

TO TEXT OR NOT TO TEXT:

BY KELLEY K. HASSON, ESQ.

Supreme Court Rule 1.4(a) requires lawyers to promptly and reasonably communicate with their clients regarding their cases. In the modern era of electronic discovery, texting, emailing and various other means of electronic communication, a client's idea of prompt is no longer the few days it takes for the post to arrive. Clients come to our offices with pictures and documents on phones, notepads, computers and various other electronic devices, expecting us to understand how to use these devices and to respond promptly via these devices. With the majority of clients in today's electronic era, texting facilitates prompt communication in a time-saving, unobtrusive, silent format.

Getting Started

When deciding whether or not to text your clients, a twist on Sun Tzu's advice regarding warfare applies. "Know thyself and know thy client, and you will never fear the outcome."¹ If your client walks into your office with her cellular phone glued to her hand, texting, emailing and looking up information on her phone during the initial intake, then she is a client with whom you should text. If your client walks in with a cane and owns a cell phone with a 10-key pad rather than a QWERTY board, then he is not someone whom you should text.

When in doubt, ask your client how s/he wishes to communicate with you. Offer texting, email, phone calls and mail as options. Prior to sending a confidential message, send a confirmation text to your client, ideally before he or she leaves the office. This allows time for a responsive text and confirms the text phone number. Keep in mind that, when texting, a simple misspelling of an email address or phone number can send confidential

THAT IS THE QUESTION

Safety

information to the wrong person. For this reason it is imperative to send a confirmation email or text before divulging confidential information. Furthermore, your fee agreement should outline the charges for text messaging. Keep in mind that daytime texts should cost less than middle-of-the-night texts, and your clients should be made aware of this at the beginning of representation. Outlining the fees for text messages will keep your clients from abusing the texting privilege and allow you to bill for texting.

Clients often text us while we are in transit to court, the office or another location. Natural reflexes tempt us to respond immediately. However, NRS 484B.165 expressly forbids texting, accessing the Internet or using a handheld device while driving. Please keep in mind that most jurisdictions place restraints upon texting and driving. If traffic safety concerns do not dissuade you from texting and driving, autocorrect may. Autocorrect is a built-in feature on many smartphones that completes and corrects words

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according to what autocorrect deems best. Texting one-handed while driving leads autocorrect to make some interesting and often embarrassing corrections to texts, as one small bump in the road can force your thumb to hit “send” before you’ve had a chance to proofread or correct autocorrect’s mistakes. Some lawyers opt to turn off the autocorrect feature. This is a matter of personal preference. (Driving and texting, however, shouldn’t be; don’t do it!).

Subject Matter of Texts

Subjects appropriate for text messages include reminders of court dates, changes in courtroom location, cancellation of hearings and yes or no answers to questions posed by clients. Typically, I mail a Notice of Hearing to the record address the same day I file the notice. The week prior to the hearing, I call my client with a reminder about the hearing. The night before and/or the morning of, I text the client another reminder. This may seem excessive, but it surprises me how often clients resist appearing at court, despite their adamancy regarding their case while in my office. Texting informs my clients of the importance of their appearance at the hearing.

Another reason to text when court rooms change at the last minute or a judge decides to hear things in chambers. At other times, the opposing party is waiting in an area that I want my client to avoid, due to bad blood between the litigants. This is a perfect time to text clients a message requesting they meet me at a certain alcove and wait with their families there. This prevents hot-blooded litigants from running into each other and provides a quiet spot for conversation.

Texting While in Court

Many lawyers spend several hours waiting for their cases to be called. Judge permitting, this waiting period can be a good time to respond to text messages. Unlike phone calls, text messages are silent and do not require you to leave the courtroom. Often, I am able to resolve a situation while sitting

in the courtroom, rather than having to leave the courtroom to return a phone call. A text is silent, unheard by those around you in the courthouse, and much faster than a phone call. Texting while waiting is an ideal way to make use of an attorney’s time.

After Hours

Due to the deluge of work in family and criminal law cases after typical business hours, this is the perfect time for texting. Early in my solo-practitioner career, I mistakenly answered every phone call after hours, rather than allowing voicemail to answer and text me the message. One late Friday night, I picked up the phone to a distraught client concerned about toy trains or, as he described them, “model Lionel’s collector’s edition steam locomotives.” I quickly learned to allow calls to go to voicemail or an answering service. I then respond via text message, informing my client of the solution or the non-emergency nature of the situation. My voice messages are transcribed into text and sent to my phone. This saves time and effort when dealing with multiple family law emergencies during the weekend.

