# When Is a Tweet an Attorney Advertisement?

by Cyrus D. Mehta

Immigration attorneys have naturally adapted to the internet faster than attorneys in other practice areas. They were the among the first to set up their own web sites,[1] and with the advent of social media have also happily adapted to Facebook, Twitter, Linkedin, and other social networks. Using social media helps an immigration attorney to reach out to an audience very quickly, without expending huge marketing resources. Moreover, since the client base of an immigration attorney is not bound by a particular area or State (as immigration practice is mostly based on federal law), and can also be located across the globe, social media can help an immigration attorney reach out to it.

Still, an attorney needs to be mindful of the various ethical rules that would be applicable when using social media. This advisory will focus on the ethical rules concerning advertising, and reference will be made to the American Bar Association's Model Rules of Professional Conduct and the New York Rules of Professional Conduct, although attorneys are advised to also refer to their own state bar rules of professional conduct.

While this advisory is applicable to all social media messaging, Twitter will be its particular focus since it poses unique challenges compared to other social media. Twitter allows one to communicate only within 140 characters, which can be particularly problematic if such messaging needs to include the various disclaimers following an attorney advertisement. Twitter is also more open than other social media sites since a follower does not need permission to follow you. Moreover, even nonfollowers can view your tweets, which can be constant and numerous. The whole essence of Twitter is to effectively fit your message within a limited number of characters, while ethics rules constraining attorney advertising require a lot more verbiage.

While lawyers are permitted to advertise their services, they are bound by various ethical constraints.

Model Rule 7.1 states, "A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading." Also, many jurisdictions require that when a lawyer advertises his or her services, the words "Attorney Advertising" be stated in such a communication.

For example, this is what New York's Rules of Professional Conduct Rule 7.1(f) requires:

> Every advertisement other than those appearing in a radio, television or billboard advertisement, in a directory, newspaper, magazine or other periodical (and any web sites related thereto), or made in person pursuant to Rule 7.3(a)(1), shall be labeled "Attorney Advertising" on the first page, or on the home page in the case of a web site. If the communication is in the form of a self-mailing brochure or postcard, the words "Attorney Advertising" shall appear therein. In the case of electronic mail, the subject line shall contain the notation "ATTORNEY ADVERTISING."

However, not every communication made by a lawyer would constitute an advertisement. If a lawyer wishes to quickly share an article in the New York *Times* on comprehensive immigration reform on Twitter as soon as it appears, would it constitute advertising? This lawyer may have a completely altruistic motivation, which is to share a timely and interesting article on immigration reform to her community of 3,000 followers on Twitter. On the other hand, the lawyer also hopes that by her sharing of this article, people would realize that the lawyer is on top of the latest developments and may be more inclined to retain her services. Thus, while such a communication does not overtly invite people to employ this lawyer's services, it might be the underlying motivation of the lawyer to brand herself as someone who is on the top of her game and hope that people would reach out to her.

When does a tweet constitute an advertisement that will be subject to the various ethical constraints? For instance, New York Rules of Professional Conduct at

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[1] For example, Greg Siskind, a prominent immigration attorney, had the first immigration law firm web site, first web site of a solo law firm in the world, and first law firm web site in the southern United States. See http://www.visalaw.com/gsiskind.html.

Rule 1.0 defines advertisement as "any public or private communication made by or on behalf of a lawyer or law firm about that lawyer or law firm's services, the primary purpose of which is for the retention of the lawyer or law firm. It does not include communications to existing clients or other lawyers."

It is thus unclear whether the sharing of the New York *Times* article would constitute an advertisement, as it does not suggest that its primary purpose is for the retention of the lawyer, and then require the attorney under the New York rules to indicate "ATTORNEY ADVERTISING." Such a requirement with respect to a tweet, which only allows 140 characters, would also diminish the value of the impromptu and conversational tone of the Twitter message, although one should be cautioned that a disciplinary committee would not be concerned about a lawyer's desire to preserve the spontaneous character of a tweet if it violated the constraints on attorney advertising. Still, at least with respect to the sharing of an informational article, a New York attorney can take comfort in Comment 7 to New York Rules of Professional Responsibility Rule 7.1, which provides in part:

> Topical newsletters, client alerts, or blogs intended to educate recipients about new developments in the law are not considered advertising. However, a newsletter, client alert, or blog that provides information or news primarily about the lawyer or law firm (for example, the lawyer or law firm's cases, personnel, clients or achievements) generally would be considered advertising.

