



Texting: Legal and Ethical Issues

2020 Edition



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LEGAL & ETHICAL ISSUES

TEXTING



PRIVAC
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PRIVACY EXPECTATIONS

A confidential communication between attorney and client for the purpose of seeking or giving legal advice is privileged information.

- ▶ “While privilege can be waived in various ways, the technology-related cause of privilege waiver is **disclosure**. Disclosure of otherwise privileged information compromises confidentiality, which can result in a judge ruling that the privilege has been waived.” (Schaefer)

PRIVACY EXPECTATIONS

- ▶ Courts have held clients have a reasonable expectation of privacy in attorney-client text messages sent or received on a personal device if the messages are not disclosed to a third party.
- ▶ As long as the text message sent or received on a personal device is not disclosed to a third party or the privilege is not otherwise waived, the text message is protected by the attorney-client privilege. As with email, however, there is no reasonable expectation of privacy, and therefore no privilege, in personal text messages sent or received on a device owned and/or issued by an employer.
- ▶ It is important clients are aware they should be careful when sending and receiving confidential text messages on a device they do not own personally.

(Price & Sansalone)



CASE STUDIES

CASE STUDIES / EXAMPLES

- ▶ Inadvertent disclosure of privileged communications is not a new problem for attorneys. A typical scenario involves an attorney accidentally producing a privileged letter to opposing counsel in a large stack of documents during discovery. Once the inadvertent disclosure is discovered, the issue becomes whether or not the privilege is waived by virtue of the disclosure
- ▶ Some jurisdictions hold *an inadvertent disclosure automatically waives the attorney-client privilege*.
- ▶ Other jurisdictions hold *an inadvertent disclosure does not waive the privilege*. Still others take a mid-line approach and apply a balancing test in order to determine whether the disclosure has waived the privilege.

CASE STUDIES / EXAMPLES

- ▶ **Balancing Test:**

Consider the following...

- 1) the reasonableness of the precautions taken to prevent the inadvertent disclosure;
- 2) the amount of time taken to rectify the inadvertent disclosure;
- 3) the scope of the discovery;
- 4) the extent of the inadvertent disclosure; and
- 5) overriding issues of fairness.

CASE STUDIES / EXAMPLES

- ▶ Despite the lack of a uniform standard, these varying approaches help illustrate the importance of ensuring attorney-client communications and other protected information are not disclosed to a third party.

(Price & Sansalone)



