

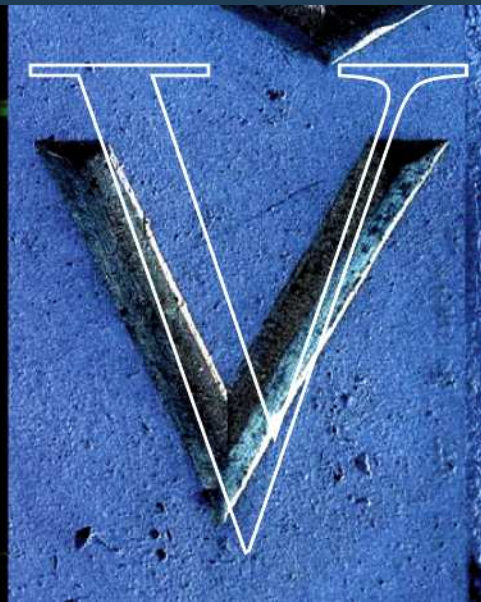
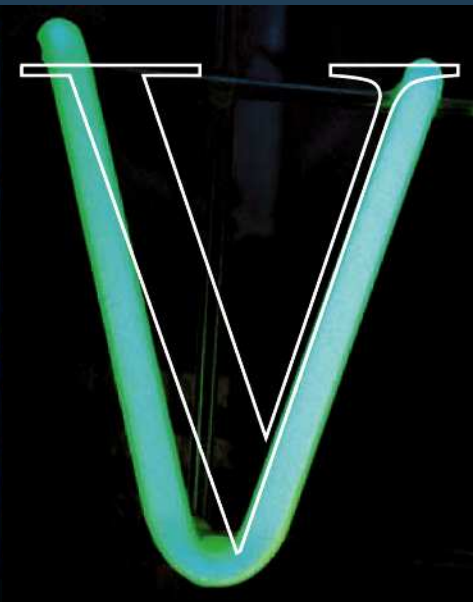
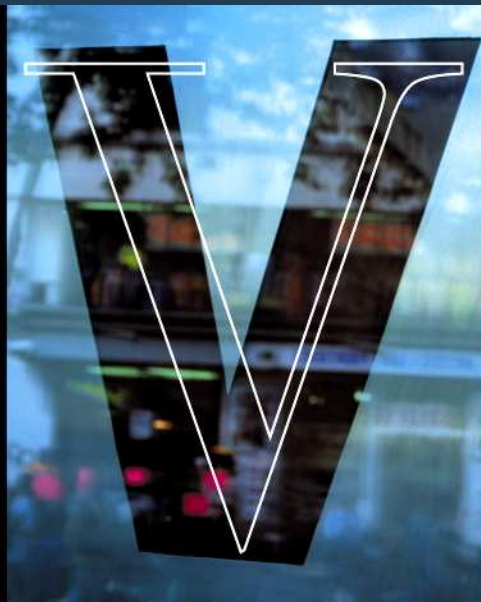
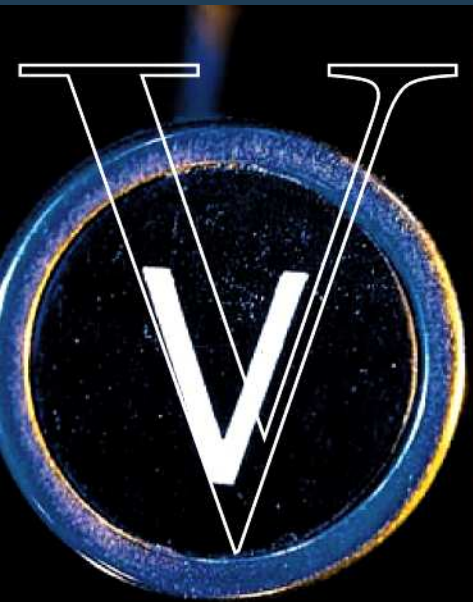


Nonprofit Organizations Committee Legal Quick Hit: Litigation Basics for Nonprofits: What to Do When a Complaint or Subpoena is Served

MODERATOR: JEFFREY S. TENENBAUM, ESQ.

