PROPOSED GUIDELINES FOR ARBITRAL DISCLOSURE OF SOCIAL MEDIA ACTIVITY

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ABSTRACT

The statutes and rules governing the disclosures of conflicts of interest by arbitrators, which failed to provide much clarity even prior to the advent of social media, do not provide any concrete guidance about the disclosure of an arbitrator’s social media connections with the arbitration participants. The absence of clear, consistent standards governing social media disclosures is problematic for both arbitrators and the parties who select and appear before them. This problem will only get worse as arbitrators make increasing use of social media for personal and professional purposes, and as challenges to arbitration awards based on inadequate disclosure of social media activity work their way through the courts. Arbitrators who fail to make adequate disclosures about their social media activity expose themselves to ethical and reputational risk and their awards to vacatur. Arbitrators who search for and fully disclose their social media connections—in an era when many of their peers do not—are likely to be unfairly punished for their transparency in the marketplace for arbitration services. And in today’s uncertain environment, the parties to an arbitration do not know how to interpret an arbitral disclosure that does not contain any reference to social media activity. Does it mean that there are no social media connections between the arbitrator and the participants in the arbitration, to the best of the arbitrator’s recollection? Does it mean that the arbitrator searched the social media platforms she uses and identified no such connections? Or does it mean that the arbitrator has social media connections to the participants in the arbitration, but views those connections as immaterial? Unfortunately, absent a uniform approach, there is no way to know the answers to these questions. Arbitrators need clearer guidance to ensure compliance with ethical rules and the standards governing vacatur of arbitral awards.

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They also need to know that they will not be competitively disadvantaged by being more transparent about their social media connections than their peers. And the parties to an arbitration are entitled to consistent disclosures about social media activity so that they can realize one of the primary benefits of arbitration—the ability to meaningfully participate in the selection of an impartial arbiter. This Article proposes the first comprehensive set of guidelines for the disclosure of an arbitrator’s social media connections. If adopted by the arbitral community, these guidelines will level the playing field and yield consistent disclosures that will benefit all the participants in an arbitration, as well as safeguard the integrity of the arbitration process. The guidelines, which offer specific disclosure recommendations across all social media categories that arbitrators are likely to use, are based on three core principles. First, adherence to the guidelines should ensure compliance with the most exacting disclosure standards imposed upon arbitrators by existing statutes and rules. Second, arbitrators should disclose with arbitration participants all ongoing social media relationships that arise out of affirmative conduct by the arbitrator. And third, while it is reasonable to expect arbitrators to conduct a search of their social media activity to identify disclosable relationships, it should be practicable and not overly burdensome for arbitrators to do so.

I. INTRODUCTION

The fulsome disclosure of conflicts of interest is essential to the integrity of the arbitration process. Proponents of arbitration often tout the parties’ ability to select the arbiters of their disputes as one of the primary advantages of arbitration over litigation.¹ Rather than accept the fickle decisions of the judicial assignment wheel, the parties to an arbitration, often with input and advice

from counsel, typically have substantial input into who will decide their dispute. This is meaningful for at least three reasons. First, the parties might prefer an arbitrator with relevant prior expertise to a judge or jury with no background in the subject matter of the dispute. Second, certain arbitrators may possess experiences, skills, or traits the parties deem desirable in the context of their particular dispute. And third, while judges with conflicts of interest are subject to recusal in rare cases, the parties’ ability to handpick an arbitrator—or, at a minimum, eliminate undesirable arbitral candidates—might promote greater decision-making impartiality than the litigation process allows. While litigants have to live with some version of a lottery system to select their judges and jury pools, the parties to an arbitration typically have the benefit of knowing the professional backgrounds of arbitrator candidates. They also have the benefit of knowing the arbitrators’ disclosures about the specific connections they have to the parties, lawyers, and witnesses, before weighing in on whom to select as the decider of their dispute. This not only allows the participants in an arbitration to make better-informed decisions about the selection of their neutral than litigants, but might also promote greater satisfaction

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2 See, e.g., Carrie J. Menkel-Meadow et al., Dispute Resolution: Beyond the Adversarial Model 336 (3d ed. 2018) (“As a part of the customization associated with arbitration, disputants often have an opportunity to choose their decision-makers to a degree far beyond that which is afforded to litigants.”). Of course, a significant inequality of bargaining power, such as that existing in the context of an adhesion contract, could reduce the amount of input the party with less power has in the arbitrator selection process. Id.

3 Id. at 308 (“Disputants who want a decision maker with a particular background or expertise can write those requirements into the arbitration agreement.”); id. at 340 (discussing how factors such as age, education, gender, race, ethnicity, religion, professional experience, and political affiliations might impact arbitral outcomes).

4 Recusal or disqualification of a judge based on a conflict of interest is unusual. See, e.g., A.B.A. Comm. on Ethics & Pro. Resp., Formal Op. 488 (2019), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_formal_opinion_488.pdf [https://perma.cc/K7TU-99ZQ] [hereinafter ABA Opinion 488] (“Judges are presumed to be impartial. Hence, judicial disqualification is the exception rather than the rule.”).


7 In fact, litigants typically do not have any input as to whom will judge their dispute other than where to file the case, whether to voluntarily dismiss the case, whom to strike from the jury
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with arbitration outcomes in view of the more democratic nature of arbitrator selection.\(^8\) Of course, these benefits of arbitral disclosure cannot be realized absent robust, consistent disclosures by members of the arbitral community.

Unfortunately, the hodgepodge of rules, statutes, and judicial decisions governing what arbitrators must disclose is difficult to navigate. The Code of Ethics for Arbitrators in Commercial Disputes (Code of Ethics) requires arbitrators to disclose “any interest or relationship likely to affect impartiality or which might create an appearance of partiality.”\(^9\) The Uniform Arbitration Act—applicable to many state arbitration proceedings—imposes a slightly different standard, mandating disclosure of “any known facts that a reasonable person would consider likely to affect the impartiality of the arbitrator in the arbitration proceeding,”\(^10\) while the Federal Arbitration Act (“FAA”) contains no affirmative disclosure requirements.\(^11\) The Supreme Court’s seminal decision on the vacatur of arbitral awards for non-disclosure of conflicts of interest, Commonwealth Coatings Corp. v. Continental Casualty Co.,\(^12\) has spawned two different disclosure standards—a broad “impression of possible bias” standard and a narrower reasonableness standard—that have divided the federal courts.\(^13\)

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\(^8\) See, e.g., Jethro K. Lieberman & James F. Henry, Lessons from the Alternative Dispute Resolution Movement, 53 Univ. Chi. L. Rev. 424, 431 (1986) (“[I]f the parties have personally participated in selecting the neutral, they may be psychologically disposed to accept his statement of the case, whether it is a binding decision . . . or an advisory opinion.”).


\(^10\) UNIF. ARB. ACT § 12 (UNIF. L. COMM’N 2000).


\(^12\) Edward C. Dawson, Speak Now or Hold Your Peace: Prearbitration Express Waivers of Evident-Partiality Challenges, 63 Am. Univ. L. Rev. 307, 318–19 (2013) (finding that federal and state courts “have disagreed over which opinion to follow and even over whether Justice Black’s opinion is actually a majority opinion” and “differed widely in their interpretation and application of the tests laid out by both opinions”); Merrick T. Rossein & Jennifer Hope, Disclosure and Disqualification Standards for Neutral Arbitrators: How Far To Cast the Net and What Is Sufficient To Vacate Award, 81 St. John’s L. Rev. 203, 209 (2007) (“Because it is generally accepted as a plurality opinion, Commonwealth Coatings has left courts free to reject ‘evident partiality’
that administer arbitration proceedings, like the American Arbitration Association (AAA) and JAMS, still impose additional (and sometimes different) disclosure rules upon arbitrators presiding over their matters.\textsuperscript{14} This mixture of disclosure guidelines, several of which may be simultaneously applicable to the same arbitration proceeding, has given rise to uncertainty and inconsistency.\textsuperscript{15} It is no wonder, then, that arbitrators “are often unsure about what facts need to be disclosed”\textsuperscript{16} regarding their personal and professional connections and, therefore, that they “may make different choices about disclosures than other arbitrators in the same situation.”\textsuperscript{17}

Before the advent of social media, compliance with the arbitral duty to disclose was typically a three-step process. First, arbitrators being considered for a matter reviewed the disclosures of the disputants by identifying the parties, lawyers, and witnesses involved in the dispute.\textsuperscript{18} Second, arbitrators cross-checked those names against their memories, their own and their law firms’ conflicts databases, and any other records they kept of personal and professional contacts. Third, arbitrators applied the muddled mélange of disclosure standards previewed above to any “hits” and made the call about what, if anything, to disclose. This disclosure analysis required (and in the social media age, still requires) a difficult balancing act. On the one hand, most arbitrators care about the integrity of the arbitration process (as well as their professional reputations) and want to get it right. A violation of a disclosure obligation could have negative ethical and professional implica-

\textsuperscript{14} See infra Part II(A)(iii).

\textsuperscript{15} See, e.g., \textit{Int’l Bar Ass’n, IBA Guidelines on Conflicts of Interest in International Arbitration} 1 (Aug. 10, 2015), https://www.ibanet.org/MediaHandler?id=E2fe5e72-cb14-4bba-b10d-d33daee8918 [https://perma.cc/36TZ-SPO5] [hereinafter IBA GUIDELINES] (finding that “[a]rbitrators and party representatives are often unsure about the scope of their disclosure obligations” and that “[p]arties, arbitrators, institutions and courts face complex decisions about the information that arbitrators should disclose and the standards to apply to disclosure”); Rossein & Hope, \textit{supra} note 13, at 251 (discussing the “patchwork” of different arbitral disclosure standards).


\textsuperscript{17} \textit{Id.}

\textsuperscript{18} See, e.g., \textit{id.} at 15 (describing the scope of a party’s duty of disclosure in an arbitration proceeding) [General Standards 7(a)–(b)].
tions and result in vacatur of an arbitral award. On the other hand, more conflicts disclosures generally mean less business for arbitrators. Parties and their counsel are likely to be wary of selecting arbitrators with disclosable conflicts over those without disclosable conflicts (even where the arbitrator makes clear that the conflicts would not impact her neutrality and are being disclosed in an abundance of caution), particularly if they have the benefit of a robust menu of qualified arbitrators to choose from. This balance was difficult to strike, even before start of the social media era.

LinkedIn, Facebook, Twitter, and other social media platforms created additional disclosure concerns and considerations. These online tools for forming and developing personal and professional relations have transformed the nature of our relationships and, in the process, significantly complicated the arbitral disclosure equation. For one thing, the ability to connect over social media has exponentially expanded the number of connections that social media users have with other people and organizations. Social media platforms enable users to have hundreds, if not thousands or millions, more connections than they did in the pre-social media era. Some users limit their social media communications to close acquaintances, while others indiscriminately connect with just about anyone they find interesting or potentially useful from a personal or professional perspective. Indeed, those who use social media aggressively to build their networks and accumulate contacts may not even know all the individuals who are part of their social networks. The very fact that social media users employ such different

19 See infra Part II(B).
21 Id.
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standards of selectivity for making and developing online relationships with new contacts adds complexity to the disclosure calculus. Depending on the user, the existence of a social media relationship might signify a thoughtful, intentional desire to develop a relationship, or a mindless, split-second decision to click on an invitation to connect. In addition, social media gives rise to both mutual and one-sided associations, while pre-social media relationships were almost all mutual, at least to some degree. Add the fact that many arbitrators are older and less familiar with social media functionality than many of the parties and lawyers who appear before them, and it is easy to see just how difficult it is to achieve consistency in arbitral social media disclosure. Consider the following hypothetical examples:

- Arbitrator A is an active social media user. Over the preceding three years, she has “liked” six Facebook and LinkedIn posts made by attorneys and law firms involved in a dispute for which she is being considered as the arbitrator. She is neither a Facebook “friend” nor a LinkedIn connection of the lawyers or the firms. Should Arbitrator A disclose her “likes” on the posts of the attorneys and firms involved in the arbitration?

- Arbitrator B is new to her community and is hoping to connect with attorneys to build her alternative dispute resolution practice. She accepts LinkedIn “connect” requests from all attorneys, regardless of whether she has met them or knows anything about them or their practices. She also sends “connect” requests to all attorneys suggested as contacts by LinkedIn. Arbitrator B is a candidate to arbitrate a dispute where one of the parties is represented by a lawyer whom she has never met, but who is a LinkedIn connection by virtue of her network-building approach. Does the arbitrator need to disclose this LinkedIn connection? Does she need to conduct a search of LinkedIn to identify this connection if she does not recall connecting with the lawyer?

- Arbitrator C is a prominent lawyer in her community. She regularly uses Twitter to post her views on political and legal issues. A lawyer involved in an arbitration for which Arbitrator C is being considered has “retweeted” Arbitrator C’s posts ten times in the past five years, although the
two have never met. Does Arbitrator C need to disclose the lawyer’s retweets of her posts?

- Arbitrator D is a member of a Facebook group of area cyclists. She regularly posts pictures from her weekend bike rides and comments on posts made by other members of the group. One of the party representatives in an arbitration for which Arbitrator D is being considered is a member of the same Facebook group, although Arbitrator D and the party are neither Facebook “friends” nor real-life friends. Does Arbitrator D need to disclose the fact that she belongs to the same Facebook group as the party representative?

Today, in the absence of any guidelines for the disclosure of social media activity, arbitrators undoubtedly would provide inconsistent responses to these questions. Some arbitrators would view social media relations as more or less important than other arbitrators because of how they interact with social media. Many would assume that the parties and counsel to an arbitration have the same views about the importance of social media relationships as arbitrators do. Those who are not familiar with how to search a social media platform for their contacts might limit disclosures to those in their social networks that they can recall from memory. Others may be influenced by their peers’ lack of social media disclosures to exclude social media activity from their conflicts checks altogether, particularly in view of the negative impact that disclosures can have on the likelihood of being selected. This type of disclosure inconsistency will increasingly undermine the credibility of the arbitration process, especially as more arbitrators become more active on social media.

The situation cries out for an objective framework that will inform arbitrators’ social media disclosure decisions and set uniform expectations for the parties and counsel who receive and evaluate arbitral disclosures. But although a few commentators have recognized the challenges that social media relationships pose for arbitrator disclosure, there are still no disclosure guidelines pointed directly at an arbitrator’s social media connections. This Article attempts to fill that void with the first set of comprehensive

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disclosure guidelines for arbitral social media activity. Part II of the Article surveys the existing rules regarding arbitral disclosure. While these rules are at times inconsistent and not specific to social media, they provide the general standards for arbitral disclosure with which the proposed guidelines should comply. Part III summarizes the scant specific guidance on social media disclosure that can be gleaned to date from the cases and scholarship in this area. Part IV catalogs the types of social media platforms and examines survey data to determine which types of platforms are most likely to be used by arbitrators. Finally, Part V sets forth our proposed disclosure guidelines, which are premised on the guiding principles: (1) that the guidelines should promote compliance with existing disclosure rules; (2) that the scope of disclosure should extend to affirmative conduct by an arbitrator that results in an ongoing social media relationship; and (3) that the research obligations imposed on arbitrators by the guidelines should be practicable.

II. THE EXISTING RULES GOVERNING ARBITRAL DISCLOSURE ARE MUDDLED AND DEVOID OF CONCRETE GUIDANCE ON THE DISCLOSURE OF AN ARBITRATOR’S SOCIAL MEDIA CONNECTIONS

Arbitration is a method for resolving disputes in which a third party makes a final and binding decision, which may be challenged only on limited grounds in the courts. While arbitration is a flexible process that gives parties latitude to determine the procedures that will be followed in any particular proceeding, arbitrations typically are decided either by a sole arbitrator or a panel of three arbitrators.

24 See, e.g., Rossein & Hope, supra note 13, at 210 (discussing the “great deference” given to the decisions of arbitrators, the “general presumption in favor of upholding arbitration awards where challenged,” and the fact that “[a]rbitration awards receive one of the narrowest standards of judicial review in all of American jurisprudence”); Menkel-Meadow et al., supra note 2, at 401 (noting that “[a]rbitration has more limited opportunities for appeal” than litigation).

25 See, e.g., Baravati v. Josephthal, Lyon & Ross, Inc., 28 F.3d 704, 709 (7th Cir. 1994) (“[S]hort of authorizing trial by battle or ordeal, or, more doubtfully by a panel of three monkeys, parties can stipulate to whatever procedures they want to govern the arbitration of their disputes; parties are as free to specify idiosyncratic terms of arbitration as they are to specify any other terms in their contract.”); Menkel-Meadow et al., supra note 2, at 308 (“To a large extent, disputants can design the parameters of the process they want under the rubric of arbitration.”).
The impartiality and independence of the arbitrator are fundamental to the integrity of the arbitration process. There are several reasons why the selection of the arbitrator is crucial. First, the parties' ability to select the arbitrator (or arbitrators) who will decide their dispute is one of the hallmarks of the arbitration process and distinguishes it—favorably, in the eyes of many proponents of alternative dispute resolution—from litigation. Indeed, the selection of the arbitrator or arbitral panel is arguably the most important choice that parties make in an arbitration.

