EXPLANATORY NOTE FROM
ROGER TRANGSRUD & ALAN MORRISON
CO-DIRECTORS, JAMES F. HUMPHREYS CENTER FOR COMPLEX LITIGATION
GEORGE WASHINGTON UNIVERSITY LAW SCHOOL

We are pleased to post the July 16, 2021, draft of the DISCOVERY
PROPORTIONALITY MODEL: A NEW FRAMEWORK, which is the work of 56 practitioners, ediscovery experts, and judges led by John Rabiej who is a consultant to the James F. Humphreys Complex Litigation Center. It supersedes the March 18, 2021, draft.

We have prepared this Explanatory Note to make two basic points about our understanding of the New Framework. First, this New Framework is intended to be useful in all cases, but only as a first step in providing context for applying all six factors listed in Rule 26(b)(1). It is not intended and can never provide the answer to a proportionality question on its own. Second, this New Framework can serve several different purposes, but at the outset it is a tool for the producing party (generally the defendant) for its internal purposes. Its potential utility to better inform the resolution of discovery disputes will, in our judgment, depend on the willingness of the defendant to share, in whole or in part, its conclusions and its assumptions underlying its development of the New Framework. Understood in this way, the New Framework is a valuable first step in getting a handle on how to address and attack the question of proportionality in cases when there is a likelihood that electronic discovery (ESI) will be sought. We now elaborate on those two points, beginning with our understanding of how the New Framework will operate in practice.
The New Framework Process

The first step in the process is for the producing party to do an internal survey referred to as a Custodian Assessment in Appendix A. The assessment looks like a draft of what the requesting party might use as a comprehensive set of form interrogatories. But the key to this being a useful tool is the defendant’s ability to give meaning to the adjective “relevant,” which appears in the first three questions, and which forms the basis for the remainder of the survey. The defendant and the plaintiff will often differ on what is relevant, or on the degree of materiality of certain evidence. For these purposes, the defendant’s definition of those terms is likely to have significant impact on the utility of its application of the New Framework; if the definition is too narrow, it can throw off the rest of the process. This survey should be done for every person who might reasonably have custody of relevant information. The final portion is used to determine the relative priority of each custodian’s information using this system: “The responses to the assessment questions can be ranked in any suitable manner from low to highest and then aggregated to create the master score.” By master score, we do not understand this to be an objective numerical ranking, but rather a relative ranking for each of the identified custodians.

The next step is to examine the eight most common sources (types) of ESI to determine which ones may have relevant information and to rank them by the level of burden to produce that type of information, from lowest to highest as was done for the information from each custodian.1 Far from being a mechanical task, these assessments must be done for each custodian and for each type of ESI applicable to that person with their individual characteristics.

---

1 Since the New Framework focuses on ESI, it is unclear why paper records are included in its analysis, even though paper documents are often scanned and converted into ESI, because the issues on production and review of paper records differs considerably from ESI such that it is unclear how their production can be meaningfully compared with that of producing ESI.
in mind. The New Framework also recognizes that some custodians may have control over certain records, but not be a witness – for example, the person in charge of maintaining the company’s files for medical journal articles related to the company’s business.

The New Framework spells out the three elements it uses to rank burden, which it defines to mean the *comparative* difficulty in retrieving that information from the respective data sources. After ranking the custodians by the significance of their relevant information, the defendant assigns a classification of low, medium, high, highest burden to each data source from each custodian. Those rankings are then combined in what the New Framework calls a Heat Map. The Map provides a visualization, which shows the importance of the information from each custodian and the burden of producing it from each source, with the most important and least burdensome to produce in the top-left quadrant, and the least important and most burdensome in the bottom-right quadrant.

Separate from ranking the data sources by degree of burden, a cost-prediction calculator provides a method that projects costs for retrieving data from five common data sources. Under that model, all costs are to be fully described and explained, including assumptions – all of which must be tailored by the user to meet the circumstances of the case. Collection Costs are those incurred in gathering the information, and they typically account for 5%-15% of overall costs. Next come Processing and Hosting Costs, which typically run 10%-20% of the total. These primarily involve the costs for culling the volume of data to eliminate nonrelevant data, which may include purchasing or leasing software and the attendant staff expense. This part of the process also includes normalizing the data and optimizing it for the search, analytic, and review functions that follow. This step will also generally include migrating the data to a separate review tool, which can ultimately be used to search data across platforms for the production of
ESI to the requesting party or to the court for in-camera review. Finally, there are the attorney-review costs that, according to the New Framework, consume 65% - 75% of the costs. Reviews by attorneys are done to remove information that is not relevant, privileged, and/or forbidden by law from being disclosed, such as medical records that would invade the personal privacy of an individual. The New Framework, for the first time, projects per gigabyte costs for five different data sources, all of which are subject to modification in an individual case.