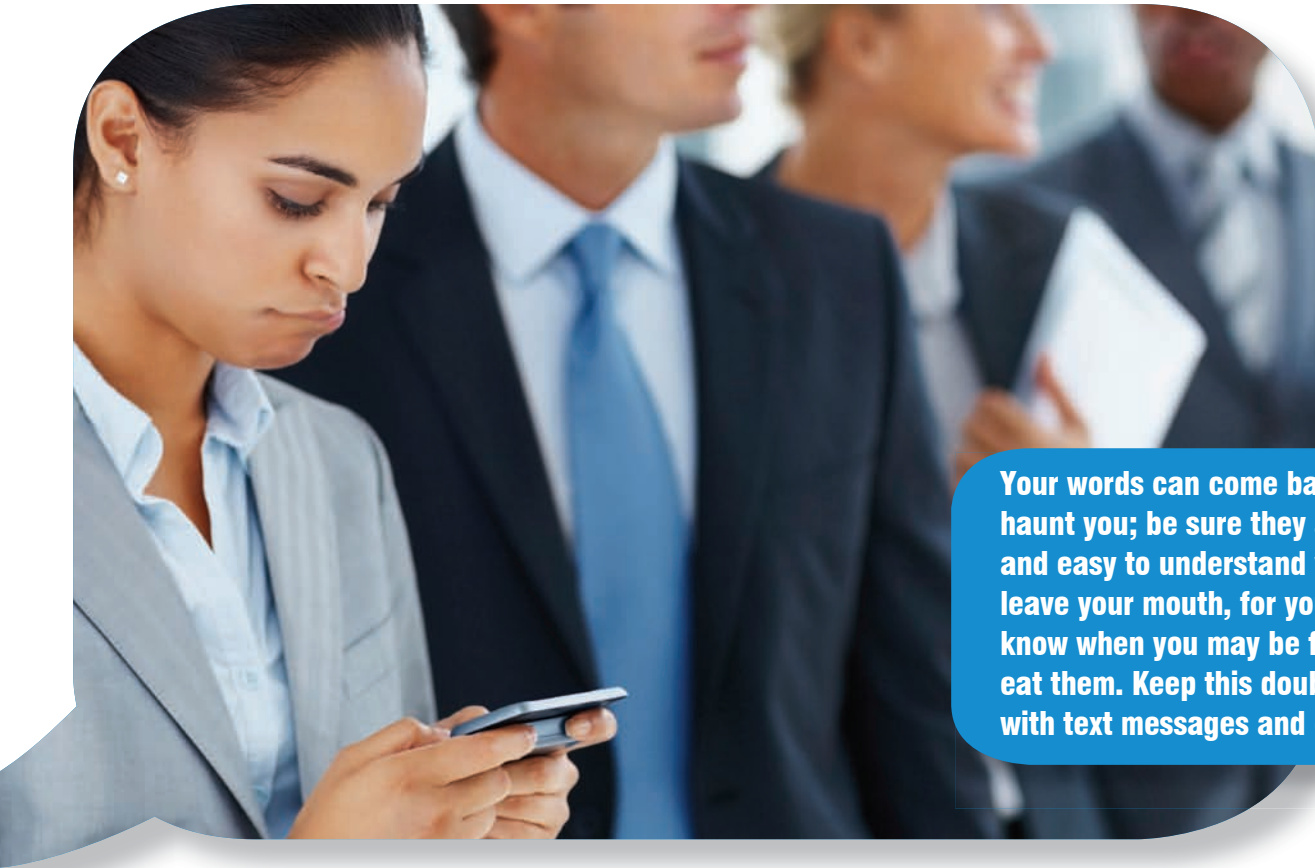
Back Up

The State Bar of Nevada’s Standing Committee on Ethics and Professional Responsibility’s Formal Opinion No.33, (Feb 9, 2006) allows attorneys to use third-party servers to store electronic information, as long as the attorney takes reasonable precautions to safeguard the confidential information. This opinion allows for cloud and gmail back-up of documents. My personal preference is backing up to gmail, which adds a date/time stamp with an origin number in a printable or electronic format. Although I am not an iPhone/Apple user, I understand Apple has cloud technology that enables similar storage. You may also download or back up text messages to an SD card within the phone or to a computer hard drive.

Security

Part of Formal Opinion No. 33 includes the duty of an attorney to take reasonable steps to safeguard clients’ confidential information. Text messages between attorneys and their clients are confidential. A few simple steps will protect your text messages:

1. Password protect your phone;
2. Do not allow others to use your phone;
3. Add GPS tracking or a locator to your phone service; and
4. Prepare to remote memory erase a missing or stolen phone in the event of a worst-case scenario. If you do not know how to do these things, research the procedure on Google or YouTube, or contact your cellular phone service provider.



Your words can come back to haunt you; be sure they are sweet and easy to understand when they leave your mouth, for you never know when you may be forced to eat them. Keep this doubly in mind with text messages and emails.

Text Shorthand

Be leery of shorthand when communicating with clients. “Ctrm 2b” may not be as easy for a client to interpret as “moved to courtroom 2b.” Typically, text messaging other attorneys affords the convenience of common texting shorthand, while many clients usually require more explanation. It is also more likely that a client will print the text messages to use in litigation against you than is opposing counsel. Your words can come back to haunt you; be sure they are sweet and easy to understand when they leave your mouth, for you never know when you may be forced to eat them. Keep this doubly in mind with text messages and emails.

Conclusion

There are a few important matters to keep in mind when texting clients. Clearly define how you bill for your text messages. This will prevent clients from abusing them and also remind you to bill for text messages. Back up all messages to a secure server. Safeguard your phone with a password or screen lock, and acquire the ability to remotely erase the memory of your phone. Keep text messages short and to the point, while avoiding shorthand which could confuse the client. Above all else, be professional and polite and both you and your clients will enjoy the prompt communication leading to a positive resolution of the case. At the end of the case,

your clients will be more satisfied if they felt they had open lines of communication and were able to reach you when they perceived a need to do so. ■

1. Original quotation: “Know thyself. Know thy enemy...” Sun Tzu, “The Art of War,” Chapter 3.



KELLEY K HASSON, ESQ., was admitted to the State Bar of Nevada in October 2012. She focuses her solo practice on family, criminal, estate and civil litigation. Hasson graduated from Levin College of Law in December 2008, having earned three book awards and made the Dean’s list multiple times, while supporting herself and three young children. She enjoys travel and seeking admission to additional jurisdictions; she currently enjoys admittance to 10 jurisdictions.