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essentially two ways that the parties to an arbitration (and their counsel) can determine whether an arbitrator has connections to the participants\footnote{The term “participants,” when used in this Article to refer to the individuals and entities with whom an arbitrator might have an association that could be viewed as compromising her neutrality, shall mean the parties to the arbitration (including party representatives for organizational parties), counsel for the parties, and the witnesses who will testify during the arbitration proceeding.} that might compromise the arbitrator’s ability to be impartial: (1) conducting their own independent investigation; and (2) reviewing the disclosures made by the arbitrator. We focus here on the second of these windows, into the neutrality of the arbitrator.\footnote{While independent investigations certainly have a role to play in the discovery of social media activity by arbitrators that could undermine their impartiality, such investigations are outside the scope of this Article for three reasons. First, and most importantly, the ability of the parties to independently investigate an arbitrator’s social media connections does not impact the arbitrator’s legal and ethical obligations to disclose those connections. See infra Parts II(A)–(B). Second, because arbitration parties are dissimilarly situated with respect to having the resources and sophistication required to conduct such inquiries, they may not serve as a reliable check on the arbitrator’s disclosure obligations. Third, many social media platforms allow users to employ privacy settings to shield their social media activity from scrutiny by the general public. See infra Part V.} In order to furnish the parties to an arbitration with the facts they need to make informed assessments about an arbitrator’s impartiality,\footnote{Of course, the parties to an arbitration select neutrals based on other factors as well, including their (1) professional, technical, legal, or commercial background; (2) experience; (3) skills; (4) reputation; and (5) scheduling flexibility. Thomas J. Stipanowich, Arbitration and Choice: Taking Charge of the “New Litigation” (Symposium Keynote Presentation), 7 DePaul Bus. & Com. L. J. 383, 432 (2009).} neutral arbitrators are required to disclose information, including their connections to the participants in an arbitration, that might create an appearance of partiality or an actual conflict of interest.\footnote{Rossein & Hope, supra note 13, at 204. The duty to disclose conflicts is an ongoing obligation that continues from the arbitrator selection phase of the proceeding throughout the entire arbitration process.} It is axiomatic that an arbitrator’s duty to disclose is “an essential undertaking for the independent and impartial resolution” of a dispute that has been submitted to
arbitration.\textsuperscript{35} Indeed, the disclosure obligation has been described as the “[c]ornerstone of an arbitrator’s duty of independence.”\textsuperscript{36}

Arbitration is typically initiated because of a dispute resolution clause in an agreement between the parties or because the parties mutually agree that arbitration is preferable to litigation as a method for resolving their dispute.\textsuperscript{37} Agreements to arbitrate are enforceable, based on provisions in the FAA and state arbitration laws.\textsuperscript{38} The FAA was enacted in 1925 to “promote[ ] the use of arbitration to resolve conflicts involving commercial transactions among businesses in different states.”\textsuperscript{39} If a contract involves interstate commerce in the United States, the arbitration is governed by the FAA, which, when applicable, preempts state law.\textsuperscript{40} If the FAA does not apply, state arbitration statutes provide the rules for arbitrations conducted in the United States.\textsuperscript{41} Many states have adopted some form of either the Uniform Arbitration Act (“UAA”) or the Revised Uniform Arbitration Act (“RUAA”)—which are model state arbitration statutes—or have drafted arbitration protocol statutes of their own, which are similar to one or both of these model laws.\textsuperscript{42}

\textsuperscript{35} Hascher, supra note 30; see also Menkel-Meadow et al., supra note 2, at 417 (“[B]ecause of the broad scope of arbitrators’ powers once they are in place, questions of bias, conflicts of interest, disclosure and impartiality may represent the most important category of ethical duties for arbitrators.”).


\textsuperscript{37} Dawson, supra note 13, at 315.

\textsuperscript{38} Stephen B. Goldberg et al., Dispute Resolution: Negotiation, Mediation and Other Processes 235 (1999) (“There is a strong public policy in favor of arbitration as a means of relieving court congestion, and both federal and state courts will interpret agreements to arbitrate broadly and exceptions narrowly.”).

\textsuperscript{39} Lucille M. Ponte & Thomas D. Cavenagh, Alternative Dispute Resolution in Business 158 (1999).

\textsuperscript{40} Goldberg et al., supra note 38, at 235 (“The FAA displaces state law in the state courts to the extent that state law conflicts with the goals or policies of the [FAA].”).

\textsuperscript{41} Robert L. Ebe, The Nuts and Bolts of Arbitration, 22 Franchise L. J. 85, 86 (2002).

Arbitration parties often use an organization—which may be for-profit or not-for-profit—to administer the proceeding. These third-party administrators (“TPA”) offer services that range from providing a standard set of rules and guidelines to govern the proceedings, to supplying a physical location to conduct the hearing, to overseeing the entire arbitration. While the parties to an arbitration are theoretically free to develop their own rules to govern the proceeding, many arbitrations are conducted pursuant to the rules of a TPA either because the arbitration clause in the parties’ contract adopts those rules, or because the parties decide to use them after their dispute arises.

Absent a contractually-specified method for selecting the arbitrator or arbitral panel, the parties to an arbitration, particularly a commercial arbitration, often rely on a TPA to manage the arbitrator selection process. This often involves granting the parties access to the TPA’s roster of approved arbitrators (or a subset of that roster), and narrowing down the list until the parties agree or arrive at some form of a compromised decision. TPA rules estab-

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44 Goldberg et al., supra note 38, at 226.

45 Id. See also Menkel-Meadow et al., supra note 2, at 308 (“In most cases . . . efficiency and commonsense urge parties to adopt a set of already-existing rules, either in whole or in part. Perhaps the most common source of default sets of rules comes from one of the prominent organizations providing arbitration administration.”).

46 Menkel-Meadow et al., supra note 2, at 308.

47 Ponte & Cavenagh, supra note 39, at 172. For example, after providing the parties with a list of neutral arbitrators from its approved roster with experience or expertise relevant to the dispute (along with their professional biographies), a TPA might then coordinate a selection process in which the parties would strike the names of a certain number of arbitrators they deem
lish selection processes that require arbitrators to make disclosures about actual or potential conflicts of interest.\textsuperscript{48} While there are variations, these processes generally allow parties to ask follow-up questions based on the disclosures, object to arbitrators based on their disclosures (or answers to follow-up questions), and provide a method for resolving any objections.\textsuperscript{49} If the arbitration is not administered by a TPA (sometimes referred to as an “ad hoc” proceeding), arbitrator selection is governed by whatever rules are set forth in the parties’ arbitration agreement; or, if there are none, a process agreed to by consent of the parties to the arbitration.\textsuperscript{50}

As a general matter, arbitration statutes and TPA rules create two types of provisions that impact arbitral disclosure. The first category is comprised of ethical regulations, statutory provisions, and TPA rules that impose affirmative disclosure obligations on arbitrators. The second is made up of rules prescribing the standards for vacating arbitral awards, based on an arbitrator’s failure to disclose an actual or potential conflict of interest. Arbitrators must be mindful of, and comply with, both types of rules in order to meet their ethical obligations and insulate their awards against after-the-fact challenges based on alleged non-disclosure of conflicts.\textsuperscript{51} As set forth below, the general disclosure standards contained in these rules are of limited assistance to arbitrators when deciding whether to disclose their social media connections for three reasons. First, multiple contradictory rules may be applicable to the same arbitration proceeding. Second, courts inconsistently interpret the rules. And third, the rules do not provide any specific guidance with respect to the disclosure of an arbitrator’s social media activity or connections. To provide context for the social media disclosure guidelines proposed herein, and to help illustrate why there is such a pressing need for them, we turn now to an overview of the “patchwork” of rules and judicial decisions that have created ambig-

\textsuperscript{48} Dawson, supra note 13, at 315; see also infra Part II(A)(iii).

\textsuperscript{49} Dawson, supra note 13, at 315.

\textsuperscript{50} Id. at 315–16.

\textsuperscript{51} Motions to vacate arbitral awards based on inadequate arbitral disclosure typically arise out of a post-award discovery by the losing party, where an arbitrator had a relationship with the opposing party or counsel that she did not disclose. See, e.g., Mark H. Alcott, \textit{It Ain’t Over Even When It’s Over: Post-Award Attacks on Arbitrators}, 7 \textit{Disp. Resol. Int’l} 5, 5 (2013) (“[T]he arbitration community in the United States has become increasingly concerned about post-facto challenges to arbitration awards based on purported arbitrator partiality or bias, arising from an interest or relationship that was not disclosed.”).
guilty with respect to the scope of arbitral disclosure of conflicts of interest, even before factoring in the social media element.  

A. Rules Imposing Affirmative Disclosure Requirements

The starting point for determining what arbitrators are required to disclose is the collection of rules and guidelines that impose affirmative disclosure requirements upon arbitrators. While these provisions speak in general terms and are sometimes inconsistent with one another, their goal is to provide the parties to an arbitration with adequate information to make informed decisions about arbitrator selection. Affirmative arbitral disclosure rules can be found in (1) the RUAA (although not the FAA or the UAA), (2) ethics codes, and (3) TPA rules. We consider each in turn.

i. The RUAA

Neither the FAA nor the UAA imposes any affirmative disclosure obligations on arbitrators. However, the RUAA requires all arbitrators, whether neutral or non-neutral, before accepting an appointment, to make a “reasonable inquiry” and disclose to all parties and any other arbitrators involved in the matter “any known facts that a reasonable person would consider likely to affect the impartiality of the arbitrator.” This is an objective standard.

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52 See, e.g., Rossein & Hope, supra note 13, at 255 (“The courts differ as to what arbitrators should disclose to prevent disqualification of an arbitrator and/or vacatur of an award. Even when the courts agree on the standard, it is applied inconsistently. The recent efforts by various organizations and states to develop codes of conduct and standards have resulted in a patchwork of rules.”).

53 See, e.g., id. at 251 (“Various codes adopted by such organizations as the ABA/AAA and NASD, and statutory schemes . . . have attempted to articulate clear requirements and standards for violations. Although each attempt contributed positively to clarifying the requirements, it remains a patchwork of different standards.”).

54 Meyerson, supra note 42, at 8 (“Although the Code of Ethics and arbitration rules of the prominent administering agencies provide that arbitrators shall make certain disclosures to the parties before accepting appointment, neither the FAA nor the UAA has such a requirement.”). However, as discussed in infra Part II(B), the FAA and the UAA provide that an arbitral award may be set aside if the arbitrator exhibits “evident partiality” toward one of the participants in an arbitration proceeding. An inadequate disclosure may provide the basis for a finding of evident partiality. Thus, notwithstanding the absence of affirmative disclosure obligations in the FAA and the UAA, those laws remain relevant to the disclosure calculus.

55 REV. UNIF. ARB. ACT § 12 (UNIF. L. COMM’N 2000).

56 Id. at cmt. 3; see also Rossein & Hope, supra note 13, at 241 (“The Drafting Committee [of the RUAA] was unequivocal about providing an objective standard for disclosure requiring
While the RUAA does not purport to provide an exhaustive list of the information that must be disclosed under section 12, it expressly identifies “a financial or personal interest in the outcome of the arbitration proceeding” and “an existing or past relationship with any of the parties . . . their counsel or representatives, a witness, or other arbitrators” as matters within the scope of the disclosure obligation. The RUAA’s disclosure requirement is a “continuing obligation” that remains in effect after the arbitrator is appointed. Failure to comply with the RUAA’s disclosure obligations constitutes grounds to vacate an arbitral award under the RUAA.

Thus, arbitrators involved in domestic arbitrations that do not involve interstate commerce in states that have adopted some version of the RUAA must comply with the RUAA’s disclosure provisions. However, arbitrators presiding over proceedings in states that have not adopted the RUAA, or U.S. arbitrations involving interstate commerce, are not subject to statutory affirmative disclosure requirements.

ii. Ethics Codes and Guidelines

Regardless of which arbitration statute governs an arbitration proceeding, an arbitrator has an independent ethical duty to make full and fair disclosures. However, the ethics guidelines do not always prescribe a uniform disclosure standard.

The Code of Ethics, promulgated by the American Bar Association and AAA in 2004, and which is applicable to all arbitration proceedings in the United States, imposes the most demanding dis-
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closure standard of all the ethical codes and guidelines potentially applicable to U.S. arbitrators. It requires arbitrators, before accepting an appointment, to disclose, among other things, “[a]ny known existing or past financial, business, professional or personal relationships which might reasonably affect impartiality or lack of independence in the eyes of any of the parties.” This includes relationships with “any party or its lawyer, with any co-arbitrator, or with any individual whom they have been told will be a witness.” The duty to disclose under the Code of Ethics is a continuing duty. It requires a person who accepts appointment as an arbitrator to disclose, as soon as practicable and at any stage of the arbitration, any disclosable interests or relationships that arise, or that the arbitrator recalls or discovers, after the commencement of the proceeding.

The Code of Ethics imposes an affirmative duty to investigate as part of the disclosure process: “[p]ersons who are requested to accept appointment as arbitrators should make a reasonable effort to inform themselves of any interests or relationships [required to be disclosed].” While the precise contours of this duty are somewhat elusive, “court decisions make clear that whatever the Code of Ethics means by ‘making a reasonable effort’ to inform oneself under the Code, that is a greater burden than what is required” to avoid vacatur of an award under the FAA. This gives rise to “two separate levels of inquiry”—whether a court should vacate an award and whether an arbitrator fulfilled her ethical duties under

62 The Code of Ethics for Arbitrators in Commercial Disputes, supra note 9, at 4 [Canon II].
63 Id. [Canon II(A)(2)]. The Code of Ethics also mandates disclosure of “[a]ny known direct or indirect financial or personal interest in the outcome of the arbitration,” “[t]he nature and extent of any prior knowledge they may have of the dispute,” and “[a]ny other matters, relationships, or interests which they are obligated to disclose by the agreement of the parties, the rules or practices of an institution, or applicable law regulating arbitrator disclosure.” Id. [Canon II(A)(1), (3)–(4)].
64 Id. [Canon II(A)(2)]. It also includes relationships involving the families or household members of the participants in the arbitration, as well as their current employers, partners, or professional or business associates “that can be ascertained by reasonable efforts.”
65 Id. [Canon II(C)].
66 Id. [Canon II(B)]. The Code of Ethics is explicit in stating that the duty to investigate disclosable interests and relationships, like the duty to disclose itself, is an ongoing obligation that continues throughout the arbitration process. The Code of Ethics for Arbitrators in Commercial Disputes, supra note 9, at 4 [Canon II(C)].
67 Tracey B. Frisch, Arbitrator Disclosure: Ignorance Is Not Bliss, Disp. Resol. Mag., at 30 (Fall 2018). The standard for vacatur of an award under the FAA for inadequate disclosure is discussed in infra Part II(B).
the Code of Ethics.\textsuperscript{68} As the Code of Ethics places an affirmative burden on arbitrators to make reasonable efforts to ensure that they are aware of any possible conflicts—which the FAA does not—it is possible that an arbitrator’s breach of her disclosure obligations under the Code of Ethics will not result in a judicial vacatur of the arbitration award in that matter.\textsuperscript{69}

Arbitrators presiding over proceedings in the United States may also be subject to state ethical requirements. For example, if an arbitrator fails to make a required disclosure under the California Ethics Standards for Neutral Arbitrators in Contractual Arbitration (“California Standards”), she is subject to “mandatory and automatic disqualification once a party serves a timely notice of disqualification.”\textsuperscript{70} The California Standards impose affirmative disclosure requirements.\textsuperscript{71}

The International Bar Association (“IBA”) Guidelines on Conflicts of Interest in International Arbitration (“IBA Guidelines”), adopted in 2014, furnish arbitrators in the international arbitration arena with another set of ethical guidelines regarding disclosure.\textsuperscript{72} The IBA Guidelines establish seven standards of independence and disclosure to govern the selection, appointment,
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and continuing role of an arbitrator. The IBA Guidelines use an objective third party standard to assess the materiality of conflicts of interest. Under General Standard 2, conflicts of interest will disqualify an arbitrator if a reasonable and informed third party would have “justifiable doubts as to the arbitrator’s impartiality or independence.” Doubts are “justifiable” under General Standard 2 if a reasonable third party with knowledge of the relevant facts and circumstances “would reach the conclusion that there is a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching his or her decision.” The IBA expressly provides that “[a]n arbitrator is under a duty to make reasonable enquiries to identify any conflict of interest, as well as any facts or circumstances that may reasonably give rise to doubts as to his or her impartiality or independence,” and that, when in doubt, arbitrators should err on the side of disclosure.

The IBA Guidelines attempt to provide arbitrators with more concrete guidance on the significance of certain kinds of conflicts by grouping them into three “Application Lists”: the Red List, the

73 IBA GUIDELINES, supra note 15, at 4–16 (setting forth “General Standards Regarding Impartiality, Independence and Disclosure”). While the IBA Guidelines, like the Code of Ethics, “are not legal provisions and do not override any applicable national law or arbitral rules chosen by the parties,” the IBA’s objective in adopting them was to provide the international arbitration community with a widely accepted set of rules that “will assist parties, practitioners, arbitrators, institutions and courts in dealing with these important questions of impartiality and independence.” Id. at 3.

74 Id. at 5 [General Standard 2(b)] (instructing the arbitrator to assess whether information should be disclosed “from the point of view of a reasonable third person having knowledge of the relevant facts and circumstances”); id. [Explanation to General Standard 2(b)] (“In order for standards to be applied as consistently as possible, the test for disqualification is an objective one.”).


76 IBA GUIDELINES, supra note 15, at 5 [General Standard 2(c)]. General Standard 2(d) of the IBA Guidelines states that the IBA Guidelines’ “Non-Waivable Red List” (discussed infra) contains examples of situations that always give rise to a justifiable doubt about the arbitrator’s impartiality and therefore should preclude the arbitrator from accepting an invitation to serve. Id. [General Standard 2(d)].

77 Id. at 15 [General Standard 7(d)].

78 Id. at 7 [General Standard 3(d)].
Orange List, and the Green List. The Red List contains examples of the most serious conflicts of interest for an arbitrator. It contains a sub-list of non-waivable conflicts, such as where an arbitrator’s law firm “regularly advises” a party to the arbitration and “derives significant financial income therefrom”; it also contains a sub-list of other serious conflicts that can be waived by the parties, including where an arbitrator is a lawyer in the same firm as counsel for one of the arbitration parties. The Orange List identifies examples of conflicts that should be disclosed to the parties because, while they are less substantial than those on the Red List, they may “give rise to doubts as to the arbitrator’s impartiality or independence.” Some examples of Orange-List relationships are “[a] close personal friendship” between the arbitrator, a manager or director of a party or its counsel, and a professional association between the arbitrator and a party. The Green List consists of situations that might be viewed as conflicts of interest, but do not need to be disclosed—this is because, from the relevant “objective point of view,” they do not give rise to an appearance of, or actual, conflict of interest. The only reference to social media in the IBA Guidelines is in the Green List, which takes the position that a relationship between an arbitrator and an arbitration party “through a social media network” does not have to be disclosed.

While there do not appear to be judicial decisions or other authorities that have compared the disclosure burdens imposed by the Code of Ethics and the IBA Guidelines, it is clear that the standards are not identical. There are at least three reasons why it would be reasonable to infer that the Code of Ethics requires more robust disclosures than the IBA Guidelines. First, the IBA Guidelines assess whether a potential conflict is disclosable from the perspective of a third party outside the arbitration, while the Code of Ethics takes a broader view, requiring disclosure even if the parties themselves would not necessarily perceive the conflict as significant.

