JURISDICTION AND PROCEDURE

BNA Insights: Unintended Consequences—Revisions to Rule 26 Could Lead to Discovery of Settlement Talks With Regulators

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When the 2015 Amendments to the Federal Rules of Civil Procedure were proposed and enacted, proponents and commentators widely assumed that revisions to the core discovery provisions of Rule 26 were aimed at limiting the scope of discovery. Specifically, the elimination of the popular phrase “reasonably calculated to lead to the discovery of admissible evidence” was designed to refocus the inquiry of courts away from the hunt for every potential lead to evidence, no matter how attenuated, and onto such discovery as is “proportional” to the case. Early decisions under the new Rule 26, however, suggest that some courts may read the revised language to expand discovery of settlement negotiations, even though they are inadmissible in evidence under Federal Rule of Evidence 408. Prior to the Amendments, courts were divided on discovery of settlement negotiations, but had often given them heightened protection from discovery.

Of particular concern to regulated entities is the possibility of turning over settlement negotiations with regulators – protection of which was a core concern of Rule 408 – as was ordered in one recent case relying on the Amended Rule 26(b)(1). If this becomes a common interpretation of the revised Rule, pressure may build for further amendments or for judicial or statutory recognition of an explicit privilege protecting settlement negotiations from discovery. In the interim, parties to such negotiations should proceed with caution and consider, where possible, measures to protect the confidentiality of negotiations.

I. History of Rules 26 and 408

In order to understand the 2015 Amendments and their application to discovery of settlement negotiations, it is useful to consider both the history of Rule 26 and the “reasonably calculated” language and the history of Rule 408.
A. “Reasonably Calculated”

Rule 26, when introduced with the first Federal Rules of Civil Procedure in 1937, was addressed solely to depositions, providing in relevant part:

[T]he deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether relating to the claim or defense of the examining party or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts. [FED. R. CIV. P. 26(b) (1940)]

The phrase “reasonably calculated to lead to the discovery of admissible evidence” originated with a 1946 amendment designed to stop parties from refusing deposition testimony on the grounds that the testimony sought would be hearsay or otherwise inadmissible at trial: “It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence.” [FED. R. CIV. P. 26(a) & (b) & advisory committee’s note (1946)] The 1946 Advisory Committee Notes emphasized the focus on discovery of hearsay:

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 relevant facts, the names of witnesses, or any other matters which may aid a party in the preparation or presentation of his case. 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. Of course, matters entirely without bearing either as direct evidence or as leads to evidence are not within the scope of inquiry, but to the extent that the examination develops useful information, it functions successfully as an instrument of discovery, even if it produces no testimony directly admissible...Thus hearsay, while inadmissible itself, may suggest testimony which properly may be proved. Under Rule 26(b) several cases, however, have erroneously limited discovery on the basis of admissibility, holding that the word “relevant” in effect meant “material and competent under the rules of evidence”...Thus it has been said that inquiry might not be made into statements or other matters which, when disclosed, amounted only to hearsay. [Id. (emphasis added; citations omitted; collecting cases)]

As the 2014 memorandum from the Chair of the Advisory Committee summarizing the Committee’s fact-finding observed, in recommending removal of this language:

This change is intended to curtail reliance on the “reasonably calculated” phrase to define the scope of discovery. The phrase was never intended to have that purpose. The “reasonably calculated” language was added to the rules in 1946 because parties in depositions were objecting to relevant questions on the ground that the answers would not be admissible at trial. Inadmissibility was used to bar relevant discovery. [See Memorandum from Judge David G. Campbell, Chair, Advisory Committee on Federal Rules of Civil Procedure (June 14, 2014) (“2014 Rules Appendix”), at B-10 (emphasis added)]

In 1970, Rule 26 was “recast to cover the scope of discovery generally,” with the rule permitting discovery of “any matter, not privileged, which is relevant to the subject matter” of the action; the “reasonably calculated” language was relocated to subpart (b)(1), but otherwise unchanged:

The existing subdivision, although in terms applicable only to depositions, is incorporated by reference in existing Rules 33 and 34. Since decisions as to relevance to the subject matter of the action are made for discovery purposes well in advance of trial, a flexible treatment of relevance is required and the making of discovery, whether voluntary or under court order, is not a concession or determination of relevance for purposes of trial. [FED. R. CIV. P. 26(b)(1) advisory committee’s note (1970)]

With the explicit extension of the “reasonably calculated” language to other discovery devices, the Advisory Committee was thus no longer focused only on hearsay, but its concerns were still addressed to hard-to-predict relevance-at-trial issues, rather than policy-based carve-outs from evidence such as the preclusion of settlement negotiations.

