



In this Issue:

Feature Articles	1, 5
President's Message.....	3
New Members.....	3
Advertising Opportunity	8
Board of Directors.....	10



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10 Must-Haves in a Social Media Policy: Implementing a Policy that Dealerships Will "Like"

By Jami Farris, Parker Poe Adams & Bernstein, LLP

The social media phenomenon is continuing to explode. Facebook has almost 700 million users worldwide--approximately 150 million in the United States alone. Twitter has almost 175 million users, and LinkedIn has just reached the 100 million mark. The jury is still out on whether dealerships increase sales through social media. However, based on statistics, it is safe to conclude that dealership employees maintain personal pages. When the employees' online personal and professional identities overlap, the dealership faces potential liability. Even if dealerships do not want to jump on the bandwagon to market through social media, it is imperative that they implement a Social Media Policy to regulate their employees' use and protect their companies from liability.

A Social Media Policy has to balance the employees' right of free speech with the

employer's right to protect the company image. The dealership's ability to discipline its employees for disloyalty, insubordination, harassment, violation of company policy, and revealing confidential or trade-secret information extends to social media. In fact, the National Labor Relations Board has recognized the right of employers to limit employee activity on social media sites, as long as the policies do not prohibit organizing labor unions or engaging in concerted action. The key is to have a clear policy that is easily enforceable and is actually enforced by the dealership. The following are ten guidelines to consider when drafting a Social Media Policy for a dealer client.

(1) Use far-reaching definitions. Mark Zuckerberg, founder of Facebook, claims that Facebook will continue to be popular and relevant because it is ever evolving. This concept extends to all social media providers, so to avoid revisiting the Policy every few months, it needs to be far-reaching. To broaden the scope, "social media" should be defined generally to include, but not be limited to, social networking sites, blogs, video and photo sharing sites, review sites, and chat rooms. More inclusive definitions will preserve the Policy's viability when the next big social media site or technology is released.

(2) Make the dealership's monitoring of social media usage known. State that the



dealership will monitor employees' usage of social media sites and include the right to edit or delete postings on dealership-sponsored sites. Although there is nothing prohibiting an employer from requiring an employee to provide access to a personal page, this is not a recommended practice. In January of this year, the ACLU filed a complaint on behalf of a Maryland Department of Corrections employee who was required to provide his login and password information to his personal social media pages as part of a review process. In response to the complaint and the negative publicity, the Maryland DOC voluntarily revised its policy. The lesson learned is that the potential negative fallout is not worth the information that may be gained. However, if an employee does not have privacy settings on his or her pages, anything learned from those pages is fair game. A good Policy will encourage employees to be responsible and vigilant with their own personal pages in order to avoid spillover liability to the dealership.

(3) Identify a single individual or group responsible for monitoring. If the dealership uses social media to market or advertise, it should identify a specific person or group to be responsible for populating and

monitoring the dealership pages. A central social media authority helps ensure that dealership-sponsored postings are compliant with, among others, FTC regulations and state laws concerning advertising. In the event that a consumer posts on a dealership site, it is best to have one person respond to them to not only ensure an accurate, professional, and management-endorsed response, but also to prevent employees from getting personal or inappropriate.

(4) Prohibit employees from establishing a personal page on behalf of the dealership. The dealership should prohibit employees from establishing personal pages on behalf of the dealership (e.g., a Facebook page for "Joe Doe at XYZ Chevrolet"). The dealership would lack control over the content and use of the site, which could be mistaken as an official company page. Additionally, social media providers will sometimes merge similar pages. Therefore, if the dealership has a page, it could involuntarily be merged into the employee's site, leading to the same concerns as with an employee's personal site.

