High-Profile Arbitration and the Press: What About Confidentiality?

On May 15th, EASL's Alternate Dispute Resolution (ADR) Committee and the NYSBA Dispute Resolution Section co-sponsored this program. Kyle-Beth Hilfer, arbitrator at Hilfer Law and co-chair of the ADR Committee, moderated the program. The panelists included Janet L. Falk, chief strategist, Falk Communications and Research; Jordan Greenberger, partner, Firestone Greenberger, PLLC; and Mansi Karol, director of ADR services, American Arbitration Association.

The program prompted each participant to imagine a scenario in which they were an attorney representing a high-profile entertainer or an entity contracted with that entertainer. The parties were in a dispute that lands in arbitration. The panel considered confidentiality obligations and press relations in the context of arbitration proceedings from varying perspectives: the entertainment litigator, the arbitrator, the press relations manager, and the American Arbitration Association. The panel walked attendees through a hypothetical arbitration in the entertainment world, where industry, business, and local media are salivating to learn more about the dispute.

Below is a transcript of the panel discussion.

Kyle-Beth Hilfer: Welcome, all. On today's program we'll be presenting the perspectives of the arbitrator, the advocate, the PR professional, and the arbitrator administrator on the topic of "High-Profile Arbitration and the Press: What About Confidentiality?" We present tonight a case study of a dispute between Macher and Uppencomer. To set the scene, Mr. Macher is a mega producer and Ms. Uppencomer was his protégé, and they part ways after a highly publicized scandal in Macher's personal life. The company and the two individually all enter into a confidential separation agreement with releases, non-disparagement, confidentiality, and an arbitration provision. The deal terms cover a financial payout on previously co-produced plays, movies, and TV shows, and the deal terms include credits, Macher company's IP ownership, financial payouts, as well as other items at a substantial monthly payment to Uppencomer for a two-year period.

While the details of the separation agreement remain confidential, Ms. Uppencomer, and you're going to start to see a pattern as we present this, Ms. Uppencomer issues a press release announcing the formation of her own entity. And because of the scandal around Mr. Macher's personal life, the press is very eager to discuss this split. Ms. Uppencomer grants several public interviews to the media while dodging questions about Mr. Macher's personal life. Jordan, let's pretend you represent Macher for this question. What would you do if you get a phone call or an email, out of the blue, from a reporter asking about the split between the two parties?

Jordan Greenberger: Yeah, so I think the key part of your question is when it's "out of the blue," right? If you're an attorney and you have no idea that the press is going to be calling you, or even if your client wants you to be communicating with the press or has their own PR team in place or anything like that, I think as an attorney your first initial reaction should be, "No comment." Now if it's a phone call, it might put you in a little bit of an awkward position. If it's an email inquiry from a reporter, it's easy to just not respond and forward it to your client and say, "Hey, this came up, we should talk about what to do." And I think Janet has some thoughts on this too in terms of saying, "No comment," and how to respond to reporters. But if it's really out of the blue, you're going to have all these questions. How did they find out? What do they know? And you've got to get your ducks in a row before you respond.

Kyle-Beth Hilfer: And we'll talk a little bit later about the "No comment," option. But for now, Janet, let's suppose Mr. Macher is eager to redeem himself from the scandal and forms a new company and issues press releases. The media, however, is very eager to hear how recent developments affect the co-produced work under the old agreement. How would you advise your client to answer questions, keeping in mind the confidentiality requirements in the separation agreement? And you represent Mr. Macher here.

Janet Falk: I would keep in mind that Mr. Macher has his own agenda and that agenda is to promote the new company and to keep away from any discussion about the old company. A reporter is going to ask him questions like, "What happened here?" and "What happened there?" The reporter may even use some inflammatory or provocative words in phrasing these questions. Do not repeat that inflammatory or provocative wording. Stick to the talking points. This is about the new company. Keep answering the question the way that you want to answer it and keep answering the question the same way, until the question goes away. Talk only about the new company; don't talk about anything prior.

Kyle-Beth Hilfer: I think you're going to watch your favorite news talking head show with a whole new perspective after hearing Janet's comments. So, we are now at the precipitating event, the one that is going to turn into the dispute and the arbitration that we will talk about. One year later, Macher learns that Uppencomer produced a podcast episode with accompanying video starring a hot new comedian with

groundbreaking content. The podcast will be published and aired on a major streaming service. Media attention is substantial with astounding critical reviews. Uppencomer is taking press calls because she likes to talk to the press and is talking about the comedian and the podcast episode. Macher believes that the podcast is the same or materially the same as a comedy special that the two of them had worked on before their separation. He is furious. Janet, was there anything you would have recommended Macher to do in response to that podcast announcement from Uppencomer?

Janet Falk: I believe that Macher should leave Uppencomer alone, because anything that she says is trying to provoke him. When he responds, he effectively is promoting the podcast and her activity. So, he should stay away from it. If he is planning to take any kind of legal action, that's where things will play out.

