

# VENABLE<sup>®</sup><sub>LLP</sub>

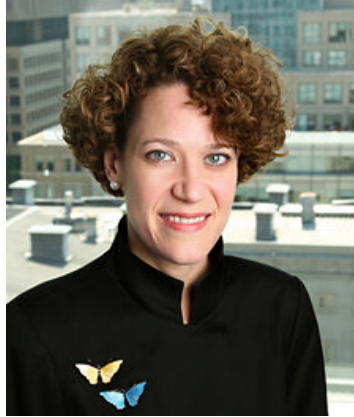
## *Social Media Risk Management*

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## Biography



**Melissa Landau Steinman** practices primarily in the areas of advertising and marketing, antitrust, trade regulation, consumer protection and general commercial law, litigating cases and counseling clients on matters that arise from these business concerns. She is uniquely familiar with the technology, retail and hospitality industries.

Ms. Steinman focuses her practice on assisting companies at every stage of distributing their products, reviewing advertising and marketing materials for all types of media, vetting pricing and "sales" claims, creating product warranties and advising clients on product safety issues, and addressing related intellectual property and privacy matters. She has represented clients in both private and government litigation relating to these matters, with experience handling both class action and Lanham Act matters, as well as Federal and State government investigations. Ms. Steinman wrote and edited the "Guide to Federal and State Regulation of Advertising," a comprehensive two volume book/CD-ROM on the law of advertising and promotions.

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## Biography



Lesley Pate Marlin concentrates her practice on labor and employment counseling and litigation. She represents employers of a variety of sizes and in numerous industries, including education, non-profit organizations, trade associations, hospitality, entertainment, and retail. Ms. Marlin counsels her clients on employment practices, policies, and decisions and assists them in developing strategies to achieve their business objectives. She helps her clients minimize the risk of litigation and comply with the various employment laws, including Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act (ADEA), the Americans with Disabilities Act (ADA) (Title I and Title III), the Family and Medical Leave Act (FMLA), the Genetic Information Nondiscrimination Act (GINA), the Fair Labor Standards Act (FLSA), the Uniformed Services Employment and Reemployment Rights Act (USERRA), state leave laws and state wage and hour laws. She conducts training for employers on equal employment opportunity compliance, sexual harassment, disability or religious accommodation, FMLA, performance reviews, and employment law developments. She defends employers in federal courts across the country and in state courts in the District of Columbia, Maryland, and Virginia, as well as in arbitration and before administrative agencies.

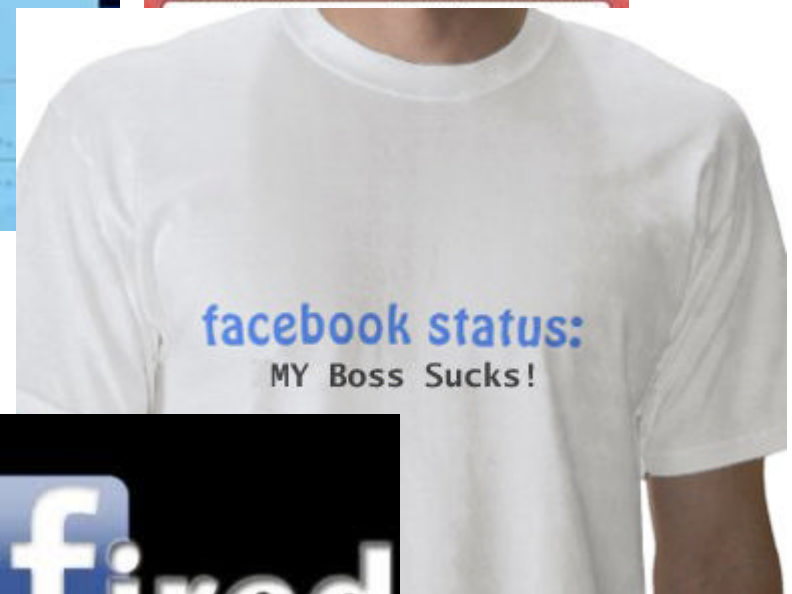
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# What's All The Buzz?

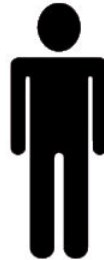


See ya later - I'm taking these social media accounts and I'm going home, bye!

Uh oh...



