

# Ethics of Social Media – Twitter

## Frequently Asked Questions

[These FAQs are neither legal advice nor an ethics opinion, and are not a substitute for your obligation to review and adhere to the requirements of the [Michigan Rules of Professional Conduct \(MRPC\)](#), ethics opinions, statutes, court rules, and/or case law. This document provides a review of Twitter features as of June of 2018 and, therefore, may not reflect the ethical implications of any updates, modifications, or added features.]

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## Reminders:

### Lawyer Competence

Lawyers must provide competent representation. MRPC 1.1. A general knowledge of social media is required to ensure competent representation. MRPC 1.1 Comment.

### Terms of Service

A lawyer should review the terms of service offered by Twitter to determine whether adequate security measures are in place to maintain and protect client confidences and secrets. A lawyer should also discuss Twitter's security and confidentiality provisions with the client to ensure an understanding of the risks of use. MRPC 1.1, 1.4, 1.6.

### Supervising Non-Lawyer Employees

A lawyer may not permit or encourage an agent to engage in ethically prohibited conduct. MRPC 5.3; [RI-191](#), [RI-205](#).

### Duty to Monitor Twitter Content

A lawyer is responsible for all content that appears on the lawyer's or law firm's Twitter account and must ensure that information regarding legal services is not false, fraudulent, or misleading. MRPC 7.1.

## Twitter: Frequently Asked Questions

### Lawyer Advertising

#### *Applicability of Rules*

#### *Business Twitter Account*

#### **Are Twitter business accounts subject to the advertising parameters of the MRPC?**

A lawyer posting information about the lawyer or legal services on social media must comply with MRPC 7.1. [RI-276](#). Best practice would be to assume that all lawyer communications on a Twitter business account are subject to MRPC 7.1 - 7.5, Information About Legal Services. As a reminder, MRPC 7.1 includes communications about the lawyer, the law firm, and any affiliated lawyers. Business accounts are designed for marketing. A firm business account is, therefore, likely to be considered lawyer advertising.

#### *Hybrid Twitter Accounts*

#### **Are personal Twitter account that I use to post information about a practice subject to the advertising parameters of the MRPC?**

Hybrid accounts, ones that provide both personal information and are used to communicate regarding a lawyer's services, should be treated as advertising and follow the advertising rules, MRPC 7.1, 7.2, 7.3, 7.4, and 7.5. [RI-276](#).

Ethics authorities have cited a number of different factors to determine whether a lawyer's social media account constitutes advertising, including the degree of detail stated regarding the lawyer's services and qualifications. The more information about the lawyer's professional qualifications, the greater likelihood that the account will be deemed advertising. If the account is established to market the lawyer's services,

whether titled in the lawyer or the law firm's name, it will be subject to the ethics rules regarding advertising.

#### *Personal Twitter Accounts*

##### **Are personal Twitter accounts subject to the advertising parameters of the MRPC?**

Personal accounts that do not provide "communications concerning a lawyer's services" are not advertising. MRPC 7.1. However, these accounts can easily become hybrid accounts that would fall within the ethics rules regarding advertising if used to communicate regarding a lawyer's services.

#### *Protected Twitter Accounts*

##### **Are tweets sent from protected Twitter accounts subject to the advertising parameters of the MRPC?**

Twitter allows "protected" accounts, which can only be seen by Twitter users who the account holder accepts as followers. Protected accounts, just like personal accounts that do not provide "communications concerning a lawyer's services" are not advertising. MRPC 7.1. However, these accounts can easily become hybrid accounts that would fall within the ethics rules regarding advertising if used to communicate regarding a lawyer's services that can be read by the protected account holder's followers.

#### *Twitter Direct Messages and Prospective Clients*

##### **May a lawyer communicate with prospective clients via Twitter Direct Messages?**

Twitter direct messages, like instant messaging, are real-time, interactive communication and when initiated by the lawyer or agent, are subject to MRPC 7.3(a), 7.3(b), and 7.1.

A lawyer may not engage in solicitation of prospective clients unless the lawyer has a "family or prior professional relationship."

