

The logo for K&L GATES, featuring the text in white on a red rectangular background. The background of the slide is a dynamic, abstract composition of horizontal, wavy lines in shades of yellow, orange, red, and purple, creating a sense of motion and energy.

K&L GATES

2018 Top 5 Trends in Social Media: How to Manage Risks to Your Corporation

Agenda

1. Social Media - Introduction
2. Hypothetical
3. Social Media in the Firm/Corporation – Factors to Consider
 - a. M&A Considerations
 - b. Social Media Platform Considerations
 - c. Cybersecurity
 - d. Social Media Advertising and Marketing
 - e. Employment Issues
 - f. Ethics and Compliance
4. Takeaways
5. Q&A

Social Media – Introduction

- Attorney Use
 - 96% of lawyers surveyed use social media
 - 70% of lawyers surveyed claim to use social media as an overall marketing strategy
 - 84% of lawyers surveyed are on LinkedIn which is still #1 source of social media, but Facebook and Twitter are quickly building lawyer usage
 - 7% of lawyers surveyed say social media is “very” responsible for getting new clients; 42% say it’s “somewhat” responsible.

* A Lawyer’s Guide to Social Media Marketing

Social Media - Introduction

- Company Use
 - 86% of Fortune 500 companies have Twitter accounts
 - 84% of Fortune 500 companies have Facebook pages
 - 97% of Fortune 500 companies are using LinkedIn (primarily for networking and recruiting)
 - 45% of Fortune 500 companies are using Instagram (including 8 of the top 10 – Walmart, Exxon Mobil, Berkshire Hathaway, McKesson, CVS Health, General Motors, Ford Motor and AT&T)

*2016 Report by the University of Massachusetts - Dartmouth

Hypothetical



M&A Considerations

- Due Diligence Requests
 - Ensure the due diligence requests adequately capture all aspects of social media to reveal potential risks and liabilities
 - Is it considered marketing? Intellectual property?
 - Does it address ownership issues? Employee use? Compliance with laws issues?
- Reputation → Valuation
- Representations and Warranties
 - Ownership
 - Infringement issues
 - Compliance with laws and agreements
 - Employee use/policies

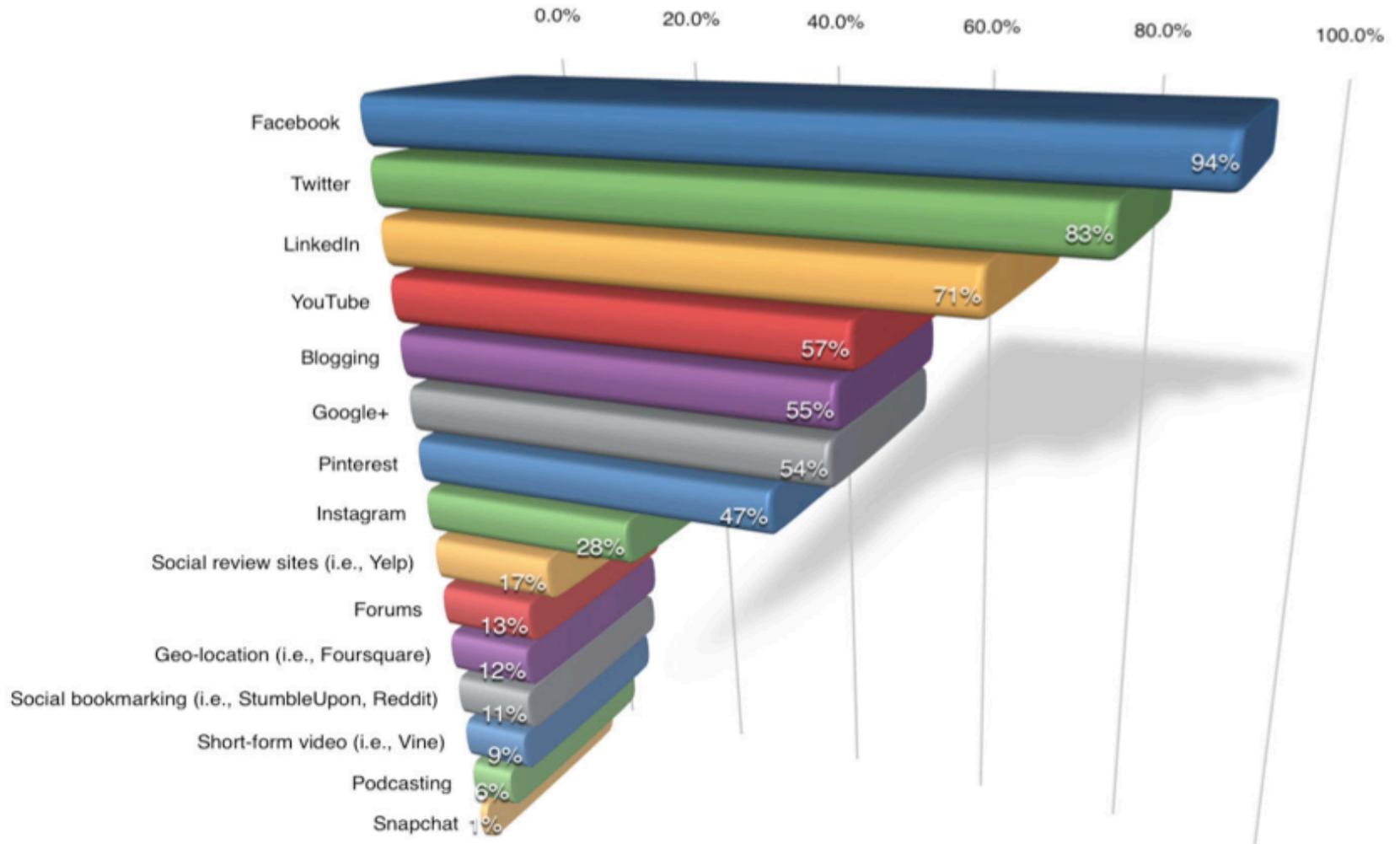
M&A Considerations, cont.