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80 IBA GUIDELINES, supra note 15, at 17.
81 Id. at 17, 20–22.
82 Id. at 18.
83 Id. at 22–25.
84 Id. at 19.
85 Id. at 27.
86 An arbitrator presiding over a proceeding in the United States that involves at least one party from outside the United States presumably would be subject to both the Code of Ethics and the IBA Guidelines, unless the parties’ agreement to arbitrate provided otherwise.
87 IBA GUIDELINES, supra note 15, at 19 (stating that “there should be a limit to disclosure, based on reasonableness” and finding that “in some situations, an objective test should prevail over the purely subjective test of ‘the eyes’ of the parties”).
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Ethics looks at it through the “eyes of any of the parties” to the arbitration.\(^88\) The arbitration parties themselves presumably would be more sensitive to conflicts and have a greater appetite for disclosure than a disinterested third party. Second, it seems that there are more relationships between arbitrators and arbitration participants that “might reasonably affect impartiality or lack of independence in the eyes of any of the parties” (“Code of Ethics standard”)\(^89\) than would cause a neutral third party to have “justifiable doubts as to the arbitrator’s impartiality or independence” (“IBA Guidelines standard”).\(^90\) The Code of Ethics does not contain any requirement that the parties’ concerns about the arbitrator’s impartiality be “justifiable”—just that they be reasonable. Moreover, the focus of the Code of Ethics on all relationships that “might reasonably affect” the arbitrator’s impartiality seems to set a lower bar for disclosure than the IBA Guidelines. Third, while the Code of Ethics is silent as to the disclosure implications of social media relationships, the IBA Guidelines state that a “relationship” between an arbitrator and a party “through a social media network” does not need to be disclosed.\(^91\)

iii. TPA Rules

Layered beneath the statutes and ethical guidelines that establish standards for arbitrator disclosure are the disclosure rules of prominent TPAs. These rules apply to TPA-administered arbitration proceedings, which are the majority of commercial arbitrations.\(^92\) While TPA rules (like ethical guidelines) do not have the force of law—meaning that a violation of a TPA rule does not, in and of itself, invalidate an arbitral award\(^93\)—arbitrators who preside over TPA-administered proceedings have strong incentives to

\(^{88}\) **The Code of Ethics for Arbitrators in Commercial Disputes, supra** note 9, at 4 [Canon II(A)(2)].

\(^{89}\) **Id.**

\(^{90}\) **IBA Guidelines, supra** note 15, at 5.

\(^{91}\) **Id.** at 27.


\(^{93}\) See, e.g., Rossein & Hope, *supra* note 13, at 249 (“[W]hile courts may look to ethics codes for guidance, they are not the law and thus not binding on arbitrators.”).
comply with TPA rules. The breach of a TPA rule might not only result in the arbitrator’s removal from the TPA’s approved roster—which could have a severe negative impact on the arbitrator’s business prospects—but could have a broader detrimental impact on the arbitrator’s professional reputation. Moreover, the violation of a TPA disclosure rule would also likely impact a court’s decision about whether to set aside an arbitration award rendered in a TPA-administered proceeding.

The AAA Commercial Rules (“AAA Rules”) contain the following disclosure standard for arbitrators in AAA matters:

Any person appointed or to be appointed as an arbitrator, as well as the parties and their representatives, shall disclose to the AAA any circumstance likely to give rise to justifiable doubt as to the arbitrator’s impartiality or independence, including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their representatives. Such obligation shall remain in effect throughout the arbitration.

The plain language of Rule 17(a) seems to anticipate broad and fulsome disclosure of an arbitrator’s relationships with the participants in an arbitration, as it suggests that “any past or present relationship with the parties or their representatives” is “likely to give rise to justifiable doubt as to the arbitrator’s impartiality or independence.” In an effort to incentivize transparency and pro-

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94 See, e.g., AM. ARB. ASS’N, FAILURE TO DISCLOSE MAY LEAD TO REMOVAL FROM THE AAA ROSTER (Oct. 2019), https://adr.org/sites/default/files/document_repository/Failure_to_Disclose_May_Lead_to_Removal.pdf [https://perma.cc/3VQU-YBJD] (“[A]rbitrators may be placed on inactive status whenever any of their awards are challenged in court based on allegations that the arbitrator failed to properly disclose relationships . . . inactive status means that the arbitrator is not being proposed for the parties’ consideration on new cases and will likely have no impact on the arbitrator’s status on pending cases.”).

95 A violation of a TPA disclosure rule—like a disclosure requirement found in a statute or professional code—could also be viewed as undermining the integrity of the arbitration process itself, which arguably has a negative impact on all arbitrators.

96 See, e.g., Rossein & Hope, supra note 13, at 231 (“While the FAA provides the basis for the review of an arbitration award, the parties’ agreement may provide the rules, usually an agreed upon institutional code or guiding statute, to guide the arbitration and arbitrators. This includes, in particular, standards for arbitrator disclosure.”); Lee Korland, Comment, What an Arbitrator Should Investigate and Disclose: Proposing a New Test for Evident Partiality Under the Federal Arbitration Act, 53 CASE W. L. REV. 815, 822 (2003) (“Failure to disclose such a conflict [to a TPA] might give rise to a strong claim for vacating an arbitration award based on evident partiality, but such an omission would certainly not be dispositive.”).


98 Id.
tect arbitrators from being commercially penalized for making robust disclosures, the AAA Rules expressly provide that “[d]isclosure of information pursuant to this Section R-17 is not an indication that the arbitrator considers that the disclosed circumstance is likely to affect impartiality or independence.” Unlike the RUAA and the Code of Ethics, the AAA Rules do not expressly require arbitrators to investigate whether there are potential conflicts of interest. The disclosure standards established by the rules of the other leading TPAs are aligned with those of the AAA.

Thus, as the above discussion reflects, the primary TPA rules are not in perfect alignment with arbitration statutes or ethics codes. This means that an arbitrator presiding over an arbitration administered by AAA filed in New York and involving parties from three different countries potentially would be subject to the differing disclosure standards in the Code of Ethics, the IBA Guidelines, and the AAA Rules.

99 Id. [R-17(c)]; see also IBA GUIDELINES, supra note 15, at iii [prefatory note] (“It is also essential to reaffirm that the fact of requiring disclosure—or of an arbitrator making disclosures—does not imply the existence of doubts as to the impartiality or independence of the arbitrator.”).

100 AAA RULES, supra note 97, at 17 [R-17].

101 See, e.g., Rule 15. Arbitrator Selection, Disclosures and Replacement, supra note 5 (“The Parties and their representatives shall disclose to JAMS any circumstance likely to give rise to justifiable doubt as to the Arbitrator’s impartiality or independence, including any bias or any financial or personal interest in the result of the Arbitration or any past or present relationship with the Parties or their representatives. The obligation of the Arbitrator, the Parties and their representatives to make all required disclosures continues throughout the Arbitration process.”); INT’L INST. FOR CONFLICT PREVENTION & RESOL., CPR PROCEDURES & CLAUSES: ADMINISTEERED ARBITRATION RULES 18, [R-7.3] (Mar. 1, 2019), https://www.cpradr.org/resource-center/rules/arbitration/administered-arbitration-rules-2019/__res/id=Attachments/index=0/2019%20Administered%20Arbitration%20Rules_Domestic_07.25.19_.pdf [https://perma.cc/F588-MY6H] (“Each arbitrator shall disclose in writing to CPR and the parties prior to appointment in accordance with the Rules, and also promptly upon their arising during the course of the arbitration, any circumstances that might give rise to justifiable doubt regarding the arbitrator’s independence or impartiality. Such circumstances include bias, interest in the result of the arbitration, and past or present relations with a party or its counsel.”).

102 Compare THE CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES, supra note 9, at 4 [Canons II(A)(2), (B)] (establishing a “might reasonably affect impartiality or lack of independence in the eyes of any of the parties” standard and imposing a duty to investigate), with IBA GUIDELINES, supra note 15, at 5 [General Standard 2(b)] (establishing a “justifiable doubt as to the arbitrator’s impartiality or independence” from the perspective of a neutral party standard with a duty to investigate), and AAA RULES, supra note 97, at 17 [R-17(a)] (establishing a “justifiable doubt” standard with no duty to investigate).
The grounds for vacating an arbitration award are much narrower than the bases for overturning a court decision. One of the few grounds for setting aside an arbitral award is found in section 10(a) of the FAA, which provides that an award may be vacated if there is “evident partiality or corruption in the arbitrators.” In the absence of an express disclosure requirement in the FAA, most of the litigation regarding allegedly inadequate arbitral disclosure occurs when courts are called upon to decide motions to vacate awards under section 10(a) of the FAA, based on claims that an arbitrator’s failure to adequately disclose a conflict of interest constituted evident partiality. The evident-partiality standard also governs disclosure-based vacatur motions under state law and motions to set aside international arbitration awards rendered in the United States. The party challenging an arbitral award based on allegedly inadequate arbitral disclosure bears the burden of proving evident partiality. As set forth below, the law in this area is murky, both because the Supreme Court has provided minimal guidance on the meaning of “evident partial-
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ity” and the lower courts have disagreed about how to interpret that scant guidance.108

i. The Supreme Court’s Sole Evident Partiality Decision: Commonwealth Coatings

The only Supreme Court case to address the FAA’s “evident partiality” standard is Commonwealth Coatings Corp. v. Continental Casualty Co.,109 which was decided over fifty years ago.110 The underlying dispute in Commonwealth Coatings involved a claim by a painting company subcontractor, that the sureties on the prime contractor’s bond owed it money for a painting job.111 The applicable contract contained a clause requiring such disputes to be resolved by a three-member arbitration panel.112 Pursuant to this provision, each side appointed an arbitrator and the two party-appointed arbitrators selected the third arbitrator, a putative neutral, to chair the panel (“panel chair”).113 In addition to his work as an arbitrator, the panel chair worked as an engineering consultant on building construction projects in the same community as the parties to the arbitration.114 The respondent in the arbitration was one of the panel chair’s consulting clients.115 Although the respondent retained the panel chair at irregular intervals and had not used his services for approximately one year preceding the arbitration, the panel chair had worked on multiple projects for, and earned fees of around, $12,000 from the respondent over a four-to-five-year period.116 Moreover, some of the consulting work that the panel

108 See, e.g., Morelite Constr. Corp. v. N.Y.C. Dist. Council Carpenters Benefit Funds, 748 F.2d 79, 83 (2d Cir. 1984) (noting that courts faced with a motion to vacate an arbitration award based on evident partiality must render a decision against the “murky backdrop of Supreme Court precedent”); Robertson, supra note 30, at 114 (“While the phrase ‘evident partiality’ is linguistically facile, its application has proven problematic for the courts, particularly when the question involves an arbitrator’s failure to disclose a relationship to one of the parties.”); Timothy W. Stalker, David J. Rosenberg, & Ryan A. Nolan, Vacating Arbitration Awards Due to “Evident Partiality” Under the Federal Arbitration Act, 83 DEF. COUNS. J. 207, 210 (2016) (“At this time there is no clear rule of what information an arbitrator must disclose to avoid future motions regarding partiality.”).
110 While there have been efforts to convince the U.S. Supreme Court to take up a case to amplify and clarify its opinion in Commonwealth Coatings, the Court thus far has declined. Dawson, supra note 13, at 324.
111 Commonwealth Coatings Corp., 393 U.S. at 145.
112 Id. at 146.
113 Id.
114 Id.
115 Id.
116 Id.
chair performed for the respondent related to the matters at issue in the arbitration.\textsuperscript{117}

The panel chair did not disclose his consulting relationship with the respondent when being considered, or at any point during the arbitration proceeding.\textsuperscript{118} The arbitration hearing went forward and the respondent prevailed in a unanimous decision.\textsuperscript{119} The painting company (the claimant in the arbitration) learned about the connection between the panel chair and the respondent after the award was rendered.\textsuperscript{120} The painting company then moved to vacate the award based on, among other things, the panel chair’s failure to disclose his association with the respondent.\textsuperscript{121} The district court declined to set aside the award and the court of appeals affirmed.\textsuperscript{122}

In an opinion authored by Justice Black, the Supreme Court reversed.\textsuperscript{123} While the Court acknowledged that the painting company did not accuse the panel chair of actual fraud or bias,\textsuperscript{124} it found that an arbitrator’s failure to adequately disclose a connection to one of the parties could still meet the evident partiality standard for vacatur.\textsuperscript{125} Justice Black analogized the evident partiality standard applicable to arbitrators to judicial impartiality standards, finding that both “rest on the premise that any tribunal permitted by law to try cases and controversies not only must be unbiased but must also avoid even the appearance of bias.”\textsuperscript{126} While recognizing that it was not fair or realistic to expect arbitrators to sever all their ties with the business world (since most arbitrators derive income from other sources), the Court stressed the importance of safeguarding the impartiality of arbitrators because they are subject to a much more limited version of appellate review than judges.\textsuperscript{127} The Court stated that “[w]e can perceive no way in which the effectiveness of the arbitration process will be hampered

\footnotesize{\textsuperscript{117} Commonwealth Coatings Corp., 393 U.S. at 146.\textsuperscript{118} Id.\textsuperscript{119} Id. at 152.\textsuperscript{120} Id. at 146.\textsuperscript{121} Id.\textsuperscript{122} Id.\textsuperscript{123} Commonwealth Coatings Corp., 393 U.S. at 150.\textsuperscript{124} Id. at 147.\textsuperscript{125} Id. at 147–48.\textsuperscript{126} Id. at 149–50. Justice Black’s opinion further stated that, like judges, arbitrators must avoid actions that “reasonably tend to awaken the suspicion that his social or business relations or friendships . . . constitute an element in influencing his judicial conduct.” Id. (internal quotation marks omitted).\textsuperscript{127} Id. at 149.}
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by the simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias.” 128 Justice Black’s opinion was joined by Justices Brennan and Douglas, and Chief Justice Warren. 129

Justice White, joined by Justice Marshall, filed a concurring opinion, joining Justice Black’s opinion, but emphasized that it should not be interpreted to hold arbitrators to the same standards as judges. 130 While he agreed that the panel chair violated the FAA’s prohibition on evident partiality, Justice White stated that arbitrators “are not automatically disqualified by a business relationship with the parties before them if . . . [the parties] are unaware of the facts [and] the relationship is trivial.” 131 He explained: “[A]n arbitrator’s business relationships may be diverse indeed, involving more or less remote commercial connections with great numbers of people. He cannot be expected to provide the parties with his complete and unexpurgated business biography.” 132 So, while joining an opinion that established an exacting “impression of possible bias” disclosure standard for arbitrators under the FAA, the White concurrence focused on distinguishing trivial connections to the parties (which did not require disclosure) from situations where the arbitrator has a “substantial interest in a firm which has done more than trivial business with a party.” 133

ii. The Uneven Application of the “Evident Partiality” Standard in the Wake of Commonwealth Coatings

The lower courts have struggled to divine a uniform standard for “evident partiality” from the split decision in Commonwealth Coatings. “Evident-partiality doctrine is currently in disarray, with

128 393 U.S. at 149. In arriving at the “impression of possible bias” standard for disclosure, Justice Black relied on both Rule 18 of the AAA Rules and the 33rd Canon of Judicial Ethics, although he acknowledged that neither was binding on the Court for purposes of adjudicating an evident-partiality challenge to an award under the FAA. Id.
129 Id. at 145. Because the concurrence of Justice White (joined by Justice Marshall) arguably conflicts with Justice Black’s opinion, with respect to the standard for arbitrator disclosure under the FAA (as discussed infra), Black’s opinion is considered by many to be a plurality, rather than a majority, opinion as it “only reflect[s] the opinion of four out of nine Justices.” Bryn Fuller, Arbitrary Standards for Arbitrator Conflicts of Interest: Understanding the “Evident Partiality” Standard, 20 PIABA BAR J. 59, 62 (2013).
130 Commonwealth Coatings Corp., 393 U.S. at 150 (opining that arbitrators should not be held to the “standards of judicial decorum of Article III judges” because they are “men of affairs, not apart from but of the marketplace”).
131 Id. at 150–52 (finding that some “undisclosed relationships . . . are too insubstantial to warrant vacating an award”).
132 Id. at 151.
133 Id. at 151–52.
courts disagreeing on how to phrase the evident-partiality standard, among many other subsidiary questions." As a result of the contradictions between the opinions of Justice Black and Justice White, and the fact that Justice White’s vote was required to reach a majority, the federal courts have used at least two different standards to determine whether an arbitral award should be vacated for evident partiality. Following Justice Black’s opinion, some courts vacate awards when they find that an undisclosed potential conflict creates an appearance or impression of possible bias. Other courts, in reliance on Justice White’s concurrence, have rejected that broad disclosure standard in favor of a more narrow one, requiring that an arbitrator disclose only those relationships that a reasonable person would conclude compromise the arbitrator’s impartiality. It is generally accepted that it is easier to find evident partiality—and, therefore, to vacate arbitral awards—under the “appearance of bias” standard than the “reasonable person” standard.

