

The Importance of eDiscovery in Restructuring and Bankruptcy Litigation:

Three Common Mistakes and How to Avoid Them

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Litigation Discovery vs Bankruptcy Discovery

LITIGATION DISCOVERY	BANKRUPTCY DISCOVERY
Discovery can go on for years.	Accelerated pace.
Typically centered around related issues.	Discovery into multiple unrelated issues.
Usually court directed.	Typically conducted by agreement.
More likely to have access to employees.	Preservation challenges in structured layoffs are common.
C-Suite/Board level documents often considered last resort.	C-Suite/Board level documents typically at issue.

APPLICABLE DISCOVERY RULES

- Rule 2004 is the basic discovery device under the bankruptcy rules
 - permits the examination of any party without the requirement of a pending adversary proceeding or contested matter.
- In addition to Rule 2004, discovery in restructuring-related litigation is typically governed by the federal rules and their bankruptcy-code equivalents
- Despite the existence of a legal framework, most restructuring discovery is conducted informally

FRCP	Bankr. P. Equivalent	Applies to:			
		Adversary Proceedings	Contested Matters	Involuntary & Contested Petitions	All Matters, Even Uncontested Matters
Rule 1 Scope of Rules	1001	Yes	Yes	Yes	Yes
Rule 16 Pretrial Procedure; Formulating Issues	7016	Yes	No	Yes ²	No
Rule 26 General Provisions Governing Discovery;	7026, 9014, 7026, 1018	Yes ²	Yes, with some exceptions	Yes ²	No
Rule 34 Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes	7034	Yes ²	Yes ³	Yes ²	No
Rule 37 Failure to Make or Cooperate in Discovery: Sanctions	7037	Yes ²	Yes ³	Yes ²	No

^[1] See Fed. R. Bankr. P. 1018 (“...[t]he following rules in Part VII apply to all proceedings contesting an involuntary petition or a chapter 15 petition for recognition, and to all proceedings to vacate an order for relief: Rules 7005, 7008–7010, 7015, 7016, 7024–7026, 7028–7037, 7052, 7054, 7056, and 7062.”).

^[2] See Fed. R. Bankr. P. 9014 (“Except as otherwise provided in this rule, and unless the court directs otherwise, the following rules shall apply: 7009, 7017, 7021, 7025, 7026, 7028–7037, 7041, 7042, 7052, 7054–7056, 064, 7069, and 7071. The following subdivisions of Fed. R. Civ. P. 26, as incorporated by Rule 7026, shall not apply in a contested matter unless the court directs otherwise: 26(a)(1) (mandatory disclosure), 26(a)(2) (disclosures regarding expert testimony) and 26(a)(3) (additional pre-trial disclosure), and 26(f) (mandatory meeting before scheduling conference/discovery plan).”)

*Other types of non-document discovery, such as depositions are also available, though not the focus of this Playbook.

The Three Common Mistakes

1. Starting to think about discovery too late.
2. Not having a comprehensive privilege strategy.
3. Failing to manage stakeholders' communications.



1) Starting To Think About Discovery Too Late

Be proactive by collecting commonly requested documents:

- Board Materials
- Data Rooms
- Financial Documents
- Major Transaction Documents



2) Not Having a Comprehensive Privilege Strategy

1. Over-Withholding/ Over-Stamping:

- Stop the stamping.

2. Third Parties:

- Map out.
- Be ready with specifics & documentation.

3. Common Interest Doctrine:

- Parent/subsidiary dynamic.
- Joint defense agreement.
- Timelines are critical.



Eaton Vance, et al. v. Wilmington Savings Fund, et al.

- Creditor Eaton Vance sought documents shared between J. Crew and advisors including Ocean Tomo, Lazard, A&M, ABMAC, and ICR.
- J. Crew objected based on privilege.
- Court focused on role of advisors:
 - Did they provide legal services/assist counsel?
 - Or did they perform business functions to facilitate debt restructuring and other needs?
- Based on the record and facts presented, court ruled no privilege.

Eaton Vance, et al. v. Wilmington Savings Fund, et al.

