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Social Media and Charitable Solicitation Considerations

2012 Exempt Organizations General Counsel Conference
World Wildlife Fund
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Jeffrey S. Tenenbaum

A.J. Zottola

Kristalyn J. Loson

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Agenda

- General Legal Issues with Entity Use of Social Media
  - Defamation
  - IP
  - Misleading Advertising
  - Privacy – “Similar Issues, New Platforms”
- Charitable Solicitation Concerns
  - Registration Requirements
  - Social Media Implications
  - Raffles / Sweepstakes
  - Prize Promotion on Common Platforms
  - Hypothetical Campaign

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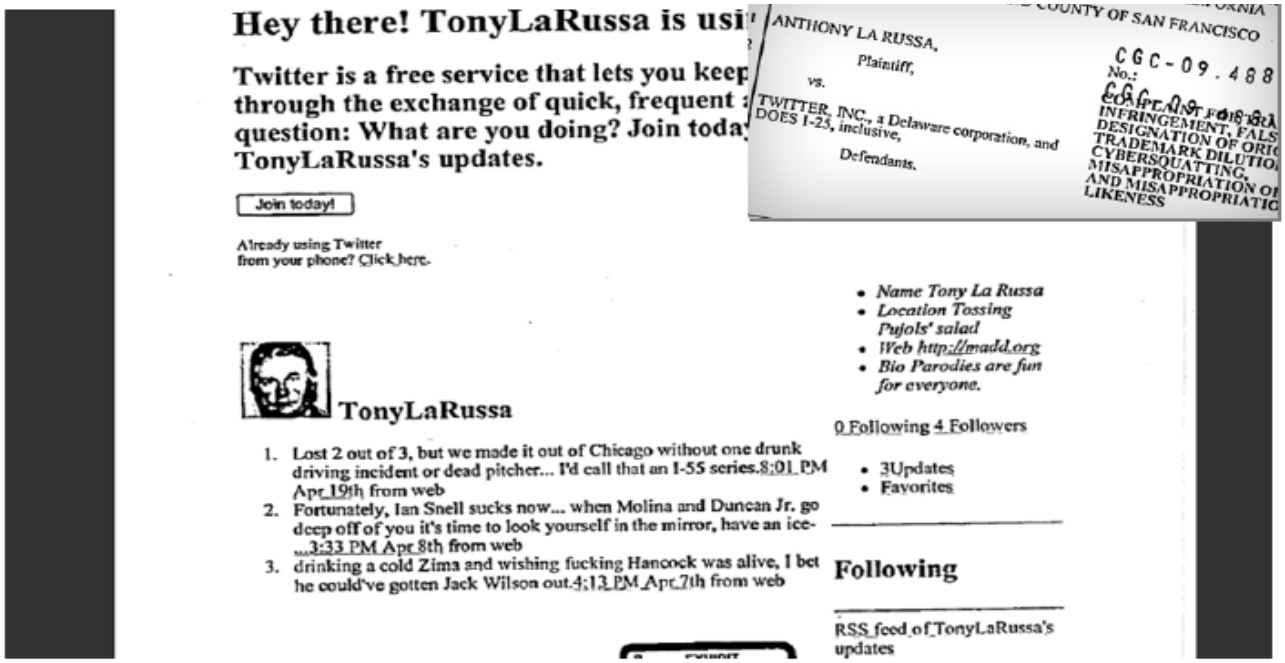
Entity Use of Social Media
Defamation

- Act of harming reputation of another through false statements to a third party
  - *@abonnnen had a public Tweet and 20 followers: "Who said sleeping in a moldy apartment was bad for you? Horizon realty thinks it's ok."*
  - *Horizon sued for defamation, although case was ultimately dismissed*
- Comments made by others can be attributed to the organization
  - Cisco and former Cisco lawyer were sued for defamation after it was revealed that the lawyer was the author of an infamous blog. Case settled
  - Whole Foods former CEO wrote anonymously in YAHOO Finance Forums criticizing rival Wild Oats Markets before Whole Foods purchase of the company (FTC and SEC investigations ensued)

Entity Use of Social Media
Imposters

- Tony LaRussa sued Twitter over an unauthorized page that made light of drunk driving and two Cardinal's pitchers who died (the case settled and the user name was disabled)



Hey there! TonyLaRussa is usi

Twitter is a free service that lets you keep
through the exchange of quick, frequent
question: What are you doing? Join toda
TonyLaRussa's updates.

