

# Marketing in the COVID Era

## Are your calls and texts legally compliant?

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Times are changing. In the midst of a pandemic, our world is looking very different these days. Not only are restaurants and shopping centers required to adapt to this new normal, but so are lawyers. We have been challenged by how to conduct in-person meetings, network and build our practices. Professional conferences have been cancelled, and court hearings have been postponed, but the show must go on.

One thing that attorneys are challenged with now more than ever is how to communicate with their existing clients and how to gain the business of new clients. Face-to-face meetings and in-person lunches may not be possible; people are keeping social distance, and everyone is being asked to put more and more on their plates to fight the economic struggles resulting from COVID-19. Whether you work with corporate or individual clients, one thing is for sure: to be successful today, you must find new and effective ways to connect.

For some clients, phone calls are becoming a nuisance, and in some instances, email is even on its way to becoming archaic. Working from home has also affected how people are communicating. The hard boundaries between professional and personal lives have blurred for those who are faced with juggling even more complex and competing needs of family and work. As a result, some businesses have turned to using more informal means of communication, with many beginning

to focus on text messages as a means of communicating and advertising. It's fast paced, effective and relatively inexpensive. But what does this mean for you as attorney? Depending on how you promote your services, it could mean large fines or even a class action lawsuit if not done properly.

Text messages, as well as certain phone calls and faxes, are governed by a federal regulation known as the Telephone Consumer Protection Act.<sup>1</sup> The TCPA places restrictions on the use of automatic telephone dialing systems (ATDS) and artificial or prerecorded voice messages. Generally, the TCPA prohibits using an ATDS or prerecorded message to contact cell phones, including telemarketing messages sent using an ATDS, unless the recipient has provided "consent" to receive the call/text.

For those who work in the telecommunications area, it's no secret that the TCPA carries hefty fines—violations can result in penalties of up to \$500 per violation, with willful violations trebled



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up to \$1,500 per violation. While news headlines focus on major corporations and their record penalties, those same restrictions apply to small and mid-size businesses as well and can impact them in devastating ways. There is no cap on statutory damages, so depending on the breadth of your communications, violations can result in hundreds of thousands or even millions of dollars in penalties. In addition, many commercial general liability and other business insurance policies explicitly or implicitly exclude coverage for TCPA claims.

How can attorneys protect their firms as they look to creative ways to build a client base, including

using text messaging?

**ATDS:** What constitutes an ATDS has been the subject of intense litigation and a clear answer still does not exist. In fact, the ATDS definition is the subject of the Facebook v. Duguid, et al case currently pending before the U.S. Supreme Court. A generic smartphone such as an iPhone is not an ATDS by itself, but any other type of dialing equipment or texting platform should be carefully analyzed.

**Consent:** Before calling or sending a marketing text to a potential client, unless an exemption applies, you must obtain prior express written





consent. There are many ways to do this, but it is critical that a consumer affirmatively consents to receiving promotional or mixed promotional/informational calls/text. Generally speaking, consent must be obtained in a signed, written agreement. The agreement must specifically indicate the caller(s) to whom consent is being provided and must include the cellular telephone number at which the person consents to receive calls/texts. The individual must take some affirmative action to indicate their assent. In addition, the agreement must clearly and conspicuously disclose that the person is authorizing the caller to make telemarketing calls, that calls will be made using an ATDS (or prerecorded message, if applicable), and the person is not required to provide consent as a condition of purchasing any services. Depending on a lawyer's practice, this could be accomplished on an inquiry form on the firm's website or even in an engagement letter for marketing of future services so long as the consent language is clear and conspicuous, and the consumer's consent is given specifically for the communications.

**Check before you text:** Before engaging in a text campaign (or making any other calls that would be subject to the TCPA), callers must regularly scrub their databases against the National Do-Not-Call Registry, unless an exemption applies, and against their own internal Do-Not-Call list. Callers must also take the possibility of reas-

signed cell phone numbers into account; TCPA liability can apply to calls/texts to the holder of a reassigned number even if the previous holder of the number gave their consent.

**Keep consent records:** Just as consumers can give consent to receiving text messages, they can revoke their consent in any "reasonable" manner. However, there is no precise definition of what is

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considered “reasonable.” Businesses, including law firms, must have a process in place to capture and implement revocations of consent. The caller has the burden of proof to show that the consumer provided written consent to be called and that it was not revoked. All records should be kept for at least five years from the last date the consent is relied upon to make a call.

**Confirm insurance coverage:** Coverage for TCPA-related claims is often excluded from standard business insurance policies, but it is available. If text campaigns or any other calls subject to the TCPA are an integral part of your business or a way your firm is looking to market in the future, you should check with your broker, as the cost of TCPA coverage may be well worth it.

The TCPA and other state and federal teleservices regulations form a complicated structure that requires specific knowledge and experience to successfully navigate. Before conducting a calling or texting campaign, seek the advice of skilled TCPA counsel so that you can conduct your campaigns with confidence and focus on growing your practice.

<sup>1</sup> (TCPA; 47 U.S.C. § 227)

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