Dating our Briefs and Opinions "1999" — Bench and Bar Overlook Two Big Changes to the Scope of Discovery

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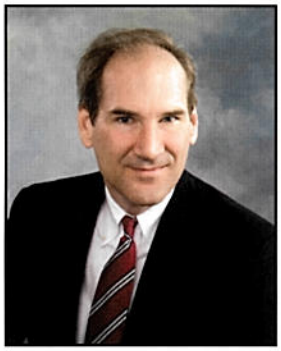

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If a rule is amended, but no one notices, has it really been amended? In 2000 the Supreme Court made two changes to Federal Rules of Civil Procedure 26(b) for the express purpose of restricting discovery. Yet the amendments have, inexplicably, escaped the attention of large portions of the bench and bar. Even today, a decade later, many judges ignore the 2000 amendments and end up ordering discovery that is forbidden by Rule 26. Many attorneys, intending to object to that discovery, in fact facilitate it by ignoring the 2000 amendments.

What is the scope of discovery under Rule 26(b)? At least four Circuit Courts have said, post-2000, that the scope is "reasonably calculated to lead to the discovery of admissible evidence."[1] At least five District Courts have done the same -- four of them within the past year alone.[2] And attorneys all over the country, objecting to discovery requests, have said so too.[3] Other courts have varied the formula slightly: some say that a matter is discoverable if either relevant or "reasonably calculated,"[4] others, that a matter is discoverable only if

[1] *See, e.g., Perry v. Schwarzenegger*, 591 F.3d 1147, 1164 (9th Cir. 2009) (agreeing with District Court that the discovery request "satisfie[d] the Rule 26 standard" because it was "'reasonably calculated to lead to the discovery of admissible evidence'"); *Remexcel Managerial Consultants, Inc. v. Arlequin*, 583 F.3d 45, 52 (1st Cir. 2009) ("The scope of discovery is broad, and to be discoverable, information need only appear to be 'reasonably calculated to lead to the discovery of admissible evidence'") (some internal quotation marks omitted); *Trentadue v. F.B.I.*, 572 F.3d 794, 808 (10th Cir. 2009) (discovery permitted "if it is 'reasonably calculated to lead to the discovery of admissible evidence'"); *Conti v. Am. Axle and Mfg., Inc.*, 326 F. App'x. 900, 904 (6th Cir. 2009) ("The operative test in determining whether discovery on a particular matter is permissible is 'whether the line of interrogation is reasonably calculated to lead to the discovery of admissible evidence'").

[2] *See, e.g., Joza v. WW JFK LLC*, 2010 WL 3619547, at *1 (E.D.N.Y. Sept. 10, 2010) (Magistrate Judge "ordered the defendants to provide [plaintiff] with an opportunity to review a representative sample of the faxes at issue to determine whether her request was reasonably calculated to lead to the discovery of admissible evidence"); *Smith v. Frac Tech Servs., Ltd.*, 2010 WL 3522395, at *1 (E.D. Ark. Sept. 1, 2010) ("The defendant has stated a legitimate reason for believing that at least some of the employment files may have information that could be relevant in the case. Therefore, the subpoenas are reasonably calculated to lead to the discovery of admissible evidence"); *Padgett v. OneWest Bank, FSB*, 2010 WL 3239350, at *3 (N.D. W.Va. Aug. 16, 2010) ("Information is relevant, and discoverable, 'if the discovery appears reasonably calculated to lead to the discovery of admissible evidence'"); *Hitachi Med. Sys. Am., Inc. v. Branch*, 2010 WL 3222424, at *2 (N.D. Ohio Aug. 13, 2010) ("Plaintiff's request . . . is reasonably calculated to lead to the discovery of admissible evidence and is proper"); *Ferguson v. Horne*, 2010 WL 819127 at *1 (N.D. Ohio Mar. 9, 2010) ("The operative test in determining whether discovery on a particular matter is permissible is 'whether the line of interrogation is reasonably calculated to lead to the discovery of admissible evidence'"); *Murata Mfg. Co., Ltd. v. Bel Fuse, Inc.*, 422 F. Supp. 2d 934, 944 (N.D. Ill. Mar. 14, 2006)("[a] party is entitled as a general matter to discovery of any information sought if it appears "'reasonably calculated to lead to the discovery of admissible evidence'").

