Ethics and Business Development for Mediators and Arbitrators

Thursday, January 25, 2018 | 2:05 – 3:15

Timed Agenda

2:05 – 2:10 **Introduction**

2:10 – 2:30 **Ethical Considerations for Marketing Your ADR Practice**

- Attorney advertising
- Use of social media
- Webhosting and domain name issues

2:30 – 2:50 **Ethical Considerations in Organizing Your ADR Practice**

- Insurance options
- Financial and banking requirements
- Cybersecurity protections

2:50 – 3:10 **Practical Considerations for Business Development**

- Building your brand
- Considerations of solo practice, law firm affiliation and private ADR organizations
- Training and education

3:10 – 3:15 **Questions & Answers**

NYSBA Dispute Resolution Section Annual Meeting
January 25, 2018

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

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

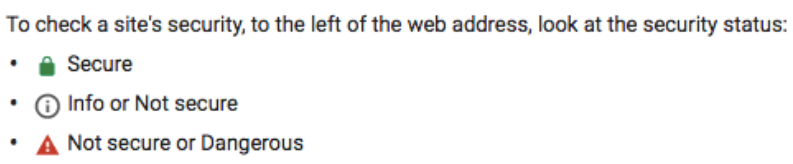
- basic webhosting packages can generally be expected to provide adequate bandwidth and disk space for an independent neutral's website
- bandwidth concerns how many uploads and downloads can be made from your web server—may be unlimited or subject to a monthly allocation
- disk space concerns storage—your 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)



  - 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 (9th 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?

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.

Date: August 15, 2014

Social Media Guidance Note Committee[2]:

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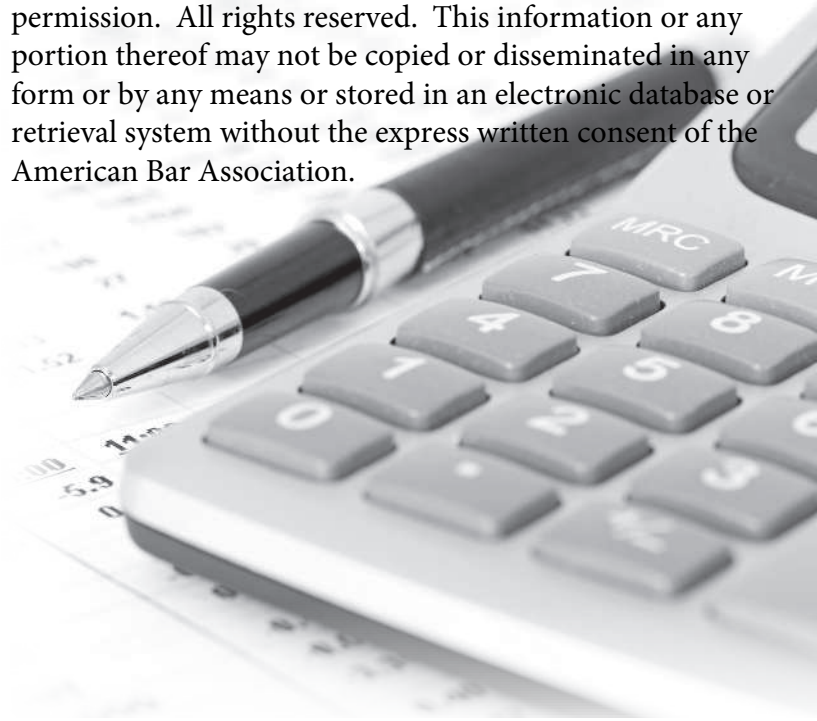
[2] The Social Media Guidance Note Committee is an ad hoc committee formed and working under the auspices of the New York Branch and the Practice and Standards Committee of the Chartered Institute of Arbitrators.

How to Succeed in Business

With a lot of careful planning and attention

By John Bickerman



In my more than 25 years of practice as a neutral, I've been approached by dozens of would-be mediators and arbitrators, some young, some not so young. Some have been counsel or parties in my mediations. Others have had distinguished legal or judicial careers. I can usually predict who will be successful — and who will not. Those who will succeed have an understanding of the business of mediation and arbitration, which is different from possessing the skills needed to be a good neutral. They have a good sense of where their work will come from, how they are going to reach their future clients, and the economics of running a business. Most important, they have an intangible quality or instinct about how to make it happen. Whether that's drive, personality, or self-confidence, they have an air that they can and will succeed.

