

GUIDANCE NOTE: ARBITRATION AND SOCIAL MEDIA

INTRODUCTION

The use of social media—namely, virtual communities and electronic networks used by participants to create and share information—has grown tremendously over the last decade. There are now billions of users of social media such as Facebook®, Twitter®, and LinkedIn®. Social media come in all shapes and sizes. There are those that are primarily social. Others are used for business networking. Still others—essentially electronic mailing lists—are used for sharing news and information of particular concern to defined user groups. A specific social media’s user group may number in the hundreds, millions, or even over a billion. As the use of social media has increased and spread broadly throughout the world, the use of social media by arbitrators has naturally also increased; however, that use is not free of issues.

Social media present unique challenges for arbitrators because of a neutral’s obligations of independence, of impartiality, to refrain from inappropriate *ex parte* communications and to maintain the confidentiality of the proceedings, among others. For example, a posting by counsel in an arbitration on a bar association website may be sent automatically to the arbitrator for the matter if he or she has signed up to automatically receive postings from that website. A partner of an attorney in a pending matter may, with or without knowledge of the matter, invite the neutral for the matter to join her personal network or otherwise connect through a social media network. And so on. To be sure, some of these issues are analogous to issues that can arise outside of social media, but many are unique.

These challenges most directly impact arbitrators,¹ but other ADR neutrals are also affected. Unfortunately, there is as yet little, if any, direct law or other authoritative guidance for neutrals on the appropriate use of social media and the obligations arising therefrom. Some courts and judicial ethics committees have begun to examine the propriety of participation by judges in social networking, but although the roles of judges and arbitrators are analogous, they are not identical and neither are the appropriate ways in which the two groups should use social media.

The purpose of this Guidance Note is to attempt to fill this void for arbitral neutrals. But it should be kept in mind that this Note sets forth recommended “best practices” rather than a summary or restatement of current law, that a currently recommended “best practice” may not be comprehensive or detailed because of the newness of the relevant issues and lack of authoritative guidance from courts and that a recommended “best practice” may vary by jurisdiction. Furthermore, this Guidance Note should not be considered as

¹ This guidance note is directed to the impact of social media on arbitrators and arbitration. Because other ADR neutrals, such as mediators, evaluators and adjudicators, may have different ethical obligations than do arbitrators, its applicability to those other types of neutrals may be affected by those differences.

containing proscriptive rules or ethical canons, the failure to comply with which might be grounds for vacatur or non-enforcement of an award. Finally, this Guidance Note does not constitute legal advice by or for anyone.

This Guidance Note comprises a set of best practice principles divided into six groups: foundational material comprising definitions and issues/concerns for neutrals arising from their use of social media (Sections I and II, below), general principles not relating to pending matters (Section III), principles applicable to invitations to serve as a neutral (Section IV), principles relating to issues arising during a specific pending matter (Section V) and principles relating to issues arising after the neutral has concluded his or her work on a specific matter (Section VI).

Finally, social media are rapidly and continually developing. This Guidance Note speaks as of the latest publication date set forth below. Although it is expected that the Note will be updated periodically, developments in social media or in pertinent law or rules after the latest publication date may not be reflected in it.

BEST PRACTICES PRINCIPLES

I. Definitions

The following terms are used throughout this Guidance Note (in uncapitalized form) with the meanings set forth for them:

A. “Communication” means the dissemination of information among users of a social media network, whether or not such dissemination is done under an expectation of privacy or confidentiality.

B. “Connect” means taking an affirmative action (such as “friending” on Facebook or “connecting” on LinkedIn) to establish a direct relationship (a “**connection**”) with another participant or participants on a social media network, a relationship that is more involved than general membership on that social media network.

C. “Information” means data, ideas, and all other information of every form and type.

D. “Matter” means the potential or actual dispute or respective arbitral process in question.

E. “Neutral” means a potential, appointed, confirmed, serving or past arbitrator with respect to the matter in question.

F. “Posting” (noun) means information created on or sent to or over a social media network with the intent that it be made available or distributed to others (whether or not users of the network in question) via the network or otherwise over the Internet, including, without limitation, messages or other communications sent via social media by one individual to another.

G. “Relationship” means any kind of affiliation, link, or association of any kind among users of a social media network, including but not limited to a connection or a recommendation.

H. “Recommend” or **“Recommendation”** means any kind of action, process or procedure whereby one user of a social media network grades, scores, rates, approves or otherwise in any way comments on or evaluates another user or such other user’s professional ability.

I. “Social media” (sometimes referred to as **“social media networks”**) means Internet-based electronic virtual communities, networks, and websites used by participants to create and share information, which sometimes require an individual to affirmatively join and accept or reject connection with particular individuals or groups (*e.g.*, Facebook®, Twitter®, LinkedIn®, photo sharing sites, listservs and, if they have such capacity, the websites of individuals, such as neutrals).

