

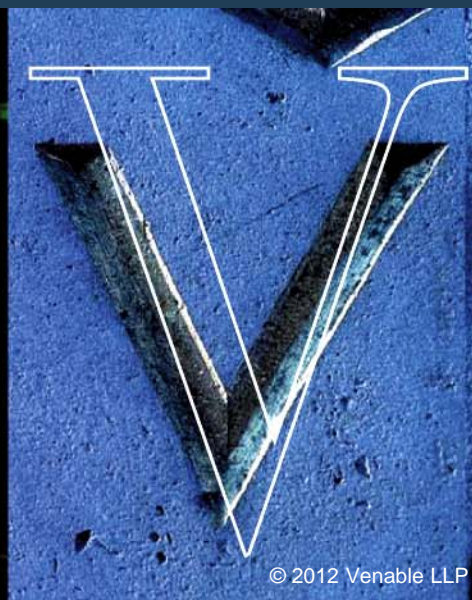
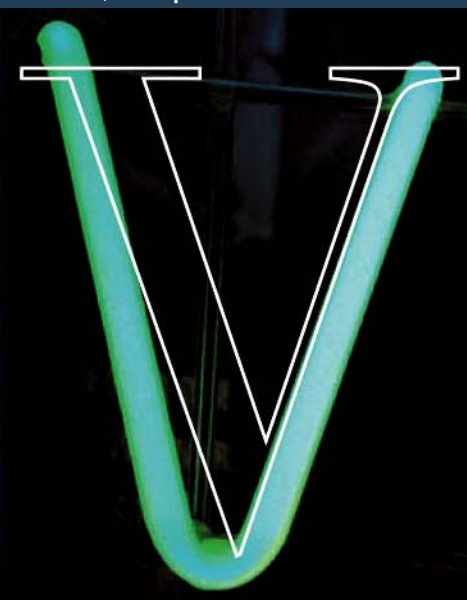
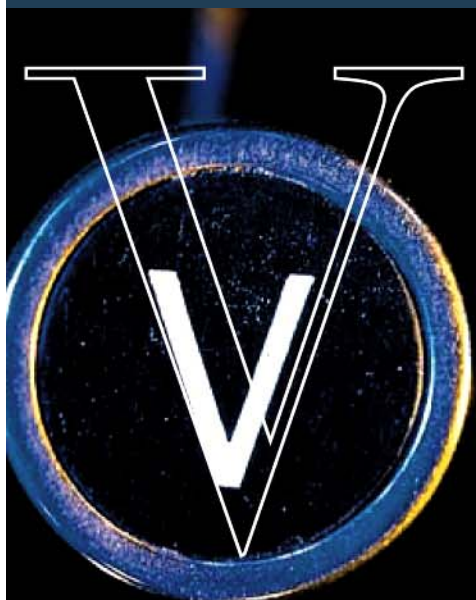


How Nonprofits Can Raise Money and Awareness through Campaigns without Raising Legal Risk

Thursday, August 2, 2012
12:30 p.m. – 2:00 p.m. EDT

Venable LLP
Nonprofit Organizations Practice
Washington, DC

Moderator:
Jeffrey S. Tenenbaum, Esq.
Panelists:
Melissa Landau Steinman, Esq.
Kristalyn J. Loson, Esq.



Upcoming Venable Nonprofit Legal Events

September 13, 2012 - Litigation Basics for Nonprofits: What to Do When a Complaint or Subpoena Is Served and Other Tips and Strategies – Details Coming Soon

October 16, 2012 - Poring over Your Foundation: Making Sure Your Nonprofit's Directors & Officers Insurance Coverage Matches Your Expectations (and Vice-Versa) – Details Coming Soon



Agenda

- Charitable Solicitation Requirements Overview
- Regulatory Update
- Social Media Implications
- Raffles / Sweepstakes
- Promotions Through Social Media
- Mobile Giving
- Auctions
- Hypothetical Campaign



Charitable Solicitation *Current State Regulation*

- A. Charity / Nonprofit Organization
- B. Professional Solicitor
 - Professional fundraiser
 - Professional fundraising counsel / consultant
- C. Commercial Co-venturer



Charitable Solicitation – *Charitable Organization Regulation*

- About 40 States Require Charities to Register
- **Triggering Definition** – Generally triggered by “solicitation” – affirmative act of asking for a gift (“contribution”) or selling goods/services that will benefit a charitable cause.
 - Broad – “by any means”
 - May include grant solicitation
- **Typical Exemptions**
 - Religious organizations
 - Organizations that do not raise more than a specified amount from public (all states) if fundraising conducted by volunteers
 - Organization soliciting only within membership
 - Hospitals
 - Named individual
- **Uniform Registration Statement** – currently accepted by 38 states
 - <http://www.multistatefiling.org/>



