

Establishing and Maintaining Document Holds

A Case Study

Foley & Lardner LLP Lessons Learned

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Dana C. Moore
National RIM Compliance Manager
Foley & Lardner LLP



Learning Objectives

Just like other businesses, law firms can become parties to potential or pending lawsuits, claims or investigations. Therefore, the ability to identify, collect, and preserve relevant records for these circumstances is critical in today's legal environment.

This case study will walk you through the steps we followed at Foley to develop a *Document Hold Policy* and the procedures we currently use to establish and maintain document holds successfully.

Participants who attend this session should be able to:

- Develop a plan to identify where your information resides, including electronic information
- Identify scenarios that will trigger or lift a hold
- Develop a procedure to collect and preserve records within the framework of your organization

What We'll Talk About Today

- What is a Document Hold and when is it triggered?
- Documents Holds?...*where we started*
- Foley's Document Hold environment today
- Establishing a Document Hold at Foley
- Maintaining Document Holds

What is a Document Hold?

- The preservation of records that may be relevant to lawsuits, claims or investigations (pending or potential) against the firm or a client of the firm based on advice provided by the firm during representation.
- Duty to impose is triggered when???
- Failure to comply can =
 - Spoliation
 - Obstruction of justice
 - Sanctions

What Triggers a Document Hold?

- When the firm is “duly notified”:
 - Subpoena
 - Order to produce records
 - Conversation with a client
 - Lawyer believes there may be a malpractice claim
 - Typically involves notification of General Counsel or Risk Management Partner
 - Client believes there is a possibility of a lawsuit, claim or investigation and records the firm has are relevant.
 - Disgruntled employee
 - Records is requested to assist in production of records

Foley Document Holds

...the beginning

...I remember it like it was yesterday. It was 2004, I'd been on the job for less than 30 days...

- Email records?
 - Technology copied the ENTIRE Mailbox for each user
- Document Management System (DMS)?
 - We relied on the honor system
- Physical Records?
 - Collected, inventoried and secured in a locked room
- Communication?
 - We hauled every timekeeper and assistant into a conference room for a required meeting

Foley Document Holds

...the saga continues

■ Review of procedures:

– Email records

- Saving the entire mailbox not such a good idea
- Public folders and required filing established

– DMS Records

- Render records “read only” and disable DELETE7DAY

– Physical Records

- Research ethics opinions and begin labeling

– *What were they doing before Records Management got involved?*

Foley Document Holds

...formal procedures evolve

- Where was our information?
- How could we collect and secure it all?
- Who should be authorized to initiate a Hold?
- We gained experience...
 - More control over electronic records
 - Document Hold Log
 - Document Hold Checklist

Where was our information?

■ Physical folders

- Records Management System (RMS)
 - Active (on-site)
 - Off-site storage
- Not yet captured (bar-coded)

■ Systems and applications

- Document Management System (DMS)
- Email (Exchange)
- Email Archives
- Litigation Supports Databases
- Personal Home Directories
- Hard Drives
- Home Computers, PDA's, USB drives, other external media

Who has the authority to issue a Document Hold?

- General Counsel
- Local Professional Responsibility Partner
- Principle Billing Partner
- Chief of Human Resources

Foley's Document Hold Environment

- Records Management Department responsible for managing ALL Holds
- Responsible Attorney
- Automated workflow program
- Physical records and ESI collected and secured
- Reliable, defensible program

Responsible Attorney for the Hold

- The Attorney responsible for the hold:
 - Professional Responsibility Partner (PRP),
 - Principle Billing Partner (PBP)
 - Outside Counsel
- Defines scope
- Enforces compliance

Automated Document Hold Workflow

- Identifies the scope of the Hold
- Captures timekeepers and assistants
- Sends Notification and reminders
- Collects acknowledgements
- Records work list
- Captures implementation and maintenance documentation