That carve-out was significantly enlarged by the new Rule 408 when the Federal Rules of Evidence were proposed in 1972. As adopted, Rule 408 was an explicit expansion of the protection for settlement negotiations that had previously existed at common law. [FED. R. EVID. 408 advisory committee’s note (1972)] Upon the Rule’s enactment in 1974, the Senate explicitly rejected a House amendment requested by government agencies who wanted to retain the admissibility of statements of fact made in settlement negotiations. [FED. R. EVID. 408 advisory committee’s note (1974); Bottaro v. Hatton Assocs., 96 F.R.D. 158, 160 (E.D.N.Y. 1982) (citing S.Rep. No. 1277, 93d Cong. 2d Sess. 10 (1974))]

Agencies feared that regulated entities would hold back information until formal negotiations had begun, thus impeding early dispute resolution. The Advisory Committee, echoing the view of the Senate, concluded that such an exclusion would “deprive the rule of much of its salutary effect” because it would “hamper free communication between parties” and discourage settlement talks. [Id.]

In 1993, reflecting Rule 26’s movement away from the focus on depositions, the “reasonably calculated” language dropped the references to objections, now reading, “[t]he information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.” [FED. R. CIV. P. 26(b)(1) (1993)] The 1993 Advisory Committee Notes do not suggest, however, that any change in the Rule was intended by that revised language.

Meanwhile, the Advisory Committee Notes from 1983 on expressed mounting concern about the burdens of excessive discovery, particularly its use for strategic purposes rather than to gather information. The Advisory Committee Notes to the 1983 Amendment opened with: “Excessive discovery and evasion or resistance to reasonable discovery requests pose significant prob-
lems. . . . [T]he 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.” [Fed. R. Civ. P. 26(b)(1) advisory committee’s note (1983)] In 1993, the Committee warned that “[t]he 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.” [Fed. R. Civ. P. 26(b)(1) advisory committee’s note (1993)] And in 2015, the Committee added, “[w]hat seemed an explosion in 1993 has been exacerbated by the advent of e-discovery.” [Fed. R. Civ. P. 26(b)(1) advisory committee’s note (2015)]

The 2000 Amendments took a variety of steps to rein in discovery, such as eliminating the reference in the first sentence of Rule 26(b)(1) to discovery “relevant to the subject matter” of an action, instead allowing discovery of “any matter, not privileged, that is relevant to the claim or defense of any party” and allowing more amorphously-defined “subject matter” discovery only on a showing of “good cause”. [Fed. R. Civ. P. 26(b)(1) (2000)] The Advisory Committee explained that this revision “intends that the parties and the court focus on the actual claims and defenses involved in the action.” [Fed. R. Civ. P. 26(b)(1) advisory committee’s note (2000)]

The “reasonably calculated” language was also amended to read: “Relevant information need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.” [Fed. R. Civ. P. 26(b)(1) (2000) (emphasis added)] As the Advisory Committee explained:
The amendments also modify the provision regarding discovery of information not admissible in evidence. As added in 1946, this sentence was designed to make clear that otherwise relevant material could not be withheld because it was hearsay or otherwise inadmissible. 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(b)(1) advisory committee’s note (2000) (emphasis added)]

In short, the Committee in 2000 viewed this language as an expansion of discovery, and sought to limit it by a specific relevance requirement.

B. Proportionality

Unfortunately, in the view of the Advisory Committee, the “reasonably calculated” language remained precisely the escape hatch from limitations on discovery that the 2000 Amendments had been designed to close. In 2015, the Committee eliminated the phrase entirely:
The former provision for discovery of relevant but inadmissible information that appears “reasonably calculated to lead to the discovery of admissible evidence” is also deleted. The phrase has been used by some, incorrectly, to define the scope of discovery. . . . The “reasonably calculated” phrase has continued to create problems, however, and is removed by these amendments. It is replaced by the direct statement that “Information within this scope of discovery need not be admissible in evidence to be discoverable.” Discovery of nonprivileged information not admissible in evidence remains available so long as it is otherwise within the scope of discovery. [Fed. R. Civ. P. 26(b)(1) advisory committee’s note (2015) (emphasis added)]

