



**Litigation Basics for Nonprofits:
What to Do When a Complaint or
Subpoena Is Served and Other
Tips and Strategies**

September 13, 2012

12:00 p.m. – 2:00 p.m.

Venable LLP

575 7th Street, NW

Washington, DC 20004

Moderator:

Jeffrey S. Tenenbaum

Panelists:

Caroline Petro Gately

David L. Feinberg

Presentation



Litigation Basics for Nonprofits:
What to Do When a Complaint or Subpoena Is Served
and Other Tips and Strategies

Thursday, September 13, 2012
12:30 p.m. – 2:00 p.m. EDT

Venable LLP
Nonprofit Organizations Practice
Washington, DC

Moderator:
Jeffrey S. Tenenbaum, Esq.

Panelists:
Caroline Petro Gately, Esq.
David L. Feinberg, Esq.



Upcoming Venable Nonprofit Legal
Events

October 16, 2012 - [You're Not Covered for
Everything: Making Sure that Your Nonprofit's
Directors & Officers Insurance Coverage Matches
Your Expectations](#)

November 13, 2012 - Top Ten Real Estate Leasing
Issues for Nonprofits - Details Coming Soon



Agenda

- Goals
- The Actors and the Forum
- Defending against Actions
 - Third-Party Subpoena
 - Summons and Complaint in a Civil Case
 - Writs
 - Request for Information from the Government
 - Government Subpoena
 - Agent Contact/Search Warrant/Criminal Subpoena
 - Indictment or Information
- Being Prepared
 - Document Retention Policy
 - Insurance Policy Review
 - Who-to-Call Refresher
- Closing/Final Q&A



Goals

- Become familiar with common types of legal actions, the actors and forum, and associated vocabulary
- Assess levels of threat and urgency
- Appreciate issues triggered by different types of legal actions
- Learn how to react
- Acquire tips to be prepared for legal action



The Actors

- Government
 - Federal – Department of Justice, Agencies, FBI, Congress
 - State – Attorney General, Agencies, Inspector General, State Legislature
- Private
 - Internal – Employees, members
 - External – Vendors, other litigants



The Forum

- Judicial – Proceedings in federal and state courts
- Executive – Federal and state administrative actions
- Legislative – Committees of Congress or state legislatures



Third-Party Subpoena



- A command to appear and give testimony at a deposition or trial, issued at the request of a litigant
- If commanded to produce documents, it is a subpoena *duces tecum*
- Enforceable by contempt of court proceedings
- Concerns: time to object, time to appear or produce, scope, burden of search, electronically stored information, affiliate/subsidiary, confidentiality or other sensitivities
- What to Do: Note the date and means of service, identify contact in business unit, alert counsel



AO 88A (Rev. 06/09) Subpoena to Testify at a Deposition in a Civil Action

UNITED STATES DISTRICT COURT
for the
District of Columbia

ABC Corporation)
Plaintiff)
v.) Civil Action No. 12-1234-WJZ
XYZ Corporation)
Defendant) (if the action is pending in another district, state where:)

SUBPOENA TO TESTIFY AT A DEPOSITION IN A CIVIL ACTION

To: Jane Jones, President, National Trade Association, 1 M Street, N.W., Washington, DC 20000

Testimony: YOU ARE COMMANDED to appear at the time, date, and place set forth below to testify at a deposition to be taken in this civil action. If you are an organization that is not a party in this case, you must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on your behalf about the following matters, or those set forth in an attachment:

Place: Smith & Associates LLP 1 Main Street Norfolk, VA 23501	Date and Time: 09/18/2012 9:00 am
---	-----------------------------------

The deposition will be recorded by this method: video, audio, and stenography

Production: You, or your representatives, must also bring with you to the deposition the following documents, electronically stored information, or objects, and permit their inspection, copying, testing, or sampling of the material:

All documents relating to the subject matter of the complaint in this lawsuit.

The provisions of Fed. R. Civ. P. 45(c), relating to your protection as a person subject to a subpoena, and Rule 45 (d) and (e), relating to your duty to respond to this subpoena and the potential consequences of not doing so, are attached.

Date: 09/13/2012 CLERK OF COURT

OR

Signature of Clerk or Deputy Clerk

John Smith

Attorney's signature

The name, address, e-mail, and telephone number of the attorney representing *(name of party)*

_____, who issues or requests this subpoena, are:



UNITED STATES DISTRICT COURT
for the
District of Columbia

ABC Corporation)	
Plaintiff)	
v.)	Civil Action No. 12-1234-WJZ
XYZ Corporation)	
Defendant)	(If the action is pending in another district, state where:)

**SUBPOENA TO PRODUCE DOCUMENTS, INFORMATION, OR OBJECTS
OR TO PERMIT INSPECTION OF PREMISES IN A CIVIL ACTION**

To: Jane Jones, President, National Trade Association, 1 M Street, N.W., Washington, DC 20000

Production: YOU ARE COMMANDED to produce at the time, date, and place set forth below the following documents, electronically stored information, or objects, and permit their inspection, copying, testing, or sampling of the material:

All documents related to the subject matter of this lawsuit.

Place: Smith & Associates LLP 1 Main Street Norfolk, VA 23501	Date and Time: 09/18/2012 9:00 am
---	--------------------------------------

Inspection of Premises: YOU ARE COMMANDED to permit entry onto the designated premises, land, or other property possessed or controlled by you at the time, date, and location set forth below, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

Place:	Date and Time:
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The provisions of Fed. R. Civ. P. 45(c), relating to your protection as a person subject to a subpoena, and Rule 45 (d) and (e), relating to your duty to respond to this subpoena and the potential consequences of not doing so, are attached.

Date: 09/13/2012

CLERK OF COURT

OR

Signature of Clerk or Deputy Clerk

John Smith
Attorney's signature

The name, address, e-mail, and telephone number of the attorney representing (name of party) ABC Corporation, who issues or requests this subpoena, are:
John Smith
Smith & Associates LLP
1 Main Street, Norfolk, VA 23501 (757) 123-4567



Summons and Complaint in a Civil Case



- A command to respond to a complaint in which the plaintiff seeks money damages, equitable relief (such as an injunction), or both against the defendant
- Civil liability, not criminal, at issue
- Typically served in person by a sheriff or private process server, although some may be served by mail
- Concerns: Short response time (21 to 30 days), public relations, notice to insurer, litigation hold
- What to Do: Note the date and means of service, promptly alert management and counsel



Writs



- Usually used to execute on court orders or judgments
- Examples: writ of garnishment, writ of replevin
- Served by a deputy marshal or sheriff
- Concerns: avoid double exposure to property owner, comply without interrupting business
- What to Do: Note date, time, and means of service; obtain contact information from serving official; alert counsel



GARNISHMENT SUMMONS Case No. CL-2012-1234
 Commonwealth of Virginia Fairfax County Circuit Court
 4110 Chain Bridge Road, Fairfax, Virginia 22030
 COURT ADDRESS

JUDGMENT CREDITOR: ABC Corporation
 1 Pennsylvania Avenue, N.W.
 Washington, DC 20000
 Telephone No. (202) 123-4567
 JUDGMENT CREDITOR'S ATTORNEY: John Smith
 Smith & Associates LLP
 123 Queen Street, Fairfax, VA 22030
 Telephone No. (703) 123-4567

JUDGMENT DEBTOR: Jane Q. Employee
 123 Prince Street
 Fairfax, VA 22030
 Soc. Sec. No. 123-45-678
 Claimant: XYZ Association
 123 Main Street
 Fairfax, VA 22030

STATEMENT:
 Judgment Principal: \$ 987.25
 Credits: 35.41
 Interest: 126.00
 Judgment Costs: 83.50
 Attorney's Fee: _____
 Garnishment Costs: 83.50

September 14, 2012 10:00 am
RELEASED DATE AND TIME

THIS IS A GARNISHMENT AGAINST (check only one)
 the judgment debtor's wages, salary or other compensation
 some other debt due or property of the judgment debtor, specifically, _____

MAXIMUM PORTION OF DISPOSABLE EARNINGS SUBJECT TO GARNISHMENT
 Support
 50% 55% 60% 65%
(If not specified, then 50%)
 debt taxes, 100%

TOTAL BALANCE DUE \$ 1,232.16
 The garnishee shall rely on this amount.

