

Text Marketing: Masterclass Series Part 2

*Facebook and the
SMS of it All*



50,000 Foot View on Express Consent

- **TCPA** –Requires “express consent” to use automated technology and prerecorded/artificial voices to contact consumers for *any* purpose
 - Prerecorded/artificial voices are always covered by the TCPA and require consent in most instances
 - Exception: limited number of pre-recorded calls to landline numbers permitted for *non-marketing* purposes
 - Includes RVM, VM, IVR
 - May include calls that begin with pre-recorded snippet (“Call may be recorded” etc.)
 - Scope of automated technology covered by the TCPA drastically reduced by *Facebook*
 - Should be viewed primarily as a litigation shield for now
 - But opportunities to increase text engagement now exist
- **DNC Rules**– Require “express permission” to contact residential numbers on the National DNC using *any* dialing mechanism for marketing purposes.
 - Inquiry and EBR are also potential defenses

Different Levels of Consent Are Required Based on Type of Phone and Content of Call

- Calls made *solely* for **informational purposes** require no or limited consent
 - Informational calls to residential or business **landlines** require no consent unless a pre-recorded or artificial voice is used
 - Even if pre-recorded or artificial voice is used callers may make between 3-12 attempts a month to **landlines** (depending on content of the call) without consent
 - Pre-recorded or ATDS calls or texts to **cell phones** for informational purposes require express consent but it does not need to be in writing.
 - Presumed anytime a consumer provides a phone number to the caller for a purpose “closely related” to the purpose of the call
- Calls made *in any way* for **marketing purposes** require EXPRESS WRITTEN consent when:
 - Call is made to a **residential** number (**cell or landline**) on the national DNC without a valid inquiry or established business relationship
 - Call is made to a **residential landline** using a prerecorded/artificial voice
 - Call is made to a **cellular phone** using a prerecorded/artificial voice *or* ATDS

