litig., No. 1:09-MD-02036, 2015 WL 464266, at *4 (S.D. Fla. Feb. 3, 2015) (holding provision unconscionable), Poublon v. Robinson Co., No. 2:12-CV-06654-CAS MA, 2015 WL 588515, at *8 (C.D. Cal. Jan. 12, 2015) (same), Sprague v. Household Int'l, 473 F. Supp. 2d 966, 974-75 (W.D. Mo. 2005) (same), *and* Schnuerle v. Insight Commc'ns Co., L.P., 376 S.W.3d

be unconscionable, this section addresses two additional issues raised by those decisions: first, whether they are preempted by the FAA after *AT&T Mobility LLC v. Concepcion*; and, second, how the inclusion of a delegation clause in the arbitration clause would affect the analysis.

On the preemption issue, the Supreme Court in *Concepcion* held that invalidating an arbitration clause as unconscionable on the ground that it did not permit class arbitration (that is, included a class arbitration waiver) was preempted by the FAA. The Court reasoned that "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA."[68] Some commentators have argued that confidentiality also is a fundamental attribute of arbitration, and so cases holding confidentiality provisions in arbitration clauses unconscionable are "suspect after *Concepcion*."[69]

I disagree. I have analyzed the preemption issue elsewhere as follows:

> A more difficult line of cases are those holding arbitration agreements with nondisclosure provisions—i.e., contract provisions precluding the parties from disclosing the existence of the arbitration and such like—to be unconscionable. Confidentiality (or, more precisely, privacy) certainly is a fundamental attribute of arbitration, as the Supreme Court has noted. Even so, under U.S. law, the privacy of arbitration typically does not extend to precluding a party's disclosure of the existence of the arbitration or even its outcome. Instead, it means that non-parties can be excluded from the hearing and that the arbitrator and arbitration provider cannot disclose information about the proceeding. Indeed, the whole reason contracts with arbitration clauses include separate nondisclosure provisions is that the default view of arbitration in the United States does not extend as far as the nondisclosure agreements would require. Accordingly, while a much closer case,

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561, 579 (Ky. 2012) (same), *with* Kilgore v. KeyBank, Nat. Ass'n, 718 F.3d 1052, 1059 (9th Cir. 2013) (holding not unconscionable), Morgan v. Xerox Corp., No. 2:13-CV-00409-TLN-AC, 2013 WL 2151656, at *5 (E.D. Cal. May 16, 2013) (same), Bourgeois v. Nordstrom, Inc., No. CIV.A. 11-2442 KSH, 2012 WL 42917, at *10 (D.N.J. Jan. 9, 2012) (same), *and* Sanchez v. Carmax Auto Superstores California, LLC, 168 Cal. Rptr. 3d 473, 482 (Ct. App. 2014) (same), *review denied* (June 11, 2014).

[68] AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1748 (2011).

[69] Arpan A. Sura & Robert A. DeRise, *Conceptualizing* Concepcion: *The Continuing Viability of Arbitration Regulations*, 62 U. KAN. L. REV. 403, 466-67 (2013) ("The Court could just as easily have held that state laws barring confidentiality agreements interfere with one of the principal advantages of arbitration, and that such laws unfairly target arbitration.").

there is a good argument that these cases are not preempted under *Concepcion* ….[70]

In my view, then, cases holding confidentiality provisions in arbitration clauses unconscionable likely continue to be good law after *Concepcion*.

On the delegation issue, the question is how inclusion of a delegation clause in a consumer or employment contract affects the unconscionability analysis. A delegation clause is a contract provision specifying that the arbitrator and not a court will have the final and exclusive authority to rule on challenges to the enforceability of the arbitration agreement.[71] As the above quote from Public Justice indicated,[72] the key Supreme Court case is *Rent-A-Center West, Inc. v. Jackson*.[73] In that case, the Court held that by including a delegation clause in their contract, the parties could delegate to the arbitrator the exclusive authority to decide whether the arbitration clause is unconscionable.[74] If the contract includes a delegation clause, the arbitrator and not a court makes that determination.[75]

So if an arbitration clause includes both a delegation clause and a confidentiality provision, the arbitrator and not the court would decide whether the confidentiality provision is unconscionable. The legal analysis does not change, but the decision maker does. Although delegation clauses are not ubiquitous, they are common.[76] And most courts have held that

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[70] Christopher R. Drahozal, *FAA Preemption After* Concepcion, 35 BERKELEY J. EMP. & LAB. L. 153, 167 (2014).

