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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

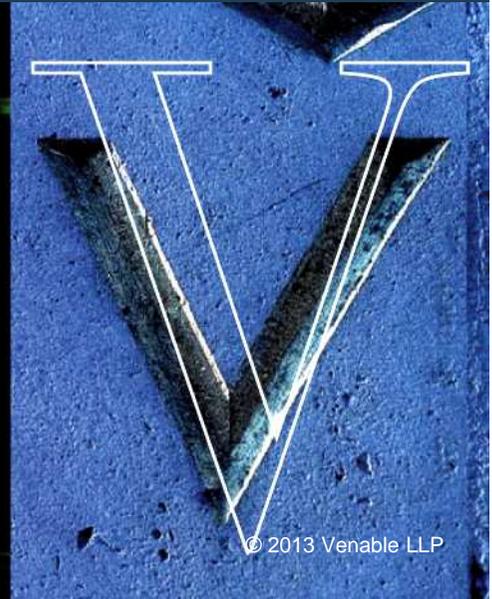
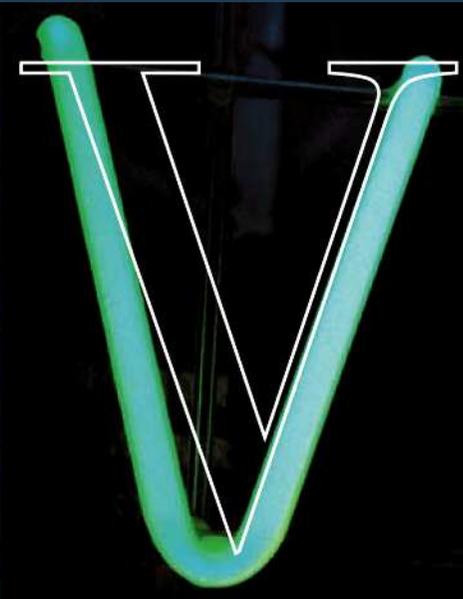
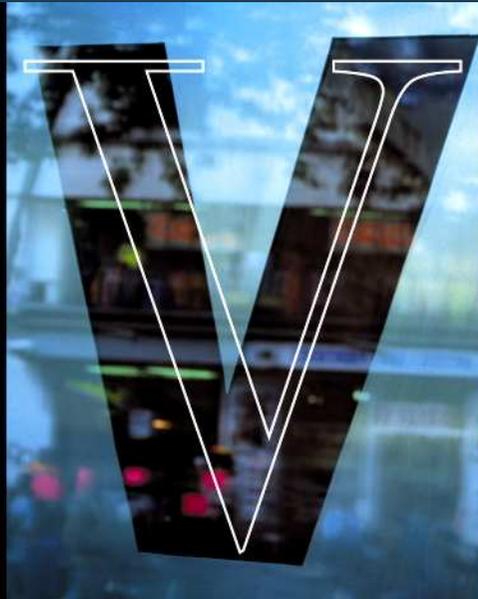
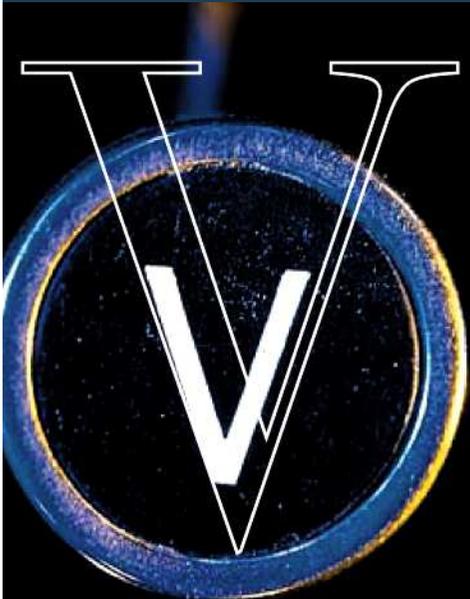
Moderator:

Jeffrey S. Tenenbaum, Esq., Venable LLP

Panelists:

A.J. Zottola, Esq., Venable LLP

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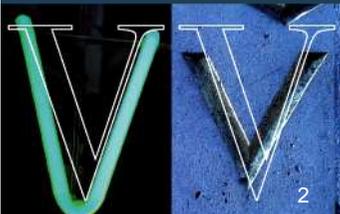


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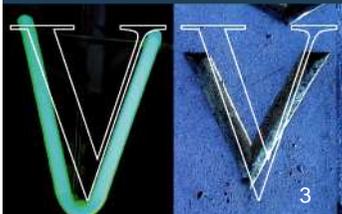
Upcoming Venable Nonprofit Legal Events