[3] *See, e.g., Info-Hold, Inc. v. Sound Merch., Inc.*, 538 F.3d 448, 451 (6th Cir. 2008) (objection to interrogatory on the ground that it sought "information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence"); *Regan-Touhy v. Walgreen Co.*, 526 F.3d 641, 646 (10th Cir. 2008) ("Walgreen objected to these discovery requests on various grounds, including that they were overly broad and not reasonably calculated to lead to the discovery of admissible evidence"); *Andretti v. Borla Performance Industries, Inc.*, 426 F.3d 824, 831 (6th Cir. 2005) ("Andretti objects to this interrogatory as overly broad, unduly burdensome, requests confidential and proprietary information, and not reasonably calculated to lead to the discovery of admissible evidence"); *Smith v. Hilltop Basic Res. Inc.*, 99 F. App'x. 644, 645(6th Cir. 2004) ("Plaintiffs moved to quash the subpoenas arguing that they were not reasonably calculated to lead to the discovery of admissible evidence"); *Jimena v. UBS AG Bank, Inc.*, 2010 WL 3768030, at *3 (E.D. Cal. Sept. 22, 2010) ("Defendant objects that this Interrogatory is vague and ambiguous in its entirety, and also overbroad, irrelevant, and not reasonably calculated to lead to the discovery of admissible evidence"); *Eichler v. Tilton*, 2010 WL 3734023, at *7 (E.D.Cal. Sept. 20, 2010) ("Defendant objected that the request calls for speculation and a legal conclusion, is an incomplete hypothetical, is over-broad and vague, and not reasonably calculated to lead to the discovery of admissible evidence"); *Joza, supra*, 2010 WL 3619547, at *1 ("On multiple occasions, defendants refused to produce the documents, asserting that the request was 'overbroad, unduly burdensome, harassing and not reasonably calculated to lead to the discovery of admissible evidence'"); *Cooper v. Woodford*, 2010 WL 3565722, at *1 (E.D.Cal. Sept. 3, 2010) ("Defendants object to the request on the ground that it is overbroad in scope and time and not reasonably calculated to lead to the discovery of admissible evidence"); *Farha v. Idbeis*, 2010 WL 3168146, at *1 (D. Kan. Aug. 10, 2010) ("CHA opposes the motion, generally arguing that (1) the documents are either already in plaintiff's possession or (2) the requests are not reasonably calculated to lead to the discovery of admissible evidence"); *Nia v. Adams*, 2010 WL 3058933, at *2 (E.D.Cal. Aug. 3, 2010) (objecting to discovery "on the grounds that it is over broad, burdensome and not reasonably calculated to lead to the discovery of admissible evidence"); *Poulos, Poulos v. Summit Hotel Prop.*, LLC, 2010 WL 2640396, at *2 (D.S.D. Jul. 1, 2010) (objection to discovery: "not reasonably calculated to lead to the discovery of admissible evidence"); *U.S. v. Smithfield Foods, Inc.*, Def.'s Resp. & Objections to Pl.'s First Set of Interrogs. Relating to Jurisdictional Disc., No. 1:03CV00434 (June 18, 2003), available at http://www.justice.gov/atr/cases/f203400/203439a.htm (discovery responses dated June, 2003) ("Therefore [the] Interrogatories . . . are . . . not reasonably calculated to lead to the discovery of admissible evidence"); The Author's Guild v. Google, Inc., Third Party Objections to Subpoena, No. 05-CV-8136-JES (Nov. 20, 2006), *available at* www.seroundtable.com/Yahoo-Objections-Google-Subpoena.pdf (discovery responses dated November, 2006) ("Yahoo further objects because this request is irrelevant and is not reasonably calculated to lead to the discovery of admissible evidence").

[4] *See, e.g., Harris v. Koenig*, 2010 WL 3909507, at *3 (D.D.C. Sept. 16, 2010) ("In general, a party is entitled to discover information if the information sought appears 'reasonably calculated to lead to the discovery of admissible evidence.' Fed. R. Civ. P. 26(b)(1). Additionally, a party may discover information that is not privileged and 'is relevant to the claim or defense of any party.' *Id.*"); *Batts v. County of Santa Clara*, 2010 WL 3629694, at *2 (N.D. Cal. Sept. 14, 2010) ("This court is unconvinced that the NMIC records, in and of themselves, are relevant to any claim or defense in this matter, . . . Nevertheless, given the presence of certain of the NMIC records in Dr. Crandall's personnel file, this court finds that, for discovery purposes, those particular records are relevant or reasonably calculated to lead to the discovery of admissible evidence under Fed.R.Civ.P. 26's broad standard of relevance"); *Lurensky v. Wellinghoff*, 2010 WL 3488255, at *2 (D.D.C. Sept. 3, 2010) "(In general a party is entitled to discover information if the information sought appears 'reasonably calculated to lead to the discovery of admissible evidence.' Fed. R. Civ. P. 26(b)(1). Additionally a party may discover information that is not privileged and 'is relevant to the claim or defense of any party.")(Citations omitted).