Even with those intangibles, however, the sad, hard truth is that just as it is in any small, undercapitalized business, without careful planning, failure is much more likely than success. The median income of mediators — the amount of income that divides the profession, with half earning more and half earning less — is believed to be $0. Stated differently, more than one-half of the professionals who call themselves mediators do not make any money in their chosen profession.

Deciding to Become a Neutral

Becoming a mediator or arbitrator requires forethought and planning. Among the questions I field often are: Should I jump into the deep end and become a full-time practitioner, or dip in my toe and try it out part-time? If I'm with a law firm, should I cut my ties — or try to maintain my affiliation and perhaps some of my legal practice? Where will my cases come from? Should I affiliate with a national or local alternative dispute resolution provider or should I be independent?"

While these are all important questions, they should be addressed only after careful construction of a business and marketing plan. Well-conceived plans may help drive many of these practical decisions.

Working as a neutral is a business, and you should treat it as one from the moment you decide that's what you want to do. Imagine going to a bank to seek a line of credit. The bank officer will want to see a business plan showing your anticipated sources of income and projected expenses as well as some consideration about how you will find your clients and meet your income projections. He or she will want to know how quickly you think you can turn a profit and some assurance that your assumptions are realistic. The Internet has many good examples of business and marketing plans; completing one is a good way to get a sense of the many challenges of starting a mediation/arbitration practice.

Expecting the money you make in your new practice to equal what you earned before is usually unreasonable, which prompts an important question. Do you have the resources to survive on limited income until your practice catches fire? After deducting your living expenses, chart out your practice expenses. Initially, you may be able to keep those costs down, but they are never inconsequential. You will need a good website, a cell phone, and access to office and/or conference space. You will also need to finance your receivables — the fees you've earned but haven't yet collected. Most important, you need to set aside money to market your practice. It helps to have a reasonably comprehensive marketing plan.

Finding a Niche and Selling Yourself

First, what's your target audience? Neutrals who have a specific practice area are much more likely to develop a clientele. Do you have special expertise or contacts that would lead to your being hired to resolve disputes? Are you especially well-respected or known in a particular area of the law or community? Once you have identified your target audience, how do you plan to reach it? Marketing plans need not be overly complicated. Start with whom you know and who might know you. Let all of them know you're going into a new area of practice. Asking for advice is often much more welcome than trying to "sell" yourself or your services, so meet with potential clients to find out what they need and get their guidance.

Several years ago, a friend of mine saw that the health-care industry was likely to become a hotbed of disputes and fertile ground for dispute resolution. He identified this niche market, learned the issues that might be relevant, marketed himself to potential consumers of his service, and carved out a thriving health-care dispute resolution practice. Many other niche practice areas are waiting to be discovered.

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I subscribe to the pinball theory of marketing. The more times you bounce off a bumper — get your name in front of a potential client — the more likely people are to give you a try. Write articles, give speeches, and use social media such as LinkedIn and Facebook to get your name out to potential clients. Even sending change-of-address notices, with mention of your new practice, to all your contacts and friends can help. Be systematic about marketing. Set up a calendar with tasks and deadlines and treat starting your new practice as a full-time job — because it can be and usually is.

Being professional from the moment you launch your practice is also crucial. You are probably going to ask clients to pay you hundreds of dollars an hour for your services, so everything about your presentation should reflect a high degree of professionalism. Be thoughtful about where to economize and where to spend to create the kind of appearance that you want for your business.

Staying or Leaving the Firm

I often meet accomplished lawyers who see mediation as a suitable steppingstone to retirement and want to remain with their law firm as they transition to a neutral practice. I also see successful attorneys with substantial financial needs who can't forgo the income of their practice while they try to launch a new career. The question of whether to stay with a firm or go it alone has no one answer, but here are some broad generalizations from personal experience.

For lawyers in firms contemplating starting a practice, the advantages of maintaining affiliation are obvious. The firm has office space, secretarial support, phones, conference space, a reception area — in short, all the creature comforts of a highly professional setting. But there are both obvious and hidden costs of remaining with a firm. The economics of a mediator's or arbitrator's practice are vastly different from those of a successful partner. With some rare exceptions, the billing expectations and income generation at a firm will not change just because your practice has. Because being a neutral does not generate leverage from employing other attorneys in your work, the income you generate for the firm will almost always decline as your practice shifts toward dispute resolution. The flip side is that most of the firm's

overhead for which you are paying isn't necessary for a dispute resolution practice. You won't need lots of support staff or dawn-to-dusk reception services. While the importance of mailrooms has declined as more communications have become electronic, you will have even less need for these services. In short, the economics of a large or even a medium-sized firm just don't fit the practice of a neutral.

