

IV. Individualized Itemized Cost-Projection Calculators

As its name implies, the itemized cost-projection calculators list the individual costs incurred in estimating discovery for eight specific data sources. They can be used to project the estimated costs in discovery.

The calculators were used to produce the aggregate discovery costs in the model set of projected costs for each of the eight most common data sources with data based on the collective judgment and experience of the experts developing the New Framework and the results of an extensive literature review. The calculators can be used to adjust the model set of projected costs to account for individual circumstances.

V. Common Variances Requiring Adjustments

Circumstances can arise that may add complexity to the process or procedures that could increase costs. A sampling of such factors can be found in Appendix G, which includes a multiplier that can be applied to adjust costs estimated by the model set of projected costs.

Section 04: Heat Map, Database Table, and Application of New Framework

I. Introduction

Section 4 pulls together the custodian and burden assessments and cost projections, displaying them in two formats: (a) a heat map, which organizes the custodians and their data sources on a sliding priority and burden scale and plots them in four quadrants; and (b) a database table, which sets out the assessments and adds ranges of cost projections for every custodian and data source. The heat map and database table are the outputs of the New Framework's "standard and cogent approach to frame proportionality assessments."

The weight accorded the assessments in the New Frameworks' heat map and the cost projections will be affected by the extent of the opposing party's input, if any. The more input from the opposing party, the less likely discovery disputes will occur and, if a dispute does arise, the judge will be better informed to resolve it.

