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Social Media and Arbitration Conflicts of Interest: A Challenge for the 21st Century

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Section 3.3.6 of the IBA Guidelines on Conflicts of Interest in International Arbitration advise that when a "close personal friendship exists between an arbitrator and counsel of one party, as demonstrated by the fact that the arbitrator and the counsel regularly spend considerable time together unrelated to professional work commitments or the activities of professional associations or social organizations," the arbitrator should disclose the relationship. This advice has hardly proved controversial — no doubt in part because the Guidelines are flexible, and designed to "be applied with robust common sense and without pedantic and unduly formalistic interpretation." (IBA Guidelines, Introduction ¶ 6). The Guidelines themselves have been well-received by the arbitration community, with arbitrators and counsel alike consulting the guidelines to determine whether a conflict exists and, if so, the proper course of action.

Though the situations described in the Application Lists — the waivable and non-waivable Red Lists, the Orange List, and the Green List — were not intended to be comprehensive, there is at least one new type of "relationship" that merits independent consideration by the arbitration community; namely, the network of potential virtual "relationships" created through growing use of social media sites like Facebook, LinkedIn, and Twitter.

Over the past several years, use of social media has grown exponentially. When the Guidelines were passed in May 2004, LinkedIn was celebrating its first birthday. Facebook (then, "thefacebook.com") had been founded only two months earlier. Twitter would not be created for two more years. But in December 2011, Facebook had 845 million members, with 483 million users logging on daily in one of more than 70 languages to connect with friends, colleagues and acquaintances; to share pictures and information; to comment on news stories; and to pledge allegiance to certain groups, ideas, or products. As of February 2012, LinkedIn hosts more than 150 million members, from more than 200 countries and territories. Members typically share their resumes, and join groups hosted by various professional organizations (where members may then participate in semi-public discussions). Twitter, for its part, boasts more than 465 million accounts, from which users post approximately 175 million 140-character "tweets" per day. Lawyers, law firms, arbitral institutions, and industry publications are among the members of these sites.

For law students trying to break into the profession, social media outlets are a way to connect with practitioners and to learn about pressing issues. For practitioners, social media outlets are a way to

maintain contacts across borders, to garner recognition within the community, and to track new developments. While for newer practitioners, whose participation in social media sites may have predated their entry into the profession, social media may seem like a normal part of life, seasoned practitioners seem also to recognize the potentials of social media as a communication tool. Whereas relationships within the profession once required direct contact and true personal connections, social media sites permit virtual "relationships" to blossom, even between people who have never actually met in person.

But with the rise of virtual "relationships" come a host of new circumstances that might give rise to potential challenges to arbitrators, based on theories of "justifiable doubts as to [an] arbitrator's impartiality or independence." Social media certainly make certain relationships more visible; unlike face-to-face meetings, phone calls, or even email, social media sites leave a more public record of the relationship between two people. If privacy settings are not enabled, third parties may easily view someone's page, "friends," pictures, posts, and comments from friends. Even where privacy settings *are* enabled, third parties may still be able to view certain information.

While it feels somewhat strange to discuss social media within the traditionally solemn context of international arbitration, the phenomenon is not something that the community may ignore. The community must set guidelines now for determining which virtual "relationships" require disclosure, waiver, or disqualification. We must similarly determine if an arbitrator's use of social media sites should be discoverable by the parties to a proceeding, and what the proper balance is between a justified need for access and the arbitrator's right to privacy.

Until consensus is reached, potential arbitrators might consider one of the following options, representing a continuum of sorts:

1. Do not use social media at all. Though technically an option and of course the surest way of avoiding any potential for controversy, avoiding social media altogether hardly seems realistic or necessary. As we have noted in a previous post, arbitrators are not simply hatched, or spring fully formed like Athena from Zeus' brow. Arbitrators are people who have contacts, friends, families, and lives outside of the hearing room. They cannot and should not be precluded from social interaction for fear of a conflict of interest. The point is particularly true for would-be future arbitrators of the younger generation: while today's senior arbitrators may feel little need to embrace social media for networking or other purposes, younger lawyers whose generation is truly knit together by such sites cannot be expected to be sole holdouts, simply to avoid the possibility that decades later — when they achieve sufficient prominence to be considered as arbitrator — one of the persons they accepted years earlier as a Facebook "friend" or a LinkedIn contact may turn out to be counsel appearing before them in a case.

2. Limit friends to truly social contacts. This is fairly easy to achieve for those whose arbitrator careers were well established before the advent of social media, who can easily distinguish in their own minds between family and friends from outside the arbitration community, and those who are simply professional contacts. It may be safest in these circumstances to exclude the latter as Facebook friends, although perhaps allowing them to be listed as LinkedIn contacts, since the latter functions less as a true sharer of life stories and more as an online Rolodex, and is comparatively unlikely to imply true personal connections giving rise to future challenges. But for the younger generation, again, this strategy may be too late. Many young lawyers already have accumulated social media "contacts" of hundreds of people whom they have met in a variety of settings, from their hometown community to their college and law school classmates, from academic conferences

and early jobs to “friends of friends.” At the time younger lawyers accepted such social media contacts, there is no way they could predict which of these individuals might develop into personal friends, which into meaningful professional contacts, and which into neither at all.

3. Use available privacy settings to diligently filter the information you share. Many social networking sites permit members to filter the information they share, so that certain information goes only to certain people. Thus, for those who decide not to limit their social media “friends” to only contacts with whom they have true personal relationships, at minimum they should carefully determine which pictures, posts, and information they wish to share with professional contacts, prior to those individuals attaining true “personal friend” status. This strategy provides some protection against later challenges, because it enables distinctions to be drawn about the level or extent of connection that can be assumed simply from social media connections. Remember, however, that sharing is a two-way street. Even if one practitioner filters the information he or she provides to social media contacts, other people might not. The scrupulous filterer may still find his or her Facebook account awash in personal reports from others with whom in reality there is no close friendship, and to an outside observer, the simple receipt of such personal reports may suggest a more meaningful relationship than in fact exists. Ultimately, the arbitration community will have to decide whether mere receipt of information through social media sites creates any conflict of interest or even an “appearance” of potential impropriety.

4. Restrict access to your account during pending proceedings. Finally, if two individuals already “linked” through social media accounts find themselves serving as arbitrator and counsel in an ongoing proceeding, both should take active steps to restrict information transmitted to the other during the pendency of the proceeding. Depending on the particular case, completely removing one another from “Friend” lists may also be warranted.

There are no categorical answers to the question of how to navigate the world of social media to avoid potential conflicts, particularly for those who are just starting out in their careers. The bottom line, however, is that members of the arbitration community must be conscious that their participation in social media sites *could* potentially create conflicts of interest in international arbitral proceedings, or be perceived as so doing, leading to possible future conflicts. All members of the community, whatever their current status, should therefore think carefully of the consequences before accepting Facebook “friend” requests, and particularly before sharing personal information with such “friends,” beyond the simple “CV” summaries routinely available through LinkedIn. As with many things in life, forewarned is forearmed, in the brave new world of social media.

By Jean E. Kalicki and Mallory Silberman

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