

# **Ethical Use of Social Media in the Practice of Law**

**Presenter:  
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# THE DAILY RECORD

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## Legal LOOP

# Lawyers and social media in 2017

Social media has been around for more than a decade. At first lawyers ignored social media, but over time, as it infiltrated our culture, they sat up and took notice. Today, more lawyers than ever use social media. Some use it for networking and marketing, while others interact online to showcase their expertise or gather valuable evidence and information to support their practices, among other reasons.

Regardless of how or why lawyers use social media, the statistics from the 2017 American Bar Association's Legal Technology Survey Report show that, generally speaking, the number of lawyers using social media has increased year over year, which is in line with the increase in the use of social media by the general population as a whole.

For starters, the use of blogs by law firms is increasing, with large firms leading the way. 71% of firms with 500 or more attorneys maintain at least one blog (compared with 60% in 2016, 58% in 2015, and 62% in 2014), as do 71% of firms with 100-499 attorneys (compared with 52% in 2016, 53% in 2015, and 47% in 2014). Mid-sized firms with 10-49 attorneys were next at 38%, followed by small firms with 2-9 lawyers at 25%, and solo law firms at 15%. The practice areas within firms that were most likely to maintain a blog were employment and labor law at 33%, personal injury law at 32%, and litigation at 31%.

When it came to lawyers who personally maintained a blog for professional reasons, however, the numbers



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were flipped. Solo lawyers led the way: 15% of solo lawyers blogged, followed by 11% of lawyers from firms of 2-9 lawyers, 11% of lawyers from firms of 100 or more attorneys, and 10% of lawyers from firms of 10-49 attorneys. Of those lawyers, 43% have had a client retain their services because of their blogging efforts.

Moving on to social media, 77% of lawyers surveyed indicated that their firms maintained a social media presence. And, 81% of lawyers reported that they personally used social media for professional purposes.

Interestingly, the age group of lawyers most likely to maintain a personal presence on social media was 40-49 years olds (93%), followed by 40 and under (90%), 50-59 (86%), and 60 or older (73%). Lawyers with the following practice areas were most likely to personally use social media: employment/labor (89%), personal injury (84%), litigation (84%), commercial law (82%), and contracts (81%).

The most popular social network used by lawyers for professional purposes was LinkedIn, with 90% of lawyers reporting that they maintained a profile. Next was Facebook at 40% and then Twitter at 26%. Two lawyer directories were included in the Report, Martindale and Avvo, with only 21% of lawyers reporting that they used each

platform.

Of those lawyers who maintained a personal presence on social media, 27% have had a client retain their legal services directly or via referral as a result of their use of social media. Solo and small firms lawyers were the most likely to be retained due to their social media presence. Lawyers in firms of 2-9 lawyers came in first in this regard at 33%, followed by solo lawyers (32%), then lawyers from firms of 10-49 lawyers (22%), and finally lawyers from firms of 100 or more lawyers (18%).

All in all, this year's report provided lots of interesting data about lawyers' social media use. Whether you're a solo lawyer or are part of a much larger law firm, social media can be a valuable tool. My hope is that some of the statistics above will help guide you in making the best use of social networking. The trick is to use social media wisely, and ensure that the time you spend interacting online is both efficient and effective.

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## LegalLOOP

# 2015 Social Media Ethics Guidelines for NY lawyers (Part 2)

Last week, in part 1 of this series, I discussed the 2015 Social Media Ethics Guidelines ([www.nysba.org/FEDSocialMediaGuidelines](http://www.nysba.org/FEDSocialMediaGuidelines)), which had just been issued by the Commercial and Federal Litigation Section of the New York State Bar Association.

I explained that the 2015 edition updates the inaugural guidelines, which were released March 2014, and include two new sections on Attorney Competence and Using Social Media to Communicate with a Judicial Officer. Additionally, new subsections have been added which address: 1) Lawyer's Responsibility to Monitor or Remove Social Media Content by Others on a Lawyer's Social Media Page; 2) Attorney Endorsements; 3) Retention of Social Media Communications with Clients; and 4) Maintaining Client Confidences and Confidential Information.