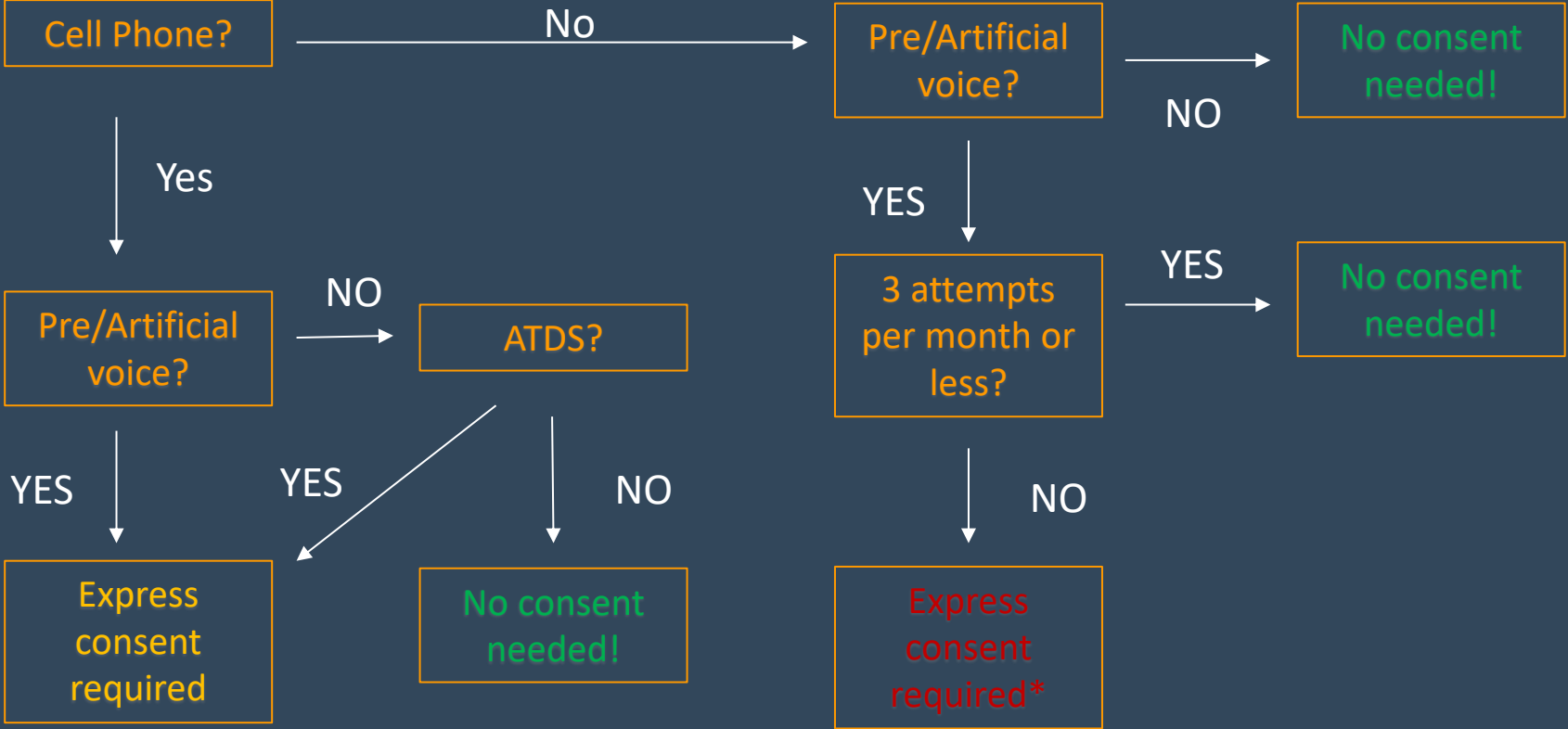
Informational vs. Telemarketing

Beware of dual purpose and “pretext” messages

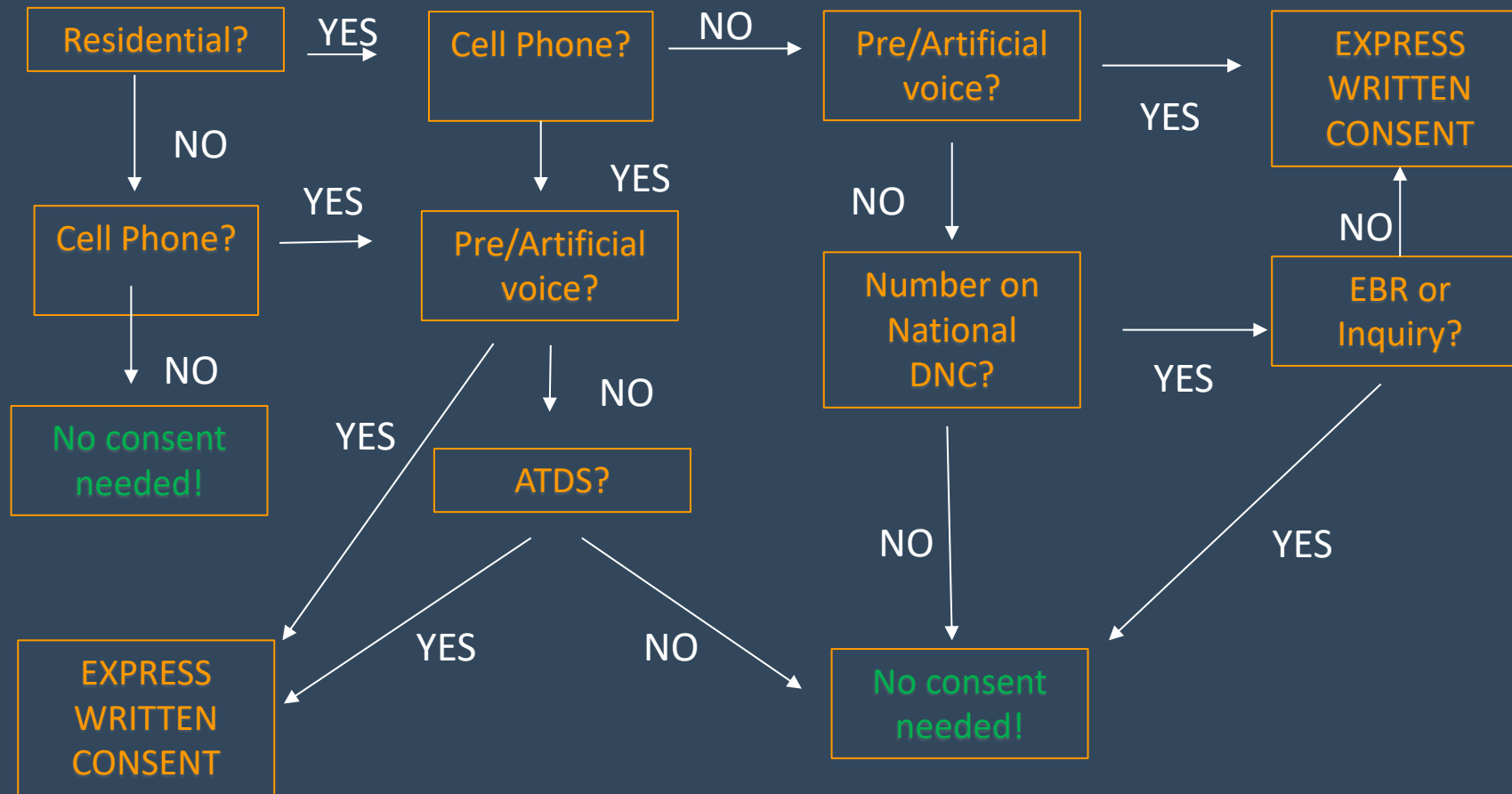
Weisbein v. Allergan, Inc., Case No. SA CV 20-0801 FMO (ADSx), 2021 U.S. Dist. LEXIS 52977 (C.D. Cal. March 16, 2021)

