

Mistrial Declared Over Executive's Texting From Witness Stand

Reminder: Do not read texts from your boss while on the witness stand. A Florida judge declared a mistrial in a civil fraud case this week after being told that a witness on the stand had engaged in text-messaging while the judge spoke with attorneys during a sidebar conference.

by Legaltech News | May 15, 2009

Case Digest Summary

Reminder: Do not read texts from your boss while on the witness stand. A Florida judge declared a mistrial in a civil fraud case this week after being told that a witness on the stand had engaged in text-messaging while the judge spoke with attorneys during a sidebar conference.

For future reference, do not read texts from your boss while on the witness stand. In fact, don't text at all.

Miami-Dade Circuit Judge Scott Silverman declared a mistrial in a civil fraud case Wednesday after being informed a witness on the stand in his courtroom had engaged in text-messaging while the judge spoke with attorneys during a sidebar conference. The dispute is over the sale of condo tower in North Miami Beach.

While the judge and attorneys conferred, a courtroom spectator passed a note to a defense attorney saying the witness, Sky Development chief operating officer Gavin Sussman, appeared to be text-messaging Sky chief executive Yizhak Toledano at the plaintiff table.

Vistaview attorney William Petros, a partner at Coral Gables-based [Petros & Elegant](#), said the incident occurred while the judge and lawyers for both sides met at the bench on the third day of trial.

Petros asked for another sidebar and relayed his suspicions. The judge asked Sussman if he'd been text-messaging, and he admitted he and Toledano texted twice about Sussman's testimony, Petros said.

One message from Toledano to Sussman said: "We never filed a lawsuit against seller. These people developed the site 40 years ago, in 40 years and know every corner." It wasn't clear from a transcript who sent the second text saying, "We maybe got this document after Sept. 7 when the bank discovered the problem."

Petros asked for a mistrial, which the judge granted.

Before that, Silverman had engaged in a heated exchange with Toledano.

“Let me be really frank about this,” the judge said. “I never had this happen before. This is completely outrageous, absolutely outrageous.”

Toledano responded, “It was on a break.”

Silverman shot back: “It doesn’t matter. You are communicating about the case and the subject matter of the case with a witness who is currently under oath and before the jury,”

Toledano said, “I’m sorry, after we took the break, it’s not in the middle.”

The judge explained himself again.

“It’s a problem on your communicating with the witness about his testimony whether it’s before the break, after the break and during the break while he’s testifying,” he said. “This is outrageous.”

A basic trial rule prevents people on the witness stand from communicating with anyone about their testimony during recesses or other breaks.

When the judge asked about the texts, Petros took Sussman’s phone to read them, and they exchanged sharp words over whether Petros snatched the phone. The bailiff threatened to call police and said “someone is going to get arrested if there’s no order in this court,” the transcript said.

Outside court, Petros repeated his objections to the electronic exchange.

“Texting in this manner is no different than being wired and having someone talk in your ear,” he said. “It was a fraud on the justice system. This case in my view is an intentional interference with the judicial process, and an act like that infringes on the ability of the court and the judicial system to operate fairly and impartially.”

He contends the texting warrants dismissal of the case and plans to file a motion.

Petros said it wasn’t the first time Sussman was caught in improper witness communications. He said the executive was chastised by a magistrate who served as a referee at a March 9 deposition for passing a note to the witness.

“During a tense period of cross-examination, Mr. Sussman slid over to the witness a note ... which said, ‘Don’t worry about pleasing him, just say no.’ That’s a backdrop that came out” during the mistrial arguments before Silverman, Petros said.

Sussman and Sky lawyer Norman Malinski of Aventura-based [Norman Malinski P.A.](#) declined to comment. Toledano did not return a call for comment by deadline.

Sky Development accused Vistaview Development of fraudulently misrepresenting the number of two-bedroom units in the 308-unit Vistaview apartment complex, which changed hands in 2007.

The texting incident is part of a growing debate in the legal community about the potential negative impact of new technology in the courts. It follows a recent allegation that [a juror used the social networking Web site Twitter during an Arkansas trial](#).

Robert Jarvis, a law professor at the Nova Southeastern University Shepard Broad Law Center, said judges, bailiffs and other court officials should be aware of the potentially harmful effects of communication devices in the courtroom.

The Miami case “is the perfect example of that mischief where you’ve had to declare a mistrial. You’ve wasted that effort and put people through a good deal of expense,” he said. “One has to be very careful about how and when you let technology in. My own feeling is nobody should ever be allowed to bring anything into a court — except medicine they need. There’s just too much potential for disruption.”

Petros said cell phones have been commonplace in Miami-Dade Circuit Court since their early days, but the incident brings to light a need to consider more rules on what should be allowed in the courtroom.

“I don’t know whether they should be barred,” he said. “There probably needs to be a careful review of what’s permitted and what’s not permitted with respect to phones.”

The courtroom setback adds to a growing list of legal troubles for Toledano. Sky and Toledano’s Aventura Land Trust face foreclosure actions against two projects — the proposed 7.5-acre mixed-use City Park Aventura and the 9.8-acre site of the proposed Park Plaza Executive Center office complex next to Memorial Pembroke Hospital in Pembroke Pines.

Reprinted with permission from the May 15, 2009 edition of the Daily Business Review © 2020 ALM Media Properties, LLC. All rights reserved. Further duplication without permission is prohibited, contact 877-257-3382 or reprints@alm.com.