Charitable Solicitation – *Charitable Organization Regulation*

- Common Requirements
 - *Registration and renewal*
 - *Disclosures when soliciting (i.e. identification)*
 - *Annual reporting requirements*



Charitable Solicitation

Internet Solicitations

- **Charleston Principles** – set of voluntary principles drafted by the National Association of State Charity Officials (NASCO).
 - Adopted into statute by only a couple of states
 - Requires registration of:
 - (A) Charitable organizations domiciled in state
 - (B) Charitable organizations not domiciled in state when:
 - **offline activities** would be enough to assert jurisdiction (e.g. – send letter or make phone calls into state)
 - solicit donations on Internet and (1) specifically target those within that state OR (2) receive contributions from the state on a repeated and ongoing basis or a substantial basis through their website



Charitable Solicitation *Charleston Principles – Application*

- *Example – a nonprofit, the Southwest Animal Charity, is headquartered in, has its principal office in, and holds all physical events within Texas. The organization provides funding to individuals throughout the U.S. (or grants to organizations throughout the U.S.). The organization has a website through which it accepts donations from throughout the U.S. Some of the individuals on the mailing list for emails and for U.S. mail are located outside of Texas.*
- Technically must register in:
 - Texas
 - States where sending U.S. mail / email messages
 - States from which “substantial” or “repeated and ongoing” contributions are received
- Consequences for failing to register:
 - Most of the time states will be lenient for first offense
 - BUT non-registration could be felony with fine of up to \$10,000
 - Reputational harm – consent orders



Charitable Solicitation

Professional Solicitor / Professional Fundraising Consultant Regulation

- **Professional Solicitor** – for a fee, solicits the general public on behalf of a charity OR has custody and control of funds
- **Professional Fundraising Counsel** – manages, advises, plans, produces or designs a solicitation, no direct solicitation and not holding funds
- About 41 states require registration and other requirements
 - *Registration*
 - *Bond*
 - *Filing of Contracts*
 - *Disclosures*



Charitable Solicitation *Commercial Co-Venture Regulation*

- **Commercial Co-Venture (“CCV”)** – An arrangement between a charity and a commercial entity under which the commercial entity advertises in a sales or marketing campaign that the purchase or use of its goods or services will benefit a charity or charitable purpose
 - *“Every time you buy a bottle of Ethos® Water, you contribute 5 cents to the Ethos® Water Fund, part of the Starbucks Foundation”*
- About 25 states have laws that specifically regulate CCVs
 - *Registration*
 - *Bonding*
 - *Written Contract*
 - *Advertising Disclosures*
 - *Accounting and Recordkeeping*



Charitable Solicitation *Regulatory Update*

- Regulators starting to take notice.
- NY AG Breast Cancer Investigation
 - October 2011 – questionnaires sent to over 40 charities / 130 for-profit companies involved in commercial co-venturer activities
 - Questions track statutory requirements – Contract? Accounting? Minimum or Maximum Contribution?
 - Also request, “television, print media, email, Twitter, Facebook, or in-store advertising”
- Other states?



Charitable Solicitation *Social Media Implications*

- “One Big Grey Area”
- *But*, look toward same basic principles for analysis -- all the traditional rules apply



Charitable Solicitation *Social Media Implications*

(1) Is There a Solicitation?

■ Facebook posts

- Status – “Instead of going to see 'The Grey', donate that \$10 to the [Grand Canyon Wolf Recovery Project!](https://www.facebook.com/#!/HSUSArizona/posts/313603705349384)”
(HSUS – Arizona -
<https://www.facebook.com/#!/HSUSArizona/posts/313603705349384>)
- Others’ status

■ Twitter Feeds

- “Right NOW every donation to the ASPCA is DOUBLED—help twice as many animals!
<http://ow.ly/aoDOd> [#DoubleYourImpact](#)”



Charitable Solicitation *Social Media Implications*

(2) Is Another Party Receiving Consideration For Solicitation?

- Facebook status loans
- Re-tweets
- Charitable Platforms (crowdrise.org, donorschoose.org)
 - Is there compensation provided to site for posting or ranking?
 - Who provides the content?
 - Where does “donation” button go?



Professional Fundraiser?



At ChangingThePresent you can help make the world a better place, one gift at a time! It's easy to give these gifts to your friends and also use them for your own charitable giving.

