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Practice Management

I am Begging You: *Don't Look Like an Idiot on the Web!*

by Jennifer Ellis

Please pardon my harshness, but I'm amazed by the number of people who manage to make themselves look like fools on the Web! I ask myself: do they not *know* they look like fools? How is this possible?

If you've managed to get yourself into adulthood (well, even if you haven't), I am begging you: *please don't make yourself look like an idiot on the Internet*.

One thing is certain about the Web: if you post it, it will never go away. Just ask the Way Back Machine about the number of really cheesy looking Websites it has managed to catalogue. Were you a huge Vanilla Ice fan? Did you decide to make a Vanilla Ice Website? Yeah. Someone is gonna find that and show it to the world – guaranteed. You can also take a look at Spokeo, which will happily pull all of the information it can find on you into one convenient, humiliating place.

There are people out there who just love to get every piece of embarrassing data they can find about someone else. All they need is a reason to do so, and you will never know what that reason will be. Numerous people have gotten themselves fired, expelled, you name it – all because of what they've posted on Facebook. Don't believe me? Try this search in your favorite search engine: *Facebook fired*.

See what I mean?

You must understand that, as soon as you post it – especially if it's really juicy and undignified – someone will find it and post it again. This often occurs at the very time you don't want it to reappear: for example, when you're running for political office, or someone wants to get you fired, or someone is considering using your services. You name it; it will come up.

Think you're anonymous? Nope. Case-in-point? There's a group out there that can find anyone – and I mean *anyone*. For example, when someone decided it would be a good thing to toss a cat into a garbage bin (http://aol.it/Na1LEX), the group harassed her so badly the target went to the police and turned herself in. All it took was a picture, and the research machine started to spin; next thing you know everyone knew the identity of the fiend who tossed the cat into the trash. Her life was ruined before you could say 4Chan.

Thankfully, most people aren't going to toss a cat into a garbage bin (something I appreciate since I like cats), but many people still manage to make themselves look really stupid online. When I teach ethics or speak with new lawyers, I constantly remind them, as my professors reminded me, there is nothing, and I mean *nothing*, more important than your reputation. Why mess it up with online antics where millions and millions of people (or at least your mom) can see your mistake?

So just how do you avoid making yourself look like an idiot online? Here are some helpful hints.

1. Consider your username/email address. Business email address: hotpants69@aol.com. Good idea? Um, no. It's also not a great idea to be smellycat33@aol.com. Really, it's not good to be anything @aol.com, but that's a conversation for another day.

2. Choose your profile picture carefully. How many of us want to be friends with someone who has a shirtless or low cut shirt image as a profile picture? Should we "like" a Facebook page even if we aren't friends? The page manager can see your profile picture. A lot of people can see your profile picture.

Bottom line: don't have an offensive or questionable picture of any kind as your profile picture. Just kidding? Doesn't matter, because at least some people won't know you're not serious. You can also embarrass other people you "friend" if your picture is offensive and other people see it when you post on their pages. In fact, you might find people un-"friending" you if your picture offends them.

Jennifer Ellis

3. Consider what you will say. Again, joking gets people into trouble. When you're communicating online, people can't see your body language, or they just might not think you're funny.

My father always told me to avoid politics and religion. You might, depending on your practice, want to avoid discussing either. This one depends on what you do and your client base.

Also, watch your language. Swearing might be fine for some people, but not for others. If you must figuratively have your online mouth washed out with soap, it won't look professional.

Be particularly cautious about what you post on other people's pages. You won't just embarrass yourself, you'll embarrass your friend or colleague. You may even lose the friend(s).

4. Watch the information you post. Do you really want potential clients and business people to know you got drunk last week? Does that suggest you're a competent attorney? Do you really need to post a picture of yourself in questionable condition? If you went to a strip club last weekend, do you want the world to know?

(continued on page 4)

Alternate Dispute Resolution

Compulsory Judicial Arbitration: *An Arbitrator/Litigator's Top 10*

by Steven M. Williams

I've observed many things in arbitration practice: some good, some not so good. Having served two terms as an arbitrator for the Dauphin County Court of Common Pleas, and having tried many cases before arbitration boards in various counties, I've developed a personal list of considerations for litigants to use before going to compulsory judicial arbitration (shortened throughout this article to "arbitration").