Kyle-Beth Hilfer: Macher and his company's lawyers are in the process of developing a nastygram, otherwise known as a demand letter, to Uppencomer's lawyers making various allegations that you can read here, about the copyright and wrongful misappropriation and irreparable harm. And the letter will demand that Uppencomer return all monies previously paid under the separation agreement and cuts off the future monthly payments. Jordan, how would you advise your client at that point? You've heard the perspective of the PR agent, and would you give those instructions to Macher before sending out that nastygram to control or wait? How would you handle that?

Jordan Greenberger: It's a tricky question because as the lawyer, you want to be focused on the legal issues; you're focused on this demand letter and how are you going to make the claim or respond to a claim under the circumstances, but you also have to be aware of the realities of the situation. And so if you're working with PR, a lot of clients are used to, especially high-profile clients, are used to speaking to the press or for whatever their background is, they're in the media a lot and they might already have a system in place.

And so you want to speak to those people and collaborate with them. You have to be aware of issues involving privilege, which we can talk about separately, and who the spokesperson is going to be and what they're going to say. But I think the lawyer's position is, let's focus on the legal issues and collaborate with any team that's in place, keeping in mind the issues like, in the hypo, that there's a confidentiality provision. And so reminding your client, there's confidentiality, advising them of the risks of breaching it and what the potential claim might be.

But clients do what clients are going to do.

You can tell a client there's a confidentiality provision and they say, "Thank you very much, I'm going to breach it." The lawyer has still done their job and then you're in damage control mode. But as long as you're advising the client or reminding them of confidentiality and focusing on legal issues, I think you're on steady ground.

Kyle-Beth Hilfer: And for either one of you, what would change if the dispute somehow leaked out to the press? What steps would you take to manage your client's reputation? I'll start with Janet.

Janet Falk: Once it gets out there, however it gets out there, then you have to respond. But at the same time, it's a very delicate situation because, as Jordan mentioned, there's confidential material in there. You want to be sure that you're not saying anything more than what is publicly available. If any documents have been filed in court, for example, you can refer to those documents. It's very sensitive, because the client is going to want to be blabbing here and there and may disclose more than is appropriate. You want to make sure that you muzzle the client and only the attorney, who knows what's able to be discussed and what isn't, is talking to the press.

Kyle-Beth Hilfer: Before Jordan answers, let's see what Uppencomer's response is to the demand letter. Uppencomer's response to the nastygram is to deny the IP ownership claim. There was no written work for hire agreement for the comedian who wrote the material. It was autobiographical, and the program included a lot of improvisation, and even if Macher and his company could claim IP ownership, Uppencomer is not in breach because she's not claiming ownership rights in the special. She co-produced it, but the copyright is owned by the streaming service who is now exploiting the program. So if Macher has an issue, go to the streaming service, keep paying me and go away. Jordan, you've seen this response now from Uppencomer or from Uppencomer's attorney, and your client is perhaps taking the bait from Uppencomer, despite Janet's sage advice to keep quiet. This is all leaked to the press. How will you rein your client in?

Jordan Greenberger: Some clients can't be reined in. Okay, so I'm representing Macher here, right? Yes. So Macher, hammer home, these are the risks: You signed a confidentiality provision, you're bound by it. From a practical perspective, it can be very challenging to prove what damages arise from a breached confidentiality agreement. My partner is in the audience right now, we have a case right now that's not in arbitration, but there's an issue about leaking information that was supposed to be confidential and as a practical matter, how do you establish damages? And those are all things that you can talk about with your client as they make the business decision. Ultimately, you're working for the client and you do what he wants you to do within the bounds of the law and ethics and everything like that. And if the client is going to

blab, the client is going to blab and you help them navigate through that.

Kyle-Beth Hilfer: Janet, let me ask you about this notion of leaking to the press. Is there a way to control a leak? Is there a right way to leak? Let's talk about that and how that might play into what Macher might choose to do here?

Janet Falk: The way to invoke the press, but still keep a rein on them, is to use what we call in my business *an embargo*. An embargo is when you contact the press in advance of taking some action or making some announcement and you say, "I have this hot story for you, but you can't talk about it until you agree that you will not write anything publicly. You will not publish anything until the date and time that I tell you." Of course, in an industry like the entertainment industry we're talking about, which loves gossip, the reporter is going to be very eager to hear this hot story. But they recognize that if they don't play along with the embargo and hold back, one of their competitors will jump at the chance and will agree to the embargo and then they will be scooped.

Now the way to *professionally leak this* is to get reporters to agree that they will adhere to the embargo and the embargo is slated for an hour or two after whatever activity you are going to perform. Then, not only does the person get the demand letter or whatever activity occurs, but then they get assaulted by this barrage of news stories, which paints a very sordid picture of how they have behaved. This is a very difficult thing to do, because, how do you know that the reporters can be relied upon to hold back on the story, until such time as you have asked them to?

Kyle-Beth Hilfer: Is that ever reduced to a written agreement like, "My lawyer is not here," or is this just a matter of trust?

