FAQs
Discovery Proportionality Model: The New Framework

1. Why did the Center develop the New Framework?

- Well, when you really think about it, the modern ESI world has made compliance with discovery obligations virtually impossible. From a universe of thousands or millions of documents, which can be located on ten or more data sources that are constantly changing, a party is called on to identify every document that is discoverable. The only guidance is two criteria, relevancy and privilege, each of which is indefinite and upon which no two lawyers, even from the same side, can agree on.
- The 2015 amendments to Rule 26(b)(1) aggravated the problem by expanding the definition of discoverability to include proportionality, compounding the difficulties by adding multiple, indefinite factors to consider.
- Without guidance or standards, parties are never quite sure that their discovery efforts are reasonable. And if a dispute is raised to the court, whether the judge would agree. This unpredictability causes distrust between the parties, which extends to judges who are given little useful information to base a ruling on.

2. What is the New Framework intended to do?

- First, the New Framework is a tool that organizes discoverable information on a so-called roadmap; the roadmap ranks the information according to various criteria—such as who possesses it (custodians), its importance, and the difficulty of accessing it.
- Second, it establishes general benchmarks based on estimates—in typical discovery situations—of the volume of information, the difficulty of accessing it, and the costs per gigabyte of five common data sources; it then compares the costs to a predetermined percentage of the amount in controversy adjusted, if appropriate, by the importance of the issues at stake.

3. How does the New Framework help the bench and bar help the bench and bar comply with the federal rules?

- The New Framework offers a uniform analytical approach that better informs proportionality assessments by focusing on key data points. It starts as a discovery tool for the producing party. The key data points are shown in an organized format that the producing party can use to plan and manage discovery that is reasonable.
- And the information in the same roadmap can be used by others to meaningfully evaluate whether that discovery was reasonable using the same vocabulary and analysis. The New Framework provides averages of the data points that quantify the four pertinent indefinite Rule 26(b)(1) proportionality factors.
4. The New Framework is intended to help the bench and bar comply with the 2015 amendments to Rule 26(b)(1), but it addresses only four of the six proportionality factors. Why?

- That is correct. Rule 26(b)(1) lists six factors, but two are not relevant to proportionality assessments of individual custodians and data sources, so that we are dealing with four factors.
- Both the ‘parties’ relative access to information” and the “parties’ resources” were intended by the rules committees to be prophylactic provisions; the former addresses situations where the producing party in an asymmetric discovery case argues that he was producing much more information than the requesting party, which arguably would not be proportional because the requesting party produces very little in comparison and the latter addresses potential abuse by a well-financed party who is trying to exhaust the resources of a financially weak party by objecting to every request or requesting excessive discovery.

5. The text of the New Framework is 55 single-spaced pages long, not to mention a separate excel spreadsheet with eight tabs containing a cost calculator. Do you really expect judges and lawyers to read the entire document?

- The 55-page draft explains and documents all assumptions and estimates so that the entire process is completely transparent and explained.
- But it is the one-page discovery roadmap that brings all the work together and implements the New Framework.

6. All this seems very complicated and time consuming. Is it?

- Boiled down to its core, the one-page roadmap asks the user for answers to only two questions -- which custodians may have potentially relevant information and how do you rank them in priority. After that, the roadmap itself is simple to complete and requires only some simple additions and multiplications that can done in a few minutes.
- The cost-calculator in Appendix F is the most sophisticated of its kind. It can be used to cross check the New Framework’s estimates to account for circumstances in individual cases.

7. Please explain why you believe it is important to quantify the indefinite Rule 26(b)(1) proportionality factors.

- Rule 26(b)(1) defines what is discoverable. Judges and lawyers are obligated to comply with the rule, which requires that they interpret and apply four very indefinite proportionality criteria. The problem is that up to now, these four factors have been evaluated without guidance from any legal or industry-wide standards, any average estimates, or any precedents.
- Without any formal guidance, defense and plaintiff lawyers and judges advance widely different estimates of costs and weights. For example, the 2012 RAND study “Where the Money Goes” examined costs ranging from $6,600 to $900,000 per gigabyte, with more than half the cases incurring $40,000 or more per gigabyte.
• With such huge disparities in the range of costs and no helpful benchmarks, no one can meaningfully assess proportionality and determine with confidence whether discovery is reasonable.

