

ABA Section on Dispute Resolution's Arbitration Committee E-Newsletter

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[Social Media Revisited: A New Look at Arbitration Disclosure in the Age of Interconnectivity](#)

By: Gary L. Benton and Ruth V. Glick

Since its early development approximately fifteen years ago, social media has revolutionized the way people interact with each other. Social media has spread virally and morphed into our everyday social and professional lives. For many, it is the preferred means for staying in touch with the world and communicating with fellow practitioners.

In early 2012, the American Arbitration Association published an article titled *Arbitrator Disclosure in the Internet Age*, which was co-authored by one of the current authors.¹ The rapid evolution of social media since that time merits that the topic be revisited.

Social media has evolved from its innovation as a novelty utilized by a few college students into a global phenomenon to communicate and share content. Social media has taken on many variants around the world but, for the legal profession in the West, Facebook, LinkedIn and Twitter are the mostly widely used and recognized sites. Yet even those sites have evolved in the last few years.

Facebook grew from (an already respectable) 900 million users in 2012 to over 2.2 billion today. In that time, it has morphed from being a purely social networking tool to emerge as perhaps the most impactful information source in our lives. As recent news developments reveal, Facebook's impact is, accordingly, coming under increased public scrutiny. In Facebook's recent incarnation, the divide between social and professional uses has faded and it is increasingly relied on for professional news and communications. Although it has lost some younger users to visual media and others due to trust issues, it remains a major force.

Member Spotlight: Gilda Turitz



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This issue in the Arbitration Committee Member Spotlight, we are proud to hear from Gilda Turitz, a full-time arbitrator of commercial disputes, based in San Francisco.

For more information, visit her website at www.turitzadr.com

1. How did you get into the dispute resolution field?

As a young lawyer I was enticed by an opportunity to become an arbitrator of attorney-client fee disputes run by the Bar Association of San Francisco. After training, I heard cases as a sole arbitrator or on a three member panel which presented a fascinating array of problems between lawyers and clients that underlay their fee dispute. I enjoyed the role and wanted to get further involved.

2. What roles do you currently play in the dispute resolution field—e.g., domestic arbitrator, international arbitrator, mediator, lawyer representing clients in these processes, other?

I am a full-time, independent domestic arbitrator and mediator of commercial cases as of September 2017 when I started my own ADR practice. Arbitration takes up about 80% of the time, the remaining 20% being mediation or early neutral evaluation (ENE). Before going full-time in ADR, as a business trial lawyer, I also represented clients in commercial and securities (FINRA) arbitrations and mediations.

¹ Ruth V. Glick and Laura Stipanowich, *Arbitrator Disclosure in the Internet Age*, *Dispute Resolution Journal*, vol. 67, no 1 (Feb. 2012).

Gilda Turitz, Cont.

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3. How did you begin your career as an arbitrator?

Early on in my commercial litigation practice, I handled a few cases where the parties had entered into contracts with arbitration clauses. I appreciated the comparative flexibility, speed to hearing, and freedom in arbitration from many constraints in court litigation, especially the burdens of pre-trial discovery, to be very satisfying. So, with my experience in attorney-client fee arbitrations, and as an advocate in commercial arbitrations, I decided to pursue becoming a neutral arbitrator and joined the commercial arbitration panel of the American Arbitration Association.

4. What knowledge, experience and/or skills are essential for a successful arbitrator?

Most importantly, it is essential for arbitrator to maintain integrity in the process, and to demonstrate his or her own neutrality throughout the arbitration. Successful arbitrators are selected for their expertise and must know the applicable law as well as the practicalities and standards of the industry involved. They need to work closely with counsel and the parties to tailor the process to the dispute at hand, with an even temperament and while maintaining control. Those skills are essential contributions to the parties' confidence in the process and to reach a fair and just result.

5. Do you specialize in a particular subject matter or field? If so, how did you become involved in that field.

I have spent my career as a business trial lawyer, arbitrator and mediator in a wide range of commercial disputes and industries. By serendipity I started handling cases involving the "business divorce" – disputes among owners of closely held businesses, often involving demands for complete dissolution, restructuring, resolution of fiduciary duty claims and management disputes, and the like. This type of case has become a mainstay of my practice, as have complex contract disputes between companies in all types of industries and businesses - for example, credit card issuers, real estate development and leasing, finance and securities, Bitcoin traders, software providers, and telecommunications and technology companies, among many others.

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LinkedIn's original focus as a virtual address book gave it some legitimacy as a site for professionals. Over time, particularly following its acquisition by Microsoft in 2016, LinkedIn has implemented additional networking and news features. It grew from 140 million users in 2012 to over 450 million today. LinkedIn is now fully adopted by professionals, including lawyers, as a means to share and comment on professional news and developments. Although LinkedIn is utilized by lawyers of all ages, the near-constant use by younger professionals to share information and support each other makes it a mode of interaction that cannot be ignored.

Twitter's positioning as a social microblogging site has expanded to include news and event alerts. Twitter grew from 185 million users in 2012 to over 330 million today and it is increasingly relied on by lawyers to follow the news and promote professional events.

