

**PRACTICAL AND ETHICAL CONSIDERATIONS FOR ARBITRATORS &  
MEDIATORS BUILDING OR UPGRADING THEIR WEBSITES**

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**A. Website Host Considerations**

- reputation
  - check industry publications such as PCMag, look for online reviews, get word-of-mouth recommendations
  - does the host identify trusted, well-known companies as clients?  
how long of a track record does the website host have?
- shared hosting environment (with your custom domain name)
  - given relatively low volume of expected web traffic and expense, shared hosting will generally make the most sense for independent neutrals (as compared to a virtual private server (“VPS”) or dedicated hosting)
- reliability: uptime and speed
  - look for a guaranteed uptime of 99.5% or higher
  - a host that uses servers with a solid state drive (“SSD”) (which stores your data in microchips) will be faster than a host that uses a more traditional hard disk drive (“HDD”)
  - speed may also be increased by the host through content delivery networks (“CDN”), caching mechanisms, or other features
    - e.g., a CDN provides faster delivery of your content based on the geographic location of website visitors
      - for a relatively low-traffic website, a CDN may not be worth any *extra* cost, but if included, may be a worthwhile distinguishing feature when choosing between potential website hosts
      - may be more important if you are targeting international users
- bandwidth and disk space

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<sup>1</sup> The author is currently revising her website in line with these materials and expects to re-launch by the date of the panel discussion.

- basic webhosting packages can generally be expected to provide adequate bandwidth and disk space for an independent neutral’s website
  - bandwidth concerns how many uploads and downloads can be made from your web server—may be unlimited or subject to a monthly allocation
  - disk space concerns storage—your website is unlikely to require much server space, but if you use the website host for your e-mail as well, note that e-mail be subject to storage limitations
- technical support
    - is it outsourced?
  - price (initial and renewal)
    - avoid free hosting which may result in ads being posted to your site
  - site building and management
    - does the site offer (and do you need) a website building service?
    - if you will personally update content on your website, is the user interface (control panel management) friendly?
  - security
    - website back-ups
      - how are back-ups maintained?
      - how often are they backed-up?
      - ease of restoration
    - SSL certificate?
      - SSL is a digital certificate that authenticates the identity of a website and encrypts information sent to the server hosting the website—a site with an SSL certificate will have a web address with “https” rather than “http”
      - not strictly necessary for an informational site (i.e., if it does not collect payments or personal information), but (i) search engines like Google rank https sites higher; and (ii) browsers may label your site as “not secure” (which may not be the image you wish to project)
- To check a site’s security, to the left of the web address, look at the security status:
-  Secure
  -  Info or Not secure
  -  Not secure or Dangerous
- log-in protection
    - can you protect your website account with two-factor authentication?

- threat monitoring and mitigation (as an add-on or otherwise?)
  - e.g., there are specific plug-ins for WordPress sites (which may incorporate site back-ups)
  - can you get alerts whenever your website is down?
- consider system-wide security, not just security of your website
  - have there been publicized security breaches?
  - does the host address any threat mitigation measures, such as DDoS (distributed denial of service) mitigation? (a DDoS attack happens when a network of computers is used to send a high volume of simultaneous requests to your website, preventing it from being legitimately accessed)
  - is the host's physical infrastructure securely hosted and managed in compliance with industry standards?
  - is data redundancy built-in to the infrastructure?
  - is there information available about environmental safeguards (for electrical failure, for example)? network security? employee access and security training?
  - does the host engage in penetration testing and vulnerability assessments?
- technical requirements (i.e., coding language, plug-ins, etc.)
  - if you are renewing/upgrading your website, you'll need to know what your site's technical requirements are in order to determine whether you can easily transfer to another host
- what features are included vs. available as add-ons (at what cost)?
  - e.g., site back-ups? SSL certificate? CDN?
  - professional **e-mail account** with your domain name?
    - carefully consider whether you want to tie your e-mail to your website host or if you would rather host e-mail separately (e.g., to ensure heightened security)
    - additional considerations for e-mail hosting (informed by ethics opinions below)
      - where is your data located?
      - encryption at rest, in transit, and on back-up media
      - do you retain ownership of all data? is it scanned for ads? how will government requests for access be handled? can you transfer your data to a different host?
      - if needed, support for regulatory compliance (e.g., HIPPA; EU GDPR)
      - support for two-factor authentication
      - phishing (spam) prevention
      - deletion and retention policies
      - storage capacity

## B. Design Considerations

- professional image and aesthetic
- user friendly
  - readability
  - works well across browsers and devices (computers, tablets, mobile phones)
- search engine optimization (SEO)
  - keywords—what is your competitive advantage?
  - update regularly
  - include relevant links (e.g. AAA or NYSBA)
  - SSL certificate / HTTPS authentication

## C. Ethical and Legal Considerations

### ***Attorney Advertising & Truthful and Accurate Promotion of Arbitrator or Mediator Services***

- does your website advertise services as an attorney? if so, content on your website may constitute attorney advertising, necessitating that you comply with requirements set out in New York Rules of Professional Conduct Rule 7.3 (including recordkeeping requirements and that the home page of your website specify it is “Attorney Advertising”)
  - see ethical opinions and detailed resources on attorney advertising at <http://www.nysba.org/MarketingYourPractice/>
- codes of ethics permit arbitrators and mediators to engage in advertising or promotion of their services provided that it is truthful and accurate
  - ABA/AAA Code of Ethics for Arbitrators in Commercial Disputes

CANON VIII: An arbitrator may engage in advertising or promotion of arbitral services which is truthful and accurate.