Janet Falk: Usually, you're sending an email, so you get them to respond to your email. You send an email and say, "I have an idea for a story for you. It's under embargo until this date and time. Please respond to confirm your agreement." If they agree, then you can send it to them. But, if they don't agree or you don't hear back, then of course you're not going to send it.

Kyle-Beth Hilfer: We could do another whole panel on what a breach of that agreement might mean legally, but we're not going to address that today, and I'm not going to put anyone on the panel on the spot on that one. Instead, let's return to our hypothetical. In response to Uppencomer saying, "Give me the money and go away," Mr. Macher files and serves a demand for arbitration, he seeks damages, a temporary injunction, and permanent injunctive relief as an effort to scare the streaming service away from airing the podcast on the schedule of release date. Macher also sends a copy of the demand for arbitration to in-house counsel for the streaming service. That's a little bit of an unusual tactic in terms of arbitral confidentiality right away. Macher has opened up the demand to another third party, and maybe the AAA is aware of that or maybe they're not aware of that. Mansi, when the AAA receives the demand for arbitration, how does AAA handle such cases internally?

Mansi Karol: When we receive a high-profile case internally, our intake team would inform the regional VP and check with him or her to see if the case should be flagged as a high-profile case. The case is assigned to a case manager based on the amount of claim, because at AAA, we are a company of 650 employees and 200 case administrators and everyone manages different cases – this case would be assigned to me or Jeff based on the amount of claim. When we see this case, we would review all case documents. In earlier days, when a high-profile case was filed at AAA, everyone had access to the case documents. But now, given confidentiality, we cannot see each other's cases. So, I cannot see labor cases or construction cases and vice versa. Just the case manager can see the documents and the case manager cannot show the documents to their family members or friends, just because sometimes one can get excited and share the news with personal contacts. All case administrators are under the obligation of keeping all information and documents confidential and not everyone in the company has viewing privileges. So if there's a high profile case, only two people, say the regional VP and the director, would have viewing privileges.

The information is kept very confidential. We initiate the case and set up an administrative call with the attorneys of both firms, even though everything is in the news, we follow our regular procedure. Just because it is a high-profile case doesn't mean that we give them special treatment, which is great about arbitration. We would reach out to both sides and talk to them on, "How do you want to proceed?" We review the clause and ask them, "What kind of arbitrators are you looking for?" We would confirm the hearing situs and rules, division of costs of the arbitrators, the arbitrator expertise and selection process of the arbitrator based on the clause.

Kyle-Beth Hilfer: Do you do any intake around where else that demand for arbitration might have been disseminated besides the other side? Is that something you ever talk about?

Mansi Karol: We do not, but also it is not disseminated anywhere else.

Kyle-Beth Hilfer: What about Macher sending the demand to the streaming service? Is that something that AAA would somehow be aware of so it could alert the arbitrator once appointed that there are some other issues out there?

Mansi Karol: No, we leave it to the claimant. We don't talk to external stakeholders involved in the case. In fact,

when a case is filed, it is the claimant's responsibility to serve the demand to respondent.

Kyle-Beth Hilfer: If Macher requests emergency relief under Rule R-39 of the AAA's rules because they want to secure some confidentiality, ironically since they've already leaked the demand to the streaming service, how quickly can that happen?

Mansi Karol: So, we have cases like this very often and usually an emergency arbitrator is appointed within 48 hours. Sometimes it's 24 hours based on the availability of the arbitrator. As soon as we see emergency relief, we would review our panel and see who all is available. We call a couple of arbitrators who are the right fit for the case and ask them if they are available to do emergency arbitration. Usually, we find somebody and an emergency arbitrator is appointed in 48 hours.

Kyle-Beth Hilfer: Jordan, you're the attorney for the streaming service and your team is eager for you to talk to the press about this dispute to increase hype around the comedian's special. What do you do? You're not Macher's attorney now, we've asked you to wear a different hat now. You're the attorney for the streaming service.

Jordan Greenberger: So, the streaming service is not a party to the settlement agreement between Macher and Uppencomer. Therefore, it is not bound by that confidentiality provision. And it's really more of a relationship and political issue, I think, if the streaming service has a business relationship with either or both of the parties, if they really want to interfere with or have some type of adverse effect on that relationship by making a statement. So, it's really more of a business decision whether or not to say anything in terms of confidentiality.

I want to go back to something I talked about before because I realize I didn't say it, which is when the lawyer is speaking with their client about confidentiality, focus on what is the confidentiality provision. Is the confidentiality provision just the material terms of the agreement? Is it the agreement itself? You can see provisions about any arbitration relating to the agreement also being confidential, preemptively putting in place a confidentiality order. So you have to read the confidentiality provision and understand exactly what it is. And that'll also frame your discussions when you're speaking with any PR team that might be involved in terms of what can or can't be said. The lawyer's job is to help navigate that as well as maybe translate some of the more technical language.

