

PLANO

**EXECUTIVE NIGHT & SEMINAR
WEDNESDAY, FEBRUARY 23, 2022**

**ETHICAL HAZARDS OF TEXT MESSAGING AND
OTHER ELECTRONIC COMMUNICATIONS:
LESSONS TO BE LEARNED**

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when you're
DRINKING...

and not
wearing
a mask!





LESSONS LEARNED DEEPWATER HORIZON

Federal Affidavit

- April 20, 2010: Deepwater Horizon rig, leased by BP, experienced an uncontrolled well-blowout of gas and oil, leading to two massive explosions
- April 21, 2010: U.S. Coast Guard and the MMS commenced a joint investigation of the Deepwater Horizon disaster
- April 21, 2010: Kurt Mix, a BP senior drilling engineer, provided early estimates of the flow rate of oil from the ruptured Macondo Well

LESSONS LEARNED

DEEPWATER HORIZON

- April 22, 2010: Mr. Mix was served with first Legal Hold Notice, advising:
 - Of obligation to retain all records relevant to the Macondo well oil spill, including preserving all instant and text messaging documents
 - That withholding, concealing, altering, falsifying or destroying anything subject to the Legal Hold Order may subject him to criminal prosecution

LESSONS LEARNED

DEEPWATER HORIZON

Over the following two months, Mr. Mix received five additional Legal Hold Notices, including one emphasizing that instant messages and text messages must be preserved

LESSONS LEARNED

DEEPWATER HORIZON

- During those 2 months:
 - Mr. Mix Worked on the "Top Kill" method for closing off the well, which required a flow-rate of under 15,000 BOPD
 - Mr. Mix exchanged numerous text messages with his supervisor and BP contractor about the Top Kill operation and the oil flow-rate
 - Top Kill ultimately failed

LESSONS LEARNED

DEEPWATER HORIZON

- June 1, 2010: U. S. Attorney General announced that the DOJ had launched a criminal investigation into the oil spill
- September 22, 2010: Mr. Mix notified that "all active electronic data" was going to be collected by a third-party document collection vendor
- August 22, 2011: Mr. Mix turned his cellular phone over to the third-party vendor



LESSONS LEARNED

DEEPWATER HORIZON

Forensic analysis revealed that Mr. Mix deleted over 300 text messages with his supervisor and with a BP contractor:

- Most were mundane, to family and friends, unrelated to the incident
- But, a few dealt with the issue of the oil flow-rate, indicating the Top Kill operation was failing because the excessive flow-rate

LESSONS LEARNED

DEEPWATER HORIZON

Mix texted at 10:25 p.m. on May 26, 2010, the first day of the Top Kill operation:

“Too much flowrate — over 15,000 and too large an orifice.” “Tired. Going home and getting ready for round three tomorrow”

This flow-rate was 3-times higher than what BP publicly attested to at that time

LESSONS LEARNED

DEEPWATER HORIZON

- April 24, 2012: Mr. Mix arrested at his Texas home based on Federal Affidavit
- Mr. Mix personally charged with two felony counts of obstruction of justice for deleting text messages from his cellular phone

LESSONS LEARNED

DEEPWATER HORIZON

- In his December 2013 trial, Mr. Mix:
 - Acquitted of one count of felony obstruction of justice
 - Found guilty by a Louisiana jury on the other count – which was subsequently dismissed due to juror misconduct
- New trial was ordered

LESSONS LEARNED

DEEPWATER HORIZON

- Before new trial, the DOJ revised charge to allow for a misdemeanor plea of intentionally causing damage to a protected computer without authorization
- Mr. Mix pled guilty to the misdemeanor charge on November 6, 2015, in exchange for no further charges brought against him

See, U.S. v. Kurt Mix, 2:12-cr-00171, U.S. District Court for the Eastern District of Louisiana

LESSONS LEARNED

DEEPWATER HORIZON

So why did Mr. Mix delete messages from his phone after having been served with hold notices, and knowing that a DOJ investigation was launched?