Meanwhile, the Rule’s reference to discovery of information relevant to the “subject matter” of an action, even for good cause shown, was eliminated as being “rarely invoked” and unnecessary, so the Rule now states that “[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case” considering a list of enumerated factors. [Fed. R. Civ. P. 26(b)(1) (2015) (emphasis added)] The concept of proportionality was explicitly introduced to Rule 26 in 1983 “to deal with the problem of over-discovery” and “encourage judges to be more aggressive in identifying and discouraging discovery overuse.” [Fed. R. Civ. P. 26(b)(1) advisory committee’s note (1983)] But, as the Advisory Committee Notes to the 2015 Amendments acknowledge, later subdivisions and additions buried the proportionality provisions, unintentionally diminishing their consideration by courts when regulating discovery. [Fed. R. Civ. P. 26(b)(1) advisory committee’s note (2015)] The 2015 Amendments “restore[] the proportionality factors to their original place in defining the scope of discovery” as an attempt to address concerns regarding overly-broad discovery “that must not be lost from sight.” [Id.]

Nothing in the Advisory Committee Notes suggests an effort to broaden the scope of discovery. Rather, taken together, the deletion of “reasonably calculated” to lead to the discovery of admissible evidence and the addition of “proportional to the needs of the case” reflected the Advisory Committee’s intent to narrow the scope of discovery by refocusing on relevancy and proportionality as opposed to the mere arguable presence of a lead to evidence. The public comments protesting the 2015 Amendments were treated by Advisory Committee as compelling evidence of how pervasive the misconception of the “reasonably calculated” phrase had become:

Despite the original intent of the sentence and the 2000 clarification, lawyers and courts continue to cite the ‘reasonably calculated’ language as defining the scope of discovery. . . . Most of the comments opposing this change complained that it would eliminate a ‘bedrock’ definition of the scope of discovery, reflecting the very misunderstanding the amendment is designed to correct.” [See 2014 Rules Appendix B-10]

As the Chair of the Advisory Committee observed:

Some [lawyers and courts] even disregard the reference to admissibility, suggesting that any inquiry “reasonably calculated” to lead to something helpful in the litigation is fair game in discovery. The proposed amendment will eliminate this incorrect reading of Rule 26(b)(1) while preserving the rule that inadmissibility is not a basis for opposing discovery of relevant information. [Id.]

Contemporary commentary predicted that the 2015 Amendments would rein in discovery in line with the
Advisory Committee’s stated goal. Commentators predicted that “the most significant of the December 2015 changes . . . are intended to make civil litigation more efficient by compressing early case management deadlines, streamlining discovery planning, [and] narrowing discovery’ [Joseph F. Marinelli, New Amendments to the Federal Rules of Civil Procedure: What’s the Big Idea?, AMERICAN BAR ASSOCIATION (February 2016), t.] that “the proposed amendments would likely restrict discovery abuse, narrow the scope of permissible discovery, and reduce overall litigation costs” [Brian K. Cifuentes, Proportionality: The Continuing Effort to Limit the Scope of Discovery, METROPOLITAN CORPORATE COUNSEL (March 18, 2015)], and that “[t]he amendments seek to increase the efficiency and speediness of litigation while slowing the rising costs of discovery [and] establish an express guiding principle to limit the scope of discovery: proportionality.” [Immanuel R. Foster, Proportionality Emphasized in Amendments to the Federal Rules of Civil Procedure, BOSTON BAR JOURNAL (April 13, 2016)]

Courts reading the revisions as a whole have expressed a similar expectation. As one district court expressed this:

What will change – hopefully – is mindset. No longer is it good enough to hope that the information sought might lead to the discovery of admissible evidence. In fact, the old language to that effect is gone. Instead, a party seeking discovery of relevant, non-privileged information must show, before anything else, that the discovery sought is proportional to the needs of the case. [Gilead Sciences, Inc. v. Merck & Co., No. 5:13-cv-04057-BLF, 2016 WL 146574 (N.D. Cal. Jan. 13, 2016)]

But despite the intent behind the 2015 Amendments and their predicted effect, early decisions under the new Rule 26(b)(1) suggest that the Amendments may have the unintended consequence of expanding discovery of inadmissible evidence such as settlement negotiations.

II. Settlement Negotiations And The New Rule 26 In The Courts

The treatment of discovery of settlement negotiations under the pre-Amendments version of Rule 26(b)(1) was not uniform, and the new Rule does not appear to be designed to settle that debate. But three early decisions suggest that, at least in this area, some courts may view the effect of the Amendments to be diametrically opposed to the projections of the Advisory Committee and commentators.