(5) Identify with specificity the categories of prohibited topics. Although we recommend using far-reaching definitions within the Policy, in order to be effective, a Social Media Policy must identify with particularity all prohibited topics. To avoid challenges to the Policy as overly restrictive with respect to free speech considerations, the Social Media Policy should list specific categories of prohibited topics to be disclosed or discussed. Among those we suggest are financial information, pricing or sales data, promotions, legal information, customer or employee information, as well as the catch-all "other confidential information." We also recommend prohibiting the posting of trademarked or copyrighted material (belonging to the dealership or anyone else), disparaging comments of the company, customers, or other employees, and offensive or actionable statements. As noted above, in no event should a policy attempt to regulate postings concerning organizing labor unions or concerted action. There is no obligation to

alert employees that this speech is permitted, so there is no need to make reference to it in the Policy in any way.

(6) Require employees to identify their employment status when posting either on a dealership-sponsored site or as a dealership employee. Employees should also be required to identify all opinions or postings as their own. In no event should a employee, directly or through others, "shill"-pose as someone else when posting, such as a satisfied customer. Such actions are subject to FTC penalties and could result in negative press for the dealership.

(7) Prohibit employees from sending SPAM through social media sites. The CAN-SPAM Act requirements and penalties extend to Internet activities. Both Facebook and MySpace have asserted this Act in actions against Spammers, resulting in awards of millions of dollars in damages, plus attorneys' fees. Accordingly, in the context of a dealership's official page, communications should be sent only to those individuals who have signed up as followers or who have "liked" the dealership's page. In the context of an employee's personal pages, no advertisements or communications on behalf of the dealership should ever be transmitted.

(8) Identify restrictions for use during company time. The vast majority of employees can access social media from their personal phones such that an outright ban on all social media in the workplace may be counterproductive. Some restrictions are important, however, in order to set boundaries for use during company time and on company equipment. It is important to identify all restrictions on timing or use of social media on company equipment with particularity. For example, games, videos, and chats that are unrelated to work should be prohibited. Regardless of the particular restrictions, they need to be clear, easily understood, and actually enforced by the dealership.

(9) List consequences for violation of the Policy. It is imperative for the dealership to identify the potential consequences to its



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employees for violation of its Social Media Policy. This section of the Policy should include a range of consequences, up to and including termination. The Policy can and should be made part of an employee handbook. However, if employee handbooks are not going to be redistributed, require employees to sign their acknowledgement of and agreement to the Policy.

(10) Identify a person employees should consult if they have a question about the appropriateness of a posting prior to that posting. Although the common sense rule is if it questionable, it probably should not be posted, not everyone has the same measure of common sense. We recommend someone in management be selected to make the decision about what is or is not acceptable to the dealership. Additionally, this person should be identified as an outlet for employees to share and report postings they feel require a response from the dealership. This provides an alternative to employees who may be tempted to respond.

It is abundantly clear that social media is and will continue to be a significant part of the business and advertising world. So in order to provide employees with guidelines on their use and to protect your client from potential exposure to liability, we recommend the implementation of a Social Media Policy using these ten considerations. Your Policy should appeal to the employees' common sense and remind them that they are representatives of the company. As such, they are required to be truthful, respectful, and professional in their postings. Remind them that postings are forever. Most importantly, as for any policy, the dealership must follow the Social Media Policy and apply it consistently to preserve its viability and enforceability. ■

Jami Farris is a Partner in the Charlotte office of Parker Poe Adams & Bernstein, LLP. Jami Farris handles commercial disputes in state and federal courts and arbitrates before the American Arbitration Association and the National Arbitration Forum.

President's Message



*Patricia E.M. Covington
Hudson Cook, LLP
NADC President*

Along with football season, nature's spectacular display of fall colors and readying for cooler weather, there is another annual fall activity to consider – the Fall Conference of the NADC! In prior years we have called this event a “workshop”; but we're shedding that name to more accurately reflect the true character of the event. While our first NADC fall event was a small meeting focused on one topic, in most recent years, this event has had a full roster of current and “hot” topics, plenty of networking opportunities, along with opening and closing socials. We do most all of this in one day – in a city where it's feasible to get in and out of quickly, and hopefully, easily.

This year's event will be in Chicago, on October 10th. We're returning to the Trump Towers because they've treated us so well (and pretty economically for Chicago) the last couple of meetings. What will we be talking about? Well, here are the topics slated for presentations:

- Spot deliveries,
- Arbitrations and class action waivers,
- Issues that arise in the closing of a buy-sell,
- The government's new assertiveness in employment matters,
- New ways manufacturers are pressuring dealers, and
- NADA's update on developments that affect dealers.

