



# To Text or Not to Text

Is your firm handling mobile device-based client communication the right way?



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**When Patrick J. Lamb, Partner at Valorem Law Group in Chicago, needs to briefly discuss a matter with another attorney in his office, instead of calling or sending an email, he often reaches for his cell phone.**

“We text internally at work,” Lamb says. “Sometimes it’s just easier to do that because you know people will check texts sooner than emails.”

Valorem’s attorneys aren’t off-base; more than 90 percent of people read a text message within the first three minutes of receiving it, according to research firm MobileSquared.

Because you don’t have to log in to a system to send or receive texts, they’re sometimes viewed as a more convenient option than email.

We’re also just getting a lot less of them. With Americans receiving roughly 122 business emails a day, according to research firm The Radicati Group, compared to approximately 32 to 33 texts each day, software-as-a-service provider Text Request’s estimate, text messages tend to stand out more than email — one reason they’ve become some clients’ preferred communication choice.

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All those messages can add up; unless the firm has agreed to an alternative fee arrangement, clients may be surprised to find out they're being charged for the exchanges.

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"In the last five years, as texting moved generationally from being something that younger people did into being a common method of communication, clients are most likely texting — so they're more likely to communicate with their law firm that way," says Meghan Freed, Managing Attorney at Connecticut marital and family law firm Freed Marcroft LLC.

### THE TROUBLE WITH TEXTING

Mobile device messaging may have become more popular in the legal realm; it can, however, pose some concerns.

Because the general texting vernacular skews toward casual, texts may not, for example, convey all the necessary information.

"Text was designed for short, quick responses," says Eric Kahn, Managing Shareholder at Javerbaum Wurgaft Hicks Wikstrom & Sinins P.C., a more than 40-attorney firm in New Jersey, New York and Atlanta. "It's very hard to give full and complete responses to legal questions by text."

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"Our sense of text messaging is the response should be immediate, even if it's maybe not an urgent matter," Freed says. "You can send a lot of rapid-fire texts and don't have to gather your thoughts."

Deciphering a string of messages — or trying to respond to one — can be challenging. Clients, according to Larry Casey, Shareholder at midsized firm Davis, Malm & D'Agostine, P.C.

in Boston, may not be sure which specific text an attorney is responding to.

"From a legal perspective, if lawyers are writing something that's not clear and the client acts on it, there's a problem of liability," Casey says. "If clients aren't reading texts carefully, a response could be confusing or be misinterpreted, if you have a text that says 'Are you OK with their offer?' versus an email that says, 'This confirms the terms of the email below.'"

Awkward phrasing isn't the only potential predicament; texting can also cause a number of other prospective issues — such as:

**Cost concerns:** Texting isn't always the most efficient communication method, according to Casey.

"People tend to not give full explanations or descriptions, or even full responses, to what the inquiry is, so you have to text again," he says. "There's much more going back and forth."

All those messages can add up; unless the firm has agreed to an alternative fee arrangement, clients may be surprised to find out they're being charged for the exchanges.

"Clients can lose track of how much time texting back and forth takes because it feels so informal," Freed says. "It's not a consolidated way of communicating, which leads to higher bills for no reason."

**Reduced work-life balance quality:** Clients know, with today's technology, attorneys can be reached virtually any time, which makes it hard for firm members to disengage and relax at the end of the day.

"Almost all lawyers here use smartphones; unfortunately, [that means] we can get our email and receive texts 24/7," says Rubin Sinins, Shareholder at Javerbaum Wurgaft. "And the expectation of clients oftentimes is that they're going to get an immediate response."

Freed's firm found clients several years ago were starting to text attorneys outside of traditional nine-to-five hours.

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Texts, which can appear on a locked screen, even if the phone is in sleep mode, may also put messages at a greater risk of being seen by unintended viewers than email, which is password-protected.

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"If you have a cell number, you can text it," Freed says. "We interact with a lot of folks going through something in their personal life, and we understand there are heightened emotions. It just became difficult to wade through the expectations of clients for immediacy, versus needing to make sure our team is able to leave work. It makes it difficult for them to have a home life."

**Document management difficulties:** Although clients can send some evidence via text, such as photos, Chicago-based Solo Practitioner Charles A. Krugel, a labor and employment attorney, has run into situations when messages or images come through without key information.

