



## Preparing an Online Social Media Policy: The Top Ten Legal Considerations for Your Nonprofit

Wednesday, March 13, 2013  
12:30 p.m. – 2:00 p.m. EDT

Venable LLP  
Washington, DC

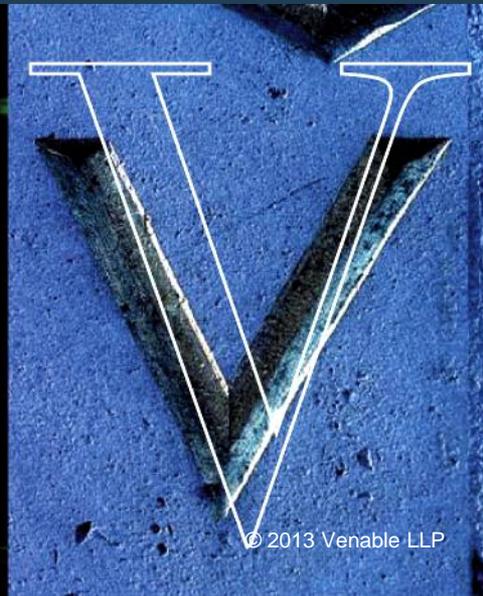
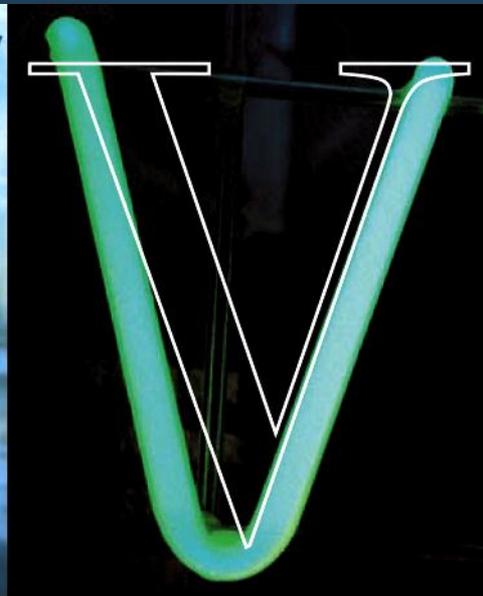
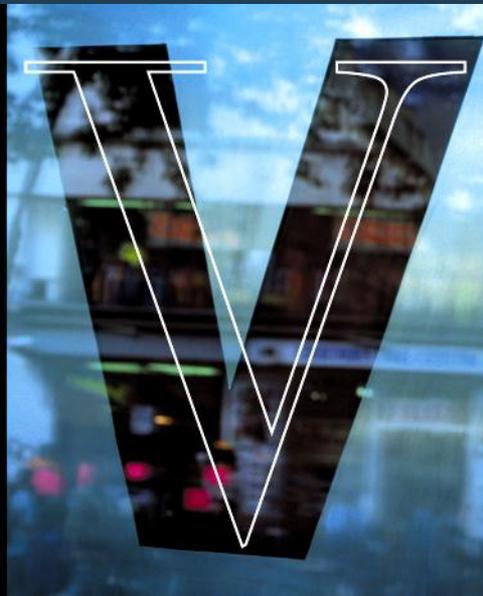
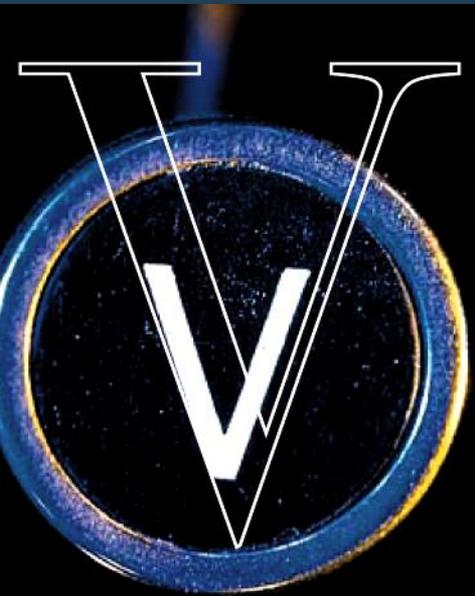
Moderator:

Jeffrey S. Tenenbaum, Esq., Venable LLP

Panelists:

A.J. Zottola, Esq., Venable LLP

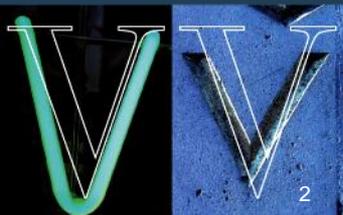
Ronald W. Taylor, Esq., Venable LLP



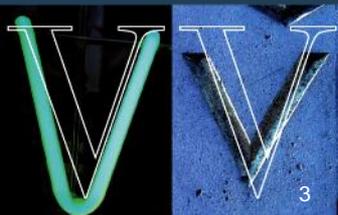
# Upcoming Venable Nonprofit Legal Events

April 16, 2013 – [Public Policy and Politics: Compliance Tips for Your Nonprofit's Advocacy and Electoral Efforts](#)

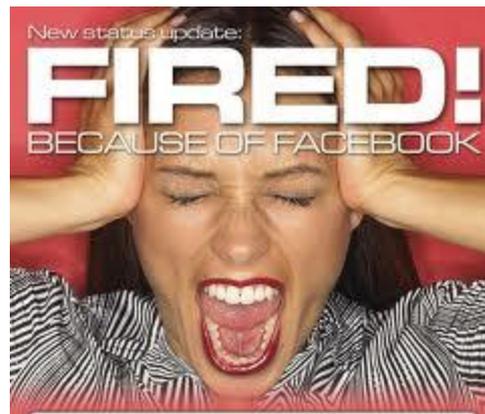
May 14, 2013 – As Nonprofits Expanded Their Global Reach, Three Areas to Focus On: Tax, Trademarks and Foreign Corrupt Practices Act (details coming soon)



# Social Media – Everywhere



# What's All The Buzz?



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

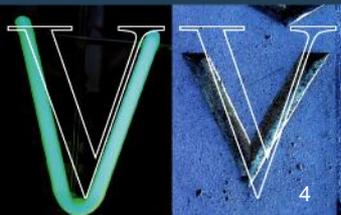
Uh oh...