[71] *See* Rent-A-Center W., Inc. v. Jackson, 561 U.S. 63, 66 (2010).

[72] *See supra* text accompanying note 60.

[73] 561 U.S. 63 (2010).

[74] *Id.* at 72.

[75] By comparison, without the delegation clause, the issue of unconscionability would be for the court to decide.

[76] CFPB FINAL REPORT, *supra* note 10, § 2, at 40-44.

standard administrator arbitration rules, like those of the AAA, act as a delegation provision.[77] Accordingly, courts may find it more difficult to police the use of confidentiality provisions in contracts with arbitration clauses. Of course, the fact that an arbitrator decides the unconscionability issue does not mean that the arbitrator necessarily will uphold the confidentiality provision. But if that is the concern, addressing it requires only reversing the outcome in *Rent-A-Center*, not invalidating pre-dispute arbitration clauses altogether.

IV. Conclusion

This article has examined an apparent misperception among some commentators about the confidentiality of consumer and employment arbitration in the U.S. Arbitration is a private process—i.e., the public cannot attend an arbitration hearing—and arbitrators and arbitration administrators are (with some exceptions) required to keep information about arbitrations confidential. But the parties to the arbitration agreement are not subject to an obligation of confidentiality. Either party can disclose the existence of the dispute and any underlying facts, the existence of any arbitration proceeding, and any information about or provided in the arbitration proceeding, including the arbitral award. Only if the arbitration clause also includes a confidentiality provision are the parties subject to a confidentiality obligation, as set out in their agreement. (Table 2 summarizes this comparison.)

Accordingly, criticisms of the confidentiality of arbitration, and in particular that arbitration clauses enable businesses to hide wrongdoing, are at best overstated and at worst misguided. They are overstated because information about disputes remains available, not from

[77] *See, e.g.,* Oracle Am., Inc. v. Myriad Group, A.G., 724 F.3d 1069, 1074 (9th Cir. 2013) (noting that "[v]irtually every circuit to have considered the issue" has so held). *But see* Tompkins v. 23andMe, Inc., 2014 WL 2903752, at *11 (N.D. Cal. June 25, 2014) (refusing "to extend this doctrine from commercial contracts between sophisticated parties to online click-through agreements crafted for consumers").

the court system but from the parties themselves. When a dispute is subject to arbitration, interested persons are not able to obtain filings and other information from the court clerk like they could if the case was in court. In the rare case that would have gone to trial, the public is not able to watch. But the parties continue to be able to disclose the same information they can disclose without an arbitration clause. The criticisms are misguided because they direct attention toward arbitration clauses and away from confidentiality provisions, which seem to be the real source of many commentators' complaints.

TABLE 2. Comparison of Confidentiality in Court and Arbitration

Court proceeding	**Arbitration w/o confidentiality agreement**	**Arbitration w/confidentiality agreement**
Party can disclose existence of dispute and underlying facts	Party can disclose existence of dispute and underlying facts	Party may be able to disclose existence of dispute and underlying facts (depending on agreement)
Party can disclose details of case and opinion	Party can disclose details of case and award	Party likely cannot disclose details of case and award (depending on agreement)
Clerk's office will release information	Administrator will not release information (except state-law-required disclosures)	Administrator will not release information (except state-law-required disclosures)
Judge can issue protective order	Arbitrator can issue protective order	Arbitrator can issue protective order
Public can attend hearing	Public cannot attend hearing	Public cannot attend hearing
Judgment made public unless sealed	Redacted award made public; award made public if enforcement action	Redacted award made public; award made public if enforcement action
Settlements not made public	Settlements not made public	Settlements not made public