

Ethical Use of Social Media in Alternative Dispute Resolution

The clash between social media and traditional litigation is tectonic. Social media's obsession with limitless access to, and loose distribution of, all sorts of personal and commercial data is diametrically opposed to litigation's tightly regulated and highly orchestrated process for producing, exchanging and presenting information. The formal discovery process, rules of evidence and civil procedure, and broad judicial discretion to control court proceedings are all meant to ensure that only certain people (counsel, the court, jurors) have access to particular information, and only at the appropriate time.

The wildfire pace at which social media use became ubiquitous has challenged courts and litigants to quickly adapt and explore rules for discovery and use of social media in court litigation, and a handful of published opinions have sketched the contours of emerging principles. But what of alternative dispute resolution ("ADR")? Historically, mediation and arbitration have distinguished themselves from traditional court litigation in part by their less formal structures and looser rules of evidence and procedure. Does ADR's relative lack of formality when it comes to gathering and presenting information make special rules regarding social media more or less important? What guidance should parties, counsel and neutrals follow regarding use of social media in mediations and arbitrations?

If an arbitration agreement or a provider's arbitration policies impose or incorporate codified rules of evidence and/or civil procedure, then court opinions and other sources of authority interpreting those rules will provide direction. But in the absence of binding formal rules, ADR participants and neutrals struggling with social media issues may be guided by two foundational concepts: 1) balancing the respective interests of the parties; and 2) adhering to professional ethics. While resort to these principles will not answer every question or resolve

every dilemma posed by the use of social media in ADR, they provide a useful framework to begin thinking through the ramifications.

A. The Parties' Interests

Without question a driving force behind the popularity of ADR is the ability to resolve disputes without the public disclosure that accompanies court litigation. But what if one of the parties wants to share information about the proceedings through a blog, tweet or Facebook post? What if an arbitration party demands disclosure of social media posts through discovery requests? Can the neutral herself use social media to find out more information about parties, counsel or witnesses?

Some, but not all, states regulate the confidentiality of mediation and / or arbitration proceedings.¹ For example, California Evidence Code § 1119(c) requires that “All communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation shall remain confidential.” Similarly, Standard V of the ABA’s Model Standards of Conduct for Mediators requires the mediator to maintain the confidentiality of all information obtained by the mediator.

These rules seem straightforward and fairly comprehensive, but they would not preclude a party from posting on Facebook, Twitter or Linked-In the fact that the dispute was mediated and how the poster felt about the process or outcome. And there is no specific penalty or private right of action for if a party violates the rules. Nor would these rules prohibit a neutral from blogging about the case as long as no confidential information or party names were disclosed. Furthermore, these rules apply to mediation, not arbitration proceedings.

¹ For states that have adopted the ABA’s Model Rules of Professional Conduct, see http://www.americanbar.org/groups/dispute_resolution/resources/Ethics.html.

In other words, the existing rules provide some confidentiality protection, but the scope and effectiveness of protection may be far less than parties anticipate or desire, particularly when public disclosure via social media has the potential to reach hundreds, thousands or more people who may know the parties or be interested in the case. On the other hand, a party seeking public vindication or who feels that public awareness of the dispute is essential to prevent further wrongdoing may feel strongly that confidentiality should be limited to the minimum required by law. In the absence of clear rules (provider rules, a comprehensive ADR agreement, etc.) which address social media, a neutral should consider working with the parties to craft a specific agreement that meets the parties' needs. The agreement can specify exactly what type of information the parties and counsel can disclose, including via law firm websites, blogs, and the various social media platforms.

Arbitration discovery disputes regarding social media present another context requiring the neutral to balance the parties' interests. "Discovery of [social networking site content] requires the application of basic discovery principles in a novel context." *E.E.O.C. v. Simply Storage Mgmt., LLC*, 270 F.R.D. 430, 434 (S.D. Ind. 2010). The arbitrator must take care to "protect parties from 'annoyance, embarrassment, oppression, or undue burden.'" *Thompson v. Autoliv ASP, Inc., et al.*, Case No. 2:09-cv-01375 (PMP-VCF), 2012 WL 2342928, (D. Nev. June 20, 2012) (crafting "attorneys-eyes only" solution to discovery dispute over social media). In addition, because social networking sites may significantly enlarge the pond for the proverbial "fishing expedition," it is critically important that discovery seeking social networking information be narrowly tailored. *Mailhoit v. Home Depot U.S.A., Inc., et al.*, 285 F.R.D. 566, 572 (C.D. Cal. 2012) (denying motion to compel responses to overbroad requests for social media information). Where privacy issues are at stake, the arbitrator should consider evidence

regarding the parties' reasonable expectations, including whether the information was available to a wide range of people or was protected through the use of privacy settings. *See Romano v. Steelcase, Inc.*, 907 N.Y.S. 2d 650, 657 (Sp. Ct. 2010).

Whether determining what information about the case can be disseminated on social media or what social media is subject to discovery, neutrals must supplement the limited available guidance with their own judgment and a careful balancing of the parties' interests. And, of course, neutrals must comply with their own ethical obligations, as discussed in the next section.

B. Professional Ethics

Social media requires that basic ethical principles, just like discovery rules, be applied in a novel context. In addition to the confidentiality issues described above, the prevalence of social media challenges ethical obligations regarding neutrality and impartiality, conflicts of interest and competence.²

For example, if a neutral has vastly more Facebook "friends" or LinkedIn "connections" on the defense side than the plaintiff side, is that a matter relating to personal or professional affiliations "that reasonably could raise a question about his or her ability to conduct the proceedings impartially," requiring disclosure? *See* California Rule of Court 3.855(b)(1). Does it matter if the Facebook or LinkedIn page is publicly available or restricted? What if the neutral has "friended" or "linked" one of the attorneys? Such social networking "affiliations" may be sufficiently loose that they do not raise a question about impartiality, but for the moment we are in an environment of very little guidance on these issues.

² There is no uniform, binding set of ethical rules for neutrals, but most of the sources of guidance include these areas.

Similarly, there does not appear to be any ethical prohibition on a mediator using social media to research the parties or counsel who will be participating in a mediation. Should there be? Having more background information about the parties and counsel can be useful, but if a social networking site reveals personal information unrelated to the case which might affect the mediator's view of the person (*e.g.*, that the person subscribes to racist beliefs), thereby impacting her impartiality, the mediator might have to step aside. Furthermore, if the social networking site reveals damaging information about one of the parties, it puts the mediator in the uncomfortable position of having information, not disclosed by the parties, that could affect the case.

Finally, neutrals who wish to use social media must be wary of the ethical rules regarding marketing. A LinkedIn or Facebook profile that describes one's mediation practice may be sound marketing, but just like any other marketing, social networking profiles or messages must be truthful, and overstating capabilities or experience is a recipe for trouble. *See* ABA Model Rule 7.1. Some states specifically prohibit mediators from indicating that he or she is licensed by a court, promising or guaranteeing results, or making any statement that "directly or indirectly implies bias in favor of one party or participant over another." California Rule of Court 3.858.

Applying basic principles of discovery and ethics in the novel context of social media is proving to be both challenging and interesting. Many of the questions raised above will have to be answered based on the circumstances of a particular case or unique set of facts. Just as the traditional discovery and ethical rules developed over time and in response to specific contexts, so too will the application of these rules to social media; the challenge will be for the rules to keep up with the technology.