both relevant and "reasonably calculated";[5] still others, that a matter is discoverable if "relevant," with "reasonably calculated" being the definition of "relevant."[6]

Rule 26(b), however, says something else entirely:

> (b) Discovery Scope and Limits.
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> (1) Scope in General. Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any non-privileged matter that is **relevant to any party's claim or defense** -- including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. **Relevant information need not be admissible at the trial if** the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26 (b)(2)(C).

Thus the scope of discovery is "relevant to any party's claim or defense." (For good cause the scope may be expanded to "any matter relevant to the subject matter involved in the action" – an exceedingly important point, to which we shall return.) "Reasonably calculated" does not describe the scope of discovery. It is neither an adjunct nor an alternative to "relevant." Nor does it define the word "relevant." The sole and exclusive function of "reasonably calculated" is to test the discoverability of a matter that is concededly relevant but would be inadmissible at trial. Indeed, one of the two widely-ignored 2000 amendments was expressly intended to eradicate this error. As the Advisory Committee explained:

> The Committee was concerned that the "reasonably calculated to lead to the discovery of admissible evidence" standard set forth in this sentence might swallow any other limitation on the scope of discovery. Accordingly, this sentence has been amended to clarify that **information must be relevant to be discoverable**, even though inadmissible, and that discovery of such material is permitted if reasonably calculated to lead to the discovery of admissible evidence.

Fed. R. Civ. P. 26 advisory committee's note (2000) (emphasis added) hereinafter Advisory Note.[7]

The "reasonably calcul clarification was only one of two amendments that has escaped attention of large parts of the bench bar. Prior to the 2000 amendmer scope of discovery was "relevant t subject matter involved in the pe action. . . ." The change, from "su matter" to "claim or defense," seem minor, but it was in fact huge "subject matter" language had used, most notably in the 1978 ca Oppenheimer Fund, Inc. v. Sande justify extremely-broad discovery

The key phrase in this definit - "relevant to the **subject ma** involved in the pending acti - has been construed broadly encompass any matter that b on, or that reasonably could l to other matter that could bear any issue that is or may be in case. *See Hickman v. Taylor*, U.S. 495, 501 (1947). Consiste with the notice-pleading sys established by the Rules, **disco is not limited to issues ra by the pleadings**, for disco itself is designed to help de and clarify the issues. *Id.*, at 501. **Nor is discovery limite the merits of a case**, for a va of fact-oriented issues may

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[5] *Pacific. Marine Ctr., Inc. v. Silva*, 2010 WL 3502647, at *2 (E.D.Cal. Sept. 3, 2010) ("Rule 26 of the Federal Rules of Civil Procedure requires that information s to discovery must be relevant and reasonably calculated to lead to the discovery of admissible evidence").

[6] *Ecclesiastes 9:10-11-12, Inc. v. LMC Holding Co.*, 497 F.3d 1135, 1144 n.11 (10th Cir. 2007) ("parties may obtain discovery of any non-privileged matter 'relevant claim or defense of any party,' which covers any request 'reasonably calculated to lead to the discovery of admissible evidence'"); *Survivor Media, Inc. v. Survivor* 406 F.3d 625, 635 (9th Cir. 2005) ("Litigants 'may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party.' Fed. R P. 26(b)(1). Relevant information for purposes of discovery is information 'reasonably calculated to lead to the discovery of admissible evidence'" (citation omi *Wiwa v. Royal Dutch Petroleum Co.*, 392 F.3d 812, 820 (5th Cir. 2004) ("Under the federal discovery rules, any party to a civil action is entitled to all inform relevant to the subject matter of the action before the court unless such information is privileged. Discovery requests are relevant when they seek admissible evide evidence that is "'reasonably calculated to lead to the discovery of admissible evidence.' Whether Kiobel's discovery requests are relevant thus turns on whether th 'reasonably calculated' to lead to evidence admissible as to her claims against Shell") (footnotes and some internal quotation marks omitted); *Lloyd v. Powell*, 201 3489940, at *1 (W.D.Wash. Aug. 30, 2010) ("Pursuant to Rule 26(b)(1) of the Federal Rules of Civil Procedure, parties may obtain discovery of relevant inform Relevant information is defined as information that is 'reasonably calculated to lead to the discovery of admissible evidence.' Fed.R.Civ.P. 26(b)(1)."); *First v. Kia Cajon*, 2010 WL 3245778, at *3 (S.D.Cal. Aug. 17, 2010) ("The Court finds this discovery is reasonably calculated to lead to the discovery of admissible evidence therefore relevant"); *Coffeyville Res. Refining & Mktg. v. Liberty Surplus Ins. Corp.*, 261 F.R.D. 586, 594 (D.Kan. 2009) ("Because discovery of the manuals is reasc calculated to lead to evidence as to whether National wrongly refused to pay the insurance claim, the requests are relevant.").

