

page 2
Take caution when offering
credit monitoring

Practice the art of responding
to negative reviews

page 3
Know who owns your
business IP rights

page 4
Get website content the right way

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Text messages could be binding contract

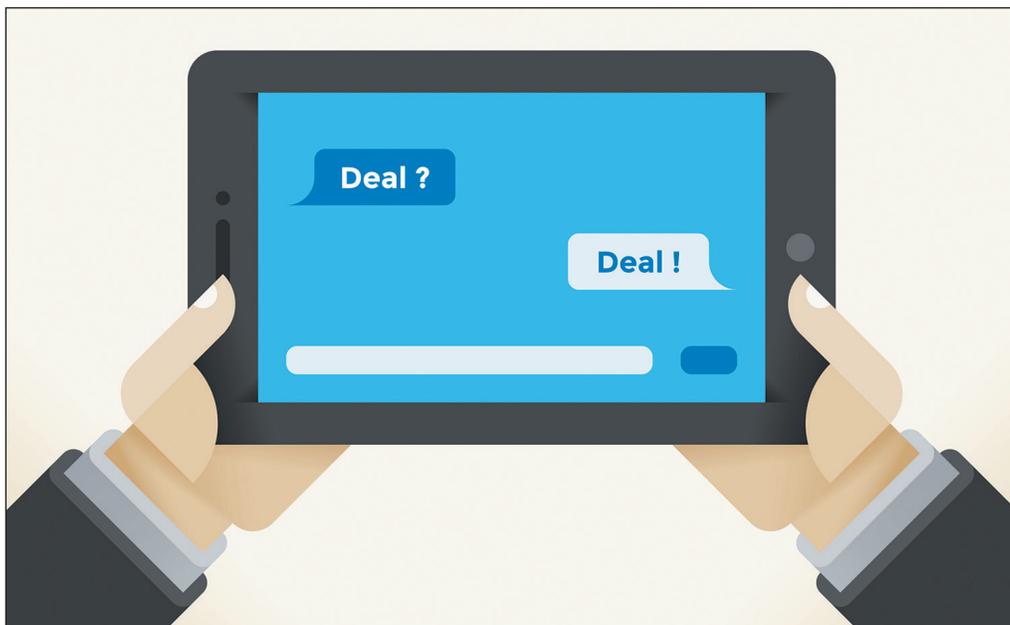
As more business communication is conducted via text messages, businesses need to be aware that they can have legal ramifications. In the eyes of the law, text messages may not be as informal as you think.

An issue is emerging regarding whether a text message can constitute a binding contract. Many states have no legislation or case law on the issue. However, most states have adopted the Uniform Electronic Transaction Act, which stipulates that electronic writing and signatures are the legal equivalent of physical writing. That potentially places text messages in the category of legally binding communication.

In California, the Statute of Frauds, which relates to real estate, expressly states that a text message is an electronic message that is ephemeral in nature and insufficient to create a contract.

In Massachusetts, however, the Land Court has held that text messages and emails can potentially satisfy the Statute of Frauds, giving rise to a binding and enforceable contract.

In that case, the court evaluated whether text messages were mere



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negotiations or whether they constituted a binding contract. The exchange involved several drafts of a letter of intent.

In the pivotal exchange, the broker responded to a text message that contained the material terms of a contract and included his first name in the end of his response. The court concluded that inserting his name at the end of the message qualified as a binding

continued on page 3

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Take caution when offering credit monitoring

If your business is involved in an information breach, you are not generally required to offer credit services to your customers. However, many organizations do, offering services such as credit reporting, credit monitoring, identity theft insurance and identity restoration services.

Recognize that many data breaches do not actually involve risk to the consumer's credit. Offering such services does not protect your customer from any harm that might result from the breach. What's more, some courts have ruled that in offering credit-related services you are acknowledging the customers' credit is at risk.

When offering mitigation services, there are several factors to consider. First, determine whether the services are a good fit for the actual data breach that occurred. For example, a breach that involves a consumer name and credit card number could lead to unauthorized charges on the credit card, but would not yield sufficient information to open a new credit account.

Vetting vendors

If you do choose to offer credit monitoring or other related services, screen potential vendors carefully. Get a copy of all enrollment materials, marketing materials and contracts that will be provided to

your customers.

Determine whether the service provider is going to try to upsell your customers a more comprehensive product. Find out if the service provider will allow others to cross-sell products to customers who enroll in the service.

In either case, your customers may feel that they were not actually given a valuable service, but rather targeted with additional sales from a third party. As a result, they may feel their privacy has been further violated.

Securing assurances

Several credit monitoring services have been investigated by the FTC for unfair or deceptive practices. No matter how well you believe you've vetted your chosen vendor, ensure you will get adequate indemnification if the information you provide to the service provider is breached. Likewise, secure indemnification in cases in which the service provider is negligent in their monitoring services.

It's best to involve legal counsel as soon as you become aware of a data breach. Counsel can help you determine the best way to proceed with an investigation and notification efforts. State and federal laws may require you to notify consumers or the media within a certain time after discovering a breach.

We welcome your referrals.

We value all of our clients. While we are a busy firm, we welcome your referrals. We promise to provide first-class service to anyone that you refer to our firm. If you have already referred clients to our firm, thank you!



Practice the art of responding to negative reviews

As a business owner in the internet age, you know a negative online review can discourage people from using your business. Research from Mintel indicates 70 percent of Americans go online to seek out reviews before making a purchase. Data from BrightLocal suggest 84 percent of people trust an online review as much as a recommendation from a friend.

There's a distinct art in learning to respond to negative reviews in a way that can help, rather than further damage, your reputation.

