Rethinking Relevance: A Call to Modify the Rules of Discovery

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Electronic discovery is inherently expensive and burdensome because of the high volume of information in the world today. The flood information cries out for a constriction of scope of discovery to prevent the profession from drowning. There is simply Too Much Information (TMI). TMI is an inevitable byproduct of rapid advances in technology. These advances cause the amount and complexity of our writings to increase exponentially every year. This trend accelerates and stresses our ability to conduct discovery in a proportional manner. There is nothing we can do to put the TMI technology-genie back in the bottle. But we can control the rules.

We can and should revise Rule 26(b)(1), *Federal Rules of Civil Procedure*, which defines the scope of permissible discovery, and related Rule 401, *Federal Rules of Evidence,* which defines relevance. These federal rules and their state counterparts permit very broad discovery. They should be revised in two ways to limit the scope of relevancy. First, relevance should be limited to the claims or defenses raised, not the general subject matter. Second, for ESI discovery at least, the information sought should be admissible. There should be no extension of scope to allow for the discovery of electronic information *reasonably calculated to lead to discovery of admissible evidence.*

Only in this way can the cardinal rule of civil procedure be followed,

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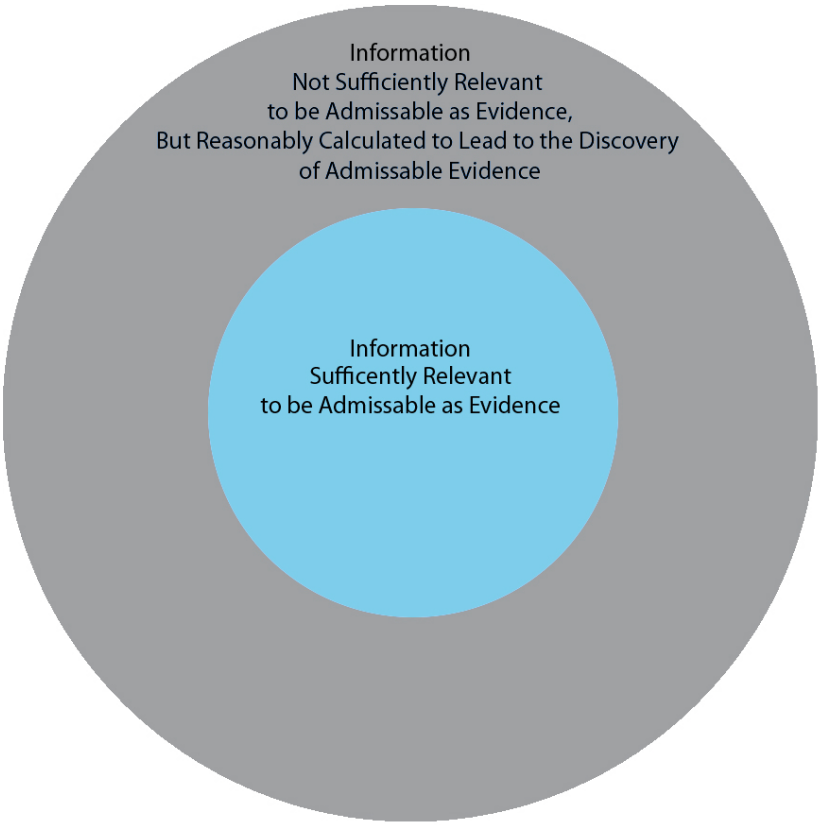
Rule 1, which requires the "just, speedy and inexpensive determination of every action and proceeding."

The Rules Today Allow for the Discovery of Inadmissible Evidence of Only Marginal Relevance

Due to the unforeseen, rapid advances in technology, Rule 1 now stands in conflict with Rule 26(b)(1). It conflicts because 26(b)(1) allows for the discovery of information not sufficiently relevant or trustworthy to be admissible as evidence, just so long as it *appears* to be *reasonably calculated* to lead to the discovery of admissible evidence. That is the grey area shown in the wheel diagram below of discoverable information. This expansive outer circle of e-discovery should be eliminated. Legal actions cannot be determined in a just, speedy and inexpensive manner if discovery into the grey area is permitted. Only directly relevant and otherwise admissible electronic writings should be discoverable, the blue inner circle.