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

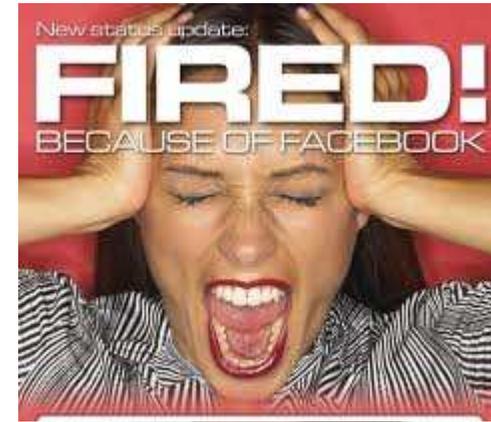
May 14, 2013 – As Nonprofits Expanded Their Global Reach, Three Areas to Focus On: Tax, Trademarks and Foreign Corrupt Practices Act (details coming soon)



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...



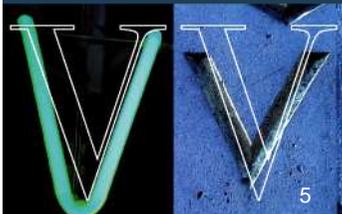
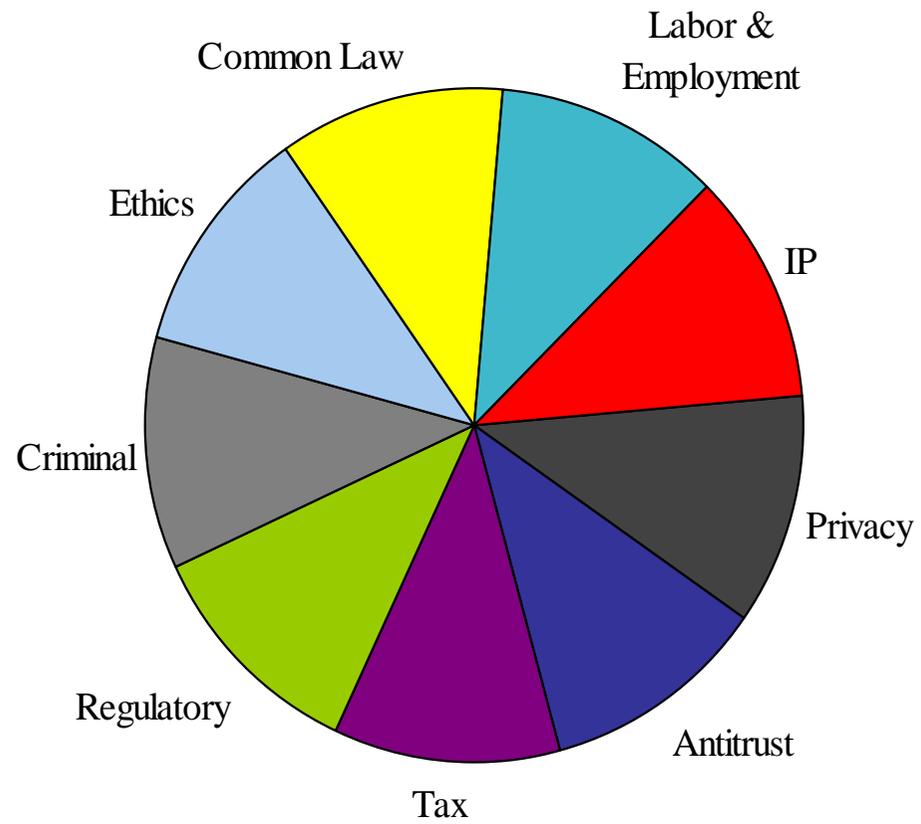
Former Employee