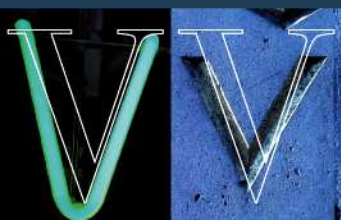
TUESDAY, DECEMBER 11, 2012

PRESENTERS: CAROLINE PETRO GATELY, ESQ.
DAVID L. FEINBERG, ESQ.



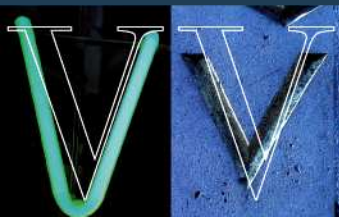
Upcoming Venable/ACC Webcast

- **December 12, 2012** – Nonprofit Executive Compensation and Incentive Compensation: Keys to Protecting Your Organization and its Leaders from IRS Sanctions (Jeffrey Tenenbaum & Matthew Journy of Venable LLP)



Agenda

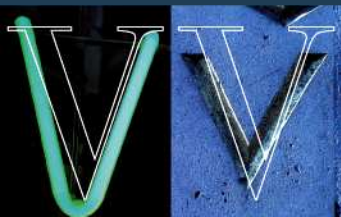
- Defending Against Actions
 - Third-Party Subpoena
 - Summons and Complaint in a Civil Case
 - Writs
 - Request for Information from the Government
 - Government Subpoena
 - Agent Contact/Search Warrant/Criminal Subpoena
 - Indictment or Information
- Being Prepared
 - Document Retention Policy
 - Insurance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



Third-Party Subpoena



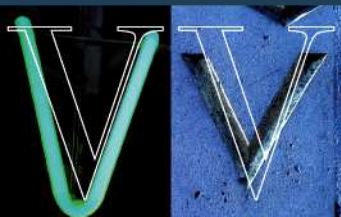
- A command to appear and give testimony at a deposition or trial, issued at the request of a litigant; if commanded to produce documents, it is a subpoena *duces tecum*
- Enforceable by contempt of court proceedings
- Concerns: time to object, time to appear or produce, scope, burden of search, electronically stored information, possession/custody/control and third parties, First Amendment concerns, confidentiality, or other sensitivities
- What to Do: note the date and means of service, identify contact in business unit



Summons and Complaint in a Civil Case



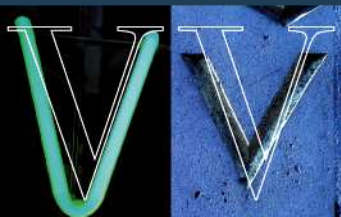
- A command to respond to a complaint in which the plaintiff seeks money damages, equitable relief (such as an injunction), or both against the defendant
- Civil liability, not criminal, at issue
- Typically served in person by a sheriff or private process server, although some may be served by mail
- 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



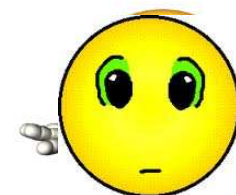
Writs



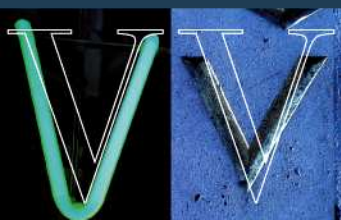
- Usually used to execute on court orders or judgments
- Examples: writ of garnishment, writ of replevin
- Served by a deputy marshal or sheriff
- Concerns: avoid double exposure to property owner, comply without interrupting business
- What to Do: note date, time, and means of service; obtain contact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



Request for Information from the Government



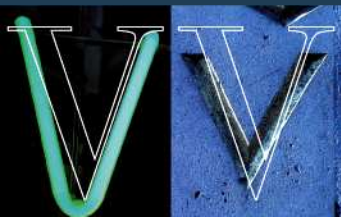
- What It Is: a broad term describing an official government request to aid in the exercise of the government's duties
- How Best to Handle: treat similarly to a civil subpoena; engage response "machinery"; think about "why"; negotiate scope; treat as "the last best chance" to avoid further scrutiny
- Concerns include those relevant to civil subpoena, plus government scrutiny of company