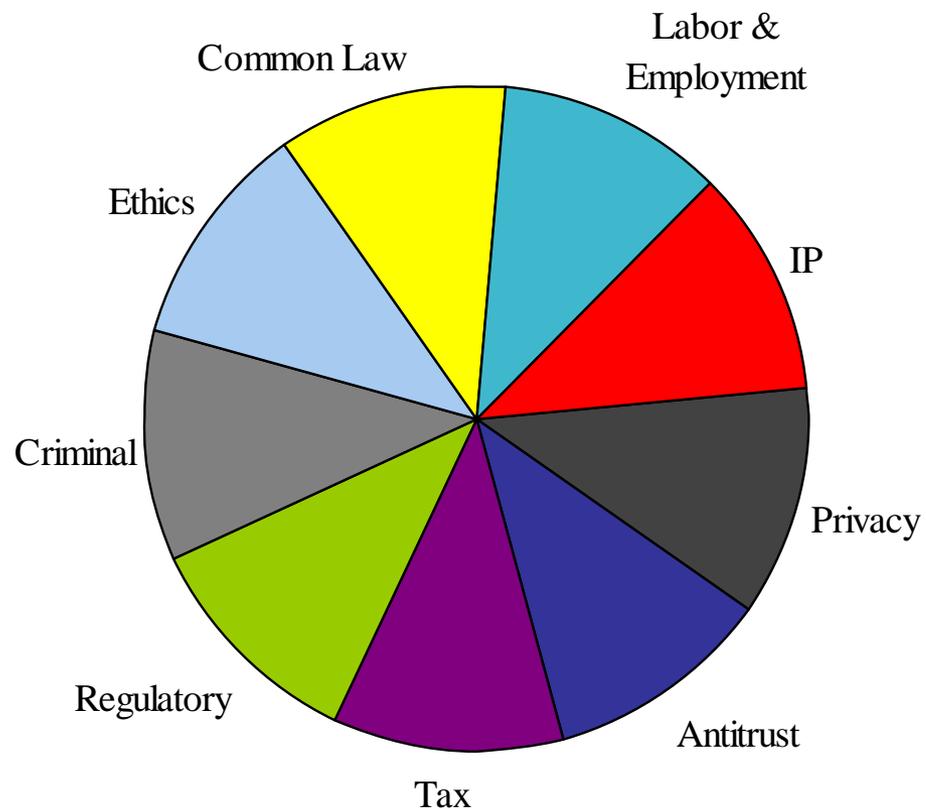
Former Employee



Business



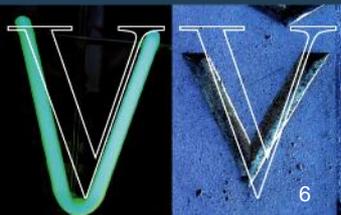
# Laws – Evolving





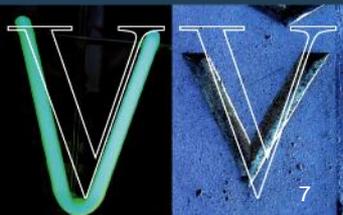
## Overview

- Legal issues → Same as before but new platforms
  - Entity use of social media
  - Pathways to Legal Liability or Risk
    - Defamation, Intellectual Property, Trade Secret, Advertising, Privacy, and Promotions
  - Employee use of social media
    - Attribution to entity
    - Discrimination/harassment
      - Business vs. personal use
      - On vs. off the job conduct
- Two key concepts: external versus internal



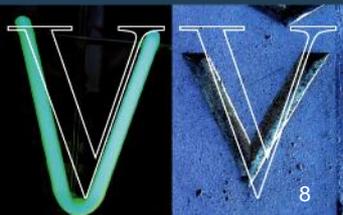
# Defamation

- Restatement (Second) of Torts, Section 559
  - Act of harming reputation of another through false statements to a third party. Occurs when you have (a) false or defamatory statement concerning another person, (b) communication or publication to at third party, and (c) harm to third party.
- Possible with social media publication, display, or posting.
  - “Publisher Liability”
    - Party who publishes the defamatory statement
  - “Distributor Liability”
    - Party who repeats the defamatory statement with knowledge or reason to know its contents
- Comments made by others can be attributed to the organization



# Defamation

- How to avoid
  - Federal Communications Decency Act of 1996 - § 230
    - Pattern behavior. Essentially, there is different treatment online.
    - Only possible with information or content published or provided by another person.
    - Immunity for interactive computer service if (a) voluntary, good faith action to restrict access or (b) enablement of technical means to restrict access. Won't be treated as publisher or distributor.
  - Beware informal nature of social media networks.
  - Utilize disclaimers and terms of use
  - Enforce a take down policy
  - Refrain from commenting on third-party posts
  - Remain mindful of trade secrets and confidentiality
  - Consider available screening capabilities for third-party hosts



# Trademark

- Trademarks are source identifiers
- Trademark problems are always possible when using third-party marks
  - Don't assume "fair use" because of nonprofit or tax-exempt status.
  - Seek permission
  - Be especially careful in commercial context
  - Don't allow use in account names
  - Avoid using third-party trademarks in search terms, domain names, or user names



# Copyright

- Copyright protects creative expression
- Social media is essentially the type of media that is based on communication and interaction between persons online.
- Social media is primarily about the content
- Be mindful of copyright ownership.
  - Who owns work on social media?
  - Work-made-for-hire doctrine, written assignments of rights
- Pattern behavior to take advantage of Sec. 512(c) safe harbor provision
  - No financial benefit from infringing activity
  - Not awareness of infringing activity
  - Take-down policy



# Trade Secrets

- Information kept secret to create advantage or which has value from not being known generally
- Unauthorized disclosure increases with social media usage.
  - Larger audience
  - More opportunities for leakage through accounts, mobile devices, and communication
- Are social media contacts a trade secret?
- Is the account employer owned? Who owns the social media account?
- Consider commitments or protections in vendor contracts and whether social media is covered.