May 25, 2012
DATE OF FILING

If none of the above are checked, then § 34-29(a) (on reverse) applies.
 TO ANY AUTHORIZED OFFICER: You are hereby commanded to serve this summons on the judgment debtor and the garnishee TO THE GARNISHEE: You are hereby commanded to (1) file a written answer with this court, or (2) deliver payment to this court, or (3) appear before this court on the return date and time shown on this summons to answer the Suggestion for Summons in Garnishment of the judgment creditor that by reason of the fact of writ of fieri facias, there is a liability as shown in the statement upon the garnishee. As garnishee, you shall withhold from the judgment debtor any sums of money to which the judgment debtor is or may be entitled from you during the period between the date of service of this summons on you and the date for your appearance in court, subject to the following limitations: (1) The maximum amount which may be garnished is the "TOTAL BALANCE DUE" as shown on this summons. (2) You shall not be liable to the judgment creditor for any property not specified in this garnishment summons. (3) If the sums of money being garnished are earnings of the judgment debtor, then the provision of "MAXIMUM PORTION OF DISPOSABLE EARNINGS SUBJECT TO GARNISHMENT" shall apply. If a garnishment summons is served on an employer having one thousand or more employees, then money to which the judgment debtor is or may be entitled from his or her employer shall be considered those wages, salaries, commissions or other earnings which, following service on the garnishee-employer, are determined and are payable to the judgment debtor under the garnishee-employer's normal payroll procedure with a reasonable time allowance for making a timely return by mail to this court.

DATE OF SERVICE OF FIDELITY _____, Clerk
 by _____ DEPUTY CLERK

DATE OF SERVICE OF WRIT OF FIERI FACIAS TO DEBTOR _____
 by _____ DEPUTY CLERK

WRIT OF FIERI FACIAS TO ANY AUTHORIZED OFFICER: You are commanded to execute this writ and to make from the intangible personal estate of the judgment debtor(s) the principal, interest, costs and attorney's fees, less credits, as shown in the Garnishment Summons. You are further commanded to make your return to the clerk's office according to law.
 Homestead Exemption Waived? Yes No Cannot be demanded

DATE _____
 by _____ DEPUTY CLERK

FORM CD-146 (MASTER, PAGE 1 OF 2) 1/97
 VA. CODE §§ 8-81-411, -512.3



Request for Information from the Government



- A broad term describing an official government request to aid in the exercise of the government's duties
- Examples: EEOC request for information; IRS request for information; request for information to individual members of regulated industries
- Concerns: can indicate government scrutiny; confidentiality or other sensitivities; legal consequences for failure to provide information; the logistics of producing information
- What to Do: treat as a subpoena; note the date and means of service, identify contact in business unit, and alert counsel; think about "why"



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
 REGION III
 1690 Arch Street
 Philadelphia, Pennsylvania 19103-2029

SEP 29 2011

Dear

Enclosed is an Information Request ("Request") issued this date by the U.S. Environmental Protection Agency ("EPA") Region III, pursuant to Section 308 of the Clean Water Act ("Act"), as amended, 33 U.S.C. § 1318. Your responses to this Request must be accompanied by a certificate that is signed and dated by you or the person who is authorized by you to respond to the Request within fifteen (15) days unless otherwise stated. The certification must state that the response is complete and contains all information and documentation available to you pursuant to the Request. Section IV, Paragraph 31 provides a Statement of Certification for this purpose.

You should carefully read the contents of the Request, and communicate to each responsible official, agent or employee the actions which each such person must take to ensure compliance with its terms. Failure to comply with the Request may result in further enforcement actions being taken, including a civil suit for penalties and injunctive relief, or a criminal prosecution as appropriate.

If you require any information or assistance regarding this matter, please contact

Sincerely,

Enclosure (1)

cc:



Government Subpoena



- A command to compel production of documents, testimony, or both, issued by a government agency, a committee of Congress, or a state legislature (as opposed to a court)
- Concerns: likely indicates government scrutiny; can implicate serious consequences, including criminal prosecution; confidentiality; consequences if failure to respond
- What to Do: note the date and means of service; alert management and counsel; think about “why”



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

SUBPOENA AND INFORMATION REQUEST

I. STATUTORY AUTHORITY

This Subpoena and Information Request is issued pursuant to the authority vested in the EPA Administrator under Section 11(c) of the Toxic Substances Control Act (“TSCA”), 15 U.S.C. § 2610(c), Section 308 of the Clean Water Act (“CWA”), 33 U.S.C. § 1318, and Section 3007 of the Resource Conservation and Recovery Act (“RCRA”), 42 U.S.C. § 6927.

II. CERTIFICATION

The information provided shall be verified by, and submitted under an authorized signature by a responsible corporate officer,¹ with the following certification:

I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, I certify that the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

III. CONFIDENTIAL INFORMATION

The information requested herein must be provided notwithstanding the possibility that the information requested may be characterized as confidential information or trade secrets. Request for confidential treatment must be made when information or access to records is provided and in accordance with the instructions provided in Section V.O below.

IV. SUBMISSION OF YOUR RESPONSE TO THE INFORMATION REQUESTED

All submissions required by this request shall be provided by December 1, 2010, and addressed to:

¹ The term “responsible corporate officer,” as used herein, means a president, secretary, treasurer, or vice-president of the corporation in charge of a principal business function, or any other person who performs similar policy or decision-making functions for the corporation.



Agent Contact/Search Warrant/ Criminal Subpoena



- Criminal, not civil or administrative in nature
- Indicates a criminal investigation is underway
- Alert management; retain experienced counsel
- Examples
 - Employee reports that an agent requested an interview
 - Employee reports he or she has been interviewed
 - Search warrant
 - Criminal subpoena requesting documents



Agent Contact



- A call or visit from a government agent, which very likely indicates government investigation of the contacted organization, a person within the organization, or another person or organization
- Concerns: risk of prosecution; risk of “*add-on*” *allegations*; details and logistics of producing information – e.g., document productions
- What to Do:
 - For employee already interviewed, request debrief
 - For employee with pending request, inform employee of his or her rights
 - Consider alerting current and/or former employees of possible agent contact and requesting that they keep organization informed



Search Warrant



- Issued by a court at the request of the government upon proof of probable cause that a crime has occurred; authorizes search of specific locations and seizure of specific objects
- Concerns: limit search/seizure to the scope of the warrant
- What to Do:
 - Ask for agent's credentials and copy of warrant; review warrant for scope
 - Escort agents; choose the route; log the documents or property seized
 - Consider securing facility and dismissing non-essential employees



Criminal Subpoena



- A subpoena issued by a court, at the request of the government, commanding the recipient to appear before the court and give testimony, produce documents, or do both in aid of a government investigation, e.g., before a grand jury.
- Concerns: possibility of being examined by a prosecutor while sworn under oath; Fifth Amendment; risk of prosecution; risk of "add-on" allegations; need to negotiate scope of any document subpoena; details of production – *document productions are critical to your credibility with the prosecutor*
- What to Do: work with counsel to prepare for (or try to avoid) testimony; establish procedures for preserving documents, especially electronic documents; possibly retain individual counsel for employees; possibly conduct internal investigation



AO 140 (Rev. 12/05) Subpoena to Testify Before Grand Jury

United States District Court
CENTRAL DISTRICT OF ILLINOIS

TO: 2006R00086/MJC
CJ-06-0123
**SUBPOENA TO TESTIFY
BEFORE GRAND JURY**

SUBPOENA FOR:
 PERSON DOCUMENT(S) OR OBJECT(S)

YOU ARE HEREBY COMMANDED to appear and testify before the Grand Jury of the United States District Court at the place, date, and time specified below.

PLACE: U.S. District Court
100 N. E. Monroe Street
Peoria Illinois
COURTROOM:
DATE AND TIME: March 16, 2006
9:00 a.m.

YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s):*

SEE ATTACHED

You are not to disclose the existence of this request as any such disclosure could impede and obstruct an ongoing federal criminal investigation. In lieu of appearing at the date, time and place indicated above, you may comply with this subpoena by mailing the records to Assistant United States Attorney Matthew J. Cannon, U.S. Attorney's Office, 1836 2nd Avenue, Rock Island, Illinois, 61201, provided you attach to the records a completed and signed declaration for custodians of records (or other persons with knowledge). A form for such a declaration is attached. Please note that the contents of the declaration must be attested to under penalty of perjury.