Even where the federal courts have purported to adopt a similar standard for evident partiality, they have used different tests to determine whether that standard has been satisfied. As a result:

134 Dawson, supra note 13, at 318.
135 See, e.g., Fuller, supra note 129 (characterizing Justice Black’s opinion and Justice White’s opinion as “impossible to reconcile”).
136 See, e.g., Rossein & Hope, supra note 13, at 212 (finding that “the circuits are split on what constitutes ‘evident partiality,’ with some following” an “appearance of impression of bias” standard based on “the Supreme Court’s plurality in Commonwealth Coatings,” and some adopting “a more narrow reasonableness standard” under which awards are vacated for evident partiality where an inadequate arbitral disclosure “would lead a reasonable person to conclude that the arbitrator lacked [im]partiality”); Fuller, supra note 129 (noting that Commonwealth Coatings “created two potential standards that since have been inconsistently applied”); Robertson, supra note 30, at 116 (“Due to the inability of the majority of the Justices to agree on anything other than a result, the decision has provided the lower courts of the United States with little guidance, with most courts struggling with the import to be afforded Justice White’s concurrence.”).
137 See infra Part III(B)(i).
138 See infra Part III(B)(ii); see also Rossein & Hope, supra note 13 (“Because it is generally accepted as a plurality opinion, Commonwealth Coatings has left courts free to reject ‘evident partiality’ as the broad ‘appearance of bias’ standard in favor of (what has been interpreted as) Justice White’s more narrow standard requiring disclosure of relationships such that a ‘reasonable person would . . . conclude that an arbitrator was partial.’”).
139 See, e.g., Fuller, supra note 129 (“Justice Black’s opinion, labeled the ‘appearance of bias’ standard, creates a low standard and broader base upon which a party may seek vacatur, when compared to White’s ‘actual bias’ standard.”); Dawson, supra note 13 (discussing the “confusion” arising out of the two opinions in Commonwealth Coatings, describing the Justice Black standard as an “exactig standard of disclosure,” and noting that the White concurrence “advocated what has been interpreted as . . . requiring not just an appearance of bias, but a reasonable impression of it”).
140 Dawson, supra note 13.
[T]he doctrine of evident partiality is inconsistent and divided by multiple splits among courts, which the Supreme Court has not yet resolved or granted certiorari to resolve. The federal circuits have an acknowledged split over how to phrase the basic evident-partiality test, specifically a disagreement about whether evident partiality requires a mere appearance of bias or a more robust reasonableness standard. They also vary on both sides of the split in how they apply the standard. State courts similarly differ with one another, and with federal courts (including sometimes federal courts in the state’s own circuit), about what is necessary to show evident partiality.\footnote{141}{Id. at 321–22.}

In the absence of a uniform standard, the standard for evident partiality that has emerged “can best be characterized as a case-by-case objective inquiry into partiality or a reasonable impression of bias standard.”\footnote{142}{Robertson, supra note 30, at 116.} This has resulted in inconsistent findings as to when vacatur of an arbitral award is required, based on undisclosed relationships between an arbitrator and a participant in the arbitration.\footnote{143}{See Dawson, supra note 13, at 309 ("[C]ourts and theorists are and have long been deeply divided about the content and the application of the doctrine of evident partiality, offering different formulations of the evident-partiality test and reaching conflicting results in similar cases.").}

1. The “Appearance of Bias” (Justice Black) Standard

In the years following the split decision in \textit{Commonwealth Coatings}, some courts have adopted the “appearance of bias” standard, articulated by Justice Black. For example, the Ninth Circuit, in \textit{Schmitz v. Zilveti}, held that, even though Justice White’s concurring opinion was inconsistent with Justice Black’s opinion in some ways, it did not reject the “appearance of bias” test for determining evident partiality.\footnote{144}{Schmitz v. Zilveti, 20 F.3d 1043, 1046 (9th Cir. 1994); Christopher D. Kratovil & Anne M. Johnson, \textit{Evident Partiality}, 65 \textit{ADVOC.} 52, 54 (2013) ("[T]he Ninth Circuit appears to follow the ‘reasonable impression of partiality’ standard established by Justice Black in his \textit{Commonwealth Coatings} plurality opinion.").} Accordingly, the court adopted a “reasonable impression of partiality” standard, based on Justice Black’s opinion.\footnote{145}{Zilveti, 20 F.3d at 1047.} In \textit{Schmitz}, the arbitrator failed to run a conflicts check on the parent company of one of the parties to the arbitration.\footnote{146}{Id. at 1049.} A post-award investigation by the losing party revealed that the arbitrator’s law firm represented the prevailing party’s parent company...
in at least nineteen cases over thirty-five years.\(^\text{147}\) The district court confirmed the award on the ground that arbitrators are bound to disclose only those potential conflicts of which they are actually aware.\(^\text{148}\) The Ninth Circuit reversed, finding that “a reasonable impression of partiality can form when an actual conflict of interest exists and the lawyer has constructive knowledge of it.”\(^\text{149}\) Applying its “reasonable impression of partiality” standard, the court held that “representation of a parent corporation is likely to affect impartiality or may create an appearance of partiality in the lawyer’s representation of or dealing with a subsidiary.”\(^\text{150}\)

Other courts have expressed a favorable disposition toward the “appearance of bias” standard as well. For example, Judge Patterson opined:

> Because of the increase in international transactions and the corresponding increase in disputes it is crucial that there exist a requirement of an appearance of impartiality in arbitrations conducted in this jurisdiction, and that courts take actions designed to assure foreign entities that arbitrations in the United States are free from the suggestion of partiality.\(^\text{151}\)

And the Eleventh Circuit has cited with approval language from Justice Black’s opinion in imposing a “reasonable impression of partiality” standard.\(^\text{152}\)

2. The “More-Than-Appearance-of Bias” (Justice White) Standard

Based on Justice White’s concurrence, which has “grown in influence as courts . . . have become friendlier to arbitration,”\(^\text{153}\) a majority of courts require a party seeking to overturn an arbitral award based on evident partiality to show something more than an appearance of bias on the part of the arbitrator.\(^\text{154}\) Under this standard, “arbitrators are not automatically disqualified by a business

\(^\text{147}\) Id. at 1044.

\(^\text{148}\) Id.

\(^\text{149}\) See id. at 1048. The court further observed that while a lack of knowledge of a conflict may preclude a finding of actual bias, “it does not always prohibit a reasonable impression of partiality.”

\(^\text{150}\) Id. at 1049.


\(^\text{152}\) Middlesex Mut. Ins. Co. v. Stuart Levine, 675 F.2d 1197, 1200–02 (11th Cir. 1982).

\(^\text{153}\) Dawson, supra note 13, at 319.

\(^\text{154}\) Kratovil & Johnson, supra note 144 (“The First, Second, Third, Fourth, Sixth, Seventh, Eighth, Tenth, and District of Columbia Circuits all require more than a ‘mere appearance of bias’ and thus appear to be more aligned with . . . Justice White’s concurring opinion in Com-
relationship with the parties before them, if both parties are informed of the relationship in advance, or if they are unaware of the facts but the relationship is trivial.”

However, there is a lack of consensus as to how much more serious than “trivial” the undisclosed relationships must be, in order to rise to the level of evident partiality in these courts. For example, some courts simply have held that a trivial conflict of interest does not trigger a duty to disclose, even if it might create an appearance of bias on the part of the arbitrator. Other courts have required a more robust showing that the undisclosed information was material. The Third Circuit, for instance, only permits vacatur for evident partiality if a reasonable person would conclude that an arbitrator’s partiality toward a party to the arbitration is “ineluctable” and “direct, definite, and capable of demonstration.” The Tenth Circuit requires the evidence of the arbitrator’s bias to not only be “direct, definite and capable of demonstration,” but more than “remote, uncertain, or speculative.” Other courts embracing the White concurrence have adopted similar, but not always identical, standards for evident partiality.

156 See Rossein & Hope, supra note 13 (observing that some courts have indicated that the undisclosed relationship must be “material” or “substantial” to justify vacatur for evident partiality).  
157 Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S., 492 F.3d 132, 137–38 (2d Cir. 2007) (affirming the district court’s vacatur of an arbitration award, but criticizing the lower court’s use of an “appearance of partiality” standard); see also Montez v. Prudential Sec. Inc., 260 F.3d 980, 983 (8th Cir. 2001) (finding that evident partiality exists when an arbitrator’s relationship with one of the parties creates “an impression of possible bias” and the relationship is “more than trivial” (internal quotation marks omitted) (quoting Olson v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 51 F.3d 157, 159 (8th Cir. 1995)); Health Servs. Mgmt. Corp. v. Hughes, 975 F.2d 1253, 1264 (7th Cir. 1992) (requiring more than a mere appearance of bias); Apperson v. Fleet Carrier Corp., 879 F.2d 1344, 1358 (6th Cir. 1989) (requiring the same); Morelite Constr. Corp. v. N.Y.C. Dist. Council Carpenters Benefit Funds, 748 F.2d 79 (2d Cir. 1984) (defining evident partiality “as requiring a showing of something more than the mere ‘appearance of bias’ to vacate an arbitration award,” yet something less than “proof of actual bias”).  
158 Freeman v. Pittsburgh Glass Works, LLC, 709 F.3d 240, 253 (3d Cir. 2013) (citation omitted).  
159 Legacy Trading Co. v. Hoffman, 363 F. App’x 633, 635 (10th Cir. 2010) (quoting Ormsbee Dev. Co. v. Grace, 668 F.2d 1130, 1147 (10th Cir. 1982)).  
160 See, e.g., Applied Indus. Materials Corp., 492 F.3d at 137 (holding that the undisclosed relationship between the arbitrator and one of the parties must be “material” to constitute evident partiality but not defining “materiality”); Nationwide Mut. Ins. Co. v. Home Ins. Co., 429 F.3d 640, 645 (6th Cir. 2005) (requiring the arbitrator’s alleged partiality to be “direct, definite, and capable of demonstration” and the party asserting evident partiality to point to “specific
While the materiality threshold varies among the courts purporting to adopt the White concurrence, all of these courts frame the key inquiry as some version of whether “a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration.”161 To answer this question, courts attempt to stand in the shoes of a reasonable third person and conduct a fact-intensive analysis of the information that was not disclosed by the arbitrator and assess its significance from an impartiality perspective.162 In order to assess the significance of the undisclosed relationship, the Fourth Circuit has suggested that courts should consider: (1) any “personal interest, pecuniary or otherwise, the arbitrator has in the proceeding;” (2) the “directness” of the relationship between the arbitrator and the party toward which she is allegedly biased; (3) the extent to which the undisclosed relation-

161 Morelite Constr. Corp., 748 F.2d at 84; see also, e.g., JCI Commc’ns, Inc. v. Int’l Bd. of Elec. Workers, Local 103, 324 F.3d 42, 51 (1st Cir. 2003) (“[E]vident partiality means a situation in which a reasonable person would have to conclude that an arbitrator was partial to one party to an arbitration.” (citation omitted)); Univ. Commons-Urbania, Ltd. v. Universal Constructors Inc., 304 F.3d 1331, 1339 (11th Cir. 2002) (finding that evident partiality can occur “when either (1) an actual conflict exists, or (2) the arbitrator knows of, but fails to disclose, information which would lead a reasonable person to believe that a potential conflict exists” (internal quotation marks omitted) (quoting Gianelli Money Purchase Plan & Tr. v. ADM Inv. Servs., Inc., 146 F.3d 1309, 1312 (11th Cir. 1998))); Consolidation Coal Co. v. Local 1643, United Mine Workers of Am., 48 F.3d 125, 129 (4th Cir. 1995) (“To demonstrate evident partiality under the FAA, the party seeking vacation has the burden of proving that a reasonable person would have to conclude that an arbitrator was partial to the other party to the arbitration.”); Rossein & Hope, supra note 13, at 254 (“[W]here there is actual bias or an arbitrator fails to disclose ‘information which would lead a reasonable person to believe that a potential conflict exists,’ then evident partiality is present.” (quoting Gianelli Money, 146 F.3d at 1308)).

162 Rossein & Hope, supra note 13, at 216 (noting that evident partiality is established “by objective factors requiring a fact-intensive analysis of the information that was not disclosed and its relationship to the parties and the arbitration.”); see, e.g., Applied Indus. Materials Corp., 492 F.3d at 137 (requiring a fact-specific inquiry into the undisclosed conflict that “considers all of the circumstances”).
ship is connected to the arbitration; and (4) the timing of the arbitrator’s previous contacts with the participants in the arbitration.\footnote{Consolidation Coal Co., 48 F.3d at 130 (citing Hobet Mining, Inc. v. Int’l Union, United Mine Workers of Am., 877 F. Supp. 1011, 1021 (S.D.W. Va. 1994)).}

3. The Inconsistent Imposition of a Duty to Investigate

The evident partiality landscape is further complicated by the courts’ collective inability to agree on whether arbitrators have a duty to investigate the existence of relationships with arbitration participants that are subject to disclosure. Just as the arbitration statutes provide inconsistent guidance on the investigative obligations of an arbitrator in the affirmative disclosure context,\footnote{See supra Part II(A)(i) (noting that the RUAA, but not the FAA or UAA, imposes an affirmative duty on arbitrators to investigate conflicts of interest).} courts adjudicating evident partiality challenges to arbitral awards have differing views on whether there is a duty to investigate and, if so, the extent of that duty.\footnote{See, e.g., Dawson, supra note 13, at 322 (“Courts disagree about whether an evident-partiality challenge can be sustained based on facts not known by the arbitrator, and correspondingly whether arbitrators have any duty to search for unknown conflicts such that an award can be vacated if they fail to discover one.”); Rossein & Hope, supra note 13, at 256 (noting that courts “sometimes” impose a duty to investigate on arbitrators).}

In the evident partiality context, the general rule seems to be that there is no affirmative duty to investigate potential conflicts of interest.\footnote{Rossein & Hope, supra note 13, at 227–28 (analyzing evident partiality decisions under the FAA and finding (1) that “[g]enerally, an award will not be vacated for a mere failure to investigate,” and (2) that only “a few courts . . . have held that the failure to investigate per se requires vacatur.”).} For example, in Al-Harbi v. Citibank, N.A., the District of Columbia Circuit flatly rejected an attempt to invalidate an arbitral award for evident partiality after the arbitrator failed to inquire into potential conflicts of interest.\footnote{Al-Harbi v. Citibank, N.A., 85 F.3d at 683.} The court “explicitly held that there is no duty on an arbitrator to make any such investigation.”\footnote{Id.; see also Gianelli Money Purchase Plan & Tr. v. ADM Inv. Servs., Inc., 146 F.3d 1309, 1312–13 (11th Cir. 1998) (holding that there is no independent duty to investigate under the FAA where the arbitrator is unaware of the undisclosed facts).}

However, there are a few courts, most notably in the Ninth Circuit, that have held that an arbitrator’s failure to investigate requires vacatur. In Schmitz v. Zilveti, the arbitrator’s law firm represented the parent company of a party to the arbitration, but the arbitrator only used the name of the arbitration party (not its parent company) in the conflicts check he conducted of his law firm’s
The court held that the arbitrator had a duty to investigate his law firm’s prior relationship with the parent company of the arbitration party, charged him with constructive knowledge of the conflict of interest arising out of his firm’s relationship with the parent company, and vacated the arbitral award for evident partiality based on the undisclosed conflict. The arbitrator “had a duty to investigate the conflict at issue,” according to the court, because, while a lack of knowledge may preclude the existence of an actual conflict of interest, “a reasonable impression of partiality can form when an actual conflict of interest exists and the lawyer has constructive knowledge of it.” Other courts in the Ninth Circuit and elsewhere have vacated (or affirmed the vacatur of) arbitration awards based on an arbitrator’s failure to investigate potential conflicts of interest.

To further muddy the waters, the Second Circuit follows what could be described as a middle-ground approach, which imposes upon arbitrators a duty to investigate only those potential conflicts of which they are aware. In *Applied Industrial Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S.*, the court found that the chair of a three-member arbitration panel acted with evident partiality when he failed to inquire further into a business relationship between his company and one of the parties to the arbitration. The panel chair disclosed that he was aware of a potential business
relationship with an arbitration party, but he did not investigate the extent of the relationship or advise the parties that he was not conducting such an inquiry.\textsuperscript{175} After the award on liability was issued, counsel for the losing party discovered that the panel chair’s company realized approximately $275,000 in revenue as a result of its relationship with the prevailing party.\textsuperscript{176} The court held that where an arbitrator knows of a potential conflict, “a failure to either investigate or disclose an intention not to investigate is indicative of evident partiality.”\textsuperscript{177} Thus, it invalidated the arbitration award.\textsuperscript{178} However, the court made clear that it was “not creating a free-standing duty to investigate” and emphasized that “[t]he mere failure to investigate is not, by itself, sufficient to vacate an arbitration award.”\textsuperscript{179}

4. The Variability in Evident Partiality Standards and the Application of Those Standards Yields an Unpredictable Mix of Fact-Specific Outcomes

The bottom line is that the hodgepodge of evident partiality standards and the variability of the application of those standards make it hard to predict the outcomes of challenges to arbitration awards under the FAA for inadequate disclosure of conflicts of interest:

[W]ith the confused guidance of Commonwealth Coatings as their lodestar, [courts] have struck the balance in different ways. Some emphasize keeping arbitrators honest through searching judicial inquiry into the sufficiency of disclosures, and a rule requiring arbitrators to err on the side of disclosure. Others emphasize preserving finality, recognizing that the losing party has different incentives than prior to the arbitration and will often seize on facts or potential conflicts that seemed (or would have seemed) insignificant pre-arbitration in hopes of overturning the award. There is some agreement at the core, but at the margins (and they are fairly wide margins), courts disagree.\textsuperscript{180}

\textsuperscript{175} Id. at 135.

\textsuperscript{176} Id.

\textsuperscript{177} Id. at 138; see also Scandinavian Reinsurance Co. Ltd. v. Saint Paul Fire & Marine Ins. Co., 668 F.3d 60, 73 n.17 (2d Cir. 2012) (holding that “where an arbitrator has reason to believe that a nontrivial conflict of interest might exist, he must (1) investigate the conflict (which may reveal information that must be disclosed under Commonwealth Coatings) or (2) disclose his reasons for believing there might be a conflict and his intention not to investigate.”).

\textsuperscript{178} Applied Indus. Materials Corp., 492 F.3d at 136.

\textsuperscript{179} Id. at 138.

\textsuperscript{180} Dawson, supra note 13, at 321 (footnote omitted).
Regardless of whether courts purport to follow the Black or White opinions in *Commonwealth Coatings*, they all take a highly fact-intensive, case-specific approach to adjudicating motions to set aside arbitral awards for evident partiality. A survey of evident partiality opinions illustrates that some judges are loath to disturb an arbitration award, even where the arbitrator failed to disclose a potential conflict that might have impacted a party’s decision about whether to select that arbitrator. Other courts have vacated awards for the failure to disclose conflicts that seem less significant, and, in some cases, that the arbitrator may not even have known about. The following examples demonstrate the challenges that (1) arbitrators must navigate in deciding the specific potential conflicts to investigate and disclose; and (2) arbitration parties face in interpreting an arbitrator’s disclosures or non-disclosures.