Former Employee



Business



## Social Media – Everywhere



Social media: Term used to describe a type of media that is based on conversation and interaction between people online. Social media are media designed to be disseminated through social interaction, using highly accessible and scalable publishing techniques.

[En.wikipedia.org/wiki/social\\_media](http://en.wikipedia.org/wiki/social_media)

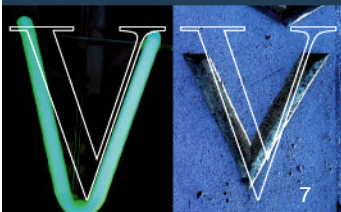
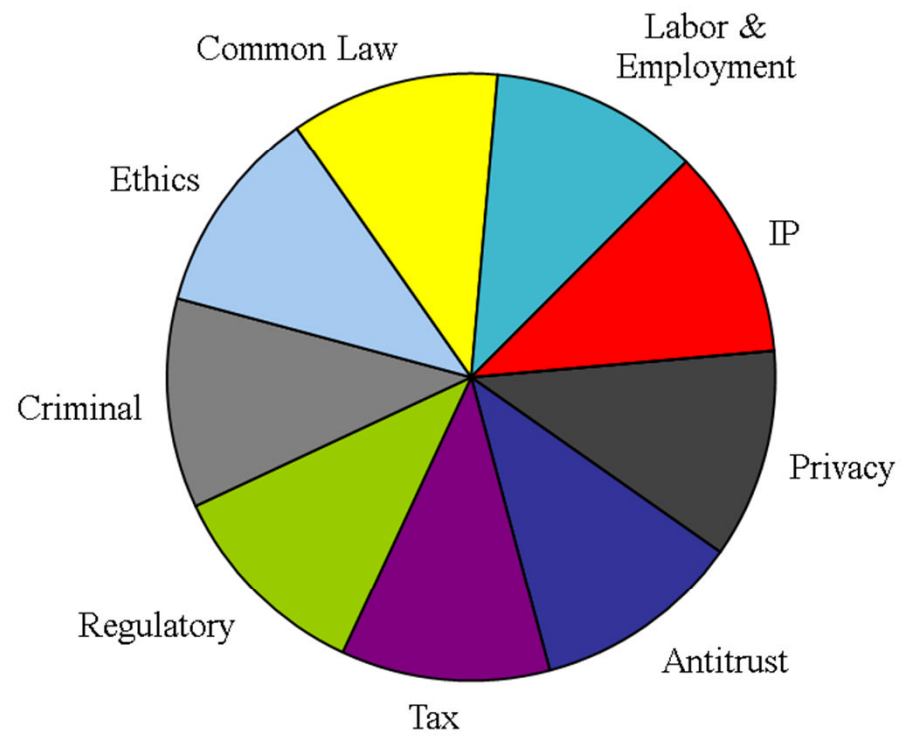


## Social Media: What Is It?

1. **Social networks (Facebook, MySpace, LinkedIn)**
  2. **Picture sites (Flickr, Picasa, Google Images)**
  3. **Video sites (YouTube, Hulu)**
  4. **Blogs and microblogs (Blogspot, Twitter)**
  5. **Wikis (Wikipedia, Medpedia, Sidewiki)**
  6. **News Sites, RSS and Newsreaders (Googlereader)**
  7. **Consumer reviews (Epinions.com, BBB. Org)**
  8. **Avatars (SecondLife)**
  9. **Bookmark Storage (Digg, StumbleUpon))**
  10. **Polling (SurveyMonkey, Polldaddy)**
  11. **Videoconferencing (Skype)**
  12. **Slidesharing (Slideshare)**
  13. **Synchronous webinar tools (Gotomeeting)**
- **Each carries its own risks....**



# Laws – Evolving



# Social Media Sites' Terms and Conditions

- Social networking websites generally have terms and conditions that govern use of their sites. Users must comply with such terms and conditions
- Facebook has own IP policies, advertising and promotions guidelines, sweepstakes rules
- Twitter guidelines for proper usage of logos, icons and buttons
  - “Twitter” and “Tweet” must be capitalized; “Tweet” may be used only with a direct reference to Twitter (e.g., “Tweet with Twitter”)
  - Twitter marks must not be used in a manner that creates an impression that Twitter sponsors, endorses, or is associated with users
    - E.g., Twitter bird cannot be used to “carry” company logo.
  - Twitter marks *cannot* be used on apparel, merchandise, or product packaging without express consent.
  - “Tweet” cannot be used in Twitter app names (except if the application is exclusively for Twitter), but uses of “Tw-“ or “Twit-“ permitted as prefixes for application names.
- .... No more “Twittermoms.”