LESSONS LEARNED

DEEPWATER HORIZON

Mr. Mix said that he deleted messages from his phone because the majority of them were largely personal in nature and did not include anything important about the incident

INTRODUCTION

- Today, our clients expect instant responses and availability 24/7/365
- These expectations are fostered by modern technology, which allows almost instant communication via emails, text messages, and videoconference at any time and place

INTRODUCTION

- Meeting modern client expectations can create an ethical minefield as attorneys are able to open, edit and sign documents from the same device they use to call their spouse and text their friends
- Stringent obligations are imposed on attorneys that demand attention and sensitivity to matters of confidentiality, file retention, and waiver of various privileges

ABA Model Rules of Professional Conduct

Model Rule 1.1: Competence

- A lawyer shall provide competent representation to a client
- Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation

ABA Model Rules of Professional Conduct

Model Rule 1.1: Competence

- Comment 8 recognizes that the duty of competence requires that lawyers keep abreast of the changes in law and in practice
- Includes the benefits and risks associated with new technology

ABA Model Rules of Professional Conduct

Model Rule 1.1: Competence

- Attorneys must be aware of industry and client trends, such as the widespread adoption of certain client-attorney technologies, such as Zoom or Lifesize for videoconferencing
- Before adopting new technology, the attorney must make sure the he/she is comfortable using it and that any security or privacy risks are accounted for, with necessary mitigation measures put into place

ABA Model Rules of Professional Conduct

Model Rule 1.4: Communications

Proper communication is another duty set forth by the Model Rules, and attorneys must:

- Inform clients promptly regarding any circumstance in which the client's informed consent is required
- Keep clients reasonably informed
- Promptly respond to reasonable requests for information
- Let clients know of any relevant limitation on the attorney's conduct when the attorney knows the client expects assistance not permitted under the Rules
- Explain matters well enough to permit the client to make informed decisions regarding the representation

ABA Model Rules of Professional Conduct

Model Rule 1.4: Communications

An attorney must know the best means to communicate with a particular client to comply with these requirements

- For example:
 - Texting is less formal than letters and emails and can be useful for quick messages, such as confirming appointment times
 - But, it should not be used to explain a complex legal argument or to convey to seriousness of the matter
- The casual nature of texting may cause recipients to understate the seriousness of a message or bolster their impression that there is no need to protect or save them

ABA Model Rules of Professional Conduct

Model Rule 1.6: Confidentiality of Information

- The growth of electronic communication also implicates serious privacy concerns
- Model Rule 1.6 requires that an attorney not reveal information disclosed by a client - unless client consent is obtained
- Requires attorney to make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client

Communicate Short to the Point Messages



COMMON MEANS OF ELECTRONIC COMMUNICATION

TEXTING AND CELL PHONES

- Texting primarily viewed as an informal means of communicating short, to the point messages
- 81% of Americans text regularly
- >1/3 of professionals say they can't go over 10 minutes without responding to a text

COMMON MEANS OF ELECTRONIC COMMUNICATION TEXTING AND CELL PHONES

- Should attorneys even be using texting as a means of communicating with clients?
- Yes, and no. Using text messages to comply with the Model Rules can be fraught with landmines
- The risk of texting likely outweighs any benefit

COMMON MEANS OF ELECTRONIC COMMUNICATION TEXTING AND CELL PHONES

- A clear understanding of the methods of communication to be used between the attorney and the client can be the best tool to protect both parties
- An attorney who decides not to utilize text messaging should clearly state their preference to their client
 - Note that the ability to text may be an important consideration for some clients in their choice of attorney

COMMON MEANS OF ELECTRONIC COMMUNICATION TEXTING AND CELL PHONES

- An engagement letter should include a standard provision expressing the preferred methods of communication
- If a client is determined to communicate via text, an attorney should ensure the client understands the implications of the method of communications and the duty to preserve them