Some cases of undisclosed conflicts that have resulted in the vacatur of arbitration awards for evident partiality include:

- the arbitrator provided regular but infrequent consulting services to an arbitration party;
- a business relationship between an arbitration party and the arbitrator’s company (the fact, but not the extent, of which was disclosed) generated about $275,000 in revenue for the arbitrator’s company (even though the arbitrator unilaterally erected an ethics screen in an effort to shield himself from any conflict);
- the arbitrator’s father was the president of a union that was one of the parties to the arbitration;
- the arbitrator’s law firm had represented the corporate parent of a party to the arbitration in numerous matters.

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181 See, e.g., Rossein & Hope, *supra* note 13, at 212 (finding, based on a survey of evident partiality decisions, that deciding whether the non-disclosure of a potential conflict of interest constitutes evident partiality is “a very fact-intensive inquiry”).
182 *Commonwealth Coatings Corp.*, 393 U.S. at 146.
184 *Morelite Constr. Corp.*, 748 F.2d at 81. The court held that despite a “traditional reluctance to inquire into the merits of an arbitrator’s award,” such an intimate and undisclosed relationship, where both were involved in the arbitration, would lead “a reasonable person . . . to conclude that an arbitrator was partial to one party to the arbitration.” *Id.* at 81, 84. The court noted, however, that family relationships do not, per se, constitute evident partiality. *Id.* at 85.
185 *Zilveit*, 20 F.3d at 1044–49.
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- during the arbitration proceeding, the arbitrator accepted a position as an executive officer of a film group that was negotiating to finance a film developed by an arbitration party (even though the arbitrator did not have actual knowledge of the negotiations);\(^\text{186}\)

- the arbitrator and counsel for one of the arbitration parties had a fifteen-year history of infrequent social and business interactions, including exchanging Christmas cards, greeting each other in the hallway when they randomly crossed paths in the building that they both worked in fifteen years prior to the arbitration, and dining together five years before the arbitration;\(^\text{187}\)

- the arbitrator “regularly went to lunch with one of the [party’s] attorneys” and was provided with free use of conference rooms and free legal research by the attorneys for that party;\(^\text{188}\)

- the arbitrator had an ongoing legal dispute with a party to the arbitration;\(^\text{189}\)

- the arbitrator’s law firm represented a party to the arbitration in other, unrelated matters;\(^\text{190}\) and

- the law firm representing one of the parties to the arbitration was representing the arbitrator in an unrelated matter.\(^\text{191}\)

Some instances of undisclosed conflicts that did not result in a finding of evident partiality include:

\(^\text{186}\) New Regency Prods. v. Nippon Herald Films, Inc., 501 F.3d 1101, 1107 (9th Cir. 2007).


• counsel for one of the parties made a campaign contribution to, and was Facebook friends with, the arbitrator;\(^{192}\)

• the arbitrator was a member of the board of directors of a company with $2 billion in passive investments in a consortium that was the respondent in the arbitration;\(^{193}\)

• the National Association of Securities Dealers disciplined the arbitrator over a decade before the arbitration;\(^{194}\)

• the arbitrator’s brother worked for the union that was a respondent in the arbitration;\(^{195}\)

• the arbitrator formerly represented the parent company of the respondent in the arbitration;\(^{196}\)

• the parent company of a party to the arbitration contributed to the arbitrator’s campaign for a seat on a state supreme court;\(^{197}\)

• the arbitrator’s former law firm had represented one of the respondents to the arbitration on unrelated matters;\(^{198}\)

• the arbitrator’s disclosure to the parties failed to indicate that one of the corporations for which he did consulting work was a subsidiary of a party to the arbitration;\(^{199}\)

• eighteen months prior to the arbitration proceeding, the arbitrator had a scheduling dispute with an attorney from the firm representing one of the arbitration parties.\(^{200}\)

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\(^{195}\) Consolidation Coal Co., 48 F.3d at 129.


\(^{197}\) Freeman, 709 F.3d at 245.

\(^{198}\) Al-Harbi v. Citibank, N.A., 85 F.3d at 682.

\(^{199}\) Ormsbee Dev. Co. v. Grace, 668 F.2d 1140, 1149–51 (10th Cir. 1982) (decided under the New Mexico Arbitration Act).

\(^{200}\) Lifecare Int’l, Inc. v. CD Med., Inc., 68 F.3d 429, 434 (11th Cir. 1995).
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- the arbitrator and counsel for the prevailing party in the arbitration were co-counsel for Intel in a large dispute involving six different lawsuits, in which at least seven law firms and thirty-four lawyers represented Intel;\textsuperscript{201}

- the arbitrator and an expert witness who testified for one of the parties in the arbitration were limited partners in a partnership that owned an apartment complex;\textsuperscript{202}

- the arbitrator held stock in a company whose subsidiary owned a small portion of an arbitration party’s parent company;\textsuperscript{203} and

- fourteen years prior to the arbitration proceeding, the president of a party to the arbitration (and a key witness in the case) served as the arbitrator’s supervisor.\textsuperscript{204}

III. THERE IS A PRESSING NEED FOR GUIDANCE ON THE DISCLOSURE OF SOCIAL MEDIA ACTIVITY BY ARBITRATORS

Although arbitrators, like all users of social media, have used social networks for well over a decade to make connections and build relationships in the professional and personal arenas,\textsuperscript{205} there is a dearth of guidance regarding whether and to what extent they should disclose these virtual relationships to the participants in an arbitration. As discussed in Part II(A) \textit{supra}, the laws and provider rules that govern arbitral disclosures in the United States do not provide specific guidance on social media disclosures. The gen-

\textsuperscript{201} Positive Software Sols., Inc. v. New Century Mort. Corp., 476 F.3d 278, 280 (5th Cir. 2007). Although their names appeared together in court filings in the Intel litigation, the court found that the arbitrator and counsel for the arbitration party never spoke to each other or attended the same meetings, hearings, or other proceedings together. \textit{Id.} at 284.

\textsuperscript{202} Apusento Garden, Inc. v. Superior Ct., 94 F.3d 1346, 1352 (9th Cir. 1996).


\textsuperscript{204} Merit Ins. Co. v. Leatherby Ins. Co., 714 F.2d 673, 676–83 (7th Cir. 1983).

eral disclosure standards contained in these authorities are not easy to apply to social media activity, as social media and its reach were not contemplated when many of the standards were adopted. There is also a paucity of case law on the topic.\textsuperscript{206} And while a few scholars have identified social media activity as an emerging topic to consider from a disclosure perspective, none have proposed concrete guidelines to promote the transparent and consistent sharing of information about arbitrators’ social media activity.

A. The Sparse Case Law Addressing the Adequacy of Social Media Disclosures by Arbitrators Does Not Provide Meaningful Guidance

To date, there appear to be only three reported decisions in the United States—one from California and two from Texas—that address the impact of an arbitrator’s failure to disclose social media

\textsuperscript{206} The only cases that specifically address the adequacy of arbitral disclosures relating to social media activity are discussed in this Part of the Article. See Sebastian v. Wilkerson, No. 09-18-00223-CV, 2019 Tex. App. LEXIS 880, at *2 (Feb. 7, 2019); Morris v. O’Neill, No. B258467, 2015 Cal. App. Unpub. LEXIS 4464, at *2–3 (June 22, 2015). This thin precedent is likely attributable to the high bar for overturning arbitral decisions based on alleged disclosure deficiencies (which deters many losing parties from challenging an award), the difficulties inherent in independently ascertaining an arbitrator’s social media connections, the evolving nature of arbitrators’ familiarity with—and use of—social media platforms, and the lack of any clear standards in this area. See supra Part II; see also Campbell, supra note 103, at § 2[a] (“The grounds on which a federal district court may vacate an arbitration award are . . . much narrower than the grounds on which an appellate court can overturn the decision of a federal district court, and the courts have, correspondingly, shown little inclination to vacate arbitration awards on any ground, vacating awards in approximately 10% of the instances in which they have been challenged under the Act.”); Davis, supra note 103, at 54 (“No matter how successful a challenger is in meeting these requirements, the timing of judicial review and the prevailing interpretation effectively ensure rejection of bias challenges in all but the most egregious cases.”); Larry P. Schiffer, \textit{Vacating an Arbitration Award for Evident Partiality Just Got Harder}, \textit{Nat’l L. Rev.} (June 8, 2018), https://www.natlawreview.com/article/vacating-arbitration-award-evident-partiality-just-got-harder [https://perma.cc/4U85-3NED] (discussing the “clear and convincing evidence” standard for demonstrating evident partiality on the part of a party-appointed arbitrator); \textit{Control Who Can See What You Share}, \textit{Facebook Help Ctr.}, https://www.facebook.com/help/1297502253597210 [https://perma.cc/SECE-MDSA] (last visited Dec. 25, 2021) (allowing Facebook users to control who can view information they post online). As discussed throughout this Article, the reasons for adopting a clear, consistent framework for disclosure of arbitral social media activity go well beyond avoiding reversal of an arbitral award. Standardizing the approach to social media disclosure is also necessary to ensure a level playing field in the marketplace for arbitrator services (so that some arbitrators do not get unfairly penalized for making more fulsome social media disclosures than others) and to protect the credibility and integrity of the arbitral process in an era when its use as a dispute resolution mechanism is on the rise.
relationships on the validity of an arbitration award. All three cases involved motions to vacate an award under a state law equivalent of the FAA’s evident partiality standard. While the courts denied the motions to vacate in each case, their opinions do not provide arbitrators or arbitration parties with meaningful guidance in navigating the challenge of social media disclosure. In fact, as discussed below, there are strong arguments that the Texas cases were wrongly decided.

i. Morris v. O’Neill

Morris v. O’Neill, a 2015 California Court of Appeals decision, appears to be the first judicial opinion to squarely consider the adequacy of an arbitrator’s disclosures pertaining to his social media activity. Morris involved the alleged breach of a construction contract to remodel a home. Morris alleged that O’Neill did poor work and failed to complete necessary remodeling tasks. The parties reached an impasse when Morris withheld payment of O’Neill’s invoice unless O’Neill guaranteed that Morris’ concerns were addressed and remedied to her satisfaction. Morris then filed a complaint with the California Contractors State License Board (“CSLB”), and the parties agreed to arbitrate their dispute through the CSLB’s volunteer arbitration program. The arbitrator, Thomas Craigo, was selected by the parties after they reviewed
the resumes of three potential arbitrator candidates. Craigo’s resume listed CNA, the insurance company that provided O’Neill’s construction bond for the remodeling project, as a previous employer, but did not disclose that he inserted a link to his CNA employment in his LinkedIn profile.

After Craigo entered an award in favor of O’Neill, Morris petitioned to vacate the award on multiple grounds under the California Arbitration Act (“CAA”). In addition to alleging that her contract with O’Neill violated public policy and that O’Neill coerced the award by undue means, Morris alleged that Craigo failed to disclose that his prior employment relationship with CNA was featured on Craigo’s LinkedIn profile page. As Morris asserted in her petition, “On [Craigo’s] site at LinkedIn, the arbitrator boldly displays the CNA logo next to his name. Clicking onto the logo links the person to the CNA Insurance website,” which apparently represented Craigo’s CNA experience. Morris further asserted that this link was a “probable source of business for the arbitrator.” Morris presumably contended that she would not have selected Craigo had she known about his connection to CNA because it compromised his impartiality.

The court found that Craigo adequately disclosed his previous employment by CNA in the resume the parties reviewed during the arbitrator selection process. The court held that Craigo’s failure to disclose the fact that his LinkedIn profile page connected to the CNA website did not violate the CAA’s requirement that he disclose “all matters that could cause a person aware of the facts to reasonably entertain a doubt that the proposed neutral arbitrator would be able to be impartial.” According to the unanimous court, “unquestionably the arbitrator disclosed both his past employment relationship with CNA and his extensive professional his-


214 Id. at *25–26.
215 Id. at *7.
216 Id. at *1. Morris also asserted that the award was biased, that her consent to arbitrate was uninformed due to material misrepresentations by the entity administering the arbitration, and that Craigo exceeded his authority in granting an award to O’Neill. Id. at *28–30.
217 Id. at *25.
219 Id. at *25.
220 Id. at *29.
221 Id. at *26–27.
222 Id. at *21, 27–28 (quoting CAL. CIV. PROC. CODE § 1281.9(a)).
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Craigo’s inclusion of CNA in the experience section of his LinkedIn profile was not “competent evidence . . . that Craigo had any current or ongoing professional relationship with CNA or that he had engaged in discussions regarding prospective employment or service as a dispute resolution neutral with CNA or any other insurance company that required disclosure.”224 The court’s ultimate conclusion was that “Morris’s unsworn speculation regarding the CNA icon or logo next to Craigo’s listing of his employment history on a LinkedIn page is an entirely inadequate basis upon which to vacate the arbitration award.”225

ii. The Texas Facebook Cases

1. Prell v. Bowman

The next published decision to wrestle with the consequences of an arbitrator’s alleged failure to disclose a social media connection was the Texas Court of Appeals’ opinion in Prell v. Bowman.226 This case involved a dispute between two competing realtors, Mike Bowman and John Prell, over who should receive credit for the sale of a property.227 The dispute was arbitrated before a three-arbitrator panel, which found in favor of Bowman.228 Prell and his realty company moved to vacate the award for evident partiality under the Texas Arbitration Act (“TAA”) because one of the arbitrators, Bob Baker, failed to disclose his Facebook “friendship” with Bowman.229 Baker claimed in his deposition that he did not have personal relationships with all of his Facebook friends, but rather added as a friend pretty much anyone whose name he recognized from the real estate business.230

The district court rejected Prell’s evident partiality claim and confirmed the arbitral award.231 On appeal, the Texas Court of

223 Id. at *27.
225 Id. at *27–28.
227 Id. at *1.
228 Id. at *2.
229 Id. at *1, 7. Prell also alleged that Baker was evidently partial because of his membership in a Facebook group, although no arbitration participant belonged to the same group. Id. at *7–8. Prell also sought vacatur on the grounds that the panel exceeded its powers and committed other errors. Id. at *1. Bowman moved to confirm the award. Id. at *1.
230 Prell, 2018 Tex. App. LEXIS 3970 at *8. Baker also stated in his deposition that he did not know any of Bowman’s family members and had not been to any event with Bowman. Id.
231 Id. at *1.
Appeals found that no objective observer would find that the non-disclosure of the Facebook friendship between Baker and Bowman gave rise to a “reasonable impression” of evident partiality. The Court of Appeals concluded: “[A] Facebook friendship ‘provides no insight into the nature of the relationship.’ . . . Some Facebook ‘friends’ have meaningful social relationships, some are bare acquaintances, and some have never even met.” The court found “no significant social relationship” between Baker and Bowman and affirmed the lower court’s confirmation of the award.

2. Sebastian v. Wilkerson

Sebastian v. Wilkerson, decided by the Texas Court of Appeals in 2019, also considered the failure of an arbitrator to disclose a Facebook connection to an arbitration participant. The Sebastians contracted with Bliss Builders Inc. (“Bliss”), whose president was Weston Lee Wilkerson, for a residential property construction project. The Sebastians filed suit against Bliss and Wilkerson, asserting fraud and other claims after allegedly discovering construction defects. After the trial court granted the defendants’ motion to compel arbitration, the parties chose retired Texas District Court Judge Suzanne Stovall to arbitrate their dispute. Stovall entered an award in favor of the Sebastians in the amount of $191,047, plus interest.

Wilkerson moved to vacate the award under the TAA on the grounds that Stovall did not disclose evidence of her partiality toward the Sebastians, including her Facebook friendship with counsel for the Sebastians. The district court vacated the award

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232 Id. at *21. The court also did not find Baker’s Facebook group membership to constitute evident partiality. Id. at *24.
233 Id. at *21 (quoting Youkers v. State, 400 S.W.3d 200, 206 (Tex. App. 2013)).
235 Id. at *32.
237 Id. at *6.
238 Id. at *1.
239 Id. at *1–2.
240 Id. at *2.
243 Id. at *3.
244 Id. at *5. Additionally, Wilkerson asserted that Stovall failed to disclose (1) campaign contributions she received from counsel for the Sebastians and her law firm; (2) purchases
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based on its finding that an undisclosed Facebook friendship between an arbitrator and counsel for a party appearing before that arbitrator constitutes evident partiality. The district court found that evident partiality was “established from the nondisclosure itself and [did] not require evidence of actual bias.”

The Texas Court of Appeals reversed, finding that the Facebook friendship would not “to an objective observer, create a reasonable impression of Stovall’s partiality if not disclosed by Stovall.” The court added that “a Facebook friendship does not show the degree or intensity of a judge’s relationship with a person, and thus, standing alone, provides no insight into the nature of a relationship.” The bottom line, according to the court, was that the existence of a Facebook friendship was not “substantial enough to require disclosure.”

B. While Commentators Have Flagged Social Media Disclosures as an Emerging Issue, They Have Yet to Provide Meaningful Guidance in This Area Either

i. 2012: Spotting the Issue

Almost a decade ago, Ruth Glick and Laura Stipanowich astutely predicted that the advent of social media would present disclosure challenges for arbitrators. In 2012, Glick and Stipanowich

Stovall made from the Sebastians’ business approximately fifteen years prior to the arbitration; and (3) Stovall’s business relationships with an individual and entity who allegedly were connected to the underlying dispute. Id. at *5–6.

The court did not provide any additional information about the timing, duration, or extent of the Facebook friendship, or any information about how Stovall used Facebook or social media in general. Id. at *5.

Id. at *6. The court did not provide any additional information about the timing, duration, or extent of the Facebook friendship, or any information about how Stovall used Facebook or social media in general. Id. at *5.

Id. at *6. The court did not provide any additional information about the timing, duration, or extent of the Facebook friendship, or any information about how Stovall used Facebook or social media in general. Id. at *5.

Id. at *10–11 (citing Youkers, 400 S.W.3d at 206).