[7] The scope of discovery has never been "reasonably calculated." The "reasonably calculated" language dates back to 1946, when it was added simply "to mak that otherwise relevant material could not be withheld because it was hearsay or otherwise inadmissible." Advisory Note. An example of the type of decision th 1946 amendment was intended to address is Rose Silk Mills v. Insurance Company of North America, 29 F.Supp. 504 (S.D.N.Y. 1939). The plaintiff in Rose Sil pursuing a claim under a property insurance policy and wished to depose Blackburn, who had investigated the loss for defendant. Defendant moved for an order bl the deposition, pointing out that Blackburn had no personal knowledge – he could only say what others had told him. The District Court, correctly noting that R "confined [discovery] to 'relevant' matters," blocked the deposition: "What may have been told to him by different people during the course of his investigation is not 'relevant to the subject matter involved'; it is pure hearsay, and cannot be justified either 'for the purpose of discovery or for use as evidence'." *Id.* at 505. Arg the Rose Silk court confused relevance with admissibility, but in any event the Rule was amended, and the "reasonably calculated" language added.

[8] 437 U.S. 340 (1978)(hereinafter Oppenheimer Fund).

during litigation that are not related to the merits.

Oppenheimer Fund, 437 U.S. at 350-351 (emphasis supplied; footnotes omitted).

It was because that the "subject matter" language was, as the *Oppenheimer Fund* court put it, "the key phrase," that the Advisory Committee focused on it in 2000. The Committee's notes on the 2000 amendment began with the observation that the Committee had, two decades earlier, proposed eliminating the "subject matter" language; that alternative, less-drastic reforms had been tried instead; and that "[c]oncerns about costs and delay of discovery have persisted nonetheless. . . ." The heart of the problem, the Committee intimated, was the "subject matter" language:

> The Committee has heard that in some instances, particularly cases involving large quantities of discovery, parties seek to justify discovery requests that sweep far beyond the claims and defenses of the parties on the ground that they nevertheless have a bearing on the "subject matter" involved in the action.

Advisory Note.

This was an odd, or perhaps merely politic, way to put this point, given that parties "seeking to justify" their discovery requests were doing so (and quite rightly) by citing *Oppenheimer Fund*. In any event, the Committee made it plain that the amendments were intended to restrict discovery:

> The Committee intends that the parties and the court focus on the actual **claims and defenses** involved in the action. . . . The rule change signals to the court that it has the authority to **confine discovery to the claims and defenses asserted in the pleadings**, and signals to the parties that they have **no entitlement to discovery to develop new claims or defenses that are not already identified in the pleadings**.

Id. The 2000 Amendments, then, effectively overruled the *Oppenheimer Fund* passage quoted above. Indeed, we might fairly re-write that passage to read as follows:

> The key phrase in this definition - "relevant to any party's claim or defense" – must be construed narrowly. It does **not** encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case. Anything to the contrary in *Hickman v. Taylor*, or *Oppenheimer Fund*, is overruled. Despite the notice-pleading system established by the Rules, discovery **is** limited to issues raised by the pleadings, unless the party seeking broader discovery shows "good cause." And in all events discovery **is** limited to the merits of a case, even if fact-oriented issues arise during litigation that are not related to the merits.

