

standard-unit costs and degrees of the burden for reasonable discovery under typical circumstances, which can be adjusted for individual circumstances. The reference points are intended to facilitate the classifications and projections, especially for those less familiar with ESI and proportionality.

Proportionality assessments made under the New Framework can be adjusted periodically to account for evolving and new information learned through interactions and negotiations with opposing counsel. The New Framework is designed to be universal and to apply to all cases large and small, including complex commercial litigation (B2B), single plaintiff, class action, and investigations/trade secrets matters.

Sections 1-3 describe the New Framework's main functions, including the priority grouping of custodians and non-custodian data sources, data source burden and effort, and elements used in estimating costs. Section 4 describes the plotting of custodians on priority and burden sliding scales, the strategic uses of the New Framework, party-cooperation considerations, and the generation of a record, which will inform party negotiations and a judicial resolution of discovery disputes, if required.

### **III. Concluding Thoughts**

The New Framework's model set of data-source rankings and model set of standard-unit cost projections provide guidance. They are based on a series of assumptions and "suggest baseline-reference points and ranges" for reasonable discovery in a "typical case." They represent the collective judgment and experiences of the New Framework's lawyers, consultants, and other ediscovery experts and are grounded in numerous cost studies and surveys (see appendices).

But the results of the New Framework's model sets are subject to individual circumstances. Accordingly, the underlying worksheets and calculators used to create the model sets are explained and appended to allow adjustments to account for variances in individual cases.

## **Section 1: Custodians**

### **I. Introduction**

The New Framework establishes "a standard and cogent approach to frame proportionality assessments." Section 1 provides guidance on how to group custodians in four broad categories, from highest to low priority. Section 2 provides guidance on how to identify the eight most common data sources and rank them by the degree of burden in accessing information. The results of the custodian prioritizing and ranking of data sources "frame the proportionality assessments" by displaying the results in a graphic heat map, which visually distinguishes custodians with significantly useful information from those with marginally useful information along with the respective attendant burdens.

Section 1 sets out objective criteria used for guidance to prioritize custodians, but in the end, all the decisions represent judgment calls *by those making them*, subject to challenge by others and subject to adjustment as the litigation progresses and new information is learned. Though not conclusive, early identification of many [most] of the high-priority custodians under the New

Framework is often apparent and without dispute. The initial results may fully satisfy the discovery objectives, or more likely, sharpen additional probing.

## **II. Identification of Relevant Information and Custodians**

The New Framework does not create a new process to identify the scope of relevant matter or to identify custodians or data sources that are relevant. Lawyers typically take routine initial discovery steps at the outset of litigation to identify relevant information, its sources, and its custodians. The New Framework comes into play to prioritize custodians only after the relevant information, custodians, and data sources have been identified under traditional means. But a brief summary of the steps commonly taken to identify relevant information and custodians is needed to place the New Framework in context.

The first step in discovery is to identify the scope of relevant matter. Every case is unique, and there is no standard procedure. But there are common documents that are typically examined to define the scope of relevant matter in an individual case, including:

- Complaint(s) / charges / other pleadings
- Demand correspondence / other correspondence with the opposition
- Key documents, interviews, witness statements, and investigative materials
- Initial disclosures / Rule 34 early document requests and productions or pre-suit discovery

After the broad scope of relevant matter is defined, the second step is to identify data sources containing the relevant matter and their custodians. Again, nothing new here, and many different approaches can succeed.<sup>1</sup> But every approach should consider all reasonably available resources to identify likely persons with knowledge of the relevant facts as well as potential sources of pertinent data and information, whether custodial or non-custodial.

The following is a list of items that are typically considered to start the process by identifying obviously key custodians with relevant information:

- Organizational charts
- Discovery in similar litigation
- Industry / Market / Business assessment

Further fact investigation of the obvious main custodians, their communication patterns, and their role in the underlying issues will help identify other potential custodians with relevant information (e.g., subordinates, managers, assistants, predecessors, successors, colleagues, or data stewards<sup>2</sup>). Interviews, written requests, or data sampling are techniques often used to further the investigation.<sup>3</sup>

Following the preliminary investigations, a list of custodians, their data sources, and categories of likely relevant information, including title, position, dates of employment, and relationship to the issues, is typically compiled to begin the discovery search. Third-party custodians who may be in possession or control of potentially relevant information and any key event timelines and temporal scope of preservation efforts need to be considered as well.<sup>4</sup>

### **III. Prioritizing Relevant Information**

After the general scope of relevant matter is ascertained and the universe of custodians identified who potentially possess or control the relevant information, the analysis classifies the information by its level of priority, from low to high priority. The New Framework applies three criteria to prioritize relevant information, including: (1) materiality of the information; (2) strength of the information; and (3) uniqueness of the information.

#### **A. Materiality of Information**

Relevant information may be more useful, significant, or important than other relevant information. The New Framework's first criteria focuses on "materiality," which is defined as significant or essential, to discern qualitative differences in relevant information.<sup>5</sup> All relevant information falls on a spectrum of significance and where "materiality" starts on that spectrum is a matter of judgment. The key is whether the information is material because it is of such a nature that its knowledge would affect a person's decision-making process. The stronger the materiality of information, the higher the priority it is assigned.