II. The Impact of Social Media on the Duties of Neutrals

A. Duties of Impartiality and Independence

The use of social media necessarily entails the establishment of relationships, known and unknown and of varying degrees and natures, among the users of the social media network in question. Where a neutral is a user of a social media network, such relationships, or communications resulting therefrom, may affect, or may be perceived by a party as affecting, the neutral’s independence or impartiality.

B. Duty to Refrain from *Ex Parte* Communications

The use of social media entails the potential for communication among the users. Where a neutral is a user of a social media network, communications may violate, or be perceived by

a party to violate, an arbitrator's obligation to refrain from *ex parte* communications with the parties, counsel, and witnesses.

C. Duty to Maintain Confidentiality of the Proceedings

Information posted on social media or communicated among users cannot be assumed to be or remain confidential, regardless of privacy settings or conditions attached to the posting. Posting by a neutral, or communication by the neutral, of any information pertaining to an arbitration may accordingly violate any obligation the neutral may have to maintain the confidentiality of the proceedings or may be asserted in post-award proceedings as evidence of earlier partiality or lack of independence.

D. Duty to Act in Accordance with Applicable Law and Ethical Canons

Some arbitral administrative bodies condition service as a neutral on adherence to specific ethical canons. Ethical canons specific to arbitration have also been applied by some courts to service by a neutral. In addition, neutrals who are members of certain professions (*e.g.*, lawyers) may be bound by the law and ethical canons applicable in those professions when acting as neutrals. As some examples of all of the foregoing, use of social media by a neutral may violate one or more of such ethical obligations because it may:

- (i) constitute improper advertising or solicitation of business if it is a posting by the neutral which may be viewed by third parties;
- (ii) be a prohibited recommendation of the neutral if not, if possible, removed or deleted by the neutral;
- (iii) constitute the unauthorized practice of law if it may be construed as legal advice communicated by the neutral in response to an inquiry by a third party; or
- (iv) violate the duties set forth in Sections II(A), II(B), and II(C).

E. Duty to Avoid Activities that Impair Confidence in the Integrity of Arbitration

Because there can be no assurance that use of or communications made on a social media network will remain private or restricted to a limited circle of other users, a neutral's use or communications may become known to parties in matters that were, are or will be pending before the neutral and to the public at large. Accordingly, use of or communication by a neutral on a social media network which is in violation of the duties set forth in Sections II(A), II(B), II(C) and II(D) may thus impair confidence in the integrity of the ADR

process by parties or the public. In addition, merely inappropriate use or communication by a neutral on a social media network may do so too.

III. General Considerations Not Pertaining to Pending Matters

A. Joining a Social Media Network

Joining a social media network is not by itself a violation of any of the obligations of Section II. Nevertheless, because use of social media can give rise to such violations or the appearances of such violations, before joining a social media network a neutral is advised to evaluate the risks inherent in membership in the network, including:

- (i) the likelihood that other users of the network may include potential or current parties, counsel or witnesses;
- (ii) the degree of control a user of the network has over connections with or invitations to connect from other users;
- (iii) whether the network has a recommendation process and, if so, whether a user can opt out of such procedure or delete recommendations;
- (iv) whether the user maintains ownership of the material posted by the user on the network;
- (v) the ability of the user to control access by others to the material posted by the user on the network;
- (vi) the ability of the user to control access by others to communications made by the user on the network;
- (vii) the degree to which the public can access some or all of the material posted on the network by the user; and
- (viii) other pertinent provisions of the terms and conditions of use and privacy policy of such network.

B. Relations to Other Users through a Social Media Network

Although a relationship or connection to other users on social media networks is not by itself a violation of any of the obligations of Section II, such a relationship or connection

existing prior to the commencement of a matter with a party, its counsel, or witnesses may be used as a basis for a claim of partiality or lack of independence.

C. Postings or Communications on a Social Media Network

Although the posting or communication of information on a social media network is not by itself a violation of any of the obligations of Section II, information posted or communicated prior to the commencement of a matter may be asserted as evidence of a lack of impartiality or independence after a matter has commenced or be otherwise used by a prospective party to evaluate the neutral who made the posting.

