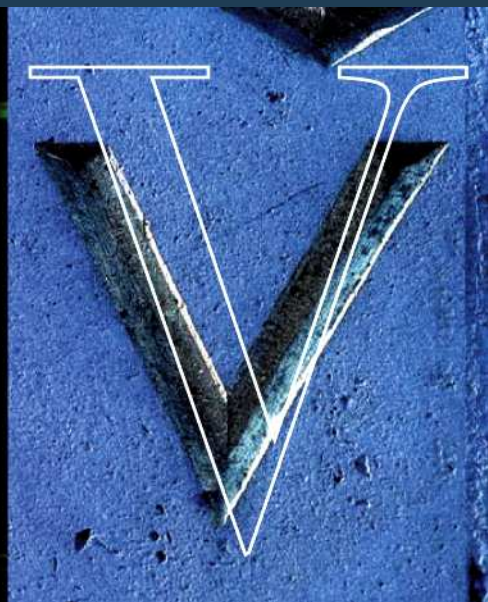
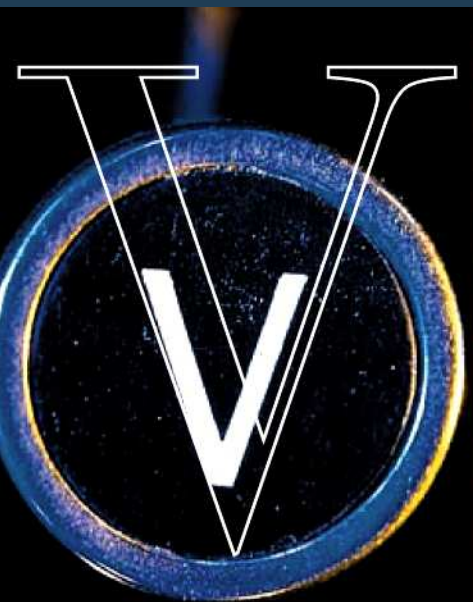


# VENABLE<sup>®</sup><sub>LLP</sub>

Preparing for the Future:  
Legal Issues in Leadership Succession Planning

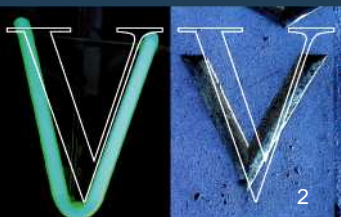
NAIS Annual Symposium 2012

Caryn Pass, presenter



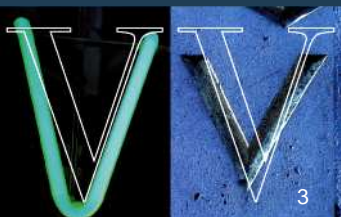
## What to Expect

- Legal Challenges
- Governance issues impacting succession of Board and Head
  - By laws; Board Policies; Governance/Trustees committee; Head of School Evaluation Process
- Search for New Head
  - Search Committee
  - Search process legal issues
  - Search firm selection and contracts
- Head of School Contracts
  - “Retiring”, Current, New Head’s
  - Terms and considerations



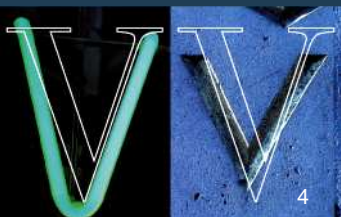
# Overview

- Drafted over 40 new Head contracts this season
  - Heads Retiring in Increasing Numbers
  - Baby boomers held on to jobs
    - Didn't plan well
    - Limited development of “next generation”
  - Fewer applicants; more competition
- Contracts different then before
  - Form 990/Intermediate sanctions implications
  - New heads are more sophisticated
  - Looking for more benefits (i.e.: child care)
  - Looking for protections should they get terminated
  - Looking for flexibility to search for “next position”
- Contract design
  - Utilize as tool
    - succession
    - incentive plan
    - development of head