Id. at *11. The holdings in Prell and Sebastian are dubious for at least three reasons. First, while it is true that the existence of a Facebook friendship, standing alone, does not show the degree or intensity of a relationship, it does indicate the existence of at least some relationship and suggests a stronger connection than the arbitrator has with parties and counsel who are not her Facebook friends. Second, the failure to disclose the existence of a Facebook friendship precludes the parties and counsel from inquiring about the degree or intensity of the relationship—which is a fair inquiry in an arbitrator selection process. The arbitrators in these matters were, of course, free to explain to the parties why they thought their virtual friendships with arbitration participants were not significant from an impartiality perspective. Third, the disclosure standard arising out of the Code of Ethics and Commonwealth Coatings focuses not on the actual degree or intensity of a relationship, but the impression of bias it creates. See supra Part II.
surveyed the disclosure standards articulated in the FAA, UAA, RUAA, CAA, Code of Ethics, AAA Commercial Rules, and Commonwealth Coatings—and found none that provided concrete guidance to arbitrators on social media disclosures. As discussed in Part II of this Article, these disclosure provisions have not been revised to address arbitral social media usage in the years since Glick and Stipanowich examined them.

In the absence of guidance on social media disclosures in the alternative dispute resolution arena, Glick and Stipanowich turned to state judicial ethics opinions involving social media activity by judges as a way to provide at least some potential guidance to arbitrators. But that exercise did not bear fruit either, both because the issue was still somewhat nascent in the world of judicial ethics and because there was no consensus among the ethicists about how judges should engage with social media. Judicial ethics opinions in some states, including New York and California, allowed judges to “friend” lawyers under certain circumstances. Opinions from other states, such as Florida and Oklahoma, recommended judges not “friend” lawyers to avoid the appearance of bias or impropriety. Even had the universe of ethics opinions on judicial social media activity been more robust and consistent, it seems unlikely that it would have provided meaningful guidance to arbitrators making decisions regarding what to disclose about their social media activity.

Glick & Stipanowich, supra note 23.

Id. at 25–26.


The judicial ethics opinions did not primarily address the issue of disclosure of social media activity, but rather whether—and, if so, how—judges should use social media to make connections and build relationships in the first place. See, e.g., Cal. Judges Ass’n Jud. Ethics Comm., Op. 66 (2010). Moreover, there are many reasons why arbitrators are differently situated than judges for purposes of deciding what to disclose to the parties and counsel that appear before them. First, parties and their counsel typically choose their arbitrators, whereas they are usually assigned to a judge without any input. See Menkel-Meadow et al., supra note 2. Therefore, disclosures by arbitral candidates during the selection process are a critical feature of an arbitra-
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Since Glick and Stipanowich did not have the benefit of any judicial decisions addressing alleged deficiencies in arbitrators’ social media disclosures, they looked to case law involving (1) traditional social connections between arbitrators and the parties and lawyers who appeared before them; and (2) the vacatur of arbitral awards based on post-award Internet searches. The authors hypothesized that non-lawyer arbitrators were likely to have more social relationships and social media connections within their field of expertise than lawyer arbitrators, but opined that social media disclosure obligations should be applied uniformly to all arbitrators, regardless of whether they were attorneys. Unable to extract concrete guidance from the sources they consulted, Glick and Stipanowich recommended that arbitrators monitor and disclose...
their social media connections to avoid the appearance of a conflict of interest, and in view of the likelihood that losing parties would conduct post-award Internet searches in an effort to discover evidence of impropriety.\footnote{Id. at 29.} They also proposed generally that “[a]rbitrators should make disclosure of both professional and personal online activity that has any substantial connection to the arbitration or its participants.”\footnote{Id. at 25.} Glick and Stipanowich further recommended that arbitrators separate their personal and professional relationships between social media platforms.\footnote{Id. at 26.}

ii. 2012–Present: A Trickle of Additional General Advice

In the years following this initial foray into the impact of social media activity on arbitral disclosures, a handful of other commentators have acknowledged the same challenges identified by Glick and Stipanowich and have offered similarly general advice to arbitrators. As a prominent construction law treatise recognizes, the capacity of social media to “create unknown or unanticipated contacts or relationships” complicates the arbitral disclosure equation.\footnote{3 CONSTRUCTION LAW ¶ 12.05 (Steven G.M. Stein ed., 2020).} The treatise recommends that arbitrators disclose any known social media connections to parties and counsel and refrain from violating their confidentiality responsibilities on social media platforms.\footnote{Id. (identifying Facebook, Twitter, LinkedIn, and LISTSERVs as examples of where social media connections may arise).} It also suggests providing a “general disclosure statement” describing the arbitrator’s participation in social media platforms to the parties during the arbitral selection process.\footnote{Id. at 26.} In a similar vein, the Texas Construction Law Manual suggests that arbitrators include in arbitration clauses a waiver that would preclude a party from objecting to the arbitrator based on her social media participation.\footnote{JOE F. CANTERBURY, JR. & ROBERT J. SHAPIRO, TEXAS CONSTRUCTION LAW MANUAL § 13:21 (3d ed. 2019). The proposed waiver provision would provide, in pertinent part, “that the arbitrator shall not be objected to or disqualified solely based on participation in . . . social media, nor shall such grounds be available for attempting to vacate the award.” Id.}
A few other organizations have also weighed in, but again, not in a way that adds much clarity or predictability to the social media disclosure dilemma. As discussed above, the IBA took the curious position in 2014 that social media relationships between arbitrators and arbitration parties do not need to be disclosed, regardless of their nature or intensity. In 2014, the College of Commercial Arbitrators (“CCA”) published a Guidance Note regarding the impact of social media on arbitration practices. In recognition of the fact that little guidance exists outside of judicial ethics opinions, this Guidance Note proposes best practices for arbitrators facing new issues created by social media. The CCA’s general advice is that arbitrators who choose to engage with social media must do so in accordance with their duties as neutrals, which include the duties to be impartial and independent. Although joining and connecting to others on social media platforms does not in itself violate any arbitral duties, the Guidance Note (contrary to the IBA Guidelines) makes clear that social media relationships could create ethical risks and trigger disclosure obligations. With respect to the disclosure of social media activity, the Guidance Note does not suggest that arbitrators should disclose facts about their general engagement with social media, such as the particular platforms they use and the specific content they post. Rather, the CCA offers the basic advice that arbitrators should disclose “any use of social media that might give rise to justifiable doubt concerning the neutral’s independence or impartiality.” Importantly, the Guidance Note recognizes that the scope of disclosure should include not only social media relationships of which the arbitrator is already aware, but also those she can identify with “reasonable investiga-

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264 IBA GUIDELINES, supra note 15, at 25 (The IBA Guidelines do not provide any explanation or rationale for this recommendation.).
266 Id. at 613–14 (The Guidance Note defines social media as “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.”); Id. at 616 (The CCA includes Facebook, Twitter, LinkedIn, photo sharing sites, and listservs with certain capacities as examples of social media.).
267 Id. at 616.
268 Id. at 618–19 (As an example, the Guidance Note recommends that, when considering the risks of social media engagement, arbitrators should consider how the platform uses information and how they can (or cannot) control access to their postings or personal information.).
269 Id. at 620.
270 GAITIS ET AL., supra note 265, at 619.
It further suggests that the use of a social media disclaimer, like those discussed above, does not obviate the need for an arbitrator to disclose a social media relationship that could be viewed as impacting impartiality when the arbitrator has actual or constructive knowledge of the relationship. Finally, the Guidance Note recognizes that the ongoing nature of an arbitrator’s duty of disclosure could require her to disclose social media activity that occurs during the arbitration.

A few years later, in 2017, the CCA revised the Guidance Note’s advice on social media’s “new species of preclusive relationships.” With respect to general social media usage, the CCA modified the advice it offered in the 2014 Guidance Note by recommending that arbitrators routinely disclose the particular social media platforms they use, the nature of that use, and any information regarding their usage of the platform that may influence their partiality. As to specific social media connections, the CCA continued to advise arbitrators to be guided by their assessment of the nature of the relationship behind each social media connection. The CCA suggested that arbitrators should disclose social media connections that “would have given rise to an obligation of disclosure if it had not arisen on social media.” And the CCA continued to advise arbitrators that they may be required to conduct a reasonable investigation 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.

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271 Id. (A “reasonable investigation” is required “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.”).

272 See 3 CONSTRUCTION LAW ¶ 12.05 (Ruth Glick presented the following example of a general social media disclaimer at the 2015 American Bar Association Dispute Resolution Conference: “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 profile, but I do not maintain a database of all these professional contacts and their connections, which now number over 500. LinkedIn also 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 of relationship other than an online professional connection, similar to connections in other professional organizations.”); Joan D. Hogarth, So Yesterday: Reconciling the Arbitrator Code of Ethics with a Seemingly Amorphous Social Media Environment, 66 FED. L AW. 12, 13 (2019), https://www.fedbar.org/wp-content/uploads/2019/01/Resolution-Resources-pdf-1.pdf [https://perma.cc/8H8V-8WSH].

273 GAITIS ET AL., supra note 265, at 620–21.

274 Id. at 621–22 (For example, an arbitrator should disclose any social media communications or connection attempts by parties, counsel, or witnesses involved in an arbitration during the arbitration proceeding.).

275 Id. at 30.

276 Id. at 31.

277 Id.

278 Id.
reasonable investigation of their social media connections to comply with their disclosure obligations, but did not suggest what that investigation should entail.279

Also in 2017, Suar Sanubari proposed a basic framework for arbitrator social media disclosures centered on the putative distinction between personal and professional social networking platforms.280 He treated social networks that focus primarily on creating conversations and communications between users, like Facebook and Twitter, as “personal” social networks.281 He considered social networks that place greater importance on functions such as building identity through the creation of a robust user profile, like LinkedIn, to be “professional” social networks.282 Sanubari’s proposal would essentially exempt professional social networking connections from disclosure and require arbitrators only to disclose personal social networking connections.283

Sanubari hypothesized:

Doubts on independence and impartiality are more likely to arise if there is an online relationship on a general social network site, since it may reflect personal nuance albeit the relationship could be of professional nature. However, if the connection is on a professional social network site, the nuance is strictly professional.284

The application of this framework would not require disclosure of LinkedIn connections but would require an arbitrator to disclose if a Facebook friend was a participant in the arbitration or if the arbitrator and an arbitration participant follow each other on

279 Id.
280 Sanubari, supra note 207, at 493.
281 Id. at 489–91 (Sanubari relied on an earlier functional analysis of social media platforms to inform his decisions about how to define and populate the personal and professional categories.); see also, Jan H. Kietzmann et al., Social Media? Get Serious! Understanding the Functional Building Blocks of Social Media, 54 BUS. HORIZONS 241 (2011), https://www.researchgate.net/publication/227413605_Social_Media_Get_Serious_Understanding_the_Functional_Building_Blocks_of_Social_Media [https://perma.cc/MP4PU-VHLB].
282 Sanubari, supra notes 207, at 493 (One of the flaws in Sanubari’s analysis is that the functionality of social media platforms is not static. As an example, Sanubari described LinkedIn as not having an “instant messaging feature,” although LinkedIn does (at least in 2021) allow for synchronous messaging communications.); see also LinkedIn Messaging – Overview, LINKEDIN HELP, https://www.linkedin.com/help/linkedin/answer/61106 [https://perma.cc/M32S-9ZPS] (last visited Nov. 15, 2021).
283 Sanubari, supra note 207, at 493 (Sanubari couched his proposal in the framework of the IBA Guidelines, recommending that personal social networking connections be placed on the Orange List and professional social networking connections on the Green List.); see supra notes 79–85 and accompanying text (discussing the IBA Guidelines’ Red, Orange, and Green Lists).
284 Sanubari, supra note 207, at 493.
Twitter. It does not appear that Sanubari’s proposal has been adopted or cited with approval.

IV. An Analysis of the Social Media Landscape From the Arbitral Disclosure Perspective

The disclosure guidelines set forth in this Article are informed by two lines of research regarding social media. First, in order to ensure that the guidelines are comprehensive and durable, we consider research that catalogs social media platforms and sorts them into categories. Rather than make recommendations on a platform-by-platform basis, the guidelines align with research organizing social media platforms into groups based on their fundamental characteristics and purposes. This ensures that the guidelines will

285 Id. (“Twitter is more delicate since it is a micro-blogging platform with social network features. A Twitter connection is based on a ‘follow’. It is possible that a user follows another user without a reciprocal follower and interact only by ‘replies’, ‘mentions’ and ‘retweets.’ However, when two users follow each other, they can engage in private conversations via a ‘direct message’ feature that also represents the ‘conversations’ functional building block. It is also reasonable to assume that two users that do not follow each other would not have frequent interactions. Therefore, disclosure would only need to be made if an arbitrator and a party or a counsel ‘follow’ each other.”).

286 Id. Sanubari’s proposal is flawed for several reasons. First, trying to draw a distinction between personal and professional social media platforms for disclosure purposes is at odds with the authorities that expressly require arbitrators to disclose personal and professional connections to the arbitration participants. See, e.g., The Code of Ethics for Arbitrators in Commercial Disputes, supra note 9, at 4 [Canon II(A)(2)], (requiring arbitrators to disclose “[a]ny known existing or past financial, business, professional or personal relationships which might reasonably affect impartiality or lack of independence in the eyes of any of the parties”). Second, the lines between personal and professional social media usage are too blurry to definitively categorize most social media platforms. For example, many Facebook and Twitter users engage with those platforms for professional purposes and there is a personal/social aspect to many LinkedIn relationships. Third, in the world of arbitration, which largely takes place in a private commercial marketplace, professional connections (which can result in repeat business and revenue to the arbitrator) may be just as, if not more, important to an arbitrator than personal connections. And fourth, it is risky to prescribe disclosure rules based on the functionality of social media platforms because their functionality is constantly changing and evolving; see Mark R. Joelson, A Critique of the 2014 International Bar Association Guidelines on Conflicts of Interest in International Arbitration, 26 Am. Rev. Int’l. Arb. 483, 490 (2015), https://www.cailaw.org/media/files/ITA/ConferenceMaterial/2017/itawkshp/joelson-critique.pdf [https://perma.cc/USK5-UXGJ] (arguing that it is a “thorny matter” to disentangle social media friendships and business associations and, therefore, that both types of relationships should be disclosed to arbitration parties “for their consideration and evaluation”); see infra Part V (While we agree with a few of Sanubari’s suggestions—namely that Facebook friendships and certain Twitter connections with the participants in an arbitration should be disclosed—we do not believe that the personal/professional distinction is useful because the parties to an arbitration justifiably would want to be informed about both personal and professional connections.).
remain viable as individual platforms come and go, and existing platforms enhance or otherwise alter their functionality. Second, based on studies examining patterns of social media usage, the guidelines focus on social media categories that are most likely to be used by arbitrators.

A. Categorizing Social Media Platforms

While there is no single, commonly accepted meaning of “social media,” social media are generally defined to include the various ways users can connect, create, and share content on the Internet. Social media encompass all “web-based applications and interactive platforms that facilitate the creation, discussion, modification, and exchange of user-generated content.” A social media platform is “a web-based technology that enables the development, deployment and management of social media solutions and services.” A social media platform “provides the ability to


288 Social Media, BLACK’S LAW DICTIONARY (11th ed. 2019).


290 Social Platform, TECHOPEDIA (Apr. 26, 2017), https://www.techopedia.com/definition/23759/social-platform [https://perma.cc/7643-6JVG]; see also Kaplan & Haenlein, supra note 287, at 60–61 (“Web 2.0 is a term that was first used in 2004 to describe a new way in which software developers and end-users started to utilize the World Wide Web; that is, as a platform whereby content and applications are no longer created and published by individuals, but instead are continuously modified by all users in a participatory and collaborative fashion.”).
create social media websites and services.”

Although Facebook is ensconced as an anchor in the current social media landscape, the environment is fluid. As developers create and update social media platforms, users follow suit by joining new platforms and abandoning old ones. To help organize this evolving space, scholars have sorted the social media platforms into categories—based on their functionality, purpose, and core characteristics—that are sufficiently flexible to accommodate the modification of existing platforms and the entry of new ones. Using this model, social media platforms can be grouped into at least the following nine buckets: (1) social networks; (2) business networks; (3) blogs; (4) microblogs; (5) forums; (6) review platforms; (7) social bookmarking platforms; (8) photo-sharing platforms; and (9) video-sharing platforms. This classification scheme informs the disclosure guidelines proposed in this Article.

291 Social Platform, supra note 290.
292 See Obar & Wildman, supra note 287, at 746 (“Social media technologies include a wide range of PC and mobile-based platforms that continue to be developed, launched, re-launched, abandoned and ignored every day in countries throughout the world and at varying levels of public awareness.”).
293 Statista Research Department, Facebook: Number of Monthly Active Users Worldwide 2008-2021, STATISTA (Nov. 1, 2021), https://www.statista.com/statistics/264810/number-of-monthly-active-facebook-users-worldwide [https://perma.cc/9SCM-MJ9A] (“With roughly 2.89 billion monthly active users as of the second quarter of 2021, Facebook is the biggest social network worldwide. In the third quarter of 2012, the number of active Facebook users surpassed one billion, making it the first social network ever to do so. Active users are those who have logged into Facebook during the past 30 days.”).
294 See, e.g., Obar & Wildman, supra note 287, at 746 (discussing how social media platforms are updated, changed, and abandoned).
296 Kaplan & Haenlein, supra note 287, at 61 (“[I]t is important that any classification scheme takes into account applications which may be forthcoming.”).
297 Aichner & Jacob, supra note 289, at 259. This Article is limited to consideration of these nine social media categories because they are most relevant to the arbitral disclosure issue. See infra Part IV(B). Professors Aichner & Jacob identify still other social media categories that are beyond the scope of this Article. Aichner & Jacob, supra note 289, at 259 (discussing collaborative online content-sharing sites like Wikipedia). While other classification schemes exist, such as the schemes used by Sanubari (Sanubari, supra note 207, at 488–89), and Kaplan, and Haenlein
Social networks are social media platforms, like Facebook, where individuals create profiles to share content and connect with others. Facebook users can “friend” other users, “like” or “follow” pages of businesses or public figures, share photos of themselves and their friends, and generally share information about themselves on their pages. The now-defunct Google+ and Myspace are other examples of social networks. Social networks allow users to stay connected to others and remain abreast of the latest news in the circles they create and join. Users of social networks, like Facebook, often can choose to allow anyone to view their content or to limit the users of the platform with whom they share information. Some currently popular social networks, like WhatsApp and Snapchat, focus primarily on individual or group messaging and do not (at least currently) offer users the ability to develop detailed profiles.