## Overview

- Legal issues → Same as before but new platforms
  - Entity use of social media
    - Defamation, IP, advertising, antitrust, tax, privacy
  - Employee use of social media
    - Attribution to entity, corporate identity, discrimination/harassment
    - Develop and implement a social media policy
      - Business vs. personal use
      - On vs. off the job conduct
- 2 key concepts: external versus internal
- Risks vs. benefits



## Entity Use Of Social Media

- Potential benefits of using social media
  - Exposure; advertising; member networks; collaboration opportunities; real time customer service; interactive contests and promotions
- But use has legal risks: distract employees, provide forum for complaints, allow employees to “leak” company secrets, contribute to hostile work environment; dilute trademark/infringe....
- Balance – benefits vs. risks – business decision
- To make informed decision → need knowledge and understanding of legal risks



# Risks of Social Media

**Risks are significant** (damage to reputation, legal violations, exposure of trade secrets)

- **Study** of companies with 1,000+ employees reported 17% had issues with employee use of SM
  - 8% of survey respondents have fired someone for their behavior on SM sites
  - 15% have disciplined for violating sharing/posting policies
  - 13% have investigated an exposure event involving short message services
  - 17% disciplined an employee for violating blog/message board policies
- Sunk cost from dismissed employees, potential for litigation, exposure from content posted (potentially confidential or sensitive)
- **“Cisco Fatty” Tweet:** Connor Riley posted Tweet after receiving a job offer from Cisco, but failed to limit it to her private network. Cisco found it and rescinded offer



## Employee Use of Social Media

- Again – balance – benefits vs. risk – on an informed basis
- Attribution to entity – actual or apparent authority
- Loss of IP and/or confidential information
- Discrimination and/or harassment claims
  - Recruiting/hiring
    - Use vs. not use. If use → systematic and controllable manner. Also internal vs. external use. If internal → non-decision-maker. If external → FCRA.
    - Consider non-solicitation obligations
  - Workplace environment
  - References (also potential for defamation)
- Employee discipline/termination
  - Law in flux -- hot topic
  - Proceed with caution before taking any disciplinary action against employees for violations of social media or internet use policies (especially based on personal use)
  - Also proactively review existing policies carefully and consider whether revisions should be made to minimize legal risk



# Creating and Implementing an Effective Social Media Policy

Team approach: Multi-disciplinary group ready to address (potentially serious) issues that might arise – legal, executive, marketing, HR, etc.

- Creating
  - Be clear and entity-specific
  - Be clear who is the designated “voice” of your organization (for any issue/matter)
  - Be consistent with other entity policies and procedures
  - Require compliance with other entity policies and procedures
  - Focus on conduct – both do’s and don’ts
  - Create a reporting procedure
  - Establish a compliance framework and designate a compliance officer
  - Use appropriate disclaimers
- Implementing
  - Notice – employees & members
  - Mandatory training
  - Monitoring
  - Have a crisis management plan



## Limit Apparent Authority And Protect Corporate Identity



- Limit individuals who have authority to speak on entity's behalf & then prohibit all others from claiming or implying authorization to speak on entity's behalf
  - Create process for gaining authorization to speak on entity's behalf
- Prohibit unauthorized individuals from using entity's intellectual property, logos, trademarks, and copyrights in any way or manner
- Prohibit employees and members from using entity's name in any online identity (e.g., username, screen name)



## Protect Confidential Information And Trade Secrets

- Prohibit employees and members from disclosing confidential information and trade secrets
  - Clients, customers, partners, affiliates
  - Financial information (pricing, revenue, expenses, etc.)
  - Development strategies and plans
  
- Dovetail with any restrictive covenant language (non-competes, non-solicitations, NDAs)