Government Subpoena



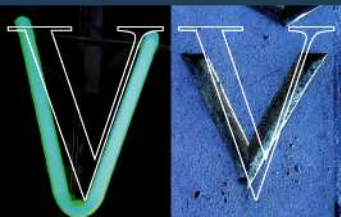
- What It Is: a command to compel production of documents, testimony, or both, issued by a government agency, a committee of Congress, or a state legislature (as opposed to a court)
- How Best to Handle: treat similarly to request for information
- Concerns: likely indicates government scrutiny; can implicate serious consequences, including enforcement action or eventual criminal investigation



Agent Contact/Search Warrant/ Criminal Subpoena



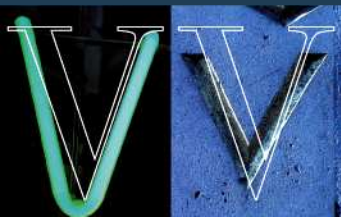
- Criminal, not civil or administrative, in nature
- Indicates a criminal investigation is underway
- Alert management; retain experienced counsel



Agent Contact



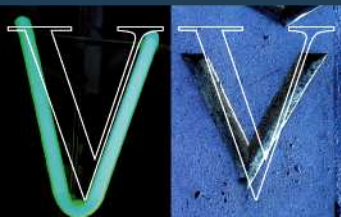
- What It Is: a call or visit from a government agent, which very likely indicates government investigation of the contacted organization, a person within the organization, or another person or organization
- How Best to Handle: engage experienced counsel and:
 - For employee already interviewed, request 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 the organization informed
- Concerns: risk of prosecution; risk of “*add-on*” *allegations*; details and logistics of producing information – *e.g.*, document productions



Search Warrant



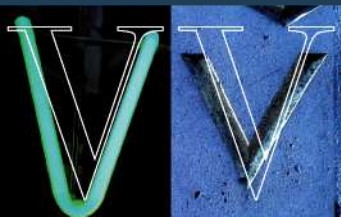
- What It Is: issued by a court at the request of the government upon proof of probable cause that a crime has occurred; authorizes search of specific locations and seizure of specific objects
- How Best to Handle: engage experienced counsel and:
 - Ask for agent's credentials and copy of warrant; review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



Criminal Subpoena

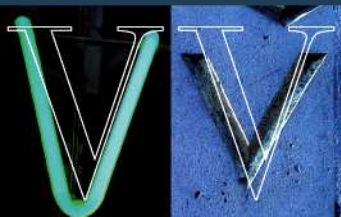


- What It Is: a subpoena issued by a court, at the request of the government, commanding the recipient to appear before the court and give testimony, produce documents, or do both in aid of a government investigation
- How Best to Handle: engage counsel; prepare for (or try to avoid) testimony; negotiate scope of document subpoena; detail-work of production – *document productions are critical to your credibility with the prosecutor*; possibly retain individual counsel for employees; possibly conduct internal investigation
- Concerns: possibility of being examined by a prosecutor while sworn under oath; Fifth Amendment; risk of prosecution; risk of “add-on” allegations



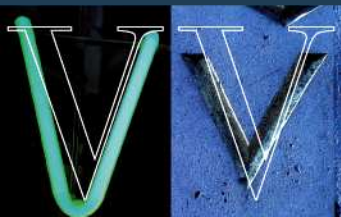
Being Prepared – Document Retention Policy

- 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



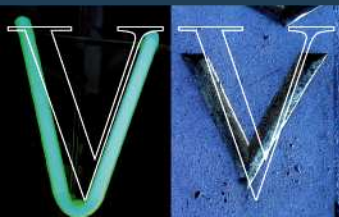
Being Prepared – Insurance Policy Review

- 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

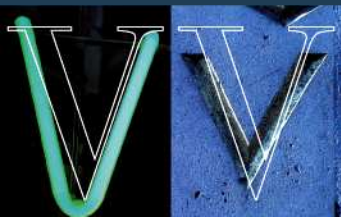


Be Prepared – Who to Call Refresher

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



Closing/Final Questions & Answers



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