Kyle-Beth Hilfer: That will be something your arbitrator will pay attention to as well, when we get to her appointment. For now, Uppencomer learns Macher is selling his private brownstone, offering proceeds to charity as a PR stunt. Uppencomer knows this is Macher's only significant asset in New York and is concerned that Macher is dissipating assets to render any arbitration award down the road ineffectual. Uppencomer files a New York Supreme Court case to seek an order of attachment pending the arbitration. He complains that the injunctive relief requested should be decided in court. Court filings include exhibits, copies of the arbitration demand, pre-arbitration correspondence. The press finds out the dispute is now on the front page of the *New York Post* and the reporters will be knocking on everybody's door: the parties, the attorneys, and the AAA, and maybe even an arbitrator if one is appointed at this point.

Before I take comments from the panel, I want to just show the arbitration clause that was in the separation agreement. It's essentially a fairly standard arbitration clause, but I want to bring a couple of things to your attention. First of all, we're under the rules of the American Arbitration Association. In addition, the parties are entitled to seek discovery and they are entitled to pursue equitable remedies and agree that the state and federal courts in New York County shall have exclusive jurisdiction for such purpose and for the purpose of compelling arbitration and enforcing an award. This clause was tweaked a little bit for a hypothetical. It comes from a case called *Comedy Club v. the Improv West Associates,* which is out of the 9th Circuit in 2009.[1]

And the crux of that case had to do with the "in addition to arbitration" language. The court said that if the parties intended a carve-out for court, the "in addition to going to arbitration" language would not have been there. Instead, the carve out only applied to claims designed to maintaining the status quo. So, for example, temporary equitable remedies could be pursued in court versus arbitration proceedings. The carve out did not apply to a permanent injunction, however. This clause would, under the 9th Circuit's case, allow Uppencomer to challenge arbitrability, perhaps in court, and Macher could go to court to get the TRO, if he didn't want to pursue an arbitral TRO.

But Macher may choose to keep everything in arbitration due to his previous scandals and desire for confidentiality and control, now that the press is nipping at the door there. Janet, how did the press come to know about the court dispute if there was no public statement out of court by either party?

Janet Falk: The press subscribes to the same court reporting services that the attorney subscribes to. If an attorney files a motion or a complaint, and they have alerts set up, then they're going to see it. They might also find out by talking to someone who, although not authorized to speak to the press, nevertheless is close to the situation and divulged such information. But, of course, this would be an anonymous source.

Kyle-Beth Hilfer: Jordan, what legal steps would you take now, again, as Macher's lawyer in reaction to the arbitration

demand and correspondence being filed in court papers? And if the press calls you, what are you going to say?

Jordan Greenberger: Yeah, so to me this part of the hypo is the key part that I want to get across to the people in the audience, which is that everybody knows that arbitration is private, but not necessarily confidential. And there are so many ways in which your arbitration can become part of a public record in court, like a motion for provisional remedies in aid of arbitration. That's like an order of attachment or an injunction. It could be because somebody filed a case in court rather than going to arbitration and you have to move to compel arbitration. It could be because the arbitrator issued a subpoena and the third party recipient said, "I'm not going to respond," and you have to go to court. Arbitrators can't hold somebody in contempt of the subpoena.

Kyle-Beth Hilfer: And at this point we don't even have an arbitrator appointed yet.

Jordan Greenberger: Yes, I'll finish the thought, which is if you need to move to confirm or vacate an award, also the award is going to become part of the record. But now to go to your direct question, which is, you will frequently see attorneys in such circumstances make a motion to seal the judicial records that have to do with the arbitration. It's usually not successful because of a presumption in favor of public access. There are a handful of decisions that you can find. I can think of two from New York County Supreme Court that really, I think, didn't like that somebody was trying to air their dirty laundry in court. But there's plenty of cases. There was a high-profile case involving "To Kill a Mockingbird,"[2] and I think they made a motion in federal court, maybe in Illinois, to confirm an award. But nonetheless, the very first thing that happened was the movant or petitioner moved to seal and then you look through the docket on *Pacer* and guess what? The court unsealed it because of this presumption of access to public records.

Kyle-Beth Hilfer: And sometimes they'll just seal it for a period of time and then it will become unsealed.

Jordan Greenberger: There could be a temporary sealing. And then the judge vacates that. There was a case involving Donald Trump and his campaign having to do with an employee at the campaign.[3] Brought in action alleging, I think, discrimination. And then the Trump campaign moved to compel arbitration and the arbitrators found that this employee had breached the confidentiality provision and her employment agreement by going to court.

Kyle-Beth Hilfer: This is the *Denson* case that's in your materials.

Mansi Karol: Both cases that you mentioned, were handled at AAA, and we can talk about it publicly because they are public and everyone knows about it

Kyle-Beth Hilfer: It also can come up in the context of bankruptcy. I had a case in which I issued an interim award on liability. The losing party filed bankruptcy before we got to the damages phase. The winning party moved to seal because we're still in the middle of the arbitration. Even though the arbitration was stayed, they were going to go to the bankruptcy court and move to lift the stay so I could finish up the hearing on damages. The bankruptcy court did seal the record. Janet, now that the case is before the court, what steps can Macher take to defend his reputation? And could you talk about some of the Rules of Professional Conduct here governing confidentiality and extrajudicial statements and how those rules would play into the situation?