## Protect Intellectual Property

- Third Party IP
  - Avoid trademark misuse
    - Seek permission to use third party trademark
    - Avoid use of others' trademarks in search terms, domain names, user names, metatags
    - **Be especially careful in commercial context**
  - Pay attention to copyright ownership, as social media is about content
    - Works for hire
    - Written assignment of rights
  - Digital Millennium Copyright Act and Communications Decency Act may provide some protections
- Entity IP
  - Consider available registrations
  - Use clear placement of appropriate symbols – ©, ®, ™
  - Monitor for misuse
  - Balance IP protection with reputation protection
    - Innocent infringers
  - Enforce with policy statements, demand letters, and legal proceedings





## Protect Privacy & Prohibit Disparaging/False Information

- Protect privacy
  - Employees and members may not write about, post pictures of, or otherwise refer to any employee, member, vendor, supplier, business partner without that person's permission
- Prohibit disparaging/false information
  - No one may give a professional reference to a co-worker, former co-worker, vendor, customer, or any other individual without permission of HR or appropriate entity official

**LinkedIn**



## Prevent Unlawful Conduct

- Prohibit posting of material that may be construed as discrimination or harassment based on race, ethnicity, color, national origin, sex, age, disability, religion, or any other legally protected characteristic
- Prohibit unlawful use of trademarked or copyrighted information
- Prohibit posting of material that is abusive, offensive, insulting, humiliating, obscene, profane, or otherwise inappropriate regarding organization or its employees, members, partners, etc.
- Prohibit unlawful/criminal conduct
  - Cyber-stalking, cyber-bulling
  - Hate crimes
- Require compliance with all applicable laws



## Privacy and Data Security in Social Media

- Social Media raises privacy issues at more than one level, and regulators from more than one arena are interested: FTC/other federal agencies, states, self-regulatory groups
- Will be an important issue in coming years
- Collecting user data?
  - Must adhere to the promises made to consumers regarding privacy and data protection (privacy policies and other statements)
  - Must implement and reasonable and appropriate measures to protect personal data against theft
  - Data is an asset -- must disclose when will use or sell data (donor lists, etc.)
- Remember what your donors and constituents expectations are
  - If they believe you violated their privacy they won't give and will tell their friends
  - Even if you violated no laws



## Defamation

- Act of harming reputation of another through false statements to a third party
  - Caution: attribution of comments to entity – issue of actual/apparent authority
- How to avoid:
  - Use disclaimers and terms of use
  - Enforce a DMCA take down policy
  - Use Federal Communications Decency Act (Sec. 230) -- Provides immunity for third-party communications if no role is played in publication
  - Refrain from commenting on third-party posts
  - Pay attention to trade secrets and confidential information
  - Consider screening capabilities for third-party hosts



## Advertising and Promotions on Social Media



- Endorsements and Testimonials
  - FTC Guides
    - Bloggers or “Word of Mouth” (or other social media) marketers who receive money or in-kind payments, including product samples, must disclose relationship
    - Blogger *and* marketer liability
    - Entity needs to have policy/procedures to make sure bloggers disclose and monitor compliance
      - **Ann Taylor file closing**: Initial enforcement (or lack) indicates FTC is being reasonable if advertiser has policy
      - **Reverb** settlement: FTC brought action against agency employees posting false blog entries for product.
      - **Legacy Learning Systems** settlement – FTC settled charges that Legacy, which sells music instrument and other instructional DVDs, paid affiliate marketers to post favorable online reviews of Legacy’s products that appeared to be from ordinary consumers or independent reviewers. The affiliates earned commission for each sale they generated. FTC alleged that the reviews were not accompanied by disclosures that the reviews were from paid affiliates.
  - Important when employees blogging on own time, too – need to make policies clear, as well as fact employees should disclose affiliation when talking about the company.



## Prize Promotions on Social Media

- Prize promotions are heavily regulated, and must be reviewed by experienced legal counsel
- Laws are often drafted such that they apply to almost every type of giveaway – customer giveaways, skill contests, employee contests/trade promotions, trade show drawings, raffles, etc.
- Facebook and Twitter have their own rules
- The first step in evaluating any promotion is ensuring that it is not an illegal lottery (and thus gambling). Lotteries are generally defined as
  - (1) The awarding of a **prize**
  - (2) By **chance**, where
  - (3) The participants have been required to submit **consideration** to enter



