



IfrahLaw

Hands-on Counsel, Gloves-off Litigation

TOLL FREE MARKET

Bring BIG DREAMS to Life!™

HYBRID TELEPHONY SUMMIT 2014

Chicago

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Member, Ifrah Law

- 22 years telecom/privacy lawyer
- Advises daily on marketing campaigns
- Special focus on toll-free/vanity numbers

Texting Tutorial – the Basics

- Telephone Consumer Protection Act (TCPA): bars the sending of prerecorded or autodialed “calls” to mobile numbers and other numbers where party is charged without prior express written consent (for telemarketing); consent for info. calls/texts
- Federal Communications Commission (FCC) and courts have held this prohibition applies to texts.

Texting Tutorial: Trouble?

- TCPA allows private lawsuits: \$ 500 per text/call; 3x if deemed “willful” by court.
 - Class actions! \$\$\$\$\$\$
- FCC can enforce - \$\$ fines
- State Attorneys General/Consumer Protection offices
- FTC – deceptive offers (under FTC Act)



Courtesy of thinkstockphotos.co.uk

Texting Tutorial: Other Requirements?

- Carriers may require confirmation of opt-in/double opt-in.
- Mobile Marketing Association: double opt-in
- Business partners/affiliates may require representations and indemnification regarding compliance with TCPA, other laws.



Courtesy of thinkstockphotos.co.uk

Texting Tutorial – Some Common Misconceptions

- ! TCPA covers all calls/texts to mobile (using autodialer – broad term) – doesn't have to be "selling."
- ! Doesn't matter if someone is not on federal "do not call" (DNC).
- ! It doesn't matter if you do business with them every day, or last week/month
- ! Need express "written consent" for telemarketing texts & "consent" for non-sales texts.

Consent – What Works?



Consent must be unambiguous - “clear and conspicuous disclosure”



Consent disclosure cannot be buried in terms and conditions, the privacy policy, or in difficult to read font size/color.



Consent check boxes should not be pre-checked.

Consent – Don't Forget About...

- Consumer must also be notified that consent is not a condition of purchase and must designate a phone number which should not be pre-populated by the marketer in an online form.
- Consent does not always need to be “hard copy” written consent. Can be check box, etc.
- Businesses should maintain consumer consent records for a minimum of 5 years.



Consent –Sample Form

_____ I hereby consent to receive autodialed and/or pre-recorded telemarketing calls or texts from or on behalf of [Marketer's Legal Name] at the telephone number provided above, including my wireless number, if applicable. I understand that consent is not a condition of purchase.



Consent – What Also Works?

Consumer consent records can include screenshots of the consent webpage as seen by the consumer, transmission databases, transmission records (with time and date stamp), together with the applicable consumer's computer IP address.



Courtesy Fotosearch.com



This backup data is important to challenge a TCPA claim, as the marketer bears the burden of proof of compliance.

Consent – Special Concerns

Consent Revoked

Once opt-ed out, no further texts

FCC said one time confirmatory opt-out ok (though was litigated).



Exceeding Consent

Company says up to 5 texts/mo, then sends 20 - -
Buffalo Bills lawsuit

Consent – Special Concerns

Consent for One Party
Doesn't Apply to
Others – Possibly
named affiliates

Consent but Changes
Number

Exceeding Consent
Company says up to 5
texts/mo, then sends 20 - -
Buffalo Bills lawsuit



Case Study

Capital One \$73 Million Settlement



- Autodialed debt collect. calls
- 21 Million Cell Numbers
- No Consent

Case Study

Buffalo Bills Lawsuit

- Fan signed up for texts about team; promised up to 5 texts/week.
 - Received 13 texts over two week span.
 - Fan sued on behalf of self and 40,000 other text subscribers under TCPA – class action.
 - \$3 million settlement (vouchers for team store).
 - Lawyers got over \$500,000.



Case Study

Hooters Lawsuit

- Recipient sued Hooters in TCPA class action for texts he allegedly received
- Advertised deals on appetizers
- Claimed never consented to receive text advertisements





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THANK YOU!

QUESTIONS?

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