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FOCUSING ON LEGAL, SAFETY & SECURITY SOLUTIONS

FEBRUARY 10th - 12th, 2014

**LEGAL HOLDS AND THE 7
STAGES OF GRIEF: MOVING
FROM “SHOCK AND
DESPAIR” TO “ACCEPTANCE
AND HOPE”**

Megan Ferraro, Hyatt Hotels & Resorts

Karen Hourigan, Redgrave LLP

PRESENTERS



Megan Ferraro - Senior Counsel, Hyatt Hotel & Resorts

- Manage litigation globally for all Hyatt Hotels Corporation entities
- Manage in-house electronic discovery and legal hold processes



Karen Hourigan - Partner, Redgrave

- Counsels clients in franchise restaurant and hotel industries on:
 - Litigation Preparedness
 - Information Governance
 - Litigation/discovery strategy, approach and procedures

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OVERVIEW

- **The Seven Stages of Grief**
- **Common questions/reactions from Legal Hold custodians.**
- **The Lawyers' Responsibilities/Model Rules of Professional Conduct**
- **Common Pitfalls in Carrying Out the Duty to Preserve**
- **Best Practices**

THE 7 STAGES OF GRIEF

- Shock and Despair
- Denial
- Anger
- Bargaining
- Guilt
- Depression
- Acceptance and Hope

COMMON REACTIONS OF LEGAL HOLD CUSTODIANS

- “Why did I receive this Legal Hold Notice?”
- “How am I supposed to comply with this Legal Hold Notice?”
- “If this is so important, I am sure someone is doing something to retain these documents.”
- “I shouldn’t have received the Legal Hold Notice; I never worked on that project/had any involvement in ____.”
- “I gave all of my documents to ____.”
- “I haven’t worked at that location/department since _____. I don’t have anything anymore.”



COMMON REACTIONS OF LEGAL HOLD CUSTODIANS

- “Stop sending me Legal Hold Notices or Reminders. This is bordering on harassment.”
 - “Who is your manager?”
 - “How do I get my name off of this list?”
-
- “The only thing I have is _____. If I give that to you, am I done here?”
 - “If I send you all of the relevant emails or documents I have, will you remove me from the legal hold?”



COMMON REACTIONS OF LEGAL HOLD CUSTODIANS

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- “How am I supposed to know what is relevant?”



- “Well, if I am on a Legal Hold, I guess that means I can’t get rid of anything or I might lose my job.”



GETTING TO ACCEPTANCE AND HOPE

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- **Achieve better understanding, cooperation and compliance with Legal Holds by:**
 - **Abiding by ethical duties and obligations;**
 - **Avoiding common pitfalls;**
 - **Training, communication, and reinforcement; and**
 - **Process, documentation, and consistency**



THE LAWYERS' RESPONSIBILITIES

- **Model Rule 3.4 Fairness To Opposing Party And Counsel - A lawyer shall not. . .**
 - (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;
 - (d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

THE LAWYERS' RESPONSIBILITIES

- **Model Rule 1.1 Competence** -- A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.
 - *Comment 8 states that lawyers should stay apprised of technological changes “including the benefits and risks associated with relevant technology.”*
- **Model Rule 1.3 Diligence** -- A lawyer shall act with reasonable diligence and promptness in representing a client.

THE LAWYERS' RESPONSIBILITIES

- **Model Rule 1.4 Communication** - A lawyer shall. . . promptly comply with reasonable requests for information;
 - *Comment 4 states “When a client makes a reasonable request for information. . . paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected. A lawyer should promptly respond to or acknowledge client communications.”*

THE LAWYERS' RESPONSIBILITIES

- **Model Rule 1.13: Organization as Client --** If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. . . .

THE LAWYERS' RESPONSIBILITIES

- **Rule 5.1 Responsibilities Of Partners, Managers, And Supervisory Lawyers** -- (a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.
- (c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:
 - (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or
 - (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

COMMON PITFALLS

- Failure to identify an event or situation triggering the duty to preserve.
- Failure to identify sources of relevant evidence within the organization's possession, custody, or control.
- Failure to identify relevant custodians.
- Failure to adequately communicate with/instruct IT personnel.
- Failure to ensure routine processes that may lead to the destruction of relevant evidence are suspended.

COMMON PITFALLS

(CONT'D)

- Failure to issue a written Legal Hold Notice.
- Failure to monitor compliance with the Legal Hold Notice.
- Failure to act on information learned through the process.
- Relying too heavily on custodians to understand the Legal Hold Notice and/or search for and preserve relevant evidence.
- Failure to supervise non-attorneys involved in the Legal Hold Process.

BEST PRACTICES

- Assemble a cross-functional team (Legal, RIM, IT, others) to establish, understand, and document approach to Information Governance.
- Establish an eDiscovery/Litigation Response Team.
- Develop and publish a Legal Hold Policy.
- Develop and document a consistent approach to the Legal Hold process:
 - Evaluating a potential trigger/documenting assessment
 - Ensuring non-attorney personnel are properly skilled and trained to execute the process.
 - Ensuring that information obtained throughout the Legal Hold process is properly considered/addressed and any required modifications to the of scope legal hold are made in a timely manner.

BEST PRACTICES (CONT'D)

- Educate and train employees about the Legal Hold process and their role and responsibilities in the process.
- Monitor and track communications with custodians and IT personnel.
- Develop, publish, and periodically update Legal Hold FAQs that provide answers to commonly asked questions related to the Legal Hold Process or the expectations of custodians.
- Trust, but verify.

THANK YOU!

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