(Kaplan & Haenlein, supra note 287, at 62–64), we believe that the Aichner/Jacob framework is the most useful for purposes of the disclosure guidelines proposed in this Article. Aichner & Jacob, supra note 289, at 259. Social networks can also be defined as “web-based services that allow individuals to: (1) construct a public or semi-public profile within a bounded system; (2) articulate a list of other users with whom they share a connection; and (3) view and traverse their list of connections and those made by others within the system.” Sanubari, supra note 207, at 489 (citing Danah M. Boyd & Nicole B. Ellison, Social Network Sites: Definition, History, and Scholarship, 13 J. COMPUT. MEDIATED COMM’N 210, 211 (2007)).


Ashwini Nadkarni & Stefan G. Hofmann, Why Do People Use Facebook?, 52 PERSONALITY & INDIVIDUAL DIFFERENCES 243, 243 (2012) (“Users can add basic facts about themselves, such as home town, add contact information, personal interests, job information and a descriptive photograph.”).


Niraj Chokshi, Myspace, Once the King of Social Networks, Lost Years of Data from Its Heyday, N.Y. TIMES (Mar. 19, 2019), https://www.nytimes.com/2019/03/19/business/myspace-user-data.html [https://perma.cc/A9G7-8E9G].


See Control Who Can See What You Share, supra note 206 (informing users how to change privacy settings).

Business networks, such as LinkedIn, allow individual users to connect with professionals, search for employment, recruit employees, and share information geared towards building a professional brand.\textsuperscript{308} Examples of other business networks include Plaxo,\textsuperscript{309} now discontinued, and Xing,\textsuperscript{310} a German platform. Business network users build individual profiles, which include their employment history,\textsuperscript{311} and grow their business contacts within their areas of interest and expertise, such as the legal field.\textsuperscript{312}

Blogs allow individuals or organizations to publish reflections or other content and other users to comment on those posts.\textsuperscript{313} Blogs can be hosted on a website like a WordPress site\textsuperscript{314} or a platform like Medium.\textsuperscript{315} Once considered “the cheapest, fastest publishing tool ever invented,”\textsuperscript{316} blogs are fighting to stay relevant in today’s social media landscape, in large part because of the popu-

\textsuperscript{308} See Aichner & Jacob, supra note 289, at 259 (“Individuals use business networks to establish and maintain professional contacts.”); see also Sarah Rycraft, 7 Benefits of Using LinkedIn, LINKEDIN (May 24, 2018), https://www.linkedin.com/pulse/7-benefits-using-linkedin-sarah-rycraft [https://perma.cc/FR72-27CX] (“A professionally written LinkedIn profile allows you to create an online professional brand which can help open doors to opportunities and networks that you may not have been aware of without the help of social media.”).


\textsuperscript{310} Aichner & Jacob, supra note 289, at 259; Ingrid Lunden, German LinkedIn Rival Xing Is Rebranding as ‘New Work,’ Acquires Recruitment Platform Honeypot for Up to $64M, TECHCRUNCH (Apr. 1, 2019, 11:17 AM), https://techcrunch.com/2019/04/01/german-linkedin-rival-xing-is-rebranding-as-new-work-acquires-recruitment-platform-honeypot-for-up-to-64m [https://perma.cc/QH2F-6883].


\textsuperscript{312} See Allison Shields, 2017 Social Media and Blogging, AM. BAR ASS’N (Dec. 1, 2017), https://www.americanbar.org/groups/law_practice/publications/techreport/2017/social_media_blogging [https://perma.cc/979V-9YEU] (“Close to half of attorneys in firms of less than 50 lawyers report that their firms use LinkedIn, and firms of 100+ continue to have the largest firm presence on LinkedIn, between 63–73%.”).

\textsuperscript{313} Aichner & Jacob, supra note 289, at 259; see also KATHRYN OSSIAN, SOCIAL MEDIA AND THE LAW 1–4 (6th ed. 2019).


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larity of the microblog. Microblog platforms, like Twitter, often limit the character count in posts on the platform. Twitter is commonly used for both personal and professional purposes.

Forums enable social media users to communicate with other individuals about specific topics in public conversation threads. Reddit and Quora are popular social media forums. Social media review platforms allow users to write and read reviews about professional services or products. Lawyers and clients may use platforms like Martindale or Avvo to review or research providers of legal services.

Social bookmarking platforms such as Pinterest and Delicious (now defunct) allow users to save links and photos from the Internet, in order to compile them for personal use and share with others. Pinterest users are able to create their own “pins” from a website link or a photo and share them with other users through “boards” organized around various topics. Other users can then add those pins to their boards.

Photo-sharing and video-sharing platforms have similar features, namely allowing users to upload photos or videos onto the platform, where other users can then view the uploaded content.

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317 See, e.g., Farah Mohammed, The Rise and Fall of the Blog, JSTOR DAILY (Dec. 27, 2017), https://daily.jstor.org/the-rise-and-fall-of-the-blog [https://perma.cc/39AA-3Q4E] (“Blogs are still important to those invested in their specific subjects, but not to a more general audience, who are more likely to turn to Twitter or Facebook for a quick news fix or take on current events.”).

318 Aichner & Jacob, supra note 289, at 259–60.


320 Aichner & Jacob, supra note 289, at 260.


322 See Quentin Hardy, Quora and the Search for Truth, N.Y. TIMES: Bits (Feb. 9, 2014, 7:45 AM), https://bits.blogs.nytimes.com/2014/02/09/quora-and-the-search-for-truth [https://perma.cc/XZV5-RQ3H] (referring to Quora as a “question-and-answer website” that “organize[es] knowledge into categories about which people can have discussions”).

323 Aichner & Jacob, supra note 289, at 260.

324 See Shields, supra note 312 (discussing survey results of lawyer and law firm social media usage including usage of Martindale and Avvo).

325 Aichner & Jacob, supra note 289, at 259–60.


327 Id.
and comment on the photo or video. Photographers can use the photo-sharing platform Flickr to post and store their photos. YouTube is an example of a video-sharing platform, where users upload video content to share with other users on channels. For example, Crash Course is a YouTube channel offering educational videos on topics such as history and chemistry. The hugely popular (and politically controversial) TikTok is also a video-sharing platform.

Not all social media platforms fit neatly into a single bucket. The multi-faceted functionality of some of the more successful social media platforms could place them in multiple categories, depending on how they are being used. For example, Facebook is a social network that also allows users to upload and stream videos to share with others. Instagram is most commonly categorized as a photo-sharing platform, but it has further functionality, including the ability to connect with friends and businesses by following and messaging. As discussed in Part V, the guidelines proposed in this Article account for this overlap by considering not only the fundamental nature of the social media platforms, but the ways in which they are most frequently used.

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328 Aichner & Jacob, supra note 289, at 260.
330 Aichner & Jacob, supra note 289, at 268.
B. Identifying the Social Media Platforms Most Likely Used by Arbitrators

The time is right to propose concrete social media disclosure guidelines for arbitrators, in part because of the increasingly robust data that has been collected on social media usage. These data help identify the social media platforms—and categories of social media platforms—that are likely to be most frequently used by arbitrators and the parties and counsel who select them. As set forth in Part V, the proposed guidelines target the categories of social media platforms that, according to the statistics, arbitrators and arbitration participants interact with the most.

Social media use is pervasive throughout the United States. Early social media platforms like Myspace and Facebook, which arose out of early Internet blogs, first arrived on the scene in 2003 and 2004, respectively. According to a long-term study by the Pew Research Center, only five percent of U.S. adults used at least one social media platform in 2005. That figure had grown to seventy-two percent by 2019.

While we are not aware of studies focused specifically on how arbitrators use social media, the data that has been collected on social media usage by adults, with further stratification by level of education, is instructive. In 2019, sixty-nine percent of U.S. adults used Facebook—the leading social network in the world. Twenty-seven percent of U.S. adults used LinkedIn, the top online business network. Further, in 2019, seventy-three percent of U.S. adults used YouTube (a video-sharing platform), thirty-seven

336 Kaplan & Haenlein, supra note 287, at 60.
337 Id.
339 Id.
340 While there is generally no requirement that arbitrators have a law degree—or even a college degree—to be qualified to decide a dispute, the vast majority of arbitrators are lawyers. See Thomas Stipanowich & Zachary P. Ulrich, Arbitration in Evolution: Current Practices and Perspectives of Experienced Commercial Arbitrators, 25 AM. REV. INT’L ARB. 395, 401–05 (2014) (“The CCA/Straus Institute Survey portrays a group of experienced arbitrators who by and large are ‘elders.’ They are virtually all members of the legal profession—an apparent reflection of the dominance of lawyers in arbitration and the growing legal orientation of arbitration.”).
342 Id.
percent used Instagram (a hybrid photo-sharing, video-sharing, and social network platform), twenty-eight percent used Pinterest (a social bookmarking platform), twenty-four percent used Snapchat (a social network), twenty-two percent used Twitter (a microblog), twenty percent used WhatsApp (a social network), and eleven percent used Reddit (a forum).343

While the usage rates of both social and business networks are higher among college graduates than the general adult population, the impact of higher education on the usage of business networks is profound. In fact, the usage rate of LinkedIn nearly doubled—to fifty-one percent—when the user population is confined to college graduates.344 And nearly three-fourths of all college graduates reported using Facebook.345 In addition, in 2019, eighty percent of U.S. college graduates used YouTube, forty-three percent used Instagram, thirty-eight percent used Pinterest, twenty percent used Snapchat, thirty-two percent used Twitter, twenty-eight percent used WhatsApp, and fifteen percent used Reddit.346

A recent survey conducted by the American Bar Association (“ABA”) provides a window into the social media behavior of lawyers—who, as set forth above, constitute the vast majority of arbitrators.347 The survey collected data not only on how lawyers and law firms use social media for professional purposes, but lawyers’

343 Id.; Another study conducted in 2020 found that of 24,000 respondents from the United Kingdom, United States, Germany, France, Spain, Italy, Ireland, Denmark, Finland, Japan, Australia, and Brazil, sixty-three percent used Facebook, sixty-one percent used YouTube, forty-eight percent used WhatsApp, thirty-eight percent used Facebook Messenger, thirty-six percent used Instagram, twenty-three percent used Twitter, and thirteen percent used Snapchat, when asked if they used the platform for any purpose within the last week. Statista Research Department, Global Active Usage Penetration of Leading Social Networks as of February 2020, STATISTA (Jan. 28, 2021), https://www.statista.com/statistics/274773/global-penetration-of-selected-social-media-sites [https://perma.cc/E2BJ-85FT]. Our World in Data reported in 2019 that “with 2.3 billion users, Facebook is the most popular social media platform today. YouTube, Instagram, and WeChat follow, with more than a billion users. Tumblr and TikTok come next, with over half a billion users.” Esteban Ortiz-Ospina, The Rise of Social Media, OUR WORLD DATA (Apr. 30, 2020), https://ourworldindata.org/rise-of-social-media [https://perma.cc/BGR3-AGKD].

344 Perrin & Anderson, supra note 341.
345 Id. (finding that seventy-four percent of the U.S. adult population uses Facebook).
346 Id. In 2018, seventy-seven percent of U.S. college graduates used Facebook, fifty percent used LinkedIn, eighty-five percent used YouTube, forty-two percent used Instagram, forty percent used Pinterest, twenty-six percent used Snapchat, thirty-two percent used Twitter, and twenty-nine percent used WhatsApp. Aaron Smith & Monica Anderson, Social Media Use in 2018, Appendix A: Detailed Table, PEW RSCH. CTR. (Mar. 1, 2018), https://www.pewresearch.org/internet/2018/03/01/social-media-use-2018-appendix-a-detailed-table [https://perma.cc/CSV7-CWJ3].
347 Shields, supra note 312.
DISCLOSURE OF SOCIAL MEDIA ACTIVITY

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personal usage, as well. The survey reflects that lawyers and law firms use business networks at an even higher rate than other college-educated adults: seventy-two percent of attorneys and more than half of the law firms surveyed use LinkedIn for professional purposes. The use of social networks for professional legal purposes was lower, although still meaningful, as close to forty percent of the law firms and over one-third of the lawyers surveyed made use of Facebook for business purposes. When personal as well as professional purposes are taken into account, the ABA survey reflects that lawyers are even bigger users of social networks than other college-educated adults, as a whopping eighty-two percent of attorneys reported using Facebook. Fewer law firms and lawyers used Twitter professionally. Lawyers also use legal-specific review platforms, but at lower rates than LinkedIn, Facebook, or Twitter.

V. PROPOSED GUIDELINES FOR SOCIAL MEDIA DISCLOSURES

Our proposed guidelines for arbitral disclosure of social media activity (“Guidelines”) are premised on three core principles:

The Guidelines should align with existing disclosure rules. The first principle underlying the Guidelines is that they should promote compliance with the most rigorous potentially applicable disclosure standards. Arbitrators who follow the Guidelines should have a high degree of confidence that they are meeting all ethical requirements and insulating their awards against vacatur. Thus, the Guidelines identify and recommend disclosure of social media relationships that (1) “might create an appearance of partiality”.

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348 Id.
349 Id. (finding that fifty-three percent of law firms use LinkedIn for professional purposes). Almost one-third of the survey respondents indicated that they used LinkedIn for personal purposes. Id.
350 Id. (“Overall, 34% of respondents reported personally using Facebook for professional purposes.”).
351 Id.
352 Shields, supra note 312 (finding that nineteen percent of law firms and twenty-six percent of lawyers used Twitter for business purposes and that twenty-seven percent of attorneys used Twitter for personal purposes).
353 Id. (finding that seventeen percent of lawyers used legal-review sites Martindale and Avvo).
354 The Code of Ethics for Arbitrators in Commercial Disputes, supra note 9, at 4 [Canon II(A)].
or (2) give rise to an “impression of possible bias.” These two disclosure standards—which arise out of the Code of Ethics and Justice Black’s opinion in *Commonwealth Coatings*—are the most exacting requirements imposed upon arbitrators. Adherence to the Guidelines should ensure that these and other more forgiving disclosure standards, like the reasonableness standard some federal courts use to evaluate vacatur motions premised on nondisclosure, are satisfied.

Ongoing mutual social media relationships that arose out of affirmative conduct by the arbitrator should be disclosed. As discussed above, social media connections may be unilateral or mutual. A social media user may “connect” with an arbitrator on social media by, among other things, following her microblog, commenting on her posts, or liking her photos. But these connections involve no affirmative action on the part of the arbitrator to associate with that social media user. The Guidelines distinguish between these types of passive social media connections—which need not be disclosed—and those that are the product of affirmative conduct on the part of the arbitrator. The second principle underlying the Guidelines is that a mutual ongoing relationship on social media, such as a Facebook friendship or LinkedIn connection, between an arbitrator and participant in the arbitration may create an appearance of partiality. The Guidelines recommend that these connections be disclosed. While some arbitrators may attach little significance to their social media relationships, the fact that an arbitrator has taken affirmative action to connect and stay connected with an arbitration participant creates at least an appearance of partiality from the perspective of the parties, which is what matters

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356 *See supra* Part III(B).
357 Of course, this is not to suggest that every failure to follow the Guidelines constitutes grounds for vacatur of an arbitral award. As discussed above, many courts use a more forgiving standard to adjudicate vacatur motions than the more exacting standards that the Guidelines are designed to satisfy. *See supra* Part II(B).
358 It does not appear that there is a meaningful difference between the “might create an appearance of partiality” standard contained in the Code of Ethics and the “impression of possible bias” standard articulated in Justice Black’s opinion in *Commonwealth Coatings*. Both have a similar threshold for disclosure. Thus, for ease of reference, we refer to the two standards collectively throughout this Part of the Article by using the language from the Code of Ethics, which, unlike the “impression of possible bias” standard, is applicable to all arbitrations in the United States. Any disclosure that complies with that standard should also satisfy the “impression of possible bias” standard in the jurisdictions where that standard is also applicable.
under the “appearance of partiality” standard. It seems obvious that a party would want to know if an arbitrator had taken action to connect with an opposing party or lawyer, or a witness whose credibility the arbitrator would be asked to evaluate, before deciding whether to select that arbitrator to decide the dispute. Even if an arbitrator takes a big-tent approach to social networking, the fact that she has taken steps to form a relationship with a participant in an arbitration suggests that there is at least something different about that relationship than the arbitrator’s relationships with the other participants in the arbitration, with whom she did not connect on social media. Of course, arbitrators are free to explain their general approach to social media engagement.

The research obligations imposed on arbitrators by the Guidelines should be practicable. The Guidelines should not impose unrealistic or unreasonable burdens on arbitrators. Accordingly, the Guidelines do not recommend disclosure of social media connections that are not known to the arbitrator or are discoverable through a reasonable search of the applicable social media platform. All social media searches contemplated by the Guidelines are technologically feasible, simple to execute, and not overly time consuming.

With these guiding principles in mind, we now set forth the Guidelines containing disclosure recommendations for each of the major social media categories, which the data suggest are likely to be relevant to arbitral disclosure. This Part concludes with a chart summarizing the Guidelines.

359 The Code of Ethics for Arbitrators in Commercial Disputes, supra note 9, at 4 [Canon II(A)(2)] (requiring disclosure of current or past relationships that might reasonably affect impartiality or independence “in the eyes if any of the parties”).

360 This approach is consistent with the Code of Ethics, which the founding joint committee “intended to be applied realistically so that the burden of detailed disclosure does not become so great that it is impractical for persons in the business world to be arbitrators, thereby depriving parties of the services of those who might be best informed and qualified to decide particular types of cases.” Howard M. Holtzmann, The First Code of Ethics for Arbitrators in Commercial Disputes, 33 Bus. Law. 309, 313–14 (1977).

