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The Duty to Preserve Evidence: Government In-House Counsel At Risk

The life of government in-house counsel just became more interesting thanks to a recent decision by a Florida federal district court. In *Swofford v. Eslinger*, 2009 WL 3818593 (M.D. Fla. Sept. 28, 2009), the court used its inherent powers to sanction to impose a monetary fine on government in-house counsel even though he had not entered an appearance in the case. What got the court's ire up? Government in-house counsel failed to comply with the duty to preserve evidence.

In *Swofford*, General Counsel for the Seminole County Sheriff's Department received multiple pre-suit letters from plaintiff's counsel requesting preservation of emails related to plaintiff's claims. General Counsel did not issue an adequate litigation hold and otherwise failed to follow up to ensure that any potentially relevant emails would be preserved. Not surprisingly, potentially relevant emails were destroyed and could not be recovered. The court found that General Counsel's insufficient actions to preserve the emails amounted to bad faith. In addition to imposing an adverse inference jury instruction sanction against the defendants, the court levied monetary sanctions (still undetermined, but could be up to \$300,000) against General Counsel. Outside counsel avoided any punishment as the destruction of emails occurred prior to its retention.

Swofford is a cautionary tale for government in-house counsel. Courts routinely find that a pre-suit event has triggered the duty to preserve. If government in-house counsel fails to recognize the trigger or responds inadequately, government in-house counsel is increasingly at risk of having monetary sanctions imposed directly against them. Knowledge of common pre-suit triggering events is essential. After all, the *Swofford* Club is not one any government in-house counsel wants to join.

Miller Canfield will offer a free Webinar at 1:00 p.m. EST on Wednesday, January 13, 2010 discussing the *Swofford* case and its ramifications in greater detail, as well as case law concerning common "duty to preserve" triggers. If you are interested in attending, please contact Virginia Herrick at 313.496.7548 or herrick@millercanfield.com.

For more information about Miller Canfield's Electronic Discovery + Records Management Group, or to request removal from our mailing list, please contact Jay Yelton at 269.383.5819 or yelton@millercanfield.com.