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Municipal Lawyer

THE JOURNAL OF LOCAL GOVERNMENT LAW

MAR APR 2021
VOL.62
NO.02



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Robocall Me Maybe[1]

Examining Federal Law Restrictions on Automated Calls and Texts Made by Local Governments

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As local governments seek to streamline processes and efficiently utilize funds in continually decreasing budgets, automated phone calls and text messages may appear to be an attractive option to communicate with citizens. These methods of communication are commonly referred to as "robocalls" and "robotexts." The federal Telephone Consumer Protection Act of 1991 ("TCPA") and associated Federal Communications Commission ("FCC") rules[2] place restrictions on how automated calls and texts are made. Additionally, the FCC recently released a ruling that formally applies those restrictions to local governments and their contractors.[3] This article describes the relevant federal law as well as some practical considerations for municipal lawyers when advising local government clients that desire to contact citizens using automated calls and texts.

I. Telephone Consumer Protection Act Basics

In general, the TCPA and associated FCC rules prohibit a person from making phone calls or sending text messages using an automatic telephone dialing system or an artificial or prerecorded voice ("automated calls and texts") without the called party's prior express consent.[4] In addition to the TCPA and rules noted above, the FCC has issued many rulings and orders interpreting these laws. For example, although these provisions in the TCPA and FCC rules only refer to phone calls, the FCC has found that they equally apply to text messages.[5]

There are similar, but slightly different standards for automated calls and texts made to a cell phone as opposed to a residential landline. Since fewer and fewer people maintain a residential landline, the bulk of this article focuses on the federal law as it relates to automated calls and texts made to cell phones.

- **Cell Phone Calls** – a person may not make a call using an automatic telephone dialing system or an artificial or prerecorded voice to a cell phone number without the called party's prior express consent.[7] There is an exception when a call is made for emergency purposes.[8]

- **Residential Landline Calls** – a person may not make a call using an artificial or prerecorded voice to a residential line to deliver a message without the called party's prior express written consent.[9] There are exceptions when a call is made for emergency purposes or for non-commercial purposes.[10]

A call is made for "emergency purposes" if it is "made necessary in any situation affecting the health and safety of consumers."[11]

Consequences for violating the TCPA include legal action to enjoin the violation, legal action for actual monetary loss or $500 in damages for each violation, whichever is greater, or both.[12] Also, a court may increase damages up to three times the amount available upon a finding that the caller acted willfully or knowingly.[13]

If a local government engages a contractor to handle any aspect of making automated calls or texts to citizens, the local government or its contractor could be liable for TCPA violations, depending on who is considered the "maker of the call."[14] A caller makes or initiates a call

"by 'tak[ing] the steps necessary to physically place a telephone call'" or "by being 'so involved in the placing of a specific telephone call as to be directly liable for making it.'"[15] The "maker of the call" is determined under a totality of the circumstances by considering several factors: "who determines the content of the message, who determines the recipients of the message, who determines the timing of when the message is sent, the extent to which a person willfully enables fraudulent spoofing, and whether a calling platform knowingly allows clients to use the platform for unlawful purposes."[16]

II. TCPA and Local Government Automated Calls and Texts

Recently, the FCC ruled that local governments and their contractors are considered "persons" subject to the TCPA restrictions above.[17] Local governments may desire to make automated calls and texts for many purposes, including: inviting citizens to join telephone town hall events, notifying defendants of municipal court dockets and due dates, notifying water utility customers about past due accounts and utility service matters, and, more recently, providing information to citizens about preventing the spread of COVID-19. This section examines how the TCPA applies to these types of automated calls and texts.

A. Telephone Town Halls

To reach a large group of citizens, local governments may desire to make non-emergency automated calls or texts about upcoming telephone town hall events (also known as "tele-town halls"), or may use a contractor to do so. Shortly before a telephone town hall event is set to begin, a local government or its contractor may plan to make an automated call or text to a group of citizens with instructions on joining the event. Under the general rule, the local government needs prior express consent to make this non-emergency automated call or text to a citizen's cell phone about a telephone town hall event.[18]

In December 2020, the FCC released the *Broadnet Order on Reconsideration* ("*Broadnet Order*"), which examined whether a local government and its contractors were considered "persons" subject to the TCPA in the context of a contractor that facilitated non-emergency automated calls for government clients about telephone town halls.[19] Ultimately, the FCC determined that local governments and their contractors were indeed "persons" under the TCPA and may only make non-emergency automated calls and texts to cell phone numbers with the called party's prior express consent.[20]