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Environment

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Charitable Gifts from ChangingThePresent



Stop Toxic Dumping

One reporting trip

\$45



Fund for Global Human Rights ▶

Your gift will fund one trip by an activist to help document and report ongoing abusive practices against these communities. Because of the work of Fund grantee Green Advocates, these local communities are starting to organize, resist, and generate media attention. [more ▶](#)



Fight Corruption

One hour of work

\$75



Transparency International USA ▶

Your gift will provide one hour of tool development, helping TI-USA develop and promote anti-bribery codes and implementation programs and benchmarking tools for the private sector. [more ▶](#)



Connect Generations

One art performance

\$75



Generations United ▶

Your gift will allow one performer to attend and participate in an intergenerational performance. [more ▶](#)





<http://www.crowdrise.com/willferrell>

Will Ferrell's Charitable Life ... X

Edit View Favorites Tools Help

ABOUT

I'M A FUNDRAISER

I'M A NONPROFIT

DONATE

CHAOS

e.g Find Events, People, Charities

SEARCH

+

718,882

POINTS EARNED

WILL'S CHARITABLE LIFE | CROWDRISE VERIFIED

VOTE FOR WILL | ADD TO FRIENDS | POST A COMMENT FOR WILL

WILL...

Help me send some cancer survivors to college! Donate \$19 and my friends at CFC will send you my Super Sexy Hot Tan Sunscreen.

via Crowdrise 1 month ago

MY CROWD

MY RISE

CROWDRISE MEMBER SINCE: APR 28, 2010

HOME: San Diego, CA, United States

PERSONAL WEBSITE: www.cancerforcollege.org

ROCK PAPER OR SCISSORS: PAPER

[Email](#)
[Pinterest](#)
[LinkedIn](#)
[Tweet](#)
[+1](#)
[Send](#)

STUFF ABOUT ME:

Hi, I'm Will Ferrell.

Cancer for College is an organization started by a friend of mine that helps fund college scholarships for cancer survivors. We all know how expensive hospital visits, surgeries and treatments can be. By the time the cancer battle is overcome, getting back on your feet is incredibly difficult.

Cancer for College is performing miracles and removing that barrier by

DONATE

\$48,085

\$ RAISED

DONATIONS

Brian Bullock	\$20
Vince Vigil	\$20
Shawn Murray	\$20
Alex Yanovich	\$20
Jon Albers	\$19

1

FUNDRAISERS

Charitable Solicitation Social Media Implications (3) Are Goods or Services Being Offered Under Premise Will Benefit a Charity?

– “We can see it from our desks”

The screenshot shows a Facebook interface. At the top, the search bar and navigation tabs are visible. The main content area displays a post from 'The Pink Ribbon' dated Monday. The post includes a link to 'www.shop2give.us/NorthernLightShow' and a promotional message about funding free mammograms. A large image of a pink silicone watch with a diamond-encrusted bezel is shown. A light blue arrow points to the text 'Get \$10 off \$50 orders -Enter the code PICNIC in your cart.' Below the watch, there are like and share buttons, and a comment section with two visible comments from Laura Gahn and Michelle Russell Armendo.





https://twitter.com/

Facebook (6527) Twitter / Search - donate Twitter / Home Sevenly | Do Good - Cause & C...

File Edit View Favorites Tools Help

Confirm your email address to access all of Twitter's features. A confirmation message was sent to Kristalynloson@gmail.com.
Resend confirmation · Update email address · Learn more >

Home @ Connect # Discover Search

#IADMIT
#askholly
Deion Sanders
New Christina Aguilera Single SOON
Who is Jerry
Do You Approve
New Gmail Comes
MY RELATIONSHIP with MY BELIEBERS
Play Hard

twitter
© 2012 Twitter About Help Terms Privacy
Blog Status Apps Resources Jobs
Advertisers Businesses Media Dev

AmnestyInternational @amnesty 1h
It's back! Mark your calendars for the return of the
@secretpoliceman's Ball on April 27th on @EpixHD owl.li/asgLY

CAREUSA (care.org) @CARE 1h
Have you ever wondered not why, but how, we fight global #poverty?
Visit our updated "What We Do" page to learn more: bit.ly/l5t1CL

Heifer International @Heifer
Buy a t-shirt from @Sevenly, save the world with Heifer: hefr.in/la6khl

4 RETWEETS 1 FAVORITE

5:01 PM - 23 Apr 12 via HootSuite · Details
Reply Retweet Favorite

Yoko Ono @yokoono 1h
Yoko Ono's 13 Days Do-It-Yourself Dance Festival : 9th day.
pinterest.com/pin/8866468638...