"What I really need when they send me things is metadata — [identifying] when the document text was created, who had the chain of evidence, where it came from in the organization," Krugel says. "If we can't independently corroborate its existence, then it's really no good; the evidence is basically worthless."

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Texting can also complicate document storage and retrieval. Although Freed's firm has systems in place to capture emails and phone calls, it realized, when clients began texting more frequently, that it didn't have a way to log text messages.

"People were capturing them via screenshot and uploading them into the filing system, which was just not an efficient way to communicate and save documents [in regard to] practice management and maintaining files," Freed says.

**Privacy risks:** Although Krugel says a basic attorney-client privilege would technically apply to texts due to the nature

of the communication, he has seen instances in which clients have mistakenly sent items to other people — for example, the opposing counsel — because the person's phone automatically populated numbers or names.

"All you can do is tell the other side it was intended to be a privileged conversation and ask them to destroy it," he says. "You can't just leave it out there if the client sends something to someone by mistake; you have to maintain some sort of protection of privacy."

Texts, which can appear on a locked screen, even if the phone is in sleep mode, may also put messages at a greater risk of being seen by unintended viewers than email, which is password-protected.

"A lot of times, texts will appear when you turn your phone on," Lamb says. "You want to avoid texting confidential information in case something appears, and the intended receiver isn't the one opening the phone."

Clients, however, sometimes do text sensitive information — which, with some devices, may appear in multiple locations.

"A text message might show up on my phone — but also on my child's iPad or the family computer through iCloud," Freed says. "You could be texting and commiserating with a friend about your situation and have a spouse or child read it, which can lead to upset feelings or acrimony. It's not the most private way to chat."

### WHAT FIRMS CAN DO

With more than 560 billion texts being sent each month worldwide — a more than 7,700 percent increase in the past decade, according to data from research provider Statistic Brain — texting doesn't seem to be going away anytime soon; it's up to firms to find an approach that will help them manage the correspondence.

The most obvious way to prevent clients from texting you is to avoid giving them your cell phone number. A number of attorneys at Javerbaum Wurgaft share their contact information sparingly.

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## A carefully crafted communications policy can also help prevent texting from becoming an issue.

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“We don’t require or even encourage lawyers to give their cell phone number to clients,” Rubin says. “The nature of most attorneys’ work doesn’t lend itself to [needing an immediate response].”

Kahn doesn’t always offer his cell number to clients either.

“In criminal cases, you need after-hours contact because people get arrested on weekends and Friday nights,” he says. “In the personal injury work I do, primarily, there’s not a lot of action required on an urgent basis. I don’t trust everyone to honor my time away from the office or weekends; I’d rather be more judicious in who I give my number to.”



Some attorneys limit their texting to brief updates and encourage clients to do as well.

“I don’t have any problem with quick communications to connect with a client,” Casey says. “I’ve seen more short texts — ‘I’m available for a call’ or ‘I just left a voicemail; call me back,’ than heavy-duty texting.”

A carefully crafted communications policy can also help prevent texting from becoming an issue.

When Freed’s firm realized a number of attorneys were getting texts outside of normal business hours, it decided to put an informal communications policy into writing.

Clients now see a two-page document when they start working with the firm that explains why text messaging isn’t the best way to communicate and outlines its preferred contact methods, along with other information, such as what

the firm defines as a textable emergency — for example, a spouse threatening to take the children out of the country.

“The vast majority of people don’t run afoul of it; when people do, our first attempt isn’t to remind them that they violated a policy,” Freed says. “We decided when a lawyer received a text message from a client, they should just respond in email. We’ve learned by responding via a more approachable communication mode, most people get it and redirect the communication.”

Freed Marcroft’s attorneys do, on occasion, text clients — if, for example, the courtroom they were supposed to meet in has been changed to one on a different floor. But firm members are careful not to make it a habit.

“We try to isolate it for limited purposes, if it’s time-sensitive — just a quick note because the client might not be opening email on their way into court,” Freed says. “But even before we do that, we say, ‘I apologize for texting,’ to acknowledge that we’re going out of our normal communication method.”

Adhering to a well-defined communications stance is crucial to reigning excessive client texting habits in — and keeping them from again getting out of control.

“In general, if the firm has a policy or not, you have to have your own personal policy, depending on how comfortable you are receiving texts or calls,” Kahn says. “We need to be available to our clients; but we don’t need to be available to all of them 24/7 — it’s just not a reasonable expectation.” ■

### ABOUT THE AUTHOR

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