A. Pre-Amendments Decisions

Under the pre-Amendments version of Rule 26(b)(1), courts were divided on discovery of settlement negotiations in light of Rule 408’s protection against their introduction in evidence. As one district court noted in 1994, “[t]his question has received surprisingly little treatment in the published opinions.” [Varian Golf Co. v. BRMG Golf Ltd., 156 F.R.D. 641, 650 (N.D. Ill. 1994)]

The Sixth Circuit in Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc., [332 F.3d 976, 979-81 (6th Cir. 2003)] and a handful of district courts, have found that settlement talks are protected by a privilege from discovery. [See, e.g., Cook v. Yellow Freight Sys., Inc., 132 F.R.D. 548, 554 (E.D. Cal.1990), overruled on other grounds by Jaffe v. Redmond, 518 U.S. 1 (1996); Olin Corp. v. Ins. Co. of N. Am., 603 F. Supp. 445, 449-50 (S.D.N.Y. 1985).] There is, however, no consensus on this view. [See JZ Buckingham Inv. LLC v. United States, 78 Fed. Cl. 15, 21-22 (Fed. Cl. 2007) (collecting cases)]

No other Circuit has yet adopted a privilege; at least two Circuits have reserved the question of a settlement privilege in light of the significant inquiry the Supreme Court requires before recognizing a new privilege. [See Gov’t of Ghana v. ProEnergy Servs., LLC, 677 F.3d 340, 344 n.3 (8th Cir. 2012); In re Subpoena Duces Tecum Issued to Commodity Futures Trading Commission, 439 F.3d 740, 754-55 (D.C. Cir. 2006)]

One early district court decision, citing Rule 408’s breadth and the Senate’s rejection of a narrower rule, concluded that “[g]iven the strong public policy of favoring settlements and the congressional intent to further that policy by insulating the bargaining table from unnecessary intrusions . . . the better rule is to require some particularized showing of a likelihood that admissible evidence will be generated by the dissemination of the terms of a settlement agreement.” [Bottaro, 96 F.R.D. at 160] This approach has attracted significant support; one district court in 1996 concluded that “[w]hen the requested discovery concerns a confidential settlement agreement, the majority of courts considering the issue have required the requesting party to meet a heightened standard . . .” [Young v. State Farm Mutual Auto. Ins. Co., 169 F.R.D. 72, 76 (S.D. W.Va. 1996)]

Another cited a Justice Department brief arguing that “candid communication between investigated parties and the Department of Justice in qui tam actions is essential to the efficient resolution of these cases” as a reason to require a “convincing reason for discovery” offered by the proponent. [United States ex. rel. Underwood v. Genentech, Inc., Civil Action No. 03-9383, 2010 WL 8917474, at *2 (E.D. Pa. Oct. 7, 2010)] The Eighth Circuit, reviewing the denial of such discovery, found that “it is generally not an abuse of discretion for a district court to deny discovery when the intended use of a document would be prohibited at trial.” [Gov’t of Ghana, 677 F.3d at 344-45]

Other courts have rejected this view and kept the usual burden under Rule 26 on the responding party to show a reason for quashing discovery, arguing that the interest in protecting settlement negotiations is sufficiently accomplished – at least for concluded settlements – by the evidentiary bar. [See, e.g., Bennett v. La Pere, 112 F.R.D. 136, 139-40 (D.R.I. 1986) (Selya, J.)]

B. Post-Amendments Decisions

The first reported decision on discovery of settlement negotiations under the new Rule 26, Arcelorittal Indiana Harbor LLC v. Amex Nooter LLC, [No. 2:15-CV-195-PRC, 2016 WL 614144 (N.D. Ind. Feb. 16, 2016), reconsideration denied, No. 2:15-CV-195-PRC [Docket No. 96] (N.D. Ind. July 8, 2016)] relied explicitly on the Amendments to find that the elimination of the “reasonably calculated” language strengthened the case for discovery. The plaintiff in Arcelorittal, a suit over an industrial accident, sought discovery of two documents related to settlement negotiations between the defendant and its regulator, the Indiana Occupational Safety and Health Administration, in order to explore “whether the [defendant’s] employees were properly trained, whether the [defendant’s] employees properly
engaged in all safety precautions, and whether the [defendant’s] employees were otherwise negligent in their actions.” [Id. at *2-3, *6] The court rejected invocation of a settlement privilege, as well as an argument that the documents were outside the scope of Rule 408. [Id. at *1, *4] Although “[n]either party acknowledged [the 2015 A]mendment [to FRCP 26(b)(1)] nor discussed its impact on the instant dispute,” the court then raised sua sponte whether the discoverability of settlement negotiations – in this case, with a regulator – were affected by the 2015 Amendments given that the Amendments “removed the familiar language that relevant information does not have to be admissible at the trial to be discoverable if it ‘appears reasonably calculated to lead to the discovery of admissible evidence.’ ” [Id. at *4]