The Judicial Code, 42 Pa.C.S. § 7361 ("Code"), Pennsylvania's Rules of Civil Procedure §§ 1301 *et seq*. ("Rules"), and the local rules of the various courts of common pleas govern arbitration in the Commonwealth. Adequate preparation for an arbitration proceeding requires familiarity with all of these provisions. However, good strategizing, professionalism, and common sense play a large role as well. Without further ado, here are my Top 10 arbitration considerations:

1. Is your case subject to arbitration?

Generally, the local rules of the various courts of common pleas govern what cases are subject to compulsory arbitration. These local rules may address not only substantive matters, but also the amount in controversy.

Substantively, the Judicial Code provides only that cases involving title to real estate are not subject to arbitration; everything else is fair game. It is generally accepted, however, that arbitrators do *not* have the authority to grant equitable or declaratory relief. So, for the most part, cases involving such issues are not subject to compulsory arbitration.

Notwithstanding these general rules, litigants have avoided the arbitration step on occasion. Here's one example:

Many years ago, I was involved in an eviction case. Rather than listing the case for arbitration, I went right to a bench trial. After defense counsel objected to my filing, the judge asked him, "Look, if you lose at arbitration, are you gonna just appeal and end up here anyway?" When defense counsel answered in the affirmative, the judge heard the case.

The Judicial Code also provides that cases in which the amount in controversy (not including interest and costs) exceeds $50,000 are not subject to arbitration. In many counties, however, courts of common pleas by local rule have lowered the threshold.

2. Know the court's local rules.

Neither the Judicial Code nor the Rules offer much in the way of procedural insight. Rather, the local rules of court provide most of the necessary information: for example, how when must a case for an arbitration Some of the local rules tell us what to use, and some court calendars prescribe dates by listing must occur for the case to be for a hearing.

Steven M. Williams

In addition, the local rules tell us who the arbitrators may be. Does the court appoint them on an *ad hoc* basis, or does it empanel its arbitrators to serve for two-year terms? Dauphin County, for example, publishes the arbitrators' identities and the months in which they sit for hearings. Thus, you may list an arbitration case strategically to avoid (or ensure) the presence of a particular arbitrator and that the case is heard during a particular week. By contrast, in other counties, you may not know the identity of the arbitrators until the case is listed for arbitration, so you may have no input on the scheduling.

Finally, some courts' rules require litigants to give notice to the other parties

(continued on page 5)

Practice Management *(continued from page 1)*

Lots of us may dress up in a crazy costume for Halloween. Do you want both those you know and complete strangers to see you in that costume?

5. Watch your temper. It's very easy to get annoyed, especially in the middle of a bad day. But remember, what you post today could come back to haunt you tomorrow. Is it worth venting now if you'll have to pay for it later?

If you're really mad, write a post or message, save it, and come back to it later. Then review and edit your post. By the time you're ready to send it, you might just find you don't feel the need to respond any more. Others may already have said what you wanted to say. And they might have said it more politely – or not, but that is their problem.

6. Watch what other people post about you. Friend posted a picture of you at the strip club? Ask the friend to take it down. Cameras are everywhere – keep that in mind when you're out and about. Random people love to take embarrassing pictures of other people and post them online. Check out sites such as Fail Blog.

7. Remember that listservs aren't confidential. It's easy to forget that listservs are public. They seem like they are just conversations between a private group of people; they aren't. Many listservs are archived, and some of these archives are publicly accessible. And anyone on the list could forward any list email.

Forwarded emails can cause a great deal of grief. There are myriad examples of attorneys getting into trouble – even losing their jobs – due to indiscreet postings. Email battles on listservs are notorious for lasting for long periods of time. Just as an argument seems to be simmering down, someone pops up to add his or her two cents, then someone who was on vacation comes back and feels the need to comment. These arguments can hijack a list and annoy everyone. They can also end up posted on blogs, forwarded, or archived. Bottom line: avoid getting

(continued on page 5)

Alternate Dispute Resolution (Continued from page 4)

before a case may be listed for arbitration. In those counties, the failure to provide the required notice could be grounds for striking the case from the arbitration list.

