



Look Who's Talking



**Legal Implications of Twitter
Social Networking Technology**

By Steven C. Bennett



At a recent joint session of Congress, where President Obama spoke on plans for responses to the economic crisis, some members of Congress amazed (and perhaps shocked) the public by using some of the latest communication technology available: “Twitter.”¹ This new social networking system aims to keep participants connected through the exchange of quick, frequent answers to one simple question: “What are you doing?”² Founded in 2006, the service became publicly available and rapidly gained popularity.³ The service principally operates through cellular telephones, using messages of 140 characters or less (known as “Tweets”).⁴

Many lawyers, when first encountering Twitter, “just don’t get it.” But this latest phenomenon, like e-mail, IM, voicemail, blogging and other social networking technology, is clearly here to stay, in one form or another.⁵ What should lawyers make of the new technology? What risks should lawyers recognize? And what advice should lawyers give to their clients? This article briefly addresses some of the legal implications of Twitter.

Implications for Lawyers

The essential purpose of Twitter, for lawyers and other professionals, is to keep connected to friends, acquaintances, clients and prospects. Lawyers, for example, may wish to use Twitter to share information on developments in their practice area or news regarding their activities (the progress of trials, presentations or business travels, for example). The benefits may include “increased visibility” within the lawyer’s professional sphere.⁶ Twitter is “about the conversation” within a network; users of the technology hope that small talk on Twitter “leads to real conversations and relationships.”⁷

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Twitter messages from lawyers, for all their informality, must be treated with the same caution as messages in any other form (including correspondence, memoranda or e-mails). Lawyers must pay particular attention to the risks of revealing privileged or confidential information in Twitter messages, which are often programmed to be sent to a group of friends and acquaintances. Further, despite the informality of the medium, messages that contain what may appear to be legal advice, that operate

as not part of the company's record-keeping system. Some businesses may go further and forbid the use of such messaging for business purposes.¹⁵

Yet, corporations clearly have a stake in preparing for the possibility that their employees may use Twitter (and other social networking technologies). Messages sent from corporate employees may convey proprietary information, may reveal other privileged or private information and may expose the company to claims of defa-

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on the (unstated) premise of an attorney-client relationship, or that may be characterized as a solicitation of legal work, may have the unintended consequences of raising professional responsibility issues or ethics concerns.⁸ To avoid doubts about the meaning of Twitter communications, lawyers may need to establish some protocols: avoiding anything but general professional news in their Twitter communications, restricting the group of recipients of Twitter communications (or some subset of such communications) and/or providing periodic notice to recipients of the conditions under which the Twitter communications are made.⁹

Implications for Businesses

Business use of social networking tools has grown tremendously in recent years. No longer just a fad, social networking has particularly drawn the attention of advertisers and corporate communications specialists.¹⁰ The Internet has created hundreds of "communities" of interest for marketing, branding and the introduction of new products and services.¹¹ In a down economy, recruiters and unemployed workers may use such technologies to help change career directions.¹² And some sources suggest that social networking can perform admirably in the event of emergencies.¹³

Twitter enthusiasts suggest that this technology may offer similar business (as well as social) benefits. Because of its novelty, however, Twitter applications typically are not offered by businesses directly for their employees. As a result, text messages generally do not run through an enterprise network but rather through the telecommunication carrier's network. In effect, Twitter messaging, like many forms of mobile computing, may not (at least as yet) fall within the purview of any company IT regulators.¹⁴

Indeed, to the extent that businesses cannot capture and save such messages, they may have particular difficulty regulating Twitter communications. As a result, some businesses may choose to label Twitter messaging

information or harassment. Messages received by employees may contain spam, malware or illegal materials. And, to the extent that employee dedication to social networking becomes a distraction, it may decrease the efficiency of the organization.¹⁶

As a result of these kinds of concerns, companies may need to survey employee communication practices periodically and may need to conduct training or information campaigns regarding what social networking practices (including Twitter) will be supported and which considered unacceptable.¹⁷ System monitoring may be required to confirm that employees use corporate communication systems in conformity with established policies. In certain circumstances, the company may consider specifying that misuse of corporate communication systems (or private communication systems while on company time or in connection with corporate business) will be considered grounds for termination of employment.¹⁸

Implications for Litigation

The increasing speed of communication media (from written correspondence to telegraphs, telephones, facsimile transmissions, e-mail, IM and now texting and Twitter) may have decreased the attention span of the average user.¹⁹ Whatever the cause, experience in litigation since the Internet was invented, and e-mail popularized, shows that abbreviated, casual messaging systems tend to breed abbreviated, casual messages.²⁰ Such messages can get individuals (and companies) in a lot of trouble in the event of litigation.²¹