If a local government already has the prior express consent of the citizens it plans to contact by automated call or text, there is likely no issue under the TCPA. If, however, the local government is making automated calls or texts to citizens "blindly" without any record of consent, a potential TCPA violation could result. To address these issues, there are ways for local governments to obtain prior express consent from citizens before making non-emergency automated calls and texts about telephone town hall events. For example, local governments could create posts on their websites or social media pages inviting citizens to sign up online for automated calls and texts about future telephone town hall events. Then, local governments could make non-emergency automated calls and texts about those events to those citizens who "opt in" and give consent for such communications. These actions could potentially resolve issues raised in the *Broadnet Order* and allow local governments to make non-emergency automated calls and texts about telephone town hall events in compliance with the TCPA

B. Municipal Court Dockets and Due Dates

Municipal courts may desire to make automated calls and texts for various reasons, including to notify defendants about upcoming court dockets and due dates, missed due dates, as well as the issuance of orders compelling attendance and other court orders. Under the general rule, a municipal court, as a local government department, needs prior express consent to make a non-emergency automated call or text to a defendant's cell phone.[21] To address consent issues, these automated calls and texts should be made to phone numbers provided by defendants for contact purposes at some point during the judicial process. There may also be instances when a municipal court may desire to make an automated call or text for an emergency purpose, such as the court being closed for inclement weather or "incidents of threats and/or imminent danger" to the court based on fire, dangerous persons, or health risks.[22] In these instances, prior express consent would not be needed.

In the *Blackboard / Edison TCPA Declaratory Ruling* ("*Blackboard / Edison Ruling*"), the FCC examined "prior

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Robocall *cont'd from page 7*

express consent" in the context of a school district that made non-emergency automated calls and texts to cell phone numbers of students and parents.[2] The FCC found that when a parent, guardian or student provides their cell phone number as a contact to a school, they give prior express consent for the school to contact them (using automated calls and texts) about matters closely related to the educational mission of the school or official school activities, unless there is an instruction to the contrary.[2] The FCC concluded that the TCPA authorized the school district to make non-emergency automated calls and texts involving notices of parent-teacher conferences and surveys for input on school-related issues.[2]

Although the school district's non-emergency automated calls and texts in the *Blackboard / Edison Ruling* do not present an identical scenario to these notice-type calls and texts from municipal courts, there is a good argument that they are analogous and the same reasoning from that ruling could apply in the context of municipal courts. In both situations, automated calls or texts are made to a cell phone number provided by the called party and involve non-emergency matters closely related to the mission of the group or its official activities. These types of non-emergency automated calls and texts from a municipal court relate to the court's purpose, such as managing dockets, processing cases, and issuing orders; and, municipal courts would be calling numbers provided by the defendants regarding their court cases, which would address consent issues as noted above.

Thus, a municipal court could likely make non-emergency automated calls and texts to defendants' cell phone numbers as long as the court used the numbers provided by defendants, and the calls were closely related to the court's mission or official court activities. Additionally, a municipal court could make automated calls or texts for emergency purposes without prior express consent.

C. Water Utility Service and Past Due Accounts

A local government's water utility department may desire to make automated calls for various reasons, including to notify customers about past due account balances as well as other matters related to utility service. Under the general rule, water utility departments need prior express consent to make non-emergency automated calls and texts to a customer's cell phone.[2] On the other hand, when a water utility department makes automated calls and texts for "emergency purposes," prior express consent is not required.

In the *Blackboard / Edison Ruling*, the FCC also examined "prior express consent" in the context of an electric utility company that made non-emergency automated calls and texts to its customers' cell phone numbers about their utility service, including calls and texts about the failure to make payment on current utility service.[27] As with the school district, the FCC found that when customers provide their cell phone numbers as a contact to a utility company such as a water utility service, the customers give prior express consent for the utility company to contact them (using automated calls and texts) about matters closely related to the service, including calls to warn that service may be curtailed due to failure to make payment, unless there is an instruction to the contrary.[28] The FCC found that the TCPA allowed the following types of non-emergency automated calls and texts, which are closely related to the utility service: "those that warn about planned or unplanned service outages; provide updates about service outages or service restoration; ask for confirmation of service restoration or information about lack of service; provide notification of meter work, tree trimming, or other field work that directly affects the customer's utility service; notify consumers they may be eligible for subsidized or low-cost services due to certain qualifiers such as, e.g., age, low income or disability; and calls that provide information about potential brownouts due to heavy energy usage."[29]

Notably, the FCC reiterated its prior findings that some utility-related automated calls and texts qualify under the TCPA's emergency exception and thus would not require a customer's prior express consent at all: "'[s]ervice outages and interruptions in the supply of water, gas or electricity could in many instances pose significant risks to public health and safety, and the use of prerecorded message calls could speed the dissemination of information regarding service interruptions or other potentially hazardous conditions to the public.'"[30]

Thus, water utility departments can make non-emergency automated calls or texts to customers' cell phone numbers as long as they use numbers provided by the customers and the calls are closely related to the utility service. Additionally, water utility departments can make automated calls or texts for emergency purposes without prior express consent.