Comment to Canon VIII - This Canon does not preclude an arbitrator from printing, publishing, or disseminating advertisements conforming to these standards in any electronic or print medium, from making personal presentations to prospective users of arbitral services conforming to such standards or from responding to inquiries concerning the arbitrator’s availability, qualifications, experience, or fee arrangements

- ABA/AAA/Association for Conflict Resolution Model Standards of Conduct for Mediators

#### Standard VII. Advertising and Solicitation

A. A mediator shall be truthful and not misleading when advertising, soliciting or otherwise communicating the mediator's qualifications, experience, services and fees.

1. A mediator should not include any promises as to outcome in communications, including business cards, stationery, or computer based communications.

2. A mediator should only claim to meet the mediator qualifications of a governmental entity or private organization if that entity or organization has a recognized procedure for qualifying mediators and it grants such status to the mediator.

B. A mediator shall not solicit in a manner that gives an appearance of partiality for or against a party or otherwise undermines the integrity of the process.

C. A mediator shall not communicate to others, in promotional materials or through other forms of communication, the names of persons served without their permission.

- recent cases have challenged arbitrator “advertising” and raised questions about the scope of arbitrator immunity – should you include disclaimers (no reliance; no warranties) and limitation of liability on your website?
  - *Kinsella v. JAMS* – JAMS website was commercial speech for false advertising lawsuit  
<https://www.americanbar.org/groups/litigation/committees/alternative-dispute-resolution/practice/2017/jury-finds-for-jams-resume-padding-case.html>
  - *Douglas Hopper v. American Arbitration Association*, No. 16-55573 (9<sup>th</sup> Cir. 2017) (not for publication and not precedent except as provided by Ninth Circuit Rule 36-3) – reversing and remanding dismissal of false advertising claim against the AAA based on arbitral immunity -  
<https://law.justia.com/cases/federal/appellate-courts/ca9/16-55573/16-55573-2017-12-26.html>

***Domain Name vs. Practicing of Law Using the Domain Name (Misleading the Public)***

- New York's ethical rules prohibit lawyers from practicing under a trade name and ethical opinions have made clear that a law firm name cannot include an area of law in which the lawyer or law firm practices (such as "tax"), however, more leeway is permitted in the use of domain names

**NYSBA Ethics Opinion #1017 (8/6/2014)**

Topic: Firm Name; Trade Name

Rule 7.5(e)(2) states that "A lawyer or law firm may utilize a domain name for an internet website that does not include the name of the lawyer or law firm provided: the lawyer or law firm in no way attempts to engage in the practice of law using the domain name." Comment [2] to Rule 7.5(e) states that "as long as a firm's name complies with other Rules, it is always proper for a law firm to use its own name or its initials or some abbreviation or variation of its own name as its domain name."

**NYSBA Ethics Opinion #869 (05/31/2011)**

Topic: Permissible law firm names.

Digest: A law firm may not include an area of law in the law firm name. A sole practitioner may use the terms "Firm" or "Law Firm" as part of the law firm name.

Rules: 7.1(a), 7.5(b).

[A] lawyer who complies with other relevant ethical rules (such as those prohibiting deception, regulating advertising, and restricting claims of specialization) could describe his firm as a "tax law firm" on a website or in other advertising apart from the law firm name.

... Law firm names, however, are subject to more stringent regulations than the regulations that govern advertising. With limited exceptions, a lawyer in private practice may not "practice under a trade name, a name that is misleading as to the identity of the lawyer or lawyers practicing under such name, or a firm name containing names other than those of one or more of the lawyers in the firm...." Rule 7.5(b). This rule serves to protect the public from being deceived as to the identity, responsibility or status of those who use the firm name. *See* N.Y. State 732 (2000) (applying trade name prohibition in former Code of Professional

Responsibility).

... Precedents from this Committee confirm the breadth of the trade name prohibition. In N.Y. State 740 (2001), we said: "Using a name that is not the legal name of one or more partners or former partners in the law firm constitutes use of a trade name" within the meaning of the predecessor to Rule 7.5(b). In N.Y. State 445 (1976), we disapproved the firm name "Community Law Office." To support our decision, we cited former EC 2-11, which indicated that "a lawyer in private practice should practice only under his own name, the name of a lawyer employing him, a partnership name composed of one or more of the lawyers practicing in a partnership, or, if permitted by law, in the name of a professional legal corporation, which should be clearly designated as such."

