

**PROPORTIONALITY ANALYSIS IN E-  
DISCOVERY**

Campbell Law Review Symposium  
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**A Brief E-discovery Review**

- The Differences Between Paper and ESI
  - Volume
  - Location
  - Changeability

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**Features of the Present Federal  
Discovery System**

- Lawyer Managed Discovery
- Cooperation
- Limitation
- Managerial Judging

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### The 2006 Amendments

- Early attention to E-discovery
- The Two Tier E-discovery Standard
- Rules concerning Privilege Assertion
- Rules relating to Form of Production
- Limitations on Sanctions

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### Recent Developments

- The Report of the American College of Trial Lawyers and the Institute for Advancement of the Legal System – March 2009
  - Discovery needs reform
- The ABA Section on Litigation Survey on Civil Practice Detailed Report (December 11, 2009)
  - Discovery is commonly abused, particularly e-discovery

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- Preliminary Report to the Judicial Conference Advisory Committee on Civil Rules, Federal Judicial Center National Case Based Civil Rules Survey (October 2009)
  - Discovery appears to be OK
- The Meeting of the Advisory Committee in May 2010

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### The Emergence of Proportionality Analysis as a Solution

- Proportionality Analysis
  - First Appeared in the Civil Rules in 1983
  - It was emphasized in the 2000 amendments
    - The committee was told that courts have not implemented the proportionality limitations "with the vigor that was contemplated"
  - It calls for a cost benefit analysis

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### The Proportionality Rules

- Rule 26(g)(1)(B)(iii) – the rule requires a certification when filing a discovery request that the request is not unduly burdensome or expensive considering the needs of the case, prior discovery in the case, the amount in controversy and the importance of the issues at stake in action

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- The language of Rule 26(g) is similar to the proportionality language of Rule 26(b)
- It is a two way street
- It is designed to eliminate knee jerk discovery requests served without consideration of cost or burden
- It is also designed to eliminate boilerplate objections

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### The Proportionality Rules (cont)

- Rule 26(b)(2)(C)(iii) – the court must limit the frequency or extent of discovery if it determines that the burden or expense of discovery outweighs its likely benefit considering the following factors

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- The Needs of the case
- The Amount in Controversy
- The Parties Resources
- The Importance of the Issues at Stake in the Litigation
- The Importance of the Discovery in Resolving the issues

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### Global Factors & Specific Factors

- Global Factors
  - The Amount in Controversy
  - The Importance of the Issues at Stake in the Litigation
- Specific Factors
  - The Needs of the Case
  - The Importance of the Discovery in Resolving the Issues
  - Parties Resources

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**The Great Value of Proportionality Analysis**

- It encourages focused discovery
- It encourages phased discovery

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**Problems with Proportionality Analysis**

- Courts do not often think of proportionality
- There are dangers associated with application of the global factors
  - The Mancie decision and the notion of a discovery budget
  - Civil Rights and Constitutional Law Cases

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**Solutions**

- Create a local rule or protocol which specifically requires discussion of proportionality prior to the filing of the Rule 26(f) report
- Use caution when applying the global factors to civil rights and constitutional law cases

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- The End
- Questions?

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