

## TENTH CIRCUIT: THE SLOW TRANSITION TO ANALYZING EDISCOVERY VIOLATIONS

The Federal Rules of Civil Procedure governing discovery have been amended since their inception to limit the scope and amount of discovery to only relevant information that is proportional to the needs of the case.<sup>1</sup> Concerns of proportionality routinely arise in litigation when a plaintiff's economic status is significantly lower than that of a potential defendant.<sup>2</sup> This concern is perhaps greater now than ever before, as costs associated with the retrieval and maintenance of electronic discovery can double or triple a client's budget.<sup>3</sup> Rather than sifting through boxes of paper by hand, e-Discovery permits the process to take place in half the time, but this also leads to the introduction of more data than was ever conceivable through paper discovery.<sup>4</sup> Now, emails are sent in a fraction of the time it took to type and mail a letter, and more emails are being sent per hour, which are then backed up and saved to a company's server.<sup>5</sup> Cloud computing, both public and privately hosted, provides space for companies to save information without the added cost of onsite servers, allowing for more data to be saved for longer periods of time.<sup>6</sup> Yet these services are not cheap, and retrieval of data for the purposes of litigation often requires the retention of technical service companies that may be affordable only in top-dollar cases.<sup>7</sup> Even with a mere twenty gigabytes of data, to retrieve, filter through the information and eliminate irrelevant information, maintain the data on a third-party hosting site, and review the data, which could potentially yield 200,000 responsive documents, the cost may be upwards of \$200,000.<sup>8</sup> Now, imagine the data is culled from several servers or cloud services maintained within a large company and the facts of litiga-

---

1. FED. R. CIV. P. 26(g) (amended 1983). The Committee notes states the amendment was made "to deal with the problem of overdiscovery. The objective is to guard against redundant or disproportionate discovery by giving the court authority to reduce the amount of discovery that may be directed to matters that are otherwise proper subjects of inquiry." *Id.*

2. Michele C.S. Lange & Kroll Ontrack, *2017: The Year of Proportionality*, LEGALTECH NEWS (Dec. 20, 2016), <https://www.law.com/legaltechnews/almID/1202775145806/?slreturn=20180010143709>.

3. David Degnan, *Accounting for the Costs of Electronic Discovery*, 12 MINN. J.L. SCI. & TECH. 151, 151 (2011).

4. *Want to Reduce the Cost of eDiscovery? Re-think the Approach*, MINDSEYE SOLUTIONS (Mar. 30, 2017), <http://www.mindseyesolutions.com/2017/03/30/want-to-reduce-the-cost-of-ediscovery-re-think-the-approach/>.

5. Heinz Tschabitscher, *How Many Emails Are Sent Every Day*, LIFEWIRE (Dec. 11, 2017), <https://www.lifewire.com/how-many-emails-are-sent-every-day-1171210>.

6. Julie Bort, *Google has Nabbed Some Huge Customers for its Most Important New Business – Cloud Computing*, BUSINESS INSIDER (Jun. 18, 2015), <http://www.businessinsider.com/google-names-huge-companies-using-its-cloud-2015-6>.

7. Degnan, *supra* note 3.

8. *Id.*

tion require review of several years' worth of information; the twenty gigabytes quickly turn into twenty terabytes of information. When is review and production of potentially relevant data no longer proportional to the needs of the case?

In 2015, the Rules Advisory Committee amended F.R.C.P. 26(b)(1), removing the language requiring production of discovery "reasonably calculated to lead to the discovery of admissible evidence," and replacing it with language requiring discovery that is "proportional to the needs of the case" and that "need not be admissible in evidence."<sup>9</sup> Since the rule change, the Tenth Circuit and its district courts have only heard a handful of cases addressing the issue of proportionality with respect to electronic discovery.<sup>10</sup> While courts typically rely on the judgment of counsel to assess proportionality,<sup>11</sup> courts have encouraged certain techniques to identify potentially responsive data, specifically through the utilization of search terms.<sup>12</sup> Issues arise when the parties either fail to agree on the search terms or do not confer on the appropriate method of searching through data.<sup>13</sup>

Under the old rule, the Tenth Circuit failed to apply a formalistic approach to determining proportionality or relevancy.<sup>14</sup> In one case in which the responding party of a request for interrogatories attempted to argue the requests were overly burdensome, the Tenth Circuit "did not require courts to make formal findings applying the proportionality factors."<sup>15</sup> With the rule change, six additional factors were included to aid the courts in defining proportionality.<sup>16</sup> Now courts must consider "the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit."<sup>17</sup>

---

9. Michael J. Miles, *Proportionality under Amended Rule 26(b)(1): A New Mindset*, ABA LITIGATION (May 18, 2016), <http://apps.americanbar.org/litigation/committees/pretrial/articles/spring2016-0516-proportionality-amended-rule-26b1-new-mindset.html>.