Please see additional information on reverse

This subpoena shall remain in effect until you are granted leave to depart by the court or by an officer acting on behalf of the court.

DATE:  JOHN M. WATERS, CLERK DATE: February 14, 2006
BY SERVICE:  NAME AND ADDRESS OF PROSECUTOR: Matthew J. Cannon, Assistant United States Attorney
1836 2nd Avenue, Rock Island IL 61201
(309) 793-3884
FAX: (309) 793-5895

*If not applicable, enter "None"



Indictment or Information



- Indictment – grand jury has found probable cause to accuse of/charge with a crime, usually a felony
- Information – government has found probable cause to accuse of/charge with a crime, sometimes a felony
- Concerns: indicates government's intent to prosecute; stigma and public relations challenges; collateral consequences, among them loss of business relationships and employee attrition; risk of "add-on" allegations
- What to Do: really it is what to continue doing (indictment or information is not often a surprise) and how to best resolve the matter





*AMJ
Dec 8, 2009*

Case 1:09-cr-00639-JFM Document 1 Filed 12/08/09 Page 1 of 9

RM:03:USAO:0098:00704

FBI
U.S. DISTRICT COURT
DISTRICT OF MARYLAND

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA :

v. :

CRIMINAL NO. *JFM-09-00639*
Conspiracy to Commit Wire Fraud
(18 U.S.C. 1349);
Wire Fraud (18 U.S.C. 1343)

Defendants. :

...000000...

INDICTMENT

The Grand Jury for the District of Maryland charges:

COUNT ONE

1. At times material to this Indictment,
2. At times material to this Indictment,
3. From in and around April 2006 until in and around February 2009, in the State and District of Maryland, the Defendants

did unlawfully, knowingly and willfully conspire and agree with each other and with others known and unknown to the Grand Jury, to commit offenses against the United States, that is: to devise a scheme and artifice to defraud individuals and lenders of money and property through materially false and fraudulent statements and misrepresentations, to be executed through the use of interstate wire transfers, in violation of 18 U.S.C. 1343.



Being Prepared – Document Retention Policy

- Inadvertent destruction of documents can carry grave consequences
- Litigation hold can be disruptive of company business
- Inefficient document hunting can be expensive
- Know where and how documents (especially electronically stored information) are maintained in your organization
- Know when and how documents and information are destroyed in your organization
- Review your document management and retention policy, or consider working with legal counsel to develop one
- Quality document policies help make for quality document productions

Being Prepared – Insurance Policy Review

- Some insurance policies provide liability insurance
- Know what types of litigation and disputes your insurance policies cover – are you comfortable?
- More broadly, do your policies cover the *risks* that you intend your policies to cover?
- Consider professional legal review of your policies and your risk management system – this itself is a form of risk management



Be Prepared – Who to Call Refresher

- Do you have and maintain an Emergency “Who to Call” List?
- Is there someone to handle litigation-based concerns on that list?
- For example, if you received a civil summons and complaint, who would you call?
- If you received word that an employee has been asked to meet with an agent about his employer, who would you call?



Closing Thoughts/Final Questions & Answers



Questions and Discussion

Venable LLP
575 7th Street, NW
Washington, DC 20004
t 202.344.4000

Jeffrey S. Tenenbaum, Esq.
jstenenbaum@Venable.com
t 202.344.8138

Caroline Petro Gately, Esq.
cpgately@Venable.com
t 202.344.4744

David L. Feinberg, Esq.
dlfeinberg@Venable.com
t 202.344.8278

To view Venable's index of articles, PowerPoint presentations, recordings, and upcoming seminars on nonprofit legal topics, see www.Venable.com/nonprofits/publications, www.Venable.com/nonprofits/recordings, www.Venable.com/nonprofits/events.



Speaker Biographies



Jeffrey S. Tenenbaum

Partner

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jstenenbaum@Venable.com

AREAS OF PRACTICE

Tax and Wealth Planning
 Antitrust
 Political Law
 Business Transactions Tax
 Tax Controversies
 Tax Policy
 Tax-Exempt Organizations
 Wealth Planning
 Regulatory

INDUSTRIES

Nonprofit Organizations and Associations
 Credit Counseling and Debt Services
 Financial Services
 Consumer Financial Protection Bureau Task Force

GOVERNMENT EXPERIENCE

Legislative Assistant, United States House of Representatives

BAR ADMISSIONS

District of Columbia

Jeffrey Tenenbaum chairs Venable's Nonprofit Organizations Practice Group. He is one of the nation's leading nonprofit attorneys, and also is an accomplished author, lecturer and commentator on nonprofit legal matters. Based in the firm's Washington, DC office, Mr. Tenenbaum counsels his clients on the broad array of legal issues affecting trade and professional associations, charities, foundations, think tanks, credit and housing counseling agencies, advocacy groups, and other nonprofit organizations, and regularly represents clients before Congress, federal and state regulatory agencies, and in connection with governmental investigations, enforcement actions, litigation, and in dealing with the media.

Mr. Tenenbaum was the 2006 recipient of the American Bar Association's Outstanding Nonprofit Lawyer of the Year Award, and was the inaugural (2004) recipient of the *Washington Business Journal's* Top Washington Lawyers Award. He was one of only seven "Leading Lawyers" in the Not-for-Profit category in the 2012 *Legal 500* rankings, and was the 2004 recipient of The Center for Association Leadership's Chairman's Award, and the 1997 recipient of the Greater Washington Society of Association Executives' Chairman's Award. Mr. Tenenbaum was a 2008-09 Fellow of the Bar Association of the District of Columbia and is AV Peer-Review Rated by *Martindale-Hubbell*. He started his career in the nonprofit community by serving as Legal Section manager at the American Society of Association Executives, following several years working on Capitol Hill.

REPRESENTATIVE CLIENTS

AARP
 American Academy of Physician Assistants
 American Association for the Advancement of Science
 American Association for Marriage and Family Therapy
 American Association of Museums
 American College of Radiology
 American Institute of Architects
 Air Conditioning Contractors of America
 American Society for Microbiology
 American Society for Training and Development
 American Society of Anesthesiologists
 American Society of Association Executives
 American Society of Civil Engineers
 American Society of Clinical Oncology
 American Staffing Association
 Associated General Contractors of America
 Association for Healthcare Philanthropy
 Association of Corporate Counsel
 Association of Private Sector Colleges and Universities
 Automotive Aftermarket Industry Association

EDUCATION

J.D., Catholic University of America, Columbus School of Law, 1996

B.A., Political Science, University of Pennsylvania, 1990

MEMBERSHIPS

American Society of Association Executives

California Society of Association Executives

New York Society of Association Executives

Brookings Institution
The College Board
Council on Foundations
Cruise Lines International Association
Foundation for the Malcolm Baldrige National Quality Award
Goodwill Industries International
Homeownership Preservation Foundation
Independent Insurance Agents and Brokers of America
Institute of International Education
LeadingAge
Lions Club International
Money Management International
National Association of Chain Drug Stores
National Athletic Trainers' Association
National Coalition for Cancer Survivorship
National Defense Industrial Association
National Fallen Firefighters Foundation
National Hot Rod Association
National Propane Gas Association
National Quality Forum
National Retail Federation
National Student Clearinghouse
National Telecommunications Cooperative Association
The Nature Conservancy
NeighborWorks America
Peterson Institute for International Economics Professional Liability Underwriting Society
Project Management Institute
Public Health Accreditation Board
Public Relations Society of America
Recording Industry Association of America
Romance Writers of America
Texas Association of School Boards
Trust for Architectural Easements
Volunteers of America

HONORS

Recognized as "Leading Lawyer" in the 2012 edition of *Legal 500*, Not-For-Profit

Listed in *The Best Lawyers in America 2012* and *2013* for Non-Profit/Charities Law, Washington, DC (Woodward/White, Inc.)

