

Presented at:

38th Annual Jay L. Westbrook Bankruptcy Conference

November 14-15, 2019

Austin, Texas

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

Deirdre Carey Brown, Hoover Slovacek LLP
Ashley L. Harper, Hunton Andrews Kurth LLP
Jay Ong, Munsch Hardt Kopf & Harr, P.C.

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***

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](http://utcle.org/elibrary)

Title search: Navigating the Discovery Minefield

Also available as part of the eCourse

[2019 Jay L. Westbrook Bankruptcy eConference](#)

First appeared as part of the conference materials for the 38th Annual Jay L. Westbrook Bankruptcy Conference session "Navigating the Discovery Minefield"