- **TEXT 1:** Hello, please note that Allergan has an additional California Privacy Policy that you can view at www.allergan.com/privacy/ccpa
- **TEXT 2:** Are you eligible for the BOTOX Saving Program? You'll get 4 questions to answer via text. Terms & Conditions: bit.ly/2RvxiWr Msg & data rate may apply. STOP to end. HELP for help. See full Product Information, including Boxed Warning: bit.ly/2RKyxW4. (Q1 of 4) Do you have commercial health insurance or commercial prescription drug insurance? Reply YES or NO. “
- **TEXT 3:** Are you still interested in [the Botox] Saving Program? Reply YES to continue enrollment, STOP to end. See full Product Information, including Boxed Warning: bit.ly/2RKyxW4.”

Informational Calling Consent Analysis



Marketing Calling Consent Analysis



Impact of Facebook

- Facebook interpreted the TCPA's ATDS definition narrowly
 - ONLY DIALERS WITH "CAPACITY" TO STORE OR PRODUCE NUMBERS USING A RANDOM OR SEQUENTIAL NUMBER GENERATOR SUBJECT TO TCPA
- But confusing footnote 7 suggests that dialers calling from lists might be covered by the statute still:

⁷Duguid argues that such a device would necessarily "produce" numbers using the same generator technology, meaning "store or" in §227(a)(1)(A) is superfluous. "It is no superfluity," however, for Congress to include both functions in the autodialer definition so as to clarify the domain of prohibited devices. *BFP v. Resolution Trust Corporation*, 511 U. S. 531, 544, n. 7 (1994). For instance, an autodialer might use a random number generator to determine the order in which to pick phone numbers from a preproduced list. It would then store those numbers to be dialed at a later time. See Brief for Professional Association for Customer Engagement et al. as *Amici Curiae* 19. In any event, even if the storing and producing functions often merge, Congress may have "employed a belt and suspenders approach" in writing the statute. *Atlantic Richfield Co. v. Christian*, 590 U. S. ___, ___, n. 5 (2020) (slip op., at 10, n. 5).

Dialing Technology Post *Facebook*



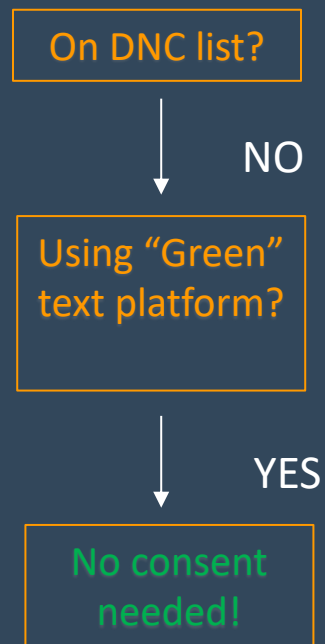
Pre-recorded/Artificial Voice
IVR
Ringless VM
VM
DNC calls

Predictive dialers
Preview dialers
Blast text platforms

AI/Interactive text
Triggered text alerts
P2P txt platforms

Theoretical Impact

- *Facebook means –in theory– you can use the green technology to call cell phones without consent. Even for marketing—unless on DNC list*



- *But let's not do that*

Best Practices?

- Does *Facebook* mean that consent is out the window?
- Modify practices?
- Purchase leads from third parties?

Best Practices?

DO's	Do get permission	Make sure you have permission to text the consumer prior to sending the first text message.
	Do keep it brief	Keep it under 160 characters. Keep your outbound messages short and succinct, and make your purpose/motive clear. Leads and consumers are easily turned off by wordy or ambiguous messages. Keep it short and simple.
	Do make it personal	Consumers should never have to second guess who's texting them. Be sure to introduce yourself by including your title in the outgoing message and why you are contacting them.
	Do have a call-to-action	Your call-to-action should be to-the-point and simple. Make sure what you're asking them to do can be completed in as few steps as possible.