Business



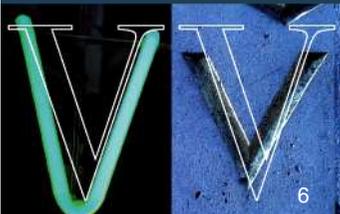
Laws – Evolving





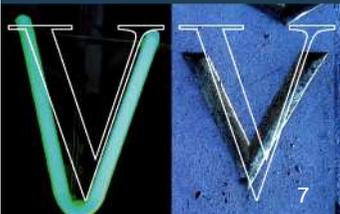
Overview

- 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



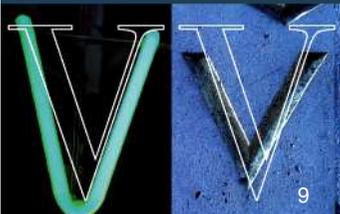
Defamation

- 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



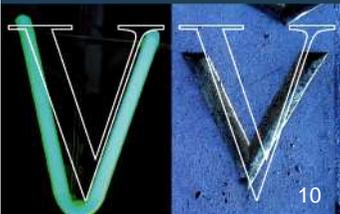
Trademark

- 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



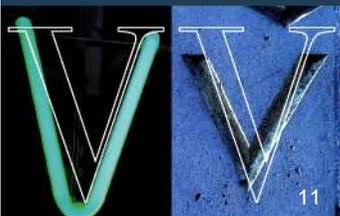
Copyright

- 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



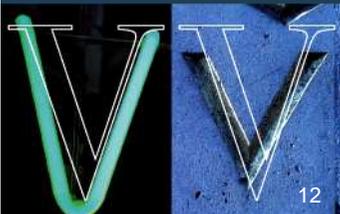
Trade Secrets

- 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.



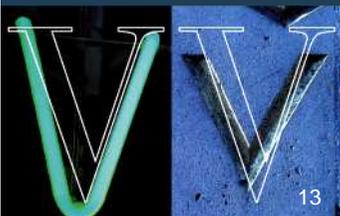
IP Protection

- 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



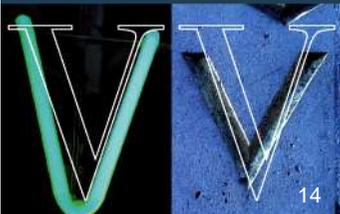
Misleading Advertising

- 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)



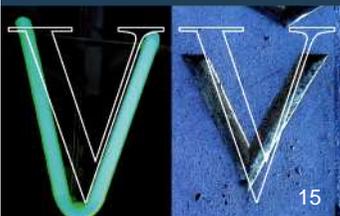
Privacy

- 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



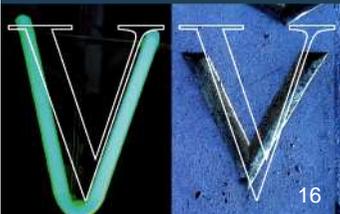
Promotions and Contests

- 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



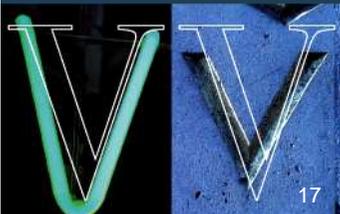
Employee Use Of Social Media – Risks

- 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

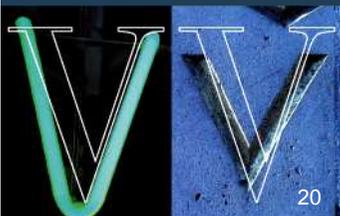
- Creating
 - Be clear and entity-specific
 - Be consistent with other entity policies and procedures
 - Require compliance with other entity policies and procedures
 - Focus on conduct – both do's and don'ts
 - Create a reporting procedure
 - Establish a compliance framework and designate a compliance officer
 - Use appropriate disclaimers
- Implementing
 - Notice – employees & members/others
 - Mandatory training
 - Monitoring



Limit Apparent Authority and Protect Corporate Identity

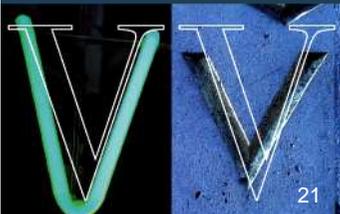


- Limit individuals who have authority to speak on entity's behalf & then prohibit all others from claiming or implying authorization to speak on entity's behalf
 - Create process for gaining authorization to speak on entity's behalf
- Prohibit unauthorized individuals from using entity's intellectual 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



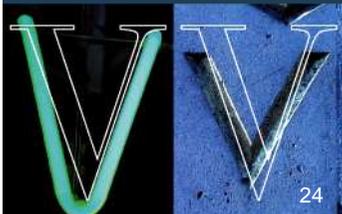
Prevent Unlawful Conduct

- 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



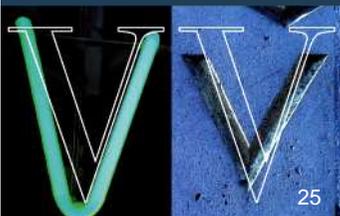
Prevent Unlawful Conduct

- 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.



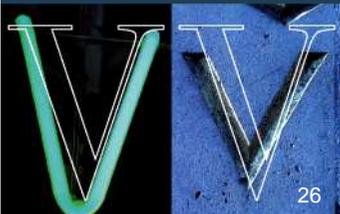
Address Employee Use Of Social Media

- 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

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