Hanover Miscellaneous Professional Advantage

Advice sux. Myatty says UR so screwed LOL.

A letter on company letterhead (on the "good" paper) signed in ink.

For years, this was how professionals corresponded. Even after the advent of the fax machine, firms simply faxed a copy of the original letter and then followed that up by placing the original in the mail. As firms went paperless, the paper letter gave way to the electronic letter attached to an email. And then finally, the body of the email simply became the avenue for client discussion and decisions. Why are we taking this trip down memory lane? The evolution of client communications has raised distinct issues that impact professional liability exposure. Faster, easier, newer communication is not without hazards. Without appreciating those hazards, professionals run the risk of being in a disadvantaged position in the event of a professional liability claim.

Speed of communication is critical. Clients demand it. Professionals who insist that to remain competitive they must be uber-responsive are compelled to use whatever means available to them in the moment. In some professions, especially those where disciplinary complaints and claims for slow or non-communication are commonplace, not responding within a specified timeframe is considered unacceptable and unprofessional. For a growing number of clients and professionals tethered to their smartphones, text messaging has emerged as the desired way to convey time-sensitive information. But using text as a preferred medium comes with questions.

Situation #1 – You have been sued by a client who alleges that you agreed via text to make a key change that deviates from the terms of your signed contract. Your position is that you made no such agreement. If you can produce the communication, the likely outcome is that you will be vindicated in the suit. If you cannot, the likely result is a tedious finger-pointing exercise for the court.

Many professionals' ethics codes have a compulsory record-retention obligation. Where such an obligation does not exist, there is still a strong argument to proactively maintain a contemporaneous record of client communications for a minimum amount of time, either for regulatory audit reasons or in case they need to be produced in litigation. Depending on state, a professional may be sued for negligence over two years after the service was provided. Text messages typically disappear after 30 days. They are not permanently gone (even deleting a text message will not accomplish this), but after 30 days they become very difficult to recover.

Situation #2 – Your normal practice is to email client communications and your emails include some form of the following language in the signature: *Discussions contained herein are not final advice and may not be relied upon for the avoidance of penalties or any other economic loss.* Your client texts you in a panic about an opportunity they need immediate response on. In your mind the dialogue says: I would ***want*** to see ***more detail*** before you sign-off on this, ***but*** it ***sounds like something*** I could see ***that*** it ***might be good*** for you ***to move forward on***. But you respond via text: ***want more detail but sounds like something that might be good to move fwd on***. Client gets it right? Client enters transaction, loses large sums and sues you for poor advice.

This situation highlights three problems. The most obvious is that text messages likely do not carry the protective disclosures that warn the user of the limits on use. In fact, at litigation it may be especially difficult for you to answer why you chose to use a response method that offered no protection when you just as easily could have resorted to a method that did provide some protection. Second, the client created a sense of urgency that you as the professional responded to in the name of "good client service". By the way, this frame of mind (*Must. Respond. Quickly. Urgent!!!*) is *exactly* why cybersecurity professionals warn about "social engineering" and our proclivity to respond to urgency without thinking or analyzing the situation for danger. That urgency will prove to be challenging to your defense – the finder of fact in litigation will assess whether it was reasonable for the recipient to act on your communication based on the totality of the circumstances. Professionals who operate in industries where time is of the essence may have difficulty proving that their texts were not "advice" and should not have been relied upon, or that client acts in

reliance upon your texts were unreasonable. Here, you may find yourself arguing about the word "might", and whether that should be enough warning to not act immediately. It was clear in your head, but what was in your head was not what you texted. This brings us to the third issue. The brevity and nature of text communication often differs from email or other formal communications. The tendency to shortcut full sentences or proper grammar (after all, you have at least 5 more texts to respond to *right now*) creates ambiguities that do not work to the professional's favor. If your statement is subject to more than one interpretation, you may have to live with an interpretation that conflicts with your actual intent.

Situation #3 – You have been sued for negligence and your client has alleged that you failed to advise them properly causing substantial economic loss. In the discovery phase of litigation, you reveal to opposing counsel that at a critical moment of the service you were on vacation and your associate texted you about a client ask. The attorney asks you if texting either associates or clients is a normal practice in your firm. You respond that you have clients that expect a high level of responsiveness so you may text them occasionally, and that text on client matters is common between staff members.