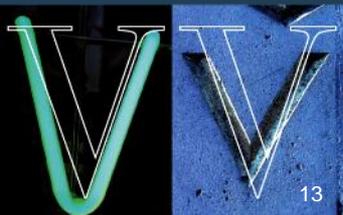
# IP Protection

- When protecting your own intellectual property rights
  - Monitor for misuse
  - Balance IP protection with reputation protection
    - Many times, it's an innocent infringer
    - Use clear placement of appropriate symbols –  
©, ®, ™
  - Enforce with policy statements, DMCA, demand letters, and legal proceedings
  - Consider available registrations, such as for trademark, domain name, or user name



# Misleading Advertising

- Advertising or promotion that misrepresents nature, characteristic, or origin of good or service
- All product or service claims on social media are considered advertising
- Third-party statements / deceptive endorsements in promotional activities. Potential for risk.
  - Statement(s) that consumers believe reflects opinion of speaker rather than advertiser
  - Potential for blogger and entity liability
  - Entity doesn't have to request endorsement
- FTC guidelines – testimonials/commenting – not binding
  - Specifically include social media and network marketing
  - Apply when (1) “endorsement” and (2) “connection”
- Require disclosure of connection
  - Whether the speaker is (1) acting independently (blogger) or (2) acting on behalf of the advertiser (or its agent)



# Privacy

- Protection of personal privacy, *i.e.*, personally identifiable information
- Increased scrutiny on online data collection through mobile apps and online social networks
- Limitations on collection and publishing of personally identifiable information
  - Consider use of privacy notices describing data collection
  - You must have a privacy notice with a mobile app
  - Remember disclosure and consent requirements
  - Be mindful of privacy policies of third-party platforms
  - Be consistent with general web site policy if potential for overlapping data use



# Promotions and Contests

- Sweepstakes = prize giveaway through luck
- Contest = winner determined by some merit
- Lotteries = prize drawing requiring payment
- Sweepstakes and contests are popular but some forms are heavily regulated
  - Strict state laws regulating lotteries
  - Must also consider and assume applicability of terms and conditions of social media sites
    - Facebook – May promote, but cannot administer (collecting entries, notifying winners) without prior approval from Facebook
- Payment, chance & prize = lottery
  - Requiring a donation to enter = lottery under most state laws
- Registration often is required; other requirements can vary
- Takeaway:
  - Many contests governed by state law
  - Control through use terms and limits on participation

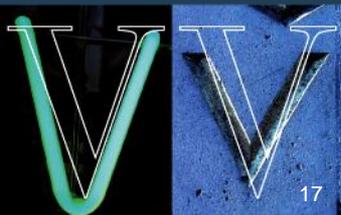


# Employee Use Of Social Media – Risks

- Again – balance – benefits vs. risk – on an informed basis
- Remember: Attribution to entity – actual or apparent authority
- Loss of IP and/or confidential information
- Ownership
  - *Eagle v. Morgan* (Oct. 4, 2013)(claim that employer hijacked LinkedIn account)
- Discrimination and/or harassment claims
  - Recruiting/hiring
    - Consider non-solicitation obligations
  - Workplace environment
  - References (also potential for defamation)
- Employee discipline/termination
  - Law in flux
  - Proceed with caution before taking any disciplinary action against employees for violations of social media or internet use policies (especially based on personal use)
  - Proactively review existing policies
    - Consider whether revisions should be made to minimize legal risk

