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Ryan, Swanson & Cleveland, PLLC

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*Stay Ahead of the Game:*  
**Best Practices with Electronic  
Records**

James M. Shaker

## What is E-Discovery?

Electronic discovery: exchange of electronically stored information (“ESI”) between parties during a civil lawsuit



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## The Rule

- Federal Rule of Civil Procedure 26(f) provides that the parties must confer and develop a discovery plan that addresses the timing, form, and substance of discovery, including electronic information.
- Parties must make a good faith attempt to agree.

## Proportionality



## Employer's Obligation

- As soon as you reasonably anticipate litigation, preserve all information that could relate to the case—even information deleted in the ordinary course of business.
- Identify potential witnesses and notify them of the duty to preserve evidence.
  - Generally via written hold notice. Track responses.

## Failure to Comply

- In 2009-2010, 26% of published opinions addressing e-discovery issues resulted in sanctions.
- Defendants were **three times** as likely to receive sanctions as plaintiffs.
- The most common causes of sanctions were failure to preserve electronic evidence, failure to produce documents, and delay in production.

## Costs

- Vendors usually charge by quantity.
- The cost of attorney and paralegal review of records/files is approximately 73% of every e-discovery dollar spent.
- If you save everything, lawyers have to review everything.

## Records Policy

- Develop a written records retention policy.
- Specifically address main sources of electronic records (e.g. email).
- Explain policy to employees and have them sign it.

## Best Practices

- Know your system. Where is data stored, who knows how to access it, and who can explain it to others?
- *Follow* the written record retention policy.
- Develop a procedure for notifying employees and witnesses of their duty to preserve evidence in case potential litigation arises.



Thank you!

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