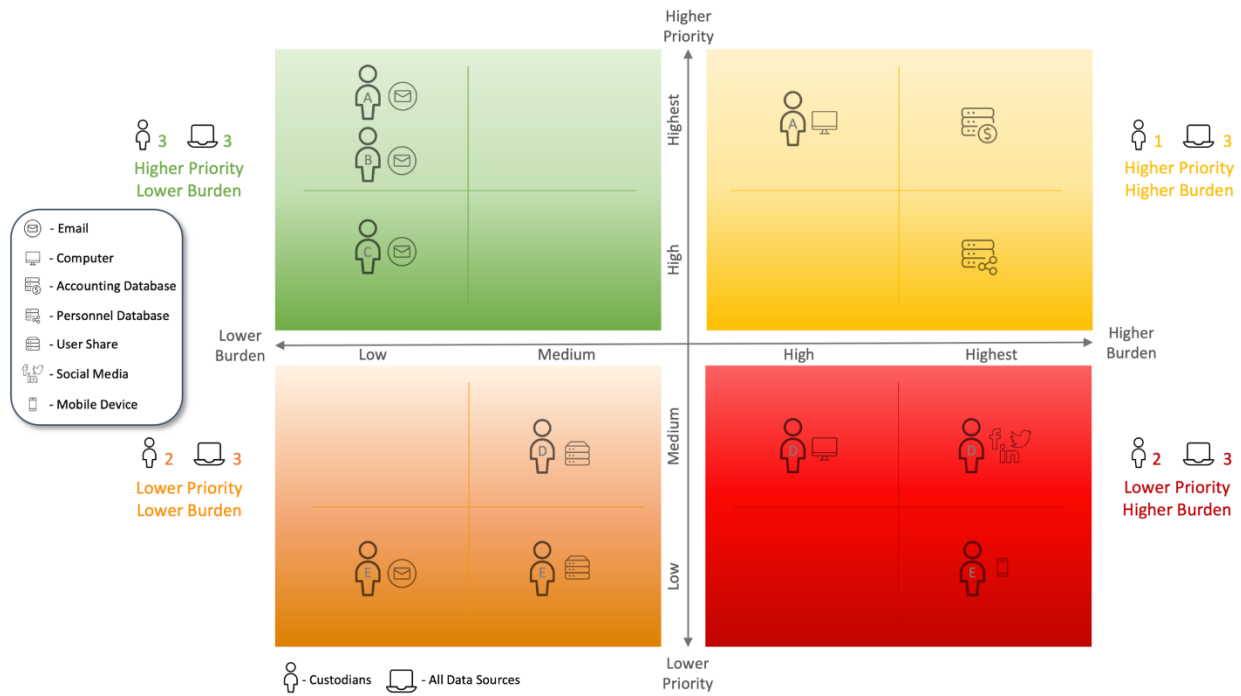
II. New Framework Heatmap

The custodian prioritizing and data-source burden assignments under Section 1 and Section 2 are placed into a Heat Map for a simple and clear graphical representation. The custodians and non-custodian sources assessments are plotted on a quadrant grid on the Y-axis from Highest to Low Priority. The data-source burden assessments are plotted on the X-axis from Highest to Low Burden. Each quadrant is further broken down into an additional four sectors, showing a total of 16 groupings of Priority / Burden scale.

The illustration below is an exemplar.

ASSESSING BENEFITS / BURDEN PROPORTIONALITY DISCOVERY MODEL

Mapping Custodians / Data and Burden




III. New Framework Database Table

The New Framework database table contains the data results from prioritizing custodians in Section 1, assessing data-source burden in Section 2, and projecting costs in Section 3. The table is an exemplar.

New Framework Database Table (Exemplar)

Name	Priority	Data Source	Level of Burden	Cost Ranges
Custodian "A"	Highest	Email	Low	\$ \$\$ \$\$\$
		Computer	High	\$ \$\$ \$\$\$
Custodian "B"	Highest	Email	Low	\$ \$\$ \$\$\$
Custodian "C"	High	Email	Low	\$ \$\$ \$\$\$
Custodian "D"	Medium	User Share	Medium	\$ \$\$ \$\$\$
		Computer	High	\$ \$\$ \$\$\$
		Social Media	Highest	\$ \$\$ \$\$\$
Custodian "E"	Low	Email	Low	\$ \$\$ \$\$\$
		User Share	Medium	\$ \$\$ \$\$\$
		Mobile Device	Highest	\$ \$\$ \$\$\$
Non-custodian	Highest	Accounting Database	Highest	\$ \$\$ \$\$\$

Non-custodian	High		Personnel Database	Highest	\$	\$\$	\$\$\$
----------------------	------	-----------------------------------------------------------------------------------	--------------------	---------	----	------	--------

IV. Applying the New Framework at Different Stages of Litigation

The New Framework can be applied at every stage of the litigation lifecycle, including the commencement of litigation, discovery management, and close of discovery. By establishing a “standard approach to frame proportionality assessments,” the New Framework focuses attention on key issues, creates a common analysis with standard vocabulary, and sharpens proportionality assessments.

A. Commencement of Litigation

The New Framework’s heat map and database table can serve several useful purposes early in litigation. Although the information available at the commencement of litigation often is preliminary and inadequate to make firm proportionality assessments that are reliably certain about all custodians, sufficient information is usually available to make early assessments of custodians identified at both priority extremes on the New Framework’s heat map.

The degree of confidence in these early assessments and cost projections can be affected by the extent of the opposing party’s input, if any, into the development of the New Framework’s heat map and database table.

The early assessments, as well as cost projections, can have immediate dividends, including:

- The database table’s cost projections will provide information necessary to plan a budget covering likely discovery expenses.
- The database cost projections as well as the calculator accounting for variances provide baseline reference points to compare and evaluate RFPs, which can be particularly helpful for those less experienced in ESI.
- The information about priority custodians in the heat map will better inform the decision to make early productions in accordance with Rule 26(d)(2) and initial disclosures under Rule 26(a) by identifying obviously significant custodians which will assuredly result inevitably in discovery productions.²³
- Custodians not tagged at either priority extreme in the heat map are identified who need further investigation, which may involve additional written questions, interviews, or sampling.²⁴
- The preliminary assessments in the heat map will better inform preservation decisions by highlighting information that is obviously important and unquestionably preservable compared with information that is less significant.²⁵

B. Discovery Management

As additional information becomes available during discovery, including information learned from interactions with the opposing party, the assessments and cost projections can be adjusted and become firmer.²⁶ The extent of the opposing party’s input, if any, in any adjustments to heat map and database table will affect the degree of confidence the opposing party has in the accuracy of the assessments and cost projections.