# Contests/Sweepstakes

- With the proper disclosures/limitations, you can structure a national promotion that is substantially complies with state and federal requirements ... but **you need a good set of rules!**
- **The rules are a contract with the participant and are required by law:**
  - Rules should be readily available to all eligible participants and clearly set forth the terms and details of the promotion
  - Rules should include specific provisions protecting the promotion sponsor from liability.
  - Required disclosures include odds of winning, terms and conditions (e.g., eligibility and deadlines), and retail value of prizes
- Some states requires registration and bonding of sweepstakes
- Use of sweepstakes and contests for marketing/data collection purposes raises privacy issues, consideration



# User Generated Content on Social Media

## User Generated Content Prize Promotions

1. Rules should include provisions releasing IP rights and limiting liability for promotion sponsor
2. Screen entries and/or regularly review posted entries. Remove posted entries if they pose legal risk
3. Consider using disclaimers stating that the sponsor had no hand in producing the user-generated content, and, where appropriate, stating that the content does not reflect the opinions of the sponsor





# Email Marketing: Federal CAN-SPAM Act

- Social networking sites often include an email component
  - Members may contact each other, or friends outside the network, by email
  - Site contacts members for communications and marketing
    - Potential spam and privacy issues
- The federal CAN-SPAM Act prohibits sending *commercial* electronic email messages to wireless devices unless the recipient has provided prior express authorization to receive such messages from the sender
- A message is *commercial* if its primary purpose is to advertise or promote a commercial product or service (including comment on a commercial website).
  - Messages that are “transactional” in nature, such as those that complete or confirm a transaction, are not subject to CAN-SPAM’s requirements
  - *E.g.*, a text message confirming sign-up for a gaming service is transactional, not commercial
- The requirements of the CAN-SPAM Act apply to any message sent to an email address that includes a domain name that has been posted on the FCC’s wireless domain list for at least 30 days before the message is sent. Note that the CAN-SPAM Act applies *only if* the technology used to send a message that references an **internet domain name** on the FCC list
  - *So, messages addressed to the email address [2125551212@verizonwireless.com](mailto:2125551212@verizonwireless.com) might be covered*
  - *BUT phone-to-phone SMS messages that do not include a reference to a domain name are not covered*



## E-Mail and the CAN-SPAM Act

- E-mail solicitations must include:
  1. Opt-out mechanism (opt-outs must be honored within 10 business days)
  2. Sender's physical postal address
  3. Disclosure that message is a solicitation ("ADV" in subject line not required)
- Prohibitions:
  1. False header information
  2. Misleading subject lines
  3. E-mail address harvesting or dictionary attacks



# Mobile Marketing: “The Third Screen”

## What Is the Environment?

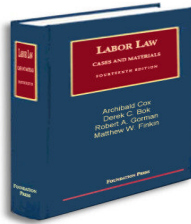
- Social media can be accessed by cellphone – how do we regulate?
- Government regulators actively tracking area:
  - FTC had workshop specifically addressing issue in 2008 and issued staff report (“Mapping the Mobile Web”) in 2009; new Privacy Report also requests comments on privacy and mobile technologies
  - FCC Rulemaking
  - Florida AG very active
- Technology is ahead of the law
  - Mobile web
  - Tracking consumer behavior/privacy issues
  - Location-based mobile marketing
  - Premium text-messaging sweepstakes/contests; Mobile couponing
- Multiple industry standards: Mobile Marketing Association (MMA) is the leader; DMA; CTIA



# Antitrust

- Rules that can't participate in sharing inter-company pricing info fully apply to social media.
  - WholeFoods CEO Mackey's posts
- Penalties for (1) corporation, (2) individual, (3) association
- How to Avoid
  - Implement a written antitrust statement or policy that is easily visible to users
  - Require click-consent of rules prohibiting discussions of:
    - prices or pricing systems,
    - market allocation,
    - margins,
    - inventory levels,
    - reduction of output
    - statements that could be seen as encouraging boycott of vendor, supplier, or competitor
  - Monitoring and Enforcement