ESI Collected & Secured

■ ESI collected

- DMS
- Email
- Lit Support
- Local and shared drives
- Personal devices

■ ESI Secured

- Declared for preservation (locked)
 - Cannot edit, delete or save as new version

Physical Records Collected & Secured

■ Physical records labeled

- Why?...records must be labeled to identify that they are protected under a document hold
 - Required by the ethics opinions in most states
- Off-site records labeled as recalled
 - Bad Check List

■ Physical records secured

- Confidentiality
- Court Ordered
- A locked environment is established with limited approved access

Establishing a Document Hold at Foley

- Identify Responsible Attorney
 - Review role
- Determine Hold name and scope
- Identify effected timekeepers and assistants
- Initial Document Hold Notification
- Timekeeper and assistant acknowledgements
- Collection & preservation of records
- Review & production

Document Hold Name & Scope

■ Hold Name

- Style of case
- Matter Name
- Unique identifier

■ Hold Scope

- The action prompting the Hold
- Identifies specifics (Subject matter, Record types, Record authors)
- ALAS Claim or Circumstance?
- Date Range

Identify Timekeepers and Assistants

- Query Time & Billing system based on client/matters identified
- Query intranet for assistants linked to identified timekeepers
- Update Document Hold form

Document Hold Notification & Acknowledgement form provides:

- An overview of Firm DH policy and ESI retention guidelines
- The name of the Document Hold
- The scope of the Document Hold
- The action that prompted it
- Required Acknowledgement questionnaire designed to identify where relevant information resides

Document Hold Acknowledgement Questionnaire

- Timekeeper and Assistant responses automatically populate an electronic work list
 - Email in Outlook Inbox or private folders?
 - Deleted relevant email in past 7 days
 - Deleted DMS documents
 - DMS documents profiled under a different matter
 - Local/shared drive, thumb drives, home computer, or personal PDA
 - Litigation Support database

Collection and Preservation

...Physical Records

- All files labeled “The contents of this file are under a Document Hold and should not be altered or destroyed”
- Records may require secured location storage
- Retention suspended

Collection and Preservation

...ESI

- Confirm email has been filed
 - Daily reminder triggered if user indicates email resides in personal Outlook Mailbox
- Collect ESI from non-official repositories
- DMS records declared for preservation
- Suspend destruction activities

Declare Records for Preservation

- Declaring records for preservation is used to secure electronic records in the Document Management System
- When declaring records for preservation:
 - Security is set on each document
 - A visible lock will be placed on the document
 - Current document security (view, public, private) will not be changed
 - **The document cannot be edited or deleted**

Review and Production

- Technology or Litigation Support exports ESI under the direction of Records team

Maintaining Document Holds

- Confirmation of acknowledgement
- All required action must be completed
 - Records work list
- Monthly reminders to effected users
- Monthly reminders to Responsible Attorneys
- On-going matters
 - Search for new timekeepers nightly and send N&A
- Periodic review with primary contact to determine:

Maintaining Document Holds

...Administration

- Documentation that demonstrates your actions to implement and maintain the hold
 - Notification of Hold
 - Acknowledgements
 - Confirmation of compliance
 - Reminder notices
 - Notification a hold has ended
- Retention of administrative documents related to the hold under a unique matters with an associated retention schedule

Lifting a Document Hold

- A Document Hold can usually be lifted when:
 - A settlement is reached
 - The Statute of Limitations on litigation has passed
 - The lawsuit is over - a verdict is reached and all appeals are over
- Have an approval process in place to lift holds
 - General Counsel/Risk Management Partner authorization for internal holds
- Retention Periods should resume

Things to Consider

- Review your Document Hold Policy
 - If you don't have one...write one
- Publish and remind the Firm about the policy
- Define roles and responsibilities
 - One department should take the lead
- Develop a checklist of critical steps
- Include your Document Hold administrative records in your retention schedule
- Be consistent

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Dana C. Moore

National Records & Information Compliance Manager

Foley & Lardner LLP

dcmoore@foley.com