- Intellectual Property and Other Rights to Content
- Ownership/Access/Transferability Issues
 - Employee-created or operated social media accounts
 - Who owns the social media account? Employee or company?
 - Prohibition on the transfer, sale or assignment of rights
 - Example: Written permission is required by Facebook

Social Media Platform Use

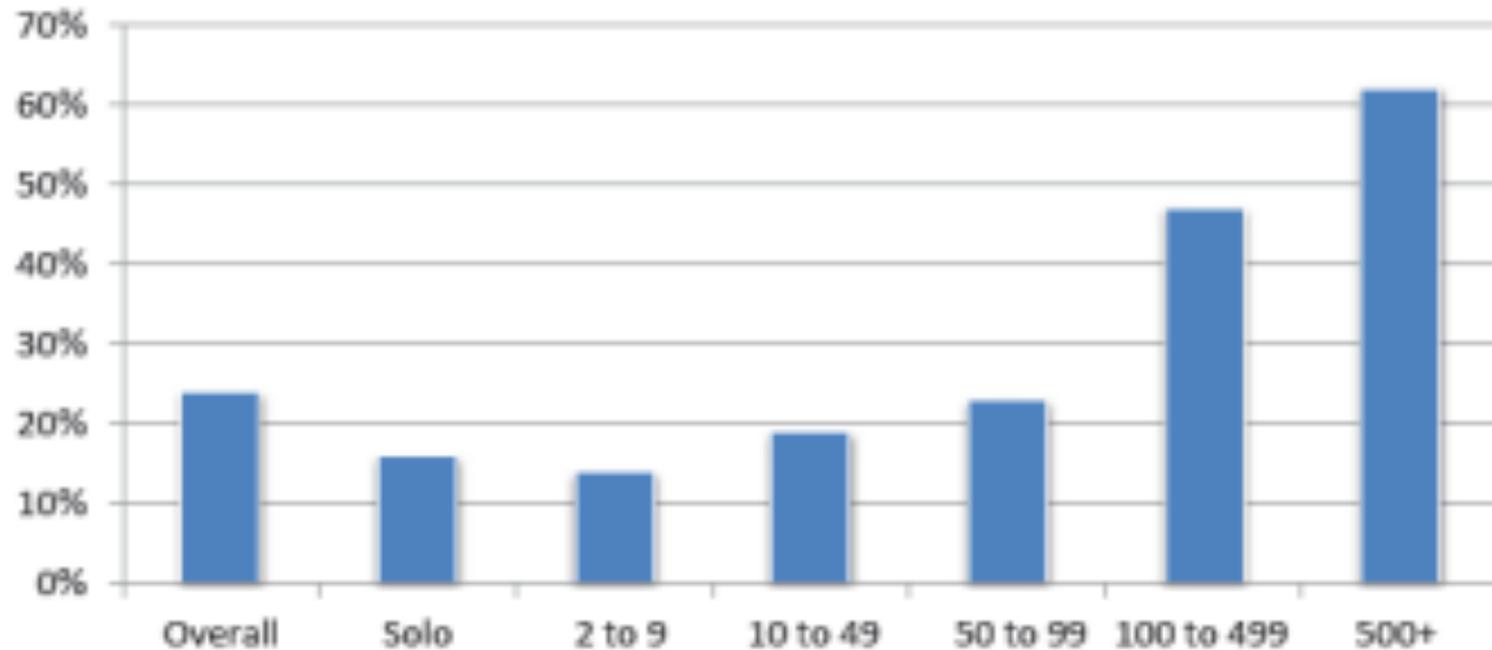
- Third-Party Platform vs. Company Platform
- Terms of Use (i.e. licensing issues, changing terms, etc.)
- Communications Decency Act (“CDA”)
- Digital Millennium Copyright Act (“DMCA”)
- User-Generated Content
- Privacy and General Data Protection Regulation (“GDPR”)
- Transparency
- Compliance
- Security

