

**Ethics Corner: The Ethics of Texting: Preserving Client Files**

**QUESTION:** *I have been practicing business law for many years. Several years ago I brought on two young associates, one a lateral and one right out of law school. Both have worked out very well. They have expanded my practice by attracting a number of younger entrepreneurs. I have recently noticed that they use text messaging for much of their communication with these clients. I understand that the younger clients, as well as my associates, prefer this informal and prompt mode of communication. I am wondering if this presents any ethical concerns.*

**ANSWER:** The NH Bar Association Ethics Committee is aware of no case or ethics opinion finding the use of text messages to communicate with clients to be per se prohibited by the rules of professional conduct.

Ethics committees in other jurisdictions that have examined the use of text messaging in law practice have done so primarily in two contexts. First, several committees have issued opinions on whether it is considered solicitation to send advertisements by text message. See e.g., [Ohio Supreme Court Ethics Op. 2013-2](#), 29 Law. Man. Prof. Conduct 238 (2013) (concluding that lawyers may solicit professional employment by text messaging, but placing conditions on use of this technology). The second issue is whether text messages are public records for right to know purposes. See e.g., [blog.gulflive.com](#) (finding text messages sent by public officials about governmental business to be a public record).

The Committee notes attorneys may have clients for whom text messaging is the preferred mode of communication. For example, lawyers representing clients in criminal matters or emergency family law cases often need to be “on call,” and responding to clients by cell phone text is more immediate than by a computer-hosted email system.

The ABA has recently added a comment to its Model Rules of Professional Conduct specifying that in order to maintain competence, a lawyer “should keep abreast of ...the benefits and risks associated with relevant technology...” [ABA Model Rules of Professional Conduct 1.1, cmt. 8](#). This comment was recently included in the rules, as are other ABA comments, by the New Hampshire Supreme Court. See Order of the New Hampshire Supreme Court, dated Nov. 10, 2015. The Court does not adopt the ABA comments.

Nonetheless, lawyers using this technology should be mindful of recordkeeping and preservation issues. See e.g., [NH Ethics Committee Opinion 2006-06/3](#) (stating that the content of the client’s files would necessarily include both paper and electronic forms of communication). Aon Risk Solutions recently raised this issue in its Loss Prevention Bulletin 15-03 (October 2015). The Bulletin points out that texts are not easily printed off to be placed in client files. This is especially true if the lawyer is not using a firm-issued device.

Techniques such as taking a screenshot of the text message and forwarding it to the firm’s email account and document management system become inconvenient as the complexity of the communication increases. Aon points out that there are applications and third-party programs

that can do this efficiently. Two of these are SMS Backup and Decipher TextMessage. Several members of the Ethics Committee have used these systems to back up all text messages in their firm email system and report that they work quite well.

Using third-party programs may solve the problem of how to get the messages into the firm's system, but it does not answer the more difficult question of identifying those messages that should be retained in client files for billing or other purposes.

Committee members are aware from personal experience that text messages often contain a good deal of irrelevant (and sometime irreverent) information. Aon recommends that if the law firm is not convinced that "its lawyers will take the time to transfer important text messages from smartphones to client files, then the firm should at least remind its lawyers to place a short note or memo in the client file summarizing any significant events in the matter that were initially discussed by text..." Id. The Committee agrees with this advice and believes it also makes sense for lawyers to consider the type of discussions that are suited for this technology. For example, texting to confirm the time and place of a court hearing is probably acceptable, but providing substantive legal advice may not be appropriate.

Although this question deals only with text messaging, the Committee notes that many clients and witnesses use electronic communications other than email. This is especially true of clients and witnesses under 40 years old and/or who are not part of the white-collar business community. These methods include Facebook messaging, other instant messaging services, or "chat" programs. It is not unusual for an attorney to receive such messages from a client or witness unexpectedly.

To avoid the risks of inappropriate, non-secure communications, an attorney should discuss with the client what forms of communication will be used. A good practice may be to limit all electronic communication to arranging in-person meetings or phone calls. It is always important to warn clients that electronic communications may not be secure and that the client should take precautions. The client should consider the risks – whether the client's phone or computer is encrypted, whether a secure network is being used, etc. The attorney must be aware of these possibilities as well and take appropriate precautions.