Many courts have ignored the change from "subject matter" to "claims." Some courts are incredibly still quoting -- even emphasizing -- the old rule.[9] Other courts more often correctly quote the new rule but end up applying the old rule by ignoring the change and relying on *Oppenheimer Fund* and similar pre-amendment authorities.[10]

We've all written a check in early January and mistakenly dated it with the previous year's date. When we catch ourselves doing that, we laugh. But if we made the same mistake in, say, March, we might find it less funny and more disturbing. Whatever excuse there might have been for overlooking the 2000 amendments in the first few months after they took effect, the time has come – has long since passed – for attorneys and judges to stop dating their briefs and opinions "1999." ■

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[9] *See, e.g., Jerome v. Marriott Residence Inn Barcelo Crestline/AIG*, 211 F. App'x. 844, 848 (11th Cir. 2006) ("Parties may obtain discovery regarding any matter, not privileged, which is *relevant to the subject matter involved in the pending action*"); *Newsom v. Barnhart*, 116 F. App'x. 429, 432 (4th Cir. 2004) (same) (emphasis supplied by the Court); *Lee v. Nucor-Yamato Steel Co., LLP*, 2008 WL 4014141, at *3 (E.D. Ark. 2008 Aug. 25, 2008) ("As a general rule, parties may obtain discovery regarding any matter, not privileged, so long as it is 'relevant to the subject matter involved in the pending action'").

[10] *See, e.g., Marsico v. Sears Holding Corp.*, 370 F. App'x. 658, 654 (6th Cir. 2010) (correctly quoting current rule, but asserting that the "scope of discovery under the Federal Rules of Civil Procedure is traditionally quite broad," and discovery "encompass[es] any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case") (quoting *Oppenheimer Fund*, 437 U.S. at 351); *Conti v. Am. Axle and Mfg., Inc.*, 326 F. App'x. 900, 904 (6th Cir. 2009) ("As the Supreme Court has instructed, because 'discovery itself is designed to help define and clarify the issue,' the limits set forth in Rule 26 must be 'construed broadly to encompass any matter that bears on, or that reasonably could lead to other matters that could bear on, any issue that is or may be in the case'" (quoting *Oppenheimer Fund*, 437 U.S. at 351); *Morrow v. City of Tenaha Deputy City* 2010 WL 2721400, at *2 (E.D. Tex. Jul. 8, 2010) (citing a pre-2000 case for the proposition that "discovery rules are accorded a broad and liberal treatment"); *Poulos v. Summit Hotel Prop., LLC*, 2010 WL 2640396, at *2 (D.S.D. Jul. 1, 2010) (citing a pre-2000 case for the proposition that the "discovery [rules] are to be accorded a broad and liberal treatment"); *Gary Davis v. Chase Bank U.S.A.*, , 2010 WL 1531410, at *4 (C.D. Cal. Apr. 14, 2010) (affirming Magistrate's order granting discovery because, under *Oppenheimer Fund*, discovery "encompass[es] any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case," and "discovery is not 'limited to the merits of a case'"); *Ferguson v. Horne*, 2010 WL 819127, at **1-2 (N.D. Ohio Mar. 9, 2010) ("Rule 26 must be 'construed broadly to encompass any matter that bears on, or that reasonably could lead to other matters that could bear on, any issue that is or may be in the case. . . .'") (quoting *Oppenheimer Fund*, 437 U.S. at 351); *Rosenbaum v. Becker & Poliakoff*, 2010 WL 623699, at *1 (S.D. Fla. Feb. 23, 2010) (discovery "'encompass[es] any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case'" (quoting *Oppenheimer Fund*, 437 U.S. at 351); *Id*. at n.4 (citing the 1946 Advisory Committee note in favor of "fishing expeditions"!); *Fosselman v. Gibbs*, 2008 WL 745122, at *1 (N.D. Cal. Mar. 18, 2008) ("discovery is not limited to issues raised by the pleadings . . . Nor is discovery limited to the merits of a case") (quoting *Oppenheimer Fund*, 437 U.S. at 351); *Florer v. Johnson-Bales*, 2009 WL 3444598, at *2 (W.D. Wash. Oct. 21, 2009) ("discovery is not limited to issues raised by the pleadings . . . Nor is discovery limited to the merits of a case") (citing *Oppenheimer Fund*, 437 U.S. at 351); *Murata Mfg. Co., Ltd. v. Bel Fuse, Inc.*, 422 F. Supp. 2d 934 (N.D. Ill. Mar. 14, 2006) (the scope of discovery "need not even be confine to 'issues raised by the pleadings' or 'the merits of a case'") (quoting *Oppenheimer Fund*, 437 U.S. at 351); *Great Plains Mut. Ins. Co., Inc. v. Mutual Reinsurance Bureau*, 1993 WL 270510, at *3 (D. Kan. Jun. 29, 1993) (quoting *Oppenheimer Fund* for the propositions that "discovery is not limited to issues raised by the pleadings . . . Nor is discovery limited to the merits of a case").