Commonly used social media platforms



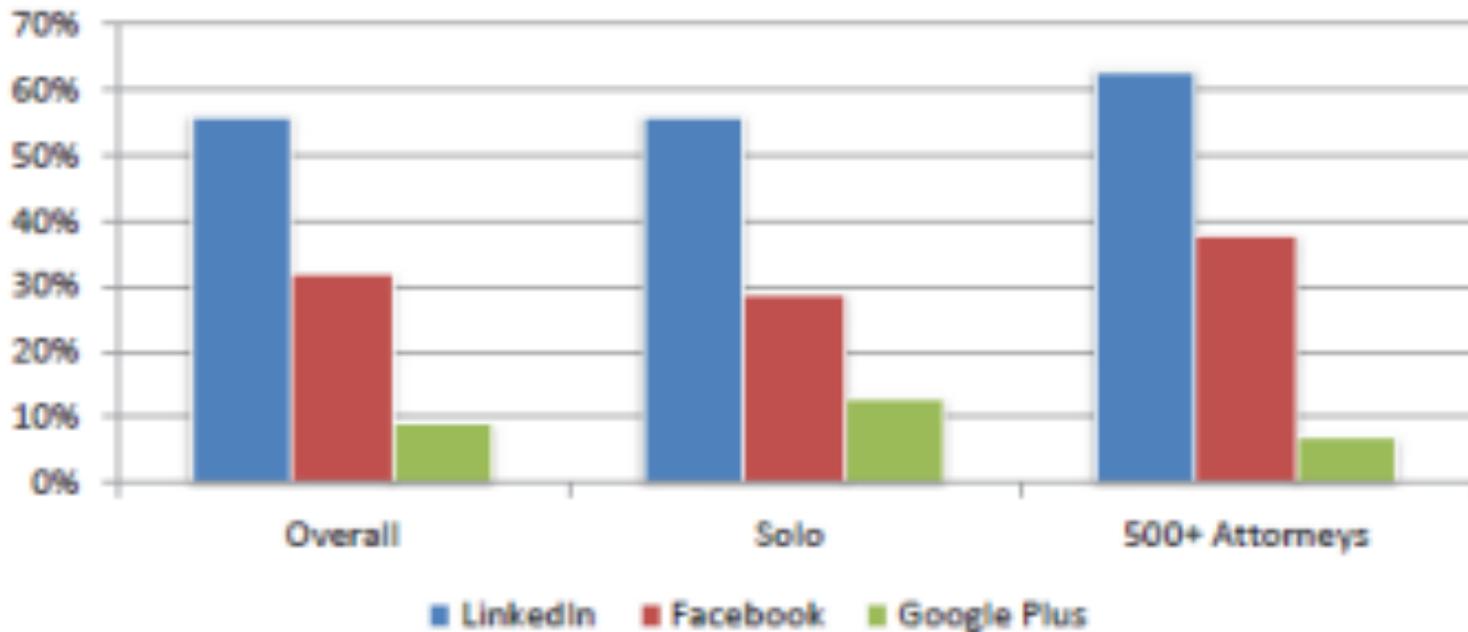
2014 ABA Legal Technology Survey Report

Law Firms Maintaining Blogs