In addition to the economics, there is a more important drawback to firm affiliation: conflicts. As most firm lawyers know, under your state's rules of professional conduct, the clients of one partner and the ethical conflicts connected to them are imputed to all partners. In theory, with client consent, it may be possible to screen your neutral practice for these potential conflicts, but the reality is different. First, clients may not be willing to grant consent. Second, there are many potential retentions that you will never even learn about for which you were rejected because a party was uncomfortable with your firm affiliation. After I left my firm, I learned that I'd been proposed for and rejected for many matters solely because of my firm affiliation. In addition to the known conflicts, your fellow partners may resist your taking certain matters because of the future downstream conflicts such a retention would create for them. Once someone from the firm has been hired as a neutral by a major corporate client in a particular line of business, the firm may be precluded from taking on work from that client in the future. I experienced the problem of a putative downstream conflict firsthand I was being considered to mediate a billion-dollar, nationwide class-action matter. My law firm did not allow me to serve as the mediator in the case because the firm did not want to be precluded from future opportunities to represent one of the parties in the dispute. This experience convinced me that it was time to move on.

Affiliating with Private ADR Providers

The few national and many local providers of dispute resolution services generally follow the same model. These providers affiliate with neutrals as independent contractors. The full-service firms provide name recognition (of the firm), marketing, and, most important, office and support staff for a neutral. While you may not get your own office, you will have a place to hang your hat and access to phones, a receptionist, conference rooms, catering services, billing services, and all the support services a neutral could need. These firms will also provide varying degrees of marketing services to help promote your practice, but these come with a substantial cost, often starting out at 50% of your fees. (As your fees increase, the firm's share may decline.)

Even if you decide to affiliate with a provider, the ability to be successful will still rest with you and your ability to market yourself as a neutral, especially when you're starting out. Before a firm will be willing to welcome you into its fold, the business people there will assess the likelihood that you will be successful. That assessment may be based on your prior legal experience. In some states, bench experience will be an excellent credential. However, often the firm will want to see how you've done on your own generating clients and income. The admonitions about finding a niche and developing a plan apply with equal force to joining a dispute resolution firm. Of course, the obvious advantages of affiliating with a full-service firm are that you don't have to worry about running the business or collecting your fees. The firm will do all that work for you, and your association with the firm may help you generate business. The downside is that you pay a substantial price and give up some control over your practice. Especially for accomplished lawyers and jurists, provider affiliation may be a very attractive and profitable alternative.

> "I subscribe to the pinball theory of marketing. The more times you bounce off a bumper — get your name in front of a potential client — the more likely people are to give you a try."

Going Solo

Many of the most successful mediators in the United States are solo practitioners. Being independent has many rewards but substantial challenges. Without the support of a firm, you will have to set up your business from scratch, and at first you may not be able to afford an assistant to help with scheduling, billing, marketing and other support tasks. Until then, you're on your own performing all those tasks, but you won't have to share your fees, and you will have complete control over your practice. You will need fewer assignments to become "profitable."

For many neutrals, having this kind of control from the initial call to the final bill is important. As you become successful and can afford your own support system, the payoff will be considerably higher than if you affiliate with a firm. Successful solo practitioners are usually able to keep 75 percent or more of their fees. Also, the transition to part-time work is easier because the reduction in hours is cushioned by the higher percentage of fees retained.

Solo practice does require great attention to many details, particularly setting and collecting adequate retainers and fees. In the last several years, some clients, especially insurers, have been very slow to pay.

Mediation is a Process — Not an Event

As most good mediators know, mediation is a process, not an event. As you start your practice, you should realize that how you present yourself and your business from the moment someone encounters you or your name — whether he or she is looking at your website, calling your office, or seeing your marketing material — affects that person's perception of you and your work. If every contact that a client has with you and your office is crisp and professional, this will be to your benefit. However, the opposite is equally true: if you meet a client in a messy office, your communications or your bills contain mistakes, or you are late, you risk harming your business. Make sure that when you go live, you're ready to provide the type of service that you would want to receive. If you're affiliated, make sure that the organization is providing the level of efficiency and professionalism you want for your practice.

Working Full or Part-Time?

Some lawyers nearing retirement view a dispute resolution practice as the perfect part-time practice to make the transition from their firms. While a fortunate few can make that transition, for most attorneys the start of a dispute resolution practice requires intense effort to develop a demand for services. For the latter group, after the proper groundwork has been laid, a part-time practice is a worthy goal.

