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What About Attorney-Client Privilege When Text Messaging?

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You're running late for your client meeting, and you're all the way across town. Quick – how do you communicate this critical message to your legal client? One end of the communication method is that you call your executive assistant to relay the message via landline. The other end is that you simply and quickly jot off a text message. You've already thought about whether it's wise for a lawyer to exchange text messages with a client, right? Of course, you have, especially in light of attorney-client privilege. But here are a few more thoughts to bandy about when it comes to 21st-century communications in the legal word.

It turns out that your average lawyer does not prefer to exchange text messages with clients. In "[How Do Lawyers Want To Communicate With Their Clients?](#)" Keith Lee mentions a [LawyerSmack](#) discussion where lawyers discussed ways in which they prefer to communicate with legal clients. The email was the clear favorite. At least in the 21st-century, with email, we're often communicating with our reliable, always-with-us, mobile device. It may also seem like a better option regarding the issue of attorney-client privilege.

But wait, in the non-lawyering world, texting has become ubiquitous, especially among the younger set. In all, Americans sent 1.5 trillion text messages in 2017. Further, more than 80 million US households used their cell [phones for texting in 2018](#). Until the next super quick, super easy form of communications arrives, texting is here to stay for a while.

Let's take a look at several advantages and disadvantages of texting clients.

Attorney-Client Privilege and the Model Rules of Professional Conduct

To kick off the conversation, the ABA's Model Rules of Professional Conduct speaks to technology in Comment 8 to Rule 1.1 Competency by stating that "[a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology.](#)" Given that so many laypeople employ text messaging, it makes sense that texting is relevant technology and therefore a tool in the model legal practice.

Ability to Keep a Record

With a little-learned skill or the use of third-party apps, it is possible to keep a record of text messages, including images, videos, and audio. This is useful for client files, discovery, and other legal matters. It is also important to recognize information that gets messaged is existent forever, so it behooves clients and attorneys to tread carefully when texting. Treating text messages as you would an email would behoove you. You want to be able to maintain attorney-client privilege.

Swift and Short



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Texting is so incredibly easy. It's perfect for conveying a message like, "Let's meet for lunch," or "The jury's in!" Not so great for explaining the legal nuances of the relationship of the Uniform Commercial Code to Bitcoin as it pertains to land transfers and stock options. Should you find yourself faced with the text question of the relationship of the Uniform Commercial Code to Bitcoin as it pertains to land transfers and stock options, it's perfectly fine to cut the text conversation short with a friendly, "Call my office and let's set up a meeting about this eye-popping conversation." Besides the spectacular and unreasonable wordiness of that conversation, there is also the specter of an attorney-client privilege violation when the message gets long and detailed.

Speaking of Swift...

According to Text Request, "[99%+ of texts are read, and have an average response time of 90 seconds.](#)" As a means of modern communications, only a telephone beats that statistic. It is an advantage because most of the time a quick answer to your short question is a good thing and vice versa. On the other hand, you always want to be credited with providing a well-thought-out legal answer to your client's queries, and the expected quick turn-around time shortens the period you get to prepare an answer. But, again, if it's about the Uniform Commercial Code and Bitcoin, shoot back a text asking for a meeting.

Are you kidding?! Give out my cell number to clients?!!

Well, calm down. It's been done before, and lawyer survivors are still here. No one, lawyer or not, is giddy at the idea of receiving a communication at 3:00 a.m. on a Sunday morning about the latest behavior of the immoral, no account, soon to be ex. But if your client happens to be a high-powered billionaire you might want to keep your cell phone turned on at all times.

Lack of Contact

One of the most frequent Bar Grievances is lack of contact from one's attorney. While you may have a very good reason why you haven't contacted your client, say, a lack of movement on the matter, the client, simply feels neglected and ignored. A quick, short text to check in will go a long way to reassuring a client. Of course, the downside to this is that the quick, short text message could open a floodgate of questions. If it seems necessary, ask for a meeting about the Uniform Commercial Code and such.

Disable that Lock Screen

If you know that your client has your cell number, be sure to disable the lock screen so that the client's message does not appear automatically. You certainly don't want to violate attorney-client privilege unwittingly.

Security

Micah Lee, a security technologist in San Francisco, told USA Today [that SMS messages are not secure](#). In fact, not many text platforms are secure. The article went on to give a four-item checklist of considerations.

1. End-to-end encryption is the gold standard, and WhatsApp, Signal, and iMessage are best in class. They're all free, as well.
2. Remember that even if you use a service providing end-to-end encryption texts become vulnerable if the recipient does not. "You both need to be using the same app," Lee reminded me a couple of times.
3. Security experts recommend apps that use "open-source" software, which means that the code is publicly available and tech gurus can make sure there are no bugs or backdoors. "They can make sure it's doing what it claims to be doing," said Lee. Apple's code is not open source, which means users must trust but cannot verify what's promised.
4. Nothing is foolproof: While the content of your text messages is secure when using services like WhatsApp, your metadata is vulnerable, which means that the existence of text messages can be determined.

Conclusion

The long and short of deciding whether or not to use texting in your legal communications seems to be primarily the particular message conveyed. This is easy to control on your end, but you need to hold a meeting on text messaging policies with your client. With the Model Rules comment as well as the ubiquitous nature of texting, it seems that a lawyer will not be able to get away from using texting as a means of communication. However, that particular means needs to be kept concise and free of information that falls under attorney-client privilege. A large part of learning to use texting as a skill is following these guidelines in sight.

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