



## Advice and Content: New York State Bar Association Social Media Ethics Guidelines

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Reading Time : **3 min**

The first guideline addresses attorney advertising on social media. In short, this guideline reminds lawyers that many social media platforms are, in essence, means of broadcasting, and as such the existing rules regarding attorney advertising may apply, with the exception of social media profiles that are solely for personal use. Guideline 1.B draws special attention to the prohibition against lawyer assertions of specialization, and its application to sites such as LinkedIn, which have categories for specialization and skills that may be ethically problematic.

The second guideline discusses the furnishing of legal advice through social media. Most relevant, Guideline 2.A reminds lawyers that the existing rules regarding the furnishing of legal advice and the inadvertent creation of an attorney-client relationship apply to social media interactions. The guideline draws the distinction between provision of a general answer to a legal question—analogueous to publication of an article on a legal topic—and answering a specific legal question posed by a member of the public on a social media site, which may give rise to an unwanted attorney-client relationship.

The third guideline considers the review and use of evidence on social media. Here, the guidelines draw the important distinction between the public and private portions of social media profiles and sites. For example, a Google search for a person's name may result in a public Facebook page, providing only rudimentary information. By contrast, that person's Facebook "friends" have access to the "private" portion of that profile. While a lawyer may ethically look at the public profile, there are limitations on when and how that lawyer (or his agent) can contact a party to attempt to gain access to the private profile. (Guideline 4.D discusses *client* access to the private portions of social media sites). For those whose practice includes looking at Facebook profiles, it would be prudent to read this guideline carefully, as it addresses a number of nuances and jurisdictional differences.

One additional point raised in the third guideline, that has both ethical and practical lawyering considerations, is that a lawyer should be aware that some sites, such as LinkedIn, automatically alert users when their profiles are accessed. If a lawyer is logged into her own account on that site, by viewing a profile she may be tipping her hat. It is unclear whether such a notification could give rise to an ethics violation. A recent ABA ethics opinion, discussed below, asserts that such a notification should not be an unethical juror communication, while the NYSBA Guidelines observe that such notifications *have* been found to be ethical violations when investigating jurors.

The fourth guideline, regarding ethical communication with clients regarding the client's social media presence, is perhaps uniquely of interest to in-house counsel. Guideline 4.A reminds attorneys that, while they can advise clients to “take down” or remove certain posts, they may not do so if there are countervailing requirements that the information be preserved (for example, if a party “reasonably anticipates litigation,” or if there are other statutory preservation duties). Guideline 4.B considers attorney pre-review of new posts to a client's social media site. While an attorney may (and probably should) advise clients regarding new social media posts, they may not “direct or facilitate the client's publishing of false or misleading information that may be relevant to a claim.” In addition, an attorney may advise their client that what they post on social media, even on a “private” page, may be reviewable through “court order, compulsory process, or unethical conduct.” Put another way, what's “private” on social media may be anything but.

Finally, the fifth guideline is a detailed consideration of the ethics of social media usage relating to prospective jurors and the reporting of juror misconduct. Underscoring the fact that Bar advisory guidelines and opinions differ, it is important to note that an ABA ethics opinion issued last week, categorically prohibiting the viewing of private social media pages of jurors, is more stringent than the NYSBA Guidelines, which merely disallow access of such pages through deceptive means.

Social media present new opportunities—and challenges—for lawyers and their clients. The NYSBA guidelines are reminders that social media communications are not held to a lower standard because they are faster and easier to make, and that one can make social media communications without even realizing it. And while these guidelines do not break new ground, they focus attention on how pre-existing attorney ethical duties and requirements are playing out in a challenging new social media landscape.

## Categories

Ethics

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