The evolution of social media and our interactions with it are pertinent to how we approach disclosure issues. Legal disclosure standards, as well as rules prescribed by arbitration providers and codes of ethics for arbitrators, place an affirmative duty on arbitrators to disclose any circumstances likely to give rise to justifiable doubts as to the arbitrator's impartiality or independence. These rules were written well before social media existed so how can you now measure justifiable doubts when you are digitally connected to almost anyone with less than six degrees of separation?

Lawyers using Facebook or LinkedIn today may have thousands of connections. "Friending" someone on Facebook, "connecting" with someone on LinkedIn or even "liking" a post in 2018 has a different connotation than it did in 2012 or years before. Today, we readily recognize that most Facebook "friends" are not friends and may be acquaintances at best. Similarly, LinkedIn connections may be other professionals around the world with whom we've never met or spoken. And "liking" a post may mean little more than that you've read it and it didn't offend you.

This evolution needs to be considered in the context of ethics disclosures. Although there is sparse case authority regarding use of social media by arbitrators, there is a developing pool of professional advisories and court cases involving judges, and those cases are now turning to the question of online connections.

The guiding rule for both judges and arbitrators is that disclosures should be made based on the degree of a relationship. By 2012, ethics opinions, from jurisdictions including Florida, New York and California, tolerated judges joining social networks but precluded or expressed concerns about "friending" lawyers. Those prohibitions still hold despite the fact that, in perspective today, it is unlikely having a social media connection necessarily constitutes a meaningful relationship or even creates an impression of having influence on others.

The question of a judge “friending” a lawyer on Facebook is currently under consideration by the Florida Supreme Court (No. SC17-1848). In that case, Law Offices of Herssein and Herssein v. USAA, 229 So. 3d 408 (3rd Dist. FL 2017), a Florida appellate court held that the mere fact that a judge is a Facebook “friend with a lawyer for a potential party or witness, without more, does not provide a basis that the judge cannot be impartial or is under the influence of the Facebook friend.

We shall see in months and years ahead what the courts say about judges and, eventually, arbitrators making social media connections. Logic tells us arbitrators should be held to a similar standard as judges when it comes to social media. The argument can be made otherwise. We expect arbitrators to be connected with the world and to provide practical insights in their decision-making. The authors would argue that requiring arbitrators to pledge social media abstinence makes arbitrators less suited for appreciating and evaluating real world realities.

Fearful of change, some arbitrators have eschewed any social media presence at all. But the digital world is moving forward and ADR users increasingly prefer an arbitrator with a social media presence so that they can access materials and information about the arbitrator more readily. In 2012, the guidance for arbitrators was to disclose everything, particularly close personal relationships and any business relationships with parties, counsel or witnesses, and never make social media connections. That is still safe advice but the authors contend that, given the evolution of social media, it is outdated guidance. There is room in the world for social media, and the task should be identifying significant relationships, online or offline, rather than merely disclosing the existence of a social media account.

The test should be to compare the online relationship to an in-person relationship and determine whether it is significant enough to disclose. For example, one would not list all members of the ABA Section of Litigation but would disclose whether the arbitrator knew an advocate from some greater interaction such as being on a small committee together or being a co-presenter on a program. While that in itself would rarely, if ever, be a cause of disqualification, one might justify disqualification based on ongoing substantive connections, like frequent personal chat or substantial comments on posts online. Disclosing relationships that may be perceived as significant is better than merely disclosing you have hundreds or thousands of contacts through LinkedIn or Facebook and not disclosing substantial connections among those contacts.

Gilda Turitz, Cont.

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6. In your opinion, what is the most important issue or new development in arbitration today?

In my view, a critical issue in arbitration, recently getting increasing attention, is recognition that the pool of arbitrators - both domestically and internationally - is not sufficiently diverse. Women and minorities are underrepresented on provider panels. Even with provider attention to ensuring arbitrator selection lists include diverse candidates, the rate of selection of women and minorities as arbitrators also lags, especially for the larger and more significant cases. The ADR and legal communities need to make diversity in neutral selection a priority, and develop and implement practical solutions, to further ensure that arbitration fulfills its obligation to its users to be a fair, equitable and just dispute resolution mechanism.

7. Is there anything else you would like to tell the readers about yourself?

I am a native New Yorker and have lived in the San Francisco Bay Area since college. Before I went to law school, I was a public librarian in Napa and San Francisco, and am a voracious reader. I'm always happy to recommend books to anyone looking for a good read - so feel free to ask! [Editor's note: Gilda gives fantastic recommendations!]

Arbitration Institute - SAVE THE DATE!!!!

The Eleventh Annual ABA Arbitration Training Institute will be held on May 17-18, 2018 in Miami at Akerman LLP 98 SE 7th St Fl 6 Miami, FL. This program will feature leading arbitrators and advocates in plenary sessions on all aspects of the arbitral process. It is the *essential* annual update for all arbitrators and advocates. Small, facilitated breakout sessions will follow each of the plenaries to allow participants to exchange ideas and learn from each other. Concurrent sessions on securities, employment, construction and health care (new this year) arbitration will allow participants to delve more deeply into each of these substantive areas.