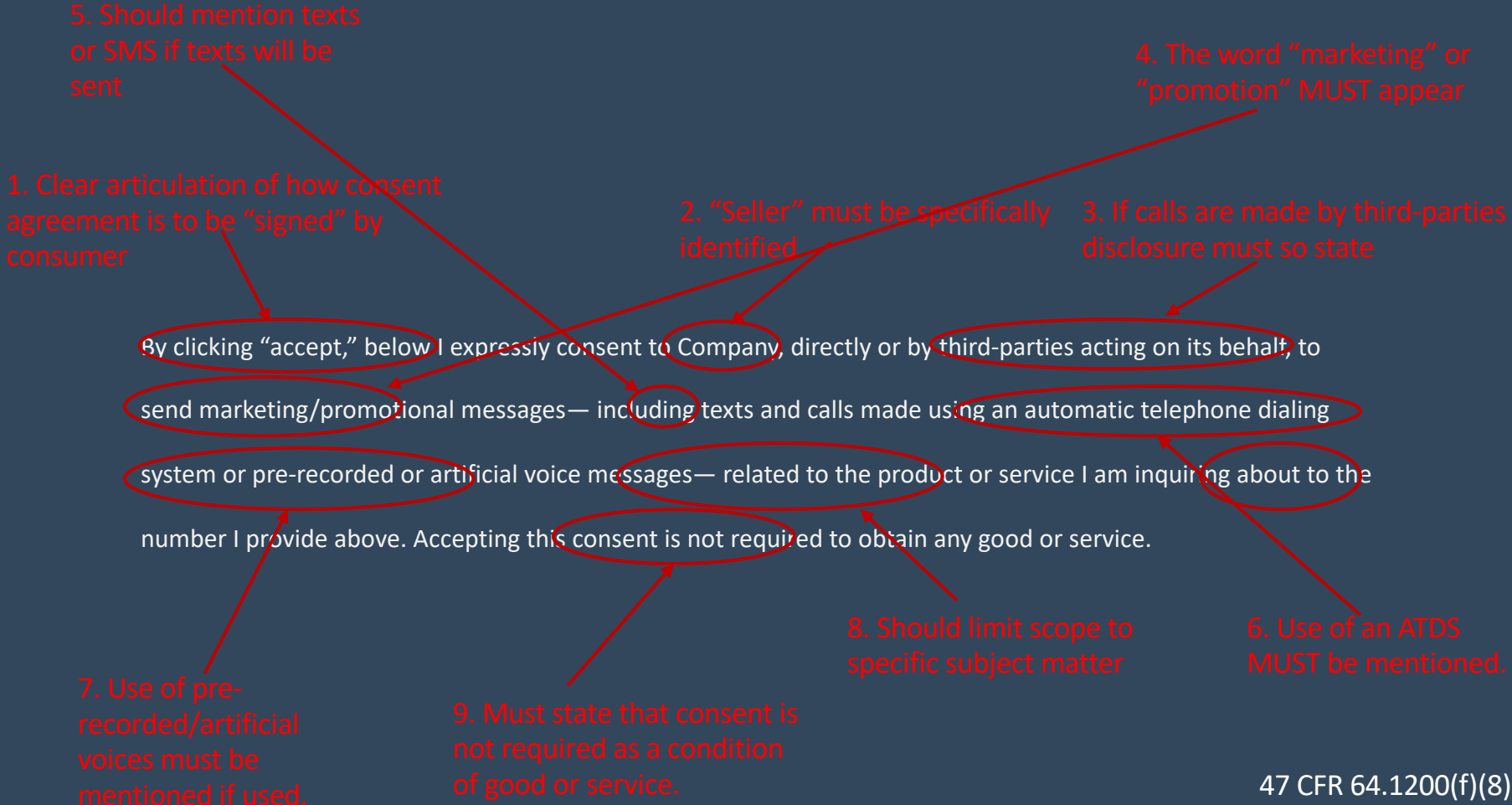
Things to Avoid

DON'Ts	Don't text too frequently	Timing is crucial, but frequency is equally important. Never ever send messages just to say you're sending something. Avoid contacting consumers too often or your message will come off as SPAM. Remember, less is more!
	Don't text at the wrong time	Don't send bulk SMS to consumers at inappropriate times. Late night and early morning messages are never welcomed. Consider the times of day when it is most appropriate to send your messages.
	Don't text slang and abbreviations	Not everyone understands texting abbreviations and slang. If consumers have no idea what you're talking about, they will simply ignore the message or decide to unsubscribe.
	Don't text customers who have opted out	Don't send messages to consumers that have decided or indicated they don't want to be contacted by you anymore.