I also noted that while this comprehensive set of guidelines was drafted by a very knowledgeable group of lawyers, some of whom I know personally, and offers insightful and practical advice regarding the issues presented when lawyers interact online, I wasn't convinced that separate guidelines were warranted for social media interaction. It's always been my position that social media should be treated no differently than any other type of communication since online conduct is simply an extension of offline conduct.

That being said, this particular document provides useful advice for New York lawyers seeking to interact online — with two caveats. I addressed the first one last week and shared why I thought that the newly added Guideline 2D, which addresses the responsibility of lawyers to monitor and remove problematic attorney endorsements found on social media, placed an undue burden on lawyers to monitor the vast and ever-changing assortment of online lawyer profiles and social media sites.

The other section with which I disagree is the committee's recommendation in Guideline 4B relating to an attorney's ethical

obligations when seeking to connect with an unrepresented party on social media in order to obtain evidence. In this section the committee cites NYCBA, Formal Op. 2010-2 (2010) and concludes that "In New York, there is no 'deception' when a lawyer utilizes her 'real name and profile' to send a 'friend' request to obtain information from an unrepresented person's social media account ... In New York, the lawyer is not required to disclose the reasons for making the 'friend' request."

I would argue that the issue is not that black and white in New York. The New York State Bar Association Committee on Professional Ethics addressed this issue tangentially in Opinion 843 in 2010. In it, the committee concluded that lawyers may view publicly available information on social media relating to parties (there was no indication as to whether the parties referred to were represented by counsel).

Importantly, the committee opined the following conclusion regarding the viewing of public social media pages: "A lawyer who represents a client in a pending litigation, and who has access to the Facebook or MySpace network used by another party in litigation, may access and review the public social network pages of that party to search for potential impeachment material. As long as the lawyer does not 'friend' the other party or direct a third person to do so, accessing the social network pages of the party will not violate Rule 8.4 (prohibiting deceptive or misleading conduct), Rule 4.1 (prohibiting false statements of fact or law), or Rule 5.3(b)(1) (imposing responsibility on lawyers for unethical conduct by nonlawyers acting at their direction)."

In other words, the committee implied that "friending" a party to a lawsuit could be unethical. For that reason, I believe that it is currently unclear whether it would be ethical for New York lawyers or their agents to "friend" a party to litigation without



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providing more information, such as the underlying reason for the interest in connecting, which is what all other jurisdictions that have addressed this issue thus far have concluded. So, I would suggest that it would be prudent for lawyers to err on the side of caution and provide all relevant information to unrepresented parties when attempting to view information on their social media profiles that is behind a privacy wall.

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## Legal LOOP

# NYSBA nixes Avvo Legal Service marketing fees

Lawyers and marketing: It's always been a rocky road, and internet-based marketing tools have only added new areas of uncertainty for lawyers seeking to advertise their services online. Not surprisingly, as online marketing services have become increasingly common, so too have the ethical opinions addressing whether online marketing tactics are ethically compliant. Two of the latest opinions on this topic were handed down by the New York State Bar Association in early August, Opinions 1131 and 1132. I'll be writing about Op. 1132 this week (online: <http://www.nysba.org/ethicsopinion1132/>) and will address Op.1131 in the near future.

In Opinion 1132, the NYSBA Committee on Professional Ethics addressed the issue of whether a lawyer may pay a marketing fee to participate in Avvo's Legal Services under the current fee payment scheme. The committee explained that Avvo is an online lawyer directory that provides ratings for lawyers and also allows lawyers to pay a fee to be included in the group of lawyers offered up to consumers who want to discuss a legal issue with an attorney. The committee explained that "Avvo allows clients to choose from among all of the lawyers in a geographic area who have listed themselves as practicing the field of law in which the client wants legal services."

