

So Yesterday: Reconciling the Arbitrator Code of Ethics With a Seemingly Amorphous Social Media Environment

by Joan D. Hogarth



Joan D. Hogarth is an arbitrator, mediator and attorney with substantive law experience in healthcare and in assisting seniors to navigate the multiple legal issues that may affect them. Hogarth has arbitrated over 500 consumer and securities cases and approximately 65 mediations to include Storm Sandy cases.

“Should an arbitrator walk into a bar? Walking into the bar is innocuous—legally and ethically neutral—but what you say or do there might matter and should be treated in the same way that you’d treat similar activity done anywhere else. The same analysis applies to things done on social media.”¹

“I avoid participating in social media ... because I find it to be a serious waste of time. ... Then there is the possibility of creating a problem for yourself in creating unwanted conflicts of interest. Leave it to the kids and millennials”²

A huge gap is evident between the pro-social-media arbitrator and the anti-social-media arbitrator. On the one hand, the arbitrator that is open to the use of social media likens it to any other social situation. It is not about participating but how you conduct yourself when you do participate. Enter the bar. Drink responsibly. The other arbitrator is legitimately concerned about situations because of her participation on the social media platform, which could result in actual or perceived conflicts. This arbitrator yields social media to the “kids and millennials.” It is not an uncommon sentiment as it is well-known that the majority of active and successful arbitrators today are professionals who have had long careers in their field and are now leveraging that expertise in arbitration. Their view, as the older generation, is that social media should be left to the younger generation. I object to that position; social media is one of the places where business is conducted by current and potential users of arbitration. The consequence of disengagement is abandonment.

I must confess that I am not of the younger generation working in a paperless environment and thriving on virtual relationships. Indeed, I am from the old school of drafting articles with pen and pad, banking by walking into the bank building, submitting typed resumes, hand writing letters, and even “dialing” a phone

number. The primary sources of my social networking are professional events, training, and Meetups. These are all such “yesterday” modes of communicating that if I remain unchanged for too long, I really will be left behind. So, too, will the disinclined arbitrator bent on maintaining the old world order in a world that no longer recognizes, or even uses, the old tools of communication. Social media has grown exponentially and developed amorphous characteristics that the arbitrator has become agitated in her attempts to grasp the full meaning of its role in society and its effects on the arbitrator’s ethical duties. Advice has ranged from “carefully tread into the social media environment” to “stay away at all costs.”

In this column, I encourage arbitrators to engage in social media; to be transparent; and to maintain the professionalism, fairness, independence, and impartiality that is required in all communications environments.³ You will be engaging with the young professionals who are either principals of the businesses for which you are arbitrating or who are desirous of becoming arbitrators.

Social Media

Social media is a form of communicating and has been variably defined as: (1) facilitating communications and communities; (2) the range of internet-based services that allow users to participate in online discussions, share user-created content, and join online communities; and (3) web-based portals created to allow dialogue and the sharing of content. There are many social media platforms, with the most popular ones being LinkedIn, Facebook, Flickr, Twitter, Instagram, YouTube, and Snapchat.⁴ Social media has gained popularity in all industry segments including that of the legal field. It is used for marketing, advertising, recruitment, and communication with clients. “It’s where people are” the Environmental Protection Agency (EPA) claimed in a 2014 presentation.⁵ It is where people network and communicate with each other.

Effectively, what has occurred over a few short years is that communications has morphed from controlled, confidential one-on-one or targeted communications and discourse to a more open, world-wide, dispersed and amorphous communication. In this environment, the communicator is not necessarily aware of who is listening to or reading the content of his/her remarks or creation, until there has been some feedback or consequence of the communication. It is this uncertainty that has created anxiety for arbitrators. Will my participation in social media aid or hurt my work and/or the arbitration process?

The Arbitrator's Code of Ethics

Consider, then, the underlying code of ethics for the arbitrator. Arbitration is a private way of resolving disputes in an environment where the parties are treated fairly and impartially. The Arbitrator's Code of Ethics⁶ provides guidance in resolving the dispute so there is confidence that the process is fair and that there are high standards of conduct. That is the statement of Canon I of the Arbitrator's Code of Ethics.

There are about four canons that possibly could be implicated by the arbitrator's use of social media. The arbitrator has the obligation to (1) be impartial, (2) disclose conflicts, (3) maintain confidentiality of the proceedings, and (4) refrain from ex parte communications. A fifth canon indicates that the arbitrator may advertise as long as it is truthful and accurate.

Reconciling the Relevant Codes With Social Media Use Impartiality

The arbitrator's obligation of impartiality is satisfied when he exhibits neutrality and fairness in the process. Impartiality indicates that the arbitrator does not favor one party over the other. That lack of impartiality is often exhibited by providing advice and counsel to one or the other. Impartiality could be implicated by a user of social media if, as a member of a virtual community, one of the parties or counsel inadvertently contacts the arbitrator through the platform. Social media notwithstanding, an arbitrator who is a member of a bar association in which one of the parties is a member, is no more in breach of this code when he connects in person than online. There is no unethical behavior in this contact, although it is likely to be perceived as partiality. In none of these scenarios—online or at a bar event—should the arbitrator fall victim to inappropriate inquiries. Without disclosure of such an in-person or online contact, the likelihood exists that this simple appearance of partiality could lead to an award being vacated.

