# Arbitrators and Orders of Confidentiality

"Arbitrators must consider all aspects of an arbitration to be confidential." This is the instruction given to arbitrators in *The Arbitrator's Manual* compiled by members of the Securities Industry Conference on Arbitration (SICA). While the statement is certainly true, it is important that arbitrators not misinterpret its intended meaning. Its purpose is to encourage arbitrators to respect the privacy of the parties before whom they serve, being careful not to casually divulge information obtained during the course of the proceeding. For this reason, the instruction in *The Arbitrator's Manual* goes on to state: **"records of the arbitration hearing should not be provided by the arbitrators to nonparties"**. The instruction is designed to remind arbitrators of their ethical responsibility not to personally disclose the details of arbitration proceedings.

There have been instances, however, where arbitrators have misinterpreted the above instruction and have ordered that all matters pertaining to the dispute be kept confidential by everyone involved – including the parties. While blanket orders of confidentiality in arbitration might be acceptable if all parties agree, they should be the exception, not the rule. The NASD staff, and the arbitrators on its Roster, are ethically obligated to keep confidential information obtained in an arbitration. However, parties are generally free to disclose details of their own proceeding as they see fit.

The issue of confidentiality also arises in the context of discovery. As stated in NASD Dispute Resolution's *Discovery Guide*: "If a party objects to document production on grounds of privacy or confidentiality, the arbitrator(s) or one of the parties may suggest a stipulation between the parties that the document(s) in question will not be disclosed or used in any manner outside of the arbitration of the particular case, or the arbitrator(s) may issue a confidentiality order." In cases where it is appropriate, ideally the parties will agree on a confidentiality agreement, as described above. This relieves the arbitrator from having to decide whether to issue a confidentiality order that may not be acceptable to all parties involved.

In some instances, the parties will not agree as to what is and is not confidential. A ruling that documents are confidential may impose burdens and limitations on the receiving party, such as requiring special handling or limiting the ability of the party to discuss the documents with witnesses and others who may assist in developing the case. Likewise, such a ruling may keep regulatory officials from learning of conduct in violations of statutes and rules. Thus, confidentiality orders should not be granted without a serious and case-by-case consideration of the issues. When deliberating contested requests for confidentiality orders, the arbitrators must consider the competing interests of the parties.

The arbitrators should bear in mind that the party asserting confidentiality has the burden of establishing that the documents in question legitimately require confidential treatment. In considering questions about confidentiality, the arbitrator should consider such factors as:

1 Is the information so personal that disclosure would constitute an unwarranted invasion of personal privacy (*e.g.*, an individual's social security number, tax return, or medical information)?

2 Is there a real threat of injury attendant to disclosure of the information?

3 Is the information proprietary containing confidential business plans and procedures or a trade secret?

4 Are there essential competing interests at stake that require confidential treatment of certain portions of the proceedings?

5 Is the information already public (*e.g.*, has it previously been published or produced without confidentiality) or is it already in the public domain?

6 Would an excessively broad confidentiality order be against the public interest in disclosure? Keep in mind that securities arbitration is highly regulated by the Securities and Exchange Commission. The former SEC Director of Enforcement, William R. McLucas, has stated: "[P]rivate [securities] actions will continue to be essential to the maintenance of proper investor protection."

7 Are there first amendment or other issues which might be raised by excessive restrictions on the ability of parties to comment freely upon matters in which they are involved?

8 Would an unduly extensive confidentiality order impair the ability of counsel to represent other clients?

Arbitrators should not routinely designate all discovery as confidential. Where confidentiality is appropriate, bear in mind that it should generally be accomplished in the least restrictive manner.

These are just some of the questions that an arbitrator must consider before issuing a confidentiality order that has not been agreed to by all parties to an arbitration proceeding.

* The above article was jointly written by members of the Neutral Roster Subcommittee of the National Arbitration and Mediation Committee (NAMC), a Committee of the NASD Dispute Resolution Board.