Washington DC's Legal Elite, *SmartCEO Magazine*, 2011

Fellow, Bar Association of the District of Columbia, 2008-09

Recipient, American Bar Association Outstanding Nonprofit Lawyer of the Year Award, 2006

Recipient, *Washington Business Journal* Top Washington Lawyers Award, 2004

Recipient, The Center for Association Leadership Chairman's Award, 2004

Recipient, Greater Washington Society of Association Executives Chairman's Award, 1997

Legal Section Manager / Government Affairs Issues Analyst, American Society of Association Executives, 1993-95

AV® Peer-Review Rated by *Martindale-Hubbell*

Listed in *Who's Who in American Law* and *Who's Who in America*, 2005-present editions

ACTIVITIES

Mr. Tenenbaum is an active participant in the nonprofit community who currently serves on the Editorial Advisory Board of the American Society of Association Executives' *Association Law & Policy* legal journal, the Advisory Panel of Wiley/Jossey-

Bass' *Nonprofit Business Advisor* newsletter, and the ASAE Public Policy Committee. He previously served as Chairman of the *AL&P* Editorial Advisory Board and has served on the ASAE Legal Section Council, the ASAE Association Management Company Accreditation Commission, the GWSAE Foundation Board of Trustees, the GWSAE Government and Public Affairs Advisory Council, the Federal City Club Foundation Board of Directors, and the Editorial Advisory Board of Aspen's *Nonprofit Tax & Financial Strategies* newsletter.

PUBLICATIONS

Mr. Tenenbaum is the author of the book, *Association Tax Compliance Guide*, published by the American Society of Association Executives, and is a contributor to numerous ASAE books, including *Professional Practices in Association Management*, *Association Law Compendium*, *The Power of Partnership*, *Essentials of the Profession Learning System*, *Generating and Managing Nondues Revenue in Associations*, and several Information Background Kits. He also is a contributor to *Exposed: A Legal Field Guide for Nonprofit Executives*, published by the Nonprofit Risk Management Center. In addition, he is a frequent author for ASAE and many of the other principal nonprofit industry organizations and publications, having written more than 400 articles on nonprofit legal topics.

SPEAKING ENGAGEMENTS

Mr. Tenenbaum is a frequent lecturer for ASAE and many of the major nonprofit industry organizations, conducting over 40 speaking presentations each year, including many with top Internal Revenue Service, Federal Trade Commission, U.S. Department of Justice, Federal Communications Commission, and other federal and government officials. He served on the faculty of the ASAE Virtual Law School, and is a regular commentator on nonprofit legal issues for *The New York Times*, *The Washington Post*, *Los Angeles Times*, *The Washington Times*, *The Baltimore Sun*, *Washington Business Journal*, *Legal Times*, *Association Trends*, *CEO Update*, *Forbes Magazine*, *The Chronicle of Philanthropy*, *The NonProfit Times* and other periodicals. He also has been interviewed on nonprofit legal issues on Voice of America Business Radio and Nonprofit Spark Radio.



Caroline Petro Gately

Partner

Washington, DC Office

T 202.344.4744 F 202.344.8300

cpgately@Venable.com

Caroline Petro Gately is a trial lawyer with over 20 years' experience litigating commercial transaction disputes, primarily in the real estate and commercial lending industries. As a first-chair lawyer, she has tried numerous cases to verdict or judgment in the District of Columbia, Virginia and Maryland courts, including breach of contract claims; fraud, breach of fiduciary duty, and other business torts; commercial landlord/tenant disputes; landlords' and creditors' rights in bankruptcy proceedings; insurance coverage issues; and intellectual property and unfair competition claims.

Representative clients include pension funds, banks, institutional investment advisors, national asset and property management companies, entrepreneurs, closely held companies and partnerships, franchisors, and retailers with real estate holdings. Before joining the firm, Ms. Gately was a partner at DLA Piper US LLP and an associate at Swidler & Berlin, Chtd.

AREAS OF PRACTICE

Commercial Litigation

BAR ADMISSIONS

District of Columbia

Virginia

Maryland

COURT ADMISSIONS

U.S. Supreme Court

U.S. Court of Appeals for the Fourth Circuit

U.S. Court of Appeals for the District of Columbia Circuit

U.S. Court of Appeals for the Federal Circuit

U.S. District Court for the District of Columbia

U.S. District Court for the Eastern District of Virginia

U.S. District Court for the Western District of Virginia

U.S. District Court for the District of Maryland

U.S. Bankruptcy Court for the District of Columbia

U.S. Bankruptcy Court for the Eastern District of Virginia

U.S. Bankruptcy Court for the

REPRESENTATIVE MATTERS

Real Estate and Commercial Lending Litigation

- Successfully represented numerous property owners, asset or portfolio managers, lenders, investors, developers, and commercial tenants in a broad range of real estate disputes, including lawsuits over title and easement issues, commercial landlord/tenant disputes and evictions, claims under purchase and sale agreements, landlords' and creditors' issues in bankruptcy court, real property tax sale foreclosures, commercial mortgage foreclosures, and receivership actions.
- Represented lender in foreclosure of mortgage on shopping mall securing over \$74 million debt.
- Favorably resolved participant bank's claim against lead bank for breach of loan participation agreement arising from mismanagement of asset.
- Obtained summary judgment in favor of seller of interest in apartment building against tenants' association that claimed opportunity to purchase under D.C. Rental Housing Conversion and Sale Act, which was affirmed on appeal. *Twin Towers Plaza Tenants Ass'n, Inc. v. Capitol Park Associates, L.P.*, 894 A.2d 1113 (D.C. 2006).
- Obtained judgment in favor of D.C. real property tax sale purchaser, conveying title to real property, after three-year litigation against other stakeholders.
- Collected 100% of principal due and accrued interest on unsecured business loan (total recovery over \$5 million), as a result of fraudulent transfer action for diversion of company assets to insider.
- Represented public pension fund in highly profitable liquidation of \$500,000,000 portfolio of distressed assets in the mid-Atlantic region, involving litigation of

Western District of Virginia
U.S. Bankruptcy Court for the
District of Maryland

EDUCATION

J.D., University of Michigan Law
School, 1989

A.B., *cum laude*, Princeton
University, 1986

broad range of commercial real estate and bankruptcy issues, including bad faith bankruptcy filing.

Intellectual Property and Unfair Competition Claims

- Representing company in trademark infringement and unfair competition claims against former owners.
- Won motion to dismiss complaint for patent infringement of method patent known as “JPEG-on-a-Website,” which was affirmed on appeal. *Global Patent Holdings, LLC v. Panthers BRHC LLC d/b/a The Boca Raton Resort & Club*, 586 F. Supp. 2d 1331 (S.D. Fla. 2008), *aff’d*, No. 2008-1588, 318 Fed. Appx. 908, 2009 WL 886300 (Fed. Cir. 2009).
- Obtained summary judgment on trademark infringement claim, which was affirmed on appeal. *Dick’s Sporting Goods, Inc. v. Dick’s Clothing and Sporting Goods, Inc.*, 188 F.3d 501, 1999 WL 639165 (4th Cir. 1999).

Owner-to-Owner Disputes

- Representing company in lawsuit with former shareholders over disputes arising from redemption of shareholder interests.
- Obtained arbitration award granting damages and equitable relief in favor of minority partners in cogeneration project against managing partner for breach of fiduciary duty and partnership agreement claims arising from diversion of company assets.

General Business-to-Business Disputes

- Obtained defense judgment in favor of trade association in action by former member alleging defamation and malicious civil prosecution.
- Successfully resolved claim of international manufacturer of generic pharmaceuticals in breach of contract action against international branded manufacturer.
- Obtained dismissal of substantially all claims in complaint in connection with wholesale purchase and sale of coal. *A.T. Massey Coal Co., Inc. v. Rudimex GmbH*, 2006 WL 44278 (E.D. Va. 2006).

ACTIVITIES

Throughout her career, Ms. Gately has been active in firm and community leadership. She has held various positions including Diversity Ombudsman, Chair of Associate Litigation Trial Skills Training and Development Program, Hiring Committee Member, Office Pro Bono Attorney Coordinator, Pro Bono Committee Member, Summer Program Coordinating Attorney. Ms. Gately’s professional activities outside the firm include the following:

- The Fishing School, Inc., Board of Directors (2010-present)
- Women’s Bar Association Foundation, President (2001-2002), Vice President (2000-2001), Board of Directors (1999-2002)
- Office of the Inspector General for the DC Department of Corrections, Training instructor on sexual harassment and retaliation (2002-2005)
- Pro bono representation as guardian *ad litem* in child abuse and neglect proceedings, District of Columbia Superior Court

RECOGNITIONS

Benchmark Litigation, 2012 “Rising Star” in Washington, D.C. market

SPEAKING ENGAGEMENTS

- Bankruptcy Issues Frequently Arising in Real Estate Transactions
- Best Practices: Tips for Property Managers Handling Tenant Defaults



David L. Feinberg

Associate

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AREAS OF PRACTICE

Environmental Law
Environmental Crimes Defense
Insurance
Insurance Coverage and Disputes

BAR ADMISSIONS

District of Columbia
Maryland
Massachusetts (inactive)

COURT ADMISSIONS

U.S. District Court for the District of Columbia
U.S. District Court of the District of Maryland
U.S. Court of Appeals for the Fourth Circuit

EDUCATION

J.D., University of Virginia School of Law, 2006
Dillard Fellow
Editorial Board, *Virginia Journal of Social Policy & the Law*
Editorial Board, *Virginia Law and Business Review*
Captain, ATLA Trial Advocacy

Mr. Feinberg is a litigator focusing his practice on business disputes, insurance coverage matters, and environmental claims.