Join today!

Already using Twitter
from your phone? Click here.

TonyLaRussa

1. Lost 2 out of 3, but we made it out of Chicago without one drunk driving incident or dead pitcher... I'd call that an I-55 series.8:01 PM Apr 19th from web
2. Fortunately, Ian Snell sucks now... when Molina and Duncan Jr. go deep off of you it's time to look yourself in the mirror, have an ice-...3:33 PM Apr 8th from web
3. drinking a cold Zima and wishing fucking Hancock was alive, I bet he could've gotten Jack Wilson out.4:13 PM Apr 7th from web

- *Name Tony La Russa*
- *Location Tossing Pujols' salad*
- *Web http://madd.org*
- *Bio Parodies are fun for everyone.*

0 Following 4 Followers

- 3Updates
- Favorites

Following

RSS feed of TonyLaRussa's updates

COUNTY OF SAN FRANCISCO

ANTHONY LA RUSSA,
Plaintiff,
vs.
TWITTER, INC., a Delaware corporation, and DOES 1-25, inclusive,
Defendants.

No.: CGC-09-488

COMPLAINT FOR INFRINGEMENT, FALS DESIGNATION OF ORIG TRADEMARK DILUTIO CYBERSQUATTING, MISAPPROPRIATION O AND MISAPPROPRIATIO LIKENESS

Entity Use of Social Media
Defamation

- How to Avoid
  - Federal Communications Decency Act - § 230
  - 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

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Entity Use of Social Media
IP Issues

- Avoid Trademark Misuse
  - Seek permission
  - Be especially careful in commercial context
  - Avoid using other's trademarks in search terms, domain names, or user names
    - Oneok (a natural gas company) sued Twitter over a misappropriated user name
    - Hasbro vs. RJ Software over a Facebook version of its game Scrabulous, which had more than 500,000 users

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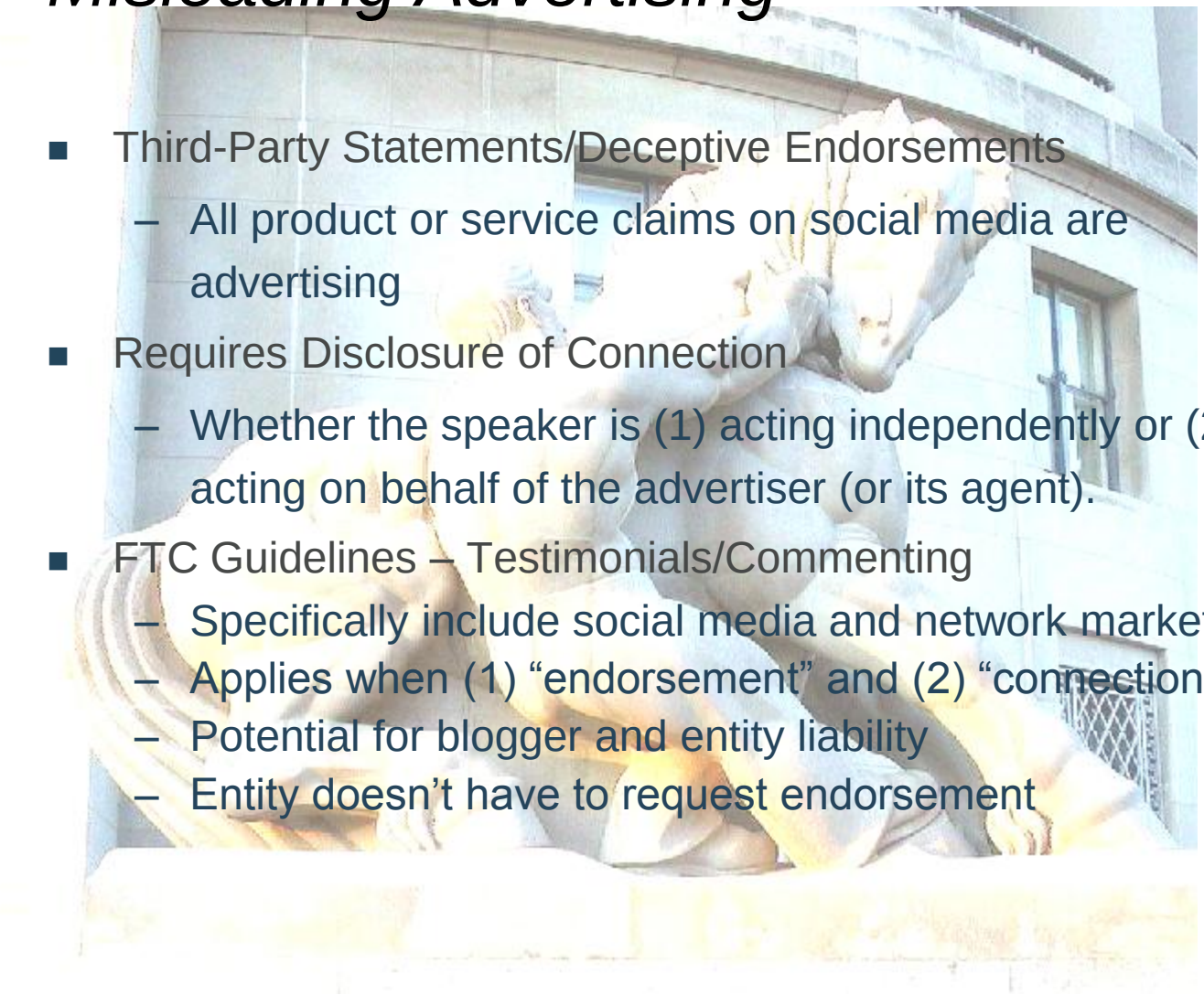
Entity Use of Social Media
IP Issues

