# **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:

FROM	TO	TIME
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.

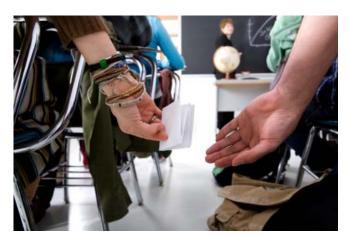
Federal Rule of Civil Procedure Rule 30(c) states that "depositions are to be conducted in the same manner as trial examination." *Ngai*, 12.

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.