361 The Guidelines expressly address six of the nine social media categories discussed in Part IV(A) of this Article, supra. The Guidelines do not make any specific recommendations with respect to the disclosure of arbitrator activity on review platforms, forums, and social bookmarking sites. See supra notes 320–27 and accompanying text. These platforms do not promote the same level of connectivity as the platforms expressly covered by the Guidelines, and based on existing data, are unlikely to be anything other than a de minimis component of an arbitrator’s social media activity. However, as discussed below, the catch-all provision of the Guidelines would require an arbitrator to disclose any known or reasonably discoverable ongoing relationships with arbitration participants on these platforms if they arose out of affirmative conduct of the arbitrator. See infra Part V(E).
A. Social Networks

Arbitrators should disclose whether they are Facebook friends—or the equivalent on other social networks—with any of the participants in an arbitration because it takes affirmative action on the part of the arbitrator to form such an ongoing relationship. A social network user must either send or accept a “friend” request to become connected to another user in this way.\footnote{362 See Adding Friends, FACEBOOK HELP CTR., https://www.facebook.com/help/246750422356731 [https://perma.cc/5HUY-U8PZ] (last visited Oct. 3, 2021) (explaining how to send a friend request).} Although two Texas state court decisions have suggested otherwise,\footnote{363 See supra Part III(A)(ii) (discussing and critiquing Prell v. Bowman and Sebastian v. Wilkerson).} it is hard to argue that such a mutual, voluntary, lasting association does not create at least an appearance of partiality. Parties to an arbitration have a right to know if an arbitral candidate has taken steps to make a participant in the arbitration part of her social network before deciding whether to select that arbitrator. Arbitrators also should disclose if they “follow” the pages of any arbitration participants. This is an activity that requires affirmative conduct by an arbitrator and might create an appearance of partiality. It seems safe to say that followers of people and organizations on social networking platforms either view them positively or have some greater level of interest in them than people and organizations they do not follow. This is suggestive of some level of partiality. Accordingly, the parties to an arbitration should be apprised of these connections.

While certain social networking relationships are superficial—and may only be the product of a brief, one-time, online interaction—others clearly are more meaningful. Because the parties cannot discern one from the other in an informational vacuum, and because the more rigorous disclosure standards assume the perspective of the parties to the arbitration, it follows that the parties should be provided with the information outlined above to enable them to explore the arbitrator’s social networking relationships if they desire to do so. As long as some ongoing social networking relationships have significance from an impartiality perspective—and some clearly do—then all ongoing social networking relationships involving affirmative arbitrator conduct might create an appearance of partiality from the perspective of the parties. If an arbitrator has a disclosable social media relationship that she
thinks would not affect her ability to remain impartial, she is free to offer that explanation in conjunction with her disclosure.

To ensure that they identify all disclosable social networking relationships, arbitrators should conduct a search of Facebook and any other applicable social networking platforms to determine whether (1) any of the arbitration participants are their friends (or the equivalent on other social networking platforms); and (2) the arbitrator follows any of the arbitration participants. For example, an arbitrator can determine whether she is “friends” with an arbitration participant by clicking into the “Friends” section of her profile page.\footnote{364}{See Control Who Can See What You Share, supra note 206 (describing the “Friends” section of a user’s profile). Citations to guidance provided by social media platforms refer to the platform’s website, rather than its mobile applications.} Within the “Friends” section, arbitrators can conduct a simple search to determine whether an arbitration participant is a “friend” by using the “Friends” section search bar.\footnote{365}{See How Do I Unfriend or Remove a Friend on Facebook?, FACEBOOK HELP CTR., https://www.facebook.com/help/17295689431357 [https://perma.cc/QDG9-2VKB] (last visited Oct. 3, 2021) (demonstrating how to search for “friends” in a user’s profile).} If an arbitration participant is a “friend,” the search will yield a link to her profile.\footnote{366}{Id.} The search will yield no results if the arbitration participant is not a “friend.” Arbitrators can also use this search tool to identify people or pages they follow.\footnote{367}{See How Do I Follow a Profile or Page on Facebook?, FACEBOOK HELP CTR., https://www.facebook.com/help/27645810935418 [https://perma.cc/C8YT-ZV22] (last visited Oct. 3, 2021) (providing instructions on how to “see who you’re following”).}

The remainder of an arbitrator’s social networking activity does not require disclosure under the Guidelines. Based on the current functionality of Facebook and other social networking platforms, it does not appear that there are other ways (at least that are commonly used) that users affirmatively establish lasting relationships with other users. For example, arbitrators should not have to disclose if any of the participants in an arbitration follow them or like their posts on a social network. These types of connections require no affirmative conduct by the arbitrator targeted at the participant in the arbitration. And while it requires affirmative arbitrator conduct to “like” content posted by an arbitration participant, that conduct does not result in a lasting relationship that might create an impression of partiality. “Liking” a post or a page is the equivalent of a one-time comment that does not give rise to the type of ongoing relationship that is disclosable outside
the social media realm.\textsuperscript{368} Thus, it need not be disclosed under the Guidelines. Similarly, an arbitrator should not have to investigate and disclose whether a participant in an arbitration belongs to a Facebook or other social networking group to which the arbitrator also belongs. As long as the arbitrator has not taken the affirmative step of “friending” or following that individual, mere common membership in a social networking group does not create an appearance of partiality.\textsuperscript{369}

B. Business Networks

In a similar vein, arbitrators should disclose (1) whether they are connected on LinkedIn or other business networks to any of the participants in an arbitration; and (2) whether they follow any of the arbitration participants on a business network. For an arbitrator to connect with another LinkedIn (or other business network) member, the arbitrator needs to either send or accept an invitation to connect.\textsuperscript{370} This is the type of affirmative action that, as discussed above, might create an appearance of partiality. While certain business network connections are less meaningful than others—some simply reflect a desire to indiscriminately accumulate contacts—some of these contacts arise out of actual past or present professional interactions. Thus, like the disclosable social networking relationships identified above, these business networking relationships might create an appearance of partiality from the perspective of the parties and should be disclosed. Arbitrators also should disclose if they follow any of the participants in an arbitration on LinkedIn or another business network. For the reasons set

\textsuperscript{368} The fact that users cannot readily search social media platforms for “likes” or retweets further supports not requiring such episodic interactions to be disclosed. See How Do I Use My Activity Log to Find Specific Things on Facebook?, FACEBOOK HELP CTR., https://www.facebook.com/help/170480839698876 [https://perma.cc/R83D-N2VZ] (last visited Oct. 3, 2021) (explaining how a user must scroll through the Activity Log to view their “likes” chronologically).

\textsuperscript{369} Of course, if an arbitrator actually knows an individual in her social networking group, she would likely be required to disclose that fact, as well as the nature of the relationship, separate and apart from the existence of the group on social media. The Guidelines simply take the view that common membership in a social networking group, standing alone, is not a social media connection that needs to be disclosed.

\textsuperscript{370} Your Network and Degrees of Connection, LINKEDIN HELP, https://www.linkedin.com/help/linkedin/answer/110 [https://perma.cc/4YBU-YHK4] (last visited Jan. 8, 2022) (“You can build your network by sending invitations to connect with other LinkedIn members and your contacts you’ve imported or by accepting invites from others.”).
forth above, this affirmative conduct by the arbitrator also might create an appearance of partiality. If an arbitrator has a disclosable business networking relationship that she thinks would not affect her ability to remain impartial, she is free to offer that explanation in conjunction with her disclosure.

To ensure that they identify all disclosable business networking connections, arbitrators should conduct a search of LinkedIn and any other applicable business networks to determine whether (1) they are connected with any of the participants in the arbitration;371 and (2) they follow any of the arbitration participants. Like Facebook, LinkedIn allows users to search their connections. By accessing “My Network” and then “Connections” within “Manage my network,” an arbitrator can search her connections using a search bar to determine if she is connected to any of the arbitration participants.372 Arbitrators can also use LinkedIn’s search bar, which is located at the top of all LinkedIn webpages.373 When an arbitrator searches for an organization—like a company or a law firm involved in an arbitration—a button will read “Unfollow,” if the arbitrator follows that organization, or “Follow,” if the arbitrator does not follow the organization’s page.374 Arbitrators can search for individuals they follow by entering the person’s profile and clicking on the ellipses button, which allows arbitrators to “follow” individuals they have yet to follow and “unfollow” individuals they do follow.375

Other activity on LinkedIn and other business networks does not qualify for disclosure under the Guidelines. For example, arbitrators should not have to disclose if any of the participants in an arbitration follows them or their law firm on LinkedIn or another business network. As discussed above, this type of connection requires no affirmative conduct by the arbitrator targeted at the participant in the arbitration.

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371 Id. (Connection is the LinkedIn equivalent of a “Friend.”).
374 See Follow and Unfollow an Organization on LinkedIn, LinkedIn Help, https://www.linkedin.com/help/linkedin/answer/3539 [https://perma.cc/P23P-X5K5] (last visited Oct. 3, 2021) (“You can follow or unfollow an organization from its LinkedIn Page or through search.”).
C. **Blogs and Microblogs**

Arbitrators also should disclose whether they follow the blogs or microblogs of any of the participants in an arbitration. It obviously requires affirmative action to follow someone’s posts; that is not a relationship that can be created without the willing participation of the arbitrator. As set forth above, when an arbitrator follows on Twitter (or another blog or microblog) a participant in an arbitration, it might create an appearance of partiality because the arbitrator has affirmatively chosen to receive a feed of content posted by that participant. If an arbitrator believes that the relationship would not affect her ability to remain impartial in the proceeding, she should offer that explanation in conjunction with her disclosure. Conversely, as set forth above, an arbitrator need not disclose if an arbitration participant follows her blog or microblog, unless the arbitrator’s privacy settings require her to approve follower requests. Such a one-sided relationship does not reflect any affirmative action by the arbitrator to connect with that individual and, therefore, does not create an appearance of partiality. An arbitrator also is not required by the Guidelines to disclose every time she likes, comments on, or shares (by “retweeting” or otherwise) the posts of arbitration participants. While these are affirmative actions on the part of the arbitrator, they do not result in the type of ongoing relationship that is analogous to a disclosureable relationship outside the social media space.

To comply with the Guidelines, arbitrators who are sufficiently active in the blog/microblog arena, to the point that they cannot recall all of the people and organizations they follow, should conduct a search of Twitter and any other applicable platforms to

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379 Presumably, an arbitrator who is not especially active in the blog/microblog space will recall which accounts she follows without needing to conduct an investigation of any kind.
determine whether they follow any of participants involved in the arbitration. Twitter’s search bar, on the top of the webpage, allows arbitrators to search for all participants in an arbitration. The button to the right of the search result will read “Following” if the arbitrator follows the arbitration participant; it will read “Follow” if the arbitrator does not. Since some users who post content on Twitter and other microblog platforms have account names that are different from their real names, an arbitrator may not be able to identify every account linked to a participant in an arbitration by means of a reasonable search. It is not reasonable to expect an arbitrator to do more than conduct a search of the accounts she follows using the actual names of the arbitration participants that are disclosed to her. An arbitrator should disclose the fact that she follows the blog or microblog of a participant in an arbitration if she (1) recalls it from memory; or (2) discovers it based on a search using the actual names of the participants. An arbitrator would not violate the Guidelines if it turns out that she unknowingly follows a participant whose Twitter (or other) handle does not contain her real name, and, therefore, is not discoverable through a name-based search of the platform.

D. Photo- and Video-Sharing Platforms

The approach of the Guidelines to the identification and disclosure of connections on photo- and video-sharing social media platforms tracks its approach to the other social media categories discussed above. If an arbitrator follows or subscribes to an account associated with a participant in an arbitration, she should disclose these connections. These connections all require affirmative conduct by the arbitrator and give rise to lasting connections. Thus, they might create an appearance of partiality. Photo- and video-sharing platforms enable users to conduct searches to identify the usernames of the accounts on the platform that they follow.


and the accounts to which they subscribe.\footnote{Using the search bar on a video- or photo-sharing platform website, arbitrators can search usernames to determine if they follow or subscribe to a user’s profile or channel. \textit{See Find Your Way Around YouTube}, \textit{YouTube Help}, https://support.google.com/youtube/answer/2398242 [https://perma.cc/N9VC-NW6U] (last visited Oct. 3, 2021); \textit{How Do I Search on Instagram}, \textit{Instagram Help Ctr.}, https://help.instagram.com/1482378711987121 [https://perma.cc/RYD9-K5BX] (last visited Oct. 3, 2021). YouTube searches return search queries with a button reading “Subscribed” or “Subscribe.” \textit{Subscribe to Channels}, \textit{YouTube Help}, https://support.google.com/youtube/answer/4489286 [https://perma.cc/75P-3RM9] (last visited Oct. 3, 2021). In Instagram searches require the user to click into a profile to determine whether the user “follows” the profile. WikiHow Staff, \textit{How To Follow Someone on Instagram}, wikiHow (June 29, 2021), https://www.wikihow.com/Follow-Someone-on-Instagram [https://perma.cc/W9RR-QPTP]. On the Instagram mobile app, if the user follows another user’s profile, then a button below the profile name will read “Following.” \textit{Managing Your Followers}, \textit{Instagram Help Ctr.}, https://help.instagram.com/269765046710059 [https://perma.cc/9V5X-8W7K] (last visited Oct. 3, 2021). If the user does not follow the profile, the button will read “Follow.” \textit{How To Follow Someone on Instagram, supra}.} Arbitrators should conduct a search of Instagram, YouTube, and any other applicable platforms using the actual names of the arbitration participants to determine whether they follow any of participants involved in the arbitration.

On the other hand, merely liking or commenting on photos and videos posted on a photo- or video-sharing platform is not within the scope of disclosure because such conduct does not create a forward-looking relationship that might create an appearance of partiality. An arbitrator also should not have to disclose whether a participant in an arbitration has engaged in unilateral conduct to follow or view content she has posted on Instagram, YouTube, or another photo or video-sharing platform because such one-sided conduct also does not create an appearance of partiality on the part of the arbitrator.

\section*{E. The Catch-All Provision}

While the Guidelines attempt to provide thorough coverage of the current social media landscape, we recognize that the environment is highly dynamic.\footnote{\textit{See supra} Part IV(A).} Thus, to account for scenarios and social media categories not specifically addressed by the Guidelines and to anticipate new social media categories that have not yet arrived on the scene, we add a catch-all provision. In the event that an arbitrator must decide whether to disclose social media connections with participants in an arbitration that are not expressly addressed in the Guidelines, she should disclose any known or
reasonably discoverable ongoing relationships—as opposed to episodic interactions that do not result in ongoing connectivity—arising out of her own affirmative conduct. This hews to the core principles of the Guidelines by focusing on relationships created, at least in part, by the affirmative action of the arbitrator—which, as set forth above, are the contacts that might create an appearance of partiality—that are either known to the arbitrator or discoverable through a reasonable search.

VI. CONCLUSION

There is a glaring void in the statutes, rules, and cases addressing the disclosure of conflicts of interest by arbitrators. Those authorities do not provide meaningful guidance on how to handle the disclosure of arbitrators’ social media activity. This chasm jeopardizes the durability of arbitral awards—which will increasingly be challenged based on undisclosed social media activity—and threatens, over time, to undermine the integrity of the arbitrator selection process. It also pollutes the marketplace for arbitral services, where arbitrator social media disclosures are uneven and difficult to interpret by parties and their counsel. The problem will be solved if arbitrators simply follow the Guidelines, which yield clear, consistent disclosure decisions regarding social media activities that are the subject of inconsistent treatment today. For example, the four hypothetical scenarios introduced at the outset of this Article, which would be difficult to navigate in the current rudderless disclosure environment, have clear outcomes under the Guidelines:

- Absent a disclosable relationship outside of social media, Arbitrator A is not required to disclose her “likes” of social media content posted by attorneys and law firms involved in an arbitration. These likes do not give rise to a lasting relationship that might create an appearance of partiality.

- Arbitrator B is required to disclose the fact that she is connected on LinkedIn with a lawyer involved in the arbitration. That connection is the product of Arbitrator B’s affirmative conduct and results in an ongoing relationship. Arbitrator B can explain her liberal approach to social networking in her disclosure.
Absent a disclosable relationship outside of social media, Arbitrator C does not have to disclose the fact that an arbitration participant has retweeted her Twitter posts for two reasons: (1) Arbitrator C did not engage in any affirmative conduct to connect with the lawyer who retweeted her posts; and (2) a retweet does not give rise to an ongoing relationship that might create an appearance of partiality.

Arbitrator D does not have to disclose that she belongs to the same Facebook group as a party representative in an arbitration because Arbitrator D did not take any affirmative action to connect with that arbitration participant.

Although social media is a fluid environment, the Guidelines and their undergirding principles are sufficiently flexible to provide arbitrators with disclosure guidance that will be applicable to future updates and platforms not yet in existence. The clarity provided by the Guidelines should be beneficial to arbitrators, arbitration participants, TPAs, and the integrity of the arbitration process as a whole.
**Disclosure of Social Media Activity**

<table>
<thead>
<tr>
<th>Conduct</th>
<th>Affirmative Conduct?</th>
<th>Ongoing Relationship?</th>
<th>Disclosure Required?</th>
<th>Social Media Category</th>
</tr>
</thead>
<tbody>
<tr>
<td>Friendship, connection, or other bilateral relationship between arbitrator and participant</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Social Networks, Business Networks, Blogs &amp; Microblogs</td>
</tr>
<tr>
<td>Arbitrator follows, likes, or subscribes to participant’s account</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Social Networks, Business Networks, Blogs &amp; Microblogs, Photo/Video Sharing Sites</td>
</tr>
<tr>
<td>Participant follows, likes, or subscribes to arbitrator’s account</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
<td>Social Networks, Business Networks, Blogs &amp; Microblogs, Photo/Video Sharing Sites</td>
</tr>
</tbody>
</table>

385 Disclosure is required when social media conduct by an arbitrator (1) involves affirmative conduct that (2) results in an ongoing relationship that might create an appearance of partiality.

386 Not all platforms within a social media category will allow the same conduct. Social media categories are included in this column if at least one current platform within the category permits the conduct at issue.

387 Although public blog/microblog users do not require the approval of “follow” requests, private accounts may require an arbitrator to expressly approve a follower request.

388 Following, liking, or subscribing to a user’s social media account or profile page reflects an affirmative choice by the arbitrator to receive that user’s shared content indefinitely until the arbitrator unfollows, un-likes, or unsubscribes from the user. This is in contrast to merely liking a user’s post, which is the equivalent of a one-time comment and does not create an ongoing relationship.
The exchange of a message on social media—like a passing comment on the street—does not, standing alone, indicate the existence of an ongoing relationship. However, if messaging is sufficiently frequent, it might suggest the existence of a disclosable relationship outside of social media.