Several points need to be made about this process. First and most important, the process requires the defendant, or most realistically its lawyers, to make many assumptions, estimates, and judgment calls. This subjectivity is inevitable in any effort to respond to ESI discovery, but the advantage of the New Framework is that the process is organized in a logical fashion, and if properly applied, can narrow the debate between the parties and can aid the court in resolving any disputes that come to it. Moreover, the entire process is designed to be transparent and permits the defendant and others to modify assumptions and projections in accordance with their views. At the very least, gathering this information in this manner should be useful to the defendant in responding to plaintiffs’ discovery requests.

Second, the surveys, the responses, the ranking of custodians, and the estimates of costs are almost certainly attorney work-product material that the defendant could not be compelled to produce. But if the defendant simply announces to the plaintiff that A, B & C are the only custodians with significant relevant information, that is hardly likely to advance the discussion. Despite their privileged status, it would be desirable if documents prepared as part of the New Framework were voluntarily made available to the plaintiff as a means of finding a way to narrow discovery and mitigate disputes. In addition, if a motion to compel is made, the court

2 The Itemized Cost Predictor Calculator in Appendix F shows review costs of $101,160.61 out of a total cost of $123,584.87, which would be closer to 83%.
may well demand the bases of defendant’s conclusions as to which custodians are most likely to have relevant information, its assumptions underlying assertions of burdens, and its bases for estimating the associated costs. But in the end, the ranking of custodians by the significance of the relevant information and the ranking of burdens are, to some extent, a subjective judgment. Of course, neither the court nor the plaintiff will accept at face value the defense’s assessments. To respond to that problem, the Center is working with experts to develop a sampling method as a safeguard. The relevant information produced from the sampling of a “low-ranked” custodian should be useful in revealing whether the custodian, in fact, possesses significant or not significant relevant information.

Fitting the New Framework into Rule 26(b)(1)

We agree that the New Framework can be used as an important building block for a rational approach to handling ESI discovery generally and to resolving differences under Rule 26(b)(1). But Rule 26(b)(1) has six factors of which “the burden or expense of the proposed discovery outweighs its likely benefits” is only one (the last). Whether discovery is “proportional to the needs of the case” cannot be determined in the abstract, but must take into account the other parts of the Rule, which are “(1) the importance of the issues at stake in the action; (2) the amount in controversy; (3) the parties’ relative access to relevant information; (4) the parties’ resources; [and] (5) the importance of the discovery in resolving the issues.” Depending on the legal and factual issues in the case, each of these six factors contains, to varying degrees, subjective determinations.

One advantage of the New Framework is that the ranking of the importance of custodians and sources of ESI should be generally subject to objective determination, and there should also be some basis for agreement on the relative degrees of burdens of producing different sources of
ESI by the defendant in this case. Of course, that assumes that the parties are engaged in basic communications about discovery and that neither party is taking an all-or-nothing position. While the actual, in contrast to the relative, cost estimates are more likely to be in dispute, at the very least each side should be prepared to explain the assumptions that underlie their numbers.

It is important to emphasize again that the New Framework does not apply the six Rule 26(b)(1) factors. It only provides the context. Thus, unlike the earlier March draft, the July draft does not focus on any single proportionality factor. Instead, it establishes a framework to focus the parties’ and court’s attention on key data points. The Center plans to hold a conference next year, which will begin developing guidance on how to apply the six Rule 26(b)(1) proportionality factors in the context of the New Framework.

In applying the six Rule 26(b)(1) factors, for example, there may be more agreement than is often assumed, and the New Framework can play a useful role on that as well. The amount in controversy (factor 2) can be gleaned from the operative complaint, and while the defendant will surely contest the specific amount that plaintiff claims, the parties should be able to agree whether the range of damages is, for example, seven or ten figures. Of course, if non-monetary relief is also requested, there may be challenges on the issue of importance of the issues at stake (factor 1). For cases in which money damages are the principal relief sought, the importance of the issues is not likely to be in dispute. But there are several important exceptions, including employment discrimination lawsuits, which seek money damages and also involve vindication of important constitutional and statutory rights. Other actions, including environmental, privacy, and health claims, may raise similar concerns. Both (3) & (4) – access and resources – should not be the source of major disputes in most cases. Because both involve comparisons, there may not be agreement on the size of the gulf between the parties, but the question of who has more
resources and better access should not generally be in dispute. However, because complex cases are increasingly arising where third-party financing must be considered, that may complicate the analysis of the resources factor. As for the importance of discovery (5), that is both a general question – can defendant prevail on a motion to dismiss some or all of the complaint – and a specific one – how important is this source of ESI to the issues in this case? In the end, that is an issue for the judge, but with respect to a specific discovery request, the New Framework may provide some guidance, especially if it has been shown to be reliable with respect to ESI already produced.

Next Steps for the Framework

The July 16th draft is a work in progress. It is being reviewed now, and that process will continue until the next draft is posted for an eight-week public-comment period. In the meantime, the committee is accepting interim comments, but submitting them now (or not) will not preclude further submissions. We especially encourage those who have not commented on what is now the July 16th draft to make their views known on that draft, with specific suggestions being the most welcome. After the comment period has concluded, all comments will be circulated to the team members and further edits may be made. That draft will then be reviewed by a Center editorial board before it is finalized.