Janet Falk: As you know, you cannot use confidential information to the detriment of the party on the other side. Macher has to watch out for how he's going to use that confidential information against Uppencomer. Now, if you're familiar with Rule 3.6, then you know it governs what you can and cannot say during trial. That means you can say, "These are the parties that are involved and this is the schedule of how we're going to proceed and these are the dates," and that is it.

Kyle-Beth Hilfer: You may not even be able to say that in arbitration.

Janet Falk: But you cannot give any color and detail about what is going on in that particular matter. You are hoping for resolution, but you cannot go any further. Now, Rule 4.1 is a reminder that attorneys must be truthful in what they discuss. Rule 8.4 is that an attorney cannot misrepresent what they say or engage in misconduct. These are the boundaries and the attorney must stay within these lines. In general, that's why you want to keep your client on the sidelines, because you cannot trust your client to stay within those boundaries.

Kyle-Beth Hilfer: Mansi, how would the AAA respond to a call where the press has found out and is calling everybody, how would they respond to a call from the media about the pending arbitration and the court case? Is there a point person who fields those calls within the AAA?

Mansi Carroll: AAA does not respond to calls from the media about high profile arbitration cases, even if they are pending. There is a point of contact who would deal with such calls – usually it is the regional VP.

Even for cases that become public, such as the Harper Lee case and the Trump case, AAA does not respond to media. Once a case becomes public, we still have to be neutral about

what we speak, even if one side criticizes AAA, we have to maintain our neutrality – ultimately both sides are our clients.

If somebody from the media is trying to get in touch with AAA staff and cold call, an internal email is circulated stating that media is trying to get in touch with AAA regarding a case that has been filed. Staff should not respond to the call.

Also, sometimes media and even the respondents who are upset, start cold calling and again, an internal email is sent out that, "Do not respond to media or this person." So, whenever something like this happens, our marketing team or the legal team takes care of it. We also need to get in touch with our legal team when it is a high profile case on what are the next steps? What's going on? And make sure we are intact with our legal guidelines within the company.

Kyle-Beth Hilfer: Can you talk about rule R-53, which allows the AAA to furnish to a party copies of papers not privileged or confidential for judicial proceedings. How does the AAA interpret what is confidential? If there is some emergency confidentiality order in place, as opposed to if there is not such an order in place, how do you decide that? Because we haven't even gotten to the arbitrator appointment yet here.

Mansi Carroll: Per Rule 53 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. If a confidentiality order is passed, AAA will not furnish the copied of documents.

Kyle-Beth Hilfer: Good to know. We are now going to the step of choosing the arbitrator. Mansi mentioned that they will put together a list of potential arbitrators. What considerations do you give in putting that list together, especially with high profile clients in the entertainment industry? What are you looking for? Especially now you've got a case that's getting a lot of public attention, what are you looking for?

Mansi Carroll: So, when we receive a high-profile case or any other case where there's a big claim involved, we would talk to the attorneys on both sides and take down arbitrator expertise, as I already mentioned. It could be intellectual property expertise, it could be commercial contract expertise or something else based on the type of claim. Jeff and me, we talk about the expertise requested and which arbitrators would be a good fit for the case. Sometimes there are some arbitrators who already handled high profile cases, so they have more experience and we would probably list one or two arbitrators who have dealt with situations like this, especially when there's a confidentiality order that needs to be written down immediately. So we do have a few arbitrators in mind who know how to do that, and we make sure the list is 30% diverse because this is the policy now.

Any list that goes out has to be 30% diverse, which means that we include women, it could be people of color, members of LGBTQIA+, people with disabilities, but they have to code as diverse in our system. But sometimes media also gets it wrong. For example, again, in the Jay-Z case,[4] the list that was sent out was actually 50% diverse. I'm sure many people in this room know about the case and Jay-Z's attorneys, Quinn Emanuel was the law firm representing him, they wanted a list that only had African-American male arbitrators, which is really not diverse, given their request. The administrator had listed about seven of them. So it was 50% diverse with African-American male arbitrators.

When the list was sent out a TRO was filed by the Claimant's attorney and the media got the wrong story. AAA got a bad name because of it, because everyone started to speak about our diversity efforts. And even though we've been promoting diversity since the 1970s, we have our Higginbotham Fellow Program and we are making sure all our diverse arbitrators are listed and promoting diversity from all standpoints. However, the silver lining of that case was that there was a dialogue about diversity and now all institutions speak about diversity. The only challenge is the media got it wrong. We believe that media should connect with us and speak to us directly as opposed to just coming up with the story and all those articles that were published in *New York Times* and other channels, they were not articulated correctly.

