

Social Media Revisited: A New Look at Arbitration Disclosure in the Age of Interconnectivity

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Since its early development approximately fifteen years ago, social media has revolutionized the way people interact with each other. Social media has spread virally and morphed into our everyday social and professional lives. For many, it is the preferred means for staying in touch with the world and communicating with fellow practitioners.

In early 2012, the American Arbitration Association published an article titled *Arbitrator Disclosure in the Internet Age*, which was co-authored by one of the current authors.¹ The rapid evolution of social media since that time merits that the topic be revisited.

Social media has evolved from its innovation as a novelty utilized by a few college students into a global phenomenon to communicate and share content. Social media has taken on many variants around the world but, for the legal profession in the West, Facebook, LinkedIn and Twitter are the mostly widely used and recognized sites. Yet even those sites have evolved in the last few years.

Facebook grew from (an already respectable) 900 million users in 2012 to over 2.2 billion today. In that time, it has morphed from being a purely social networking tool to emerge as perhaps the most impactful information source in our lives. As recent news developments reveal, Facebook's impact is, accordingly, coming under increased public scrutiny. In Facebook's recent incarnation, the divide between social and professional uses has faded and it is increasingly relied on for professional news and communications. Although it has lost some younger users to visual media and others due to trust issues, it remains a major force.

LinkedIn's original focus as a virtual address book gave it some legitimacy as a site for professionals. Over time, particularly following its acquisition by Microsoft in 2016, LinkedIn has implemented additional networking and news features. It grew from 140 million users in 2012 to over 450 million today. LinkedIn is now fully adopted by professionals, including lawyers, as a means to share and comment on professional news and developments. Although LinkedIn is utilized by lawyers of all ages, the near-constant use by younger professionals to share information and support each other makes it a mode of interaction that cannot be ignored.

¹ Ruth V. Glick and Laura Stipanowich, *Arbitrator Disclosure in the Internet Age*, *Dispute Resolution Journal*, vol. 67, no 1 (Feb. 2012).

Twitter's positioning as a social microblogging site has expanded to include news and event alerts. Twitter grew from 185 million users in 2012 to over 330 million today and it is increasingly relied on by lawyers to follow the news and promote professional events.

The evolution of social media and our interactions with it are pertinent to how we approach disclosure issues. Legal disclosure standards, as well as rules prescribed by arbitration providers and codes of ethics for arbitrators, place an affirmative duty on arbitrators to disclose any circumstances likely to give rise to justifiable doubts as to the arbitrator's impartiality or independence. These rules were written well before social media existed so how can you now measure justifiable doubts when you are digitally connected to almost anyone with less than six degrees of separation?

Lawyers using Facebook or LinkedIn today may have thousands of connections. "Friending" someone on Facebook, "connecting" with someone on LinkedIn or even "liking" a post in 2018 has a different connotation than it did in 2012 or years before. Today, we readily recognize that most Facebook "friends" are not friends and may be acquaintances at best. Similarly, LinkedIn connections may be other professionals around the world with whom we've never met or spoken. And "liking" a post may mean little more than that you've read it and it didn't offend you.

This evolution needs to be considered in the context of ethics disclosures. Although there is sparse case authority regarding use of social media by arbitrators, there is a developing pool of professional advisories and court cases involving judges, and those cases are now turning to the question of online connections.

The guiding rule for both judges and arbitrators is that disclosures should be made based on the degree of a relationship. By 2012, ethics opinions, from jurisdictions including Florida, New York and California, tolerated judges joining social networks but precluded or expressed concerns about "friending" lawyers. Those prohibitions still hold despite the fact that, in perspective today, it is unlikely having a social media connection necessarily constitutes a meaningful relationship or even creates an impression of having influence on others.

The question of a judge "friending" a lawyer on Facebook is currently under consideration by the Florida Supreme Court (No. SC17-1848). In that case, *Law Offices of Herssein and Herssein v. USAA*, 229 So. 3d 408 (3rd Dist. FL 2017), a Florida appellate court held that the mere fact that a judge is a Facebook "friend with a lawyer for a potential party or witness, without more, does not provide a basis that the judge cannot be impartial or is under the influence of the Facebook friend.

We shall see in months and years ahead what the courts say about judges and, eventually, arbitrators making social media connections. Logic tells us arbitrators

should be held to a similar standard as judges when it comes to social media. The argument can be made otherwise. We expect arbitrators to be connected with the world and to provide practical insights in their decision-making. The authors would argue that requiring arbitrators to pledge social media abstinence makes arbitrators less suited for appreciating and evaluating real world realities.

Fearful of change, some arbitrators have eschewed any social media presence at all. But the digital world is moving forward and ADR users increasingly prefer an arbitrator with a social media presence so that they can access materials and information about the arbitrator more readily. In 2012, the guidance for arbitrators was to disclose everything, particularly close personal relationships and any business relationships with parties, counsel or witnesses, and never make social media connections. That is still safe advice but the authors contend that, given the evolution of social media, it is outdated guidance. There is room in the world for social media, and the task should be identifying significant relationships, online or offline, rather than merely disclosing the existence of a social media account.

The test should be to compare the online relationship to an in-person relationship and determine whether it is significant enough to disclose. For example, one would not list all members of the ABA Section of Litigation but would disclose whether the arbitrator knew an advocate from some greater interaction such as being on a small committee together or being a co-presenter on a program. While that in itself would rarely, if ever, be a cause of disqualification, one might justify disqualification based on ongoing substantive connections, like frequent personal chat or substantial comments on posts online. Disclosing relationships that may be perceived as significant is better than merely disclosing you have hundreds or thousands of contacts through LinkedIn or Facebook and not disclosing substantial connections among those contacts.

It remains best not to selectively invite connections with counsel on an active case. On the other hand, pre-existing connections shouldn't necessarily merit disclosure unless there is more to the relationship. Similarly, perhaps, accepting a LinkedIn invite from counsel on a case is inconsequential in and of itself.

We need to ask ourselves, in 2018, does it truly make sense to avoid social media? If you have a social media account, what benefit is there to the parties in your disclosing one of hundreds or thousands of Facebook "friends" when there is no significant relationship? Is there really any harm in creating LinkedIn connections with counsel on a case? Does "following" the President or anyone else on Twitter mean you have a close relationship with them?

Undoubtedly, we will face new questions as old ones fade away. Avoiding social media is becoming less and less possible. Perhaps the push for "arbitrator transparency" and "advocate transparency" might someday compel all of us to disclose every one of our

contacts online rather than have their identities hidden away. Or there might be adoption of a more defined standard, such as the authors have suggested, of significant relationships, that must be disclosed. Stay tuned or, rather, stay connected.

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