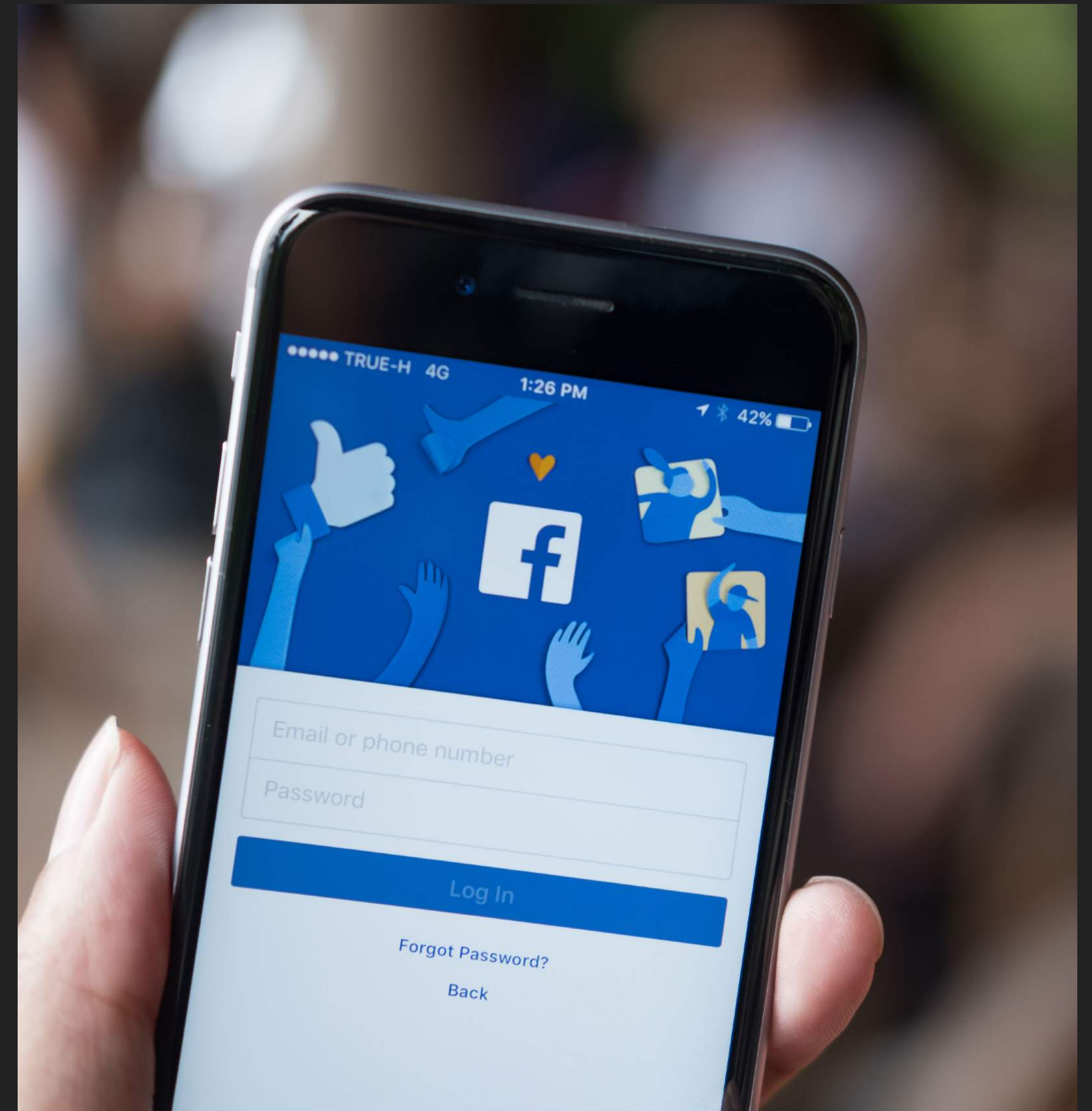
CONFIDENTIALITY
& ATTORNEY
CLIENT PRIVILEGE

ATTORNEY CLIENT PRIVILEGE

- ▶ Three Primary Threats to Attorney Client Privilege:
 - 1) Clients, Social Media, and Purposeful Disclosures;
 - 2) Privilege Waiver through Use of Employer Technology to Communicate with Counsel; and
 - 3) Inadvertent Disclosure by Attorneys.