But, this list isn't exclusive. As with all our other conferences, there are impromptu sidebars happening all over the place on many other topics – issues that members

are in the midst of grappling with. This is just one of the benefits of attending our fall conference – you are in the company of colleagues who work with dealers and encounter many of the same issues you do. That's not easy to find in our specialty practice of representing dealers.



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While it's great to ask questions on the member ListServ – nothing can beat in-person discussions, putting faces with names so you feel more comfortable picking up the phone to call a colleague, learning what others do to have referrals handy (or even be a referral yourself!), and exploring the products and services our Associate members offer to you and your clients. These are additional benefits of attending our fall event.

We'll be starting off with an opportunity to reconnect with old friends and meet new ones at our opening cocktail reception, sponsored by The Fontana Group. Monday morning we'll start bright and early, well-nourished with a breakfast sponsored by CounselorLibrary.com. And, the folks at Dixon Hughes will make sure you continue bright-eyed throughout the day by sponsoring our coffee and refreshment breaks. Rosenfield and Company want to make sure our conference materials are easy to carry home and always available by sponsoring the USB/thumbdrives.

We'll be meeting in the Trump Towers' Grand Ballroom that Auto Dealer Law is sponsoring. Finally, to make sure you leave feeling "decompressed" from all the learning you'll be doing, the Anderson Economic Group is putting on a closing cocktail.

So, as you can see – this fall event is a full-fledged conference!

If you get an opportunity, please give thanks to the Planning Committee, our sponsors and Erin Hussey, our Executive Director, who have contributed a lot of time, money and energy to ensure we have a well-balanced "curriculum," good drink and food, along with opportunities to socialize and network. So you know who to thank, our Fall Conference Planning Committee members are Rob Cohen, Jeff Ingram, Paul Metrey, Andy Weill, Mike Charapp and Shawn Mercer. My personal thanks to all of you, our sponsors and Erin!

I hope to see you in the windy city! ■

Patty Covington



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Evident Partiality: Reversing Arbitration Awards Based on Presumed Bias

By Mark A. Counts, Counts & Bonacci, LLP

Feature Article

Judicial review of an arbitration award is severely restricted. However, the Federal Arbitration Act (FAA) permits a court to vacate an arbitration award where there is “evident partiality or corruption in the arbitrators.” 9 U.S.C. § 10(a)(2).¹ Courts examining this section have generally found “evident partiality” where an arbitrator has failed to disclose information involving a “significant compromising connection” to one of the parties. See, e.g., *Positive Software Solutions, Inc., v. New Century Mortg. Corp.*, 476 F.3d 278 (5th Cir. 2007) (*en banc*).² Importantly, under the “evident partiality” standard there is no requirement to prove actual bias. *Id.* Rather, the “evident partiality” standard can be met by proving a mere “**appearance of bias**.” See *Commonwealth Coatings Corp. v. Cont'l Gas Co.*, 393 U.S. 145, 150 (1968).³

A recent example of “evident partiality” can be found in *Dealer Computer Services, Inc. v. Michael Motor Company, Inc.*, 761 F.Supp.2d 459 (S.D. Tex. 2010) (“DCS”).⁴ In this case, the United States District Court for the Southern District of Texas⁵ found that “evident partiality” was present where a party-appointed arbitrator failed to fully disclose her service in a prior arbitration involving one of the litigants. *Id.* The facts underlying the case showed that the plaintiff, a DMS vendor, had been sued in an arbitration proceeding by an automobile dealership which alleged that the vendor had breached a DMS agreement. Pursuant to the parties’ written contract, the American Arbitration Association was chosen to administer the arbitration. The contract’s arbitration clause called for an arbitration panel consisting of three **neutral** arbitrators, including one appointed by each party.