Once a legal consumer chooses an attorney, any legal fees collected by Avvo are then paid to that attorney and a legal marketing fee is then billed to the attorney by



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Avvo. The marketing fee varies depending on the cost of the legal services provided.

After describing the fee structure, the committee moved on to consider the ethical issues presented by Avvo's overall operation and noted that many aspects of Avvo's online directory and marketing services arguably trigger

a number of different ethical rules, including attorney advertising rules, scope of representation issues and confidentiality issues. However, the committee decided that it need not address those issues since it had ascertained that its answer to the question posed by the inquiring attorney—whether the New York ethics rules permit lawyers to pay Avvo's marketing fees—would be dispositive.

Next, the committee turned to the issue of whether paying marketing fees to Avvo was ethical. The issue to be determined, according to the committee, was whether the marketing fees constituted an improper payment for a recommendation as set forth in Rule 7.2(a):

A lawyer shall not compensate or give anything of value to a person or organization to recommend or obtain employment by a client, or as a reward for having made a recommendation resulting in employ-

ment by a client... [Emphasis added].

The committee examined Avvo's online format and marketing scheme concluded that Avvo was in fact recommending lawyers to potential legal clients:

(T)hrough Avvo's description of its rating system, Avvo is giving potential clients the impression that a lawyer with a rating of "10" is "superb," and is thus a better lawyer for the client's matter than a lawyer with a lower rating. Avvo is also giving potential clients the impression that Avvo's eligibility requirements for lawyers who participate in Avvo Legal Services assure that participating lawyers are "highly qualified"... We do not believe that a bona fide professional rating alone is a recommendation. But, even assuming that Avvo ratings are "bona fide professional ratings," we believe the way Avvo describes in its advertising material the ratings of participating lawyers either expressly states or at least implies or creates the reasonable impression that Avvo is "recommending" those lawyers.

Based on this determination, the committee concluded that New York lawyers could not ethically use Avvo's marketing services: "A lawyer paying Avvo's current marketing fee for Avvo Legal Services is making an improper payment for a recommendation in violation of Rule 7.2(a)."

Not surprisingly, Avvo took issue with this conclusion. For Avvo's perspective, you can read their response to this opin-

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ion online: <https://tinyurl.com/avvo-response-nysba>.

So that's the Avvo opinion, But as I mentioned earlier, the NYBSA also recently addressed other legal marketing issues in Op. 1132. Stay tuned for an article in the near future where I'll tackle that opinion.

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## LegalLOOP

# 2015 Social Media Ethics Guidelines released (Part 1)

My good friend Scott Malouf, a Rochester attorney who also aids other lawyers in using social media as evidence, recently advised me that the Commercial and Federal Litigation Section of the New York State Bar Association had just released its 2015 Social Media Ethics Guidelines ([www.nysba.org/FEDSocialMediaGuidelines/](http://www.nysba.org/FEDSocialMediaGuidelines/)).

The 2015 edition updates the inaugural guidelines, which were released March 2014, and includes two new sections on Attorney Competence and Using Social Media to Communicate with a Judicial Officer. Additionally, new subsections have been added which address:

1) Lawyer's Responsibility to Monitor or Remove Social Media Content by Others on a Lawyer's Social Media Page; 2) Attorney Endorsements; 3) Retention of Social Media Communications with Clients; and 4) Maintaining Client Confidences and Confidential Information.

This comprehensive set of guidelines was drafted by a very knowledgeable group of lawyers, some of whom I know personally. It offers insightful and practical advice regarding the issues presented when lawyers interact online.

That being said, I've consistently written in past articles that I don't believe that social media should be treated any differently than any other type of communication since online conduct is simply an extension of offline conduct. Given my position on this, I don't necessarily agree that a separate set of guidelines specifically addressing social media is necessary.

But, if there is going to be a set of guidelines adopted by the NYSBA in the near future, this comprehensive document is certainly the one to consider adopting. It provides an extensive overview of New York ethics decisions on a vast assortment of social media-related issues, including attorney advertising and solicitation, mining social media for evidence, and researching jurors using social media.