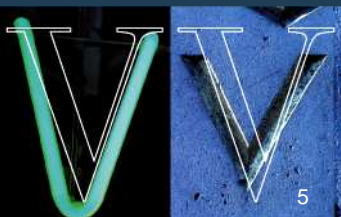
## Legal challenges

- By candidate against board
  - Failure to hire based on protected categories
    - Race, age, gender, national origin, disability
  - Breach of privacy
  - Slander and or libel
- By community member against board
  - Negligent hire
    - Failure to conduct due diligence resulted in injury to school
      - safety - pedophile; sexual harassment by head
      - fiduciary - theft, mismanagement of financial resources by head
  - Breach of duty of care
    - Obligation of board to protect school and reputation of institution
  - Breach of fiduciary duty
    - Misuse of fiscal resources in search



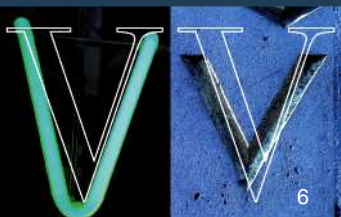
# Board Succession Plan

- Good governance strongly impacts search
  - Candidates look closely at behavior of board
  - Helps set up procedures to avoid legal claims
- Bylaws
  - Rarely used by boards in strategic manner
  - Terms; Members and officers
    - development of new leadership
    - Term of Chair especially important
  - Trustee/Governance Committee
    - Selection of trustees and officers
      - Process for selection
      - Process for vote – slate/cherry pick
    - Training and review of trustee performance
    - Recipient of complaints and consequences
  - Removal of Trustee
  - Committees – Especially executive
- Policies
  - Detail procedures



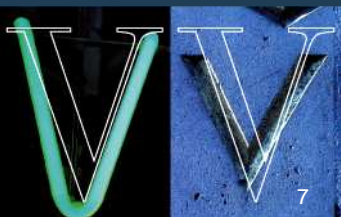
# Head Succession Plan

- Head's evaluation
  - Starts moment head is hired
  - In employment contract and by-laws
  - Process
    - Input by trustees, administrators, faculty, parents?
    - Conducted by Chair, Executive Committee, Evaluation committee?
  - Consider long term plans for school
    - Is head appropriate leader
    - Re-evaluate each evaluation
  - Carefully address goals and objectives
- Design contract with succession in mind
  - Long term fiscal security
  - Tuition remission
  - Other benefits



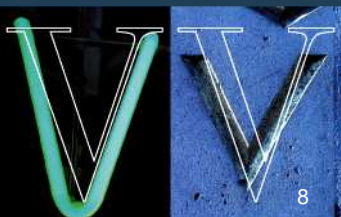
## Search Logistics

- Carefully select a search committee
  - Consider constituents
  - Consider skill set
  - Consider confidentiality
  
- Search committee leadership
  - Committee chair
  - “COO” of Committee
  
- Other considerations
  - Chair and COO not board chair
  - Primary contact with search firm
  - Search committee “committees”
  
- Create detailed timeline and responsibilities at each stage
  - Communication



# Search Firm Considerations

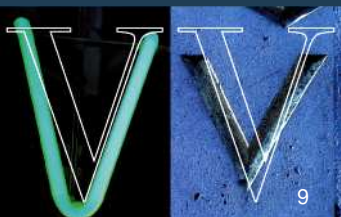
- Carefully select a firm
  - Get recommendations
  - Interview range of firms
  - Comfort level
  - Consistent with strategic plan and mission
- Carefully review agreement with firm
  - Total cost of Search
  - Document staffing
  - Document process; timeline; breadth of service
  - Payment schedule
    - Initial payment, after candidates presented, upon execution of agreement
    - Weighted towards end
  - Agreement if search fails
    - Interim candidate
    - New search





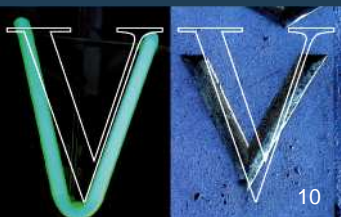
## Interview

- Train interviewers on what is acceptable and not acceptable
  
- Carefully select who interviews
  
- Avoid questions such as
  - Do you have proper child care?
  - Will you be having more children?
  - Will you be taking maternity leave?
  - Are you planning on marrying?
  - What is your financial situation?
  - Do you have any disabilities?
  - How old are you? Do you think you still have the energy to do this job?
  - What impact will your gender have on you style?



