

A man with a beard, wearing a blue pinstriped suit, white shirt, and blue tie, is looking down at a smartphone in his right hand. The background is a blurred indoor setting.

What Attorneys Should Know About How Privacy Laws Relate to Texting

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What Attorneys Should Know About How Privacy Laws Relate to Texting

The TCPA regulates the collection and use of telephone numbers for commercial purposes. It applies to both telephone calls and text messages. The TCPA and the regulations promulgated under it set out rules governing, for example:

- Times during the day when telephone solicitations can be made.
- Use of automated telephone equipment for solicitations.
- Maintenance of a do not call registry.
- Information the solicitor must give to the consumer.

The TCPA permits private rights of action and provides for recovery of either actual or statutory damages ranging from \$500 to \$1,500 per unsolicited call or message. Because of these statutory damages, TCPA class action litigation is a key issue for businesses, and the terms of the statute are frequently litigated (see Practice Note, TCPA Litigation: Key Issues and Considerations). For more information on the FCC's interpretation of the TCPA regulations, see Expert Q&A: Far-Reaching Declaratory Ruling on the TCPA.”ⁱ

The Declaratory Ruling also addressed a number of issues that specifically affect text messaging under the TCPA. What were the most significant rulings with respect to marketing via text?

First, the FCC reaffirmed its position that SMS text messages are subject to the same consumer protections under the TCPA as voice calls, rejecting the argument that SMS text messages should not be subject to the TCPA because they are more similar to instant messages or emails than to voice calls. (Declaratory Ruling ¶ 107, 30 F.C.C.R. at 8016-17.)

Second, the FCC addressed Internet-to-phone text messages. Internet-to-phone text messages are different from SMS messages in that they originate as emails (as opposed to SMS text messages) and are sent to an email address in the form of

the recipient's wireless telephone number and the carrier's domain name. The FCC clarified that Internet-to-phone text messages are the functional equivalent of SMS text messages and require consent per the TCPA, a significant clarification given that these messages appeared to have been subject to the CAN-SPAM Act, not the TCPA. The FCC also found that the equipment used to send these messages is an ATDS for purposes of the TCPA. In so doing, the FCC defined the term "dial" to include the act of sending these messages and held that the technology stores numbers and "dials" them using random or sequential number generators within the meaning of the TCPA. (Declaratory Ruling ¶¶ 108-22, 30 F.C.C.R. at 8017-22.)

Third, the FCC provided helpful guidance regarding one-time messages sent in response to a consumer's specific request for information or a "call-to-action." Companies often use such calls to action in advertising, inviting interested consumers to text a particular short code for product information. It is now clear that one-time messages sent in response to such texts do not violate the TCPA, as long as they are sent to the consumer immediately in response to a specific request and contain only the requested information without any other marketing or advertising information. (Declaratory Ruling ¶¶ 103-106, 30 F.C.C.R. at 8015-16.ⁱⁱ)

Lawyers in California or Massachusetts have an even greater challenge with privacy and data security regulatory compliance. Because such issues are state-specific, they are beyond the general scope of this presentation, but lawyers in those jurisdictions are encouraged to familiarize themselves with their unique privacy and data security regulations.

Finally, generally speaking, privilege tends to extend to attachments in the same way it would extend to the text messages or emails to which they are attached. Privilege (and waiver thereof) tends to extend to screenshots of messages on devices as it would to both the message and a saved image on a device. For example, privilege might be waived with respect to an otherwise privileged email an employee sends to their lawyer from their Gmail account if the employee takes a screenshot of the email on a device provided by his employer.

Complications & Risks

Attorneys' Concurrent Personal and Professional Use of Devices

Using the same device for personal and professional tasks could expose you to additional risk. Inadvertently waiving attorney-client privilege is easier when you use your personal phone or computer to send and receive privileged communications, because more people may have an interest in the device (spouses, children, etc.).

Imagine your kid using your phone to play a game. A message from a client comes through. Your kid starts pressing virtual buttons on the screen, trying to get back to their game, and inadvertently forwards the message to an unintended recipient. While this scenario may seem unlikely, it's not impossible; and you can probably imagine worse scenarios. The point is you may not be the only person using your device.

What about your spouse? Maybe they're trying to send themselves pictures from your recent weekend away, and they come across some salacious photos saved on your phone that pertain to a divorce case you're working on. Now, to paraphrase Desi Arnaz, you got some 'splainin' to do!

Hacking Risks

"Attorneys and legal teams have to be particularly careful with mobile devices. 'Unfortunately, mobile devices and wireless systems can be hacked to compromise contact lists, usernames, passwords, client data, and browser history. As well, ... lawyers routinely carry around confidential information on small USB flash drive devices.' ... 10,000 laptops are lost each week in the nation's largest 36 airports, typically at security checkpoints. ..."ⁱⁱⁱ

To protect confidential information:

- Password protect devices and individual documents.
- Use encryption tools when communicating any privileged information.

- Create and store electronic documents only on the firm's network—not on home systems.
- Scrub metadata before documents are sent to external email addresses, including the lawyer's home email.
- Avoid installing third-party mobile applications on firm-issued smartphones—they spread malware, infiltrate networks or gain access to data. Clients should know this too.
- Put Bluetooth® devices in 'non-discoverable' mode, protect pairing with passwords, and pair with other devices only when in a trusted location.
- Password protect and encrypt USB flash drives." *Id.*

Meet or Exceed Expectations

Maintaining Confidentiality is one of the hallmarks of the legal profession. The best lawyers, therefore, maintain confidentiality of communications. Likewise, when reviewing discovery materials, they take extra care not to transmit or release privileged documents or communications. By meeting—or exceeding—our clients' expectations with respect to privileged communications, we maintain their trust, without which the attorney-client relationship cannot function as intended.

ⁱ US Privacy and Data Security Law: Overview, Practical Law Practice Note Overview 6-501-4555.

ⁱⁱ Expert Q&A: Far-Reaching Declaratory Ruling on the TCPA, Practical Law Article w-000-5132. See also the July 10, 2015, Federal Communications Commission Declaratory Ruling and Order addressing nearly two dozen pending petitions related to the agency's interpretation of several key TCPA provisions (see *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 F.C.C.R. 7961 (July 10, 2015)).

ⁱⁱⁱ Danna, A. (2013, November 20). Attorney-client privilege: Technological changes bring changing responsibilities for attorneys and legal departments (LexisNexis®, Ed.). Retrieved April 16, 2018, from <https://www.lexisnexis.com/communities/corporatecounselnewsletter/b/newsletter/archive/2014/01/06/attorney-client-privilege-technological-changes-bring-changing-responsibilities-for-attorneys-and-legal-departments.aspx>



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