A lawyer may respond to Twitter messages initiated by prospective clients. MRPC 7.3(a). When responding to prospective clients regarding their legal matter, the lawyer must be careful to ensure that the communication is confidential as required by MRPC 1.6. Similarly, as with all communications with prospective clients, the lawyer should be cautious about inadvertently creating a lawyer-client relationship and triggering other ethical duties to prospective clients, including those pertaining to conflicts of interest. MRPC 7.3; [RI-276](#); [RI-74](#); [RI-48](#).

#### *Following Potential Clients*

##### **May an attorney follow someone on Twitter who is outside of the attorney's family and with whom there is no personal or professional relationship?**

Yes, because, like e-mail, following someone on Twitter is not a real-time, interactive communication subject to MRPC 7.3.

### *Paid Advertising on Twitter*

#### **May a lawyer participate in paid advertising on Twitter?**

Twitter offers numerous paid advertising options. MRPC 7.3 allows lawyers to send “truthful nondeceptive letters to potential clients.” As such, lawyers may utilize targeted advertising as long as it complies with MRPC 7.1 - 7.4; [RI-74](#); [RI-147](#); [RI-169](#).

### *Copies of business or hybrid Twitter accounts*

#### **Must a lawyer maintain a copy of my Twitter account?**

MRPC 7.2(b) requires that “[a] copy or recording of an advertisement or communication shall be kept for two years after its last dissemination along with a record of when and where it was used.” If a Twitter accounts is deactivated, the lawyer must maintain the required information in another format, such as PDF.

### *Communicating with Current Clients*

#### **May a lawyer communicate with current clients via Twitter or Twitter Direct messages?**

BEST PRACTICE: A lawyer should avoid communicating with a client about privileged information via Twitter, to protect against inadvertent disclosure of confidential information. MRPC 1.6.

Whether or not an attorney may ethically communicate via Twitter Direct Messages depends on the security of the application. A lawyer should review the terms of service and discuss security measures with the client to ensure that both understand the risks.

### *Lawyer-Client Relationship*

#### **Is it possible to form an attorney-client relationship via Twitter?**

An attorney-client relationship can be formed via social media and should be considered when posting or communicating on Twitter. Lawyers must exercise caution when entering into a dialogue with a prospective client who has posted questions or comments on Twitter to avoid the inadvertent formation of a lawyer-client relationship. “Whether a client-lawyer relationship was established may depend on how *specifically* the case was discussed during consultation. If confidences were imparted in good faith, a client-lawyer relationship existed for purposes of applying Rule 1.9.” [RI-048](#), [RI-350](#); MRPC 1.9; MRPC 1.10; MRPC 1.7.

### *Legal Advice*

#### **May a lawyer answer legal questions posted on Twitter?**

A lawyer may provide general answers to legal questions or comments on Twitter in the same way in which the lawyer would provide general legal advice to those attending a seminar. [RI-141](#), [RI-081](#), [RI-099](#). However, the lawyer must be careful not to create a lawyer-client relationship or disclose confidential client information. MRPC 1.0 Comment. MRPC 1.6. [RI-350](#), [RI-048](#).

## Following Adverse Parties

### **May a lawyer follow the public account of an adverse party or witness on Twitter?**

A lawyer may follow an opposing party's public account, whether personal or professional, as long as the lawyer complies with MRPC 4.2, 4.3, and 8.4. MRPC 4.2 and 4.3 may be implicated if there is direct communication about the subject matter of the representation, either through posts, replies to posts of other persons that may be viewed by both parties, or by tagging the adverse party.

### **May a lawyer follow an adverse party on Twitter who has a protected account?**

BEST PRACTICE: Lawyers and their agents should avoid following adverse parties who have a protected account, as MRPC 4.2 or 4.3 may be implicated. Also, a lawyer may not direct an agent to do what he or she cannot do. MRPC 5.3(c) and 8.4; [RI-205](#).

### **What if the adverse party sends a lawyer with a protected account a Twitter request?**

BEST PRACTICE: Lawyers should delete or ignore the follow request until the adverse proceeding is concluded as MRPC 4.2 or 4.3 may be implicated.