COMMON MEANS OF ELECTRONIC COMMUNICATION

TEXTING AND CELL PHONES

- Text messages may have evidentiary value and may become evidence at some point
 - A court may order that a cell phone be made available for inspection or even forensic analysis
- This, in turn, raises possible spoliation issues, for failure to preserve text messages that may have relevance in legal actions

ABA Model Rules of Professional Conduct

Model Rule 3.4: Fairness To Opposing Party And Counsel

- Model Rule 3.4 addresses an attorney's obligation to preserve evidence, including text messages
- Once a text is deleted, it is often irretrievable, even by the mobile provider
- Some phones are equipped with the ability to auto-delete texts after a certain time period

ABA Model Rules of Professional Conduct

Model Rule 3.4: Fairness To Opposing Party And Counsel

If texts between an attorney and a client are present on a phone, both the attorney and the client must be aware that affirmative steps may be necessary to save the messages

- If possible, technology should be used to archive the text messages so they are not inadvertently deleted

SPOILIATION OF EVIDENCE

- Under Comment 8 to Model Rule 1.1, attorneys likely have both an ethical obligation and a duty of care to warn clients of the potential consequences of using text messaging and the failure to preserve text messages that may be subject to discovery
- Failure to do so has resulted in the imposition of significant financial penalties to both attorneys and their clients

SPOLIATION OF EVIDENCE

- Spoliation of evidence is the intentional, reckless, or negligent withholding, hiding, altering, fabricating, or destroying of evidence relevant to a legal proceeding.
- The risks posed by text messaging, and the importance of advising clients of these risks under the duty imposed by Model Rule 1.1, is highlighted in actions where sanctions were imposed for the failure to take reasonable steps to preserve text messages

SPOLIATION OF EVIDENCE

Courts consider a number of factors when deciding to impose sanctions for spoliation of evidence, including:

- The culpability of the spoliating party
- The prejudice the failure to preserve poses to a non-offending party
- Whether the evidence is irretrievably lost
- The relevance or importance of the evidence
- The degree of interference with the judicial process the spoliation has caused
- Whether lesser sanctions can remedy the harm
- Whether sanctions will deter future spoliation
- Whether sanctions would unfairly punish a party for attorney misconduct

ATTORNEY-CLIENT PRIVILEGE AND CONFIDENTIALITY

- The attorney-client privilege protects most oral and written communications between an attorney and a client during the attorney-client relationship
- In most cases, the privilege prevents discovery of communications between clients and their lawyers, assuming that the conversation was intended to be private and is not in furtherance of a crime
- If so, such communications remain free from discovery and the lawyer cannot disclose their communications with their client



ATTORNEY-CLIENT PRIVILEGE AND CONFIDENTIALITY

- The privilege generally includes written communications, such as letters, e-mails, and text messages
- Today, more attorney-client communication is conducted using e-mails or text messaging, and cloud computing services are being used to share documents
- Risk of inadvertent disclosure increases with growth of electronic communication
- With the click of a button, the attorney and/or client may inadvertently waive important privileges – even if the disclosure was made by mistake

ATTORNEY-CLIENT PRIVILEGE AND CONFIDENTIALITY

The American Bar Association's Standing Committee on Ethics and Professional Responsibility issued a formal ethics opinion on May 4, 2017 stating that a fact-based analysis was necessary to determine when a lawyer had breached his or her duty of confidentiality

ATTORNEY-CLIENT PRIVILEGE AND CONFIDENTIALITY

Factors to be considered include:

- (1) The sensitivity of the information
- (2) The likelihood of disclosure if additional safeguards are not employed
- (3) The cost of employing additional safeguards
- (4) The difficulty of implementing the safeguards
- (5) The extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use)

Many of the safeguards necessary for protecting text messages are simple to install and do not require much human or financial capital to implement.