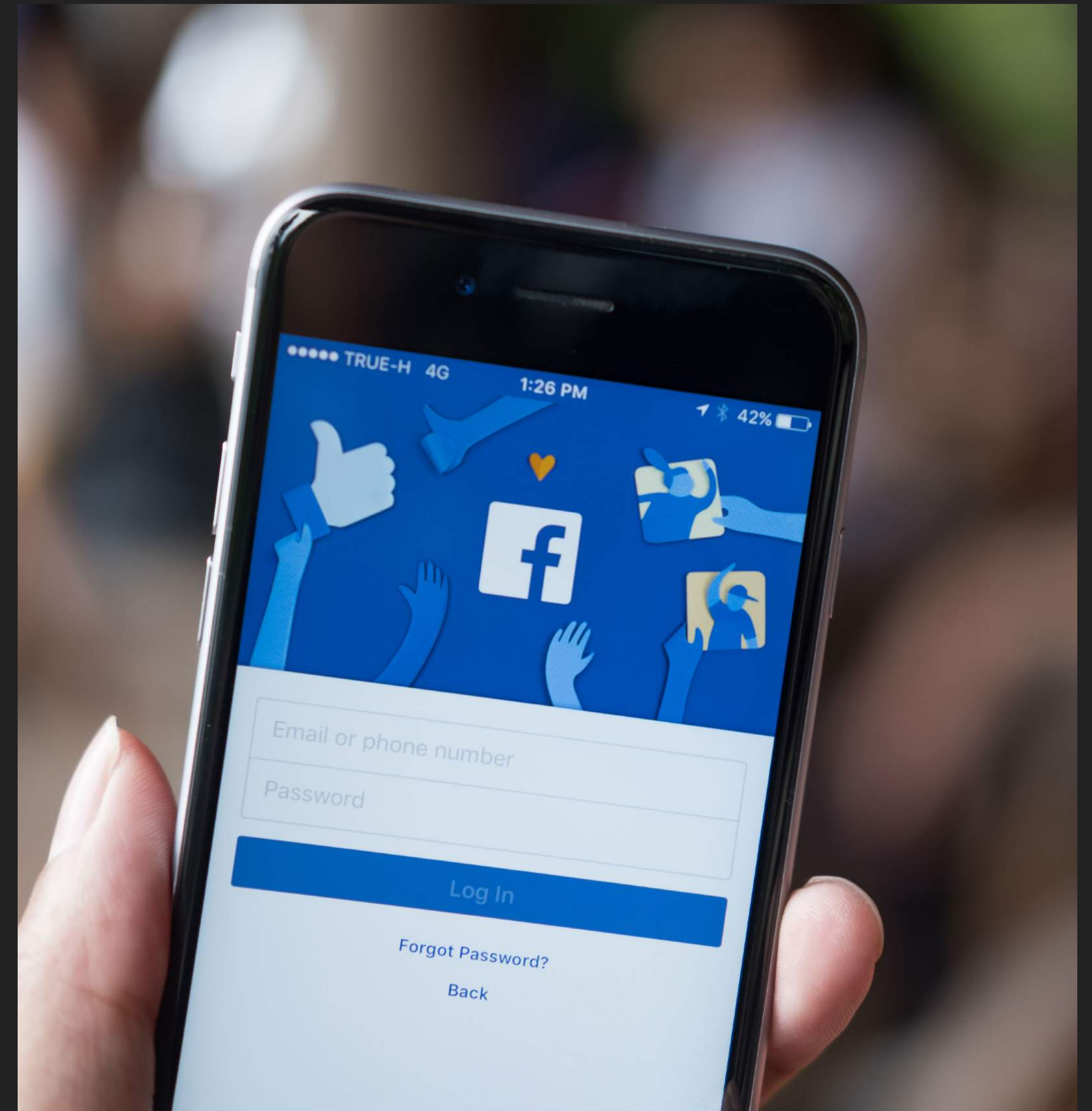
SOCIAL MEDIA & PURPOSEFUL DISCLOSURES

- ▶ ...[P]rivilege waiver can occur through client disclosure of confidential communications. This is true not only for individual clients but also for sophisticated business clients who may post confidential information on their business websites. Voluntary disclosures that compromise confidentiality have always resulted in privilege waiver. But today, given the plethora of easy and public avenues to make those disclosures, counsel must educate clients about the heightened risk to the privilege...



SOCIAL MEDIA & PURPOSEFUL DISCLOSURES

- ▶ ...[P]rivilege waivers did not occur because attorneys or clients lacked understanding of the underlying technology; instead, the clients were fully aware that they were using email, Gmail chat, and a blog to communicate information to third parties. These were not Luddites; they were sophisticated consumers of technology. What these clients did not understand, however, was the legal repercussions of communications, and it is that knowledge gap that led to these privilege waivers.
(Schaefer)



EMPLOYER TECHNOLOGY

- ▶ If your client is using technology provided by their employer to communicate with you, **attorney-client privilege is not likely to protect those communications.**
- ▶ In order for attorney-client privilege to be effective, an employee using technology provided by their employer to communicate with their attorney must have a reasonable belief that he was having a confidential, private conversation with counsel, **taking into consideration the employer's technology-use policies.**



EMPLOYER TECHNOLOGY

- ▶ Monitoring and anti-tampering software.
- ▶ Devices remain the property of the employer.
- ▶ Employees typically agree to make the devices available to their employer for the purposes of inspection, maintenance, [corporate] security, etc.
- ▶ E-mail accounts are subject to employer oversight.
- ▶ **Bottom line: Courts have held that attorney-client privilege typically does not extend to communications sent via workplace e-mail accounts or devices provided by an employer, because employees do not have a reasonable expectation of privacy when using such services or devices.**



INADVERTENT DISCLOSURE

- ▶ Attorneys, rather than clients, are most often the people behind inadvertent— or arguably inadvertent—disclosures that may result in privilege waiver.
- ▶ Upon receipt of such communications or documents, opposing counsel will often argue that the privilege has been waived with respect to them.