He began his career as a trial court clerk and litigates cases with an eye towards taking them to trial.

He litigates disputes for business clients of all sizes and across a broad spectrum of issues. He has handled commercial and contract litigation, limited liability company disputes and disputes concerning property damage resulting from commercial real estate construction.

He also concentrates his practice on the zealous pursuit of insurance coverage for insureds. He helps insureds perfect their claims and solves coverage disputes on favorable terms either through litigation or through settlement. His experience includes handling claims and coverage matters for clients holding property, environmental, commercial general liability, and errors and omissions policies. He has handled claims and coverage matters for a client located in the hospitality industry, a Fortune-listed national home builder, and one of the Washington, DC area's largest public transportation entities.

His experience handling environmental matters includes both plaintiff-side and defendant-side work. Most recently, he has defended high-stakes civil suits for alleged violations of federal law. His experience also includes defending corporations and individuals who are subjects of administrative enforcement actions or are under investigation for possible environmental crimes. He also has assisted his corporate clients by conducting internal investigations concerning potential environmental violations.

SIGNIFICANT MATTERS

His significant matters include the following:

- Defending a Fortune-listed national home builder in coverage litigation;
- Defending one of the leading agribusiness companies in a high-stakes Clean Water Act citizen suit;
- Defending a leading manufacturer of farm equipment against allegations of environmental violations;
- Representing a party in a polar bear Endangered Species Act multi-district litigation; and
- Conducting an internal investigation of allegations of environmental violations and cover-up at a Fortune 100 company.

As a third-year law student at the University of Virginia, he worked for the Commonwealth Attorney's Office in Charlottesville and tried numerous trials to successful conclusions.

Team

M.T.S., Emory University, 2003

Master of Theological Studies
Scholarship

A.B., Bowdoin College, 1999

JUDICIAL CLERKSHIPS

Honorable Benson E. Legg, U.S.
District Court for the District of
Maryland

ACTIVITIES

Feinberg is actively involved in the firm's recruiting efforts and is a coordinator of the firm's summer associate program.

He maintains a vigorous pro bono practice, and in 2011 was named a Benjamin R. Civiletti Pro Bono Lawyer of the Year. He regularly works with an organization providing foster home care in the Baltimore, Maryland area.

He has been an avid soccer player for more than thirty years and regularly plays in leagues all around the Washington, DC area.

PUBLICATIONS

"Hurricane Katrina and the Public Health Based Argument for Greater Federal Involvement in Disaster Preparedness and Response," 13 Va. J. Soc. Pol'y & L. 596 (2006).

- February 16, 2010, Look Before You Leap: DPAs, NPAs, And The Environmental Criminal Case, *ALI-ABA Business Law Course Materials Journal*
- May 2, 2008, To Voluntarily Disclose Or Not: That Is Still The Question For Regulated Businesses, *Legal Background*
- April 2008, Look Before You Leap - DPAs, NPAs, and the Environmental Criminal Case, *Environmental Enforcement Crimes Committee*

SPEAKING ENGAGEMENTS

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

Additional Information

Articles

August 31, 2012

When Associations Attack: Beware Standing and Other Pitfalls When Suing on Behalf of Members

Related Topic Area(s): Antitrust and Trade Regulation, Miscellaneous

If you are an in-house lawyer for a trade or professional association, you probably spend a good amount of your time counseling the association and its members on the importance of complying with government regulations, industry-specific laws, and laws of general applicability, such as the antitrust laws. On occasion, however, the circumstances may flip, with members pushing your association to file a lawsuit on behalf of members – perhaps to challenge a government regulation or to protect members from a perceived competitive threat. How should you counsel your association in these situations? On the one hand, you are sensitive to member needs and pressure. On the other, pursuing litigation is costly and time consuming, and may expose your association and its members to potential counterattacks. Balancing these interests is often a complex task.

For those associations looking for an excuse not to pursue litigation, a recent federal district court case, *Association of Independent Gas Station Owners v. Quiktrip Corp.*, No. 4:11CV2083 (E.D. Mo. July 20, 2012), reaffirms the high jurisdictional bar that associations face when bringing suit on behalf of members. This article provides a brief overview of the case along with practical guidance for associations considering (or trying to avoid) litigation on behalf of their members.

High Bar for Representational Standing

As with all litigants, an association may bring a lawsuit in court only if it has standing – meaning the association must demonstrate to the court that it has suffered injury in fact, that the injury is fairly traceable to the defendant, and that the injury will likely be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992); *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471-472 (1982). An association may sue on its own behalf if it has suffered an injury, or the association may, under certain circumstances, sue in a representational capacity on behalf of its members.

The U.S. Supreme Court has held that an association has standing to sue on behalf of its members only if the following conditions are met: (1) the association's members would otherwise have standing in their own right, (2) the interest the association is seeking to protect is germane to the association's purpose, and (3) neither the claim asserted, nor the relief requested, requires participation of individual members in the lawsuit. *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333 (1977). As demonstrated in *Association of Independent Gas Owners*, meeting this standard is often a challenge for associations.

In the case, the plaintiff trade association, which represented independent retail gas stations, filed suit on behalf of its members against QuikTrip, a retail gas station operator that allegedly violated the antitrust laws in its effort to dominate the St. Louis market for the distribution of gasoline. The court dismissed the association's complaint for lack of either individual or representational standing.

First, the association lacked individual standing because it did not operate retail gas stations and therefore was not injured by the defendant's alleged predatory pricing. Second, the court held that the association could not satisfy the second and third *Hunt* factors for representational standing. According to the court, the association failed to present evidence showing that the lawsuit was germane to the association's purpose. Finally, with respect to the third *Hunt* factor, the court found that the association's claim required the participation of individual members because the complaint alleged that members suffered varying degrees of injury. *Compare to Nat'l Office Mach. Dealers Ass'n v. Monroe, the Calculator Co.*, 484 F. Supp. 1306 (N.D. Ill. 1980) (finding the challenged conduct to be "equally applicable and equally detrimental" to all of the association's members).

AUTHORS

Jeffrey S. Tenenbaum
Andrew E. Bigart

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Lessons Learned (or How to Avoid Unnecessary Headaches)

For in-house counsel looking to caution members on the wisdom of pursuing litigation, *Association of Independent Gas Owners* reaffirms the high bar that associations face to establish representational standing. From the association's perspective, this is not always such a bad thing. Litigation is costly, time consuming, and redirects association resources that would otherwise be used in furtherance of the association's purposes.

To the extent that your association decides to move forward with litigation, you should keep the following points in mind as you put together the complaint and craft a litigation strategy. First, confer with association management to confirm that the litigation is in the best interests of the association, notwithstanding member pressure. As part of this analysis, you should explore whether there are less aggressive ways to resolve the proposed litigation. Maybe you could lobby federal or state legislators or regulators to reconsider a troubling law or regulation. Or, for example, if you are contemplating an antitrust complaint, maybe you could interest a federal or state antitrust enforcement agency to do the heavy lifting by opening an investigation. (Under the *Noerr-Pennington* doctrine, joint efforts to influence public officials do not violate the antitrust laws, even if intended to eliminate competition. *United Mine Workers of America v. Pennington*, 381 U.S. 657, 670 (1965)). You also should review the association's articles of incorporation, bylaws, internal policies and procedures, federal tax exemption recognition application and annual IRS forms 990, and other organizational documents to determine whether the litigation falls within the organization's mission and purposes. The association should document, whether through meeting minutes or otherwise, any decision to pursue litigation, including how such pursuit will further the association's mission and purposes.