D. COVID-19 Information

With the COVID-19 pandemic still impacting many communities across the world, local governments may desire to make automated calls and texts to citizens with information about the associated health and safety risks and efforts to prevent the spread of the disease.

In March 2020, the FCC released the *COVID-19 TCPA Declaratory Ruling* addressing automated calls and texts related to the dissemination of COVID-19 information.[31]

> *[I}f a local government plans to make such calls and texts to cell phone numbers provided by citizens, the FCC recommends disclosing the full range of calls that citizens should expect to receive and informing them that by providing their phone number, they are consenting to receiving such calls and texts.*

The FCC found that the COVID-19 pandemic constitutes an "imminent health risk to the public" and that governments may lawfully make automated calls to citizens' cell phone numbers under the TCPA's emergency exception *without prior express consent* as long as: (1) the caller is a local health official, other government official, or a person under their express direction and acting on their behalf; and (2) the content of the call is solely informational, made necessary because of COVID-19, and directly related to the imminent health or safety risk arising out of the COVID-19 outbreak.[32]

The FCC provided this example of a permissible COVID-19 emergency automated call from a local government: "a call made by a county official to inform citizens of shelter-in-place requirements, quarantines, medically administered testing information, or school closures necessitated by the national emergency would be made for an emergency purpose as such measures are designed to inhibit the spread of the disease."[33] In presenting a list of permissible COVID-19 emergency automated calls by hospitals, health care providers, and governments, the FCC noted that its list was not exhaustive,[34] allowing for other types of emergency automated calls and texts that would be lawful under the TCPA. Thus, as long as a local government meets the standard above, it can make automated calls and texts about COVID-19 to citizens under the TCPA's emergency exception without prior express consent.

III. Best Practices for TCPA Compliance

The TCPA as well as the associated FCC rules and rulings interpreting the TCPA can be complicated to navigate. Accordingly, the following is a non-exclusive list of best practices and tips for complying with these laws.

A. Disclose the Full Range of Calls

The caller has the burden to prove that they have the called party's prior express consent when making a non-emergency automated call or text.[35] Thus, if a local government plans to make such calls and texts to cell phone numbers provided by citizens, the FCC recommends disclosing the full range of calls that citizens should expect to receive and informing them that by providing their phone number, they are consenting to receiving such calls and texts.[36] It can also be helpful for local governments to document how such disclosures were made in the event that citizens claim to have not given consent.

B. Called Party's Consent and Reassigned Numbers

When making a non-emergency automated call or text, callers must obtain the prior express consent of the called party, i.e. the actual subscriber of the cell phone number or the non-subscriber who is the customary user of the phone—this *does not* include the person whom the caller intended to call if they are not one of these individuals.[37] Additionally, callers are liable for automated calls or texts to a reassigned cell phone number "when the current subscriber or customary user has not consented, subject to a limited one-call opportunity for cases in which the caller does not have actual or constructive knowledge of the assignment."[38] Even though a local government may have a citizen's prior express consent to make non-emergency automated calls or texts to a certain cell phone number, that consent does not count if the number is reassigned. Local governments could do the following to avoid making automated calls and texts to the wrong person: keep up-to-date records of citizens' current contact information, remove reassigned numbers from records for future automated calls, and request that citizens update their contact information regularly.

C. Revocation of Consent

People may revoke their prior express consent to receive non-emergency automated calls and texts by using any reasonable method (orally or in writing) that clearly expresses their desire not to receive further messages.[39] Establishing a process to honor consent revocation requests may help local governments to ensure that automated calls and texts are not made to cell phone numbers of citizens who revoked their prior consent.[40]

D. Skip-Tracing

Some debt collection firms and other entities utilize the process of "skip-tracing" to identify other numbers for contacting people. The FCC described skip-tracing as "the process of locating a person, using as much information as possible,

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Robocall *cont'd from page 9*

including from sources such as phone number databases, credit reports, job applications, criminal background checks, utility bills, and public tax information."[41] Skip-tracing seeks to identify a person's current phone number, but is not guaranteed to find the person.[42] Although skip-tracing may yield new contact information for a citizen whom a local government desires to reach, TCPA violations may result if the local government uses a new phone number obtained through that process to make non-emergency automated calls or texts. This is primarily because it is unlikely that the local government could establish that the called party at the new number gave prior express consent to receive automated calls and texts, especially if they are not the person the local government intended to call. Local governments should seek the advice of counsel before using skip-tracing to identify new phone numbers for future non-emergency automated calls or texts.

