

# SECURITIES ARBITRATION COMMENTATOR

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### Hot Topics 2014

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## Can Reviewing an Arbitrator's Social Media Presence Trigger an Impermissible Ex Parte Communication?

by James L. Komie & James J. McNamara\*

For many securities arbitration practitioners, reviewing a proposed arbitrator's social media presence has become an important part of the vetting process. The information available ranges from benign biographical and professional data on LinkedIn to potentially more revealing information that sometimes can be found on blogs, Twitter and even Facebook.

Practitioners must take care, however, that their investigation does not lead to an improper communication with the proposed arbitrator. Recent legal ethics opinions have examined this issue in the context of an attorney's review of a prospective juror's social media. But the same issue exists in the arbitration context – namely, can reviewing a proposed arbitrator's social media result in an impermissible *ex parte* communication? Fortunately, a recent ABA ethics opinion makes clear that the answer is “no” in most instances, provided the practitioner limits the research to passive review and avoids making any type of request of the proposed arbitrator to gain access to his or her social media.

Rule 3.5 of the ABA Model Rules of Professional Conduct prevents attorneys from having *ex parte* communications with “a judge, juror, prospective juror or other official” during a proceeding unless authorized by law or court order. The model rule does not specifically mention “arbitrator” in its list of individuals with whom an attorney may not have *ex parte* communications, but an arbitrator most likely would be considered an “other official” under the model rule.<sup>1</sup>

Securities industry arbitration rules likewise prohibit *ex parte* communications with arbitrators. Rule 12210 of FINRA's Code of Arbitration Procedure for Customer Disputes provides that, except as permitted under rules for direct communication, “no party, or anyone acting on behalf of a party, may communicate with any arbitrator outside of a scheduled hearing or conference regarding an arbitration unless all parties or their representatives are present.”<sup>2</sup> The arbitration rules of the National Futures Association are similar.<sup>3</sup>

Applying these rules in the Internet age, when attorneys can use sites like Facebook or Twitter to investigate arbitrators, has proven challenging. Account holders on those sites can use privacy settings to designate content as non-public. Other users can view this non-public information only after a friend request or invitation is sent and subsequently accepted. The act of sending a friend request or invitation to a proposed arbitrator could be construed as an improper *ex parte* communication.

LinkedIn presents a further wrinkle. While most profiles are open to public review and do not require consent from the LinkedIn member, the LinkedIn member may nevertheless be notified that another user has reviewed his or her profile and even may be provided the name of the user who reviewed the profile.

State and local bar ethics committees have reached varying conclusions about these issues.<sup>4</sup> But a recent opinion by the ABA Standing Committee on Ethics and Professional Responsibility<sup>5</sup>

has provided new clarity, finding that passive review of a juror's social media does not constitute an impermissible *ex parte* communication, even if the juror is notified by the website of the review. An attorney may not, however, send a “friend request” or similar communication to a juror to gain access to the juror's social media.

The ABA opinion establishes clear guidelines for practitioners to follow when researching a proposed arbitrator's social media presence.

- It should always be permissible to engage in passive review of a proposed arbitrator's social media where the proposed arbitrator is not made aware of the review. For example, reviewing a proposed arbitrator's profile on a law firm website or reading his or her publicly available blog posts or unprotected tweets should not be an issue.

- In most jurisdictions it should be permissible to engage in passive review of a proposed arbitrator's social media even if the proposed arbitrator is notified by the website of the attorney's review. An example of this is reviewing a proposed arbitrator's LinkedIn profile where the proposed arbitrator receives a notification from LinkedIn naming the attorney.<sup>6</sup> Another example would be becoming a listed “follower” of a proposed arbitrator's Twitter account where the arbitrator has not “protected” his or her tweets.

- It is never advisable to contact a proposed arbitrator to receive access to the proposed arbitrator's social media. An attorney should not send a Facebook “friend request” or LinkedIn “invitation” to a prospective arbitrator. Similarly, an attorney should not send a

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request to a proposed arbitrator to follow him or her on Twitter if the arbitrator has designated his or her tweets as protected.

Of course, even if an attorney commits no rule violation by passive social media research, it nevertheless may be ill-advised from a tactical standpoint. Arbitrators may resent having their social media activities scrutinized. Attorneys thus should familiarize themselves with the privacy settings of social media sites. For example, LinkedIn members can change their privacy settings so that other members are not provided with their name when they review that other member's profile.<sup>7</sup> Changing this setting will prevent an arbitrator from receiving a notification that names the attorney.

Social media has become an important tool in the arbitrator selection process.

However, a practitioner must fully understand exactly how the social media sites work in order to avoid any *ex parte* communications with arbitrators. 

**ENDNOTES**

<sup>1</sup> See Phila Ethics Op. 95-8 (1995).

<sup>2</sup> Rule 13210 of the Code of Arbitration Procedure for Industry Disputes is identical.

<sup>3</sup> NFA Code of Arbitration, §4(f).

<sup>4</sup> See, e.g., N.Y. Cnty Lawyer Ass'n Formal Op. 743 (2011); Ass'n of the Bar of the City of N.Y. Comm. On Prof'l Ethics, Formal Op. 2012-2; Ky. Bar Ass'n, Op. E-434 (2012).

<sup>5</sup> ABA Standing Comm. On Ethics & Prof'l Responsibility, Formal Op. 466, 4/24/14.

<sup>6</sup> New York attorneys should review the New York bar opinions

cited above, which suggest that a LinkedIn notification could be an improper contact depending on the circumstances.

<sup>7</sup> To change your LinkedIn privacy settings, hover your cursor over your profile photo in the upper right-hand corner of your LinkedIn homepage and click on Privacy & Settings from the drop-down menu that appears. That will take you to a page where, under Privacy Controls, you can click on "Select what others see when you've viewed their profile" <[https://www.linkedin.com/settings/wvmp-visibility?goback=%2Enas\\_\\*1\\_\\*1\\_\\*1](https://www.linkedin.com/settings/wvmp-visibility?goback=%2Enas_*1_*1_*1)> . That will bring up a text box giving you three options, one of which is "You will be totally anonymous." Select that option and then click Save Changes.

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