IV. Guidelines Applicable to Invitations to Serve as a Neutral

A. General Disclosure Obligations

A neutral invited to serve in a matter has an obligation to timely disclose to the parties any information that might give rise to justifiable doubt concerning the neutral's independence or impartiality. A neutral should assume that such obligation also pertains to any use of social media that might give rise to justifiable doubt concerning the neutral's independence or impartiality, including but not limited to:

- (i) information about any existing relationship on a social media network known to the neutral or of which the neutral should reasonably have known, if the relationship was a relationship that would have given rise to an obligation of disclosure if it were not on social media;
- (ii) information about any existing relationship on a social media network that would be discovered after a reasonable investigation by the neutral, if the relationship was a relationship that would have given rise to an obligation of disclosure if it were not on social media and if the applicable laws or rules impose upon the neutral the obligation to make a reasonable investigation under the circumstances; and
- (iii) information posted by the neutral, or known by the neutral to have been communicated to him or her, on a social media network, if the sending or receipt of such information would be subject to an obligation of disclosure if it were not on social media.

B. Specific Disclosure Obligations

Without limiting the general disclosure obligations of Section IV(A), a neutral invited to serve should consider whether under applicable law or rules he or she has an obligation to disclose the identity of any party, counsel, or identified witness for a matter who the neutral actually knows at the time of the disclosure (without undertaking any investigation unless the neutral is required to do so under applicable law or rules):

- (i) was or is connected with the neutral;
- (ii) has recommended the neutral or has been recommended by the neutral; or
- (iii) has communicated with the neutral.

C. Information not Subject to Disclosure

Except as provided in Sections IV(A) and IV(B) or unless required by applicable law or rules, a neutral invited to serve should not be obligated to disclose:

- (i) the general extent and nature of the neutral's use of social media;
- (ii) the names of the social media networks of which the neutral is a user; and
- (iii) the content of information posted by or communicated to the neutral on any social media network, unless the information would be subject to an obligation of disclosure if it were not on social media.

D. Use of Disclaimers

A neutral may under applicable law and rules be able to limit his or her disclosure obligations through the use of an appropriate disclaimer. Nevertheless:

- (i) a neutral may not be able to disclaim the obligation to disclose a relationship with another user of a social network if the neutral has actual knowledge of such user;
- (ii) a neutral may not be able to disclaim or limit constructive knowledge of a relationship with another user of a social network if applicable law and rules do not permit a disclaimer or limitation of constructive knowledge;
- (iii) a neutral may not be able to disclaim or limit the obligation to make an investigation of the neutral's relationships with other users of a social network if the applicable law and rules do not permit such a disclaimer or limitation of an obligation of investigation; and

- (iv) a neutral may not be able to disclaim or limit any affirmative disclosure obligations set forth in Sections IV(A) and IV(B).

V. Guidelines Applicable During a Pending Matter

A. Additional Disclosure

A neutral serving on a matter has a continuing obligation during its pendency to disclose to the parties any information that might give rise to a justifiable doubt concerning the neutral's independence or impartiality. The guidance in Sections IV(A), IV(B), IV(C) and IV(D) apply throughout the pendency of the matter. In particular, but without limiting the foregoing, a neutral should consider whether under applicable law or rules he or she has an obligation to disclose:

- (i) a communication on a social media network during the pendency of a matter which the neutral knows he or she received from any party, counsel or witness in the matter; or
- (ii) an attempt during the pendency of a matter which the neutral knows was by a party, counsel or witness in the matter to connect with, or recommend, the neutral.

B. Posting on a Social Media Network

During the pendency of a matter, a neutral should refrain from posting any information on a social media network that would:

- (i) violate any confidentiality obligation imposed on the neutral under any applicable law or rule; or
- (ii) constitute what is known by the neutral to be an impermissible *ex parte* communication.

C. Use of a Social Media Network

A neutral should not make any use of a social media network during the pendency of a matter that would violate any obligation imposed on the neutral under any law or rule applicable to the neutral. In particular, but without limitation, during the pendency of a matter a neutral should refrain from:

- (i) a connection with, or attempt to connect with, any party, counsel or witness;

- (ii) a recommendation, or attempt to recommend, any party, counsel or witness;
or
- (iii) a use which would constitute a violation of any duty set forth in Sections II(A), II(B), II(C), II(D) and II(E).

VI. Guidelines Relating To Issues Arising After the Pendency of a Matter

Applicable law or rules may impose obligations on a neutral which affect the neutral's use of social media after the pendency of a matter, including but not limited to:

- (i) a continuing obligation of confidentiality, which would prohibit the posting of confidential information about the matter;
- (ii) a general obligation not to engage in conduct which may give rise to a ground for impeaching the award, which could proscribe or limit the posting of comments on the matter even if an obligation of confidentiality does not apply; and
- (iii) a continuing obligation to refrain either permanently or for a period of time from having a relationship with a party, counsel or witness, which would limit communication on or connection or recommendation through a social media network.

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² The Social Media Guidance Note Committee is an ad hoc committee formed and working under the auspices of the New York Branch and the Practice and Standards Committee of the Chartered Institute of Arbitrators.