There are several indicators of materiality, including whether the information:

- goes to the heart of the case or addresses a subsidiary issue;
- proves an ultimate fact or an intermediate fact;<sup>6</sup> and,
- is an essential link in a line of evidence needed to prove an assertion.<sup>7</sup>

#### **B. Strength of the Information**

The weight of relevant information in proving an assertion will vary. The New Framework's second criteria focuses on the "strength" of the information to distinguish the weight of relevant information based on how directly it is connected to the asserted fact.

Although considerations of materiality will overlap, the strength of the information may be indicated by:

- whether it provides direct or circumstantial evidence; and
- whether the information is complete and thorough or limited and partial.

The stronger the information, the higher the priority it is assigned.

#### **C. Uniqueness of the Information**

In a certain sense, every document and piece of information is unique.<sup>8</sup> The New Framework's third criteria characterizes uniqueness by distinguishing similar information from qualitatively different information. (Exact duplicates are not pertinent because they are eliminated as part of routine deduplication processes.) The stronger the uniqueness of the information, the higher the priority it is assigned.

There are no bright-line tests to distinguish unique information, which will depend on the circumstances. And identifying unique information is a judgment call by those making the decisions,<sup>9</sup> like many other decisions prioritizing custodians and information. But a growing number of courts have posited "unique relevant information" as a standard in their

proportionality analyses to distinguish discovery that is not proportionate to the needs of the case. As caselaw matures, the evolving standard will become clearer and provide more guidance.

#### **IV. Prioritizing Custodians and Non-Custodian Data Sources**

Under the New Framework, custodians and non-custodian data sources are prioritized by the level of relevant-priority information they possess or control. Along with the relevant-priority information, a custodian's position, level of knowledge, and depth of involvement in the particular issues must also be considered when prioritizing them.

The role of the custodian within an organization, the nature of the custodian's involvement, and the pertinent time period of the custodian can add critical gloss to the priority of information that they possess or control.<sup>10</sup> Whether the custodian has personal first-hand knowledge or whether the information is second-hand knowledge or comes from a third-party source are factors to account for ("track" or "consider").

##### **A. Standardized Report Format**

In a case with few custodians, prioritizing them can be readily apparent after minimal investigation. And every custodian can be promptly plotted on the New Framework's heat map in one of four quadrants: (1) highest priority, (2) high priority, (3) medium priority, and (4) low priority. But in cases involving scores or more of custodians, standard procedures gathering and recording the results of investigations are needed to provide more uniform results.

A standardized report format can facilitate the prioritizing of information and custodians by recording the investigation results of applying the three criteria of materiality, strength, and uniqueness to assess the priority of the relevant information along with the custodian's connection to the relevant information.

Written requests in the form of a survey, interviews, or data sampling are techniques often used to gather the information for the report. The purpose of the report is to organize the investigative results and provide a master score for each custodian based on the value of the information they possess or control as determined by the three criteria and the custodian's connection to the information. The master scores of the custodians are used to plot the custodians on the New Framework's heat map.

Although no single format can effectively handle all cases, Appendix A suggests an initial survey, containing a series of questions, which will inform the scoring of custodians, that can be used as a template for the report.

##### **B. Atypical Use Cases**

Special situations or atypical cases will require different handling. Atypical cases may involve a departed employee, non-custodian data, or information in other countries subject to foreign privacy laws. The New Framework can be adapted to fit those circumstances.

- a. **Departed Employees:** A legal hold is in place, but one of the subject employees is no longer with the company. Appendix B illustrates the adaptations to the New Framework.

- b. **Non-custodian Data:** Data is non-custodian, and a traditional custodian interview is not feasible. Appendix C illustrates the adaptations to the New Framework.
- c. **International Custodians:** If international custodians are involved, local data privacy law must be considered. Appendix D provides an example scenario that takes privacy laws into account.

## **Section 02: Defining Data Source Burden and Effort**

### **I. Introduction**

The New Framework’s “standard approach to frame proportionality assessments” requires the designation of data sources by the degree of burden. Section 2 provides guidance on how to rank eight of the most common data sources in four broad categories, based on the degree of burden incurred in accessing information. Five primary variables are identified, which directly affect the degree of burden for each data source. The specific degree of burden associated with each data source is not determined, which is dependent on circumstances.

Although the ranking of data sources by burden must be done on a case-by-case basis using the five variables, the New Framework provides a “model set” of rankings for a “typical” case. The model rankings are based on a literature review and the collective judgment and experiences of the New Framework’s experts, applying the five variables as they most commonly appear in a typical case. They are intended to provide guidance and reference points, especially to those unfamiliar with ESI, when ranking the data sources. A graphic illustrating the “model set of rankings” of the eight data sources is set out at the end of this section.

Individual circumstances will require adjustments to the model rankings. The clearest example are emails, which typically are located on a centralized server, providing relatively easy access and modest burden, compared with the less common use of decentralized email, which is located on individual computers, requiring multiple extractions and significantly increasing the burden.

The following discussion identifies the eight most common data sources and explains the variables that affect the burden assessments.

### **II. Data Sources and Types of Data**

Listed below are the eight most common sources of ESI, which are considered under the New Framework.

- Collaboration / Messaging Systems (Slack, Teams)
- Computers / laptops
- Email Systems
- File shares (departmental and personal)
- Mobile devices
- Paper documents / physical evidence
- Social Media
- Structured data (HR, finance, marketing databases)