UberSocial @UberSoc 1h
RT @ubereditors Upcoming Dark Knight Rises has more than an hour
of IMAX footage. Will you see it in IMAX? cot.ag/HWTeki

Literacy Bridge @LiteracyBridge 1h
Check out our all new Talking Book interface ow.ly/d/AR5

IIED @IIED 20 Apr

Charitable Solicitation *Dealing with the Grey Area*

- Recognize the effect of going viral – potential nationwide registration
- For any charitable solicitation partner – representations and warranties
- Consider broad definition of “consideration”
- Check in with regulator



Fundraising Raffles/ Sweepstakes

- Federal law and all states prohibit lotteries (except state-run lotteries). A lottery has the following elements:
 - (1) The awarding of a ***prize***
 - (2) By ***chance***, where
 - (3) The participants have been required to submit ***consideration*** to enter
- In many states certain charitable fundraising games of chance are exempt from lottery prohibitions, subject to registration/permit requirements for charitable gaming
- Skill and chance promotions that do not require consideration may not be subject to residency and registration requirement
- For lawful prize promotions, legal requirements for advertising disclosures and rules are extremely specific



Endorsements and Testimonials on Social Media

When are nonprofits and charities responsible for what social media posters/commenters and bloggers say about their charities under FTC rules re endorsements and testimonials?

FTC revised Endorsements and Testimonials Guides in 2009 to include examples addressing social media

Bloggers or other social media marketers who have a relationship with the company about which they are blogging must disclose the relationship

Entity needs to have policy/procedures to make sure bloggers disclose and monitor compliance

“Influencer” who receives money or in-kind payments must disclose relationship

Employees blogging on their own time should also disclose their affiliation when talking about the charity

Organization cannot use a comment/blog that it knows is wrong/deceptive to say something it otherwise could not say.

Are “likes” endorsements?



“You walk the walk and talk the talk. We need someone who can also blog the blog!”



Fundraising Raffles/ Sweepstakes

Types of Use of Raffles

- *“Buy a ticket for \$5 for a chance to win a car. All ticket proceeds benefit Kid’s Charity.”*
- *“Raise \$1,000 or more for The Food Pantry Walkathon, and you’ll be entered into a raffle to win a trip to Tahiti.”*
- *“Your ticket to The Event includes entry into raffle for several fabulous door prizes!”*



Fundraising Raffles / Sweepstakes (cont'd)

- In some states, an organization must have been in existence in the state for a minimum amount of time to qualify for charitable gaming exemption.
 - E.g., Indiana
 - An organization must have been continuously in existence in Indiana for at least 5 years; OR
 - The organization must be affiliated with a parent organization that has been in existence in Indiana for at least five 5 years.
- Residency and registration/permit requirements limit ability to offer fundraising gaming via the Internet



User Generated Content on Social Media

1. Prize Promotion rules/terms of use should include provisions releasing IP rights and limiting liability
 - Limit to only those rights needed—don't overreach
 - How does one obtain the signed, written release required to obtain copyright?
2. Screen and/or regularly review promotion entries, postings and comments.
 - Consider removing posted promotion entries if they pose legal risk
 - BUT, many companies no longer remove negative comments on websites due to backlash ("a screenshot is forever"), address in other ways
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
4. Use other tools such as DMCA policies, CDA to protect against infringing content



Promotions through Social Media

- Social Networking sites – Facebook, Twitter, LinkedIn – have their own rules that apply to prize promotions run by nonprofits as well as for-profits.

facebook *Promotion Guidelines:*

- Promotion may not be administered directly on the site, must be administered through a third-party Facebook Platform application
- Cannot use Facebook functionality or feature as an entry mechanism; e.g., “Liking” a profile page or posting a comment on a wall. Also cannot condition entry into the promotion upon taking any other action on Facebook; e.g., liking a status update or uploading a photo.
 - However, can condition entry on a user “liking” a Facebook page, checking in to a “Place”, or connecting to the Facebook platform-based promotion application *as part of* the entry process. E.g, can require that users “like” a Facebook page and then submit a completed entry form to enter.
 - Must include specific releases, acknowledgments and disclosures regarding Facebook’s non-affiliation with the promotion and the promotion sponsor’s collection of data from entrants in the rules and on entry form



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Promotions through Social Media (cont'd)

Guidelines:

- Discourages creation of multiple accounts; rules regarding retweeting to enter
- Limits number of tweets/entries to one per day
 - *E.g.*, don't encourage retweets to win
- Recommends including @usernameMention in tweet entries so each entry will be visible in user timeline
- Suggests including relevant “hashtag” topics in tweet entries
 - *E.g.*, #promotion or #companyname.