The way it now stands, discoverable "information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." *See e.g.*, *Martin Properties, Inc. v. Florida Industries Investment Corp*., 2003 WL 1877963, *2 (N.D.Ill. Apr. 14, 2003). Courts permit discovery if there is "any possibility" that the information sought may be relevant to the claim or defense of any party. *See, e.g., Sheldon v. Vermonty*, 204 F.R.D. 679, 689-90 (D.Kan. 2001).

As the Second Circuit explained in *In re Surety Association of America*, 388 F. 2d 412, 414 (2nd Cir. 1967)

> The only restriction placed upon the matters which may be gone into upon discovery examinations is that they be relevant. Rule 26(b), Fed.R.Civ.Pro. Relevancy, in this context, is tested by a rather liberal standard. "Thus it is relevancy to the subject matter which is the test and subject matter is broader than the precise issues presented by the pleadings." *Kaiser-Frazer Corp. v. Otis & Co.*, 11 F.R.D. 50, 53 (S.D.N.Y.1951).
>
> When the discovery sought appears relevant, the party resisting the discovery has the burden to establish the lack of relevance. This is done by establishing the requested discovery to be of such marginal relevance that the potential harm occasioned by discovery outweighs the ordinary presumption in favor of broad disclosure. *Beach v. City of Olathe, Kansas*, 203 F.R.D. 489, 496 (D.Kan. 2001).
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> The process of requiring the responsive party to seek a protective order, wherein they must prove potential harm and need for protection under Rule 26(b)(2)(C), can be expensive and uncertain. Trial judges and magistrates have broad discretion and protective orders are not lightly provided.

Under the rules as now written, the broad discoverability standards apply to both paper documents and ESI. As the District Court Judge pointed out in *Mirbeau of Geneva Lake LLC v. City of Lake Geneva*, 2009 U.S. Dist. LEXIS 101104 (E.D. Wis. 2009):

> The [*3] advisory notes to the *Federal Rules of Civil Procedure* indicate that the federal rules take an "expansive approach toward discovery of ESI and that "discovery of [ESI] stands on equal footing with discovery of paper documents." Fed. R. Civ. P. 34(a), advisory notes.

The bottom line, as all litigators know, is that it is unduly difficult to defeat discovery requests on the grounds of irrelevance. Parties requesting ESI discovery know this. Some exploit this fact, particularly in disproportionate litigation where one side has many more computers and ESI than the other. They misuse e-discovery as a weapon. Over-broad discovery requests are common under the rules as they now stand. As a result, it is all too easy in discovery to run up a big bill chasing down and producing ESI that has little, if any, real value or impact upon the merits of the case.

An Expansive Concept of Discovery is the Product of a Bygone Era

The expansive concepts of discovery were developed in prior centuries, long before the computer was invented or mankind could even imagine a world of terabytes of information and instantaneous, global writings. As the Supreme Court noted in *Hickman v. Taylor*, 329 U.S. 495, 515 (1947):

> 'Discovery'… traces back to the equity bill of discovery in English Chancery practice and seems to have had a forerunner in Continental practice. *See* Ragland, *Discovery Before Trial* (1932) 13-16.

The revisions to the Federal Rules of Civil Procedure at the end of the last century accelerated and expanded broad discovery. This expansion made sense in the paper world where these discovery concepts were formed. It was not inherently burdensome in the pre-digital age to allow for discovery of inadmissible writings, so long as they were likely to lead to relevant evidence. There were a limited, manageable number of paper records. But in today's world, the expansive concept of discoverable writings makes little sense. We can no longer afford the discovery of ESI that lacks sufficient probative value and trustworthiness to be admissible as evidence.