Collecting cases within the Seventh Circuit that had “adopted a higher standard for discovering the settlement negotiations based on the pre-amendment [reasonably calculated] language,” the court found that they had been overruled by the Amendments:

The reliance in [these cases] on the pre-amendment language of Rule 26(b)(1) to limit the discovery of settlement negotiations is no longer persuasive. Rule 26(b)(1) expressly provides that evidence need not be admissible to be discoverable. The only question then is whether the discovery sought meets the standard set out in Rule 26(b)(1) for relevance and proportionality . . . [A]ny concerns regarding confidentiality of settlement negotiations in this context of relevant discovery . . . can be remedied by a protective order. [Id. at *5-7]

In its analysis of the proportionality of the proposed discovery, the court concluded that – while the plaintiff could obtain information on the same topics from depositions – it “cannot obtain the exact information through any other means” and the documents would not be costly to produce. [Id. at *7] For parties concerned about saying too much in settlement talks, this is one of the major concerns with such discovery: that summary presentations to a regulator or an adversary in litigation could provide a roadmap to discovery that future litigants would otherwise have to assemble piecemeal.


Although the rule was recently amended to remove language permitting the discovery of “any matter relevant to the subject matter involved in the action” . . . and “relevant information . . . reasonably calculated to lead to the discovery of admissible evidence,” the rule in its current form still contemplates the discovery of information relevant to the subject matter involved in the action, as well as relevant information that would be inadmissible at trial. . . . Accordingly, it remains true that relevancy in discovery is broader than relevancy for purposes of admissibility at trial. . . . [Thus,] relevance not admissibility, is the appropriate inquiry. [Id. at *1-2, *5 (emphasis in original; internal quotation omitted)]

In Townsend, a suit for discriminatory termination after the plaintiff took disability leave, the defendant sought discovery of settlement negotiations between the plaintiff and her insurer regarding their settlement of a case arising from a car accident that occurred after she took leave from work. [Id. at *2, *5] The documents included a “settlement evaluation” presented by the plaintiff’s attorney to the insurance company. [Id.] The court found the documents protected by no settlement privilege and potentially “relevant to [plaintiff’s] credibility and claim of damages” because they “in all probability describe [plaintiff’s] condition or ability to work at the time during which she claims that she could have been working for Defendant.” [Id. at *5] Again, the presumed candor and summary nature of the settlement evaluation is precisely what made it valuable to the defendant and attractive to the court under a proportionality analysis.

The third such decision, City of Jacksonville v. Shop- pes of Lakeside, Inc., [No. 3:12-cv-850-J-25MCR, 2016 WL 3447383 (M.D. Fla. June 23, 2016)] also addressed settlement communications with an insurer. The plaintiff municipality in City of Jacksonville sought in a CERCLA case to use the defendant’s claims to an insurer for liabilities of a gas company it had acquired, in order to prove that the defendant was the successor-in-interest to the gas company, as well as to impeach credibility and show a failure to mitigate damages. [Id. at *1-4] The court rejected any settlement privilege, and followed Arcelormittal in concluding that cases decided before the 2015 Amendments were no longer persuasive: “the Court finds that the requested information is ‘relevant to any party’s claim or defense.’ This is what the current version of Rule 26 requires.” [Id. at *4-5 & n.8]

III. Conclusion

The language and history of Rule 408 demonstrate a strong federal policy in favor of free and candid settlement negotiations, without fear of subsequent use in litigation. Yet, Rule 26 has never explicitly addressed how that policy should be translated when courts face demands for discovery of those negotiations. The 2015 Amendments to Rule 26 were plainly not intended to expand the scope of discovery, and the elimination of the popular and misunderstood “reasonably calculated” language was clearly not designed to create new categories of discovery or eliminate existing obstacles to discovery. Yet, the Amendments’ focus on proportional costs and burdens may tempt more courts to prefer the shortcut of allowing discovery of settlement talks in which lawyers let their guard down.

The new Rule 26 should not be read to expand discovery of settlement negotiations, but the question of what the old Rule 26 allowed has never been settled in the first place. In the absence of clearer guidance, pressure may grow for a rule to be fashioned either by judicial recognition of a common-law privilege under Federal Rule of Evidence 501 or by renewed attention from the Advisory Committee. In the interim, litigants – especially regulated businesses making presentations to their regulators – should proceed with caution, especially with regard to written materials, and where possible consider additional protective steps to guard the confidentiality of settlement talks.