



To Hold or Not To Hold

Practical Considerations for Developing a Records Preservation Process
in Response to Litigation of Government Investigation

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+ Agenda

- Overview – litigation and legal holds
- Legal hold considerations
- Other practical considerations
- Conclusion; Q&A

My background is that I started out as a paralegal for a SF law firm before going to library school and discovering records management. So I've always had some kind of connection with litigation – and to a certain extent, legal holds. But I also understand how attorneys think – and don't think about documents and discovery. Since assuming my current position, I stumbled back into the legal holds world and found that, other than technology, little has changed in the intervening years. So, while I rely heavily on the excellent Isaza and Jablonski book on legal holds (especially for all of the legal details), most of this presentation comes from thoughts I've gathered in my years in records management, and most recently, my experience at Wells Fargo.

Review agenda

+ Overview – litigation and legal holds

- Definition of legal hold: act taken by an organization to prevent destruction of information relevant to a lawsuit or government investigation
- Corporations (private sector) and preservation:
 - Corporate perspective is different from law firms: Corporate entities are either litigants or third party participants
 - Government agency perspective may or may not be same as private entities. For investigations, government agencies = plaintiff role in litigation
- Law Department owns the process
 - Consider all information related to legal holds as confidential – do not share!
 - Law Department will structure and guide the process
 - Records Management departments must follow guidance from Law Department – but can and should be *active participants*

Note this definition, like so much else in the legal world, is intentionally broad and vague. Each organization – and particularly legal counsel for each organization – must define what this means to them. But, under no circumstances may this process be ignored or shortchanged. The law books are filled with examples of entities that tried to short change the legal hold process – either out of ignorance or a real attempt to avoid preservation.

I approach legal holds from my current perspective – as part of a records management function in a large financial institution. My perspective will have much in common with other private sector entities, and also the government sector, when it is the subject of litigation or investigation by another body (while we may sue others, we are most likely to be on the defense side of litigation). We do not approach legal discovery in the same way that law firms do, although we're very interested in what they may do

Very important: never forget that the Law Department owns the legal hold process. Records management cannot try to create a legal hold process where one does not exist. Must be a collaborative endeavor.

Law department needs to outline process to follow by all custodians prior to litigation or investigation so that all are aware of their preservation duties and when these

+ Legal hold considerations* – Trigger events

- Events that indicate an organization has a duty to preserve records and information – above and beyond normal retention requirements
- Events indicating reasonably foreseeable, anticipated, threatened, anticipated, imminent or actual litigation or government investigation
 - Correspondence from opposing counsel or government agency
 - Service of litigation complaint
 - Occurrence of event likely to lead to litigation or government investigation
- Once trigger event occurs, duty to preserve is required

*Reference:
John Isaza & John Jablonski
7 Steps for Legal Holds of ESI and Other Documents
(ARMA International, 2009)

Again, note I draw heavily from Isaza and Jablonski and I seriously recommend buying the book from the ARMA bookstore. It is easy to read and contains a wealth of good information

Don Skupsky was also instrumental in guiding my approach to legal holds.

For those in records mgmt responsibilities, trigger event must be identified and acted upon by legal counsel. No trigger event = no duty to preserve.

However, once the duty to preserve has been triggered, destruction of relevant records and information after trigger event would be interpreted as spoliation by legal counsel or government investigators.

Note: only relevant records need to be preserved. Should not be interpreted as a requirement to preserve everything, unless so interpreted by Law Dept

Can use Arthur Anderson as example where destruction continued after duty to preserve was triggered. Also Carlucci v Piper aircraft – the model for the buried alive series

+ Legal hold considerations: Duty to preserve

- Law Department will determine if there is a duty to preserve after a trigger event occurs
 - If the duty exists, Law Department will issue Legal Hold Notice, outlining scope of preservation
 - If Law Department determines no duty to preserve, no Legal Hold Notice will be issued
- If Legal Hold Notice is issued, all named parties have a duty to preserve records and information, as outlined in the Legal Hold Notice
- Failure to preserve required records may be considered spoliation: destruction of evidence. Consequences:
 - Fines and/or sanctions
 - Possibility of jail time

Address spoliation here

+ Legal hold considerations: Legal hold notices

- If Law Department determines duty to preserve, will issue Legal Hold Notice
 - Will be sent only to those with a duty to preserve
 - Highly confidential; not issued on organization-wide basis
 - Recipients must preserve relevant records within their custody and follow all instructions included in the Legal Hold Notice
 - Individuals who do not receive Legal Hold Notices do not have duty to preserve records and information within their custody
- For large repositories of data/information: another approach may be required
 - E-discovery team: information contained within applications and databases
 - Email: lockdown of delete capabilities in email
 - Off-site storage: suspend regularly scheduled disposition per retention schedule

Use example of employee litigation: personal confidentiality may be an issue. Therefore, hold notices should only be sent to those who have a duty to preserve. These notices are usually highly confidential and normally not issued on a organization-wide basis.

For persons receiving hold notices, their duty to preserve have been triggered. If they have questions, they need to have a resource in the Law Dept to whom they can direct their questions.

If employees do not receive hold notices, they have no duty to preserve. Hold notices should not be “blanket” notices.

Standard and non-standard preservation: Should note that custodians don’t always have control over all records that require preservation, such as computer systems and applications, email systems and physical records in offsite storage. In this instance, some form of non-standard preservation will be necessary. This was an approach we needed to take at WF because Law Department realized that there were other types of information requiring preservation over which custodians had no control. We developed, implemented (and continue to refine) a system of non-standard preservation.