Here are some general guidelines:

- **Cool down:** Take time to compose yourself and collect your thoughts. Never post in anger. If emotions are running at all hot, ask a colleague to review your response before posting.

- **Respond promptly:** After giving yourself time to cool down, post a prompt response. A quick reply demonstrates you care about customer experiences.

- **Personalize your response:** Make sure you understand the customer's concerns and respond appropriately. You don't want to come off as though you're providing a canned answer. Do not copy and paste the same response to multiple disgruntled customers.

- **Use the magic words:** Say "thank you" and

"I'm sorry," and explain what you're doing to make it right. Thank the reviewer for taking the time to offer feedback.

When appropriate, outline the actions you're taking to resolve the issue. You may mention new technology, new training or additional staff.

You want to promote, tactfully, a positive image of your business. In tandem with the apology, you can express that the customer's experience, although highly regrettable, was out of the norm for your business.

- **Challenging fake reviews:** Unfortunately, your business may occasionally receive a fake review, possibly from a competitor, a disgruntled employee or an angry customer.

If you believe the review is fake, contact the review site. Most mainstream sites have policies to help you remove fake reviews, assuming you have sufficient evidence that the review is fake.

If you can't get the review removed, provide a brief response expressing that the review is not accurate. Keep your comments factual and respectful.

Finally, if you believe a review is fake and defamatory, consult a business attorney. You may have legal recourse if the reviewer made factually incorrect claims.

Text messages could be binding contract

continued from page 1
signature.

Even where there are no regulations in place, business owners would be advised to assume that the Massachusetts interpretation could be applied in their own state. As many other states have adopted the Uniform Electronic Transaction Act, it's reasonable to assume those courts would interpret the law in the same way.

Though the Massachusetts case involves real estate, it provides some direction for other business negotiations, including sales and construction change orders.

One practical step to avoid confusion or conflict is to insert a provision into draft agreements stating that the agreement can only be executed

via a physical signature and that a name in an email or text is insufficient.

Alternatively, you may want to avoid the use of text messages during negotiations or ensure you do not manually type your name below the message.

To protect themselves, businesses should take steps to preserve relevant text messages, in the same way they preserve email documentation. A legal claim could survive or fail on the basis of text messaging documentation.



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Know who owns your business IP rights

If intellectual property is a pivotal component of your business, you need to ensure you own the rights to that property. Demonstrating legal ownership does more than protect your IP from infringement; it adds to your business value when securing investors or new ownership.

There are times in your business when you cannot assume ownership of certain intellectual property. Special consideration should be paid to IP as part of employee and contractor agreements, in third-party relationships in which another company is developing something for your business, and at the time of business formation.

Employee and contractor agreements

Generally, when an employee does work for a company, the company owns their work product. However, there are exceptions to this rule. The work for hire doctrine does not apply to inventions that could be protected by patents and is not consistently applied outside the United States. Moreover, contractors own all IP created under an agreement, unless there is a written assignment of IP rights.

As part of employee onboarding and new vendor engagements, work with legal counsel to ensure contracts include appropriate IP assignment and that those agreements comply with the laws of any applicable country.

When looking at work developments in retrospect, consider whether someone worked on a project as a consultant or before they were an employee of the company. If IP rights to what you consider your company product are retained by

a third party, you will need to get assignment of those rights.

Third-party agreements

The same principle applies whether you're working with an individual contractor or a third-party firm. The developer owns the work unless the developer assigns ownership in writing. Similarly, if you develop something for a customer, you retain ownership unless you've signed an agreement assigning ownership.

When IP ownership negotiations create difficulty, you may find common ground with a joint ownership or exclusivity license. Each of these agreements should be created carefully with experienced legal representation.

Generally, you want to protect your right to use the development and to provide the same development to another customer.

Business formation

This issue comes into play when one of the founders develops something that could be protected as intellectual property before the business was established. For the business to own that IP, the founder must assign ownership to the company.

As an organization, clear ownership of IP is essential to operations. Breach of third-party property rights can result in expensive legal damages or licensure agreements. What's more, failure to secure IP rights can undermine the value of your company in the eyes of investors or potential acquirers.

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Get website content the right way



Content marketing is becoming a go-to tool for businesses, but generating enough quality content to keep your blogs and social media posts populated can be a challenging proposition. Here are some guidelines to avoid copyright infringement issues when buying and repurposing content.

- **Assume copyright:** When you find information, pictures, video or music online, you should always assume that material is protected. Using content without permission can lead to copyright infringement lawsuits and monetary damages.

- **Get permission:** If you want to repurpose content you find online, you need to locate the copyright owner and get written permission first. You also need permission to repost customer photos of people using your product or wearing your brand.

Additionally, you need permission to use a news article about your company and any photographs taken by the news outlet. In many cases, you may be asked to pay a licensing fee in order to use the content.

- **Use original posts:** Original content establishes you as a thought leader in your industry. If your organi-

zation lacks the time or talent to create it, hire a professional writer to assist. You may want a writer to do all the research and content development, or you may want someone who will simply help shape and polish your own ideas for publication.

- **Get familiar with Creative Commons:** Some creators post their work under a Creative Commons license. Other users then may share, use or possibly adapt that content based on applicable license conditions. You can use Creative Commons-licensed materials as long as you adhere to the license parameters. You can find more information and search tools at [CreativeCommons.org](https://creativecommons.org).

- **Review presentation decks:** Your company marketing team may already have a grasp on what constitutes legal use for materials on your website. What about having those staffers put together slide decks for speaking engagements and client meetings?

To avoid copyright infringement, the photos and art in those decks also should be secured with written permission or license agreements.

If you have questions regarding what constitutes fair use and what you may publish, speak to a business attorney.