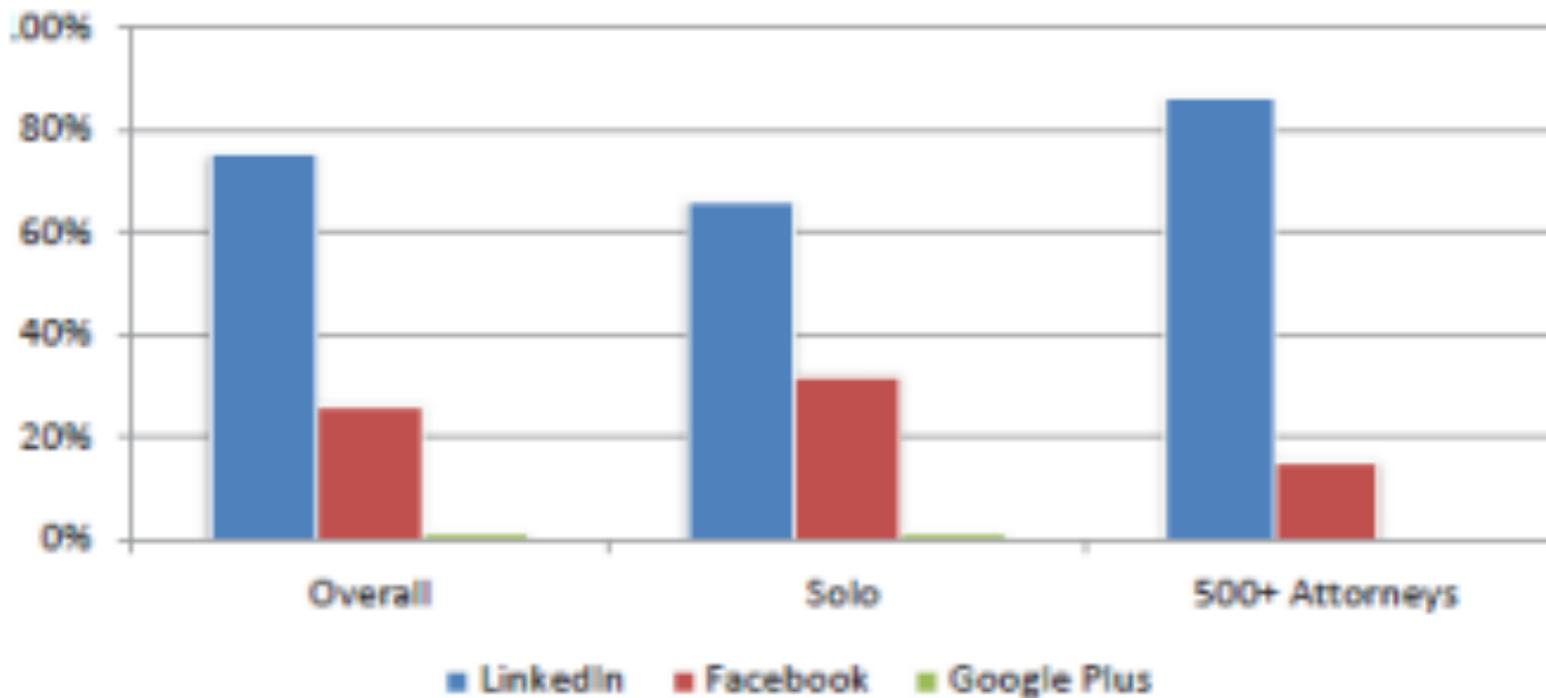
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Firm Use of Social Networks