The Arbitration Training Institute is sponsored by the American Bar Association Sections of Dispute Resolution, Litigation, Labor and Employment Law, Health Law, Infrastructure and Regulated Industries, and the ABA Forum on Construction Law, as well as the American Arbitration Association, JAMS and the College of Commercial Arbitrators. ACE and CLE credit will be offered. **Register here:** <https://shop.americanbar.org/ebus/ABAEventsCalendar/EventDetails.aspx?productId=301816714>

It remains best not to selectively invite connections with counsel on an active case. On the other hand, pre-existing connections shouldn't necessarily merit disclosure unless there is more to the relationship. Similarly, perhaps, accepting a LinkedIn invite from counsel on a case is inconsequential in and of itself.

We need to ask ourselves, in 2018, does it truly make sense to avoid social media? If you have a social media account, what benefit is there to the parties in your disclosing one of hundreds or thousands of Facebook "friends" when there is no significant relationship? Is there really any harm in creating LinkedIn connections with counsel on a case? Does "following" the President or anyone else on Twitter mean you have a close relationship with them?

Undoubtedly, we will face new questions as old ones fade away. Avoiding social media is becoming less and less possible. Perhaps the push for "arbitrator transparency" and "advocate transparency" might someday compel all of us to disclose every one of our contacts online rather than have their identities hidden away. Or there might be adoption of a more defined standard, such as the authors have suggested, of significant relationships, that must be disclosed. Stay tuned or, rather, stay connected.

Ruth Glick is an independent arbitrator and mediator whose skills and knowledge of ADR stem from her background as a lawyer, businesswoman and educator. <http://www.ruthvglick.com/>

Gary Benton is an internationally recognized Arbitrator and Mediator with over thirty years major law firm and in-house expertise in both corporate/commercial transactions and litigation/arbitration practice. <https://www.garybentonarbitration.com/>

Co-Chairs' News Update

Colleagues: The ArbCom is off to a fast start in 2018. In this issue we want to update you on key committee projects that are underway and highlight important upcoming events. First, the May issue of *Just Resolutions*, the DR Section's e-newsletter which ArbCom is sponsoring, is shaping up well. Adam Martin, Sub-committee Chair for Publications, has lined-up four articles for publication on the theme "*Novel Approaches to Dispute Resolution.*" Next, our Program Sub-committee, headed by David Tenner, is organizing a webinar on "*Dispelling the Myths of Arbitration*" for the Fall, and has recruited four speakers for the program.

ArbCom will co-sponsor the program together with the Litigation Section's ADR Committee. Finally, our Sub-committee on *Domestic Arbitration Rules*, led by Peter Merrill and Jaya Sharma, Co-Chairs, has organized into working groups and begun work. This long-term project aims to prepare a set of standard arbitration rules for use where the parties have not selected any.

We hope many of you will attend the **DR Section's 20th Annual Spring Conference** on April 4-7 in Washington D.C. Both of us have attended the annual conference in the past and found the programs enlightening and enjoyable. Several members of ArbCom will be presenting **CLE programs** during the Conference.

The DR Section also sponsors the **11th Annual Arbitration Institute** to be held on May 17-18 in Miami. This comprehensive two-day program focuses on the primary aspects of the arbitration process. **The faculty includes several ArbCom members** and other experienced arbitrators. And the Institute provides a great opportunity to brainstorm with colleagues and get-up-to-date on the latest developments. A special guest speaker this year is **Liz Kramer, author of the Arbitration Nation Blog**. Liz Kramer is both well-informed on the developing law of arbitration and an entertaining speaker. **We encourage all ArbCom members to attend the Institute this May.**

You can register for the Spring Conference and the Arbitration Institute at:
www.americanbar.org/groups/dispute_resolution/events_cle.html.

We look forward to seeing you in Washington at the Spring Conference.
Ed Lozowicki and Louis Burke, Co-Chairs

Announcements

Stephanie Cohen and Mark Morril are pleased to report that their article, [A Call to Cyberarms: The International Arbitrator's Duty to Avoid Digital Intrusion](#), was awarded the 2018 Outstanding Professional Article Award by the CPR Institute for Dispute Resolution (CPR). The article originally appeared at 40 *Fordham International Law Journal* 981 (2017) and was re-published as an advance publication by *Transnational Dispute Management (TDM)*.

Next Meeting: the next ArbCom Quarterly Business Meeting will be held over breakfast on April 6 during the Spring Conference. Please plan to attend the Conference, bring your ideas for Committee activities, and meet your colleagues on ArbCom.

In addition, the Annual ArbCom Dine-Around will be held April 5 at La Tomate, 1705 Connecticut Avenue. Please RSVP to Louis Burke at <mailto:lburke@lfbllaw.com> to reserve your place at this fun event.