The New Frameworks' heat map and database table distill and concentrate key information in an organized format, which is necessary to make proportionality assessments. These two sources can ground the proportionality decision-making. For example:

- The granular information on data-source burdens and costs for every custodian and their respective data sources will better inform negotiations and decision-making at the Rule 26 meet-and-confer meeting as well as a later Rule 16 pretrial conference.²⁷
- The identification of data sources and attendant burdens will help the parties better craft an ESI protocol, which considers all pertinent information.
- The same information can help the parties develop a phased-discovery plan, when appropriate, identifying which collections and custodians should go first and which should follow sequentially.²⁸
- Negotiating production-format decisions such as whether to produce data in native, image, or mixed native/image-format, whether to produce images with color, how to handle redactions, and how to log privileged documents and confidentiality designations, are better informed when considered with all other pertinent information shown in the heat map and database table.

C. Close of Discovery

The New Framework's heat map and database table can be used to address proportionality-related issues, which may arise at the end of the discovery stage.

- The decision when to release litigation holds is better informed by the New Framework's heat map, which highlights individual custodians most likely to possess information that can be released.²⁹
- Information in the New Framework's heat map and database table better informs decisions to reopen discovery.³⁰

The New Frameworks' workflow results in the heat map and database table and provides a record documenting the decisions and actions occurring throughout the litigation lifecycle. The documentation is essential from a standpoint of establishing defensibility of process.

V. Judicial Resolution of Discovery Disputes

The information in the New Framework's heat map and database table provides a judge with essential information in an organized format to evaluate whether counsel's discovery efforts are reasonable and in good-faith and whether discovery is proportional to the needs of the case, subject to consideration of all the Rule 26(b)(1) factors. The extent to which opposing counsel provided input into the New Framework's heat map and database table will be a factor that a judge will consider when evaluating the weight to be accorded the proportionality assessments.

Most significantly, the New Framework's standard approach framing proportionality assessments presents a fuller picture of all the potential data sources, custodians, and attendant costs that counsel must consider and evaluate under Rule 26. Under this approach, a judge can better evaluate the overall reasonableness of counsel's proportionality assessments, underlying rationales, and discovery decisions.

The New Framework's model set of projected costs for each data source provides a judge a reference point to evaluate suspiciously high claimed costs along with an itemized-cost calculator that can be used to verify the variances, which may explain the discrepancy in cost.

A judge can rely on the New Framework's custodian prioritizing and data-source burden assessments and cost projections at several key litigation mileposts, including:

- A judge can consider the information to evaluate the scope of a requested preservation order. Custodians possessing marginally significant information in burdensome data sources are identified and can be scrutinized, which considerably narrows the preservation analysis.³¹
- A judge can consider the same information at the Rule 16(b) conference, in evaluating and deciding the scope and sequencing of discovery. The New Framework's custodian prioritization and cost projections provide a ready-made roadmap for the sequencing of discovery, starting with custodians with high-value information at low burden and moving to custodians with less significant information at high burden.³²
- A judge can use the information to evaluate and resolve discovery disputes, involving a motion to compel or a motion for a protective order. Judges are routinely requested to rule on motions asking discovery for "x" number of additional custodians or to limit the number of custodians to "x." The database table provides concrete information on the costs projected for each additional custodian, and most importantly, the cost is given by data source, providing the judge the capability to make more precise rulings that consider every data source.³³
- A judge can use the information to evaluate and resolve sanction motions. Reasonableness is the overarching issue for a judge to consider when evaluating counsel's discovery actions. The New Framework's heat map and database table provide a record of all custodians, data sources, expenses, and burdens that counsel was faced with in making proportionality assessments and taking action. The record's full accounting better informs the judge's decision on the reasonableness of any specific discovery action taken by counsel.³⁴ The judge may also consider the extent that opposing counsel provided input, if any, to the development of the custodian prioritizing and data-source burden assessments and cost projections, in determining whether counsel's action was reasonable.