8. How does the New Framework apply the averages and quantify the four proportionality factors shown in the roadmap?

• Let’s go through the four Rule 26(b)(1) proportionality factors:
  • First Factor -- importance of discovery in resolving the issues (roadmap addresses this factor by plotting custodians on the map according to the significance of the information that they possess and on which data source)
  • Second Factor -- burden or cost outweighs benefit [five common data sources are ranked according to burden from less burdensome on the left to more burdensome to the right; an average volume of data expressed in gigabytes is provided for each of five common data sources; and the cost of the average volume per data sources is provided, which allows easy computation of the average cost per gigabyte]
  • Third Factor -- amount in controversy (caselaw applies this factor by comparing the amount in controversy asserted in the complaint to the cumulative discovery cost; using results from an FJC multivariate analysis and other studies the New Framework suggests that the comparative percentage should range from 5%-10% of the amount in controversy);
  • Fourth Factor --- importance of interests at stake (range from 0.0% to 25% of the discovery costs, using results from an FJC multivariate analysis and other studies)
• Straightforward process

9. Isn’t most of the information in the discovery roadmap privileged work-product, so that the producing party cannot be compelled to disclose the information?

• The New Framework takes no position, but the ranking and costing of discoverable information likely is subject to work-product privilege claims.
• The New Framework provides options.
  • Keep the roadmap entirely confidential
  • Disclose some or all of the roadmap to the other party when negotiating or when defending a position in response to a motion to compel

10. Why does the New Framework propose average estimates of costs when you concede that the actual numbers may vary significantly in an individual case?

• It is true that costs will vary depending on the circumstances and that is why the New Framework created the cost calculator in Appendix F, which allows the user to substitute their own numbers.
• But lawyers, and especially judges, pressed us to use the collective judgment of our experts to come up with average estimates in typical discovery situations. They wanted benchmarks at the start of a lawsuit when they do not know what the costs
will be, and they wanted the benchmarks so that they could use them later in the lawsuit to meaningfully compare and evaluate projected costs.

- Everyone understands that these estimates are just that and are not rigid.

11. **Have you heard any concerns from plaintiffs and defense counsel about the New Framework? If so, any examples?**

- Both are concerned about how the New Framework could be used to worsen their tactical position.
- Defense counsel is concerned that the 5-10% amount of controversy may serve as a “floor,” inviting the plaintiff counsel to demand unnecessary discovery until that level is reached; and
- Plaintiff counsel is concerned that the 5-10% amount of controversy may serve as a “ceiling,” inviting the defense counsel to automatically reject requests for necessary discovery, which exceeds that level

12. **Does the New Framework actually establish a “floor” or a “ceiling” on discovery costs**

- Neither, it is important to note that the New Framework projects estimates that quantify the four proportionality factors based on typical discovery situations, which can widely vary.
- It does not assign a weight to each factor because that is an assessment that the judge and parties make, so that in an individual case the party or judge can determine that reasonable discovery exceeds or falls below the level calculated by the New Framework.

13. **Does the roadmap dictate what the proportionality assessment must be?**

- Absolutely not. The New Framework’s quantifications in the roadmap reflect estimated data points in typical discovery situations. It is up to the parties and the judge to determine whether the New Framework’s benchmarks should be adjusted to fit the circumstances of the case and what weight to assign the individual proportionality factors.

14. **Any plans for future editions?**

- Three plans: (i) regularly review cost estimates in Appendix F and make adjustments to account for technology; (ii) develop discovery roadmaps for specific types of litigation like patent, antitrust, and insurance cases, that use more precise data points; and (iii) explore developing a “preservation” roadmap based on a similar conceptual framework that quantifies data points in typical discovery situations.