The limits of the term "electronically stored information" (ESI), as used in the 2006 amendments to the Federal Rules of Civil Procedure, have not been clearly established. One case involving RAM information on a Web site suggests that the term could cover relatively ephemeral information, such as Twitter messages.²² The case, however, has received some serious criticism.²³ Thus, there may be some question whether Twitter messages are "stored" within the meaning of the Rules.²⁴

At very least, the discoverability question may turn on the facts of how Twitter technology has been used in the particular case.²⁵

Even if such information is not produced as part of the discovery process, however, Twitter messages may be findable, and usable, in the event of disputes, to the extent that such messages are posted on social networks.²⁶ Indeed, an ad hoc system for identifying and aggregating Twitter messages on common themes (such as a news event) has developed.²⁷ And such messages may become potent evidence in the event of litigation, just as e-mail has become.²⁸

Formulating Best Practices for Twitter Use

Contrary to the instincts of some, there has been no “end of history” regarding communications technology.²⁹ The acceleration of new technologies, new computing capabilities, new communications media and new social customs continues.

For lawyers and their clients, the advance of technology may have significant legal implications. The only reliable means to cope with new technologies like Twitter is to embrace an understanding (if not a use) of such technologies, to participate actively in efforts to understand how such technologies may modify legal regimes, and to help clients formulate best practices to control and exploit such technologies.³⁰

Lawyers cannot do this job alone. The effort must be interdisciplinary, aimed at understanding both what is legally required and what is practical and economical. Ironically, new technologies like Twitter may drive lawyers to recognize their interdependence with other professional disciplines, even if they never choose to adopt the social networking technologies with which they must become familiar.³¹

1. See Dana Milbank, *A Tale of 140 Characters, Plus the Ones in Congress*, Wash. Post, Feb. 25, 2009, at A3, available at www.washingtonpost.com (“Some members called it a new age of transparency, a bold new frontier in democracy.”).

2. See *What Is Twitter?* at <http://twitter.com>.

3. Twitter.com does not release information on usage rates. One estimate of 2008 usage, however, put the number of Twitter users as high as 4 to 5 million. See Jeremiah Owyang, *Social Networks Site Usage: Visitors, Members, Pages Views and Engagements by the Numbers in 2008*, www.web-strategist.com/blog/2008/11/19/social-networks-site-usage-visitors-members-page-views-and-engagement-by-the-numbers-in-2008/ (Nov. 19, 2008); see also posting of Andy Kazeniak to Compete, *Social Networks: Facebook Takes Over Top Spot, Twitter Climbs*, <http://blog.compete.com/2009/02/09/facebook-myspace-twitter-social-network/> (Feb. 9, 2009) (ranking Twitter highly among users of social networking sites).

4. Twitter notes that messages may be connected through “phone, IM, or web site, and you are only expected to pay as much or as little attention to them as you see fit.” *Isn't Twitter Just Too Much Information?*, www.twitter.com/about#about.

5. One measure of the success of the technology is the fact that many imitators of the Twitter approach already exist. See posting of Sean P. Aune to Mashable, <http://mashable.com/2008/01/10/7-tweeters-of-the-world/> (Jan. 10, 2008) (Twitter is “easy to love; easy to clone”; listing similar sites).

6. See posting of Kevin Hunt to WESTBLOG, <http://tncorpcomm.wordpress.com/2009/02/03/twitter-and-lawyers/> (Feb. 3, 2009).

7. Posting of Matt Homann to LawyerKM, <http://lawyerkm.wordpress.com/2009/02/03/what-is-twitter-and-how-can-i-use-it/> (Feb. 4, 2009, 12:38 EST) (summarizing panel discussion at LegalTech New York).

8. See Melissa H. Weresh, *A Bold New Frontier – To Blog Where No Lawyer Has Blogged Before*, Iowa Law. (Jan. 2009) (noting ethical concerns regarding unauthorized practice of law, unintended creation of attorney-client relationships, and violation of restrictions on attorney advertising), available at http://www.law.drake.edu/academics/docs/weresh_Articles/A%20Bold%20New%20Frontier.pdf; Jason Boulette & Tanya DeMent, *Ethical Considerations for Blog-Related Discovery*, 5 Shidler J.L. Com. & Tech. 1 (Sept. 2008), available at <http://lctjournal.washington.edu/vol5/a01BouletteDeMent.html>; Adrienne Carter, *Blogger Beware: Ethical Considerations for Legal Blogs*, 14 Richmond J. L. & Tech. 5 (2007), available at www.law.richmond.edu/jolt/v14i2/article5.pdf.