“J. Crew did not demonstrate that Weil needed these service providers so that it could effectively provide legal services and that their assistance was indispensable to the provision of **legal** advice.

As such, these third parties’ documents are not privileged and any privilege that would otherwise apply was waived as to documents shared with them.”

Eaton Vance Management, et. al v. Wilmington Sav. Fund Socy., 654397-2017, Sup Ct NY, December 3, 2018 (emphasis in original).

2) Not Having a Comprehensive Privilege Strategy

Possible consequence of not having a comprehensive privilege strategy is sanctions:

- Monetary
- Evidentiary
- Waiver



In re Haynes

- Adversary proceeding arising out of Ch. 13.
- Court ordered that all rules in Part VII of the FRBR (incorporating FRCP) would apply in the contested matter, with exception of FRCP 26(a)(1) and (f).
- Discovery challenges for UpRight Law LLC:
 - Delayed objections
 - Boilerplate objections
 - Multiple hearings on same issue
 - Tension with Ch. 13 Trustee
- Court required privilege logs – AND – that they be signed using 26(g) standard.
 - Court required information about the roles of individuals named in the log

In re Haynes

- UpRight Law issued bare-bones privilege logs and requested an *in camera* review.
- Court refused, holding that a party asserting privilege must provide a “properly prepared privilege log,” and address challenges through the meet-and-confer process.
- Court held that UpRight Law’s conduct amounted to a waiver of any objection to production of the documents.
- Court ordered payment of costs for Trustee’s motion under Rule 37.

*“In short,
enough is
enough.”*

577 B.R. 711 United States Bankruptcy Court, E.D. Tennessee (2017)

3) Failure to Manage Stakeholder Communications

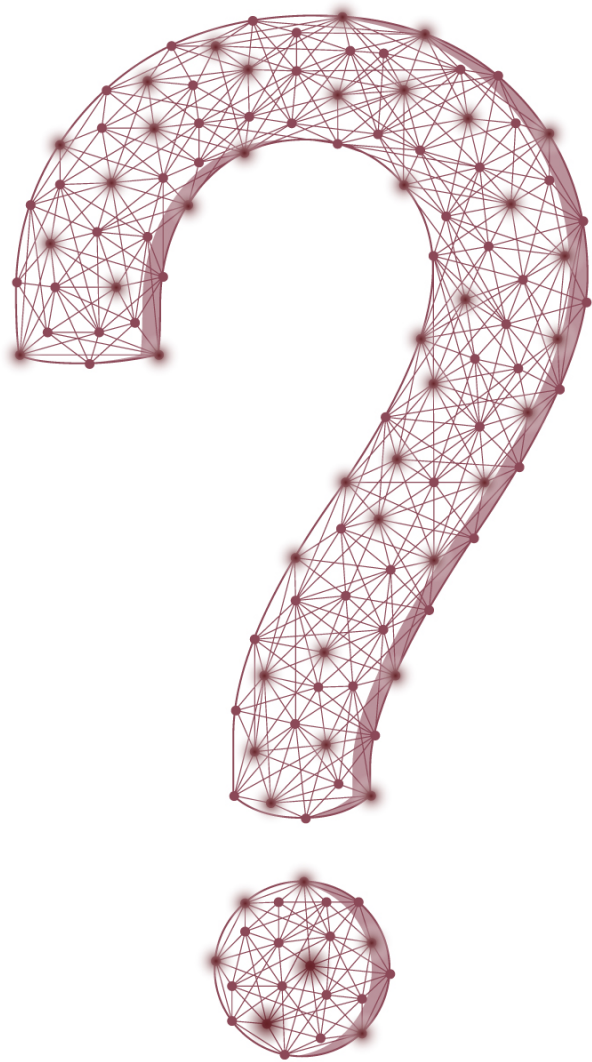
Board Email Accounts

- Company address v. separate address
- Board member/employee of sponsor must understand risk

Data Rooms

- Nature and scope of documents in data room
- Access logs
- Review agreements signed for access





QUESTIONS?