E. Manual Phone Calls and Texts

It is important to note that the TCPA *does not* affect the ability of a local government, its contractor, or another person to make traditional *manual* phone calls and text messages on behalf of the local government without the involvement of an automatic telephone dialing system or an artificial or prerecorded voice.[43] The TCPA only establishes legal restrictions on *automated* calls and texts. If there is any concern about whether a local government may lawfully make a non-emergency automated call or text, especially if there is doubt as to whether the called party gave prior express consent, the local government could first make a manual phone call or text message to remove any doubt.[44]

Local governments may make automated calls and texts to citizens about COVID-19 without prior express consent under the TCPA's emergency exception if the calls and texts are informational, made necessary because of COVID-19, and directly related to the imminent health or safety risk arising out of the COVID-19 outbreak.

Conclusion

The federal laws governing automated calls and texts can be a complex subject. In light of this, the following summary may be of assistance when advising local government clients on making automated calls and texts:

- In general, local governments must have the called party's prior express consent to use an automatic telephone dialing system or an artificial or prerecorded voice to make non-emergency phone calls or send text messages to the party's cell phone number.
- Local governments are not required to have the called party's prior express consent if the automated call or text is made for emergency purposes, i.e. made necessary in any situation affecting the health and safety of consumers.
- When citizens provide their cell phone numbers to a local government department, they are generally deemed to have given prior express consent for non-emergency automated calls and texts about matters closely related to the department's mission or its official activities. Likewise, when customers provide their cell phone numbers to a local government utility service, they are deemed to have given prior express consent for non-emergency automated calls and texts about matters closely related to the service.
- Local governments may make automated calls and texts to citizens about COVID-19 without prior express consent under the TCPA's emergency exception if the calls and texts are informational, made necessary because of COVID-19, and directly related to the imminent health or safety risk arising out of the COVID-19 outbreak. **ML**

Notes

1. Title inspired by Carley Rae Jepsen, "Call Me Maybe," on Kiss (Interscope Records 2012).
2. Codified at 47 U.S.C. § 227 (2019) & 47 C.F.R. § 64.1200 (2020), respectively.
3. Broadnet Teleservices LLC Petition for Declaratory Ruling, CG Docket No. 02-278, Order on Reconsideration, 2020 WL 7383274 (Dec. 14, 2020) ("Broadnet Order on Reconsideration"). 3. 47 U.S.C. § 227(b)(1)(A)(iii) & (b)(1)(B), & 4. 47 C.F.R. § 64.1200(a)(1)(iii) & (a)(3).
5. Blackboard, Inc. Petition for Expedited Declaratory Ruling, Edison Electric Institute and American Gas Association Petition for Expedited Declaratory Ruling, CG Docket No. 02-278, Declaratory Ruling, 31 FCC Rcd 9054, 9055, ¶ 3 & n. 10 (2016) ("Blackboard / Edison TCPA Declaratory Ruling").
6. Defined as "equipment which has the capacity to store or produce telephone numbers to be called, using a random or sequential number generator; and to dial such numbers." 47 U.S.C. § 227(a)(1).
7. 47 U.S.C. § 227(b)(1)(A)(iii) & 47 C.F.R. § 64.1200(a)(1)(iii).
8. *Id.*
9. 47 U.S.C. § 227(b)(1)(B) & 47 C.F.R. § 64.1200(a)(3).
10. 47 U.S.C. § 227(b)(1)(B) & (b)(2)(B), & 47 C.F.R. § 64.1200(a)(3)(i)–(ii).
11. 47 C.F.R. § 64.1200(f)(4).
12. 47 U.S.C. § 227(b)(3).
13. *Id.*