### **What if the adverse party and a lawyer are already follow each other on Twitter?**

Although there is no ethical requirement to unfollow an adverse party as an existing Twitter follow, MRPC 4.2 and 4.3 may be implicated if there is direct communication about the subject matter of the representation, either through posts, replies to posts of other persons that may be viewed by both parties, or by tagging the adverse party.

### **May a lawyer have a third party send a request to follow the protected account of a witness for the undisclosed purpose of gathering evidence?**

Generally no. Lawyers are responsible for the actions of their agents consistent with the requirements of MRPC 5.3. A lawyer's conduct of asking a third party to send a request to connect to a witness for the undisclosed purpose of gathering evidence implicates MRPC 8.4, 4.1, and 4.2. Also, a lawyer may not direct an agent to do what he or she cannot do. MRPC 5.3(c) and 8.4; [RI-205](#).

## Trial Publicity

### **May a lawyer tweet about a trial?**

Yes. However, lawyers should be aware of MRPC 3.6 regarding trial publicity, which is applicable to Twitter and other forms of social media. If a lawyer posts comments about a trial, the lawyer may violate the ethics rules depending on the statements made, the statement's impact on the trial, and the lawyer's involvement in the case. MRPC 3.6 prohibits a lawyer from making extrajudicial statements the lawyer knows or should know will be disseminated publicly and will have a substantial likelihood of materially prejudicing the judicial proceeding. The rule applies to lawyers who participate in or have participated in the investigation or litigation.

## Judicial Officers

### **May a lawyer follow a judicial officer on Twitter?**

A lawyer may follow a judicial officer on Twitter. However, a lawyer should not attempt to influence a judicial officer regarding matters related to their judicial position.

A lawyer should also avoid *ex parte* communication with a judicial officer regarding pending matters. MRPC 3.5, 8.2, and 8.4; Michigan Code of Judicial Conduct Canon 2(A) and (C); Canon 3(A)(4); [RI-243](#), [JI-44](#).

## Mentions and Publishing, Responding to, or Retweeting Articles or Posts

### **If a lawyer publishes, responds to, or retweets an article or post through Twitter, is this advertising?**

A lawyer or law firm's published posts or articles that contain promotions or highlights of recent successes, accomplishments, or achievements constitute lawyer communications about services, and must comply with MRPC 7.1 and 7.3. Additionally, lawyers should be cautious to avoid revealing confidences or the identity of clients without obtaining client consent. Lawyers are strongly encouraged to provide the entirety of the proposed text to any client whose cases will be featured in a blog post or article in advance of publication, to demonstrate informed consent. (MRPC 1.6; [RI-72](#); [RI-77](#).)

### **Is there a potential conflict of interest if a lawyer publishes, responds to, or retweets an article or post through Twitter?**

MRPC 1.7(b) may be implicated if a lawyer publishes, responds to, or retweets an article or a post on Twitter. A lawyer's own interest in publishing and promoting legal advice may materially limit the lawyer's ability to represent a current or prospective client whose position requires an argument contrary to the lawyer's published article or blog post.

### **If a Lawyer is mentioned in a tweet is there an obligation to respond, correct, or acknowledge the mention?**

Generally no, as long as the sender of the mention was not acting as an agent or on behalf of the Lawyer. However, if the Lawyer that is mentioned is a follower of the sender so that the mention appears on the Lawyer's home timeline the Lawyer may have to unfollow the sender. (See *Duty to Monitor Twitter Content* above)

*Note:* A Mention is a Tweet containing another account's Twitter username, preceded by the "@" symbol that appears on the sender's profile page of public Tweets and in the home timeline of anyone following the sender.

### **Can an ill-advised tweet be removed?**

Not necessarily. Lawyers may not be able to delete an ill-advised tweet, due to retweets and third-party websites.

### **Should a lawyer have a disclaimer when publishing articles or posts?**

Lawyers are strongly encouraged to post disclaimers on social media publications to clearly indicate that the material does not create a lawyer-client relationship, is not

intended to convey legal or ethics advice, and does not guarantee the same or similar results in all cases.

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