For the most part, I agree with the advice provided. There are, however, two conclusions/recommendations with which I take issue. In this article I'll address the first and will address the second next week.

First, there's the newly added Guideline 2D, which addresses the responsibility of lawyers to monitor and remove problematic attorney endorsement found on social media. In part, this section provides: "A lawyer must ensure the accuracy of third-party legal endorsements, recommendations or online reviews posted to the lawyer's social media profile. To that end, a lawyer must periodically monitor and review such posts for accuracy and must correct misleading or incorrect information posted by clients or other third-parties."

And in footnote 25, the following directive is added: "Lawyers should also be cognizant of such websites as Yelp, Google and Avvo, where third parties may post public comments about lawyers."

In my opinion, this section imposes a nearly impossible burden on lawyers to be aware of and to monitor social media sites and online profiles which they may not have had a part in creating, and over which they may not have any control. Not only are lawyers purportedly responsible for monitoring the content of the profiles they and sites they created, but according to this section they also must be cognizant of other sites where profiles have been created on their behalf and must monitor not only their profiles, but also comments made elsewhere on those sites that relate to the attorney's services.

The time required to monitor this information and regularly conduct searches on these sites will be substantial. And even more time will be required to stay abreast of the vast numbers of online attorney directories and business review sites, which number in the thousands, with new ones popping up every day.

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I would argue that this particular section places an undue burden on lawyers, most of whom are busy trying to keep their heads above water and their law practices out of the red in the midst today's competitive legal landscape. I believe they should only be responsible for monitoring content on profiles that they've claimed, not those over which they arguably might have control should they choose to take the step of claiming their profiles.

Another recommendation in the guidelines that I take issue with relates to mining social media for evidence, so tune in next week for more on that.

And, in closing, I would like to emphasize that although I'm providing constructive criticism about a few aspects of the guide-

lines, the document as a whole is an impressive piece of work and provides valuable insight and guidance for New York lawyers on how to ethically use social media in their practices.

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## Legal LOOP

# New York Bar on ethically using online legal marketing services

The internet has changed our lives, for better or for worse. It's become an integral part of our culture, affecting the way we receive information, shop for goods and services, and interact with our peers and colleagues.

Because so many people spend so much time online, the internet offers businesses a vast array of methods for reaching target audiences in an affordable and efficient manner. It is, however, a relatively new frontier and one that is changing all the time. For that reason it poses challenges for people seeking to market their services online who are part of a highly regulated profession, like lawyers. That's why over the past decade, ethics committees across the country have often grappled with the thorny ethical issues presented when lawyers seek to market their services online.

One of the most recent opinions issued by the New York State Bar Association's Committee on Professional Ethics is the latest in a long line of opinions from New York and other jurisdictions that address many of the issues lawyers face when marketing their services using the internet.

At issue in Op. 1131 (online: <http://www.nysba.org/ethicsopinion1131/>) is whether and under what circumstances a lawyer may pay a for-profit company (Service) for leads obtained online. The committee explained that it was opining on the general issue of whether a lawyer may pay an online lawyer



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matching service a monthly fee or a fee for each referred potential client and that its conclusion was not intended to cover every factual permutation that may exist in regard to referral websites of this type.

At the outset, the committee concluded that the Service's website is an advertisement since it was "a communication 'on behalf of' a lawyer 'about' the lawyer's services for the 'primary purpose' of retention of the lawyer." As such, it was required to comply with Rule 7.1(h), which provides that "[a]ll advertisements shall include the name, principal law office and telephone number of the lawyer or law firm whose services are being offered."

According to the committee, compliance with this rule could be achieved "by providing a link to either (i) a list of all participating attorneys with the required contact information or (ii) a list of all participating attorneys who fall within the geographic and practice area parameters that may be set by the potential client, along with the required contact information."

Next the committee turned to the functionality of the Service's website and whether it passed ethical muster.