INADVERTENT DISCLOSURE

- ▶ Even though professional conduct rules in most jurisdictions impose a duty on the receiving attorney to notify the sending attorney of an “inadvertent” disclosure, receiving attorneys often do not provide this notice.
- ▶ These receiving attorneys likely thought notice was not required because—in the receiving attorneys’ sole judgment—the disclosure was so careless that it was not “inadvertent” but something more egregious; and it is “inadvertence” that triggers the notice obligation under the vast majority of professional conduct rules.



INADVERTENT DISCLOSURE

- ▶ Federal Rule of Evidence 502(b) contains the federal waiver standard, providing that disclosure does not result in waiver of attorney-client privilege, if the disclosure was inadvertent, the disclosing party took reasonable measures to prevent the disclosure, and the disclosing party promptly took reasonable measures to rectify their error.
- ▶ Even having a clawback does not prevent privilege waiver; so, be careful!



INADVERTENT DISCLOSURE

- ▶ Using technology you don't fully understand creates a risk that you will make a mistake, such as inadvertently sending what you intend to be a privileged communication to the wrong party and, thereby, waiving the privilege with respect to that communication.
- ▶ Typing the wrong recipient's name in an e-mail
- ▶ Hitting "Reply All," instead of "Reply"
- ▶ Entering a phone number for a text message incorrectly
- ▶ Misidentifying privileged documents as "not privileged"





TEXTING

DO'S &
DON'TS

DO NOT TEXT CLIENTS IN THE FOLLOWING SCENARIOS

- ▶ Billing or bill-related issues, questions, or problems.
- ▶ Scheduling a meeting.
- ▶ When what you need to say cannot be limited to 140 to 160 characters.
- ▶ When you need to fire someone — an employee or a client.
- ▶ Sending an apology.

DO NOT TEXT CLIENTS IN THE FOLLOWING SCENARIOS

- ▶ Delivering really great news.
- ▶ Changing contract terms.
- ▶ Sending questionable content (including gossip, pictures, etc.) to colleagues, employees, clients, etc.

HOW TO RESPOND

- ▶ Use a standard message to respond to business-related text messages that are not appropriate for that medium of communication.

HOW TO RESPOND

“I RECEIVED YOUR MESSAGE. I’M
HAPPY TO DISCUSS THIS WITH YOU VIA
E-MAIL. TO WHICH E-MAIL ADDRESS
WOULD YOU LIKE ME TO SEND REPLY?
THANK YOU.”

Johnny Lawyer

HOW TO RESPOND

- ▶ We tend to believe that *speed* of communication is an improvement to communication.
- ▶ We should understand that improved *capacity* for communication does not necessarily mean improved *quality* of communication.
- ▶ Sometimes, we need to pause and consider what we're saying and how we're saying it. Sometimes, formality adds gravitas and propriety to our message.
- ▶ **Our communication, in business, should always be context-appropriate, safe for work, and delivered in the most effective, efficient way possible.**

WHEN IT IS APPROPRIATE TO TEXT

- ▶ Running 5 minutes late to a meeting? Send a text message. It's courteous.
- ▶ Want someone to be excited about your upcoming meeting? Send a teaser text:
“Got some really great news on your account. See you at 3:00!”



TEXTING

PRIVACY LAWS

PRIVACY LAWS

- ▶ The TCPA regulates the collection and use of telephone numbers for commercial purposes. It applies to both telephone calls and text messages. The TCPA and the regulations promulgated under it set out rules governing, for example:
 - ▶ Times during the day when telephone solicitations can be made.
 - ▶ Use of automated telephone equipment for solicitations.
 - ▶ Maintenance of a do not call registry.
 - ▶ Information the solicitor must give to the consumer.
- ▶ The TCPA permits private rights of action and provides for recovery of either actual or statutory damages ranging from \$500 to \$1,500 per unsolicited call or message. Because of these statutory damages, TCPA class action litigation is a key issue for businesses, and the terms of the statute are frequently litigated.

THE DECLARATORY RULING ALSO ADDRESSED A NUMBER OF ISSUES THAT SPECIFICALLY AFFECT TEXT MESSAGING UNDER THE TCPA.

WHAT WERE THE MOST SIGNIFICANT RULINGS WITH RESPECT TO MARKETING VIA TEXT?

- ▶ FCC reaffirmed its position that SMS text messages are subject to the same consumer protections under the TCPA as voice calls, rejecting the argument that SMS text messages should not be subject to the TCPA because they are more similar to instant messages or emails than to voice calls. (Declaratory Ruling ¶ 107, 30 F.C.C.R. at 8016-17.)