We live in a completely different world than when the Federal Rules of

Procedure were modified in 1946 to allow for very broad discovery. As the *Notes of Advisory Committee on 1946 Amendments to Rules* explained:

> The amendments to subdivision (b) make clear the broad scope of examination and that it may cover not only evidence for use at the trial but also inquiry into matters in themselves inadmissible as evidence but which will lead to the discovery of such evidence. The purpose of discovery is to allow a broad search for facts, the names of witnesses, or any other matters which may aid a party in the preparation or presentation of his case. *Engl v Aetna Life Ins. Co*. CCA2d, 1943, 139 F2d 469; *Mahler v Pennsylvania R. Co.* ED NY 1945, 8 Fed Rules Serv 33.351, Case 1. In such a preliminary inquiry admissibility at trial should not be the test as to whether the information sought is within the scope of proper examination. Such a standard unnecessarily curtails the utility of discovery practice.

That may have been sound logic in the 1940s before the copy machine was invented, much less the computer, but it is not now.

Prior Attempts to Fix the Problem of Relevance

By the 1980s the number of documents had begun to expand dramatically by virtue of the widespread use of the copy machine. The increase was tame by today's standards of the computer driven information explosion, but it still caused problems for the profession. Discovery abuses connected to an over-broad relevancy standard were beginning to plague legal practice. These problems were recognized by the *Notes of Advisory Committee on 1983 Amendments to Rules.*

> Excessive discovery and evasion or resistance to reasonable discovery requests pose significant problems. Recent studies have made some attempt to determine the sources and extent of the difficulties. See Brazil, *Civil Discovery: Lawyers' Views of its Effectiveness, Principal Problems and Abuses*, American Bar Foundation (1980); Connolly, Holleman & Kuhlman, *Judicial Controls and the Civil Litigative Process: Discovery*, Federal Judicial Center (1978); Ellington, *A Study of Sanctions for Discovery*

Abuse, Department of Justice (1979); Schroeder & Frank, *The Proposed Changes in the Discovery Rules*, 1978 Ariz. St. L.J. 475.

The purpose of discovery is to provide a mechanism for making relevant information available to the litigants. "Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation." *Hickman v. Taylor*, 329 U.S. 495, 507 (1947). Thus the spirit of the rules is violated when advocates attempt to use discovery tools as tactical weapons rather than to expose the facts and illuminate the issues by overuse of discovery or unnecessary use of defensive weapons or evasive responses. All of this results in excessively costly and time-consuming activities that are disproportionate to the nature of the case, the amount involved, or the issues or values at stake.

Given our adversary tradition and the current discovery rules, it is not surprising that there are many opportunities, if not incentives, for attorneys to engage in discovery that, although authorized by the broad, permissive terms of the rules, nevertheless results in delay. See Brazil, *The Adversary Character of Civil Discovery: A Critque and Proposals for Change,* 31 Vand.L.Rev. 1259 (1978). As a result, it has been said that the rules have "not infrequently [been] exploited to the disadvantage of justice." *Herbert v. Lando*, 441 U.S. 153, 179 (1979) (Powell, J., concurring). These practices impose costs on an already overburdened system and impede the fundamental goal of the "just, speedy, and inexpensive determination of every action." Fed.R.Civ.P. 1.

By 1993 the very early stages of the computer revolution and information explosion were beginning to be felt by the profession. The Official Commentary to the 1993 revisions to Rule 26(b) recognizes this problem:

The information explosion of recent decades has greatly

> increased both the potential cost of wide-ranging discovery and the potential for discovery to be used as an instrument for delay or oppression.

By 2000 there was already a growing cry within the legal profession to finally narrow the scope of discovery in a fundamental way by changing the definition of relevance. The Advisory Committee again responded timidly and continued its ineffective baby steps approach. The definition of relevance was constricted somewhat in the 2000 Federal Rule amendments to today's wording of Rule 26(b)(1).

