

# Attorney Client Text Messages or Texting & Depositions Don't Mix

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A child was injured at an Old Navy store (a subsidiary of the Gap) on a clothing rack, and naturally, a lawsuit followed in Federal Court based on Diversity Jurisdiction. *Wei Ngai v. Old Navy*, 2009 U.S. Dist. LEXIS 67117 (D.N.J. July 31, 2009).

The Plaintiffs deposed the Gap's General Liability Claims Manager via video deposition on the chain of custody of the clothing rack. *Ngai, 2.*

The witness was in Sacramento, California, Defense attorneys in Fort Lee, New Jersey and Pro Hac Vice in Southfield, Michigan. *Ngai, 2.*

The deponent and their Pro Hac Vice attorney were only visible from the chest up and their hands were not visible. *Ngai, 2.*

However, the Pro Hac Vice attorney and the deponent had very busy hands texting each other. Before the deposition, the two sent 11 text messages between themselves. *Ngai, 4.*



During the one hour and twelve minute deposition, the attorney and client exchanged 5 more text messages. *Ngai, 3.* Below is the timing of the messages:

<b>FROM</b>	<b>TO</b>	<b>TIME</b>
PHV counsel	Deponent	3:05:26 PM
PHV counsel	Deponent	3:24:18 PM
PHV counsel	Deponent	3:26:30 PM
Deponent	PHV counsel	3:28:38 PM
Deponent	PHV counsel	3:28:54 PM

*Ngai, 4.*

Then there was perhaps one of the worst sending errors text message history: The Pro Hac Vice attorney sent a text to the PLAINTIFF attorney saying, “[you] [are] doing fine.” *Ngai, 2.*

The Plaintiff's attorney suspected shenanigans, requested the defending attorney preserve his text messages from the deposition. *Ngai*, 2.

As one would expect, the Pro Hac Vice attorney claimed the text messages were all sent during a break. However, the Court stated the record showed that only one break was taken, at an unknown time. *Ngai*, 5. Moreover, the NJ attorneys reported that the deponent was visible the entire deposition, minus the deponent and NJ attorneys going off camera to phone the Pro Hac Vice attorney. *Ngai*, 5.

### **The Fallout Begins...**

Pro Hac Vice attorney informed the court by letter of the text message incident and claimed the text messages were protected by the attorney-client privilege. *Ngai*, 6. Deciding to fall on his own sword, the Pro Hac Vice attorney attempted to withdraw from representing the Defendant. *Ngai*, 6.

The Plaintiff opposed the Pro Hac Vice attorney's withdrawal, claiming the withdrawal would delay the trial. *Ngai*, 6. The Plaintiff requested all non-attorney-client privileged documents that supported the Pro Hac Vice attorney's withdrawal. *Ngai*, 6.

The Court granted the withdrawal and ordered the Defendant to either produce the text message attachment provided to the Court or explain why the Attorney-Client privilege should not be pierced. *Ngai*, 6-7.

### **Privileged Text Messages?**

The Defendant argued against producing the that the transcript of the text messages because:

- (1) The communications are protected by the attorney-client privilege and work product rule;
- (2) The crime fraud exception does not apply because the communications were not in furtherance of a crime;
- (3) The "at issue" exception does not apply because the communications do not refer to the client's state of mind or any other relevant issue in the case;
- (4) There is no Rule of Professional Responsibility that compels this discovery; (5) the communications have no effect on the case; and
- (6) The court rules provide that inadvertent disclosures must be returned to the sender. *Ngai*, 7.

The Plaintiff in turned argued that the text messages were not protected by the Attorney-Client Privilege. *Ngai*, 7-8.

### **New Jersey Attorney-Client Privilege Standards**

The attorney-client privilege statute states "communications between lawyer and his client in the course of that relationship and in professional confidence, are privileged, and a client has a privilege (a) to refuse to disclose any such communication, and (b) to prevent his lawyer from disclosing it . . ." *Ngai*, 8-9, citing N.J.S.A. 2A:84A-20.

One key test for sending an Attorney-Client communication is between the attorney and their client for legal advice with the expectation that its content remain confidential.” *Ngai*, 9-10, citations omitted.

The disclosure of these communications “to or in the presence of third-parties destroys the confidential nature of the communication and therefore such communications are not privileged.” *Ngai*, 10, referencing *Aysseh v. Lawn*, 186 N.J. Super. 218, 222, 452 A.2d 213 (Ch. Div. 1982).

### **Just When Were the Communications Made?**

The Court held the text messages made BEFORE the deposition were privileged, which the possible exception of the last message, which the Court did not explain in depth. *Ngai*, 11-12.

The Court explained the pre-deposition text messages related to the upcoming deposition, including “words of encouragement,” that attorney and client would have before a legal proceeding. The Court characterized these text messages as furthering the client’s legal interest and were thusly protected. *Ngai*, 11-12.

### **Texting During the Deposition or “No Note Passing”**

The text messages sent during the deposition were not privileged. *Ngai*, 12.

Federal Rule of Civil Procedure Rule 30(c) states that “depositions are to be conducted in the same manner as trial examination.” *Ngai*, 12.

Rule 30 does not allow a lawyer and witness to have a discussion during trial or deposition testimony because, “once a deposition begins, the right to counsel is somewhat tempered by the underlying goal of our discovery rules: getting to the truth.” *Ngai*, 13.

The Court stated, “The goal of obtaining the facts of a case is defeated when the lawyer and not the witness is answering questions or influencing the answers to them.” *Ngai*, 13.

During a deposition if there is an “off-the record” discussion other than discussing the assertion of a privilege, the exchange is not privileged and “deposing attorney is [] entitled to inquire about the content thereof.” *Ngai*, 13.

The Court stated the Pro Hac Vice attorney violated Federal Rule of Civil Procedure Rule 30 by texting during the deposition. *Ngai*, 14. The Court equated the conduct with passing notes to the client that included instructions “intended to influence the fact finding goal of the deposition process.” *Ngai*, 15.



The Court found no “it was on a break” defense for the text messages. *Ngai*, 15-16. A deposing attorney may question a deponent to determine if any witness coaching occurred. *Ngai*, 16. Additionally, Rule 30 only allows discussions pertaining to privileged issues. *Ngai*, 16. Finally, there was no evidence the text messages were actually sent during a break. *Ngai*, 16.

## **Bow Tie Thoughts**

If it had not been for the Pro Hac Vice attorney sending a text to the Plaintiff's attorney, no one would have known of this impermissible (and ethically questionable for arguably witness coaching) conduct. It will be a sad day for our system if deposing attorneys need to include a "no texting" provision to deposition admonitions.