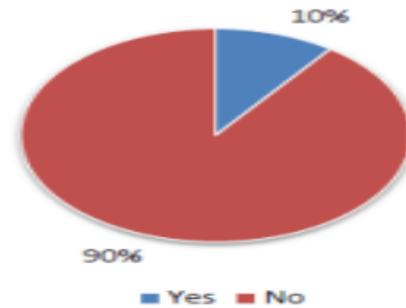
2014 ABA Legal Technology Survey Report

Individual Professional Use of Social Networks

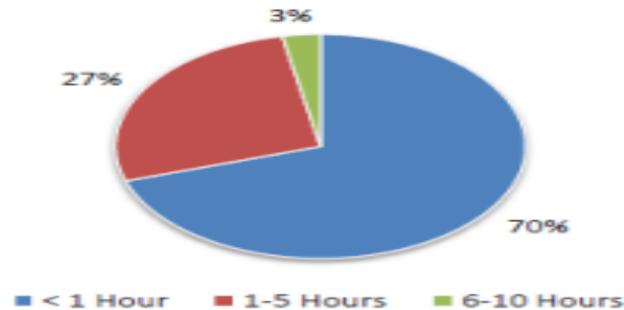


2014 ABA Legal Technology Survey Report

Lawyers Use of Twitter



Time Spent on Twitter



Digital Millennium Copyright Act

- DMCA Agent
- DMCA Notice & Takedowns
- Notice Requirements
- Counter-Notice

Instagram, Community Guidelines

*“If you find that one of your posts has been uploaded to another person’s profile, **try not to panic**. It is likely a misunderstanding and not ill-intended. A good first step is to **comment on the post & politely ask that they take the content down**. If that doesn’t work, please **file a DMCA report** so that we may investigate. You might find yourself wanting to post a screenshot of the offending account to your photo-stream in order to draw attention to the situation or person, but that’s often not the best way to go about resolving the issue. **We do not encourage singling out the person**, as it may be classified as harassment, which violates our guidelines.”*

Section 230, Communications Decency Act

No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”

47 U.S.C. § 230

Cybersecurity

- Cyber Risk Concerns
- Phishing/Spoofing, Trojans and Malware
- Brand-jacking
- Username Squatting
- Protected Activity
- Mitigating Cyber Risk

Social Media Advertising

- What is advertising?
 - First Amendment issues
- Disclosures
 - Clear and conspicuous
- Federal Trade Commission (FTC) Guides
 - Provides guidance on how to *avoid potentially unfair and deceptive advertising practices* under Section 5 of the FTC Act
 - Applies to every form of media, including blogs and social media
- Endorsements

What is an Endorsement?

An “**Endorsement**” is a promotional message, such as a blog post, Tweet, product review or sponsored research, that (i) is prepared and made public by a consumer, a celebrity, expert or an employee of the business or one of its agencies (each, an “**Endorser**”) who receives some kind of payment (including free products or other consideration) from the business in exchange for making an endorsement that consumers are likely to believe reflects the opinions, beliefs, findings, or experiences of the Endorser.

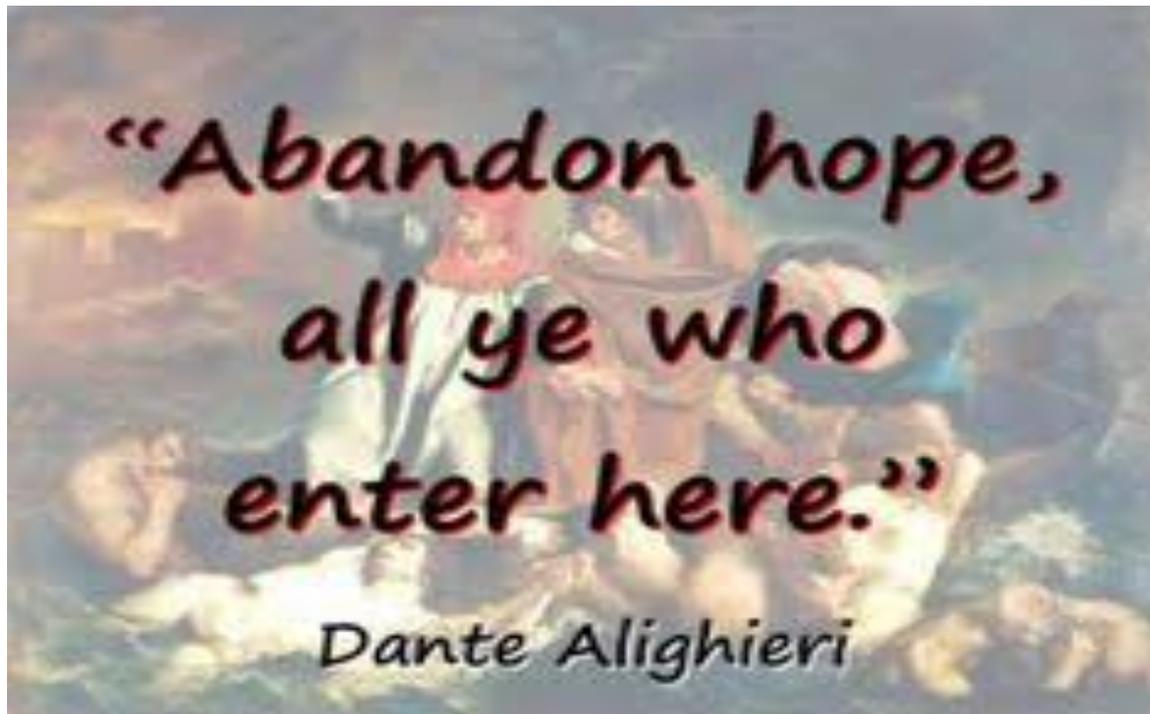
Examples of Endorsements



Employment Issues

- Employer Use of Social Media
 - Hiring
 - 95% of recruiters use social media to post and promote openings
 - 70% of employers use social media to screen hires
 - 50% of employers that used social media found something on a profile that made them avoid hiring a candidate
 - Discrimination claims under federal, state, and local laws
 - Best practices
- Employee Use of Social Media
 - National Labor Relations Act (“NLRA”)
- Social Media Policies