The Advisory Committee thought that such a minor tweaking of the relevancy scope would correct the problem. They changed the wording of 26(b)(1) to put in a good cause requirement for subject matter relevance:

> … the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense …
>
> For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action.

It was a big mistake to think this minor change would do anything to stem the tide of discovery cost inflation. In fact, this minor revision had no impact whatsoever, and most practitioners today are unaware of the slight change to a two-step good-cause process. The advisory Committee explained this minor rule change as follows:

> The amendment is designed to involve the court more actively in regulating the breadth of sweeping or contentious discovery. …
>
> 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.

This designed intent, which was not coupled with any increase in the number of judicial officers, failed completely. The judges on the bench

did not hear the message of this subtle signaling. In practice judges have ignored the good cause requirement. In the rare occasions when the issue is forced, judges so easily find good cause as to make the requirement meaningless. In practice, the judiciary failed to regulate "the breadth of sweeping or contentious discovery." Discovery has continued to go beyond the claims and defenses raised. It has continued to apply to general subject matter with virtually no restraint on the vague scope.

You can hardly blame the Rules Committee of 2000. Few in the late 1990s predicted the incredible growth in technology and information of the next ten years. The Rules Committee after 2000 realized the problem, but they did try to change the relevance definition as part of their proposed fix.

The 2006 Amendments were very helpful, but we now know they were inadequate. They did not change Rule 26(1) at all, but did reduce the scope of discovery somewhat by the creation of new Rule 26(b)(2)(B). As the Committee explained:

> The amendment to Rule 26(b)(2) is designed to address issues raised by difficulties in locating, retrieving, and providing discovery of some electronically stored information. Electronic storage systems often make it easier to locate and retrieve information. These advantages are properly taken into account in determining the reasonable scope of discovery in a particular case. But some sources of electronically stored information can be accessed only with substantial burden and cost. In a particular case, these burdens and costs may make the information on such sources not reasonably accessible.

This revision does not really address relevance at all. It just provides limited protection from discovery of *hard to access* ESI. As a result, discovery abuses continued after 2006, virtually unabated. In my view the 2006 Amendments were inadequate because they did not address the underlying problem of an over-expansive scope of discovery. They did not address relevance.

We now know the volume of information is going to continue to grow with no end in sight. We must take action now to fundamentally change and narrow the scope of relevance.

We Must Rethink Relevance for Purposes of ESI Discovery

The scope of discovery should be constricted in two ways. First, relevance should be limited to the claims and defenses raised. It should not be extended to the general subject matter of the case. It should not allow fishing expeditions into other possible causes of action. The good cause exception should be eliminated. That is a signal that the Bench and Bar will hear.

Secondly, if ESI is not relevant or trustworthy enough to be admissible evidence, it should not be discoverable. Period. ESI directly relevant to claims and defenses is already voluminous. The additional grey areas of ESI that *appears* to someone as *reasonably calculated to lead to discovery of admissible evidence*, is inherently excessive and burdensome. It is a luxury we can no longer afford.

The rules must change for the system to function. Discovery of irrelevant and otherwise inadmissible ESI evidence should not be permitted. It makes speedy, inexpensive determinations impossible in many, if not most cases involving ESI.

We need to tighten our concepts of relevancy for purposes of discovery. Modification of the state and federal rules on this key point should make it easier to curb the abuses of disproportional discovery. Other rule changes may also be necessary, but this one seems to be obvious.

Change Procedure Rule 26(b)(1)

In the federal courts we need to change the provision in Rule 26(b)(1), *Federal Rules of Civil Procedure*, which reads as follows:

> **Rule 26. Duty to Disclose; General Provisions Governing Discovery. (b) Discovery Scope and Limits. (1) Scope in General.** Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged 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).

The rule should be modified by eliminating the good cause exception. This sentence should be removed: "For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action." Discovery should instead be restricted to: "any nonprivileged matter that is relevant to any party's claim or defense."

The rule should be further modified by eliminating all reference to "reasonably calculated to lead to the discovery of admissible evidence," at least in its application to the discovery of electronic information where large-volume ESI discovery is involved.