This situation may open a hornet's nest. When opposing counsel requests but does not receive details of texts sent or received related to the issue underpinning the lawsuit, internal or external, that fact will be brought to the court's attention. "All communications" in the discovery request means exactly what it says: *all communications*. In whatever form. Including text messages. Opposing counsel may first look to your attorney and inquire as to why you are not complying with the request for discovery. It is not just the direct client communications; it is also the internal discussions (which likely are not privileged and thus must be disclosed) that may provide details about how you handled the work. Recall that texts disappear after 30 days. Opposing counsel will re-assert their request for <u>all</u> communications and may seek to compel you to produce the missing information. This may require a court order directed to the cell phone carrier and there is no guarantee they will comply or how quickly. You may need to hire a forensic expert to verify the texts in question. Your attorney will need to spend additional time and money to track down the necessary information to fully comply with the discovery order (or be held in contempt) and understand how the results affect the outcome of your case. In the extreme, your attorney may also need to defend an allegation of spoliation – the tampering or destruction of evidence, or in this case, the failure to preserve evidence. All of these actions will result in additional costs which you ultimately may be responsible for.

A related but separate issue? Texts may be part of an extended, continuous chain of communication that includes meetings, phone calls and emails, and possibly involving more than one team member. Any person that picks up the chain and is not in possession of the full picture runs the risk of providing advice that makes sense in isolation but is really not applicable when viewed in totality. As relates to professional liability, "not knowing" is not a defense that works.

A potentially awkward outcome? The phone used to text the client may be subpoenaed. For many professionals, that means their *personal* phone. How would that work if you needed to go an extended period without your phone? Is there anything on your phone you might not want a complete stranger to see? By the way, for those that use their personal computer for emails, that same exposure (subpoena of device) is worth thinking about.

Situation #4 – You think you have sent a text to a client named "James Martin". In reality you sent the text to "Martin James".

The mistakes that happen in emails happen just as easily in text and for many of the same reasons. Moving too fast. Fingers and brain are not on the same page. Auto-fill. If you are in a profession that makes it unethical or illegal to disclose confidential client information without prior consent, depending on the content, sending a text to the wrong text recipient may violate those rules. Further, once sent there is no guarantee the (wrong) recipient will delete the information or not use the contents for whatever reason. At a basic level, it is professionally embarrassing to send the wrong information to the wrong client, and it immediately makes the recipient think, "I certainly hope they haven't sent my information to the wrong person."

Situation #5 – Privileged conversations were mentioned in Situation #3. One of the basic requirements of privilege – in general, an ability to restrict certain discussions from disclosure – is that the communication be confidential. Whether a text could ever be considered "confidential" is situation-specific. However, given the informality of most text messages, the ease by which texts may be forwarded, and the short-lived accessibility of a text, it is easy to see strong arguments against confidentiality and how contents of a text should not be treated as privileged. Contrast this with emails which, although also easily forwarded, have more permanence and frequently bear multiple warnings to recipients (e.g., *"CONFIDENTIAL"* in subject line or body and/or language in the body that restricts forwarding or use of contents) that at least outwardly purport to convey the confidential nature of the communication.

The risks associated with the use of text messaging are not limited solely to texting. Social media (Twitter, Instagram, LinkedIn) raises a few of the same concerns (format weaknesses, evidence production, privilege) even if their use for client communication is not prominent. However, the allure and frankly the ease and convenience of text messaging make it particularly prone to abuse. In this case, speed is not your friend. A more appropriate course (assuming the letter on the "good" paper is not a realistic option) is to ***not provide advice via text*** and dissuade your clients and staff from resorting to text as a either a formal or informal method of communication for official business. For critical decisions especially, speak directly to your client and immediately follow up with a clear and concise writing that summarizes the contents of the discussion and any action steps to be taken. If a client insists on using text, consider sending a communication along the lines of, "received your message, we should speak first before you do anything". Create no ambiguity. Be responsive, but do not take on the added risk.

Contact information

If you have any questions about the content of this article, please contact J Michael Reese, Director of Risk Management (MPL).

Phone: 630-760-3026

The Hanover Insurance Group®

The Hanover Insurance Company
440 Lincoln Street, Worcester, MA 01653

hanover.com

LC 2021-354 (07/2021)