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WHAT WERE THE MOST SIGNIFICANT RULINGS WITH RESPECT TO MARKETING VIA TEXT?

- ▶ FCC addressed Internet-to-phone text messages. Internet-to-phone text messages are different from SMS messages in that they originate as emails (as opposed to SMS text messages) and are sent to an email address in the form of the recipient's wireless telephone number and the carrier's domain name. The FCC clarified that Internet-to-phone text messages are the functional equivalent of SMS text messages and require consent per the TCPA, a significant clarification given that these messages appeared to have been subject to the CAN-SPAM Act, not the TCPA. The FCC also found that the equipment used to send these messages is an ATDS for purposes of the TCPA. In so doing, the FCC defined the term "dial" to include the act of sending these messages and held that the technology stores numbers and "dials" them using random or sequential number generators within the meaning of the TCPA. (Declaratory Ruling ¶¶ 108-22, 30 F.C.C.R. at 8017-22.)

THE DECLARATORY RULING ALSO ADDRESSED A NUMBER OF ISSUES THAT SPECIFICALLY AFFECT TEXT MESSAGING UNDER THE TCPA.

WHAT WERE THE MOST SIGNIFICANT RULINGS WITH RESPECT TO MARKETING VIA TEXT?

- ▶ FCC provided helpful guidance regarding one-time messages sent in response to a consumer's specific request for information or a "call-to-action." Companies often use such calls to action in advertising, inviting interested consumers to text a particular short code for product information. It is now clear that one-time messages sent in response to such texts do not violate the TCPA, as long as they are sent to the consumer immediately in response to a specific request and contain only the requested information without any other marketing or advertising information. (Declaratory Ruling ¶¶ 103-106, 30 F.C.C.R. at 8015-16.)

PRIVACY LAWS

- ▶ Lawyers in California or Massachusetts have an even greater challenge with privacy and data security regulatory compliance. Because such issues are state-specific, they are beyond the general scope of this presentation, but lawyers in those jurisdictions are encouraged to familiarize themselves with their unique privacy and data security regulations.
- ▶ Generally speaking, privilege tends to extend to attachments in the same way it would extend to the text messages or e-mails to which they are attached.
- ▶ Privilege (and waiver thereof) tends to extend to screenshots of messages on devices as it would to both the message and a saved image on a device.



TEXTING

COMPLICATION
S
& RISKS

ATTORNEYS' CONCURRENT PERSONAL AND PROFESSIONAL USE OF DEVICES

- ▶ Using the same device for personal and professional tasks could expose you to additional risk. Inadvertently waiving attorney-client privilege is easier when you use your personal phone or computer to send and receive privileged communications, because more people may have an interest in the device (spouses, children, etc.).

HACKING RISKS

- ▶ “Attorneys and legal teams have to be particularly careful with mobile devices. 'Unfortunately, mobile devices and wireless systems can be hacked to compromise contact lists, usernames, passwords, client data and browser history. As well, ... lawyers routinely carry around confidential information on small USB flash drive devices.' ... 10,000 laptops are lost each week in the nation's largest 36 airports, typically at security checkpoints. ...”

TO PROTECT CONFIDENTIAL INFORMATION...

- ▶ “Password protect devices and individual documents.
- ▶ Use encryption tools when communicating any privileged information.
- ▶ Create and store electronic documents only on the firm’s network—not on home systems.
- ▶ Scrub metadata before documents are sent to external email addresses, including the lawyer’s home email.
- ▶ Avoid installing third-party mobile applications on firm-issued smartphones—they spread malware, infiltrate networks or gain access to data. Clients should know this too.
- ▶ Put Bluetooth® devices in ‘non-discoverable’ mode, protect pairing with passwords and pair with other devices only when in a trusted location.
- ▶ Password protect and encrypt USB flash drives.”



TEXTING

FINAL
THOUGHTS

DON'T FORGET THE RULES.

► Rule 1.6:

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

DON'T FORGET THE RULES.