3. What if you need a continuance?

Technically, only the court may grant a continuance, and some counties require a formal motion for continuance. In many counties, however, the arbitrators may grant continuances and work with the parties to find an acceptable hearing date. I've seen many arbitration panels tell the party who needs a continuance to coordinate all parties' and arbitrators' calendars and notify them when the hearing will be held.

4. Show up for the hearing!

It's obviously important that parties show up for the hearing. In more than a few of the hearings over which I have presided, however, one of the parties has failed to appear, either in person or through counsel. Arbitration panels used to have little discretion over what to do in such cases. Often, they merely removed the case from the arbitration list (because arbitration panels don't have the authority to enter a non-suit or non-pros).

The amendment to Pa.R.Civ.P. 1303(a)(2) in January of 1999, however, allows local courts to establish a procedure by which the court can hear an arbitration case if one or more of the parties fails to appear. For that to happen, however, a notice of that possibility must be included with the hearing notice sent to the parties. If the court hears the case, the losing party no longer has the *de novo* appeal right that normally accompanies arbitration.

5. Take the arbitration hearing seriously.

I've unfortunately witnessed many cases where counsel wasn't prepared or the parties didn't seem interested in their own cases, and the participants were apparently present solely to get to the next step: a jury trial. In one case over which I presided, it was apparent that the plaintiff's attorney hadn't even met his client prior to the morning of the hearing. He had no idea what injuries the client had sustained, was unaware of the medical treatments the client had undergone, and had no clue as to the relief his client was seeking.

In another case, the plaintiff's attorney admitted to the arbitration panel that his case had no merit; still he pleaded with the panel to allow the case to go forward, because he was "afraid of what his client might do if he doesn't get his day in court." Defense counsel agreed to put on a case, but, in a humorous twist, the defense rested after asking his client to identify herself on the witness stand.

The arbitration process serves a beneficial purpose, actually resolving most cases tried at that level. And of the cases not resolved in the way a party wanted, many are settled rather than appealed, because the parties have "had their day in court."

Counsel and their clients should treat the process as they would a court hearing: prepare for the case and put their best case forward. Arbitration isn't just another step needed to get to court; it should not be used to appease clients whose cases shouldn't have been filed in the first place.

6. Consider arbitration to be part of your discovery plan.

Due to the lower amount in controversy, counsel are frequently hesitant to engage in protracted discovery in arbitration cases. In many of these matters, the parties know from the start that, whatever the award, there will be an appeal and a trial in common pleas court.

I've tried, and presided over, a number of arbitrations in which the hearing appeared to be more of a discovery tool than an adversarial contest. Cross-examinations in these cases were much like depositions. In many, one or more of the parties even brought in court reporters to transcribe the testimony for later use at trial.

While the arbitration process clearly was not designed to be a discovery tool, we can't deny that the hearing is a great way to discover other parties' evidence. I'm not suggesting that we should disregard the decisional nature of an arbitration hearing – or that we should begin using hearings merely for discovery purposes. I am suggesting, though, that counsel consider the benefits in preparing for trial that one may reap at the arbitration hearing.

7. Prepare your client for the realities of an arbitration hearing.

In many counties, multiple hearings are scheduled to occur at the same time, in a "cattle call" format. While sometimes, after speaking with counsel who have the cases before us on the list, we can gauge how long the wait may be, there's no safe way to avoid being prepared to proceed at the appointed time, even though our case may not actually be heard until hours later. This uncertainty often causes client frustration, because not only is the wait inconvenient for the parties and their witnesses, but for those attorneys and witnesses who bill by the hour, the client can see the clock ticking during the entire

(continued on page 8)

Practice Management (continued from page 4)

drawn into email battles.

Everything I've said is basic common sense; you get the idea. The main reason people end up hurting themselves online is that they simply forget who is seeing what they're posting, or how easy it is to share a silly or obnoxious post, picture, or video. It's one thing to tell a friend at a cocktail party a joke; it's another to post something obnoxious online with the potential to reach thousands, even millions, of people.