The committee concluded that the Service could avoid ethical pitfalls related to referral fees and solicitation issues by implementing certain necessary procedures. Specifically it would be ethical for a lawyer to participate in a marketing scheme of this type as long as "(i) the lawyer who contacts the potential client has been selected by transparent and mechanical methods that do not purport to be based on an analysis of the potential client's legal problem or the qualifications of the selected lawyer to handle that problem... (and) (ii) the service does not explicitly or implicitly recommend any lawyer..."

Finally, the committee concluded that if the potential client matched to a lawyer consented to a phone call, the lawyer could call that individual without triggering any solicitation issues.

Although this opinion does not apply to a specific online service, the general principles set forth in it provide helpful guidance to New York lawyers seeking to take advantage of online lawyer matching websites. Also useful is the accompanying opinion (which I wrote about a few weeks ago), Op. 1132 (online: <http://www.nysba.org/ethicsopinion1132/>), which provides additional information for lawyers seeking to market their services online using Avvo and similar services.

The bottom line is that it is possible for lawyers to ethically market their

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services online using third-party websites. The trick is to fully understand how each service works, so that you can assess your ethical obligations in light of the guidance handed down thus far.

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## Legal LOOP

### NYSBA issues updated social media guidelines for lawyers

I've always believed that social media use by lawyers should be treated no differently than any other type of communication by lawyers. After all, online interactions are simply an extension of offline interactions, and the medium doesn't change the message. For that reason, it has pained me to see so many ethics committees issuing so many opinions over the years on the many perceived nuances of online communication by lawyers.

Many of these opinions are simply unnecessary and constitute knee jerk reactions to a new way of interacting. And many are based on faulty reasoning grounded in the assumption that online communications are somehow different than those occurring offline and thus warrant the application of new, more stringent standards. Others, however, necessarily address issues that are unique to online communications. One good example is opinions that address the issue of whether the passive notifications received by LinkedIn users (who also happen to be jurors) which indicate that a lawyer has viewed their profile constitute impermissible juror contact.

Regardless of whether I agree with the sheer volume of opinions or their merit, the end result is that lawyers are left to their own devices when it comes to reviewing the many opinions and deciphering which types of online interactions are ethical. Navigating the maze of ethics opinions can be a difficult and overwhelming task and for that



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reason, some attorneys simply choose to forgo using social media altogether.

That's where the recently updated "Social Media Ethics Guidelines," issued by the Commercial and Federal Litigation Section of the New York State Bar Association, come in.

These guidelines were first released in 2014 with the intent to provide lawyers with guidance in navigating the many ethical issues encountered when using social media in a professional context. The guidelines were revised in 2015 and, then, just two weeks ago, a newly updated version of the guidelines was released (online: <http://www.nysba.org/SocialMediaGuidelines17/>).

Some of the more notable revisions include:

- Attorney Competence (§ 1.A) reflects that 27 states have adopted some duty of technical competence.
- Maintaining Client Confidences (§ 5.E) offers information on how an attorney can respond to online reviews as well as services that offer to import contacts.
- Positional Conflicts (§2.E) is new and discusses DC Bar Ethics Opinion 370 regarding whether social media posts adverse to a client's interest may present a conflict of interest.

- The revised appendix describes social media terminology and some of the more popular social media platforms.

The newly added social media definitions are particularly useful, and I have to admit that although I've always considered myself to be more social media-savvy than most lawyers (having written a book on lawyers using social media), even I learned a few things after reading through the definitions.

So, if you haven't yet read the updated guidelines, make sure to set aside some time in order to do so. They provide a very useful, extensive roundup of how ethics committees across the country have approached lawyers using social media. The guidelines are a great resource that will serve as a handy reference guide for your professional online social media activities.

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## Various Blog Posts

- [Lawyers' Social Media Use In 2017](#)
- [LinkedIn For Lawyers: 5 Tips For Success](#)
- [Twitter 101 For Lawyers](#)
- [Facebook 101 For Lawyers And Law Firms](#)
- [Blogging 101: 5 Tips for Lawyers](#)