► **Rule 1.6, continued:**

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(6) to comply with other law or a court order; or

(7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

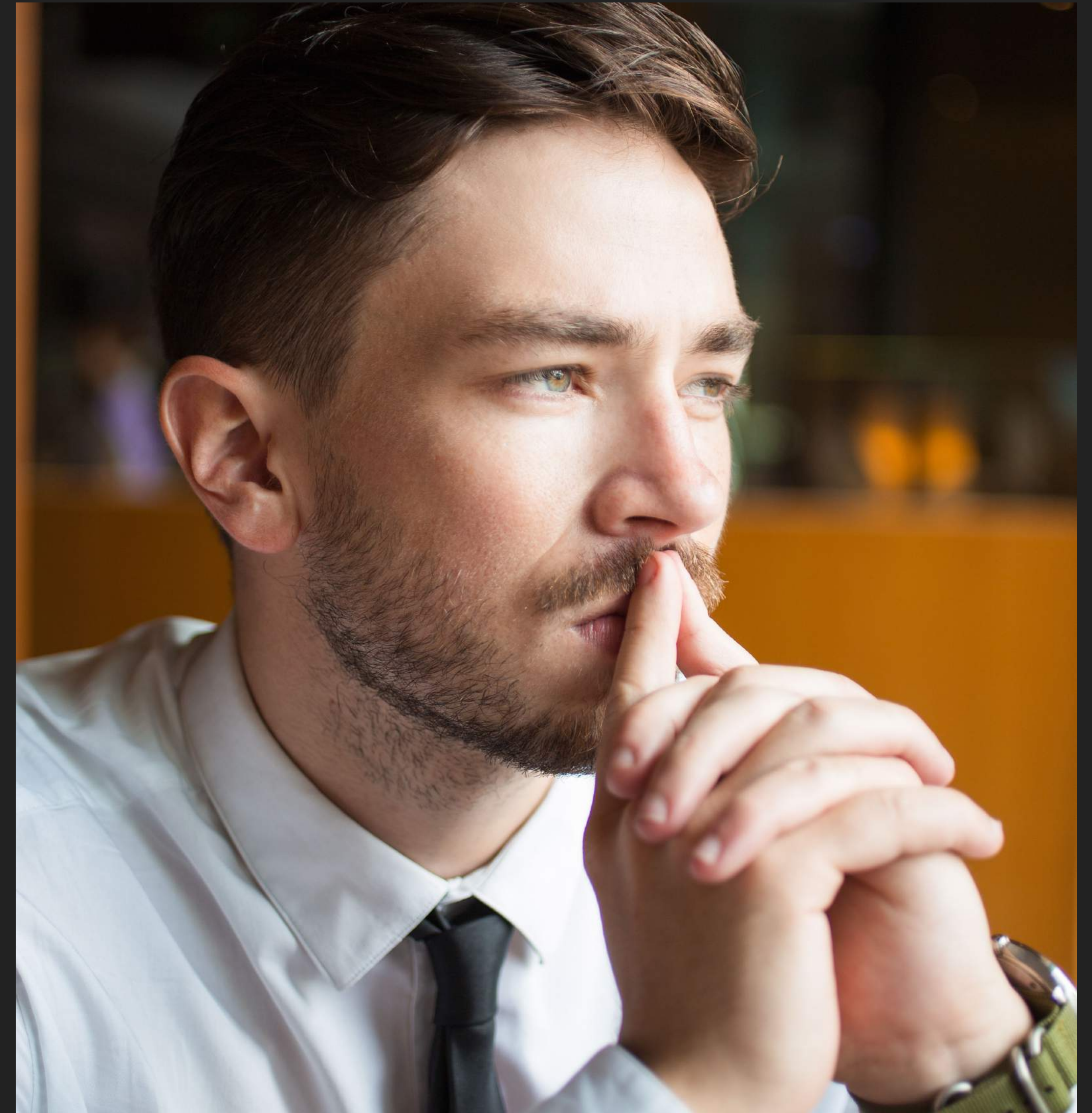
DON'T FORGET THE RULES.

- ▶ **Rule 4.4(b):**

A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.

MEET OR EXCEED EXPECTATIONS

- ▶ Maintaining Confidentiality is one of the hallmarks of the legal profession. The best lawyers, therefore, maintain confidentiality of communications.
- ▶ When reviewing discovery materials, they take extra care not to transmit or release privileged documents or communications.



MEET OR EXCEED EXPECTATIONS

- ▶ By meeting—or exceeding—our clients' expectations with respect to privileged communications, we maintain their trust, without which the attorney-client relationship cannot function as intended.