## Consider Labor Law Concerns

- NLRA applies to ALL employers involved in interstate commerce except airlines, railroads, agriculture, and government
- Non-supervisory employees have §7 rights to **concerted activity**
  - Employees can get together to discuss workplace activity related to their interests as employees
- NLRB litigation
  - Complaint against American Medical Response – Fall 2010
    - 2 alleged violations: Unlawfully terminating employee for posting negative remarks about her boss on Facebook; and unlawfully prohibiting employees from making negative comments about the company or discussing the company at all without the company’s permission (internet use policy)
  - 3 NLRB advice memoranda – 7/19/11
    - JT’s Porch Saloon & Eatery, Ltd.; Martin House; Wal-Mart
  - Administrative judge → firing for Facebook posts to be unlawful – Hispanics United of Buffalo – 9/2/11
  - Administrative judge → firing for Facebook posts to be lawful – Knauz BMW – 9/30/11
- Lessons
  - Activity needs to be concerted to be protected, but knowing whether activity is concerted can be hard
  - Matters of mutual concern (not individual gripes) likely protected, even if communicated via social media and/or seen by non-employees
  - Some leeway for impulsive/intemperate behavior
  - Caution – both as to any policy and any employee discipline
- But stay tuned for future developments



## Addressing Employee Use Of Social Media

- Usage – old approach of control versus newer approach of inevitability of use
  - Importance of good employee relations
- Address business vs. personal use
  - Define what constitutes legitimate business use (and by whom)
  - Consider adopting process to govern business use of social media
  - Remind employees that they are personally responsible for any of their social media postings
- Distinguish between on-the-job and off-the-job
  - Govern off-duty conduct only if it presents a conflict of interest and is reasonably related to the job



## Addressing Employee Use Of Social Media

- Employees have no Constitutional right to privacy in the workplace
  - First Amendment (freedom of speech) N/A;
  - Fourth Amendment (searches + seizures) N/A
- Reduce expectation of privacy on computers, e-mails systems, blackberry/PDAs, and telephone/voicemail systems by:
  - Notifying employees that information exchanged via equipment and/or social media can be monitored and accessed;
  - Expressly state no expectation of privacy with use of entity owned equipment, even with personal use or when telecommuting
  - Reserve right to remove content without notice
  - Remind employees about privacy settings

But note that some states have specific restrictions on monitoring employee use



# The “Golden Rules” of Social Media

- One Voice/Be Consistent
  - Have a plan/policy that identifies who will take the lead and stick with it
- Think Before You Speak
- Act – Don’t Overreact
  - Take a Breath
  - Accuracy Trumps Speed
- Entity First (e.g., a FB or Twitter page manager is speaking as the entity, not as herself)
- Refer Back to Source (e.g., refer back to a static set of info to ensure consistency, e.g. tweeting a link to college alumni association web page in providing answers to inquiries like “how do I join the college alumni group?”)
- Everything is Public
- The Internet Is Forever
- You Win Some; You Lose Some (e.g. you can’t always win over all audiences and positively impact a social media SM conversation)





# Additional Laws Providing Entity Immunity: DMCA and CDA

## Digital Millennium Copyright Act

- Generally protects internet service providers from all monetary and most equitable relief for copyright infringement where a third party initiated the delivery of the allegedly infringing content and the service provider did not edit or selectively disseminate the content.
- “Take down” procedures – immunity from liability for removing or disabling access to content that allegedly infringes a copyright

## Communication Decency Act

- Affords immunity to ISPs for content posted by third-party users of the service
- Does not extend immunity to criminal laws, intellectual property laws, or state laws that are consistent with CDA
- Not entitled to CDA immunity if play some role in creation of the content, including editing content, or give appearance played such role (e.g., by failing to make clear is publishing content that was created by a third party)



## Hypotheticals: What Would You Do?

- Outside legal counsel posts that he is off to Client X for a meeting (and outside counsel is a data breach expert).
- During the interview process, Easttown Community College sends a FB or LinkedIn Request to a job candidate, putting candidate in an awkward position with respect to pressure to accept, and broadcasting to her network that she has been talking to the school.
- Employee posts creative content on Facebook asking friends: “Which do you like better?”
- Employee posts the following on Facebook: “So excited about the our new campaign launch next week and the cool new car we’ll be giving away to the alumni rep who solicits the most donations by 12/31.” All of his friends know who he works for and that he works on fundraising and alumni relations, the giveaway is not public yet and, as it turns out, it does not go forward because it is determined that the structure is neither legal nor feasible. What do you do?





I've updated my blog three times, responded to 35 text messages, answered 42 e-mails, and sent out 57 tweets. Now that I've got the personal stuff out of the way, I should probably do some work.





# Questions?