ATTORNEY-CLIENT PRIVILEGE AND CONFIDENTIALITY

- Some courts have held that clients have a reasonable expectation of privacy in attorney-client text messages sent or received on a personal device if the messages are not disclosed to a third party.
- Therefore, as long as a text message sent or received on a personal device is not disclosed to a third party or the privilege is not otherwise waived, the text message is protected by the attorney-client privilege

ATTORNEY-CLIENT PRIVILEGE AND CONFIDENTIALITY

- Factors an attorney must consider when communicating with a client via text message is whether the client's device was furnished to them by their employer or some other third party
- A finding of waiver may be more likely if the client has no reasonable expectation their communications would remain confidential from the third party that owns or controls the device

ATTORNEY-CLIENT PRIVILEGE AND CONFIDENTIALITY

- The privilege can also be easily waived through inadvertent disclosure – which is more likely to occur with a quick form of communication, such as text messaging, as it is often not treated with the seriousness that it deserves
 - For example:
 - Text messages are frequently sent or forwarded to the wrong person, as was the case of an attorney who inadvertently sent a text message intended for his client to opposing counsel during a deposition
 - Cell phones are often misplaced, lost or stolen, or left unattended where others can review confidential matters

CLIENT FILE RETENTION

- Client communications via text messages are likely to be considered documents relating to a client file
- Attorneys have an ethical duty to preserve these client files during representation and the subsequent file retention period
- Text messages pose special challenges to file retention because they are by their nature transient and temporary
- A third-party application or professional should be used if a large amount of texting data needs to be removed from a cell phone and permanently stored online
- Another alternative may be to prepare a memo summarizing text messages which is then saved to the file

SOCIAL MEDIA

- According to a 2019 American Bar Association report, 80% of attorneys maintain a presence on social media
- Social media content is viewed by several states as attorney advertising, and so special attention should be paid to what is posted online to ensure that it complies with applicable advertising rules

Social Media



SOCIAL MEDIA

Instant Messaging

- Attorneys should be cautious when sending unsolicited messages via social media
- These messages may be held to be improper advertisements

SOCIAL MEDIA

Commenting on Posts

- Attorneys who comment on the posts of various third parties and clients run the risk of their post being construed as either formal legal advice, or as the creation of an attorney-client relationship

SOCIAL MEDIA

Recommendations and Testimonials

- Reviews and recommendations are a major component of many of the social media platforms used today
- The Model Rules state that nothing of value may be given to a person for recommending an attorney's services
- Attorneys should look to the rules of their specific state regarding statements made by third parties as to the value of the legal services offered

SOCIAL MEDIA

Trial Publicity

- An attorney should not overshare on his or her social media page and post every update about a trial or other proceeding
- Model Rule 3.6 states that an attorney cannot say anything which will have a “substantial likelihood of materially prejudicing an adjudicative proceeding in the matter,” and this includes posts made online

SOCIAL MEDIA

Video Conferencing

- The overnight growth of Zoom during the COVID-19 pandemic posed early security risks as the video conference companies raced to keep up with unprecedented growth
- Attorneys should be aware of the risks that these necessary platforms pose, even with the new security patches implemented throughout the past year
 - Zoombombing
 - Recorded Meetings
 - Mute Button Accidents
 - Secured Backgrounds

394th Judicial District Court

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LAWYER DECLARES 'I AM NOT A CAT' TO JUDGE IN ZOOM FILTER FIASCO



Privacy Considerations When Using Zoom

- A. Purpose and Principles
- B. Technical Tips and Privacy Protections for Video Conferencing
 1. Visibility of Remote Work Locations
 2. Screen Sharing Privacy
 3. Managing Participants
- C. Recording of Zoom Meetings and Chats
- D. Disability Accommodations
- E. Privacy Data Protections with Zoom

That will be \$1000. Chasing birds is not a reasonable excuse to be outside