If every tweet is considered an attorney advertisement, it would be virtually impossible to tweet anything under the New York Rules of Professional Responsibility. For instance, under New York Rules of Professional Conduct 7.1(d) and (e), statements that are likely to create an expectation about results the lawyer can achieve have to be accompanied by the following disclaimer: "Prior results do not guarantee a similar outcome." Moreover, under 7.1(h) all advertisements shall include the name, principal law office address, and telephone number of the lawyer or law firm whose services are being offered. Finally, 7.1(k) requires a copy of all advertisements to be retained for three years following initial dissemination. This would require an attorney to keep a copy of each of his or her thousands of tweets for three years!

Fortunately, the State Bar of California Standing Committee on Professional Responsibility recently issued a helpful ethics opinion clarifying under what circumstances an attorney's postings on social media websites would be subject to the standards governing attorney advertising.[2] The opinion provides the following examples of an attorney's postings on her Facebook page, which has about 500 friends.

**Example 1**

**"Case finally over. Unanimous verdict! Celebrating tonight."**

**Example 2**

**"Another great victory in court today! My client is delighted. Who wants to be next?"**

**Example 3**

**"Won a million dollar verdict. Tell your friends and check out my website."**

**Example 4**

**"Won another personal injury case. Call me for a free consultation."**

**Example 5**

**"Just published an article on wage and hour breaks. Let me know if you would like a copy."**

California's Rule 1-400 defining "communications," which is similar to the New York rule 7.1(f), includes "any message or offer made by or on behalf of a member concerning the availability for professional employment of a member or a law firm directed to any former, present or prospective client. . . ."

The key determining factor, therefore, is whether an attorney communicates in such a way so as to make himself available for professional employment or for the purpose of retention of his services. Under this standard, according to the California ethics opinion, the following Facebook messages may or may not be communications:

**"Case finally over. Unanimous verdict! Celebrating tonight."**

Example 1 is not a communication. as it is not a message or offer "concerning availability of professional employment" regardless of the attorney's subjective intent in sending it. The opinion thus makes an important point. The communication must overtly suggest that the lawyer is available for professional employment, regardless of whether this was the attorney's underlying motive in doing so.

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[2] See Formal Opinion No. 2012-186, *available at* http://ethics.calbar.ca.gov/Portals/9/documents/Opinions/CAL%202012-186%20%2812-21-12%29.pdf and 2012 Calif. Op. LEXIS 24 (Dec. 21, 2012).

**"Another great victory in court today! My client is delighted. Who wants to be next?"**

The verbiage in Example 2 "Another great victory in court today! My client is delighted" standing alone is not a communication, but the additional text "Who wants to be next?" makes it a communication. as it suggests availability for professional employment. Moreover, the opinion goes on to state that an attorney cannot disseminate communications regarding client testimonials unless there is an express disclaimer. The statement further violated California ethical rules, as it included guarantees or predictions regarding the representation, which can be deceptive. "Who wants to be next?" can be interpreted as "Who wants to be the next victorious client?"

**"Won a million dollar verdict. Tell your friends and check out my website." "Won another personal injury case. Call me for a free consultation."**

It is readily obvious that both Example 3 and Example 4 constitute communications and are thus subject to the restraints on attorney advertising. Directing friends to "check out my website" suggests that people may consider hiring her after looking at her website. Even directing people to call for a free consultation can be viewed as a step towards seeking potential employment, and thus such an offer also constitutes a communication.

**"Just published an article on wage and hour breaks. Let me know if you would like a copy."**

According to the opinion, Example 5 does not constitute a communication, since the attorney is merely relaying information regarding an article that she has published and is offering a copy. Even communications relating to availability of seminars or educational programs, or mailing bulletins or briefs, do not entail attorney advertising, according to the opinion.