Under the AAA’s rules, each arbitrator was required to submit a response to a standard questionnaire regarding impartiality. The DMS vendor’s party-appointed arbitrator failed to disclose that she had served as an arbitrator in a prior case between the vendor and another automobile dealership. She further failed to disclose that she had been exposed to certain facts and expert witnesses who had testified on the vendor’s behalf. In response to the questionnaire, the vendor’s party-appointed arbitrator answered “NO” for every question except two. In response to one question the arbitrator stated that the vendor’s representative had appeared before her in the past. In response to a second question,⁶ the arbitrator answered neither “YES” nor “NO.” Rather, she placed a question mark between the possible responses.

The vendor’s party-appointed arbitrator did include this

statement:⁷ “I served on panel [sic] of three arbitrators that considered a dispute between [the vendor] and another party. I do not believe that my services on that panel creates a conflict with my serving in this case.”⁸ *Id.* The dealer’s counsel did not inquire further into the party-appointed arbitrator’s prior dealings with the vendor.⁹

The prior case on which the vendor’s party-appointed arbitrator had served involved the vendor and another automobile dealership, *Venus Ford. Dealer Computer Services, Inc.*, 761 F.Supp.2d at 462. The vendor’s counsel in the *Michael Motor* case was the same counsel representing the vendor in *Venus Ford*, and both cases involved an identical contractual provision. *Id.* The Vice President who was head of accounting for the vendor testified as a damages expert in both cases. *Id.* The dealership had no actual knowledge of the party-appointed arbitrator’s past history with the vendor and did not object to the appointment of the arbitrator during the case. After the arbitration award was rendered, the dealership’s counsel learned of the party-appointed arbitrator’s prior service to the vendor and sought to vacate the arbitration award.

The vendor argued that the motion to vacate should be denied on the grounds that the arbitrator’s disclosure to AAA was sufficient to put the dealer on notice of her potential partiality and that the dealer had waived its right to object by failing to object to the party-appointed arbitrator before the award was given.¹⁰ The district court rejected the vendor’s waiver argument and granted the dealer’s motion to vacate the arbitration award. In analyzing the facts of the case, the district court found the party-appointed arbitrator’s disclosure was insufficient and should have included more information. *Dealer Computer Services Inc.*, 761 F.Supp.2d at 465. The court seemed to place emphasis on the fact that, three months prior to making her disclosure in the *Michael Motor* case, the vendor’s party-appointed arbitrator had drafted, written and signed an eight-page opinion on the same subject matter covered in the *Michael Motor* case. The court held:

“[The arbitrator’s] participation in the Venus Ford Arbitration is ‘a significant compromising connection’ to [the vendor], and her failure to disclose that participation constitutes ‘evident partiality.’”

Dealer Computer Services Inc., 761 F.Supp.2d at 465. The court explained how it came to its conclusion:

“Taken as a whole, [the arbitrator’s] prior exposure to the

legal issues and witnesses involved in the Michael Motor arbitration creates a reasonable impression that she had prejudged at least some of the issues in the arbitration. It would be unreasonable to expect an arbitrator who had already signed an eight-page opinion ruling for a party as to how a contractual provision should be interpreted to change her mind in a subsequent arbitration and rule against that party on the exact same contractual provision.”

Id. The court also found that it would be unreasonable for an arbitrator to reject damage theories from an expert witness where she had previously adopted the same theories from the same expert. The court further stated that it was reasonable to assume that an arbitrator would consider prior testimony from other witnesses on identical issues, even if those witnesses did not testify in the current case.

In response to the vendor’s argument that the dealer had waived its objection to the arbitrator’s service, the court adopted the standard set forth in *Positive Software Solutions Inc. v. New Century Mortg. Corp.* 436 F.3d 495 (5th Cir. 2006) (later vacated by the *en banc* court on grounds unrelated to waiver) which held that to waive

a challenge to an arbitrator’s failure to disclose, a party must have *actual knowledge* of the presence of a conflict of interest. *Id.* at 505. The court found that the dealership did not have actual knowledge of the arbitrator’s prior service and therefore could not waive its right to object to her partiality. *Dealer Computer Services, Inc.*, 761 F.Supp.2d at 467.¹¹