Duty to Disclose

Canon II of the Arbitrator's Code of Ethics for commercial cases states that an arbitrator should disclose any interest or relationship likely to affect impartiality or that might create an appearance of partiality. The arbitrator must disclose any known existing or past financial, business, professional, or personal relationships that might reasonably affect impartiality or lack of independence in the eyes of any of the parties. With or without social media, such an obligation can be satisfied with reasonable inquiry. The obligation to disclose continues from pre-arbitration to the start of the arbitration process and throughout the process, and it continues after arbitration. Any issue that arises at any time before, during, and after the arbitration process that could give the appearance of partiality or a conflict of interest should be disclosed.

So, it is the arbitrator's continuing obligation to disclose all interests that may give the appearance of partiality and, since there is no

reasonable inquiry that could definitively identify all relevant social media contacts, the arbitrator needs to prepare a blanket disclosure that could address current and potential online contacts. Parties in arbitration are mostly now aware of social media, how it works, and the resulting formation of "worldwide relationships." The arbitrator who uses social media may wish to use a disclosure such as the one shown below:

I use a number of online professional networks such as LinkedIn and group email systems. I generally accept requests from other professionals to be added to my LinkedIn profile, but I do not maintain a database of all these professional contacts and their connections, which now number over 500. LinkedIn also features endorsements, which I do not seek and have no control over who may endorse me for different skills. The existence of such links or endorsements does not indicate any depth of relationship other than an online professional connection, similar to connections in other professional organizations.⁷

Confidentiality

Arbitration is private and is generally touted for the confidential nature of the proceedings. Canon VI of the arbitrator's code states that an arbitrator should be faithful to the relationship of trust and confidentiality inherent in that office. In other words, he must keep proceedings and information gained during proceedings confidential. The arbitrator has a duty to refrain from sharing this confidential information in whatever forum he may be in. The arbitrator would not discuss the substance of the arbitration with the parties, friends, or even a colleague without the permission of the parties. Why then should the arbitrator allow the anonymity of the social media platforms to embolden him to share information when that would not otherwise have occurred?

The arbitrator should take the time to understand social media—the breadth and scope of the various platforms—in order to make an informed decision to join. For example, a whisper to a colleague about a case does not have the same impact as a posting online. Even with identifiers removed, it is likely that someone in the community could recognize the case. Sharing confidential information would be a breach of the code of ethics.

Neutrality in Ex Parte Communications

Canon III states that an arbitrator should avoid impropriety or the appearance of impropriety in communicating with parties.

This obligation is easily affected by social media because many of the platforms allow for "friending,"⁸ endorsing people, or subscribing to a channel. An arbitrator, as a member of a social media group, may endorse or "like" discussions of people on social media before being engaged in an arbitration. To the extent that a reasonable review cannot reveal that relationship, a disclaimer would be in order. Where it is known that a social media relationship will affect an ongoing matter, the arbitrator may wish to refrain from participating in the discussion to avoid breaching the ex parte communication rule.

Advertising

Canon VIII is perhaps the more accommodating of the arbitrator's ethics rules in that an arbitrator may engage in advertising or promotion of arbitral services that is truthful and accurate. The use of social media is for precisely this purpose. Private industry and government have come to recognize the benefits of social media for

marketing purposes. An arbitrator, even if listed on a provider list, is generally allowed to promote the work they do. The arbitrator, in keeping with the professionalism of ADR and of the arbitration process, needs to choose wisely where to have his or her presence known. For example, in evaluating the various platforms, an arbitrator's potential client would not be a Snapchat user but is more likely to be a LinkedIn user. LinkedIn is a social media platform for professionals that the arbitrator could use. Due diligence and ongoing monitoring of the chosen platforms will ensure that the arbitrator complies with the rules.

Conclusion

If social media has become so integrated into our society that most marketing, advertising, hiring, sharing, and communicating is done on it, an arbitrator needs to consider its use in his practice. It is appropriate and wise to question and analyze social media but not to the point of paralysis. The arbitrator must be engaged in the social media environment. The Arbitrator's Code of Ethics are not being compromised. The cautious arbitrator should sit down with a "kid" or "millennial" and, together, assess how social media activities of an arbitration will affect each canon and create a subset of rules to ensure that the arbitrator does not breach the code. To remain on the outside looking in would provide the arbitrator no comfort and

do the arbitration process no good. People are on social media. The enlightened arbitrator must be on it, too. That is the innocuous part. As long as the rules are followed, there will be no ethical breach. ☺

Endnotes

¹A blogger's response to the line of discussion as to the extent arbitrators should be active on social media.

²Yet another blogger's response to the same line of discussion.

³Where provider's arbitration rules prohibit the arbitrator's use of social media, this encouragement should be ignored.

⁴This list was created in September 2018 and is subject to change.

⁵E.P.A., AN INTRODUCTION TO SOCIAL MEDIA (Mar. 2011), <https://www.epa.gov/sites/production/files/2014-03/documents/social-media.pdf>.

⁶A.B.A. & COLL. OF COMMERCIAL ARB., ANNOTATIONS TO THE CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES (2003), https://www.americanbar.org/content/dam/aba/events/dispute_resolution/committees/arbitration/Code_Annotated_Final_Jan_2014_update.pdf.

⁷Example of disclosure language offered by Ruth Glick, mediator and arbitrator. ABA Section of DR (@ABA_DR), TWITTER (Apr. 16, 2015, 2:21 PM), https://twitter.com/ABA_DR/status/588814439119335425.

⁸Wikipedia defines "friending" as the action used on social networks to add someone to your list of "friends." It further explains that "friending" does not necessarily involve the concept of friendship.



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