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Navigating the Discovery Minefield: Contemporary Discovery Techniques to Keep Pace with Constantly Changing Communications in Modern Society

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Rule Amendments Overview

- Relevant amendments:
 - Rule 1 (Procedural Responsibility)
 - Rule 16 (Scheduling Order Coordination and Timing)
 - Rule 26 (Proportionality Test)
 - Rule 37(e) (Sanctionability)
- Collectively, the 2015 amendments that relate to ESI reflect a policy of close party coordination and judicial involvement, in order to promote cooperation, expeditious coordination and problem solving, and minimize expense.

Rule 1: Procedural Responsibility

Amended to expressly provide who is responsible:

These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed, administered, and ***employed by the court and the parties*** to secure the just, speedy, and inexpensive determination of every action and proceeding.

Fed. R. Civ. P. 1 (2015) (emphasis added).

Rule 16: Scheduling Orders

- **Preservation of ESI:** Rule 16(b)(3)(B)(iii) - scheduling orders may now address the “preservation of electronically stored information”
 - ✓ ***Parties discovery plan should address preservation of ESI, which may help minimize frequency of motions alleging spoliation of evidence***
- **Clawback:** Rule 16(b)(3)(B)(iv) scheduling orders may now include “any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced, including agreements reached under Federal Rule of Evidence 502”
 - ✓ ***Parties should consider adding clawback agreements for inadvertent production of privileged information common in voluminous e-discovery***

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