Employee Use of Social Media



Employee Use of Social Media

- Does use of social media constitute protected, concerted activity under the NLRA?
 - Coverage of NLRA
 - Protected activity
 - Concerted activity
 - Unprotected conduct
 - Impact on disciplinary decisions

Social Media Policies

- Does employer's written social media policy comply with the NLRA?
 - Assess whether the policy contains provisions that are considered overbroad and vague by the NLRA
 - Examples of unlawfully overbroad and vague provisions include those that fail to properly limit:
 - defamation;
 - disparagement;
 - disclosure of confidential information; or
 - inappropriate discussions.

Examples of Social Media Policies

- Policies Deemed “Unlawful”
 - “Do not make insulting, embarrassing, hurtful or abusive comments about other company employees online.”
 - “Avoid the use of offensive, derogatory or prejudicial comments.”
 - “Do not create a blog or online group related to your job without the advance approval of the legal and communications departments.
- Policies Deemed “Lawful”
 - “Do not make negative comments about our customers in any social media.”
 - “You may not create a blog or online group related to the company (not including blogs or discussing involving wages, benefits or other terms and conditions of employment, or other protected activity) without the advance approval of the legal communications department.”

Ethics and Compliance

- Ethics Rules
 - ABA
 - State
- Ethics Opinions

ABA Rule 1.1 (Competence)

A lawyer shall provide competent representation to a client.

Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

ABA Rule 1.1 (Comment (8))

To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, **including the benefits and risks associated with relevant technology, engage in continuing study and education** and comply with all continuing legal education requirements to which the lawyer is subject.

Are ABA Model Rules/Opinions Binding?

While California has yet to adopt the ABA Model Rules, when no rule exists governing an ethical issue, California courts may look to the ABA and other jurisdictions for guidance. The rule states, **"Ethics opinions and rules and standards promulgated by other jurisdictions and bar associations may also be considered."**

State Compensation Insurance Fund v. WPS Inc. (State Fund) (1999) 70
Cal.App.4th 644, 656

Are California Ethics Opinion Binding?

California Rule of Professional Conduct 1-100 states that while California Ethics Opinions are not binding authority, they **should be consulted by California lawyers “for guidance on proper professional conduct.”**

California Ethics Opinion 1983-71

ABA Rule 7.1 Communicating Lawyer's Services

Restricts content lawyers can share in advertisement

A lawyer shall not make a **false or misleading communication about the lawyer or the lawyer's services**. A communication is false or misleading if it contains a material **misrepresentation of fact or law**, or **omits a fact necessary** to make the statement considered as a whole not materially misleading.

ABA Rule 7.2 Advertising

Restricts ways lawyers may advertise

- a) Subject to the requirements of **Rules 7.1** and **7.3**, a lawyer may advertise services through written, recorded, or electronic communication, including public media. ...

- c) Any communication made pursuant to this rule shall include the **name and office address of at least one lawyer** or law firm responsible for its content.

ABA Rule 7.3 Contact With Prospective Clients

Restrictions on how lawyers contact prospective clients

- a) A lawyer shall not by **in-person, live telephone or real-time electronic contact solicit professional employment** from a prospective client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:
- 1) is a lawyer; or
 - 2) has a family, close personal, or prior professional relationship...

ABA Rule 7.3 *continued*

Restrictions on how lawyers contact prospective clients

- c) **Every written, recorded or electronic communication** from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter **shall include** the words "**Advertising Material**" on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2).

(<https://www.facebook.com/Francineward>, <https://twitter.com/francineward>)

Key Takeaways

- Prevention + Reaction
- Inventory and monitor corporate IP and social identities
- Limit access to material IP (and gateways)
- Develop internal policies
 - Examples:
 - Password hygiene
 - Know how to report to social media platforms
- Provide employee training
- Plan and test plan.....and test again

Q&A



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