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Don't let client preferences come before your legal obligations

Clients may prefer communicating by text, but texting clients comes with risks

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This pandemic has made it crystal clear that we need to take care of ourselves before we are able to take care of others. But how do you rationalize putting yourself first when the regulators' message — as evidenced in the client-focused reforms — has consistently been that you need to put clients first? The purpose of this article is to explain how adherence to regulations and your internal dealer policies might not always mean putting clients' wishes first. If you find this confusing, read on…

Always remember that above all — even above clients' preferences — you must comply with your regulatory and legal obligations and adhere to your firm's internal policy requirements, even if they do not seem to be putting clients first. Here is an example.

With this pandemic forcing most of us to work from home, many of us may be sharing our cell phone numbers with clients. The natural response from some clients — like Jody, for example — is to move from email to texting their advisors. Is that a problem if Jody finds texting easier, faster and more convenient?

In short, yes, it is a problem, unless your firm permits texting with clients, your clients' privacy is protected and your firm backs up all texts onto the dealer system or, even better, directly into your client relationship software. Text messages are often not retained in a firm's record-keeping system. Not only is it part of the Canadian legal framework (see National Instrument 31-103) to preserve and protect all client communication for at least five years, it is also important for the following reasons:

- Retaining records of correspondence is required through your firm's policies. Adherence to your firm's policies is likely a term of your contract, and violating policies might be reason for termination.
- Without the correspondence trail, you cannot retrace your steps.
- If a client like Jody sues you, you may not be able to retrieve all of your communication with her, especially if you changed your phone or didn't save the texts onto the CRM system.
- If you do not have a correspondence trail, you will not be able to produce the evidence necessary if a client sues or the regulator audits or commences enforcement proceedings.

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Emails tell a story and provide a chronology of communication. They provide the back and forth of setting up calls, so if what happened to me the other day (I misplaced my client notes from a call) ever happens to you, you can figure out when you spoke and track down your notes (which I did!). If the texts are gone from your cell phone and were not otherwise preserved, proving your side of the story becomes impossible.

Last year, the Securities and Exchange Commission issued its first-ever fine ($100,000) related solely to text messaging against a California-based dealer. The infraction — failure to record and preserve business-related text messages sent and received by many of the firm's registered representatives while communicating with each other and their clients — was discovered during an unrelated investigation. Like most Canadian regulators and dealers, there were regulations and internal policies that prohibited employees from using text messages from personal devices for business communication. Furthermore, like most Canadian dealers, employees (including all registered advisors) were required to attest annually to compliance with regulations and internal dealer policies.

So, it is key to tell Jody politely that you need her to communicate with you using your business email, and not through texts.

Here is another example — and there are many — of how adhering to your compliance obligations may seem to be putting clients second. Some clients are very private and refuse to provide advisors with the personal information necessary to determine which insurance and/or investment products are suitable for them. Skipping the deep dive to get to know your clients can come back to haunt you in a regulatory or internal audit. Further, if the client ever sues for losses, you will not have the necessary evidence to prove that you assessed and fulfilled your KYC obligations. This is the basis of many cases that I have litigated.

Putting clients second to meeting your legal and regulatory obligations and adhering to the company's policy is not what the regulator refers to when it states in the client-focused reforms that you must put clients first in a conflict situation.

Conflicts in which you need to put clients first are ones in which the dealer or advisor benefits to the detriment of the client. Examples include choosing more expensive products for clients with larger commissions for the advisor when less expensive products exist that would be as good as or better suited to the client.

Other conflicts of interest would be advising clients to borrow money to invest so the advisor can increase his or her commissions even though the client is unable to support the loan obligations.

So, do not be confused into thinking that when the regulator refers to putting clients first it means bending the rules to suit client service preferences. In circumstances when you need to choose between client demands/preferences and your legal or regulatory obligations, you need to put yourself and your licence first.