



The Perils of Text Messaging

Rules to keep in mind when texting for business

by: Greg Goldberg, BTA General Counsel

Last month, the Business Technology Association's (BTA's) former general counsel (and my dad), Bob Goldberg, penned his final Courts & Capitols column for Office Technology magazine — a moving reflection and heartfelt thank you for 47 years of dedicated and distinguished service. This month, BTA turns the page to a new chapter in which this attorney/writer humbly pledges to continue Bob's storied legacy for the next generation of BTA members.



To commemorate this moment, this month's magazine debuts my first "Legal Perspective," a monthly column covering the legal and regulatory issues affecting the dealer channel. The goal is to highlight subjects that percolate in members' everyday business operations. Therefore, I encourage readers to join the conversation by sending in topics you would like to see featured in this space.

This month's column touches on a topic that has become ubiquitous in daily life: text messages. Historically, business negotiations took place almost exclusively in the boardroom or over the telephone. More recently, however — in particular, since the COVID-19 pandemic — workers have eschewed the formal trappings of the office in favor of a work-from-anywhere ethos.

As a result, corporate communications have increasingly migrated from snail mail to email to the rapid-fire arena of texting — including on popular messaging apps like iMessage and WhatsApp. But even though texting may seem more relaxed, it can cause legal headaches, like forming binding contracts.

The formation of a valid and enforceable contract requires four elements: (1) an offer; (2) acceptance of the offer; (3) mutual assent; and (4) consideration. A valid offer must include terms that are clear and unambiguous. For instance, if I offer to paint your house for \$1,000, that is a likely valid offer. But if I offer to paint your house for a "reasonable price," then further negotiation is necessary to determine what I mean by "reasonable." Once made, the offer must be accepted. A valid acceptance must also be clear and unambiguous.

Mutual assent requires a meeting of the minds between the parties regarding the essential contract terms. Continuing with my prior example, if you own both a primary residence and a vacation home, and I do not specify in my offer which house I intend to paint, then there can be no meeting of the minds. Finally, consideration means that both parties entering into a contract must promise something to one another.

If I promise to paint your house but seek nothing in return, that is akin to a gift. Thus, no contract is formed because there is inadequate consideration. If, on the other hand, I promise to paint your house, and you promise to pay me to do so, then a contract is formed.

The contract principles above may be applied to oral or written agreements, including text messages. Accordingly, anyone sending

or receiving text messages in a business context should remember the following recommendations:

(1) Always, always, always proofread. Texters often send messages quickly and they rarely adhere to conventional grammar rules. Nevertheless, speed, informality and lack of punctuation are not valid defenses against contract formation. Remembering to reread text messages prior to sending is the best way to avoid costly errors and misunderstandings.

(2) Beware of "autocorrect." Although predictive text technology has greatly improved, autocorrect errors may be confusing or embarrassing to texters. In the worst-case scenario, an autocorrect error may convey the opposite of a sender's meaning, causing the recipient to believe a contract exists. Although contracts formed by mistake may be voidable, voiding contracts can be complicated, particularly if the recipient acts in reliance on the message.

(3) Be careful using talk-to-text features. It is ironic that so many texters dictate text messages, rather than making traditional voice calls. But, like autocorrect errors, blaming Siri for a transcription error may not be sufficient to void a contract.

(4) Leave yourself an out. Simply stating that an agreement reached over text will be formalized and reduced to writing in the future is a strong defense against contract formation. A text message may capture this idea efficiently by saying something like, "Will send draft agreement shortly."

Time and again, text message conversations appear as evidence in courtrooms around the country. That means any time you send a text for business, remember to ask yourself: "Is this something I would be comfortable showing to a judge and jury?" If the answer is "no," do not hit send. ■

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