Kyle-Beth Hilfer: Jordan, should the clients be involved in the arbitrator selection process, or just the attorneys?

Jordan Greenberger: Clients should be offered the opportunity to be involved. When you're dealing with the AAA or another ADR service provider, frequently we get a list and it's a lot of lawyers, usually with subject matter expertise.

Mansi Karol: Often in those administrative calls, especially high-profile cases and high claim cases, in-house counsel join the administrative call just to see how the call is running and the expertise that are involved in the case are actually being discussed.

Jordan Greenberger: My point being, clients don't necessarily know those people on the list. So, when you show them a list of 10 attorneys who are the arbitrators, they'll just throw their hands up and say, "Jordan, I leave it to you and ask around or if you know anybody, figure it out." But that's not to say that there aren't industries that have their own little ADR worlds. I have a friend who does a lot of sports arbitration and there's a handful of people that everybody goes to all the time.

And so the clients are likely more involved in saying, "Oh, I know this person, I had experience with them or not." And we had a case recently where there was an arbitration provision that was from 1940-something or early 1950s, and it

named the person, Harry Schwartz (that's my grandfather's name). But Harry Schwartz was dead, and so yet another way that you could go to court is you need the court to appoint an arbitrator. And in that case, actually, they appointed the AAA, just FYI. So, the point being that clients can be, even going back to the drafting of the confidentiality agreement, be involved in identifying who they want to do the arbitration. I'd say more frequently, though, you find one of the larger service providers identifying potential arbitrators.

Kyle-Beth Hilfer: There's also the opportunity under AAA's enhanced arbitration process to do some interviewing ahead of time of arbitrators. You can interview and ask specifically about experience with the industry. Then, the client may be more involved in reading through those answers. Maybe it's a good time to remind the client this is not the time to go to the press to talk about this list of potential arbitrators. But then again, clients will do what they want. So at this point, let's assume that the arbitrator has been chosen and we're at the first status conference and on the party's first preliminary hearing. It is likely Macher's lawyer is going to raise the issue of confidentiality. If she doesn't, it's probable that the arbitrator herself will raise the issue, given the contents of Rule 45B.

Now, as many of you know, the AAA revised its Confidentiality Rule in 2022 and 45B, together with R-24, as it also was amended, the Rules now give much greater enforcement powers to the arbitrator. We can now provide for a confidentiality order that governs the entire arbitration. Before, we had an obligation as arbitrators to keep things confidential, but we had little control over what the parties or their counsel could say to the press or anybody else, unless they had entered into a confidentiality agreement. Those issues might be part of the underlying settlement agreement in our hypothetical, as Jordan mentioned, but maybe not. Now, because of the revisions to 45B, as the arbitrator, I have the power to protect the integrity of the proceedings.

However, the Rule does say that it's upon agreement of the parties or a request of the party. So, in theory, such an order is still party driven. Now we can have a debate, as arbitrators tend to do, about whether arbitral authority under other Rules gives the arbitrator the right to order a cone of silence around the proceeding. The argument for authority is especially true if local law is on the side of confidentiality or the arbitration clause in the agreement makes it easy for you and dictates confidentiality. So, typically at this point, you'll probably find most arbitrators will at least raise the issue of a confidentiality order, even if the parties don't raise it, particularly knowing that it's a sensitive case. Sometimes the advocates aren't fully aware of this amendment to the Rules, and they may choose to submit an order once they know about the robust powers the arbitrator has.

One thing that I've seen in my practice as an arbitrator is frequently they'll come in and say they want a confidentiality order, and I'll say, "Fine, draft something up for me." What they submit will really just address the documents and not address these bigger issues. And that's the point where I might educate them about the possibilities. They often will go back and redraft it so that there is this broader protection. Don't assume your advocates know about the arbitrator powers. If they present you with their first draft of the confidentiality order, it doesn't mean they don't want a broader confidentiality order. It's possible they are not even aware that that's a possibility. Mansi, since the rule change in 2022, have you seen an uptick in these broader confidentiality orders?

Mansi Karol: Yes, definitely. Since the rule change, there has been an uptick in the confidentiality orders. That's why when the Rules were revised in 2022, we implemented this Rule. Just so you know, parties and the arbitrators are aware of the fact that a confidentiality order can be implemented. But even before this Rule was added in September 2022, oftentimes if parties requested, the arbitrators would implement confidentiality orders to protect the documents and the integrity of the case, right from the beginning of the case. Especially where large companies are involved or it's very high profile client.

Kyle-Beth Hilfer: And again, I think it's very common for them to think about it as being to protect the documents. And now we have this broader codified ability.

Mansi Karol: Arbitrators could not implement it by themselves, but now that the Rule is there, if the arbitrator believes that it's important, the arbitrator can ask the parties. Sometimes attorneys are not aware that there is a Rule on it.

