Technology and Ethics: A Guide for Neutrals
By Andrea L. Dooley

"Alito and Sotomayor suggested that the Supreme Court may be too formal, isolated and technologically backward. Sotomayor cited two reasons for the court's reluctance to use technology. One was tradition. "The other," she said of some of her colleagues, "is they don't know how."[1]

Most neutrals use email now, but it was less than a decade ago that most people believed that email was too informal, and was possibly inappropriate for communicating about even basic issues like setting a meeting or hearing date.. Most people still faxed hard copies of these communications to one another, believing that the fax confirmation was the best record for showing that there was no ex parte communication or that every party had notice of the relevant information. With the rise of e-filing in state and federal courts and the acceptance of electronic service, most attorneys have shifted to the current mindset, where email is seen as the best and easiest way of ensuring that all parties are communicated with simultaneously, and the record is kept digitally, rather than on that old fading fax paper.

This article explores the pitfalls and opportunities that exist for neutrals who have shifted to this technological framework. While the ethical issues that email and social media create are not new, the availability of the technology multiplies the opportunities for ethical issues to arise. The informality of social media can create conflicts of interests, magnify inappropriate conduct and provide additional opportunities for ex parte communications and disclosure issues.

Ex Parte Communications

Social media creates multiple platforms for people to communicate with one another. The informal nature of this communication may lead some to feel like these communications are private and exempt from the usual rules of ex parte communications. This increases the chances that a neutral might have ex parte communications with a party. In 2010, Georgia superior court judge Ernest "Bucky" Woods retired after emails surfaced which showed that he had initiated a Facebook relationship with a defendant, who later tried to borrow money from the judge.[2] Judge Woods told the Fulton Country Daily Report that he retired because, "I just got tired of living under a microscope." While contacting a defendant has never been permissible, the email trail created by Facebook no doubt hastened Judge Woods' exit from the bench. In 2013, Texas State District Judge Elizabeth E. Coker resigned after complaints that she had texted the prosecutor during a criminal case, where the judge recommended questions that the prosecutor should ask during the trial.[3]

A more high profile example of a judge forced to resign because of ex parte communications occurred last summer, when Randall R. Rader, who had served as chief judge of the U.S. Court of Appeals for the Federal Circuit in Washington, retired after an email he sent an advocate surfaced. Rader sent Edward Reines, a lawyer at Weill Gotshal & Manges LLP, an email praising Reines' skills in a case before Judge Rader and invited Reines to share the email with clients. A friendship that may have remained private in the past was easily rebroadcast, and discovered, via email blast.[4]

While these are high profile examples of ex parte communications that should be avoided, there are pitfalls even in the day-to-day use of email and social media. When communicating about routine matters, neutrals should still ensure that all party representatives are included in reply emails, and should copy excluded parties to prevent accusations of ex parte communications. For example, if one party requests a continuance without copying the other party, it is appropriate for the neutral to reply to the requesting party, with a copy to the other party, stating that you will consider the request after hearing from the other party. While disclosure requirements (which are discussed below) are clear for existing

relationships, neutrals should avoid having social contact of any kind with parties who currently or recently appeared before them.

Texting most resembles a telephone call, and should not be used by neutrals to communicate with parties, except in limited circumstances. Texting should be used when the parties are not available by telephone, and all parties should be included on every text. A limited example might be a text to tell the parties that the neutral's train is delayed and that she expects to arrive 10 minutes late. Substantive communications should not be conducted by text.

Inappropriate Materials

In general, neutrals should be very cautious about the content of their emails, even personal emails intended solely for family members. It has become routine for a public figure to be embarrassed by the disclosure of email content that does not reflect well on their character. Pennsylvania Supreme Court Justice Seamus McCaffrey was recently suspended from his position on the bench for distributing pornographic and other explicit material from his personal account to others in state government.[5] A New Mexico judge was forced to resign after admitting that he had sent "excessive and improper" texts to his wife, a court employee, during court proceedings. While he denied that the texts were of a sexual nature, they did include negative remarks about other judges and parties appearing before him.[6] Any neutral who is considering whether to send an email that has potentially offensive content should also consider the impact its disclosure would have on their career and family. Communicating during a proceeding deprives the parties of the neutral's attention to the case.