Google+: Limits offering prize promotions on Google+, e.g., you cannot run a sweepstakes on your Google+ page, although you can link to one from your page.

Pinterest: Permits prize promotions, but “pin to win” UGC promotions may raise copyright and trademark issues.



Mobile Giving

- CTIA, The Wireless Association® Guidelines for Mobile Giving via Wireless Carrier's Bill
 - Qualified charities may lease short codes from the CTIA operated Common Short Code Administration at a 60% reduction to published rates for commercial short code campaigns
 - Must be accredited by the BBB Wise Giving Alliance or receive three- or four-star rating from Charity Navigator.
 - Can mix communications, promotions and mobile giving with the code as long as the campaign complies with the Mobile Marketing Association's guidelines and provide consumers with a separate opt-in for each type of activity



Mobile Giving



- **Telephone Consumer Protection Act** – prohibits using automatic dialing systems to make calls to wireless devices without express prior consent
 - Text messages included in “calls”
 - *Satterfield v. Simon & Schuster* – must have prior consent from the consumer to receive messages from that specific entity (not affiliate)
 - Prior donor or membership doesn’t count as consent
 - FCC Rulemaking – text messaging could require express written authorization
- **Carrier Rules and Regulations** have additional requirements for engaging in mobile giving campaigns – size of charity, years in existence, etc.



Auctions and Reverse Auctions



- Bid on item; may be asked to pay for each bid (money, points)
- Functions much like a sweepstakes, similar issues, need similar disclosures
- Note: US gaming policy recently relaxed
 - DOJ reversed its position on the applicability of the U.S. Wire Act to online gambling that does not involve sports betting
 - May clear the way for States to enable intra-state online gaming
 - May signal that the Federal government will consider licensing and regulation permitted online gambling
 - Indicates less strict interpretations of games of chance v. lottery issues
 - Important for “gamification”, advergaming as well



General Dot Com Disclosure Considerations

- FTC last issued online advertising disclosure guidelines 12 years ago.
- Now re-examining guidance on how to make disclosures online/on social media/using mobile devices, e.g.:
 - When are hyperlinks sufficient? Is requiring consumers to scroll down for terms ok?
 - Are there certain types of promotions that should not be attempted on certain media because their terms are simply too complex to be disclosed there?
- Could affect the requirements for charitable solicitation and promotions...stay tuned.



Privacy Issues

- Basic principles when collecting user data:
 - Must adhere to the promises made to consumers regarding privacy and data protection (privacy policies/other statements)
 - Must implement and reasonable and appropriate measures to protect personal data against theft
 - Must disclose when will use or sell data – remember, data is an asset
- “Hot” issues:
 - Geo-location
 - Behavioral advertising and tracking
 - Children’s privacy
- What comes next in terms of regulation?



Federal Tax Consequences – Unrelated Business Income

- Generally, organization is not taxed on income related to tax-exempt purpose.
- UBI – income generated from regularly carried on trade or business that is not substantially related to tax-exempt purpose
 - **Exclusion for Qualified Sponsorships – IRS Code 513(i)**
 - Less than 2% fair market value of contribution
 - Acknowledgment vs. advertising
 - **Exclusion for Certain Gaming Events – IRS Code 513(a)(1) / 513(f)**
 - Income and gaming events staffed by volunteers and
 - Bingo games
- Reported on Form 990, Schedule G if more than \$15,000.



Hypothetical Fundraising Campaign

- A concert promoter and a nonprofit cancer awareness organization team up to promote the concert and raise funds for the nonprofit:
 - *A giveaway drawing offering VIP concert tickets as the prize*
 - *5% of the proceeds from ticket sales will go to the nonprofit*
 - *The giveaway and 5% donation advertised via radio, TV, and the Internet*
 - *At the concert, a text-to-give campaign is announced*
- The following legal requirements apply:
 - Charitable raffle registration and disclosure requirements
 - Commercial co-venture laws
 - Mobile giving/marketing laws



Closing Thoughts

- When planning fundraising promotions, allow for ample lead time for compliance with any applicable laws (e.g., any registration requirements) for both charity and any partners.
- Consider your target audience.
- Assess whether fundraising campaign is worthwhile in light of compliance costs/burden. Further, determine whether the campaign will not only help achieve financial goals, but will also effectively promote your organization's brand.
- A highly visible fundraising campaign that was not carefully planned can lead to PR damage, attorney general enforcement matters, or even class action.



Questions and Discussion

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