Kyle-Beth Hilfer: They just don't know. So that's our job as arbitrators, is to inform them of the possibilities. So, what are the arbitral powers? R-24 deals with enforcement powers of the arbitrator, and in part it allows the condition of document exchange and admissibility at the hearing on confidentiality orders. 24-D covers the willful non-compliance with any order issued by the arbitrator. And on that situation of willful non-compliance, it allows the arbitrator to draw adverse inferences, exclude evidence, and makes allocations of costs or even issue interim awards based on costs related to non-compliance. 24E, the next provision, allows the arbitrator to issue any other enforcement orders that they're empowered to, according to the law. Jordan, how would you think about proving costs of non-compliance or instructing the arbitrator on what enforcement orders might be allowed under applicable law under 24E?

Jordan Greenberger: Yeah, it's challenging, right? If there's a breach of confidentiality, what has been disclosed? Is it the secret sauce or is it something that a party claims is proprietary but maybe isn't? And just going back to the first

year of law school, even if there's a breach, you have to prove damages. I think you should also just think about the real-world effect. Arbitrators are humans. Their job is to be neutral, but if a party willfully violates an arbitrator's order, will that make them grumpy or have some other impact on just the way the proceedings go? So it's very context specific as to what the damages might be, but I would say it's probably very challenging in some circumstances and may even be outside the scope of the arbitration provision, if that's something that the arbitrator is charged with being responsible for.

Kyle-Beth Hilfer: Well, if we're allowed to make special allocations and costs, someone has to show us what those costs might have been, right? Even if we have the authority to do it, we can't just pull it out of thin air. And maybe we should talk for a minute about R-60, covering sanctions. So that's an even more refined and delicate enforcement power that the arbitrator has. R-60 allows the arbitrator to order appropriate sanctions where a party fails to comply with an order of the arbitrator. And it's very broad, but there are some limits on arbitral authority.

First, there are certain due process requirements baked into the Rule and we're not going to discuss those today, but you can go back and read the Rule and you'll see the due process requirements just written into the Rule. Second, the failure to comply with R-60 does not have to be willful. On the other hand, R-24, that we talked about previously, does require willful noncompliance to levy its enforcement powers. I'd venture to say that most arbitrators are going to be very careful without any willful noncompliance in even considering some sanctions.

They're also going to take a look at what the arbitration agreement itself says. The clause may not allow sanctions. It may specifically say that, and then the arbitrator's hands are tied. State law may come into play if the contract prohibits punitive damages and whether that could prevent sanctions, potentially. That's a briefing issue for on what is the interplay between punitive damages and sanctions. And if the abusive conduct occurred in the judicial arena, it may not even be something you can complain to the arbitrator about. Let's also note that arbitrators are not permitted to issue default awards as a sanction, so that's off the table.

Finally, the sanctions apply against the party, not the counsel. So that's a very difficult situation. If the counsel is the one who is willfully violating or non-willfully, depending on the case, can that be attributed to the party? And it probably is a very fact-specific inquiry. So all in all, I think that arbitrators are going to be very careful to make sure they aren't exceeding their powers in terms of granting sanctions.

But Jordan, what would you think would be appropriate if there has been a willful violation of an arbitral order? What would you as the advocate be asking for?

Jordan Greenberger: Perhaps financial, perhaps some type of adverse inference with respect to the nature of what's been disclosed and how it plays out in the case. Basically the same type of thing you would ask for in court if there was some type of violation of a discovery order or breach of confidentiality or something like that. If you can't default and strike somebody's pleadings, if that's off the table, then you're really just stuck with financial or an adverse inference or evidentiary preclusion, stopping somebody from being allowed to present evidence on a certain topic related to whatever the issue is.

Kyle-Beth Hilfer: That's tricky. Most arbitrators, I think, are probably going to be very careful about precluding evidence, right? Even if there has been a bad act, you still want to hear the relevant evidence, because that could impact the merits of the case. Financial sanctions only help so much, especially because the arbitrator doesn't tend to deal with financial issues until the end of the case. That's likely a briefing issue as well: can you declare a penalty in the middle of the case for contempt of arbitration, so to speak? Certainly, any counsel requesting sanctions should be expected to brief all these issues. And I wonder also, is there any sanction that could jeopardize the confirmation or enforcement of the award? What do you think about that, Jordan?

Jordan Greenberger: Sure. If there was some type of due process issue, and I think somebody referred to that before, make sure there's due process baked into the rules, but if there's some type of showing of bias or impropriety or something like that with respect to the arbitration proceeding or the arbitrator themselves, then moving to vacate an award, I could see that being an argument, sure. But the arbitrator exceeded the bounds of some type of public policy or the arbitration agreement doesn't allow the arbitrator to do that. Even if the AAA has rules regarding sanctions, arbitration can take place in other contexts. They might not have those same types of rules. So I could certainly see that being an argument that was made.

Kyle-Beth Hilfer: We're going to just jump ahead and the case is now over. I'm not going to tell you how it came out, but the case is over. And so Mansi, what happens when a high profile case is closed at the AAA?