+ Legal hold considerations: Scope of hold

- Scope determined by Law Department
 - Often vague and overly broad
 - May require interpretation to determine what information actually needs to be preserved
 - Law Department prefers to over-retain rather than under-retain
- Develop template to assist Law Department in determining scope for holds expanding past level of custodian preservation
 - E-discovery: which systems and applications require preservation. How to implement
 - Email: beyond immediate custodians
 - Physical records: how to create hold at off-site storage facilities (if using vendors, must work with them to design process to ensure preservation, especially if multiple holds apply to physical records)

This has been our greatest challenge: to get Law Department to describe hold scope in ways that can actually be implemented. Usually the scope in hold notices is very broad and vague. This interpretation often leads to over-retention. Need to work with attorneys to try to narrow scope as much as possible before hold is implemented. Once a broadly scoped hold is implemented, it is very hard to scale back. Easier to do this up front than after the fact.

As part of our non-standard preservation process we worked with a group including the e-discovery folks, email folks and litigation paralegals, to try to implement a template outlining scope of these very broad holds. For physical records, we try to provide ways so as not to put all physical records on hold.

Many computer applications and systems are not legal hold friendly. Some may require moving out of automated disposition. Once disposition is moved out, is very difficult to move back.

Other systems require an all or nothing approach to preservation.

Email holds must be incorporated in setting up retention in email. Again, not always easy, because needs to be approached on a custodian basis – cannot shut down disposition for entire email systems.

+ Legal hold considerations: Hold modifications

- Hold scope may change over time, requiring modifications
 - Custodians may be added or released
 - Systems may be added or released
 - Physical records may be added or released
- Law Department will issue legal hold modification notices either expanding or releasing scope of the hold

Holds may be modified from time to time. Again, easier said than done as custodians added or released.

Depending on how holds are set up for physical boxes, this may just be a situation of taking individual boxes off of hold – again depending on how original hold was set up.

For computer systems and applications, this may be more of a challenge, depending on how the individual systems are configured to accommodate legal hold preservation.

+ Legal hold considerations: Legal hold release

- Will come from Law Department – as a written release notice
- May or may not be tied to actual conclusion of litigation or investigation
 - Settlement considerations – extend after matter conclusion and required continued preservation
 - Preservation through appeals process – especially if opposing party has right to appeal
 - May be complete or partial release – follow Law Department instructions
- Upon release, all records/data resume normal retention
 - For records/data now past due, may/should be destroyed upon hold release
 - For records/data not yet due, they will assume their original destruction eligibility dates. These are not extended by virtual of the hold

Don't follow news media on releases. Just because the media reports a matter as concluded, doesn't mean that the hold will necessarily be released at that time

Legal hold releases must again come from the law dept. Must wait until all activities related to the preservation activity have concluded – and only the law dept can determine that. Holds may need to be in place long after all visible attention to the legal matter has concluded.

Once holds have been released, records need to return to normal retention and disposition schedules. Easier for physical records (especially those in offsite storage, if retention has been set up behind the scenes and is not user controlled).

For computer systems, this may be a greater challenge depending on how hold has been structured. Mobius, for example is one system where retention must be pushed out to accommodate preservation. That is relatively easy to do – but may need to do multiple times. Much more challenging from a systems perspective to reset retention after hold has been released.

+ Other practical considerations

- Repeat: Law Department owns the legal hold process
 - And all documentation related to legal hold process, including written policy
 - Need to get Law Department approval before including any legal hold guidance in procedural documentation
- Attorneys prefer broad and vaguely-worded hold scope
 - Would rather hold too much rather than not enough
 - Must be ongoing dialogue with Law Department re what Records Management can and cannot do to support legal holds
- Mergers and acquisitions: how to determine how these fit into the process (if records on hold are part of a divestiture)
 - Suspend transfer of data and records
 - Provide copies only
 - Some combination of these approaches

Worth repeating that the law dept owns the legal hold process. The sooner you understand that, the easier it will be for you

With legal hold scope addressed broadly, you may or may not be able to help narrow the scope. If you cannot, then best to understand the position of lawyers. Not interested in destroying records – other than prior to litigation. Once legal hold notices are issued, they will cast as large a net as possible to preserve all information that may be relevant. Need to be vigilant in this effort. For us, this has been a process we've been working on for more than 10 years. We meet on a regular basis to discuss and refine this process – and keep each other in the loop regarding current and future preservation requirements.

Legal holds not always addressed with M&A&D – especially in divestitures, since if you are divesting, you may not be able to divest all records, if covered by legal holds. If acquiring, you may not be able to receive all records if they are required to be on hold by divesting company. Also, if you are an acquiring company, you may inherit a legal matter, requiring the issuance of a legal hold. Best if you have a process in place prior to this occurrence.

+ Conclusion: Legal hold process always will and must be collaboration between Law Department and supporting functions including:

- Records Management/Information Governance
- Technology
- Lines of business/official records owners
- Other business partners, such as
 - Risk
 - HR
 - Audit/Compliance

Take as active a role as you can in the development of a legal hold process. Be tenacious. Results will be worth it.

Also, best if all involved parties participate in this process. But again, remember, the process is owned by the law dept. Don't overthink it!

+ Thank you



Questions?