Litigation Alert: In-House Counsel Sanctioned for Failing to Monitor the Preservation of Electronic Evidence

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In the latest escalation of penalties on those who ignore their records management responsibilities, a federal court has sanctioned in–house counsel for his failure to ensure that prospective evidence, including laptops and e–mails, was properly preserved. More ominously, the September 2009 decision in *Swofford v. Eslinger*[1] levied the monetary sanction even though in–house counsel **had** relayed to six of his senior colleagues a request to preserve evidence relating to the events at issue. Although the facts of *Swofford* were particularly dramatic—plaintiff had been shot by defendant law enforcement officers, who then wantonly destroyed physical evidence as well as relevant e–mails—it further signals courts' willingness to sanction companies, and now their in–house counsel, who have no specific procedures in place for identifying and preserving e–mails and hard–copy evidence once it reasonably may be anticipated that such evidence will be discoverable in litigation.[2]

"Affirmative Steps to Monitor Compliance"

In *Swofford*, a burglary suspect and his wife sued the Sheriff and two deputies of the Seminole County Sheriff's Office, alleging that the officers had used excessive force by shooting him seven times. Plaintiffs' attorney had written two pre–suit preservation demand letters to the Sheriff's Office, requesting that all evidence related to the shooting, including any electronic evidence, be preserved. General Counsel for the Sheriff's Office admitted he had received the preservation letters, but pointed out that he had made certain his paralegal forwarded the letters to six senior Sheriff's Office employees. He also acknowledged, however, that the Sheriff's Office never issued any separate directives or "litigation hold memos" to all applicable employees to suspend the destruction of e–mails and evidence which might be relevant to the case. At a hearing on the plaintiffs' motion for sanctions, the General Counsel testified that he believed forwarding a copy of the letter was sufficient, but he conceded that he had not ascertained, "even on a rudimentary level," what his and his office's obligations were regarding preservation, nor had he shared the notice with the two deputies who had shot the plaintiff, nor had he asked the Sheriff's Office Information Technology Department to identify or preserve electronic information potentially relevant to the plaintiffs' lawsuit. When the two deputies later deleted from their laptop computers all e–mails related to the shooting, and the plaintiffs eventually discovered that destruction, the plaintiffs sought spoliation sanctions against the Sheriff's Office.

In a blistering opinion, U.S. District Court Judge Mary S. Scriven specifically reprimanded the General Counsel for his "abject failure to comply with legal standards" by failing to issue a "litigation hold memo" and failing to ensure that employees subsequently complied with their

preservation obligations. Citing to the seminal line of *Zubulake*[3] cases, Judge Scriven held that counsel "*must* take *affirmative* steps to monitor compliance [with preservation obligations] so that *all* sources of discoverable information are identified and searched," and that the General Counsel's failure to do so in this case warranted a finding of bad faith.

On those findings, the Court not only imposed an "adverse inference" sanction—ordering that the jury would be instructed that the destroyed e–mails "contained information detrimental to" the Sheriff's Office's case—but also awarded attorneys' fees and costs to the plaintiffs, which their counsel estimated at over $300,000. Remarkably, Judge Scriven then held the deputies *and the General Counsel* jointly and severally liable for the full monetary sanction. Though the General Counsel had neither been sued individually nor even entered an appearance in the case, Judge Scriven found that his "complete failure to fulfill his duty … to take affirmative steps to monitor compliance so that all relevant, discoverable information is identified, retained and produced" warranted the levying of sanctions directly against him.

Avoiding *Swofford*'s Swift Sword

Swofford offers several potentially costly lessons about the preservation of evidence and the importance of "litigation hold" memoranda, but three are particularly pivotal for in–house counsel and compliance officers:

- Merely forwarding a preservation request to senior colleagues is not sufficient. Companies should have detailed, user–friendly policies for sending and implementing "litigation hold" memoranda. While the litigation hold memo may not need to be sent to all employees, every employee whose job function is related to the events at issue must be promptly and specifically instructed as to his/her duties to search, identify, and preserve.
- In–house counsel and compliance officers must take "affirmative steps to monitor compliance" once any litigation hold memo issues. Compliance may neither be assumed nor unreasonably delegated.
- The preservation of e–mail and other electronically stored information merits particular attention. A company's IT Department must be specially warned of the duty to preserve, and affirmatively act to prevent the deletion of any relevant information. Where a company fails to preserve relevant electronic records, it invites sweeping sanctions (again, in *Swofford*, the court ordered an instruction to the jury that a year's worth of deleted e–mails—no matter their prospective probative value—must be deemed detrimental to the defendants who had deleted them).

If you need assistance on any of these fronts, Mintz Levin's records management experts (including attorneys and information technology professionals) have helped over 30 clients draft, revise and/or implement tailored and practical records management policies, as well as situation–specific litigation hold memoranda—all consistent with the most current federal, state, regulatory and industry requirements. We have assisted private companies, Fortune 500 companies, not–for–profit corporations, and financial services, life sciences and other companies in areas closely regulated by state and federal authorities. To maximize efficiency and minimize cost, we start by providing you with a quick departmental survey and itemized budget estimate, available from any of the members of our team listed at left.

Endnotes

[1] *Swofford v. Eslinger*, --- F. Supp. 2d ---, 2009 WL 3818593 (M.D. Fla. Sept. 28, 2009).

[2] Recent cases in Massachusetts, California, New York and DC underscore this trend toward heightened sanctions, as counsel are increasingly expected to be familiar and comply with preservation obligations under the applicable rules of civil procedure and evolving case law. *See, e.g., Stein v. Clinical Data, Inc.*, 2009 WL 3857445 (Mass. Super. Oct. 9, 2009) (Court dismissed a complaint and ordered plaintiff to pay $243,000 in attorneys' fees and costs after finding that he had ignored a court order and destroyed a series of relevant e–mails); *Keithley v. Homestore.com, Inc.*, 629 F. Supp. 2d 972 (N.D. Cal. 2008) (upholding magistrate judge's order of monetary sanctions against defendants who produced no evidence of a document retention policy or litigation hold memorandum, and recklessly allowed the destruction of relevant source code after the lawsuit was filed); *Green v. McClendon*, 2009 WL 2496275 (S.D.N.Y. Aug. 13, 2009) (imposing monetary sanctions against defendants for destruction of electronically stored evidence after the obligation to preserve had attached); *U.S. v. Philip Morris USA, Inc.*, Civ. Action No. 99–2496, 2004 WL 1627252 (D.D.C. July 21. 2004) (fining Philip Morris $2.75 million for "reckless disregard and gross indifference" where company managers destroyed e–mails reflecting potentially relevant evidence in a lawsuit against the tobacco industry).

[3] Specifically, *Zubulake v. UBS Warburg, LLC*, 229 F.R.D. 422, 432 (S.D.N.Y. 2004).

For assistance in this area, please contact one of the professionals listed below or any member of your Mintz Levin client service team.

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