Mansi Karol: Any case, high profile or not high profile, when it's closed, all information is kept confidential. All documents that are on other file are deleted after 18 months after the case is closed, unless the case is vacated or the award is reviewed. We send a closing letter to counsel that all documents will be intact in our system for 18 months per our policy, and then everything is deleted.

Kyle-Beth Hilfer: That's something for arbitrators to think about. We all have our standard policy on when we purge our files after a case. In a case like this, it's tempting

to hold it a little longer maybe because just in case there's a challenge comes out, but maybe that's also the reason to get rid of it sooner. The high-profile nature of the case cuts both ways. And I guess it depends on where you fall on your spectrum of risk protection. And Jordan, the victor will go to the court to confirm the award. What steps can the loser take to maintain confidentiality? I think we talked a little bit about this already, but in terms of asking for a seal?

Jordan Greenberger: That's really the only option that I can think of. As I said before, it's unlikely that that would be permanently sealed. I mean, even if you look at, you're moving to confirm in state court in New York, that would be the CPLR, which requires the arbitration award as part of the judgment roll. I'm pretty sure the FAA, if you're in federal court, also requires the arbitration award as part of the court file with respect to any judgment that's entered confirming an award. So, it would be difficult for me to see a scenario where at some point the award isn't publicly available. You might have to go to the courthouse or even if you don't have a PACER account or online access, but I think you should not expect it to be sealed.

Kyle-Beth Hilfer: Let's do a final round-robin for the panelists. What would you do if you get a phone call or email out of the blue again from a reporter asking about a previous arbitration that you had worked on? And I'll start with Mansi.

Mansi Karol: Sure. we would send it to our legal to review.

Kyle-Beth Hilfer: So it will go to legal to handle?

Mansi Karol: To handle or to see how we should respond to this one call or email.

Kyle-Beth Hilfer: And Jordan?

Jordan Greenberger: Yeah, I guess it depends on when you're getting the call. If you're getting a call a year later, do you even remember what the confidentiality provisions were or what the ground rules you had established were? So I think you're safe in probably saying, "No comment" or ignoring. And if you have time, go back and check with your client and see if anything's publicly available, you could always refer to that, but you're probably better off just saying nothing. At least speak to your client first.

Kyle-Beth Hilfer: Janet, I'm going to give you the final word here about the "No comment" scenario. What's your PR take on "No comment" as a response?

Janet Falk: Okay, "No comment," generally reflects negatively on the person who says, "No comment." What I recommend is, you get the contact information of the reporter; you get their phone number, their name, their publication, and their email address. Then you say, "I'd really like to talk with you about it, but you have to tell me what exactly you would like to discuss, because I'm going to have to consult my client, I'm going to consult my files, and I want to be able to be helpful to you. Please tell me exactly what you would like to discuss and I'll call you back in 30 minutes." This way you buy yourself a little time. You show the reporter that you do want to be responsive and you do want to be helpful, but you cannot do that at that moment.

Now, you take your 30 minutes and you get permission from the client to make sure that responding to the reporter in this way is in the best interest of your client. Then, you refresh your memory with what transpired. Then, you come up with your three talking points of what it is that you're going to say to the reporter. You print them out in 16-point font, so that you can have them in front of you clearly and remember what it is that you're going to say. Then after the half hour, you call the reporter back and you say, "This is what I can tell you." If you are constrained by proprietary information or confidential information or privileged information, then you say, "This is what I can tell you. Everything else is privileged or proprietary or confidential, and so I cannot discuss it any further."

Now, I want to point out that, while you're doing this work of consulting with the client, refreshing your memory and coming up with your three talking points, the reporter is not sitting by the phone like a teenage girl on Saturday night waiting for it to ring. The reporter is calling other people who were involved in this situation. You have to be prepared to respond, even if it's only to deflect, because the story will not go away. The reporter will write it and the other people that the reporter might speak to will not see the story the same way that you and your client do. So, I'm sorry, Jordan.

Jordan Greenberger: I like your answer better.

Janet Falk: Saying, "No comment" effectively pushes the reporter out the door to find another source.

Kyle-Beth Hilfer: And certainly as an arbitrator, if I were to get a call, I would call the AAA and legal and see if they want me to respond or if they want me to just refer the matter to legal. But if somebody shoved a microphone in front of my face and I didn't even have time to consult, certainly we've learned from Janet that we're going to not say, "No comment." Instead, we're going to say that we're bound by confidentiality.

Endnotes

1. *Comedy Club v. Improv West Assocs* 553 F. 3d 1277 (9th Cir. 2009).
2. *The Dramatic Publishing Company v. Carter et al*, 1:21-cv-05541 (N.D. Ill.).
3. *Denson v. Donald J Trump for President, Inc.*, 180 A.D.3d 446, 116 N.Y.S3d 267 (1st Dep't 2020).
4. CPLR § 7503(b), *Petition to Stay Arbitration in Carter et al. v. Iconix Brand Group, Inc. and Icon de Holdings, LLC*, *available at* www.thetmca.com/files/2020/01/2017193.pdf.