Neutrals should also maintain an email address that is separate from their personal email address. If your personal email is breached, having a separate email address will ensure that parties are not contacted, even inadvertently, and it minimizes the likelihood that you might forward that hilarious, but mildly risqué, joke from your brother-in-law to everyone who appears before you. Personal emails, jokes and invitations should not be sent to parties appearing before the neutral.

Comments on Facebook or blog posts can also compromise the perception of neutrality. A judge in Ottawa retired after crude comments she made about another judge on Facebook came to light.[7]Blogs have become less popular with the rise of other social media sites but there are still quite a few active blogs, some of which permit comments from other contributors. While reading blogs in your area of law can be a good way to keep abreast of current issues, neutrals should be very hesitant to comment on other people's blog posts. Comments made on a blog or other website can be construed as an opinion or demonstration that your decision-making is influenced by opinions or facts outside of the matters before you. For example, if a neutral were to negatively comment on a blog post about a court decision, the parties who appear before that neutral might believe that the neutral is unable to prevent her personal opinion from affecting their case.

Obviously, the same would be true for a neutral who had their own blog. For that reason, maintaining a personal or professional blog in conjunction with or separate from a professional website should be done with caution. A neutral should never comment on a pending matter or identify parties who appear before them. A neutral should never post any materials (communications or evidence) from a matter which they have heard. Arbitrators should only publish decisions on their personal website if all the parties have agreed to their publication. It is appropriate for neutrals who act as factfinders in the public sector to link to decisions published by a state agency if the neutral is identified in the decision. Likewise, it is appropriate to provide links to decisions published by other legal websites, such as Westlaw or BNA.

Disclosures

What is a friend? What is a colleague? Traditionally, these terms have been fairly obvious ones, and neutrals have long considered when to disclose these traditional relationships. The rise of social media, however, calls into question the meaning of these terms, and how they apply to the increasing number of more tech-savvy neutrals joining the field.

One of the primary ethical duties of every neutral, whether arbitrator, mediator, judge or fact finder, is to avoid conflicts of interest and to disclose personal relationships with the parties who appear before them. Whether to disclose Facebook "Friends" or LinkedIn "connections" is a new consideration for many neutrals.

Social networks create the biggest dilemma for neutrals. It's hard to avoid the draw of a website where one can see pictures of one's grandchildren, read articles recommended by smart friends, and get a quick sense of the lives of people one has met and cared for over many years. There is no reason that neutrals should be excluded from these networks. However, internet searching permits parties appearing before a neutral to quickly discover that neutral's "friends," whether or not those connections are relationships that rise to the level of requiring disclosure. Knowing a little about different social networks can help you decide whether you want to be on those networks and how you want to manage your privacy and disclosures about those relationships.

Because Facebook is commonly used as a personal and social networking tool, you should limit your connections on the site to people whom you've actually socialized with, or to whom you are actually connected. That is, Facebook should be used to connect to people whom you would already otherwise have to disclose if they were a party or witness before you.

If you have connections on Facebook who do not meet that criteria but whom you might still like to be able to connect with in the future for professional reasons, invite them to connect on LinkedIn. Although that might not eliminate the need to disclose the connection in the future, at least it draws a brighter line about the nature of your relationship.

LinkedIn is a network for maintaining professional connections, and can be a great platform for providing potential parties with information about your experience, and finding groups that may robust legal discussions and networking opportunities. Since your connections on LinkedIn might be former or current clients or parties, it is important to disclose your participation in LinkedIn in your disclosure materials. In a recent AAA blog post about social media, Deborah Masucci suggests using a disclosure similar to the one she uses:

> *I use a number of online professional networks such as LinkedIn and group email systems. I generally accept requests from other professionals to be added to my LinkedIn website but do not maintain a database of all these professional contacts and connections. LinkedIn now features endorsements, which I do not seek and have no control over who may endorse me for different skills. The existence of such links or endorsements does not indicate any depth or relationship other than an online professional connection, similar to connections in professional organizations.*[8]

At a recent arbitrators' meeting that I attended, I was surprised to learn that a number of arbitrators had not conducted an internet search of their own name. Searching your name and checking the links that come up in the search is important to do for a number of reasons.