10. See e.g., *Gordon v. T.G.R. Logistics, Inc.* 2017 WL 1947537 (D. Wyo. 2017), *Pertile v. General Motors, LLC*, 2016 WL 159450 (D. Colo. 2016), *In re Western Insurance Company v. Rottman*, 2016 WL 7480361 (D. Utah 2016) (In the American Law Reports, updated in 2017, opinions addressing the limitations of the new rule appeared in forty-nine topics, only seven of which the Tenth Circuit has seen since the amendment. 26 A.L.R. Fed. 3d Art. 2).

11. *Lange & Ontrack*, *supra* note 2.

12. *United States v. New Mexico State Univ.*, No. 1:16-CV-00911-JAP-LF, 2017WL4386358, at \*2 (D.N.M. Sept. 29, 2017) (Order Denying Motion for Protective Order).

13. *Id.*

14. *In re Cooper Tire & Rubber Co.*, 568 F.3d 1180, 1194 (10th Cir. 2009). ("At the outset, we find no authority in this circuit that obligated the district court to make formal and explicit findings regarding each of the factors identified in Fed.R.Civ.P. 26(b)(2)(iii).")

15. Thomas P. Howard, *The 2015 Amendments to the Federal Rules of Civil Procedure*, 45 COLO. LAWYER 23, 25 (2016).

16. FED. R. CIV. P. 26(b)(1).

17. *Id.*

Other jurisdictions have decided issues in cases involving numerous parties, to which the Tenth Circuit will likely look for guidance in the event a case arises.<sup>18</sup> In a case involving twenty-three defendants, proportionality concerns were raised when the defendants offered to search twenty-one document custodians' files using fifty-six search terms.<sup>19</sup> Plaintiffs objected to this method, stating their preference to email every employee at Citco and request the documents being sought; however, the court failed to understand how the plaintiffs' request was any less burdensome or more proportional to the issues at stake and denied their motion.<sup>20</sup> In that case, the court identified one of the six factors on which to make its ruling.<sup>21</sup> It is likely the Tenth Circuit and its district courts will use a similar technique to rule on discovery disputes.

Even with the new factors, courts still have to answer the question of how much is too much. Parties with decades' worth of data involved in litigation with high monetary values seem to have limitless opportunities to cull data from the deep recesses of company servers. Discovery requests are typically limited,<sup>22</sup> but under the proportionality rules, argument can easily be made requiring a large company to produce files kept in the regular course of business over an extended period of time. And the companies must comply, or explain why the data is no longer accessible; failure to provide an adequate explanation could result in sanctions under F.R.C.P. 37(e).<sup>23</sup> Parties are required to preserve information when litigation is anticipated or conducted.<sup>24</sup> In the Tenth Circuit, a duty to preserve arises when litigation is imminent.<sup>25</sup> When a party fails to preserve electronically stored information, the party can be sanctioned "upon finding prejudice to another party from loss of the information" or "only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation."<sup>26</sup> Although the failure to preserve evidence due to negligence is sufficient under the changed rule to sanction a party for lost information, it seems the courts are more interested in whether a party failed to produce information in bad faith.<sup>27</sup> In the Tenth Circuit, however, the destruction of evidence *must* rise to the level of bad

---

18. *Firefighters' Ret. Sys. v. Citco Grp. Ltd.*, No. CV-13-373-SDD-EWD, 2018WL276941, at \*1 (M.D. La. Jan. 3, 2018) (Ruling and Order on Motion to Compel).

19. *Id.* at \*4.

20. *Id.*

21. *Id.*

22. *See* FED. R. CIV. P. 33(a)(1); Although parties are restricted by a set number of interrogatory requests, when viewed with other rules requiring production of documents proportional to the needs of the case, parties will often stipulate to expand the number of requests at the outset of the case.

23. Neil E. Aresty, *The 2015 Amendment to Federal Rule of Civil Procedure 37(e)*, ABA LITIGATION (Nov. 3, 2015), <https://apps.americanbar.org/litigation/committees/commercial/articles/fall2015-1115-2015-amendment-federal-rule-civil-procedure-37e.html>.

24. *Id.*

25. *Turner v. Pub. Serv. Co. of Colo.*, 563 F.3d 1136, 1149 (10th Cir. 2009).

26. *Id.*

27. Fed. R. Civ. P. 37(e).

faith in order for a party to incur sanctions.<sup>28</sup> To analyze whether destruction was intentional, the court must first look to when the duty to preserve was effective, and then determine whether the information lost is prejudicial to the opposing party.<sup>29</sup>

Parties must look to the six factors when determining whether requests and production of data are proportional to the needs of the case, and parties must also preserve any potentially relevant data in anticipation of litigation. Until the rule amendments are recognized by the Tenth Circuit, parties must rely on agreements pertaining to the appropriate methods by which to conduct discovery of massive amounts of data.

*Susie J. Lloyd\**

---

28. *Turner*, 563 F.3d at 1149.

29. CAROLE BASRI & MARCY MACK, EDISCOVERY FOR CORPORATE COUNSEL, Westlaw (database updated Jan. 2018).

\* Susie Lloyd is a Staff Editor for the *Denver Law Review* and is a 2019 J.D. Candidate at the University of Denver Sturm College of Law.