## Search Committee's Due Diligence

- Don't depend on search firm
  - Usually disclaimer in agreement
  
- Written Materials
  - Use application designed by committee
  - Confirm resume
  
- Background Checks
  - Criminal, credit, education, work history
  
- Reference Checks
  - References search firm spoke with
  - Candidate provided references
  - References not provided by candidate
  - Dig deep but use same interview legal considerations
  - Take notes with care



# Head of School Contract

- Design Contract carefully to address needs of head and goals of board
- New head
  - Provide term sheet with offer
    - Basic terms, condition on execution of contract
    - Allows for announcement
  - Draft and negotiate contract
    - Recommend Board chair or Search committee chair interact with head
    - Have head review by legal counsel
- Returning Head
  - Plan timing of negotiation and execution
  - Consider language in agreement regularly
    - Laws change, issues change, situations change
    - Caution when using attachments or addendum
- Retiring head
  - Address succession plans
    - “retirement” payment, search announcement

## Term

- Sends message to head
- Give security without extending beyond reasonable period
- Consider long term plans for school
  - Does head provide appropriate leadership
- New or first time head
  - Most common 3 years
  - Hope for best/plan for worst
  - Considered in choice by candidates
- Renewed contracts
  - 3 years, 5 years, sometimes 10 years
  - Think strategically
- Retiring heads
  - How long does board need to conduct search



# Evergreen

- Benefit vs. Detriment
  - Disincentive for negotiating new agreement
  - Allows for continued employment when lack of attention to contract
  
- Allows contract to roll over for additional time following end of “term”
  
- Time options
  - Additional 1 year, 2 years etc.
  - Term of agreement (3 year agreement roll over for additional 3 years)
  
- Notice of decision not to “rollover”
  - Timing
    - Prior to end of last year of contract
    - After 2<sup>nd</sup> or 3<sup>rd</sup> year for period to allow for continued same term



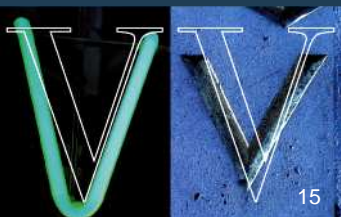
# Compensation

- Salary
  - Amount to be paid in 1<sup>st</sup> year of contract or each year in term
- Increase in salary
  - Determined by Board
  - Not less than “X” %
  - Same as faculty
  - Not less than prior year
- Bonus
  - Yearly or discretionary
  - Based on performance or result of “special performance”
- Intermediate Sanctions and rebuttable presumption
  - Create committee
  - Collect and review data
  - Establish salary and benefits in consideration of data
  - Document process
  - Present to board



# Evaluation and Duties

- Duties
  - Describe duties of Head
  - Address other activities (writing, speaking, sitting on boards)
    - Address honoraria
  
- Procedure as established by board and head
  - Caution if including detailed process
  
- Evaluation
  - Set system in detail vs. general description
  - Goal setting and review of goal achievement
  - Consideration of long term plan for school and leadership of candidate



## Benefits

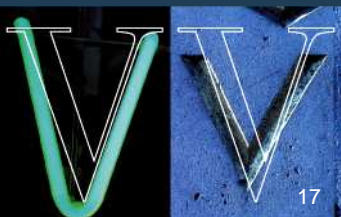
- Health, Life, Disability
  - As provided to other employees
  - If define bound by details
    - i.e.: Blue cross Blue Shield
  - Pay higher premiums or additional amounts
  