The court’s holding in *DCS* affirms the principal that *counsel does not bear the burden to investigate* an arbitrator or to attempt to obtain actual knowledge of potential partiality. Rather, the court held firm to the principal that this burden is placed on the arbitrator. While understanding that counsel has no duty to investigate an arbitrator, it would appear to be in the client’s best interest to inquire into the arbitrator’s prior service. This inquiry should include a full examination of the arbitrator’s disclosures to discover prior relationships that could create an “appearance of bias”, immediately filing an objection to the service of any arbitrator who may have an “appearance of bias” and asking the arbitrator(s) to make supplemental disclosures prior to the final arbitration hearing so that potential bias may be uncovered. These precautionary measures should ensure that clients are not forced to litigate before “evidently partial” arbitrators.¹² ■



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References

- 1 9 U.S.C. § 10(a) states that an arbitration award may be vacated:
 - (1) where the award was procured by corruption, fraud, or undue means;
 - (2) where there was evident partiality or corruption in the arbitrators, or either of them;
 - (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of an party have been prejudiced; or
 - (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.
- 2 Finding there was not a "significant compromising connection" where the arbitrator and one of the parties' counsel had represented the same party in a law suit that ended seven years before the arbitration.
- 3 Finding an "appearance of bias" where an arbitrator failed to disclose that one party was a regular customer of the arbitrator's engineering consulting business.
- 4 This case is currently pending before the Fifth Circuit and is styled *Dealer Computer Services, Inc. v. Michael Motor Company, Inc.*, 761 F.Supp.2d 459 (S.D. Tex. 2010), *appeal docketed*, No. 11-20053 (5th Cir. March 14, 2011).
- 5 Hon. Judge Keith P. Ellison, presiding.
- 6 This question asked: "Have you [...] ever served as an arbitrator in a proceeding in which any of the identified witnesses or named individual parties gave testimony?"
- 7 The questionnaire also included this statement:

In accordance with the Code of Ethics please disclose any past or present relationship with the **parties**, their **counsel**, or **potential witnesses**, direct or indirect, whether financial, professional, social or of any other kind, if any additional direct or indirect contact arises during the course of the arbitration or if there is any change at any time in the biographical information that you have provided to the AAA, it must also be disclosed. **Any doubts should be resolved in favor of disclosure.** If you are aware of direct or indirect contact with such individuals, please describe it below.

The AAA will call the facts to the attention of the parties' counsel. *Dealer Computer Services, Inc.*, 761 F.Supp.2d at 461.

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- 8 After the hearing was concluded, it was discovered that the arbitrator's prior service occurred a mere three (3) months prior to the date the arbitrator made this disclosure.
- 9 Case law firmly establishes that litigants have **no** obligation to investigate arbitrators. See *Positive Software Solutions* 436 F.3d 495, 505 (5th Cir. 2006); *Middlesex Mut. Ins. Co. v. Levine*, 675 F.2d 1197, 1204 (11th Cir. 1982). Rather the burden is placed on an arbitrator to disclose. *Dealer Computer Services, Inc.*, 761 F.Supp.2d 459.
- 10 The vendor relied on *Berstein Seawell & Kove v. Bosarge*, 813 F.2d 726 (5th Cir. 1987), to support its argument that a party seeking to vacate an arbitration award on the grounds of "evident partiality" generally must object during the arbitration or else they waive their right to object. *Dealer Computer Services, Inc.*, 761 F.Supp.2d at 467.
- 11 The court stated that even if the dealership had "constructive notice of the statement [the arbitrator] disclosed to the AAA (which the dealership disputes), that minimal acknowledgement was not sufficient to put the dealership on notice of a potential conflict of the sort that was present." *Dealer Computer Services, Inc.*, 761 F.Supp.2d at 467-468.
- 12 Based on the facts of the *DCS* case it would appear that any arbitrator who had previously seen and heard testimony from fact or expert witnesses on the same or similar contractual issues may be "evidently partial."

Mark A. Counts is the managing partner of the law firm *Counts & Bonacci, LLP* in Houston, Texas.

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