Because it draws on your intellectual and creative abilities and helps clients achieve resolutions efficiently, creatively, and constructively, a dispute resolution practice can be very rewarding. While the competition is fierce, if a mediation practitioner has strong skills, passion, and a deep understanding of how the business works and exactly what's needed to start up a business, success is possible. ■

John Bickerman *is an internationally recognized neutral, specializing in complex, multi-party insurance coverage and general commercial disputes who left his firm 20 years ago to form a solo practice and has never looked back. He teaches negotiation and mediation courses at Cornell University and is a past Chair of the ABA Section of Dispute Resolution. He can be reached at jbickerman@bickerman.com.*

USI Affinity Cyber Solutions For Law Firms

Not all data breaches are malicious cyber-attacks. A breach can be an employee error or even an internal system error. However, the consequences are the same and immediate response is required.

When it happens, are you prepared? Many law firms believe that cyber liability risks are already covered by legal professional liability (LPL) or indemnity insurance. While LPL insurance affords some coverage for cyber liability risks, there are limitations to the coverage provided by a law firm's LPL policy, and there are distinct advantages to shifting that coverage to a dedicated cyber policy.

As a leading specialty broker for law firms, USI Affinity's Cyber Practice has developed PrivaSafe, a proprietary cyber liability solution with NAS Insurance and a Lloyds of London syndicate. Our PrivaSafe cyber solutions product can offer law firms the comfort of knowing how to manage and mitigate exposures, and in the event of a data breach, they are protected.

For more information on the professional insurance products available to New York State Bar Association members, please contact:

Mike Mooney
Phone: 1.800.265.2876 ext. 1141
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For more information on Cyber Liability insurance please contact:

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A CYBERSECURITY GUIDE FOR ATTORNEYS

Learn how to protect your law firm's electronic assets. For more information, visit **www.nysba.org/NYSBACyber**.

Lawyers must keep abreast of the risks associated with managing technology and sensitive information, taking steps to safeguard themselves, their firm and their clients.

"[C]yber-criminals have begun to target lawyers to access client information, including trade secrets, business plans and personal data. ***Lawyers can no longer assume that their document systems are of no interest to cyber-crooks.***"

Committee on Professional Ethics, Opinion 1019 (August 6, 2014)
(emphasis added)

NYSBA

Protect yourself, your firm and your clients.

www.nysba.org/NYSBACyber

Protect firm computers and networks

Install security and antivirus software that protects against malware or malicious software on mobile devices and computers used within the firm or accessed from outside the office. Secure electronic communications as appropriate, through passwords or encryption, as well as the transmission of data stored in the cloud, ensuring secure "cloud" storage. Scrub "metadata" from electronic communications. Also, use a firewall program to prevent unauthorized access.

Require strong authentication

Ensure that users accessing your firm's network create strong user IDs and passwords/passcodes for computers, mobile devices and online accounts. Make sure users are accessing official websites when entering passwords/passcodes using a mix of upper and lower case letters, numbers, symbols and/or long, uncommon phrases. Differentiate passwords/passcodes on devices and/or accounts, changing them regularly in order to maintain passwords/passcodes in a secure manner. Be sure to never provide your passwords/passcodes to others.

Provide firm education

Establish security practices and policies for all firm employees. Monitor employees and enforce best practices pertaining to internet usage guidelines for mobile devices, internet usage, email and social media. Do not update software and apps unilaterally; instead, updates should be done after inquiry to the responsible individual or department. Identify an individual/department responsible for the above monitoring and advise all firm employees of the need to update devices upon consultation with appropriate personnel at the firm.

Access information on secure internet connections

Connect to the internet using only secure wireless network connections to ensure a private connection, such as a VPN. Public internet provided at airports, hotels and/or internet cafés may not be secure.

Suspicious emails, attachments and unverified apps/programs

Be suspicious of opening, forwarding or responding to unsolicited emails and attachments or links from unknown sources and be sure to charge phones on reliable USB ports. Do not download apps/programs from unverified sources to your computer or mobile devices, especially apps/programs that have access to contacts or other information on your mobile devices. Log out of apps/programs instead of simply closing the internet browser. And avoid file sharing services.

Software updates

Software vendors regularly provide patches and/or updates to their products to correct security flaws and improve functionality. Ensure timely patches and antivirus software updates are installed in all devices.