Expansive TCPA Liability Still A Risk

- Corporate officers can be named
- Allergan Vice President of Marketing and Director of Digital Strategy trapped in *Weisbein v. Allergan, Inc.*, Case No. SA CV 20-0801 FMO (ADSx), 2021 U.S. Dist. LEXIS 52977 (C.D. Cal. March 16, 2021)
- Porch CE

9 Part Test: Anatomy of a Valid TCPA Express Written Consent Disclosure



47 CFR 64.1200(f)(8)

Must the Seller Be Specifically Identified?

- Many online webforms do not specifically reference the name of an ultimate seller but merely advise the consumer that a “lender” or “service provider” will contact the consumer in response to their inquiry.
- Two recent cases suggest this practice is insufficient:
 - *Williams v. PillPack LLC*, C19-5282 TSZ, 2021 U.S. Dist. LEXIS 27496 (W.D. Wash. February 12, 2021)(Written consent for call center to call. Calls were subsequently warm transferred to seller, with consumer’s oral consent. The court expressed doubt that this was lawful and determined the issue was suitable for classwide treatment);
 - *Mattson v. New Penn Fin.*, No. 3:18-cv-00990-YY, 2020 U.S. Dist. LEXIS 197955 (D. Or. October 25, 2020)(district court found that because the lender is not specifically named in a disclosure that said only “up to 4 lenders” may call the consumer, the lender do not have a valid consent defense on Plaintiff’s DNC Claim. Plus, the lender may even have a bona fide error defense since the lender did not verify that they were specifically listed on the website.)

How to Capture Consent

- Online webforms are great— but can be problematic
- Contract terms
- Apps and web portals for demographic updates
- Recorded phone calls?
 - Good for informational consent but probably not marketing consent
- Text message consent
- Vendor intake

Dealing with Revocation

- Only matters where consent is needed—which is reduced by *Facebook*—but why contact consumers that don't want to hear from you?
- Can be limited by contract— but honor consumer contact preferences?
- Any reasonable means, unless contract term says otherwise
- SMS “stop” and many other ways to revoke consent

Reassigned Numbers

- Again, using “green” technology largely avoids concerns—but watch out for DNC traps
- If using technology regulated by TCPA statute likely strict liability-but some case law ameliorates this
- Use vendors to detect wrong numbers and SCRUB the DNC frequently (every 30 days)
- Reassigned number database will be out soon(ish)

Carrier Delivery Issues

- Carriers given broad power to regulate text messages
- Impacts ability to get messages through
- May be unconstitutional and violation of Communications Act, but advocacy to the carriers and FCC likely more beneficial than litigation

Huge 2020 Case Law Trend: Courts Refusing to Enforce Online Disclosures

- Numerous cases refused to enforce online disclosures in 2020.
- Courts are applying a holistic approach with an emphasis on whether a consumer is truly likely to understand they are accepting terms and conditions when submitting a web form.
- General things to keep in mind:
 - **Disclosure must be close to the acceptance button—while “above the button” is not necessarily required it is preferred;**
 - **Hyperlinks must be obvious and underlined or capitalized;**
 - **Disclosure must be in readable font—both in terms of size and color against background;**
 - **Website should not be cluttered or otherwise full of impertinent language in different font sizes and colors that might distract from the disclosure;**
 - **Disclosure should actually and clearly explain that by clicking the button the customer will actually be accepting the disclosure;**
 - **Disclosure must be apparent at the time the user clicks the submit button and cannot pop up only before or after the button is presented.**

Huge 2020 Case Law Trend: Courts Refusing to Enforce Online Disclosures

- Least to most:
 - No confirmation other than a “continue” or “next” button
 - “Accept” “I agree” button indicating they are agreeing to something (maybe they should read it!)
 - Prechecked checkbox
 - Pre selected radio box
 - Unchecked checkbox
 - Pre opt-out radio box
- Consider pros and cons of each. Similar with font color/size, location of discloser, etc.

Still have questions? I'm here to help

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Connect with me on LinkedIn!



[LinkedIn.com/in/NealKent](https://www.linkedin.com/in/NealKent)

Book time on my calendar

bit.ly/nealkent