No matter how private you think it is, the Internet is simply not a private place. Ignore that at your peril; the corpses of numerous reputations and careers are chronicled at Above the Law or available after doing a quick search on Google.

So please, folks, take a few simple precautions. Avoid embarrassing yourself, your firm and your mom.

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wait.

The length of the hearing or the apparent disinterest of some of the arbitrators may also be frustrating. Whereas clients rightly expect a full hearing on their case by fact finders who are interested and paying attention, sometimes the opposite is true. Especially in the "cattle call" counties, arbitrators are sometimes rushed to get through a long case list in a short timeframe. In this situation, disgruntled clients should not be a surprise.

Alert your clients to the realities of the process long before the arbitration hearing. More often than not, clients who've had full disclosure ahead of time are less frustrated. An added benefit is that they may be more helpful in helping to strategize a streamlined presentation of their cases.

8. The Arbitration Memorandum

Both as an arbitrator and an advocate, I've been surprised at how few attorneys prepare arbitration memoranda, and of those who do, how many wait until the hearing day to provide the memorandum to the arbitrators. Perhaps this is because there's no state rule that provides for arbitration memoranda, and few counties' local rules address them. But a memorandum is generally helpful to the arbitrators, and could even help to determine the case.

Memoranda may preview the evidence, argue the anticipated legal and evidentiary issues, and provide copies of relevant documents. A good memorandum can go a long way toward proving a party's case before a rushed hearing to present it. But the benefits that may flow from a memorandum are almost always minimized unless the arbitrators have a copy in advance of the hearing.

In most cases, the arbitration panel will make a decision on the cases it hears before ending the day or term, while the evidence is fresh in their minds. In most cases, there's simply not enough time for the arbitrators to read a memorandum supplied on the day of the hearing. And I can't recall a case in my experience where the panel agreed to delay the decision so that the members could review a party's memorandum.

9. You want to admit *what* evidence?

Generally speaking, the rules of evidence apply to arbitration hearings. There are two exceptions to this, however. First, in practice, some arbitration panels are somewhat (or for some, overly) relaxed in applying them.

Second, Rule 1305 provides that the arbitrators must accept certain documents into evidence without authentication or certification, so long as the admitting party provided notice of the intended admission, together with copies of the documents, to the other side at least twenty-one days before the hearing. If the admitting party had previously provided copies of the documents to the other side, even where there was no notice, the arbitrators may still (but are not required to) admit the documents without authentication or certification.

Rule 1305 is important because it allows for a more streamlined presentation, as fewer witnesses may be required to testify at the hearing. In cases where the amount in controversy is $25,000 or less, the admission of the documents specified in Rule 1305 may be admitted at trial without authentication or certification, as well.

Note that this Rule in essence requires that counsel prepare for the arbitration well in advance of the hearing date. In the busy lives of some lawyers, this doesn't always happen. But the failure to consider Rule 1305's notice requirement will frequently require the attendance of authentication witnesses, meaning more time needed to present the case.

10. Consider the appeal.

Appeals from arbitration panels are a matter of right, heard *de novo*. In many cases, though, the question should be whether an appeal is a good idea. Many times, a losing party is willing to accept the arbitration decision because he feels his case has been heard and given due consideration.

Sometimes, though, parties want an appeal simply because they're entitled to one. Unlike traditional appeal situations, the parties in arbitration appeals usually have no way of knowing why the panel entered its award. In fact, in all of the arbitrations in which I've participated, never have the arbitrators provided any rationale for their decision.

Knowing why the arbitrators entered the award may assist the parties in determining whether an appeal is appropriate. While the Rules are clear that arbitrators may not be called to testify about what happened at the arbitration, even for impeachment purposes, arbitrators may frequently be willing to discuss the rationale behind their award with the parties. Don't hesitate to contact the panel members after the award has been entered to ask why they made the award. Their response may play a significant role in your appeal decision.

Final notes:

The compulsory arbitration process is sometimes frustrating and burdensome, so it's imperative that practitioners know the procedural rules well in advance of the hearing to avoid the "bumps in the road." Equally important to a successful experience is ensuring that clients are fully aware of the realities of arbitration practice.

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SAVE the DATE!

PBA Committee/Section Day

Thurs., Nov. 15, 2012

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