- 403(b)
  - As provided to other employees
  - Caution to avoid details
    - i.e.; 7% match will limit ability to change plan
  
- Sick, Vacation other leave
  - If different from other employees define clearly
    - Mostly vacation





## Supplemental Life or Disability

- Draft carefully to avoid tax implications
  
- Life
  - Head owns and pays premiums
  - School reimburses
  - Avoids taxable treatment of benefit
  - GREAT CAUTION PRIOR TO GRANTING
  
- Disability
  - School owns plan and pays premium to avoid taxable treatment of premium payment



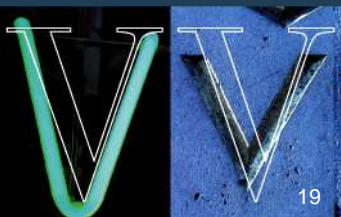
## Deferred Compensation

- 457 (b)
  - Fixed amount of contribution \$16,500.00
  - Either Head or School can contribute
  - Forfeit if bankruptcy of school
  - Can offer to other highly compensated
  
- 457(f)
  - Unlimited amount of contribution
  - Only by school
  - Substantial risk of forfeiture
    - Once met must distribute compensation
  - Can extend if prior to final year of vesting
  - Failure to accurately draft results in taxable treatment in year of contribution



## Housing

- School House
  - Property on or adjacent to campus
  - Condition of Employment
  - Used for entertainment
  
- Allowance
  - Taxable income
  
- Cleaning, maintenance or repairs
  
- Loan
  - Arms length agreement
    - Written document
    - Interest rate, term of payment, collateral
  - Forgiveness of loan issues



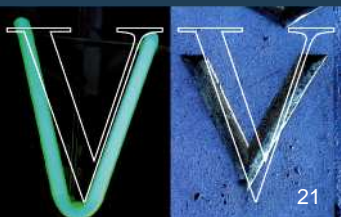
## Tuition

- Remission
  - If same as other faculty
  - Greater than additional faculty
    - Full amount taxable
  
- Payment of other institution tuition
  - Independent school or College
  - Amount of tuition of school
  
- Execution of enrollment document



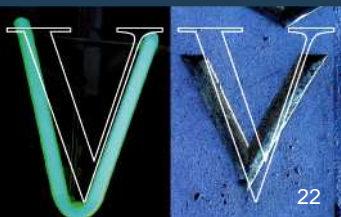
## Ending of employment

- By Head
  - Notice period by Head
  - Newer heads want less time
  
- Mutual
  - Parties agree as to time and transition
  
- Death or Disability
  - Payment of Salary
  - Cobra
  - House
  
- Expiration of Agreement



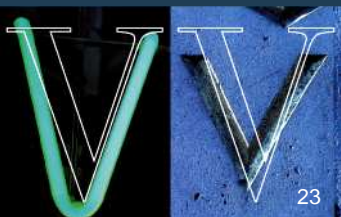
# Termination of employment

- Term for Cause
  - Define cause
  - Appearance before Board
  - Ability to cure
  - Notice in writing
  
- Without Cause
  - Get out of jail free
  - Notice period
    - 12/18 months
    - Work out notice period
  - Execution of release
  - COBRA or other benefit continuation defined



## Extras

- Car
- Blackberry, laptop and cell phone
- Child Care
- Country Club
- Relocation Assistance
  - Moving, house sale, purchase expenses
- Attorney Fees
- Financial Advisor
- Executive Coach



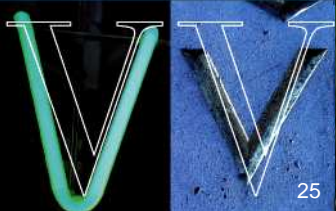
## Other

- Accounts
  - Heads discretionary Account
  - Professional Development
  - Entertainment and travel
  
- Copyright
  
- Use of Pictures, Videos and images
  
- Non compete/Non solicitation
  
- Sabbatical
  
- 409 (a) language





Questions?



## contact information

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