- Be Mindful of Copyright Ownership. Social Media is Primarily About the Content
  - Who owns work on social media?
  - Work-made-for-hire doctrine, written assignments of rights
- Protecting 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

Entity Use of Social Media
Misleading Advertising



- Third-Party Statements/Deceptive Endorsements
  - All product or service claims on social media are advertising
- Requires Disclosure of Connection
  - Whether the speaker is (1) acting independently or (2) acting on behalf of the advertiser (or its agent).
- FTC Guidelines – Testimonials/Commenting
  - Specifically include social media and network marketing
  - Applies when (1) "endorsement" and (2) "connection"
  - Potential for blogger and entity liability
  - Entity doesn't have to request endorsement

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Entity Use of Social Media
Privacy

- Limit on Collection and Publishing of Personally Identifiable Information
  - Consider use of privacy notices describing data collection
  - Remember disclosure and consent requirements
  - Be mindful of privacy policies of third-party platforms

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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/

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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 not-registering
  - 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
Social Media Implications

- "One Big Grey Area"
- *But*, look toward same basic principals for analysis

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!" (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?

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http://www.changingthepresent.org/gifts

The Pink Cart | (597) Twitter / Search - donate | Changing The Present

File Edit View Favorites Tools Help

changing the present
The thought that counts

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.

Search
all GO

shopping cart | login | join | help | about us

Gifts | Drives | Registries | For Nonprofits

Sign up for our free newsletter GO


Wedding Registries


See our films, created by StrawberryFrog


Greeting Cards and e-Cards

Choose a Cause

Basic Needs
- Disaster Relief
- Education
- Housing
- Human Rights
- Hunger
- Millennium Goals
- Water

Community
- Aging
- Arts & Culture
- Children & Youth
- Civil Society
- Peace
- Public Broadcast
- Refugees

Charitable Gifts from ChangingThePresent

Keep Kids Safe
Afternoon of arts — $80

National Housing Trust

One way to keep kids out of trouble is to encourage learning all day long and provide access to fun, constructive activities. With this aim, we strive to provide quality after school programming at many of our properties. more

Protect A Child
Legal assistance — $90

US Committee for Refugees and Immigrants

A sustaining gift of $90 a month will provide a full intake screening, thorough needs assessment, brief legal advice, health and social service referrals, and a trained pro bono attorney for one child. more