14. Broadnet Order on Reconsideration, 2020 WL 7383274, ¶ 18.
15. *Id.* at ¶ 19, *quoting* Joint Petition filed by DISH Network, CG Docket No. 11-50, Declaratory Ruling, 28 FCC Rcd 6574, 6583, ¶ 26 (2013).
16. Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, Declaratory Ruling and Order, 30 FCC Rcd 7961, 7980 & 7982, ¶¶ 30 & 33 (2015) ("2015 TCPA Omnibus Declaratory Ruling and Order").
17. Broadnet Order on Reconsideration, 2020 WL 7383274, at ¶¶ 3, 13, 29-34, & 37-38.
18. 47 U.S.C. § 227(b)(1)(A)(iii) & 47 C.F.R. § 64.1200(a)(1)(iii).
19. Broadnet Order on Reconsideration, 2020 WL 7383274, ¶¶ 3, 8, 13, 18, 29-34, & 37-38.
20. *Id.* at ¶¶ 3, 13, 29-30, & 37-38.
21. 47 U.S.C. § 227(b)(1)(A)(iii) & 47 C.F.R. § 64.1200(a)(1)(iii).
22. Blackboard / Edison TCPA Declaratory Ruling, 31 FCC Rcd at 9062-9063, ¶ 21 (identifying analogous emergency calls made by a school district).
23. *Id.* at 9063-65, ¶¶ 22-24.
24. *Id.* at 9064, ¶ 23.
25. *Id.* at 9064-65, ¶ 24.
26. 47 U.S.C. § 227(b)(1)(A)(iii) & 47 C.F.R. § 64.1200(a)(1)(iii).
27. Blackboard / Edison TCPA Declaratory Ruling, 31 FCC Rcd at 9065-9068, ¶¶ 27-34.
28. *Id.* at 9066-68, ¶ 29 & 32.
29. *Id.* at 9066-67, ¶ 30.
30. *Id.* at 9066, ¶ 28, *quoting* Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CC Docket No. 92-90, Report and Order, 7 FCC Rcd 8752, 8778, ¶ 51 (1992).
31. Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, Declaratory Ruling, 35 FCC Rcd 2840, 2020 WL 1491502 (Mar. 20, 2020) ("COVID-19 TCPA Declaratory Ruling").
32. *Id.* at ¶¶ 2 & 7 (referenced and affirmed by Broadnet Order on Reconsideration, 2020 WL 7383274, ¶ 17, n. 44 & ¶ 39, n. 96).
33. *Id.* at ¶ 8.
34. *Id.* at n. 14.
35. Blackboard / Edison TCPA Declaratory Ruling, 31 FCC Rcd at 9067, ¶ 31.
36. *Id.* at 9065 & 9067, ¶¶ 25 & 31.
37. 2015 TCPA Omnibus Declaratory Ruling and Order, 30 FCC Rcd at 8000-01, ¶ 73.
38. Blackboard / Edison TCPA Declaratory Ruling, 31 FCC Rcd at 9065, ¶ 26 & n. 95.
39. 2015 TCPA Omnibus Declaratory Ruling and Order, 30 FCC Rcd at 7996, ¶¶ 63-64.
40. *See e.g.* Blackboard / Edison TCPA Declaratory Ruling, 31 FCC Rcd at 9065 & 9068, ¶¶ 25 & 33.
41. Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, Notice of Proposed Rulemaking, 31 FCC Rcd 5134, 5139, n. 40 (2016).
42. *Id.* at 5139, ¶ 14.
43. 2015 TCPA Omnibus Declaratory Ruling and Order, 30 FCC Rcd at 8006, ¶ 84.
44. *Id.*

UPCOMING 2021 WEBINARS

Update on FCC Rules on Cell Tower Zoning
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Speakers: John Pestle & Jonathan Kramer

What Every Municipal Lawyer Should Know About Recovering Damages for Legacy Environmental Contamination of Municipal Resources
March 9, 2021 | 1 PM Eastern - 2:30 PM Eastern
Speakers: Kyle McGee, Suzanne Sangree, Viola Vetter, & Jason Wilson

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March 16, 2021 | 1 PM Eastern - 2 PM Eastern
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CLE available to Kitchen Sink subscribers and in some cases to others, but fees may apply.

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Speakers: Eugene Hsue, Paula Donato, Philip H. Lam, Lara Mainella & Patrick Bryant

Transportation Oriented Development
March 23, 2021 | 1 PM Eastern - 2 PM Eastern
Speaker: Jonathan Hunt

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Speakers: Deanna Shahnami, Patricia Miller, Deanne Durfee & Josette Flores
This webinar will qualify for Elimination of Bias and Implicit Bias CLE (depending on your jurisdiction).

For more information and to register, please go to IMLA.org and see our Webinars tab.