# Employee Use of Social Media - Labor Law Concerns

- NLRA applies to ALL employers involved in interstate commerce except airlines, railroads, agriculture, and government
- Non-supervisory employees have rights to engage in **concerted activity**
  - Employees can get together, including electronically, to discuss workplace activity related to their interests as employees
- NLRB litigation
  - Complaint against *American Medical Response* – Fall 2013
    - Two 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)
  - NLRB advice memoranda – 7/19/11
    - *JT's Porch Saloon & Eatery, Ltd.; Martin House; Wal-Mart*
  - Administrative judge → firing for Facebook posts unlawful – *Hispanics United of Buffalo* – 9/2/11
  - Administrative judge → firing for Facebook posts lawful – *Knauz BMW* – 9/30/12
  - More NLRB advice memoranda – 10/13/11 – *Schulte, Roth & Zabel* and 10/19/2013 – *Cox Communications*
  - Board decision → unlawful social media policy – *DirecTV* – 1/25/13
- 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
  - Use caution – both as to any policy and any employee discipline



# Considerations for Developing Social Media Policy

- Don't Ignore Social Media Network Operator Policies
- Network Operator Policies Provide Limited Protection, although They Offer Some Enforcement Mechanisms
- Involve Multi-disciplinary Team (HR, Legal, Marketing, and Executive)
- How Will Entity Manage Its Presence (Internally & Externally)?
- Try to Maintain Consistent Approach Across Platforms & Networks
- Consider Level of Monitoring
- Consider Shelf-Life of Archived Content
- How Will You Communicate Policy?



# Creating and Implementing An Effective Social Media Policy

- Creating
  - Be clear and entity-specific
  - 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/others
  - Mandatory training
  - Monitoring



# 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/others from using entity's name in any online identity (e.g., username, screen name)



# Protect Confidential Information And Trade Secrets

- Prohibit employees and members/others 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)
- Courts have treated former employees favorably in cases involving social media and non-solicitation agreements



# Protect Privacy & Prohibit Disparaging/False Information

- Protect privacy
  - Employees and members/others may not write about, post pictures of, or otherwise refer to any employee, member, donor, 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, member, vendor, customer, or any other individual without permission of HR or appropriate entity official

The LinkedIn logo, featuring the word "LinkedIn" in a bold, sans-serif font. The "in" is contained within a blue square, and the entire logo is tilted slightly to the right.

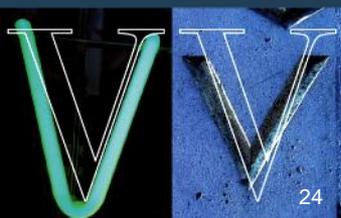
# Prevent Unlawful Conduct

- 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 unlawful/criminal conduct
  - Cyber-stalking, cyber-bulling
  - Hate crimes
- Require compliance with all applicable laws



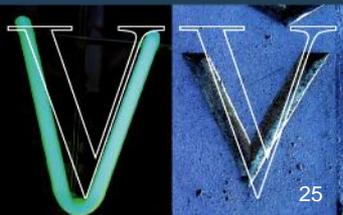
# Prevent Unlawful Conduct

- Prohibit posting of material that is abusive, offensive, insulting, humiliating, obscene, profane, or otherwise inappropriate regarding organization or its employees, members, vendors, advertisers, sponsors, exhibitors, partners, chapters, affiliates, etc.



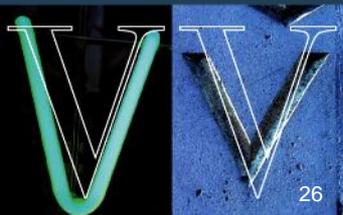
## Address Employee Use Of Social Media

- 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
- Note: some states have specific restrictions on monitoring employee use and some states prohibit employers from asking employees for their passwords to personal accounts.



# Address 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 their social media postings
  - Consider adding policy that the use of social media should never interfere with an employee's work
- 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



# Questions

Jeffrey S. Tenenbaum, Esq.

[jstenenbaum@Venable.com](mailto:jstenenbaum@Venable.com)

t 202.344.8138

Armand J. Zottola, Esq.

[ajzottola@Venable.com](mailto:ajzottola@Venable.com)

t 202.344.8546

Ronald W. Taylor, Esq.

[rwtaylor@Venable.com](mailto:rwtaylor@Venable.com)

t 410.244.7654

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