... Another restriction on law firm names is that lawyers may not make deceptive or misleading statements, whether in advertisements or otherwise. See Rule 7.1(a)(1) (prohibiting "false, deceptive or misleading" statements in lawyer advertisements) and Rule 8.4(c) (prohibiting a lawyer or law firm from engaging in "conduct involving dishonesty, fraud, deceit or misrepresentation"). The phrase "Tax Law Firm" as part of a firm name may be literally true, but literal truths can nonetheless be misleading. We are concerned that unsophisticated consumers could read "The Smith Tax Law Firm" as saying more than just that the firm practices tax law. The name would be misleading to the extent it suggests that there is a legal entity called a "tax law firm" - falsely implying an officially recognized subcategory of law firms that have more authority or more skill to practice tax law than do "ordinary" law firms.

### ***Due Diligence in Choosing Cloud Providers for Storage of Client Confidential Information***

#### **NYSBA Ethics Opinion 842 (9/10/10)**

Topic: Using an outside online storage provider to store client confidential information.

Digest: A lawyer may use an online data storage system to store and back up client confidential information provided that the lawyer takes reasonable care to ensure that confidentiality will be maintained in a manner consistent with the lawyer's obligations under Rule 1.6. In addition, the lawyer should stay abreast of technological advances to ensure that the storage system remains sufficiently advanced to protect the client's information, and should monitor the changing law of privilege

to ensure that storing the information online will not cause loss or waiver of any privilege.

Rules: 1.4, 1.6(a), 1.6(c)

(1) Ensuring that the online data storage provider has an enforceable obligation to preserve confidentiality and security, and that the provider will notify the lawyer if served with process requiring the production of client information;

(2) Investigating the online data storage provider's security measures, policies, recoverability methods, and other procedures to determine if they are adequate under the circumstances;

(3) Employing available technology to guard against reasonably foreseeable attempts to infiltrate the data that is stored; and/or

(4) Investigating the storage provider's ability to purge and wipe any copies of the data, and to move the data to a different host, if the lawyer becomes dissatisfied with the storage provider or for other reasons changes storage providers.

### **NYSBA Ethics Opinion 1019 (8/6/2014)**

Topic: Confidentiality; Remote Access to Firm's Electronic Files

Digest: A law firm may give its lawyers remote access to client files, so that lawyers may work from home, as long as the firm determines that the particular technology used provides reasonable protection to client confidential information, or, in the absence of such reasonable protection, if the law firm obtains informed consent from the client, after informing the client of the risks.

Rules: 1.0(j), 1.5(a), 1.6, 1.6(a), 1.6(b), 1.6(c), 1.15(d).

A law firm may use a system that allows its lawyers to access the firm's document system remotely, as long as it takes reasonable steps to ensure that confidentiality of information is maintained. Because of the fact-specific and evolving nature of both technology and cyber risks, this Committee cannot recommend particular steps that constitute reasonable precautions to prevent confidential information from coming into the hands of unintended recipients. If the firm cannot conclude that its security precautions are reasonable, then it may request the informed consent of the client to its security precautions, as long as the firm discloses the risks that the system does not provide reasonable



assurance of confidentiality, so that the consent is "informed" within the meaning of Rule 1.0(j).

**ABA Formal Opinion 477R** (Revised May 22, 2017) – Securing Communication of Protected Client Information

A lawyer generally may transmit information relating to the representation of a client over the internet without violating the Model Rules of Professional Conduct where the lawyer has undertaken reasonable efforts to prevent inadvertent or unauthorized access. However, a lawyer may be required to take special security precautions to protect against the inadvertent or unauthorized disclosure of client information when required by an agreement with the client or by law, or when the nature of the information requires a higher degree of security.

....

[Reasonable steps may include conducting due diligence on vendors providing communication technology]

Consistent with Model Rule 1.6(c), Model Rule 5.3 imposes a duty on lawyers with direct supervisory authority over a nonlawyer to make “reasonable efforts to ensure that” the nonlawyer’s “conduct is compatible with the professional obligations of the lawyer.”

In ABA Formal Opinion 08-451, this Committee analyzed Model Rule 5.3 and a lawyer’s obligation when outsourcing legal and nonlegal services. That opinion identified several issues a lawyer should consider when selecting the outsource vendor, to meet the lawyer’s due diligence and duty of supervision. Those factors also apply in the analysis of vendor selection in the context of electronic communications. Such factors may include: reference checks and vendor credentials; vendor’s security policies and protocols; vendor’s hiring practices; the use of confidentiality agreements; vendor’s conflicts check system to screen for adversity; and the availability and accessibility of a legal forum for legal relief for violations of the vendor agreement.

See also Stephanie Cohen & Mark Morril, [\*A Call to CyberArms: The International Arbitrator’s Duty to Avoid Digital Intrusion\*](#), 40 Fordham International Law Journal 981 (2017)

***Privacy Policy***

- using Google Analytics? terms of service require that you have a privacy policy
- may also be required if you are engaging in direct marketing
- desirable for transparency? international nature of practice?