Rule 26 (1) as I would have it rewritten when then read as follows:

> **(1) Scope in General.** Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged 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. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).

This is just one possible way to do it. I am sure others can think of other, perhaps better ways to tie it down so that discovery is not unduly limited. The broad *reasonably calculated standard* of expansive discovery should remain for purposes of depositions, interrogatories, and requests for admissions, but not for e-discovery. Subject matter discovery should be eliminated for all types of discovery.

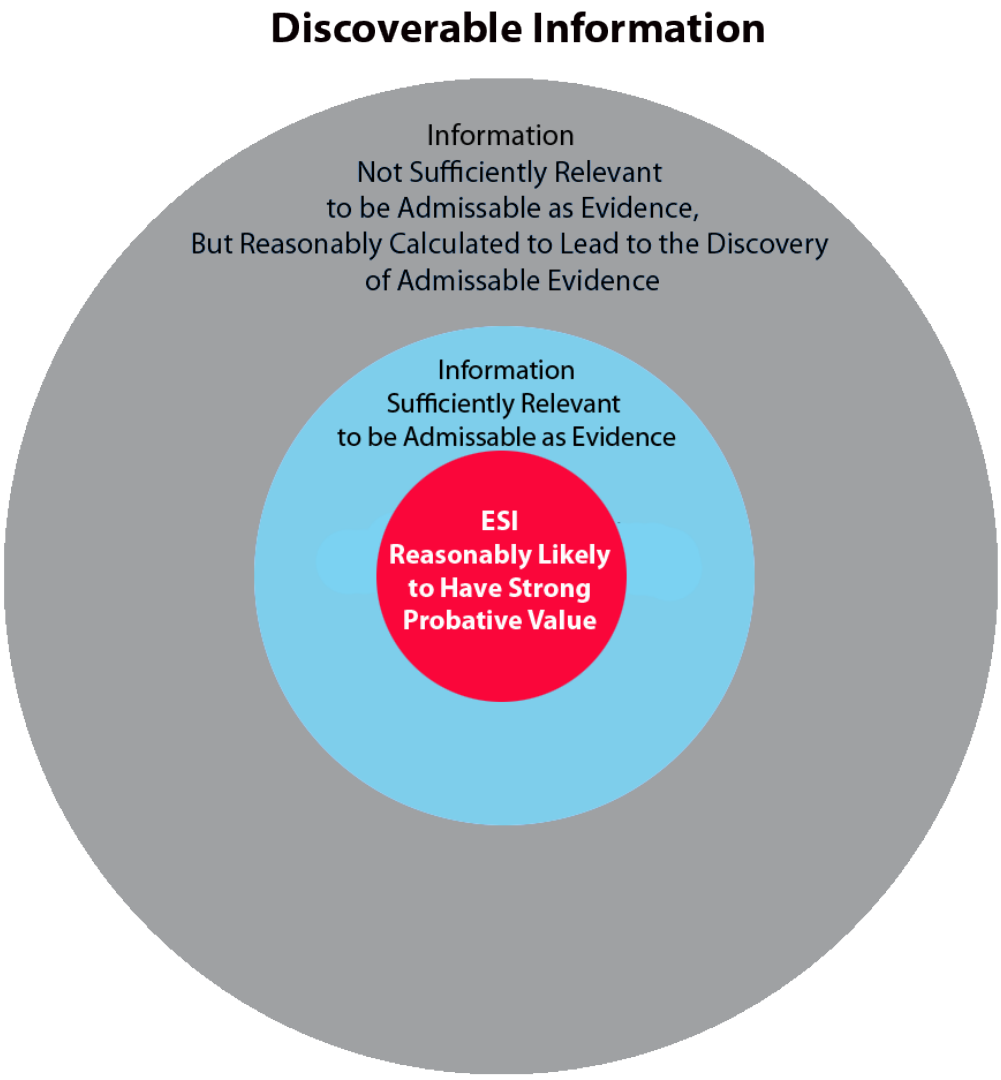
This call for a change in the rules is directed to both the federal and state courts, as all states have adopted this expansive concept of

discovery relevance. As the Supreme Court explained in *Seattle Times Co. v. Rhinehart,* 467 U.S. 20, 30 (1984):