9. Given the 140-character limitation, it may be difficult for lawyers to send automated coda for every message, confirming that the message is not intended as legal advice, or to solicit an attorney-client relationship. If that is the intent of the lawyer’s Twittering, some alternative form of (at least periodic) notice may be required.

10. See posting of Ollie Ross to ZDNet, *CIOs Getting Serious About Social Networking*, http://news.zdnet.com/2100-9595_22-272809.html (Feb. 25, 2009) (noting use of social networking to “generate a buzz”).

11. See posting of Martha Young to ITWorld, <http://itworld.com/virtualization/55572/social-networking-what-business-value> (Oct. 2, 2008).

12. See Melanie Rodier, *Wall Street Recruiters and Employees Increasingly Use Social Networking for Career Management*, <http://wallstreetandtech.com> (Dec. 19, 2008).

13. See posting of Jason Palmer to New Scientist, <http://www.newscientist.com/article/mg19826545.900-emergency20-is-coming-to-a-website-near-you.html> (May 2, 2008) (research at University of Colorado at Boulder suggests that “some of the social media were extremely well suited to disaster response, despite not being designed for that purpose”).

14. See Steven C. Bennett & Cecilia Dickson, *E-Discovery: The Challenges in Mobile Computing*, N.Y.L.J., Sept. 30, 2008, p. 5, col. 1.

15. See posting of Robert Mullins to Suite 101, http://office-software.suite101.com/article.cfm/web_20_conflicts_with_ediscovery (Jan. 28, 2009) (“Businesses concerned about the content of IMs first forbade them in the office, but eventually allowed IM once messages could be archived.”).

16. See posting of Clint Boulton to eWeek, <http://www.eweek.com/c/a/Messaging-and-Collaboration/Facebook-Twitter-Use-in-The-Enterprise-Sparks-Hot-Debate> (Aug. 20, 2008).

17. Some commentators suggest that “[p]romoting the use of a corporate tool that leverages Twitter’s API [application programming interface] . . . is a less risky option than banning it and forcing staff onto a tool that has no auditing capability.” Posting of Matthew Hodgson to the [app]gap, www.theappgap.com/ediscovery-enterprise-20-and-the-open-web.html (Nov. 6, 2008).

18. See posting of Reed Irvin to ca, www.blog.ca-ig.com/2009/01/enterprise-social-networking-and-the-new-governance-paradigm (Jan. 15, 2009).

19. See Steve Rubel, *Twitter, Human Attention and Moore’s Law*, www.micropersuasion.com/2007/03/twitter_human_a.html (Mar. 12, 2007) (noting phenomenon of “continuous partial attention” to communications as a result of overwhelming volume of messages).

20. See Tresa Baldas, *Beware: Your “Tweet” on Twitter Could Be Trouble*, Nat’l L.J., Dec. 22, 2008 (noting that short “tweets” can be “vulnerable to misinterpretation” and may “open[] the door to poor judgment,” especially when sent in anger) (quotations omitted), available at www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202426916023; Correy E. Stephenson, *E-Discovery Implications of Twitter*, www.lawyersusaonline.com/index.cfm/archive/view/id/432466 (Dec. 16, 2008) (“Twitter is the haiku of internet communications,” so that “this is a medium that has a great potential for de-contextualization – thoughts and words and phrases on Twitter can be more easily construed out of context than in a longer medium where they might be expressed more fully.”) (quoting Douglas E. Winter of Bryan Cave law firm).

21. See generally Peter Wardle & Barnali Chouhury, *Ediscovery: Weapons of Mass Discovery* (2007), available at www.practicepro.ca/information/doc/eDiscovery_slides2.pdf at p. 2 (informal e-mails “can contain ill-considered and potentially damaging statements not found elsewhere” in corporate records).

22. See *Columbia Pictures Indus. v. Bunnell*, 245 F.R.D. 443 (C.D. Cal. 2007).

23. See, e.g., Robert B. Mullen, *Ephemeral Data Meets Hard Law*, The Recorder (Feb. 10, 2009) (decision was “not in keeping with the way lawyers and judges have always done business”), available at <http://www.law.com/jsp/legaltechnology/pubArticleLT.jsp?id=1202428129189>; Electronic Frontier Foundation, *Columbia Pictures Indus. v. Bunnell* (aka *Movie Studios v. TorrentSpy*) (2007) <http://w2.eff.org/legal/cases/torrentspy> (decision is “unprecedented” and “threatens to radically increase the burdens that companies face in federal lawsuits”).

