

## Social Media Law Update

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### [Why Companies Want Arbitrators Who Have A Public Profile On LinkedIn And The Internet](#)

By [Michelle Sherman](#)

Your company has a dispute with a vendor or customer, and the terms of the agreement between the company and the person you are about to sue provide for binding arbitration. It is common for contracts to have arbitration provisions. Arbitration is viewed as less expensive and more expeditious than litigating a dispute in court. Arbitration provisions also allow the parties to agree that consequential (*e.g.* down time, finance fees, lost profits) and/or punitive damages cannot be awarded. Arbitration also gives the parties more control in deciding who will adjudicate their dispute, rather than having a judge randomly assigned to your case. There are many positives to arbitrating a dispute.

The only real downside that comes to mind is that arbitration awards are extremely difficult to set aside. In California, an arbitration award will stand unless the party challenging the decision can show (1) "the award was procured by corruption, fraud, or other undue means"; (2) "the rights of the party were substantially prejudiced by the misconduct of a neutral arbitrator"; or (3) an arbitrator failed to make a timely disclosure of a conflict which would be a ground for disqualification. Cal. Civ. Proc. Code § 1286.2. The Federal Arbitration Act includes similar limited grounds for vacating an award, with "evident partiality or corruption in the arbitrators, or either of them," being one ground. 9 U.S.C. § 10.

Consequently, companies assume a significant risk when choosing an arbitrator to decide their dispute. Arbitrators also charge rates ranging from \$350 – \$625 per hour. It behooves the company and its counsel to research the prospective arbitrators before settling on one or a panel of arbitrators. Before the Internet, legal counsel would rely on word of mouth, and seek input from attorneys at their firm. With the Internet and the professional networking site, LinkedIn, there is much more information available.

On LinkedIn, for example, the potential arbitrators can make their connections available to anyone who is connected to them, which is easy enough to do by accepting a request to connect. This is one way to disclose if they are affiliated with anyone who is a party, witness, or interested

party in the action. And, it is an easy way to invite questions if anyone is concerned about a connection, which will not be a problem in most instances. Being "connected" on LinkedIn does not necessarily mean there is a relationship that would "cause a person aware of the facts to reasonably entertain a doubt that the proposed neutral arbitrator would be able to be impartial..." Cal. Civ. Proc. Code § 1281.9(a). It is also worth looking at what LinkedIn groups the prospective arbitrators have joined to see if there is anything that would indicate a potential bias in your case. LinkedIn profiles usually include the employment history of the person, and also websites if they have one.

Information from the Internet has resulted in one judge disqualifying himself when it became public. In the Ninth Circuit, a judge was in the middle of an obscenity trial when the Los Angeles Times broke a story that the judge had an extensive collection of suggestive or explicit images and videos on his personal computer server. It turned out that the server was connected to the Internet, and, through that connection, the images on his personal website had become publicly available. The judge, the Honorable Alex Kozinski, disqualified himself from hearing the obscenity case. Judge Kozinski also declared a mistrial in the case. The newspaper story had raised a suspicion that the court could be biased in favor of the defendants.

In another case, a motion to vacate an arbitration award was granted because the arbitrator Sean SeLegue did not disclose that his legal practice centered on representing law firms in disputes with their clients, and that he was currently involved in representing a law firm in a fee dispute with its former client. *Benjamin, Weill & Mazer v. Kors*. The perceived conflict could have been avoided if the arbitrator had disclosed the case. Alternatively, if the party moving to vacate the award had done her due diligence, she would have found numerous Google hits showing the nature of the arbitrator's practice, including his profile on his law firm's website, and his membership in the Association of Discipline Defense Counsel, an organization that describes itself as the "bar association for lawyers who represent lawyers and others in disciplinary, admissions and regulatory proceedings before the State Bar of California and the California Supreme Court." Since Kors was in a fee dispute with her prior counsel, she would have probably asked SeLegue to withdraw as one of three arbitrators if she had known about his potential conflicts. A motion for rehearing has been granted in this case, so the case cannot be cited.

At a February 2011 conference for arbitrators in Los Angeles, one speaker reportedly told his audience that arbitrators should avoid social networking sites altogether, including LinkedIn because of the risk of perceived conflicts. This advice is misguided and shortsighted. The problem does not rest in having a presence on LinkedIn or the Internet. In fact, this may be one of the best ways for professionals to make themselves known and visible. This is especially true in fields where there is lots of competition, and a wide range of choices. It is unreasonable and unfair to discourage arbitrators, who are drawn from retired judges, law professors, litigators and trial attorneys, from having websites, participating in LinkedIn groups, or taking advantage of the resources on the Internet to market themselves. Also, information on the Internet benefits parties who are trying to find the most suitable arbitrator(s) for their dispute.

The better wisdom is for arbitrators to immediately disclose to parties who are considering their services where they appear on the Internet (websites, professional associations, blog articles),

and invite the parties upfront to connect if they want to see a list of their LinkedIn connections.

When choosing an arbitrator, remember the Internet and LinkedIn are wonderful resources that can possibly provide more information than word of mouth, and second hand information. The upside is possibly avoiding an arbitration award that will be binding and final, if a better "neutral" had been selected with a little investment of time and knowledge of the Internet.

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