First of all, many parties who consider you for an appointment are going to do an internet search before they decide to retain you as a neutral, particularly if they do not have any experience with you in the past. You need to know what they are going to learn when they do that search. Some parties use services to conduct assessments of neutrals, and others collect information informally from other practitioners, but most of them are going to do a quick internet search, too. The information they find might not be accurate, current or useful, but it is what they will rely on to make a decision about you.

Occasionally, the parties will discover something true and relevant about you and your work history or relationships, and which you ought to have disclosed prior to the parties before accepting the appointment. There are at least two California cases where losing parties moved to vacate arbitration awards after finding information about undisclosed relationships that the arbitrator had with one party or their representative.

In *Mt. Holyoke Homes v Jeffer Mangels Butler & Mitchell LLP*, (2013) 219 Cal.App.4th 1299, one party discovered, after an internet search, that the arbitrator had listed the other party as a reference on an undisclosed resume that was posted on a website for neutrals. She moved to vacate the arbitration award on the basis that California Code of Civil Procedure §1281.9(a)(6) required disclosure. The Court said,

> An objective observer reasonably could conclude that an arbitrator listing a prominent litigator as a reference on his resume would be reluctant to rule against the law firm in which that attorney is a partner as a defendant in a legal malpractice action. To entertain a doubt as to whether the arbitrator's interest in maintaining the attorney's high opinion of him could color his judgment in these circumstances is reasonable, is by no means hypersensitive, and requires no reliance on speculation. We believe that an objective observer aware of the facts reasonably could entertain such a doubt.

More importantly, the Court found that the parties are not obligated to conduct their own research about the arbitrator. "A party to an arbitration is not required to investigate a proposed neutral arbitrator in order to discover information, even public information, which the arbitrator is obligated to disclose. Instead, the obligation rests on the arbitrator to timely make the required disclosure." [9]

In *Casden Park La Brea Retail LLP v. Ross Dress for Less, Inc.* (2008) 162 Cal.App.4th 468, the party seeking to vacate an award similarly conducted an internet search after receiving the award. In that case, the party discovered that the arbitrator had made campaign contributions to one of the party arbitrators, among other things. The Court of Appeals found that the arbitrator had disclosed prior relationships and had conducted a pre-hearing conference to permit the parties to determine whether they wanted to ask him to withdraw. Although the disclosure had not specifically mentioned the campaign contributions discovered by the moving party, the court declined to uphold the trial court's order to vacate.

> *Only "significant or substantial business relationships between the neutral arbitrator and a party or his representative must be disclosed to the other party, to avoid the appearance of impropriety, but ordinary and insubstantial business dealings do not necessarily require disclosure. . . . Because arbitrators are selected for their familiarity with the type of business dispute involved, they are not expected to be entirely without business contacts in the particular field, but they should disclose any repeated or significant contacts which they may have with a party to the dispute, his attorney or his chosen arbitrator."* Citing *Guseinov v. Burns* (2006) 145 Cal.App.4th 944, 959.

The modern neutral need not live in a cave, using a typewriter and the post office as their only way to communicate. These basic guidelines will help neutrals access social media in a way that avoids landmines like disclosure and marketing issues.

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[1] "The Supreme Court Justices Return to Yale," Adam Liptak, New York Times, October 25, 2014
[2] www.abajournal.com/news/article/ga/_judge_resigns_after_questions_raised_about_facebook_contacts/
[3] http://www.chron.com/news/houston-texas/houston/article/District-judge-resigns-in-texting-case-4913627.php
[4] http://blogs.wsj.com/law/2014/06/13/judge-rader-author-of-controversial-email -to-lawyer-to-resign-from-bench
[5] http://www.philly.com/philly/news/20141021_Supreme_Court_votes_to_suspend_McCaffery_over_e-mails.html
[6] www.kiva.com/news/New-Mexico-judge-resigns-after-allegations-of -sexting-during-court/19210032
[7] http://ottawacitizen.com/news/local-news/ottawa-judge-who-made-crude-facebook-post-retires-rather-than-face-disciplinary-hearing
[8] http://nysbar.com/blogs/ResolutionRoundtable/2014/04/social_media_and_neutrals.html
[9] http://caselaw.findlaw.com/ca-court-of-appeal/1645087.html#sthash.2ql0xsyv.dpuf, Citations omitted.