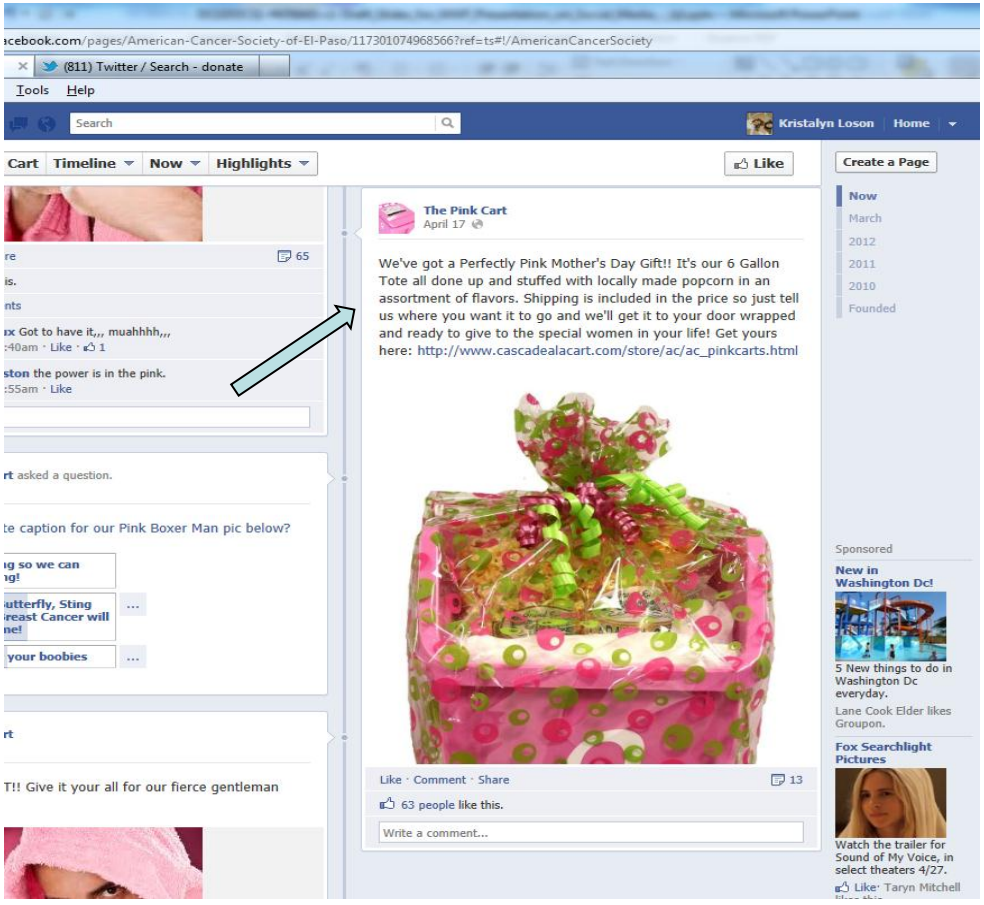
http://www.changingthepresent.org/gift/1190/protect_a_child

125%

Charitable Solicitation
Social Media Implications

(3) Are Goods or Services Being Offered under Premise It Will Benefit a Charity?

– *"We can see it from our desks"*



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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

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Charitable Solicitation
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
- However, states require registration / permit for charitable gaming

Charitable Solicitation
Fundraising Raffles / Sweepstakes

- 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 five years; OR
    - The organization must be affiliated with a parent organization that has been in existence in Indiana for at least five years
- Residency and registration / permit requirements limit ability to offer fundraising gaming via the Internet

Charitable Solicitation
Prize Promotion in 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

Charitable Solicitation
Prize Promotion in Social Media

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

Charitable Solicitation
Prize Promotion in Social Media

twitter ***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: Prohibits prize promotions on Google+

Charitable Solicitation
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: U.S. 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

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Charitable Solicitation
Hypothetical 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

contact information

YOUR VENABLE TEAM

Jeffrey S. Tenenbaum, partner
jstenenbaum@venable.com
t 202.344.8138
f 202.344.8300

Kristalyn J. Loson, associate
kloson@venable.com
t 202.344.8138
f 202.344.8300

A.J. Zottola, partner
ajzottola@venable.com
t 202.344.8546
f 202.344.8300

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