Most immigration attorneys who use social media generally share articles and information. Under this California opinion and Comment 7 to the New York Rules of Professional Responsibility Rule 7.1, they may not be constrained by the rules relating to attorney advertising. Still, it is unclear whether other States will follow this logic and its important distinction. Comment 7 to New York Rules of Professional Responsibility Rule 7.1 states that "[t]opical newsletters, client alerts, or blogs intended to educate recipients about new developments in the law are not considered advertising. However, a newsletter, client alert, or blog that provides information or news primarily about the lawyer or law firm (for example, the lawyer or law firm's cases, personnel, clients or achievements) generally would be considered advertising."

Comment 8 to New York Rules of Professional Responsibility Rule 7.1 is worth noting:

> The circulation or distribution to prospective clients by a lawyer of an article or report published about the lawyer by a third party is advertising if the lawyer's primary purpose is to obtain retentions. In circulating or distributing such materials the lawyer should include information or disclaimers as necessary to dispel any misconceptions to which the article may give rise. For example, if a lawyer circulates an article discussing the lawyer's successes that is reasonably likely to create an expectation about the results the lawyer will achieve in future cases, a disclaimer is required by paragraph (e)(3). If the article contains misinformation about the lawyer's qualifications, any circulation of the article by the lawyer should make any necessary corrections or qualifications. This may be necessary even when the article included misinformation through no fault of the lawyer or because the article is out of date, so that material information that was true at the time is no longer true. Some communications by a law firm that may constitute marketing or branding are not necessarily advertisements. For example, pencils, legal pads, greeting cards, coffee mugs, T-shirts or the like with the law firm name, logo, and contact information printed on them do not constitute "advertisements" within the definition of this Rule if their primary purpose is general awareness and branding, rather than the retention of the law firm for a particular matter.

It is advisable that any communication on Twitter, as well as other social media websites, comport with the last example in the California opinion involving the sharing of information. However, any information written about a lawyer by a third party, which the lawyer then distributes, may constitute advertising. On the other hand, as noted in Comment 8, "Some communications by a law firm that may constitute marketing or branding are not necessarily advertisements."

A lawyer who chooses to communicate on Twitter in a way that would invite followers to use his services is doing so at his own peril. It would be impossible to include all the disclaimers required by the ethical constraints in a tweet that can comprise only 140 characters! It is also debatable whether putting a one-time

disclaimer in the Twitter header profile would suffice such as "Tweets = ATTORNEY ADVERTISING." Twitter also does not allow you to include more than 160 characters of information in the profile (such as the attorney's address and other disclaimers). Moreover, a disciplinary authority might opine that every tweet ought to have included the required disclaimers, since people viewing it in their Twitter feed will not bother to look at the header profile of the attorney. Still, putting a disclaimer in the profile would probably be the best good faith option for an attorney who wishes to use Twitter for attorney advertising. Indeed, New York's Professional Rules of Professional Conduct Rule 7.1(f) requires the "Attorney Advertising" notation only on the home page of the law firm's website, and by analogy, it could be argued that putting this notation only in the Twitter profile may comply with the rule. Another option with respect to a tweet that is an advertisement is to provide a link to another site that contains all the additional disclaimers, if applicable.

In conclusion, social media, especially Twitter, provide a valuable tool for an immigration attorney with limited resources to reach out to a global audience. In order not to get snared by the advertising constraints, it is best for immigration attorneys to use social media to share information for marketing and branding, which in turn will create awareness of the attorney's expertise and knowledge in the field. Until the ethics rules catch up, it would also be consistent with the spontaneous character of social media sites, especially Twitter, to use them to share information rather than to engage in outright advertising. Using Twitter in this way is likely to attract more followers than if the attorney used it for blatant advertising purposes only. Also, a tweet involving useful information is more likely to be "retweeted" than an advertisement.[3] There are other sources for attorney advertising, which, unlike Twitter, would not constrain an attorney's ability to include all the disclaimers and requirements under the ethical rules.

[3] A "retweet" is a re-posting of someone else's tweet. See https://support.twitter.com/articles/77606-faqs-about-retweets-rt#.

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