> Most States, including Washington, have adopted discovery provisions modeled on Rules 26 through 37 of the Federal Rules of Civil Procedure. F. James & G. Hazard, *Civil Procedure* 179 (1977). Rule 26(b)(1) provides that a party "may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." It further provides that discovery is not limited to matters that will be admissible at trial so long as the information sought "appears reasonably calculated to lead to the discovery of admissible evidence." Wash. Super. Ct. Civ. Rule 26(b)(1); *Trust Fund Services* v. *Aro Glass Co.,* 89 Wash. 2d 758, 763, 575 P. 2d 716, 719 (1978); cf. 8 C. Wright & A. Miller, *Federal Practice and Procedure* § 2008 (1970).

Change Evidence Rule 401

One additional, complementary rule change would be to tighten the definition of relevant evidence itself, so that the blue inner circle of the diagram is also reduced, at least for voluminous ESI discovery. Thus, for instance, you could reduce the scope of relevance for purposes of ESI discovery to *ESI reasonably likely to have high probative value*. This is shown in the inner red circle below.



Relevancy is defined in state and federal rules of evidence, not in rules of procedure. The definitions are all very broad in scope and do not distinguish between types of evidence. For instance, the *Federal Rules of Evidence* define relevance as follows:

> **Rule 401. Definition of "Relevant Evidence."** "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

The Rule's standard of relevance is said to be a liberal standard allowing consideration of evidence. *Daubert v. Merrell Dow*

Pharmaceuticals, Inc., 509 U.S. 579 (1993).

The evidence rules could be revised to add a weight factor for purposes of ESI or some other limiting criteria. For instance, the words "any tendency" could be revised for purposes of ESI only, to something like "a significant tendency," or "a reasonable likelihood." Again, the Rule Committee, composed of our best experts on the subject, could collectively parse out the specific language that would work best to rein in excessive ESI discovery. **The idea is to limit discovery of ESI to information reasonably likely to have strong probative value.**

An additional possible change is to limit *relevance* for purposes of discovery to facts that are disputed. The definition of relevance in the Evidence Code and case law does not contain any such limitation.

These changes, and perhaps the others suggested here as well, could probably be implemented in procedural rules alone, without revising the related evidence rules. This would require careful study and consideration by the rules committee.

Conclusion

It has only been a few years since the last federal rule changes went into effect on December 1, 2006. The rules were changed to try to help litigants, attorneys, and judges cope with electronic discovery. The conventional wisdom is to wait a few more years before making any more revisions. That is what I used to think, until recently, and in the past it was certainly prudent to proceed slowly. But I have come to realize that what made sense in the last century no longer makes sense now. TMI is the 800-pound gorilla in the room. We have got to do something about it now.

The pace of change has accelerated. We must as a profession keep up with the rapid advances. We can no longer afford to wait. Society is changing fast and so should the law. To wait is to condone further violations of the prime directive of Rule 1.

Changes to Rule 26(b)(1), *Federal Rules of Civil Procedure*, and Rule 401, *Federal Rules of Evidence*, are an obvious next step in what must be a continuous evolution of the law. We should no longer tolerate the discovery of information that only has a vague appearance of

relevance. We need to redefine relevance for purposes of electronic discovery and we need to do it today, not tomorrow.

The flood of information in our courtrooms has a natural spigot in the rules. We have to turn down the flow by narrowing the scope of discovery and relevance. There is not other way around it. Otherwise we will surely drown in unnecessary ESI review and production expenses. I am not sure my specific proposals are the best way to turn the spigot, but I am sure it has to be done.

For questions or comments, please feel free to contact the author at: Ralph.Losey@JacksonLewis.com.