Second, once the decision is made to file a complaint, work with management and outside counsel to develop an organized litigation strategy and budget. In addition to addressing litigation tactics, the plan should provide for a media strategy, address document preservation requirements, and ensure that the association informs relevant employees of the nature of the litigation, their potential roles, and what to expect moving forward.

Third, following *Association of Independent Gas Owners*, make sure to draft your complaint carefully to tie the association's mission and purposes to the lawsuit. In *Association of Independent Gas Owners*, the association very well may have filed suit to protect members from a legitimate competitive threat. The association's complaint, however, did not provide the court with sufficient factual information regarding the association or its members to establish standing, *i.e.*, "the number of members it has, the location of these members, the types of gas stations owned by its members, or what general interests its organization seeks to serve." It also might help to explain that the alleged injury applies equally to all members.

Finally, before pulling the trigger, make sure that your association's house is in order and that filing the complaint will not expose your association and/or its members to counterclaims, such as product disparagement, defamation, trade libel, or other unfair trade and antitrust allegations. In this regard, make sure to counsel your association that offense is not always the best defense.

By Jeffrey S. Tenenbaum, Esq. and Andrew E. Bigart, Esq.¹

* * * * *

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This article is not intended to provide legal advice or opinion and should not be relied on as such. Legal advice can only be provided in response to a specific fact situation.

¹ Jeffrey S. Tenenbaum chairs Venable's Nonprofit Organizations Practice Group. Andrew E. Bigart is an associate in Venable's Washington, D.C. office, where he focuses on antitrust and trade regulation.

AUTHORS

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- Frequently Asked Questions & Answers about Records and Information Management

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July 2010

Are You Protected? Frequently Asked Questions & Answers about Records and Information Management

Related Topic Area(s): Corporate Governance

At a time when business requirements have driven the number, formats and types of records to record levels, the risks associated with ineffective management of an organization's records are far higher than ever before. Having a comprehensive policy, schedule of records, procedures and IT systems in place to effectively manage your organization's records is now, more than ever, a critical business function.

What is records and electronic information management?

Records management is the application of systematic controls to all recorded information generated in the operation of an organization's business. The goal of a records management program is to manage cost (typically the cost of storage) as well as risk (the risk of not having records available in case of litigation or a government inquiry or the risk of keeping too many records and increasing potential liability). It involves managing the creation, maintenance, use, storage and disposition of hard-copy records and electronically stored information ("ESI").

Why should my organization spend resources on a records management program?

An effective records management program can support your organization's goals by limiting risks and controlling costs in the following ways:

- Lowering costs of records storage;
- Assuring continuity of business functions in the event of a disaster;
- Protecting against privacy violations resulting from inappropriate access to data or disclosure of data, and;
- Avoiding substantial fines and penalties for discovery failures (in civil or administrative cases) or criminal sanctions for obstruction of justice (in government investigations).

A properly drafted records management policy, addressing all relevant records and ESI, and consistently applied throughout the enterprise, will ensure that documents which should be produced in litigation are available to be produced, and that those records which are not available due to the routine, consistent operation of the policy and procedures prior to notice of the threat of litigation do not become the subject of civil sanctions or a separate criminal inquiry.

Is my organization at risk because we don't have an effective records management policy and program?

Yes. A robust records management program has long been an important internal control for managing both the costs of storage and risks associated with an organization's records. Changes to the Federal Rules of Civil Procedure, which went into effect on December 1, 2006, explicitly extend an organization's obligations to preserve and produce records in federal litigation to all electronic information, and recent cases have deemed companies' production obligations to include metadata associated with electronic records. The obligations to implement effective systems to comply with the new federal rules run to senior corporate officers; failure to adopt effective systems to manage and produce records as required may subject responsible corporate officers to questioning about corporate records management systems, and may lead to fines and other sanctions against the organization. Likewise, an amendment to the federal criminal obstruction of justice statutes included in the Sarbanes-Oxley Act, effective July 2002, makes it a crime to knowingly destroy, alter or modify any document with the intention of obstructing a matter within the jurisdiction of an agency of the federal government, where such matter is pending, imminent or contemplated. Case law has already established that this language is broad enough to encompass any area of federal interest or activity, and extending potential criminal exposure to circumstances where a matter within the government's jurisdiction is contemplated makes determining the boundaries of proper corporate conduct challenging, to say the least

How much will it cost to implement a records management policy/program?

Not surprisingly, that depends. The wide range of costs associated with developing a records management program (including a policy and schedule of records) are based on a variety of factors: the number, diversity and storage media of the organization's records, whether new technology solutions are needed, staffing resources to be committed, and employee training.

What kinds of questions should we be thinking about?

Some of the questions you should be asking include:

- Does my company have a policy in place, and a complete schedule of records, that may simply need updating, or do we need to create a policy, schedule and program from scratch?
- Apart from the company's policy, what are our current practices when it comes to handling records?
- Approximately how many kinds of records are created, used, received and stored by my organization, and in what formats?
- What kind of resources does my company plan to commit to records management?
- What is my company's regulatory and risk environment? For example, is my company publicly traded or privately held, does it do business in a highly regulated part of the market (e.g., is the company subject to environmental regulation, OSHA, banking regulation or self-regulation via a trade association)? In how many states does my company have offices? Do we produce products that are potentially subject to product liability lawsuits?

Why shouldn't my organization use the records management policy that I found on the Internet (or in a book or at a seminar)?

There really is no "one-size-fits-all" policy for managing records. A records management policy that is not based upon a proper assessment of how your organization actually uses the information it handles, the risk environment in which it operates, and the IT challenges and resources available is not likely to satisfy your company's unique needs, or provide adequate protection against various risks associated with records management. Each company faces its own set of records management challenges stemming from, among other factors, its information technology architecture, the legal and regulatory environment in which it operates, and the organization's culture and goals. The development of an effective records management program for your company should account for these and other factors that make your company unique.

We already have an automated technology solution for records management, so why do we need a records management policy/program?

Records management technology should be implemented according to a broader records management policy governing all of the organization's records, whether hard copy documents or electronically-stored information, because a records management policy provides the most protection where all of the organization's records are managed according to consistent, objective and neutral criteria. A policy and a program that together address issues such as litigation hold procedures, offline sources of information, and crisis situations, created with your company's needs in mind will help "fill the gaps" left by your technology solution.

Third parties (vendors, business partners, etc.) handle our data, so why do we need a records management policy?

Your company's data is valuable and may contain confidential personal or trade secrets information. Third-party management of your company's records presents a number of risks in terms of safety and record retention. Trade secrets, competitive commercial information, and sensitive personal and financial information must be managed in a way that is consistent with applicable privacy rights, data security laws and other legal obligations, as well as the obligation to protect your business processes and intellectual property. A records management policy can help your company meet its obligations in this respect by addressing issues related to the transfer of data to the third party, allowing your company to assess the third party's records management practices, and focusing counsel on records management issues when negotiating and reviewing contracts with third-party vendors.

We already have a records management policy. Does it need to be updated? If so, how often do we need to update our existing records management policy/program?

A company should review its records management policy and retention schedule annually, and update them whenever it appears necessary. Updates should address changes in applicable legal requirements as well as any shifts in the types and functions of information that your company uses. Updating the policy and retention schedule to reflect changes in the company's business and the regulatory environment may highlight the need for new technology solutions, new procedures or staffing changes for records management. The review process should extend to the practices of third-party vendors who handle your organization's records. Fundamentally, the review process should include an evaluation of

compliance with your policy and management program, and the updates should be designed to keep the policy, procedures and technology current with the company's practices and risk environment.

How do I decide which records should be subject to the records management program?

Typically, you should try to identify each and every kind of record that your organization creates, uses, receives, or maintains. The resulting "schedule of records" should identify records as either temporary or permanent, set the period for retaining each record or category of records, and provide instructions for the disposition of records. The schedule of records should be administered according to the principles set forth in a company's records management policy. Retention periods should be based upon the functional needs of the business and relevant state and federal law.

Who should be responsible for records management in our organization?

This depends upon your company's needs and resources. Management may decide to use existing staff (General Counsel's office, HR, IT, etc.) to perform records management responsibilities, or, in cases where the records management tasks and resources available are more extensive, to make records management the responsibility of a records management professional or a separate organizational unit. Every records management program needs leadership from management, input from all departments, the involvement of legal counsel, and compliance training and incentives for rank and file employees.