24. Several cases suggest a contrary view. See, e.g., *Phillips v. Netblue Inc.*, 2007 WL 174459 (N.D. Cal. Jan. 22, 2007) (rejecting as “absurd” argument that hyperlinks should have been preserved); *Healthcare Advocates, Inc. v. Harding, Earley, Follner & Frailey*, 497 F. Supp. 2d 627 (E.D. Pa. 2007) (no sanctions for failure to preserve temporary cache files); *Convolve, Inc. v. Compaq Computer Corp.*, 223 F.R.D. 162 (S.D.N.Y. 2004) (no sanction for failure to preserve “ephemeral” data).

25. See posting of Anthony P. Chan to E-Discovery Bytes, *Data Talk: Cache and Transient*, <http://ediscovery.quarles.com/2009/02/articles/case-law/data-talk-cache-and-transient> (Feb. 12, 2009) (suggesting that discoverability may turn on: whether the data serves a business purpose that warrants retention; whether the requested data is relevant to the case; whether the party is capable of preserving the data; whether data that might have served as evidence has been purposefully destroyed; the timeliness of the request for data, and whether a party has been given notice of the duty to preserve; whether the party acted in good faith to preserve the data; and whether the data is inaccessible because of undue burden or cost, within the meaning of Fed. R. Civ. P. 26(b)(2)(B)).

26. See Perry L. Segal, *E-Discovery 101: Twitter MySpace Away on Facebook*, www.ediscoverycalifornia.com/insights/2009/02/ediscovery-101-twitter-myspace-away-on-facebook.html (Feb. 4, 2009) (“You have to be your own filter. Before you post, ask yourself whether you’re OK with the concept that anyone on earth might see it – forever. If the answer is yes, go ahead. Post it. Otherwise, keep it to yourself.”).

27. See Amy Graham, *How to Start a Twitter Hashtag*, www.contentious.com/2008/11/20/how-to-start-a-twitter-event-hashtag (Nov. 20, 2008) (describing informal “convention” by which users label “tweets” to help put together “disparate coverage” of an event).

28. One commentator suggests that Twitter messages, as “present sense impressions,” or “excited utterances,” may be admissible as exceptions to ordinary hearsay rules. See posting of Joshua L. Konkle to DCIG <http://www.dcginc.com/2008/02/twitter-and-federal-rules-of-e.html> (Feb. 20, 2008). Following such logic, Twitter messages that contain statements of “then existing mental, emotional, or physical conditions” might also be admissible under Rule 803(3) of the Federal Rules of Evidence. See generally *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534 (D. Md. 2007) (extensive discussion of evidentiary issues surrounding electronically stored information).

29. The rumor has long circulated that a U.S. Patent Office official once suggested that “everything that can be invented has been invented.” The truth of the rumor is highly debatable. See Samuel Sass, *A Patently False Patent Myth*, 13 *Skeptical Inquirer* 310 (1989), available at www.myoutbox.net/posass.htm. Whatever the truth of the rumor, the notion that technology will stand still has been repeatedly disproved.

30. See Grace L. Mastalli & K. Krasnow Waterman, *Trust, Ethics and the Technology Factor* (June 20, 2008), available at www.kkrasnowwaterman.com/Default.aspx?app=LeadgenDownload&shortpath=docs%2FTechnologyandLegalEthics.pdf at p. 8 (“Today legal competence requires increasing degrees of jurisdiction-specific knowledge, web savvy and technical expertise.”); Steven C. Bennett, *Teaching Technology Skills to Lawyers*, 28:19 *Nat’l L.J.*, Jan. 16, 2006.

31. Guidance in this area starts with the essential principle that a team approach (involving input from legal, business, IT, records, risk management and business professional, wherever possible) is essential in developing effective document management and communications policies. See, e.g., Steven C. Bennett, *Implications of a “Keep It All” Data World*, N.Y. St. B.J. (Feb. 2009) p. 42; Steven C. Bennett, *Records Management: The Next Frontier in E-Discovery?*, 7/08 *Prac. Litigator* 31 (2008); Steven C. Bennett, Sharon Alexander & Cecilia Dickson, *Getting Started: Procedures for Developing a Document Retention System*, 3:1 *BNA Accounting Policy & Prac. Spec. Rep.* 1 (2007); Steven C. Bennett, *E-Document Management: A Litigator Looks at Retention Policies*, *Computerworld*, June 1, 2004, www.computerworld.com/action/article.do?command=viewarticleBasic&articleID=93565; Steven C. Bennett, *Building an E-Document Retention Policy*, 3:3 *InfoPro* 42–45 (2001).

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