Legal Quick Hit: Privilege Considerations for Nonprofit In-House Counsel

MODERATOR: JEFF TENNENBAUM
PRESENTERS: WARREN HAMEL
VICTORIA DANTA

TUESDAY, SEPTEMBER 11, 2012



Agenda

- The Basics
 - What is the attorney-client privilege?
 - What is the attorney work-product doctrine?
 - How do they differ?
- Special Considerations for Nonprofit In-House Counsel
 - The impact of affiliate/subsidiary relationships
 - Who is the “client?”
 - Examples and explanations



The Basics

- Proposed Rule of Evidence 503(b) (1972): A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purposes of facilitating the rendition of professional legal services to the client
- Two kinds of protection:
 - *Attorney-client privilege*: In general, protects confidential communications between a client or an agent of the client and an attorney made for the purpose of seeking or obtaining legal advice
 - *Attorney work-product doctrine*: Protects work product created by the attorney or by the client in anticipation of litigation

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The Basics

The Attorney-Client Privilege

- Key Policy: To encourage full and frank disclosure by a client to an attorney so the attorney can provide sound and informed legal advice
- *The privilege exists to protect not only the giving of professional advice to those who can act on it, but also the giving of information to the lawyer to enable him [or her] to give sound and informed advice.*
 - Upjohn Co. v. U.S., 449 U.S. 383, 389-91 (1981)
- *The attorney-client privilege is designed “to facilitate the administration of justice,” in order to “promote freedom of consultation of legal advisors by clients.”*

- Natta v. Hogan, 392 F.2d 686, 691 (10th Cir. 1968)

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The Basics

The Attorney-Client Privilege (Cont.)

- Four Key Elements:

1 A communication

2 Among privileged persons

3 Made in confidence

4 For the purpose of seeking or obtaining legal assistance

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The Basics

The Attorney-Client Privilege (Cont.)

- What is a “Communication?”

- Any expression through which a privileged person undertakes to convey information to another privileged person OR any document or record conveying such an expression
- Communications can be in ANY FORM

- Who are “Privileged Persons?”

- For example,
 - The client
 - The client’s agents for communication
 - The lawyer
 - The lawyer’s agents for communication

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The Basics

The Attorney-Client Privilege (Cont.)

- Is the communication made “in confidence?”
 - The communicating party must reasonably believe that no one other than a privileged person will learn its contents
 - Intent = relevant, but ≠ determinative
 - A “practical” requirement
- “For the purposes of seeking or obtaining legal advice?”
 - Business or other non-legal advice is not protected
 - Consider:
 - The relationship between the privileged parties
 - Whether a lawyer is drawing on his or her expertise in advising the client
 - Whether the lawyer’s training adds value

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The Basics

Legal Advice v. Business Advice

- Does the nature of the task change the privilege?
 - “Can we execute on business strategy?”
 - “What is the likelihood of litigation or an enforcement action?”
- Internal investigations
- Responses to whistleblower allegations

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The Basics

The Attorney Work-Product Doctrine

- Provides qualified protection from discovery in a civil action when materials are:
 - Documents and tangible things that are otherwise discoverable
 - Prepared in anticipation of litigation or for trial
 - By or for another party, or by or for that other party's representative
- To overcome the doctrine, the party seeking discovery must show:
 - A substantial need for the materials; and
 - That there is no other way to obtain the information or its equivalent without substantial hardship

- Fed. R. Civ. P. 26(b)(3)

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The Basics

The Attorney Work-Product Doctrine (Cont.)

- “Opinion” work product is protected, e.g.,
 - Theories
 - Analyses
 - Thoughts
 - Mental impressions
 - Conclusions
 - Options for consideration
- Examples:
 - Witness outlines
 - Witness memoranda
 - Compilations of otherwise non-privileged documents or records

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Special Considerations for Nonprofit In-House Counsel

Who Is the “Client” for Purposes of Privilege Considerations?

- Often said that the “entity” is the “client,” but this can obscure rather than clarify which individuals (or groups of individuals) are, in effect, the client for purposes of advice, counsel, and privilege.
- Consider:
 - Officers
 - Board Members
 - Audit Committee
 - Employees
 - Independent Contractors
 - Consultants



Special Considerations for Nonprofit In-House Counsel

Who Is the “Client” for Purposes of Privilege Considerations?
(Cont.)

- Ask:
 - What is the role of the individual seeking advice? Giving advice?
 - What kinds of information are being communicated?
 - What is the subject matter of the advice sought? The advice given?
 - Is the person within the “control group?”
 - Will disclosure constitute a “waiver” of the privilege?
- Special considerations for organizational employees
 - Upjohn / “Corporate Miranda” warnings
 - “Do I need a lawyer?”
 - Always be on the look-out for actual or potential conflicts of interest!



Special Considerations for Nonprofit In-House Counsel

Protecting Your Organization and Protecting Yourself

- When asked for advice, always have a clear understanding of the requestor's objectives, as well as his or her role *vis-à-vis* your organization
- Is the request for advice made on behalf of the organization, or does it implicate the requestor's individual interests? Both? Are there actual or potential conflicts of interest?
- Is there a potential to "waive" or weaken your organization's assertion of the attorney-client privilege or attorney work-product protection?



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Special Considerations for Nonprofit In-House Counsel

Impact of Parent/Subsidiary Relationships

- Nonprofit organizations that demonstrate sufficient interrelatedness can be treated as one entity for purposes of the attorney-client privilege. The organizations must be closely affiliated or under common ownership and share a common legal interest
- Ask:
 - Do the nonprofit organizations operate, in effect, as a single entity?
 - What is the basis for the assertion of privilege?
 - Who is seeking discovery and for what purpose?



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Questions?

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Baby Steps, Big Consequences: How Minimal Efforts Can Maximize Nonprofits' Insurance Coverage



June 7, 2012

ASAE Finance, HR & Business Operations Conference

David (D.S.) Gray | Aaron S. Merki



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Our (Expected) Journey

- I. Why We Need to Walk: Understanding a Nonprofit's Need for Insurance
- II. What Steps Are Available to Us: Assessing a Nonprofit's Insurance Needs
- III. Who Should Walk on Behalf of Us and for Us: Identifies Insured Persons and Entities
- IV. How Far We Need to Walk: Insurance and Geography
- V. Keeping In Step: Reconsidering Insurance-related Choices
- VI. Keeping In Step: Satisfying Your Obligations
- VII. Conclusion/Question and Answer Session

Why We Need to Walk: Understanding a Nonprofit's Need for Insurance

Obvious Answer:

To protect against risks.

- First line of defense
 - Reasonably expected risks associated with “third parties” (generally, losses by someone other than the “insured”)
 - Reasonably expected risks associated with “first parties” (generally, losses by the “insured”)

- Last line of defense
 - Tiers of insurance
 - Umbrella policies

3

Why We Need to Walk: Understanding a Nonprofit's Need for Insurance

Not So Obvious Answers:

There may be legal obligations.

- Automobile Liability
- Workers' Compensation
- Contractual Obligations

4

Why We Need to Walk: Understanding a Nonprofit's Need for Insurance

It makes business sense to have comprehensive coverage.

- Protects your organization against catastrophic loss
- Protects your organization against unforeseeable loss
- Protects your people
- Attracts and keeps qualified board members, directors, and officers

Litigation follows success.

5

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Why We Need to Walk: Understanding a Nonprofit's Need for Insurance

One size does not fit all.

- “CGLs”
- “Blanket” Policies
- “All Risk” Policies
- “Nonprofit Organization” Policies



Policies should be relatively, but realistically, custom-fitted.

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Why We Need to Walk: Understanding a Nonprofit's Need for Insurance

Spending more does not equal better coverage.

Insurance is part of an ongoing, self-evaluative process.

A nonprofit that does not understand its policies cannot protect against its risks.

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What Steps are Available to Us: Assessing a Nonprofit's Insurance Needs

- Automobile
- Commercial General Liability
- Directors & Officers
- Errors & Omissions
- ERISA/Fiduciary



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What Steps are Available to Us: Assessing a Nonprofit's Insurance Needs

- Employee Dishonesty/Fidelity
- Property Damage
- Umbrella
- Workers' Compensation
- Specialty Policies



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Specialty Policies That Have Drawn an Increasing Amount of Attention

Three types of policies that we increasingly see:

- Cyber-security Policies
- Kidnapping Policies
- Expanded Commercial Auto Coverage

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Insurance Coverage for Cyber-Risky Business

In an ever-increasingly technology-centered world, the risks associated with data storage and loss – either by accident or as a result of criminal activity – is very real.

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Specific Cyber-risks

Potential injuries that can result from cyber-security breaches include:

- The compromise of customer financial security through disclosure of personal information
- Lost profits
- Invasions of privacy

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Kidnapping and Ransom

In an increasingly perilous and globalized world, with employees routinely traveling internationally, it is important to consider the realistic dangers posed to you and your employees as a result of international kidnapping and ransom demands.



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Commercial Auto

Organizations have similar auto coverage needs as individuals—liability, collision, comprehensive, medical payments, and coverage for uninsured motorists.

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Who Should Walk on Behalf of Us: Identifying Insured Persons and Entities

You should be the insured.

- Use the legal name for your nonprofit organization.
 - If you use a trade name, a street name, or some other identifier, your applications and your policies also should reflect that name.
 - If your nonprofit organization changes its name, be sure that your applications and your policies reflect that change.

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Who Should Walk on Behalf of Us: Identifying Insured Persons and Entities

- Do not assume that your insurers know who “you” are.
 - Subsidiary organizations
 - Parent organizations
 - Affiliated organizations
 - Member organizations
 - Committees
 - Branches

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Who Should Walk on Behalf of Us: Identifying Insured Persons and Entities

- Do not assume that your insurers know who your “directors and officers” are.
 - Boards of directors
 - Boards of trustees
 - Those with dual responsibilities
 - Shareholders
 - Managers
 - Officers
 - Spouses

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Who Should Walk on Behalf of Us: Identifying Insured Persons and Entities

- Do not assume that your insurers know what your “directors and officers” expect.
 - Right to retain (and duty to pay) counsel
 - Conflicts of interest
 - Personal indemnification
 - Intersection with articles of incorporation, bylaws, and other issues of corporate governance

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Who Should Walk on Behalf of Us: Identifying Insured Persons and Entities

- Do not assume that your insurers know who your “people” are.
 - Employees
 - Volunteers
 - Students Earning Credit
 - Interns
 - Contractors

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Who Should Walk on Behalf of Us: Identifying Insured Persons and Entities

Additional Insureds

- Subsidiary, Parent, and Affiliated Organizations
- Independent Contractors
- Co-Venturers
- Government Agencies
- Venues and Related Entities
- Other Contractual Obligations
- Other Drivers (Automobile Policies)

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Who Should Walk on Behalf of Us: Identifying Insured Persons and Entities



You need to
be involved in
that
determination.

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Who Should Walk on Behalf of Us: Identifying Insured Persons and Entities

**Your qualified insurance broker needs to be involved in
that determination.**

- Understanding your organization
- Understanding your goals
- Understanding your business

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Who Should Walk on Behalf of Us: Identifying Insured Persons and Entities

Your qualified insurance broker needs to be involved in that determination.

- Frankly assessing your potential liabilities
- Helping you address potential liabilities, to the extent possible
- Helping you achieve an optimal level of coverage

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Who Should Walk on Behalf of Us: Identifying Insured Persons and Entities

- Your insurance carriers should be involved in that determination.
- Coverage counsel also can help address your concerns about various issues.
 - Scope of the coverage provided
 - Who may be an insured
 - What potential liabilities may be excluded

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How Far We Need to Walk: Insurance and Geography

- Where have your activities been?
- Where are your activities now?
- Where will your activities be during the policy period? The foreseeable future?

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Keeping In Step: Reconsidering Insurance-related Choices

First Steps

- What are your risks? How do you intend to account for them if “disaster strikes?”
- What are your needs? What role, if any, does insurance play?
- Who are your people and what do they do? What coverage, if any, is provided for their activities?
- What are your goals?

Warning: Don't stop there!

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Keeping In Step: Reconsidering Insurance-related Choices

Keep Stepping

- Ongoing, continuous, thoughtful self-evaluations
- Reconsidering risks as activities (and potential liabilities) expand
- Learning from your own claim history

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Keeping In Step: Reconsidering Insurance-related Choices

Keep Stepping

- Monitoring fellow nonprofits and claims filed against them
- Monitoring potential plaintiffs, potential claimants, and their counsel
- Monitoring significant legal developments that affect the kinds and amount of potential liability

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Keeping In Step: Reconsidering Insurance-related Choices

Re-evaluating Where You Are and Where You Want To Go

- You must keep track of your “policy periods.”
- It is reasonable to expect an insurance agent to monitor the end of a policy period, but this is not a delegable responsibility.
- Calendar expirations of insurance policies just like any other deadlines.
- Be sure to include sufficient time to reassess your risks, needs, people, and goals before time runs out on your policies.

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Keeping In Step: Reconsidering Insurance-related Choices

- **Closely monitor your “renewed” policies and consider how they change or impact.**
 - Coverage
 - Insureds
 - Endorsements
 - Exclusions
 - Conditions

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Keeping in Step: Satisfying Your Obligations

You should consider insurance to be part of a risk management program, not the risk management program.



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Keeping in Step: Satisfying Your Obligations

Identify and address risks that you can eliminate.

- Unprofitable activities that do not warrant investment of insurance
- Unprofitable activities that cannot be insured
- Unprofitable activities that cannot be *reasonably* insured

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Keeping in Step: Satisfying Your Obligations

Identify risks that you can limit.

- Establish and enforce clear employee guidelines.
 - Can reduce litigation and your premiums.
 - Help account for potential risks and liabilities as part of your assessments.

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Keeping in Step: Satisfying Your Obligations

Raise awareness about potential liabilities.

- Defensive driving classes for employees who operate organization vehicles
- Harassment training
- Lunch-and-learns
- Sharing risk-related information from your broker, counsel, and other sources of information about potential liabilities

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Keeping in Step: Satisfying Your Obligations

Take a hard look at the risks that you can and want to insure. Then look again.

- Assess (and reassess) what you consider important.
 - Past
 - Present
 - Future

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Keeping in Step: Satisfying Your Obligations

Assess (and reassess) what risks your organization faces and potential liabilities associated with those risks.

- Organization's risk history
- Comparable organizations' risk histories
- Legislative environment
- Regulatory environment
- Legal environment
- Risks posed by advocacy groups

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Keeping in Step: Satisfying Your Obligations

Assess (and reassess) changes to the policies.

- Understand them
 - Match your coverage with your risks
 - Match your coverage with your insureds
 - Ensure the coverage provided meets your realized risks and potential liabilities
 - Ensure the coverage provided extends to the right people
- Keep them

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Keeping in Step: Satisfying Your Obligations

Common Exclusions

- Exclusions explicitly preclude insurance coverage for losses arising from certain conduct, activities or circumstances
 - “We will defend against and indemnify you against certain kinds of losses, but...”
 - They vary, somewhat, from policy to policy and insurer to insurer
 - The effect that any given exclusion will have on your organization depends on, among other things, the risks that your organization faces

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Keeping in Step: Satisfying Your Obligations

Safe Harbors

Sometimes insurers provide a respite from broad exclusions—sometimes with, sometimes without an additional premium.

Safe harbors can mean the difference between no coverage for certain risks and conditional coverage for certain risks.



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Keeping in Step: Satisfying Your Obligations

Safe Harbors

Dishonesty exclusion

Example: “This policy excludes coverage for loss arising from an insured’s dishonest, fraudulent or criminal acts or omissions. If a claim would invoke the insurer’s duty to defend but for the allegations, then the insurer will defend the claim until there is a final adjudication by a factfinder, or admission by the insured...”

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Keeping in Step: Satisfying Your Obligations

Safe Harbors

Intentional acts exclusion

Example: “This policy excludes coverage for loss arising from acts expected or intended to cause property damage or bodily harm, except that this exclusion does not pertain to any Wrongful Acts as defined by this policy.”

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Keeping in Step: Satisfying Your Obligations

Conditions

- Even if a “covered event” occurs and even if no exclusions apply, the insurer’s assistance can be lost
 - Also vary, somewhat, from policy to policy and insurer to insurer
 - Duty to report potentially covered event promptly and/or within a certain number of days
 - Duty to cooperate with the insurance company

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Conclusion

- **The Big Ideas:**

- Know your *types* of policies
- Know *your* policies
- Evaluate your risks and coverages on an *ongoing, continuous* basis.

- **Executing on Those Ideas:**

- Use the checklist



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